THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***28th May 2021*** Signature: _____

CASE NO: A5014/2019

In the matter between:

BMK KITCHENBRAND (PTY) LIMITED, trading as:
UNIVERSAL OFFICE AUTOMOTIVE First Appellant

KITCHENBRAND, KEVIN Second Appellant

and

SAPOR RENTALS (PTY) LIMITED Respondent

Coram: Kathree-Setiloane, Twala *et* Adams JJ

Heard: 22 February 2021 – The 'virtual hearing' of the Full Court Appeal was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 28 May 2021 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 28 May 2021.

Summary: Contract – breach of warranties – contractual damages arising from such breach of contract – factual finding by court *a quo* that first appellant in fact breached the agreement – mutually destructive versions – trial court required to select a conclusion which seems to be the more natural or plausible one –
Appeal – against factual findings of court *a quo* – if no misdirection on fact by the trial Judge, the presumption is that his or her conclusion is correct – the appellate court will only reverse it where it is convinced that it is wrong –
Court orders – a court is obliged to adjudicate upon all issues raised in a case before it – it must do so by rendering a judgment and issuing an order dealing with all the issues – if not, appeal court should supplement order of court *a quo*.

ORDER

On appeal from: The Gauteng Local Division of the High Court, Johannesburg (Mokose AJ sitting as Court of first instance):

(1) Save to the extent set out in paragraph 2 below, the appeal is dismissed.

(2) The order of the trial court is substituted by the following order:

'[37] Judgment is granted in favour of the plaintiff against the first and second defendants jointly and severally, the one paying the other to be absolved, for: -

(a) Payment of the sum of R335 932.94;

(b) Payment of interest on R335 932.94 at the rate of 12% per annum from date of service of the summons to date of final payment; and

(c) Costs of suit.'

(3) The first and second appellants, jointly and severally, the one paying the other to be absolved, shall pay the respondent's costs of the appeal, including the costs of the applications for leave to appeal to the trial court and the Supreme Court of Appeal.

JUDGMENT

Adams J (Kathree-Setiloane *et* Twala JJ concurring):

[1] The first appellant[1], BMK Kitchenbrand (Pty) Ltd ('Kitchenbrand'), is a provider of office automation solutions and a supplier of hardware and software technology *inter alia* in the form of printers, scanners and copiers. The respondent[2], Sapor Rentals (Pty) Ltd ('Sapor'), is in the business of financing the acquisition of office automation equipment. Sapor, not unlike a commercial bank in a credit agreement, finances the purchase or rental of office equipment. The second appellant[3], Mr Kevin Kitchenbrand ('Mr Kitchenbrand'), is a shareholder in, and a director of Kitchenbrand. He was cited in the action on the basis of a performance guarantee he signed in favour of Sapor.

[2] On 29 February 2012, Kitchenbrand, in terms of a written 'Master Rental Agreement' ('MRA') between it and a firm of attorneys, Trollip, Cowling & Janeke ('TCJ'), agreed to supply to TCJ, and to install at their offices, thirteen specified pieces of office equipment, including a *Kyocera FS-1135* multifunction printer and a *Kyocera FS-C5150DN* network colour laser printer. The MRA was for a period of *sixty* months, with a monthly rental of R7000 per month (excluding value added tax). In the MRA provision was also made for an annual escalation of the monthly rental of 10% per annum. The total value of the rental agreement, excluding the annual escalation, was therefore approximately R420 000.

[3] The MRA between Kitchenbrand and TCJ was financed by Sapor, who 'purchased' from Kitchenbrand the rental agreement in terms of a written cession incorporated into a 'Supply Agreement' concluded between Sapor and Kitchenbrand on 6 March 2012. The purchase price paid by Sapor as consideration for the acquisition by it of all rights, title and interest in and to the MRA was the sum of R389 458.27. This Supply Agreement, so Sapor alleged in

[1] First defendant in the trial court

[2] Plaintiff in the trial court

[3] Second defendant in the trial court

its declaration in the trial court, was breached by Kitchenbrand in that it had failed to install, as it warranted that it had done or would do, at the offices of TCJ, two of the machines of the thirteen, namely the *Kyocera FS-1135* multifunction printer and the *Kyocera FS-C5150DN* network colour laser printer. Sapor alleged that as a result of this breach it suffered contractual damages amounting in total to R335 932.94.

