

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**CASE NO: EL 1072/2014
ECD 2372/2014**

In the matter between

ARISTOPIX (PTY) LTD

Plaintiff

and

TFM MANUFACTURING (PTY) LTD

Defendant

JUDGMENT

HARTLE J

1. The defendant was contracted by the plaintiff to modify several vehicles destined to form part of a fleet which the plaintiff had agreed to lease to the King Sabata Dalindyebo Local Municipality (“the municipality”) pursuant to the award of a fleet management tender to the plaintiff by the municipality in March 2010.

2. Six out of several vehicles form the subject matter of the present action (the “affected vehicles”). Two of the vehicles are mounted cherry pickers, one a jetting truck and three of them compactor trucks. The defendant refers to the specialized vehicles as platform vehicles, a vacuum truck and refuse trucks respectively.

3. The plaintiff claims that the defendant breached the parties’ agreement to modify the affected vehicles because of which it suffered damages. There was a loss of income consequent upon the late delivery of the cherry pickers and the jetting truck in the first instance. There was a loss of income because the same vehicles were defective and unable to perform in the manner or according to the purpose for which they were intended, so they had to be returned to the defendant to repair them, all the while being out of commission and causing a loss of income by their unavailability. The plaintiff further incurred vehicle hire charges to replace the jetting truck which was unserviceable while it was out of commission. Finally, it had to expend monies to rectify the defective workmanship in the jetting truck to place it in a serviceable condition. The compactor trucks and the cherry pickers were repaired by the defendant at its cost but not the jetting truck.¹

4. There are two essential premises underpinning the breach of contract which the plaintiff contends for. The first, says the plaintiff, is that the parties pertinently agreed that the defendant would return the modified vehicles to it within 90 days of delivery of the vehicles to it for purposes of the modification, which time period it flouted, and the second is that they agreed that the defendant would return the vehicles to the plaintiff duly modified, fit for the respective purpose of each

¹ It is not clear why reference was made to the compactor trucks at all as they do not feature in the quantification of the plaintiff’s claim for damages. Mr. Cole who appeared on the plaintiff’s behalf placed on record in its opening address that the “compactor truck problem was perceived and that the evidence (would be) that the defendant repaired it at (its) own cost and it does not come into the quantification of damage ... But the evidence will still cover the quality of the work done on the compactor trucks”.

vehicle, which standard it claims the defendant did not meet in respect of the affected vehicles, although no claim arises concerning the compactor trucks.

5. The defendant does not deny its obligation in the latter respect but claims no breach. It says that it complied in full of all its obligations i.e. that it duly manufactured, supplied, modified and/or fitted the vehicles as was agreed would be done. In respect of the former, it denies the term of the agreement contended for by the plaintiff or the supposed contemplation that the plaintiff would probably suffer damages if there was a delay in delivering the properly modified vehicles to it in order to place them at the disposal of the municipality in terms of the plaintiff's own service level agreement entered into with the municipality.²

6. The plaintiff asserts that it concluded the following agreement with the defendant:

“5. During June 2010, and at East London, the Plaintiff and Defendant, duly represented as aforesaid, entered into an oral agreement in terms whereof the Defendant agreed and undertook to attend to the required modifications of all the said vehicles on the following express material terms, namely:

- 5.1 the Plaintiff would deliver the vehicles as set out in the schedule annexed hereto marked Annexure “POC1”, to the Defendant to enable the Defendant to undertake specified modifications to the vehicles; and
- 5.2 the Plaintiff would specify the precise modifications to be undertaken for each vehicle; and
- 5.3 the Defendant would be paid in advance for all work required to be undertaken in terms of the agreement between the parties; and

² The service level agreement was only concluded on 29 July 2010, but the tender was awarded in March 2010.

- 5.4 upon payment being received by the Defendant, and upon delivery of the vehicles to the Defendant, the Defendant would return the duly modified vehicles to the Plaintiff within ninety days; and
- 5.5 the Defendant would be paid a total sum of R9 035 301.87, inclusive of Value Added Tax, for all modification work to be undertaken in respect of all the said vehicles.”

(Emphasis added.)

7. The plaintiff pleads that it was within the contemplation of the parties, and the express basis upon which they contracted, that in the event that the vehicles were not returned by the defendant to the plaintiff, duly modified, within 90 days of being made available to the defendant for the required modification work that the plaintiff would: (1) then not be able to make the relevant vehicles available to the municipality timeously; (2) would not be able to meet its obligations in terms of its service level agreement with the municipality; (3) would be obliged to hire alternative vehicles during the time of any delay to enable the plaintiff to meet its obligations to the municipality accordingly; (4) and that, in the event of such delays occurring, the plaintiff would suffer damages and consequential losses as a result.

8. The plaintiff paid in full, in advance, on 3 June 2011 for the work to be undertaken.

9. The defendant was given delivery of the relevant chassis and bakkies to be modified during 2011 to enable it to meet its side of the bargain. The defendant was properly primed concerning the required modifications to be attended to in respect of all the vehicles so delivered to the defendant but breached its obligations to the defendant by failing to attend to the modification of the six affected vehicles

in a proper and workmanlike manner.³ In respect of the cherry pickers the plaintiff claims that these were not modified in accordance with the detailed specifications. The hydraulic lifts were not functional and caused damage to the roof of each Nissan Patrol vehicle (the chassis) on which the cherry pickers were mounted. Regarding the jetting truck, the plaintiff says it was unable to use it to vacuum and provide a jet of water suitable for the purposes of cleaning the municipality's pipes and drains because the defendant did not modify it according to the proper specifications. It was unable to garner adequate power because it was fitted with an incorrect high-pressure pump, hose and nozzle. The compactor trucks were fitted with inferior chassis and/or chassis material which led to the fracturing and cracking of the chassis structures of each.⁴

10. As a result, the affected vehicles fell short of being able to perform as they were destined to or could not function correctly or consistently which caused them to be out of commission on an ongoing basis.⁵

11. The defendant, in a rather prolix document, admits that an oral agreement was concluded with the defendant to modify and convert the vehicles based on

³ The particulars of claim are awkwardly framed. Reading between the lines the plaintiff appears to suggest that the consequential damages sustained during the downtime of the vehicles, because they were defective and needed to go back to be repaired, arise on the basis that the defendant is a manufacturing seller to which the law irrebuttably attaches liability for consequential losses flowing from a latent defect unless he contracts out of it, but the lines become blurred because the emphasis in the pleadings is placed more on a delay in delivery as being causal to all the plaintiff's woes.

