IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : 720/2007

In the matter between:-

MPUMELELO PROJECTS CONSTRUCTION CC Plaintiff

and

SASOL WAX (PTY) LTD Defendant

HEARD ON: 14 NOVEMBER 2013

JUDGMENT BY: RAMPAI, AJP

DELIVERED ON: 23 JANUARY 2014

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[1] The plaintiff sued the defendant for damages resulting from an alleged breach of contract arising from the supply of a product called "C9-C20 N paraffin". The amount claimed is R21 052 422.00, according to the plaintiff, which constitutes the loss of profit it would have made over a period of four years had the product complied with market expectations.

[2] The action was defended. The defendant did not only defend the plaintiff's action, but also filed a counter claim. I shall return to this disputed counter claim later.

[3] After the plaintiff had adduced the evidence of its managing member Dr Clement Chalera, Ms Singo and Ms Tshabalala (end-users of the product), Mr Jacot-Guillarmod, a chartered accountant, and Mr L.F. Opt'Hof, who gave evidence as an expert, I granted absolution from the instance.

[4] The plaintiff appealed against that order to the full bench of the Free State Division with the leave of the Supreme Court of Appeal. The appeal was successful, the order of absolution from the instance was reversed and the case remitted to me to complete the hearing.

[5] At the resumed hearing, the defendant adduced the evidence or Mr Heinrich Ernst (the defendant's marketing manager), Mrs Janette Cawood (his assistant at the time), Ms Fritz and Mr Rossouw (analytic chemists) and Mr Nicolas Louw (the principal scientist of the defendant). None of these experts' expertise was disputed. I shall deal with their evidence in more detail below in due course.

[6] Having heard the evidence adduced on behalf of the defendant, I adjourned the matter for closing argument. The legal representatives filed the written heads. The matter was subsequently argued on 14 November 2013. I then reserved judgment.

[7] Whether the plaintiff's claim was founded on delict or contract was not apparent from the pleadings. That being the case, I

had to consider both possible causes of action since the cause of action determines the *facta probanda* and the onus.

[8] In the first place I proceed to deal with the matter on the basis that the plaintiff's claim was founded on delict. In delict, a plaintiff may claim damages from a defendant which damages resulted from an alleged extra contractual or pre-contractual misstatement made unlawfully and negligently and which induced the plaintiff to conclude a contract with a defendant – Harms: **Ambler's Precedents of Pleadings**, 7th Edition, p 294-5.

[9] The plaintiff pleaded that the alleged misrepresentation had induced it to enter into a contract with the defendant. It appeared that the contract which was so entered into, was the "Memorandum of Understanding" or MOU, which was, according to the heads of argument filed by the plaintiff's attorney, subject to a suspensive condition which would be fulfilled "once the business plan was developed by plaintiff with the defendant".

[10] The plaintiff then pleaded that the alleged representation was false and was made negligently. It further pleaded that the defendant owed the plaintiff a duty of care.

All of these averments, which the defendant denied, were indicative of the delictual character of the plaintiff's claim. According to the pleadings so formulated, the plaintiff's claim can be nothing but a truly delictual claim.

[11] I now proceed to examine the pleadings in order to determine whether the plaintiff has discharged the requisite onus to prove such delictual damages. On the pleadings, the dispute is fivefold namely:

- the alleged misrepresentation;
- unlawfulness;
- negligence;
- inducement to contract; and
- causation of damages.

[12] As regards the first category of the dispute, the plaintiff pleaded the alleged misstatement as follows at par 6 of the summons:

> "'During the negotiations defendant represented to plaintiff that the illuminating and power paraffin that was to be sold by defendant to plaintiff was suitable for domestic use.'"

[13] In a request for further particulars the plaintiff was required to define the concept "domestic use". In its reply to the request for further particulars the plaintiff conceded that the representation was not made in writing, but stated that "it was clearly defined during the negotiations preceding the MOU and it was agreed between the parties that the business model was to target the rural and semi-urban communities to use the paraffin for illuminating and power purposes. Furthermore it was an **implied term** that the product has to comply with the requirements of the law that is, the Petroleum Products Act, 58 of 2003, as amended".

[14] The plaintiff's choice of the words "implied term" within the context of a delictual matrix was rather confusing and thus lamentable. Doing so tended to conflate issues delictual and issues contractual. I think there is no room for those words under the current topic, delictual matrix. If necessary, I shall deal with the expression later under a different topic, contractual matrix.

