

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 1699/09
Dates Heard: 16 March 2011
6-17 June 2011
31 October 2011
Date Delivered: 20 December 2011

In the matter between:

EMADYL INDUSTRIES CC
t/a RAYDON INDUSTRIES

Plaintiff

and

FORMEX INDUSTRIES (PTY) LTD
t/a FORMEX ENGINEERING

Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiff claims damages arising from the defendant's alleged breach of contract. It is common cause that the defendant was a supplier of components to Toyota South Africa (Pty) Ltd (to which I shall refer as "Toyota"). The defendant entered into a number of contracts with the plaintiff in terms of which the plaintiff manufactured certain stainless steel brackets for the defendant and which the defendant would in turn supply to Toyota. The contracts in issue were concluded at different times over the period from December 2005 and 2007. From the time of the conclusion of each contract until 3 July 2008 the plaintiff manufactured

these brackets in quantities as ordered by the defendant from time to time.

[2] On 3 July 2008 the defendant advised that Toyota no longer required further parts and instructed the plaintiff forthwith to halt production. The plaintiff contends that the said communication constituted a repudiation of the contract. As at 3 July 2008 the plaintiff had a number of completed products available and ready for delivery which it had manufactured in terms of the contracts. It also had a quantity of raw material which it had already purchased for the production of parts which the plaintiff contends that the defendant had already ordered. All the material, it is common cause, consists of coils of stainless steel pre-cut to meet the requirements of the production of these brackets. It is accordingly, so the plaintiff contends, worthless for any other purpose.

[3] The plaintiff's claims are to be compensated for the parts manufactured at the agreed prices and for the raw material at the cost incurred in securing same. Plaintiff tenders delivery thereof to the defendant.

The contracts

[4] It is common cause that the parties concluded five agreements in terms of which the plaintiff would produce certain stainless brackets for

catalytic convertors which the defendant was committed to supply to Toyota. The brackets in issue are described as TSA 37, TSA 42, TSA 43, TSA 44 and TSA 45 respectively. The agreed prices in respect of the supply of each of these parts are not in dispute. The plaintiff contends that the further express, alternatively implied, alternatively tacit terms of the agreement were as follows:

- '5.3 The Defendant shall place "forward orders" in writing with the Plaintiff for the production (of) the aforesaid parts for a period of up to five months after date of order, on receipt of which the Plaintiff shall take immediate steps to enable timeous production of the parts detailed and ordered.
- 5.4 The Defendant shall take delivery of the parts produced by the Plaintiff pursuant to the said forward orders placed by the Defendant with the Plaintiff;
- 5.5. Payment shall be effected within 30 days of the date of production and delivery of the parts by the Plaintiff;
- 5.6 Notice of cancellation of the contract must be given for a period of three months, alternatively, for the period for which the "forward orders" have been placed with the Plaintiff by the Defendant, whichever period is the longer;
- 5.7 ...'

[5] The defendant pleads, however, that it was always within the contemplation of the parties that the purpose of the agreement was to enable the defendant to supply parts to Toyota. Accordingly, it contends

that it was within their contemplation that the defendant would not be liable to any “extrinsic or special damages” sustained by the plaintiff in the event of the defendant breaching or repudiating the agreement.

[6] The defendant proceeds to allege:

“5.4 The following were the material either express, *alternatively* implied, *further alternatively* tacit terms of the oral agreements, as pleaded by the Defendant:

5.4.1 jobs TSA 37, 42, 43, 44 and 45, which related to, and formed a component of, the Defendant’s expected performance between itself and Toyota South Africa, pursuant to an agreement concluded between itself and Toyota South Africa;

5.4.2 jobs TSA 37, 42, 43, 44 and 45, as between the Plaintiff and Defendant was relative to Toyota South Africa’s order(s) for metal components with the Defendant pursuant to an agreement concluded between Toyota South Africa and the Defendant;

5.4.3 in the event of Toyota South Africa reducing or terminating its demand for the supply of metal components, to be delivered to it by the Defendant, and which related to the Defendant’s expected performance to Toyota South Africa (pursuant to an agreement concluded between itself and Toyota South Africa), then, as an immediate consequence, the Defendant would reduce or terminate its order which relates to jobs TSA 37, 42, 43, 44 and 45 with the Plaintiff;

5.4.4 it was incumbent on the Plaintiff to purchase sufficient raw materials which would have the effect that it was eight weeks ahead in the production of components, to be utilized in the preparation of jobs TSA 37, 42, 43, 44 and 45;

5.4.5 the Defendant would not be liable for any of the Plaintiff's anticipated extrinsic loss, in the event of a material breach of a contractual term by the Defendant, and/or cancellation of the agreement by whichever party, *alternatively* by a breach of a material term of an agreement between Toyota South Africa and the Defendant, *further alternatively* by the repudiation and/or cancellation of an agreement between the Defendant and Toyota South Africa;

5.4.6 risk of impossibility of performance did not pass to the Defendant;

5.4.7 in the event of either one of the parties cancelling and/or repudiating and/or terminating any or all agreements, an amount equivalent of three months' supply is to be paid by the Defendant to the Plaintiff, and in accordance with customary industry practice;

