FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A135/12

In the appeal between:-

DIE TRUSTEES VIR TYD EN WYL VAN AMM CLAASSENS TRUST	Appellant
and	
PBD BOEREDIENSTE (EDMS) BPK	Respondent

CORAM:	RAMPAI, J *et* THAMAGE, AJ
HEARD ON:	8 OCTOBER 2012
JUDGMENT BY:	RAMPAI, J
DELIVERED ON:	14 DECEMBER 2012

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[1] The matter came to us by way of an appeal against the judgment of the district magistrate court, which was handed down in Bloemfontein on 1 March 2012. In the court *a quo* judgment was granted with costs in favour of the respondent *qua* plaintiff against the appellant *qua* first defendant in respect of two separate claims. The appeal was opposed.

[2] The trial magistrate, Mr. T.M. Viljoen, ordered the appellant to pay to the respondent an amount of R66 346,46 capital

interest thereon at the rate of 1,5% per month from 1 November 2011 and the costs, as quantified, of the action. That was the first order as regards the first claim.

[3] The trial magistrate also ordered the appellant to pay to the respondent an amount of R45 482,80 capital claim, interest thereon at the rate of 1,5% per month from 1 November 2000 and the costs, as qualified, of the action. That was the order as regards the second claim.

[4] The appellant was aggrieved by the aforesaid first and second orders in respect of the respondent's first and second claims respectively - hence the trust came to this court on appeal against the whole of the judgment and the orders which emanated from it.

[5] The current respondent, previously known as Delport Beherend (Edms) Bpk, was a successor in title. The original seller was a corporate persona called Plaaslike Boeredienste (Edms) Bpk, which used to trade as Greenlands. The respondent's acquired rights, title and interest in the two transactions through cession in 2004. Since that moment of cession the respondent stepped into the shoes of the original

seller. From now on I shall refer to the respondent as if the respondent was a party to the conclusion of the two transactions.

[6] The first agreement was concluded at Vanderbijlpark on 28 March 2000. The appellant ordered 45 tons of fertilisers from the respondent. The transaction was evidenced by a written document, order form 24576. The respondent's general terms and conditions of sale were printed on the reverse side of the order form (annexure "a"). At the time the parties negotiated the first transaction, Mr. J.H. Beyers was the proprietor of the fertiliser enterprise. He was the managing director, while Mr. P. Janeke and Mr. J.S. Blignaut were the general manager and the marketing manager respectively of the respondent. During those negotiations the respondent was represented by a certain Mr. P. Bester and the appellant by Mr. Claassens.

[7] The appellant carried on certain agricultural operations on a few farms. The chief crops cultivated on the farms were wheat and maize. On the wheat-fields and mealie-fields fertilisers were used to improve the quality of the crop. Mr. A.M.M. Claassens was the sole trustee of the appellant trust.

The order form was signed by Mr. Claassens. The appellant tendered a post-dated (31 October 2000) cheque as a form of payment. See p. 4 record for precise details of the first cheque. The respondent delivered the first load of goods to the appellant's farm. The first agreement was a credit transaction. The appellant's farm is the Bultfontein district and the respondent's factory at Vanderbijlpark.

[8] The second agreement was concluded on 26 March 2000. On that second occasion the appellant ordered 50 tons of fertilisers from the respondent. However, only 30 tons were actually delivered. The delivery of the remaining 20 tons was held back pending the appellant's further instructions. But the second agreement was eventually cancelled before the final delivery (annexure "b"). The transaction was evidenced by a written document, order form 24577. The respondent's conditions of the sale were similarly printed on the reverse side of the second order form (annexure "c"). During the second round of the negotiations, the appellant, as the purchaser, was represented by the same Mr. Claassens and the respondent, as the seller, by the same Mr. Bester. Once again the order form was signed by the appellant's representative. The respondent then partially delivered the

second load of goods to the appellant. The appellant again tendered a post-dated (30 November 2000) cheque as a form of payment. For precise details of the second cheque – see p. 5 record. The second agreement was also a credit transaction.

[9] In due course the respondent presented the two cheques on two separate occasions to his bank for collection of the sale prices from the appellant's bank. The first cheque was not honoured because the appellant stopped payment on the very same day on which the cheque was presented. The second cheque was later dishonoured. The stopping of the first cheque and the dishonouring of the second cheque prompted the respondent to apply for provisional sentence against the appellant. The appellant opposed the application for the provisional sentence.

[10] The respondent's application was unsuccessful. The respondent then amended his particulars of claim by broadening its cause of action in respect of each claim. In its amended particulars of claim the respondent averred that the appellant was indebted to the respondent in the aforesaid

amounts of the claims, as amended, for goods sold and delivered in terms of the aforesaid two agreements.

This completes the synopsis of the respondent's pleading.

[11] The appellant, determined to defend the action, filed its plea to the respondent's action. The defence put up by the appellant was that the respondent did not render due performance in accordance with the agreement(s) in that the product delivered by the respondent did not match the product ordered by the appellant. It was the appellant's plea that the contents of two of the three chemical elements, *viz* nitrate and calcium as symbolised by the alphabetical letters "N" and "K" respectively, in the chemical formula V21 of the mix ordered, were inadequate. Such deficiencies in the chemical composition of the product(s) supplied by the respondent, rendered the fertiliser product(s) materially defective for the purpose for which they were purchased.

[12] It was also the appellant's pleaded defence that the appellant was not legally bound by the respondent's general terms and conditions of sale seeing that the appellant was unaware of such terms and conditions on the reverse side of the order

forms. Accordingly the appellant pleaded that in terms of the maxim *exceptio non adempliti contractus*, the appellant was not liable to the respondent for the payment of the money claimed.

This in brief completes the synopsis of the appellant's pleading.

[13] The plea of the appellant prompted the respondent to amend its particulars of claim again. Having done so, the respondent alternatively replicated that should the court find that the fertiliser delivered was defective, as alleged or in any other respect whatsoever, which allegation the respondent persistently denied - then and only in that event, the respondent averred that seeing that the appellant had nonetheless utilised the respondent's incomplete performance, in other words, defective product(s), the appellant was only entitled to a partial reduction and not total retention of the price money.

Those then were the pleadings in a nutshell.

[14] There were several disputes, factual and legal, for adjudication by the court *a quo*. It will serve no useful purpose to exhaustively tabulate them at this juncture. Among them the following may be fleetingly mentioned:

- Whether the respondent's general terms and conditions formed part of each agreement;
- Whether the respondent had properly performed in terms of the sale agreement by delivering the correct products of the right quality to the appellant;
- Whether lack of extensive product description by means of product tag or lack of official product registration was indicative of complete performance by the respondent;
- Whether there was any value to be attached to the respondent's performance; and
- If the respondent's performance was found to have been defective, whether the appellant had beneficially used the respondent's performance its defects notwithstanding;
- Whether the appellant's unilateral chemical analysis report provided sufficient proof of the respondent's alleged breach of the contract(s).