[15] The defendant, apart from denying the misstatement, also relied on a disclaimer contained in a written contract, signed by both parties, into which certain standard "General Terms of Sale" have been incorporated by reference. One such clause is clause 7 thereof.

[16] Clause 7.1 of the plaintiff's Standard General Terms of Sale concerns exclusion of warranties. It reads as follows:

> "7.1 Sasol Wax does not give any warranties in respect of the products or their use, and all warranties implied by law are expressly excluded. The purchaser waives any claim for loss, damage or liability which it might have against Sasol Wax arising from, but not limited to, claims based on the products not being suitable for the purchaser's purposes."

[17] Clause 7.2 of the plaintiff's Standard General Terms of Sale concerns disclaimer of liability. It reads as follows:

> "7.2 Notwithstanding anything contained herein or elsewhere, Sasol Wax shall not be liable, whether in contract or in delict, for any consequential loss such as, but not limited to,

> loss of production and loss of market share. In all instances Sasol Wax's liability shall be limited to the replacement of the products concerned at no cost to the purchaser or re-imbursement of the purchasing price as set out in 4.10."

[18] It is accepted that, where a defendant facing a delictual claim, wishes to rely on a disclaimer such as the one found in the "General Terms of Sale", the onus is on the defendant to prove the disclaimer. However, it is not necessary for the defendant to prove that the plainbtiff actually read and agreed to the terms of the disclaimer. In **Durban's Water Wonderland (Pty) Ltd v Botha and Another** 1999 (1) SA 982 (SCA) Scott, JA at 991D – J held:

> "The principles applicable to the so-called 'ticket cases' apply *mutatis mutandis* to cases such as the present where reliance is placed on the display of a notice containing terms relating to a contract. (See Joubert (ed) The Law of South Africa vol 5 part 1 (first reissue) para 186.) Had Mrs Botha read and accepted the terms of the notices in question there would have been actual consensus and both she and Mariska's guardian, on whose behalf she also contracted, would have been bound by those terms. Had she seen one of the notices, realised that it contained conditions relating to the use of the amenities but not bothered to read it, there would similarly have been actual consensus on the basis that she would have agreed to be found buy those terms, whatever they may have been. (Central South African Railways v James 1908 TS 221 at 226.) The evidence, however, did not go that far. Mrs Botha conceded that she was aware that there were notices of the kind in question at amusement parks but did not admit to having actually seen any of the notices at the appellant's

park on the evening concerned, or for that matter at any other time. **In these circumstances, the appellant was obliged to establish that the respondents were bound by the terms of the disclaimer on the basis of quasi-mutual assent. This involves an inquiry whether the appellant was reasonably entitled to assume from Mrs Botha's conduct in going ahead and purchasing a ticket that she had assented to the terms and disclaimer or was prepared to be bound by them without reading them.** (See Stretton v Union Steam Ship Co Ltd (1881) 1 EDC 315 at 330 331; Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A) at 239F – 240B.) The answer depends upon whether in all the circumstances the appellant did what was 'reasonably sufficient' to give patrons notice of the terms of the disclaimer. The phrase 'reasonably sufficient' was used by Innes CJ in Central South African Railways v McLaren 1903 TS 727 at 735. Since then various phrases having different shades of meaning have from time to time been employed to describe the standard required. (See King's Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N) at 643G – 644A.) It is unnecessary to consider them. In substance they were all intended to convey the same thing, *viz* an objective test based on the reasonableness of the steps taken by the proferens to bring the terms in question to the attention of the customer or patron."

[19] On behalf of defendant Mr Ellis contended that the plaintiff, through Dr Chalera, its main member, actually received an email from the defendant to which those general terms of sale as well as the purchaser's credit application were attached.

Counsel further contended that Dr Chalera went a step further than merely and actually receiving the email. He opened the

email and printed it. He printed the purchaser's credit application form, completed it, signed it and faxed it back to the defendant. In that credit application form, express reference to the general terms of sale was made.

[20] On behalf of the plaintiff Mr Khang contended that Dr Chalera did not receive the alleged document in which general terms of sale were embodied. It was the plaintiff's case that only one document with the title "Purchaser's Credit Application" was attached to the email.

