IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)

"REPORTABLE"

CASE NO.: 6919/2002

In the matter between:

SEMSRISH WHOLESALERS **Plaintiff**

and

DALMANS AUTO PARTS (PTY) LTD. **Defendant**

JUDGMENT DELIVERED ON 24 MARCH 2005

DLODLO, J

INTRODUCTION

1) In this matter the Plaintiff claims payment of the sum of One Hundred and Fifty Thousand Rand (R150 000.00) plus interest and costs from the Defendant, allegedly paid as a deposit in respect of the business sale agreement. Repayment of the aforesaid sum of money is resisted by the Defendant. The Defendant contends that the money was paid to it in terms of a subsequent oral agreement as a consideration of granting time required by Plaintiff to seek for a loan. In particular the Defendant maintains that R150 000.00 was paid to it on the basis that:

(i) If the linked Agreements fell through, the sum of R150 000.00 would be forfeited to the Defendant;

(ii) If the linked Agreements were successfully concluded, the sum of R150 000.00 would act as a credit towards the purchase of one or the other of the Agreements (business sale or Property sale) as to be determined by the Defendant.

Mr. Wragge appeared on behalf of the Plaintiff and Mr. Kawalsky appeared on behalf of the Defendant.

BACKGROUND

2) On or about 31 March 2002 the Plaintiff, represented by one Mr. Mansoor Parker, and the Defendant, represented by one Mr. Mohamed Osman, entered into a written Memorandum of Agreement pursuant to which the Defendant sold to the Plaintiff a motor spares business for a purchase price of R2, 75 million. This Agreement ("business sale agreement") was subject to the successful conclusion of a deed of sale between Dalmans CC ("Dalmans") and Rapidough Properties 71 CC ("Rapidough") of the land and building situated at the corner of 10th Avenue and Bravo Street, Mitchell's Plain ("the property"). On or about 31 March 2002 a deed of sale was entered into between Dalmans and Rapidough pursuant to which Dalmans sold to Rapidough the property for a purchase price of R3 million ("the property sale agreement").

3) On or about 17 April 2002 the Plaintiff and the Defendant entered into an oral agreement in terms of which the Plaintiff would pay to the Defendant the sum of R150 000.00 as a deposit in respect of the business sale agreement in order to show the Plaintiff's good faith in the purchase of the motor spares business. This amount was duly paid by the Plaintiff to the Defendant on 18 April 2002. On or about 24 June 2002 the Defendant cancelled the property sale agreement and, in the result, the business sale agreement also became of no force and effect.

4) The Plaintiff contends that it is entitled to the return of the deposit of R150 000-00. The Defendant, however, disputes that

the Plaintiff is in any way entitled to this repayment. Shortly before the trial the Defendant delivered its amended plea in which it responded to the allegations made in the Plaintiff's Amended Particulars of Claim. In this Amended Plea the Defendant raised three (3) alternative defences. I deem it necessary to set out these alternative defences. **The first alternative defence** is to the effect that Mr. Parker and Mr. Osman, acting in their respective capacities as representatives of the Plaintiff Rapidough on the one hand, and the Defendant and Dalmans, on the other hand, entered into an agreement. This agreement was entered into before the business sale and property sale agreements were signed, that is before 31 March 2002. In terms of this agreement:

- Rapidough and the Plaintiff would attempt to raise a loan of R2,5 million to pay for the property within 60 days of 31 March 2002.
- Dalmans was in the process of closing down its cash and carry business on the ground floor of the property because it intended to renovate it so that the Defendant could move the motor spares business from the first floor to the ground floor.
- Dalmans would hold over construction for sixty (60) days.
- In consideration for granting the 60 day period, the Plaintiff and/ or Rapidough would pay the Defendant and Dalmans an amount of R150 000-00.
- Should Rapidough and/or the Defendant fail to raise a bond of at least R2, 5 million within 60 days, the sum of R150 000-00 would be forfeited to the Defendant and to Dalmans.
- Should Rapidough or the Defendant raise the sum of R2, 5 million then the sum of R150 000-00 would be credited towards the purchase price of the business or the property. The Defendant, Dalmans CC, the Plaintiff and Rapidough omitted to

advise the Defendant's Attorney of the above agreement and the terms thereof were therefore omitted from the business sale and property sale agreements. The Defendant claims that the business sale and property sale agreements should be rectified so as to incorporate the terms set out in sub-paragraphs 3.3(a) to (d) of the Amended Plea.

In the second alternative defence the Defendant has pleaded that:

- Prior to signing the two (2) written agreements the Plaintiff, the Defendant and Rapidough (not Dalmans) entered into a separate independent oral agreement in terms of which the Plaintiff and Rapidough would pay the Defendant and Dalmans the sum of R150 000.00 in cash prior to signing the agreement or within thirty (30) days after entering into the agreement.
- The sum would be regarded as compensation to the Defendant or Dalmans for allowing the Plaintiff or Rapidough sixty (60) days to raise a loan of R2. 5 million to purchase the property.
- Should the required finance be raised, the Defendant or Dalmans may, in their discretion deduct this amount from the balances then outstanding by either the Plaintiff or Rapidough after payment of the initial amount paid in respect of the sale of the business and the property.
- Should the Plaintiff and Rapidough fail to raise the finance within sixty (60) days, then the sum of R150 000.00 would be forfeited as compensation or liquidated damages.

