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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 3116/2011

In the matter between:

MEDITERRANEAN TEXTILE MILLS (PTY) LTD Plaintiff

and

MARBURG MANUFACTURERS (PTY) LTD Defendant

JUDGMENT

KOEN J:

INTRODUCTION:

[1] This matter has come before me as an action in which the Plaintiff claims:

(a) payment of R2 150 045.68;

(b) interest on the sum of R3 588 286.83 at the rate of 15.5% per annum from 1 December 2010 to 19 May 2011, both dates inclusive;

(c) interest on R2 150 045.68 at the rate of 15.5% per annum from 20 May 2011 to date of payment;

(d) costs of suit, including, where employed, the costs of two Counsel, on the scale as between attorney and client.

The Defendant counterclaims for payment of the sum of R2 305 080.00, interest thereon and costs.

[2] The quantum of the Plaintiffs claim, should liability be established, is agreed.

[3] The Plaintiffs claim is in respect of the balance of the purchase price of certain fabric referred to as 12C97[1] sold and delivered during the period April 2010 to August 2010. The Defendant maintains that the fabric supplied by the Plaintiff was unfit for use in the production of work wear garments and, as a result, that it has suffered damages in the sum of R2 305 080.00.

THE PLEADINGS:

[4] Briefly stated, the Plaintiff avers that:

(a) On or about 25 November 2004 and at Durban it and the Defendant concluded a written contract comprising the 'Credit Application and Standard Trading Terms Agreement' annexed as annexure 'A' to the Particulars of Claim.

[1] or C1297, hereinafter referred to simply as 'the fabric'.

(b) This agreement incorporates the Plaintiffs 'Conditions of Sale'.

(c) Subsequently, during the period April 2010 to August 2010 and pursuant to that agreement, the Plaintiff sold and delivered the fabric to the Defendant for agreed prices alternatively Plaintiffs usual price in the sum of R5 401 992.83.

[5] The essence of the Defendant's case is that the fabric was sold pursuant to a partly written and partly oral agreement concluded during or about December 2009, the written portions comprising two emails, namely one from the sales director of the Plaintiff, Mr Lindsay Meyer, to the managing director of the Defendant, Mr Leon Raubenheimer dated 11 November 2009 and Mr Raubenheimer's reply dated 12 November 2009. It pleads that the parties were represented, in the case of the Plaintiff by Mr Varoli[2] and/or Mr Meyer and/or Mr Broughton[3], and the Defendant by Mr Raubenheimer. In terms of this agreement 60 000 meters of the fabric was to be supplied and it was to be identical to and have all the qualities of a fabric manufactured by Berg River Textiles using the fabric code TOO6 of which a sample was provided to the Plaintiff. The Defendant would pay the Plaintiffs agreed price for such fabric within 90 days of delivery. It was further pleaded that at the time that the agreement was concluded the parties were aware that the fabric would be used by the Plaintiff in the production of certain work wear garments which were to be exported by the Defendant to a company known as Wenaas in the United Kingdom, which would in turn supply the garments to BP for use by the latter's employees, and that if, for any reason, the garments were not suitable, the garments would be rejected and Wenaas would refuse to pay the Defendant and/or claim compensation from the Defendant. The Defendant pleads that the fabric manufactured and supplied by the Plaintiff pursuant to the agreement pleaded by it, was unfit for use in the production of garments in that it shrank and frayed after washing.

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[2] the Plaintiff's Managing Director.

[3] a former employee and later agent of the Plaintiff.

THE ISSUE SEPARATED FOR DETERMINATION:

[6] At the commencement of the action and on the application of the Plaintiff, agreed to by the Defendant, I granted an order in terms of rule 33 (4) separating for determination, prior to all other issues, the question whether the Plaintiffs 'Conditions of Sale', attached to annexure 'A' to the Plaintiffs Particulars of Claim, were applicable to the sale of the 12C97 fabric. The respective contentions of the parties in regard thereto were identified as those arising from paragraphs 3 to 7 of the Particulars of Claim, paragraphs 3 to 11, 15 and 17 to 29 of the Defendant's plea and paragraphs 2 to 4, 9, 12 to 17 of the Plaintiffs replication.

THE PARTIES' CONTENTIONS IN RESPECT OF THE ISSUE SEPARATED

[7] The Defendant raised a number of specific defences to the Plaintiffs contention that the sale was governed by the Plaintiffs conditions of sale. They have been referred to by Mr Smithers SC [4] as the first, second, third, forth and fifth defences. For the sake of convenience that designation will also be followed in this judgment. Briefly stated, they are as follows:

(a) A lack of authority on the part of the signatory to the credit application, Mr Thevan, to have bound the Defendant to the terms of the Credit Application[5];

(b) Alternatively, the second defence was that:

  (i) Mr Raubenheimer, who represented the Defendant in the negotiations leading up to the conclusion of the agreement for the supply of the fabric, was unaware of the existence of annexure 'A';

[4] with him Mr Boulle on behalf of the Plaintiff.

[5] the 'first defence'.

(ii) Annexure 'A' had been signed five years previously and at a time when Mr Raubenheimer had no involvement in the Defendant;

(iii) The Plaintiffs representatives, Messrs Varoli, Meyer and Broughton ought therefore to have realized that Mr Raubenheimer may be unaware of the existence of annexure 'A' and should therefore have drawn his attention thereto and in particular to the conditions of sale contained therein;

(iv) They failed to do so and accordingly 'the conditions of sale must be deemed not to apply to the sale of the fabric.'

(c) Alternatively, the third defence raised is that:

(i) The Plaintiffs representatives' failure to draw the existence of the conditions of sale in annexure 'A' to the attention of Mr Raubenheimer, amounted to a representation by silence that no previously agreed conditions of sale would apply to the sale of the fabric;

(ii) The Defendant acted on such representation to its detriment in as much as:

(aa) The conditions of sale are highly detrimental to a purchaser of fabrics in that they negate the purchases common law rights;

(bb) Had Raubenheimer been aware that the conditions of sale were to apply to the purchases of the fabric he would not have caused the Defendant to have entered into the transactions;

(iii) In the circumstances the Plaintiff is estopped from relying on the conditions of sale.

(d) Alternatively, the fourth defence is as follows:

(i) Annexure 'A' was signed at a time when the Defendant was purchasing small amounts of other types of fabric from the Plaintiff for use in the domestic market and when the Defendant required credit facilities up to a maximum of R300 000.00[6] for a period of sixty days;

(ii) Conversely, when the parties concluded the agreements for the sale of the fabric, they intended that, depending upon the delivery rate of the fabric, the Defendant might enjoy credit facilities up to an amount of R10 million for a period of ninety days;

(iii) Furthermore the parties contemplated that by reason that the garments were to be exported, if the fabric should prove to be defective, the Defendant would not be able to comply with the provisions of paragraph 10.1 and 10.2 specifically of the conditions of sale;

(iv) Clause 1 of the conditions of sale provides that no variation thereof shall be binding unless made in writing by the Plaintiff. No such variation was made in writing by the Plaintiff to cater for any of the above changed trading conditions;

(v) In the circumstances, the parties could never have intended that the conditions of sale contained in annexure 'A' would apply to agreements for the sale of the fabric.

