IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5058/2015

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE:NO (2) OF INTEREST TO OTHERS JUDGES:NO (3) REVISED DATE..... SIGNATURE

In the matter between:

SCHNEIDER ELECTRIC SA (PTY) LTD Appellant

And

JIM FUNG INDUSTRIAL LIMITED Respondent

Coram: MNGQIBISA-THUSI et MAKUME et WEPENER JJJ
Heard: 4 May 2016
Delivered: 8 December 2016

JUDGMENT

MNGQIBISA-THUSI, J

[1] This is an appeal against the judgment and order of the court *a quo* (Francis J) handed down on 18 May 2015. The respondent, Jim Fung Industrial Limited ('Jim Fung') had instituted claims (A, B, C, D and E) against the appellant, Schneider Electric SA (Pty) Ltd ('Schneider') for payment of certain amounts based on its alleged performance in terms of an agreement the parties concluded in 2004. At the beginning of the trial, claim A was settled. The court *a quo* granted an order in terms of which Schneider was ordered to pay Jim Fung certain amounts relating to three claims (Claims B, C and D). The court a quo dismissed Jim Fung's claim relating to the storage costs (claim E) incurred between October 2009 and August 2011; and disallowed the qualifying fees of Jim Fung's expert witness.

[2] Jim Fung is cross-appealing the court a quo's decision to dismiss its claim for storage costs and the expert's qualifying fees.

[3] The appeal and cross-appeal are with the leave of the court a quo.

Factual background

[4] In 2004 Clipsal South Africa (Pty) Ltd ('Clipsal'), represented by Graham Chick ('Chick') and Jim Fung Industrial Limited ('Jim Fung'), represented by Dickie Cheung ('Cheung') and Cordy Lam (who acted as interpreter), concluded an oral agreement, which was supplemented by certain drawings and email communication between the parties. In terms of the agreement Jim Fung undertook to manufacture and sell to Clipsal certain electrical products. During negotiations of the agreement,

Clipsal had indicated to Jim Fung that it sought a more cost-effective product than what it had previously produced locally.

[5] In 2007 Clipsal was taken over by Schneider Electric SA (Pty) Ltd ('Schneider'). Hereinafter I will refer to the respondent as Schneider in the place of Clipsal.

[6] It is common cause that the electrical products, side by side couplers fitted with safety shutters, forming the subject-matter of the agreement were intended for sale in the South African market. There was agreement that the electrical products had to comply with the standards prescribed by the South African Bureau of Standards[1] ('the SABS'). There is also no dispute that in order for the electrical products to comply with the SABS standards, Schneider would communicate the required standards to Jim Fung, which was not familiar with the South African regulatory system. It is furthermore common cause that in order for compliance with the required standards to be achieved, the following process would be followed before Jim Fung would get final approval from Schneider to manufacture the electrical products in bulk:

[6.1] Schneider would send Jim Fung the specifications and drawings of the product to be produced;

[6.2] on receipt of the drawings, Jim Fung would make its own drawings and build the moulds for the tooling to be manufactured;

[6.3] the drawings and the moulds would be sent to Schneider for approval;

[6.4] Jim Fung would then produce a sample or a prototype of the electrical product in accordance with the specifications as communicated to it by Schneider;

[6.5] the prototype would be sent to Schneider for approval;

[1] In terms of the Standards Act 29 of 1993 (subsequently replaced and substituted by the Standards Act 8 of 2008) the SABS (whose functions are now performed by the National Regulator of Compulsory Specifications ("the NRCS")) is empowered to issue national standards that apply to products sold in South Africa.

[6.6] on receipt of the prototype, Schneider would test the prototype for compliance with its specifications and if it was not satisfied, it would return the prototype back to Jim Fung to be re-worked;

[6.7] if Schneider was satisfied with the sample or prototype, it would send the sample or prototype to the SABS for approval in terms of the SABS's various standards; and

[6.8] once approved by the SABS, Schneider would send the approved prototype to Jim Fung and Jim Fung would be obliged to produce on a large scale an exact copy of the prototype.

[7] The drawings submitted by Schneider to Jim Fung specified that the shutters were made of glass-filled nylon or polycarbonate, materials used by Schneider to produce the products locally. In the drawings Jim Fung sent to Schneider, reference was made to acrylonitrile butadiene styrene ("ABS"). The drawings by Jim Fung were approved by Connie Eckard ("Mr Eckard"), Schneider's engineering manager, subject to compliance with the SABS's standards.

[8] It is common cause that during 2004 and 2005 the SABS approved the samples sent by Schneider for testing. The approved prototype was sent to Jim Fung with the direction to proceed to reproduce the approved prototype in accordance with the South African standards.

[9] Between 2007 and 2008 Jim Fung produced certain electrical products for Schneider amongst which were the snapper, 1, snapper 3 and snapper 31. In 2008 after some of the products were delivered to Schneider and sold locally by Schneider, the NRCS discovered some problems with the products and issued a directive that Schneider should remove and recall the products from the market as they had failed what is known as the glow-wire test[2]. As a result, production on these products was stopped and the products already received by Schneider were no longer sold on the South African market and those not yet delivered to Schneider

[2] Also known as the flame-retardant test.

were held back in China. Schneider refused to accept delivery on the products en route to it or to pay for any of the affected products.

[10] In order to resolve the problem the parties concluded a compromise agreement in order to deal with the issues which had arisen as a result of the NRCS's directive. In terms of the agreement, the parties agreed that the affected products would be reworked using a different material, with Schneider reworking the products already in South Africa and Jim Fung reworking products still in China. It was also agreed that Jim Fung would be responsible for the costs of the rework.

[11] Subsequently, the Regulator issued an instruction that the affected products should be handed over to it. The affected products were stored at Access Freight International (Pty) Ltd at Jim Fung's cost. The Regulator also required a letter from the regulator in China that the returned products would be allowed entry into China. When Jim Fung could not obtain the required letter from the Chinese authorities, the Regulator threatened to destroy the products which led to Jim Fung launching an application for an interim interdict to stop the Regulator from destroying the products. A settlement was reached between Jim Fung and the Regulator in terms of which Jim Fung was granted an extended period to arrange for the shipping of the products to China.

