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

CASE NO: EL 1123/11
ECD 1956/11

In the matter between

MERCEDEZ-BENZ SOUTH AFRICA (PTY) LTD **PLAINTIFF**

and

BUFFALO CITY MUNICIPALITY **DEFENDANT**

J U D G M E N T

REVELAS J:

[1] The defendant, at the commencement of the hearing of the trial, brought an application in terms of Rule 33(4) of the Uniform Rules of Court, for the separation of certain questions of law which, it argued, could be conveniently decided before any evidence was led on the merits. The application was opposed by the plaintiff. I granted the application and the matter proceeded on the legal questions which are set out below. It is necessary to first refer to the pleadings from which these issues arise.

[2] The plaintiff is a manufacturer of motor vehicles which uses electricity on a substantial scale for its production and operational requirements. It concluded an agreement with the defendant on 9 December 1999 styled the Electricity Supply Agreement (the agreement), in terms of which the defendant would provide the plaintiff with a new bulk supply of electricity with effect from 4 January 2004.

[3] On 26 September 2009, a voltage fluctuation occurred which fell outside the parameters of the agreed supply of electricity in terms of the agreement. The fluctuation consisted of a power dip of 9,624 volts, followed by an overvoltage which peaked at 12,274 volts for over six hours in duration. The agreed supply was for 11 000 volts. In terms of the agreement, the municipality was obliged to ensure that any variation beyond 7.5% of the required voltage of electricity supplied would not continue for a period in excess of ten minutes. The power dip and overvoltage constituted respectively a low deviation of 12,51% and a high deviation of 11,58%, both in excess of what was stipulated in the agreement. It lasted for three days, which is much longer than the maximum period provided for.

[4] The plaintiff's case is that, as a result of these voltage fluctuations, in breach of the agreement, certain of its machinery and equipment were damaged beyond repair, necessitating their replacement, and the interruption of production for a period of three days resulted in additional salary payments for extra work hours to meet its supply obligations.

[5] The plaintiff claims damages from the defendant in the amount of R2 300 234.38, together with interest thereon calculated at the legal rate of 15.50% *per annum* from 29 October 2009 to date of payment, and costs of suit.

[6] The plaintiff contends in its particulars of claim that the defendant's breaches of the terms of agreement led to the voltage fluctuations referred to. Those breaches are enumerated as the defendant's alleged failure to:

a) regulate the supply of electricity to the plaintiff and to ensure that the supply fell within the parameters stipulated;

b) ensure that any variation beyond 7.5% of the required voltage of electricity supplied did not continue for a period in excess of ten minutes;

c) properly maintain and set its plant and equipment in the West Bank Sub-station;

d) carry out on-load tap change tests simultaneously and to correctly set the out-of-step timer so as to avoid an out out-of-step sequence in the supply of electricity;

e) to ensure that an out-of-step alarm was in working order, alternatively, to monitor and observe the activation of the out-of-step alarm which indicated a voltage fluctuation outside the parameters of the agreed supply.

[7] In the alternative to the aforesaid alleged breaches, which are all premised on terms of the agreement, the plaintiff pleads that the defendant was liable in delict for the damages suffered by the plaintiff, on the basis that the defendant breached its duty of care towards the plaintiff by failing to perform its duties. The various breaches of its duty of care are set out in the plaintiff's particulars of claim. In a nutshell, the plaintiff's cause of action is based on delict, as an alternative to contractual liability.

[8] Clause 5.3 of the agreement featured prominently in the pleadings as well as the submissions advanced by the parties. Under the heading **"CONTINUITY, REDUCTION OR VARIATION OF SUPPLY"** the agreement provides that the defendant "shall not be liable for damages, expenses or costs caused to the consumer (the plaintiff) as a result of a reduction interruption in the supply or ***variation of voltage frequency*** or any failure to supply

electricity" (emphasis added) .

[9] The defendant relying on clause 5.3, which is an indemnity clause, pleads that it precludes the plaintiff from claiming any damages caused by the fluctuations in the supply of electricity, as has happened on 26 September 2009. In its amended plea, the defendant seeks rectification of clause 5.3 of the agreement to the effect that the phrase "variation of voltage frequency" should read "variation of voltage **or** frequency". The import of the rectification is to reflect the true intention of the parties when the agreement was concluded which was to even further limit the liability of the defendant for damages. As a result, the defendant would not be liable for damages resulting from variations of voltage, even if more than 7.5%, as provided for in the agreement.

