IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2141/2004

In the matter between:

TERMINUS CENTRE CC	Plaintiff
and	
HENRY MANSELL (PTY) LTD	1st Defendant
HENRY ROSSER MANSEL	2nd Defendant
GARRY MITCHELL PRICE	3rd Defendant
MICHAEL ANTHONY AIREY	4th Defendant

JUDGMENT: 16/01/006

VAN REENEN, J:

1] The plaintiff a company with a share capital and at the time known as Betting World (Pty) Ltd on 1 June 1999 entered into a written agreement of lease (the first agreement) in terms whereof it let to the first defendant shops numbers 2 and 3 in the Terminus Centre, Wynberg as well as 10 parking bays, for a period commencing on 1 August 1999 and terminating on 31 July 2006 at a monthly rental, exclusive of value-added tax, of R17 724 in respect of the shops and R800 in respect of the parking bays payable monthly in advance escalating at 11% per annum during the second and third years; the greater of 11% or the market value as determined by arbitration during the 4th year; and 11% per annum during the remainder of the lease period. It also provided for an option of renewal for a further period of 3 years terminating on 31 July 2001.

2] The second to fourth defendants, in terms of written deeds of suretyship executed by the second and third defendants on 1 June 1999, and by the fourth defendant on 13 June 1999, bound themselves as sureties and co-principal debtors in solidum for the due and punctual fulfilment by the first respondent of all its obligations under and in terms of the said agreement.

3] Pursuant to the conclusion of the said agreement the first defendant took occupation of the leased premises on 1 August 1999.

4] The first defendant, in terms of a written agreement entered into on 2 August 2000, sold, inter alia, the cash bookmaking business conducted by it on the premises under the style "Betting World" to Styleprops 33 (Pty) Ltd (Styleprops) subject to the fulfilment of certain conditions precedent one whereof, namely Clause 5.1.2, provided as follows:

> "The satisfactory conclusion of leases, sub-leases and/or deeds of assignment of the existing leases pertaining to the various

premises as may be required to facilitate to the reasonable satisfaction of Gold Circle, secure tenure by the Purchaser of the premises."

(Gold Circle is the controlling share-holder of Styleprops)

5] Styleprops with the knowledge of the plaintiff took occupation of the leased premises on or about 1 September 1999 but as clause 5.1.2 of the agreement of sale had not been given effect to the first agreement remained of full force and effect.

6] It is common cause that the plaintiff, the first defendant and Styleprops entered into an oral agreement during July 2001 in terms whereof the first defendant remained bound to all the terms of the first agreement but that Styleprops would effect payment of the rental directly to the plaintiff.

7] It is also common cause that the plaintiff as from 9 October 2000 was converted into a close corporation and changed its name from Betting World (Pty) Ltd to Terminus Centre CC and that Styleprops subsequently changed its name to Betting World (Pty) Ltd (Betting World).

8] As from 1 August 2002 Betting world failed to pay the full rental, including the escalation, to the plaintiff as provided in the first agreement, and accordingly, the first defendant remained liable for the payment of the shortfall in rental which, in each instance, was paid only after demand.

9] The plaintiff and Betting World on 26 March 2003, entered into a written agreement of lease in terms whereof the former let the premises and twelve parking bays to the latter for a period commencing on 1 August 2003 and terminating on 31 July 2008 at a monthly rental, inclusive of value-added tax, of R25 431,12 for the period 1 August 2003 to 31 July 2004 and escalating at 10% during the second, third, fourth and fifth years, calculated on the basic rental payable during the last month of the preceding twelve month period (the second agreement).

10] The second agreement –

10.1 embodied an option of renewal for a further period commencing on 1 August 2008 and terminating on 31 July 2011 on the same terms and conditions at a rental to be agreed upon or determined by arbitration

10.2 was subject to a suspensive condition in the following terms: -

"23.1 It is recorded that there is presently a lease in force over the leased premises between the Lessor and Messrs Henry Mansell (Pty) Ltd

23.2 This Agreement of Lease shall only become binding upon the Lessor subject to the following:

A. The original Agreement of Lease being returned by the Lessee to the Lessor duly signed by the Lessee, by the 31st March 2003.

B. Within one month after receipt by the Lessor of the original Agreement of Lease duly signed by the Lessee, the Lessor providing written confirmation to the Lessee of the cancellation of the current Agreement of Lease between the Lessor and Henry Mansell (Pty) Ltd.

