

SOUTH AFRICA / JUDGMENT

Bottom Line Solutions (Pty) Ltd v FPT Group (Pty) Ltd (18171/11) [2011] ZAWCHC 454 (16 September 2011) [2011] ZAWCHC 454

COURT

Western Cape High Court, Cape Town

BEFORE

P.A.L. Gamble

CASE / FILE NUMBER

18171/11

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IN

THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE HIGH COURT, CAPE TOWN
CASE

NO: 18171/11

In

the matter between:

BOTTOM

LINE SOLUTIONS (PTY) LTD

.....Applicant

and

FPT

GROUP (PTY) LTD

.....Respondent

JUDGMENT

DATED 16 SEPTEMBER 2011 GAMBLE, J: [1] On Friday 2 September 2011 the Applicant served an urgent application on the Respondent demanding enforcement of a ten year

agreement concluded between the parties on 2 October 2006 and which the Respondent had alleged on 26 August 2011 was either void ab initio or voidable. [2] The application was set down for hearing at 10h00 on Monday 5 September 2011, on which day the parties agreed to an interim

arrangement pending the further hearing of the matter on Friday 9 September 2011. A comprehensive set of answering papers was filed by the Respondent by close of business on Wednesday 7 September 2011 and the Applicant replied thereto (albeit fairly concisely) 24 hours later.

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GAMBLE, J:

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agreement concluded between the parties on 2 October 2006 and which the Respondent had alleged on 26 August 2011 was either void ab initio or voidable.

[2] The application was set down for hearing at 10h00 on Monday 5 September 2011, on which day the parties agreed to an interim

arrangement pending the further hearing of the matter on Friday 9 September 2011. A comprehensive set of answering papers was filed by the Respondent by close of business on Wednesday 7 September 2011 and the Applicant replied thereto (albeit fairly concisely) 24 hours later.

[3] The matter was heard in the fast-track on Friday 9 September 2011, together with various other urgent matters. The Court is indebted to the parties for the neat presentation of the papers and the most useful heads of argument which have facilitated the preparation of this judgment. Due to the time constraints imposed by the procedure adopted by the Applicant this judgment is not as detailed as I would have preferred. Given the importance of the matter to both parties, and in light of the fact that the main dispute has been referred to arbitration for hearing towards the end of November 2011, I believe that it would be in the interests of all concerned that they should know where they stand sooner rather than later.

THE BUSINESS RELATIONSHIP BETWEEN THE PARTIES [4] The Respondent (one of a member of companies in the Capespan Group) operates certain terminals in the ports of Cape Town, Port Elizabeth and Durban under long leases from the National Ports Authority. These terminals are custom-made to facilitate the primary business of Capespan viz the export of fresh fruit.

[5] At certain times of the year the terminals are underutilized due to the seasonal nature of fresh fruit exporting. During that time the Applicant, whose business is that of clearing and forwarding, makes use of the Respondent's terminals for the import and export of other types of general cargo for clients of its own.

[6] After operating under various short-term arrangements, the parties concluded a written agreement on 2 October 2006 in which their respective rights and obligations were set out. Initially the Applicant's entitlement under this agreement (which I shall further refer to as the "main agreement") was to procure berthing space at the three terminals for its clients and pay the Respondent an agreed sum per ton of cargo shipped through the terminal. The Applicant

would charge its clients whatever the market could sustain (as the parties put it in argument) and was not limited to a particular

percentage commission.

[7] The nature of their business relationship changed in 2009 when the terminals in Cape Town and Port Elizabeth were hived off and in respect of which the Applicant became entitled to a fixed 10% commission remuneration on all cargo passing through each terminal. This cargo was that of either the Applicant's own clients or the Respondent's clients. Business at Durban (South Africa's busiest port according to media reports) continued as usual under the main agreement. [8] No formal amendment to the operational side of the main agreement was made in 2009. From time to time there was an exchange of correspondence in which operational issues were discussed and agreed. The parties both operated in the same sphere of business,

understood each other and knew what was required from each of them. [9] After a modest profit of some R200 000.00 in the first year under the main agreement, the Applicant's business took off and by 2010 its profit was in excess of R50 million. NEGOTIATIONS REGARDING SALE OF THE BUSINESS [10] No doubt realizing the lucrative nature of the Applicant's enterprise, the Capespan Group declared its interest in acquiring

the business during 2010. Formal offers and counter offers were made over a period of about ten months but ultimately the parties could not agree on a price. There were two due diligence exercises conducted during this process - something which no doubt indicates

the commitment of both parties to concluding a deal. [11] Ultimately, however, the parties found that they were too far apart and on 9 June 2011 the Applicant declined the Group's final offer. In doing so, the Applicant expressed its commitment to its contractual arrangement with the Respondent and said that it expected the same from the latter. TERMINATION OF BUSINESS RELATIONSHIP AND THE CONSEQUENCES THEREOF [12] On 26 August 2011 (and it appears quite unexpectedly) the Respondent's erstwhile attorneys wrote to the Applicant in terms

which were fairly confrontational given the long standing relationship between the parties. In this letter the Respondent contended that the main agreement had been corruptly induced by a separate agreement concluded in a memorandum of understanding dated 1 November 2006 ("the MOU") in which the Applicant's shareholders (Messrs Howroyd and Henstock) had sold 20% of the shareholding in the Applicant to two erstwhile senior employees of the Respondent - the late Mr Fell, the former General Manager: New Business of Respondent and its then Managing

Director, Mr Maartens. [13] On 29 August 2011 the Applicant's attorneys informed the Respondents attorneys in no uncertain terms that their client denied the substance of the allegations made against it and indicated that a more detailed response would be forthcoming once proper instructions had been taken. Already at that stage litigation was mooted. [14] Notwithstanding that response, the Respondent set about immediately informing customers (who were really the clients of the Applicant) that the "existing marketing agreement" with the Applicant had been terminated. Clearly the Respondent was intent on doing business with the customers directly. From the available correspondence it seems as if this pre-emptive step by the Respondent caused uncertainty amongst those customers. [15] On 31 August 2011 the Applicant's attorneys formally declared a dispute in terms of the arbitration clause under the main agreement and invited the Respondent's attorneys to agree to the appointment of certain nominated arbitrators. They also admonished the Respondent for unlawfully interfering with the Applicant's customers and called for an undertaking that the Respondent would desist therefrom pending the final determination of the arbitration proceedings. Respondent's erstwhile attorneys were advised that in the event of no such undertaking being forthcoming by 14h00 on 1 September 2011 an application for urgent interdictory relief would follow. [16] The Respondent then instructed Its current attorneys of record who advised the Applicant just after 14h00 on 1 September 2011 that they were busy taking instructions to deal with the Applicant's demands. In the event, there was no further correspondence between the parties before the papers herein were served on the Respondent's attorneys during the evening of Friday 2 September 2011. [17] After giving an interim undertaking acceptable to the Applicants the Respondent then proceeded to oppose the matter at all levels with the customary vim and vigour that one has become accustomed to in cases of this sort. THE NATURE OF THE RELIEF SOUGHT. [18] The primary relief sought in the notice of motion, aside from prayers for urgency and costs, is the following: "2. That the Respondent be directed to comply with its obligations in terms of the 10 year agreement concluded between the parties on 2 October 2006 (annexure "GH10" to the founding affidavit.....);