[12] However, in 2010 it was discovered that the SABS had erroneously issued the directive of non-compliance with the glow-wire test. In subsequent tests, the electrical products passed the glow-wire test. It appears that when the initial glow-wire test was done, the SABS's glow-wire machine was not properly calibrated. In this appeal Schneider has accepted that the compromise agreement had ceased to be an issue.

[13] In 2009 the products which form the subject-matter of Jim Fung's claims failed the heat resistance test (the oven test) when tested by the SABS. This fact was communicated to Jim Fung with an instruction to cease further production of the products. Schneider cancelled all orders it had made with Jim Fung and refused to take delivery of products already manufactured on the ground that Jim Fung had produced electrical products not in compliance with prescribed safety standards.

[14] The court a quo came to the conclusion that Schneider was liable to pay the amounts claimed by Jim Fung in relation to claims B, C and D and dismissed Jim Fung's claim E. The court *a quo* found that it was a term of the agreement between Jim Fung and Schneider that Jim Fung would manufacture the shutters from ABS notwithstanding the fact that the ABS shutters failed the 100^0C I hour oven test. The court a quo further held that the products were compliant and the risk of any loss as a result of non-compliance with SABS standards rested with Schneider. Further the court a quo held that Schneider's cancellation of the orders it had made to Jim Fung was unlawful and amounted to a repudiation of the agreements. With regard to claim E the court *a quo* dismissed the claim on the ground that that the respondent had not proven that the appellant was unjustifiably enriched. The court a quo reasoned that since the products made of ABS were useless, they could not have been kept for the benefit of the appellant.

[15] Schneider has raised several grounds of appeal, amongst which are the following:

[15.1] that the court a quo failed to take into consideration the fact that if ABS had been agreed upon and used in the shutters of the prototypes, the prototypes would not have passed the SABS test;

[15.2] that the court a quo erred in failing to make a finding that the prototypes were made of PC and that therefore Jim Fung had failed to replicate the prototype;

[15.3] that the court a quo erred in not finding that Jim Fung failed to present evidence that he applicable standard was not done;

[15.4] that the court a quo erred in not finding that Jim Fung failed to discharge the onus on a balance of probabilities that it was expressly agreed that ABS could be used for the shutters;

[15.5] that the court a quo erred in placing reliance on the incorrect glow-wire testing by the SABS as being demonstrative of the unreliability of the SABS tests generally, including the 100^0C oven test; and

[15.6] that the court a quo misdirected itself in concluding that the 100^0C oven test may not have been performed by the SABS or that it was inaccurately performed by the SABS.

[16] It was submitted on behalf of the appellant that the court erred in finding that Jim Fung manufactured the electrical products which were ordered by Schneider.

[17] It was submitted on behalf of Schneider that Jim Fung had breached the agreement in that in terms of the agreement, Jim Fung was obliged to have reproduced the prototype as approved by the SABS. It is Schneider's contention that it is improbable, in view of Jim Fung's assertion that it had reproduced the prototype, that if the prototype was made of ABS that the SABS would have given it a pass score. It was further contended on behalf of Schneider that it is undisputable that the prototype Jim Fung used to manufacture the products ordered by Schneider had passed the over test, therefore it means that the products produced which have failed the oven test did not conform to the prototype.

[18] It was further submitted on behalf of Schneider that the terms of the agreement provided that once the prototype was approved by the SABS, Jim Fung would reproduce the prototype for mass distribution in the South African market. Inasmuch as Jim Fung through Mr Cheung alleges that during 2008 the parties had agreed that Jim Fung could use either ABS or polycarbonate (PC) in making the shutters, it is submitted the shutters of the prototype must have been made with PC since the prototype had passed the oven test conducted by the SABS. In view of the fact that the prototype had passed the oven test, it was argued that it can be inferred that in replicating the prototype Jim Fung must have used ABS and not PC as the products had failed the oven test.

[19] It is common cause that Mr Cheung's evidence was that he had always used ABS for the shutters except on the few occasions when he managed to get PC at a discount.

[20] On the issue of onus, Schneider's contention is Jim Fung, in order to prove that it had performed in terms of the agreement, bore the onus of proving that the

shutters of the prototype which passed the oven test were made with ABS. It was argued that if the shutters of the prototype were made of ABS as alleged by Jim Fung, the prototype would have failed the oven test and Schneider would not have given approval for the failed prototype to be mass produced. It was further argued that the logical conclusion should be that Jim Fung, contrary to the terms of the agreement, failed to replicate the prototype.

[21] Finally it was argued on behalf of Schneider that it was not under any obligation to pay for Jim Fung's non-performance[3].

[22] The following submissions were made on behalf of Jim Fung. It was submitted that the issue to be decided is whether the electrical products manufactured by Jim Fung complied with the terms of the agreement. It is Jim Fung's contention that in terms of the agreement it was only obliged to comply with specifications communicated to it by Schneider. It is common cause that Schneider, through Mr Chick had informed Jim Fung that the products had to pass the glow-wire test and that Mr Chick did not make Jim Fung aware that the oven test was one of the specifications required by the SABS for the products to get approval. It is Jim Fung's contention that had it been made aware of the fact that the products had to pass the oven test, it would not have used ABS in making the shutters as Mr Cheung, on learning that the products had failed the oven test, asserted that he was aware of the fact that products containing ABS would not pass the oven test. Further it was contended on behalf of Jim Fung that because the parties had agreed that Jim Fung could use either ABS or PC in the manufacture of the shutters, it therefore follows that the products which contained ABS complied with the terms of the agreement.

[23] It is further Jim Fung's contention that even if the prototype had been approved by the SABS because it passed all the tests, the products manufactured by Jim Fung subsequent to the approval by the SABS were compliant with the specifications communicated to it by Jim Fung as the parties had subsequently agreed that the shutters could be made of either ABS or PC.

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[3] With regard to the conclusion that Jim Fung's actions amount to non-performance see *Freddie Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA).

[24] It was further argued that ultimately Jim Fung's performance should be measured against the specifications Schneider communicated to Jim Fung and not against the SABS standards. It is Jim Fung's contention that Schneider carried the obligation to inform Jim Fung about all the required standards of the SABS in the production of the ordered products. Counsel argued that it could not have been expected for Mr Cheung, who was not familiar with the standards required by the SABS to have known and complied with the required standards. It was further argued that in terms of the drawings submitted by Jim Fung to Schneider which were approved by Mr Eckard on behalf of Schneider, it was apparent that the material to be used for making the shutters was ABS.