[21] I am persuaded by Mr Ellis' argument. The defendant conclusively proved that an email was sent to the plaintiff; that two documents were attached; that one of those attachments was a document titled "Standard General Terms of Sale"; that it can be objectively deduced from the proven facts that it appeared more probable than not that Dr Chalera received such a document on behalf of the plaintiff; that Dr Chalera's undisputed actual receipt, completion, signing and ultimate faxing of the credit application form, which was also attached to the same email militated against his denial. In coming to this conclusion I am fortified by the fact that although Dr Chalera initially denied that he actually received the email itself, he later admitted he in fact did.

[22] From the evidence I can infer that the defendant, to paraphrase the words of Scott JA in the **Durban's Water Wonderland** case, *supra*, was reasonably entitled to assume from Dr Chalera's conduct in returning the signed credit

application and in going ahead and purchasing the product, that he had assented to the general terms of sale containing the disclaimer or was prepared to be bound by them without actually reading them in order to familiarise himself with their significance or import.

[23] However, Mr Ellis submitted that it was equally possible, if not more possible than not, that Dr Chalera in fact opened and read those standard and general terms and that he actually, albeit in a tacit manner, consented to be thereby bound. There was substance in that argument. The witness projected the appearance of a seasoned and astute businessman. It seemed to me improbable that such a man would have signed a contract without ascertaining the standard and general terms of any sort. That, I find hard to believe.

[24] The disclaimer is, however, only a safety net on which the defendant did not really rely upon. I am persuaded that the plaintiff failed to prove that any false representation whatsoever was made by the defendant to the plaintiff. The plaintiff's counsel had great difficulty in extricating evidence from Dr Chalera regarding the so-called misrepresentation. The high-water mark of the plaintiff's case was the following sentence in the evidence of Dr Chalera:

> "They (sic) in fact told me that indeed thy (sic) had developed a new product which is odourless and smokeless."

[25] That evidence, couched in the vaguest possible terms, does not support the plaintiff's claim, as pleaded in paragraph 6 of the particulars of claim, and is diametrically opposed to clause 7 of the general terms. The common cause evidence of both Dr Chalera and Mr Ernst was that numerous samples of the product were initially given and later sold to the plaintiff by the defendant for the purpose of enabling the plaintiff to perform tests on the product to make sure that the product was suitable for the application to which the plaintiff intended to put the defendant's product. The evidence of Mr Ernst and Mr Louw that the defendant does not do "application testing", was not disputed, and was consistent with clause 7.1 of the general terms of sale. The only possible purpose of the handing out of samples could only have been to enable the plaintiff to test the product beforehand. Such samples of the product were, in my view, not supplied for the purpose of actual marketing. If that was so, any talk of loss of expected profit would become absurd.

[26] Any notion that a misrepresentation was made to the plaintiff is destroyed by Dr Chalera when he said moments later:

> "I personally tested this product and I think it is a product that is going to be accepted in the market, but we need to physically promote. Let's test this market and see how the response of the market is going to be. The response I got was that if I think the product can work and it is my responsibility to buy the product on my own, and test the market. Well I was excited with the product and I did not really think it was a problem to me so I bought the product myself…"

[27] These statements are inconsistent with any representation by the defendant that the product was suitable for any particular purpose. Significantly, it was not put to Mr Ernst that he had made any misrepresentation to the plaintiff during the negotiations or that any tacit term was implied into the contract regarding the use of the product.

[28] I therefore find that the plaintiff failed to prove the misrepresentation it relied upon. In any event, even if representation was made, the disclaimer contained in the "general terms of sale" prohibits the plaintiff from relying thereon.

[29] As regards the second category of the dispute, the plaintiff alleged that the defendant owed the plaintiff a duty of care. To the alleged breach of the defendant's duty of care I now turn.

[30] Where, as in this matter, the plaintiff delictually sues for the recovery of pure economic loss, (s)he or it must allege and prove that the defendant owes the plaintiff a duty of care to prevent the incurrence of such pure economic loss.

[31] In **Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others** 2013 (2) SA 213 (SCA) at par [17] Wallis JA had this to say about a legal duty:

> "[17] The class action serves to bring a number of separate claims together in one proceeding. In other words it permits the aggregation of claims. However, that is not its only

> function. Of equal or greater importance, as Professor Silver points out, is the fact that the class action is 'a representational device'. It is —
>
> 'a procedural device that expands a court's jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case.
>
> Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a court to treat a named party as standing in judgment on behalf of them. This is a mistake. . . . Class members neither start out as parties nor become parties when a class is certified.'"

