Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. A 96/2019

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mrs Justice Steyn
The Hon. Mr Justice Sher

Date of hearing: 27 January 2020
Date of judgment: 4 February 2020

In the matter between:

BONNIEVALE PIGGERY (PTY) LTD Appellant

and

EUGENE VAN DER MERWE Respondent

JUDGMENT

BINNS-WARD J (STEYN and SHER JJ concurring):

Introduction

[1] The appellant, which carries on business in the raising of pigs for slaughter, instituted action against the respondent for payment of the sum of R1 196 868,84. The amount was made up as to (i) R1 191 084,94, being the outstanding balance allegedly due in respect of the invoiced price of pig carcasses sold by it to the respondent on various occasions during January and February 2013, (ii) an amount of R4 637,95 outstanding in respect of an invoice rendered prior to 1 January 2013 and (iii) accrued interest in the sum of R 1 145,95 due in

respect of the late or short payment for purchases made by the respondent in the first half of January 2013.[1]

[2] The respondent defended the action and brought claims in reconvention against the appellant.

[3] The pleadings, drafted by the parties' respective attorneys, were far from a model of clarity, and repeatedly amended. They lacked factual and legal coherence in material respects and were amenable to exception on both sides. None was taken, however. In their finally settled form which, for the reasons just mentioned, was unsatisfactory,[2] they appeared to draw the battle lines broadly as follows: the respondent alleged that he had been overcharged for the carcasses that he had purchased and that he also had a claim for compensation in damages against the appellant. In addition, he challenged the legal validity of his transactions with the appellant by reason of the latter's alleged non-compliance with the requirements of the National Credit Act 34 of 2005 ('the NCA'). He sought a stay of judgment in the claim in convention pending judgment in his favour in his claims in reconvention.

[4] The respondent's claim in respect of the alleged overcharge was two-pronged. He sought (i) a rebate on the amount charged in the invoices rendered by the appellant in January and February 2013 and (ii) the repayment of amounts allegedly overpaid by him in numerous like transactions over the preceding years. The alleged overcharge was predicated on the respondent's allegation that the appellant had been contractually obliged to set the prices that it charged him in a fixed and predetermined relationship to those that it charged to a related concern, Winelands Pork (Pty) Ltd, [3] but had failed to do so.

[5] The respondent's damages claim was framed in contract, alternatively in delict.

[6] In support of his counterclaim for contractual damages, the respondent alleged that the appellant had breached a contract between the parties whereby it was bound to market all of its produce - save for that sold to its sister company Winelands Pork - through the auspices of the respondent. The appellant denied that it had been in breach of the contract. It alleged that the agreement had been cancelled in July 2012.

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[1] Prayer (a) of the plaintiff's amended particulars of claim read with annexure POC 2.

[2] See also paragraphs [9], [17]-[20] below.

[3] The appellant and Winelands Pork (Pty) Ltd were both partly owned subsidiaries of Number Two Piggeries (Pty) Ltd, a company based in Komani (Queenstown) in the Eastern Cape.

[7] The respondent's alternative claim founded in delict was alleged to have arisen by virtue of the appellant having used the respondent's confidential information, to which the appellant had had access in terms of a cession of book debts agreement entered into in consideration of the credit facility that the appellant had afforded to the respondent, to compete unlawfully with the respondent by poaching the customers to whom he had historically on-sold the carcasses of the pigs that he had purchased from the appellant. It was common ground that after July 2012 the appellant did indeed start dealing directly with many of the respondent's customers, but it denied that that had been unlawful.

[8] The respondent also alleged in his finally amended pleadings, delivered late in the day, more than a month after the commencement of the trial, that the contracts of sale were void by virtue of s 89 of the NCA.[4] He alleged that was so because the appellant had sold the pigs to him on credit whilst not having been registered as a credit provider, as required in terms of s 40(1) of the Act. Section 89(2)(d) provides (subject to certain exceptions that did not apply in the current case) that a credit agreement is 'unlawful' if at the time it was made '*the credit provider was unregistered and th*[e] *Act requires that credit provider to be registered*'. At the relevant time (prior to its amendment in terms of the National Credit Amendment Act 19 of 2014), s 40(1) required every credit provider to which the total principal debt under all outstanding credit agreements, other than incidental credit agreements, exceeded R500 000 to apply for registration as a credit provider.

[9] The respondent's belated invocation of the NCA was at odds with his counterclaim for contractual damages. Perhaps conscious of that effect, the respondent's pleading purported to make the alleged incidence of the Act contingent upon the court's acceptance of the appellant's allegation that the marketing agreement had been cancelled.[5] The pleaded contingency made no sense whatsoever, however, because if there had been an obligation on the appellant to have registered, it would have arisen irrespective of whether the original arrangement between the parties had continued to subsist or not. That was so because the trigger for the obligation to register as a credit provider was the total amount outstanding under all outstanding credit agreements. In the current case it was common ground that the R500 000 threshold had been surpassed and that the appellant was not registered. It would not matter for the purposes of the NCA, and its potential effect in the current matter, whether that had happened under the business relationship entered into by the parties in 2005 (which

[4] 'Defendant's Consequential Plea to Plaintiff's Amended Particulars of Claim'.

[5] Para. 10.1 of the respondent's 'Consequential Plea to Plaintiff's Amended Particulars of Claim'.

was the respondent's case), or pursuant to sales on credit concluded under an allegedly different regime post the July 2012 cancellation of the sole marketing agreement (which was the appellant's case).

[10] The appellant responded to the respondent's invocation of the NCA by alleging that the credit extended to the respondent had been in terms of an 'incidental credit agreement', and therefore excluded from the ambit of s 40(1).

[11] At the hearing of the appeal we were informed by counsel that the NCA issues were abandoned by the respondent before the court a quo. It does not appear from the record, however, when this might have happened, and there is strangely no mention of it in the judgment. Certainly, the respondent only introduced some of the NCA-related matter in amendments to its pleadings effected at an advanced stage of the trial, and his counsel cross-examined one of the appellant's witnesses on the issue of the appellant's registration status as a credit provider in terms of the Act. Whatever the position in the court a quo, it was conceded by the respondent's counsel before us that there was no merit in any of the points taken by the respondent based on the NCA. The credit agreements that were involved were unmistakeably 'incidental credit agreements' as defined in s 1 of the Act.[6] It would have curtailed our preparation time had we been informed of the concession before the hearing. In the absence of the intimation that we should have been given, we were obliged to prepare on the NCA issues notwithstanding that they did not feature in the notice of appeal and were not subject of a cross-appeal. They raised rule of law issues that we were duty bound to consider *mero motu*; cf. *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15 (18 September 2008); 2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1; 2009 (2) SA 204, at para. 67, and *Minister of Justice and Correctional Services v Walus* [2017] ZASCA 99 (18 August 2017); [2017] 4 All SA 1 (SCA); 2017 (2) SACR 473 (SCA) at para. 23.

[12] The trial court dismissed the claim in convention with costs, and, in addition (evidently in respect of the claims in reconvention), made an order declaring that '[t]*he defendant has successfully established liability by the plaintiff and as such the defendant is entitled to claim such damages as may be proved in due course*'. The court made no determination in respect of either prong of the respondent's overcharge claim. It appears to have been overlooked. But there is no cross-appeal (understandably, as will appear).

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[6] See *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* [2010] ZAKZDHC 34 (20 August 2010); 2010 (6) SA 173 (KZD); [2011] 1 All SA 318, followed in this Division in *Collotype Labels RSA (Pty) Ltd v Prinspark CC and Others* [2016] ZAWCHC 159 (9 November 2016).

[13] The appeal to the full court against the judgment at first instance was brought by leave of the learned judge in the court a quo.

The implications of the respondent's pleaded reliance on rule 22(4) and the unsatisfactory state of the pleadings

[14] As mentioned, the respondent prayed for a stay of the determination of the appellant's claim pending judgment on his claims in reconvention. He invoked rule 22(4) of the Uniform Rules for that purpose.[7]

[15] Resort is ordinarily had to rule 22(4) when a defendant wholly or partly admits a claim sounding in money, but contends that the admitted debt will be extinguished by set-off when it obtains judgment against the plaintiff in an equal or greater amount on its accompanying counterclaim.[8] Less commonly, the subrule is also utilised in situations in which a defendant denies liability, but contends in the alternative that the plaintiff's claim should be stayed because in the event that the court dismisses its primary defence, its resultant liability would nevertheless be extinguished by set off upon judgment being granted in its favour in its accompanying claim in reconvention.

[16] It will be evident from the description of the pleadings given in the introduction to this judgment that in the current matter, subject to the effects of the alleged incidence of the NCA, the respondent must be taken to have admitted his indebtedness to the appellant in the amount of the difference between the sum of the appellant's claim and the sum in which he alleged that he had been overcharged for his January and February 2013 purchases.[9] This was not one of those cases in which the scope for set-off to operate was pleaded by the defendant in the alternative to a primary defence of an out and out denial of any liability.