[10] Paragraph 5 of the plaintiff's particulars of claim reads as follows:

> "At all material times the Defendant was aware that in the event it supply of electricity to plaintiff was not maintained within the parameters stipulated by the agreement, the Plaintiff's machinery and equipment would be damaged requiring replacement and production in Plaintiff's factory would be lost and required to be made up at an additional cost so as to meet its obligations of supply. The agreement, Annexure "A" was concluded on the basis thereof".

In response thereto, the defendant pleads that it constitutes a variation of the agreement not having been reduced in writing, which in terms of the non-variation clause (18.1) is of no force and effect. It is further pleaded that the allegations in paragraph 5 offend the parol evidence rule, rendering them inadmissible.

[11] In response to the plaintiff's delictual claim, the defendant pleads that those allegations also amount to an alteration of the agreement in conflict with the parole evidence rule. The contention is that that the plaintiff was not in law entitled to rely on a delictual claim where the

plaintiff had chosen to enter into a contractual relationship in order to regulate the risk of harm and to protect itself.

[12] The defendant further pleads that the plaintiff was also negligent in failing to protect its own equipment and plant as is required by the agreement. It furthermore disputes the damages alleged by the plaintiff. These of course are aspects for evidence.

[13] The matter was set down for trial on Wednesday 12 September 2012. I could only hear the matter the following day. On Thursday when the trial in the present case should have commenced, the defendant brought its application for separation in terms of Rule 33(4). The defendant contended that it would be convenient to both the court and the litigants if the following issues were to be decided separately:

a) Whether the phrase "variation of voltage frequency" in clause 5.3 of the agreement should read "variation of voltage **or** "variation of voltage **or** frequency". In other words, the issue of rectification of clause 5.3.

b) Whether the plaintiff was precluded from relying on a "duty of care" as stated in paragraph 5 of its particulars of claim by virtue of the non-variation clause (18.1) of the agreement and the parol evidence rule.

c) Whether clause 5.3 (the indemnity clause) of the agreement precluded the plaintiff from claiming damages in accordance with the alleged breaches of the agreement in its particulars of claim as set out above.

d) Whether the plaintiff was precluded from claiming in delict (in

the alternative or otherwise).

e) Whether the indemnity clause was unconstitutional and of no force and effect as pleaded by the plaintiff in its replication,

[14] Except for the rectification issue which required the leading of witnesses (according to both parties), although only to a limited extent, I regarded the remaining matters capable of disposal by way of legal argument and I consequently, on the following day, ordered the separation. The defendant then requested a postponement for purposes of consulting with the person who represented the respondent's predecessor, when the agreement was concluded. I was also informed that the whereabouts of the witness was uncertain as well as what he would say. This seemed rather strange given that this witness was required to give evidence about what the intentions of the parties were when they concluded the agreement in 1999, and in particular that the word **"or"** was supposed be present between the words "voltage" and "frequency" in the indemnity clause.

[15] This witness, it seems, is Mr David Chester Orgley, who, in his capacity of chief executive of the defendant's predecessor, represented it when the agreement was concluded. I gleaned as much from the covering sheet of the agreement. Apparently, the legal representatives of the defendant had not yet consulted with him and they moreover did not know whether he could be located in Cape Town.

[16] I dismissed the application for a postponement for the reason that the separation of issues was ordered at the behest of the defendant, and in the face of strong opposition from the plaintiff, based on considerations of convenience. That would have been utterly defeated by a postponement since the next available date on the trial roll was in August

2013. The search for the witness, even if he was found, seemed to be a futile in the circumstances. The resultant prejudice to the plaintiff is obvious.

[17] The parties proceeded to argue the separated legal issues without the leading of any evidence. The separated issues are inter-linked and can be summarised as follows:

a) Whether the indemnity clause is capable of rectification and if not, whether it indemnifies the defendant from liability based on contract; and

b) Whether the plaintiff's allegation that the damages it suffered were reasonably foreseen and in the contemplation of the parties when they contracted with each other (special damages), was ousted by the non-variation clause and too remote to confer liability on the defendant;

c) Whether the plaintiff, as a matter of law, was entitled to sue in contract and in delict, as concurrent claims, albeit the delictual claim having been pleaded in the alternative.

d) Whether the indemnity clause is valid or offends public policy and constitutional values, the defendant being a municipality and thus an organ of state.