[15] Having heard the evidence the court *a quo* found that the following was common cause between the parties:

- That the parties entered into two agreements whereby the appellant purchased fertilisers from the respondent;
- That the respondent delivered two loads of fertilisers to the appellant;
- That the appellant used all the fertilisers in its agricultural lands for the planted seeds;
- That the respondent's agent, Mr. Bester, did not draw the attention of the appellant's agent, Mr. Claassen, to the general terms and conditions of sale printed at the back of the order forms;
- That notwithstanding such omission by the respondent's agent, the appellant's agent nonetheless had ample opportunity to read such general terms and conditions.

[16] The court *a quo* found further found:

- That the appellant's agent subsequently took a sample of fertilisers from a bag in the fields during October 2010 and sent it for chemical analysis;

- That the fertiliser sample taken after the respondent had initiated the action proceedings, was analysed on 2 July 2011;
- That the sampled fertiliser was taken from the second load delivered to the appellant ;
- That the outcome of the chemical analysis revealed that the sampled fertiliser was inconsistent with the loading script formula ;
- That the extent of the inconsistent deviation was substantial;
- That even if the sample taken from one of many bags was accepted as sufficiently representative of the widespread general deficiency in all the bags delivered, all the same such fertilisers still had some useful value when the appellant utilised it as such.

[17] The court *a quo* after analysing the evidence and on the strength of the aforesaid findings identified two critical issues that fell to be determined. The one was whether the respondent had delivered to the appellant a fertiliser product which was qualitatively inferior for the purposes of successfully cultivating and producing good harvest of

wheat. The other was whether the appellant was contractually bound by the respondent's general terms and conditions of sale that were printed on the backside of the standard order forms designed and used by the respondent to evidence the two transactions.

[18] The court *a quo* concluded that the respondent had succeeded to establish on a balance of probabilities that both issues had to be determined in its favour. The dispute was thus adjudicated in favour of the respondent against the appellant - hence the appeal.

[19] The grounds of the appeal were that the court *a quo* had erred in finding that:

19.1 the respondent had discharged the onus that it had properly performed its contractual obligations in terms of the sale agreement;

19.2 the respondent had discharged the onus of proving that the fertiliser delivered to the appellant was indeed the fertiliser the appellant had ordered from the respondent;

19.3 the respondent had discharged the onus of proving that the appellant had consumed or utilised the incomplete performance rendered by the respondent;

19.4 the respondent had discharged the onus of proving what the reduced price relative to the extent of the defective product was;

19.5 there was no admissible evidence tendered by the respondent to the effect that the correct product was delivered to the appellant; and

19.6 the adjudicative conclusion ultimately reached by the court *a quo* concerning the extent of the tolerance level of the chemical composition, the elementary deviations and the magnitude thereof, was contrary to the respondent's expert witness.

[20] The appellant's chief contention was that the respondent had defectively performed its contractually obligations. It has to be borne in mind that the appellant had ordered the fertilisers for the planting of wheat on 500 hectares of land, which was originally leased. The lease contract was cancelled by the lessee shortly before the orders were made. The orders were a prescriptive mixture specifically formulated for the appellant's peculiar needs, but selected from the

respondent's pricelist. Such a prescriptive mixture was an exclusively mixture prepared at the special instance and request of a specific farmer.

[21] The chemical composition of each product ordered, was V21: 10.3.2 (25) + 0,2% Zn + 20% K in a 50 kg bag. Such a fertiliser product consisted of:

- Nitrogen (N) 16,7%
- Phosphate (P) 5,0%
- Potassium (K) 3,3%
- Calcium (Ca) 3,2%
- Magnesium (Mg) 1,9%
- Sulphur (S) 8,0%

See the respondent's pricelist – p. 160 record.

[22] The loading script formula numbers (laaimagtigings nommers) allocated to the orders were 39, 42 and 54 – (*vide* annexure "f2" in respect of the first order and annexure "f3" in respect of the second order). The label on each of the two loads of the fertiliser as delivered, read as follows: 10.3.2 (25) prescriptive mix. The label or tag showed the nitrate

contents of the mix to be “2.5”. However, no numerical figure was printed on the tag to indicate the calcium or magnesium contents of the mix (annexure “b”). The tag did not contain any description whatsoever of the product.

[23] As a result of such lack of description Mr. Claassens, on behalf of the appellant, took the matter up with Mr. Blignaut, on behalf of the respondent. The latter assured the former that the product was correctly mixed and prepared in accordance with the loading script formula notwithstanding such lack of product description on the product tag.

[24] The loading script formula specified the constituent elements of the product according to the loading script formula and the delivery note (annexure “f1”). The proportions of the constituent elements were determined and accordingly adjusted in the chemical factory and not the respondent’s chemical laboratory or outlet during the course of the manufacturing process.

[25] According to the loading script formula the product consisted of the following elements.

"38. Aldus die laaimagtigings het produk bestaan uit:

38.1	N-Sulf:	357	(107,10 kg)
38.2	Ureum:	145	4350 kg)
38.3	MAP:	228	(6840 kg)
38.4	KCL:	66	(1980 kg)
38.5	Kalk:	199	(5970 kg)
38.6	Zn:	5	(150 kg)"

[26] As previously indicated the first order of the fertiliser was on 11 February 2000 and delivery instructions 15 April 2000. The first cheque in the amount of R66 346,46 was presented for payment on 31 October 2000, in other words, some seven months after the delivery of the first load. Mr. Janeke and Mr. Beyers had consented to the deferred payments at the request of Mr. Claassens. The appellant subsequently and unilaterally stopped the first cheque on the day on which the respondent presented it for payment. The respondent reckoned that the appellant thereby cancelled the first contract. Consequently the respondent accepted that the appellant, by stopping the cheque, intended to cancel the first contract and accepted the conduct of the appellant as such (annexure "b"). That first cheque was returned to the respondent unpaid. As I have already pointed out, the payment of the first cheque was stopped by the appellant.

By then the appellant had completely utilised the respondent's first load of fertilisers.

[27] The second order was made on 11 February 2000. The second cheque in the amount of R72 049,22 was presented for payment on 30 November 2000, in other words, some seven months after the delivery of the second load. This was so because the sale agreement was a credit transaction. The respondent unsuccessfully sought the guarantee of payment from the bank. (*Vide* annexure "aa".) However, Absa Bank, the appellant's bank, declined to guarantee payment. (*Vide* annexure "bb".) That second cheque was also returned unpaid to the respondent. The second cheque was not stopped by the appellant, but returned by the appellant's bank to the respondent who was referred to the drawer for the underlying reason. To put it frankly the second cheque was dishonoured because, according to the appellant's bank, there were no sufficient funds to meet the cheque. By then the appellant had used all of the respondent's fertiliser product.