3. That the Respondent be interdicted and restrained from acting otherwise than in compliance with the agreement;
4. That the Respondent be interdicted and restrained from informing third parties that the agreement has been cancelled;
5. That the Respondent be directed to inform such third parties as it has already informed as set out in paragraph 4 above that the agreement remains of full force and effect" [19] In the alternative, and pending the final determination of the intended arbitration, the Applicant asked for relief "7.1. Directing the Respondent to comply with its obligation in terms of the agreement; 7.2. Interdicting and restraining the Respondent from acting otherwise than in compliance with the agreement; 7.2. Interdicting and restraining the Respondent from informing third parties that the agreement has been cancelled; 7.3. Directing the Respondent to inform such third parties as it has already so informed to inform them that the agreement remains of full force and effect pending the outcome of arbitration

proceedings." The Applicant further asked that the provisions of paragraphs 7.1 - 7.4 operate with immediate effect as temporary interdicts. [20] In argument Mr Dickenson SC for the Respondent contended that the Respondent had been brought to court to answer an application for final relief. That being so the test in *Plascon*

- Evans¹ would apply. In regard to the primary relief, Mr. Dickenson is undoubtedly correct. But, he went on to argue that in any event the alternative relief, although cast in the form of a temporary interdict was in fact permanent in effect and therefore fell to be evaluated similarly. [21] Mr. Dickenson also complained that the notice of motion was unclear and potentially misleading in that it referred to the main agreement of October 2006 whereas in fact the papers clearly demonstrated that the business relationship between the parties had been varied in 2009 in the manner in which I have briefly described above. [22] In my view the Respondent's complaint that it is uncertain as to what terms it will be bound by a temporary interdict is somewhat

contrived. It had no difficulty in identifying the relevant agreement when its erstwhile attorneys addressed its voidability in their letter of 29 August 2011². In any event Mr. McClarty SC, who appeared with Mr. Melunsky for the Applicant, sought to remedy any ambiguity or uncertainty by presenting a revised draft order which put the matter beyond the pale. The Respondent was afforded an opportunity to comment on the revised draft but, through its attorneys, declined to do so. [23] The relief ultimately sought in the draft order presented to the court is in my view interim in substance. Clearly the Applicant

seeks to maintain the status quo while the factual issues entitling the Respondent to withdraw from the main agreement are resolved at arbitration. Given that the parties have agreed to an expedited arbitration some 2 months hence, and since the main agreement still has some 5 years to run if enforced at arbitration, one is not dealing with one of those cases where the immediate enforcement of the agreement will render the ultimate dispute moot due to the short period of time for performance remaining under the agreement³. REQUIREMENTS FOR AN INTERIM INTERDICT [24] The requisites which must be established by an Applicant for an interim interdict are by now to be considered as trite. These are: (i) a clear right, or a *prima facie* right established though open to some doubt; (ii) a well grounded apprehension of irreparable harm if the interim relief is not granted and final relief is granted (iii) a balance of convenience in favour of the granting of interim relief; and (iv) the absence of an suitable alternate remedy.⁴ [25] The onus of establishing these criteria is of course throughout on the Applicant but it is not required to do so on a balance of probabilities. It is sufficient for the Applicant to satisfy the court that it has a reasonable prospect of success in the main action without it having to show a definite preponderance of probabilities in its favour. The approach was summarised thus by Corbett J (as he then was) in *L.F.Boshoff Investments (Pty) Ltd. v Cape Town Municipality*⁵ "Where the Applicant cannot show a clear right, and more particularly where there are disputes of fact the court's approach in determining whether the Applicant's right is *prima facie* established, though open to some doubt, is to take the facts as set out by the Applicant, together with the facts set out by the Respondent which the Applicant cannot dispute, and to consider whether having regard to

the inherent probabilities, the Applicant should on those facts obtain final relief at the trial of the main action" [26] And more recently Heher J (as he then was) in *Ferreira v Levin N.O. and others*⁶ provided the following summary of the position:

1. "A prima facie right though open to some doubt exists when there is a prospect of success in the claim for the principal relief albeit that such prospect may be assessed, as weak by the Judge hearing the interim application.
2. Provided that there is a prospect of success, there is no further threshold which must be crossed before proceeding to a consideration of the other elements of an interim interdict.
3. The strength of one element may make up for the frailty of another.
4. The process of measuring each element requires a holistic approach to the affidavits in the case, examining and balancing the facts and coming to such conclusion as one may as to the probabilities where disputes exist." [27] In considering the application of these requirements Ogilvie Thompson CJ said the following in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and another*:⁷ "The foregoing considerations [prima facie right, well grounded apprehension of irreparable injury and absence of ordinary remedy] are not individually decisive, but are interrelated; for example, the stronger the Applicant's prospects of success the less his need to rely on prejudice to himself. Conversely the more the element of some doubt, the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations according to the facts and probabilities.....Viewed in that light, the reference to a right which, through prima facie established, is open to some doubt is apt, flexible and practical and needs no further elaboration". [28] Applying these authorities to the instant case, this court's function is not to decide whether the main agreement was induced by a corrupt business relationship between Fell and Maartens on the one hand and Henstock and Howroyd on the other hand: that is the purpose of the arbitration. Rather it must approach the case holistically and determine whether it will be arguable at arbitration that there was no link between the conclusion of the main agreement and the MOU⁸. Then, following the same approach it must consider the other criteria before deciding whether to exercise its discretion in

