

SOUTH AFRICA / JUDGMENT

Commissioner for Inland Revenue v Langa National Brickworks (Pty) Ltd. (454/89) [1991] ZASCA 86 (22 August 1991) [1991] ZASCA 86

COURT

Supreme Court of Appeal

BEFORE

Hoexter, Nestadt, Milne, Eksteen, Goldstone

CASE / FILE NUMBER

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Case No 454/89

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

THE COMMISSIONER FOR INLAND REVENUE Appellant and LANGA
NATIONAL BRICKWORKS (PROPRIETARY) Respondent LIMITED
CORAM: Hoexter, Nestadt, Milne, Eksteen et Goldstone, JJA
HEARD: 14 May 1991 DELIVERED: 22 August 1991

JUDGMENT

HOEXTER, HOEXTER, JA On 11 November 1988, and at Phoenix near Durban, the appellant served upon the respondent company ("LNB") a sales tax notice reflecting sales tax payable by LNB in the sum of R410 756 together with the imposition of a penalty in the same sum. In terms of sec 21 of the Sales Tax Act, No 103 of 1978 ("the Act") any person who is dissatisfied with any assessment made upon him may lodge an objection with the Commissioner, and the latter after having considered the objection shall send to the objector written notice of any alteration or reduction in the assessment, or of his disallowance of the objection, as the case may be. In terms of sec 22 of the Act an objector who is dissatisfied with any decision of the Commissioner as notified to him under sec 21, may appeal therefrom to the special court constituted under the provisions of sec 83 of

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the Income Tax Act, No 58 of 1962. On 30 November 1988 LNB lodged an objection to the assessment with the appellant. By notice of motion dated 11 January 1989 LNB applied in the Durban and Coast Local Division for an order setting aside the assessment and a further order declaring that certain sales concluded by LNB as a vendor are exempt from sales tax. Before the hearing the LNB abandoned its prayer for an order setting aside the assessment. The appellant resisted the application which came before SQUIRES, J. At the time of the hearing, and for reasons to be mentioned hereafter, the appellant had not yet been able to consider LNB's objection to the assessment. On 10 April 1989 the learned judge granted the declarator sought with costs. On 3 July 1989 the court a quo granted the appellant leave to appeal to this court.

LNB is incorporated in Swaziland. It has its

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head office and principal place of business at Manzini. In Swaziland LNB manufactures bricks which are marketed both in Swaziland and in the Republic of South Africa. Sec 6(1)(a)(ii) of the Act exempts from payment of sales tax -

"...the sale of goods which are situated outside the Republic by any seller who is resident or carries on business outside the Republic (other than any sale of such goods in the ordinary course of any enterprise carried on by the seller in the Republic) if such goods are intended for shipment or conveyance to any purchaser thereof at an address in the Republic." (Emphasis supplied).

It is common cause that LNB is a seller "who is resident or carries on business outside the Republic." At Phoenix LNB maintains a depot ("the depot"). In some of the affidavits filed reference is made to the depot as "the Durban Branch." It is common cause that the depot

represents, within the meaning of the Act, an "enterprise" carried on by LNB in the Republic. It is the precise

nature and extent of this enterprise which is in dispute

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between the parties. The dispute arises in the following way. At the depot LNB carries a small stock of bricks for sale and delivery to the passing trade. To these sales reference is made in the application as "over the counter sales." LNB pays sales tax on over the counter sales. LNB's over the counter sales, however, represent a mere fraction of its total sales to South African customers. The substantial portion of LNB's trade with South African customers flows from bulk orders for bricks situated in Swaziland. These bricks are delivered by LNB pursuant to orders which South African customers place either directly with LNB's head office in Swaziland or with its depot at Phoenix. LNB contends that in respect of all such bulk orders acceptance by LNB takes place at its head office; that in respect of each and every such bulk order accepted by LNB the contract of sale is concluded in Swaziland; and that no single bulk sale of its bricks in

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Swaziland constitutes a "sale of its goods in the ordinary course of any enterprise" carried on by LNB at its depot. LNB has not paid sales tax in respect of its bulk sales to its South African customers. The declaratory order sought and obtained by LNB relates to such bulk sales to South African customers. In respect of all bulk orders placed with LNB a member of its staff completes and on behalf of LNB signs a printed form ("the c/o form") which is thereafter posted to the customer who has placed the order. The c/o form is on LNB's letterhead, and in bold print it displays the heading: "CONFIRMATION OF ORDER" Upon the face of the c/o form are entered, in the appropriate spaces provided therefor, particulars of the customer's name and address; details of the quantities ordered and the prices quoted; delivery instructions, the

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manner of payment and the date of signature of the form. For the sake of convenience there is annexed to this judgment a blank specimen of the c/o form. As will become clear in due course a crucial issue in the case concerns the legal effect of posting to the customer who has placed an order the completed and signed c/o form.