[28] The non-payment of the two cheques led to a meeting between the parties. The meeting held at Kroonstad during

December 2000, was attended by Mr. Claassens, on behalf of the appellant, and Mr. Janeke, Blignaut and Bester on behalf of the respondent. Mr. Claassens was very upset. He accused the respondent's representatives of presenting the cheques too early. He alleged the appellant had suffered damages as a result of the respondent's actions. He threatened the respondent's representatives that the appellant was going to sue the respondent for the recovery of damages. He insisted that the respondent acknowledge that it had made a mistake by presenting the cheques too early.

[29] As a result of the appellant's threat, Mr. Janeke undertook to do everything in his power to resolve the matter. He specifically agreed to write a letter to the appellant's bank in which he, on behalf of the respondent, would explain that there was a misunderstanding and that due to such a misunderstanding the two cheques were presented earlier than they were supposed to have been (annexure "f").

[30] For his part Mr. Claassens tendered on behalf of the appellant to pay the sum of R113 819,65 to the respondent on condition that the respondent would see to it that the

appellant's dented creditworthiness was repaired by the respondent (annexure "e").

[31] The aforesaid meeting was important. By that time the appellant had already harvested the wheat. The appellant's agent, Mr. Claassens, was very pleased with the harvest. He expressed his satisfaction with the respondent's product. He showed the bank statements of the appellant's current account to the respondent's representatives. The idea was to indicate to them that the appellant was in a healthy financial position to pay. That meant that after the harvest the financial position of the appellant had tremendously improved. By so saying and doing, the appellant acknowledged that the respondent's product had positively produced the desired effect. It is of vital importance to note that the appellant did not at all complain about the inferior quality of the respondent's product during the meeting held at Kroonstad during December 2000.

[32] Still at the Kroonstad meeting the respondent's representatives showed to the appellant's representative the outstanding balance (annexure "e"). Mr. Claassens perused, confirmed and admitted the respondent's total outstanding

balance due by the appellant. Notwithstanding the admission, Mr. Claassens told the respondent's representatives that the appellant was in no hurry to settle the respondent's claims.

[33] After the meeting the respondent addressed a letter to the appellant's bank in accordance with Mr. Janeke's undertaking. On the strength of the respondent's letter (annexure "g") Absa Bank rectified the appellant's credit record, which had been adversely affected by the second cheque which was dishonoured. Although the appellant had earlier made a conditional offer to pay the undisputed debts, the respondent claims were not paid, despite the fulfilment of the condition.

[34] The recalcitrant attitude of the appellant and its apparent unwillingness to pay for the respondent's goods sold and delivered, caused the respondent to sue and to apply for judgment against the appellant by way of a provisional sentence. Thereupon the appellant signed an affidavit on 1 March 2001 in support of its opposition. Nowhere in that affidavit did the appellant complain that the respondent had delivered a defective product. I hasten to point out that the

affidavit was deposed to almost twelve months after the delivery of the first load and eleven months after the second load. The omission was not without significance.

So much about the historical background. I turn to the hearing now.

[35] The version of the appellant consisted of the testimonies of three witnesses. The first was Mr. C.J. Claassens. He testified that the identification of the suitable fertiliser for agricultural purposes required an analysis of the soil, taking into account the objectives of the harvest, as well as the particular crop. Those were important considerations. The insufficient application of fertilisers negatively affected the crop output. The discolouring of the plants was a symptom of inadequate minerals in the soil.

[36] Both orders of the fertilisers were chiefly used for the planting of wheat and the residue was later used for the planting of maize. The wheat was planted toward the end of April 2000. Two weeks later the wheat germinated. Defects in the wheat became visible about three to four months after the planting. However, he did not complain to the

respondent about the quality of the fertiliser during that period.

[37] The wheat crop was harvested from 20 November 2000. The rain during that particular wheat season was very good. It was above average on other farmlands where the proceeds of the harvest were also above average. However, the appellant's wheat harvest on the farm where the specific wheat-fields were fertilised with the fertilisers purchased from the respondent, was below average. The actual proceeds of the harvest were 0.6 to 0.8 ton per hectare in comparison to the proceeds of the harvest on the other wheat farms approximately 25 km away. The poor harvest on the specific farm was attributable to nitrate deficiency which retarded good growth and healthy bud formation.

[38] In spite of Mr. Claassens knowledge that the respondent had supplied him with an inferior and defective product, the appellant went ahead to use the remaining defective fertiliser during October 2000 by fertilising its mealie-fields. About 20 bags of the alleged defective fertilisers were used to cultivate maize. The conduct of the appellant clearly demonstrated that the respondent's fertiliser had some relative value and

that it was not absolutely useless in spite of its alleged defect. The extent of the defect, he averred, was at least 10% and at most 12% of the value of the proper product.

[39] The appellant's second witness was Ms M.J.D. Riftel. She testified that registered products had registration numbers. The regulations required that such registration number of the product be reflected on the product tag. The tagging requirements of the product were only applicable to registered mixtures and not prescriptive mixtures. Although the elements which made up the prescriptive mixture must be registered, it was not compulsory to have a special prescriptive mixture registered.

[40] There was no statutory regulation which required that the ordering of prescriptive mixtures should be made in a written form. The product which the respondent supplied to the appellant was supposed to have been registered, seeing that such prescriptive mixtures, on the respondent's pricelists, were widely marketed to the general public and not sold to a specific farmer only. The responsible registrar had circulated a letter to that effect in line with the regulation which required such registration.

[41] The evidence of the witness as to the precise regulation left much to be desired. The precise details of the letter were vague. There was no concrete evidence that a copy of such circular letter was ever factually delivered to the respondent. Moreover there was no basis laid on which such a letter derived its official, let alone statutory, force.

[42] The witness conceded that the product tagging requirements were only applicable to registered mixtures, but not unregistered or prescribed mixtures. She added that the unregistered mixtures were exempted from such requirements on condition that there was to be no written reference on their product tags to the applicable legislation, in other words, Act No. 36 of 1947 on the product tags.

[43] The third and last witness who testified for the respondent was Mr. J. van Vuuren. He was a Ph.D graduate in agricultural science. His experience in quality control of fertilisers dated as far back as 1982.

