



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No 4443/2006

In the matter between:

**RITCHIE INDUSTRIES CC**

**Plaintiff**

and

**NRG GESTETNER SOUTH AFRICA  
(PTY) LTD**

**First Defendant**

**GBS MUTUAL BANK**

**Second Defendant**

**Court:** CLOETE, AJ

**Heard:** 23, 24, 28, 29, 30 March and 23 May 2011

**Delivered:** 13 June 2011

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**JUDGMENT**

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**CLOETE AJ:**

**INTRODUCTION**

[1] The plaintiff close corporation seeks damages for breach of contract against the first defendant. No relief is sought against the second defendant. The first defendant has filed a counterclaim against the plaintiff (but indicated during argument that it may withdraw such counterclaim). Prior to the hearing the parties agreed to separate the merits of the plaintiff's claim and the quantum (inclusive of the first defendant's counterclaim) and the trial thus proceeded on the merits of the plaintiff's claim only.

[2] The plaintiff's cause of action was initially based on an implied breach of a warranty against latent defects, alternatively negligent misrepresentation. During argument and after the conclusion of evidence the plaintiff abandoned its cause of action in respect of an implied breach of a warranty against latent defects. Accordingly the only issue for decision at this stage is whether the plaintiff has established negligent misrepresentation on the part of the first defendant.

## **BACKGROUND**

[3] The plaintiff close corporation conducts business as printers and manufacturers of promotional products and novelties, including mouse pads, coasters and similar desktop laminated products. The first defendant conducts business as the seller and distributor of photocopying and printing machinery. For sake of convenience the parties will be referred to as plaintiff and defendant unless otherwise indicated.

[4] On 2 October 2002 a meeting took place at the plaintiff's premises at which the plaintiff was represented by Mr Ritchie Buttle ("*Buttle*") and the defendant was represented by one of its sale consultants Mr Phillip Theunissen ("*Theunissen*") and its corporate sales manager Mr Wolfgang Steincke ("*Steincke*"). There is a dispute as to which of the parties approached the other but nothing turns on this. The purpose of the meeting was for Theunissen and Steincke to interest Buttle in a new Gestetner product on the market, the DSC 38, which was a full colour laser printing



system. At the time the plaintiff used a Canon CLC 900 copier and printer (*"the Canon"*) to print and manufacture its promotional products, and had used it successfully for a period of approximately four years. The Canon (which was digitally networked to a graphics computer) was used to produce colour laser copies of pre-approved designs on A3 paper. Buttle was interested in acquiring the DSC 38 if its capabilities at least matched those of the Canon since the plaintiff's contract with the supplier of the Canon was coming to an end. However he did not wish to place financial strain on the plaintiff and made it clear to Theunissen and Steincke that they would have to find a way to relieve him of the Canon in order to enable him to acquire the DSC 38. Buttle testified that he took Theunissen and Steincke on a *"factory tour"* and demonstrated the plaintiff's manufacturing process to them. He explained what his requirements were. He was assured that the DSC 38 would not only be able to meet the plaintiff's requirements especially in respect of the production of colour consistent A3 copies, but that it also had greater functionality than did the Canon. He was also assured that the operating costs of the DSC 38 would be less than those of the Canon.

[5] Thereafter (but on the same day) Theunissen and Steincke furnished Buttle with a written proposal. This proposal reflects that the print volume specification of the DSC 38 was *"50 000 prints per month or 3 million prints over 5 years (60 months)"*, that it could produce 28 pages per minute in digital full colour laser and 38 pages per minute in mono (i.e. black and white). The proposal also contained the following:

'□A4/A3 & A3□ (Full A3 Bleed)  
2 x 500 sheet cassettes  
100 Sheet Bypass Tray'

[6] The proposal referred to a *"maintenance agreement"* and directed Buttle's attention to the following:

### MAINTENANCE AGREEMENT

Maintenance will be charged ☐ R1-30 per full colour laser print – (irrespective of toner coverage up to 100% per page)

Maintenance will be charged ☐ 20 cents per Black & White print – (irrespective of toner coverage up to 100% per page)

Maintenance agreement includes:

Colour and Black toners

Drum warranty

Labour

All spare parts

Travelling time

**Full maintenance'**

[7] Buttle does not recall having received a brochure for the DSC 38 nor does it seem that the defendant provided any specific operating instructions or documentation as to the machine's specifications or operating requirements. During the trial the defendant did not produce any such evidence either.