[17] The waters were muddied, however, when, in mid-trial, the respondent delivered his finally amended plea. In that pleading, in which the respondent purported to have amended

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[7] Rule 22(4) provides: 'If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that *judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed* unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet.' (Italicisation for emphasis.)

[8] Cf. e.g. *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* [2002] 1 All SA 517, 2002 (2) SA 580 (C), at para 20.

[9] Apparently in the capital sum of R1 127 379,38 (R1 191 084,94 - R63 705,56).

his plea *consequentially* to an amendment of the appellant's particulars of claim effected well before the trial commenced, he erased any reference to rule 22(4). The apparent withdrawal of the plea in terms of rule 22(4), and thereby also of the admission of at least part liability for payment of the appellant's claim that was inherent in the erasure, was in point of fact not *consequential* to any amendment of the particulars of claim. It was therefore certainly not an amendment that the respondent would have been entitled to make in terms of rule 28(8). On its face it appeared to involve a gratuitous and unexplained withdrawal of a previously made admission. That impression was underscored by the inclusion in the amended plea of a blanket denial of the summary of transactions in annexure POC 2 to the appellant's particulars of claim.[10] (Annexure POC2 itemised the various invoices rendered to the respondent by the appellant in respect of the sales effected during January and February 2013 and described the character of the pig carcasses that were sold, indicating in each case the applicable rand per kilogram basis used for the computation of the invoiced price.)

[18] That said, those indications of an apparent withdrawal of the admission in the amended plea were gainsaid by the admission, in para. 8 of the respondent's 'consequential plea', that he had received the invoices listed in POC 2, and by the formulation of his overcharge defence and related counterclaim with reference to the amounts due in terms of those invoices. Of course, the respondent's formulation of the overcharge aspect of his defence and counterclaim would not make any sense if he had not been sold the goods subject of the invoices listed in POC 2 at the prices set out therein. Adding to the confusion, the respondent also continued to refer expressly to rule 22(4) and set-off in his amended claim in reconvention, which, amongst other matters, resulted in an inconsistency between the prayers in that pleading and those in the 'consequential plea'.

[19] The 'consequential plea', which was delivered well after the commencement of the first stage hearing and outside the period provided in rule 28(8), furthermore included a prayer (apparently predicated on s 89(5)(b) of the NCA, which had actually by then long since been repealed[11]) for an order directing the appellant to repay to the respondent all the payments that it had received in respect of the sales effected by it to the respondent since July 2012. Technically, a claim for repayment should have been advanced in a further amended claim in reconvention, not in a plea. The deviation from the technical rules of pleading might explain how the drafter of the respondent's pleadings overlooked the incompatibility between

[10] Para. 7 of the amended particulars of claim read with para. 9 of the 'consequential plea'.

[11] In terms of s 27(b) of the National Credit Amendment Act 19 of 2014, with effect from 13 March 2015.

the NCA based claim and the overcharge claim that remained included in the claim in reconvention. More fundamentally, it also appears to have been overlooked that s 89(5)(b) was declared unconstitutional in *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15 (5 June 2015); 2015 (10) BCLR 1158 (CC), and that the claim for repayment was consequently demonstrably bad in law, as there was not even scope to argue that a right to claim repayment under the provision had accrued before its repeal.

[20] The resultant muddle, which does not appear to have elicited any objection by the appellant, as it should have done,[12] illustrates only part of the reason for the complaint about the state of the pleadings voiced at the outset of this judgment.[13] At the end of the day we are able to deduce what the respondent's pleaded case would appear to have been only by ignoring the denials in his plea that are contradictory of the positive allegations advanced in his particulars of claim in reconvention; and also by disregarding allegations and claims that were palpably bad in law. That is the only way in which the pleadings can be construed sensibly; the alternative would be irredeemable incoherence.

[21] If the pleadings are construed in the manner just indicated, it becomes evident, despite an initial attempt by the respondent's counsel - advisedly abandoned under pressure of argument - to contend the contrary, that there was in point of fact no significance in the omission of the express reference to rule 22(4) in the consequentially amended plea. It is apparent on the pleadings, so read, that the respondent actually continued to rely on the subrule to avoid judgment being given in the appellant's favour in at least the amount of the undisputed indebtedness until he was able to obtain a judgment sounding in money in respect

[12] The need for the respondent to deliver a consequentially amended plea to the appellant's amended particulars of claim was made evident during the appellant's counsel's opening address. The judge was informed by the respondent's counsel at that time that he had discussed the import of the intended amendment with the appellant's counsel, who was content for the hearing to commence and for the amended plea to be delivered later. The judge was ill-advised to have acquiesced in that arrangement. As the judge was not himself enlightened as to the intended formulation of the intended plea, he could not know how it might affect the delineation of the issues and impact on the conduct of the trial. It is not possible for a judge to effectively fulfil his or her role in managing the proceedings if he or she is not fully cognisant of the pleadings. The muddled state of the pleadings that ensued upon the eventual delivery of the consequentially amended plea could have been avoided had the judge insisted, as he should have done, on the amended pleading being produced before the determination of the application for a separation order in terms of rule 33(4) (discussed below) and the hearing of any evidence. Had the plea been delivered when it should have been, it would in all likelihood have elicited an exception, and even if it did not, it would have provided reason to put the judge on enquiry before allowing the hearing to proceed on an obviously ill-defined basis, as discussed further in the body of this judgment.

[13] In paragraph [3].

of his claims in reconvention.[14] The respondent's counsel in essence spelled that out for the court in the address that he was invited (somewhat unconventionally[15]) to make before the appellant adduced its evidence. Counsel stated then with regard to the pig carcasses that were the subject matter of the invoices identified in the appellant's particulars of claim: '*So we* [i.e. the respondent] *got them. We got the benefit thereof. … Which means that subject to the pricing, which is in dispute at two levels, we have to pay for it*'.

[22] As the wording of the subrule makes plain,[16] the default position where a defendant resorts to rule 22(4) is that judgment on the plaintiff's claim is stayed until judgment is given on the defendant's claim in reconvention. The underlying principle is that judgment is given pari passu on the claims in convention and reconvention so that set-off can operate if the outcome makes that possible. It is evident from the orders made by the trial court described earlier[17] that that did not happen.

The separation of issues in terms of rule 33(4) and the problems to which it gave rise

[23] The action was tried in the court a quo before Parker J. At the commencement of the hearing on 13 September 2017, and at the request of the parties' counsel, the learned judge made a ruling in terms of rule 33(4) of the Uniform Rules directing that there would be a separation of issues for the purposes of the trial. The ruling, which confirmed and amended an earlier ruling to similar effect made during the pretrial judicial case management process, was framed as follows:

> The issue of quantum and causation of the defendant's counterclaim (in the event of liability being established) is stayed until the other issues in dispute between the parties are disposed of.

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[14] In his claim in reconvention the respondent in point of fact prayed for an order that set-off should apply. That was inept, for set-off operates automatically by operation of law to cancel out the debts on both sides to the extent that the amounts thereof are equal to each other. An order of court is not required. The prayer does, however, serve to confirm that, on a sensible construction of the respondent's pleadings, he admitted the appellant's claim, subject to his alleged entitlement to an abatement for the overcharge.

[15] The conduct of trials in the High Court is regulated in terms of rule 39 of the Uniform Rules. Rule 39(5) read with rule 39(9) provides that before any evidence is adduced an opening address may be made by counsel for the party who bears the duty to begin (usually the plaintiff). The opposing party's counsel's opportunity to make an address is provided for in rule 39(7) read with rule 39(9). It arises only after the firstmentioned party has closed its case. The procedure adopted in the court a quo appears to have been inspired by rule 29(3) of the Magistrates' Court Rules, which provides: '*Before proceeding to hear evidence, the court may require the parties to state shortly the issues of fact or question of law in dispute. The court may record the issues of fact or questions of law thus stated*'.

[16] See footnote 7 above, especially the italicised wording.

[17] At paragraph [12].

In formulating the separation of issues, the judge inserted the words '*and causation*' into the phrasing of the earlier ruling made on 25 April 2017.

[24] I proceed now to explain why the separation of issues was ill considered and conduced to unfortunate results, as indeed counsel, somewhat ruefully, conceded in argument before us.

[25] Three witnesses gave evidence at the ensuing first stage hearing. They were the two directors of the appellant company, Messrs Brent Burger and David Osborne, and the respondent. Mr Osborne was also the chief executive officer of the aforementioned Number Two Piggeries (Pty) Ltd,[18] which is apparently a major role-player in the national pork industry. The witnesses testified as to the basis upon which the appellant and the respondent had conducted their business relationship with each other over the period between 2002 and 2013, and as to the circumstances in which the appellant had, from July 2012, ceased using the respondent as a sort of middleman and started selling its produce directly into the market place, including to some of the respondent's established customers.