5.4.8 included in (or as a component of) sub-paragraph 5.4.7, and again in the event of either one of the Plaintiff or the Defendant, alternatively the Defendant and Toyota South Africa cancelling and/or repudiating and/or terminating any or all agreements, and in respect of the Plaintiff's finished goods:

(i) a sum calculated on two weeks' worth of production is to be paid by the Defendant to the Plaintiff, in settlement of its obligations to the Plaintiff;

5.4.9 included in (or as a component of) sub-paragraphs 5.4.7 and 5.4.8, and again in the event of either one of the Plaintiff or the Defendant, *alternatively* the Defendant and Toyota South Africa cancelling and/or repudiating and/or terminating any or all agreements, and in respect of the Plaintiff's raw materials on hand:

(i) an amount equivalent to three months' worth of raw materials is to be paid by the Defendant to the Plaintiff, in settlement of its obligations to the Plaintiff.

5.5 The remainder of the averments in paragraph 5 (sub-paragraphs included) inconsistent with the above are denied.

5.6 In addition to the foregoing, the Defendant pleads that the implied terms, as reflected in sub-paragraphs 5.4.8(i) and 5.4.9(i), which relate to amounts to be paid for finished goods and 'stock-on-hand', have become a matter of implied custom by trade usage in this industry. Additionally, the Defendant pleads as follows:

5.6.1 This custom is made from the presumed common intention of the Plaintiff and the Defendant, to include the terms customarily included (reflected at sub-paragraphs 5.4.8(i) and 5.4.8(i);

5.6.2 the custom is within the Plaintiff's knowledge;

5.6.3 the custom is universally and uniformly observed within the trade industry, and

5.6.4 the custom is established, well-known, reasonable, certain and not in conflict with the law, or the general provisions of their agreement.”

[7] Later, and still in response to paragraph 5 of the Particulars of the Plaintiff’s Claim the defendant avers that it was an express, alternatively, implied, alternatively tacit term of each agreement that the risk of impossibility would not pass to the defendant and by virtue of Toyota’s sudden termination of demand the purpose for which defendant had contracted had become “objectively impossible”. In these circumstances defendant contends that it is relieved by performance.

The onus

[8] It is now well settled that a party alleging a contract must prove the terms of the agreement which he seeks to enforce. (Compare **McWilliams v First Consolidated Holdings (Pty) Limited** 1982 (2) SA 1 (A).)

[9] This onus may involve the proof of a negative, for example that an additional term alleged by the defendant was not agreed upon by the parties. (Compare **Kriegler v Minitzer and Another** 1949 (4) SA 821 (A); and **Topaz Kitchens (Pty) Limited v Naboom Spar (Edms) Beperk** 1976 (3) SA 470 (A).)

[10] Notwithstanding this general rule where a party seeks to imply a trade usage as a term of the agreement the party alleging the implied term will bear the onus of establishing the trade usage. (See **Golden Cape Fruits (Pty) Limited v Fotoplate (Pty) Limited** 1973 (2) SA 642 (C) 646A.)

[11] Similarly, where a defendant seeks to rely on impossibility of performance he bears the onus to establish the impossibility.

The nature of the agreement

[12] It appears from the pleaded terms that the plaintiff contends for an agreement to manufacture the identified parts at the agreed prices as ordered from time to time. That is not in dispute and it appears to be common cause on the evidence, to which I shall revert below. The precise quantities which the plaintiff was required to produce from time to time and the time for delivery of such components therefore depends upon the orders which are placed from time to time. Agreements of this nature, usually referred to as *pacta de contrahendae*, are well known in our law. In **Hirschowitz v Moolman and Others** 1985 (3) SA 739 (A) at 765I Corbett JA said:

'A *pactum de contrahendo* is simply an agreement to make a contract in future (see *Montrose Diamond Mining Co v Dyer* 1912 TPD 1 at 5; *Lugtenborg v Nichols* 1936 TPD 76 at 79; Wessels *Law of Contract* 2nd

ed para 217; De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 29; Joubert *Law of South Africa* vol 5 para 117). It was a class of contract “very well known in the Civil Law” (see *McIlrath v Pretoria Municipality* 1912 TPD 1027 at 1037 – per WESSELS J, BRISTOWE J concurring).’

[13] In ***McIlrath’s*** case to which reference is made by Corbett JA McIlrath entered into an agreement with the Pretoria Municipality to perform a certain cartage work at agreed prices whenever required by the Municipality to do so. Where an agreement of this nature results in a firm offer and it is not too vague it will be enforceable. In the circumstances where the remuneration or the price is ascertainable the contractual duties must be performed whenever demanded within limits fixed by the agreement (the *pactum*). (Compare also ***H Merks and Co. (Pty) Limited v B-M Group (Pty) Limited*** 1996 (2) SA 225 (A) 233D-235G.) In such circumstances each demand or order initiates a separately identifiable contracts containing some of its own terms and some terms imported by the *pactum*.