[4] During April 2014, Sapor instituted action in the High Court against Kitchenbrand and Mr Kitchenbrand ('appellants') for damages for breach of contract. As already indicated, Sapor sued Mr Kitchenbrand on the basis of a performance guarantee issued by him in favour of Sapor, in terms of which Mr Kitchenbrand guaranteed compliance by Kitchenbrand of its obligations in terms of the Supply Agreement. There is no dispute relating to Mr Kitchenbrand's liability to Sapor in the event that Kitchenbrand is found to be liable to Sapor for damages. Mr Kitchenbrand's liability is secondary in nature.

[5] Kitchenbrand disputed liability to Sapor and defended the action on the basis that it did not breach the Supply Agreement. There is no dispute between the parties that in terms of the Supply Agreement, Kitchenbrand undertook and gave an express warranty that it would supply to TCJ the machines and install same at their offices. It is also common cause between the parties that a failure by Kitchenbrand to have installed the printers, at the offices of TCJ, amounted to breach of contract and that Sapor, in the event of such breach being proven, would be entitled to contractual damages arising from the breach. Kitchenbrand's case was simply that it had complied with all of its obligations in terms of the MRA with TCJ. In particular, it alleged in its plea that it did in fact install the two printers at the offices of TCJ.

[6] The trial court (Mokose AJ), after considering the evidence found that the version of Sapor was to be preferred to that of the appellants. She accordingly made the following order:

'(i) The first and second [appellants] are 100% liable for the damages occasioned by [Sapor], the one paying and the other being absolved.

(ii) Costs of suit.'

[7] The appeal lies against the order with leave of the Supreme Court of Appeal. The question for determination on appeal is whether the trial court's factual finding was correct.

[8] I interpose here to deal briefly with two special pleas raised by the appellants, which were dismissed by the trial court.

[9] The special pleas relate to and are based on clause 7.2 of the MRA, which provides as follows under the heading 'Indemnities by the Supplier [Kitchenbrand]':

'7.2 As an alternative, at Sapor's election and in the event of any breach by the Supplier [Kitchenbrand] of any of the provisions of this agreement or any cession, Sapor shall be entitled to require the Supplier to repurchase all or any contracts and/or Sapor Rental Agreement, subject to 8.10 below, upon the following terms and conditions:

7.2.1 the consideration payable by the Supplier to Sapor on any such repurchase shall be the value of the collectibles still outstanding under the Contracts and/or Sapor Rental Agreement repurchased as at the date of receipt of that consideration by Sapor and all costs and expenses which Sapor may have incurred including (but not limited to) costs of storage, repairs, repossessions, refurbishing, sale and legal costs on the scale as between an attorney and his own client;

7.2.2 the consideration referred to in 7.2.1 above shall be payable against delivery of the Contracts and/or Sapor Rental Agreement in question by Sapor to the Supplier and, upon receipt by Sapor of such consideration, all the rights, title and interest in and to the Contracts and/or Sapor Rental Agreement shall be deemed to have been ceded to or back to the Supplier.'

[10] Clause 8.10 reads as follows:

'8.10 All Contracts and/or Equipment and/or Goods and/or Sapor Rental Agreement sold and/or ceded by Sapor to the Supplier, whether in terms of 6 or 7 or for any other reason whatsoever, and are sold and ceded in the condition that it is found and Sapor shall not be bound by any common law warranties, representations, undertakings or the like, express or implied with regard thereto. The cession of the rights and transfer of ownership will be effected by Sapor by delivering the relevant Sapor Rental Agreement and/or Contract and supporting documents to the

> Supplier, which delivery will constitute the said cession and transfer. The Supplier will have no claim of whatsoever nature against Sapor. Sapor will not be liable to effect delivery of the Equipment and/or Goods to the Supplier and the Supplier will be liable to pay all costs relating to such cession and transfer of ownership. The Supplier will have no defence and/or claim against Sapor if the goods are defective, broken beyond repair, do not exist or cannot be found.'

[11] The first special plea raised by the appellants was to the effect that Sapor had failed to prove, as it was required to do in terms of clause 7.2. after making the election as per the said clause, that: (1) it (Sapor) had required of Kitchenbrand to repurchase the Master Rental Agreement, and (2) it (Sapor) had simultaneously tendered return of ownership to Kitchenbrand of the equipment leased in terms of the MRA.

