

SOUTH AFRICA / JUDGMENT

Building Product Design Ltd v Cordustex Manufacturing (Pty) Ltd and Another

(929/2012) [2012] ZAECPEHC 42 (3 July 2012)

[2012] ZAECPEHC 42

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J W Eksteen

CASE / FILE NUMBER

929/2012

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**NOT REPORTABLE****IN THE HIGH COURT OF SOUTH AFRICA****EASTERN CAPE, PORT ELIZABETH****Case No.: 929/2012****Date Heard: 10 May 2012****Date Delivered: 3 July 2012****In the**

matter between:

BUILDING

PRODUCT DESIGN LIMITED

.....Applicant

and

CORDUSTEX MANUFACTURING

(PROPRIETARY) LIMITED

.....First

Respondent

UKUVULA INVESTMENT HOLDINGS

(PROPRIETARY) LIMITED

.....Second

Respondent

JUDGMENT

EKSTEEN J:

[1] This is an application in which the applicant, a company with limited liability registered in England in accordance with the laws of England and carrying on its business in that country, seeks a declaratory order confirming the cancellation by it of an agreement concluded with the first respondent, a South African company.

[2] The applicant, as its name suggests, carries on business as a manufacturer and distributor of building products with a special

emphasis on roof ventilation, natural ventilation systems, louvers and solar shading and natural daylight products and including

construction membranes for roofs and walls.

[3] The first respondent carries on business as a marketer, manufacturer and distributor of polypropylene spunbond and laminated

textiles to the hygiene, medical, construction and industrial markets.

[4] The second respondent is Ukuvula Investment Holdings (Proprietary) Limited (Registration Number 1999/018692/07), a company

with limited liability registered in accordance with the Laws of the Republic of South Africa carrying on business as a direct and indirect investor in a variety of companies. The second respondent has guaranteed the obligations of the first respondent under the equipment loan agreement referred to below.

[5] On 17 April 2008 the applicant and the first respondent entered into an equipment loan agreement in terms of which the applicant

agreed to purchase a 3.2 metre single beam non-woven spunbond machine for the manufacture of spunbond non-woven material and to loan the machine to the first respondent, an expert in the manufacture and supply of high quality spunbond non-woven material, on certain terms. The purpose of the agreement, from the perspective of the applicant, was to secure a guaranteed source of high quality spunbond non-woven material for itself. I shall revert to the terms of the equipment loan agreement later.

[6] Simultaneously with the conclusion of the equipment loan agreement, the applicant and the first respondent accordingly entered

into a material supply agreement in terms of which the applicant would place purchase orders for the supply of spunbond material with the first respondent from time to time. The terms of this agreement are not directly material to the present application.

- [7] During the subsistence of these agreements a number of issues of dispute arose between the parties which culminated in a notice of termination of the equipment loan agreement (the initial cancellation) by the applicant to the first respondent on 25 November
2011. Further discussions occurred between the parties and further disagreements arose which ultimately led to a further notice of termination (the final cancellation) by the applicant to the first respondent on 2 March 2012.
- [8] As a result of these events the applicant launched the present application as one of urgency on 19 March 2012 in which the following relief is sought:
- ‘1. ...
2. That the Applicant’s termination of the Equipment Loan Agreement concluded between the Applicant and the Respondents on 17 April 2008 (the “Agreement”) be and is hereby confirmed.
3. That the First Respondent be and is hereby directed to:
- 3.1 permit the Applicant, its employees or duly authorized agents:
- (a) Access to its premises situated at Caravelle Street, Walmer Industrial, Port Elizabeth, (the “Premises”) as envisaged in clause 11.1 of the Agreement;
- (b) To de-install the Applicant’s 3.2 meter single beam non-woven spunbond machine, otherwise known as line 3, (the “Equipment”) from the Premises as envisaged in clause 11. of the Agreement;
- 3.2 Following the aforementioned de-installation:
- (a) transport the Equipment to the First Respondent’s loading dock, goods inwards or similar facility for collection by the Applicant, its employees or authorized agents; and
- (b) opening up or dismantling the Premises as may be required to facilitate the removal of Equipment from the Premises;
- as envisaged in clause 11.4 of the Agreement, alternatively to re-imburse the Applicant such costs as may be incurred in undertaking the activities listed in paragraph 3.2(a) and 3.2(b) above within 7 days of invoice.
4. As to costs:
- 4.1 That the First Respondent pay the Applicant’s costs on a party and party scale;
- 4.2 In the event of the Second Respondent opposing the Application, an order directing the Respondents to pay the Applicant’s costs on the party and party scale, jointly and severally, the one paying the other to be absolved.’

- [9] A number of preliminary issues arise from the papers. The respondent issued a notice calling for security for costs to be provided on the basis that the applicant was a foreign company. I was advised at the commencement of proceedings that this matter had been resolved and that the security called for had been forthcoming.
- [10] A dispute appears too on the papers relating to the validity of the attestation of affidavits on behalf of the applicant which had purportedly been signed and attested to before a notary public in England. At the commencement of the proceedings before me I was handed a fresh copy of the same affidavits now attested to before a commissioner of oaths in South Africa. The parties were agreed that the original difficulty had accordingly been cured and I was not called upon to make any finding in this regard.

Urgency

- [11] Mr Buchanan, on behalf of the respondents, argues that the application ought not to have been launched as a matter of urgency and that on this basis the application ought to be dismissed with costs.
- [12] It is not in dispute that clause 11 of the agreement provides that the applicant will be entitled to remove the equipment from the premises upon termination of the agreement. I have recorded above that the applicant has on two occasions given notice of the cancellation of the agreement. The first respondent disputes the validity of the termination and denies that it has breached the agreement in any material respect. In response hereto the applicant contends, on the papers, that there exists no legitimate basis to dispute the termination of the agreement and hence seeks the relief which I have set out above.
- [13] On 2 March 2012, after the final cancellation, the attorneys of record of the applicant directed a demand to the attorneys of record of the first respondent that the first respondent give an undertaking in writing that it will permit the applicant to collect the equipment on the expiry of fourteen days from the date of the letter. By virtue of the attitude taken by the respondent in respect of the validity of the cancellation such undertaking was naturally not forthcoming. Against this background the deponent to the founding affidavit for the applicant alleges:

“142. I am informed that vindicatory applications are always inherently urgent.

143. The Applicant owns the Equipment and the lawful basis upon which the First Respondent was entitled to possess the Equipment has been legitimately terminated.
144. The Equipment is valuable, worth well in excess of R7.5 (seven point five) million, and for so long as it remains in the possession of the First Respondent whilst these acrimonious proceedings endure, the greater the exposure of the Applicant to intentional or malicious damage being caused to the Equipment. “
- [14] These, essentially, constitute the grounds of urgency.

[15] Mr Buchanan argues that the dispute between the parties as to the alleged termination of the underlying agreement arose, at best for the applicant, in November 2011 and that the applicant has unduly delayed the institution of these proceedings.