[14] In the present case the description of the parts and the price agreed are set out in the *pactum*. The quantities to be manufactured and the time for delivery depends upon each order placed and each order placed brings about a separate agreement.

[15] A central dispute which emerges in this matter relates to what

constituted the orders placed. The additional terms contended for by the defendant are terms which it contends are contained in the *pactum*.

The evidence

[16] Mr Donovan van Rensburg (Mr van Rensburg) and Mrs Esperanza van Rensburg (Mrs van Rensburg) are both members of the plaintiff. They testified on behalf of the plaintiff.

[17] It is not in dispute that the *pactum* was concluded orally in each case. It is admitted on the pleadings that the plaintiff was represented on each occasion by Mr van Rensburg whilst the defendant was represented by Johan Swart and/or Adrian Chantson and/or Alana Oliver. None of the alleged representatives who were engaged in the conclusion of the agreement on behalf of the defendant testified. The evidence of Mr van Rensburg must accordingly prevail in respect of the oral and tacit terms of the agreement. Mr Rensburg testified that he had dealt only with the defendant and at no time did he have any dealings with Toyota. He was not privy to the contract between the defendant and Toyota and he had never seen it. The terms of the agreement between the defendant and Toyota were accordingly not known to him.

[18] Mr van Rensburg testified that after the conclusion of the *pactum*, which is not in dispute, the defendant's supplied to plaintiff schedules containing particulars of "call-offs" indicating the number of each

component which the defendant would require for each week, usually extending five to six months in advance. These schedules were referred to in evidence as "releases" and I shall refer to them accordingly. Mr van Rensburg testified that it was his understanding that the figures represented in the releases constituted orders. In this regard Mr van Rensburg testified as follows:

"COURT: So when you get that document that is an order placed until that time? --- That is the figures that we work with yes.

I am not asking you whether those are the figures you work with. I understand that those are the figures which the defendant anticipates or the defendant knows that it has to supply to Toyota. Does the delivery of that document to you constitute the order for those parts?

--- We took it as such because this was always the paperwork supplied to us as an order, and if we were short on their volume as indicated here they would hence supply us with another e-mail saying we short supplied, we need to obtain X amount of components.

No other documentation? --- No other documentation as far as the orders go."

[19] The evidence shows that over and above the releases there were indeed isolated e-mails in which the defendant required a number of products at variance with the schedules. From the discovered documentation five of these e-mails were received between February and July 2008. One of these commences with the opening line: "Please find order for next three weeks". Two commenced with the words: "Please find my order according to our three week plan". One refers to an order for "week 24/week 25" and one for an order only in respect of "week 21".

These orders accordingly refer to fixed periods varying from one week to three. Mr van Rensburg states that he regarded these e-mails as variations on the orders previously placed in terms of the releases.

[20] Mr van Rensburg states that upon receiving the releases from time to time the plaintiff made its own calculations to make the necessary alterations with their suppliers in order to ensure that they had sufficient raw material to produce such stock. I pause to mention that a considerable volume of evidence and cross-examination was dedicated to Mr van Rensburg's evidence that because of the variations in quantities on orders the plaintiff calculated its raw material needs in accordance with the historical orders rather than the forward orders contained in the releases. By virtue of the conclusion to which I have come I do not think that this evidence has any relevance to the adjudication of this matter and I accordingly do not set out all that evidence herein.

[21] It is the undisputed evidence that all these releases were documents which originated from the defendant not directly from Toyota. It appears that these releases were provided monthly and that the number of parts required, looking forward, varied from release to release.

[22] During or about the first half of June 2008 Mr van Rensburg says that he got word that Toyota intended terminating the production of these components. He thereupon telephoned Mr Shabodien, a senior employee

in the defendant with whom he had a long relationship. He enquired from Mr Shabodien as to the future of the production of these parts. Mr van Rensburg testified that Mr Shabodien explained to him on the telephone that they were going to have a meeting with Toyota in Durban to confirm what would take place and at what point there would be a run out or a termination of production of these components.

[23] In the week proceeding 13 June 2008 Mr van Rensburg testified that he again contacted Mr Shabodien to enquire as to whether any certainty had been achieved. Mr Shabodien advised that there was definitely an end to the production and that they would be contacting the plaintiff with relevant details. Shortly thereafter on 13 June 2008 an e-mail was received from Ms Alana Oliver of the defendant. In the e-mail Ms Oliver states as follows:

"Please find attached a spreadsheet with the latest figures received from Toyota where the call-off ends in November 2008. I think you can work and plan on this."

[24] Attached to the e-mail was a release covering the period 2 June 2008 to 24 November 2008 setting out the number of parts required in respect of each component. The evidence of Mr van Rensburg is undisputed that after receipt of this e-mail he spoke to Ms Oliver to verify that she was sure of the figures and that the figures represented the end of the run. She confirmed this.

[25] On 3 July Mr van Rensburg testifies that an e-mail was received by the plaintiff from Alana Oliver indicating that this would be the end of production and that plaintiff was to cease production forthwith. Shortly thereafter he was advised by Mrs van Rensburg that she had verified with Ms Oliver the correctness of the instruction and that it was indeed true. He thereupon also phoned Ms Oliver and spoke to her himself, whereafter he contacted Mr Shabodien, however, alas, it was confirmed that he should halt production.