[32] It was, therefore, incumbent upon the plaintiff to plead the material facts, from which it could be inferred that indeed the defendant owed the plaintiff a legal duty of care. However, the plaintiff did not so plead, as it was required to do.

[33] In **Trope and Others v South African Reserve Bank** 1993 (3) SA 264 (AD) at 273A – B F.H. Grosskopf JA aptly commented as follows:

> "It is trite that a party has to plead - with sufficient clarity and particularity - the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts *(Mabaso v Felix* 1981 (3) SA 865 (A) at 875A-H; Rule 18(4)). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. *(Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 792J-793G.)"

[34] In the instant matter the plaintiff did not particularise any fact from which the defendant's alleged legal duty could be inferred. In view of such a glaring omission, I could not speculate or guess as to the existence of the alleged legal duty of care. Even at the trial, no evidence was adduced on behalf of the plaintiff from which a legal duty of care attributable to the defendant could be drawn. In the light of those two omissions I was not in a position to determine whether the defendant owed the plaintiff a legal duty of care to prevent the incurrence of pure economic loss by the plaintiff.

[35] The evidence showed that the plaintiff approached the defendant and proposed purchasing and reselling the latter's product. The defendant gave the plaintiff ample samples of the product to enable the plaintiff to test the market. The plaintiff did so and later returned for further supplies. The defendant then required the plaintiff to apply for credit facility. The parties then concluded a credit agreement for further supplies.

[36] As regards the element of negligence, it was merely pleaded but not canvassed by the plaintiff at the hearing. No evidence was adduced which indicated or tended to indicate that the defendant acted negligently in supplying the product to the plaintiff. In such circumstances there is hardly any room for guessing. During the course of oral argument and in the plaintiff's written heads of argument, the element of negligence was not meaningfully addressed.

[37] As regards the element of inducement, the plaintiff alleged that the defendant induced it to enter into the contract. The contract that the plaintiff was allegedly induced to conclude, is the Memorandum of Understanding or "MOU", which was, according to the plaintiff, subject to a suspensive condition, the occurrence of which would transmute the MOU into a contract.

[38] The parties fundamentally differed on the form and terms of the contract between them. The MOU was signed by both parties on 4 February 2004. The plaintiff placed heavy reliance on the MOU. At paragraph 3 of the particulars of claim the plaintiff pleaded:

> "… which would result in a contract once plaintiff and defendant had developed (sic) a business plan or model in terms of which defendant would supply plaintiff with odourless and non-smoking illuminating paraffin (C9-C20) for a period of your years."

The MOU and the business plan were attached to the particulars of claim as annexure "CC1" and annexure "CC2" respectively.

[39] The defendant, whilst admitting that annexure "CC1" (the MOU) records an understanding between the parties prior to the possible conclusion of the supply agreement, relies on a different (oral) agreement, the terms of which were reduced to writing and incorporated by reference to a set of "general terms of sale applicable to domestic sales" - annexure "a" to the plea.

The evidence of the plaintiff is summarised in the following statement by Dr Chalera:

> "The effect of completing a business plan as the MOU states it was that now the MOU would transmute (sic) into a supply agreement between the two parties."

Dr Chalera then testified that, in fact, the "transmutation" occurred in March 2004.

[40] Although the verb "to transmute" or its noun "transmutation" are well known to authors of novels in science fiction, it appears to be unknown to our domestic law. I, therefore, assume as Mr Khang, counsel for the plaintiff seemed to do, that the plaintiff thereby meant that the MOU was concluded subject to a suspensive condition. The effect of such condition was that the parties would reach an agreement on the terms of the business plan: only upon such agreement being reached would the MOU become a binding supply agreement.

[41] A contract subject to a suspensive condition must contain, within itself, all the relevant terms. If a contract requires the parties to agree on yet further outside terms before it comes into effect, then it is not a contract subject to a suspensive condition, but at most, "an agreement to agree" or a *pactum de contratendo*. Of such an agreement Schutz JA said the following in **Premier, Free State, and Others v Firechem Free State (Pty) Ltd** 2000 (4) SA 413 (SCA) at par [35]:

> "As Christie *The Law of Contract in South Africa* 3rd ed at 152 explains, it is somewhat of a solecism to describe as a conditional contract one in which the condition is purely potestative (the *si volam* of Roman law), as such a provision is destructive of any enforceable agreement. Nor does it matter if the provision is cast as a term: *Christie (op cit* at 109). The result is the same. Accordingly, if the provision is potestative it does not matter for present purposes whether it is classified as a condition or a term. In either case enforcement is dependent upon the will of both parties, in this case particularly the will of the province. An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree: *Scheepers v Vermeulen* 1948 (4) SA 884 (O) at 892, *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A) at 828I."