[16] I consider that this argument overlooks the very extensive negotiations which continued between the parties after the initial

cancellation. On 10 February 2012 the attorneys of record of the applicant addressed an email to the attorneys of record of the

respondent in which it recorded in unequivocal terms that “[o]ur client accepts that the first Equipment Loan Agreement between the parties is still of full force and effect”. It appears accordingly that the urgency of this application cannot arise from the initial cancellation. Given the context in which this continuing correspondence occurred in which the entitlement to cancel the agreement was in issue, I think that this communication, coming from the applicant’s attorneys as it did, constitutes a waiver of any further reliance on the initial cancellation. On any version of events, it seems to me, that the parties were in agreement after 10 February 2012 that the contract continued to exist. No right to reclaim the equipment can exist prior to cancellation. The final cancellation occurred on 2 March 2012 and it is only then that the right which is sought to be enforced in this application arose. In the circumstances, I am of the view that the argument advanced in respect of the dispute arising in November 2011 cannot be sustained.

[17] Mr Buchanan argues, however, that in any event the grounds of urgency set out in the founding affidavit are “scanty to say the least”. I have set out above the essential grounds of urgency alleged in the founding papers. I think the submission made by Mr Buchanan in respect of the cogency of these averments has some force. I do not think, however, that this should be viewed in isolation.

[18] The application was delivered on 20 March 2012. Although the form of the application deviates from form 2A of the Uniform Rules of Court the applicant did not seek to approach the court as a matter of extreme urgency. It afforded the respondents until 16h30 on 22 March 2012 to enter an appearance to defend and to 16h30 on 29 March 2012 to file answering affidavits. A comprehension answering affidavit was filed. The applicant thereafter, on 10 April 2012, filed very extensive replying papers and raising a number of matters which were not contained in the founding papers. The matter was only enrolled for hearing on 10 May 2012 and at the hearing the respondent sought leave to file yet another set of affidavits more than two hundred pages in length.

[19] What emerges from the foregoing is that all parties have had ample opportunity to file whatever papers may have been required and to air all the issues raised fully and comprehensively. The time frames set by the applicant in its deviation from form 2A of the Uniform Rules of Court did not materially curtail the opportunity for the respondents to place their case before court, rather it sought to obtain a preference on the roll over other cases pending on the opposed roll. Viewed in this context I think that the grounds of urgency alleged, scanty as they may be, do provide some basis for urgency. The nature of

the application is the vindication of heavy machinery which is in constant use with the inescapable consequence of an ongoing depreciation in value, even without any intentional or malicious damage. Whilst these circumstances may not provide justification for a party to run to court on a few hours notice, I think that they do afford a greater measure of urgency to this application than an ordinary claim for damages sounding only in money.

- [20] In all the circumstances I do not think that the interests of justice would be served by dismissing the application at this stage and thereby compelling the applicant merely to commence proceedings afresh at very considerable costs to all concerned.

Governing Law

- [21] Clause 24 of the agreement provides as follows:

“24.1 The construction, interpretation, meaning, validity and performance of this Agreement shall be governed by English Law which is agreed to be the proper law of this Agreement and, subject to Clause 24.2, each party hereby submits to the exclusive jurisdiction of the English Courts.

24.2 Notwithstanding the provisions of Clause 24.1 with respect to jurisdiction only, BPD retains the right and will be entitled to, in its discretion, commence legal proceedings in the courts of the Republic of South Africa for the recovery of the Equipment. CDX hereby irrevocably waives any objection to, and agrees to submit to, the jurisdiction of such other courts.

24.3 ...

24.4 CDX and the Guarantor agree that, in the event that any mandatory local law means that any dispute arising out of or in connection with this Agreement is judicable in any court that is not in England, then, notwithstanding Clause 24.1, CDX or the Guarantor shall not seek to argue any matter which would be unlawful under, or incapable of being argued in accordance with, English Law and shall limit its arguments accordingly.”

- [22] The references in the contract to BPD, CDX and “the guarantor” are references to the applicant, the first respondent and the second respondent respectfully.

- [23] At common law courts do not ordinarily take judicial notice of foreign law which must be proved by the evidence of an expert

witness. The common law was, however, considerably varied by the Law of Evidence Amendment Act, 45 of 1988 (the Act) which provided in section 1(1) as follows:

“(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law ...”

- [24] In *Harnischfeger Corporation and Another v Appleton and Another* 1993 (4) SA 479 (W) at 485D-E Flemming DJP gave consideration to the meaning of section 1(1) of the Act. He concluded that although the words “readily” and “sufficient certainty” in subsection (1) defy definition, they cannot be ignored. In issue in the *Harnischfeger Corporation* supra case was the law of copyright applicable in Milwaukee, USA in 1966-1969. Flemming DJP reasoned

that the libraries to which he had access were entirely inadequate for him to determine the law of Milwaukee “with sufficient certainty”. He reasoned,

accordingly, that the law of Milwaukee was not “readily” ascertainable and accordingly he declined to take judicial notice of the foreign law.

[25] By contrast, in *C Hoare and Co v Runewitsch and Another* 1997 (1) SA 338 (W) at 340G-H Flemming DJP reasoned that:

“... our Courts have always taken the liberty of being influenced by authorities on English law and practice in regard to determining what our law on a specific point is or should be. In this process lines of accessibility and of grasp have developed which are important to assessing, as I have to do in this case, what the English Law is for its own sake. In regard to establishing that (not to decided what our law is), such qualities are present to an adequate extent to permit judicial cognisance in terms of section 1(1) of the Law of Evidence Amendment Act 45 of 1988”.

(See also *The South African Law of Evidence*: DT Zeffertt and AP Paizes (2nd ed at p. 879).

[26] I am in full agreement with the latter comments of Flemming DJP set out in the case of *C Hoare and Company supra*. In addition access to English legal textbooks and law reports are readily available in South African court libraries.

[27] Where the foreign law relates to a foreign statute, the statute should be laid before the court, generally speaking, to allow the court to determine its meaning and effect. (See for example *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting Syndicate Nos 960, 48, 1183 & 2183* 2002 (3) SA 765 (T) at 794A; and *Zeffertt and Paizes: The South African Law of Evidence supra* (p. 338.) To this end Mr Nelson, on behalf of the applicant, has placed before me, for purposes of his argument, the relevant extract upon which reliance is placed from the English Bankruptcy Act, 1914 and the English Insolvency Act, 1986. I shall revert to this below.

[28] Mr Buchanan argues, however, reliant on the common law approach, that complex issues of English law of contract and insolvency are involved in the present matter. For this reason it is argued that section 1(1) of the Act cannot assist and the law of England must be proved by evidence, or at least be referred to and made available.

[29] In considering the application of section 1(1) of the Act in *The MT “Yeros” v Dawson Edwards & Associates and Another* [2007] 4 All SA 922 (C) at 929e Bozalek J held:

“Where, however, this provision is not met, as in this case, the contents and effect of foreign law must be treated as a question of fact and be proved by properly qualified experts. If that content and effect relates to a foreign statute, the statute should be laid before the court to allow it to determine its meaning and effect.”

[30] I am in agreement with this approach. Where the foreign law in issue cannot be readily ascertained with sufficient certainty it is a fact which ought to be proved by evidence and reference must be made to this in evidence by an appropriately qualified expert. Where,

however, such law can be readily ascertained with sufficient certainty and the provisions of section 1(1) of the Act are met, I do not consider that it is incumbent upon a party seeking to rely upon the foreign law to refer to the provisions of that law in evidence. The section entitles the court to take judicial notice of the content of that law without reference thereto in the evidence. This, I think, applies both to common law and statute.

