IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.: 5814/2002

In the matter between:

VENFIN INVESTMENTS (PTY) LIMITED Plaintiff

and

KZN RESINS (PTY) LIMITED T/A KZN RESINS

Defendant

J U D G M E N T

VAN DER REYDEN J:

INTRODUCTION

Fibalogic (Pty) Ltd (Fibalogic) ceded its right to claim damages from the Defendant to Venfin Investment (Pty) Ltd (Plaintiff).

The Plaintiff in turn indemnified Fibalogic against the Defendant's claims for payment for resin sold and delivered to Fibalogic.

The dispute between the parties has its origin in the failure of glassfibre geysers manufactured by Fibalogic. At all material times the Defendant was the supplier

of resin used by Fibalogic in the manufacture of the geysers. Fibalogic concluded that Defendant's resin was the cause of the failures.

The Plaintiff claims damages from the Defendant based on an alleged oral agreement between Fibalogic and the Defendant in terms of which the Defendant has agreed to compensate Fibalogic for certain consequential losses flowing from the geyser failures. The Defendant counterclaims for resin sold and delivered.

By agreement between the parties, three issues were referred for determination by this Court.

IN SUMMARY THESE ISSUES ARE:

1. The issues in relation to the oral agreement contended for by the Plaintiff ("the agreement") and the impact of any of the Defendant's standard terms and conditions on the agreement, which issues are defined *inter alia* by paragraph 9 of the Plaintiff's amended particulars of claim, read together with paragraph 8 of the Defendant's amended plea ("the first issue").

2. The issue as to whether the indemnity furnished by the Plaintiff to Fibalogic as provided for in clause 12.5 of the sale agreement (annexure "FGR9" under case number 1720/2004), constitutes an indemnity as contemplated by Section 156 of the Insolvency Act 24 of 1936 ("the Insolvency Act"), red together with Section 339 of the Companies Act 61 of 1973, such as to render the Plaintiff liable for any existing indebtedness of Fibalogic to the Defendant in respect of goods sold and delivered ("the second issue").

3. The issues raised by paragraph 21 of the Defendant's counterclaim read with paragraphs 15 and 16 of the Plaintiff's plea thereto dealing with the Plaintiff's status as cessionary of Fibalogic in its claim against the Defendant and whether the Defendant is entitled to rely upon its counterclaim against Fibalogic for payment of the amounts due for resin sold by the Defendant to Fibalogic.

During the course of a ten-day period (11 to 15 February 2008 and 28 July 2008 to 1 August 2008) Mr. Dawie Thirion (Thirion) on behalf of the Plaintiff and Messrs Don Reid (Reid) and Salim Kajee (Kajee) on behalf of the Defendant testified.

It is common cause that Thirion during the relevant period – was the managing director and Reid the technical director of the Plaintiff and Kajee the director/chairman of the Defendant.

Plaintiff's argument on the first issue: The oral agreement

Mr Dickerson's argument focused on paragraph 9 of the Plaintiff's amended particulars of claim and the Defendant's response thereto.

Paragraph 9 of the Plaintiff's amended particulars of claim reads as follows:

"9. On or about 23 November 2001, at Paarl, Fibalogic, represented by its Managing Director Mr Davie Thirion, and Defendant, represented by its Chairman Mr Salim Kajee, both of whom were duly authorised thereto, concluded an oral agreement, the material terms of which included the following:

9.1 Defendant would compensate Fibalogic for the costs incurred by Fibalogic in respect of all returns in excess of the Fibalogic's normal returns, which norm is 2% of the number of units produced by it;

9.2 Such costs would include the costs of the replacement water heater (geyser) and Fibalogic labour and travelling costs.

The agreement was confirmed on 26 November 2001 by Mr Thirion in a letter to Mr Kajee, which reads as follows:

"Dear Salim

We refer to our meetings of 16, 22 and 23 November 2001.

After analysing all the variables we are all in agreement that there is a difference in performance between the resins supplied by you and the resins previously used.

We have discussed and shown you from our analyses the norm expected from a resin as used in our back-up layer on our tanks. We believe that the main question remains unanswered as to the difference between your resin and the one previously used.

At these meetings we discussed the option of continuing with your resins on the thicker lay-up (150 litre) and at the same time testing a Terapthalic resin which you believe will be the ideal resin for our application.

Summary of the meeting, dated Friday, 23 November 2001;

- Your chemist (N T Moodley) will motivate his reasons for changing from an ISO resin to a Terapthalic resin, based on our application on a matrix comparing the advantages and disadvantages of the two resins;

- KZN Resins will compensate Fibalogic the difference between the agreed norm (of two percent of production) and the actual rate experienced. This will include the cost of the geyser as well as the labour/travelling cost.
  (Warrantee costs);

- KZN Resins will continue to subsidise the additional lay-up costs on the 150 litre tank. As discussed with your Accountant, this will result in an average price of R12, 57 per kg. We are however prepared to pay R12,60 per kg).

Whilst we appreciate and accept your offer as outlined above, we however are still of the opinion that the reason(s) in variation of performance must be found and we will run independent tests to answer this.

Regards

D Thirion"

CC FG Rupert

D Reid

Paragraph 8 of the Defendant's amended plea reads as follows:

"8 Ad paragraph 9

Save that the Defendant admits that on or about 23 November 2001, and at Paarl, Mr Thirion and Mr Kajee had a discussion and that the Plaintiff wrote a letter dated 26 November 2001 (annexure 'A' to the particulars of claim) to the Defendant, the Defendant denies each allegation in paragraph 9 and:

(a) specifically denies that it concluded an oral agreement with the Plaintiff either in the terms alleged or at all;

(b) specifically denies that annexure 'A' correctly reflects or records the matters discussed at the meeting between Mr Thirion and Mr Kajee on 23 November 2001;

(c) Alternatively, and in any event, the alleged oral agreement could have no force or effect in terms of clause 2.1 of the said standard conditions, read with clause 3.1 of the said standard

conditions, standard because if proved it would constitute a variation of the terms and conditions otherwise than in writing."

Mr Dickerson submitted that in order to determine the first issue, two questions must be addressed; firstly whether any agreement was reached by the parties during the meetings on 22 and 23 November 2001 and if so, secondly what the terms of the agreement were.

On the first question he argued that on the conspectus of the evidence of Thirion, Reid and Kajee an agreement was concluded during these meetings.

The real issue, however, relates to the terms of the agreement which was concluded. This issue has now been reduced to a fundamental dispute in which the Plaintiff maintains that it was a term of the agreement that compensation would be paid by the Defendant, whereas Defendant and its witnesses maintain the agreement to have been merely that the Plaintiff would only be compensated if the Defendant's insurer accepted the claim.

Mr Dickerson identified the following material facts as either common cause between the parties or conceded by the Defendant's witnesses.

1. Fibalogic was a manufacturer of hot water cylinders. Until January 2000 the hot water cylinders were manufactured *inter alia* using a product known as Derakane.

2. In January 2000, the production process for the hot water cylinders was changed to incorporate one layer of Derakane and a second layer of Isopthalic resin. The Isopthalic resin was manufactured by an entity known as NCS.

3. Mr Thirion became the managing director of Fibalogic in March 2000.

4. The change in January 2000 was colloquially described as the change to a single layer.

5. From January 2000 onwards the use of the single layer remained the norm until 14 August 2001.

6. In October 2000 Fibalogic switched from Isopthalic resin manufactured by NCS to Isopthalic resin manufactured by the Defendant. The change to the use of the Defendant's product occurred, in the main, as a result of a substantial increase in prices proposed by NCS, the then suppliers of resin.

7. Following the change of resin supplier from NCS to that of the Defendant, Fibalogic experienced a marked increase in the rate of returns of 150 litre hot water cylinders. This increase was from an initial average rate of return of 1.36% to well in excess of 2%.

8. The increase in the rate of returns coincided with Fibalogic making use of the resins supplied to it by the Defendant. Fibalogic (and Messrs Thirion and Reid) concluded that the increased rate of returns was attributable to the use of the Defendant's resin.

9. Mr Thirion was under severe pressure from the board of directors of Fibalogic which board of directors included Mr Reid to resolve the problem of the increased rate of returns. It was apparent that there would be serious consequences to the business of Fibalogic – in fact the very existence of that company – if the problem was not curtailed.

10. The Defendant regarded Fibalogic as a substantial client with the potential to grow even further, and it was prepared to do everything possible to retain Fibalogic's business.

11. As part of the attempts to address the substantial increase in the rate of returns, an agreement was concluded in August 2001 between the Defendant and Fibalogic in terms of which the Defendant agreed to compensate Fibalogic for the cost of an additional layer of resin being applied to the hot water cylinders. It was hoped, and believed by the Defendant, that the additional layer would solve the problem of the increased rate of returns.

12. A number of meetings were held in November 2001. These meetings were attended by Mr Thirion on behalf of Fibalogic, and *inter alia* Messrs Kajee and Nair on behalf of the Defendant. The meetings convened during November 2001 – and in particular those held on 22 and 23 November 2001 – were obviously important, and called to address the

particular issue of the increased rate of returns. The Defendant sent a large delegation from Durban to attend the meeting.

13. Prior to the November 2001 meetings, Mr Thirion had approached NCS, the previous supplier of resins to Fibalogic, in order to explore the possibility of their once again becoming the resin supplier to Fibalogic.

14. The fact that Mr Thirion wrote the letter (supra pages 3 to 4) to the Defendant on 26 November 2001 – that is the next working day after the conclusion of the November 2001 meetings – The Defendant's disagreement with the contents of this letter is reflected in the letter of 8 July 2002.

15. Mr Thirion, on behalf of Fibalogic proceeded to deduct from amounts payable to the Defendant those amounts representing the compensation to which Fibalogic was entitled in terms of the agreement.

Mr Dickerson argued that insofar as Mr Reid and Mr Kajee contrived to assert the agreement was conditional i.e. that compensation would be paid by the Defendant to Fibalogic only in the event that its insurer agreed to pay, their evidence is highly improbable even at face value, and they are so lacking in credibility that their testimony cannot be accepted.

With regard to the evidence of Mr Thirion Mr Dickerson argued that his evidence was largely unchallenged in cross-examination. Even on those issues where he was challenged, he emerged from cross-examination unshaken. In this regard he made the following submissions:

1. From Mr Thirion's evidence it is plain that he approached the meetings in November 2001 with a clear understanding of what he required from those meetings, and on the clear understanding that were he not to achieve his objective, Fibalogic would stop using the Defendant as a supplier of resin. This was clearly communicated to the Defendant's representatives at the time. This is corroborated by the fact that when it became apparent that

the Defendant did not intend compensating Fibalogic as demanded by Mr Thirion, Fibalogic in fact stopped using the Defendant as its resin supplier.

2. Moreover, Mr Thirion relied on extensive and ongoing contemporaneous notes which he referred to in his evidence and which corroborated his version of events in every respect. His evidence was corroborated by other objective records, such as the minutes of the meeting of the board of directors of Fibalogic. In this regard Mr Dickerson referred to the following:

2.1 The minutes of the meeting of the board of directors of Fibalogic of 29 November 2001 read as follows:

"Failures on geysers due to the resin being used, lead to negotiations of KZN Resins. They undertook to repay the amount of ±R300,000.00 to Fibalogic and in future to compensate Fibalogic for the difference between the agreed failure norm (2% of production) and the actual failure rate. This will include the cost of the geyser as well as the labour/travelling costs."

2.2 The minutes of the meeting of the board directors of Fibalogic of 24 April 2002 read in its relevant part as follows:

"Meneer Thirion rapporteer dat KZN, Fibalogic se resin verskaffer angedui het dat hulle die Fibalogic eis teen die kwaliteit van hulle produk moontlik as 'n eenmalige skikkings eis wil hanteer, alhoewel hulle onderneem het om enige kostes vir resinverwante valings bo 2% te betaal. Kennis word geneem dat 'n bedrag van R650,000.00 tot op hede teen die KZN rekening gedebiteer is."

With regard to the evidence of Mr Reid he argued that:

1. Mr Reid conceded that, as a director of Fibalogic, he owed it certain fiduciary duties. He conceded that he was also under a duty at meetings

of the board of directors of Fibalogic to correct statements which he knew to be wrong and to raise any material facts which were relevant.

2. Mr Reid was present at the important board meetings of Fibalogic where the agreement with Defendant was discussed. At these meetings he never raised or suggested that Mr Thirion's account of the agreement reached with the Defendant, as recorded in the letter of 26 November 2001, was mistaken. More importantly, he participated in board decisions which were taken on the basis that there was such an agreement.

3. Mr Reid confirmed that the minutes of the board meetings were an accurate reflection of what were discussed at those meetings.

4. Mr Reid claims to have spoken to the internal auditors of the Rembrandt Group, in order to express his dissatisfaction at the fact that deductions were being made by the Plaintiff to the Defendant's account. However, he was unable to point to any documentation in substantiation of this, or to say when it occurred other than that it was probably after July 2002.

5. Mr Reid stated that it was agreed that Fibalogic's compensation would cover the cost of the Geyser as well as the labour/travelling costs as reflected in the letter of 26 November 2001, and that was in fact agreed.

6. Mr Reid agreed that a norm of 2% had been agreed between the parties, as also that the 2% mark was the cut-off point for liability.

7. It appears from the evidence of Mr Reid that the only letter which he did not receive which was copied to him was the letter of 26 November 2001.