C. In the event of the Lessor not providing such written confirmation to the Lessee within the stipulated period, then this Agreement of Lease shall be deemed to be void ab initio and of no force and effect."

11] The time-limit in clause 23.2 of the second agreement, by agreement between the parties, was extended initially to 31 May 2003 and subsequently to 31 July 2003. The provisions of the suspensive condition, as extended, were duly complied with and accordingly, the second agreement took effect as from 1 August 2003.

12] The plaintiff's attorneys of record, Messrs C & A Friedlander Inc on 15 July 2003, by means of a letter delivered by hand and sent by means of a facsimile transmission, cancelled the first agreement with effect from 31 July 2003.

13] The plaintiff, averring that it has suffered damages as a result of the first defendant's breach of the first agreement in an amount equal to the difference between the rental income it would have received if the first defendant had not breached the first agreement and the rental income it will receive during the corresponding period under the second agreement, instituted an action in which it claims -

13.1 as against the Fourth Defendant:

An order rectifying the written deed of suretyship, Annexure "D" to the Particulars of Claim by the substitution of "1st day of June 1999" for "13th day of July 1999" on page 1 thereof; and

13.2 as against first Defendant, alternatively against Second, Third and Fourth Defendants jointly and severally, the one paying the other to be absolved:

a) Payment of an amount of R210 075.21;

b) Interest thereon at the rate of 15.5% with effect from 12 August, 2003, being the date on which demand was made, to date of payment;

c) Payment of value-added tax in an amount of R29 410.53;

d) Costs of suit on a scale between attorney and client; and

e) Further and/or alternative relief.

14] As a result of an unopposed application the words "alternatively against" in the second of the two headings were deleted.

15] The defendants opposed the action and –

15.1 filed a plea that need not be elaborated on in view of the subsequent narrowing of the issues between the parties; and

15.2 instituted a counterclaim for the repayment of an amount of R57 005,81 being the deposit paid in terms of the first agreement.

16] As the parties were in agreement that the fourth respondent was entitled to an order in terms of claim (a) of the Particulars of Claim such an order was granted without further ado.

17] As the parties' legal representatives had reached agreement in respect of a number of issues at the end of the trial only three issues remained for adjudication. The first is whether the plaintiff took reasonable steps to mitigate any damages that it may have suffered. The second is whether if the damages claim is successful, the date from which interest thereon is to be calculated. The third is whether, if the plaintiff is entitled to the payment of damages, it is entitled to an order in terms of claim (d) of the Particulars of Claim.

18] A party suing for damages on the basis of a breach of contract by the other party bears the onus of proving, on a balance of probabilities, that damage has been suffered (See: **Everett & Another v Marian Heights (Pty) Ltd** 1970(1) SA 198 (C) at 204 D). It is generally accepted that there is a duty on a party who has suffered a loss as a result of the breach of an agreement to mitigate it (See: **Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd** 1915 AD 1 at 22; **Versfeld v SA Citrus Farms Ltd** 1930 AD 452 at 454; **Hazis v Transvaal and Delagoa Bay Investment Corporation Ltd** 1939 AD 372 at 398). The mitigation rule requires no more than that the party who has suffered a loss should take such steps to minimize it as would in the circumstances have been taken by a reasonable man (See: **Hazis v Transvaal and Delagoa Bay Investment Co Ltd** (supra) at 398; **Soar h/a Rebuilds for Africa v**

J.C. Motors en Andere 1992(4) SA 127 (A) at 135 C). The onus of showing that the plaintiff failed to take reasonable steps to mitigate its loss rests on the first defendant (See: **Hazis v Transvaal and Delagoa Bay Investment Co Ltd** (supra) at 388 – 389; **Minister of Water Affairs v Mostert and Others** 1966(4) SA 690 (A) at 736 (A); **Novick v Benjamin** 1972(2) SA 842 (A) at 858 C; **De Pinto and Another v Rensea Investments (Pty) Ltd** 1977(2) SA 1000 (A), insertion at 1007 A in 1977(4) SA at 529 – 530). It is accepted that as the party who has breached a contract is the cause of the other's predicament, courts should not bend over backwards to hold that such an onus has not been discharged (See: **Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd** 1977(3) SA 670 (A) at 689 D – E).