- [31] In the alternative and in response to the argument of Mr Buchanan, Mr Nelson, argues that in the absence of evidence to the contrary, foreign law is presumed to be the same as the law in South Africa. In this regard he has referred to *MV Heavy Metal; Belfry Marine Limited v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) at 1101I-1102A; *Maschinen Frommer GmbH & Co. KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* 2003 (6) SA 69 (C) at 79C-E and to *Burchell v Anglin* 2010 (3) SA 48 (ECG) at 57C-58D.
- [32] As will transpire below, for purposes of this judgment the issues in dispute are considerably narrowed and it is conceded on behalf of the respondents that for purposes of this judgment it is not necessary to decide the issue and the respondents are content to argue the issues which I am called upon to decide as if such a presumption does exist. Mr Buchanan has however expressly stated that he reserves the right for purposes of issues which may arise later in the litigation to argue that such a presumption does not exist in our law and that the application ought to be dismissed in the absence of proof of the law of England.
- [33] In *Kwikspace Modular Buildings Limited v Sabodala Mining Co. Sarl and Another* 2010 (6) SA 477 (SCA), a similar concession was made by counsel, however, at 482B-C Cloete AJA (as he then was) said:

“[7] Counsel on both sides were content to submit that there is a presumption (see the authorities collected in Harnischfeger Corporation and Another v Appleton and Another 1993 (4) SA 479 (W) at 486A-D) that the law of a foreign state is, in the absence of evidence to the contrary, presumed to be the same as the law of South Africa. (This view is challenged in DT Zeffertt, AP Paizes & A Skeen The South African Law of Evidence (2003) at 313; and see also Kahn (1970) 87 SALJ 145).

But as I believe the law in Australia on the points in issue in this appeal can be ascertained readily and with sufficient certainty, as contemplated in s 1(1) of the Law of Evidence Amendment Act 45 of 1988, (‘Any court may take judicial notice of the law of a foreign State so far as such law can be ascertained readily and with sufficient certainty’) I propose applying the Australian law to the interpretation of the building contract and in particular, GC 5”.

- [34] Similarly I am of the view that the law of England relating to the interpretation of contracts can be readily ascertained with sufficient certainty and I accordingly propose to apply the law of England in respect of the interpretation of the contract.

The issues

- [35] I recorded earlier that the issues I am called upon to decide are considerably narrower than those which emerge from the papers.

[36] At the commencement of proceedings Mr Nelson conceded that numerous genuine disputes of facts have arisen on the papers and which cannot be resolved without reference to oral evidence. He contends, however, that two issues emerge from the papers in respect of which no material dispute of fact exists and which are decisive of the application. If I hold in favour of the applicant on either of these issues, so it is argued, then the applicant has established that as at 2 March 2012 the applicant was entitled to terminate the equipment loan agreement, the termination is then valid and enforceable and the applicant is entitled to the relief it seeks.

[37] In the first instance Mr Nelson argues that on the papers it is established that the first respondent has failed and refused to grant the applicant access to documentation to which it is entitled in terms of the equipment loan agreement and that such refusal entitled the applicant to terminate the agreement. (I shall refer to this argument as the applicant's first argument.)

[38] In the second instance Mr Nelson contends that the papers clearly establish that the first respondent acknowledged in writing in 2010 to Safripol (Pty) Limited, a supplier of polypropylene, that it was unable to pay its debts. This, it is argued, entitled the applicant at any time to terminate the agreement in terms of the provisions of the agreement. (I shall refer to this argument as the applicant's second argument.)

[39] Mr Buchanan, on behalf of the respondents, similarly argues two points which he contends are decisive of the application. Firstly it is argued that no notice of termination as envisaged in the equipment loan agreement has been given and accordingly that the contract has not been validly cancelled. (I shall refer to this argument as the respondents' first argument.)

[40] In any event, so it is argued, it is now conceded that there are numerous disputes of fact which emerge from the papers and which cannot be determined on the papers. These disputes, Mr Buchanan argues, were clearly foreseeable and in those circumstances application proceedings were not appropriate. For this reason alone

it is submitted that the application should be dismissed. (I shall refer to this argument as the respondents' second argument.)

Interpretation of the contract

[41] In order to determine the first three issues set out above it is necessary to have regard to the terms of the contract.

[42] The rules of interpretation of contract in England are in many respects similar to those which apply in our law. In respect of the origins thereof AA Roberts in Wessels' Law of Contract in South Africa (2nd ed), vol 1 at para 1894 states as follows:

“We have seen what rules of evidence must be followed in order to prove to the court what the actual terms of a contract are, and we have seen that these rules are taken from the law of England. Although we know what the terms of a contract are, we may not know the exact meaning of these terms. To ascertain their true meaning, we must have recourse to certain rules of construction laid down by Roman-Dutch law. It is only with regard to the proof of the contract that we invoke the law of England: in order to ascertain the meaning of the contract when proved - the interpretation of the contract - we must go primarily to the Civil Law for guidance. As, however, the rules of construction which prevail in the English courts are largely based upon the principles of the Civil Law, the difference between the two systems of law with regard to the interpretation of contracts is not great.”

[43] Like in our law, the general point of departure is that the meaning of documents are to be found in the documents themselves and in the language used therein. It is presumed that the parties have intended what they in fact said, so that their words must be construed as they stand. (See *IRC v Raphael* [1935] A.C. 96, 142; and *British Movietonews v London and District Cinemas*

[1952] A.C. 166.)

[44] This general rule was articulated by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society*; *Investors Compensation Scheme Ltd v Hopkin & Sons* (a firm) and Others; *Alford v West Bromwich Building Society and Others*; *Armitage v West Bromwich Building Society and Others* [1998] 1 All ER 98 at 115 as follows:

“The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition

that we do not readily accept that people have made linguistic mistakes, particularly in formal documents ...’

[45] The words used in the contract cannot however be viewed in isolation and must necessarily be considered against the background

of the circumstances under which the agreement was concluded and in the light of the purpose for which it was concluded. (See *Mannai Investment Company v Eagle Star Life Assurance* [1997] UKHL 19; [1997] 3 All ER 352 at 376 and *Investors Compensation Scheme v West Bromwich Building Society supra*.)

[46] In interpreting the language of the contract the court will therefore investigate the full background to and circumstances

surrounding the conclusion of the contract and take an objective approach to ascertain the contextual meaning of the words in question. (Compare *Sirius International Insurance Company (PUBL) v FAI General Insurance Limited and Others* [2004] UK HL 54, at para 18.)

[47] Where the meaning of the words cannot be found from this enquiry resort may be had to a number of guides, or “cannons of construction” in order to do justice between the parties. Usually where ambiguity remains and it is to be determined in whose favour the ambiguity is to be decided the courts will resolve the uncertainty surrounding the provision against the party who would benefit from the suggested interpretation. Compare *Photo Production v Securicor Transport* [1980] UKHL 2; [1980] 1 All ER 556.