[42] In my view the MOU was not susceptible to the interpretation which the plaintiff sought to place upon it. The MOU lacked particularity. The product to be supplied, the quantities to be supplied and the precise price were not specified in that document. The whole thing was characterised by vagueness. Therefore, it did not constitute a supply agreement, as the plaintiff contended.

The business plan also suffered from the same shortcomings. Such aspects were not addressed even in that document, the very business plan which would have been a suspensive condition that would have triggered off the transmutation process of the MOU into a binding and final supply agreement.

[43] The plaintiff also relied on an implied term to the effect that the product had to comply with the requirements of the Petroleum Products Act, 58 of 2003. There is no room for such an implied term in the face of an express provision to the contrary (clause 7.1 and 7.2 of the "general terms"). In any event, I could not find any specifications or requirements for C9 – C20 N paraffin in the particular statute or its regulations and none were specifically pointed out to me.

[44] The last paragraph of the MOU provides that:

> "This MOU will result in a supply agreement once the final business model has been developed."

At paragraph 29 of the particulars of claim the plaintiff pleaded that the business plan must be developed between the parties.

[45] Firstly, it is implicit, upon an integrated reading of those two paragraphs, that the parties needed to do something more, notwithstanding the signing of the MOU, to have consensus about the terms of the business plan, a separate and distinct matter apart from the MOU, before a contract was concluded. It was quite obvious that further steps, arrangements and negotiations were therefore required before a contract could be concluded. Whether or not that was eventually concluded depended on consensus concerning a great variety of material points such as the product itself. Such a contract is invalid in our law. On the facts, I cannot find that the MOU was a final supply agreement as the plaintiff contended.

[46] Secondly, the MOU expressly provides for the eventuality of a breakdown in negotiations which would entitle any party simply to walk away from the MOU. This is yet a further indication that further negotiations were required to bring about a contract.

[47] Thirdly, the MOU distinguishes between a "business model" (to be developed between the plaintiff and the defendant) and a "business plan" to be developed between the plaintiff and **Sasol Limited**, a different company not cited as a party in the current proceedings. The last paragraph of the MOU talks about the former. The particulars of claim in paragraph 3 refer to the latter concept, that is to say a "business plan" to be developed between the plaintiff and the defendant.

[48] The evidence of Dr Chalera on this "transmutation" was vague, bald, sketchy and devoid of any factual substance. He did not testify about any single communication between the parties that would constitute this "transmutation". He attempted to place it in historical context and indicated that this occurred in March 2004. If one analyses the document one only finds reference to February 2004 and one incomplete reference to 2003. There is, therefore, no evidence before me that anything happened to the business plan subsequent to 4 February 2004 and no evidence was adduced that the parties came to any agreement on the terms of the business plan or business model after 4 February 2004.

[49] Mr Ernst expressly testified that there was no further negotiation or agreement between the parties on the business plan or model to be used by it, after 4 February 2004. That evidence was not contested by the plaintiff during cross examination.

[50] In any event, and insofar as it may be argued that the memorandum of understanding had become a supply agreement, I am of the view that the method of determination of the price of the product was fixed only for a period of three months whereafter it was stipulated that the parties "will negotiate and determine a suitable gap between the SW product and the regulated IP government price".

[51] About such an "agreement to negotiate" Du Plessis J had the following to say in **Londoloza Forestry Consortium (Pty) Ltd & Another v Safcol & Others** [2006] ZATPD (28738/06) at p12 - 13:

> "Counsel for all the parties were agreed that our law of contract does not recognise a contractual obligation the sole content of which is to negotiate with a view to enter into another contract (*Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) par. 35). Counsel for the applicants submitted that our law should be developed to recognise such an obligation. In view of the binding authority of the judgment referred to, this court is not in the position so to develop the law. Even if it were, the facts, as I have concluded, do not even prima facie prove the consensus required for such a contract."