[44] The important aspects of the witness' evidence were:

- that scheduled or listed fertilising products which were marketed, had to be registered;

- that all bags of fertiliser products had to be properly tagged;
- that a farmer who required a special mixture, in other words, a prescriptive mixture, had to expressly make such a request, expressly give such an instruction in writing that the so-called “laai magtigings” issued pursuant to a product vendor’s receipt of special request for a mixture from a product consumer, was a special chemical formular whereby a special fertiliser product was manufactured or chemically mixed;
- that sometimes control samples were taken in order to verify that the chemical formula of the special mixture was correct;
- that retention samples must be preserved; that there were statutory formalities which regulated the taking and analysing of fertiliser samples;
- that the sample taken by and ultimately analysed for and on behalf of Mr. Claassens did not comply with the legislative requirements.

[45] The witness went further and testified that 20 bags of fertiliser which are carefully monitored would constitute a

fairly representative sample. According to the fertiliser analysis report (annexure "j") as compiled by the Central Analytical Laboratories on 2 July 2001, the sampled mix consisted of the following percentages of the elements:

	Fertiliser Analysis Report			Fertiliser Loading Script
•	**Nitrogen**:	**N**	**13,3%**	16,7%
•	**Phosphate:**	**P**	**4,98%**	5,0%
•	**Potassium:**	**K**	**3,62%**	3,3%
•	Calcium:	Ca	5,34%	3,2%
•	Magnesium:	Mg	3,0%	1,9%
•	Sulphur:	S	9,02%	8,0%

I added the loading script values here for comparative purposes.

[46] Deviation from the NPK percentage (*vide* annexure "j") indicated that the product was defective. The sum of the first three elements nitrogen, phosphate and potassium, in other words NPK, according to the loading script was supposed to be 25%. However, according to the analysis report the total sum of those three elements was 21,9% = 13,3% + 4,98% + 3,62%. Therefore, the shortfall between the respondent's loading script and the appellant's analysis report was 25% -

21,9% = 3,1%. The shortfall of 3,1%over 25,0% represented the equivalent of 12,4% chemical deficit.

[47] The permissible tolerance as regards chemical deficit was 1,2% and not 3,1%. The witness was of the opinion that a chemical deficit of 3,1% in the chemical composition of the fertiliser mix supplied to the appellant was substantially excessive, since it was far beyond the tolerance level. This was the essence of the appellant's case.

[48] The previous regulations were not available. They were not exhibited during the course of the trial in the court *a quo*. Seemingly they were unknown to the witness. Consequently the evidence of the witness as far as the regulations were concerned, lost a great deal of steam.

[49] The version of the respondent in connection with the fertiliser was narrated by Mr. P. Janeke first. He denied that the fertiliser analysis report (annexure "j") was accurate. The product supplied to the appellant was correct and in accordance with the product ordered. There was a match between such a product and the loading script. The

consistency between the two rendered the incomplete description as per the product tag irrelevant.

[50] As regards registered products, the witness testified, that the chemical composition of the fertiliser must be written on the product tag. Such requirement did not apply to prescriptive mixtures exclusively made at the special request and instance of a particular consumer. The product ordered by the appellant fell in the latter category of mixtures.

[51] The second witness for the respondent was Mr. J.S. Blignaut. His evidence was that the alkaline component in the fertiliser mixture did not substitute a farmer's soil alkalinisation program. Such a program was a matter within a farmer's personal knowledge. A farmer was supposed to have knowledge of his soil composition.

[52] The third witness who gave evidence on behalf of the respondent was Mr. G.S.C.H. Venter. He was an expert in the field of fertilisers. In his opinion the regulations were unclear as far as the registration of mixtures was concerned. The correct fertiliser analysis was one done in accordance

with a recognised protocol. The salient features of the protocol were:

- that the sample must be a truly representative specimen where at least 20 bags are sampled;
- that a sample must be taken from a properly sealed bag of fertiliser;
- that a few sub-samples must be taken from each main sample taken from a bag;
- that samples must be put together and repeatedly reduced;
- that the entire process of taking, analysing and monitoring fertilisers must be transparent;
- that the samples must be sent to three laboratories, at least.

[53] The witness testified further that a sample which did not comply with the aforegoing protocol was not chemically representative. Such a sample was unreliable. Although such a sample would have an analytic value, it would not, however, serve as a useful qualitative yardstick. The loading script formula (annexure “f”3”) and the fertiliser order form (annexure “f2”) contained the constituent elements and chemical compositions of the product as set out on the

respondent's pricelist and the appellant's order. He confirmed that a correct product with the correct "NPK" ingredients was delivered to the appellant's representative.

[54] He stated his opinion that annexure "j" was consistent with the product which was ordered by the appellant because: firstly, the chemical values of the constituent elements P, K and Zn were correct; and secondly the chemical values of the following constituent elements, though inaccurate, were not all entirely inaccurate: nitrogen (N), calcium (Ca) and magnesium (Mg).

However, the inaccuracies pertaining to calcium and magnesium were not to the disadvantage, but rather advantage of the appellant, seeing that the chemical values of those two elements were higher and not lower than they were supposed to be according to the appellant's fertiliser analysis report – *vide* the comparative table in para [44] *supra*.

[55] According to the witness the alleged deficiency in nitrate would have brought about a shortage of 3 kg of nitrate per 1 hectare of wheat and not 100 kg and 150 kg in respect of

wheat and maize respectively as pleaded by the appellant. He stated that it was extremely difficult to determine the impact of 3 kg deficiency in the nitrate on the ultimate harvest. At most such chemical deficiency could negatively lead to a 12% reduction in the anticipated harvest. However, at times such deficiency would have virtually no adverse impact at all on the anticipated harvest. The only basis on which to determine a price reduction in the matter was by way of considering the adverse impact, if any, attributable to the deficiency of nitrate in the mixture.

[56] Additional information was required about a great variety of factors in order to make an accurate assessment of the real impact the nitrogen deficit could have had on the proceeds of the harvest. Among others, the following factors were important:

- time of planting;
- climatic conditions;
- soil comparisons;
- weed-killer; and
- temperature.

[57] The tolerance differential of zinc was 7% in respect of simple fertilisers and 4% in respect of compound fertilisers. The current regulations allow somewhat greater tolerance differential for zinc because it is a micro-element. According to the witness tolerance levels apply rather to deficits and not to excesses. The alleged nitrogen deficit and the alleged calcium excess in this matter demonstrated the practical way in which the principle of chemical tolerance levels operated.

[58] The deviation of nitrogen on the plant from the previous norm would not have been necessarily measurable by means of a naked eye. There existed comparable quantities of the right type of product against which it can be so measured. If annexure ”j” was regarded as correct, then, in that event, the deviation from the normal chemical composition, occasioned by the nitrate deficiency, was substantial. The nitrate deficit as we have seen went beyond the tolerance level. This then completes the respondent’s evidence in the court *a quo*.

[59] In my view the issues were correctly identified by the trial magistrate. However, I deem it expedient to deal with the issue of defective performance first. Before I do so, I want to give a cursory overview of the applicable principles of law.