Is clause 5.3 capable of rectification?

[18] Counsel for the defendant submitted that the absence of the term "voltage frequency" anywhere else in the agreement, in particular in the definitions and provisions in the NRS, is of significance and provides an indication that the word "or" should separate the two words, which is

what the parties must have intended.

[19] The defendant emphasized the difference between the two concepts: voltage is measured in volts and frequency in hertz, as is evident from the usage of two concepts in the pleadings, the agreement and the applicable legislation. If I understood correctly, the word "or", if introduced between "voltage" and "frequency" would change the meaning of frequency *ex facie* the indemnity clause from "commonness of occurrence" to "number of cycles per carrier wave" or "rate of recurrence of vibration" as in physics (see: The Concise Oxford Dictionary 6th edition). In Afrikaans the difference is more obvious from the phrases "gedurige herhaling" (continued repetition) as opposed to "frekwensie", which is measured in hertz.

[20] If the word "or" is inserted as contended for by the defendant, it would substantially widen the range of circumstances in which the defendant would be indemnified from liability. Circumstances in which the defendant would not be liable for damages were in fact foreseen and those are defined in clause 22 of the agreement. These are acts of God, industrial actions, lock-outs, trade disputes, fire, government directions and/or war. The plaintiff's opposing contention is that the defendant's indemnity is limited to the circumstances enumerated in this clause.

[21] There does not appear to be a factual or evidentiary basis for the defendant's contention that the parties intended to include the word "or" between the words "voltage" and "frequency". It, for one, plainly does not read better that way: neither does it make more business sense. The plaintiff was never amenable to the construction contended for by the defendant and it therefore unilaterally relies on it, without evidential support having been tendered.

[22] Reference was made to another electricity supply agreement

concluded between Eskom Holdings and the defendant, in October 2004 (the Eskom agreement). Clause 14.3 of that agreement is virtually identical to clause 5.3 of the agreement under discussion, but for the word "or" which does occur between the words "voltage" and "frequency". The Eskom agreement was not properly introduced in evidence. Its relevance escapes me. It was concluded to enable the defendant to purchase bulk electricity from Eskom. It is a different type of contract: specific provision is made for "under-frequency load-shedding schemes" as well as "load curtailment" and shortages of "generating and/or transmission capacity" in it. The parties clearly contemplated and planned for different outcomes and eventualities in that agreement. It cannot serve as evidence that the parties in the agreement under consideration intended something different at the conclusion thereof some 13 years ago.

[23] Clause 5.3 of the agreement between the parties, in my view, is not capable of rectification and remains as it is within the parameters stipulated in the agreement.

Is the plaintiff precluded from relying on the allegations in paragraph 5 of its particulars of claim by virtue of the non-variation clause in the agreement as well as the parol evidence rule as pleaded by the defendant?

[24] This question must be answered as if clause 5.3 of the agreement does not exist. Paragraph 5 of the particulars of claim (quoted above) it will be remembered, alleges that the agreement was concluded on the basis of the defendant being aware that if its electricity supply to the plaintiff was not maintained within the parameters stipulated in the agreement, the plaintiff's machinery would be damaged, requiring replacement and resulting in a loss of production.

[25] The plaintiff is wholly dependent on the supply of bulk electricity by

the defendant. It is not an ordinary business consumer. It has specifically sought to introduce limits to voltage variations over certain periods by introducing particular terms in the agreement. In those circumstances it is open to the plaintiff to contend that the parties envisaged that damages would occur if the supply of electricity is not maintained.

[26] The defendants' principal objection to this paragraph is that it introduces a claim for special damages and such damages do not flow naturally and directly from a breach of the agreement, as would be the case in general or intrinsic damages. Special damages are damages which may reasonably have been in the contemplation of the parties, at the time they concluded the contract, where they have knowledge of special circumstances and contract on the basis of such knowledge.[1]

[27] Therefore, the plaintiff had to demonstrate, not only that it was contemplated at the time of contracting that such damages would flow from the breach but also, that the contract was entered into on the basis of the parties' knowledge of special circumstances so that in substance they formed part of the contract itself.[2]

[28] In *Holmdene Brickworks (Pty) Ltd*[3] *v Roberts Construction Co Ltd* special damages was defined thus:

> "those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract the parties actually or, presumptively contemplated that they would probably result from its breach".

