

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
JOHANNESBURG

CASE NO: 2009/1696

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
	<u>26/04/13</u>
	DATE
	<u>[Signature]</u>
	SIGNATURE

In the matter between:

**VOLTEX (PROPRIETARY) LIMITED**

Plaintiff

and

**PG HUMAN INSTRUMENTATION AND ELECTRICAL  
CONTRACTORS CC**

First Defendant

**PETRUS GERHARDUS HUMAN**

Second Defendant

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**J U D G M E N T**

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**MILTZ AJ:**

1. This is an action for payment by the second defendant of an amount of R120 411.62 being the balance due in respect of certain cable racks ("the racks") that were sold and delivered by the plaintiff to the first defendant during 2002.
2. The second defendant bound himself prior to the sale concerned to the plaintiff as surety and co-principal debtor in *solidum* with the first defendant, *inter alia*, for the payment to the plaintiff of any amount which may at any time be owing to the plaintiff by the first defendant.
3. The second defendant resists the claim relying on the *exceptio non adimpleti contractus* in contending that the goods delivered were not in accordance with the specifications required in terms of the parties' agreement.
4. Ms Sue Phillips, the technical sales manager of the Cabstrut division of the plaintiff, testified that she was involved in the plaintiff's dealings with the first defendant and that she knew the second defendant. She learnt from the second defendant in what must have been approximately August 2002, that the first defendant was tendering for a project at Anglo Platinum when he asked for a quotation for certain goods which included the racks.
5. A quotation was provided by the plaintiff to the first defendant which the second defendant duly accepted on behalf of the first defendant. The

quotation dated 14 August 2002 related to the "PMR-Capacity Increase-Batemans" project. The quotation provided for the goods to be delivered "with TOPHAT CROSS RUNG WITH NO SPLICE HOLES MILD STEEL AND PAINTED AS PER SPEC".

6. Ms Phillips testified that the words "AS PER SPEC" referred to the finish which was reflected in a column on the quotation under the heading "FINISH" as being "EP/CO" which she said meant Epoxy Coating. The colour would be azure blue.
7. It is common cause that on 10 October 2002 Ms Phillips provided the second defendant with the delivery schedule for the order. The schedule specified a first delivery on 22 October 2002 and the second on 24 October 2002. Apparently the second delivery was a day late. Nothing turns on this.
8. On 12 November 2002, the second defendant wrote on behalf of the first defendant to the plaintiff with reference to the order for the cable racks. It was recorded therein, *inter alia*, that the second defendant had explained to Ms Phillips that the racks were for the PMR-Capacity Increase project, that that meant that the racks had to be fabricated according to Anglo Platinum specifications as well as prepared and painted to Anglo Platinum specifications. It was also recorded in the letter that Ms Phillips had the details of the project when quoting.

9. The first defendant complained however that upon the inspection of the racks and installations it was ascertained that the racks were not prepared and painted to the Anglo Platinum application specification. The relevant specification required that the racks were sandblasted, primed and then painted. The racks that were delivered were epoxy coated but not sandblasted, primed and then painted.
10. Significantly, prior to providing its quotation to the first defendant, the plaintiff had provided a quotation to Group Five for the same project. The second defendant testified that he had been told this by Ms Phillips before the plaintiff provided its quotation to the first defendant and that she had assured him that she was familiar with and knew the specifications for the project.
11. Events that followed those described above were the following:
  - 11.1. at an undisclosed time Ms Phillips faxed a letter to the defendants in which she recorded that as per their telephone conversation the same morning:

"The painting spec on all racking sent for the abovementioned project was painted to the Anglo Spec APS105 and not APS107.

The racking will be manufactured and the finishing will comply to APS107 as requested. While the racking is being manufactured, an equivalent option for a painting finish will be offered. A sample will be made and presented which could result in getting the racking sooner.

We are aware of the urgency of this order and will deal with it timeously.

Please accept our sincere apologies for any inconvenience caused.

Please do not hesitate to contact me should you require any further information.”;

11.2. on 13 November 2002, the second defendant on behalf of the first defendant informed the plaintiff that:

“Due to the time delay which will be caused by re-manufacturing of racks it was decided by Anglo Platinum’s project manager Mr Barend Venter, that the following actions were to be taken.

Arrangement had to be made with a company “Structural Applications” who has got a sandblasting and painting yard on the Anglo premises, to correct all of the racking. Cabstrut are therefor no longer required to collect the racking and re-fabrication does not need to take place.

Due to the time constrain on the project these actions were opted but please note that there will be a cost implication to cover the labour, blasting and painting of the above, which will be for the account of Cabstrut.”;

11.3. the plaintiff refabricated a portion of the racks and on 17 March 2003 the first defendant paid the plaintiff an amount of R146 516.02 in respect of the invoice therefor;

11.4. the first defendant was wound up. Notwithstanding the expiration of a considerable period of time since the winding-up, no liquidator has been appointed yet.