[8] The plaintiff accepted the defendant's proposal. Buttle testified that the plaintiff's printing requirements averaged approximately 6 500 A3 prints per month and accordingly 50 000 colour prints per month would be more than sufficient to meet these requirements. The defendant subsequently relieved the plaintiff of the Canon.

[9] The plaintiff alleged in its pleadings that the defendant sold both the DSC 38 and the subsequent machine (a CS213D) to it. These "sales" of the machines were admitted by the defendant in its pleadings and are thus not in dispute for the purpose of these proceedings. However for sake of clarity it should be noted that the defendant was merely the supplier of the two machines and that they were in fact purchased by the plaintiff from the second defendant GBS Mutual Bank. The "*asset finance/instalment sale*"



agreements were initially entered into between the plaintiff and a company Technofin but these agreements were later apparently ceded to GBS Mutual Bank. The plaintiff had a separate maintenance agreement in respect of each of the machines with the defendant.

[10] The DSC 38 was installed at the premises of Graphic Design House CC, the graphic design business of Mr Andrew Bowen ("*Bowen*"). Bowen was the plaintiff's graphic designer and he was the one who actually operated the DSC 38 and printed the plaintiff's jobs in exchange for which Graphic Design House was given a "*preferential price*" on the copies which it generated for its own business purposes.

[11] The DSC 38 did not meet the plaintiff's requirements. Virtually all of Buttle's evidence relating to the problems experienced must be discounted since during the course of his testimony he gave the clear impression that he had personal knowledge of these problems and the resultant call outs by the defendant's technicians. It was only during cross-examination that it became evident that it was in fact Bowen who had operated the DSC 38, and a substantial amount of court time was wasted as a result.

[12] Bowen impressed as an honest witness who did not attempt to embellish his evidence. He testified that initially Graphic Design House had rented office space at the plaintiff's premises. It was during that occupancy that the business arrangement between himself and Buttle began. Bowen testified that the Canon was "*fine for my business and it seemed to run well with Ritchie's*". Bowen then relocated his business and the Canon was also relocated to those new premises. The DSC 38 was installed at those new premises.

[13] Bowen testified that the major problem with the DSC 38 was the lack of colour consistency and colour degradation on print runs. In short once a proof was approved by a client the DSC 38 could not produce consistent

multiple copies thereof as the Canon was able to do. His evidence was as follows:

'... this was the major concern with the machine, was that the first print, say for example the mouse pad was solid red it would, each print after that it would kind-of go from red to lighter, red to lighter, red to lighter, red to lighter red until it got to a pinky colour and we went up and down with the guys from Gestetner for a while and they realised that the machine couldn't load the toner fast enough. And it was a little bit of a technical thing, but basically if it had high ink coverage of solid red area the machine couldn't load the toner fast enough to be able to sustain the density of the ink coming out on paper and I know they struggled with it a lot and seemed to put quite a lot of effort into trying to resolve it from having software patches or even stopping the machine through the run (inaudible) software patch in and stop the machine during the run to enable to load toner, but never seemed to be able to resolve it completely.

Were there any similar problems with the Canon, this colour thing? --- No, the Canon didn't have that problem.'

[14] After three months and seven call outs by the defendant's technicians attempting to rectify the problem Buttle (on 25 February 2003) wrote to the defendant's managing director Mr Richard Pinker ("*Pinker*") who was based in Johannesburg. Buttle complained that since its installation in December 2002 the DSC 38 had not been functioning properly. The defendant's employees were aware of the "*faulty machine*" and had been unable to rectify the problem. Buttle proposed that one way of addressing the problem would be to replace the DSC 38 "*with a suitable equivalent*".

[15] Pinker communicated with Buttle in response to this letter. The content of that communication is in dispute. According to Buttle it was Pinker who recommended a specific machine as a substitute for the DSC 38. This was denied by Pinker who explained why he would not make any recommendation of a specific machine to a client. He testified that "*I would firstly not make a recommendation telephonically. We have people that*



*specialise in specific areas of our business and in an instance like that I would recommend that one of our product specialists make a recommendation for a particular machine and/or product. I would not do it remotely I am not a technical person and I do not make judgment calls telephonically".*

[16] After conclusion of the evidence and during argument plaintiff's counsel advised that plaintiff accepted that Pinker would not have recommended the machine which replaced the DSC 38 and that he (i.e. Pinker) only facilitated the replacement of the DSC 38 with the assistance of representatives of the defendant's Cape Town branch.