(e) Finally, the fifth defence advanced is that in the event of it being held that the conditions of sale did apply to the sale of the fabrics, the Defendant pleads as follows:

'(a) The Defendant has a constitutional right enshrined in s 34 of the Constitution to have any dispute which might arise between it and the Plaintiff determined by application of law in a fair public hearing before a court;

(b) Clauses 10.1 and 10.2 of the Conditions of Sale amount to a limitation of that right;

[6] which should in fact read R500 000.00.

(c) The parties were at all times aware that by the reason of the fact that the goods were to be exported, the defendant would be unable to comply with clauses 10.1 and 10.2 before instituting a claim against the Plaintiff in a court of law;

(d) Accordingly, in the circumstances of the case, it is unreasonable and unconstitutional for the Plaintiff to seek to enforce clauses 10.1 and 10.2, and therefore may not do so.'

THE FIRST DEFENCE:

[8] In paragraph 3 of its Plea the Defendant denied the enforceability and validity of the original agreement concluded during November 2004. In amplification of that denial the Defendant pleaded that the credit application form was signed by one Suggie Thevan purportedly on behalf of the Defendant, but that he had neither actual nor ostensible authority to conclude that agreement on behalf of the Defendant. This led to a replication by the Plaintiff persisting with its original averments, but replicating further that should it be found that Mr Thevan was not so authorized, that the Defendant is estopped from denying his authority for a number of reasons, which need not be detailed herein. At the conclusion of the trial the Defendant conceded that it was unable to gainsay the Plaintiffs contentions that Mr Thevan had been ostensibly authorized to conclude the agreement, but cautioned that such concession was not to be construed as an admission that the Plaintiffs standard trading conditions applied to the transaction giving rise to the present proceedings.

RELEVANT FACTUAL BACKGROUND:

[9] In the light of the concession by the Defendant, it became common cause that an enforceable and binding agreement was concluded between the Plaintiff and the

Defendant on 25 November 2004 incorporating *inter alia* the following material terms of the Plaintiffs standard conditions of sale as they would apply to the Defendant:

(a) The particulars of the particular sale read with the Plaintiffs standard conditions would constitute the agreement of sale between the parties and in the case of any inconsistency with and any form of contract sent by the Defendant to the Plaintiff[7] the terms of the confirmation shall prevail. No variation of the terms of the contract shall be binding unless made in writing by the Plaintiff;[8]

(b) In executing orders to the Defendant's requirements, the Plaintiff shall be entitled to exceed, or deliver less than the quantity ordered by not more than 10 per cent in respect of yarn and cloth. Weight and width, shall be subject to a tolerance of 5 per cent, provided that cloth manufactured to a South African Bureau of Standards specification shall comply with the tolerances prescribed therein;[9]

(c) The delivery date specified in the contract shall be the date on which the goods are ready for dispatch by carrier from the Plaintiffs premises;[10]

(d) The Plaintiff does not guarantee delivery on any specified date, but will endeavour to make delivery within the reasonable time of the dates mentioned in the order confirmation. The Plaintiff shall not be liable for any damages suffered by the buyer as a result of the failure of the Plaintiff to make timeous delivery;[11]

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[7] whatever their respective dates.

[8] clause 1.

[9] clause 3.1.

[10] clause 4.1.

[11] clause 5.1.

(e) Should the Plaintiff be prevented by any cause whatsoever from delivering the goods at the time specified, then the time for delivery shall be extended until the operation of the cause preventing delivery has ceased, or this contract, may at the Plaintiffs sole option be cancelled either wholly or in part. The Plaintiff shall not be liable for any loss or damages that the Defendant may thereby suffer;[12]

(f) If the full manufacturing specifications on all goods ordered are not contained in the order or in this document, the Defendant shall furnish such specifications in writing to the Plaintiff as soon as possible but not later than three months before the agreed delivery dates. Failing receipt of the complete specifications for the whole order within such period, the delivery date shall be deemed to be postponed to a date acceptable to the Plaintiff without minimizing the purchases obligations under the order or, alternatively, the Plaintiff shall at its option be entitled to cancel any unspecified portion of the order or to deliver such portion as nearly as possible in accordance with any specifications received; failing such receipt of any specifications the Plaintiff shall be entitled to deliver against such manufacturing specifications as the Plaintiff in its sole discretion may deem fit.[13]

(g) The full purchase price is payable within 60 days from date of statement. A 1.25 per cent discount on the purchase price is allowed if settlement is received within 30 days from date of statement.[14]

(i) Each delivery is to be considered as a separate contract on the Plaintiffs standard terms and conditions of sale and the price is payable accordingly.[15]

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[12] clause 5.2.

[13] clause 5.3.

[14] clause 6.

[15] clause 7.

(j) All goods sold shall remain the property of the Plaintiff until payment thereof has been made in full notwithstanding that the delivery of the goods may have been made.[16]

(k) In the event of any yarn, materials or other goods hereby sold being used in the manufacture of any material or articles, such material or articles shall be the sole property of the Plaintiff until all yarn, materials and other goods purchased by the Defendant from the Plaintiff have been paid for.[17]

(l) All future sales entered into between the Defendant and the Plaintiff shall be concluded *mutatis mutandis* on the terms and conditions herein set out, until such time as the Plaintiff amends his standard conditions of sale.[18]

(m) The Defendant shall within 21 days from the date of delivery of the goods give written notice to the Plaintiff of the particulars of any matter or thing by reason whereof he may allege that the goods are not in accordance with the contract. If the Defendant fails to give such notice the goods shall be deemed to be in accordance with the contract in all respects and it shall thereafter not be open to the Defendant to allege that the goods are not in accordance with the contract.[19]

(n) Notwithstanding the aforegoing, the Defendant shall have no claim whatsoever in respect of goods which have been cut or processed by the buyer. The Defendant shall furthermore have no claim in respect of unprocessed goods, nor may these be returned to the Plaintiff without the latter first being given an opportunity to inspect and analyze same.[20]

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[16] clause 8.1.

[17] clause 8.2.

[18] clause 9.

[19] clause 10.1.

[20] clause 10.2.