[12] As correctly found by the trial court, the uncontested and unchallenged evidence on this aspect was presented by Sapor's witness, Mr Corey Badenhorst ('Mr Badenhorst'). He testified that at a meeting, during December 2012, between him and a representative of Kitchenbrand, a Mr Lourens Groenewald ('Mr Groenewald'), he requested Kitchenbrand to buy back the MRA. The offer was, however, refused. The same request was made to Mr Kevin Kitchenbrand, at a subsequent meeting during February 2014. He also rejected Sapor's offer. Instead, Mr Kitchenbrand offered only to buy back the printers for R65 000.

[13] Mr Groenewald did not testify on behalf of the appellants. The testimony of Mr Badenhorst relating to their meeting, therefore, stands uncontested. The appellants contend that Mr Badenhorst's testimony is undermined by a subsequent letter of demand from Sapor's attorneys, in which demand is made for relief in terms of clause 7.2.2. They contend that nowhere in this letter of demand did Sapor tender ownership of the equipment to Kitchenbrand, hence Sapor's election failed to comply with the terms of the agreement. There is no merit in this contention as it flies in the face of the uncontested evidence of Mr Badenhorst, which, if it was seriously challenged by the appellants, could easily have been gainsaid by Mr Groenewald if he had been called as a witness.

[14] The second special plea is to the effect that Sapor had failed to allege and prove, as it was required to do in terms of clause 7.2, that it had given notice to

Kitchenbrand requiring it to repurchase the MRA, and to simultaneously give notice of tender to return ownership of the equipment. Put differently, the appellants' case is that Sapor was required to give notice to Kitchenbrand that it should repurchase the MRA. Since Sapor failed to allege and prove such notice, its claim was bad in law.

[15] For the same reasons given in relation to the first special plea, the second special plea was, in my view, correctly dismissed by the trial court. The point is that during the meetings between Sapor and Kitchenbrand during December 2013 and February 2014, the parties engaged with one another on the issue of repurchase, and even went as far as making and receiving offers. It cannot therefore be argued by the appellants that ownership of the equipment or the MRA for that matter, was not tendered. If the offer was made and accepted, payment would have been made against delivery of the MRA.

[16] The fact that these discussions took place, must mean, by implication, that notice had been given by Sapor as required by the particular clause.

[17] Returning to the main issue in this appeal, which is whether the factual finding of the trial court was correct. As already alluded to, the factual question for determination is whether Kitchenbrand breached the terms of the Supply Agreement by failing to install the two printers, as it was required to do.

[18] When a court is confronted with two mutually destructive versions, logic dictates that both cannot be true. If the evidence presented on behalf of Sapor, that the printers were not installed, is accepted, it follows as a matter of logic that the evidence led on behalf of the appellants, that the printers were in fact installed, must be rejected as false. The onus was on Sapor in the trial court, to prove on a balance of probabilities that its version is the correct one. This requires the court, upon a conspectus of the evidence as a whole and by balancing probabilities, to select a conclusion which seems to be the more natural or plausible (in the sense of acceptable, credible or suitable) conclusion, though that conclusion may not be the only reasonable one. If, however, the probabilities are evenly balanced, Sapor could only succeed if the court nevertheless believed it, and was satisfied that their evidence is true and that the version of the appellants

is false. See *Govan v Skidmore*[4]; *Ocean Accident and Guarantee Corporation Ltd v Koch*[5]; and *National Employers' General Insurance Co Ltd v Jagers*[6].

[19] In analysing and weighing the evidence tendered by the parties, it appears that the facts set out in the paragraphs which follow are either common cause or at least not seriously disputed.

[20] Sapor called two witnesses, the first being Mr Badenhorst, its sales director and shareholder, and the second being an expert, a Mr Kim Swift ('Mr Swift'), whose evidence related only to the quantum of the claim. Mr Swift gave evidence relating to the fair market value of the equipment which formed the subject of the Supply Agreement. For purposes of this appeal, the evidence of Mr Swift has little relevance.

[21] Two witnesses gave evidence on behalf of the appellants, namely Mr Botha ('Mr Botha') who, at the relevant time, was a senior technician employed by Kitchenbrand, and Mr Kitchenbrand himself, the managing director of Kitchenbrand.