At the foot of the c/o form there are printed

three "NOTES". The first note reads thus:

"We draw your attention to our Conditions of Sale printed on the reverse, and specifically that all quotations are subject to escalation."

On the reverse side of the c/o form the preamble recites that what follows "shall be the Sole Terms and Conditions upon whichLNB will contract to sell goods." It is necessary to quote here portions of the terms and conditions governing the price of LNB's goods, delivery of the goods and related matters. In relation to price paragraphs 2.1 and 2.2 of the Conditions of Sale state:

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"2.1 The price of goods sold shall be LNB's price ruling as at the date of despatch of goods.

2.2 Should this price be different from the price ruling as at the date at which any quotation may have been given to the Purchaser or Agent LNB shall advise the Purchaser or Agent prior to the dispatch of the goods of the said increase and the Purchaser or Agent shall be entitled to cancel his order at that time. .. If however, at the time of placing the order and the issuing of a written acceptance of such order by LNB both a date for delivery has been agreed to by the Purchaser and the purchase price of the goods has been paid in full then that price will be the price at which the goods will be sold."

In regard to delivery paragraph 3 of the Conditions of Sale

contains, inter alia, the following provisions:

"3.1 In the case of goods sold for delivery at LNB's Factory, the Purchaser shall provide transport and labour and take delivery of the goods at a rate and at such time or times as agreed to by the Purchaser or Agent and LNB.

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3.2 In the case of goods sold for delivery by a haulage contractor or by rail, such carrier shall be deemed to be the Purchaser's or Agent's carrier and delivery shall be deemed to be effected upon possession of the goods sold being taken by the carrier. A consignment note issued by the carrier shall constitute proof of delivery of the goods expressed to be covered thereby. 3.3 In the case of goods sold for delivery by LNB the Purchaser or Agent may request the delivery of goods in accordance with a delivery schedule and depending on the efficient use of its delivery fleet and subject to 3.5 LNB will attempt, but shall not be bound, to meet such delivery schedule

3.5 Should LNB agree, in writing, to a delivery schedule, then LNB shall attempt to deliver products in accordance with such delivery schedule, but shall not be bound to do so...."

Under the heading "IMPOSSIBILITY OF PERFORMANCE" the

Conditions of Sale state:-

"In the event of LNB being prevented from any cause beyond its control from supplying goods ordered, which shall be deemed to include shortage of stocks of the goods, then it shall be

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excused from performance during the period for which it is so prevented."

Under the heading "CLAIMS" paragraph 6.1 of the Conditions

of Sale reads as follows:

"LNB will attempt to deliver products in accordance with a delivery schedule agreed to in terms of 3.5, but the Purchaser or Agent shall have no claim of any nature whatsoever against LNB by reason of any delay by LNB in giving delivery of goods on any date or dates that may be specified in the Purchaser's or Agent's order or a delivery schedule agreed in terms of 3.5 or within a reasonable time in those cases in which no such date is specified or agreed."

In regard to payment of the purchase price paragraph 7.1 of

the Conditions of Sale states:-

"The normal form of payment for goods including cartage shall be cash payable in advance of delivery or despatch or in such other form as may have been contractually agreed. In the event of the purchase price and other charges not being paid as aforesaid, LNB shall be entitled to cancel any contract for the delivery of goods without prejudice to its right to recover from the Purchaser or his Agent any loss or damage suffered by it by reason of such cancellation.."

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Against the background sketched above it is necessary to turn now to a consideration of those commercial activities, other than over the counter sales, which were carried on at the depot. LNB's secretary is Mr Eric Knowles. He deposed to the founding affidavit to LNB's notice of motion; and, after answering affidavits had been filed by and on behalf of the appellant, Knowles filed a replying affidavit. One of the answering affidavits was deposed to by a former employee of LNB, Mr E G W Chaplin. From January 1987 to November 1988 Chaplin was employed at the depot, initially as a sales representative and after August 1988 as the depot manager. In the latter post his predecessor was a Mr Knox. The secretary at the depot was Mrs H Brown.