19] It is trite that the basic aim of an award of damages for a breach of contract is to place the innocent party in the same patrimonial position he or she would have been in had it been properly performed, to the extent that it is capable of being achieved without undue hardship to the defaulting party, by awarding an amount of money (See: **Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd** (supra) at 22; **Culverwell and Another v Brown** 1990(1) SA 7 (A) at 29 F; **Rens v Coltman** 1996(1) SA 452 (A) at 458 E) and with due regard to both the beneficial and detrimental results of the breach (See: **Everett and Another v Marian Heights (Pty) Ltd** (supra) at 204 C – D; **Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd and Another** 1985(1)

248 (W) at 253 B – C).

20] When a breach of an agreement of lease gives rise to a valid cancellation thereof the ordinary measure of damages is the difference between the loss of rental income during the unexpired period thereof and the rental that a lessor obtains or can reasonably be expected to obtain from reletting the premises **Wireless Rentals v Stander** 1965(4) SA 753 (T) at 754 H – 755 A; **Western Credit Bank Ltd v Kajee** 1967(4) SA 386 (N) at 393 D). The plaintiff's claim for damages has in its particulars of claim been formulated on that basis. The conclusion of the first agreement and the rentals payable in terms thereof; the plaintiff's entitlement to have cancelled same; and the conclusion and terms of the second agreement have not been placed in dispute. As the parties furthermore have reached agreement as regards the correctness of the calculation of such damages and also the present-day value thereof as on 7 December 2005, the plaintiff, in my view, has succeeded in adducing **prima facie** proof of the quantum of the loss suffered by it. In my view the decided case relief on by the defendants' counsel in support of a submission to the contrary namely, **Nedfin Bank Limited v Muller & Others** 1981(4) SA 229 (D) is distinguishable on the facts.

21] The first defendant's case - that the plaintiff failed to take steps reasonable in the circumstances in order to minimize its damages - is based on the following submissions. The first is that Mr Michael Weare, the Managing Director of Betting World - who was the only witness called by the defendants' counsel - testified that he during negotiations preceding the conclusion of the second agreement, offered Mr Leon

John Singer - the sole member of the plaintiff and the only witness called by the plaintiff's counsel - two choices namely, that Betting World would uphold the first agreement for the remainder of its duration and vacate the premises by 31 July 2003 or would be prepared to enter into a new agreement of lease for a composite period of 10 years at a market-related rental and that the plaintiff by having failed to accept the first of those choices alternatively, by not having upheld the first agreement of lease, had not acted reasonably and should have contented itself with "the minimal amount of damages" that resulted from the late payment of rental. The second submission was, that the plaintiff failed to satisfy the onus resting on it as regards proof of the damages suffered by it in that it failed to take into account the benefit of having secured Betting World as a tenant for an additional period of two years beyond 31 July 2006, the date on the first agreement would have expired.

22] On the basis of what the respective parties' counsel had conveyed to the court during argument as well as the contents of their heads of argument, the only issue as regards the merits of the plaintiff's claim for damages that remained unresolved was whether the plaintiff had taken such steps as he was in law obliged to in order to mitigate its damages.

22] A recognition that the plaintiff in fact suffered damages as a result of the first defendant's breach of the first agreement and the cancellation thereof by the plaintiff, is implicit in the raising by the first defendant of the defence that the plaintiff failed to have mitigated such damages as have been suffered by it either adequately or at all (See: **Hazis v Transvaal and Delagoa Bay Investment Co Ltd** (supra) at 388 where Stratford JA said: "A defendant in such claim says 'admitting that in fact you suffered those damages you have only yourself to blame for having so much or at all, because you did not take reasonable steps to protect yourself and therefore me' "; cf also: **Smith v Weeks** 1922 TPD 235 at 236 in fine – 237). A lessor of immovable property in the position of the plaintiff has two choices. It can either uphold the agreement of lease and sue for rental as and when it falls due in terms of the agreement or it can cancel the agreement and sue for damages without the need to await the arrival of the expiry date thereof.