[22] It is common cause that pursuant to the MRA, TCJ, in a separate delivery note, had confirmed the delivery in writing of all the printing machines. It is furthermore common cause that Kitchenbrand presented its tax invoice to Sapor, and therefore, if regard is had to a deeming provision in the Supply Agreement, the printers are deemed to have been delivered to and installed at the offices of TCJ. In that regard, clause 2 of the Supply Agreement reads as follows:

'2 Offer of Sale of Equipment;

2.1 All purchases of Equipment by Sapor from the supplier [Kitchenbrand] shall only be binding on Sapor on receipt by Sapor of a Sapor Rental Agreement, duly completed by the customer's authorised representative, and will be subject to the condition precedent that the Supplier deliver and install the equipment to the Customer for and on behalf of Sapor at the supplier's risk and the Customer having confirmed such delivery in a separate delivery note; and

---

[4] *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C – D

[5] *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159C – D

[6] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D – G

2.2 The conditions precedent, contained in 2.1, will have been deemed to be fulfilled on presentation by the supplier of its tax Invoice.'

[23] The MRA also contained a signed declaration by TCJ, in the form of a signed acceptance certificate, that all of the printers listed in the said agreement had been delivered and installed in accordance with the conditions of the agreement. Additionally, and as per the evidence of Mr Badenhorst, before the Supply Agreement was finally implemented, a final call would have been made to TCJ to confirm and ensure that the goods had indeed been installed and that TCJ was satisfied with the service rendered by Kitchenbrand.

[24] As already indicated, shortly after the conclusion and signing of the Supply Agreement, Kitchenbrand rendered to Sapor a tax invoice, which was duly paid by them. Thereafter, the cession of the MRA to Sapor kicked in and TCJ was required to effect payment of the amount of monthly rental to Sapor, which it duly did for the period from February 2012 to September 2013 (approximately nineteen months). Payment of the monthly rental was paid for this period by TCJ without demur until September 2013. Importantly, during this nineteen-month period, TCJ did not once complain or raise any concern with Sapor that the equipment had not been installed at their premises. However, the October 2013 payment was not forthcoming from TCJ, which was obviously of concern to Sapor, who immediately started investigating the reason for the default of payment by TCJ.

[25] During their investigation and with a view to establishing the reason for TCJ defaulting on its payments in terms of the MRA, Sapor convened a meeting with Kitchenbrand on 26 November 2013 at the offices of TCJ in Brakpan. The meeting was attended on behalf of Sapor by Mr Badenhorst and his attorney at the time, (Mr Neil McKinnon ('Mr McKinnon')). Mr Groenewald attended on behalf of Kitchenbrand. Photographs taken by Mr McKinnon, on the day, depicted the two printing machines still in boxes and not yet installed some nineteen months after they were supposed to have been installed. These uninstalled machines, according to the evidence of Mr Badenhorst, had been pointed out to them by Mr Groenewald, who himself was visibly surprised that the equipment, bizarrely, had not been installed. The owners of TCJ were not at the office on the day of the

meeting and obviously did not attend. Between Mr Badenhorst and Mr McKinnon, it was then resolved that they would discuss this issue with Kitchenbrand and, more particularly, Mr Kitchenbrand.

[26] It bears emphasising that the unequivocal evidence of Mr Badenhorst was that, when they visited the offices of TCJ on 26 November 2013, they found the two printers which are mentioned in the respondent's declaration, namely the *Kyocera* FS 1135MFP and the *Kyocera* FS-CS5150DN, still in boxes. This evidence was corroborated by the objective evidence of the photographs taken on the same day by Mr McKinnon in the presence of Mr Badenhorst. These photographs depicted the two printers still in their original boxes and they had clearly not been installed. This, as indicated earlier, came as a complete surprise to the Kitchenbrand's representative at the meeting, Mr Groenewald.

[27] A short follow-up meeting was held on 3 December 2013 between Mr Badenhorst, his attorney (Mr McKinnon) and Mr Groenewald. Mr Kitchenbrand did not attend this meeting. During this meeting possible solutions to the problem were proposed. Mr Badenhorst testified that the suggestion, at the meeting, was that Kitchenbrand should buy back its equipment in light of its breach of the Supply Agreement or place the machines at another customer. Mr Groenewald, who seemingly did not have the authority to make these type of decisions on behalf of Kitchenbrand, undertook to discuss the proposals with Mr Kitchenbrand, and revert to Mr Badenhorst.