As the third alternative defence to the above defences, the Defendant averred that the oral agreement was concluded on or about 18 April 2002. The Defendant also avers that it is entitled to invoke clause 11 of the property sale agreement (the breach clause) because the business sale agreement should be rectified so as to include and incorporate clause 11 of the property sale agreement. In addition to the aforegoing the Defendant claims rectification of the addendum to the business sale agreement. In its Replication the Plaintiff denied that it had entered into any of the agreements relied upon by the Defendant.

5) The trial commenced on 13 October 2004. The Plaintiff adduced evidence of Mr. Mansoor Parker and closed its case. The Defendant adduced evidence of Mr. Mohamed Osman. After Mr. Osman had given his evidence in chief and had been cross-examined, the Defendant brought an application to further amend its Plea. The amendment application was not opposed and was granted. In the result, the Defendant delivered its Plea as further amended. In this further Amended Plea, the Defendant altered its defence substantially in that:

- Whereas in sub-paragraph 3.3 of its Plea the Defendant had alleged that Dalmans was in the process of closing down its cash and carry business on the ground floor of the property so as to enable the Defendant to move the entire motor spares business to the ground floor, it is now alleged that Dalmans was merely scaling down the cash and carry business and would only be moving part of the motor spares business to the ground floor. It is now alleged, in respect of all the terms pleaded and relied upon by the Defendant, such terms were "express and/or tacit and/or implied conditions."
- Whereas the Defendant originally alleged in sub-paragraph 3.3 (d) (i) that the sum of R150 000.00 would be forfeited if the Plaintiff failed to raise a loan of R2.5 million within the sixty (60) day period, it is now alleged that the deposit would be forfeited if the deal fell through for whatever reason as a consequence of a material breach on the part of the Plaintiff/Rapidough.

- Whereas it was originally alleged by the Defendant in sub-paragraph 3.3(d) (ii) that should the Plaintiff or Rapidough raise the amount of R2.5 million then the deposit would be credited towards the purchase price of the business of the property, it is now alleged that the deposit would only be credited if the deal was successfully concluded.
- Whereas it had been alleged in sub-paragraph 5.2.1 of the Plea that in terms of the separate independent oral agreement the Plaintiff and Rapidough would pay the Defendant and Dalmans the sum of R150 000.00 in cash prior to entering into the business and property sale agreements "prior to entering into the agreements or within thirty (30) days after entering into the agreements" it is now alleged that the sum of R150 000.00 would be paid "upon signing the agreements".

Paragraph 5.2.3 of the Plea was not further amended.

- Whereas in sub-paragraph 5.2.4 it had been alleged that in terms of the oral agreements, should the Plaintiff and Rapidough not succeed or fail to raise the finance, then the sum of R150 000.00 would be forfeited as compensation and/or liquidated damages for the delay caused to the Defendant and Dalmans, it is now alleged that the aforementioned amount would be forfeited as compensation and/or liquidated damages in the event, also, of the overall deals not being successfully concluded for whatever reason as a result of any material breach on the part of Plaintiff and/or Rapidough.

THE EVIDENCE

6) **Mr. Mansoor Parker** testified that he is the Manager of the Plaintiff. The Plaintiff conducts business of selling motor spares on wholesale as well as on retail level. The sole member of the

Plaintiff is Mr. Parker's father, Ismail Saaidien Parker. Mr. Parker's family uses Rapidough as a property owning company. The Plaintiff's business is situated next door to Dalmans Auto Parts in Bravo Street, Mitchell's Plain. The Defendant was operated by Mr. Mohamed Osman and it trades as a Midas franchise. At the time that the business and property sale agreements were entered into, Dalmans Auto Parts operated out of the first floor of the building and Dalmans cash and carry operated from the ground floor. During September 2001 Mr. Parker heard that Mr. Osman might be prepared to sell the Defendant business. The Plaintiff and Rapidough were keen to purchase the business and the building from which it operated. Mr. Parker and Mr. Osman met for a discussion. Mr. Osman's attorney, Mr. M.R. Khan, was present at most of the meetings. Negotiations continued over a couple of months. These culminated in the two (2) separate agreements being signed on 31 March 2002. Mr. Parker identified these agreements filed of record as Exhibit A1 and Exhibit A9 respectively. Mr. Parker signed both agreements on behalf of Rapidough and returned them to Mr. Osman. The latter signed the agreements on behalf of the Defendant.