[60] It is incumbent upon a plaintiff who alleges that he has performed in terms of a bilateral agreement to aver and prove that he duly rendered proper performance or to aver and prove that, although he did not duly render proper performance, the defendant, with the full knowledge of the defect, nonetheless accepted the defective performance - **BK TOOLING (EDMS) BPK v SCOPE PRECISION ENGINEERING (EDMS) BPK** 1979 (1) SA 391 (A) at 419.

[61] Adequate proof of a disputed issue is established whenever a plaintiff can show, by means of credible evidence, that his evidence on the point in issue is more probable than that of the defendant. The judicial exercise to determine credibility and probability is contained in a single investigation and not separate and parallel investigation - **MABONA AND ANOTHER v MINISTER OF LAW AND ORDER AND OTHERS** 1988 (2) SA 654 (SE).

[62] The court has to decide a case on the real issues which were ventilated during the course of the trial and ultimately addressed during the course of closing argument - **SENTRACHEM BPK v WENHOLD** 1995 (4) SA 312 (A).

[63] A witness' evidence on a point in dispute has to be challenged during cross-examination by an adversary. Where the relevant evidence of a witness on a real point in dispute is not attacked during cross-examination, it entitles the party in whose favour a witness testified, to believe and indeed to accept that the unchallenged evidence of his witness is correct. An adversary who obviously gets hurt by uncontested evidence would unsuccessfully argue to persuade a court to disbelieve such evidence - **SMALL v SMITH** 1954 (3) SA 434 (SWA) and **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS** 2000 (1) SA 1 (CC).

[64] The evidence as a whole has to be considered in order to resolve an issue. The court has held that the evidence of an expert witness should not be preferred to that of an eye-witness and that the opinion of an expert witness should only be used provided the evidence of an eye-witness, often a lay-person, on a specific point is unacceptable. However, if the evidence of an eye-witness is acceptable, it does not necessarily render the evidence of an expert witness useless. In such an event a court has to determine whether

the evidence of an expert witness may be used to water down the factual evidence of an eye-witness in any manner - **STACEY v KENT** 1995 (3) SA 344 (E). Direct evidence of a proximate witness on the scene is preferred to the indirect evidence of a distant witness of the scene - **MOTOR VEHICLE ASSURANCE FUND V KENNY** 1984 (4) SA 432 (E) at 436 – 437.

[65] A court is not bound by an opinion of an expert – Schmidt, **BEWYSREG**, Second Edition, from p. 427 especially p. 433 – 434 where the learned author discusses the criminal case of **S v GOUWS** 1967 (4) SA 527 (E). See also Schwikkard-Van der Merwe, **PRINCIPLES OF EVIDENCE**, Second Edition from p. 84. In our law a court is regarded as an expert and the evidence of an expert on a particular point may be found inadmissible – Schmidt, *supra*, p. 431 footnote 11 where the case of **EX PARTE SMITH EN ANDERE** 1970 (4) SA 122 (O) at 125H was cited.

[66] The contractual principle of "*quantis minoris*" is not only supposed to be ascertained on the strength of the actual monetary costs of the supplement required to cure a defect in the original performance. The remedy of price reduction

may also be determined on the strength of another accurate measure which may be found to be applicable on the peculiar facts of a specific matter at hand - **THOMPSON v SCHOLTZ** 1999 (1) SA 232 (SCA) at 249 – 250.

[67] Now I proceed to examine the evidence. The respondent contended that the loading script formula was correct; that the mixing of the product was correct and that the product ultimately delivered was also correct.

[68] The appellant contended, on the contrary, that the chemical mixing of the product was defective and that, as a result of such incorrect chemical mix, a chemically defective product was ultimately delivered by the respondent to the appellant. Consequently it was submitted that the contrary finding of the court *a quo* was a material misdirection.

[69] The evidence of Mr. Janeke, Mr. Blignaut and Mr. Venter, as regards the correctness of the loading script formula (laai magtiging) was not attacked or contradicted. After the chemical mixing of the product at the appellant's special request and instance, there existed no chemical imbalance in the respondent's factory. There was no intolerable

discrepancy between the loading script and the stock after the mixing and actual loading of the product. The two readings or figures balanced quite well after the stocktaking, according to the undisputed evidence of Mr. Janeke.

[70] Since the evidence of the aforesaid three witnesses on those important aspects of the dispute was not challenged, the respondent was entitled to accept that their evidence on those aspects was correct - **SMALL v SMITH**, *supra*. The absence of a detailed description of the product on the product tag fastened to each bag of fertiliser, did not, on its own, rebut such evidence.

[71] The products sold to the appellant were a special prescriptive mix. I accept the respondent's evidence that it was not subject to compulsory registration. The fact that the product was on the respondent's pricelist, the fact that it was marketed to the farmers in general and not a particular farmer and the fact that it was formulated by the respondent in its chemical outlet did not alter the nature of the chemical mix. The fact of the matter was that the appellant, on its own accord, specially selected, from a great variety of listed

chemical mixtures, the one which the appellant itself, considered peculiarly suitable for his particular needs.

[72] If two or more farmers should select the same chemical mix V21, as formulated by the respondent, because their individual farming needs are identical as regards the type of plants, the season of planting, the conditions of climate, the type of soil and the temperature – that in itself would not automatically transform a chemical mix which is ordinarily not registrable into one which is.

[73] Accordingly I am of the view that the tagging requirements that were peremptory in respect of registrable chemical products, were not applicable to the products we were here concerned with.

[74] The test sample on which the appellant heavily relied for its contention that the product was defective, did not comply with the standards of the recognised protocol in the fertilising industry. The two experts, Mr. Venter and Dr. Van Vuuren were in agreement. The taking of the fertiliser sample relied upon, violated all the safety precautions and preservative measures of the applicable protocol of the industry. Such

lack of protocolically reliable analysis and lack of supporting evidence in respect of the handling of the bag of fertiliser from which the test sample was taken, left a great deal of doubt concerning the adequacy, correctness and reliability of annexure “j”. It follows, therefore, that the fertiliser sampled by the appellant – *vide* annexure “j” – had no evidential value that could practically serve as conclusive proof of the alleged defect to underscore the alleged breach of the contract. It was simply not representative and reliable enough.

[75] Mr. Pienaar’s main argument was that there was no evidence given by the respondent that the product delivered by the respondent to the appellant was, in fact, mixed in accordance with the chemical formula as specified in the loading script.

[76] Mr. Buys sharply differed. He argued that the respondent delivered to the appellant a product that had been chemically mixed in accordance with the fertiliser product as specified in the loading script.