12. The first question to be decided is whether the plaintiff, in terms of its agreement with the first defendant as constituted by the accepted quotation for the sale of the racks, required that they would be manufactured in accordance with a particular specification, being APS107.
13. It was not in dispute that the plaintiff was a specialist in the manufacture and sale of mechanical support systems. The largely common cause facts surrounding the conclusion of the agreement support this. The plaintiff knew of the project and had already provided its quotation for Group Five in respect thereof.
14. The contents of the letter of the second defendant on 12 November 2002 and the response thereto of Ms Phillips when she identified the correct specification and apologised for any inconvenience, satisfy me that it was indeed a term of the agreement that the goods that would be delivered would be in accordance with the appropriate Anglo Platinum specification for the project. The appropriate specification was APS107 which required sandblasting, priming and then painting and not APS105 which did not.
15. Although not raised in argument, it is a well-known principle of our law that a residual obligation of a seller in the absence of agreement to the contrary, that manufacturers and merchant sellers warrant the skill of their respective arts, which means that of their respective professions,

pursuits or callings. See: **AJ Kerr, The Law of Sale and Lease (Third Edition) at pages 218 to 219.**

16. On the facts in the present case it does not matter that no mention was made specifically at the time of the conclusion of the agreement of the Anglo Platinum specification APS107 that was required for the racks. Ms Phillips' evidence in this regard was unhelpful as the code "EP/CO" applied equally to APS105 and APS107. The significant difference between the specifications was that APS107 required sandblasting, priming and then painting whereas APS105 did not.
17. Accordingly, I find that the agreement between the parties envisaged that the racks to be delivered in terms thereof were required to be in accordance with the required specification as aforesaid and that initially they were not.
18. However, the matter does not end there. Ms Phillips tendered on behalf of the plaintiff in the undated letter I have referred to above to refabricate the racks to the correct specification as expeditiously as possible. The tender was taken up partially and then the payment I referred to was made.
19. The second defendant did not testify that the balance of the payment withheld, being the sum claimed by the plaintiff in its action, reflected the cost to the first defendant of remedying the plaintiff's defective performance.

20. On the contrary, as I understood the second defendant's evidence, he attributed the unpaid balance of the invoice to the penalty imposed by Anglo Platinum for the late performance by the first defendant of its obligations in respect of the project.
21. Ms Phillips testified that she had no knowledge of the terms of the first defendant's contract with Anglo Platinum. She testified that all she knew of the project was that she had received a bill of quantities from Group Five. She said that she had no knowledge of Anglo Platinum's right to levy penalties on the first defendant for late performance. No basis was provided by the second defendant to show otherwise.
22. The first defendant did not participate in the trial and its counterclaim is not before the Court. It seems unlikely that it ever will be.
23. When all is said and done, it remains for me to consider whether the second defendant has proved that the amount claimed is not due, owing and payable by him to the plaintiff. The certificate of indebtedness handed up by the plaintiff pursuant to the certificate clause which forms part of the application for credit facilities impacts on the question of onus in this case.
24. In the absence of any evidence as to the correlation between the amount that has not been paid and the second defendant's failure to deliver properly specified goods in the first place, I am unable to find

that the second defendant has shown that the balance of the invoice is not payable.

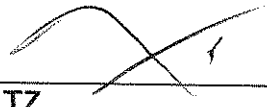
25. The first defendant's payment of a substantial part of the debt, its acceptance and use of the goods remanufactured by the plaintiff as well as its decision to permit Anglo Platinum to refabricate the remainder of the racks despite the plaintiff's offer to do so, indicate that the first defendant unconditionally discharged the plaintiff from its obligation to deliver the racks in accordance with the specifications of the agreement. The first defendant, on the evidence before me, was never obliged to release the plaintiff from the obligation concerned.
26. The fact that Anglo Platinum subsequently penalised the first defendant for the allegedly late performance of its obligations cannot be visited without more on the plaintiff. The late performance by the first defendant with its obligations was not canvassed in evidence in a manner that would enable me to find that the plaintiff is liable for the damages constituted by the penalties. There simply is no basis on which I can find that the plaintiff was aware of the consequences of its inadequate and then late performance of its obligations for the first defendant with reference to its agreement with Anglo Platinum.
27. In the premises, I have no option but to find that the plaintiff is entitled to judgment, despite the fact that initially it did not deliver racks that were manufactured according to the requisite specifications.

28. In the summons, the plaintiff claims interest on the indebtedness at the maximum rate permissible in terms of the Usury Act from 30 April 2002 to date of final payment. This prayer appears to be founded on the provisions of clause 2 of the Credit Facility Agreement.
29. However that clause was not referred to in evidence nor was I addressed on it in opening or closing argument. The certificate of indebtedness also is silent on the question of interest.
30. In the premises, I consider it appropriate to award only *mora* interest on the claim. However I will award costs on the attorney and client scale in terms of the relevant provisions of the Credit Facility Agreement.

### ORDER

Accordingly, the following order is made:

1. The second defendant is ordered to pay to the plaintiff the amount of R120 411.62 together with interest *a tempore morae* at the prescribed rate of 15.5% per annum calculated from date of service of summons to date of payment;
2. The second defendant is ordered to pay the plaintiff's costs of suit on the attorney and client scale.



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**I. MILTZ**  
ACTING JUDGE OF THE SOUTH  
GAUTENG HIGH COURT,  
JOHANNESBURG

COUNSEL FOR THE PLAINTIFF, ADVOCATE N. SEGAL, INSTRUCTED BY  
ATTORNEY NORMAN BARLING

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