⁴ As I have indicated above, I am not sure why the plaintiff included the compactor trucks among the affected vehicles. No claim arises from their late delivery and the plaintiff makes the point in its particulars of claim that these vehicles were repaired by the defendant at the latter's cost.

⁵ Here the emphasis is on the non-availability of the vehicles because they are defective and not because there was a delay in delivery. The alleged contemplation of the 90 days delivery time frame does not make sense in such a context. It would have made better sense if the claim was framed in this respect on the principle of the law of contract that manufacturing sellers are liable for consequential damages caused to the purchaser by reason of a latent defect in the goods.

certain specifications (albeit it says this was in March 2011) but, asserts additional terms to that agreement.

12. The defendant concedes the basic agreement to modify each affected vehicle to render them fit for the purpose required by the plaintiff. In its plea it sets forth the way each of the vehicles would be modified and converted including what was expected to be manufactured, supplied and/or fitted in each instance. It is unnecessary to repeat this detail save to note that the exact specifications coincide with what is stated on the various written quotations furnished to the plaintiff ahead of the work to be done to each vehicle and the corresponding pro-forma invoices issued out by the defendant relevant to each vehicle consequent to the orders having been placed, which documents were entered into evidence during the course of the trial.

13. In respect of the price of each unit requested to be modified, the only dispute between the parties concerns what deposit was required to be paid in each instance. The defendant pleads that the plaintiff unilaterally and without being requested to do so paid the full contract price to it (for all the vehicles to be modified), rather than a 50% deposit which was all it required on its terms.

14. The most significant issue between the parties concerns the projected delivery date of the modified vehicles agreed by them. The defendant says that the completed vacuum truck would be delivered by the defendant to the plaintiff “as soon as reasonably possible after the delivery of the Chassis to the defendant by the plaintiff, depending on the workload of the defendant at that time, as well as the availability of labour and material”. The estimated date by which the cherry

pickers could be delivered could and would only be determined once the defendant had acquired requisite and suitable aerial platform units.

15. The defendant pleads that further additional terms were also agreed upon, the most significant effect of which was to limit its liability according to a standard warranty, a template example of which was annexed to the plea. In terms of this warranty the defendant pledged that the services performed, and goods supplied by it, would be free of defects for a period of twelve months commencing from the date on which the affected vehicles were delivered to the plaintiff. It would not be liable to the plaintiff for any loss or damage suffered because of any defective workmanship or goods supplied other than in terms of the warranty and would certainly not be liable for special or consequential damages. Its guarantee in each instance was that the material supplied by it would be suitable for the work to be performed in terms of the agreement and that in performing such work it would utilize the level of skill and expertise as can be expected of members of the trade to which it belongs. Finally, the plaintiff was to assume all risk of damage to the affected vehicles due to the operation and maintenance thereof from the moment when delivery of each affected vehicle passed to the plaintiff.

16. The defendant pleads that on 26 March 2011 the plaintiff placed formal written orders for the manufacture, supply, modification and fitment of *inter alia* the affected vehicles. It says that it took delivery of the relevant trucks, chassis and the bakkies to be modified on various dates from the plaintiff's agent and that it duly manufactured, supplied, modified and/or fitted the affected vehicles in compliance with its obligations. Once modified, these vehicles were returned to the plaintiff.

17. It claims to have no knowledge and does not admit that the three compactor trucks went back to it for repairs. It concedes that the jetting truck was out of commission when the plaintiff says it was and that it came back to it for repairs. Although refuting that it was in fact responsible to fix the vehicle, it agrees that it did so as a gesture of goodwill. The same applies to the cherry pickers. It concedes that these vehicles too came back to it for repairs and that they were out of commission as it were but pleads that it fixed them also as a gesture of goodwill.⁶

18. The defendant is adamant that in each instance the affected vehicles did not suffer “of any material or defective workmanship”. To the contrary it claimed that any breakdowns, mechanical failure or damage to the equipment was occasioned by: (1) the negligence of the operators thereof who failed to exercise the necessary care, caution or to follow the prescribed procedures to operate the vehicles; (2) the deliberate tampering with or damaging of the vehicles by the operators or third parties; and (3) the failure of the plaintiff to care for or maintain the vehicles despite it being repeatedly advised by the defendant that it should do so.

19. On the issue of the alleged delay in delivery (on the term contended for by the plaintiff) the defendant firstly firmly refutes that it agreed to any fixed delivery dates. Moreover, it claims that it experienced difficulties in initially sourcing what was necessary to modify the cherry pickers. The delay in respect of the completion of the jetting truck was due to circumstances beyond its control. In both respects however, the plaintiff was apprised of the reasons for the delay, which

⁶ The basis upon which it says it repaired vehicles is recorded in a letter addressed to the plaintiff’s attorneys dated 31 March 2014 in response to their letter of demand.

explanations it accepted without demur. It further never placed the defendant on terms to deliver before it could.

20. The plaintiff did not file a replication to the defendant's plea although the nature of the plea perhaps called for new allegations, especially regarding the defendant's averment that the parties agreed to exclude any liability on its part for consequential loss and that liability for damages for defects was limited in terms of a manufacturer's warranty which applied for a 12 month period only post-delivery.

21. It is trite law that the plaintiff bears the onus in this action. It must prove the agreement it relies upon. This will include proving, on a balance of probabilities, what the terms of the oral agreement were. It also includes the negative onus of disproving the version pleaded by the defendant that there were additional terms to the agreement, more especially that delivery was not strictly 90 days but qualified; that a standard warranty applied in respect of any defects; and that there was an exclusion of liability in respect of any damages.⁷

22. No doubt in line with its understanding that there was no duty on it to begin and adduce some evidence in support of its averments of the additional terms relied upon, the defendant failed to call any witnesses.

23. The plaintiff on the other hand called four witnesses, two of whom testified regarding the nature of the defects, its consequences and the extent of damages alleged to have been suffered by the plaintiff. It is unnecessary for me to summarize their evidence in any detail given the conclusion which I reach herein.

⁷ *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A); *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 474A - D; *Abraham Johannes Van Huyssteen N.O. and Another v Milla Investment and Holding Company (Pty) Ltd* [2017] ZASCA 84 (2 June 2017) at par [26].