7) Both the business sale agreement and the property sale agreement were prepared by the Defendant's attorney, Mr. M.R. Khan. At some time after the business sale and property sale agreements had been signed there was a meeting attended by Mr. Parker and Mr. Osman. At this meeting the payment of a deposit was discussed. Mr. Khan was not present at this meeting. Mr. Osman insisted that the Plaintiff give the Defendant a deposit to show how serious the Plaintiff was. It was agreed that if the sale took place, the deposit would form part of

the purchase price of the business. On 18 April 2002 Mr. Parker duly paid the deposit of R150 000.00. Mr. Osman gave him a receipt which provided as follows:

> "*I, Mohamed Farouk Osman, do hereby acknowledge that I have received from Mansoor Parker the sum of R150 000.00 (One Hundred and Fifty Thousand Rand only) being a deposit on sale of agreement entered into by both parties for the purchase of the motor spares."*

This receipt is Exhibit **A27** in this case. Mr. Parker then visited a number of banks in order to obtain the loan of R2.5 million referred to in clause 15.1 of the property sale agreement. The Albaraka Bank of Athlone indicated its preparedness to make a loan to the Plaintiff of an amount of R3 million for the purchase of the property subject to an independent valuation of R3 million. The bank confirmed this in a letter dated 17 May 2002 **(Exhibit A28)**. The bank caused the property to be valued. It was found that the valuation was less than R3 million. The bank accordingly agreed only to loan to the Plaintiff the sum of R2 million for the purchase of the property. This was confirmed in a letter by the bank to the Plaintiff **(Exhibit A29).**

8) Due to the fact that the Plaintiff and Rapidough could not raise a loan of R2.5 million, as was required in terms of clause 15 of the property sale agreement, the Plaintiff wrote to Dalmans advising that they had no alternative but to withdraw from the property sale agreement.

The letter went on to state *"kindly make the necessary arrangements for a refund of the deposit at your earliest convenience."*

The parties thereafter met in order to see if the transaction could be saved. Mr. Khan attended this meeting. The parties agreed to an amendment of the property sale agreement. On 31 May 2002 the parties entered into a handwritten addendum to the property sale agreement. The handwritten agreement was drafted by the Defendant's attorney, Mr. M.R. Khan **(Exhibit A17-21)**. This addendum, with some alterations, was typed up by Mr. Khan and once again signed by the parties on 5 June 2002 **(Exhibit A22-26)**. After the addendum to the property sale agreement had been signed, Mr. Parker heard that Mr. Osman was moving stock. He confronted Mr. Osman who denied this. The business sale agreement did not specify what fixtures and fittings and stock was part of the business sale. Mr. Osman started by saying that some of the fixtures belonged to the cash and carry store but agreed to give an inventory. Mr. Osman showed Mr. Parker an inventory but did not give him a copy thereof.

9) Mr. Osman also indicated that he wished to remove the telephone system and telephone numbers to his other branch. This was not part of the agreement and Mr. Parker found this to be unacceptable. Mr. Osman also advised that he was going to reduce the capacity of the computer and take some of the hardware and software. Mr. Parker also found this unacceptable. At this stage Mr. Parker sought and obtained legal advice from his attorney. The latter advised Mr. Parker that the business sale agreement was risky. After consultation Mr. Parker and the Plaintiff decided not to go ahead with the agreement which was then cancelled on 24 June 2002. Mr. Parker's father never dealt directly with Mr. Osman. Mr. Parker would negotiate with Mr. Osman and then keep his father informed. The Plaintiff had no interest in buying the property without the motor spares business. They had no intention of purchasing the property as an investment. Although Mr. Osman did discuss the renovation of the downstairs section of the property, he never indicated to Mr. Parker that he was concerned that renovations would be delayed by the sixty (60) day period within which the Plaintiff was to obtain a loan for the purchase of the property. Mr. Osman did not advise Mr. Parker that, as a result of the delay for sixty (60) days, the Defendant's building plans might expire. During the

initial discussions the Plaintiff offered to purchase the business for cash. The funds were available and they could have paid a deposit and could have paid the balance off in installments without the intervention of a financial institution or the registration of a bond. Mr. Parker was given the opportunity to comment on the version of the Defendant. He disputed the version of the Defendant totally.

10) **Mr. Mohamed Farouk Osman** testified that he was a director of the Defendant and a member of Dalmans. During 2001 the Defendant/Dalmans decided to have renovations done to the property so as to relocate the entrance of the motor spares business on the ground floor of the building. Plans were drawn up which were valid for one year, expiring in June 2002. Mr. Osman and Mr. Parker started discussions during September 2001 regarding the sale of the business and the property. Mr. Osman wanted a total of R6.5 million for the overall deal but eventually settled on a total package of R5.75 million. Of this amount, R2 million was to have been paid in cash and the remainder was to have been paid by way of a loan secured by a mortgage bond. It was agreed that the balance of the purchase price of the motor spares business would be paid off in instalments. In the beginning the Plaintiff offered large sums of cash which the Plaintiff did not want reflected in the sale agreement. Mr. Osman was not in favour of this and told Mr. Parker that all of the sale details should be reflected in an agreement. Mr. Osman required an amount of R3 million clear to settle his bond and to pay his creditors. He approached Mr. Khan in March 2002. Mr. Khan drew up the contracts and brought them to Mr. Osman's offices. Mr. Osman read through the contracts and was satisfied with them. The negotiations were