favour of the Applicant. Against that background I proceed to briefly discuss the individual requisites for interim relief. **PRIMA FACIE RIGHT** [29] At first blush it would seem that the applicant has established a clear right given that the parties concluded a written agreement for 10 years, which agreement has been implemented and of which 5 years have lapsed. However, both Mr. McClarty and Mr. Dickerson approached the case on the basis that to succeed at interim interdict stage, the Applicant would have to show that it had established the right to enforce the contract: this then is the prima facie right which must be established by the Applicant. [30] When the matter ultimately goes to arbitration the Respondent will bear the onus of establishing its entitlement to avoid performance under the main agreement on the basis of commercial bribery⁹. This will involve it establishing; "(i) a reward (ii) paid or promised (iii) by one party, the

briber (iv) to another the agent (who may be an agent in the true sense or merely a go-between or facilitator), (v) who is able to exert influence over over (vi) a third party, the principal, (vii) with the intention that the agent (viii) should induce the principal (ix) without the tatter's knowledge and (x) for the direct- or indirect benefit of the briber (xi) to enter into or maintain or alter a contractual relationship (xii) with the briber, his principal, associate or subordinate."10 [31] In these proceedings, 3 of the 4 alleged parties to the commercial bribe, (Maartens, Howroyd and Henstock) have denied under oath that they were involved in such activity. They do admit the acquisition by Maartens and Fell of part of the shareholding in the Applicant and offer an innocent explanation in that regard. They claim that some weeks after the conclusion of the main agreement negotiations fortuitously commenced between them for the acquisition of the shares and they stress that nothing suspicious should be read into this. [32] In argument Mr McClarty relied heavily on an e-mail sent by Howroyd to Fell on 22 October 2006 (i.e. 20 days after signature of the main agreement and 10 days before the signature of the MOU) which commences with the following sentence: "Thank you for visiting our offices the other day and proposing to purchase a minor shareholding into BLS [the Applicant's acronym] albeit even with a hard copy of a drafted MOU

you presented" (Emphasis added). [33] It was contended that not only does this e-mail fail to demonstrate any request for a bribe but it appears that the negotiations which culminated in the conclusion of the MOU had only commences a few days before 22 October 2006. [34] Mr Dickerson alluded to a number of facts which he said justified the reasonable inference that the main agreement was tainted by commercial bribery. [35] In the first place he referred to allegations in the Respondent's papers that Howroyd had "confessed" at a meeting on 11 August 2011 with the Respondent's Managing Director, Mr Ferreira, that negotiations in respect of the MOU had preceded the conclusion of the main agreement but that the former had only been signed a few weeks after signature of the latter. This allegation was denied by Howroyd and Henstock and Mr. McClarty referred the court to various documents which he said tended to support these denials. [36] Secondly, the Respondent relied on an affidavit deposed to Ms Beverly Fell in these proceedings in which she claimed, inter alia, that her late husband had told her that negotiations leading up to the MOU had "continued for a number of months" before its conclusion. Mr McClarty pointed out that this allegation (clearly hearsay) was inconsistent with the aforementioned e-mail of 22 October 2006. He went on to argue that Ms Fell harboured ill - feelings towards Howroyd because he had sold her short when she disposed of her husband's shareholding in the Applicant which she had inherited. [37] Thirdly, Mr Dickerson pointed to a number of facts which he said warranted the necessary inference of corruption. The Applicant's

reply thereto was to attack the integrity of the primary facts upon which the secondary fact (the inference of corruption) was based. [38] It is not possible to establish the probabilities of the corrupt relationship without resorting to cross-examination. Having said that, I consider that the Respondent has quite a mountain to climb in proving the alleged basis for avoiding the agreement. This consideration certainly favours the Applicant at this stage in the evaluation of its prima facie right. [39] The Applicant's case is that the recent reliance on the alleged corrupt relationship by the Respondent and the report to the Director of Public Prosecutions is a ruse to

conceal the real motive. Mr McClarty drew the court's attention to certain facts

which he said supported the Applicant's claim that the Respondent, having failed in its endeavour to acquire the Applicant's business cheaply, was looking for a way out of the main agreement so that it could approach the Applicant's clients directly. He argued that having learnt of the material facts in support of the allegations of commercial bribery by 25 May 2011, the Respondent did not seek to resile from the main agreement at that stage. Rather, it continued to negotiate with the Applicant for more than 2 months in the hope of concluding a deal. [40] A telling example of the Respondent's attempt to exit the contract (so said the Applicant) was to be found in a letter which it wrote to its former attorneys on 12 August 2011 and in respect of which it elected to waive privilege. The document, which was annexed to the answering affidavit to other ends, contains the following important passage: "GOING FORWARD?" "My conclusion would then be that it is not ethically possible for Capespan to continue with the agreement and it has to be cancelled. You mentioned the possibility of a civil suit against Capespan if we do that. The timing and process would be critical and we can always oppose the civil case by (sic) the fact that a criminal investigation is done.¹¹ As far as acting in the best interest of Capespan, I gladly make the following statements: 1. Capespan and FPT could damage its reputation severely if it becomes public knowledge that we continued with an agreement that had an illegal basis at the start which is the subject of alleged corruption or based on a bribe. 2. FPT Exco took a decision this week that they could successfully defend their business as they have built up enough knowledge and relationships with the ultimate customers in order to protect the majority of their business deals. The sooner it happens the better as the citrus season is almost complete after which the Durban general cargo business will start. 3. It is only Durban where the dependence on BLS was high. My request is therefore to construct a position and timing on how to end the contract unilaterally with good chances of defending a civil case. "(Emphasis added)." [41] I have referred to the various allegations by the parties not for the purposes of pronouncing on the veracity thereof: this can only be done after cross-examination of the witnesses and evaluation of the documentary evidence at arbitration. But what these competing positions demonstrate is that at this stage the Respondent, and importantly the Applicant, have arguable cases to take to arbitration. As Heher J pointed out in Ferreira's case, *supra*, this is sufficient to establish a *prima facie* right for purposes of interim interdictory relief. [42] In the circumstances I am satisfied that the Applicant has established a *prima facie* right. WELL-GROUNDED FEAR OF IRREPARABLE HARM [43] Where a party seeks to enforce contractual rights, the violation or threatened violation of those rights is ordinarily sufficient to meet the requirements of irreparable harm for purposes of securing a temporary interdict. Actual pecuniary harm need not be established and that would normally be the end of the matter.¹² [44] In any event the Applicant alleged in its founding papers that it was anticipating a profit in excess of R40 Million in 2011 and forecast that a significant portion of this figure will be lost unless interim relief is granted. This allegation was not seriously challenged by the Respondent. [45] In its answering papers the Respondent pointed out that the Applicant's profit in Cape Town and Port Elizabeth was generated