All of the other letters which were copied to him were apparently received by him.

Mr Dickerson argued that Mr Reid was an evasive, unsatisfactory and unreliable witness. Moreover the version of events put forward by him relating not only to the letter of 26 November 2001, but also relating to the allegations made by him regarding the issue of agreement being conditional on the insurers making good the loss, are improbable. It follows that his evidence should be rejected where it is inconsistent with that of Mr Thirion.

As far as Mr Reid's evidence relating to the insurance is concerned, he submitted that it is improbable at best. In particular, it would appear to be quite improbable that agreement would be reached on matters such as the costs of labour and travelling – as also the norm of 2% - if the agreement remained conditional on the insurance company agreeing to compensate Fibalogic. In those circumstances, an agreement on these issues would serve little practical purpose.

With regard to the evidence of Mr Kajee, Mr Dickerson submitted that Mr Kajee was evasive, dissembling and a palpably mendacious witness. It is apparent from a consideration of his evidence that whatever he thought was convenient at the time was the stance that he adopted in relation to the facts.

In this regard, Mr Dickerson made the following submissions:

1. There was no hint in the letter of 8 July 2002, addressed by Mr Kajee on behalf of the Defendant, to Mr Thirion, that Mr Kajee was aware that there was a possibility that the insurance claim would not be honoured by the

insurance company. On his own evidence he was aware of the potential difficulties pertaining to the insurance claim as early as 28 January 2002.

2. His reliance on the issue of insurance was no more than an *ex post facto* attempt to evade the consequences of the agreement. This is evidenced by the fact that Mr Kajee now claims in his evidence that at the time of the meetings in November 2001, he did not believe the Defendant had any liability towards Fibalogic. His attempts to then explain how he could – as he claimed – have proposed a claim to the insurance were revealed as contrived and dishonest. In fact, as far as the insurance was concerned, Fibalogic would be doing no more than *"taking a chance"* that the insurers might pay.

3. The letter of 8 July 2002 was an attempt – in essence – to perpetuate Mr Thirion's belief that there was an agreement to compensate in order to retain Fibalogic's business, whilst at the same time avoiding a traceable acknowledgement of liability, which may have imperilled the insurance claim. In short, he was attempting to deceive one or both of Fibalogic and the insurer.

4. His evidence on when he learned about the increased rate of failure to 2% changed in the course of his evidence. Having at first conceded that this had been conveyed to him by Mr Thirion, he later sought to distance himself from this evidence.

5. No credible or satisfactory explanation was given for the failure to respond, in writing, to the letter of 26 November 2001. In this respect, the following is particularly relevant:

5.1 The letter from Fabalogic to the Defendant of 26 November 2001 remained unanswered until 8 July 2002, that is more than seven months after that letter was written. Even then, Mr Kajee said he avoided disputing the agreement to compensate because if he had done so he knew Fibalogic would move to another supplier, as threatened before the November 2001 meetings.

Relying on Hamilton v Van Zyl 1983(4) SA 379 E at 388 F-G and McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA (A) at 10 D – F. Mr Dickerson argued that where an agreement is allegedly concluded between two parties, and one party sends the other a letter setting out what he or she understands the terms of the agreement to be, the absence of a reply will usually be evidence that those terms were accepted as correct. Furthermore under cross-examination Mr Kajee agreed that a reasonable businessman who received the letter and disagreed with it would have written back to say the recording was wrong.

Mr Dickerson submitted that the Defendant could have been under no misapprehension as to what Fibalogic understood to be the terms of the agreement concluded between them if regard is had to the content of Thirion's letter of 26 November 2001 (*supra*) under the heading "Summary of the meetings dated Friday 23 November 2001."

Mr Thirion's evidence is entirely consistent with the probabilities in this matter. It follows that where the evidence of Mr Kajee is inconsistent with that of Mr Thirion, it ought to be rejected.

Moreover his evidence is borne out in every respect by the conduct of the parties in that:

1. Fibalogic in fact deducted amounts from monies due to the Defendant as a consequence of the agreement reached by the parties.

2. There was no protest on the part of the Defendant as regards this conduct until after it became apparent that the insurance claim lodged by them might be rejected.

3. The Defendant requested, and received, an invoice from Fibalogic. The only convincing explanation for this is that the Defendant intended to compensate Fibalogic in terms of the agreement reached between the parties. No reasonable businessman would incur a substantial VAT liability, (in this case, in excess of R90,000.00), on the speculative basis that an amount may or may not be claimed from an insurance company in due course.

4. Moreover, the version put up by the Defendant as regards the insurance claim is improbable on the basis that no reasonable businessman in the position of Mr Thirion would have accepted such agreement. Mr Kajee acknowledged this. On Mr Kajee's account, he knew that the Defendant could never be liable to the Plaintiff as a result of the terms of the credit application completed by Fibalogic. Despite this, Mr Kajee said nothing to Mr Thirion, in an obvious attempt to deceive him.

Mr Dickerson argued that the credibility of Mr Reid and Mr Kajee is accordingly placed in doubt by the evidence given by them. Furthermore despite Mr Reid's obvious inability to remember dates, he was suddenly able to remember that he received a telephone call from Mr Kajee the day after Mr Kajee had received a letter that he, Mr Reid, purported never to have seen before. It follows, that the

Plaintiff's version of the agreement – as pleaded at paragraph 9 of the Amended Particulars of Claim – ought to be accepted by this Court.

COUNSEL'S EVALUATION OF THE EVIDENCE

Mr Harpur countered Mr Dickerson's reliance on Hamilton (*supra*) with the argument that these authorities do not say that it is mandatory to revert with a written response. The relevant extract from Hamilton (*supra*) at p. 388 F-G reads as follows:

> "Where there have been previous negotiations between the parties, and particularly where the letter itself refers in detail to such previous negotiations, to previous under takings to pay and extensions of time given, and to the fact that there was a witness to such undertakings, the failure to reply or in any way to dispute such allegations is in my view inexplicable, save as an admission of the truth thereof."

Mr Harpur argued that Kajees's oral response as confirmed is perfectly acceptable. Furthermore Kajee explained that he was weary of broaching the topic of liability in writing, in case it was misconstrued by the insurance company. I am satisfied that the documents relied upon in Hamilton (*supra*) and McWilliams set out the terms allegedly agreed upon in much more detail and certainty than those set out in Thirion's letter.

I am not persuaded that Kajee's failure to reply in writing to Thirion's letter seen against his evidence as confirmed by Reid, can be taken as an admission by him of the conclusion of the contract relied upon by the Plaintiff.

Mr Dickerson urged me to follow the approach in Ultraframe (U.K.) Ltd v Fielding and others [2005] E W Hc 1638 (Ch) par 12 of the Judgment where the Court stated the following on the evaluation of evidence:

"However, a judge should not fall back on the burden of proof as a way out of making difficult decisions. In Stephens v Cannon [2005] EWCA Civ. 222 Wilson J, giving the only judgment of the Court of Appeal said:

"(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.

(b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.

(c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.

(d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.

(e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a *moiré* detailed demonstration and explanation in judgment will be necessary."

On the manner in which evidence should be considered Mr Dickerson relied on the "Occam's razor" approach referred to in par. 18 of the judgment (*supra*).

"**Occam's razor**

18. Faced with a mass of evidence, much of which is alleged to consist of deliberate, elaborate and persistent lies; and given a mound of

> documents, many of which are alleged to have been fabricated, backdated or forged, Occam's razor may be a useful tool. In its essence the principle of Occam's razor (or the principle of parsimony), formulated by the mediaeval schoolman William of Occam, is that where there are multiple explanations available for a phenomenon, the simplest version is to be preferred, because it requires the fewest assumptions. The principle must of course be used with circumspection and it is no more than a working tool. But it has its uses."

In conclusion Mr Dickerson argued that the principles expressed apply with equal force in South African law and that this court will not shy from finding that the probabilities favour the Plaintiff. The mere fact that the Defendant has presented the evidence of two witnesses whom, it alleges, confirm its version of events that the agreement concluded was conditional on insurance cover being granted, is not of such a nature that this Court can shy from its duty to make a proper and considered finding on the probabilities. He submitted that the only finding that this Court can make on the probabilities - despite the welter of evidence that has been presented to it - is that the agreement contended for by the Plaintiff and supported by the largely unchallenged evidence of Mr Thirion ought to be accepted as having been proved by it.

I do not propose to deal at length with Mr Dickerson's reliance on the Ultraframe case (*supra*).

His reliance on this case is misplaced. My understanding of our South African law is that the onus of proof has to be considered, albeit not in isolation, to make a ruling in any legal dispute. The short answer to Mr Dickerson's argument is to be found in the dicta of De Villiers JP and Leon J in Schoonwinkel v Swart's Trustees 1911 TPD 397 at p. 401 and S v Singh 1975 (1) SA 227 (N) at p. 228 approved by Joubert AJA in S v Guess 1976 (4) 715 (AD) at p. 718.

In essence a court "is …. To apply its mind not only to the merits and demerits of the" plaintiff's and defendant's witnesses "but also to the probabilities of the case". per Leon, J in Singh (*supra*)

In the present matter this approach must be adopted to establish whether the plaintiff has discharged the onus in proving the contract on which it relies.

Defendant's argument on the first issue

Mr Harpur's argument commenced with an analysis of paragraph 9 of the Plaintiff's Particulars of Claim (*supra*), the letter from Fibalogic to the Defendant dated 26 November 2001 (*supra*) and paragraph 8 of the Defendant's amended plea (*supra*) which in sub-paragraph (e) introduces clauses 2.1 and 3.3 of the Defendant's Standard Terms and Conditions of Sale (Plaintiff's "B" Bundle at p. 754).

Clause 2.1 provides:

"The Standard Conditions of Sale shall augment the specific terms of the sale as agreed to between the parties and shall unless and only to the extent otherwise agreed in writing by the parties, apply to the exclusion of any standard conditions of purchase which may appear on any order or other similar such document of the buyer or its agent."

"The company shall in no circumstances be held liable to the buyer to to any other persons for any loss or damage whether direct or consequential arising from the use of such goods or materials or any other portion thereof or from any alleged defects in them."

In paragraph 6 of the Defendant's Plea, the Defendant relied upon Clauses 2.1,

3.1 and 3.3 of the Standard Terms and Conditions.

Clause 3.3 reads as follows:

"In all cases where the goods are supplied to the specification, design or description of the buyer, the buyer indemnifies us, our servants, agents or any persons whom we may be liable in law against loss, damage or expenses including legal costs which may be demanded from or a sustained by one or more of us, our servant, agents or persons to whom you are liable in law, by reason of any claim brought by any third party (not restricted to claims contemplated in this clause) arising out of the implementation of this agreement or any act or omission on the part of the buyer, its servants, agents or persons for whom it is liable in law."

Mr Harpur referred to paragraph 1 of the Plaintiff's Replication in response to paragraph 6 of the Defendant's Plea. He argued that since paragraph 1 of the Plaintiff's Replication is specifically mentioned in the Consent Order defining the first issue, it is also now important to set it out in the terms in which it was pleaded by the Plaintiff:

"1. AD PARAGRAPH 6:

1.1 The Plaintiff admits that on 7 July 2000, Mr King acting on behalf of the Plaintiff applied to the Defendant for credit facilities in terms of Annexure "1" to the Claim in Reconvention.

1.2 Clause 4.4 of Annexure "1", provided that the Plaintiff would at all times be bound by the Defendant's Standard Terms and Conditions of Sale".

1.3 Clause 2.1 of the Defendant's Standard Terms and Conditions of Sale reads:

"The Standard terms and conditions of sale shall augment the specific terms of the sales as agreed to by the parties and shall, unless and only to the extent otherwise agreed in writing by the parties, apply to the exclusion of any order or other similar such document of the buyer or its agent."

1.4 Accordingly, writing was only required in circumstances where at the time of purchase, it was sought to apply any other standard conditions of sale appearing in any order or similar document.

1.5 The Plaintiff admits that Clauses 3.1 and 3.3 of the Standard Terms and Conditions apply to each of the sales referred to in paragraph 8 of the Particulars of Claim and to the extent that they are correctly reflected therein, admits paragraph 6 (c) and (d) of the Plea.

1.6 Nothing in Clauses at 3.1 and 3.3 or elsewhere in the Standard Terms and Conditions of Sale precluded the parties from concluding the agreement referred to in paragraph 9 of the Particulars of Claim, whether by way of oral variation of Clauses 3.1 and 3.3, or by way of an oral waiver by the Plaintiff or Fibalogic of the rights conferred upon Fibalogic by those clauses or by way of the co-lateral oral agreement or otherwise."

Mr Harpur's submissions on the Onus: Thirion's evidence in chief

Mr Harpur dealt briefly with the onus of proof resting on the Plaintiff to prove all the essential elements of the contract on which it relies and referred to relevant authorities in support of his argument.

The Plaintiff's sole witness on the conclusion of the contract in issue and its terms is Thirion. His evidence and that of Reid and Kajee for the Defendant require close scrutiny and I therefore incorporated most of Mr Harpur's references contained in his heads of argument to Thirion's evidence and that of Reid and Kajee. Having regard to the voluminous transcript of the evidence I am indebted to Mr Harpur for condensing the evidence of Thirion, Read and Kajee to the essential passages relevant to contractual issue.