(o) In no circumstances will the Plaintiff be liable for consequential loss of any kind howsoever caused.[21]

(p) The Defendant agrees to pay all costs incurred by the Plaintiff as between attorney and client including collection commission in the event of any amount being handed over for collection or in the event of the Plaintiff consulting an attorney arising out of any breach of the agreement by the Defendant.[22]

[10] It is common cause that subsequent to November 2004, the Defendant purchased goods from the Plaintiff sporadically on the following dates, per the following invoice numbers and for the under-mentioned amounts:

25 January 2005	Invoice No 86772	R123 455.96
10 June 2005	Invoice No 87265	R123 492,55
19 July 2007	Invoice No 90260	R 72 005,21
25 September 2009	Invoice No 94077	R 57 569.95

[11] The exact circumstances and terms and conditions relating to these further transactions were not investigated in any detail during the evidence.

[12] Mr Raubenheimer had some dealings with the Plaintiff while he was still with Breslin during the late 1990s. He became involved with the business of the Defendant from September 2005 following an amalgamation of businesses. He became the managing director. The Defendant previously had three directors. Of these a Mr Steven

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[21] clause 10.3.

[22] clause 12.1.

Bernstein remains the sales director to this day although he does not live in the Republic of South Africa. Mr Daryl Aaron also does not live in the Republic of South Africa but remains a director with the designation 'joint managing director' of the Defendant with Mr Raubenheimer.

[13] The Defendant used to obtain its supply of a fire retardant fabric referred to as T006 from the Frame Group and after its closure, from a 'sister company', Berg River Textiles. Certain problems regarding deliveries from that supplier were experienced. During September 2009 it was suggested to the Defendant that consideration be given to securing that kind of fabric from the Plaintiff. In an email from one Bruce to Mr Raubenheimer dated 3 September 2009 the author indicated that 'a swatch of the T006 fabric to work on' had been provided to Mr Lindsay Meyer of the Plaintiff. This resulted in a follow up negations relating to the acquisition of the fabric.

[14] The T006 fabric sample was analyzed by the Plaintiff and its equivalent, being not a product with specifications prescribed by the South African Bureau of Standards or any similar authority, duplicated under the designation 12C97.

[15] The Plaintiff maintains that a sample of this newly developed fabric was sent to the Defendant on or about 18 November 2009. This sample, grey in colour, was delivered by Mr Broughton on behalf of the Plaintiff, to the Defendant's preferred transporter, Zultrans, for delivery to it in Port Shepstone. Mr Raubenheimer testified that he personally had no recollection of the receipt of such a sample, although he could not dispute that it could have been received by the Defendant. Mr Raubenheimer is however not present at the premises of the Defendant every day. Nothing much however appears to turn on this aspect.

[16] Negotiations ensued during November not only in respect of the 12C97 fabric but also J54 and D59 fabric.[23] In issue was the price and final colour of the fabric, terms of payment, and a rebate.[24]

[17] On 17 November 2009 and as part of the ongoing negotiations Mr Meyer wrote to Mr Raubenheimer that Defendant could give 90 days terms for payment. The issue of a rebate and the amount thereof was still in dispute. Counter proposals were made and exchanged. These negotiations do not suggest anything other than two contracting parties of equal or very near equal bargaining power driving at the best possible financial bargain, the Plaintiff wanting to achieve a sale and the Defendant wanting to secure the fabric on the best terms to it.

[18] On 9 December 2009 the Defendant's order number 25412 was faxed to the email address of Mr Broughton on behalf of the Plaintiff, requesting the supply of 59 000 meters of 12C97 white width 150 centimeters at R30.00 for supply and to 'charge to (the Defendant's) account'. The first delivery was to be on 25 January 2010 with three further weekly deliveries thereafter. As regards the colour, the order recorded that the Plaintiff 'Will send you a sample of the shade of white we require'. This order was signed on behalf of the Defendant[25] by a Mr Naidoo and co-initialled by Mr Thevan.[26] Although Mr Raubenheimer testified that Mr Naidoo and Mr Thevan did not have authority to place orders on their own and that he decides on all purchase requirements of the Defendant, it is clear from their signature to the order that they were authorized by him, and viz a

[23] being fabric referred to in annexures A & B to the Defendant's plea. They are however irrelevant to the present case.

[24] as opposed to a discount.

[25] Referred to by its trade name Marburg Beslin.

[26] The same Mr Thevan who initially signed the Credit Application in November 2004 on behalf of the Defendant. Although it was indicated at one stage that Mr Naidoo might be called to testify, neither he nor Mr Thevan testified.

viz third parties would appear to be authorized to place the order on behalf of the Defendant.

[19] On 11 December 2009, two days after the order was placed and in an email from Mr Raubenheimer to Mr Meyer, Mr Raubenheimer indicated that he had spoken to his 'partners' and that he would motivate that they accept an annual rebate of 1.75 per cent. He proposed that Mr Meyer obtain a similar mandate from the Plaintiff.

[20] Although there is no email or other documentation confirming the 90 day term for payment contended for by the Defendant, or an annual rebate of 1,75 per cent, the parties are *ad idem* that these were subsequently agreed.

[21] When the sample relating to the shade of white was received by the Plaintiff, it was noted that it was an 'optical white' that was required. This entailed a further process and an increase in price from R30 to R31.00 per meter.

[22] The Plaintiffs factory closed over the 2009 festive season reopening early, around or about the 11th January 2012. The price of R31 per meter was agreed.

[23] On 20 January 2010 the Plaintiff issued its first confirmation note number D 1461, which was sent to the Defendant per post indicating as the "scheduled delivery' the 12 February 2010 . The quantity of 12C97 optical white was stated to be 15 000 meters at a price of R31.00 per meter excluding VAT. The confirmation note furthermore recorded 'terms 1.25% disc for payment within 30 days FRM DTE of statement strictly 60 days net - subject to available CJIC cover'. At the bottom of the confirmation note it records 'REFER TO CONDITIONS OF SALE OVERLEAF'. These conditions which

appear overleaf, and which per a specimen example of a confirmation note which became exhibit 'B', appear even when viewed from the front as the printing is on flimsy paper, repeat the Plaintiffs conditions of sale.

[24] Although, in the experience of Mr Varoli the confirmation notes are not normally signed and returned by South African purchasers, the purpose thereof was explained to be confirmation/ acceptance of the order, price, delivery date and of the terms upon which the supply would occur.[27] The evidence was that confirmation notes, of which the aforesaid one was the first in the series, are sent by post. This evidence, and with it the implication that it would in the ordinary course have been received by the Defendant, could not be disputed by Mr Raubenheimer.[28] His version however was that as the managing director, confirmation notes would not come to his attention.[29]

[25] Garments were thereafter made up by the Defendant from the fabric and the first batch shipped on the 16 March 2010 and received by Wenaas on 26 March 2010.[30]

[26] On the 9 July 2010 an email was sent by Mr Raubenheimer to Mr Meyer in which he stated that he had received 'the odd report of shrinkage'. It also recorded that following a meeting between the Defendant's country manager in the UK and a senior executive of the Defendant's client, the problem appeared a lot more serious.