24. Ms. Voyiswa Mfaka and Sonwabo Canham both directors and shareholders of the plaintiff gave testimony regarding the circumstances under which the supposed express term relied upon by the plaintiff regarding the 90-day delivery imperative came to be incorporated in the parties' agreement. They also testified about the alleged defective workmanship in the affected vehicles to the extent that they bore knowledge of these problems.

25. Ms. Mfaka related that after gleaning what vehicles the municipality required for the maintenance lease they sat down with Mr. Glenn Lloyd from their preferred supplier, Nissan, to cost the necessary purchases of the trucks, chassis and bakkies that they would require. The defendant was also consulted at the recommendation of Mr. Lloyd to quote in respect of the vehicles that were required to be modified. This information furnished by both the defendant and Nissan informed them as to how to pitch their bid to the municipality.

26. She says that once it was official that the plaintiff was the successful bidder, its three directors personally met with Mr. Lincoln Strydom representing the defendant (with whom each of them were already acquainted by their prior work in the fleet management industry under various guises) at his office in Woodbrook during June 2010. It was at this meeting she claims that it was impressed upon Mr. Strydom that the lead time indicated in the plaintiff's service level agreement with the municipality, according to which all new vehicles leased to it had to be provided within 90 days of being ordered by the municipality, was of vital significance to the plaintiff. He was aware, so she explained, that the plaintiff could incur penalties in terms of its service level agreement if it did not deliver within the requisite time frame. He also knew that they were keen to make an

impression on the municipality, being new in the business. She clarified that in any event this time frame (almost four months) was known or standard to or in accordance with the practice of the industry.

27. She claims that Mr. Strydom was not averse to meeting the plaintiff's requirements in this respect in the sense that he at no time indicated that it was a bad time for the defendant to take on the work, or that it did not have space in its workshop, neither did he raise any other impediments to the defendant being able to deliver on its "promise". Had he done so, she explained, they would not have put their contract with the municipality in jeopardy but would have gone instead to the defendant's competitors. It was further indicated to him that payment for the work would be made in advance, as an added incentive as it were.

28. She was emphatic that they would never have agreed to an "open-ended" delivery arrangement with the defendant knowing how critical it was to deliver timeously in the service level agreement and what was at stake if the plaintiff did not. This is evident from what she explained they "spoke about" with the defendant's representative:

"... did you explain to, in the meeting to Mr Strydom the consequences of failure to meet your SLA obligations and deadlines? --- Yes, Sir, we spoke about everything, from us getting the money from the funders and them doing this work, it was very much of paramount in essence that everybody was on a very clear page and this was big work that had come, you know big money so there was no way that we would have wanted to go against the terms of the SLA, we did speak about it, everybody was clear."

29. She confirmed in this respect having specifically also discussed with Mr. Strydom the issue of providing a replacement vehicle if delivery was prolonged for

any reason and that there would be a cost to the plaintiff thereby but did not elaborate on what was said in this respect.

30. Asked under cross examination how the conditions in the plaintiff's service level agreement with the municipality (which incidentally was only signed on 27 July 2010 after the month in which the plaintiff says the oral agreement was concluded) would have found their way into the plaintiff's agreement with the defendant, she reasoned that the latter agreement would have to be "directly tied" to what the plaintiff was expected to deliver and that what she was promising to the municipality had to be "in sync" with what the person making the vehicles for the plaintiff had to do. If she promised delivery to the municipality in 90 days, so she explained, it had to be "well communicated" to the plaintiff's supplier. She reasoned that "indirectly" the defendant would become "part" of the service level agreement signed by the plaintiff with the municipality because it was a supplier: "Whatever I say on the service level agreement, my suppliers need to adhere and conform to that". Pressed to indicate then whether the specifications sent by the plaintiff to the defendant would have included this 90-day imperative, she asserted instead that "they know very well" and then went on to explain that 90 days is a standard in the industry:

"In the documents it was stated that was sent to TFM requesting the quote that there was a 90 day period? --- Sir, it was 90 days, I am not sure if Sir is aware that we have got certain standards within the industry, 90 days is a standard practise that is why then TFM knows that if they are to do the work, they need to put it in writing that they will also adhere to that and on the quotes that we got from them we were talking the same language, they know we got the quotations that was even on the pro forma invoice that was saying, we will deliver within 16 weeks, which is actually the same as the 90 days, it is equivalent to that."

31. In replying as she did, the witness unwittingly acknowledged that the defendant had put in writing on their quotes and pro forma invoices when delivery would take place, but without realizing that it had in fact in respect of the affected vehicles, consistent with its plea, qualified the industry norm or lead times and specifically reserved the right to deviate therefrom. This much became apparent much later when Mr. Jooste, who appeared on behalf of the Defendant produced some of these written quotes dated 14 April 2010 (Exhibit “C”), addressed to Mr. Lloyd, which clearly demonstrate that the defendant dictated its own terms both in respect of the crucial aspects of delivery and limited liability for damages.

32. She could not explain or grasp the significance of the plaintiff’s failure to itself have discovered the written quotes provided by the defendant in respect of the vehicles to be modified which by their very nature speak to the basis upon which defendant was prepared to undertake the work.

33. When pointed to the plaintiff’s particulars of claim and what is pleaded there regarding the expectation of the defendant to deliver within 90 days of initial delivery of the vehicles to the plaintiff, she volunteered herself that the 90 days was rather a “threshold” based on the industry standard. This appears from the following excerpt from her evidence:

“--- I do not know Sir, if you understand that the 90 days is almost like a threshold, it is kept at 90 days, it could have been a week later, depending on the work that they are doing, but it is known that it will not take them 90 days or over 90 days to do one truck or to do one body, so that is why I am saying 90 days is what is kept at, TFM could have given these to us in two weeks from the time that they received

the chassis, if they were giving overtime to staff or anything, so 90 days is a standard Sir and it is something that does not change anywhere in this industry, it is not going to change today, it does not change.”

34. She also appeared to have difficulty understanding the suggestion put to her that it was unclear from the particulars of claim what event triggered the running of the 90 days relied upon by the plaintiff for its cause of action. She also plainly seemed to be confused by the concept of an “order” from by the municipality equating this with the payment by the plaintiff to the defendant for the order.⁸

35. Ironically, she volunteered, along a tangent to a question focused on what was pleaded by the plaintiff, that the 90 days “is also part of the terms and conditions with TFM. It is part of their terms and conditions. It is their standard “they do their work within ... 16 weeks, which is 90 days”, again conceding in a sense that they dictate the timeframe for delivery in standard written terms and conditions.