[48] Against this general background I turn to consider the relevant provisions of the equipment loan agreement. I have recorded earlier that the purpose of the agreement, viewed from the prospective of the applicant, was to purchase the equipment and to loan it to the first respondent on certain terms and conditions. Clause 2 of the agreement deals with the duration of the loan whilst clause 3 provides for the guarantee by the second respondent. Clause 4 relates to the obligations of the first respondent in respect of the acquisition of the equipment.

[49] Clause 5 deals with first respondent’s obligations in respect of the equipment loan arrangements. In this regard clause 5.3 stipulates that the first respondent will pay to the applicant the “initial payments” in consideration of the loan of the equipment during the loan period. The initial payments are defined in clause 1 of the agreement to mean “the monthly fee payable to BPD by CDX during the term of the agreement calculated on the basis of the Material price per tonne of 980 ZAR multiplied by the monthly output measured in tonnes of Material produced by CDX using the Equipment.”

[50] To this end, clause 5.4 of the agreement provides:

“Following the Acceptance Date and for the duration of the Loan Period, CDX will promptly following the end of each calendar month forward to BPD a report detailing the output of the Equipment for such month (if any) by tonne, or part thereof, for each Material and each of CDX’s end user customers including, but not limited to BPD, along with payment for the Initial Payments for that month, or part thereof. CDX agree to allow BPD to have access to any necessary records for the purposes of audit verification of the Material output.”

[51] Clause 6 provides for an option in favour of the first respondent to purchase the equipment at the conclusion of the loan

period. In terms of clause 7 the parties committed themselves to enter into a material supply agreement upon the conclusion of the equipment loan agreement. Clauses 8 and 9 of the agreement provides for the obligations of the applicant and of the first respondent

respectively in respect of the maintenance, repair, upgrade, safekeeping, insurance and security of the equipment.. Clause 9.3.2

which provides that the first respondent will, from the date of receipt of the equipment, “keep the Equipment free of all

security interests, charges, liens and other encumbrances” is significant to the applicant’s first argument. The remaining

obligations of the first respondent set out in clause 9 of the agreement do not appear to me to be material to the present debate.

[52] At the heart of the first argument raised by Mr Nelson lies the interpretation of clause 10 of the agreement. I shall accordingly set out the terms of this clause in full. It provides:

“10. ACCESS TO CDX PREMISES AND BPD AUDIT RIGHTS

10.1 For the purpose of verifying CDX’s compliance with its obligations under this Agreement, including, but not limited to, confirming the Material output of the Equipment, BPD or its authorized representative will be entitled upon reasonable advance written notice to CDX and during normal business hours in the Republic of South Africa, the right to enter into and inspect all records and documentation relating to the Equipment, the Material and this Agreement held at CDX’s premises.

10.2 CDX will grant the BPD full access to all relevant CDX records for the purposes of Clause 10.1.”

[53] Clause 14 of the agreement lies at the heart of the second argument advanced by Mr Nelson. Clause 14 provides for the termination of the contract and the relevant provisions of clause 14 are:

“14.2 Either Party may terminate this Agreement forthwith by sending a written notice to the other Party, if:

14.2.1 the other commits a material breach of its obligations under this Agreement and, in the case of a breach capable of remedy as determined under Clause 14.3, such breach is not remedied to the satisfaction of the injured party, within thirty (30) days of that other Party being deemed to have received such notice in accordance with clause 20.1;

14.2.2 the other enters into any compromise or arrangement with its creditors, commits any act of bankruptcy or, in the case of a company, an order is made or an effective resolution is passed for its winding up (except for the purposes of amalgamation or reconstruction as a solvent company) or if a petition is presented to court, or if a receiver and/or manager, receiver, administrative receiver or administrator is appointed in respect of the whole or any part of the other’s undertaking or assets;

14.2.3 in an encumbrancer takes possession or an administrative receiver or receiver is appointed of the whole or any part of that other Party’s undertaking or property;

14.2.4 the other ceases to pay its debts or becomes unable to pay its debts within the meaning of Section 123(1) or (2) of the Insolvency Act 1986;

14.2.5 anything analogous to any of the events referred to in Sub-clauses 14.2.2 to 14.2.4 inclusive under the law of any jurisdiction occurs in relation to CDX;

14.2.6 ...

14.2.7 ...

14.3 For purposes of Clause 14.2.1, a breach shall be considered capable of remedy if the Party in breach can comply with the provision in question in all respects to the reasonable satisfaction of the other Party, other than as to the time of performance (provided that time of performance is not of the essence other than in respect of payment of debt properly due)."

[54] Clause 20 of the agreement deals with notices. It provides:

"20.1 Any notices, requests, communications or other information required to be given hereunder shall be made in writing, and may be hand delivered or sent by pre-paid first class post or facsimile to the address of the relevant Party at its address set out at the beginning of this Agreement or at such other address as shall have been notified for this purpose."

[55] There is a dispute between the parties in respect of the documentation to which the applicant is entitled pursuant to the

provisions of clause 10 of the agreement. The nature of the agreement is such that the applicant has invested considerable funds in the purchase of an expensive and specialised piece of equipment which is entrusted to the exclusive possession of the first respondent. The first respondent conducts business utilising the equipment for its own benefit and to the benefit of the applicant and other customers of the first respondent. The initial payment, which constitutes the consideration which is due to the applicant in respect of the loan, is calculated with reference to the extent of the use of the machine as appears from the definition of "initial payment". This information is solely within the knowledge of the first respondent and the payments are calculated by the first respondent. Clause 5.4 is formulated to protect the applicants' interests in this regard by affording it access to the "necessary records" to verify the material output. The records to which the applicant is entitled to have access to in terms of this clause are limited to those which are necessary for purposes of audit verification of the material output.

[56] The equipment requires ongoing maintenance and repair and the provisions of clause 8 of the agreement stipulate that the applicant

is responsible for the costs of providing such services and repairs. Save for these services and repairs, as defined in clause 1 of the agreement, the further management and control of the equipment is exclusively in the hands of the first respondent. Clause 9 of the agreement places upon the first respondent a number of obligations in respect of the ongoing maintenance and operation of the machine, insurance thereof and in particular the obligation to keep the machine free of all security interests, charges, liens and other encumbrances. It further imposes an obligation upon the first respondent to prepare an annual report on the condition of the machine for the benefit of the applicant.

[57] Clause 10 of the agreement provides a mechanism for the applicant to verify that the first respondent is complying with his

obligations under the agreement, notably those obligations set out in clauses 5 and 8 of the agreement and in particular its obligation to correctly quantify the initial payments and to make the initial payments in respect of the material produced by the machine. It is for this purpose that clause 10 provides access to certain documentation. It permits the applicant to enter into and to inspect

“all records and documentation relating to the equipment, the material and this agreement held at CDX’s premises”. The records to which the applicant is entitled are further circumscribed by clause 10.2. They are limited to such records which are relevant for the purpose of verifying the first respondent’s compliance with his obligations under the agreement.

[58] Clause 14.2.1 of the agreement entitles either party to terminate the agreement by sending a notice to the other party if the other party has committed a material breach of its obligations under the agreement, provided that, where the breach is capable of remedy, the other party must first be afforded a period of thirty days to remedy its breach.