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[27] although the last purpose only emerged during Mr Varoli's cross-examination.

[28] who was the only witness who testified on behalf of the Defendant.

[29] There was evidence, including a reference to various emails relating to alleged late delivery and a lack of communication and feedback but these are not relevant to this judgment.

[30] according to an email from Bruce Cormie of that date.

[27] Thereafter followed a period during which discussions took place, emails were exchanged expressing various levels of frustration, but all seemingly aimed at trying to achieve a practical business resolution to the complaints of alleged shrinkage. Tests were being conducted and a report was compiled by Mr Broughton which suggests high levels, if not unacceptable levels, of shrinkage and exploring possibilities to correct same by introducing a different suitable sanforising chemical agent and replacing the sanforising belt. Offers were also made to give a credit for the purchase price of the fabric. Ultimately, however, these discussions came to naught. That such negotiations would ensue appears to be a feature of this industry. It is consistent with Mr Raubenheimer's evidence that when in the past he had problems regarding the quality of fabrics supplied, the parties have always resolved it through negotiations and that he has never had the terms of any standard terms and conditions 'raised against him'. That, of course, would not necessarily mean that standard terms and conditions might not have applied in respect of other contracts for the supply of fabric he might previously have concluded whether on behalf of the Defendant or Beslin with other textile suppliers.

[28] During September 2010 and later that year, the Plaintiff had agreed to take back 10 000 meters of fabric. When the fabric was collected, a quantity of only just over 5 000 meters was available, the rest having been cut up for the manufacture of garments. The evidence on this aspect is inconclusive. The suggestion by the Plaintiff is that this would show that the fabric was in fact not defective in the respects contended for by the Defendant, whereas the Defendant maintains that it still was, but that garments were cut two sizes larger. Whether the fabric was defective or unfit for the purpose supplied is irrelevant at this stage of the proceedings. The issue is simply whether the standard conditions applied to the sale of the fabric.

DISCUSSION:

[29] The concession of Mr Thevan's authority means that the Plaintiffs standard conditions applied to the 2004 sale. But it goes beyond that. Unless varied in writing by the Plaintiff[31] and even if any subsequent document is sent by the Defendant to the Plaintiff, whatever the date i.e. including subsequent orders, the conditions of sale would apply.[32] Further, all future sales entered into between the Defendant and the Plaintiff would be concluded *mutatis mutandis* on the terms and conditions set out in the conditions of sale, until such time as the seller amends his standard conditions of sale (clause 9), which amendment could either be an amendment of the conditions of sale *in toto* or stipulating a term pertaining to a particular transaction which amends or varies 'his standard conditions of sale'.

[30] I accordingly have no hesitation in concluding that in the ordinary course, the conditions of sale which pertain to the transaction in November 2004 would *mutatis mutandis* have applied to the subsequent sales on the 25 January 2005, the 10 June 2005, the 19 July 2007 and the 25 September 2009 save and insofar as the Plaintiff may have stipulated in writing, for example in the form of a confirmation note that a discount rate different to that stipulated in clause 6 might apply, or any other term of the contract might have been amended.

[31] The negotiations pertaining to the supply of the 12C97 fabric and the conclusion of the agreement pursuant thereto, must be viewed against the background of that simply being 'a future sale entered into between the buyer and the seller', on terms some of which now vary from those originally agreed in the 2004 insofar as the particular fabric, price, quantity, colour, delivery date(s), terms of payment[33] and a annual rebate

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[31] clause 1.

[32] clause 1.

[33] 90 days as opposed to 60 days.

annual rebate of 1.75 per cent (which is not normally provided for) may require, but in all other respects *mutatis mutandis* save insofar as peculiar to that particular sale subject to the Plaintiff's conditions of sale. Accordingly, if the Defendant did not avail itself of the 90 day term for payment but elected to make payment within 30 days, then a discount of 1.25 per cent would have applied. The variation to the term of 90[34] days was one made in writing by the seller in an email of 17 November 2009. However, even if not reduced to writing, just as the final agreement regarding the annual rebate of 1,75 per cent apparently never was reduced to writing by the Plaintiff, the Defendant would probably be entitled to hold the Plaintiff to the actual terms agreed. The Plaintiff would not, in my view, be allowed to defeat the effect of the true agreement between the parties, by relying on the non-variation provision. That would be unfair and unconstitutional and contrary to the good faith which underlies our law of contract. It would be an appropriate instance where a party would be allowed to escape the effect of such a Shifren[35] clause which might otherwise apply, just as an exception was also made in *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM).

[32] Unless excluded or rendered unenforceable in terms of the second to fifth defences raised, clause 10.1 and 10.2 of the conditions of sale would therefore apply to the sale of the fabric.

[33] The aforesaid legal interpretation also appears consistent with Mr Raubenheimer's factual understanding as testified to in the Defendant's first affidavit opposing summary judgment. In paragraph 5 thereof he implicitly accepted that the standard conditions would apply to the transaction, by stating that they 'had been amended as new terms of trade had been negotiated with the Plaintiff'. His attempt in his evidence to draw some distinction between 'amend' in a wide and narrow sense is

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[34] as opposed to 60.

[35] Shifren and others v SA Sentrale Ko-op Graanmaatskappy Bpk 1964 (2) SA 343 (O).

futile. An 'amendment' presupposes the existence of something which requires to be changed. What was to be changed were some of the terms of the standard conditions as affected by the negotiations, either by the variation or addition of terms. If he was totally unaware of the standard conditions, then his simple response would have been not to refer to an amendment of those conditions, but to say that they didn't apply at all and that he was not aware thereof. His attempts in a further 'Supplementary Affidavit' to try and explain away the application of clauses 10.1, 10.2 and 10.3 of the standard conditions on the basis that he had not previously appreciated 'the significance' thereof, is highly improbable. His first reaction was that the standard conditions had been amended to the extent stated in paragraph 5 of his first affidavit opposing summary judgment. He did not say that clause 10 of those conditions was amended by the deletion thereof. Appreciating the significance of those clauses does not come into play at all if his state of mind was that he did not know they existed. The second affidavit was tendered on the basis that Mr Raubenheimer wanted to include 'some factual matters which ought to have been included in [the first] affidavit and which will indicate that the Defendant indeed has a *bona fide* defence to the Plaintiffs claim'. However, the second affidavit did not supplement the first so as to 'include' matters which had been omitted from the first affidavit. It proceeded on a different premise altogether. Whereas the first affidavit accepted that the conditions of sale were applicable, the second affidavit was devoted in its entirety to an endeavour to exclude the conditions of sale, and then on alleged facts which were within the knowledge of Mr Raubenheimer at the time he signed the first summary judgment answering affidavit when he would have realized their relevance to the Defendant's defences. In evidence his version was that when contracting, the conditions of sale were never in his mind and that he had never intended to include them. However, if that was so, then the insurmountable hurdle remaining is why he did not say so in his first affidavit. The only inference is that the Defendant knew that the conditions of sale were applicable, but possibly had not realized at that time that they could defeat the Defendant's defence and claim in reconvention.