1. In April 2000 Thirion was employed by Fibalogic as Managing Director and Mr Reid as the Production or Technical Director. In April 2001 the financial position of Fibalogic was not good. There were a number of different potential problems with the geysers during 2001 including, thermostats, bond leaks, and resin. At that stage, Thirion did not ask for any explanation from the Defendant. If he could have succeeded in rectifying the problems, he would have been the "*blue-eyed boy*" in the group. The problem was that he notwithstanding an increase in sales, the return of defective geysers also increased. He experienced tremendous pressure from ABSA Insurance as a result of damage that was caused as a result of failing geysers in customers' roofs. He suspected the Defendant's resin on the basis that he previously used a blue drum of resin (NCS resin) and changed this to a green drum, (the Defendant's resin) and was then faced with an increase in returns of defective geysers. This was as at 22 November 2001 and at that stage a meeting was held between Fibalogic and the Defendant.

2. According to Thirion's handwritten note, the persons who attended that meeting were Salim Kajee ("Kajee") , Sabeer Kajee, N T Moodley, Reid, and himself. Helpful background to this meeting is to be found in the following documents:

[a] a letter from Kajee on 20 August 2001; in the A Bundle at pages 255 and 256; and a letter from Thirion in response in the A Bundle at pages 270 and 271, confirming an agreement that an additional strengthening layer would be used in the geysers and that Fibalogic would pick up the cost of the additional glassfibre used (a reference to the actual fibre matting/cloth) and that the Defendant would supply free of charge, the additional resin for that layer.

[b] A minute of a meeting of Directors of Fibalogic held on 31 October 2001 from which it is apparent that there was concern as regards the high cost of guarantee calls, a clear reference to failure in the geysers and that there were a number of possible concerns, including the failure of suppliers, products, valves, thermostats and elements and that a detailed timeline be compiled in order to pinpoint the problem currently experienced.

[c] A minute of a meeting held at an earlier date on 21 August 2001 (*Bundle A pages 253-254*), at which the following is noted: "*The meeting concluded very positively and Dawie (Thirion) seemed to be pleased that it was not the A560 resin (Defendant's resin) as originally thought*" which was

subsequently explained by Kajee on the basis that Thirion had been pleased at that stage that it was not the Defendant's resin that was to blame for the geyser problems.

[d] The document at page 184, which is a minute of a Management Meeting of Fibalogic held on 28 June 2001 which records that: "*It was noted that the main area of complaint still is thermostat-related and various tests are currently undertaken to establish the problem, together with the manufacturer.*"

[e] Thirion's handwritten notes as at July 2001, where he is still asking questions such as:

> *"Do we know why geysers pop?*
> *Do we know why geysers develop bond leaks?*
> *Our tests relate to field experience.*
> *Specifying use of material-vs-working of material.*
> *Increase since October; Isothalic KZN; Bonding Paste KZN; co-incidence?"*

[f] The documents at page 261-262 which is a timeline drafted by Mr Don Reid, from which it is apparent that in the latter stages of the use of the NCS resin, and prior to the adoption of the Defendant's resin, Fibalogic decided to compromise the design of the geyser by cutting from it a layer of cloth and resin, which

was in fact the layer that was later added back; with Fibalogic and the Defendant sharing the cost of that addition. At that stage, according to Reid, Fibalogic did not disclose that it had earlier cut out this layer from the design specification, but according to Kajee, the Defendant had

> ascertained this in any event at the time by examining cut-throughs of the geysers and was, as it had done all along, co-operative in an attempt to assist the Plaintiff in order to further a mutually beneficial relationship.

Mr Harpur submitted that against this background it is quite clear that it was not the state of mind of anybody on behalf of Fibalogic, on the one hand and on behalf of the Defendant on the other hand, that the cause of the geyser failures had been pinpointed and it was not the state of mind of anybody that it had been established that it was any defects in the Defendant's resin that caused those geyser failures. Fibalogic was responsible for the original and continuing design changes of the geyser. Fibalogic provided the specifications for that geyser, including specifying which type of resin should be used. This was common cause. If the type of resin that was used was wrong, then no blame can be laid at the Defendant's door. It is Fibalogic's fault for specifying the wrong type of resin; i.e Isopthalic resin used in a dual lay-up instead of Vinyl-Ester resin used in a single lay-up. If however the correct type of resin was specified and used

and the resin itself was defective, then no blame could have been laid at the Defendant's door. In the latter instance, only, could blame be laid with the Defendant, and then Fibalogic's remedy according to the Standard Terms and Conditions was to require the Defendant to replace the defective product, if it was defective, and extended no further, and certainly did not include the right to claim any amount for damages, whether direct or consequential. Quite apart from the Standard Terms and Conditions, excluding all other liability, there were exclusion clauses on the green drums themselves, and each batch of resin was accompanied by a Certificate of Analysis, which itself contained an exclusion clause. The exclusion sticker on the drum and on the Certificate of Analysis, were identified as being that set out in *Bundle B at page 665*.

Mr Harpur argued that on examination of Thirion's notes of the meeting, which are only two pages, *Bundle A page 350 and 351*, reveals that he made various cryptic notes, none of which reflect the conclusion of any agreement. In commenting on these notes, Thirion says, that he deduces from the relaxed nature of his handwriting that he must have made it on his own as a summary of the meeting that took place on 22nd November. According to him, he was in and out of the meeting the whole time. In his evidence-in-chief, Thirion hardly deals with that meeting and certainly does not conclude that any agreement was concluded at that meeting, nor is this the Plaintiff's pleaded case. He focused more on the meeting of Friday 23rd November 2001. He says the people who

attended the meeting on the 23rd were Salim Kajee, Mr O'Neill, and himself, Dawie Thirion. The notations appearing at page 352 in the A Bundle were made at the time of the meeting. He said that the reference to 2% at page 352, multiplied by the turnover resulted in a figure of R264 000.00 that he would have expected Fibalogic to spend on warranty costs, in the normal course of events. He was unable to identify what the figure of R677,000.00 on his notes referred to. The figure of R619 739.42 was the actual warranty material used. During this discussion with Kajee and O'Neil, they threw around ideas to arrive at a comparison. They sat with a concept, and he said "*that's what I expected and look what I have*" and "*what are we going to do about the matter*". The reference to 1.5 kg of resin for free, cost of future resins, noted at page 352, was a reference to the 1.5 kg of resin that Fibalogic at that stage obtained for nothing, in respect of the 150 litre, cylinder geysers, and the question was what were they going to do about future costs, he suggested that this should rather be in the form of kilograms resin supplied free. Further discussions ensued and he put it on the table that the geyser failures from October 2000 were above the norm of 2%. When he was asked what the reaction was to that suggestion, he replied that: "*Die gesprek het voortgegaan U Edele. Verdere onderhandelinge het plaasgevind, die vergadering het aangehou.*"

Mr Harpur argued that it is very significant to note that on this version there is no agreement. All that happened was, that there was a suggestion made by him

that geyser failures from October 2000 were above the norm of 2%. This was not something that particularly called for a reaction. On this evidence, this was not even a demand for payment, and certainly cannot be construed as an offer and acceptance, from either side. From the notations at 353 and 354 in the A Bundle, it is apparent that they refer to the double lay-up consideration and a suggestion regarding teraphthalic resin. Thirion wanted to know what the teraphthalic resin would cost per kilogram before he would give it attention. Thirion says that he undertook to work out what the deviation norm was in relation to the actual returned rate, with reference to the 2% that he put on the table and that he suggested as to how to resolve the problem.

Mr Harpur argued that Thirion's remarks that this is "*hoe ek die ooreenkoms wat bereik is, verstaan het."* is mystifying, because none of his evidence up to that point indicated that any agreement was reached at all, and certainly if one refers to the notes which he stated constituted a summing up, there is no agreement reflected there either. He was then asked about page 355 and in particular, the portion above the horizontal line reflected there. He said that that related to the proposal regarding the 1.5 kg resin for the additional layer.

When he was asked about page 359 in his diary, which has a heading “1. Brief. KZN: Summary”. He said that he wrote this at the end of the meeting to sum everything up. Mr Harpur submitted that it is of great importance that this

summary nowhere records that any agreement was reached. Mr Harpur emphasised that nowhere in Thirion's evidence as regards the events that took place at the meetings on 22nd and 23rd November 2008 does he testify that in fact, an agreement was reached, and as indicated above his evidence cannot even be construed at a level that there was an offer and acceptance made by any person. When he was asked about the letter, which forms the Annexure to the Particulars of Claim, a copy of which is reproduced in the A-Bundle at pages 361 and 362, Thirion says that he drew up the letter with the support of Mr Reid and that because he, Thirion, is Afrikaans-speaking, he asked Mr Reid, who is English-speaking for help with the drawing up of the letter. Thirion says he typed the letter himself but Reid sat on the other side of Thirion's desk and together they drew up the letter. When he was then taken through the contents of the letter, he was asked in particular about the crucial passage at page 362, which reads:

> *"While we appreciate and accept your offer as outlined above, however, we are still of the opinion that the reason or reasons in variation of performance must be found and we will run independent tests to answer this*."

Mr Harpur argued that it is significant, that apart from an offer to pay in respect of the extra resin for the additional lay-up layer, in respect of which Fibalogic was to share in the cost, there was no offer mentioned by him at all during his evidence, certainly, not an offer to pay for damages above the 2% as alleged in the letter. Moreover, the fact that he purports on the one hand to confirm the letter which

refers to an offer and an acceptance thereof by the letter itself, yet on the other hand to contend, after the event that the letter somehow confirmed an agreement that had already been reached, is contradictory. The reality was that Thirion was under an ultimatum from his Directors that he had to have an answer to the problem by the end of November. Thirion's evidence regarding the participation of Reid in the drafting of the letter is denied by Reid. Reid also denies that there was any agreement concluded during the crucial meetings, or at any time. Reid confirms that after the letter was sent out to Kajee, Kajee telephoned Reid and told him that the letter was wrong and that he had not offered to pay or admitted liability and instead had referred to the fact that Fibalogic was welcome to attempt to prove to the Defendant's insurers that the Defendant was to blame, and it would be up to the insurers to decide on the fate of the matter.

Mr Harpur argued that by the time of the subsequent Directors' Meeting a few days later, Thirion, now faced with the ultimatum, was telling the Directors that an agreement has been concluded. Mr Reid's understanding of this letter, was that this entire debate took place within the context of insurance and he did not focus particularly on what was said in this regard. Thirion denies flatly that he ever got any indication that the Defendant was unhappy with the contents of the letter.

Mr Harpur submitted that Thirion's evidence that the agreement allegedly reached was implemented by Fibalogic by withholding payments on KZN's

outstanding resin account and that there was no reaction to the withholding of payments is another aspect that does not entirely accord with the exact terms of the alleged agreement, because the letter refers to payment and not to withholding and set-off.

The cross-examination of Thirion

Mr Harpur submitted that when it was pointed out to Thirion that in his evidence-in-chief he did not say that there was a specific agreement reached by the Defendant's representative at the meeting of 23 November 2001 and the subsequent days his response was that he set out his understanding of the meeting in writing and that it was his understanding that an agreement was reached as set out in his letter of 26th November. When asked to answer the question directly, as to whether there was an agreement concluded at the meetings or not, he said according to his memory and what he can remember, yes there was, and that gave indication to the letter of 26th November. He confirmed that at the conclusion of these meetings that what had been reached was "verstandhouding van 'n ooreenkoms".

Mr Harpur argued that it is apparent from the examination of Thirion's letters generally that he had a good understanding of business and legal matters pertaining thereto. When asked whether he knew that a contract comprises an

offer and an acceptance and as regards whether there was an offer and a binding acceptance, he said that he understood that. When asked what the terms of the agreement were his response was, as set out in his letter. When he was asked whether it was specifically discussed at the meeting and whether the contents of the letter were specifically agreed, his answer was "*korrek*" but this answer collapsed under more detailed questioning as to exactly what was said. He was then asked to explain as regards what actually happened at the discussion and whether he actually said to them "look, this is the exact term that I want recorded" or not. His answer was that the general terms of the agreement were discussed and that at that stage, everyone was aware of the problem. This of course is contradictory to his evidence in chief where he said merely that there were further negotiations. When he was asked how long the agreement was going to last his answer was that it would last for as long as Fibalogic purchased resin from KZN and for as long as there were failings for the period from 13 October above 2%. He agreed that this was nowhere stated in his letter. It was pointed out to him that his allegation regarding the duration of the agreement was contradictory to what had been pleaded on behalf of the Plaintiff. He was driven to concede that there was no express discussion about the term of the agreement. There was considerable uncertainty on his version as regards exactly what would be covered by the agreement. He repeatedly talked about *"falings*" in the sense of failures being covered by the agreement. It was then pointed out to him that a failing of a geyser in a roof somewhere would have no

economic impact on Fibalogic, unless it is actually returned and Fibalogic replaced it at its own expense. He stated that he is aware that there were hundreds of geysers that were replaced by the owners themselves that Fibalogic did not even know about. It was then pointed out to him that surely he must have meant returns which were legitimately returned and in respect of which expenses were legitimately incurred. His response was that he could not claim something from KZN Resins if Fibalogic did not carry the financial consequences thereof. Whilst this no doubt makes sense, it is not what is pleaded in paragraph 9.1 of the Particulars of Claim nor what is contained in the second bullet point of the letter of 26 November 2001.