[59] In addition to these circumstances clause 14.2.2 to 14.2.7 provides for a number of other instances, where no breach of any

obligation under the agreement has occurred, entitling either party to terminate the agreement. These relate to circumstances where the solvency of the other party is placed at risk. When such a risk occurs the other party is entitled to terminate the agreement.

The applicant’s first argument

[60] The applicant contends that there is no real dispute on the papers that the “creditor aged analysis and correspondence with creditors” are relevant documents for purposes of clause 10 of the agreement. These documents were specifically requested and were not forthcoming. When a demand was made for these documents it was refused. This being so, so the argument goes, the applicant was entitled to terminate the agreement.

[61] It is necessary to consider the background leading up to this dispute and the exchange of correspondence in this regard. It is not in dispute between the parties that the first respondent has experienced financial difficulties over an extended period. On behalf of the applicant it is alleged that the precarious financial position of the first respondent caused it to harbour serious doubt about the first respondent’s ability to discharge all its obligations in terms of the agreement. In these circumstances it is alleged on behalf of the applicant that the applicant was left “with no other alternative but to actively seek the ultimate termination of the agreement ...”. It is against this background that the initial cancellation occurred and the subsequent negotiation and exchange of correspondence proceeded.

[62] The relevant correspondence commenced on 2 February 2012 when Attorneys Joubert, Galpin & Searle, representing the applicant,

addressed a letter to Rushmere Noach Attorneys, representing the first respondent, in respect of the various concerns of the applicant. The relevant portion of the correspondence reads as follows:

“9. We have received instructions from our client to conduct, with the assistance of IT experts and auditors if necessary, an audit in relation to all the records and documentation of your client relating to the equipment, the material, and the Equipment Loan Agreement as a whole in terms of Clause 10 of the Equipment Loan Agreement.

10. Would you please discuss our client’s request with your client and provide us with a date and time on which full and unrestricted access will be granted to our client and its authorised representatives of your client’s records and documentation. Without limiting the generality hereof our client would require access to:

10.1 your client’s server; and

10.2 the hard drives of the following personnel in the employ of your client:

- (a) the Managing Director;
- (b) the Financial Manger, Senior Manager: Finance and all finance staff reporting to them;
- (c) the Sales Manager;
- (d) the Operations Managers;
- (e) the Quality Manager.

11. Your client’s response to our client’s request, and the date on which access must be granted are to take place within seven (7) days of the date of this letter.

12. In the event that your client refuses to provide the said access;

12.1 Our client may regard such refusal as a repudiation of your client’s obligations in terms of the Equipment Loan Agreement ...”

[63] On 6 February 2012 Rushmere Noach Attorneys responded by drawing attention to the provisions of clause 10.1 and contending that the applicant was entitled only to records and documentation which relate to the equipment, the material and the agreement. Attorneys Rushmere Noach recorded:

“Our client is naturally prepared to provide your client with access to the records and documentation to which it is entitled, which our client will extract and make available at its premises at such time and on such date as may be agreed. In this regard, our client is of the view that a reasonable period within which to enable it to assemble and segregate such records is seven days. ...”

[64] To this Attorneys Joubert, Galpin & Searle responded, acknowledging the limitation and contending as follows:

‘3.4 However, our client is entitled to inspect all your client’s records and documentation relating to the following three items:

- (a) “the Equipment”;
- (b) “the Material”; and
- (c) “this Agreement.”

3.5 All records and documentation relating to “this Agreement”, for purposes of verifying your client’s compliance with its obligations, would, needless to say, include the right to verify your client’s obligations stated or implied in clause 14 of the Agreement, including, inter alia, your client’s obligations:

- (a) not to enter into any compromise or arrangement with its creditors;
 - (b) not to commit any act of bankruptcy;
 - (c) not to be subject to an order, or to make a resolution for its winding up;
 - (d) not to find itself in a position where an encumbrancer takes possession, or an administrative receiver or receiver is appointed in respect of the whole or any part of your client’s undertaking or property;
 - (e) not to cease to pay its debts or become unable to pay its debts within the meaning of Section 123(1) and (2) of the Insolvency Act of 1986;
 - (f) not to dispose of the whole or any substantial part of its undertaking in assets; and
 - (g) not to cease or threaten to cease to carry on all or any substantial part of its business.
4. In order to verify your client’s compliance with, inter alia its aforesaid obligations, our client would, of necessity, require access to, inter alia, and in addition to the records and documentation relating specifically to the equipment and the material:

4.1 all the e-mails and facsimiles of the personnel of your client listed in paragraph 10.2 of our letter dated 2 February 2012; and

4.2 all of your client’s financial records, which includes but is not limited to:

- (a) all Agreements entered into between your client and its funders/bankers;
- (b) all correspondence between your client and its funders/bankers;
- (c) all your client’s bank statements;
- (d) all your client’s annual financial statements and monthly management accounts for the current financial year;
- (e) all correspondence between your client and its auditors and/or financial advisors;
- (f) aged debtor and creditor lists;

- (9) all correspondence between your client and its debtors and creditors;
5. It is furthermore important to note that our client's entitlement is not limited to be provided with documentation which your client will extract and make available at its premises, as contended by your client. Such an arrangement might defeat the entire purpose of our client's verification and audit process.
6. Our client has the right "to enter into and inspect" all the relevant records at your client's premises. This clearly means that our client will be entitled, with the assistance of IT experts and auditors, if necessary, to conduct an audit in relation to all the relevant records and documentation, excluding the records and documentation listed in paragraph 3.3 above. Your views on any further documentation of your client which might not be relevant to our client's enquiry would be considered on receipt of your representations in this regard."
- [65] Paragraph 3.3 of the letter to which reference is made refers only to customer and price lists in relation to material produced by the first respondent using equipment other than the applicant's equipment and secret formulas/recipes or research and development which does not affect the material manufactured by the first respondent using equipment other than that of the applicant. It is apparent from this letter that the tender by Rushmere Noach Attorneys to extract and make available such records as first respondent considers relevant was rejected.
- [66] This communication from Attorneys Joubert, Galpin & Searle was met on 14 February 2012 by a response from Rushmere Noach

Attorneys. They responded, inter alia, as follows:

"... , your client persists with its demand that our client allow your client's agents unrestricted access to categories of information and to the various electronic and other mediums of data storage referred to by you, without the right to extract data to which your client is not entitled or which is otherwise irrelevant for the purposes of the agreement ...

Our client has been advised that your client is actively engaged in establishing a production facility in South Africa, in cooperation with our client's erstwhile employee, Mr Adlam with the intention of directly competing with our client and for the purposes of which, your client requires the equipment.

The agreement does not provide your client with a mechanism to engage in a speculative search for information to assist it in this endeavour or to try and establish a basis to cancel the agreement and thereby obtain return of the equipment or otherwise to advantage your client in future litigation.

It is apparent that a dispute has arisen as to the interpretation of the agreement. Our client is willing to consider a suitable and cost-effective mechanism for resolving such dispute, including expedited arbitration on such basis as may be agreed and we await your client's suggestion in this regard."