[26] I shall discuss the evidence insofar as it bore on the claims in reconvention in greater detail presently. Suffice it at this stage to say that it was clear by the end of the first stage hearing that there was no substance in the allegation that the parties had undertaken vis-à-vis each other that the prices at which the appellant transacted with the respondent would be in a fixed and predetermined relationship to the prices at which it did business with Winelands Pork. Indeed, the respondent in his testimony expressly conceded as much.

[27] The result was that the substratum for the allegation of an overcharge advanced in the respondent's pleadings in abatement of the total purchase price claimed in the appellant's claim in convention came apart at the seams. It followed, in the context of what we were informed had been the advised abandonment of the NCA issues, that, subject to the effect of the stay brought about consequent upon the respondent's plea in terms of rule 22(4), it should have been apparent to the trial court at the end of the first stage hearing that the appellant was entitled to judgment in its favour in the full amount that it had claimed. Startlingly in the circumstances, apparently overlooking the effect of rule 22(4), the court a quo, however, made an order dismissing the appellant's claim in convention with costs at the end of the first stage hearing.

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[18] See footnote 3 above.

[28] The trial judge gave as his reason for arriving at that result the view that the appellant had not been entitled to claim payment for the produce sold while it was in breach of the aforementioned sole marketing agreement that it had with the respondent, and which he had found had not been cancelled in July 2012, as alleged by the appellant. The judge's approach, which was at odds with the presentation of the respondent's case,[19] implied that the appellant's obligations under the sole marketing agreement were reciprocal to those of the respondent under the sale of pig carcasses agreements. The approach of the court a quo in this regard[20] was misconceived, and understandably the respondent's counsel did not try to support it.

[29] The marketing agreement was discrete from the sale agreements; and although they were fundamentally interrelated for the purposes of the parties' business relationship, they were not reciprocal in the sense that a breach by the appellant of the marketing agreement would entitle the respondent to refuse to pay the purchase price for goods delivered to it in terms of the sales agreements.[21] The alleged cancellation of the marketing agreement, which was contentious, bore only on the respondent's claim for damages for breach of that agreement; it had no relevance to the appellant's entitlement to payment for goods that it had sold and delivered to the respondent, and which the respondent had appropriated and turned to account.

[30] With regard to the claims in reconvention, the court a quo, as mentioned, declared that the respondent had '*successfully established liability by the plaintiff and as such* ... [was] *entitled to claim such damages as may be proved in due course*'.[22] The learned trial judge did not, however, specify whether the liability on the appellant's part that he found to have been established was in respect of the respondent's claim for contractual damages, or the alternative claim framed in delict. His reasoning suggests that he considered that the appellant was liable in respect of both claims, notwithstanding that the one had been framed in the alternative to the other. It was by no means obvious that the measure of damages that the respondent could recover in respect of the alternative heads of claim, if liability were

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[19] See the quotation from the respondent's counsel's address in para. [21] above.

[20] Which was manifest in an extensive discussion in the judgment of the *exceptio non adimpleti contractus* notwithstanding that such a defence had, unsurprisingly in the circumstances, not been pleaded.

[21] Indeed, even if the various agreements in terms of which the parties transacted their business fell to be characterised as integral components of a single contract, it would not necessarily follow that all of their mutual rights and obligations arising under such contract would be reciprocal in nature; cf. *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C), [1973] 3 All SA 199 (C).

[22] 'Recover' would probably have been a more accurate word to use than 'claim'.

established, would be indistinguishable; and the legal and factual underpinnings for each of them were different. The judge should therefore have clearly identified in respect of which of the alternative claims he had found the appellant to be liable. Identification was necessary to establish the basis upon which the second stage hearing contemplated by the judge was to proceed.

[31] Crucially, in making an order dismissing the appellant's claim in convention at the end of the first stage hearing, the trial judge completely overlooked the implications of the respondent's pleaded reliance on rule 22(4), which required the judgments on the claim in convention and those in reconvention to be given pari passu. I suspect that this obviously infelicitous result had as much to do with the unfortunately framed separation order as the shambolic state of the pleadings.

[32] It has been stressed repeatedly that a ruling in terms of rule 33(4) should be made only after very careful consideration by the judge *and the legal representatives* concerned of the practical import for the conduct of the trial and the determination of the action. As it is on appeal that the detrimental effects of an ill-considered separation of issues are most often painfully exposed, it is not surprising that many of these admonishments have emanated from the Supreme Court of Appeal.[23] The jurisprudence also emphasises that when a separation is being considered conscientious attention should be given to how the ruling is formulated. Experience teaches that it is often in the context of attempting the appropriate formulation of such rulings that the flaws in what might at first blush have appeared to be a convenient basis for separation are shown up.

[33] The directive in terms of rule 33(4) in the current matter failed to identify or particularise 'the other issues in dispute between the parties' that fell to be disposed of in a first stage trial. But having regard to the respondent's plea in terms of rule 22(4), they could hardly allow for an adverse determination in the first stage of the appellant's claim in convention, at least to the extent of the part of it that was admitted. As appears from the preceding discussion, the only aspects of the claim in convention that could fall within 'the

[23] See e.g. *Denel (Edms) Bpk v Vorster* [2004] ZASCA 4 (5 March 2004), 2004 (4) SA 481 (SCA), [2005] 4 BLLR 313, at para. 3; *Absa Bank Ltd v Bernert* [2010] ZASCA 36 (29 March 2010), 2011 (3) SA 74 (SCA), at para. 21; *Adlem and another v Arlow* [2012] ZASCA 164; [2013] 1 All SA 1 (SCA), 2013 (3) SA 1, at para. 5; *Road Accident Fund v Mohohlo* [2017] ZASCA 155 (24 November 2017), 2018 (2) SA 65 (SCA), at paras. 2-3; *First National Bank v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6 (9 March 2015); 2018 (5) SA 300 (SCA) at paras. 8-14 and *Government of the Western Cape: Department of Social Development v C B and Others* [2018] ZASCA 166 (30 November 2018); 2019 (3) SA 235 (SCA), at paras. 19-25.

other issues in dispute' at the first stage hearing were the alleged overcharge and the alleged effect on the claim of s 89(5)(a) of the NCA. It is manifest, however, that that must have been overlooked by the trial judge when he made an order dismissing the claim in convention with costs at the end of the first stage hearing without mentioning the NCA or acknowledging the aforementioned effect of the evidence in respect of the overcharge claim.[24] The error would have been less likely to have happened had the separation order identified precisely what was entailed in 'the other issues in dispute between the parties'.

[34] It is clear then that the trial court materially misapprehended the character of 'the other issues in dispute' and, in finding, *en passant* as it happened,[25] that there had been an agreed fixed and predetermined interrelationship between the prices the appellant was obliged to charge the respondent and those it charged Winelands Pork, it misconstrued the evidence. Its misdirection in dismissing the claim in convention at the end of the first stage hearing was manifest, as counsel for the respondent ultimately conceded before us. I shall come back later to address the order that should have been made.

[35] Turning to the second part of the order made by the court a quo, in terms of which it held that the respondent had successfully established the liability of the appellant to compensate him for such damages as he might prove that he had sustained. In regard to this aspect too, the ruling in terms of rule 33(4) was intrinsically problematic. It expressly contemplated that the hearing should canvas those matters necessary to equip the court to make a finding whether the appellant should be liable in damages to the respondent, be it in contract or in delict. Yet at the same time, and inimically to the enablement of that object, it excluded causation from the issues to be canvassed in the first stage hearing.

[36] It is impossible to conceive how liability to compensate could sensibly be attached to anyone without proof that their acts or omissions had been *causal* of the allegedly compensable loss. In the current matter, it should also have been evident, having regard to the nature of the respondent's alternative claim founded in delict, that legal causation – a legal policy based concept that inextricably intertwines considerations related to factual causation and the quantification of compensable loss[26] – was likely to feature materially in any determination of the delictual damages he was claiming. This should have shone an

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[24] See paragraphs [26] and [27] above.

[25] Because it did not determine the overcharge claim as one of 'the other issues in dispute'.

[26] Cf. *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); [1990] 1 All SA 498 at 700E-701G (SALR) and the other authorities discussed there.

especially bright light on the impracticability of separating causation and quantum. For these reasons, which in essence are closely congruent with those recently articulated in comparable circumstances by the appeal court in *Government of the Western Cape: Department of Social Development v C B and Others* supra loc cit,[27] the final formulation of the already too loosely worded original rule 33(4) directive by the exclusion of causation as an issue in the first stage hearing was confounding.