[28] On 5 February 2014 the parties attended a further meeting at which Mr Kitchenbrand was present. Again, possible solutions to resolve the issues between Sapor and Kitchenbrand were discussed. In particular, it was proposed that Kitchenbrand buy back the MRA and the equipment. Mr Kitchenbrand was, however, only prepared to offer R65 000 to buy back the equipment. This offer was accordingly rejected by Sapor.

[29] Mr Botha testified on behalf of the appellants. His evidence was that he was employed as a senior technician by Kitchenbrand during 2012. He was responsible for the installation, repair, servicing and maintenance of equipment.

He further testified that he delivered and installed the relevant equipment, as stated in the delivery note, at the offices of the TCJ.

[30] Mr Kitchenbrand testified that he had been doing business with TCJ since 1999. With reference to clause 7 of the Supply Agreement, he claimed that he never received notice from Sapor requiring him to buy back the MRA. Nor did Sapor tender return of ownership of the goods to Kitchenbrand.

[31] The question is which one of these two versions is the correct one. The appellants contend that the trial court should have accepted Mr Botha's evidence that the machines had been installed by Kitchenbrand, as such evidence remained uncontested. Furthermore, they contend that this version is supported by documentary evidence, notably a written declaration and certification by CTJ, in the form of a document titled 'Contract and Installation Confirmation', which was duly signed, on behalf of TCJ, on 6 March 2012. This is the date on which the printers were ostensibly supplied to TCJ and installed at their offices. Additionally, the said firm, as part of the MRA, signed a certificate on 29 February 2012, in terms of which it irrevocably declared that:

'(a) The goods described in the schedule ("the goods") have been delivered and installed in accordance with all the conditions of the agreement.'

[32] The appellants contended that the same can be said of a document styled 'Equipment Schedule and Certificate of Acceptance', in which TCJ also expressly confirmed that all of the equipment listed in the MRA had in fact been installed. Furthermore, before the supply agreement was implemented, Sapor telephonically confirmed with TCJ that the installation of the equipment had in fact been done.

[33] The appellants contend that the cumulative effect of the documentary evidence, presented by Sapor no less, coupled with the direct evidence of Mr Botha, should have led the trial court to the conclusion that the machines had been installed by the time the Supply Agreement came into effect. Moreover, they submit that it is inherently improbable that TCJ would have paid the monthly instalments for a period in excess of eighteen months when the machines had not been installed. The flipside of the coin, so they argued, is that the version of

the Sapor is supported only by the photographic evidence of the boxes ostensibly containing the machines which were not installed. They contend that this evidence is, in any event, subject to doubt, as there was no evidence presented which confirmed that the machines, depicted in the photographs, were the ones identified (with the serial numbers) and listed in the MRA.

[34] Moreover, it was submitted on behalf of the appellants, that the trial court should have accepted that, on the probabilities, the reason why TCJ stopped paying their monthly rental had nothing to do with the fact that the two printers had not been installed by Kitchenbrand, but rather that the firm was experiencing financial difficulties. This is pure supposition as is evident from the testimony of Mr Badenhorst. He could not even confirm that TCJ was sequestrated, despite suggestions that they were. Accordingly, no reliance can be placed on this aspect of Mr Badenhorst's testimony.

[35] There is no clarity on the evidence why, if the machines had not been installed during February / March 2012, TCJ nevertheless declared in a number of documents, and on other occasions, that the equipment had been installed? Moreover, why did they pay, for a period in excess of eighteen months, monthly rentals and not complain once to Sapor that the equipment had not been installed?

[36] The point is that on the uncontradicted evidence of Mr Badenhorst, the printers were not installed. He saw this on his visit to TCJ's office on 26 November 2013, as did Mr Groenewald, the representative of Kitchenbrand. Furthermore, at no stage during subsequent meetings between Mr Badenhorst and the Mr Kitchenbrand, did he dispute that the machines had not been installed. In fact, during February 2014, Mr Kitchenbrand offered to buy back some of the equipment albeit for R65 000 only, but not the MRA. This begs the question: Why did Mr Kitchenbrand offer to buy back the machines if Kitchenbrand had complied with all of its obligations in terms of the Supply Agreement?