through a 10% commission on Respondent's charges to the customers. This the Applicant admitted in reply. The Respondent went on to say that the calculation of the Applicant's losses would not be difficult given that Respondent keeps good records of its activities. But, said the Applicant, the bulk of its profit came from Durban where it still sourced the clients and where it fixed its remuneration through negotiation with the clients - there was no fixed rate and each deal depended on how far the Applicant could push the client. [46] The lucrative nature of the Durban business is confirmed in the passage cited in para 40 above which incorporates the Respondent's strategic considerations conveyed to its former attorneys. The Applicant further contends that the loss of income from all of the ports but (and in particular Durban) will immediately have disastrous consequences for its business and could well lead to the company's liquidation. In fact, the Applicant complains that its lifeblood has all but been cut off by the Respondent's precipitative

conduct. [47] In light of these facts it could be argued that at arbitration the Applicant will not struggle to prove its losses at Cape Town and Port Elizabeth since it will have ready access to the Respondent's trading records in the interim. To that extent it is claimed that any loss which the Applicant will suffer is not irreparable. But this argument loses sight of the fact that the immediate termination of an important component of the Applicant's revenue stream could have immediate dire consequences for the Applicant's solvency. In that event, it would seem as if the harm suffered in respect of Cape Town and Port Elizabeth is likely to be irreparable. [48] Finally on this point there is the fact that the Respondent has lost no time at all in contacting the Applicant's clients in Durban for purposes of informing them of the "cancellation" of the contract and enticing them away from the Applicant. It is this prospective loss that the Applicant fears will be very difficult to address should interim relief not be granted. That harm too will be irreparable. NO ALTERNATE REMEDY [49] In their correspondence of 20 August 2011 the Applicant's attorneys deny that there was any basis upon which the Respondent was entitled to resile from the main agreement, make it clear that their client stands by the contract and demand performance by the Respondent of its obligations thereunder. [50] The Applicant's election to hold the Respondent to the main agreement is a right which is only available to the Applicant to exercise. The Respondent does not enjoy the right to choose to pay damages instead of being required to render specific performance¹³. [51] In such circumstances I am of the view that a court will give serious consideration to a party's election to claim specific

performance which is after all the primary remedy available to a contracting party. It will refuse same if to do so would cause the other party undue hardship. On the other hand a court will more readily grant an interdict if an Applicant indeed does not have an alternate or adequate claim for damages. [52] In the instant case the Applicant will no doubt have significant difficulty in quantifying its damages in respect of the Durban arm of its business. The parties were in agreement that it is not feasible to isolate the rights and obligations in respect of Durban on the one hand and Cape Town and Port Elizabeth on the other: there is one consolidated agreement covering all three ports. Accordingly I am of the view that it is fair to accede to the Applicant's demand for specific performance and not to expect of it that it should forego that right¹⁴.

BALANCE OF CONVENIENCE [53] Finally the court is required to assess the inconvenience to the Applicant if the order is not granted against the inconvenience to the Respondent if it is. In the present case the Respondent seems never to have complained about the operational side of the main agreement. Its fundamental concern is with the legality of the agreement. In such circumstances it cannot be said that the

Respondent's business will be adversely affected if the status quo ante is restored pending determination of the issue of legality. [54] Such prejudice as the Respondent may suffer is no doubt attributable to the fact that it terminated the main agreement with almost unseemly haste and lost little time in approaching the Applicant's clients. In short, it has really brought such prejudice upon itself. [55] On the other hand, and as I have attempted to demonstrate above, the Applicant will certainly be adversely affected if the relief is not granted. A further important consideration is the fact that the Applicant has tendered in its papers to make good any damages which the Respondent may suffer as a consequence of the granting of an interim interdict. This is regarded as a material consideration.¹⁵ The Respondent's retort to this is firstly that the tender is "nebulous." With respect I disagree - it is quite clearly

set out in the founding affidavit. Its further complaint that the tender is worthless because of the potential insolvency of the Applicant misses the point. The Applicant has made very substantial profits in the past number of years¹⁶ and there is no suggestion that it presently does not have the financial wherewithal! to make good on its promise. In my view

therefore the balance of convenience clearly favours the Applicant and it is appropriate to exercise my discretion in this matter in favour of the Applicant. URGENCY [56] At the commencement of the hearing I expressed some misgivings to Mr McClarty about the manner in which the Applicant had rushed to court and placed the Respondent and the Court under unnecessarily burdensome time constraints. [57] Having heard the arguments advanced by both sides I am now satisfied as to the urgency of the matter and I consider that unless the provisions of Rule 6(12) are applied the Applicant will not be afforded substantial redress at a hearing in due course.

CONCLUSION

[58] I am accordingly of the view that in light of the considerations set out above it would be proper for this court to come to the assistance of the Applicant and grant the interim relief sought. COSTS [59] Although an order for costs was sought in the notice of motion, Mr McClarty did not press the issue in argument and asked rather that the issue of costs be determined at arbitration. I consider that this is the preferable route to take, given the serious nature of the allegations made in these papers. [60] Furthermore, there is the fact that the Applicant initially sought final relief in the notice of motion and put the Respondent to the task of answering such a case while abandoning this approach at the hearing and only seeking interim relief. Further, the initial relief sought in the notice of motion was refined in terms of the draft order filed by the Applicant after the hearing which made it quite clear what the nature of the agreement was which the Applicant wished to be enforced. These

issues may, or may not, have costs implications which can be more properly considered at arbitration. ORDER In the circumstances I make the following order: 1. The Applicant is permitted to bring this application as one of urgency. 2. Pending the final determination of the arbitration proceedings which the parties have agreed to hold (including any appeal therefrom or review thereof) in respect of the agreement concluded by the parties on 2 October 2006 (annexure "GH10" to the founding affidavit) as varied by their agreement recorded in the exchange of emails on 19 and 27 May 2009 (annexure "GH32" to the replying affidavit) ('the agreement'), in which arbitration the Applicant seeks orders declaring the Respondent's cancellation of the agreement to be of no force or effect, declaring that the agreement remains of full force and effect, directing the Respondent

to comply with its obligations in terms of the agreement and for costs: The Respondent is directed to comply with its obligations in terms of the agreement; The Respondent is interdicted and restrained from acting otherwise than in compliance with the agreement; The Respondent is interdicted and restrained from informing third parties that the agreement has been cancelled; and The Respondent is directed, in respect of such third parties as it has already informed that the agreement has been terminated, to inform them that the agreement remains of full force and effect pending the outcome of arbitration proceedings. 3. All costs associated with this application are to stand over for determination in the arbitration. P.A.L. Gamble Judge of the Western Cape High Court

[7] The nature of their business relationship changed in 2009 when the terminals in Cape Town and Port Elizabeth were hived off and in respect of which the Applicant became entitled to a fixed 10% commission remuneration on all cargo passing through each terminal. This cargo was that of either the Applicant's own clients or the Respondent's clients. Business at Durban (South Africa's busiest port according to media reports) continued as usual under the main agreement.