[37] It is clear that the ruling was devised without proper consideration. Indeed, had the relevant questions been given the attention they required, I think it is unlikely (with the arguable exception of the NCA-related questions, which were not yet pleaded when the ruling was made) that it would have been found that the case lent itself to a convenient separation of issues at all. The parties' legal representatives, who would have been more steeped in the matter than the trial judge could be at the outset of the hearing, must shoulder a substantial part of the blame for the unfortunate course that the matter consequently took. [28]

[38] In the circumstances it is only fortuitously that the record on appeal has put us in a position to be able to make a determinative judgment in respect of the claims in reconvention, and, as it happens, on the claim in convention.[29] This was because, notwithstanding the exclusion of 'causation' as an issue to be traversed in the first stage hearing, some evidence on factual causation was nevertheless adduced and there was enough material to determine whether the damages claims had any merit. In the circumstances I do not consider that it would be appropriate, or fair to the parties, for us to remit the action for trial afresh before a differently constituted court, as we might otherwise have had to do.[30] For the reasons that will follow, I have concluded that the respondent did not establish either that the appellant caused him to suffer damages by breach of contract, or that he enjoyed a claim in delict

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[27] Footnote 23 above.

[28] In motivating the amendment of the originally made ruling in terms of rule 33(4) to include 'and causation', the respondent's counsel informed the trial judge that he and the appellant's counsel '*had a long discussion on that this morning and we separately last night came to the conclusion that in this particular case there's such an overlap between causation and quantum that it's going to be very difficult. So we've agreed, subject of course to Your Lordship's agreement, that we also allow causation to stand over.*' Counsel's appreciation of the inherent overlap was perceptive but, having regard to the fact that there cannot be liability without proof of causation, it should have alerted them, and the judge, to the fact that the proposed separation (whether in originally determined or amended form) would in point of fact very clearly *not* be convenient.

[29] For an example of a case in which an ineptly determined separation of issues resulted in the appellate court being unable to determine the case on its merits on appeal and consequently constrained to make an order setting aside the judgment of the court a quo and remitting the case for trial afresh before a different judge, see *Silatsha v Minister of Correctional Services* [2018] ZASCA 145 (2 October 2018).

[30] Cf. *Road Accident Fund v Mohohlo* supra, at para. 3.

founded on unlawful competition. In the circumstances there was no basis for the claims in reconvention to proceed to a second stage hearing. The judge was in a position at the end of the first stage to have pronounced judgment on both the claim and counterclaim then and there in the manner contemplated by rule 22(4).

The nature of the parties' multifaceted contractual relationship

[39] In its original particulars of claim, the appellant alleged that the sale of pig carcasses in issue had taken place in terms of a contractual arrangement allegedly entered into between it and the respondent in 2005. The evidence on both sides, while not altogether consistent in all respects, broadly confirmed the existence of the alleged arrangement and testified to its multi-faceted character, constructed, as it was, from a series of interlinking agreements. These included an oral agreement that the respondent would purchase carcasses exclusively from the appellant and take all of the appellant's pigs except those that the appellant disposed of weekly or fortnightly to Winelands Pork. The carcasses purchased by the respondent would be marketed by it under its own brand and sold to customers to be found by the respondent in the Western Cape outside the area in which Winelands Pork marketed its product.

[40] The respondent would act for its own account in disposing of the slaughtered pigs acquired from the appellant, and not as the latter's agent. It was evident, however, that the arrangement created something in the nature of a symbiotic relationship between the parties' respective businesses, it being implied that the respondent would be able to sell on the carcasses at margins that would allow it to conduct a viable business. This carried the obvious concomitant that the prices at which the appellant would sell the pigs to the respondent would be fixed with due regard to the conditions prevailing from time to time in the relevant marketplace. The implication did not, however, exclude the possibility that the respondent might have to bear losses in tough market conditions that it might try to recoup in good times. Indeed, the respondent admitted that this had occasionally happened. There was therefore nothing in the evidence that would justify the conclusion that the parties' business arrangement was ordered to guarantee the respondent a profit on the turnover from every single one of its transactions with the appellant. The appellant was not there to subsidise the respondent.

[41] It was apparent from the oral evidence, which was supported by the contemporaneous correspondence between the parties, that the governing prices applicable from time to time

were determined by negotiation on a regular basis. It was plainly in the respondent's interest to buy from the appellant at the lowest possible prices, for that would maximise its opportunity to profit from the on-selling of the purchased produce. But at the same time, he also needed the appellant to remain viable as his supplier, so he could not sensibly seek to drive the prices so low as to imperil the viability of the appellant's business as his sole supplier. The appellant in turn would naturally also wish to maximise *its* own profit margins. This infused the business relationship with an element of inherent tension. That the parties should approach their price negotiations with their mutually competing interests in mind would not in the circumstances, of itself, be indicative of bad faith. It is apparent that the respondent frequently requested the appellant to reduce its prices. He motivated these requests with reference to prevailing market conditions and the prices charged by other suppliers. The appellant sometimes acceded to the requests and sometimes declined them based on its own assessment of the market.

[42] The prices were changed several times in the course of every year, and a regular seasonal trend, related to the changing levels of end-consumer demand for pork, was discernible. They were determined per kilogram of the weight of the carcasses after the pigs had gone through the abattoir. Different prices applied depending on whether the pig was of smaller size (which consisted of categories respectively called 'porkers' and 'baconers') or in the heavy weight league (divided between those of 76 to 100 kg weight and those over 100 kg), with the heavier pigs generally realising relatively lower prices per kilogram. The porkers and baconers were pigs that were sent for slaughter after being kept for fattening in the appellant's pens for a shorter period than those that stayed there longer growing in size and weight all the while. A downturn in end-consumer demand, something that happened during the winter months, tended to slow up the turnover of pigs from the pens and lead to a build-up in the proportion of pigs in the heavier categories at the appellant's piggery. This could give rise to problems, as the demand by the respondent's customers was predominantly for carcasses in the smaller categories because they made for leaner meat. The result was a seasonal mismatch between supply and demand. It was a recurrent situation that, in the words of the respondent, was something that had to be 'managed' between the appellant and himself. Moving the oversupply of heavyweight pigs was achieved by lowering prices. That was done by negotiation between the principals.

[43] There was no provision for a deadlock breaking mechanism in the event that the appellant and the respondent might not be able to agree on price. The absence of a deadlock

breaking mechanism highlighted how pivotal it was to the continuing subsistence of the parties' business relationship for them to be able, when necessary, to find each other on the prices at which the sales would take place. The practicalities of the arrangement were such that if agreement could not be reached, the relationship would inevitably founder. The business relationship endured for several years because, until mid-2012, in circumstances to be described presently, that situation did not eventuate.

[44] The interlocking agreements on which the parties' relationship was based included (i) an exclusive supply agreement, (ii) regularly concluded contracts of sale concluded on the basis of periodically agreed prices and (iii) a sole marketing agreement. It was axiomatic that the contracts just identified as (i) and (iii) were intrinsically dependent for their operation on transactions being effected between the parties pursuant to the periodic conclusion of the agreements identified as (ii). The structure of the parties' trading relationship was such that if they were unable to conclude the sale agreements by reason of an inability to achieve *consensus ad idem* on pricing, the supply and marketing agreements just could not work.

[45] The respondent's counsel's argument that there was actually no scope for deadlock because a market related price was capable of objective ascertainment was bereft of any merit. The very concept of a market *related* price conjures one that is identifiable as falling within an objectively ascertainable range. The word 'related' connotes a degree of connection; it does not imply a precisely determinable price. There is nothing exceptionable about parties to a contract of sale agreeing that the price be fixed with reference to what Corbett JA in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 574 D-E called an 'external standard'. But an external standard would not serve its purpose of giving certainty if it could not render a precisely ascertainable price. [31] The evidence in fact pointed up that there was a range of prices charged by the players in the marketplace and that the discrepancy between the prices charged by the various suppliers contributed to the competitiveness that characterised the industry. The argument in

[31] The remark by Grosskopf JA in *Stead v Conradie en Andere* 1995 (2) SA 111 (A) at 123 that '[m]*arkwaarde van 'n eiendom is na my mening iets wat objektief vasstelbaar is*', on which counsel for the respondent sought to rely, was made in circumstances quite distinguishable from those that presented in the current matter. In *Stead* it fell to one of the parties to a contract of sale to make a market value determination for the purpose of fixing the purchase price. The effect of the learned judge of appeal's remark was that the fact that the determination fell to be made within objectively ascertainable parameters took the matter outside of the situation in which fixing the price was in the absolute discretion of one the parties, which would have rendered the agreement invalid. Certainty was obtainable in *Stead* because the contract nominated a person whose determination of the price with reference to the market would be definitive. All that the parties in the current matter did was to agree to negotiate on the determination of a market related price.

any event went against the import of the respondent's evidence, which was that the prices had to be negotiated.

[46] The parties' business relationship was also regulated by an agreement in terms of which the respondent was afforded 14 days' credit for the payment of the prices of the pigs purchased from the appellant. This followed on the grant by the appellant of a written application for credit by the respondent. The terms of credit required the respondent to pay the appellant within 14 days of date of invoice and rendered him liable to pay interest at two percent above prime should he fail to do so. The respondent ceded its book debt to the appellant to provide security for the discharge of its obligations under the credit facility.[32] The cession agreement, which was recorded in a discrete deed of contract, required the respondent to regularly furnish the appellant with particulars of its transactions with its customers. The information supplied would apprise the appellant of the identity of the customers, the volume of the respondent's transactions with them and the prices at which sales were made to them. This was the allegedly confidential information that the respondent claimed was misappropriated by the appellant to 'hijack' the respondent's business by selling directly to its established customers.