concluded during the early part of March. It was agreed that Mr. Parker needed two (2) months in order to raise a bond from a bank. Mr. Osman was concerned about the renovations being in limbo for two (2) months. His concern was what would happen if the Plaintiff did not take up the offer. Mr. Osman was keen to do the deal and it was agreed that if Mr. Parker wanted sixty (60) days in order to raise a loan he was prepared to give him this period provided that Mr. Parker paid the sum of R200 000.00 to compensate Mr. Osman if the deal did not go through. If the deal did not go through then there would be a joint decision on whether to deduct the deposit from the purchase price of the business or the property. Mr. Parker made a counter proposal of R150 000.00 which Mr. Osman accepted on the basis that if the deal did not go through, this amount would be forfeited to Mr. Osman. Mr. Parker gave Mr. Osman the sum of R150 000.00 but specified that he did not want the payment to be reflected in an agreement. He did not say why. Mr. Osman went along with this. It was agreed that the sum of R150 000.00 would be paid on signature of the agreement. When the agreements were signed, Mr. Khan called to collect them. Mr. Osman did not advise Mr. Khan about the payment of the deposit because Mr. Parker did not want any mention of the deposit in the agreement.

11) The sum of R150 000.00 was a payment simply for the extension of time to arrange bond finance. Mr. Osman did not regard this as a deposit on the purchase price. If the deal went through, however, he would give Mr. Parker a credit. If the deal did not go through, then the amount would be forfeited. When Mr. Parker did not pay the deposit on 31 March 2002 he tried to phone him but was unsuccessful in making contact with Mr. Parker. Mr.

Osman then contacted Mr. Khan and told him about the deposit. He asked Mr. Khan to contact Mr. Parker to remind him about the deal. Mr. Khan was upset when Mr. Osman told him about the payment of the deposit because Mr. Osman had not advised him of this prior to signing the agreement but he agreed that he would contact Mr. Parker. On 18 April 2002 Mr. Parker and his brother came and paid the money to Mr. Osman. Mr. Osman gave a receipt for the money. In drawing up the document Mr. Osman intended to represent both the Defendant and Dalmans. Mr. Osman did not regard the sum of R150 000.00 as being a deposit. Towards the end of May 2002, because Mr. Parker experienced problems in raising a bond, Mr. Osman was prepared to accommodate him and agreed to take a lesser figure in cash. An addendum to the property sale agreement was drawn up and signed on 31 May 2002. The price of the property was increased because Mr. Osman was now giving Mr. Parker extended terms. Mr. Osman testified that there was no truth in the allegation that the Defendant was depleting the stock of the Bravo Street premises. The business was still being carried on as a running business and the stock interchange continued. He maintained that he gave Mr. Parker a copy of the inventory.

12) According to Mr. Osman during his negotiations with Mr. Parker, the sale of the business and the property were considered as one deal. However, Mr. Parker wanted the deal split into two (2) parts. With regard to the difference between the breach clauses in the business sale and the property sale agreements, Mr. Osman testified that he read through the agreement and was satisfied with them in general terms. As far as the business sale agreement was concerned, in Mr. Osman's view, if there was a default on any part of the deal on the part of the Plaintiff, the

deposit would have been forfeited. Mr. Osman received Mr. Parker's letter calling for refund of the R150 000.00. He regarded this merely as a chance being taken by Mr. Parker. He contacted his attorney and emphasized the importance of saving the deal. There was a meeting attended by Mr. Osman himself, Mr. Parker and Mr. Khan. At this meeting the deposit was not in issue. The handwritten addendum of 31 May 2002 was drawn up. At this stage the deal was still alive and the deposit would not have been forfeited. The addendum did not reflect R150 000.00 as a credit. This is because at that point in time Mr. Parker had only fulfilled one part of the agreement, i.e. to get a bond. In Mr. Osman's view, even if Mr. Parker had got a bond and for some reason the deal had been cancelled, the sum of R150 000.00 would be forfeited.

13) In cross-examination it emerged that Mr. Osman is the owner of a number of businesses and knows what a breach clause is. When he signed both agreements he signed them in the full knowledge of what the clauses in the agreement were and what they meant. The negotiations between Mr. Parker and Mr. Osman leading to the sale of the business and the property took a period of at least six (6) months. Mr. Osman insisted that the payment of R150 000.00 was not a deposit. The decision not to refer to the agreement relating to the R150 000.00 in the two (2) agreements was not a mistake or an error by the parties. It was intentional. Both Mr. Osman and Mr. Parker intended the provisions not to be included in the business sale and property sale agreements. Mr. Osman did not initially raise the question of the payment of the R150 000.00 with his attorney, Mr. Khan. When he however did raise it, Mr. Khan was upset because he felt that the agreement should have been disclosed to him and incorporated in the written agreement. Mr. Osman agreed that that was the best thing to have done.