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NEGOTIATIONS REGARDING SALE OF THE BUSINESS

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the business during 2010. Formal offers and counter offers were made over a period of about ten months but ultimately the parties could not agree on a price. There were two due diligence exercises conducted during this process - something which no doubt indicates

the commitment of both parties to concluding a deal.

- [11] Ultimately, however, the parties found that they were too far apart and on 9 June 2011 the Applicant declined the Group's final offer. In doing so, the Applicant expressed its commitment to its contractual arrangement with the Respondent and said that it expected the same from the latter.

TERMINATION OF BUSINESS RELATIONSHIP AND THE CONSEQUENCES THEREOF

- [12] On 26 August 2011 (and it appears quite unexpectedly) the Respondent's erstwhile attorneys wrote to the Applicant in terms

which were fairly confrontational given the long standing relationship between the parties. In this letter the Respondent contended that the main agreement had been corruptly induced by a separate agreement concluded in a memorandum of understanding dated 1 November 2006 ("the MOU") in which the Applicant's shareholders (Messrs Howroyd and Henstock) had sold 20% of the shareholding in the Applicant to two erstwhile senior employees of the Respondent - the late Mr Fell, the former General Manager: New Business of Respondent and its then Managing Director, Mr Maartens.

- [13] On 29 August 2011 the Applicant's attorneys informed the Respondent's attorneys in no uncertain terms that their client denied the substance of the allegations made against it and indicated that a more detailed response would be forthcoming once proper instructions had been taken. Already at that stage litigation was mooted.
- [14] Notwithstanding that response, the Respondent set about immediately informing customers (who were really the clients of the Applicant) that the "existing marketing agreement" with the Applicant had been terminated. Clearly the Respondent was intent on doing business with the customers directly. From the available correspondence it seems as if this pre-emptive step by the Respondent caused uncertainty amongst those customers.
- [15] On 31 August 2011 the Applicant's attorneys formally declared a dispute in terms of the arbitration clause under the main agreement and invited the Respondent's attorneys to agree to the appointment of certain nominated arbitrators. They also admonished the Respondent for unlawfully interfering with the Applicant's customers and called for an undertaking that the Respondent would desist therefrom pending the final determination of the arbitration proceedings. Respondent's erstwhile attorneys were advised that in the event of no such undertaking being forthcoming by 14h00 on 1 September 2011 an application for urgent interdictory relief would follow.
- [16] The Respondent then instructed its current attorneys of record who advised the Applicant just after 14h00 on 1 September 2011 that they were busy taking instructions to deal with the Applicant's demands. In the event, there was no further correspondence between the parties before the papers herein were served on the Respondent's attorneys during the evening of Friday 2 September 2011.

[17] After giving an interim undertaking acceptable to the Applicants the Respondent then proceeded to oppose the matter at all levels with the customary vim and vigour that one has become accustomed to in cases of this sort.

THE NATURE OF THE RELIEF SOUGHT.

[18] The primary relief sought in the notice of motion, aside from prayers for urgency and costs, is the following:

"2. That the Respondent be directed to comply with its obligations in terms of the 10 year agreement concluded between the parties on 2 October 2006 (annexure "GH10" to the founding affidavit.....);

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[19] In the alternative, and pending the final determination of the intended arbitration, the Applicant asked for relief

"7.1. Directing the Respondent to comply with its obligation in terms of the agreement; 7.2. Interdicting and restraining the Respondent from acting otherwise than in compliance with the agreement;

7.2. Interdicting and restraining the Respondent from informing third parties that the agreement has been cancelled;

7.3. Directing the Respondent to inform such third parties as it has already so informed to inform them that the agreement remains of full force and effect pending the outcome of arbitration proceedings."

The Applicant further asked that the provisions of paragraphs 7.1 - 7.4 operate with immediate effect as temporary interdicts.

[20] In argument Mr Dickenson SC for the Respondent contended that the Respondent had been brought to court to answer an application for final relief. That being so the test in *Plascon*

- *Evans*¹ would apply. In regard to the primary relief, Mr. Dickenson is undoubtedly correct. But, he went on to argue that in any event the alternative relief, although cast in the form of a temporary interdict was in fact permanent in effect and therefore fell to be evaluated similarly.

[21] Mr. Dickerson also complained that the notice of motion was unclear and potentially misleading in that it referred to the main agreement of October 2006 whereas in fact the papers clearly demonstrated that the business relationship between the parties had been varied in 2009 in the manner in which I have briefly described above.

[22] In my view the Respondent's complaint that it is uncertain as to what terms it will bound by a temporary interdict is somewhat

contrived. It had no difficulty in identifying the relevant agreement when its erstwhile attorneys addressed its voidability in their letter of 29 August 2011. In any event Mr. McClarty SC, who appeared with Mr. Melunsky for the Applicant, sought to remedy any ambiguity or uncertainty by presenting a revised draft order which put the matter beyond the pale. The Respondent was afforded an opportunity to comment on the revised draft but, through its attorneys, declined to do so.

[23] The relief ultimately sought in the draft order presented to the court is in my view interim in substance. Clearly the Applicant

seeks to maintain the status quo while the factual issues entitling the Respondent to withdraw from the main agreement are resolved at arbitration. Given that the parties have agreed to an expedited arbitration some 2 months hence, and since the main agreement still has some 5 years to run if enforced at arbitration, one is not dealing with one of those cases where the immediate enforcement of the agreement will render the ultimate dispute moot due to the short period of time for performance remaining under the agreement³.