36. The witnesses’ cross examination was interrupted by a request by the defendant for a postponement, the costs of which were ordered to be in the cause, in order to enable the plaintiff to produce specified documents which she appeared to concede might supplement what the parties’ agreement was. More significantly she appeared to be *ad idem* that the agreement relied upon by the plaintiff was not merely oral, but now also contained a written component.

⁸ I noted that the witness was confused about a number of legal concepts such as order, delivery, terms and conditions, warranties and damages.

37. As an aside, during the period of the postponement the defendant's attorneys delivered a notice in terms of Rule 35(3) in which certain specific documents were requested.

38. The witness herself deposed to the formal affidavit in terms of the sub-rule in which she refuted that the plaintiff was in possession of the original invitation to tender to the municipality; the tender package provided by the municipality to the plaintiff in order to verify the specifications for the tender; or the written request by the plaintiff to the defendant furnishing the specifications to have enabled the defendant to provide a quotation to the plaintiff. She averred that the absence of the tender documentation was attributable to a move by the plaintiff from its premises because of which these could have either been lost or destroyed. She explained further that the plaintiff had sought to obtain these documents from the municipality itself, by making a request pursuant to the provisions of the Promotion to Access of Information Act, No. 2 of 2000, but to no avail. She pointed out that the defendant had itself discovered the various written quotations that were not in the plaintiff's possession, not appreciating the sting of Mr. Jooste's criticism that it appeared as if the plaintiff was selectively withholding documents adverse to its case which coincidentally support the defendant's version that there were additional terms and conditions which applied in respect of the parties' agreement. Lastly, she clarified that there would be no written acceptance of these quotes in existence because payment by the plaintiff of the quoted amounts denoted such acceptance.

39. The only document produced through this exercise was a letter of demand addressed by the plaintiff's attorneys to the defendant dated 30 August 2013. Although the letter of demand does allude to "the industry norm and (that) what

was agreed ... was that the modified vehicles would be delivered within 90 days from date of payment to yourselves”, it very tentatively reserves the plaintiff’s rights to pursue a claim for damages for loss of income and vehicle hire based on such a delivery imperative.

40. When the trial resumed several months later the witness conceded in effect that the terms of the parties’ agreement were what was stipulated in the written quotations discovered by the defendant, introduced by Mr. Jooste during his earlier cross examination of her.⁹

41. Asked if on the plaintiff’s version of what the agreement was she had queried the delays or placed the defendant on terms to deliver after 90 days she replied that the plaintiff had not done so because Mr. Strydom kept on making promises that the vehicles were coming. She agreed that there was an absence of any written communication between the parties’ concerning the notable delays.

42. As an aside the plaintiff discovered several email communications between their technical advisor, Mr. Alfred Bobi, and the defendant which ostensibly denote and record the parties’ mutual understanding of problems with the vehicles

⁹ The written quotations referred to in the bundle marked exhibit “C” relate only to a compactor truck and the jetting truck, but among the earlier documents discovered by the defendant and which already formed part of the trial bundle (Exhibit A), are detailed quotations addressed to Mr. Nathi Mfaka, also a director with the plaintiff, with the standard terms and conditions of the defendant which were ostensibly also provided in respect of the cherry pickers and a tipper truck. In these the defendant clearly reserves the right to extend or shorten projected delivery dates. They also assert that liability arising from the defendant’s obligations to modify are limited to their standard warranty that the bodywork and components fitted are to be free from defects in material and workmanship for a period of 12 months only, which separate warranty document in turn record that it contracts out of liability for consequential loss and damage howsoever arising.

and how they were being dealt with from time to time. Only two of these touch upon the issue of delays and the plaintiff being upset because of it. The first is dated 30 May 2013, and the other 29 August 2013. Neither suggest a breach of contract nor constitute a firm indication that the defendant is being placed on terms to deliver. To the contrary, other than requesting that faults be rectified, and reporting generally on the status of delivery, the tone of the emails is very accommodating. Even after the plaintiff's attorneys became involved and addressed the defendant about the plaintiff's attempts to resolve the perceived issues between them on a non-litigious basis, there is an absence of any suggestion that the 90 days was an express premise of their agreement.

43. This notwithstanding, the witness volunteered that even at the time of the hiring the replacement vehicle because the jetting truck was out of commission, she kept Mr. Strydom apprised of the cost being incurred by the plaintiff because of faulty workmanship.

44. When it was put to her by Mr. Jooste that liability for the incidental costs of hiring could not be reconciled with the exclusionary clause provided for in the defendant's standard terms and conditions, she justified the plaintiff's claim on the basis that it was only once the warranty had run its course that such an indemnification came into operation. In this instance however, everything that the plaintiff had "picked up" concerning defects was still within the warranty period. She did not appear to appreciate the significance that the plaintiff's cause of action is not premised on a breach of warranty. Her lack of understanding of the concept of special or consequential damages or what the plaintiff's case is about exactly is also aptly demonstrated in her insistence why the defendant should presently be held liable for the plaintiff's damages:

“But Ma’am your case is not premised on a breach of warranty, your case is premised on something different. You didn’t say I entered into a contract with the defendant who gave me a 12-month warranty and in that 12 months they didn’t comply with the obligations in terms of the warranty, you pleaded a completely different agreement. --- Perhaps you haven’t noticed that the units that they could not fix were taken to Vince to be fixed and it is part of the monies that we are actually claiming.

Ma’am [interrupted] --- So that is a warranty basically because they should have within 12 months fixed the unit, they couldn’t fix, hence now they are liable for the work that was done by somebody else, because it was raised within the 12 months, they went over years without finishing it and in the meantime we incurred costs.”

45. Under re-examination she purported (unconvincingly in my opinion) to negate her prior concession that the written quotations supplied by the defendant in Exhibit C and trial bundle A formed the basis for the parties’ agreement, alluding instead to the proviso specified in the quote that “we are however open to negotiation on alternative terms”. She asserted that this is exactly what they did when the oral agreement on the plaintiff’s version was concluded. However, this explanation overlooks that this concession in the defendant’s standard terms and conditions to negotiate on alternative terms self-evidently relates to price only. She also purported to deflect that the quotations were of any significance on account of the fact that they were not addressed to the plaintiff, but to Glenn Lloyd of Nissan, forgetting that she testified that Mr. Lloyd had been instrumental in getting the information from the defendant on their behalf in order to pitch their bid for the tender and that their acceptance of these quotes had been denoted by payment of the full contract price for the modifications. She also highlighted the difference between the quotations for the compactor trucks and the vacuum and jet

rodding combination unit truck around the issue of delivery, overlooking the fact that each quotation was different, as pleaded by the defendant, in respect of each vehicle for reasons that were unique to the specifications, chassis availability, factory workload and availability of labour and materials.