[77] The appellant’s contention was based on the following segment of Mr. Janeke’s evidence:

> "Laai magtiging nommer 42 dui die produk aan as 10.3.2(25)plus sink, plus kalk en dan onder gee dit die produk samestelling. Die produk samestelling is ammonium sulfaat korrels 375, ureum 145, MAP 228, KCL 66, sink 5 en kalk 199. As ek net vir die Hof kan verduidelik. Ons meng die produk in batches van 1 ton op 'n slag. So hierdie is samestelling van die verskillende grondstowwe om 1 ton te maak. Hierdie laai magtiging is die instruksie wat na die aanleg toe gaan, hoe om daardie produk te vervaardig en dit moet so saamgestel word. dit is wat daardie syfers beteken."

[78] The thrust of the appellant's contention was that the evidence of Mr. Janeke did not go far enough to show that the product ordered was, as a fact, chemically mixed according to the formula. The critique was that the evidence of the witness was that the product ordered had to be mixed and not that it was mixed. I am not so persuaded. The point was not persistently pursued at the trial. The witness steadfastly asserted that what was delivered was what was ordered. It logically followed from the steadfast assertion that between the ordering and the delivery, the correct chemical processes were adhered to. Implicit in the assertion was the averment that the elements that had to be

chemically mixed, were factually mixed as the order was formulated.

[79] The law was clear. The respondent was not required by law to establish his claim(s) by means of absolute and perfect masterpiece of evidence. The law required the respondent to provide adequate and not absolute proof of his case by means of honest and trustworthy evidence that his version was more probable than that of the appellant. In my view the respondent did – **MABONA**, *supra*.

[80] The following snippets of probabilities refute the contention that the respondent had rendered defective performance to the appellant:

- The appellant fertilised all his wheat-fields with the respondent's product in spite of his knowledge or suspicion of the alleged defect.
- The appellant went a step further after the harvesting of the wheat, by utilising the surplus product for the purpose of cultivating a different crop, maize in spite of his knowledge of the alleged defective performance by the respondent.

- The appellant did not complain about the poor or inferior quality of the respondent's product although he had ample opportunity to raise such an objection before during or after the wheat harvest. Perhaps the best opportunity he had presented itself to him at the meeting he called and attended at Kroonstad during December 2000.
- The appellant's version was greatly weakened by sheer lack of credible and reliable evidence in respect of the soil samples, defective harvest proceeds, comparable previous harvests on the specific lands, in connection with the wheat-fields and mealie-fields.

[81] The Kroonstad meeting was very important. The meeting was convened by the appellant's sole trustee. He scheduled the meeting, for one and for one specific purpose only, *viz* to repair his creditworthiness dented by the unpaid cheque. During the meeting he expressed his willingness, intentions and ability to pay the respondent's claim(s). He demanded written apology from the respondent to Absa Bank Ltd. That was the way he wanted to have the credit record repaired. He made the demand a condition for the payment of the debts he owed to the respondent. During the meeting he

forewarned the respondent's representative that they would have to wait for a long time for the payment, because he wanted to play the respondent a fool for some time.

[82] It has to be repeated and stressed that no allegation of any sort was made by the appellant's trustee, during the course of that meeting, about any defect whatsoever in the fertiliser. At the time the meeting was held, the harvesting of wheat was an accomplished fact. Both the quality and the quantity of the proceeds of the harvest were known to the appellant. Yet he hardly complained about any crop failure let alone a disastrous harvest of the magnitude, as pleaded. He demanded no compensation for the poor harvest of wheat occasioned by the respondent's nitrate deficient fertiliser.

[83] On the contrary, the appellant's trustee verbally and without any reservation, expressed his satisfaction with the harvest. The conduct and comments of the trustee gave substantial credence to the version of the respondent that the product purchased was correctly formulated; that the chemical ingredients thereof were correctly mixed and that the merx ordered was correctly delivered. The testimony of the appellant's trustee cannot be reconciled with the verbal

statements he made at that meeting. The one is as different from the other as night-time is to day-time. Such substantial evidential discord significantly diminished the merits of the appellant's version. In my view such version is less probable than that of the respondent – **MABONA**, *supra*.

[84] The respondent subsequently complied with its Kroonstad undertaking by apologising to the appellant's bank for prematurely presenting the two cheques, as the appellant dictated. The appellant's credit record was thus not blemished by the dishonoured cheque drawn in favour of the respondent. Notwithstanding the favourable reaction of the bank to the respondent's apology and its decision not to hold the dishonoured cheque against the appellant, the appellant would still not pay its debt(s). The failure of the appellant to pay, after the condition it had imposed on the respondent had been met, was in breach of the Kroonstad undertaking. It demonstrated that the appellant's trustee was not a trustworthy witness. A man of his word would not have acted in that fashion.

[85] The appellant subsequently made a sworn statement in support of his opposition to the respondent's application for

provisional sentence against the appellant. Nowhere in that affidavit did the appellant's deponent say a word about the alleged inferior quality of the product supplied by the respondent. Once again the omission was telling against the appellant. Once again the appellant lost yet another golden opportunity to complain about the product which, as alleged, had drastically reduced its expected harvest margins. Once again the failure fortified the respondent's contention that there never was any defect in the product as alleged or at all.

[86] The allegation that the product was defective and the performance incomplete, was raised in the appellant's plea for the very first time. On the facts, the allegation had all the hallmarks of an afterthought fabrication.

[87] It has to be borne in mind that hardly one bag of the first load of fertilisers was at all sampled and tested. Therefore even if defective performance by the respondent was established by the appellant, the scope of the contractual breach of performance would have had to be factually and legally confined to the second order or load of fertilisers. In such a scenario the appellant would have been entitled to a price reduction of at least 10% and at most 12% of the costs

relative to the value of the 30 ton second load in accordance with the remedial *exceptio quantis monoris* – **BK TOOLING**, *supra*.

[88] However, the appellant would still have had an insurmountable mountain to climb. Obviously the greatest difficulty of the appellant in that regard would be adequacy of proof. One out of tens of bags was not enough to conduct a conclusive scientific analysis. That one bag had been left in the open veld for some time and exposed to sharply differing day-time and night-time temperatures and other weather elements. Therefore it was not adequately representative. The proverb that "one swallow does not make a summer" seemed appropriate in this instance. The exposure of the one bag could possibly have made the sample less reliable than otherwise would have been the case. Moreover the appellant took his time to have the sample analysed. The analysis was done on 2 July 2001, some fifteen or so months after the appellant had used the bulk of the fertiliser. There was no satisfactory evidence of how such a sample was preserved and how the entire analysis process was monitored. The whole sampling exercise was done in breach of the protocol.