Mr Harpur argued that this demonstrates another important point – on Thirion's evidence, fairly construed as a whole, none of these very important details were expressly discussed at the time and he merely made up what he considered to be the terms of the agreement by way of reconstruction after the event, and over the weekend, after the meeting on Friday 23 November 2008 and then set them out in a letter as if they had specifically all been agreed, which of course they were not.

Thirion was also taxed as regards what was meant by the wording of the said letter, which written in the past tense Mr Harpur submitted seems to indicate that what Thirion said the Defendant had agreed to was the actual rate experienced.

His answer was that it was supposed to be in the light of the production months from 13 October for as long as the failure rate was above 2%. He was asked whether that was expressly discussed with Kajee, on his version and his answer initially evaded the question. When pressed by the Court, he sought refuge in a lack of memory: "*Ek kan nie nou onthou dat ek dit spesifiek so bespreek het nie. Die bedoeling was egter so maar of ek dit so spesifiek bespreek het, kan ek nou nie onthou nie".* He was then asked as regards whether he knew what was in Kajee's mind, and his answer was "*Ek het geen idée nie U Edele*". When pointed out that he said in his evidence-in-chief that it was difficult to explain things, and that maybe Kajee did not fully understand him, his response again was to seek refuge in a lack of memory: "*Ek kan nie dit onthou nie, U Edele*". The following question was then put to him: "*Well is it possible that they did not completely understand you when you talked about this agreement? We know that the term is undefined. We know that the actual rate experienced as summarised by you afterwards refers in the past tense and you have conceded that you don't know what's in their mind. Is it possible that your mind and their minds meet on these aspects?"* Thirion's response was that he could not really think out of their viewpoint, and that is why he set out his understanding in writing, and then said: "*ek weet regtig nie*". Mr Harpur submitted that this graphically demonstrates a lack of meeting of minds, and therefore no agreement.

When pressed by the Court as regards, whether there was in fact a meeting of

the minds, express meeting of the minds "*wils ooreenstemming bereik ten tye van die vergadering*", his answer was: *"die optrede het dit vir my laat verstaan. Daar was nie, so ver ek kan onthou, 'n ja of 'n nee daarop geskryf".*

Mr Harpur argued that if it was only the *"optrede"* that led him to this alleged understanding then clearly there was nothing said orally to lead him to the alleged understanding. When pressed on this point: "*So there was no definite indication of yes or no at that meeting, the series of meetings?"* The answer was again a refuge in a lack of recollection: "*Ek kan dit nie spesifiek onthou nie, U Edele*". Mr Harpur submitted that this clearly demonstrates that there was no oral agreement as alleged by the Plaintiff.

When it was put to Thirion that "*We have reached the point where you can't dispute what they say was in their mind at the time from their conduct at the meeting?*" Thirion conceded that *"Dit kan so wees, U Edele*". Mr Harpur argued that this evidence is insufficient to sustain the conclusion of an agreement. It was pointed out to Thirion that nowhere in his letter does it say that the Defendant's product must be used before the compensation will be paid, and his response was that it was self-evident that it would only apply where the Defendant's resin was used in production. He was then asked to assume that the Defendant's product was used but during the manufacturing process, Fibalogic's technicians who were now applying the layer to the mould, made a

serious error which has nothing to do with the Defendant's resin which caused a failure above the 2% and whether on his understanding, the Defendant was liable. His answer was that his state of mind was that the Defendant would nonetheless be liable if this caused the rate to go above 2%. Mr Harpur submitted that it is quite clear from Mr Thirion's responses that on his version he simply never gave this any thought and he had no idea as regards what Kajee thought on the topic: "*Ek weet nie wat in Mnr Kajee se gedagtes aangegaan het, of dit 'n belangrike client was aldan nie. Ek kan nie sê nie. Ek weet ook nie of Mnr Kajee in daardie stadium gedink het dat dit so a groot probleem so kon wees nie."*

Mr Harpur argued that on this testimony there was clearly no meeting of minds. Yet Thirion persists that there was an agreement. In this regard, Mr Thirion's persistence is clearly reconstruction and wishful thinking on his part, and once he had committed to the Directors in order to avoid the deadline set by them, this became entrenched in his thinking, although it had no factual basis. Even if the cause of going above 2% was thermostats, which was a well-known problem prior to the meetings, Thirion persisted that KZN would have to pay for this. Transcript page 278 lines 5-20. This again is an example of how there was clearly no meeting of minds, and the reconstruction adopted by Thirion is, so unreasonable as to be preposterous, and there is simply no possibility that there could have been any meeting of minds to this effect.

Eventually when it was put to Thirion that even at the Directors' Meeting subsequently, the question of failed thermostats was very much present to his mind, he alleged that thermostat problems had nothing to do with geyser failures. Thirion was asked whether he ever stopped to ask himself why any sane businessmen would agree to such a term and his answer was that he did not think of it at the time.

When Thirion was asked about the final paragraph being the letter at Exhibit A page 362 namely, the paragraph that indicates that the reason or reasons in variation of performance must be found and it was put to him that what would have happened if it was not the Defendant's resin that was at fault. His response was: "*U Edele, ek kan my herinner by 'n voorige vergadering het die punt ook opgekom en ons het dit bespreek en my bespreking en wat nou uitloop op 'n ooreenkoms wat nou gesien is twee verskillende goed, maar die punt is geopper indien dit nie KZN Resins die rede en die oorsaak daarvan sou wees, sou Fibalogic uiteraad daarvoor betaal. Dit maak tog net kommersiele sin dat as dit nie die produk is wat die probleem veroorsaak het nie kan u tog nie teen daardie persoon optree nie*". Mr. Harpur submitted that the fact that according to Thirion this point had also come up during a previous meeting, and that clearly the Defendant could not be held liable if it was not the Defendant's resin at fault, emphasizes that there can be no doubt in the agreement as contended for by

Thirion that the Defendant would not be liable if its resin was not to blame. The point was emphasised in the following question and answer: "*So you say KZN Resins would not be liable in those circumstances? – Korrek U Edele en ons het nooit terugvoer gekry op versoeke in die verband nie*". Again Thirion emphasised that in the following passage: "*Die punt wat ek probeer maak is dat KZN Resins is wat die probleem veroorsaak en toetse wys – toetse wys dat dit nie KZN is nie. Van waar ek beweeg sal ek nie 'n eis teen KZN instel nie. Die twee goed moet saam loop so ek verstaan nie die onderskeid nie".*

When taxed as regards why in his notes he had never recorded that there was an agreement, Thirion stuck to his version and when the Defendant's version was put to him in relation to proving, if he could, to the Defendant's insurers that the Defendant's resin was defective, he testified that the word *"insurance*" was not mentioned at all. "*So ver my kennis strek*". Mr Harpur argued that this testimony is directly contradicted by both Reid and Kajee and their evidence accords in this regard with the probabilities entirely – clearly such insurance existed and why would Kajee not mention insurance, as the first resource? Thirion conceded that if the word "*insurance*" and the topic was raised during the meeting, he would have known immediately that under no circumstances could Kajee admit liability as this was a common and usual term in insurance policies that liability could not be admitted by the insured. This is a telling point and renders incomprehensible Thirion's subsequent participation in the insurance. It

was pointed out to Thirion that in the A-Bundle at page 577, he acknowledged the fact that Kajee told him that he could never put any admission in writing because of the insurance claim. His response was that this was a reference to the period only after the alleged agreement was concluded and was during or about 7 December 2001. He conceded that a short time after the alleged agreement, namely on 7 December, insurance was raised. It also constitutes corroboration from Thirion himself that Kajee's attitude was that he could not admit any liability for fear of prejudicing the contemplated insurance claim.

Mr Harpur argued in relation to the notion that Reid had assisted Thirion to draft the letter, and Reid's denial of all knowledge of the letter, Thirion sought refuge in the fact that he is Afrikaans speaking, but was unable to explain the many other letters written by him in perfect English. In particular, the letter in the A-Bundle at page 577-578 is in perfect English and was admittedly written by Thirion himself: "*Ek het die brief alleen geskryf".* Thirion conceded also that the majority of his notes are also in English.

Mr Harpur in dealing with the evidence of the defendant's witnesses made the following submissions:

Don Reid started the company Fibalogic in 1995 and was the inventor of the geyser product, holding the patent in his own name, which patent was then ceded to Fibalogic. An expert notice was furnished in relation to his evidence

and he gave evidence in accordance with that notice and gave evidence which was both of an expert nature and factual. He is a qualified Marine Engineer and his many years experience.

The geyser as originally designed, was designed around the use of a certain type of resin, namely the vinyl-ester resin. As a cost-cutting exercise the design was changed from being a pure vinyl-ester barrier complete construction, to just the inner layer of vinyl-ester, and then another resin behind it, the second resin being in isopthalic resin i.e. it changed from a single layer to a dual layer construction. The change happened during that time that resin was still being purchased from NCS and initially there were no concerns as regards the weakness of that resin in the design, but then as a further cost-cutting exercise another layer of the glass fibre was cut off, which compromised the mechanical strength of the geyser.

Ultimately, there were failures with this design, and the failure surfaced during the period after Fibalogic had changed to purchasing the Defendant's resin instead of the NCS resin. Further testing resulted and in the words of the Reid: "*But now you weren't comparing apples with apples. This one had a layer of KZN and basically the same construction. Also, isopthalic resin with Derakane on the inside and the KZN started failing. They all passed the SABS test, every single one of them. They went out in the field and ……. and they started failing. So at that time we said it was the KZN resin because that's all it pointed to. However afterwards the NCS unit started and I had months because I kept a*

record. I think I tested something like 8000 units that came back, I had months where the NCS failures were as high as 22/25% of the month's production and we logged everyone of those." The result was: *So that "the NCS were also going. They just took longer because the construction was slightly different."* Reid was asked what in his expert opinion at the end of the day was the real cause of the geyser failures that had been experienced by Fibalogic and his answer was: "*In my opinion, undoubtedly the dual layer, even cutting it further made even more problems. So the original layer with the Derakane how it was designed that's the right way and I believe that's how It's being made now again*."

Reid concluded that the real cause of the defective geysers of Fibalogic was not any defective batch or batches of resin of the Defendant but a design problem and in particular, the conversion from the original single layer construction using vinyl-ester resin to a dual layer where vinyl-ester resin was restricted only to the inner core and the outer core was changed to isopthalic resin. Based on his expert knowledge of the industry he would not have expected the supplier of the resin to guarantee that the entire geyser would not fail. His explanation for this is that there are too many factors in the handling of the product to guarantee it. It depends on the amounts of catalysts that are putting in, how they mix it, how they apply it, what ambient temperatures you work in, there is a myriad of factors plus the contamination that can happen inside the factory and thus every single manufacturer in Reid's experience has said limited liability applies. The usual

practice is to give a Certificate of Conformance with the product. He explained the various variables involved in the process of manufacture from which it seems obvious that no reasonable supplier of resin would guarantee the performance of the end product being the geyser, in which the resin is used. More importantly, no manufacturer of geysers could reasonably expect such a guarantee from a supplier of resin.

Before accepting the Defendant's resin, Fibalogic did its own testing and was impressed by the Defendant's resin. Then the geysers started failing, and at the time it was a natural assumption on the part of Fibalogic that the Defendant's resin was to blame, because: *"The NCS weren't - the devil hadn't started sticking his head out yet, so we didn't have failures there".* Then Fibalogic "*got KZN in and we said "you need to start talking to us here" and I am sure you have seen through the case here that that's where the negotiations started with them*". At that time, Reid was the Technical Director. He was the main contact man between Fibalogic and the Defendant on any technical matter.

Reid was present at a meeting one 22nd/23rd November 2001, where a question of 2% returns was raised. He agrees with Thirion that 2% failure rate would be considered to be a norm in the industry. He was asked to comment on Thirion's version that there was an oral agreement concluded at that meeting when the 2% failure rate was raised. He disputed Thirion's version that there was no mention

of insurance made at the meeting. On his version there was no admission of liability nor undertaking to pay by the Defendant, and he repeated his understanding that all Kajee said in relation to liability was to the effect that, if it's the Defendant's fault then the insurers must pay. He said that in the period that they were talking about, they were talking about two batches. The total damage for that batch could have been R640,000-odd and Kajee had mentioned the insurance cover was R2.5 million.

Reid was referred to the letter from Thirion in the A-Bundle at pages 361 to 362, and he said that he never got the letter at the time. He stated that he received a phone call on 27 November from Mr Kajee saying *"I cannot accept liability on behalf of the insurance company*". He enquired what Kajee was talking about and Kajee's response was that he had got this letter from "*you people*". Reid asked who sent the letter, because he, Reid did not send it. Kajee's response was he got a letter from "*Dawie Thirion*". He suggested to Kajee that he phone Dawie and was present in the afternoon in the office with Dawie when Kajee phoned him, but does not know what was said on the telephone. When Reid was shown the letter in Bundle A at page 362 he again repeated that Kajee's offer was no more than that the matter should be referred to the Defendant's insurers and that the Defendant was not going to pay. If liable, the insurance company has got to pay and on the strength of this "*so I cannot see how he agreed to liability for that".*

Reid was asked about the subsequent Directors' Meeting Minute, a meeting at which he was present, and he said that he thought that they were talking about an insurance claim and although the minute does not mention anything about insurance, it was his understanding that they were talking about insurance. He was never required to sign off the minute as correct. He was referred to another minute of a meeting of the Board of Directors appearing in the B-Bundle at page 467, which this time mentioned insurance. This minute records that *"an independent test for the reason for the failed geysers must still be done".* He confirmed that a Mr Mark Collier, an Insurance Assessor had come to do his own investigation in the factory. This would have been in January 2002. Ultimately, the claim was rejected.