[26] Mr van Rensburg states that Mr Shabodien advised him that the plaintiff would need "to start gathering (their) totals of components etc and Toyota would be following up with a visit to (them) in order for them to validate that (plaintiff) had material and/or components on hand, as well as to validate the costing to themselves for these components and material." Toyota, however, never visited them. Mr van Rensburg states that correspondence flowed between the plaintiff and the defendant to find out what exactly was happening and when Toyota would be arriving to finalise the details so that the plaintiff could be reimbursed for the work and material purchased for the production of the components. However, nothing occurred.

[27] Mr van Rensburg testifies that 3 July 2008 was the Thursday of the week starting 30 June 2008 and that the plaintiff was ready and able to

deliver the parts due for that week on the following day. At that stage Mr van Rensburg testifies that the plaintiff had 11 000 parts of TSA 37, 9 689 parts of TSA 42, 7 814 parts of TSA 43, 17 856 parts of TSA 44 and 5 050 parts of TSA 45 already manufactured and in stock.

[28] In addition Mr van Rensburg testified that the plaintiff already had a considerable amount of raw material either in stock or which had already been ordered and pre-cut to width required for these specific components. The plaintiff, with the assistance of their supplier VRN, sought for months to resell some of this raw material in order to mitigate its damages. It has been admitted at the pre-trial conference that the plaintiff succeeded in selling some of this raw material for an amount of R 67 322,40.

[29] In addition to the amount of stock held by VRN at the time Mrs van Rensburg testified in respect of the quantities of materials at hand on the premises of the plaintiff at the time of the cancellation of the agreement. Those figures are not disputed and I shall revert to them below.

[30] Mrs van Rensburg was not involved in the conclusion of the agreement. Her evidence can cast no further light on the terms of the agreement. She too is a member of the plaintiff and testifies that she was actively involved in the operation of the plaintiff's business, however, more on the administrative side.

[31] Mrs van Rensburg testified as to the background to the agreement. As recorded above the defendant was contracted to Toyota to supply parts. The defendant experienced considerable difficulty in producing these parts in the volumes required by Toyota from time to time. By virtue of the fact that the plaintiff had recognised expertise the defendant requested the plaintiff to take over the production of these parts. The machinery utilised belonged to the defendant. Initially the defendant took care of the purchase of raw materials and provided same to the plaintiff. Later it was agreed that the plaintiff would take over the purchasing of raw material as well.

[32] Mrs van Rensburg says that she was in almost daily contact with Ms Oliver at the defendant discussing the logistics relating to the delivery. Mrs van Rensburg testified at some length in respect of her regular discussions with Ms Oliver in respect of the manner of the ordering of raw materials and logistical difficulties associated therewith. By virtue of the conclusion to which I have come in this matter I do not consider that evidence to be material.

[33] Mrs van Rensburg confirmed the evidence of Mr van Rensburg relating to the communication between plaintiff and the defendant in June and July 2008 where they were instructed to terminate production. She confirms too that she was in regular contact with defendant, and more in particular with Mr Shabodien, in respect of the anticipated reconciliation

which they had been advised that Toyota would do in respect of parts already manufactured and raw material on hand. She says that she had approximately 17 calls to Mr Shabodien. On 8 December Mr Shabodien advised her to put in a claim to the defendant as Toyota would only be visiting the defendant and would do so during January 2009. She accordingly produced a schedule, annexed to the Particulars of Claim, which sets out the parts which they had on hand, the material which they had on hand and the material which had already been ordered and prepared and was on hand on the premises of VRN as of 3 July 2008.

[34] Mr Henkemeier testified as an expert on behalf of the plaintiff and Mr Victor on behalf of the defendant. Their testimony relates to the alleged trade usage pleaded by the defendant. Mr Henkemeier's evidence is that there is a general practice in the automotive industry that, in the absence of an agreement to the contrary, where an ongoing production process is cancelled or terminated users are paid an amount equivalent to between three and five months worth of raw material and an amount equivalent to two weeks worth of production (finished goods). It is accordingly flexible. In the rule 36(9)(b) summary of the evidence of Mr Victor he states that in the motor industry "release forecasts" are common. The purpose of a release forecast, he says, is to advise the client of the customers expected output. The summary goes on to say that a "release forecast" is not a "firm order" but merely an indication to the customer of the expected sales. On a receipt of such a forecast, Mr

Victor's summary records, a supplier in ordinary circumstances would order enough material to ensure that its "lead time" was three months from the date of order. In respect of these three months Mr Victor considers that the first two weeks of the twelve weeks are known as "firm orders". Thereafter the next two to four weeks are known as "firm forecasts" with the remaining weeks being merely a forecast. On this basis Mr Victor contends that where a manufacturer terminates an agreement during the currency of one of these forecasts it would be liable to pay the supplier twelve weeks worth of production. This would equate to two weeks worth of finished product and a further ten weeks of raw material. In explaining these concepts in evidence Mr Victor says:

"You take the release and, looking at the demand that is drawn out for you, you need to ensure that you have capacity, you have to have production capacity to meet those requirement, okay. You need to ensure that your supply chain is alive okay ... That is the greater overview of the release, if you will. Closer to your current week or looking at your current week due to supply okay, the standard practice that I have been working with and have been groomed on is, in your firm period okay, it's where you then, tying up with your supplier, what you need in the immediate foreseeable future okay. Typically you would give a four week firm period, what that entails is, that it is authorisation for your supplier to have two weeks of finished product for you and it covers two weeks of his work in progress, be it in its production or in its raw material store, perhaps something has been delivered, it's continuously moving okay. Outside of that, you would give another eight weeks as a minimum ..., you would pass it on as a minimum, so at least give the guy a twelve week window that he can see what's going on, he can ensure and feel comfortable with his stock

on his, his finished goods or in his production facility, and it gives him the opportunity to order and the assurance to maintain his supply chain.”

[35] Mr Victor was later asked whether various categories of forecasts occur. His response was as follows:

“Yes, in this context they do. If you wish to get technical, there is different types of releases, different types of orders, but the industry in Port Elizabeth and the rest of the country with the automotive industry I’ve dealt with, the guys give release forecasts.”

[36] Later he was asked what the affect would be if half way through the forecast a manufacturer were to cancel the order. His response was as follows:

“It was only a release, unless you give somebody for example a purchase order with a globular amount, ‘I want six million over three years, there it is sign, value, terms and conditions, sign.’ Then you’ve bought three million ...”

[37] He was thereafter asked if it sometimes happens in the automotive industry that a company may place an order for six months or seven months in advance and he responded as follows:

“Yes M’Lord. It does. They, different OE’S or companies use different methodology okay, but the practice as it has become in South Africa okay, is to always attempt to give your supplier a minimum of his lead

time okay, so in the CAT industry, component industry, with Columbus' ordering of once a month, to get your stock in the third month, you give them twelve weeks, so that you support them placed their order and you cover their exposure of the material on their floor So you always try to attain a minimum of twelve weeks."

[38] The twelve weeks Mr Victor says is a minimum. He goes on to say:

"Our lead times as we know is, place your order in three months, it arrives the next month, next one. So that is part and parcel of how it's become industry practice to negotiate in and around those twelve weeks."

It seems to me that the evidence of Mr Victor too is of a flexible practice. He recognises that where a contract is made for a fixed quantity over a fixed period the general practice does not arise.

[39] Finally Mr Shabodien the commercial manager of the defendant testified. Mr Shabodien, as recorded above, had no involvement with the conclusion of the agreement. He cannot assist in casting light on the terms of the contract. He testified that he is unsure if there was a written contract with Toyota. He gave extensive evidence of the manner in which Toyota dealt with orders *vis-à-vis* the defendant. He also explained his understanding of the manner in which companies usually dealt with releases. He explained the defendant's relationship in general with Toyota, which, by virtue of the conclusion to which I have come below, I

do not think contributes to the resolution of the present matter. Finally he testified that defendant too was ignorant of the pending abrupt termination of the contract. The decision, he says, was taken in Japan and all players in South Africa were taken off-sides.

Terms of the contract

[40] It seems to me that on either version the contracts in issue necessarily constitute *pacta de contrahendae*. Each order placed therefore constitutes a new contract incorporating the terms of the *pactum de contrahendo* and the terms of the order which would relate to the number of parts to be delivered and the specific times for delivery. The import of the defendant's version is that a new contract comes into existence each week as a further week is added as a "firm order". This, the defendant avers, arises by virtue of the industry practice.

[41] It is immediately apparent, both from the view of Mr Henkemeier and Mr Victor that this "practice" to which they refer applies only where no other agreement is in place. Mr Victor acknowledges that sometimes agreements are concluded for the production of predetermined quantities over a fixed period. If that has occurred the practice does not arise.

[42] Whatever the general position may be in the absence of the agreement, it seems to me that a firm agreement did come into existence on 13 June 2008. Ms Oliver did not testify and the evidence of Mr van

Rensburg in respect of the telephonic communication on 13 June 2008 remains uncontradicted. It is borne out by the e-mail sent by Ms Oliver on 13 June where she records: "I think you can work and plan on this." It seems to me that defendant has established a firm agreement concluded on 13 June 2008 pursuant to the telephonic communication of 13 June for the manufacture of all those components set out in the release provided on that day at the times stipulated. In these circumstances, on an acceptance of the evidence of Henkemeier and Victor the general practice finds no application. It follows that I think the plaintiff has established that the terms contended for in para 5.4 of defendant's plea did not form part of the agreement. In any event, even if I err in this regard I do not think that the trade usage has been established.