[34] I agree with the submission by the Plaintiff that the effect of the concession of authority on the part of Mr Thevan necessarily means that:

(a) The Plaintiffs conditions of sale would apply and be binding on the Defendant in respect of all future transactions until varied in writing by the seller or it is recorded in writing not to apply;

(b) The conditions of sale together with the particulars of sale appearing on any confirmation would constitute the contract of sale.

(c) No variation of the terms of the contract would be binding unless made in writing by the Plaintiff.

[35] The situation is not one in which the doctrine of quasi-mutual assent[36] would find application. The conditions of sale applied. However, even if I was wrong in that regard and the doctrine of quasi-mutual assent found application requiring, as the Defendant contended, that the Plaintiff would have to demonstrate that it was actually misled by the Defendant into believing that the Defendant contracted with the Plaintiff on the basis of including the standard conditions, a reasonable man having regard to the terms of the conditions of sale could not have concluded otherwise than that this was just a 'future sale'. This position is not changed by the fact that the parties were embarking on a new venture, with potential volumes far in excess of what their previous transactions entailed, with negotiations even being conducted between them at managing director level. The conditions of sale set out the basis upon which a credit line had been opened for the Defendant with the Plaintiff as long ago as 2004 and it would continue to apply according to its terms, notwithstanding any changes in management, until amended or otherwise varied in terms thereof. To arrive at a different conclusion would mean that changes in board management of a corporate structure could be used to escape binding legal obligations to which that corporate entity, properly authorized but with

[36] *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 A at 239F-H and *Pillay and another v Shaik and Others* 2009 (4) SA 74 (SCA) at para 55 and further.

different directors had previously lawfully bound itself to set up a credit line or other continuous basis for management. That would be an untenable situation. If that is the kind of situation that is sought to be avoided, then business entities should not arrange themselves in a corporate structure of any nature but trade as either sole proprietorships or partnerships. Arranging one's affairs in a corporate structure or carrying on business in such a structure carries with it the obligation for management to familiarize itself with exactly what standard conditions govern any relationship, particularly an existing relationship between it and any supplier, or alternatively then at the very least to stipulate, preferably in writing, that no conditions other than those expressly agreed upon in respect of a particular transaction were to apply, thereby excluding the possible application of any other terms or conditions. This the Defendant did not do.

[36] That the standard conditions were practically unworkable would also not be of any assistance. There is no express contractual requirement that the Defendant should have tested the fabric it received for any shrinkage. But that is not the issue. The reality is that the Defendant could have tested the fabric, even simply by way of a domestic wash of part of the fabric as a test sample, or alternatively by more advance laboratory testing, to determine any possible shrinkage. The evidence is that such testing could comfortably have been done within 21 days. Accordingly, the 21 day period within which notice was required to be given, could practically have been complied with before any garments were made up or while they were made up. Objectively, it is not a practically unworkable situation.

[37] I turn then to the specific defences.

THE SECOND OFFENCE:

[38] I agree with the Plaintiffs submission that it is difficult to fathom the basis of the second defence. Mr Raubenheimer testified that he was unaware of the existence of annexure 'A'. That is inconsistent with what he said in his first affidavit opposing summary judgment. Granted, he does not specifically say that he was aware of the existence of annexure 'A', but his allegation that the standard conditions were amended is inconsistent with the notion that he was unaware thereof. Against that background it is all the more difficult to understand on what basis the Plaintiffs representatives then ought to have realized that Mr Raubenheimer may be unaware of the existence of annexure 'A' and therefore to have drawn his attention thereto. The failure to draw attention to any particular state of affairs normally only give rise to any action in law if there was a duty on the part of the Plaintiff to draw attention to the true state of affairs. The Plaintiff is correct in saying that if this defence is founded in delict, that it is bad in law because it makes not attempt to establish any legal duty on the part of the Plaintiff which would suggest unlawfulness in the event of a breach thereof, it makes no allegation of any fault on the part of the Plaintiff in the form of intention or negligence, it fails to establish the causation requirement for delictual liability, and it fails to establish or allege any loss on the part of the Defendant.

[39] Indeed it would more likely amount to an inversion of the South African Law of Agency and Company Law because the effect thereof would be that a principal[37] with knowledge of a contract to which it previously committed itself, can escape the contract on the basis of ignorance on the part of its agent. The principles of the Law of Agency also govern the representation of companies.[38]

[37] the Defendant.

[38] See Corporate Law: Cilliers, Benade, Henning and du Plessis 3rd Edition para 12.01.

[40] As a director, Mr Raubenheimer was also under a fiduciary duty to act with reasonable care and skill. He had a statutory right of access to all the books and records of the Defendant in terms of section 284 (3) of the Companies Act 1973, being the applicable Companies Act at the time. In those circumstances he as a director cannot escape liability based on his alleged ignorance.

[41] The judgment in *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and Another*[39] which the defendant relied upon must be understood in the context of the facts of that case.

[42] The decision in *Durban Water Wonderland (Pty) Ltd v Botha and Another*[40] also does not find application. The present is not an instance where the question is whether the Plaintiff did what was reasonably sufficient to give the Defendant notice of a term.[41] The conditions of sale are contractual conditions to which the Defendant had previously bound itself to apply also in respect of all future transactions. When it requested that the order be charged to its account, it clearly intended to refer to the line of credit previously established and which it enjoyed with the Plaintiff. In any event, the application of the standard conditions was again drawn to the attention of the Defendant in the confirmation notes which served to confirm the order placed by the Defendant. The fact that the Defendant might have styled its internal management in such a way that Mr Naidoo/Mr Thevan may place orders on behalf of the Defendant also entitles the Plaintiff to confirm its terms of acceptance of any such order to those officials and level of management. That is the management style which Mr Raubenheimer has elected to follow and he cannot be heard to complain if the confirmation note did not come to his

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[39] 2006 (3) SA 593 (SCA).

[40] 1999 (1) SA 982 SCA.