Upon a comparison of the affidavits of Knowles on the one hand and Chaplin on the other, a number of sharp

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conflicts in regard to various issues of fact leap to the eye. These disputes of fact will be examined later. However, in order to gain a general picture of the manner in which bulk orders placed with the depot were dealt with by Chaplin and Mrs Brown, it is convenient to quote here at some length from those portions of Chaplin's affidavit unchallenged by Knowles. In paragraph 8.4.2 of his affidavit Chaplin gives the following description of the procedure observed at the depot in connection with what he dubs "cash up front sales":

"A customer who wished to order bricks for

delivery from Swaziland, but who did not have credit facilities, would be required to pay for the bricks in advance before an order could be executed. A 'CONFIRMATION OF ORDER' form was completed and signed by Mrs Brown or me and held in abeyance until payment was made. In these cases the money paid by the customer was paid into the Durban Branch, in cash or by cheque, or transferred to the Applicant's banking account in Durban. In these cases delivery dates for the bricks ordered were discussed at the time of

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payment for the bricks...."

Concerning credit transactions Chaplin, in paragraph 8.4.3 gives the following account:-

"If a customer required credit he or it would be required to give South African trade references to me or Mrs Brown, and usually we would then investigate them and report to the Head Office. A credit application form would be filled in in respect of the customer and signed by it, and this would be telefaxed by the Durban Branch to Head Office in Swaziland, which would decide on the customer's limit. Where sales were on credit a 'CONFIRMATION OF ORDER' form would be completed at the Durban Branch at the time the order was placed with the Durban Branch, and particulars regarding the quantities, price and delivery costs would be filled in on the form at the time of placing the order, together with information regarding the method of delivery, the address for the delivery, other delivery instructions and the proposed method of payment. Whenever a credit customer placed an order Mrs BROWN or I would be required to check the

amount of the order against the amount of the customer's credit limit and whether it was within the 30 day payment basis, as notified to us by the Head Office in Swaziland. If a customer had exceeded his or its credit limit or 30 days' terms we would, before accepting the order, be required to get a cheque from the customer to clear the arrears before accepting the order and this

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cheque would be paid into the Applicant's banking account in Durban."

In paragraph 9 of his affidavit Chaplin says that (save forov'er the counter cash sales) all orders received at the depot were processed as follows:-

"Either Mrs BROWN or I, or my predecessor, would complete the 'CONFIRMATION OF ORDER' form setting out the information referred to above, and sign it for and on behalf of the Applicant, in the place indicated, with the date of placing of the confirmation of the order. There were three copies of the 'CONFIRMATION OF ORDER' form. Upon signature by me or Mrs BROWN, the top, original copy, would be posted to the customer, and a copy transmitted to the Applicant's Head Office in Swaziland by telefax machine.

One carbon copy, usually a pink copy, would be

retained at the Durban Branch, There was no delivery schedule attached to the 'CONFIRMATION OF ORDER'. Head Office would compile a delivery schedule for all orders despatched from Swaziland and faxed to the Durban Branch. Sometimes the customer had special requirements regarding delivery dates and the urgency for delivery and these would be entered on the 'CONFIRMATION OF ORDER' form by me or Mrs BROWN."

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Here it is convenient to make brief reference to

certain events at the depot immediately preceding the issue of the assessment on 11 November 1988. The person primarily concerned with the investigation of LNB's bulk

sales to South African customers was Mr N J Ward, a sales tax inspector in the appellant's Durban office. Ward is a chartered accountant. In response to the founding affidavit he filed a lengthy answering affidavit. On 2 November 1988 Ward paid a visit to the depot and, in terms of the Act, he sought certain information from Mrs Brown who was then in charge of the depot. Ward says that Mrs Brown, acting on instructions previously issued to her by LNB's head office, declined to divulge to him any

information regarding bulk orders taken at the depot and

telefaxed to its head office. In Ward's presence Mrs Brown telephoned Knowles at head office. Ward says he

heard Knowles instruct Mrs Brown not to release the desired

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information to Ward. Ward himself spoke to Knowles over the telephone and told him that a search warrant would be obtained. Thereafter a search warrant was secured and brought to the depot. Before its arrival, however, LNB's sales manager at head office had telephoned Mrs Brown and instructed her to remove all c/o forms relating to bulk sales executed from Swaziland. According to Ward Mrs Brown refused to carry out this last instruction. Upon the arrival of the search warrant all the c/o forms available at the depot were seized. Ward was the official who drafted and issued the assessment served on LNB. The assessment was based on the c/o forms impounded at the depot on 2 November 1988. All of these c/o forms related to bulk orders placed at the depot. Among the seized forms there were a number of cancelled c/o forms. These were separated from the remainder; and the latter were totalled to determine an