14) The addendum was signed on 31 May 2002, after Mr. Khan had been advised of the sum of R150 000.00. This notwithstanding, there is no reference to the payment in the addendum. Mr. Osman furnished no explanation for this omission. Mr. Osman

confirmed that, when the Plaintiff was unable to raise a loan in an amount of R2.5 million, the effect of this was that the sum of R150 000.00 was in fact forfeited to the Defendant. This was, however, inconsistent with the attitude adopted by Mr. Parker in Exhibit A30 and the attitude adopted by the Defendant's attorney in its letter of cancellation (Exhibit A41) which made no mention of the forfeiture. Mr. Osman testified that when the business sale and the property sale agreements were cancelled, new plans for the renovation of the property were drawn up. The new plans were drawn up around August and September and renovations were effected shortly thereafter. The Defendant was able to carry on business in the renovated premises during January 2003. At this stage, during cross-examination, Mr. Kawalsky on behalf of the Defendant, brought an application further to amend the Defendant's Plea.

15) **Mr. M.R. Khan** testified that he was at all material times the attorney of record for the Defendant. He drew up the business sale agreement as well as the property sale agreement and the addendum thereto. He first heard about the R150 000.00 on 13 April 2002. On that date he received a phone call from Mr. Osman who advised him that he had a separate arrangement with Mr. Parker. Mr. Osman advised him that some time in March 2002 he and Mr. Parker had agreed that the Plaintiff pay an amount of R150 000.00 in cash. If Mr. Parker did not raise a loan within sixty (60) days or if the deal lapsed, the sum of R150 000.00 would be forfeited. Mr. Khan advised Mr. Osman that this was an awkward situation. Mr. Osman advised him that Mr. Parker had wanted the payment of the deposit kept quiet. Mr. Khan advised Mr. Osman that the oral agreement was a precarious agreement but that if he agreed to pay, Mr. Osman

would be protected by the breach clause. Mr. Khan was asked by Mr. Osman to contact Mr. Parker for the discussion of the payment. On the next day Mr. Khan asked Mr. Parker to come to his office. Mr. Parker went to his office. During this meeting, Mr. Khan reminded Mr. Parker of his agreement with Mr. Osman and Mr. Parker advised him that he would pay the sum of R150 000.00 in cash. Mr. Khan subsequently gathered telephonically that the amount has been paid. Mr. Khan only saw Mr. Parker at his home on one occasion on 15 or 16 April 2002 when the payment of the R150 000.00 was discussed.

16) On 30 or 31st May 2002, Mr. Osman contacted Mr. Khan and advised him that he had received a letter from Mr. Parker advising that he was unable to raise a loan of R2.5 million and wanted the R150 000.00 back. Mr. Osman wanted to discuss the matter and to see whether there was a way of salvaging the deal as he was ready to retire. There was a meeting attended by all three (3), Mr. Osman, Mr. Parker and Attorney Khan. The discussions eventually resulted in the addendum to the property sale agreement. As a result of this agreement, Mr. Osman agreed to give Mr. Parker terms for an additional amount of R1 million which was to be paid off. In consideration for this, the purchase price was increased. The amendment was agreed to at Mr. Osman's premises. Both sides were happy. Mr. Parker wanted to obtain possession of the property by 30 June 2002. He asked Mr. Osman to close down the cash and carry business so that he could obtain occupation.

Subsequently, Mr. Parker complained about the computer and rotation of stock. Mr. Khan sent two (2) letters on 11 June 2002 calling upon the Plaintiff and Rapidough to remedy their breach.

These letters were ignored. Due to error and haste Mr. Khan inadvertently omitted to insert the entire breach clause as it appears in the property sale agreement. Under cross-examination Mr. Khan testified that when Mr. Osman contacted him during April and advised him of the oral agreement relating to the sum of R150 000.00, Mr. Khan advised him that he would be protected by the breach clauses in the business sale and did not check the clauses to make sure that this was right. The reference to "liquidated damages" in the two (2) letters of cancellation sent to the Plaintiff and to Rapidough **(Exhibit A41 and A42)** is a reference to the deposit of R150 000.00. Although there was never any suggestion that the oral agreement upon which the Defendant relies is an agreement which related to liquidated damages, this was the terminology which Mr. Khan used. Mr. Khan confirmed that Mr. Osman is both a client and a friend to him. Mr. Khan was the author of the addendum which was drafted on 31 May 2002.

APPLICABLE LAW

17) The law applicable in the dispute evident from this matter was ably set out by Corbett JA in **Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd** 1979 (3) SA 754 (A) at 762 thus:

> "**Ordinarily, the general rule is that a plaintiff who sues on a contract must prove his contract, even though this may involve proving a negative, viz that an additional term alleged by the defendant was not agreed to by the parties."**

See also: ***Kriegler v Minitzer and Another (Edms) Bpk*** 1976 (3) SA 470 (A) at 472-4.