46. She also identified two pro-forma invoices dated 11 March 2011 (entered into evidence marked Exhibit “D”), one in respect of the vacuum truck in which the exact same detail is repeated as is reflected on the corresponding written quotations (but barring the standard fine print on warranties), which includes the proviso that the defendant reserves the right to extend or shorten the delivery period of 16 weeks from date of official order, which terms and conditions she claimed to have accepted instead, denoted by payment to the defendant of the invoiced amount.¹⁰ In this respect she failed to recognize that her present evidence on this aspect constituted a different contract entirely than the one relied on by the plaintiff in its particulars of claim or as held out for in her earlier evidence in chief.

47. Mr. Sonwaba Canham sought to corroborate Ms. Mfaka’s evidence concerning the alleged meeting which she says took place between the plaintiff’s three directors and Mr. Strydom at the premises of TFW in 2010 at which they concluded the oral agreement. He suggests that it happened by the time their funding had become available.¹¹ He claims that at the meeting they negotiated time frames, looked at specifications and discussed the penalties that would be involved

¹⁰ An invoice doesn’t necessarily contain terms and conditions to form part of the contract. This is especially so since payment had by then already been made. The quotations, all of which refer to, *inter alia*, the standard warranty of application clearly does however appear to constitute the offer to do business in respect of each order. The fact that the defendant’s qualification of lead times is coincidentally also stated on the invoices however strengthens the probabilities in favour of the defendant’s case that its general conditions governed the contractual relationship between the parties rather than the express oral terms contended for by the plaintiff.

¹¹ The dates do not accord. According to her testimony funds became available towards the end of 2010. Payment of the contract price was ultimately effected in June 2011.

should the plaintiff (as opposed to the defendant) not deliver within the specified 90-day period. He recalled that this was their second meeting, the first having taken place before the funding was put in place. His recall of the minutiae of the discussion is evident from the following excerpt from the transcript:

“Now in regard to the work that was to be done and the fact that you had a lead time of 90 days, was that taken up in any way with Mr Strydom the timing, what did you discuss about that, if anything? --- Okay, as soon as the payment, as soon as TFM confirmed that they have received the payment we re-emphasise the fact that we expect the units to be complete within that period of 90 days as per the service level agreement that we had with our client, but prior to that we made them aware that should there be any delay it was going to compromise our contract because of the instability with the municipality and us having come in from this side of the Eastern Cape and them being in the Transkei where our competitors are, so we reiterated the point that we want all the units to be completed within that 90 day period.

And was there any counter proposal to that by Mr Strydom or anyone else? --- There was no counter proposal to that M’Lady, because what we requested from them was that it is our wish that when all the units arrived with them, that is from Nissan Auto Mall that we so wish that they have enough space to cater for those units and having spoken to Mr Strydom at the time he said that they were busy finishing up Public Works trucks and by the time our units arrive so they won’t have any hassles when it comes to space availability and workforce to work on the trucks.

Should it have happened that he said no, I am sorry we have got a big project coming in from somewhere and we won’t be able to start you for the next 4 months, what would you have done? --- Yes M’Lady prior to us going to TFM we had other companies in mind, like MNH Bodies, and Ranco which are TFM’s competitors, we told TFM that

TFM if you don't have space or you are tied in working on our trucks you know we have been approached by other competitors, so assure us that you are able and you have got the capacity to finish the units, working stability and time frames.

And did they? Did he I am sorry? Did Mr Strydom give you that assurance or not? --- He did M'Lady, he said he does have enough capacity to finish the job he went as far as showing us on the screen on his desktop the trucks that they have done which are similar to ours, so he said the issue of design and material that will meet our deadline are there, are in place so they won't battle to finish the trucks in time.

If Mr Strydom had said to you we would love to do your work, but we can't give you any assurance when we will be finished we might take 6 months, we might take a year or longer, like an open-ended finishing time, what would you have done? --- M'Lady we would have gone to the competitors and I have mentioned before like Renco and MNH Bodies, because should that have been the case it would have compromised our delivery promise with our client and the contract would have been cancelled by our client."

48. He claims too that they took Mr. Strydom through the aspects of the service level agreement that involved penalties should the plaintiff not deliver timeously. Asked regarding any discussion about replacement vehicles, he related that:

"--- The three of us which is myself, Ms Mfaka and Unathi we told Lincoln that if we don't deliver the units on time the KSD requires that we hire a replacement vehicle then we said, because our contract is structured over a period of 5 years, which then means that we charge a lesser amount a month than it would have been if the contract was a short contract, so we said to him that the cost of hiring would put a burden on our cash flow so they must make sure that we get our trucks

on time because if not it will be dire for our company to hire out trucks, because trucks in Mthatha are very expensive to hire so it would have dire impact on our cash flow as a company.”

49. Under cross examination, when presented with Exhibit C, he confirmed that although the written quotations had been addressed to Mr. Lloyd of Auto Mall, the latter had obtained the quotes on the plaintiff’s behalf for the modifications and that the information was indeed vital in order to submit their tender documentation to the municipality.

50. Whilst agreeing that it was important - given that servicing a government tender was the objective, that the relevant documentation had to be in writing and had to exist in writing prior to the tender being awarded and the service level agreement being entered into, he yet asserted that his recollection of “all of this, all that was said with TFM ... was based on oral agreement”.

51. He denied any sinister motive behind the fact that neither the plaintiff nor the municipality could provide copies of the tender package.

52. He was firm that in the meeting in 2010 they had drawn to the attention of Mr. Strydom the negative consequences should they not deliver their modified units within the 90 days and now also added “and also should they deliver them in a poor standard of quality”. He claims that Mr. Strydom “agreed”, I suppose meaning that he acknowledged that the plaintiff would incur penalties.