Trade usage

[43] Where a trade usage is known to both parties the knowledge will be regarded as one of the surrounding circumstances indicating that a trade usage ought to be incorporated into the contract as a tacit term. (See for example ***Easigas (Pty) Limited v Solgas (Pty) Limited and Another*** 2009 (4) SA 37 at 46 para [42] and *Christies The Law of Contract in South Africa* 6th ed p. 168.) The circumstances in which a trade usage of which one party has no knowledge will be implied in a contract are set out by Krause J in ***Cook v Pedison Limited*** 1927 WLD 62 at 71 and were fully discussed in ***Golden Cape Fruits*** (*supra*) where Corbett J (as then was) at 645G said:

"At the trial it appeared that appellant - through its director, Ashworth, who contracted upon its behalf - had no knowledge of the alleged trade usage. This was accepted by the magistrate and his finding in this regard was not challenged on appeal. Accordingly, this is not a case where the trade usage could be said to have been incorporated by the parties as an implied term of the agreement. Nevertheless, despite its ignorance, appellant would be bound by - and the contract in question would be subject to - the alleged trade usage provided that it is shown to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, and does not conflict with positive law (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract."

[44] I consider firstly whether the "trade usage" contended for could be incorporated into the contract as a tacit term. In the present case Mr van Rensburg testified as follows:

"A period of three to five months is what they would, the industry norm would allow for as far as purchases went. As I described earlier we would need to order in advance of three months minimum, also have another month on hand to cover the period of production needs. The norm differs slightly from product to product as can be noted that some materials are more difficult to obtain than others, so the norm would apply within that time frame of a three to five month period as far as raw materials go and as far as the production of the components go to a period of two weeks to four weeks would also be the norm depending on the complexity of the operation."

[45] Under cross-examination Mr van Rensburg stated as follows:

COURT: Is there a universally accepted norm? --- M'Lord, it would be as stated that you would work around the three month scenario.

Is the three month scenario, universally accepted norm in the industry? --- Yes it is M'Lord."

[46] The evidence of Mr van Rensburg seems to me to accord with that of Mr Henkemeier of a flexible approach which would vary depending on circumstances. Although there is some difference between Mr Henkemeier and Mr Victor in respect of the period, I think that it appears from the evidence of Mr Victor which I have set out above, that there is a very flexible guideline. His conclusion that the industry norm is "to negotiate in and around those twelve weeks" is indicative thereof that the guideline provides for negotiation and settlement. I do not think that the acknowledgment of Mr van Rensburg of this guideline could possibly found a tacit term incorporated into the contract. In **OK Bazaars v Bloch** 1929 WLD 37 at 44 Solomon J said:

"I think that the law is quite clear that, if I am to imply a term, the term to be implied must be as certain (although it was never mentioned between the parties) as if it had been carefully drawn up and embodied in a written deed."

[47] This accords with more recent dictum in **Smith v Van Reenen Steel (Pty) Limited** [2001] 2 All SA 604 (D) at 614 where it is said:

"It would be almost impossible to draw a clause importing the necessary implied term which would not be void of vagueness."

[48] It seems to me that this dictum is particularly apposite to the present facts when regard is had to evidence of Mr van Rensburg, Mr Henkemeier and Mr Victor. Certainly I do not think that the industry norm which Mr van Rensburg professes knowledge of is that which the defendant contends for.

[49] To incorporate an implied term, implied by law, on the strength of the trade usage alleged is even more problematic. It would require the trade usage long established, notorious, reasonable and certain. I think that what emerges from what is set out above is that it is clearly not certain.

[50] Corbett J, as he then was, in ***Golden Cape Fruits*** (*supra*) stated as follows at 646A-646C:

"Generally speaking the Courts require convincing evidence of the existence of a trade usage conforming to the requirements listed above. In *van Breda's* case, *supra*, SOLOMON, J.A., speaking of the establishment of a custom having the force of law and having referred to the views of Voet that a *turba* of witnesses (not fewer than ten) was required in order to do so, remarked (at p. 333) -

'I think we should refrain from laying down any fixed rule on the subject, as the requisite number of witnesses might very well vary

with their character and with the nature of the custom which is set up. Much must in every case be left to the discretion of the Court, which, however, must be satisfied beyond any reasonable doubt that the alleged custom does in fact exist. It is desirable, however, to add that it is better for him who sets up a custom to err on the side of calling too many rather than too few witnesses.'"

[51] Later, on the same page opposite the letter H Corbett J stated:

"While these views may not be entirely harmonious, they indicate, in my view, that, putting the position at its lowest, the evidence required to establish a trade usage must be clear, convincing and consistent. It must, moreover, amount to something more than mere opinion: instances of the usage having been acted upon should be provided in order to establish the fact of the existence of the usage. No rule can be laid down as to the number of witnesses required. This depends very much upon the nature of the usage in question, the character and quality of the witnesses and the extent to which their evidence is placed in issue by other evidence. In the nature of things the Court would not readily act upon the evidence of a single witness, even if uncontradicted."

[52] I think when measured up against this test the defendant has failed to establish the usage contended for. What is required is evidence of specific instances where the usage was applied, not an opinion. At best it seems to me that the defendant has established as a general guide in the industry that the parties would negotiate a settlement of their differences dependent upon the lead time involved in the procurement of the particular raw material in question using the twelve week period as a

point of departure. This will only apply where no firm agreement has been concluded.