The well known writer on contracts R H Christie (***The Law of Contract***

in South Africa 4th edition) states the law as follows in this regard: "……***..but it must be noted that the popular notion that nobody can be required to prove a negative is not always correct. It is more correct to say that he who asserts must prove, if that phrase is understood in its proper sense as meaning that he who claims relief must assert and prove the facts on which his claim is based. Hence if the defendant, instead of merely denying the Plaintiff's version of a contract, pleads an additional term of a defence, the onus will remain on the Plaintiff to prove his version of the contract in order to succeed in his claim, and will involve proving a negative, that the term alleged by the defendant was not in the contract."*** See **also Dave Birrell** 1936 TPD 192 ***De Wet v Habig Bros.*** 1912 OPD 67

18) In ***Nel v Nelspruit Motors (Edms) Bpk*** 1961 (1) SA 582 (A) 584B the Appellate Division reaffirming its approval in the earlier decision and in ***Topaz Kitchens (Pty) Ltd. v Naboom Spar (Edms) Bpk.*** 1976(3) SA 470 (A) 472-474 rejected the contention put forward by ***Hoffman(The South African Law of Evidence)*** 2nd edition held as follows:

> "**There is, in my opinion, no justification for the proposition that in cases such as the present case, where the plaintiff seeks to enforce a contract and the onus is on him to prove the terms thereof, which would involve his proving a negative, that burden is alleviated by a duty imposed on the defendant to begin and to adduce some evidence in support of his averment that the additional term relied on by him was agreed upon."**

ASSESSMENT OF EVIDENCE AND APPLICATION OF LAW TO FACTS

19) The Plaintiff relies for its claim against the Defendant upon an oral

contract entered into between the parties on or about 17 April 2002. The Defendant has, however, pleaded as part of its defence that the business sale and property sale agreements, and the addendum to the property sale agreement, fall to be rectified. More particularly the Defendant alleges the following:

a) That the business sale and property sale agreements fall to be rectified by reason of the fact that before the agreements were concluded, an oral agreement in the terms set out in paragraph 3.3 of the Plea as further amended was entered into.
b) The business sale agreement (Exhibit A1) should be rectified so as to incorporate the breach clause appearing in the property sale agreement (Exhibit A12).
c) The addendum to the property sale agreement should be rectified by the inclusion of the terms appearing in paragraph 10.3 of the Plea as further amended.

20) It is settled law that not only does the onus of proving that a rectification should be ordered rest upon the party seeking the rectification but it is recognized that this onus is not easily discharged (See: ***RH Christie*** op. cit., p.383-384).
See also ***Benjamin v Gurewitz*** 1973(1) SA 418(A);
Lazarus Gorfinkel 1988(4) SA 123(C) at 131.
The law makes provision that the following facts must be alleged and proved if a claim for rectification is to be properly made:

a) An agreement between the parties which was reduced to writing;
b) That the written document does not reflect the common intention of the parties correctly; See ***Meyer v Merchants Trust Ltd.*** 1942 AD 244; ***Kathmer Investments (Pty) Ltd v Woolworths***

(Pty) Ltd. 1970(2) SA 498(A) at 503.

c) A mistake in drafting the document. See ***Von Ziegler v Superior Furnitures (Pty) Ltd.*** 1962(3) SA 399 (T) at 411.

It was the evidence of Mr. Osman that he and Mr. Parker intentionally did not include reference to the oral agreement relating to the payment of the deposit in the business sale and property sale agreement. Mr. Osman suggested that the mistake was in not advising Mr. Khan, the Defendant's attorney, that the agreement had been concluded. Failure to tell your own lawyer is certainly not the type of mistake which gives rise to a claim for rectification. Mr. Parker denied that the agreement alleged by the Defendant had been entered into. He further denied that he had ever requested that the oral agreement not be incorporated in the written agreements. It was not put to Mr. Parker that it had been the Plaintiff's intention to include the breach clause, clause 11 of the property sale agreement, also in the business sale agreement. Even if I accept that the whole clause was not included in the business sale agreement as a result of a mistake by attorney Khan (Defendant's attorney), there is no evidence to suggest the mistake was common to both the Plaintiff and the Defendant. I find therefore that the Defendant's claims that the agreements fall to be rectified in a manner alleged cannot succeed.

The reason is clear and it is simply because no evidence was adduced to demonstrate that the alleged omissions from the agreements were as a result of a common mistake or a mistake in drafting the document.