53. Asked if they plaintiff had placed the defendant on terms to remedy the alleged breach of terms contended for by the plaintiff, he delivered a lengthy reply

which was not quite on point and demonstrated his misunderstanding of the concept of a fixed term for delivery and the legal consequence of the breach of such a term:

“Now one of the things that must happen when there is a time clause and then is non-compliance by a contracting party is to put the party who is in breach on terms to comply with that term that he is breaching in this instance the 90 days. You understand what I am saying to you? To put it in simple terms if I tell you you must build me a swimming pool within 30 days, if you are not finished with this building in 30 days then I must put you on terms to finish it, that had not happen in this matter at all, as far as I can see it. --- Practically that would have been the case, however, due to our relationship with TFM and having been engaging for all these years prior to the award of the contract it was all verbal agreement when it reached a stage where we got frustrated with them not listening to us, that was a point where e-mails started flowing between ourselves and them, two we wouldn't have anticipated that TFM was not going to meet the requirements as set out by us in that oral agreement that we had with them, due to them being a reputable company, that is based on East London which some of us have worked with them through the companies that we were working with, like in the case Fleet Africa and also as we were busy tendering we knew exactly once we get the tender TFM is there next door of which it cuts down all the logistics of going to a manufacturer that is in PE. And also because we made, we were assured by TFM that no we will be able to supply you with these units we don't have issues with space, we don't have issues with capacity, you know hence we gave TFM there was that trust, element of trust between ourselves and them emanating from that long term relationship that we had with them.”

54. Ultimately, he replied that the plaintiff did not have any formal written agreement with the defendant: “all was oral”, and that it was unnecessary at first “to engage in any formal written agreements or breach of contract issuing a breach of contract” because the defendant up to a point had delivered.

55. Asked what was meant by the plaintiff’s attorneys requesting confirmation that an extended warranty on the jetting truck would be provided when the latter became involved in trying to sort out those challenges between the parties, he explained that everybody in the manufacturing industry issued a warranty for their work and that the defendant was no exception. According to him the defendant did “talk” of the warranty on one of their agreements or pro-forma invoices. He understood it to mean that they would not cover wear and tear, but poor workmanship or a defect within a certain period.

56. He conceded that the affected vehicles got sent back to the defendant to remedy repairs on the understanding that they would make good on the warranty alternatively, they repaired the vehicles because of their longstanding relationship. Ultimately, he agreed that requesting an extension of a warranty meant that there was an existing warranty in place at the time.

57. He acknowledged that more than a year had elapsed after delivery of the jetting truck to the plaintiff when the warranty had run its course before any complaints were raised in writing in respect of the problems with this vehicle. However, he deferred to the casual relationship between the parties suggesting that their staff spoke to the defendant’s employee/mechanic Manus over the phone several times regarding their issues with the jetting truck. It was only later, so he explained, that it became necessary to reduce matters to writing for record

purposes. He acknowledged that an initial issue of the water pump had been dealt with by the defendant's technician from Johannesburg because it was within the one-year warranty period but was unable to explain convincingly why there was nothing in writing recording the problems with the jetting truck which the plaintiff alleges were there from the outset until well after the warranty period had expired.

58. He agreed that at the instance of the defendant Vest Technologies had replaced the pump at no cost to the plaintiff although he was reluctant to concede that it was as a gesture of goodwill.

59. Ultimately, he agreed that a warranty had been of application in respect of the jetting truck, which was extended for a period of a year. He was however not prepared to agree that the warranty was a term of parties' agreement because in his view the warranties were only "sent" after Mr. Vince Harmon of Ergon Cranes "summoned the (defendant) to issue (them)".

60. Mr. Jooste made much of Ms. Mfeka's concession that the parties' agreement was indeed based on the standard terms and concessions as provided for in Exhibit C and the other written quotations in the trial bundle (Exhibit "A"). He argued at the close of the plaintiff's case, and without leading any evidence on behalf of the defendant, that the concession in effect put paid to the plaintiff's case that the agreement was concluded on the express terms contended for by the plaintiff rather than on the extended written terms contended for by the defendant in terms of which delivery was qualified by the peculiar exigencies that applied in respect of each order, and that its liability was limited by a standard warranty, an aspect concerning which Mr. Canham appeared also to be in agreement. He also submitted that no adverse consequences could ensue for the defendant because Mr.

Strydom and those employed by the defendant had elected not to testify, whether to gainsay the plaintiff's evidence that an oral agreement was concluded on the terms testified to by the plaintiff's directors, or that the jetting truck was supposedly defective from the outset as testified to by the plaintiff's expert witness, Mr. Vincent Harmon, because the onus was on the plaintiff both to prove the alleged express oral terms of the agreement as well as to negate the defendant's pleaded case that the agreement was concluded on additional terms. As startling as it might sound, there is indeed no evidentiary burden on the defendant to prove the additional terms relied upon by it, neither any duty to begin.

61. In *Topaz Kitchens (Pty) Ltd v Naboom SPA (Edms) Bpk*¹² the court set the record straight regarding the position of a plaintiff such as in the present instance who bears the onus, even though it was the defendant who relied on an alleged additional term, which was denied by the plaintiff. Before reaching this conclusion, the court considered the opinion of Hoffman, *The South African Law of Evidence*,¹³ who notes the practical difficulty of proving a negative or adducing positive evidence to establish a negative proposition. The suggestion of the author relied upon by the appellant's counsel in *Topaz Kitchens* is that in cases where the situation is analogous to those in *Kriegler v Minitzer and Another*¹⁴, according to which the burden of proof was on the plaintiff, there was nevertheless a duty on the defendant to begin and to adduce at least some acceptable evidence in support of the contention that there was an additional term of the contract. The anomaly, so the author explained following his own analysis of *Kriegler*, is that the plaintiff in such an instance could hardly be expected to lead positive evidence that no further terms had been agreed to, and unless the defendant adduced some evidence in his

¹² *Supra*, at pages 473h – 474d.

¹³ The court in that matter referred to the 2nd edition of the author's work, at pages 352-3 and 359.

¹⁴ *Supra*.

favour, no reasonable man could have found that such terms existed. But once the defendant adduced sufficient evidence to leave the court in doubt, so he went on, that defendant was entitled to succeed because the *onus* was upon the plaintiff. To counter this practical difficulty perceived by Hoffman, he suggested that this point can be met by placing a duty to adduce evidence upon the party who denies a negative proposition, without necessarily making him bear the onus as well. He noted that this accorded with cases where the party has the onus of proving a negative without necessarily having a duty *to adduce evidence on the point*. So in the situation that pertained in *Pretorius v Van der Merwe*¹⁵ where the plaintiff had sued on an *actio redhibitoria* claiming the right to rescind an agreement of sale of a bull on account of the fact that it had a latent defect in it (it turned out to be impotent), and wherein the defendant had asserted that the contract had provided for the sale to be voetstoots (i.e. an express term excluding Aedilitian liability for latent defects), he opined that although the onus was on the plaintiff to establish that the contract did *not* contain a voetstoots clause, since all the other terms of the contract were not in issue, the defendant should have started with a duty to adduce evidence. This is so because in his view the plaintiff could not be expected to produce positive evidence to negative the existence of a voetstoots clause.