[89] The appellant's trustee discovered four weeks or so after the wheat plants had come out of the soil that there was something wrong. The appellant's witness, Dr. Van Vuuren, stated that nitrate deficiency in the plant becomes immediately noticeable. It was unclear as to why if there was such immediately noticeable deficiency the trustee had failed to immediately notice its symptoms. I have already alluded to the appellant's failure or neglect or omission to promptly take the matter up with the respondent and his subsequent use of the surplus fertilisers to boost his maize crop. The mere fact that the mealie-fields were fertilised after the wheat harvest defied logic. An experienced farmer, like the trustee, aware of the enormous adverse impact of the defective product on his wheat output, would not have gone further to utilise the same harmful fertiliser on his mealie-fields.

[90] The most logical step one would have expected from the trustee after the alleged pathetically dismal harvest of wheat was the return of the harmful surplus to the supplier. Instead of doing damage control in that manner, the appellant surprisingly went ahead to spread the harmful surplus on his mealie-fields. The question was why did a seemingly level-headed farmer of note widely and indiscriminately

contaminate his agricultural lands with the full knowledge of the havoc the fertiliser had already caused?

[91] In his evidence the trustee made no mention of the proceeds of the maize harvest or ultimate output at the end of the maize season. Instead he made unsubstantiated comparisons between the wheat harvest on the particular farm and the wheat harvest on some other farms approximately 25 km away. In my view there was plainly no comparison. There was no evidence of the harvesting on those farms for a period of about five years immediaely preceding the harvest we were here dealing with. Between 1995 and 2000 the appellant's farms were leased to a third party.

[92] All those aspects of the appellant's conduct materially strengthen the respondent's case and materially weakened the appellant's defence, which was why no counterclaim was ever filed as the appellant had threatened to do.

[93] The appellant's expert, Dr. Van Vuuren, gave direct evidence to the effect that a chemical supplier, such as the respondent, was legally obliged to retain a chemical mix sold

to a chemical consumer, such as the appellant, for a minimum period of two years after the mixing process. During his indirect evidence, however, the witness could not say on which specific provision of the applicable statute or its regulations his evidence was based.

[94] Until the new regulations, as published in Government Gazette R250 on 25 March 2007 came into operation, the applicable regulations which were operative at the time of the two transactions were the previous regulations as were published in the Government Gazette R799 of 20 May 1977. Those previous regulations of 1977, unlike the current regulations proclaimed in 2007, contained no prescripts to regulate standardised practices which had to be followed by chemical outlets in connection with the keeping of records.

[95] The appellant's orders for the supply of fertilisers were for a specific mix, which was adjusted according to the particular farmer's special needs regard been had to the soil analysis which the consumer itself had done or caused to be done for cultivation of specific plants. Ms Riftel and Dr. Van Vuuren were of the same opinion that the particular fertilisers supplied by the respondent to the appellant did not qualify as

a special prescriptive mix. According to them, the particular chemical mix was supposed to be a registered chemical mix, seeing that it was, firstly, described and included on the chemical supplier's pricelist and secondly, that it was marketed for sale to all interested farmers in general and not to one particular farmer.

[96] In the chemical industry a distinction is seemingly made between legally registrable products and unregistrable products. In the case of the former class of products, the law requires that the chemical composition of the fertilisers had to be printed on the product tag. In the case of the latter class of products, however, there is no such peremptory legal requirement.

[97] Ms Riftel's opinion was grounded on a certain official circular by the responsible registrar of chemicals. The difficulty I had with her was that the circular letter which was central to the witness' opinion was not discovered and exhibited in the court *a quo* during the trial. Consequently no evidence concerning its contents was vouched. In her direct evidence the expert had averred that the letter was informed by the regulations. On behalf of the respondent it was suggested

that the witness confused the letter with the regulations. The critique seemed fair. This was so because even her fellow witness, Dr. Van Vuuren, though adamant that the question of prescriptive chemical mixtures was very clearly addressed by the statute and its regulations, could not specify any relevant provision to beef up his and her opinion. Accordingly the opinions were not helpful at all.

[98] The respondent's expert witness, Mr. Venter, was not in agreement with the opinions of the aforesaid witnesses for the appellant. According to him there were no clear prescripts in either the statute or the regulations. During his cross-examination it was put to him by Mr. Pienaar, who also appeared in the court *a quo* for the appellant, that the appellant as a consumer, did not have any choice besides the pricelist which was shown to him. He disagreed with the suggestion. He explained that he saw, in the pleadings, that the appellant had ordered a prescriptive mix which, according to his special analysis of his soil, would be suitable for his particular needs.

[99] Mr. Buys submitted that even the 2007 regulations contained no provisions in line with the opinions of the appellant's

expert witnesses. Mr. Pienaar made no submission to the contrary. I am therefore persuaded to find that the expert evidence tendered by the respondent on the point was preferable to that tendered by the appellant.

[100] In order to succeed with its claim(s) the respondent was required to aver and prove either that it rendered the performance in terms of the contract of sale to the appellant or that, although the performance it rendered was somewhat defective in certain respect(s), the appellant with the full knowledge of such defect, nonetheless utilised the defective performance – **BK TOOLING**, *supra*.

[101] On the peculiar facts of this particular matter, I have come to the conclusion that the respondent established, on a balance of probabilities, that the fertiliser product as ordered was correctly formulated; that the product was, in all probabilities, correctly mixed and that the product was correctly delivered to the appellant. The onus was discharged.

[102] The court *a quo* made the following finding in respect of the issue of the quality of the performance rendered by the respondent to the appellant:

> "In die lig van die voormelde faktore word bevind dat die eiser op 'n oorwig van waarskynlikhede aangetoon het dat die kunsmis wat aan die 1ste Verweerder gelewer was, nie substandaard was nie. Bygevolg moet die eiser se eis ook op hierdie grond slaag."

[103] That cardinal finding of the trial magistrate is one which we, sitting as we are in an appellate mode, cannot hold to be wrong. I would, therefore, determine the first and main issue in this appeal in favour of the respondent. In my view the appeal had no substance as regards the first issue. There was virtually no credible and reliable evidence tendered by the appellant on whom the onus rested to show that there was substance in his defence that the respondent had rendered undue, defective and incomplete performance. I am inclined, therefore, to dismiss as false and highly improbable the appellant's defence that the respondent had supplied him with a product so defective that it boiled down to an undue performance which constituted material breach of the contract.

[104] Now I turn to the second issue. First I want to restate a few applicable principles of law. He who signs a contract without reading it is bound by the terms and conditions thereof. This is so because the appending of a signature to a contract presupposes that the signatory knowingly signed such document and that he was prepared to be bound by its terms and conditions without reading them. This salient principle of the law of contract is briefly encapsulated in the maxim "caveat subscriptor" – the reader beware - **HOME FIRES TRANSVAAL CC v VAN WYK AND ANOTHER** 2002 (2) SA 375 (W) from 381E.