[41] in that case excluding liability for certain conduct.

personal attention. There was no evidence that Mr Naidoo and/or Mr Thevan had not received the confirmation note preceding the first delivery on the 12 February 2010.

THIRD DEFENCE:

[43] The third defence of an estoppel based on a representation by silence must fail for similar reasons. Silence can only be actionable if it follows in circumstances where there was a duty to speak. The Defendant had previously during 2004 committed itself to an agreement that provided that the standard conditions of sale were to be applicable to all future transactions between the Plaintiff and the Defendant without variation, or only subject to limited variation as provided for in terms of the standard conditions.

[44] Spencer–Bower[42] states:

> '75 The main condition subject to which alone silence or inaction amounts to a representation is that at a legal (not a mere moral or social) duty shall have been owed by the representor to the representee to make the disclosure, or take the steps, the omission of which is relied upon as creating the estoppel.'

[45] The present is not an instance where the Plaintiff had exclusive knowledge of the standard conditions and that such conditions were inaccessible to Mr Raubenheimer, on behalf of the Defendant, to the point that the result is an involuntary reliance on the Plaintiff – see *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) par [1] - [5]. Mr Raubenheimer was not so reliant. He could have ascertained the basis upon which a credit line was open for the Defendant with the Plaintiff from the Defendant's documentation.

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[42] Estoppel by Representation pg 60

[46] Even if the Defendant was reliant on the representation,[43] it cannot in my view said to be reasonable. No person in the position of Mr Raubenheimer could reasonably have thought that a supplier in the textile industry would contract on common law terms with no standard conditions to protect the supplier. Mr Raubenheimer was aware of and accepted that De Gama, Berg River Textiles and formerly Frame and SBH all have standard terms and conditions and would contract thereon, even if they would not necessarily be enforced in the interest of promoting sound business relationships. Mr Varoli had testified that such conditions exist in respect of these other entities and that they contract on the basis thereof. All Mr Varoli conceded was that he could not of his own knowledge say that the Defendant and or–Mr Raubenheimer had contracted on the basis of such conditions with those entities

THE FOURTH DEFENCE:

[47] The fact that annexure 'A' to the Particulars of Claim was signed at a time when the Defendant was purchasing smaller quantities of fabric other than the 12C97 fabric, that facilities which might extend to an amount to R10 million for a period of 90 days were not previously required, and that it might not previously have been contemplated that fabric would be used in the manufacture of garments for export, is neither here not there.[44]

[48] The credit application form expressly provided that the Defendant:

> '….accept[ed] the Standard Trading Terms appearing herein, which I/We have read and understood shall apply and be binding on [the Defendant] in respect of all transactions.'

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[43] by silence.

[44] The fabric sold was in fact not for R10 million but for R1,8 million.

[49] There is no provision in the conditions of sale that if the approximate credit limit applied for initially would be exceeded, that the sale conditions would no longer be applicable. Indeed such a contention would be absurd because it would enable a delinquent debtor to circumvent the sale conditions by exceeding its credit limit.

[50] Where the credit application expressly provided that it would apply in respect of 'all transactions', it would apply irrespective of value. The increase in the credit limit was in any event a purely administrative matter to be taken care of by an increased facility being arranged with Credit Guarantee Insurance Corporation. The parties had accepted that procuring an increase in the guarantee facility would in any event not stand in the way of the Plaintiff fulfilling the 12C97 order.

<u>THE FIFTH DEFENCE</u>:

[51] The fifth defence entails this court being persuaded that it would be 'unreasonable and unconstitutional for the Plaintiff to seek to enforce Clauses 10.1 and 10.2'.

[52] In *Barkhuizen v Napier*[45] the Constitutional Court per Ngcobo J expressed: 'grave doubt on the appropriateness of testing the constitutionality of a contractual term directly against a provision in the Bill of Rights', in this instance, section 34 of the Constitution enshrining the constitutional right to have any dispute which might arise determined by application of law in a fair public hearing before a court or other tribunal.

[53] The Constitutional Court divided any such inquiry into two questions namely:

[45] 2007 (5) SA 323 (CC) at para [26].

(a) Is the clause itself unreasonable;

(b) If the clause is reasonable, whether it should be enforced in the light of the circumstances.[46]

The first question requires that two considerations to be weighed up against each other, namely *pacta sunt servanda* and the right to seek judicial redress.[47] The test to be employed is an objective one. If objectively, the terms are not inconsistent with public policy, the question arises whether the clause is nevertheless contrary to public policy in the light of the 'relative situation' of the parties, on which issue a relevant factor would, for example, be unequal bargaining power.[48] In *casu*, of course, there was no material unequal bargaining power, if there was unequal bargaining power at all.

[54] It has always been a trite principle of our law, long before the decision in *Barkhuizen v Napier* that a clause in a contract[49] which is *contra bonos mores,* is unenforceable. Barkhuizen's case went further only in that it, with respect correctly, found that the *mores* of society had to be judged against the values and entrenched in the Bill of Rights.[50] That is consistent also with section 39 of the Constitution. It was held that public policy takes into account the necessity to do simple justice between individuals.[51] Accordingly, it was found to be contrary to public policy to enforce a time

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[46] at paragraph [56].

[47] at paragraph [57].

[48] at paragraph [59].

[49] or even the whole contract itself.

[50] at paragraph 29.

[51] at paragraph 51

limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.[52]

[55] In *casu*, the Defendant relies on the second of the two questions posed to determine fairness, namely, accepting that clauses 10.1 and 10.2 are reasonable, whether they should be enforced in the light of the circumstances of this particular case. Specifically, the question becomes whether there was good reason why the Defendant could not comply with clauses 10.1 and 10.2 of the sale conditions. In support of this contention the Defendant relied not only upon the judgment in *Barkhuizen* but also of that in *Brümmer v Minister for Social Development and others*[53] where the time limitation of 30 days notice required in terms of the Promotion of Access to Information Act 2 of 2000 were held to be unreasonable and unconstitutional.

[56] The only reason advanced by the Defendant as a reason why it could not comply with clauses 10.1 and 10.2 of the standard conditions is that the parties were at all times aware that 'by reason of the fact that the goods were to be exported, the Defendant would be unable to comply with clauses 10.1 and 10.2 before instituting a claim against the Plaintiff in a court of law, hence, the Defendant pleads that 'it is unreasonable and unconstitutional for the Plaintiff to seek to enforce clauses 10.1 and 10.2'. The alleged unreasonableness and unconstitutionality is sought only with reference to section 34 of the constitution. There is no specific separate reliance on 'public policy'.

[57] 'Unreasonableness' and 'unconstitutionality' are two different concepts with different pedigrees, different applicability and different consequences. The Defendant did not make much of that distinction but simply emphasized that like the Plaintiff it

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[52] at paragraph 51

[53] 2009 (6) SA 323 (CC).

ultimately concludes with the issue whether there was a good reason for the Defendant's failure to comply with clauses 10.1 and 10.2.