62. To bring the matter home to *Topaz Kitchens*, the Appellate Division was not enamored with this proposition and reaffirmed that there was no duty on the defendant in such a situation to begin and to adduce some evidence in his favour. This is evident from the *dictum* below:

“Counsel did not cite any authority in support of the propositions stated by *Hoffmann* in the above passages, namely that, in cases such as *Kriegler v. Minitzer*, *supra*, where the burden of proof is

¹⁵ 1968 (2) SA 259 (N).

on the plaintiff, there is nevertheless a duty on the defendant (a) to begin, and (b) to adduce some evidence in his favour.

Indeed, counsel informed us that he was not aware of any such authority. Nor am I.

From the decision in *Kriegler v. Minitzer and Another, supra*, it is clear that the burden of proof was on the plaintiff, even though it was the defendant who relied on an alleged additional term, which was denied by the plaintiff. The burden of proof therefore involved proving a negative assertion. There is, in my opinion, no justification for the proposition that in cases such as the present case, where the plaintiff seeks to enforce a contract and the *onus* is on him to prove the terms thereof, which would involve his proving a negative, that burden is alleviated by a duty imposed on the defendant to begin and to adduce some evidence in support of his averment that the additional term relied on by him was agreed upon.

In *Kriegler v. Minitzer and Another, supra*, GREENBERG, J.A., dealt fully with the particular aspect now under consideration, namely that the burden of proof, in cases such as the present one, involves proving a negative. There is, in my view, no suggestion in his judgment that the position is as stated by *Hoffmann*.

For the reasons stated I cannot agree with counsel's first submission. The position we are faced with is that evidence was adduced by both sides, and, as the burden of proof was on the plaintiff, it was for the trial Court to decide whether, regard being had to all the evidence and the probabilities of the case, it had discharged that burden."

63. The circumstances in the present matter being analogous to *Kriegler* and *Topaz Kitchens*, it is for this court to decide whether, regard being had to all the evidence and the probabilities of the case, the plaintiff has established that there were not additional terms as contended for by the defendant.

64. In ordinary circumstances I have no doubt that a plaintiff who bears a negative onus such as the plaintiff in this instance might acquit itself of its burden by simply providing acceptable evidence that these were the express terms upon which it contracted which would negate by necessary implication that there were other terms applicable on its say so, but I am inclined to agree with Mr. Jooste's

submission that the plaintiff's evidence, albeit uncontroverted, was dealt a blow by admissions made by Ms. Mfaka and Mr. Canham both that give credence to the defendant's pleaded case, and what was put during cross examination to the plaintiff's witnesses, namely that the defendant contracted with it on its own standard terms and conditions.

65. Whilst I believe that the directors were certainly mindful of their own obligations in terms of their service level agreement with the municipality (and the consequences of their failure to deliver timeously) and must have voiced these concerns aloud to Mr. Strydom (indeed I accept even that he was aware of what the municipality expected because the defendant also competed for the same tender), assuming the service level agreement was already in existence by the time they were engaging with the defendant to provide the necessary modification services, neither of the witnesses went so far as to state in clear unequivocal terms that there was a meeting of minds concerning this aspect of delivery that was crucial to the plaintiff's case. Speaking it does not mean that there was agreement. Both were careful to describe the nuances of the meeting, right down to their being impressed that the employee who served the tea was hearing impaired, but neither really got down to the nitty gritty of what was supposedly the parties' agreement on the specific terms. This aspect was vaguely and very tersely related.

66. One further gets the impression that the directors, although they both placed themselves in a room with their third director and Mr. Strydom on an occasion when they had visited the premises of the defendant to see their set up and have a discussion around services which were going to be needed, were speaking of different times in the context of when exactly this meeting of minds purportedly happened. Ms. Mfaka's testimony that it happened in June 2010 is improbable on

her account because she would not have had the benefit of a signed service level agreement yet in order to speak to the punitive terms thereof having a bearing on a discussion around delivery dates or a presumptive contemplation that damages could result from a breach by the defendant of those terms. I expect that she must at that stage have had some knowledge about the municipality's specific requirements but what exactly was known is speculative because none of the documentation that must have existed at the time was available to inform the correct position. On Mr. Canham's version the defendant had already been paid when the express term was discussed and supposedly agreed (this timing would have been more realistic), but that then casts doubt on Ms. Mfaka's recollection and the Plaintiff's pleaded case that the agreement was concluded in June 2010 already. It also raises a flag about both being firm about the peculiar nuances of a meeting which on their respective versions could never have happened at the same time. I have also noted in my summary of their evidence above that not only were the witnesses vague in asserting how the supposed agreement on their terms came to be concluded (the main thrust of the case been on the defects in the affected vehicles instead), but Ms. Mfaka when pressed about the delivery term eventually watered it down to a "threshold" rather than an express term.

67. It was not surprising that the witnesses themselves revealed that the defendant had standard terms and conditions and that this was the basis upon which it did business. This firmly accords with both the written quotations provided at a time before the tender was even submitted as well as the pro forma invoices generated closer to the time once the plaintiff had paid the contract price. If ever there was a time to reinforce the supposed oral terms it was at the point when payment of the full contract price was imminent, yet the plaintiff's evidence was very vague regarding the basis upon which it did so, offering this evidence

only in support of the perceived improbability that it would have parted with 100% of the contract price before a spanner was even lifted unless the defendant was going to meet the 90-day imperative on its terms. Whilst on this point, it is most improbable in my view that the purported express term of the parties' agreement concerning payment would have been in the bag as it were in June 2010 already, long before orders were officially placed or funding for the numerous vehicles became available.