Mr Harpur argued that Mr Reid was subjected to a lengthy cross-examination, and remained steadfast in his version of events. There was some attempt to put questions to him which, if left unexplained, could lead to a misconstruction of his evidence and an objection was duly noted to this. Whatever confusion may have resulted from the manner of questioning, it was clarified in re-examination. In relation to Directors' Meetings, he clarified that there is no verbatim record of everything that is said during the Directors' Meetings, and that sometimes matters were left out. He testified that as at 31 January 2002 it was recorded in Management Minutes that the Defendant had said to Fibalogic that Fibalogic

must lodge its claim directly with the Defendant for insurance purposes.

With regard to Kajee's evidence Mr Harpur made the following submissions:

Prior to the meetings in question Kajee had been forewarned generally by the Defendant's Insurance Brokers to the effect that: "*at any time do not speak about liability, it's not your area of discussion. Refer it to the insurance and they will have a special department to the effect*".

When the Court asked about the reason for this, his answer was: "*My Broker indicated to us that, "if you discuss liability the insurance company will refuse to pay you".* Mr Harpur submitted that this is obviously an important point because it impacts directly on the probabilities. He was referred to the actual clause in question in the policy, which appears in the B-Bundle at page 774 and he confirmed that this was the clause that he had in mind.

He knew in general terms prior to the said meetings that the Defendant had had various problems with the geysers, but was not aware of all of the specifics. At the time of Thirion's note dated July 2001 asking questions such as "*Do we know why geysers pop?*". Kajee's attitude was that the Defendant should give Fibalogic every possible assistance with regard to improving all the defects that they have complained about, and weaknesses that the Defendant needed to help

them to improve the product. Kajee says that the Defendant was given various geysers to cut cross-sections through, to do certain bonding tests, adhesion tests and to give them anything that the Defendant could bring to the table to improve this composite that they were manufacturing. Generally, the Defendant was very accommodating and would help Fibalogic with anything on the basis that this was a major client, but not their biggest customer at the time.

Kajee's state of mind prior to the meeting was that the Defendant's products had passed the SABS tests and that the resin would only be accepted by Fibalogic provided that the Defendant sent a batch of resin covered by a Certificate of Analysis. All the tests were passed and that is why Fibalogic kept buying from the Defendant. On a few occasions, Fibalogic returned batches that they were not happy with. The standard procedure of Fibalogic was to "*take this Certificate of Analysis and they would see that the values there are correct and after delivery and if it's correct they would accept it. If it wasn't correct, they returned it.*"

Mr Harpur argued that this evidence, which was never challenged, establishes that Fibalogic carefully looked at each Certificate of Analysis and that both sides must have been aware of the exclusion of liability appearing thereon.

Kajee testified about the letter from him appearing in the A-Bundle at pages 250

and 251 in which he deals with various concerns raised by Fibalogic. All of those problems constituted a request for assistance by Fibalogic from the Defendant and none of them were related to the resin supplied by the Defendant, save for point 4 which was a resin, specification and Kajee's explanation was: "*It is probably a spec. They wanted to get the values on our resin so we probably send them a specification sheet, because all resins have a specification sheet*".

In relation to the contribution towards costs required by Fibalogic, Kajee explained that Fibalogic were continuously looking at ways and means to contain their cost at their end, because they were penetrating the market and they had very stiff competition from conventional geyser manufacturers so they would request the Defendant to contribute to their costs in any way that the Defendant could. The Defendant also realised that putting on an additional layer of glassfibre around the composite would strengthen it and would improve Fibalogic's product, and they were also aware that Fibalogic were complaining of various factors that were leading their geysers to fail. That then was behind the agreement by the Defendant to assist in supplying additional resin without cost for the layer to be added back to the construction.

Kajee's state of mind as regards the quality of his resin was: "*The quality and the standard of our resin was never in doubt by me My Lord, because then we are told that the resin outperforms. We are told that "we will never use your resin if*

doesn't pass the stringent SABS test", which is inspected by the SABS on their premises. So I never doubted my resin. There was nothing wrong with my resin. I knew they had problems and I knew as well Dawie Thirion at that stage had just joined the company a couple of months. So he asked me to assist to turn this company around because they were having so many - they didn't know where to start and they've had various key managers leave them. There was a rep stealing in Jo'burg, there was all sorts of things going on there. So I genuinely wanted to assist him to get through the whole thing. So that was basically, what was in my mind. My mind was, I am here giving him all the assistance to help him get this product right because we going to take the world over. That's what I believe."

Kajee in dealing with the crucial meetings on 22nd and 23rd November 2001 testified that: "*At that meetings I went to visit them, I had a request from Dawie to come and sit down. They were having an exceptional amount of geysers failing and Dawie said "Please come over and check. Now we are looking at everything. We going to look at everything", that's basically it. I said, "But you know, I know there's nothing wrong with our resin. We've passed the test that's what I know", so as far as I was concerned, my resin….[indistinct]. They could be some problem like we found the other time and when I got there he proceeded to take me through the factory and I clearly remember he took me to*

show me some valve and whatever and he said to me: "We need to see where this problem is coming through". He even indicated to me, you know, "it could be your problem," and I said to him, "Hang on, if you have a problem with the resin and you feel that we are liable for anything you must phone my insurance company. I have adequate insurance. Have comfort in it, don't worry". I remember I phoned my Accountant, I said, "Listen just find out what's our liability cover". He gave me a figure, I think it was 2.5 was something. I said "fantastic we covered for 2.5 million. If you put in the claim put it through to the insurance company and we'll get to come an assess it and come and see all the stories", and that's basically what [incomplete]."

Kajee explained further that Thirion had said to him "*Listen, you may have to pay for costs of our loss", and he said to Thirion, "No problem I have an insurance policy. I will get the insurance company to come and see you and give you the necessary assistance that you need". Further that: "No problem, be comfortable, we have an insurance policy which should suffice if, for any reason we are responsible for whatever your losses are*".

Kajee explained further that the insurance policy is the first thing that he would mention if anybody tries to claim money from him. *"If I am in a motor car accident, the moment I tell the guy straight, "I've got an insurance, don't worry",*

so then there is no fight with me, fight with the insurance company". He was then asked as regards why did he say: *"If you prove to the insurance company that we liable?" and his answer was "Because I believed I was not responsible. I knew my resin was meeting the standards, I knew we passed the test that we needed to pass when we delivered the product and there was no complaint as far as the product not passing those tests that they have to put it through before they use it. That was the protection we had for us".*

Mr Harpur submitted that this evidence has the ring of truth to it. The prohibition against admitting liability is well known to any reasonably experienced businessman, and Mr Kajee's response is the normal response that a reasonable man would have adopted in the circumstances. In particular, there is no reason why Kajee would suddenly have blurted out an admission of liability, as Thirion would have it, if Kajee genuinely believed that the Defendant's product was not to blame, or at least that it had not been proved that the Defendant's product was not to blame. It is quite apparent, from a conspectus of the evidence as a whole that no one, not even Thirion had established conclusively that the Defendant's product, defects-wise, was to blame for the geyser failures, and in fact it transpired ultimately that the Defendant's product was not to blame. Thus, no-one's state of mind could have been at that time that the Defendant's product was definitely to blame, and this makes it all the more unlikely that any agreement could have been reached in which the Defendant suddenly and

unconditionally admitted liability.

Kajee says that he telephoned his secretary and told her to inform the insurance company that there is a problem at Fibalogic where they are blaming us for some product that is not working because they are using our product and have increased failures. He said that an Assessor was required. It stands to reason that an Assessor would not have been required if there had been an out-and-out case where liability was already established, since the Assessor's job is to assess whether or not liability exists.

Kajee said that at the time he was aware of the limit of liability stickers on the green drums which is another factor which militates against any admission of liability having been made by Kajee at the time, because he would know that the Defendant had no responsibility for this type of loss. Kajee said that Thirion's reaction once he had told him about the insurance cover was that "*He was very pleased. He was quite happy".* Mr Harpur submitted that this is entirely probable and has the ring of truth to it.

Kajee said that he got no indication from Thirion during the meeting that Thirion was going to ask him to reach a binding agreement. This much accords with Thirion's evidence. This is another factor that militates against the parties having *animus contrahendi* at that time.

Kajee commented on the letter dated 26 November 2001. He denied that he on behalf of the Defendant had agreed to compensate Fibalogic as stated in the second bullet point of the letter He stated "*We didn't agree to do that at all. This is not what I agreed upon, this is not what I'd explained to him."* According to his understanding, if the insurance said that they were not paying, then the Defendant would not have to pay. In relation to the final paragraph of the letter appearing in A-Bundle at page 362 and the reference to the test still to be done, he pointed out that it demonstrated that "*we didn't know what the problem was. We were all working together to find out the problem".*

Kajee says that when he received a letter he telephoned Don Reid to tell him that the letter was not correct and thereafter spoke direct to Thirion and told him the same. According to him Thirion had someone in his office at the time and was quick on the telephone, which may explain why there is no note made by Thirion of that discussion.

Kajee was referred to Thirion's handwritten note dated 7 December 2001 and stated that this confirmed their telephone discussion between him and Thirion in relation to insurance. There were suggestions during the hearing that Thirion had only heard about insurance at a much later date, and this file note disproves that, and Kajee's evidence was never challenged on this score.

Kajee commented that Fibalogic had not paid the account in full and had not adhered to the credit limits. He was referred to another notation in Thirion's handwriting dated 18 February 2002 relating to further discussions regarding the progress of the insurance claim. All of this is consistent with his version that insurance was mentioned right at the outset, as the initial response to the raising by Thirion of the possibility that the Defendant's resin was to blame and that there should be some payment.

Kajee commented further on the Defendant's statement of the account that Fibalogic had with it and this demonstrated that the credit limit had been exceeded even prior to the alleged agreement. Some payments were made, even after the alleged agreement, which militates against the correctness of Thirion's version that there were withholding of amounts, because of the alleged agreement. Matters came to a head in June 2002 regarding the account and then there was the exchange of further letters in terms of which Kajee disputed in writing the alleged agreement.

He commented that Thirion's version of the agreement, that even if a factory worker in Fibalogic's factory caused the failure rate, the Defendant would still be liable: *"Doesn't make business sense. I must have been out of my mind to agree to it. I would never agree to something like that. I would never. That's the point, I would never agree to something like that because there's no end. Forget*

my case, my daughters would probably have to work to pay for that. There could be no end. No definitely I would never agree to something - it doesn't make business sense. You've got the quantify it before I can tell you or anybody, I could never."

Mr Harpur submitted that this is how a reasonable businessman would have reacted and this has the ring of truth to it.

Thirion's evidence, was put to him that the alleged undertaking would continue for as long as the Defendant supplied the resin. Kajee stated: *"I knew they could have a mountain of failures because all the factors that were involved. I knew the situation. I could never have agreed to something like that. I would never agree to something like that. All I knew was that we have an insurance policy, they could claim from me if they find me for whatever it's not important, but otherwise I would never give them a clear undertaking about "go-ahead do what you have to do." If there's a problem I will pay you". For what? For a R250,000.00 account. Never, Your Honour. Or R300,000 or R1 million. I could never".*

Mr Harpur submitted that this is how a reasonable businessman would have reacted and Thirion could not reasonably have expected anything different at the time of the meeting.

In relation to whether Thirion had ever mentioned a period for which the claim would be for insurance purposes, Kajee said he did not pay attention to periods or time, because all that he was interested in was: *"whatever you have to say, say it to the insurance company" because I was too scared to go into any depth there because of the first thing, I've had experience before you'll find you get involved in area where you have been warned from insurance, you lose out."*

It was put to him that there is a suggestion that he, Kajee was so desperate to keep the business he would have agreed to anything. He stated: "*I wasn't desperate. I was eager because of all the promises that were made in terms of how the growth would go and whatever, but I couldn't be desperate to the point where I'll become their slave you know. No, I was never desperate. They had a choice, they were not bound to buy from me. They were buying from somebody else as well".* Kajee's evidence that Fibalogic was in fact still buying from NCS was never disputed.

Mr Harpur submitted that under cross-examination Kajee did not deviate from his version and maintained that there had been no admission of liability by him and no agreement to pay as alleged by Thirion. There was some suggestion in cross-examination to Kajee that Thirion had left the meeting as a happy man because he thought that he got what he wanted and Kajee's response was "*Your*

Honour he was happy. That's why I wrote there he was happy because he was told that there is an insurance policy, he mustn't worry. If he proves it to them he's going to get paid and I will give him all the help. I said "Yes listen I won't step in the way". I wouldn't get involved." All the repeated questioning on this topic did in cross-examination, with respect, was to strengthen Mr Kajee's evidence in this regard. Kajee further confirmed that he had told Thirion that what was stated in the letter of 26 November was not true and that he did not want to put anything in writing for fear of running foul of the insurance prohibition in relation to discussing liability. *Transcript page 814.*

In his analysis of the Plaintiff's evidence Mr Harpur highlighted the following contradictions:

The pleaded allegations do not accord exactly with the term as it appears in the letter dated 26 November 2001 and this is obvious from a mere comparison of paragraph 9.1 of the Particulars of Claim and the first bullet point on the second page of the letter. In the pleading, the term is alleged to be that the Defendant would compensate Fibalogic for the costs incurred by Fibalogic in respect of all returns in excess of Fibalogic's norm of returns, which norm was 2% of the number of units produced by it whereas the letter says that KZN Resins will composite Fibalogic the difference between the agreed norm (of 2% of production) and the actual rate experienced. Thus whilst the letter leaves vague

what the actual rate experienced means, the pleaded term reconstitutes this in the form of "*all returns*". Thus, while the actual rate experienced refers clearly to the failure rate of the geysers which may or may not be returned, the pleaded version is that it is only in respect of "all returns" that the liability will allegedly commence. In neither formulation is the failure rate or "*all returns*" linked to any defects in the Defendant's product, which means that the Plaintiff's version is that the Defendant knowingly agreed that even if a failure of the 2% was caused by some other cause entirely for example Fibalogic's factory, or a defective set of thermostats, then the Defendant would still be liable. As indicated above, Thirion maintained this version in the witness box. Mr Harpur submitted that this is an absurd proposition and no sane businessmen would have agreed to this.