[37] As rightly found by the trial court, the person who, from the appellants' side, was in a position to put paid to the veracity of Sapor's version, if indeed it was untrue, would have been Mr Groenewald. The appellants, however, elected

not to call Mr Groenewald to testify. That, in my view, was the end of the appellants' case. In the absence of an explanation for why the appellants omitted to call Mr Groenewald to testify, I am compelled to infer that Mr Groenewald's evidence would have damaged their case.

[38] This is a primary aspect which, in my view, tilts the scales in favour of Sapor.

[39] In assessing the evidence before it, the trial court in its judgment must account for all of the evidence. In *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426E – H, citing with approval from *Moshephi and Others v R* (1980 – 1984) LAC 57 at 59F – H, Marais JA stated:

'The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[40] This was the approach adopted by the trial court. Having considered the evidence as a whole, the version of Sapor, notwithstanding doubts about certain aspects of its evidence, had to prevail. I agree with the trial court that, upon a conspectus of the evidence as a whole and by balancing the probabilities, the conclusion to be reached is that the version of Sapor is the more natural or plausible (in the sense of acceptable, credible or suitable) conclusion as compared to the version of the appellants.

[41] This is aptly illustrated by the unchallenged evidence-in-chief of Mr Badenhorst which I quote below:

'**Ms Bezuidenhout:** And where was the meeting held? --- At the end user's offices in Brakpan.

Right and who all attended? --- It was Louwrence and myself and Neil McKinnon.

Who is Neil McKinnon? --- Neil McKinnon is someone from the attorneys' firm that represents us – one of the attorney firms we used at the time.

And on arrival at the premises what did you find in relation to the equipment? --- Well, on arrival we met in reception. Then we were taken through to show us where or show me and Neil where the equipment was installed and the *TaskAlfa* 3500 was in one office still being used. Then they took us through to some other room which looked like they converted it into a store room and there was the *TaskAlfa* 181 copier standing there, unplugged. And then there were two copiers still in their boxes and, I think it was a copier and a printer, laser printer that were still in their boxes … [intervenes]

And ... --- And were not installed, ja.

Can you describe to the court in what state the boxes were? --- The one had not even been opened and the tape that goes across the top had not even been opened. The other one had been opened partially but you know you could clearly see that the equipment had not been installed. They had never been used.

And this was observed by who? --- Louwrence and Neil McKinnon, Lourens Groenewald and Neil McKinnon.

And yourself? --- And myself.

Was there a reaction to what you have found from these parties who were present with you? --- Well, I think Louwrence looked a little surprised that the equipment had not been installed. Neil too, you know, because, and myself you know we know that that should have never happened. The equipment should be installed in a ... [intervenes] … …'

[42] Having regard to this unchallenged evidence presented on behalf of Sapor, the trial court was correct in its finding that Kitchenbrand breached the Supply Agreement by failing to install the printers at the offices of TCJ.

[43] Even if we have doubts about the correctness of the factual findings by Mokose AJ, the appeal should still fail on the basis of the principles enunciated in *R v Dhlumayo & Another,* 1948 (2) SA 677 (A), in which Davis AJA at pg 706 stated:

'[8]. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

[9]. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

[10]. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

[11]. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

[12]. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all – embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.' (My emphasis).

[44] In *S v Francis*, 1991 (1) SACR 198 (A) at 204C – E, Smalberger JA reiterated the position set out in *Dhlumayo*, stating that in the 'absence of any misdirection the trial Court's conclusion', including in that case its acceptance of the evidence of an accomplice, 'is presumed to be correct'. In order to succeed in an appeal against factual findings, an appellant must convince an appeal court 'on adequate grounds that the trial court was wrong' when it accepted the evidence in issue: and 'a reasonable doubt will not suffice to justify interference with its findings'.

[45] I am not convinced that the trial court's factual finding was wrong. There is accordingly no basis for this Court to interfere with the finding of the trial court on appeal.

[46] For all of these reasons the appeal must fail.

[47] There is, however, one last aspect which requires my attention. This relates to the manner in which the court *a quo* formulated its order. In the trial court, Sapor proved the quantum of its contractual damages which arose as a result of the breach of contract by Kitchenbrand. Sapor's damages amounted in total to R335 932.94. It was therefore entitled to judgment against the appellants for payment of that sum.