[67] On 15 February 2012 Attorneys Joubert, Galpin & Searle replied, inter alia, as follows:

“2. In your letter dated 6 February 2012 your client tendered to extract and make available to our client at a time and date after 13 February 2012, those records of your client it considered to be relevant.

3. Whilst our client disputes that its right of access to records is limited in the manner suggested by your client, our client has, ... instructed us to request that your client make copies of the records it has collated available to our client for collection.
4. We raised this request with you telephonically this morning and you undertook to discuss it with your client and get back to us.
5. Given that by your client’s own admission it has had sufficient time available to it to collate the records we can see no reason why copies of the records cannot be made available for collection by 12H00 on Thursday 16 February 2012. Our client tenders your client’s reasonable copying charges.”

The tender to resolve the dispute relating to the interpretation of the agreement was not accepted.

[68] To this Rushmere Noach Attorneys again confirmed that it would require seven days to extract, assemble and segregate the records.

They pointed out that their earlier tender to do so was not accepted and accordingly tendered to make the information available by 21 February 2012. This was not acceptable to Attorneys Joubert, Galpin & Searle who advised on 16 February 2012, inter alia, that:

“Our client does not accept that a further delay of 7 (seven) days is required in the circumstances and trusts that your client will now make every effort to place our client in possession of copies of the records it has collated without delay.”

This was duly done and delivered on 21 February 2012.

[69] On 22 February 2012 Attorneys Joubert, Galpin & Searle, on behalf of the applicant, again responded recording the extensive

documentation provided by the first respondent and then proceeds to record:

“2.3 On 10 February 2012 we addressed a letter to your offices in response to your letter dated 6 February 2012 on behalf of our client:

- (a) Disputing your client’s interpretation of clause 10.1 of the Agreement;
- (b) Persisting with its demand for access to records (both in manner and nature), listing the following specific records it requires access to:
 - (i) ...
 - (ii) ...

(iii) ...

(iv) ...

(v) ...

(vi) aged debtor and creditor lists;

(vii) all correspondence between your client and its debtors and creditors.”

The documents demanded in paragraph 2.3(b)(vi) and (vii) are the subject of the first argument.

[70] To this Rushmere Noach Attorneys again responded on 1 March 2012, by now exhausted by the debate, and indicated that they did not intend to enter into a debate on the subject. They record therein as follows:

“Our client is satisfied that it has complied with its tender to provide those documents and records which it is obliged to in terms of the agreement. Your client chose not to inspect these at our client’s premises. Our client accordingly contests your client’s

contention that it has breached the agreement in this regard.”

The final cancellation followed the next day.

[71] This is the history of the debate as it emerges from the founding and answering papers. The alleged breach now contended for

on behalf of the applicant is the failure to provide the aged debtor and creditor lists and all correspondence between the first

respondent and its debtors and creditors. This was not a breach relied upon in the founding papers but was raised in the replying

papers. In the replying papers the applicant refers to its demand for these specific records and then proceeds to allege that it “is plainly entitled” to at least such records to verify whether the first respondent has discharged its obligation to “keep the equipment free of all security interests, charges, liens and other encumbrances” as required in clause 9.3.2 of the agreement and relating directly to the first respondent’s “equipment obligations”. No explanation was provided as to how these documents could assist the applicant in determining whether the equipment had been kept free of security interests, charges, liens and other encumbrances.

[72] In response the respondents contend that the “aged analysis and correspondence with customers” would not assist

the applicant in establishing whether the equipment is free of “security interests, charges, liens and other income and other

encumbrances”. They contend in addition that the applicant was provided with a copy of the most recent available annual financial

statements which is an appropriate source for determining which assets have been encumbered as security to creditors. They then

proceed to state that the information regarding customers of the first respondent (and correspondence with them) can have no relevance

to the determination by the applicant as to whether the first respondent is complying with its obligations in terms of the agreement.

[73] In argument before me Mr Nelson submits that the first respondent has not disputed that “creditor aged analysis and correspondence with creditors” would be relevant records for purposes of verifying whether or not the first respondent has discharged its obligations specifically to keep the equipment free of all security interests, charges, liens and other encumbrances. He submits further that the first respondent’s reasons for not providing “information regarding its customers” is disingenuous as this information, insofar as it could be of any benefit to the applicant, must in any event be supplied in terms of clause 5.4 of the agreement.

[74] I do not think that this argument can be upheld. The argument loses sight of the fact that although the particular point was never raised in the founding papers the factual basis for the argument now advanced was canvassed extensively with reference to the correspondence which flowed between the parties at the time. The documentation which the applicant now contends that the first

respondent has failed to deliver was specifically demanded in the correspondence and the unequivocal response from Rushmere Noach

Attorneys on 1 March 2012 is that “it has complied with its tender to provide those documents and records which it is obliged to in terms of the Agreement”. I think accordingly that the first respondent has in its answering affidavit clearly placed in dispute the relevance of aged debtor and creditor analysis and correspondence with creditors. Its ultimate response to the averment in the replying papers must be read in conjunction with material already covered in the answering affidavit.

[75] The accusation that the first respondent is “disingenuous” in its reasons for not providing information regarding its customers is equally untenable in my view. The averment on behalf of the applicant in its replying papers is set out above. It was the specific contention that the applicant was entitled to such documentation to “keep the equipment free of all security

interests, charges, liens and other encumbrances” as required by clause 9.3.2 of the agreement. No reliance was placed on clause 5.4 thereof. The response on behalf of the first respondent, which is now the subject of this criticism, was directed specifically at the averments of the applicant. In any event, clause 5.4 of the agreement provides for the applicant to have access to “any necessary records” for the purposes of audit verification of the material output. Neither in the founding papers nor in the replying papers is any case made out on behalf of the applicant as

to why it is contended that the aged debtor and creditor lists and all correspondence between the first respondent and its debtors and creditors would be necessary to verify the material output. Whether such documentation is necessary documentation is a question of fact which would have to be established on evidence. I have earlier found that I think that the relevance of this documentation has been clearly and expressly placed in dispute. It is not a denial which can be said to be so fanciful as to be dismissed out of hand. In all the circumstances I think that a real dispute of fact has been raised in respect of this documentation.

Applicant's second argument

[76] The applicant contends that in terms of clause 14.2.2 of the agreement it is entitled to give notice to terminate the agreement in the event that the respondent commits "any act of bankruptcy" in terms of the law of England. Clause 14.2.5 provides for the applicant to terminate the agreement if anything analogous to any of the events referred to in sub-clauses 14.2.2-14.2.4 inclusive under the law of any other jurisdiction occurs in relation to the first respondent. It is argued on behalf of the applicant that a deed of insolvency, as envisaged in the South African Insolvency Act, 24 of 1936, is analogous to an act of bankruptcy in England. Whereas the first respondent has admitted in writing its inability to pay a particular debt in 2010, it is argued that such an event has occurred and that the applicant is accordingly entitled to terminate the agreement.

[77] For purposes of this judgment I shall accept, without making any finding in that regard that a deed of insolvency under the South African Insolvency Act is analogous to an act of bankruptcy under the English Bankruptcy Act and that accordingly the occurrence of such an event would ordinarily, on a proper interpretation of the equipment loan agreement, entitle the applicant to terminate the agreement.