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estimated value of those sales which were believed to be subject to sales tax. Ward states (and his averment is not challenged by Knowles in the latter's replying affidavit) that all of the c/o forms on which the assessment was made had been issued by either Chaplin or Knox or Mrs Brown; and that the appellant has neither seized nor been provided with any c/o forms issued anywhere else. So much for the events leading up to the assessment. Thereafter, according to Ward, a meeting took place on 30 November 1988 between on the one hand Ward and two other senior officials representing the appellant and on the other hand two persons representing LNB. At this meeting LNB's objection to the assessment was handed over and discussed. On behalf of LNB an undertaking was given to provide the appellant with a set of LNB's audited financial statements; and its sales figures broken up into various sales categories. By 11 January 1989 the promised

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information had not been furnished. On 13 January 1989 a further meeting between representatives of the parties was held whereat it was agreed that LNB's application in the court below would be postponed to 27 January 1989 and that LNB would furnish certain information to the appellant. At this meeting Mr R C P Langley, who is the Chief Director: Sales Tax in the Inland Revenue Branch of the Department of Finance, undertook to consider LNB's objection to the assessment upon receipt of the further information required. Thereafter LNB addressed a letter dated 16 January 1989 to the appellant. The further information therein set forth, so deposes Ward:

"....does not resolve the dispute of fact between the version of the activities at the Applicant's Durban Branch as deposed to in the founding affidavit and the version given by Mr CHAPLIN, supported by the 'CONFIRMATION OF ORDER' forms on which the assessment was made."

In the founding affidavit Knowles makes the

assertion that the dispute between the parties in regard to

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which a declaratory order is sought -

"...arises from a difference in interpretation of the applicable provisions of the Act "

In truth, however, as the learned judge in the court a quo rightly perceived, the real dispute hinged on the resolution of what was in part a factual issue. In the course of his judgment SQUIRES, J remarked:-

"The dispute initially turns on what happens at the depot when a customer places an order and it is signed by one of the applicant's staff."

It was also necessary for the court a quo to consider the legal consequences attaching to the completion and despatch of c/o forms by the depot staff; but such questions of law as arise in this connection, so I consider, involve general principles of the law of contract rather than any inquiry into the true interpretation of the Act itself.

The way has now been cleared for an enumeration

of the more significant conflicts which are to be noticed upon a comparison of the versions of fact respectively put

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forward by Knowles and Chaplin. They are the following:- (A) Were bulk orders by South African customers

placed mainly with the depot or with head office? In the founding affidavit Knowles is at pains to stress that the mass of bulk sales by South African customers was placed directly with LBN's head office in Swaziland. He says:-

"The absence of reliable communication lines to Swaziland often leads customers to lodge orders with the Applicant's depot or sales representatives outside Swaziland for transmission to the Applicant. However, by far the majority of orders are placed with Applicant directly at its offices in Swaziland."

Chaplin, on the other hand, paints a very different picture. He says that the "vast majority" of orders for Natal (his estimate is approximately 99%) were transacted

through the depot. He goes on to say:-

"In fact, on occasions the Head Office directed customers to the Durban Branch for the placing of orders."

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In his replying affidavit Knowles denies that the vast majority of orders were transacted through the depot. He adds:

"This, however is irrelevant. It is not correct that thehead office directed customers to the Durban depot for the placing of orders. There could be no purpose in doing this." (B) Was the depot staff merely there to accept bulk orders for transmission to LNB's head office, or was the staff authorised to accept such orders on behalf of LNB? In his founding affidavit Knowles describes the

depot as (save for over the counter sales) being:-

"...nothing but a receiving office for bulk orders and inquiries all of which are referred to the Applicant's head office and are dealt with thereat."

Knowles says that except for over the counter business no sales are effected through or at the depot and no business is conducted there. In particular, so avers Knowles, the

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staff at the depot do not have and never had any authority to decide whether or not a bulk order should be accepted. These claims by Knowles are flatly contradicted by Chaplin. In his affidavit he states:-

"It would never have been possible to operate the

Durban Branch economically if it existed only to deal with 'over the counter' sales. As far as I am concerned, its main function was to operate as the base from which I solicited and at which the Applicant received orders for the sale and supply of bricks, and at which such sales were confirmed and the customers concerned received such information and service as we were able to provide. In those instances in which orders placed through the Durban Branch were wholly or partly canceled, this would be noted on the 'CONFIRMATION OF ORDER' form, and Head Office would be advised accordingly."