23] A proper analysis of the first of the submissions in paragraph 21 above shows that the conduct on the part of the plaintiff which is being subjected to scrutiny relates to its election (see eg: **Desai v Mohamed** 1976(2) SA 709 (N) at 712 D) to resile from the first agreement rather than to uphold it. What in fact is being challenged is the reasonableness of the plaintiff's election to have cancelled the first agreement, an act that constituted an indispensable prerequisite for the coming into being of the plaintiff's claim for damages. As it is axiomatic that a duty to take reasonable steps to minimize damages cannot arise until a claim for such damages manifests itself and the conduct of the plaintiff which is the focus of the first of the said submissions preceded the coming in existence of such a claim, the contentions made thereanent and also the evidence presented in support thereof, fall outside the scope of the issue for decision and accordingly, do not need to be considered. In any event: to the extent that the first part of the first of the said submission is predicated on an acceptance of Mr Weare's evidence that he presented Mr Singer with two alternatives, I find myself in agreement with plaintiff's counsel's submission that the latter's evidence is to be preferred. That Mr Weare would have told Mr Singer that Betting World would uphold and comply with the terms of the first agreement is not only difficult to reconcile with the contents of the correspondence and documents that have been placed before this court but would furthermore have emasculated the enhanced bargaining position that had been contrived by carefully choreographed misrepresentations as regards Betting World's intentions relating to its continued occupation of the premises. Not only does what has been said in connection with the first part of the first submission above apply to the second part thereof, but the categorisation of additional payments flowing from any late payments of rental as damages and the assumption based thereon, namely that a duty to mitigate finds application, is totally misplaced in my view (See: **W.E. Cooper: Landlord and Tenant** (2nd Edition) at 159) by reason of the fact that clause 12.2 of the first agreement specifically provides for the payment of interest at 2% above the prime overdraft rate on any outstanding amounts of rental.

24] As the second of the submissions in paragraph 21 above is restricted to the failure on the part of the plaintiff, to have taken into account in the quantification of the damages suffered by it, such pecuniary benefits as were allegedly derived from the fact that the second agreement enured for a period beyond the expiration of the first agreement, implies that the entering into of the second agreement at, what is common cause is a market-related rental, was unexceptional. That approach gives recognition to the plaintiff's right to claim the rental payable in respect of the unexpired period of the first agreement as damages (See: **Commercial Careers College (Pvt) Ltd v Forest View (Pvt) Ltd** 1979(2) SA 402 (R A) at 404 A – 405 F; **De Pinto and Another v Rensea Investments (Pty) Ltd** (supra) at 529) as well as that the plaintiff had in fact taken steps to mitigate its loss as it was in law obliged to do (See: **De Pinto and Another v Rensea (Pty) Ltd** (supra) at 529 E – F) by having entered into the second agreement of lease. What is being held against the plaintiff is that it failed to quantify and bring into account against such damages, in addition to the rental payable under the second agreement during the period that the first and second agreements of lease overlapped, a monetary benefit that it allegedly derived from the fact that the second agreement of lease enured for a two years longer than the first agreement. **PJ Visser and JM Potgieter,** the authors of **The Law of Damages** (2nd Edition) at page 261, footnote 132, seem to support the view that only the overlapping period is relevant.

25] The plaintiff set about proving the damages suffered by it in the conventional manner by having adduced evidence to the effect, and was common cause between the parties, that the rental payable under the second agreement during the period that the two agreements overlapped (as calculated at 16 January 2006) was R204 165,58 less than would have been paid for the remaining period of the first agreement of lease. The first respondents' counsel challenged the reasonableness of the manner in which the plaintiff mitigated the damages suffered by it. On my understanding of the law, there is no onus on the plaintiff to substantiate the reasonableness of its conduct as regards mitigation - which has been held is a factual enquiry - but that the first defendant bears the onus of substantiating its contrary challenge (See: **Hazis v Transvaal and Delagoa Bay Investment Co (Pty) Ltd** (supra) at 388 – 9; **De Pinto and Another v Rensea Investments (Pty) Ltd** (supra) at 529 H; **Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd** 1995(3) SA 377 (D & CLD) at 381 G – H). Although it, to me as a lay person, appears to be self-evident that the terms and duration of an agreement of lease over immovable property might, depending on perceptions of whether rentals are likely to follow an up- or downward trend in the future, affect the market value thereof (Cf: **Solomon NO and Others v Spur Cool Corporation (Pty) Ltd and Others** [2002] 2 All SA 359 (C) at 373 c – d) no evidence thereanent has been adduced by either of the parties. In the absence of any evidence to the effect that the additional period of two years for which the second agreement will enure enhanced the plaintiff's patrimonial position, no factual basis on which the mitigation of the damages suffered by it could be assailed, has been shown to be present. As in my view, the onus in that regard rested on the first defendant and it has not been discharged the defence that the plaintiff failed to mitigate its damages, adequately or at all, cannot succeed.