[47] The business relationship was accordingly regulated by five identifiably separate, but practically closely interlinked, agreements. It is by no means unique for business arrangements to be governed by means of a structure of interrelated agreements rather than a single contract. Whether such agreements are mutually interdependent in any given case; and if they are, the extent to which any of them can continue in effect if any of the others fails, depends on the evident intention of the contracting parties. In essence, it is a matter of construction; cf. e.g. *Wynn's Car Care Products (Pty) Ltd. v First National Industrial Bank Ltd.* [1991] ZASCA 34 (26 March 1991); 1991 (2) SA 754 (A).

[48] In the current matter I think that the structure of the parties' business relationship imposed a duty on them to use their best endeavours to successfully negotiate the periodic pricing agreements that were an essential component for its continuance.[33] The allegation pleaded by the respondent that the appellant had been obliged to give reasons in writing in the event of it nevertheless being unable to reach agreement with the respondent on the price

[32] I obviously use the term 'credit facility' in its ordinary sense, as distinct from the technical concept provided for in s 8(3) of the National Credit Act.

[33] Cf. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30 (17 November 2011) 2012 (1) SA 256 (CC); 2012 (3) BCLR 219.

at any time was not sustained by the evidence, and, in the absence of any contractually agreed binding review mechanism, it is in any event difficult to conceive what practical purpose any such requirement would have served. Assuming (without deciding) that the duty to negotiate in good faith gave rise to an enforceable obligation in this case,[34] I shall address the question whether the appellant acted in good faith in endeavouring to negotiate the prices in July 2012 presently.

The respondent's counterclaim based on contract

[49] That part of the respondent's claim in reconvention that was founded on an alleged breach of contract was premised on the allegation that the appellant had acted in breach of the parties' contract by selling those of its pigs that were not purchased by Winelands Pork to third parties instead of exclusively to the respondent. When confronted with the respondent's counterclaim predicated on an alleged breach of contract, the appellant amended its particulars of claim to allege that some of the agreements that it had alleged had been concluded in 2005 (viz. those that I identified earlier as agreements (i), (ii) and (iii)) had actually been cancelled in July 2012 after it and the respondent had been unable to reach agreement on the price for a large number of pigs in the heavy weight categories that needed to be disposed of from the appellant's piggery. The cancellation was allegedly effected to give the appellant a free hand to sell its pigs directly to other customers. It was alleged to have followed on a breach by the respondent of its obligation to acquire pigs exclusively from the appellant. In that regard, it was common ground that at the time of the impasse with the appellant over the disposal of the surplus of heavy pigs the respondent had bought some pigs from another supplier based in the Free State called Huntersvlei. He had done so without informing the appellant of his action. The appellant alleged in its amended particulars of claim that the sales it had made to the respondent subsequent to the aforementioned cancellation had been on an ad hoc basis, but still on the previously determined terms as to credit, secured by the respondent's cession of book debts.

[50] The first stage hearing, insofar as it concerned the respondent's claim based on breach of contract, proceeded on the premise that the outcome turned on whether the originally established business relationship between the parties had still been extant when the appellant embarked on selling to third parties, or whether the agreements under which the appellant

[34] Cf. *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para. 35 and *Southernport Developments (Pty) Ltd v Transnet Ltd* [2004] ZASCA 94 (29 September 2004); [2005] 2 All SA 16 (SCA), at paras. 11-16.

was bound to sell exclusively to the respondent, and the latter given sole marketing rights, had been cancelled. That was the only relevance of the cancellation issue. As already pointed out, it did not bear on the appellant's claim for payment. It did not matter for the purposes of the claim in convention whether the produce had been sold under the auspices of the alleged 2005 business arrangement, as contended by the respondent, or in terms of post-July 2012 ad hoc agreements, as alleged by the appellant. The respondent was liable to pay the purchase price in either context. The alleged cancellation was relevant to the counterclaim for contractual damages, however, because such a claim obviously would have no foundation if the sole marketing agreement had been cancelled, or otherwise come to an end.

[51] The appellant's witnesses testified that the agreement had been cancelled and that the respondent had been informed at the time that he could continue to make purchases from the appellant on a non-exclusive basis on the existing terms of credit. The logical implication in what was allegedly communicated to the respondent was that it was the exclusive supply and marketing agreements that were being cancelled. The respondent denied that the contracts had been cancelled.

[52] It does not appear to have been in seriously in issue that the appellant would have been entitled to cancel the contracts on account of the respondent's purchases of supplies from Huntersvlei; the matter in contention was whether the cancellation had been communicated to the respondent. It is trite that the cancellation of a contract is effective only once it is communicated to the counterparty.[35]

[53] The respondent did contend in the course of his evidence that he had been within his rights to purchase produce from other suppliers, but his almost apologetic attitude about having treated with Huntersvlei and the emphasis he placed on the fact that he had done so only in extremis was inconsistent with that claim. His claim to have been contractually entitled to act in that manner was also inconsistent with the allegations pleaded in his

[35] The trial judge was of the opinion that another step was required. He held that a cancellation could be effected only after the appellant had given the respondent notice to cure its breach. He mentioned the concept of *mora*. But *mora* is concerned with the failure of a debtor to perform his contractual obligations timeously, in other words a default. The concept is not engaged when a party to a contract violates it by doing something positive in material breach of his obligations. Quite how a breach of the nature involved could be cured is in any event problematic. The judge appears to have had in mind, although this is by no means clear, something like an undertaking by the guilty party not to do it again.

amended particulars of claim in reconvention, dated 26 September 2016.[36] The notion that the respondent would have been at liberty to source his pigs from competitors of the appellant would have been completely at odds with commercial sense in the context of the parties' business relationship. Furthermore, had the respondent indeed been entitled to make purchases from the appellant's competitors, the probability is that he would have maximised on the leverage that would have given him in price negotiations with the appellant and would have promoted the fact that he was obtaining his supplies more cheaply from another source when the negotiations with the appellant appeared to be approaching an impasse, rather than keeping it quiet. The respondent's endeavour to suggest that his transaction with Huntersvlei was an isolated event with very limited potential to harm the appellant's interest was also unconvincing in the light of his admitted (unsuccessful) application to that entity to do business with it on credit. The respondent's weak attempts to deny having acted in breach detracted from his credibility.

[54] In my judgment, however, the cancellation question was a red herring. I consider that the parties' inability to reach a meeting of minds on pricing brought with it a concomitant failure of the business relationship that had contemplated that the one would supply exclusively to the other and the latter would purchase its produce exclusively from the former. As discussed earlier, if the parties could not agree on price the whole scheme would necessarily fall through.

[55] I would be prepared to allow that the respondent might arguably have been entitled to some contractual redress (probably only by way of damages) if he had been able to show that the inability to achieve agreement on price was the result of wilful intent by the appellant to render the interlinked agreements unworkable.[37] But it is not necessary to go into that because any suggestion of bad faith on the part of the appellant was not supported by the evidence.

[56] On the contrary, it was evident that the price negotiations were indeed taken seriously by the appellant. It held a meeting with the respondent to try to bridge the gap. The meeting

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[36] In para. 20, the respondent had pleaded that '… in order to sell and deliver the pork products required by its (*sic*) …customers, and to survive business-wise, [he] was accordingly enjoined (*sic*) to mitigate its (*sic*) losses, on two occasions, to purchase pork products during the period approximately end June 2012 from an entity known as Hunters Vlei'.

[37] The decisions in *Roazar CC v Falls Supermarket CC* [2017] ZASCA 166 (29 November 2017); [2018] 1 All SA 438 (SCA); 2018 (3) SA 76 and *Trustees for the time being of Oregon Trust v Beadica 231 CC and Others* [2019] ZASCA 29 (28 March 2019); 2019 (4) SA 517 (SCA) serve to demonstrate the difficulties that might confront any such claim.

was held in a coffee shop in Bonnievale on 18 July 2012. The attendees were Messrs Burger, von Memerty and Botha, representing the appellant, and the respondent in person. Mr von Memerty was a director of Number Two Piggeries (Pty) Ltd, the 50% shareholder in the appellant company. Mr Botha was the appellant's farm manager. Also present was the owner of the Bonnievale Abattoir, which was the business where the pigs supplied to the respondent by the appellant were slaughtered. It was common ground that the slaughtering fee, which was also charged per kilogram, was a factor that was built into the prices at which the appellant's produce was sold to the respondent. Both the appellant and the abattoir owner were prepared to make reductions in their prices to help bridge the gap in the prevailing difficult market conditions. The respondent, however, found himself unable to compromise his position sufficiently for an accord to be achieved. I do not suggest that it was the respondent's fault that agreement could not be reached despite the other parties' best endeavours,[38] but the evidence does make it clear that it was not for want of trying on the part of the appellant and the abattoir owner that the negotiations failed.