21) Mr. Kawalsky apparently realized that rectification was not a proper path to follow. I say so because in his submissions he

asked me to apply *Arrha confirmatoria* the determination of the dispute between the parties. *Arrha confirmatoria* is something handed over by a party after conclusion of a contract as an indication of the seriousness of his or her intention to fulfill his/her contractual duties. The difficulty is that the Defendant never pleaded *Arrha confirmatoria* in its various amended Pleas. It is brought forth for the first time when Mr. Kawalsky made his submissions. In any event, in ***Wolpe v Hyde and Others*** 2000 (4) All SA 636 (W) Wunsh J held that *Arrha* is hardly dealt with in current South African textbooks because some of its forms are obsolete. In ***Baines Motors v Piek*** 1955(1) SA 534 (A) Van den Heever JA held that *Arrha* comprehended what he called a *"relique"*. In his own words he said the following of *Arrha:*

> "**In Roman law Arrha had importance since it became exigible as a pactum adjectum if agreed upon simultaneously with a principal obligation; otherwise it merely founded a ground of defence but was not actionable per se. Since in our law all agreements have become consensual, Arrha, in the sense of earnest money, has become a fossil important only to the manufacturers and sellers of engagement and wedding rings. On the other hand *Arrha poenalis* is a conventional penalty like any other."**

22) The only question which remains is whether the Plaintiff has proved the terms of the oral agreement upon which it relies, or whether the agreement was in fact as alleged by the Defendant. In my view Mr. Parker's evidence is wholly consistent with the documentary evidence which has been produced:

There is no reference to the complex oral agreement upon which the Defendant seeks to rely in any documentation outside of the pleadings.

The payment is described as a “deposit” in the receipt which Mr. Osman made out and gave to Mr. Parker on 18 April 2002 (Exhibit A27). Mr. Osman testified that he knows what the word “deposit” means, but he contends that the payment made to himself was not a “deposit”. I hold the view that Mr. Osman would not have used the word “deposit” if the payment was in fact a compensation payment as he now alleges.

23) The evidence of Mr. Khan was that he became aware of the oral agreement relating to the deposit on 13 April 2002. He testified that he was aware of the risk of not having recorded this agreement in writing. Yet, on 31 May 2002, when the addendum to the property sale agreement was drafted, again no reference to the complicated agreement relied upon by the Defendant was made. There is no acceptable explanation for this omission that has been offered by the Defendant. On 29 May 2002 Mr. Parker wrote to Mr. Osman advising that the Plaintiff had been unable to arrange finance for the purchase of the property. In that letter Mr. Parkers stated:

“kindly make the necessary arrangements for a refund of the deposit at your earliest convenience.”

24) Mr. Osman testified that this letter was handed to his attorney, Mr. Khan for discussion. It is inconceivable that, if Mr. Parker’s request that the deposit be refunded was contrary to the agreement which had been entered into by the Plaintiff and the Defendant, neither Mr. Osman nor Mr. Khan would have corrected Mr. Parker’s misapprehension. They had ample opportunity to do this at the time that the addendum to the

property sale agreement was signed on 31 May 2002 (Exhibit A17). On 24 June 2002 the Defendant's attorney, Mr. Khan, addressed letters to both the Plaintiff and Rapidough canceling the business sale and property sale agreements. Both letters state:

"*Kindly note that all monies paid to date will be retained by our client towards liquidated damages and our client reserves its right to claim further damages for breach of contract."* If there had been an oral agreement pursuant to which the sum of R150 000.00 paid by the Plaintiff to the Defendant was forfeited when the "deal fell through" then Mr. Khan would have referred to this agreement in his cancellation letters. Mr. Khan has sought to explain that this was merely his terminology and understanding of the matter. I cannot accept this explanation. Had there been an oral agreement in terms alleged by the Defendant in its Plea as further amended it would have been easy to raise this agreement in the cancellation letters.

25) On the other hand, the evidence of Mr. Osman was unsatisfactory in a number of material respects. In his evidence Mr. Osman sought to create an aura of urgency in relation to the renovations which were to be effected to the property. It was necessary for him to create an atmosphere of urgency so as to provide a basis for his requirement that he be "compensated" for the two (2) month period during which he was obliged to hold over his renovations whilst Mr. Parker took steps to raise a loan to purchase the property. There was no such urgency. We know that the plans for the renovations had in fact been approved during June 2001 and no steps had been taken to effect the renovations prior to the commencement of the negotiations between Mr. Parker and Mr. Osman during September 2001. We

also know that the negotiations between Mr. Osman and Mr. Parker lasted for a period of six or seven months, commencing in September 2001 and reaching a conclusion when the business sale and property sale agreements were signed on 31 March 2002.