There are the contradictions regarding the alleged duration of the agreement. On the one hand, the Plaintiff alleges that the Defendant agreed to compensate in respect all geysers manufactured between 13 October 2000 and 14 August 2001, as set out in the Plaintiff's Further Particulars dated July 2006, paragraph 7(c) at page 69 of the indexed pleadings. Yet, on the other hand, this term is not set out in the letter dated 26 November 2001 and the pleaded allegation is contrary to Thirion's evidence that the agreement was to apply for all future purchases for as long as Fibalogic purchased resin from the Defendant. Clearly, the duration of the agreement and the duration of the period for which there would be compensation are material terms, constituting part of the *essentialia* of

the agreement, without which there could be no agreement. The contradiction itself demonstrates that there could be no agreement because the Plaintiff's lawyers are unable to agree with the Plaintiff's witness Thirion as regards what was the correct term. Thirion himself says that the term was never discussed at the meetings on 22nd and 23rd November 2001, which vagueness and uncertainty on its own ought to be sufficient to prevent the formation of any agreement, or render it void for vagueness.

There is the contradiction in Thirion's evidence, between his allegation on the one hand, that there was an agreement reached on 23rd November 2001, repeated in paragraph 9 preamble in the Particulars of Claim (pleadings page 6), and the letter dated 26 November 2001 itself, which does not refer to any agreement having been reached at the meeting. Instead, it uses the language of offer and acceptance and indicates that an offer was made at the meeting by the Defendant, which is then accepted in the letter i.e. the letter itself purports to constitute the acceptance of an offer, which means that there was in fact no agreement concluded at the earlier date on 23 November 2001, which is also destructive of the agreement in fact pleaded.

There are contradictions between the letter and the Directors' Minutes. The first minute which purports to record a meeting of directors of Fibalogic, a scant three days after the date of the letter is in different terms. The version of the

agreement, according to the minute is that the Defendant undertook to repay the amount of plus minus R300 000.00 to Fibalogic and in future to compensate Fibalogic for the difference between the agreed failure norm (2% of production) and actual failure rate. There is no mention of any amount in the letter, which is contradictory to the minute, which records a specific amount. It is repeated that according to the Plaintiff's version, the agreement was for all geysers manufactured between 13 October 2000 and 14 August 2001, and Thirion's version was that it applied for as long as the Defendant supplied resin to Fibalogic. Now we have a third version, set out in the minute, where there is a stated amount of +- R300,000 in respect of which there is an alleged undertaking to "*repay*" and an agreement to compensate Fibalogic in perpetuity for the difference between the alleged agreed failure norm and the actual failure rate;

Although Thirion maintained his denial that there was any mention of insurance at the meetings on 22nd and 23rd November 2001. Thirion's notes themselves record that he had a discussion with Kajee, a relatively short time after the meeting, the discussion having taken place on 7 December 2001, where insurance was specifically discussed and Thirion noted *"claiming from Ins .Co - next week results*", both of which are consistent with the Defendant's version not the Plaintiff's version. Then in a Management Report of Fibalogic dated 31 January 2002 there is a notation, without any surprise or objection being recorded, that Fibalogic were informed by the Defendant that the Defendant has had various meetings with their insurers and that Fibalogic has to lodge its claim

directly against the Defendant.

Thirion's note of 18 February 2002 in B-Bundle page 431 records a discussion between himself and Kajee in relation to a meeting with the Insurance Assessor. Then the next Directors' Meeting Minutes, as at 27 February 2002 in Bundle-B page 467 records that the claim amount that would be forwarded to the Defendant for insurance purposes clearly, is in the sum of R660,641.00, VAT included. It records that the Defendant was aware of the size of the claim and undertook to discuss the situation with its insurers. The last sentence in paragraph 3.2 of that minute records*: "Kennis word geneem dat die laaste sewe maande se waarbog eise wat verband hou met resin probleme baie laag is*". Mr Harpur argued that this demonstrates that contrary to the Defendant's pleaded version and Thirion's version under oath, the claim was clearly linked to resin problems, and could not possibly be linked to failures in geysers caused by other sources;

At a Directors' Meeting held on 24 April 2002, according to the minute which appears in the B-Bundle at page 529, which again records what Thirion reported to the Board, now puts forward a different version by Thirion, namely that the Defendant's undertaking was to pay any costs "*vir resinverwante falings*" above 2%. Thus Thirion is now saying to his Board that the undertaking was only for resin related failings, not failings from whatever source, contrary to the pleaded allegations and to what Thirion in fact testified.

Mr Harpur argued that Thirion contradicts himself when he says that there was an agreement reached on 23rd November 2008 because his account of the agreement reveals that in fact, no agreement was reached, as indicated above. All that he says is that the higher failings were put on the table and that negotiations continued. There was no yes or no from Kajee, which cannot possibly constitute an agreement. In conclusion Mr Harpur argued that it is contradictory, for the Plaintiff to allege that there is a binding agreement entitling it still to sue the Defendant, when on Thirion's own version of the agreement, it was never intended that the Defendant could be sued if it transpired that the geyser failures were in fact not caused by defective resin from the Defendant, as in fact, he conceded was the case.

Mr Harpur dealt at length with the requirements of an offer and acceptance of the offer as a prerequisite for a binding agreement. I do not intend to embark on a evaluation and consideration of the authorities referred to by Mr Harpur. All that is required is to consider Mr Harpur's submission that the 26 November 2001 letter alleges that there was an offer from the Defendant which Fibalogic accepted. The Plaintiff is bound by its version as contained in this letter. The question then arises as to what constituted this offer by the Defendant, according to the Plaintiff. In this regard the Plaintiff alleges an oral agreement. In paragraph 9 of the Particulars of Claim the Plaintiff alleges that Kajee was the

Defendant's representatives, it follows that the oral offer could only have been made by Kajee. However Thirion never actually states that Kajee made an oral offer instead his version has stated that Kajee never said yes or no.

Mr Harpur submitted that this does not constitute any offer at all, still less an offer that is clear and unambiguous and made *animo contrahendi.*

Here again I do not intend to do an analysis of the authorities referred to by Mr Harpur. The following dicta of the authors of Wille's Principles of South African Law, Eighth Edition page 413 and the authorities there cited would suffice:

> "An offer is a proposal by one person of certain terms of performance. For an offer to be capable of being turned into a contract by acceptance it is necessary that the offer must contain definite terms of performance and that it must be made with the intention of being accepted by some other person. It follows that if an offer is vague or indefinite and the vagueness is not determinable, an acceptance of it does not constitute a contract."

The Plaintiff's response to Defendant's analysis of the evidence of Reid and Kajee

In his response Mr Dickerson highlighted a number of passages in the evidence of Reid and Kajee in support of his argument that they were evasive, unsatisfactory and unreliable witnesses. I am of the view that Mr Dickerson's

criticism of Reid and Kajee's evidence, albeit that there may be merit therein if these passages are viewed in isolation, does not assist the Plaintiff, if regard is had to Mr Harpur's argument on the probabilities.

PROBABILITIES

Mr Harpur advanced the following argument on the probabilities:

It is entirely improbable that such an important and far reaching agreement, with so many ambiguous and vague terms and implications would have been concluded there and then orally. Kajee would never have admitted liability unless he had first been convinced that it was defects in the Defendant's resin that had caused the geyser failures, which he was not, nor was anyone for that matter. No warning was given by Thirion before or at the meeting that any far-reaching and major agreement of this nature was to be agreed at the meetings, and one would have expected such a warning if an agreement was to be concluded.

Kajee's explanation, supported by Reid is inherently probable. It is common cause that there was product liability on the part of the Defendant and that a claim was made. It is improbable that Kajee would have risked prejudicing that claim by admitting liability in the first instance, as he knew that the insurers could repudiate the claim if he admitted liability before they had decided on the merits

of the claim. Bearing in mind the fact that it was common cause that the Defendant had product liability insurance and that there was an insurance claim, it was entirely probable that this would have been discussed when the claim was raised on 22nd and 23rd November and Thirion's denial of this is entirely improbable.

Given Reid's evidence as regards the many variables in the process of manufacture of geysers, it is entirely unrealistic to believe that either Thirion or Kajee would seriously have expected a situation where the Defendant would make an outright oral undertaking to pay of this far-reaching nature. Particularly where it is common cause that there were exclusion of liability clauses, to the knowledge of both Thirion and Kajee, in stickers on the Defendant's drums limiting liability, and each Certificate of Analysis of resin, delivered at the same time of each delivery of resin.

There is no reason, on the probabilities, to suppose that Kajee would simply have blurted out an admission of liability when everyone knew at the time that there were a number of possible sources and that it had not been established by any means that the Defendant's resin was defective or that any such defect had caused the geysers failures. The fact that further tests were to be done is echoed in the letter of 26 November 2001 itself.

The Plaintiff suggests that the Defendant was desperate for Fibalogic's business and would have agreed to anything. This makes no commercial sense. Fibalogic was not even the Defendant's largest customer and whilst the business was important to the Defendant, it is improbable in the extreme, to suppose that the Defendant would effectively have risked committing financial suicide in order to retain the business, particularly in circumstances where it had an insurance policy and was paying premiums thereunder and there was a possibility that its insurers could be persuaded to make some payment. The alleged agreement is so improbably wide, it is grossly improbable that any reasonable and sane businessman would undertake such wide and far-reaching liability, which would include even problems caused by Fibalogic's own workmanship, and problems caused by other suppliers, notably thermostats, a problem which at one stage was described by the management of Fibalogic as being its main problem with geyser failures.

Mr Harpur argued that it is highly improbable, as Thirion contended, that Reid helped him with the drafting of the letter. If Reid had done so, then Reid would immediately have known when phoned by Kajee as regards the letter, what the letter was all about. Reid had no such knowledge and had no idea as regards what was said in the letter. Thirion’s evidence simply does not withstand scrutiny in this regard in view of the other English letters and notations made by him, and his version that he needed Reid’s help with the English is highly improbable. It

is also highly improbable that there would not be any response whatsoever to the letter of 26 November, as Thirion contended. When the parties dealt with each other previously in relation to the addition of the further layer, and agreed effectively to split the costs relating thereto, this was well documented in meetings between the parties and in letters exchanged back and forth and was put in writing by both parties. Yet there is no writing from the Defendant, which in the circumstances is only reasonably explicable by the fact that Kajee would have made an oral response thereto. Yet Thirion denies that there was any such oral response. This denial is highly improbable. Far more probable, is the version of Reid and Kajee, that Kajee telephoned immediately after receiving the letter to refute the contents of the letter and deny that he had made any admission of liability. Kajee's explanation as regards why he did not put this response in writing is also highly credible and probable. He said that he did not wish anything to appear in writing, discussing the question of liability in case this could be misinterpreted and relied upon by the insurance company in repudiating the claim on the basis that it fell foul of the anti-admission of liability clause in the policy.

Mr Harpur argued that what happened after the alleged agreement is also consistent with the Defendant's version. It is common cause as indicated, that an insurance claim was pursued and that an Assessor went around and it was only once this took some period of time that Thirion wrote another letter where he

again asserted the existence of the agreement. This was in the following year; 2002, and his written letter in this regard filed in the B-Bundle page 576-578 - dated 28 June 2002, echoes Kajee's evidence by stating: "*We acknowledge the fact that you have never put the second point in writing for fear of committing to an unknown quantity or to jeopardize any future insurance claims you may incur."* Thus Thirion himself acknowledges that, implicitly, there was no commitment to an unknown quantity, and that Kajee did not wish to jeopardize any insurance claim. Kajee's written response dated 8 July 2002 makes it quite clear that he never admitted liability and that *" both contractually and legally we, as you would be well aware, were in no position, to either confirm or deny the liability aspects of such a claim as only our insurers could accept or repudiate a claim submitted to them based on the merits"*. Significantly, in the documents adduced by the Plaintiff itself, and therefore never challenged by the Plaintiff, there are documents from the Insurance Brokers in terms of which the Insurance Brokers and the insurers were told that the Defendant never admitted liability. Moreover, the Defendant told its insurers that they had telephoned Fibalogic to refute the allegations in Fibalogic's letter of 26 November. *B-Bundle page 700 and B-Bundle page 418A*.