[78] Adopting a purposive approach to the interpretation of the contract, as English law does, I think that the clear purpose of

entitling a party to terminate the agreement when the events set out in clause 14.2.2-14.2.4 occur is to enable the applicant to protect the equipment against the risks which may ensue if the first respondent were liquidated whilst the equipment was in the possession of the first respondent.

[79] The "deed of insolvency" relied upon by the applicant herein is a deed of insolvency as envisaged in section 8(g)

of the South African Insolvency Act which provides that a debtor commits an act of insolvency "if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts".

[80] There are numerous allegations and counter allegations made in the papers relating to the conduct of the financial affairs of the first respondent. On behalf of the applicant it is acknowledged that in respect of all but one there are bona fide disputes which arise from the papers which cannot be resolved without resort to oral evidence. One deed of insolvency, it is argued, stands uncontested, namely that relating to Safripol to which I have referred above. It emerges from the papers that in January 2010 one Adlam, then in the

employ of the first respondent, forwarded an email to Safripol in which he recorded that “we are unable to settle the full R1M this month – we can settle 300k. I do not anticipate end February and onwards to be an issue”.

[81] On 31 March 2010 Adlam again addressed an email to Safripol in which he states as follows:

“Based on our current payment plan, I would appreciate if you would reconsider current payment terms? Although we have service (sic) the account to the best of our ability to date, we are faced with some challenges which are further exacerbated by the current payment terms. The company in terms of this month’s commitment is only able to make an R500,000 payment on 09 April. Furthermore, I would appreciate if we could for a period of 6 months agree to R500,000 per month as opposed to R1,000,000.”

[82] This proposal was not readily acceptable to Safripol and a further exchange of emails occurred. In the interim, a turnaround

manager was appointed to attend to the financial woes of the first respondent. He met with representatives of Safripol on 7 October 2010 and recorded in writing the outcome of the meeting as follows:

“Our request was for a moratorium in payment to Safripol of the outstanding balance (estimated at just under R2m) until at least to the end of November, whereupon a formal plan and actions would be presented..”

And later:

“Your agreement to the payment moratorium is appreciated ...”

[83] On behalf of the applicant it is argued that there is accordingly clear evidence of deeds of insolvency on the part of the

first respondent viz-a-vis Safripol.

[84] In response it is acknowledged on behalf of the first respondent that it was necessary to make arrangements with Safripol for payment of the amount owing and it is contended that the first respondent did so. The first respondent contends that the exigencies of business required the first respondent to renegotiate the terms originally agreed and on each occasion Safripol did in fact agree to new terms. On each occasion the first respondent complied with its renegotiated commitments and it has settled the outstanding amount in full, together with market related interest thereon in accordance with the agreements reached.

[85] I have set out the terms of clause 14 of the equipment loan agreement above. It seems to me, as recorded earlier, that on a reading of clauses 14.2.2-14.2.4 in the context of the agreement as a whole and against the background circumstances which existed at the time the agreement was concluded that clauses 14.2.2-14.2.4 are inserted to protect the applicant’s interest in the equipment when events occur which may threaten the solvency of the first

respondent. In the present case, the threat has come and gone. The debt referred to has been settled in full and there is no dispute between Safripol and the first respondent relating thereto. The threat to the solvency of the first applicant which arose from the interaction with Safripol has long past. I do not think, in these circumstances that it is open to the first respondent to seek to rely on these events in March 2012, nearly 18 months after the threat had passed.

[86] In the result I do not think that the applicant's second argument can be decisive of the application.

Respondents' first argument

[87] Mr Buchanan, on behalf of the respondents, argues that whatever disputes of fact may arise from the papers no valid notice of termination of the agreement has been given and accordingly the application falls to be dismissed.

I have referred earlier in considering the urgency of the application to the waiver by the applicant of its right to rely upon the initial cancellation.

[88] The circumstances giving rise thereto appear from the letters exchanged between Rushmere Noach Attorneys and Attorneys Joubert,

Galpin & Searle on 6 February 2012 and 10 February 2012 respectively. On the former date Rushmere Noach Attorneys recorded as follows:

"Your client, through his previous attorneys, contended that it had cancelled the equipment loan agreement and demanded return of the plant and equipment which is the subject matter thereof. Our client contested this contention and advised that it would hold your client to the agreement. It would seem that your client has now accepted the correctness of our client's position, given that it is seeking specific performance by our client of the agreement."

[89] In response thereto Attorneys Joubert, Galpin & Searle record on 10 February 2012:

"Our client accepts that the Equipment Loan Agreement between the parties is still of full force and effect. Your client's contention that it is not and has not been in breach of the Agreement is however noted. Our client's right to hold a different view in this regard in due course is hereby expressly reserved."

[90] This, I consider, is plainly an express abandonment of any right to rely on the initial cancellation which was communicated through the applicant's attorneys, on the instructions of the applicant, with full knowledge of the right which was being

abandoned. In argument before me Mr Nelson did not contend otherwise. In these circumstances I do not consider it necessary to deal further with the first notice.

[91] Mr Buchanan argues that the notice of the final cancellation does not constitute proper notice of cancellation in that:

1. It was not forwarded in a manner or to the address stipulated in the agreement and
2. To the extent that the alleged breach is capable of remedy are referred to therein, it also does not constitute notice in terms of clause 14.2.1 of the agreement.

[92] Clause 20.1 of the agreement has been set out above. It clearly requires that any notice given under the agreement “shall be in writing” and “may be” delivered in one or more of the ways stipulated in clause 20.1 at the address set out in the agreement or such other address as may have been notified.

[93] I think that on a proper reading of the clause the requirement for a notice to be in writing is clearly peremptory. The manner and address for delivery appears to me, however, to be merely directory. It is introduced so as to provide certainty for the benefit of the party giving notice. If he has delivered a notice in the manner set out in clause 20.1 and at the address set out therein, such notice will, by virtue of the terms of clause 20.1, be effective notice whether or not the other party has in fact received such notice. This I think accords with the terminology of clause 14.2.1 which requires an offending party who has received a notice to remedy a breach to do so within thirty days of him “being deemed to have received such notice in accordance with clause 20.1”. Where, however, a contracting party intending to give notice has delivered a notice in writing, which is a valid notice, in a manner or at a place other than that stipulated in clause 20.1, it will be incumbent upon such party to prove by way of evidence that the notice came to the attention of the opposing party. It will not be deemed to be effective notice in the absence of such evidence.

[94] In the current instance both parties were represented by attorneys, correspondence flowed between the attorneys as discussed

earlier throughout February 2012. On 2 March 2012 Attorneys Joubert, Galpin and Searle recorded:

“We are instructed to give notice to your client (through your offices) of our client’s decision to terminate the Equipment Loan Agreement (the “Agreement”) in terms of clause 14 of the Agreement.”

[95] This notice was delivered to Rushmere Noach Attorneys. Rushmere Noach Attorneys responded on 7 March 2012 recording as follows:

“We refer to the above matter and your letter dated 2 March 2012.

As previously recorded, our client denies that it has breached the agreement as alleged or at all. Our client has declared a bona fide dispute as to the entitlement and extent of the parties’ rights flowing from the agreement. All issues and allegations raised by your client in your above-mentioned letter are disputed.