[57] In the given circumstances, in which the parties' contractual scheme failed not through the fault of either of them, but because of the practical effect of an inherent vulnerability to failure in its structuring, the respondent did not enjoy a right to contractual damages. Cancellation did not come into the picture.

[58] But, even in the event that I were wrong in my approach, and the matter did turn on whether or not the sole marketing contract was cancelled, as would appear to have been the view of the court a quo, then the answer would depend on which of the conflicting versions of the facts the trial court could accept. The approach that is adopted by courts faced with mutually destructive versions of the facts is well established in principle.

[59] The summary of the considerations that are generally weighed in the process of determining which version to accept set out in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie SA and others* [2002] ZASCA 98 (6 September 2002); 2003 (1) SA 11 (SCA) at para. 5 by Nienaber JA is the most frequently cited authority in this regard. Factors bearing on the court's impression of the witnesses' credibility and reliability fall to be assessed in the context of the incidence of the probabilities, in regard to which the effect of the 'objective' evidence, such as the common cause facts and contemporaneous records, plays a weighty role. The process is an integrated one, and it falls to be undertaken mindful

[38] The respondent's inability to reach agreement with the appellant on the prices certainly did not constitute a repudiation, as the appellant alleged in its pleadings.

that in a civil case the key to the outcome is whether the evidence in favour of the party that bears the onus has established the factual basis for the claim on a balance of probability. The onus was on the respondent to prove all of the elements of its contractual damages claim, including the subsistence of the contract.

[60] The court a quo concluded that the contract had not been cancelled. It found that Brent Burger, who was the director of the appellant's company who averred that he had communicated the cancellation to the respondent, was not a credible witness. Apart from its expressed scepticism about the late pleading of the cancellation, the trial court did not clearly reason its preference for the respondent's version over that of Burger. There is little sign in the judge's reasoning, despite his reference to the judgment, that he undertook the sort of exercise described in *Martell et Cie* loc. cit. supra in making his determination to prefer the respondent's version. The judge's focus on the features of the amendment of the appellant's pleadings, whilst paying no heed at all to the endeavours by the respondent in his amended pleadings to ineptly try to avoid his admitted contractual liabilities by means of baseless resort to the NCA was less than even-handed. It is also not apparent on a reading of the record how the respondent might have impressed more favourably as a witness than Burger. Burger gave his answers in a straightforward and unambiguous manner, whilst the respondent constantly had to be urged, by both the judge and the appellant's counsel, to deal with the question and answer what had been put to him. In preferring the evidence of the respondent over that of Burger, the judge gave little, if any, attention to the objective weight of the probabilities.

[61] As a rule of practice an appellate court does not readily go against the credibility and factual findings of a trial court. But it will not render the appeal procedure illusory by holding back from doing so in a situation in which the findings go against the probabilities as established by the evidence, or where the trial court's reasons for accepting or preferring a witness's testimony, despite its import being against the probabilities, have not been cogently or persuasively explained.[39] The rationale for the practice is that an appellate court, which in an appeal from a primary court ordinarily deals with the case exclusively on the basis of the printed record of proceedings in the latter forum, does not enjoy the advantage of the trial

[39] Cf. e.g. *Santam Bpk. v Biddulph* [2004] ZASCA 11 (23 March 2004); [2004] 2 All SA 23 (SCA); 2004 (5) SA 586, at para. 5, and *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* [2005] 4 All SA 16 (SCA); 2005 (5) SA 339 at para. 14.

judge in being able to observe the demeanour of the witnesses and absorb the atmosphere in which the oral evidence is given.

[62] Demeanour and atmosphere, being factors that are 'vague and undefinable'[40] in the estimation of a witness's credibility, will, by themselves, be cogent determinative considerations extremely rarely, however, for that would postulate a case unattended by inherent or incidental probabilities; a situation very difficult to conceive of in reality. It has long been acknowledged that demeanour can be a tricky horse to ride.[41] Any finding by a trial court based on witness demeanour alone, without reference to the wider probabilities, will usually be a misdirection. That was vividly illustrated by Nugent JA in *Medscheme Holdings*,[42] where, in the course of explaining his rejection of the credibility findings of the trial court, the learned judge of appeal stated '*It has been said by this court before, but it bears repeating, that an assessment of evidence on the basis of demeanour – the application of what has been referred to disparagingly as the "Pinocchio theory" – without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the court a quo. Indeed, on many issues, the broad credibility findings, undifferentiated as they were in relation to the various issues, were clearly incorrect when viewed against the probabilities.*'[43] Atkins LJ (later Lord Atkins) put the role of demeanour in adjudication into some perspective when he remarked '*an ounce of intrinsic merit or demerit in the evidence, that is to say the value of the comparison of evidence with known facts, is worth pounds of demeanour*'.[44]

[63] A trial court is not ordinarily in any better position than the appellate tribunal to assess the incidence of the probabilities, for that is determined by the evidence, not by demeanour or atmosphere (although I accept that the court's perception of a witness's

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[40] Per Horwitz AJ in *R v Lekaota* 1947 (4) SA 258 (O) at 263.

[41] The 'homely metaphor' first used in that context, to the best of my knowledge, in *S v Kelly* 1980 (3) SA 301 (A) at 308B (per Diemont JA).

[42] At the place cited in footnote 39 above.

[43] (Footnotes omitted.) The 'Pinocchio theory' is explained in footnote 2 to the judgment as the theory '"*…according to which dishonesty on the part of a witness manifests itself in a fashion that does not appear on the record but is readily discernible by anyone physically present . . .*" see A M Gleeson QC '*Judging the Judges*' 53 Australian LJ 338 at 344, quoted in Tom Bingham *The Business of Judging: Selected Essays and Speeches* (2000) Oxford University Press at 10.

[44] *Société d'avances Commerciales (Société Anomyne Egyptienne) v Merchants' Marine Insurance Co. ('The Palitana')* (1924) 20 Lloyds Rep 140 at 152.

character may affect its interpretation of his or her evidence, in which case it behoves it to explain that in its judgment). The limitations to the proper application of the rule of practice are therefore obvious, as borne out by observations recorded in any number of authoritative decisions.[45] Their effect, and the 'loose and flexible'[46] character of the rule of practice, no doubt underpinned the observation by the Constitutional Court that '[t]*he deference which a court of appeal ought properly to accord credibility findings made by a trial court based directly or indirectly on the demeanour of witnesses who have testified orally before it, is not a matter of easy or simple formulation'*.[47]

[64] In *R v Dhlumayo* 1948 (2) SA 677 (A); [1948] 2 All SA 566, which is the locus classicus,[48] Davis AJA emphasised (at 698-700 (SALR)) that the practice by appellate courts to ordinarily show due deference to the factual and credibility findings of trial courts should not negate their duty to give meaningful effect to the object of an appeal, which is to afford '*a rehearing*' on the record (supplemented, only in exceptional cases, by additional evidence that the appeal court might admit). More recently, the Constitutional Court remarked in *Bernert v ABSA Bank Ltd* [2010] ZACC 28 (9 December 2010); 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 at para. 106 that '*The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word." The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts*

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[45] In *Arter v Burt* 1922 AD 301 at 306, Innes CJ stated, '[t]*he advantage enjoyed by a Trial Court of observing the manner and demeanour of the witnesses is very great and a resulting conclusion will not lightly be disturbed. But a finding baldly based on demeanour alone is not satisfactory. The reason*[s] *should indicate that the general probabilities and the broader aspects of the case have not been overlooked*'. To similar effect see also, for example, *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A); 1970] 3 All SA 44, at 648-650 (SALR), *Body Corporate of Dumbarton Oaks v Faiga* [1998] ZASCA 101 (26 November 1998); 1999 (1) SA 975 (SCA); [1999] 1 All SA 229, at 979-980 (SALR), *President of the RSA and Others v South African Rugby Football Union and Others* [1999] ZACC 11 (10 September 1999); 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 at paras. 78-80, *Allie v Foodworld Stores Distribution Centre (Pty) Ltd and Others* [2003] ZASCA 151 (2 December 2003); [2004] 1 All SA 369 (SCA) at paras. 35-42.

[46] *R v Dhlumayo* 1948 (2) SA 677 (A); [1948] 2 All SA 566, at 695 (SALR).

[47] In *President of the RSA & Ors v SARFU & Ors* supra, at para. 78.