Mr Harpur argued that it is very elaborate and far-fetched to suppose that the Defendant, knowing all along that it had product liability insurance, would have gone to all the trouble to admit liability to Fibalogic and then attempt a fraud on its

own insurers by claiming and lying and saying that it had never admitted liability. Why do all of this when it is so much easier for Kajee to do as he said he did, namely simply to say in effect prove to our insurers that we are to blame? Moreover it was never put to Kajee that he was lying to the Defendant's insurers and never put to him that he was engaging in an elaborate fraud of this nature.

It is improbable in the extreme that the Defendant would have persisted with the insurance claim at all, if it had already admitted liability to Fibalogic, because the Defendant knew full well that any such admission would have been fatal to that insurance claim. It is also improbable that, if Kajee had admitted liability, as Thirion alleged, Thirion himself would have participated in the insurance claim process, as he clearly did, because on his own admission he would have known that the insurance company would repudiate on this ground alone. It is improbable that if an agreement had been concluded as alleged by Thirion, that Reid, as the technical director, would not have supported him in this. Instead, at the time that he was still employed by Fibalogic he told Fibalogic's advocate a version that was entirely consistent with Kajee's version and that there was no agreement. No motive for these actions was ever established by the Plaintiff and there is no reason to suppose that Reid testified to anything but the truth. For that matter Kajee, by the time that he gave evidence was no longer employed by the Defendant and had no motive to tell anything other than the truth. Thirion on the other hand, on his own testimony would be the "blue eyed

boy" if he could solve the problem of the geyser failures at the time. He was under a deadline from Fibalogic's board of directors to do so by the end of November, and the probabilities are that the insurance claim solution offered was too long term for him and on reconstruction of what in fact happened exaggerated matters in his subsequent letter so that he could impress the board of directors at a board meeting that was to take place a few days later.

By the time of giving testimony, of course, even Thirion was of the view that subsequent events demonstrated that the Defendant could not be sued on the alleged agreement. It is very curious indeed that Thirion never followed up to get a written response to his letter, yet in relation to the previous agreement regarding the additional layer this was meticulously followed up by letters from both sides. The probabilities are that this was because in fact he was telephoned by Kajee in response to the letter denying any agreement as testified by Kajee and Reid, and he knew that he would never get a written response agreeing to his letter.

Thirion's own subsequent letter in the B bundle at page 577 confirms that he knew Kajee would *"never put the second point in writing in fear of committing to an unknown quantum or to jeopardize any future insurance claims that you may incur",* which demonstrates that, even on his own version, he knew Kajee would not be bound other than in writing to an unknown quantum, and that Kajee would

not admit liability because it would prejudice the insurance claim, and he must have been told this expressly by Kajee.

Consideration of Counsel's Argument on the Evidence

On the face of it Counsel spent an inordinate extent of time on the analysis of the evidence of Thirion, Reid and Kajee. However the nature of the dispute and the voluminous transcript of the evidence required such an approach.

At the commencement of his evidence Thirion impressed as a witness but after a prolonged stay in the witness stand and more so under cross-examination his performance deteriorated and culminated in a low-key emotional outburst signifying that he had endured more than enough questioning. It was clear that he was under great stress during his stay in the witness stand, in all probability because he had been head hunted to turn Fibalogic round, and not withstanding an all out effort on his part Fibalogic floundered and was placed in liquidation. With the advantage of hindsight Thirion's focus on the Defendant's resin as the cause of the increase in failing geysers was misguided. I accept the fact that Thirion was under great pressure by the Board of Directors to get Fibalogic on even keel and that he had to present some positive prospect of a recovery of Fibalogic at the Board meeting following his meetings with Kajee in November 21, 22 and 23. However his testimony on the conclusion of the agreement and

the terms agreed upon was vague, contradictory and against the notion that he and Kajee had concluded an agreement and that they had reached consensus on the terms of the agreement. There is merit in Mr Harpur's analytical analysis and criticism of his evidence.

Whatever shortcomings may exist in the evidence of Reid and Kajee, the Plaintiff bore the onus to prove Fibalogics agreement with the Defendant.

Having regard to Thirion's poor performance as a witness and to the probabilities I am not persuaded that the Plaintiff has discharged the onus in proving the conclusion and the terms of the alleged oral agreement. This conclusion is reached with full regard to Mr Dickerson's criticism of the Defendant's witnesses Reid and Kajee and for obvious reasons obviates the need to consider the impact of the Defendant's contractual standard terms and conditions.

In the result, on the first issue referred for determination by the court

1. The Plaintiff's claim in Convention is dismissed and judgment is entered in favour of the Defendant with costs, including all reserved costs and the costs of two counsel.

This ruling, for obvious reasons obviates a consideration of the impact of the Defendant's contractual standard terms and conditions.

THE SECOND ISSUE: SECTION 156 OF THE INSOLVENCY ACT

BACKGROUND

The Defendant 's claim in reconvention against the Plaintiff is for payment of monies allegedly due *ex contractu* by Fibalogic to the Defendant for goods sold and delivered, in an amount of R1,974 million plus. The basis of the counterclaim is that, notwithstanding the absence of any contractual privity between the Plaintiff and the Defendant, the former is alleged to be liable to Defendant by virtue of the provisions of Section 156 of the Insolvency Act No. 24 of 1936 ("the Act").

Section 156 of the Acts reads as follows:

> "**156 Insurer obliged to pay third party's claim against insolvent -**
> *Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.*"

The Defendant relies, for its invocation of Section 156 of the Act, upon a written Sale of shares and claims agreement concluded by the Plaintiff, Fibalogic, and Enhance Consulting (Pty) Limited ("Enhance") in November 2002. In terms of this agreement the Plaintiff *inter alia* sold its shares in Fibalogic to Enhance, and

Fibalogic ceded to the Plaintiff its claim against the Defendant. Clause 12 of the sale agreement provided *inter alia* as follows"

"12. *CESSION OF CLAIM*

12.1 *It is recorded that the company [Fibalogic] is currently involved in a legal dispute with KZN Resins (Proprietary) Limited ("KZN"), one of its creditors. The company has instituted action against KZN …*

12.2 *The company hereby cedes, with effect from the effective date, its claim against KZN to the seller [Plaintiff], which cession the seller hereby accepts.*

…

12.5 *The seller hereby indemnifies the company against any loss, liability, damage (excluding consequential damage), cost or expense of any nature whatsoever which the company may suffer or incur as a result of any claim made against the company by KZN for goods and/or services provided to the company prior to the closing date ("indemnified loss").*

…

12.8 *The seller shall be obliged to pay to the company the amount of any indemnified loss suffered or incurred by the company as soon as the*

company is obliged to pay the amount thereof."

It is common cause that Fibalogic has been wound-up for inability to pay its debts and that, in terms of Section 339 of the Companies Act, No. 61 of 1973, the provisions of the law relating to insolvency shall insofar as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for by the Companies Act.

Defendant contends that the provisions of clause 12.5 of the sale agreement constitute an indemnity as contemplated in Section 156 of the Act. This is denied by Plaintiff.

The crisp issue to be determined in terms of the Consent Order is:

> "…*whether the indemnity furnished by the Plaintiff to Fibalogic as provided for in clause 12.5 of the sale agreement … constitutes an indemnity as contemplated by Section 156 of the Insolvency Act, No. 24 of 1936 read together with Section 339 of the Companies Act, No. 61 of 1973, such as to render the Plaintiff liable for any existing indebtedness of Fibalogic to the Defendant in respect of goods sold and delivered … "*

Mr Dickerson submitted that the counterclaim should be dismissed on the following principal grounds:

(a) Firstly, Section 156 of the Act applies only to insurance monies payable by an insurer (properly so-called) to an insolvent insured, in respect of his or its liability to a third party. The Plaintiff is not an insurer, and its obligation in terms of clauses 12.5 and 12.8 of the sale agreement is not an obligation to indemnify contemplated by the section.

(b) Secondly, even if the obligation to indemnify in the sale agreement is one

contemplated by Section 156 of the Act, the Defendant has in any event failed to establish an exigible obligation owed by the Plaintiff in terms of clauses 12.5 and 12.8 of the sale agreement to effect payment for an existing indebtedness of Fibalogic to the Defendant.

As regards the meaning and application of Section 156, Mr Dickerson argued that:

1. Section 156 of the Act has not been amended since its original enactment in 1936. The Afrikaans text was signed, but there is no significant interpretive difference in the English test.

2. The words *"insurer"* and *"insured"* in Section 156 are not defined in the Act.

3. The introductory title *"Insurer obliged to pay third parties claim against insolvent"* is part of the legislative instrument, and hence should be looked to along with the further content of the section in the interpretive process.

4. Section 156 of the Act makes specific reference to an insurer. The word "*insurer*" is a recognized terms of art, the ordinary grammatical meaning of which has long been established as: *"One who or that which insures; … One who contracts, for a premium, to indemnify a person against losses; an underwriter.* The Shorter Oxford English Dictionary on Historical Principles.

5. Indemnity insurance is a recognized category of insurance, in which the obligation of the insurer is to *"indemnity the insured for patrimonial loss or damage suffered as the proximate result of the happening of the event*

insured against". This type of insurance, and the obligation to indemnify which characterizes it, predates Section 156. In M*alcher & Malcomess v King Williamstown Fire & Marine Insurance & Trust Co.* (1883) 3 EDC 271 at 284 Barry JP said:

"*The very essence of the contract of insurance is that it is a contract of indemnity; its sole and exclusive object is to procure for the assured indemnity, in the strictest sense of the word, for any losses he may sustain, through the agency of the risk against the effect of which the underwriter, by the terms of his policy stands pledged to protect him."*

6. It follows, too, that the word "*indemnity"* in section 156 is a term of art indentified with insurance.

7. Since the enactment of the Insurance Act No. 37 of 1923 the role and requirements for the conducting of insurance business, and the necessity for registration of an insurer, have been comprehensively regulated. In short, both at the time Section 156 was enacted and at all times thereafter, insurers have been strictly regulated and no person or entity could operate as an insurer, or consequently offer any form of indemnity insurance, unless it was registered as such. The legislature was aware of this, and is deemed to have framed the text of the section on the basis that this was the law. The legislature, when enacting Section 156, thus plainly used the words *"insurer"* and *"indemnity"* in their ordinary sense, which in the context of the section denote third-party indemnity insurance.

8. Not surprisingly, the view that section 156 applies to insurance policies is uniformly adopted in all authoritative South African insolvency textbooks. All the judicial pronouncements on section 156 similarly describe it as

governing insurance. Thus in *Le Roux v Standard General Versekeringsmaatskappy Beperk* 2000 (4) SA 1035 (SCA) para. 6 p 1046J it was held that:

"Artikel 156 vandie Wet verleen aan 'n eiser die reg om in bepaalde omstandighede 'n bedrag direk van 'n vesekeraar te vorder wat deur die versekerde aan die eiser verskuldig is. Soos uit die artikel blyk, ontstaan die reg by die sekwestrasie van die boedel van die versekerde. By ontstentenis van so 'n wetsbepaling sou 'n eiser in daardie omstandighede verplig gewees het om sy eis teen die versekerde se insolvente boedel in te dien en sou sy verhaalsreg beperk gewees het tot enige dividend wat die curator aan konkurrente skuldeisers moes betaal. Die curator sou op sy beurt verplig gewees het om ten gunste van al die skuldeisers die versekerde se reg op vrywaring uit hoofde van die tersaaklike polis teen die versekeraar af te dwing. Die gevolg van art 156 is dus om die eiser aansienlik te bevoordeel deurdat ander skuldeisers nie in die opbrengs van die polis kan deel nie."

and in *Unitrans Freight (Pty) Ltd v Santam Limited* 2004 (6) SA 21 (SCA)

at para 7, p 25C it was held that:

"The section … merely allows a person who is not a party to the policy of insurance to recover directly from the insurer in particular circumstances. It entitles the person who has a claim against someone who is indemnified against such liability by an insurer to pursue the claim directly against the insurer if the estate of the indemnified person is sequestrated."

9. There is thus no judicial authority for the Defendant's contention that Section 156 of the Act applies other than to an insurer, or that it applies to an obligation to indemnity a third party which does not arise from a contract of indemnity insurance.

10. Futhermore Section 156 introduced, and embodied a departure from the legal position which prevailed prior to its enactment. It will be interpreted as changing the law as little as possible. Gordon & Getz, *The Insurance*

Law of South Africa (4th ed), describes the purpose and effect of section 156 as follows:

Át common law, if the insured was sequestrated, the insurer had to pay the policy proceeds into the insured's insolvent estate, leaving the third party with only a concurrent claim against that estate and with no claim against the insurer. The Insolvency Act 1936 alters the position. It provides that where the insurer is obliged to indemnify the insured in respect of any liability incurred by the insured towards a third party, on the sequestration of the insured's estate the third party is entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured."

Consequently, the character and type of claims by third parties which are to be excused from the *concursus* will be confined, in this case to those which are the subject of an indemnity by an insurer.

11. Policy considerations which may have justified an extension to a third party of a direct right of recovery against an insolvent's insurer under a third party indemnity, plainly do not apply to ordinary accessory contracts.

11.1 A contract of indemnity insurance is a *sui generis* and nominate forms of contract which - have been the subject of extensive statutory regulation. The same does not apply to nominate contracts of indemnity.

11.2 Secondly, the more importantly, the distinguishing feature of indemnity insurance is that, in return for a premium, the insurer will pay a sum of money to the insured on the happening of an uncertain event.