[17] Mr Harry Stadler ("Stadler") who was employed by the defendant at the time as a colour specialist testified that after discussion between himself and various other representatives of the defendant a decision was taken to replace the DSC 38 with another machine namely a CS213D which was *"the Gestetner equivalent of the CLC, Canon CLC900"*. His evidence was that *"the thinking behind it ... was ... to provide them with the same technology and the same machine that was replaced which was the Canon CLC900 and I think therefore that's why the machine was replaced with the 213D"*.

[18] The defendant collected the DSC 38 during May 2003 and at about the same time replaced it with the CS213D. It is common cause that the CS213D was a more expensive machine with higher maintenance costs than the DSC38. The CS213D was similarly installed at the premises then occupied by Graphic Design House CC.

[19] The CS213D did not remedy the plaintiff's problems with colour consistency and colour degradation. Bowen testified that *"the second machine was better than the first machine but it still had exactly the same problem ... the first print would come out solid red and within 10 or 20 prints it would land up being pinky ... we went through a very similar kind-of whole process as we did with the ... first machine, but they tried everything that the*

*guys possibly could, but it landed up not being able to be a 100 percent resolved*". The problem persisted despite approximately 50 call outs by the defendant's technicians to try to rectify it. Bowen's evidence was confirmed by Craig Diedericks ("*Diedericks*"), the defendant's technician who attended most of the call outs. In his words "*we explored a lot of possibilities but no, we didn't resolve the problem. I am not sure whether the problem could have been resolved ... I would say for the type of work that Mr Buttle did I would have thought that something in terms of a litho press would have been a better option*". Diedericks confirmed however that the problems experienced were not due to any misuse of the machine.

[20] The plaintiff eventually cancelled the contract and released the CS213D to the defendant on approximately 25 February 2005.

#### THE ISSUE TO BE DETERMINED

[21] The crux of the dispute between the parties is whether the defendant negligently misrepresented to the plaintiff that the CS213D machine was capable of meeting the plaintiff's requirements. The plaintiff does not seek damages arising out of any breach of contract relating to the DSC 38 but damages arising out of an alleged breach of contract relating to the CS213D. The circumstances pertaining to the plaintiff's acquisition of the DSC 38 are thus only relevant to the context in which the plaintiff acquired the CS213D. As stated by Nugent JA in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) at 157G:

"In law", remarked Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly*, 'context is everything'. And so it is when it comes to construing the language used in documents, whether the document be a statute, or a contract, or, as in this case, a patent specification."

[22] A representation is a statement made by one party to the other before or at the time of the contract of some matter or circumstances relating to it:



see *Wright v Pandell* 1949 (2) SA 279 (C) at 285. If the statement is incorrect it is a misrepresentation. What distinguishes a representation from puffing is the intention of the parties, i.e. in all the circumstances did the parties intend the statement to be a representation which would form part of the contract (i.e. a material representation), or mere puffery: see *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) at 418A-H. If the parties do not make themselves clear a court will presume that they intend their statements to be representations forming part of the contract: see *A J Kerr: The Principles of the Law of Contract* (6<sup>th</sup> Ed) at 268. Representations may be in writing or oral or may be implied, *inter alia*, from the parties' conduct: see *South African Eagle Insurance Co Limited v Norman Welthagen Investments (Pty) Ltd* 1994 (2) SA 122 (AD) at 126F.

[23] If a misrepresentation is to give rise to a remedy, it must have been made in the context of, or have been incorporated into the context of, a contract. In addition the aggrieved party must prove that the statement was an inducement to enter into the contract: See *Kerr* at 272-273 and *Hulett and Others v Hulett* 1992 (4) SA 291 (AD) at 310H-311B where Hoexter JA stated the following:

'In the present case a material representation was made which was calculated to induce the appellants to enter into the contract. There is evidence, which appears to be entirely credible, that the appellants were so induced. It seems to me that in these circumstances there arises a fair inference that this is in fact what happened. Mr Gordon who, with Mr Hewitt, appeared for the appellants, called our attention to one of the judgments delivered by the High Court of Australia in *sGould and Another v Vaggelas and Others* [1985] LRC (comm.) 497. The following remarks in the judgment of Wilson J (at 517d-f) appear to me to indicate the right approach to the situation here under consideration:

'Where a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more

appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances. Examples commonly given of such circumstances are that the plaintiff not only actually knew the true facts but knew them to be the truth or that the plaintiff either by his words or conduct disavowed any reliance on the fraudulent representations.'