As to the scope of the authority with which the depot staff were invested Chaplin states:-

"Both Mrs BROWN and I were authorised by the Applicant to accept orders at the Durban Branch and elsewhere from customers, to fill in the 'CONFIRMATION OF ORDER' forms including the quantities, prices and delivery charges, to sign the forms for and on behalf of the Applicant, and to transmit them to the customers."

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Chaplin goes on to say that in the ordinary course of events orders in respect whereof the depot had signed c/o forms were executed and invoiced by head office in accordance with the c/o forms (C) The determination and variability or otherwise of

ruling prices for LNB's products:

In this connection Chaplin states in paragraph 16

of his affidavit:

"The price list for all bricks sold by the Applicant was altered twice a year at the beginning and mid-way through the year, and the listed prices were adhered to. Cancellations of orders did occur from time to time, possibly in connection with price changes, but most frequently because the customer had over-ordered and did not require the quantities originally ordered or because there was no stock available. These cancellations were dealt with at the Durban Branch and telefaxed to Head Office."

Mention has already been made of the cash up front sales when customers lacking credit facilities would be required by the depot staff to pay for bulk orders in advance: and

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in which case the completed and signed c/o form was held in abeyance until payment was actually made. in paragraph 8.4.2. of his affidavit Chaplin says of cash up front sales:-

"In the case of these sales...the price of the bricks could not be changed once it had been paid."

In his replying affidavit Knowles makes the following

averments:-

"With regard to paragraphs 14 and 16 of Chaplin's affidavit the price list was altered whenever it was appropriate for a change to be made. The change was not made regularly twice a year Price lists were faxed to the depot from time to time. Cancellations did occur both in connection with price changes and in connection with over-ordering and because customers could not wait for the delivery time which had been determined by the Applicant. Some cancellations were communicated to the Durban depot. Others were communicated direct to the Applicant's head office."

Earlier in his replying affidavit Knowles challenges Chaplin's assertion that in the case of cash up front

transactions the price once paid could not be changed. In

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this connection Knowles states:-

"It is clear from Appendix 'APP2' that the price could be changed."

(Appendix "APP2" to the founding affidavit is a specimen blank c/o form the reverse side of which contains the Conditions of Sale.)

In the court below it was urged on behalf of the

appellant on three separate grounds that LNB's application for a declaratory order was improper and should not be entertained. For purposes of the present appeal it is unnecessary to detail the third ground. The first and

second grounds of objection raised on behalf of the appellant are conveniently summarised thus in the judgment of the learned judge in the court a quo:-

"First, because the issues in respect of which the applicant sought to obtain the present order were the very ones that the respondent, and later the Special Income Tax Court, would respectively have to decide in determining the objection to the assessment, and to any consequent re-hearing on appeal. Both would be bound by the

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declaratory order that may be made as a result of the present proceedings, and that in making such order I would therefore have usurped the function of those two tribunals, and moreover would have done so where the facts had not been clearly established. Secondly the respondent argued, the facts alleged by the applicant are disputed; and until the correct facts relating to the activities of the Phoenix depot have been established, it would not be appropriate to make a declaratory order which would necessarily involve a finding as to what in fact took place at the Phoenix depot."

SQUIRES, J concluded that there was no real substance in any of the objections to the grant of a declaratory order raised by the appellant.

For reasons to be mentioned later in this

judgment I am driven to the conclusion that, at worst for the appellant, the learned judge should have declined to grant the order sought by LNB by way of motion proceedings on the simple ground that the affidavits filed revealed the existence of bona fide disputes in regard to material facts; and for that reason alone the appeal should

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succeed. In the light of that conclusion it is unnecessary to express any firm opinion on the first ground of objection relied upon by the appellant, and I refrain from doing so. In passing, however, I would mention that I am far from being persuaded that the jurisdictional point taken is unsound. The dispute between the parties involves no identifiable issue of principle in regard to the interpretation of the Act. There may well be merit in the contention that the resolution of the issue has been entrusted by the Legislature exclusively to the Commissioner for Inland Revenue and (in the event of an appeal against his ruling) the Special Court for Income Tax; and, therefore, that the court below lacked any original or alternative jurisdiction to determine the matter. For purposes of argument, however, it will be assumed, in favour of LNB, that the court a quo was legally competent to entertain the application.

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In regard to the second ground of objection

raised on behalf of the appellant the learned judge observed in the course of his judgment:-

"A reading of the affidavits does indeed give, prima facie, the impression of numerous disputes between the parties. But most of these are not disputes of fact so much as disputed inferences or possible constructions of events made by the respondent's officers on other facts. The essential facts on which relief in the present application is sought, seem to me to be either common cause or amply proved."