[52] As regards the element of causation and damages, I also had difficulty with the plaintiff's claim. Delictual damages are expressed in the form of negative *interesse*: the plaintiff must be placed in the position in which it would have been had the delict not been committed, that is to say had the alleged misstatement **not been made**. The plaintiff's claim is not based on that premise: it is based on the position the plaintiff would have been in had the alleged **misstatement been true**. If the misstatement was not made, two possible scenario's arise: either the plaintiff would not have entered into the contract at all (in which case it would not have suffered any damages, save what it wasted in entering into the contract) or it would have entered into the contract but on different terms.

[53] The basic principles regarding the assessment of damages, in a case of an alleged misrepresentation said to have induced the conclusion of a contract are set out by Visser & Potgieter: **Law of Damages**, 3rd ed on p 429. The authors write:

> "The basic principles are the following: the misrepresentee is entitled to cancel or uphold the contract. If the contract is rescinded he or she must through an award of damages be placed in the position he or she was in before the conclusion of the contract. Where the contract is upheld a distinction is to be made between a case where there would have been no contract without the misrepresentation (*dolus dans*) and where there would still have been a contract but on different terms (*dolus incidens*). In the former case damages are calculated by determining the position in which the misrepresentee would have been without a

> contract and in the latter instance by assessing his or her position if a hypothetical contract has in fact been concluded."

[54] I share the aforesaid sentiments. In the instant matter, the plaintiff's pleadings did not provide any useful guidance. It was not possible to discern whether the plaintiff wanted to rescind or to uphold the contract, which the plaintiff was allegedly induced by misrepresentation to conclude. The plaintiff's key witness in this regard was Dr Chalera. However, his evidence in this regard did not really assist me.

[55] It follows, therefore, that the plaintiff cannot succeed in its claim based on a delictual foundation. In the circumstances I am inclined to dismiss the plaintiff's claim.

[56] I now proceed to consider the plaintiff's claim assuming that it was based on contract. A plaintiff may conceivably claim damages in a case where the contract was induced by misrepresentation. In that event, the plaintiff, having entered into an otherwise valid contract, has a choice: if the misrepresentation was material, the contract is voidable at the instance of the misrepresentee – **Service v Pondart-Diana** 1964 (3) SA 277 (D). Voidness brings with it restitution from both sides. No allegation is made that the plaintiff elected to declare the contract void, or to abide the contract. No tender of restitution has been made. The absence of those averments tends to indicate that the claim is not a contractual one.

[57] Nonetheless I proceed to consider the plaintiff's claim as if it were founded on contract. In the case where the plaintiff sues for contractual damages, it must allege and prove:

- The contract;
- The misrepresentation;
- The inducement;
- The election to void or abide the contract;
- Causation; and
- Damages.

[58] The plaintiff contended, on the one hand, that the parties entered into an agreement as more fully evidenced by the MOU. The defendant denied the contention and contended that the plaintiff failed to prove the alleged contract. The defendant pleaded and contended, on the other hand, that the contractual relationship between the parties was governed by the terms and conditions of the standard general terms, "annexure "a" to the defendant's plea. That contention was denied by the defendant who stated that the annexure was never part of the agreement and that such a document was, for the very first time, annexed to the defendant's plea.

[59] The plaintiff's bore the onus of proving that the general terms did not apply to the contract between the parties. The onus did not rest on the defendant to prove that they did – **D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and Another** 2006 (3) SA 593 (SCA) at 599G.

[60] The evidence relating to the supply of the paraffin turned out to be mostly common cause. In the first instance I was of the view that the plaintiff bore the onus to prove that the "general terms" did not apply to the contract between the parties: the onus was not on the defendant to prove that they did. The evidence relating to the supply of the paraffin turned out to be mostly common cause:

60.1 Two orders were initially placed by Dr Chalera to the defendant orally.

60.2 Those oral orders were recorded in a written order confirmation by a certain Ms Antoinette Cawood employed by the defendant. Those documents were then sent to Dr Chalera who completed and signed them and returned them to the defendant by fax.

60.3 Two invoices were generated and the product was delivered to the plaintiff in the quantities and according to the prices mentioned in the order confirmation.

60.4 The defendant then realised that they had incorrectly charged value added tax on the purchase price according to those invoices and thereupon cancelled them and issued new corrected and tax-free invoices.

60.5 The order confirmations signed by Dr Chalera provided that:

> "The confirmation order together with our general terms and conditions of sale, which are already in your possession or available on requirement (sic) shall constitute the legal and

binding agreement between the purchaser and Sasol Wax SA (Pty) Ltd."