REQUIREMENTS FOR AN INTERIM INTERDICT

[24] The requisites which must be established by an Applicant for an interim interdict are by now to be considered as trite. These are:

- (i) a clear right, or a prima facie right established though open to some doubt;
- (ii) a well grounded apprehension of irreparable harm if the interim relief is not granted and final relief is granted
- (iii) a balance of convenience in favour of the granting of interim relief; and
- (iv) the absence of an suitable alternate remedy.⁴

[25] The onus of establishing these criteria is of course throughout on the Applicant but it is not required to do so on a balance of probabilities. It is sufficient for the Applicant to satisfy the court that it has a reasonable prospect of success in the main action without it having to show a definite preponderance of probabilities in its favour. The approach was summarised thus by Corbett J (as he then was) in *L.F. Boshoff Investments (Pty) Ltd. v Cape Town Municipality*⁵

"Where the Applicant cannot show a clear right, and more particularly where there are disputes of fact the court's approach in determining whether the Applicant's right is prima facie established, though open to some doubt, is to take the facts as set out by the Applicant, together with the facts set out by the Respondent which the Applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the Applicant should on those facts obtain final relief at the trial of the main action"

[26] And more recently Heher J (as he then was) in *Ferreira v Levin N.O. and others*⁶ provided the following summary of the position:

1. "A prima facie right though open to some doubt exists when there is a prospect of success in the claim for the principal relief albeit that such prospect may be assessed, as weak by the Judge hearing the interim application.
2. Provided that there is a prospect of success, there is no further threshold which must be crossed before proceeding to a consideration of the other elements of an interim interdict.
3. The strength of one element may make up for the frailty of another.
4. The process of measuring each element requires a holistic approach to the affidavits in the case, examining and balancing the facts and coming to such conclusion as one may as to the probabilities where disputes exist."

[27] In considering the application of these requirements Ogilvie Thompson CJ said the following in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and another*:⁷

"The foregoing considerations [prima facie right, well grounded apprehension of irreparable injury and absence of ordinary remedy] are not individually decisive, but are interrelated; for example, the stronger the Applicant's prospects of success the less his need to rely on prejudice to himself. Conversely the more the element of some doubt, the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations according to the facts and probabilities.....Viewed in that light, the reference to a right which, through prima facie established, is open to some doubt is apt, flexible and practical and needs no further elaboration".

[28] Applying these authorities to the instant case, this court's function is not to decide whether the main agreement was induced by a corrupt business relationship between Fell and Maartens on the one hand and Henstock and Howroyd on the other hand: that is the purpose of the arbitration. Rather it must approach the case holistically and determine whether it will be arguable at arbitration that there was no link between the conclusion of the main agreement and the MOU⁸. Then, following the same approach it must consider the other criteria before deciding whether to exercise its discretion in

favour of the Applicant. Against that background I proceed to briefly discuss the individual requisites for interim relief.

PRIMA FACIE RIGHT

[29] At first blush it would seem that the applicant has established a clear right given that the parties concluded a written agreement for 10 years, which agreement has been implemented and of which 5 years have lapsed. However, both Mr. McClarty and Mr. Dickerson approached the case on the basis that to succeed at interim interdict stage, the Applicant would have to show that it had established the right to enforce the contract: this then is the prima facie right which must be established by the Applicant.

[30] When the matter ultimately goes to arbitration the Respondent will bear the onus of establishing its entitlement to avoid performance under the main agreement on the basis of commercial bribery⁹. This will involve it establishing;

"(i) a reward (ii) paid or promised (iii) by one party, the briber (iv) to another the agent (who may be an agent in the true sense or merely a go-between or facilitator), (v) who is able to exert influence over over (vi) a third party, the principal, (vii) with the intention that the agent (viii) should induce the principal (ix) without the tatter's knowledge and (x) for the direct- or indirect benefit of the briber (xi) to enter into or maintain or alter a contractual relationship (xii) with the briber, his principal, associate or subordinate."¹⁰

[31] In these proceedings, 3 of the 4 alleged parties to the commercial bribe, (Maartens, Howroyd and Henstock) have denied under oath that they were involved in such activity. They do admit the acquisition by Maartens and Fell of part of the shareholding in the Applicant and offer an innocent explanation in that regard. They claim that some weeks after the conclusion of the main agreement negotiations fortuitously commenced between them for the acquisition of the shares and they stress that nothing suspicious should be read into this.

[32] In argument Mr McClarty relied heavily on an e-mail sent by Howroyd to Fell on 22 October 2006 (i.e. 20 days after signature of the main agreement and 10 days before the signature of the MOU) which commences with the following sentence: "Thank you for visiting our offices the other day and proposing to purchase a minor shareholding into BLS [the Applicant's acronym] albeit even with a hard copy of a drafted MOU

you presented" (Emphasis added).

[33] It was contended that not only does this e-mail fail to demonstrate any request for a bribe but it appears that the negotiations which culminated in the conclusion of the MOU had only commences a few days before 22 October 2006.

[34] Mr Dickerson alluded to a number of facts which he said justified the reasonable inference that the main agreement was tainted by commercial bribery.

[35] In the first place he referred to allegations in the Respondent's papers that Howroyd had "confessed" at a meeting on 11 August 2011 with the Respondent's Managing Director, Mr Ferreira, that negotiations in respect of the MOU had preceded the conclusion of the main agreement but that the former had only been signed a few weeks after signature of the latter. This allegation was denied by Howroyd and Henstock and Mr. McClarty referred the court to various documents which he said tended to support these denials.

[36] Secondly, the Respondent relied on an affidavit deposed to Ms Beverly Fell in these proceedings in which she claimed, inter alia, that her late husband had told her that negotiations leading up to the MOU had "continued for a number of months" before its conclusion. Mr McClarty pointed out that this allegation (clearly hearsay) was inconsistent with the aforementioned e-mail of 22 October 2006. He went on to argue that Ms Fell harboured ill - feelings towards Howroyd because he had sold her short when she disposed of her husband's shareholding in the Applicant which she had inherited.

[37] Thirdly, Mr Dickerson pointed to a number of facts which he said warranted the necessary inference of corruption. The Applicant's

reply thereto was to attack the integrity of the primary facts upon which the secondary fact (the inference of corruption) was based.