26] In the premises the plaintiff is entitled to an order in terms of claim (b) of the Particulars of Claim but for an amount the present-day value whereof has to be determined as it includes amounts that would have accumulated periodically in the future. The amount thereof, as calculated at 16 January 2006, has been agreed as being R204 165,58.

27] The plaintiff claims interest on an amount of R210 075,21 at the rate of 15,5% from 12 August 2003 to date of payment, that date being the date on which demand was made. As already stated, the parties agreed that the present-day value of the difference between the rental payable in terms of the first and second agreements as at 16 January 2006 is R204 165,58. It appears to be self-evident from the manner in which claim (c) has been formulated that it is based on the provisions of section 2 A (2)(a) of the Prescribed Rate of Interest Act, No 55 of 1975 (the Act). Subsection 2 A (1) of the Act provides that "<u>subject to the provisions of this subsection</u>" the amount of every unliquidated debt as determined by a court of law, or an arbitrator an arbitration tribunal or by agreement between the creditor and debtor, shall bear interest as contemplated in section 1.

Section 2 A (3) of the Act, which, by virtue of the underlined words, takes precedence (See: **Trend Finance (Pty) and Another v Commissioner for Inland Revenue Services and Another** (2005) (67) SATC 334 (C); [2005] 4 All SA 657 (C) and the cases therein, cited at paragraph 36), provides as follows:

> "The interest on that part of a debt which consists of the present value of a loss which will occur in the future shall not commence to run until the date upon which the quantum of that part is determined by judgment, arbitration or agreement and any such part shall for the purposes of this act be deemed to be a judgment debt"

28] As a portion of the rental payable in terms of the first agreement had been paid, albeit late, the whole of the plaintiff's claim for damages was of a prospective nature on the day that it arose namely, the date on which the cancellation became effective i.e. 1 August

2003. That being the case, the provisions of section 2 A (3) of the Act are applicable. Accordingly interest at the maximum legally prescribed rate of 15,5% is payable on the amount of R204 165,58 as from 17 January 2006 to date of payment.

29] The plaintiff in claim (d) of the Particulars of Claim seeks an order that the first defendant be ordered to pay an amount of R29 410,53 in respect of value-added tax on the basis of an allegation that the plaintiff is obliged to pay such tax on the damages claimed by it. It is common cause that both the plaintiff and the first defendant are value-added tax vendors and that the first respondent, in terms of the provisions of the first agreement was liable to pay to the plaintiff the value-added tax payable by it on the rental to be paid in terms thereof. Although the plaintiff's counsel in her supplementary heads of argument submitted that it is common cause between the parties that value-added tax will be payable by the plaintiff on any amount of damages that may be awarded to it, my recollection is that the first defendant's counsel during argument adopted the attitude that such an award, being one of damages, would not attract such liability as it falls outside the ambit of the provisions of Act 89 of 1991. Although my prima facie view, after a rather cursory perusal of the said act, is that such an award does not attract liability for value-added tax, I am not in a position to make a considered finding thereanent as I have not had the benefit of full argument thereon by either of the parties' counsel. In order to obviate the possibility of the plaintiff being under- or over-compensated the appropriate manner to deal with that aspect appears to me be to reserve judgment on claim (c) of the Particulars of Claim and to grant the plaintiff leave to approach this court, after proper notice to the defendants and further argument, if necessary, for the granting thereof should the South African Revenue Services rule that value-added tax is payable on the award that I intend making. Such an order gives recognition thereto that whether the plaintiff is so liable or not is a matter between it and the South African Revenue Services (Cf: **Solomon NO v Spur Cool Corporation (Pty) Ltd and Others** (supra) at 374 a – b).

30] The plaintiff in claim (e) of the Particulars of Claim also claims costs of suit on a scale as between attorney and client. That claim is based on two grounds. The first is that costs on such a scale are claimable in terms of the provisions of clause 15 of the first agreement. The second is that an award of costs on such a scale is warranted because the representatives of Betting World and the first defendant colluded to deliberately mislead the plaintiff as regards the status of the former's sub-tenancy as well as its intentions as regards its future occupation of the premises.