[48] Instead of the trial court making an order in those terms, it made an order that 'the first and second defendants are 100% liable for the damages occasioned by the plaintiff, the one paying and the other to be absolved'. This order is not a model of clarity by any measure and raises more questions than answers, most notably the following: (1) What is the amount of the appellants' liability to Sapor? (2) Is this a final judgment? and (3) Is Sapor required to return to court if it needs a judgment sounding in money and on the basis of which a warrant of execution could be issued? Matters are further complicated by the fact that the trial court did not at any stage order a separation of the issues in terms of Uniform Rule of Court 33(4), which means that the order of the trial court ought to have dealt with all of the issues and the disputes between the parties.

[49] As was stated by the SCA (per Ponnan JA) in *Minister of Water and Environmental Affairs v Kloof Conservancy*[7], an order or decision of a court binds all those to whom it applies. All laws must be written in a clear and accessible manner. Impermissibly vague provisions violate the rule of law, which is a founding principle of our Constitution. Orders of court must comply with this standard.

[50] Also, as was said by Weiner AJA in *P M obo T M v Road Accident Fund*[8], at para 14:

'[14] Litigants seeking relief invoke the jurisdiction of a court, usually by way of an action or an application. The issues in any particular litigation will be determined by the pleadings or affidavits and may be expanded by the parties in the course of the proceedings. It is not for the court to vary the issues so defined. But, once the case has been placed before the court for adjudication, it is obliged to adjudicate upon the issues it raises by rendering a judgment, unless the parties specifically withdraw all or some of the issues from judicial consideration. This can be done by abandoning a claim or defence, or by withdrawing the action or application in its entirety, subject to certain limitations.'

---

[7] *Minister of Water and Environmental Affairs v Kloof Conservancy* (106/2015) [2015] ZASCA 177; [2016] 1 All SA 676 (SCA); [2016] 1 All SA 676 (SCA) para 14

[8] *P M obo T M v Road Accident Fund* (1175/2017) [2019] ZASCA 97; [2019] 3 All SA 409 (SCA); 2019 (5) SA 407 (SCA);

[51] For the reasons already indicated, I am of the view that the trial court in its judgment and order, failed to make an order, as it was obliged to, in respect of the quantum of damages which was squarely an issue before it. Moreover, the order which the trial court made is impermissibly vague. It, therefore, falls upon this Court to *mero motu* rectify the position, adjudicate the quantum of Sapor's claim, which the trial court was obliged to do, and to correct the order.

[52] A further justification for interfering with the order is that the order, as formulated by the trial court, cannot be enforced. In that regard, the Constitutional Court in *Eke v Parsons*[9] referred with approval to *Mansell v Mans*ell[10], in which it was held that:

'It is surely an elementary principle that every Court should refrain from making orders which cannot be enforced. If the plaintiff asks the Court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears … to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation.'

[47] On the basis of the principles enunciated in these authorities, I reiterate that the trial court was obliged to adjudicate the issue of the quantum of Sapor's claim. It failed to do so. This Court is therefore obliged to correct the situation by substituting the order of the trial court.

Costs of Appeal

[53] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*[11].

[54] I can think of no reason to deviate from the general rule. The appellants should therefore pay Sapor's costs of the appeal.

Order

[55] In the result, the following order is made: -

---

[9] *Eke v Parsons* (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC)

[10] *Mansell v Mans*ell 1953 (3) SA 716 (N)

[11] *Myers v Abramson*,1951(3) SA 438 (C) at 455

(1) Save to the extent set out in paragraph 2 below, the appeal is dismissed.

(2) The order of the trial court is substituted by the following order:

'[37] Judgment is granted in favour of the plaintiff against the first and second defendants jointly and severally, the one paying the other to be absolved, for: -

(a) Payment of the sum of R335 932.94;

(b) Payment of interest on R335 932.94 at the rate of 12% per annum from date of service of the summons to date of final payment; and

(c) Costs of suit.'

(3) The first and second appellants, jointly and severally, the one paying the other to be absolved, shall pay the respondent's costs of the appeal, including the costs of the applications for leave to appeal to the court *a quo* and to the Supreme Court of Appeal.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	22nd February 2021 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams* digital platform.
JUDGMENT DATE:	28 May 2021 – judgment handed down electronically
FOR THE FIRST AND SECOND APPELLANTS:	Advocate Steven Katzew
INSTRUCTED BY:	Carvalho Attorneys, Alberton
FOR THE RESPONDENT:	Advocate Francisca Bezuidenhout
INSTRUCTED BY:	Jay Mothobi Incorporated, Johannesburg