I respectfully disagree with the view expressed

by the court a quo in the passage quoted above to the effect that the affidavits filed present no more than a semblance of factual disputes; and that the court need here do no more than select from diverging inferences based on undisputed or proven essential facts. The fallacy of that view may be illustrated, for example, by reference to the issue hotly disputed: the question whether or not the depot staff had authority on behalf of LNB to accept bulk

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orders placed with the depot. Had there been before the court the evidence neither of Knowles nor of Chaplin, the answer to that question would no doubt have to be attempted by a process of inference from mediate facts in the shape of purely circumstantial evidence relevant to the fact in issue. But inasmuch as both LNB's company secretary and the former manager of the depot testified on the point in issue one is here concerned with a primary fact in regard to which each of these two deponents claims direct personal knowledge. The issue is, I consider, essentially one of credibility.

As pointed out by GREENBERG, J in *Meyers v Bráudo*

1927 TPD 393 at 395/6:-

"There is a well recognised procedure for settling disputed facts, and that is not a procedure by affidavit."

In such cases the appropriate procedure is *rauw actie*.

The rule that a litigant who seeks to force a decision on

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motion proceedings in such a situation does so at his peril, is founded on notions of elementary fairness. It recognises that grave injustice may be done to a litigant who is denied the ordinary procedure adopted in

investigating the truth of conflicting allegations. The ordinary procedure involves evidence *viva voce* given from the witness stand by witnesses who are exposed to the keen edge of what is often a most effective instrument in laying bare the truth : cross-examination.

The principle is succinctly stated by MURRAY, AJP

in Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd

1949(3) SA 1155(T) at 1162:

"Inasmuch as the ascertainment of the true facts is effected by the trial Judge on considerations not only of probability but also of credibility of witnesses giving evidence viva voce, it has been emphasised repeatedly that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory

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affidavits, in disregard of the additional advantages of viva voce evidence "

The rule has been consistently followed by our courts. Seeeg Sewmungal and Another NNO v Regent Cinema 1977(1) SA814(N) at 818G/821G. A recent reaffirmation of it in thisCourt is to be found in the following remarks of 80THA, JA

in Administrator, Transvaal, and Others v Theletsane andOthers 1991(2) SA 192(A) at 197A/B:

" in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the Court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers, or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits. This rule, which is trite, applies to instances of disputes of fact "

In the course of his judgment SQUIRES, J remarked

as follows:

" it ought to be said at the outset that I am

not persuaded that reliance can be placed on

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Chaplin's evidence where it is contradicted by that of Knowles "

The learned judge was disposed to regard Chaplin's testimony with a jaundiced eye on the strength of his assessment of the probabilities, coupled with the fact that in his opinion Chaplin had made:

"...claims about the effect of the orders placed that are plainly at variance with the written terms of the document...."

In my view it is clear that on the affidavits there was a real and genuine dispute of fact between the parties. The court a quo did not find (and there could hardly have been room for any such finding) that Chaplin's version was so

far-fetched or untenable as to warrant its outright rejection. I do not agree with the learned judge's assessment of the probabilities. But even if his appraisal of the probabilities on the papers were perfectly

sound, it was his duty to consider whether viva voce

evidence might not disturb such view of the probabilities.

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This the court below failed to do.

So much for the material disputes of fact in the case. The propriety or otherwise of deciding the issue between the parties without recourse to evidence viva voce also arises crisply in another connection.

Although the averments made in the founding

affidavit are not entirely consistent or harmonious, I think counsel for the appellant was correct in urging upon us that the essence of the case put up by LNB in its founding affidavit came to the following: that acceptance by LNB of bulk orders, as evidenced by the issue of c/o forms, took place in Swaziland only; and therefore, that all bulk order sales were concluded in that kingdom. In paragraph 6.11 of the founding affidavit the following is

said:

"All orders placed on the Applicant by its South African customers are processed, accepted or rejected by the Applicant in Swaziland and the contracts of sale arising from that acceptance

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are, in accordance with the ordinary principles of South African law, concluded in Swaziland."

Paragraph 6.9 of the founding affidavit states:

"In respect of all orders accepted by the Applicant, the Applicant, after completing the confirmation of order, despatches a copy of the confirmation to the customer."

In the answering affidavits the appellant met the case so put up by LNB by demonstrating that in respect of all the bulk orders sales on which the assessment is based, c/o forms had been issued at the depot by Chaplin or Mrs Brown; and by advancing the legal submission founded thereon that acceptance of these bulk orders (and the conclusion of the contract of sale in each case) had taken place in Durban.