In *Transnet Ltd v The MV Snow Crystal*[4] Scott JA (para 35), described special damages thus:

1 Wille's Principles of South African Law, Ninth Edition 883.

2 *Lavery & Co v Jungheinrich* 1931 AD*; Schatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) 552B.

3 1977 (3) SA 670 (A) 678.

> "In the case of 'special damages' on the other hand, the foreseeability of the harm suffered will be dependent on the existence of special circumstances known to the parties at the time of contracting".

[29] The plaintiff's business is that of the manufacturing of vehicles. Its machinery and equipment are operated electronically and use a lot of electricity. To this end, it entered into a new bulk supply of electricity agreement with the defendant. The parties specifically contracted that the electricity supply of electricity must be consistent and for such interruptions in the supply of electricity which could be foreseen, specific time limits were set. The agreement also barred stipulated degrees of fluctuation. All these have been dealt with above. As a matter of plain logic, in the event of a breach of the contentious terms of the agreement, damages to the plaintiff's costly machinery and further losses were inevitable.

[30] The consequences of those losses must have been, and accordingly were in the contemplation of the parties: the parties could not have intended that the plaintiff's machinery and vehicles could be "fried with impunity", as Mr *Ford*, for the plaintiff, put it. The agreement could never have been concluded on the basis that damages caused by interruptions beyond the limits stipulated in the agreement were excluded and therefore not claimable.

Does clause 5.3 preclude the plaintiff from claiming the damages allegedly caused by the defendant?

[31] The defendant maintains that clause 5.3 in clear and unambiguous terms states that it shall not be liable for damages etc. as a result of a variation in the voltage supply. Evidence to explain it, so the argument went, would be impermissible. This argument is unassailable. The

4 (250/07) [2008] ZASCA 27, dated 27 March 2008.

considerations discussed in the aforesaid paragraph do not apply to clause 5.3 Accordingly, the plaintiff is not entitled to contractual damages as referred to in this clause.

Is the plaintiff precluded from claiming in delict?

[32] The defendant contended that a delictual claim is not competent where there is a contractual claim and relied *inter alia,* on the judgment in *Lillicrap, Wassenaar and Partners v Pilkington Brothers.*[5] In that matter the court was concerned with the question of whether the breach of a contractual duty to perform professional work with due diligence was *per se* a wrongful act for the purposes of *Aquilian* liability, with the result that if the breach were negligent, damages could be claimed *ex delicto*. The court, for policy reasons, declined to extend the remedies under the *lex Aquilia*.

[33] In *FF Holzhausen v ABSA Bank Limited*[6] Cloete JA held that the judgment in *Lillicrap* "is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent". On the contrary, the court pointed out, that Grosskopff JA, who wrote for the court in *Lillicrap* "was at pains to emphasize (at 496 D-I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to persue". Cloete JA in *Holzhauzen* also referred to the judgment in *Durr v ABSA Bank Ltd*[7] where Schutz JA found no difficulty (at 453 G) with the claim as pleaded which relied upon a contract, alternatively on delict, and was presented as one in delict.

5 1985 (1) SA 475 (A).

6 (280/03) dated 7 September 2004 para [9].

7 2002 (2) SA 510 (SCA).

[34] Cloete JA also criticized the judgment in *Pinshaw v Nexus Securities (Pty) Ltd*[8] for misinterpreting the effects of *Lillicrap*. In *Pinshaw* the plaintiff sued the director of an investment company (as second and first defendants respectively) in delict for pure economic loss suffered as a result of a bad investment made in regard to funds she had entrusted to them. The court in *Pinshaw* recognized that a legal duty giving rise to an action in delict can exist independently of a contract, and correctly so, according to Cloete JA, who critisized the court in *Pinshaw* for erring in two respects, the first of which is relevant to the present matter. It reads as follows:

> "First, the premise underlying the reasoning is that *Lillicrap decided* that where delictual liability coexists with liability for breach of contract, the aggrieved party is limited to a claim in contract. That premise is wrong, as I have already shown".[9]

The defendant's objection to the plaintiff's case as pleaded is therefore misplaced and it is accordingly rejected.