Impossibility of performance

[53] It has been held that if performance of a contract become impossible through no fault of the debtor, the obligation is extinguished unless the debtor agreed to accept the risk of impossibility. See for example ***Oerlikon SA (Pty) Limited v Johannesburg City Council*** 1970(3) SA 579 (A) 585; and ***Bischof Berger v Van Eck*** 1981 (2) SA 607 (W). In view of the conclusion to which I have come below I make no finding in respect of the question whether performance in this case has indeed become objectively impossible.

[54] It is no doubt correct that it was within the contemplation of the parties when the *pacta* were concluded that the purpose of the agreement between the parties was to provide components to the defendant which the defendant was obliged to provide to Toyota South Africa. The plaintiff was however not privy to the contract between Toyota and defendant and had no knowledge of its terms relative to cancellation. I will accept for purposes hereof that the defendant did not accept the risk of impossibility at the time of the conclusion of the *pactum*. On 13 June 2008, however, on the undisputed evidence of Mr van Rensburg, Ms Oliver confirmed the correctness of the figures set out in the final release, which was no other than a production schedule, and advised the

defendant that it should work on those figures. I consider that the defendant thereby accepted the risk of impossibility and that a firm agreement came about between the parties. I think that this is borne out by the undisputed conduct of the parties subsequent to the cancellation whereby the defendant invited the plaintiff to provide figures in respect of components already produced and raw materials on hand. This conduct seems to me to be irreconcilable with the position now contended for that defendant had no obligation to the plaintiff.

[55] In all the circumstances, for this reason alone, I do not think that the defence of impossibility of performance has been established. It is the only basis upon which the allegation of a repudiation is resisted. It follows that I am of the view that the defendant's conduct on 3 July 2008 constitutes an unlawful repudiation of the contract. The plaintiff has pleaded that it orally advised the defendant of its acceptance of the repudiation. That communication was not denied in the defendant's plea. In the circumstances I consider that the plaintiff is entitled to recover such damages as it may establish that it has suffered in consequence of the defendant's repudiation of the contract.

The quantum of damages

[56] The plaintiff alleges that at the date of the repudiation it held in stock the number of completed components recorded above. In addition it alleges that it had an amount of raw material on hand, some on its

premises and some on the premises of VRN. In mitigation of its damages it, with the assistance of VRN, sold some of its stock on hand in the amount of R67 322,40. This, as recorded above, is admitted. It transpires, as will appear below, that the material which was sold in mitigation of damages related exclusively to material utilised for TSA 42. There is accordingly no claim made in respect of material relating to TSA 42.

[57] The manner of calculation of the plaintiff's claim is unusual. Ordinarily damages for breach of contract are not intended to compensate an innocent party for his loss but to put him in the position that he would have been in had the contract been properly honoured. Van den Heever JA in ***Trotman and Another v Edwick*** 1951 (1) SA 443 (A) 449B-C said:

"A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind."

[58] The plaintiff's claim is not formulated in this manner. The plaintiff does not claim the profits which it would have derived from the manufacture and sale of the parts had the contract been honoured. Rather it claims to be paid its contract price for components produced in terms of the contract prior to the repudiation and, only for its loss subsequent to the repudiation, namely that which it paid for the raw

materials on hand. In exchange it tenders delivery thereof.

[59] In ***Hamer v Wall*** 1993 (1) 235 (T) it was held that it was not competent to formulate a contractual claim in this manner. The majority judgment in ***Hamer*** held that a plaintiff was not entitled to “elect whether to pursue either his negative or positive interesse”.

[60] In ***Mainline Carriers (Pty) Ltd v Jaad Investments CC*** 1998 (2) SA 468 (C), however, Farlam J considered the award of damages with reference to ***Hamer***. Farlam J considered the position in a number of foreign jurisdictions. He referred to the position in the Australian courts where the approach is adopted that a plaintiff was regarded as suing for his expectation interest (positive interesse) even when seeking to recover lost expenditure, on the basis that the law assumed that if the contract had been performed the plaintiff would have at least have recovered such expenditure as had reasonably been incurred in reliance on the defendant’s performance. In American, English and Canadian law, he concluded a plaintiff suing for expenditure rendered futile because of the defendant’s breach was regarded as suing to protect his reliance (negative interesse). Farlam J concluded that, subject to the rule that expectation interest set the limit of recovery, nothing much turned upon the different approaches from a practical point of view. I think that the conclusion reached in ***Mainline Carriers*** is to be preferred. In the circumstances I think that it is open to the plaintiff to approach its claim

for damages on the basis which it has, subject thereto that no greater damages can be recovered than would have been recoverable had the contract been honoured.