[25] Finally with regard to the oven test conducted on the shutters by the SABS, it was argued on behalf of Jim Fung that Schneider did not present any evidence to prove that the oven test on the prototype was correctly conducted by the SABS in view of the fact that the SABS had previously performed the glow-wire test.

[26] At the trial the respondent accepted that it bore the overall onus to prove that it had produced products Schneider had ordered in terms of the agreement.

[27] It is common cause that the products manufactured by Jim Fung for sale to Schneider did not comply with the SABS standards in that because they contained ABS, they failed the heat resistance test. Mr Cheung has admitted that from the onset Jim Fung used ABS for the shutters, inclusive of the prototypes. It is further not in dispute that the only tests Schneider had informed Jim Fung about were the glow-wire test, the withdrawal force test and the probe test.

[28] In order to determine the terms of the agreement, one has to take into account what the respondent pleaded. The issue to be determined is whether the prototypes contained ABS or not. If the prototype contained ABS, it would invariably not have received approval from the SABS as it would have failed the oven test.

[29] In its replication Jim Fung pleaded as follows with regard to claim B:

'1.3 The following are the express, alternatively tacit, terms of the agreements (in addition to or in further clarification of those pleaded in paragraph 12 of the particulars of claim).

1.3.1 The plaintiff would manufacture each particular product requested by Clipsal strictly in accordance with the specifications communicated by Clipsal, which specifications were communicated in each case by way of the one or more of a sample; drawings; and/or oral or written specifications (the oral specifications having been communicated by various representatives of the defendant (including but not limited to Graham Chick and/or Connie Eckard and/or Danie Nel and/or Percy Rogers and/or Koos Visagie and/or Sophie Mabuza) to Cheung on behalf of the plaintiff ("the specifications").

1.3.2 The plaintiff would manufacture a prototype of each of the electrical products that would be sold and delivered to Clipsal in accordance with the specifications.

1.3.3 Clipsal would approve the prototype and confirm that the plaintiff could proceed with the manufacturing of the particular product in accordance with the prototype.

1.3.4 Once Clipsal had approved a prototype, the plaintiff would be obliged to ensure that all future production of the product would conform to the specifications agreed and approved by Clipsal, as reflected in the prototype.

1.4 It was not part of the plaintiff's obligations in terms of the agreement to ensure compliance with SABS standards or to ensure that the products manufactured by the plaintiff could be sold and distributed in South Africa'.

[30] The difficulty the parties had was that when the dispute arose the prototypes were no longer available.

[31] The dispute between the parties revolves around whose responsibility it was to make sure that the products complied with the SABS's specifications of the safety standards. Inasmuch as Jim Fung has conceded that the products do not comply with the SABS compulsory standards, it is Jim Fung's contention that Schneider had the responsibility to ensure that its specifications complied with the SABS compulsory standards. On the other hand, it is Schneider's contention that in terms of the agreement Jim Fung had an obligation to reproduce the prototype as approved by the SABS.

[32] Furthermore, it is Jim Fung's contention that in terms of the agreement it only had to comply with the specifications communicated to it by Schneider in order to perform in terms of the agreement. That since Schneider had concerns with the cost of the material to be used, there was agreement that ABS could be used interchangeably with PC.

[33] Jim Fung's claim as pleaded, that it had to produce the same products as the sample or the prototype, is not reconcilable with its assertion that the products only had to comply with the specifications communicated to it by Schneider. Schneider has denied that it had agreed that ABS could be used. In his testimony, Mr Chick testified that he could not remember if agreement was reached between himself and Mr Cheung that ABS could be used and did not know what the first prototypes were made of. Even if there was agreement that ABS could be used, the prototype would have failed the oven test conducted by the SABS and therefore Schneider would not have been given Jim Fug the go-ahead to reproduce the prototype. I am of the view that the court *a quo* misdirected itself in finding that Jim Fung had produced products ordered by Schneider. The probable inference is that since the prototype received the approval of the SABS, the prototype did not contain ABS but PC.

[34] I am of the view that even though the agreement as pleaded by Jim Fung provides that the products should comply with specifications communicated to it by Schneider, the overriding intention of the parties was that Jim Fung must produce products which received the approval of Schneider and the SABS. This is so in the Jim Fung has pleaded that Schneider would approve the production of the products in accordance with the prototype. One also needs to bear in mind that the parties to the agreement knew that the intended products were meant for sale to the South African market and invariably had to conform to the standards set by the SABS.

[35] Nothing turns on the fact that Jim Fung was not *familiar* with the South African standards. It is common cause that there was agreement that Schneider would guide Jim Fung with respect to the standards to be complied with. The guidance would be in the form of the approval of the sample by the SABS. If the SABS approved the sample, all what Jim Fung was expected to do was to reproduce

an exact replica of the prototype in terms of dimensions and materials used as approved by the SABS.

[36] The fact that Jim Fung did not know that the oven test was a requirement is of no consequence since Jim Fung's obligation was to reproduce the approved prototype. The onus was on Jim Fung to prove that it had performed in terms of the agreement. Performance in terms of the agreement entailed that Jim Fung had to reproduce the prototype.

[37] There is no basis in the assertion made on behalf of Jim Fung that because the SABS had previously incorrectly done another test (the glow-wire test), that it follows that it must have performed the oven test incorrectly. At the trial the correctness of the results of the oven test were not in dispute nor was there any evidence that the test was not performed correctly. I am therefore of the view that the court a quo misdirected itself in concluding that the SABS either performed the oven test incorrectly or did not perform it at all or performed inaccurately.

[38] In conclusion, I am of the view that, taking into account the terms of the agreement as pleaded by Jim Fung, the only plausible conclusion is that, since the prototype had received approval by the SABS, it is more probable that it did not contain ABS[4]. If the prototype had contained ABS, it would have failed the oven test when assessed by the SABS. I am also satisfied that Schneider had provided Jim Fung with the standards it had to comply with as the litmus test of compliance was approval by the SABS.

[39] I am satisfied that the appeal by Schneider ought to succeed.

Cross-Appeal

[40] Jim Fung is appealing against the finding of the court *a quo* dismissing its claim E and refusing to grant it the qualifying fees of Mr Gian Campetti, its expert witness.

[4] *Govan v Skidmore* 1952 (1) SA 732 (N) where the court stated at 734 C-D that: '. . . in finding facts and making inferences, in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* (3rd ed., para. 32), by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.