68. When the evidence is considered holistically it is more probable than not that the plaintiff parted with all the funding at the outset due to its fledgling naivety, leaving no leverage to itself to control matters going forward if problems ensued as an astute experienced business would, and over zealousness. This accords with the professed trust (misplaced with hindsight) that it wholeheartedly put in the defendant and the peculiar way it handled the relationship when it started to fall apart. There is indeed no written record when it mattered of their unhappiness with the defendant. Not only were they prepared to do business with the defendant on the basis of an oral agreement involving the payment of a substantial amount of money for which they were putting themselves at risk professionally and financially, but they failed to take decisive legal steps once it dawned on them that they had been let down by the defendant. If on the plaintiff's version the defendant had agreed to a 90-day imperative, why did it not place the defendant on terms? And why, when it eventually consulted an attorney, did the plaintiff not adopt a hardnosed business attitude that it was not going to tolerate the situation any longer. Instead it espoused a non-litigious approach. Whilst the directors' desire to talk rather than fight is commendable when it comes to personal relationships, the basis upon which they sought to resolve their perceived problems demonstrates, on the probabilities, that they were not in a position of strength and

that they had done business on the defendant's unreasonable terms, and moreover that they had acquiesced in the late delivery without raising any objections.

69. I do not necessarily agree with Mr. Jooste's submission that the directors were willfully withholding discovery of documents adverse to their case. In my view their significance in a litigious context was simply not understood. I have alluded above to their lack of understanding of numerous legal concepts. This was most notable around their appreciation of why they consider the defendant should be held liable for defective workmanship, in effect on the admitted basis of the warranty that they consider was timeously actioned, which is however not the premise of the plaintiff's case. It is for this reason that Mr. Jooste's cross examination of Ms. Mfaka proved to be tortuous. She was simply not understanding where he was going with the so called negative onus or the import of her concession ultimately that they must have contracted with the defendant to provide the modifications on the latter's standard terms and conditions and could not have agreed to do so on the plaintiff's professed express oral terms instead.

70. It is against the general probabilities that the parties did not contract on the defendant's standard terms and conditions. Firstly, it is most unlikely that a seasoned manufacturing business of the defendant's stature (recognized by the plaintiff as leaders in the field of modifications to vehicles) would ever do business other than on their standard terms and conditions for which there is a printed template styled manufacturer's warranty provisions. They would naturally also quote in writing and give estimates regarding projected delivery dates based on the peculiar features of each order relative to the client's specifications of vehicles to be modified. It is not to say, as Mr. Cole who appeared for the plaintiff suggested, that the delivery date contended for by the defendant was open ended. Rather it

makes good business sense that their projections would be based on aspects unique to each order, such as chassis availability or other constraints bearing upon their ability to produce the ordered goods. It is no coincidence in my view that the evidence (which includes the admissions made by the directors) confirms that the defendant quoted in writing and made their standard terms and conditions as well as its projected delivery dates known to the plaintiff well in advance through the admitted agency of Mr. Lloyd, and that it repeated the basis upon which the work would be undertaken again at the time the official orders were placed as is reflected in the pro forma invoices. There is also the inherent improbability in my view that the defendant would go along with a strictly 90-day delivery timeframe (contrary to its usual manner of offering its services) without reducing it to writing.

71. How the parties conducted themselves thereafter is also of some significance. In this respect one only has to take into account the correspondence and the evidence of Mr. Vincent Harmon to know that the defendant from time to time attended to the repairs to some of the vehicles, if not as a gesture of goodwill then on the basis of the basis of a standard manufacturer's warranty (albeit this is denied by the defendant). The fact that this happened, and that the defendant was willing to extend the warranty period in respect of the jetting truck for a further period of 12 months based on a good relationship that it hoped to sustain, supports its case that there were these additional terms to the basic agreement to modify the vehicles in question than those relied upon by the plaintiff.

72. Whilst my empathies lie with the plaintiff which found itself in a compromising position when delivery took longer than anyone imagined (and in respect of which delay it did not place the defendant on terms) and then again when the jetting truck and cherry pickers were out of commission, I cannot find on

the evidence or probabilities that the defendant is liable on any basis to compensate the plaintiff for such delays or states of affairs. The plaintiff has simply failed to acquit itself of the burden on it to prove that the additional terms contended for by the defendant did not constitute the basis for its dealings with it, or conversely stated, failed to prove the absence of such terms. I highlight clause 7 of that warranty which provides in unequivocal terms that:

“TFM’s liability under this warranty is limited to the repair/replacement/reinstatement of parts/components/workmanship. TFM shall not be liable for any claim whatsoever by the customer or 3rd party for costs, loss, charge or damages whether direct, indirect or consequential (including, without limitation, loss of profits and loss of use) howsoever suffered, and irrespective of whether such damages arose under a claim in delict or in contract or otherwise.”

73. The provisions of clause 12 are also necessary to give a context to the defendant’s defence that no claim for damages can arise against it based on an implied warranty against latent defects or *ex lege* by virtue of its liability for defects as a merchant selling goods of their own manufacture by reason of a latent defect in the goods:¹⁶

“This warranty supersedes all prior warranties and/or guarantees whether expressly or impliedly, orally or in written format and the customer expressly renounces any common law or statutory rights which it may have against TFM whether for damages, rescission or reduction of the purchase price.”

74. Even if the warranty was not formalized or validated in the sense suggested by Mr. Cole by entry into the warranty register or the handover of the relevant

¹⁶ I will assume for present purposes that it is a “manufacturing seller”.

service manuals or sub contractor's warranties when Mr. Harmon started involving himself, it can hardly be gainsaid that the plaintiff did not consider the defendant released from the obligation to hold good on its promises in respect thereof. To the contrary it is on the basis of the manufacturer's warranty that there were purported comebacks after the risk in the vehicles had passed to the plaintiff. Warranties cannot exist to suit the plaintiff's case on one hand but be nonexistent for want of compliance with strict register formalities on the other hand.

75. As for the cost of the repairs to the jetting truck paid to Mr. Harmon which the plaintiff seeks to claim by way of damages, such a claim, in effect based on the warranty which according to Ms. Mfaka was timeously actioned, is not borne out by the pleadings and is not the basis for the plaintiff's case. Once it is accepted that the plaintiff has failed to discharge the onus which it bears to prove that it did not contract on the additional terms contended for by the defendant, there is, as Mr. Jooste submitted, nothing more to be salvaged from the plaintiff's case.

76. In the result I issue the following order:

1. The plaintiff's action is dismissed with costs.

B HARTLE

JUDGE OF THE HIGH COURT

**DATES OF HEARING : 12 and 13 December 2016
and 30 and 31 May 2017**
DATE OF JUDGMENT : 26 March 2018

Appearances:

For the plaintiff: Mr. S H Cole instructed by Conlon & Associates Inc., East London (ref. Mrs. Conlon/sp/ARI1/0002/U9)

For the defendant: Mr. P Jooste instructed by Gravett Schoeman Inc., East London (ref. Mr. Theophilus)