11.3 Because of the uncertainty as to the event which forms the subject

of indemnity, and because it pre-supposes a liability to a third party tied to the uncertain event, Section 156 does not unfairly disturb the *concursus creditorum,* or afford some trade creditors a preference over other trade creditors in respect of contractual claims against the insolvent.

11.4 A contract of indemnity insurance creates an original obligation on the insurer. The same cannot be said *in casu*, where clauses 12.5 and 12.8 of the sale agreement give rise to an ancillary obligation on the Plaintiff to re-imburse Fibalogic only when it becomes liable to pay a loss or liability incurred as a result of a claim by the Defendant.

11.5 If the ambit of Section 156 were to be beyond the realm of insurance, to cover ancillary and accessory contractual obligations, it would allow ordinary trade creditors of an insolvent, such as the present Defendant, to leap-frog the *concursus* and obtain an unfair preference over other concurrent creditors in respect of their contractual claims. The unbridled scope for the unfair preferment of creditors is obvious.

12. The intention of the legislature in referring specifically to the word *"insurer"* - and also the word *" insured"* - in the particularized context of an obligation to "*indemnify" a "liability by an insured to a third party"* was to a specific class of persons or entities, namely persons lawfully entitled to act as insurers. This must particularly be so, given the very stringent requirement for the registration of insurers.

13. Moreover, had it been the intention of the legislature that section 156 should be of general application, then the legislature would not have used specific words such as *"insurer"* or *"insured"*. The legislature could just have easily have used other words of a general and wide import had it

been the intention of the legislature that the section should be of general and wide import.

14. The Plaintiff is not alleged to be an insurer or to be registered as such under either the Long-Term Insurance, No. 52 of 1988 or the Short-Term Insurance Act of 1988, (or under their predecessors). Consequently, it is not an insurer within the meaning of Section 156, nor could it lawfully be under any obligation to *"indemnity"* within the meaning of that section. Moreover, the provisions of clause 12 of the sale of shares agreement do not constitute an agreement of insurance.

15. It follows that the obligations undertaken by Plaintiff to Fibalogic and/or Enhance in terms of the sale agreement do not fall within the ambit of Section 156 of the Act.

I do not at this stage propose to deal with the second leg of Mr Dickerson's argument relating to the Defendant's failure to establish an exigible obligation and the requirement of an existing indebtedness of Fibalogic to the Defendant

Defendant's argument on Section 156 of the Insolvency Actu

I do not propose to incorporate Mr Harpur's commendable historical research dating back to the Twelve Tables and the subsequent development of the law of insolvency under Roman and the Roman Dutch Law in this judgment.

Mr Harpur submitted that the language of Section 156 is clear, i.e. it serves to indemnity anyone in respect of an obligation incurred by an "*insured"* towards a third person and in respect of the sum so recoverable to a maximum stipulated amount, and in circumstances where the *"insured'* by virtue of his/its sequestration/liquidation has become unable to so indemnify.

The reference within the body of the Section to "the insurer" and "the insured" are clearly used only for ease of reference and are not intended to limit the meaning to a registered insurer or a policy of insurance pursuant to the Short-Term Insurance Act 53 of 1998

Insurance is not defined in either the Insolvency Act or the Short-Term Insurance Act 53 of 1998. "Short-Term Insurance Business" is defined in the latter as meaning the business of providing or undertaking to provide policy benefits under short-terms policies. "Short-term Insurer" means a person registered or deemed to be registered as a short-term insurer under this Act. The Long-Term Insurance No. 52 of 1998 similarly does not define insurance and has similar definitions regarding Long-Term Insurance Business and Long-Term Insurer as are contained in relation to Short-Term Business, m*utatis mutandis*

Mr Harpur argued that presumably, the South African draughtsman would have been alive to the possible distinction between a contract of indemnity and a contract of insurance and there seems to have been a conscious decision to avoid the use of the phrase *"contract [or policy] of insurance"* and not to limit the application of Section 156 only to a contract of insurance or to a registered insurer. This appears to be the only sensible construction from a consideration of the wide usage of words in the South African Act, namely: "any person" "is obliged to indemnify another person … in respect of any liability incurred." Certainly it would have been easy enough to simply specify if it was intended to limit the wording to *"any contract of insurance"* and to use instead of *another person"* the phrase *"registered insurer"*, if this is what had been intended. In any event, it is by no means certain that the indemnity in the present case is not in fact a contract of insurance, insurance being a particularly difficult topic to define with precision.

He submitted that in interpreting Section 156 this Court should adopt a purposive approach. This means that it is necessary to have regard to the intention of the section He referred to the following passage in *Coetzee v Attorney's Insurance Indemnity Fund* 2003 (1) SA 1 (SCA):

> "[19] The purpose and operation of this section was explained by Scott JA in Le Roux v Standard General Versekeringsmaatskappy Bpk 2000 (4) SA 1035 (SCA) at 1046J - 1047G. In the absence of such a section the insured's creditor, upon the former's sequestration, would have to prove a claim in his insolvent estate and be content with whatever dividend is paid to the concurrent creditors; whilst the insured's rights under the policy would vest in his trustee, who would claim from the insurer for the benefit of the general body of creditors. The effect of the section, therefore, is that the creditor is granted the considerable advantage that he does not have to share the proceeds of the policy with other creditors. To that end he is given a direct right of action against the insurer."

He argued that it is apparent that the purpose of the section is the protection of persons in the position of the Defendant, and in particular it was intended that they be given preference so as not to have to take merely a dividend, but that they take the full benefit of the indemnity, absent competition from other creditors and submitted that it would be in accordance with the purpose and intention of the Section so as to afford it the interpretation for which the Defendant contends, and that this purpose would be defeated by adopting a restrictive interpretation inconsistent with the wide language used.

Mr Harpur conceded that there seems to be no decided case directly in point and argued that the decided cases deal only with factual situations where on the particular facts, policies of insurance were in issue. He submitted that those cases, are of no real assistance in the peculiar facts of the present enquiry, and, references to insurance policies and insurance companies within the confines of the facts of those cases should not be elevated to a requirement that this must

exist before Section 156 can operate. In concluding his argument he submitted that the Defendant's Counterclaim is covered by Section 156 of the Insolvency Act 24 of 1936, and that the Plaintiff is therefore liable for any amount proved pursuant to the Counterclaim.

Consideration of Counsel's argument on Section 156

Mr Harpur was constrained to concede that he could not find any reported cases which supported his argument.

The difficulty I have with Mr Harpur's argument is that it provides a remedy to a third party to leap frog the concursus – as argued by Mr Dickerson, and to obtain an unfair preference over other concurrent creditors in respect of their contractual claim.

There is no profit in repeating Counsel's argument on this issue. The authorities relied upon by Mr Dickerson and the fact that Section 156 introduced and embodied a departure from the legal position which prevailed prior to its enactment, per Gordon and Getz (supra), tips the scale in Mr Dickerson's favour.

Having reached this conclusion the need to consider the second leg of Mr Dickerson's argument has fallen away.

In the result the indemnity provided for in clause 12.5 of annexure "FGR9" in case number 1720/2004 does not constitute an indemnity as contemplated by Section 156 of the Insolvency Act, No. 24 of 1936 read together with Section 339 of the Companies Act, No. 61 of 1973, such as to render the Plaintiff liable for any existing indebtedness of Fibalogic to the Defendant in respect of goods delivered.

THE THIRD ISSUE DEFINED BY THE CONSENT ORDER – THE ISSUES RAISED BY PARAGRAPH 21 OF THE DEFENDANT'S COUNTERCLAIM READ WITH PARAGRAPHS 15 AND 16 OF THE PLAINTIFF'S PLEA THERETO

Paragraph 21 of the Defendant's Counterclaim reads as follows:

"1.

In the alternative to paragraphs 16 to 20 hereof (inclusive):

(a) the Plaintiff sues as the cessionary of Fibalogic in its claim in convention;

(b) the Plaintiff is, for the purposes of that cession, the successor in title to Fibalogic vis a vis the Defendant, and the cession, as a matter of law, cannot weaken the Defendant's position;

(c) the Defendant accordingly:

a. is entitled to rely upon its said claim against Fibalogic for payment of the said amounts of R1 974 766, 67 and R 262 093, 72 together with interest thereon, as against the Plaintiff;
b. alternatively, and in any event, is entitled to rely upon the provisions of clause 3.3 of the standard terms an d conditions set out in Annexure 1 hereto in terms of which Fibalogic (and hence the Plaintiff, as its successor in title) is obliged to indemnify the Defendant in respect of the Plaintiff's claim."

Paragraphs 15 and 16 of the Defendant's Plea thereto read follows:

"15. AD PARAGRAPH 21 (a)
This paragraph is admitted.

16. AD PARAGRAPHS 21(b) AND (c)

Plaintiff denies that the cession permits Defendant to make the claim in reconvention against it. In amplification of this denial but without limiting the generality thereof, Plaintiff denies that:

16.1 as a result of the cession by Fibalogic of its claim against Defendant and Plaintiff substitution for Fibalogic as the Plaintiff in convention, Defendant may proceed against Plaintiff for relying upon its claim against Fibalogic.

16.2 Plaintiff is a third-party described in Clause 3.3 of Annexure "1"".

Two points are raised by paragraph 21 of the Defendant's Claim in

Reconvention, namely:

[a] whether the Defendant is entitled to claim its counterclaim as against the Plaintiff (as distinct from Fibalogic);

[b] whether in the alternative, the Defendant is entitled to claim an indemnity under Clause 3.3 of the Standard Terms and Conditions as against the Plaintiff.

Mr Harpur argued that in general terms, it is well established that a cession if it is to be valid cannot weaken the debtors position. In this regard he relied on NIENABER'S dissertation in The Law of South Africa Volume 2(2) Second Edition paragraph 39 and the authorization cited under Footnotes 1 and 2:

"the change of creditors brought about by cession must not impose a greater burden on the debtor than that to which, but for the cession he or she would otherwise have been subjected. Cession must neither weaken the debtor's position nor render it more onerous". LTA Engineering Co. Ltd v SeaCat Investments (Pty) Limited 1974 (1) SA 747 (A); Frank v Premier Hangers CC 2008 (3) SA 594 (C).

He submitted that the Defendant's counterclaim against Fibalogic was clearly a liquidated claim, being one for resin sold and delivered.

Mr Dickerson submitted that Mr Harpur's argument that the Plaintiff as Fibalogic's cessionary ipso facto becomes liable for the latter's obligations is unsustainable in law.

He argued that Fibalogic's contractual or other obligations to the Defendant, could only have passed by way of delegation, which requires tripartite agreement between creditors, debtor and assignee. No such delegation is alleged.

Consideration of Counsel's Argument

The cession in terms of which Fibalogic ceded its claim against the Defendant to the Plaintiff forms part of the Sale of Shares and Claims Agreement (Filed as p. 120 – 134 in Defendant's Trial Bundle "C").

In terms of this document the Plaintiff's loan account against Fibalogic to the value of R1, 664, 000-00 is confirmed and the fact that at all material times it was the beneficial owner of 31,704,974 ordinary shares constituting 99% of the entire share capital of Fibalogic. These shares and Plaintiff's loan account were sold to ENHANCE Consulting (Pty) Ltd with effect from 11 October 2002 (the effective date) for R1-00.

It is against this background and the undisputed evidence tendered at the trial that Fibalogic at that stage found itself in dire financial straits. It is common cause that Thirion was head hunted and appointed as Financial Director with the expectation that he would turn Fibalogic around and to get it back on even keel.

It is clear from the minutes of meetings of Fibalogic that at the stage when the Sale of Shares and Claim Agreement was signed the directors of Fibalogic were fully aware of its precarious financial position and its debt to the Defendant.

Clause 12.1 of the cession records that Fibalogic “is currently involved in a legal dispute with KZN Resins, (Pty) Ltd, one of its creditors” and that Fibalogic “has instituted action against KZN in the amount of R14,560,891-27.”

In terms of clause 12.5 of the cession Plaintiff indemnified Fibalogic “against any loss, liability, damage (excluding consequential damage), cost or expense of any nature whatsoever which the company may suffer or incur as a result of any claim made against the company by KZN for goods and/or services provided to the company prior to the closing date.”

Plaintiff in effect gave an undertaking to Fibalogic that it would step into the shoes of Fibalogic should it be faced by a legal claim from the Defendant for goods or services provided.

It is common cause that Fibalogic, subsequent to the cession, was placed under Provisional Liquidation on 5 June 2003 with the final order granted on 31 July 2003.

The only inference to be drawn against this background is that the cession of the claim by Fiblogic to the Plaintiff was done to frustrate the Defendant’s possible (at that stage) counterclaim against Fibalogic.

Having regard to the authorities referred to by Mr Harpur, I am satisfied that his argument is well founded and that the Defendant’s counterclaim is enforceable against the Plaintiff.

The Relief granted:

1. The first Issue

   Plaintiff's claim in convention is dismissed and judgment entered in favour of the Defendant.

2. The Second Issue

   The Defendant's counterclaim is not covered by Section 156 of the Insolvency Act 24 of 1936. The Defendant is to pay the Plaintiff's costs on this issue to include the costs of two Counsel.

3. The Third Issue

   The Defendant's counterclaim is upheld with costs with the quantum to be determined as set out in the Consent Order.

4. The Plaintiff is to pay the Defendant's costs, to include the costs of two Counsel on the First and Third Issues, including all reserved costs related to these issues

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DATE OF DELIVERY: 24/3/2010

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