Furthermore, our client denies that your client has complied with its obligations in placing our client on terms to rectify any alleged breach of the agreement (in any event, any alleged breach on the part of our client is denied).”

[96] From the foregoing it is apparent that the notice was received by Rushmere Noach, they brought it to the attention of the

respondents and obtained instructions to reply. I think that the evidence before me clearly establishes an effective notice and

accordingly the argument founded upon the provisions of clause 20.1 cannot be upheld.

[97] The second attack on the notice is founded on the provisions of clause 14.2. Clause 14.2.1 entitles a party to terminate the

agreement where the other party commits a material breach of its obligations and, where such breach is capable of remedy, such breach is not remedied to the satisfaction of the injured party within thirty days of that notice being deemed to have been received. To the extent that the applicant places reliance upon any breach by the first respondent of its contractual obligations it is accordingly

obliged, I think, to demand that the breach be remedied within thirty days, and to afford his counterparty thirty days to remedy the breach, in each instance where the breach is capable of remedy.

[98] The grounds for termination set out in clause 14.2.2 to 14.2.7 do not, as recorded earlier, arise from a breach of contractual

obligations. The applicant relies on a number of grounds set out in clause 14.2.2-14.2.7, however, it is common cause that there are disputes of fact relating to these grounds which cannot be resolved on the papers. In the circumstances I do not think that the argument founded upon the absence of proper notice can at this stage be finally decided.

[99] To the extent that the applicant does rely on the respondents' breach of its contractual obligations which may be capable of remedy the applicant is obliged to afford the respondent thirty days to remedy its breach. If it does so the applicant's right to terminate the agreement lapses.

[100] The applicant contends, however, on the strength of the correspondence which flowed between the attorneys during February and March 2012 that the first respondent has repudiated its contract in that it has unequivocally intimated that it refuses to provide the documentation to which the applicant contends that it is entitled. This being so, it is argued, that it was entitled to accept the repudiation and that notice was not required. The difficulty for the applicant in this argument is that the refusal by the first respondent as set out in the correspondence is founded upon its interpretation of the contract. In *Freeth v Burr* [1874] LR 9 CP 208 Lord Coleridge LCJ stated at p. 214:

"the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract."

[101] This test was confirmed by the House of Lords in *Mersey Steel Co. v Naylor* [1884] 9 A.C.

434.

[102] In *Re Rubel Bronze and Metal Company and Vos* [1918] 1 KB 315 at 322 McCardie J stated:

“The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provision should not as a rule be deemed to amount to repudiation ... But, as already indicated, a deliberate breach of a single provision of a contract may under special circumstances, and particularly if the provision is important, amount to a repudiation of the whole bargain ... In every case the question of repudiation must depend upon the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case.”

(See *Schlinkmann v Van der Walt* 1947 (2) SA 900 (E) 919 where Lewis J referred to these authorities with approval.)

[103] I think that this dictum is particularly apposite to the present debate. The applicant contends that it is “clearly

entitled” to the delivery of the documentation and to inspect the documentation at the premises of the first respondent in the manner demanded in its correspondence. I have already held that I think that there is a bona fide dispute of fact relating to the relevance of such documentation. If, after the hearing of oral evidence, it is patently clear that such documentation ought to have been provided and if the court is driven to the conclusion accordingly that the refusal constitutes a deliberate breach on the part of the first respondent, then it may constitute a repudiation in which event the applicant may well have been entitled to accept the repudiation. This issue too cannot be decided at this stage and it too is dependent upon the conclusions reached upon the disputed factual issues. In the circumstances I do not think that the question relating to the validity of the notice of termination can be determined on the papers.

Dispute of fact

[104] Mr Buchanan on behalf of the respondents argues that the multitude of factual disputes which are now recognised by the applicant were foreseeable and that the applicant should not have approached this court by way of application. He argues that the application should for that reason be dismissed. The argument has its foundation in the decision in *Room Hire Company Limited v Jeppe Street Mansions (Pty) Limited* 1949 (3) SA 1155 (TPD). In this matter Murray AJP summarised the position at 1162 as follows:

“It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as indicated infra) the Court has a discretion as to the further course of the proceedings. If it does not consider the case such that the dispute

of fact can properly be determined by calling viva voce evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with the direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the applicant should have

realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an

applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action.”

[107] It is apparent from the foregoing that where such a dispute of fact exists the court has a discretion whether or not to dismiss the action. In the present matter the applicant has annexed voluminous correspondence which, on the face of it, suggests acknowledgment by the first respondent that it is unable to pay its debts. Whilst the applicant recognises that there are, now that lengthy affidavits have been filed, disputes of fact which cannot be resolved on the papers I do not think that the applicant could be criticised for believing that any disputes of fact which may be put up may not be bona fide. I consider that the applicant was justified in launching these proceedings by way of application when regard is had to the content of a great deal of the correspondence annexed both to the founding affidavit and the replying affidavit. I am accordingly disinclined to dismiss the application on this basis.

Conclusion

[108] Mr Nelson, on behalf of the applicant, has urged upon me that if I find against the applicant in respect of his two grounds of attack that the matter should be referred for the hearing of oral evidence on such terms and conditions as I may direct. Mr Buchanan, on behalf of the respondents, has similarly urged upon me that in the event that I find against the respondents in respect of notice and in respect of the disputes of fact, as I have done, I should refer the matter to the hearing of oral evidence. Neither party has sought to identify the specific issues to be determined by oral evidence and as I have indicated there appear to be a multitude of issues in respect of which disputes of fact exist. The eventual scope of such dispute is not clear from the affidavits

before court. In these circumstances it seems to me to be appropriate to refer the matter to trial.

[109] In the result I make the following order:

1. The matter is referred to trial at a time to be arranged with the Registrar. The Registrar is requested to give preference to this matter on the roll.
2. The founding affidavit, answering affidavit, replying affidavit and supplementary answering affidavit will stand as the summons,

plea, replication and rejoinder respectively.

3. No witness who has not deposed to an affidavit in the application proceedings shall be called by either party to testify unless:

3.1 It has served on the other party at least fourteen (14) days before the date appointed for the hearing (in the case of a witness

to be called by the applicant) and at least ten (10) days before such date (in the case of a witness to be called by the respondents) a statement wherein the evidence to be given in chief by such person is set out; or

3.2 the court at the hearing, permits such person to be called despite the fact that no such statement has been served in respect of his evidence.

4. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.
5. The fact that a party has served a statement in terms of paragraph 3 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.
6. Within twenty one (21) days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issues relevant to the application which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Rule of Court 35 and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.
7. A pre-trial conference shall be held prior to trial and the provisions of Rule of Court 37 shall apply in respect hereof.
8. The incidence of the costs incurred up until now shall be determined at the trial.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv Nelson SC & Adv J Huisamen SC instructed by Joubert Galpin & Searle, Port Elizabeth

For Respondent: Adv R Buchanan SC & Adv G Richards instructed by Rushmere Noach Inc, Port Elizabeth

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECPEHC/2012/42.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/building-product-design-ltd-v-cordustex-manufacturing-pty-ltd-and-others-unknown-topic-aecpehc-2012>

Prepared on 10 October 2026 · Esheria