[61] The background of this procedure was explained in meticulous detail by Mr Ernst and Mrs Cawood. Their evidence was not seriously challenged in cross-examination. They were, in my view, impressive witnesses whose demeanour and answers clearly showed confidence, authority and truthfulness. According to them Dr Chalera had a discussion with Mr Ernst and requested that a credit facility be approved for the plaintiff. On 15 April 2004 Ms Cawood (then Taljaard) sent and e-mail to Dr Chalera. Attached to the email were two documents:

- An "application for credit facilities: domestic sales"; and
- "General terms of sale: domestic sales".

In the e-mail Dr Chalera was invited to complete the application for credit facilities and to return same to the defendant's credit manager, Mr Nico Janse van Rensburg.

[62] During the course of the presentation of the defendant's case, the plaintiff's representative and agents and I were invited to view and inspect the email by Ms Cawood on the computer of Mr Ernst, whom she had copied on 15 April 2004. The email was viewed in an open court. Mr Ernst opened both attachments. I carefully perused them. Upon my inspection I found that they were identical to those forming part of "exhibit x".

[63] Ms Cawood further testified that she received an email from Dr Chalera on 29 April 2004, which was generated by using the "reply" function on the computer of Dr Chalera who "replied" to her earlier email dated 15 April 2004. That was evidenced by the fact that the email of 15 April 2004 was printed at the bottom of the email of 29 April 2004. Ms Cawood correctly inferred therefrom, that Dr Chalera must have received the email of 15 April 2004 and its attachments.

[64] Dr Chalera's conduct also supported the contention that he received the credit application and the "general terms" as well. He completed, printed and signed the credit application form. Later on he returned it to Mr Janse van Rensburg by fax, as instructed in the email of 15 April 2004. In the credit application, below the printed name of Dr Chalera but above his signature, appear the following contractual terms:

> "I Clement Stanley Chalera (and) Kabena Justice Mohape by my signature hereto do warrant that:
>
> (1) All the information of the application is true, correct and up to date;
>
> (2) I am duly authorised to seek credit facilities for the applicant;
>
> (3) I am duly authorised generally to represent and to act for and bind the applicant;
>
> (4) <u>The applicant accepts the attached Sasol Wax SA general terms of sale applicable to domestic sales (the agreement):</u>
>
> (5) The applicant authorises Sasol Wax SA to make the necessary trade inquiries by contacting any of the references provided and/or any risk information agency for the purposes of assessing this application for credit facilities

> and the applicant grants permission for the references and/or risk information agency to supply Sasol Wax SA the information requested. …"

[65] That document was signed by Dr Chalera and Mr Mohapi on 16 April 2004 and sent by fax on 16 April 2004 at 15h38 from the offices of Mohapi Optometrists to the office of Mr Janse van Rensburg. Mr Janse van Rensburg promptly responded thereto and on 29 April 2004 informed the plaintiff that credit facilities were in fact granted and an account opened for it.

[66] The sole basis advanced by the plaintiff why it is not bound by the "general terms" is that "same was only annexed for the first time to the defendant's plea". Dr Chalera gave evidence in similar terms: He testified that "I first became aware of this document through the defendant's plea attached as an annexure".

[67] I was urged to reject the version of the defendant as narrated by Dr Chalera. The witness did not impress me as a candid and truthful witness. He is a seasoned and experienced business man. He would not ordinarily sign documents if he did not agree with the contents thereof. He conducted virtually all of the negotiations leading up to the conclusion of the memorandum of understanding, by email. It is therefore probable that the application for credit facilities and all related documents would be sent to him via email and not via fax as he contended during cross-examination. It is not only most probable that he would have received both attachments to the

15 April 2004 email, but it is inconceivable that he did not receive both. The suggestion that the "icon" in the email message indicating that the "general terms" were attached, was absent, was simply unconvincing, since all the attachments were clearly and identifiably listed in the email message itself.

[68] I am persuaded that the quality of Dr Chalera's evidence on the particular issue was indeed seriously unconvincing and lacking in candour and probability. Therefore, the finding that the witness received Ms Cawood's email, together with both attachments on 15 April 2004, is inescapable. In reaching this conclusion I am fortified by the undisputed fact that he received one of the attachments, completed, signed and returned it to the defendant. He thereby incorporated the other by reference.