[48] The pertinent propositions listed more than 70 years ago in *Dhlumayo* at 705-706 (SALR) have stood the test of time. It is in their application that one finds differences of emphasis in the reported cases.

as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.' (footnotes omitted). And in *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 (26 April 2016); 2016 (4) SA 121 (CC); 2016 (6) BCLR 709, at para. 40, the Court (again) cautioned that '*... the deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case*'.[49]

[65] The remarks in *Bernert* quoted above point up the close practical association between the practice of relative deference by appellate courts and the discharge by trial courts of their constitutional duty to provide adequate reasons for the findings made in their judgments.[50] One might reasonably expect to find a proportionate correspondence between the cogency and persuasiveness of the reasons given by the primary court for its factual and credibility findings and the degree of deference shown by the appellate court. That view finds support, I think, in the third principle identified by Lord Thankerton in his speech in *Watt or Thomas v Watt* [1947] AC 484; [1947] 1 All ER 582 (HL) (which was extensively referred to in the Appellate Division's judgments in *Dhlumayo*); viz. that where the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence that he or she has not taken proper advantage of having seen and heard the witnesses, the matter will then become at large for the appellate court.[51]

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[49] In Australia, where the judicial appellate system is closely similar in form and history to our own, the High Court (per Gleeson CJ, Gummow J and Kirby J) has noted, with regard to credibility findings premised on the trial judge's assessment of witness demeanour and the practice of appellate court deference to them, that *'... in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events*'. The judgment concluded in this regard '[t]*his does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical*'. *Fox v Percy* [2003] HCA 22 (30 April 2003); 214 CLR 118; 197 ALR 201; 77 ALJR 989, at para. 31.

[50] Cf. *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1 (1 March 1999); 1999 (2) SA 667 (CC); 1999 (3) BCLR 253, at para. 12, where Goldstone J stressed the furnishing of adequate reasons for judgment as fundamental to judicial accountability (in terms of the founding value in s 1 of the Constitution) and highlighted their essential role in assisting '*the appeal court to decide whether or not the order of the lower court is correct*'.

[51] At 587 (All ER). I have not overlooked the difficulties that Davies AJA expressed in *Dhlumayo* with the formulation of the so-called third principle by Lord Thankerton and have taken into account the learned acting judge of appeal's exposition of how it should be understood. The remarks in the *Bernert* judgment quoted above do seem to me, however, to be in accord with the unadulterated tenor of Lord Thankerton's expression of the principle.

[66] I have dealt with the rule of appellate practice at perhaps greater length than strictly necessary because of the assertion in the respondent's counsel's heads of argument that we were bound by the trial court's factual and credibility findings; although it should be said the argument was not pressed with any force in oral argument.

[67] Burger's evidence in regard to the amendment of the appellant's particulars of claim to allege a cancellation does not suggest any attempt by him to avoid responsibility. He admitted that the original pleading had been drawn in accordance with his instructions, and he did so without prevarication. Having regard to the fact that the claim was for payment for goods sold in terms of various sale agreements, to which the credit facility and cession of debt agreements executed in February 2005 related, but the sole supply and marketing agreements did not, it is objectively understandable how it came about that the effect of his instructions was that the transactions occurred in terms of an arrangement put in place in 2005. The date 2005 would have been taken from the respondent's application for credit and the cession of book debts agreement, which were the only documentary underpinnings for the parties' business relationship, and were agreements that remained germane to the sales transactions in issue in the claim in convention. It should have been appreciated that Burger is a pig farmer, not a lawyer. He would have had no reason when he gave his original instructions to think that the cancellation of the sole marketing agreement might be relevant to the appellant's claim for goods sold and delivered, and he quite likely therefore would not have had it in mind.

[68] It is clear from the correspondence exchanged between the parties subsequent to July 2012, when the alleged cancellation was effected, that the respondent was aware of, and apparently acquiescent in, the appellant's decision to henceforth market its produce directly, rather than through the respondent. Notwithstanding such knowledge, the respondent had not challenged the appellant's right to act in that manner. Despite the pressure under which the appellant's actions had placed his business, the respondent had not sought to enforce the sole marketing agreement or threatened the appellant with a claim for damages. He had instead continued to treat with the appellant by purchasing its produce in terms of the credit facility, albeit in considerably reduced quantities, while plaintively proposing a new arrangement in lieu of the erstwhile sole supply and marketing agreements. His actions and the tenor of his correspondence were consistent not only with knowledge, but also acceptance, that those agreements had been terminated.

[69] In those circumstances, Burger cannot fairly be criticised as untruthful for not having initially told his attorney about the cancellation. On the contrary, it is entirely understandable that it was only when, *inconsistently with his aforementioned conduct prior to the litigation*, the respondent counterclaimed for damages arising out of an alleged breach of the sole marketing agreement, that the cancellation of that component of the originally established business relationship would have become a pertinent consideration. The trial court's judgment gives no indication that these considerations were taken into account when Burger's evidence was stigmatised as dishonest and unreliable.

[70] The trial judge also erred in my opinion by rejecting as '*highly improbable, if not downright ludicrous*' the assertion in Burger's evidence that the agreements as to terms of credit and cession of book debts had survived the termination of the sole marketing agreement and continued to apply in respect of its sales to the respondent after July 2012. There is nothing farfetched or improbable about that at all. On the contrary, it was clear from the respondent's own evidence that he was unable to conduct business at all except upon terms of credit such as those that he enjoyed from the appellant. It was implicit in his evidence that he managed the cashflow in his business by applying the receipts from the sales of his produce to settle the expenses he incurred in obtaining the goods that he sold. The small amount of arrear interest that he owed when he closed his business at the end of February 2013 is testimony to the fact that he had continued to do business with the appellant on the established terms of credit between July 2012 and February 2013, all the while knowing and accepting during that period of more than seven months that the sole marketing agreement was no longer in operation. By his own account, it was his inability to obtain terms of credit from Huntersvlei or any other alternative supplier that left him wholly reliant on the appellant and unable to find an alternative source of supply to keep his business going.

[71] In my judgment, the evidence established as a matter of probability that the sole marketing agreement was indeed effectively cancelled by the appellant. It is clear on his own account of events that the respondent knew that the agreement had been terminated by 24 or 25 July 2012, and it is plain that in the period leading up to that date after the coffee shop meeting he did not transact with the appellant because of their inability to find each other on pricing. He therefore could not have sustained any losses in the short interval before he learned of the cancellation. It was of no practical consequence in the circumstances whether the respondent learned of the cancellation when he telephoned Burger after receiving a report from his employee that Burger had been seen at the premises of one of his customers (as

contended in the respondent's case), or when Burger, of his own initiative, telephoned the respondent (which was the appellant's case). It does not matter how the affected contracting party comes to learn of the cancellation, whether directly from the mouth of the cancelling party or from a third party, or even from observation of the unambiguous implications of the conduct of the cancelling party. It also does not matter whether the party entitled to cancel the contract does so giving a wrong reason, provided only that a good reason to have done so was actually available at the time; see *Datacolor International (Pty) Ltd. v Intamerket (Pty) Ltd* [2000] ZASCA 81 (30 November 2000); 2001 (2) SA 284 (SCA); [2001] 1 All SA 581 (A), at paras. 28-30.

[72] In reaching this conclusion, I have assessed the conflicting versions with reference to what I consider to be the telling effect of the objective evidence and the common cause facts; being matters in respect of which the trial court enjoyed no greater advantage than this court, and to which, in my respectful opinion, it paid no or insufficient regard. There was consequently no basis upon which the appellant could be liable in contractual damages to the respondent, as alleged in the claim in reconvention.

The respondent's counterclaim in delict

[73] Turning to the alternative claim founded in delict. The principles by which the concept of unlawful competition is defined under the extended Aquilian action were summarised in the Constitutional Court's judgment in *Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited* [2016] ZACC 42 (25 November 2016); 2017 (1) SA 613 (CC); 2017 (2) BCLR 152, at paras. 29-30:

> [29] Much development in our law has taken place since then [i.e. the judgment in *Matthews v Young* 1922 AD 492], but for present purposes we need only go to this Court's own jurisprudence that brings these common law principles in line with our constitutional framework. In *Phumelela* [*Phumelela Gaming and Leisure Limited v Gründlingh* [2006] ZACC 6; 2007 SA (6) 350 (CC; 2006 (8) BCLR 883] Langa CJ stated:
>
> > "The delict of unlawful competition is based on the Aquilian action and, in order to succeed, an applicant must prove wrongfulness. This is always determined on a case by case basis and follows a process of weighing up relevant factors, in terms of the *boni mores* [of the community] now to be understood in terms of the values of the Constitution.
> >
> > Any form of competition will pose a threat to a rival business. However, not all competition or interference with property interests will constitute unlawful competition. It is accordingly accepted that it is only when the competition is wrongful that it becomes actionable. The role of the common law in the field of unlawful competition is therefore to determine the limits of

> lawful competition. This determination, which takes account of many factors, necessitates a process of weighing up interests that may in the circumstances be in conflict. Fundamental to a determination of whether competition is unlawful is the *boni mores* or reasonableness criterion. This is a test for wrongfulness which has evolved over the years.
>
> The Bill of Rights protects the right to property, and also promotes and protects other freedoms, notably in this case, the right to freedom of trade. The consequence of the right to freedom of trade is competition.
>
> The question is whether, according to the legal convictions of the community, the competition or the infringement on the goodwill is reasonable or fair when seen through the prism of the spirit, purport and objects of the Bill of Rights. Several factors are relevant and must be taken into account and evaluated. These factors include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection that positive law already affords, the importance of competition in our economic system, the question whether the parties are competitors, conventions with other countries and the motive of the actor." [In para. 31.]
>
> "In its judgment, the Supreme Court of Appeal noted that goodwill is a valuable asset in the sphere of competition. The Bill of Rights does not expressly promote competition principles, but the right to freedom of trade, enshrined in section 22 of the Constitution is, in my view, consistent with a competitive regime in matters of trade and the recognition of the protection of competition as being in the public welfare." [In para. 40.]
>
> [30] The development of the law of unlawful competition must thus be accomplished in terms of the general principles of Aquilian liability. In general this involves conduct in the form of an unlawful and culpable act or omission that causes damage in the form of economic loss to another. It is not the conduct itself that establishes unlawfulness, but its harmful result. … There is no general right not to be caused pure economic loss, but in unlawful competition cases, … our courts have recognised that the loss may lie in the infringement of a right to goodwill or in the legal duty to respect the right to goodwill.