[61] Reverting to the facts of this matter, the release which was issued on 2 June 2008 ("the final release") and which led to the conclusion of the agreement on 13 June 2008 provided for parts to be delivered on a weekly basis to November 2008. The plaintiff contends that the contract was repudiated on 3 July, a Thursday, after the components due for delivery on 4 July had been manufactured. I pause to mention that although there is some dispute in the evidence as to when the plaintiff became aware of the termination of the production the date is not in dispute on the pleadings. It is not in dispute that the plaintiff had on hand already manufactured parts in the following quantities:

TSA 37	11 000
TSA 42	9 689
TSA 43	7 814
TSA 44	17 856
TSA 45	5 050

[62] There was a suggestion that some of these parts were due for delivery in respect of past weeks in which the plaintiff had not produced the numbers of components required and that it had in fact fallen in

arrears. On this basis the plaintiff sought to bring into consideration for purposes of calculation its own previous breach of contract. I do not consider that the defendant was obliged to receive any components relating to any period prior to the week commencing 30 June 2008.

[63] The final release which sets out the quantities of parts to be produced in accordance with the agreement of 13 June 2008 requires the following quantities of parts, in total, calculated from 30 June 2008 the end of the agreement:

TSA 37	70 158
TSA 42	34 860
TSA 43	33 403
TSA 44	32 962
TSA 45	22 227

[64] These figures constituted the limit of the plaintiff's expectation in terms of the contract. Of these parts, however, a significant number had already been manufactured and were held in stock on hand.

[65] Both Mr and Mrs van Rensburg testified in respect of a table prepared by Mrs van Rensburg setting out the quantities of raw material at hand and the number of parts which could be manufactured from them. It is apparent from this table that, by virtue of the sale of material

in mitigation of damages no raw material remained in respect of TSA 42. No claim is accordingly made in respect of raw material relating to TSA 42. In respect of the remainder of the parts the table shows that plaintiff had raw material on hand capable of producing the following numbers of components:

TSA 37	38 160
TSA 43	83 863
TSA 44	42 913
TSA 45	90 182

[66] It is readily apparent, when regard is had to the parts held in stock, that plaintiff had considerably more raw material at hand in respect of parts TSA 43, TSA 44 and TSA 45 than was required to meet expectation in the contract. In respect of TSA 43 the table, as read with the evidence of Mrs van Rensburg, shows that the raw material required had a mass of 1.27kg/m and that 18 parts could be produced per meter. In the case of TSA 44 the raw material had a mass of 1.15kg/m and 42 parts could be produced per meter. The mass of raw material in the case of TSA 45 was 0.63kg/m and 55 parts could be produced from each meter.

[67] As the plaintiff did not have sufficient raw material on hand to meet the expectation of the contract in respect of TSA 37, I consider that it is accordingly entitled to be compensated for the value of all the raw

material on hand in respect of TSA 37.

[68] On a consideration, however, on the information above the plaintiff would have required 1 805,5 tons of TSA 43 material, 413,5 tons of TSA 44 material and 196 tons of TSA 45 material in order to meet the requirements of the contract. I consider that the plaintiff is entitled to be compensated in respect of the value of this quantity of material.

[69] The cost of the material is reflected in annexure "R2" to the Particulars of Claim as was further elucidated by the evidence of Mr and Mrs van Rensburg. It appears that there is in each case a charge per kilogram to which a surcharge determined by Columbus, the manufacturers of the stainless steel, is added together with value added tax ("VAT"). The cost per kilogram and the surcharge in each case, exclusive of VAT is as follows:

TSA 37	R9,61 per kilogram and a surcharge of R4,13
TSA 43	R9,29 per kilogram and a surcharge of R5,43
TSA 44	R9,61 per kilogram and a surcharge of R4,13
TSA 45	R9,61 per kilogram and a surcharge of R4,13

[70] Utilising these figures the plaintiff is entitled to be compensated for the raw material on hand in the volumes set out above as follows:

TSA 37 R17 931,72;

TSA 43 R30 297,57;

TSA 44 R 6 476,89; and

TSA 45 R3 070,00, which amounts include VAT. There is, as recorded above, no claim in respect of raw materials relating to TSA 42. The plaintiff is accordingly awarded damages in respect of the raw material on hand at the time of the repudiation in the sum of R57 776,18.

[71] In respect of the completed components the plaintiff is entitled to be compensated at the agreed prices. The plaintiff is accordingly entitled to the following compensation in respect of the completed components in the quantities set out before:

TSA 37 R9 240,00

TSA 42 R8 913,88

TSA 43 R16 018,70

TSA 44 R15 891,84

TSA 45 R2 929,00

The plaintiff's damages in respect of the components is accordingly R52 993,42.

[72] In all the circumstances the plaintiff is entitled to be compensated in the amount of R110 769,60.

[73] In the result I make the following order:

1. The defendant is ordered against delivery of all completed components and raw material to pay to the plaintiff the amount of R110 769,60 as and for damages.
2. Defendant is ordered to pay interest on the amount of R110 769,60 calculated at the legal rate from a date fourteen (14) days after the date of judgment to the date of payment.
3. The defendant is ordered to pay the plaintiff's costs of the suit.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv S Potgieter instructed by Daniel Saks Inc
Attorneys, Port Elizabeth

For Defendant: Adv D Smith instructed by Goldberg & De Villiers
Inc, Port Elizabeth