[38] It is not possible to establish the probabilities of the corrupt relationship without resorting to cross-examination. Having said that, I consider that the Respondent has quite a mountain to climb in proving the alleged basis for avoiding the agreement. This consideration certainly favours the Applicant at this stage in the evaluation of its prima facie right.

[39] The Applicant's case is that the recent reliance on the alleged corrupt relationship by the Respondent and the report to the Director of Public Prosecutions is a ruse to conceal the real motive. Mr McClarty drew the court's attention to certain facts

which he said supported the Applicant's claim that the Respondent, having failed in its endeavour to acquire the Applicant's business cheaply, was looking for a way out of the main agreement so that it could approach the Applicant's clients directly. He argued that having learnt of the material facts in support of the allegations of commercial bribery by 25 May 2011, the Respondent did not seek to resile from the main agreement at that stage. Rather, it continued to negotiate with the Applicant for more than 2 months in the hope of concluding a deal.

[40] A telling example of the Respondent's attempt to exit the contract (so said the Applicant) was to be found in a letter which it wrote to its former attorneys on 12 August 2011 and in respect of which it elected to waive privilege. The document, which was annexed to the answering affidavit to other ends, contains the following important passage:

"GOING FORWARD?"

"My conclusion would then be that it is not ethically possible for Capespan to continue with the agreement and it has to be cancelled. You mentioned the possibility of a civil suit against Capespan if we do that. The timing and process would be critical and we can always oppose the civil case by (sic) the fact that a criminal investigation is done.¹¹ As far as acting in the best interest of Capespan, I gladly make the following statements:

1. Capespan and FPT could damage its reputation severely if it becomes public knowledge that we continued with an agreement that had an illegal basis at the start which is the subject of alleged corruption or based on a bribe.
2. FPT Exco took a decision this week that they could successfully defend their business as they have built up enough knowledge and relationships with the ultimate customers in order to protect the majority of their business deals. The sooner it happens the better as the citrus season is almost complete after which the Durban general cargo business will start.
3. It is only Durban where the dependence on BLS was high.

My request is therefore to construct a position and timing on how to end the contract unilaterally with good chances of defending a civil case. "(Emphasis added)."

[41] I have referred to the various allegations by the parties not for the purposes of pronouncing on the veracity thereof: this can only be done after cross-examination of the witnesses and evaluation of the documentary evidence at arbitration. But what these competing positions demonstrate is that at this stage the Respondent, and importantly the Applicant, have arguable cases to take to arbitration. As Heher J pointed out in Ferreira's case, *supra*, this is sufficient to establish a *prima facie* right for purposes of interim interdictory relief.

[42] In the circumstances I am satisfied that the Applicant has established a *prima facie* right.

WELL-GROUNDED FEAR OF IRREPARABLE HARM

[43] Where a party seeks to enforce contractual rights, the violation or threatened violation of those rights is ordinarily sufficient to meet the requirements of irreparable harm for purposes of securing a temporary interdict. Actual pecuniary harm need not be established and that would normally be the end of the matter.¹²

[44] In any event the Applicant alleged in its founding papers that it was anticipating a profit in excess of R40 Million in 2011 and forecast that a significant portion of this figure will be lost unless interim relief is granted. This allegation was not seriously challenged by the Respondent.

[45] In its answering papers the Respondent pointed out that the Applicant's profit in Cape Town and Port Elizabeth was generated

through a 10% commission on Respondent's charges to the customers. This the Applicant admitted in reply. The

Respondent went on to say that the calculation of the Applicant's losses would not be difficult given that Respondent keeps good records of its activities. But, said the Applicant, the bulk of its profit came from Durban where it still sourced the clients and where it fixed its remuneration through negotiation with the clients - there was no fixed rate and each deal depended on how far the Applicant could push the client.

[46] The lucrative nature of the Durban business is confirmed in the passage cited in para 40 above which incorporates the Respondent's

strategic considerations conveyed to its former attorneys. The Applicant further contends that the loss of income from all of the ports but (and in particular Durban) will immediately have disastrous consequences for its business and could well lead to the company's liquidation. In fact, the Applicant complains that its lifeblood has all but been cut off by the Respondent's precipitative

conduct.

[47] In light of these facts it could be argued that at arbitration the Applicant will not struggle to prove its losses at Cape Town and Port Elizabeth since it will have ready access to the Respondent's trading records in the interim. To that extent it is claimed that any loss which the Applicant will suffer is not irreparable. But this argument loses sight of the fact that the immediate termination of an important component of the Applicant's revenue stream could have immediate dire consequences for the Applicant's solvency. In that event, it would seem as if the harm suffered in respect of Cape Town and Port Elizabeth is likely to be irreparable.

[48] Finally on this point there is the fact that the Respondent has lost no time at all in contacting the Applicant's clients in Durban for purposes of informing them of the

"cancellation" of the contract and enticing them away from the Applicant. It is this prospective loss that the Applicant fears will be very difficult to address should interim relief not be granted. That harm too will be irreparable.

NO ALTERNATIVE REMEDY

[49] In their correspondence of 20 August 2011 the Applicant's attorneys deny that there was any basis upon which the Respondent was entitled to resile from the main agreement, make it clear that their client stands by the contract and demand performance by the Respondent of its obligations thereunder.

[50] The Applicant's election to hold the Respondent to the main agreement is a right which is only available to the Applicant to exercise. The Respondent does not enjoy the right to choose to pay damages instead of being required to render specific performance¹³.

[51] In such circumstances I am of the view that a court will give serious consideration to a party's election to claim specific

performance which is after all the primary remedy available to a contracting party. It will refuse same if to do so would cause the other party undue hardship. On the other hand a court will more readily grant an interdict if an Applicant indeed does not have an alternate or adequate claim for damages.

[52] In the instant case the Applicant will no doubt have significant difficulty in quantifying its damages in respect of the Durban arm of its business. The parties were in agreement that it is not feasible to isolate the rights and obligations in respect of Durban on the one hand and Cape Town and Port Elizabeth on the other: there is one consolidated agreement covering all three ports. Accordingly I am of the view that it is fair to accede to the Applicant's demand for specific performance and not to expect of it that it should forego that right¹⁴.

BALANCE OF CONVENIENCE

[53] Finally the court is required to assess the inconvenience to the Applicant if the order is not granted against the inconvenience to the Respondent if it is. In the present case the Respondent seems never to have complained about the operational side of the main agreement. Its fundamental concern is with the legality of the agreement. In such circumstances it cannot be said that the

Respondent's business will be adversely affected if the status quo ante is restored pending determination of the issue of legality.