[41] Jim Fung's claim E relates to storage costs it incurred after the Regulator had issued a directive on 3 August 2009 that the products it produced for Schneider which were erroneously declared to have failed the glow-wire test should be recalled and removed from the market, and that they be stored at Access Freight, either to be shipped back to China or destroyed. Even though the products were subsequently proven to have passed the glow-wire test, it was subsequently discovered that the products were not compliant with one of the SABS's standards, that they failed the heat resistance test. The relevant period during which the products were stored was 19 October 2009 to 19 August 2011.

[42] It is Jim Fung's contention that the products stored were not only those which fell within the purview of the Regulator's Directive, but included products falling outside the scope of the Directive but which Schneider had refused to take delivery of. Ultimately after some litigation, some of the products were destroyed on 20 January 2010.

[43] The court a quo dismissed the claim on the basis that the stored products were of no use to Schneider and could not have been held for its benefit and therefore that Jim Fung had not proven an unjustified enrichment on the part of Schneider.

[44] It is Jim Fung's contention that the court *a quo* erred in concluding that Schneider was not unjustifiably enriched through the storage of the products since it did not base its claim on unjustified enrichment. It is Jim Fung's assertion that its claim is based on the administration of another's property without his consent but in the interests of the owner.

[45] On behalf of Schneider it was submitted that the court a quo was correct in dismissing Jim Fung's claim in that it had not stored the products solely for the benefit of Schneider but in order to protect its own interests. Further, it was submitted that Jim Fung could not have stored the products for the benefit of Schneider since the products ultimately proved to be useless and worthless as they could not be sold on the South African market for lack of compliance with the SABS's standards. It is Schneider's contention that even if it could be found that Jim Fung

had stored the products for its interests, Jim Fung was not entitled to the whole amount paid for the storage but to the extent by which Schneider was enriched.

[46] The products which Jim Fung had produced and were stored at Access Freight turned out to be of no value to Schneider in that they could not be sold in South Africa. It therefore cannot be said that Jim Fung had stored the products in the interests of Schneider. I am accordingly of the view that the court a quo did not misdirect itself in dismissing Jim Fung's claim for storage costs.

Expert's qualifying fees

[47] Before the products were retested and passed the glow-wire test, Schneider had refused to take delivery of the products. Up to the stage that it was shown that the SABS had incorrectly calibrated the glow-wire test machine, in its plea Schneider relied also on the products having failed the glow-wire test. However, on 22 June 2011 Schneider amended its plea and abandoned its reliance on the failure of the glow-wire test.

[48] Jim Fung, however, in its particulars of claim, claimed for the full qualifying fees of its expert, Mr Campetti who was set to testify on the glow-wire test. However in this appeal, Jim Fung has limited its claim for the expert's qualifying fees up to the period when Schneider informed it of its intention to abandon reliance on the glow-wire test. Jim Fung contends that up to that stage, it incurred costs and expenses in anticipation of its expert testifying at the trial.

[49] It is Schneider's contention that Jim Fung had failed to qualify its claim for the qualifying fees in that it claimed for the full qualifying fees of its expert even though Schneider had abandoned its reliance on the failure of the glow-wire test.

[50] Even though the court a quo has not misdirected itself in dismissing Jim Fung's claim for the full qualifying fees of its expert, I am of the view that, in fairness, the court a quo erred in not limiting Jim Fung's claim to the period up to the stage when Schneider abandoned its reliance on the glow-wire test.

[51] In the result the following order is made:

1. The appeal is upheld.
2. The cross-appeal with regard to claim E is dismissed.
3. The order of the court a quo upholding claims B, C and D is replaced with an order dismissing claims B, C and D.
4. The order of the court a quo dismissing the claim for Mr Campetti's qualifying fees is replaced with an order upholding the claim for the expert's qualifying fees.
5. All costs incurred to date are to be borne by Jim Fung, the respondent in the appeal, such costs to be inclusive of the costs of two counsel.

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NP MNGQIBISA-THUSI
Judge of the High Court

WEPENER J (MAKUME J concurring):

[52] I have had the opportunity to read the judgment of prepared by Mngqibisa-Thusi J ('the first judgment"). I am unfortunately unable to agree with the conclusions reached by the learned judge in paras 33 to 38, which forms the essence of her conclusions in relation to claims B, C and D of Jim Fung against Schneider. I rely on the facts as set out in the first judgment, save as amplified herein.

[53] The approach to a matter on appeal has been authoritively stated in *Rex v Dhlumayo and Another*[5]. The applicable principles include:

> '1. . . .
> 2. . . .
> 3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

[5] 1948 (2) SA 677 (A) at 705-706.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.
7. . . .
8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.
10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.
11. . . . '

The only finding in the first judgment regarding the thorough judgment of Francis J which spans some 153 pages, is that the

'court a quo misdirected itself in concluding that the SABS either performed the oven test incorrectly or did not perform it at all or performed it inaccurately'.

I cannot agree with this finding as in my view, the learned judge a quo made such finding as he did[6] due to the absence of evidence regarding the test and I will indicate herein that there was no permissible evidence regarding the performance of the oven test by the SABS.

[54] In so far as claim E was dismissed by the court a quo and should be dismissed in the view of Mngqibisa-Thusi J who upheld that dismissal, I am in disagreement with her for the reasons set out herein. I also agree that Jim Fung's claim for qualifying fees of the expert witness should have been allowed by the court a quo to the extent that such fees are limited to include the fees of the witness Campetti up to and including the time when Schneider informed Jim Fung of its

[6] The judge a quo put it thus at para 81 of his judgment: "It is not clear why the SABS passed the initial shutters made of ABS or whether it had conducted the correct test on it. The 100 degree centigrade 1 hour test may not have been performed or may have been (performed) inaccurately, or as Chick mentioned, the shutters may have been supported by the mould in such a way that although the shutters may have softened during the test, they may have hardened in such a manner that they did not deform.

intention to abandon reliance on a glow-wire test for reasons set out in the first judgment.[7]

[55] The quantum of the claims is common cause and the amounts which Francis J ordered the appellant to pay are not in dispute.