[24] It is not unreasonable for a contracting party to accept the uncorroborated assurances of the person with whom he contracts. Trust among businessmen in the course of their dealings with each other is an every day occurrence: see *Kok v Osborne and Another* 1993 (4) SA 788 (SECLD) at 799 I.

[25] As stated by Corbett CJ (as he then was) in *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (AD) at 569E-G:

'It is also true that ... a contracting party can safeguard himself against loss by requiring the representor to guarantee the truth of his representation. This, with respect, seems to me to be a counsel of perfection. The realities of modern commercial life show that many laymen are not aware of such legal niceties and contract upon terms put forward by the other contracting party.'

[26] In the *Bayer* case the court found that the following facts and circumstances had placed a legal duty upon the appellant before making the representation in question to take reasonable steps to ensure that it had been correct: (a) the contractual relationship between the parties and the fact that the representation had been material and had induced the respondent to enter into the contract; (b) the circumstances under which the representation had initially been made by one of the appellant's representatives and repeated by another must have had made it obvious to them that the respondent would place reliance upon what he had been told, that the correctness of the representation would be of vital importance to him and that if it were incorrect the execution of the contract could cause serious damage



to him; and (c) the representation had related to technical matters concerning a new product about which the respondent, as a lay customer, would necessarily have been ignorant and the appellant, as distributor, would or should have been knowledgeable.

[27] It is common cause that the defendant supplied two machines to the plaintiff, the first being a DSC 38 model and the second a CS213D model. It is also common cause that the plaintiff was unhappy with the machines as they were unable to perform to its requirements. Buttle avers that he had a Canon machine which could "*do the job*" and was assured by the defendant's representatives that its machines would similarly be able to do so. This "*assurance*" by the defendant's representatives is the principal dispute between the parties.

[28] In support of its claim of negligent misrepresentation the plaintiff not only relies on the written proposal initially submitted by the defendant for the DSC 38. It also relies on both oral representations and conduct on the part of the defendant's representatives.

[29] The defendant denies any such misrepresentation. Its case is that the DSC 38 could indeed manage the volume of printing as quoted when used in a general office environment and for general copying and proofing purposes i.e. not for long "*production*" runs of colour saturated colour prints. As to the CS213D, the defendant's case is more or less a repetition thereof except that the evidence was also that the purpose of replacing the DSC 38 with the CS213D was that it was the Canon equivalent in the defendant's range of products and would thus be able to meet the plaintiff's requirements to the extent that the DSC38 was unable to do.

[30] Buttle was a poor witness. The defendant submitted that Buttle was belligerent, argumentative, relied on hearsay evidence, used superlatives, gave long and superfluous answers when he preferred not to answer a question, refused to concede facts which were clearly not in dispute and was

prone to repetitive exaggeration. I would not go quite so far but there is little doubt that his evidence was unsatisfactory in certain respects. He testified in chief about facts allegedly within his personal knowledge, only to be forced to concede early on in cross-examination that they were not. He was also prone to exaggeration and was at times unnecessarily defensive. I must accordingly regard his evidence with the caution which it deserves and rather focus on the documentary evidence and the evidence of Bowen, Theunissen, Stadler and Diedericks all of whom were satisfactory witnesses. In my view the expert evidence adduced by the parties is of little or no assistance in the determination of whether the defendant in fact made a negligent misrepresentation or misrepresentations to the plaintiff in the particular circumstances of this matter.

[31] Theunissen testified that he was the salesman of the DSC 38 machine. He confirmed that the written proposal relied upon by the plaintiff was submitted by him (and Steincke). The written proposal clearly states that the DSC 38 was a full colour laser printing system and that its print volume specification was 50 000 prints per month or 3 million prints over 5 years. It also states that the DSC 38 could produce 28 pages per minute in digital full colour laser. The proposal reflects that not only A4 paper but also A3 (Full A3 Bleed) could be used. The *"maintenance agreement"* incorporated in the proposal provided that maintenance would be charged at R1.30 per full colour laser print irrespective of toner coverage up to "100□ per page". Nowhere does the proposal reflect that although the DSC 38 had all round office application productivity capabilities it was not a *"high level production machine"* and could typically only be used for proofing and/or low volume colour productions typical to the office environment.