[74] There is no closed list of instances of conduct that are acknowledged to constitute unlawful competition, but the dishonest use of a third party's confidential information to gain an unfair competitive advantage is a well-recognised example. Honesty and fairness, which are relevant criteria when it comes to weighing whether any competitive conduct falls foul of the community's sense of *boni mores*, have been acknowledged to be elastic and imprecisely defined concepts, so that any conclusion whether they are present or absent is always heavily influenced by the peculiar circumstances of the given case.

[75] For information to qualify as 'confidential' in the sense that would be relevant for the purposes of competition it needs to be secret (i.e. not in the public domain) and of commercial value. There can be no basis for a complaint of unlawful competition on the

basis of the use by a competitor of allegedly proprietary information that does not have at least those two characteristics.

[76] The information that the respondent relied on in the current matter was that pertaining to the identity of its customers and the prices at which it sold pig carcasses to them. The appellant had some access to this information because the provisions of the cession of book debts agreement entitled it to periodic confirmation of the information that it would need in the event of it ever having to exercise its contingent right under the agreement to exact payment from the respondent's trade debtors. The evidence did not support the judge's finding that the appellant had had access to the respondent's price lists and discount structures. Knowledge of the prices being realised by the respondent at any particular time would in any event be of little value to intending competitors because of the volatility of prices generally in the market.

[77] The evidence did not support the attachment of confidentiality to the information concerned. On the contrary, it made it apparent that information about customer connections and pricing was exchanged quite freely within the industry. It was the very availability of that sort of information that informed the regular negotiations between the respondent and the appellant in tracking whether the latter's prices were in line with the market trends. Indeed, it could reasonably be inferred that it was the liberal availability of that information that contributed to the undisputed 'fiercely competitive' character of the industry. It was also not established that it would not be easy for anyone in the industry to identify the significant purchasers of pork products in the marketplace. They would obviously be foodstuff retailers. It is apparent from the evidence that customers were not shy of indicating to suppliers how they might obtain supplies elsewhere at lower prices.

[78] The statement in the judgment of the court a quo that Burger had acknowledged in a contract signed by him on the appellant's behalf that the appellant would have '*access to confidential information that is of substantial value to the* [respondent] *and in respect of which the* [respondent] *is entitled to protection*' was not sustained by the evidence. The only deed of agreement that was executed between the parties was the cession of book debts agreement. It did not contain any acknowledgement of the nature referred to by the court a quo.

[79] There was no evidence to suggest that by trading with the respondent's established customers the appellant had induced any of them to breach any subsisting contracts between

the customers and the respondent. Subject to it not dishonestly abusing the information that it obtained by reason of the cession of debts agreement, there was nothing in law to prevent the appellant trading with the respondent's former customers or actively soliciting their custom once the business relationship between the parties had come to an end. The trial court's implication of the principles applicable in respect of covenants in restraints of trade was misplaced. The principles could have no application to the appellant's freedom of trade because there was no restraint of trade agreement between the parties. The public policy considerations that inform the enforceability of restraint of trade agreements frequently fall to be applied in the context of agreements that are directed at prohibiting competition that, but for the agreed restraint, might otherwise be quite legitimate. They are materially affected by the principle of *pacta sunt servanda*, which plays no role in the objective determination of whether it would be reasonable to stigmatise any particular competitive behaviour as unlawful for the purposes of the extended Aquilian action. The endeavour by the court a quo to equate the sole marketing agreement with a restraint of trade agreement was also misconceived. The sole marketing agreement regulated the conduct of the parties during the subsistence of the business arrangement of which it was a component feature, whereas a restraint of trade agreement by its character is directed at regulating the covenantor's freedom of trade for a period after the primary contractual relationship between covenantor and covenantee has ended.

[80] On the facts it was quite clear that the respondent's business failed, not because the appellant started dealing with his customers, but instead because he was unable to find a suitable substitute for the appellant as a source from which to be able to supply his customers. The evidence also suggested that the respondent had maintained at least part of his customer base because of the customers' preference for the appellant's produce. That there was a direct connection between the appellant as the original source of supply and the respondent's customers was borne out by the undisputed evidence that the respondent's customers occasionally contacted Burger directly to discuss produce related issues.

[81] It was therefore clear by the end of the first stage hearing that there was no proper foundation to the alternative claim in reconvention based in delict.

Conclusion on the merits of the appeal

[82] In the circumstances, where the trial court was in a position at the end of the first stage hearing to be able to discern that there was no merit in the claims in reconvention, it

should have recognised that no point would be served by a second stage trial. For the reasons provided above, the trial judge should therefore have upheld the money claim in convention and dismissed the claims in reconvention. The terms of credit provided by the appellant to the respondent provided that late payment would be subject to 'interest at the then current maximum bank overdraft rate plus 2%'. That does not make sense. I think it would be fair to construe it to have been intended to mean '2% above the prevailing prime rate of interest charged by the plaintiff's bankers'. The appellant also claimed various directions concerning its rights under the cession of debts agreement, but no evidence was adduced to support the necessity for such relief and the appellant did not in fact need it to be able to exercise its rights as cessionary.

Application for condonation

[83] The record filed by the appellant's attorneys was deficient in a number of respects. It did not contain a complete set of the pleadings and some of the documentary exhibits referred to in the course of the evidence were also omitted. In several instances the cross-referenced page numbers in the record to various of the exhibits were incorrect or omitted altogether. As may be imagined, this caused us inconvenience and annoyance. The appellant belatedly supplemented the record with some of the omitted pleadings and, as foreshadowed in its counsel's heads of argument, applied for condonation. Its application for condonation, which was not opposed, did not, however, address the other shortcomings in the record.

[84] Having regard to the merits of the appeal, we have concluded that it would be in the interests of justice to grant the application for condonation. The shortcomings in the record, which suggest that it was not properly perused by the appellant's attorneys, before or after its delivery, should, however, not be allowed to go unnoticed. The importance of the conscientious discharge by an appellant's attorney of the duty to prepare the record on appeal has been remarked on in a number of reported judgments.[52] The courts have on occasion marked their displeasure when attorneys have failed in their duty in this respect by depriving them of their perusal fee.[53] I consider that it would be appropriate to do so in this matter.

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[52] See e.g. *Senator Versekeringsmaatskappy Bpk v Lawrence* 1982 (3) SA 136 (A); [1982] 4 All SA 314, at 144-145 (SALR) and the judgments cited in footnote 5353.

[53] See e.g. *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A); [1988] 1 All SA 296 and *Minister of Health and Another v Maliszewski and Others* [2000] ZASCA 29 (30 May 2000); 2000 (3) SA 1062 (SCA); [2000] 3 All SA 160.

Order

[85] In the result the following orders are made:

1. The appellant's application for condonation in respect of the deficient record lodged on appeal is granted, with no order as to costs.

2. The appeal is upheld with costs, save that any fee charged by the appellant's attorneys for the perusal of the record on appeal is disallowed;

3. The order made by the court a quo is set aside and replaced with an order in the following terms:

   (a) Judgment is granted against the defendant in favour of the plaintiff in respect of the claim in convention for payment in the sum of R1 196 868,84, together with interest on the capital debt component thereof at 2% above the prevailing prime rate of interest charged by the plaintiff's bankers as provided in the application for credit facilities, dated 17 February 2005 (annexure POC 1 to the plaintiff's amended particulars of claim);

   (b) The claims in reconvention are dismissed with costs;

   (c) The defendant in convention is ordered to pay the plaintiff's costs of suit in respect of both the claim in convention and the claims in reconvention.

A.G. BINNS-WARD
Judge of the High Court

E.T. STEYN
Judge of the High Court

M.L. SHER
Judge of the High Court

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