[105] Such conduct demonstrates an attitude which entitles the other contracting party to accept that the signatory who appends his signature to an unread contract considers himself bound by such contract - **DLOVO v BRIAN PORTER MOTORS LTD t/a PORT MOTORS NEWLANDS** 1994 (2) SA 518 (C) at 524D – H and **AETIOLOGY TODAY CC t/a SOMERSET SCHOOLS v VAN ASWEGEN AND ANOTHER** 1992 (1) SA 807 (W) at 810G – H.

[106] There is no authority to the effect, as regards substantive law, that a party cannot derive an advantage from his own

breach of contract - **CHUBB FIRE SECURITY (PTY) LTD v GREAVES** 1993 (4) SA 358 (W) at 326G.

[107] The second issue in the appeal was whether or not the respondent's conditions of the contract of sale were binding on the appellant as the purchaser. The court *a quo* also determined the issue in favour of the respondent.

[108] On behalf of the appellant it was submitted that the court *a quo* erred in making the findings it made pertaining to the issue at hand and in reaching the conclusion that the appellant was bound by the conditions of the contract printed on the reverse side of the order form(s).

[109] On behalf of the respondent it was submitted that the court *a quo* did not misdirect itself as contended or in any other manner and that the findings and the conclusions were justified by the evidence.

[110] The court *a quo* made two crucial findings. The first was that Mr. Bester, the respondent's representative, did not draw the attention of Mr. Claassens, the appellant's representative, to the reverse side of the order form(s) at the time each of the

two transaction(s) was concluded. This finding was favourable to the appellant. The second finding was that, even so, the appellant's representative had ample opportunity to read the conditions of the contract of sale printed at the back of the order form(s) but that he freely chose not to read them. This finding was favourable to the respondent.

[111] The trial magistrate had this to say about the conditions:

> "Mnr Claassens wat die bestelvorms namens die eerste verweerder onderteken het was ten alle tye bewus van die feit dat daar agterop die bestellings 'n geskrif was en hy het op sy eie weergawe voldoende geleentheid gehad om dit te bestudeer. Op die bestelvorm by die plek waar die 1ste verweerder moes teken was in 'bold' geskryf dat gelet moes word op die verkoopvoorwaardes op die keersy. Mnr Claassens het die 1ste bestelvorm vir 'n maand of meer in sy besit gehad voordat die 2 bestellings afgelewer is. Mnr Claassens wat 'n ervare boer is, moet uit die aard van die saak kennis dra dat die bestelvorms kontraksterme bevat. Mnr Claassens het ook getuig dat hy nie deur Mnr Bester op enige datum verhinder is om die kontraksterme agterop die bestelvorms te lees nie."

[112] During the appeal argument before us it was never contended that the aforesaid summation of the evidence by the trial court was factually incorrect. That been factually the case, nothing of significance turns on the omission by the respondent's representative to expressly draw the attention of the appellant's representative to the conditions of the contract of sale printed on the reverse side of the order form(s). In reaching this conclusion I am formed by the point in the next paragraph.

[113] Upon my perusal of the two order forms I noticed that the appellant's representative, Mr. Claassens, did not have to provide the respondent's representative, Mr. Bester, with the appellant's value-added tax certificate. In the appellant's special instructions to the respondent, it was specially noted that such certificate was already in the file. That could only have meant the respondent's file. Implicit in that special note was the fact that the parties had previous business dealings. The appellant was an old customer, it would seem. Therefore, the probabilities seemed to suggest that the appellant's representative did not bother to read the respondent's conditions, because he had probably read them

before. He probably ignored them because he knew there was nothing new to read there.

[114] The conditions of sale in respect of each order or load of fertilisers was subject to the following conditions:

> "7 Other conditions
>
> 7.1 The seller warrants that the NPK content of the goods will comply with the requirements as prescribed by legislation from time to time and that the weight of the goods will materially be as represented by the seller.
>
> 7.2 Save as provided in 7.1 above **the goods are sold without any warranty in terms of the common law or otherwise containing (sic) quality and suitability for any purpose**.
>
> 7.3 Should the goods not comply with any or both of the warranties in 7.1 or **should the goods be defective in any other respect the seller shall replace or supplement the defective goods free of charge** but the seller shall not be liable for any loss or damage to crops, soil or property or injury resulting from the use or handling of the goods."

[115] The seller's protection and the purchaser's procedural rights were also spelt out on the same reverse side. The sale of

each load of fertilisers was subject to the following conditions:

> "8 Claims
>
> 8.1 **No claim resulting from** damage of goods or containers or **shortages** arising during delivery **shall be considered unless** the delivery note has been signed by or on behalf of the purchaser and the damage have been specified on the delivery note and **the claim is received by the seller within 7 days after receipt by the purchaser**.
>
> 8.2 **No other claim shall be considered unless** the delivery note has been signed by or on behalf of the purchaser **the goods have been stored under cover and protected against the elements and the claim is received within 4 months after receipt of the goods by the purchaser**."

[116] If it is accepted, and I think it should, that the conditions were binding upon the appellant, then it follows, as a matter of logic, that the appellant was contractually precluded from complaining about the quality of the respondent's product because the respondent had guaranteed no quality thereof for any purpose – (clause 7.2). The defective goods were returnable, replaceable or supplementable free of charge – (clause 7.3). There were no goods returned. Implicit in the

appellant's omission was the legitimate inference that the goods supplied were not defective. The respondent was not contractually obliged to entertain a belated claim or a claim where the goods had not been stored under a protective cover - (clause 8).

[117] In the appellant's heads of argument, Mr. Pienaar correctly captured the thrust of the matter. He wrote:

> "Die Hof *a quo* bevind dat, vanweë die feit dat dit uit die getuienis van die appellant se getuie, mnr CJ Claassens, nie in dispuut was dat hy geleentheid gehad het om die agterkant van die bestelling te lees en wel geweet het dat daar kontrakvoorwaardes daarop was, die appellant wel gebonde is aan die kontrakvoorwaardes."

[118] I am of the firm view that the court *a quo* correctly determined the second issue as well in favour of the respondent. There was no misdirection to warrant any appellate inference.

[119] Having considered the findings made in the matter as a whole, the conclusions reached in the matter as a whole, as well as the grounds of appeal relied upon, I am not

persuaded that the court *a quo* materially misdirected itself as alleged or in any other respects. None of the grounds of appeal relief upon had substance in my view. In the absence of any material and thus appealable misdirections on any matter of fact or any question of law, we are not at liberty to interfere. On the facts I am inclined to dismiss the appeal.

[120] Accordingly I make the following order:

120.1 The appeal is dismissed.

120.2 The appellant is directed to pay the costs of the appeal.

_____

M.H. RAMPAI, J

I concur and it is so ordered.

_____

S.J. THAMAGE, AJ

On behalf of appellant: Adv. C.D. Pienaar
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of respondent: Adv. Piet Uys
Instructed by:
Symington & De Kok
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