In response to the answering affidavits Knowles in paragraph 12 of his replying affidavit complained that the use of the phrase "accepting the order" employed in the affidavits of Ward and Chaplin betrayed confusion. This³⁵ alleged confusion Knowles sought to dispel in paragraph 12 of the replying affidavit by explaining that with regard to c/o forms signed by the depot staff -

"The signing of this confirmation of the order form does not, however, indicate an acceptance of the offer contained in the order. It is merely an acknowledgment that an order has been received and is about to be transmitted to the Applicant's head office. It is also a notification to the customer of the terms on which the Applicant deals. The acceptance of the offer contained in the order takes place when the goods are despatched. (Emphasis supplied)

It was on the basis of the new case thus advanced

in the replying affidavit that the court a quo ruled in favour of LNB in regard to the crucial question in the case. This appears from the following excerpt from the judgment:

"It seems to me, therefore, that on the recital of the applicant's operations as described by Knowles, it is the despatch of the goods by delivery to the carrier who, by agreement, is the agent of the customer, that is the effective conclusion of a sale where a customer orders through the depot by means of the order form here

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employed."

The impermissibility of making out a new case in reply apart, when it appears that the new case is incompatible with the case advanced in the founding affidavit, the issues cannot satisfactorily be determined without recourse to oral evidence. See: *Administrator, Transvaal and Others v Theletsane and Others* (supra) at 196E/197D. In my view the case propounded in the founding affidavit and the new case put forward in the replying affidavit are difficult to reconcile. It follows that in this respect also the court a quo erred by deciding the matter simply on the affidavits. Having regard both to the material disputes of fact between the parties and the incongruence between the founding and replying affidavits, I agree with the contention advanced on behalf of the appellant that this was a case in which on the affidavits filed, the

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court below was not entitled to come to a final conclusion against the appellant. Nor does the matter end there. The proposition upon which the success of LNB's application depended involves issues of mixed fact and law. The legal issue turns on the true function served by a c/o form; and the proper interpretation to be assigned to its terms. Even ignoring so much of Chaplin's affidavit as was contradicted by Knowles, I remain unpersuaded that LNB discharged the onus of establishing, on a balance of probabilities, the case it sought to put forward in its replying affidavit. In the first place the assertion by Knowles that the c/o form issued by the depot served merely as an acknowledgment that the order had been received seems to me to be singularly unconvincing. In the second place it seems to me, with respect, that in deciding that no contract of sale, pursuant to a bulk order placed with the depot could have

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been concluded in Durban the learned judge misdirected himself on the law of sale. As far as the function to be served by the c/o form is concerned, it will be borne in mind that in general our law maintains an objective approach to the problem of the creation of contracts. See: *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958(2) 473(A) at 479F, and the decisions there cited. Here it is common ground that in respect of bulk sales placed with the depot the depot staff was legally empowered on behalf of LNB to complete, sign and transmit the c/o form to the customer concerned. It follows that the c/o form thus issued by the depot represents to the customer who receives it the external manifestation of LNB's state of mind in response to the order placed. Upon an ordinary linguistic construction, and when viewed in the whole contextual setting of the c/o form, the heading "CONFIRMATION OF

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ORDER" is, so I consider, reasonably - and indeed readily - susceptible of signifying "ACCEPTANCE OF ORDER." It is noteworthy that there is nothing in the terms of the c/o form which even remotely suggests that it is intended to serve simply as a formal acknowledgment by LNB that it has received the customer's order. It is further significant that the c/o form is not signed by the customer. Recognising that businessmen are not prone to engaging in transactions which make little commercial sense, courts usually construe a contract to give it ordinary business efficacy. It is difficult to conceive what useful purpose could be served by communicating to a customer the fact, of which the customer is perfectly aware, that LNB has received his order. The meaning which in the replying affidavit Knowles seeks to assign to the c/o form is a somewhat extraordinary one when judged by ordinary commercial standards and usual business practices.

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That meaning would portray LNB in the improbable role of a very reluctant vendor. Chaplin says that customers regarded the issue of the c/o form as clinching the deal. In my view, upon an objective approach, customers would be entitled so to interpret the matter. Appended to Ward's affidavit are ten c/o forms issued by the depot in response to bulk orders. Each c/o form reflects a quantity of bricks, a price, a delivery date, a method of transport, a charge for delivery and a method of payment. This is entirely consistent with a confirmation of acceptance of an order. In my judgment the meaning for which Knowles contends is rather forced and unnatural.