[56] Jim Fung's claim was initially resisted on the basis that the products failed a test referred to as the glow-wire test. As a result of the fact that the test was shown to be incorrectly performed by the South African Bureau of Standards ('SABS') and the products in fact complied with the glow-wire test, Schneider abandoned reliance on the defence. After this, Schneider shifted its defence to an allegation that the products failed to pass a different test, the heat resistance test, also referred to as the oven test – a test subjecting the product to a temperature of 100 degrees centigrade for an hour and which procedure the product should be able to withstand. But Schneider's defence was not so pleaded. Counsel for Jim Fung objected to this shift as the new issues were not canvassed at the trial and there was evidence that could have been led, that was not because this was not the nub of Schneider's case in the court a quo.

[57] The first observation which I need to make is the obvious shift in Schneider's case from the pleadings in the matter to what it eventually submitted and promoted in this court. I refer to as it, in my view, impacts on the veracity of Schneider's case. The dispute on the pleadings was whether Jim Fung was obliged to manufacture products that complied with all SABS specifications as pleaded by Schneider or whether it was obliged to manufacture products that complied with such specifications that Schneider (or its predecessor Clipsal) communicated to it as pleaded by Jim Fung. Indeed the shift became so marked that counsel for Schneider submitted that the case was about Jim Fung's obligation to manufacture and supply products which would be identical to a prototype – including in respects that were not necessary to comply with if Jim Fung's version is to be accepted, ie that it only had to comply with those specifications communicated to it by Schneider.

[7] Paras 47 and 48 above.

[58] The plea is replete with references to Jim Fung's obligation to comply with SABS standards with reference to several specific national standards issued by the SABS. It was pleaded that

> 'the obligation to produce goods compliant with the said standards was known to . . . Jim Fung at all material times and it was an expressed, alternatively implied alternatively tacit term of the agreements that Jim Fung was to manufacture and supply the goods so complying with the SABS standards'

It was further pleaded that the goods were defective in that they failed to comply with the applicable safety standards set out in the South African Regulatory Specifications. It is significant that not a word is said about a prototype in the defendant's plea. It is then pleaded that one of the South African Regulatory Specifications which governs the goods is an 'oven test' and that the products failed to comply with this test.

[59] Despite the defences which Schneider pleaded to Jim Fung's claim, it was eventually narrowed down to the dispute regarding the terms of the agreement between them and, once established, the consequences thereof having regard to the products which Jim Fung delivered to it. To put it differently, did Jim Fung deliver contractually compliant products to Schneider in order to become entitled to payment in respect thereof? This was also the thrust of Schneider's appeal before this court ie that Jim Fung did not deliver products which complied with the agreement between them. Schneider no longer relied on the fact that Jim Fung undertook and was obliged to deliver products compliant with the SABS standards. It was submitted that the prototype of the product became the standard, that the prototype passed the SABS tests and the later products did not.

[60] The defence that Jim Fung had to comply with the SABS standards was abandoned and not pursued on appeal. Before this court Schneider's defence was submitted to be that Jim Fung was obliged to manufacture and supply products that complied with the agreement between the parties – the very same allegation which Jim Fung had made from the outset. The defence was that it is to be inferred the products did not comply with the contractually agreed specifications.

[61] I need not analyse the evidence in detail. Schneider's pleaded case that Jim Fung had to comply with the SABS standards fell by the wayside and was not

persisted with. This is so as a result of the overwhelming evidence that the agreement was as alleged by Jim Fung. The court a quo found that:

> ’72. The agreement between the parties was therefore oral and informal. Its terms must be gleaned from the evidence and the contemporaneous documents, as interpreted in light of the context at the time. Chick and Dickie testified about what the terms of the agreement were. Dickie’s explanation was that he told Chick that he did not know anything about the standards applicable to South Africa, and would have to reply on Clipsal’s guidance about the standards applicable to South Africa, and would have to rely on Clipsal’s guidance and the approval process that was put in place. He did not read or speak the language of the standards. He testified that in Australia, the burden was on Jim Fung to comply with the standards and the electrical products in Australia did not have shutters. All these militate against any possibility that Jim Fung would have been burdened with an obligation that Clipsal had the experience, expertise and relationship with the SABS to take on without any difficulty.
>
> 73. It is clear from the evidence that was led that the process adopted by Clipsal and Jim Fung in respect of the development and manufacture of electrical products for Clipsal was that the plaintiff would manufacture each electrical product in accordance with the specifications communicated by Clipsal to the plaintiff which specifications were communicated in each case by way of one or more of a sample, drawings and/or oral or written specifications. The plaintiff would then manufacture prototypes of each of the electrical products that Clipsal required the plaintiff to manufacture for sale to Clipsal. When the prototypes conformed to Clipsal requirements, Clipsal would submit the samples of the product to the SABS for approval. The submission to the SABS for approval involved the SABS testing the products to ascertain whether they complied with the applicable SABS standards. Once the SABS approved the samples, Clipsal would approve the products the product for manufacture by Jim Fung in accordance with the approval samples. After Clipsal had approved the product, Jim Fung would be obliged to ensure that all future production would conform to the specifications agreed and approved by Clipsal as reflected in the approved samples.
>
> 74. The first project Clipsal introduced to Jim Fung in early 2004 was the manufacturing of the side-by-side coupler. Clipsal had by then been manufacturing its own range of domestic products locally in South Africa which included the side-by-side coupler. During the negotiations Clipsal was represented by the then technical manufacturing director, Chick. Chick had been expressly mandated to explore the opportunities to move the manufacture of was expensive and Clipsal was becoming uncompetitive. Jim Fung was represented by Dickie and Cordy. Dickie had no command of the English language and Cordy was his interpreter at the time, He made it clear to Chick that he was unfamiliar with South African electrical products and any applicable South African standards. Chick reassured Cheung that Clipsal would inform Jim Fung of the specifications that had to be met, and that Clipsal would attend to having the products approved for compliance by the SABS. He also told Chick that Jim Fung had been producing cables and plugs but not adaptors for the Australian market for some years prior to Chick approaching Dickie. Chick ensured that samples of the side-by-side coupler were sent to Jim Fung with drawings and a

document headed “Information for Quotation Purposes” containing only the basic parameters of Clipsal requirements. Jim Fung would prepare its own drawings based on the specifications that had been communicated to it which drawings would be used to manufacture the tooling of the product. The Clipsal drawings reflected that the material for the outer casing of the side-by-side coupler was made of polypropylene and the T-shutter (for the Snapper 5) was made of glass filled nylon. It is clear from the evidence that in truth, although this was not reflected on the Clipsal drawings, Clipsal was using a polypropylene mixture to manufacture the outer casing of all its domestic products, and PC in its T-shutters. Although the T-shutter was a common component in most of the domestic products the drawing had not been updated to reflect that PC material was being used to manufacture this component. Clipsal was using glass filled nylon to manufacture only one type of shutter, the rotary shutter, used in the Snapper 31. Jim Fung produced drawings on the side-by-side coupler. The drawings were sent to Clipsal for approval.