[58] The precise ambit of reasonableness and fairness has not been dealt with definitively by the Constitutional Court. In *EverFresh Market Virginia (Pty) Ltd v Shoprite Checkers*[54] Moseneke DCJ delivering the majority judgment held that had the case been properly pleaded, it would have raised a number of interlinking constitutional values which would inform the development of the common law relating to contract. He said[55] that 'indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu which inspire much of our constitutional compact'. Further on[56] he held that 'contracting parties certainly need to relate to each other in good faith'. The minority judgment of Yacoob J in the same matter reaffirmed the general principle that: 'a court should always be alive to the possibility of the development of the common law in the light of the spirit, purport and objects of the Bill of Rights. The development of the common law would otherwise be no more than a distant dream. A court should always be at pains to discover whether the development of the common law is implicit in a case.'[57]

[59] In *Maphango and Others v Aengus Lifestyle Properties* [2012] ZACC 2 Zondo AJ in a minority judgment referred to the Barkhuizen judgment but found that the conduct complained of did not amount to an unfair practice. In a minority but concurring judgment Froneman J (with Yacoob J concurring) stated that 'under the constitution all law is, or needs to be, infused by constitutional values'[58] and that 'interpretation and

[54] 2012 (1) SA 256 CC par [71]

[55] at paragraph 71.

[56] at paragraph 72.

[57] At paragraph [34].

[58] at paragraph 151.

application of the law under the Constitution is never a mechanical application of rules, it always involves a value judgment. Our Constitution and law are infused with moral values. The days of denying the value - laden content of law are long gone'.[59]Froneman J further held that 'courts deciding constitutional matters may, and at some circumstances are obliged to, make an order that is just and equitable'. He concluded however that 'determining the true ambit of *Barkhuizen* must wait for another day.[60]

[60] Until 'another day' I can only be guided, but more importantly am bound by the pronouncements of the Supreme Court of Appeal on this issue.

[61] Dealing firstly with the issue of unreasonableness as distinct from 'unconstitutionality', it was held in *South African Forestry Co Ltd v York Timbers Ltd*[61] that abstract values such as good faith, reasonableness and fairness are fundamental to the law of contract, but they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships.[62] It follows that courts will not deviate from parties' intention, as determined by the interpretation of their contract, because it may be regarded as unfair to one of them.[63] The position is different when a contract is ambiguous as all contracts are governed by good faith and the intention of the parties then falls to be determined on the basis that they negotiated with one another in good faith.[64]

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[59] at paragraph 151.

[60] Par [158].

[61] 2005 (3) SA 3213 SCA

[62] at paragraph [27].

[63] at paragraph [30].

[64] at paragraph [32].

[62] In *casu*, there was nothing ambiguous about the conditions of sale. Indeed the conditions were clearly stated that they would relate to 'all future sales'.

[63] The aforesaid principles were reaffirmed in *Bredenkamp and Others v Standard Bank of SA Ltd*[65] where it was held that 'fairness is not a freestanding requirement for the exercise of a contractual right'.

[64] In *Maphango and Others v Aengus LifeStyle Properties (Pty) Ltd*[66] it was held under the heading of 'reasonableness and fairness' with reference to the decision of the constitutional court in *Barkhuizen* that the contention that as a matter of public policy courts will not give effect to the implementation of a contractual provision that is unreasonable and unfair that:[67]

'I believe that the argument is fundamentally flawed because the proposition on which it relies is not supported by the decision of the constitutional court in *Barkhuizen*, nor does it reflect the principles of our law of contract as they stand. Reasonableness and fairness are not freestanding requirements for the exercise of a contractual right.'

The Supreme Court of Appeal stated that:

'unless and until the constitutional court holds otherwise, the laws therefore as stated by this court, for example in *South African Forestry Company, Brisley* and *Bredenkamp.* Accordingly, a court cannot refuse to give affect to the implementation of the contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair. Strictly speaking the enquiry into the reasonableness and

[65] 2010 (4) SA 468 SCA.

[66] 2011 (5) SA 19 (SCA).

[67] Par [22].

fairness of the respondent's termination of the contract of the leases is therefore unnecessary.[68]....

[65] The judgment in *Potgieter and Another v Potgieter NO and Others*[69] is to similar effect.

[66] On that interpretation to which I am bound, but in any event appears to me to be an entirely correct statement of the law, the reliance upon alleged unreasonableness in the enforcement of clauses 10.1 and 10.2 has no merit and falls to be dismissed.

[67] I turn next to deal with the question of constitutionality.

[68] As a starting point and as a general rule, I respectfully concur with the statement in *Bredenkamp and Others v Standard Bank of SA Ltd*[70] where after having considered the implications of the judgment in *Barkhuizen v Napier* it was held that:

> 'Public policy and *boni mores* are now deeply rooted in the Constitution and its underlying values. This does not mean that public policy values cannot be found elsewhere. A constitutional principal that tends to be overlooked, when generalised resort to constitutional values is made, is the principal of legality. <u>Making rules of law discretionary or subject to value judgments may be destructive of the rule of law</u>.' (my emphasis).[71]

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[68] Par [25]

[69] 2012 (1) SA 637 (SCA) at [31] to [34].

[70] 2010 (4) SA 468 (SCA).

[71] Paragraph [39].

Contractual Autonomy is part of freedom and shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.[72]

[69] Harms DP in *Bredenkamp* further emphasized that '...if evidence is required to determine whether a contract is in conflict with public policy or whether its enforcement would be so, the party who attacks the clause at either stage must establish the facts.[73]

[70] Reference has already been made earlier to the statement by Ngcobo J in *Barkhuizen* expressing 'grave doubt on the appropriateness of testing the constitutionality of a contractual term directly against a provision in the Bill of Rights'. The judgment in *Barkhuizen* held that there is no reason why public policy would not tolerate time limit or time limitation clauses and contracts, subject to the consideration of reasonableness and fairness.

[71] The parties are *ad idem* that the issue confronting this court is whether the Defendant had an adequate and fair opportunity to seek judicial redress.[74]

[72] It has always been a principle of our law that:

'the power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that

[72] *Firstrand Bank Ltd v Folscher and another, and similar matters* 2011 (4) SA 314 (GNP) para [94].

[73] At paragraph [49].

[74] as was also held in Barkhuizen at paragraphs. 51 and 52.

a contract is contrary to public policy merely because its terms (or some of them) offend ones individual sense of propriety and fairness'.[75]

[73] Reduced to its essentials, the enquiry is whether the Defendant has shown that in the circumstances of this case it was unreasonable for it to have determined that the fabric supplied was unfit within the 21 day time period stipulated in clause 10.1 and before it started cutting the fabric to manufacture garments, as per clause 10.2.