I turn to the reasons stated by the court below

in support of its finding that no contract of sale was ever

concluded at the depot. In the course of the founding

affidavit Knowles says the following:

"The Applicant has been advised that, notwithstanding the issue to a customer of a

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'Confirmation of Order' a customer remains entitled to withdraw or cancel that order because the determination of the selling price and supply dates is left for subsequent determination at the Applicant's Head Office in Swaziland and is at the sole discretion of the Applicant." (Emphasis supplied)

In deciding that no contract of sale could be concluded at the depot the court below appears to have adopted much the same line of reasoning. Having decided in the course of this

judgment:

"...that what occurred in filling in and signing the order form, was not in law the concluding of a sale "

SQUIRES, J remarked:

"I have reached this conclusion because there are simply too many variable factors at that moment to allow it to be said that a sale had been concluded. It was not known, for example, what the price would be since that could be increased; nor was it known what would be sold, if anything at all, if the applicant was unable to meet the order."

It seems to me, with respect, that in so reasoning the court erred in more than one respect. In the first place

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I am unable to agree with the proposition that upon completion and signature of the c/o form there existed any uncertainty whatever as to the price. In terms of the Conditions of Sale it is specifically provided that the goods are sold to the customer at "LNB's price ruling at the date of despatch..." of such goods. It is true, of course, that where LNB's ruling price at the date of despatch of the bricks exceeds the quotation given to the customer by the depot staff and reflected in the c/o form, the customer has the right of withdrawal. However, this right accrues not (as Knowles suggests in the founding affidavit) because the price at the date of despatch "is at the sole discretion" of LNB, but for the simple reason that the Conditions of Sale specifically accord the customer such right of withdrawal in the event of price escalation.

In truth the price ruling at the date of despatch

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is by no means "at the sole discretion" of LNB. Were the position to be so then the purported contract would be void ab initio. If it is left to one of the parties to fix the price the contract is bad. See: Dawidowitz v Van Drimmelen 1913 TPD 672 at 676; Dharumpal Transport (Pty) Ltd v Dharumpal 1956(1) SA 700(A) at 707; Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986(2) SA 555(A) at 574D; Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991(1) SA 508(A) at 514G/I. It is trite that parties must either fix the price in their contract or agree upon some external standard by the application whereof it will be possible

to determine the price without further reference to them: *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964(1) SA 669(W) at 670C/D. In the instant case the price would have been at the sole discretion of the seller if at the moment of despatch of the bricks LNB

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had been entitled, arbitrarily and ad hoc, to fix upon any price that it fancied. But that is not the position at all. It is common cause that from time to time LNB issues price lists. The price list prevailing at the time of the despatch of the goods determines the price. Such price list provides, at the time of despatch, an external standard by which it is possible, without reference to the seller, to determine the price. The price list is, I consider, no less satisfactory an external standard than the "usual price" which, according to our law, the customer tacitly agrees to pay his grocer when in the latter's shop the customer asks for and is given a box of matches although no anterior mention has been made of the price of the matches. To state the matter differently: It is not strictly accurate in the present context to speak of an "increase in price". The Conditions of Sale stipulate but a single price, which is the price ruling at the date of

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despatch of the goods. It follows that the finding by the court a quo that at the time of the completion of the c/o form it was not known what the price would be, is incorrect. The further finding of the learned judge that at that stage it was not known to the parties:

"...what would be sold, if anything at all, if the applicant was unable to meet the order"

is factually correct but it is, with respect, legally

irrelevant. In our law the essential ingredients of the contract of purchase and sale are few and simple. The contract is normally complete when the parties have agreed upon the commodity to be sold and the price to be paid and they intend that the one shall be exchanged for the other. Professor A J Kerr (Joubert, *LAWSA*, vol 24 p 4 par 1) defines the essentials of the contract thus:

"When parties who have the requisite intention agree or appear to agree that the one, called the seller or the vendor, will make something, called the thing sold or the *res vendita* or *merx*, available to the other, called the buyer or the

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purchaser, in return for the payment of the price, the contract is a sale. In non-statutory law all that is necessary is agreement on the thing to be sold and the price to be paid."

Delivery by the seller and payment by the buyer are no more than rights which flow from the contract. They are not requirements of the contract. In the instant case both the *merx* and the *pretium* were clearly specified in the c/o form.

The late filing of the appellant's notice of

appeal is condoned. The appeal succeeds with costs, such costs to include the costs consequent upon the employment of two counsel. The order granted by the court a quo is set aside, and the following order is substituted therefor:

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"The application is dismissed with costs."

G G HOEXTER, JA

NESTADT, JA) MILNE, JA) EKSTEEN, JA) Concur GOLDSTONE, JA)

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