[54] Such prejudice as the Respondent may suffer is no doubt attributable to the fact that it terminated the main agreement with almost unseemly haste and lost little time in approaching the Applicant's clients. In short, it has really brought such prejudice upon itself.

[55] On the other hand, and as I have attempted to demonstrate above, the Applicant will certainly be adversely affected if the relief is not granted. A further important consideration is the fact that the Applicant has tendered in its papers to make good any damages which the Respondent may suffer as a consequence of the granting of an interim interdict. This is regarded as a material consideration.¹⁵ The Respondent's retort to this is firstly that the tender is "nebulous." With respect I disagree - it is quite clearly

set out in the founding affidavit. Its further complaint that the tender is worthless because of the potential insolvency of the Applicant misses the point. The Applicant has made very substantial profits in the past number of years¹⁶ and there is no suggestion that it presently does not have the financial wherewithal to make good on its promise. In my view

therefore the balance of convenience clearly favours the Applicant and it is appropriate to exercise my discretion in this matter in favour of the Applicant.

URGENCY

- [56] At the commencement of the hearing I expressed some misgivings to Mr McClarty about the manner in which the Applicant had rushed to court and placed the Respondent and the Court under unnecessarily burdensome time constraints.
- [57] Having heard the arguments advanced by both sides I am now satisfied as to the urgency of the matter and I consider that unless the provisions of Rule 6(12) are applied the Applicant will not be afforded substantial redress at a hearing in due course.

CONCLUSION

- [58] I am accordingly of the view that in light of the considerations set out above it would be proper for this court to come to the assistance of the Applicant and grant the interim relief sought.

COSTS

- [59] Although an order for costs was sought in the notice of motion, Mr McClarty did not press the issue in argument and asked rather that the issue of costs be determined at arbitration. I consider that this is the preferable route to take, given the serious nature of the allegations made in these papers.
- [60] Furthermore, there is the fact that the Applicant initially sought final relief in the notice of motion and put the Respondent to the task of answering such a case while abandoning this approach at the hearing and only seeking interim relief. Further, the initial relief sought in the notice of motion was refined in terms of the draft order filed by the Applicant after the hearing which made it quite clear what the nature of the agreement was which the Applicant wished to be enforced. These issues may, or may not, have costs implications which can be more properly considered at arbitration.

ORDER

In the circumstances I make the following order:

1. The Applicant is permitted to bring this application as one of urgency.
2. Pending the final determination of the arbitration proceedings which the parties have agreed to hold (including any appeal therefrom or review thereof) in respect of the agreement concluded by the parties on 2 October 2006 (annexure "GH10" to the founding affidavit) as varied by their agreement recorded in the exchange of emails on 19 and 27 May 2009 (annexure "GH32" to the replying affidavit) ('the agreement'), in which arbitration the Applicant seeks orders declaring the Respondent's cancellation of the agreement to be of no force or effect, declaring that the agreement remains of full force and effect, directing the Respondent

to comply with its obligations in terms of the agreement and for costs:

The Respondent is directed to comply with its obligations in terms of the agreement;

The Respondent is interdicted and restrained from acting otherwise than in compliance with the agreement;

The Respondent is interdicted and restrained from informing third parties that the agreement has been cancelled; and

The Respondent is directed, in respect of such third parties as it has already informed that the agreement has been terminated, to inform them that the agreement remains of full force and effect pending the outcome of arbitration proceedings.

3. All costs associated with this application are to stand over for determination in the arbitration.

P.A.L. Gamble

Judge of the Western Cape High Court

1Plascon

- Evans Paints Ltd. v Van Riebeeck Paints (Pty)

[1984] ZASCA 51; 1984

- (3) SA 623 (A). See also National Director of Public Prosecutions v Zuma

[2009] ZASCA 1; 2009

- (2) SA 277 (SCA)

2““We have been instructed by our client to address this letter to you in relation to the agreement reached between our client and yourselves on or around 2 October 2006, commonly referred to by the parties as the Commercial Agreement for the General Cargo Terminal Services.”

3BHT Water Treatment fPtvI Ltd v Leslie and Another 1993(1) SA 47 (W) @ P.55 A-E.

4Spur Steak Ranches Ltd. and others v Saddles Steak Ranches. Claremoni and another 1996

- (3) SA 706 (C) % 114 B. See also Knox D'Arcy Ltd and Others v Jamieson and others

[1996] ZASCA 58; 1996

- (4) SA 348 (A) @ 372 E-G; Hix Networking Technologies v System Publishers (Pty) Ltd. and another

[1996] ZASCA 107; 1997

- (1) SA 391 (A) (a). 398 1 - J.

51969(2) SA 256 (C) @ 267 E-F

61995 (2)SA 813 (W) @ 832 I - 833 B

71973(3) SA 685 (A)

8Van Woudenberg N.O. v Roos 1946 TPD 110 @ 114; Johannesburg Municipal Pension Fund v City of Johannesburg 2005

(6) SA 273 (W) @ p 280 1

8Van Woudenberg N.O. v Roos 1946 TPD 110 @ 114;

Johannesburg Municipal Pension Fund v City of Johannesburg 2005

(6) SA 273 (W) @ p 280 1

9Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986(1) SA 819(A); Extel Industrial (Pty) Ltd and another v Crown Mills (Pty) Ltd

[1998] ZASCA 67; 1999

(2) SA 719 (SCA)

9Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986(1) SA 819(A);

Extel Industrial (Pty) Ltd and another v Crown Mills (Pty) Ltd

[1998] ZASCA 67; 1999

(2) SA 719 (SCA)

10See the Extel Industrial case at 724 E - F

11On 31 August 2011 the Respondent filed a report under Sec 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 with the Director of Public Prosecutions, Cape Town.

12Christie Law of Contract in SA 6th Ed. p.554 - 6. V&A Waterfront Properties (Pty) Ltd. v Helicopter and Marine Services (Pty) Ltd. 2006 (1) SA 252 (SCA) @ 257 D - G

13Havnes v King Williamstown Municipality 1951

(2) SA 371 (A) @ 378 E-F.

14Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992

(2) SA 459 (C)

15Cronshaw and Another v Coin Security Group (Pty) Ltd.

[1996] ZASCA 38; 1996

(3) SA 686 (A) @ 690 H -691 B.

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- R21m; 2008 - R50m; 2009-R44m; 2010 - R53m.

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