31] First defenant's counsel disputed that the plaintiff was entitled to claim costs on a punitive scale because, so it was submitted, the plaintiff had elected to cancel the first agreement and was not entitled to rely on the provisions of section 15 of the first agreement. Clause 15 of that agreement provides as follows:

> "In the event of the lessor finding it necessary to instruct attorneys to take steps … to claim … damages arising out of this lease … then the lessee shall pay all legal costs incurred by the lessor in connection therewith as between attorneys and client …"

32] The question for decision is whether, despite the plaintiff's cancellation of the first agreement, its claim for damages could still be said to have arisen out of it. It was held in **Sydney Road Holdings (Pty) Ltd v Simon** 1981(3) SA 104 (D & CLD) - in which a surety had bound himself to a lessor of premises for all obligations of the lessee "arising from" an agreement of lease - that damages suffered as a result of a premature termination thereof "would spring from" the agreement of lease (also see: **Norex Industrial Properties (Pty) Ltd v Monarch South Africa Insurance Co Ltd** 1987(1) SA 827 (A) at 836 J – 837 A). As the plaintiff's claim for damages flowed from the cancellation of the first agreement, which in turn followed upon the invocation by it of the lex commissoria embodied in clauses 12.1 and 12.2 thereof I, by parity of reasoning, incline to the view that the plaintiff's claim did in fact arise therefrom and that it is entitled to an award of costs on a scale as between attorney and client. That finding obviates the need to express any firm views in respect of the second ground on which costs on a punitive scale is being claimed.

33] The defendants' counsel has submitted that the wasted costs occasioned by the postponement, which was sought and granted on 8 November 2005, had been brought about by the failure on the part of the plaintiff to have made adequate discovery. The nature of the plaintiff's failure appears from the supplementary heads of argument that had been filed by the defendants' counsel. It appears therefrom that as a result of the perusal of the documentation in Mr Weare's possession during consultations, there were documents in the plaintiff's possession which had not been discovered. After the plaintiff had responded to the first respondent's request to make its file relating to the matter available, the existence of additional documents relevant to the extension of the suspensive condition embodied in the second agreement and the negotiations thereanent came to light of which the plaintiff had not made discovery in its affidavit of 7 October 2005. My recollection is that the defendant's counsel in chambers conveyed to me that the postponement was sought, inter alia, to consider whether the additional documents necessitated an application for an amendment. As the plaintiff's counsel has not joined issue in her supplementary heads of argument therewith, the accuracy of the factual averments made by the defendants' counsel must be accepted. A perusal of the documents in question (exhibits A, pages 115 –

121; 126 – 133; 149 – 151; and 183 – 187) shows that they relate to matters in question in the action within the meaning thereof in Uniform Rule 35(1) and accordingly had to be discovered. The purpose of timeous and adequate discovery and the importance thereof in the finalization of civil trials need not be re-emphasised. Where there has been inadequate discovery, such as happened in the instant case, there is an onus on the defaulting party to show an absence of prejudice on the part of the innocent party: not vice versa (See: **Ferreira v Endley** 1966(3) SA 618 (E) at 621 E – G). As the plaintiff has not even attempted to provide a reason for its failure, the onus has not been discharged. It follows logically that the defendants are entitled to an order compelling the applicant to pay all wasted costs occasioned by the postponement of the matter on 8 November 2005.

34] In the premises the following orders are made: -

a) An order is made in terms of claim (a) of the Particulars of Claim in favour of the 4th Defendant.

b) The following orders are made in favour of the plaintiff against the first, second, third and fourth respondents jointly and severally, the one paying the other to be absolved –

i) payment of damages in an amount of R204 165,58.

ii) interest on the amount of R204 165,58 at the rate of 15,5% from 17 January 2006 to date of payment

iii) judgment on claim (c) of the Particulars of Claim is reserved and the plaintiff is authorised to approach this court for relief thereon, after notice to the applicant and argument if necessary, in the event of the South African Revenue Services ruling that the plaintiff is obliged to pay value-added tax on the amount of paragraph (b)(i) hereof. It is recorded, for the sake of clarity, that no provision has been made in arriving at the amount in (b)(i) hereof for the payment of such tax.

c) The first, second, third and fourth defendants jointly and severally, the one paying the other to be absolved, are ordered to pay the plaintiffs costs (excluding the costs in paragraph (d) below) on an attorney and client scale.

d) The plaintiff is ordered to pay the first, second, third and fourth defendants' wasted costs occasioned by the postponement of 8 November 2005.

e) Claim 2 of the first, second, third and fourth defendants counter claim is granted but in an amount of R73 448,11 as agreed between the parties.

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D. VAN REENEN