[32] Under cross-examination Theunissen stated that the DSC 38 would manage a single print run of 100 copies although it certainly would not manage a single print run of 50 000 copies. Bowen's uncontested evidence was that the DSC 38 could not even manage a print run of 100 copies. And in



answer to a question by defendant's counsel whether the DSC 38 was capable of producing 50 000 prints per month (not in a single print run) Stadler replied that although this was reflected in the specifications for this particular machine he doubted that it could run to the full capacity of 50 000 prints per month since "*variances come into play into what you're actually printing to a volume of 50 000*". It was also Theunissen's evidence that this particular DSC 38 was the first and only colour printer that he sold during the course of his employment with the defendant.

[33] It is common cause that the plaintiff experienced problems with the DSC 38 to the extent that the defendant decided to replace it with the CS213D. None of the defendant's witnesses seriously challenged the evidence of Bowen that despite seven call outs over a three month period the defendant's technicians were unable to resolve the plaintiff's problem of colour inconsistency and colour degradation on longer print runs. The unchallenged evidence of Bowen was that whilst the CS213D performed marginally better than the DSC 38 problems were still encountered with colour consistency and colour degradation within the first 20 or so prints on each print run. Diedericks confirmed that there were problems with print quality "*regarding the print runs in respect of mouse pads and coasters which were very 'colour intensive'*". The defendant's service history report for the CS213D reflecting some 50 call outs over a 13 month period, largely to attend to this problem, speaks for itself.

[34] The evidence never established the parameters of a "*long print run*". What was established was that the representations made by the defendant's representatives of the number of prints which both machines could produce did not take into account making prints of high colour saturation and the result to the plaintiff was to have to adopt a "*trial and error*" approach to running even short print runs of 20 or so prints. And even on the defendant's version it was unlikely that the plaintiff's print volume for colour saturated prints exceeded what Buttle testified in his evidence to be approximately 6 500 prints per month.

[35] The plaintiff argued that the defendant was aware of its requirements and supplied it with machines which were not suitable for these requirements. The plaintiff argues that even if the defendant was not aware of the plaintiff's requirements when supplying it with the DSC 38 the defendant must have known what the plaintiff's requirements were when it supplied it with the CS213D. I agree, since the body of largely uncontested evidence bears this out. There is also no evidence to indicate that the plaintiff was informed by the defendant of how many prints would constitute a long print run. And perhaps more importantly, and despite it being common cause that the plaintiff utilised the DSC 38 for a period of a few months and the CS213D for a period of 13 months, no allegation of any substance has ever been levied against the plaintiff that it misused or abused either machine. On the contrary the evidence indicates that the defendant accepted that there were problems which could not be laid at the plaintiff's door and was intent upon assisting the plaintiff to meet its requirements (hence the number of call outs and the replacement of the DSC 38 with the CS213D).

[36] I agree with the plaintiff's submission that the defendant knew what its requirements were and therefore knew what machine to supply the defendant, even if not in respect of the first machine, then certainly in respect of the second machine. The representations made by the defendant (oral, written and by the conduct of its representatives) induced the plaintiff to contract with it not only in regard to the DSC 38 but also the CS213D. It must have been obvious to the defendant that the plaintiff would place reliance upon what it had been told particularly regarding the CS213D and that the correctness of those representations would be of vital importance to it. The representations were thus material. Further, the representations made (both in respect of the DSC 38 and the CS213D) related to technical matters concerning machines about which the plaintiff, as a lay customer, would necessarily have been ignorant and the defendant, as distributor, would or should have been knowledgeable. The defendant failed to take reasonable



steps to ensure the accuracy of its representations, had no reasonable basis for making the representations and its actions in so doing were negligent.

#### ORDER

[37] I accordingly make the following order:

- (1) The plaintiff succeeds on the merits of its claim against the first defendant.
- (2) The matter is postponed for trial on the issue of quantum (inclusive of the first defendant's counterclaim) on a date to be arranged with the Registrar.
- (3) Should the first defendant intend to withdraw its counterclaim it is directed to do so within 30 calendar days from date of this order.
- (4) Costs shall stand over for later determination.

A handwritten signature in cursive script, appearing to read "J. I. Cloete", is written above a horizontal line.

J I CLOETE