75. Chick, who was not familiar with all the technical detail required to manufacture the product, including the applicable standards, referred to Eckard, the engineering manager, Visagie, the manufacturing manager, and Rodgers, the quality manager, for advice and assistance during the initial phase of product development. Visagie and Eckard were both at the Brits factory. Rodgers gave evidence that by 2004 he was no longer based at the Brits factory and had by then moved to Midrand in his capacity as certification manager. The Jim Fung drawings were considered and analysed and approved by Eckard and Visagie. Although the Jim Fung drawings proposed nylon for the outer casing, it was an expensive material. Clipsal’s brief to Jim Fung was to search for cheaper materials which would make the product more competitive in the South African market. Although Chick and Cheung discussed various materials, Rodgers on behalf of Clipsal, disclosed to Jim Fung the polypropylene mixture used locally by Clipsal SA to manufacture the domestic range of products which proved to be the cheapest option for the outer casing. Steyn, a production manager at Brits specialising in plastics, testified that he was not consulted by anyone on the use of materials in the Jim Fung range of products. Steyn reported to Visagie at the time. Rodgers testified that he obtained the information relating to the polypropylene mixture from Steyn as he was not familiar with the properties of the various plastics. It was agreed between the parties that Jim Fung would use a similar propylene mixture (polypropylene with % talc or 40% calcium carbonate) for the outer casing of the side-by-side coupler which could withstand a heat resistance of 750 degrees centigrade.’ (own underlining)

[62] In essence, the court held that the agreement as alleged by Jim Fung was supported by the evidence of the witnesses that Schneider (or Clipsal) accepted full responsibility to ensure that the products were compliant with the SABS standards. I agree with this finding and can see no reason why it is wrong. Indeed, Schneider’s submission on appeal did not attack this finding. The appeal was based on the argument that the products did not comply with a prototype that had passed the oven

test, contrary to what Schneider had pleaded. But the matter goes further. It was Jim Fung's case that it used a product referred to as ABS in the manufacture of certain shutters of the products. It used ABS interchangeably with another product referred to as PC. It became common cause and Jim Fung accepted that, in terms of the SABS standards, the ABS product would not pass the SABS approved oven test or standards in this country. Such acceptance was not an acceptance of the outcome of the various SABS test results, which I refer to below. It became common cause that the representatives of Jim Fung had no knowledge of these requirements and were reliant upon what Schneider advised it in relation to the products that Schneider required.

[63] Eventually, the dispute on appeal arose as a result of the fact that the ABS used in the manufacture of the shutters proved insufficient in strength to pass an oven test as required by the SABS. But not only was Jim Fung not required to manufacture and supply goods that complied with the SABS standards as pleaded by the Schneider, there was direct evidence that Schneider accepted that the shutters could be manufactured with ABS. In this regard the court a quo, after carefully analysing the evidence, concluded that Schneider in fact approved the use of ABS for the shutters. If regard is had to the evidence of Jim Fung's witness, Cheung, that the oven test was not one of the specifications that was communicated to Jim Fung, this aspect becomes a red herring. It was common cause that the brief to Jim Fung was to reduce the costs of manufacturing the products. It was not disputed that ABS is a more cost efficient product that PC. It is for this reason that Jim Fung used PC and ABS interchangeably. The PC was used when Jim Fung obtained a batch of the material at a discounted price but other times ABS was used. But that it was not a contractual term that ABS may not be used or that the product must pass the oven test or that PC must be used is beyond any argument. Once it is appreciated that Jim Fung was to manufacture a cheaper product according to the specifications furnished to it, the nature of the product supplied by it by interchanging using ABS or PC can be seen in its proper context. During its initial preparation of the product specifications Clipsal furnished Jim Fung with basic parameters of its product requirements and the drawings by Jim Fung furnished to Clipsal, referred to the use of ABS. The evidence of the person on behalf of Clipsal, who had to approve the drawings submitted by Jim Fung, Mr Eckard, confirmed that he checked and

approved the drawing on which ABS was specified as no one at the time, was aware that ABS could not be used. The representatives of Schneider were either unaware of the oven test or did not regard it as material and failed to communicate it to Jim Fung – so much is common cause. Counsel for Schneider conceded during argument that it was not Schneider's case that Jim Fung knew of the oven test standard. This concession sounded the death knell of the case as pleaded by Schneider or as counsel for Jim Fung submitted, that defence faded into the background. Jim Fung could not and did not know of the oven test. Compliance with the oven test was at the risk of Schneider. It is accordingly Schneider's witnesses' version that ABS was the accepted product to be used in the manufacture of the shutters. This evidence puts paid to any argument that the use of ABS would render the products contractually non-compliant and is destructive of the case of Schneider argued on appeal. Clipsal knew that Jim Fung had no knowledge of the South African requirements (or the SABS standards) and solely relied on what was communicated to it – and this included a requirement to produce a less expensive product. Cheung's uncontroverted evidence that such a product was ABS, which was successfully used in Australia and was to be used in the manufacture of the products for Schneider, supports this conclusion. There is nothing in the evidence to suggest that the evidence of Mr Cheung was improbable or open to criticism. In fact, the specifications as contained in the drawings were approved by Clipsal. The risk of SABS compliance remained with it.