26) Mr. Osman's concern that the plans would "lapse" during June 2002 was clearly without substance. He appears to have had no difficulty in having a further set of plans approved during September 2002 and the renovations to the property effected by the end of 2002. Therefore, there was no urgency relating to the renovations. Mr. Osman was cross-examined closely about the terms of the agreement which the Defendant alleged that the parties had entered into, as set out in sub-paragraph 3.3 of the Amended Plea. Mr. Osman confirmed that he had read the Amended Plea and having read the Amended Plea once again in the witness box, that the terms as set out in sub-paragraph 3.3 of the Amended Plea were indeed the terms of the agreement. When it became evident to Mr. Osman that the terms alleged in sub-paragraph 3.3 of the Amended Plea created a difficulty for the Defendant (this is because in terms of the alleged agreement the amount of R150 000.00 would have been forfeited to the Defendant at the latest, on 29 March 2002 when the bond of at least R2.5 million was not raised by the Plaintiff) the Defendant found it necessary to alter its Plea. Mr. Osman also altered his evidence so as to allege that the terms of the oral agreement were in fact different to those alleged in sub-paragraph 3.3 of the Amended Plea. It is for this reason, whilst Mr. Osman was under cross-examination, that the Defendant brought an application to further amend its Plea. Notwithstanding the fact that Mr. Osman had made it clear in the evidence which he gave before the

amendment was effected, that he had read the Amended Plea and that he was satisfied that the terms of the agreement were correctly set out therein, he stated on oath in his Affidavit filed in support of the amended application, that he had not read the Plea properly and that he now saw that the Plea did not "place on record the fully accurate details of the true issues between the parties of this oral agreement".

27) Having regard to the material inconsistencies in the evidence given by Mr. Osman, particularly during his cross-examination which preceded the further amendment of the Plea, and the statements made in his affidavit referred to above, as well as the evidence thereafter, there is serious doubt as to Mr. Osman's credibility and that his evidence should therefore be treated with caution. Mr. Osman's explanation of the receipt (Annexure A27) is simply not acceptable. Mr. Osman testified that he knows full well what the meaning of the word "deposit" is. He would not have used this word on the receipt if the agreement between the parties had in fact not been that the payment of R150 000.00 by the Plaintiff to the Defendant was a deposit in the generally understood sense of the word. It is clear from the receipt that the deposit was paid "for the purchase of the motor spares" i.e. the deposit related to the purchase price payable in terms of the business sale agreement and not the property sale agreement. This is inconsistent with the allegations made in the Defendant's Plea as further amended to the effect that in terms of the agreement the sum of R150 000.00 was payable by the Plaintiff and Rapidough to the Defendant and Dalmans. In any event, it is unlikely that the Plaintiff would have agreed that, in the event of the required finance being raised, it would be the Defendant and Dalmans who would have the sole discretion to deduct the sum

of R150 000.00 from the balance then being outstanding for either the Plaintiff or Rapidough as is alleged in sub-paragraph 5.2.3 of the Plea as Further Amended. Having regard to the aforegoing, I hold that the evidence of Mr. Osman should be treated with suspicion and that the evidence of Mr. Parker, as regards the true agreement between the parties, is to be preferred. Mr. Khan's evidence stands to be treated with circumspection. Had Mr. Khan been told on 13 April 2002 that an oral agreement in the terms alleged by the Defendant had been concluded, and had he been upset, as he testified, it is inconceivable that Mr. Khan would not have made reference to the oral agreement in the addendum to the property sale agreement which he drew up and which was signed on 31 May 2002. It is all the more inconceivable that Mr. Khan would not have made reference to the oral agreement alleged by the Defendant in the addendum, if such an agreement had been entered into, in the light of the statement made by Mr. Parker in his letter of 29 March 2002.

28) It is also inconceivable that Mr. Khan would not have referred to the oral agreement alleged by the Defendant in the cancellation letters which he sent to the Plaintiff and to Rapidough on 24 June 2002. In these letters Mr. Khan described the monies retained by his client as constituting "liquidated damages". Had there in fact been an agreement pursuant to which the sum of R150 000.00 would have been forfeited to the Defendant and Dalmans in the event of the agreements being cancelled as a result of the Plaintiff's breach of contract, then, Mr. Khan would have said so and referred to this agreement. Mr. Khan also testified that, according to his instructions, the sum of R150 000.00 was paid to Dalmans and not the Defendant. This is contrary to what is

stated in the Plea. It is also contrary to what is noted on the receipt. It is further inexplicable, in the light of this evidence, why Mr. Khan made mention of any amounts being retained "as liquidated damages" in the letter of cancellation addressed to the Plaintiff.

I find that the existence of the oral agreement alleged in the Plaintiff's amended Particulars of Claim is amply borne out by the evidence of Mr. Parker and the documentation produced by both parties. The evidence adduced by the Defendant is contradictory in a number of material respects and is also inconsistent with the documentary evidence and therefore I reject it.

COSTS

29) The general rule stands, namely that a successful party is entitled to its costs. There is no justification in the instant matter to depart therefrom.

ORDER

30) In the circumstances I make the following order:

a) Judgment is granted in favour of the Plaintiff in an amount of One Hundred and Fifty Thousand Rands (R150 000.00).
b) The Defendant is ordered to pay interest on the aforesaid amount at the rate of 15.5% per annum with effect from 13 September 2002 to date of payment.
c) The Defendant shall pay the Plaintiff's costs of suit.

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DLODLO, J