[69] Moreover, both attachments were specifically referred to in the email. Yet in the reply the plaintiff's witness did not, as one would have expected, instantly point out to Ms Cawood that he received one attachment only, *viz* the credit application form but not the general terms. In the light of that material omission and other unsatisfactory or unfavourable aspects of the defendant's version, the witness' evidence that he actually received the application for credit only, but not the general terms, was probably false. Accordingly I find it unacceptable. I reject it.

[70] Accepting, as true in favour of the plaintiff, that Dr Chalera did not receive a set of the defendant's general terms, would still not constitute a valid ground in law for holding the defendant liable towards the plaintiff. In **Burger v Central South African Railways** 1903 TS 571 at 578 the court held a contractant bound by the traffic regulations even though neither he nor his agent had read the traffic regulation applicable to the consignment of his goods, because such regulations were incorporated into the contract by express reference in the consignment note signed by such party's agent. The principle is discussed in detail by Kerr: **The Principles of the Law of Contract**, sixth edition on p934.

[71] The email of 15 April 2004 and the subsequent events evidenced a kind of a previous course of dealing between the parties. In my view, not only did the plaintiff fail to discharge the onus of proving that the general terms did not form part of the agreement, but that the defendant conclusively proved that they did.

[72] It is therefore clear that the "general terms" were incorporated by reference and also by the two order confirmations submitted by the plaintiff's Dr Chalera, in which those general terms were specifically mentioned. Specific reference is made to paragraph 4.8, 4.10 and 6.2 of the general terms.

[73] Clause 7 of the general terms deals with the question of liability as follows:

"7.1 Sasol Wax does not give any warranty in respect of the products of their use and all warranties implied by law are expressly excluded. The purchaser waives any claim for loss, damage or liability which it might have against Sasol Wax arising from but not limited to claims based on the products not being suitable for the purchaser's purposes.

7.2 Notwithstanding anything contained herein or elsewhere Sasol Wax shall not be liable whether in contract or delict for any consequential loss such as, but not limited to loss of profit, loss of production and loss of market share. In all instances Sasol Wax's liability shall be limited to the replacement of the products concerned that cost to the purchaser or reimbursement of the purchasing price as set out in 4.10."

[74] Clause 9 deals with variations of the agreement and reads as follows:

"9.1 This agreement read with any annexures thereto constitutes the sole agreement between the parties in regard to the subject matter thereof and supersedes all prior and contemporaneous negotiations, offers, discussions, promises, representations, agreements and understandings of the parties with respect thereto. Any inconsistencies introduced by the purchaser's order shall not apply unless expressly agreed to in writing by Sasol Wax."

9.2 No addition to or variation or agreed cancellation of this agreement shall be of any force or effect unless agreed to in writing by or on behalf of the parties."

[75] It is, therefore, clear that the parties expressly agreed that no liability shall attach to the defendant in the event of the product "not being suitable for the purchaser's purposes". On the facts, I cannot find otherwise but that the general terms applied to the contract between the parties. That being my conclusion, the plaintiff's claim evaporates into thin air.

[76] In view of that decisive conclusion, I deem it unnecessary to deal with the remaining issues. No finding favourable to the plaintiff on one or more or all of the remaining issues can ever salvage the plaintiff's claim. Although Mr Ellis painstakingly addressed the remaining issues such as misrepresentation, election, causation and damages *ex abundanti cautela*, I am not inclined to go that far. Whatever may be found there in favour of the plaintiff is unlikely to alter the outcome.

[77] The defendant had already abandoned its counterclaim by the time I erroneously granted an absolution from the instance. Therefore nothing further needs to be said about it.

[78] For the reasons given in support of this judgment, it is obvious that the plaintiff did not succeed to prove its case on a balance of probabilities.

[79] Accordingly I make the following order:

79.1 The plaintiff's claim is dismissed with costs, which costs shall include the costs consequent upon the employment of two counsels.

79.2 The costs shall also include the qualifying and reservation fees of the following experts:

Prof Philip Lloyd;

Ms Carina Fritz

Mr Johannes Hendrik Rossouw

Mr Nicolas Louw

Mr Justus van Wyk

_____

M. H. RAMPAI, AJP

On behalf of the plaintiff: Attorney M. Khang
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Mphafi Khang Inc
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On behalf of the defendant: Adv P. Ellis SC
With him:
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