[64] Save for the direct agreement between the parties, the probabilities also favour Jim Fung. These are that the use of ABS in the in initial products is corroborated by the contemporaneous documentation and the evidence of the witnesses. Indeed Cheung and his wife's spontaneous response when first informed of the requirement of an oven test is indicative of the fact that they had no knowledge of such a test; the initial drawings provided by Jim Fung indicated that the shutters were to be made of ABS; Jim Fung's internal costing sheets show that the costing of the products was done on the basis that the shutters were made of ABS; the analysis schedules prepared by Jim Fung in 2007 demonstrate that all products manufactured by Jim Fung were manufactured with an ABS shutter; in January 2008 Jim Fung sent drawings which demonstrated that the material used in the shutters was ABS to representatives of Schneider without adverse comment from the latter;

when Cheung's wife presented a new price offer during April 2008 she attached a costing which was prepared on the basis that the shutters were manufactured with ABS; during a meeting on 22 May 2008 between representatives of the parties it was discussed that the shutters would be made of ABS and alternatively, of PC. Schneider's case on appeal, simply put, was that Jim Fung had to replicate a prototype. But on all the probabilities, that prototype was indeed manufactured with the ABS substance and the unproven tests results do not take the matter further. The nature of the material was irrelevant provided that it was suitable to meet the contractual specifications – the latter which specifically included the use of ABS. Counsel for Schneider submitted that the appeal hinges on whether Schneider ordered ABS shutters or not. The overwhelming evidence is that it did. The enquiry really ends there.

[65] The difficulty in Schneider's case is further exacerbated by the evidence of a witness called by Schneider, Mr Steyn, who testified that although ABS will always soften at one hundred degrees Celsius, it may harden again without deforming and therefore the product containing ABS shutters may not always fail the test. The evidence by Dr Roediger that when using ABS the shutters will probably fail an oven test does not detract from the evidence of Mr Steyn. Dr Roediger accepted the general proposition that ABS will not pass the oven test. It was not accepted that ABS will fail on every occasion and ABS will only fail a properly administered test if performed on proper equipment.

[66] Schneider's case on appeal is that Jim Fung manufactured a prototype with PC material and not ABS and later changed the products to contain ABS. This case is on the probabilities and the proved facts, as found by the court a quo, baseless. I agree that it is a rather fanciful argument which is contrary to the established facts.

[67] Having regard to the terms of the agreement and the approval of Schneider of the ABS product, the finding of the court a quo is unassailable:

> 'It is my finding therefore that it was a term of the agreement between Jim Fung and Schneider that Jim Fung could manufacture the shutters from ABS notwithstanding the fact that the SABS shutters failed the hundred degree centigrade one hour oven test.'

The reason for this is, in my view, clear. These witnesses who testified on behalf of Schneider did not know the significance of the difference between ABS and PC. They did not specify PC as preferred to ABS. In fact, they never referred to PC as a requirement despite Jim Fung having specified the use of ABS in its communications to Schneider. There was no different approach by the parties as communication by Schneider to Jim Fung and the initial discussions and connections were conducted on the basis that ABS be utilised. By accepting the evidence of Jim Fung, there is little doubt that it did not know of the so-called oven test and the risk relating to that test was never conveyed to Jim Fung. It could not and did not render the products contractually non-compliant.

[68] The case for Schneider eventually centred around the fact that the initial shutters supplied by Jim Fung, which were sent to the SABS, passed the SABS oven test and that later products did not. The statement in itself is problematic. There can be no doubt that the SABS was required to conduct specialised tests. These tests resulted in the SABS issuing reports containing conclusions. These reports were submitted by Schneider into evidence in order to support its case that the shutters did not comply with the SABS standards in the sense that the original shutters did pass the SABS test and the later shutters not, resulting in the fact that Jim Fung, by inference, later supplied shutters which did not accord with the initial prototype which passed the SABS test. In so far as Jim Fung accepted that the shutters in dispute would not pass the SABS standards, it must be borne in mind that Jim Fung did not accept that the initial tests referred by the SABS were properly and correctly done. The status of the reports in general but in particular, the reports emanating from the SABS that passed the initial prototype goes to the heart of the matter. The contents of the SABS reports (as submitted by Jim Fung) are not admissible in evidence and that the case of Schneider that the prototype was compliant with SABS standards has no basis. In fact, Jim Fung submitted that the inferential reasoning of Schneider must fail because it is based on unproven suppositions regarding tests carried out but the SABS. It was submitted that there is no evidence that the heat resistance test was carried out at all let alone that it was executed correctly and that there was consequently no base or primary facts to support the inferences sought to be drawn by Schneider. The argument has merit.

[69] Counsel for Schneider submitted that it was agreed that the SABS reports were admissible in evidence but that is not correct. The agreement was that the documents would be what they purport to be and that the truth and correctness of the contents thereof were not admitted. This was confirmed by counsel for Schneider during argument before us. That being so, the only evidential value of the reports, and particular the initial reports, is the fact that the reports emanated from the SABS. Counsel for Schneider submitted that the reports emanated from the SABS and that there is no reason for the SABS technicians to do their jobs badly and that the SABS performed a statutory function. That is not the test for admissibility of expert evidence. The contents of an expert report do not become admissible because there is other evidence tending to support it and this argument cannot be upheld. Unless the contents of the reports are accepted by Jim Fung, which it did not, all the facts upon which the expert conducting the prototype tests relied must be ordinarily established with evidence during a trial. In *Coopers*[8], Wessels JA said:

> 'As I see it, an expert's opinion represents his reasoned conclusion based on certain facts on data, which are either common cause, or established by his own evidence or that of some other competent witness.'

In *S v Naik*[9] Miller J held as follows:[10]

> 'If the court, on the evidence before it, were to come to that conclusion, it would be making an assumption rather than drawing an inference, for the facts necessary for the drawing of an inference are lacking. As Lord WRIGHT observed in *Caswell v Powell Duffryn Associated Collieries Ltd*., (1939) 3 All E.R. 722 at p. 733:
> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish . . .. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."'

[70] In the absence of the primary facts in relation to the prototype tests or admissible evidence in relation thereto[11] it would be impermissible to rely on the SABS tests. In the circumstances I am of the view that the production of reports did not render the contents thereof admissible. The danger of relying on hearsay reports

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[8] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschast Für Schadlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371G.
[9] 1969 (2) SA 231 (N).
[10] At 234C-D.
[11] *Reckitt & Colman SA (Pty) Ltd v SC Johnson and Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 351E; *Lornadawn Investments (Pty) Minister van Landbou* 1977 (3) SA 618 (T) at 623; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772.

is underlined by what happened in this case. This dispute between the parties arose pursuant to a test result of the SABS, wrongly as it turned out, that the products failed the glow-wire test. It was however, conceded that the SABS glow-wire test was wrongly and incorrectly administered. The glow-wire test was incorrect for two reasons, on two separate occasions. Firstly, because the machine was not properly calibrated and secondly, because the test was conducted improperly. These human errors occurred at the SABS testing and led to the commencement of the litigation between the parties. Francis J had regard to this failure. The learned judge found that the evidence may be relied on to place a question mark over the unproven oven test results which Schneider introduced. This was rightly done. It goes to show why the facts underlying reports should be proved before the results can be accepted as proven. This conclusion renders Schneider's argument that the later products did not comply with the prototype, baseless. Although the later products did not pass the oven test, the latter which was not a term of the contract, there is no permissible evidence from which an inference can be drawn that the earlier products or prototype did pass that test. Once that inference which Schneider wishes to draw and rely on as the entire basis of its new case fails, Schneider's defence on appeal should fail, as its defence on the merits failed in the court a quo.