[74] The Plaintiff maintains that:

(a) The clauses complained of are not unreasonable having been entered into freely and voluntarily between parties enjoying at least equal bargaining power, as is evident from the negotiations relating to the annual rebate which culminated in agreement at exactly one half of that originally contended for by the Defendant and the increase in the credit term from 60 to 90 days at the instance of the Defendant;

(b) The clauses do not in any way limit the right to seek judicial redress. All they do is require the Defendant to give notice to the Plaintiff that the fabric received was not in accordance with the order within 21 days of receipt and to preclude any claim by the Defendant after the goods have been cut or processed;

(c) That the single circumstance peculiar to this case, namely that the goods were to be exported, which Mr Varoli conceded he knew by February 2010, is irrelevant as the Defendant has not established that a customer locally or in an export country would be better placed to ascertain the fact

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[75] *Sasfin v Beukes* 1989 (1) SA 1 (A) at 9 B–C quoted in Barkhuizen in a minority judgment of Sachs J at para 159.

that the fabric in the garments was defective within a period of 21 days from receipt of the fabric at the Defendant's factory;

(d) There was no reason that could be advanced by the Defendant's witness Mr Raubenheimer, indeed he conceded that there was no reason why the Defendant could not have carried out a test to establish whether the fabric supplied was in compliance with that required, within a matter of days after receipt of each load of fabric,. The Defendant might not necessarily have had sophisticated testing facilities available to it, but all it had to do was to subject the fabric or a portion thereof and/or the made up garments to a simple stability test, such as a domestic washing test, which would have entailed laying out a suitable size square of the fabric, marking a particular length on it, washing the fabric, and then re-measuring the points marked on the fabric which would reveal whether or not the fabric shrinks and if so to what extent. There was no reason advanced why the Defendant could not have performed such tests.

[75] The Defendant contends for a finding that it was unreasonable to expect of the Defendant to have complied with the clauses in question in the light of the following facts:

(a) Mr Raubenheimer was unaware of the existence of the standard trading conditions;

(b) The parties were aware that the fabric was to be used in the manufacture of garments which were to be exported;

(c) The manufacturing process obviously required the cutting of the fabric;

(d) If the fabric contained any latent[76] defect, because the garments were to be exported, such defect would only become apparent well after the 21 day limit referred to in clauses 10.1 as 10.2 had expired;

(e) That in view of the existing common law that if goods are ordered for a particular purpose there is an implied warranty that they are fit for that purpose and that if a manufacturer is bound to supply goods corresponding exactly to the description ordered, then they must comply, that it could not be said that it was incumbent upon the Defendant to have tested the fabric;

(f) That the Defendant was entitled to assume that the 12C97 fabric supplied complied with the sample of T006 it had obtained from Berg River Textiles and which was given to the Plaintiff to duplicate.

[76] Whether Mr Raubenheimer was aware of the existence of the standard conditions, is of no consequence. The Defendant was aware of the standard conditions and that it would apply to all future sales as well until amended. In any event, it is doubtful that Mr Raubenheimer was not aware of the standard conditions, particularly in the light of his response in the first affidavit opposing summary judgment. His attempts during evidence to explain the wording of paragraph 6 of the first opposing affidavit was improbable.

[77] That the defendant would have certain implied warranties and common law in respect of the fabric supplied is also not of consequences. If the fabric supplied did not comply with any such implied common law warranties, it would afford the Defendant certain remedies. The existence of those remedies is not affected by clause 10.1 or 10.2. It is merely the notice requirement, that the Plaintiff be given within 21 days and

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[76] as opposed to patent.

that the fabric not be cut, which limits the exercise of any remedies arising from the common law implied warranties. That such implied warranties exist is therefore not of any decisive importance. Ultimately the issue is still the reasonableness of the limitation imposed by clauses 10.1 and 10.2.

[78] Whether the parties were aware that the fabric was to be used in the manufacture of garments which were to be exported, is also not decisive. Provided some form of test could be conducted comfortably within that time, from which any alleged 'defect' would be detected, the period would be reasonable (unlike the clauses in *Barkhuizen* and *Swinburne v Newbee Investments (Pty) Ltd.*[77] Obviously the time limitation cannot be seen in isolation but must be adjudged in the light of the facts and circumstances relating to each case. Although clauses 10.1 and 10.2 were contained in what might otherwise be referred to as 'fine print', they were contained in the original credit application form which clearly referred to the conditions of sale. Subsequent confirmation notes also referred to such conditions of sale which appeared overleaf. Furthermore, such conditions, if regard is had to the specimen exhibit 'B', are clearly visible on the flimsy paper even from the front of that paper. The Defendant's representative at the time that the original agreement was concluded was alive to the conditions and clearly had perused them attentively as he deleted clause 17 thereof which otherwise would have held him liable as surety.

[79] The time limitation is not contrary to the Defendant's common law rights or any implied warranties. It does not exclude the Defendant's rights to have disputes decided by a court of law or appropriate tribunal as guaranteed in terms of section 34 but merely places a limitation on the period within which written notice of an intention to exercise any contractual remedy needs to be given. Any latent defect could have been

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[77] 2010 (5) SA 296 (D)

discovered by an appropriate domestic testing within a matter of days. That evidence was not contradicted.

[80] Any Defendant with knowledge of the conditions, as the Defendant in *casu* had, should, if unhappy with the provisions of clauses 10.1 and 10.2, have specifically negotiated and concluded an agreement excluding the placing of any time limitation on the contractual remedies it would otherwise have.

[81] The Defendant has in my view not discharged the onus of showing that factually there was good reason why the Defendant could not have complied with the provisions of clauses 10.1 and 10.2. The true ambit of *Barkhuizen* must continue to wait for another day.

[82] That is accordingly the end of the matter as the Defendant's plea discloses no other defence and the Defendant's claim in reconvention is then without merit. I did not understand Defendant's representatives to argue to the contrary, should that be the conclusion reached by this court.

[83] Accordingly:

(a) Judgment is granted in favour of the Plaintiff for:

(i) Payment of the sum of R2 150 045.68;

(ii) Interest on R3 588 286.83 at the rate of 15.5% per annum from 1 December 2010 to 19 May 2011, both dates inclusive;

(iii) Interest on R2 150 045.68 at the rate of 15.5% per annum from 20 May 2011 to date of payment, both dates inclusive;

(iv) Costs of suit, including where employed, the costs of two counsel, on the scale as between attorney and client.

(b) The Defendant's claim in reconvention is dismissed with costs including where employed, the costs of two counsel.

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