Is clause 5.3 unconstitutional?

[35] Finally, it must be decided whether or not the indemnity clause (clause 5.3) of the agreement is unlawful and of no force and effect, as pleaded by the plaintiff in its replication. The relevant part thereof reads as follows:

> ". . . in circumstances where Defendant contracted in terms to provide a supply of electricity within specified parameters essential to Plaintiff's manufacturing and operational requirements it is contrary to the principles of justice, public policy and the interlinking constitutional values of public policy, that Defendant should be indemnified in respect of its breach of an express and material term of the agreement and its failure to have taken adequate measures to discharge its contractual obligations".

8 1997 (3) SA 448 (SCA)

9 Para [9].

[36] Mr *Pienaar*, who, with Mr *Louw,* appeared for the defendant, relied on the judgment in *Afrox Healthcare Bpk v Strydom*[10]*,* where the court rejected a constitutional challenge to an indemnity clause excluding liability for negligently caused injury in a private hospital's contract of admission. The court however did affirm that inequality in bargaining power could be a factor in striking down a contract on public policy and constitutional grounds, where evidence is produced of a weaker bargaining position.[11]

[37] In the present matter one of the factors for consideration pertaining to a weaker bargaining position or not, is that the plaintiff could not obtain electricity from anyone other than the defendant municipality. The question moreover arising is whether the municipality, as a form of government, is in effect the State, which would also distinguish this matter from the *Afrox* matter. In this regard Mr *Pienaar* referred me to the case of *Mateis v Ngwathe Plaaslike Munisipaliteit en Andere*[12] where it was held that the concept 'State' was an amorphous juristic-political concept with no general meaning in legislation and in particular, a municipality could not be equated therewith.[13] [14]

[38] The plaintiff is clearly in a weaker bargaining position for the supply of electricity than the defendant, who has no competitor. It must also be remembered that the defendant has to buy the electricity it supplies from Eskom, who in turn, bargains with the Government for the rates it sells it for. To a large extent, all consumers are at the mercy of Eskom, and so is the defendant. That may not strengthen the plaintiff's position, but it

10 2002 (6) SA 21 (SCA).

11 At para [12].

12 2003 (4) SA 361 (SCA).

13 Para [7], [8] and [9].

14 *Napier vs Barkhuizen* 2006 (4) SA (SCA) at paragraph [14] 8 G-H.

certainly dilutes the defendant's bargaining position as the perceived sole and omnipotent provider of electricity.

[39] This is a contractual matter. In some instances it is quite clear why certain constitutional values, such as non-racialism and non-sexism could lead to the invalidation of a contractual term. In this case, I fail to see what constitutional values would be imperilled by an indemnity clause in an electricity supply agreement of this kind.

[40] In the circumstances, I conclude that clause 5.3 of the agreement does not offend the Constitution.

[41] As to costs, both parties being successful, I consider it just and fair that the costs thus far incurred, save for the costs of the application for separation (in respect of which I held on the day it was argued, that no order as to costs will be made) should follow the result in the action.

[42] Accordingly, it is declared that:

i) Clause 5.3 of the agreement between the parties remains as it stands but does indemnify the defendant from liability flowing from the agreement.

ii) Paragraph 5 of the plaintiff's particulars of claim does not constitute a variation of the agreement, nor is it inadmissible by virtue of the parol evidence rule.

iii) The plaintiff is entitled to base its claim, in the alternative, on delict.

iv) The costs thus far incurred (save for the costs of the application for separation), shall be costs in the cause.

_____

E REVELAS
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF	***ADV B FORD SC*** ***ADV DE LA HARPE***
PLAINTIFF'S ATTORNEYS	***DRAKE FLEMMER & ORSMOND***
COUNSEL FOR DEFENDANT	***ADV B PIENAAR SC*** ***ADV F LOUW***
DEFENDANT'S ATTORNEYS	***NIEHAUS McMAHON ATTORNEYS***

DATE OF JUDGMENT ***27 SEPTEMBER 2012***