[71] The error in Schneider's argument can be gleaned from the submission made by its counsel to this court. On a question of the presiding judge whether the onus was on Jim Fung to show that the oven test was done incorrectly and not for Schneider to show that the test was done correctly, counsel for Schneider wholeheartedly subscribed to the proposition. It is clearly wrong. The test results were not introduced by Schneider. It alleged that the products did not comply with the oven test. It failed to prove the initial oven test with permissible evidence – both that it was carried out and what its result was. Insofar as Jim Fung proved its contract, it is not in dispute that Jim Fung delivered contractual compliant products. It had no onus regarding the oven test.

[72] Counsel for Schneider was at pains to attempt to justify the reception of the reports into evidence. The final argument was that the content of the reports could be proved by other means. Should this proposition be correct, and I doubt that it is,

the ‘other means’ would be the evidence to be relied upon and not the hearsay reports.

[73] The prototype argument suffers from another deficiency. The agreement is clear: the prototype could either certain ABS or PC. The argument that, because the first prototype passed the oven test (if the evidence would be permissible) therefore the later products containing ABS did not comply with the prototype, is a fallacy. It was agreed that the products could contain ABS. If it did, it conformed to what was ordered by Schneider. The terms of the agreement, in my view, destroys the prototype argument in its entirety.

[74] There are consequently several reasons why the claim of Jim Fung is unassailable. It proved its agreement that existed between the parties; Schneider did not advance its pleaded version of the agreement; Jim Fung proved that it manufactured products in compliance with the specifications communicated to it – including the use of ABS as an alternative to PC and that it delivered products which complied with the agreed specifications. Having complied with its contractual obligations, Jim Fung became entitled to payment.

[75] Schneider’s pleaded defence that Jim Fung had to comply with the SABS specifications was, in the circumstances, a red herring. The products were manufactured of the agreed material and the fact that it failed (if it did) an SABS test was at the risk of Schneider.

[76] Jim Fung’s claim for storage fees of the goods about which the parties were in dispute was dismissed by the court a quo and the first judgment upheld that dismissal. This claim was based on enrichment, or more particularly, on the negotiorum gestio. Jim Fung alleged that it incurred expenses to store the products already sold and delivered to Schneider. Once there is a finding that the goods were contractually compliant, Schneider was duty bound to receive it. Schneider refused to take the products into possession despite the fact that technically, delivery had already occurred to it. A party who in such circumstances stores goods which it had sold and delivered, in my view, stores it for the benefit of the party who is contractually bound to take physical possession thereof.

[77] Jim Fung based its claim on the principle of negotiorum gestio – a person who manages the affairs of another is entitled to re-imbursement. The requirements to succeed in such a claim are: managing the affairs of another; doing so reasonably; with the intention to be reimbursed whilst the dominus (Schneider) was ignorant of its affairs being managed.

[78] Although the finding that Jim Fung supplied contractually complaint goods goes a long way towards proving the claim by a gestor in that it stored the goods which belonged to Schneider, the other elements of the claim need to be proved. There is no dispute that the storage costs were reasonably incurred. The question remains whether Jim Fung proved that the other two elements ie that Schneider being ignorant of its affairs being managed and an intention by Jim Fung to manage the affairs of Schneider. Jim Fung at all times asserted that the goods belonged to Schneider. There can be no doubt that it intended to store the goods for the eventual benefit of Schneider and to claim the costs incurred therefore. The attitude of Schneider was that Jim Fung could do with the products whatever it wanted to as Schneider accepted no responsibility in respect of the goods. That in my view is a statement of a dominus who is aware of the management of his affairs and authorising such tacitly even against his wishes or whilst he protests.[12] The court a quo found that because the goods were non-compliant with the oven test and therefore useless, it could not be stored for the benefit of Schneider. I respectfully disagree. Once the goods are contractually complaint, the oven test issue is irrelevant and Schneider was compelled to accept the goods ordered by it. It refused to accept its goods and Jim Fung stored them for Schneider's benefit. This is in accordance with the finding of the court a quo:[13]

'The products were contractually compliant and the risk of any loss as a result of non-compliance with the SABS standards rested with Schneider.'

[79] Jim Fung as gestor voluntarily managed the affairs of Schneider by causing the safekeeping of Schneider's products without Schneider's consent. It has been shown that it is entitled to recover the storage costs incurred on behalf of the owner

[12] *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 (2) SA 386 (C) at 388F and 395A.
[13] Para 115.

of the goods, Schneider. In my view, claim E should have succeeded in the court a quo.

[80] In all the circumstances, the appeal falls to be dismissed. Although the court a quo ordered the interest to run 'a tempore morae', I need say nothing regarding the applicable dates as the parties have advised that they are in agreement as to the mora dates that apply to the interest which the court a quo ordered Schneider to pay. The following order is issued:

1) The appeal is dismissed with costs including the costs of two counsel;
2) The cross-appeal is upheld with costs, including the costs of two counsel and the orders of the court a quo at paragraphs 119.4 and 119.6 are replaced with an order in the following terms:

   '119.4 The defendant is ordered to pay the plaintiff the sums of R35 794.00 and U$ 96 540.45 in respect of claim E.'

   '119.6 The defendant is to pay the costs of the action on a party and party scale, including the costs of two counsel, and including the qualifying fees of the expert Gian Campetti incurred up to 19 February 2014'.

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W.L. WEPENER
Judge of the High Court

I agree.

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M.A. MAKUME
Judge of the High Court

Appearances:

For Appellant: Adv L. Morrison SC assisted by Adv B.M. Gilbert

Instructed by: Weber Wentzel

For Respondent: Adv P. McNally SC assisted by Adv A. Lamplough

Instructed by: Edward Nathan Sonnenbergs