IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case number : 365/2000

In the matter between :

AFRICA SOLAR (PTY) LTD APPELLANT

and

DIVWATT (PTY) LTD RESPONDENT

CORAM : NIENABER, OLIVIER, STREICHER, FARLAM and NUGENT JJA
HEARD : 25 FEBRUARY 2002
DELIVERED : 28 MARCH 2002

Summary: terms of agreement - whether the seller's standard terms incorporated into the agreement for the supply of goods to the buyer - alleged defective performance - remedies - non-compliance with the Rules of the Supreme Court of Appeal regarding the curtailment of the record and the preparation of a core bundle - non-compliance with practice note requirements - sanctions.

JUDGMENT

NIENABER JA/

NIENABER JA :

[1] The appellant is the manufacturer of, amongst other things, H70 model photovoltaic modules (also referred to as panels) that are employed in the conversion of solar energy into electricity. The respondent purchased a large quantity of these modules from the plaintiff on the strength of the appellant's specifications as to their performance. It used them, amongst other things, in supplying and installing water pumps for various of its customers in some of the more outlying parts of the country where conventional electrical power was either not available or too costly. The appellant sued the respondent in the Transvaal Provincial Division for payment of the balance of the purchase price *viz* R89 653.51 plus interest and costs. (I shall henceforth refer to the appellant as the plaintiff and to the respondent as the defendant.) The defendant withheld payment of the balance due because of an ongoing dispute that developed (and gathered

momentum) between the parties about the performance of at least some of the panels. The defendant received diverse complaints from various of its customers that their pumps failed to supply the rate of water which the defendant had promised them on the strength of the quoted specifications. The defendant alleged but the plaintiff denied that its panels were underpowered. The defendant did not, however, cancel the executed orders placed with the plaintiff. Instead it sought to boost the performance of the pumps by adding additional panels. When the plaintiff persisted in its refusal to acknowledge the problem or to recall or repair the offending panels the defendant arbitrarily withheld half of the payment then due in order, so it was explained, to bring matters to a head. The broad issue between the parties in these proceedings is whether the panels were indeed defective. The narrow issue is whether the defendant was precluded by the terms of the agreement between them from withholding payment and from

pursuing a counterclaim for damages based on its alleged breach. That narrow issue is largely dependent on whether the plaintiff's standard conditions of trade (to which I shall refer simply as the standard terms) were incorporated into the agreement for the supply of the panels by the plaintiff to the defendant.

[2] Both parties were initially anxious to avoid litigation and their respective technical directors, De Villiers on the defendant's side and Dr Venter on the plaintiff's side, agreed to submit samples of the allegedly underperforming panels to Prof Leitch, an expert from the University of Port Elizabeth, to conduct tests as to whether the panels conformed to the agreed specifications. It remained an issue between the parties whether it was also agreed that the issue of the defendant's liability would be made dependent on the outcome of those tests. The tests conducted by Prof Leitch favoured the defendant. The defendant accordingly raised a special

plea (to which the plaintiff replicated a denial) that the action had been duly compromised.

[3] The pleadings in their final form revealed a multiplicity of sub-issues, mostly factual, that may conveniently be summarised as follows:

a) whether the action was compromised, as the defendant alleged;

b) if not, the terms, express and tacit, of the agreement of sale between the parties and in particular whether, as the plaintiff alleged, the plaintiff's standard terms governed the sale;

c) whether a meaningful proportion of the panels supplied by the plaintiff to the defendant failed to measure up to the written specifications;

d) depending on issues b) and c), whether the defendant was precluded

(i) from withholding payment of the balance of the price otherwise owing in terms of the agreement, and (ii) from advancing a

counterclaim for the losses it alleged it suffered.

[4] Not all of these issues were adjudicated by the trial Court (Jansen AJ). That is because the parties requested the Court, and the Court agreed in terms of Rule 33(4) of the Uniform Rules of Court, to grant precedence to some of the issues before disposing of the remaining ones. The first major issue was whether the action had been compromised. The trial Court found against the defendant that it had not been compromised. Since the defendant has accepted that finding no more need be said about it. The second issue, the crucial one, related to the terms of the agreement and more particularly whether the plaintiff's standard terms are of application. The third issue was formulated, somewhat elusively, as follows:

> '1.3 the implication of the terms of the agreement between the parties in particular:
>
> (a) Whether the defendant is precluded from raising a defence of non-payment due to an alleged defect in some

of the solar panels; and

(b) whether the defendant is precluded by such terms from claiming damages in the nature set out in defendant's counterclaim.'

This was interpreted by the parties to pose the question, assuming the alleged defects in the solar panels to have been established, whether the defendant was entitled to rely on the *exceptio non adimpleti contractus*, regardless of whether or not the standard terms applied. It was accepted that if the standard terms did apply they would dispose of the defendant's counterclaim.

[5] What was accordingly *excluded* from consideration at the preliminary stage of the trial was, first, a decision on the defendant's complaint that some of the panels were defective and secondly, following upon it, the quantum of the counterclaim.

[6] The trial Court found against the defendant, as stated earlier, on the compromise but essentially in its favour on the remaining issues. On the

second issue posed it was held that the plaintiff was represented by Mr Mac Micciarelli, Mr Joe Micciarelli and Mr Paolo Chiaccetti when the agreement between the parties was concluded (i e at the prior meeting between their respective representatives) and that the terms of the sale were as contended by the defendant, more particularly, that the 'express alternatively tacit or implied terms' were:

> '3.1 The panels would be used in conjunction with water pumps but these would not form part of the sale and would be fitted by the Defendant or its agent(s);
> 3.2 Defendant would be granted 30 days credit from date of statement rendered by Plaintiff;
> 3.3 The panels would function in accordance with the those given as samples as stated above and to those parameters and standards laid down in the Plaintiff's specifications annexed marked DW 2 in respect of the H70 modules and DW2a in respect of the H 55 modules sold which formed the written portion of the agreement.'

Further express terms found were:

> '3.4 The guarantee as set out in paragraph 3.3 would endure for ten years.

3.5 The price for the H70 solar panels was R1 133,00 and for the H55 R910,00.

3.6 The first order which would be placed would be for 500 H70 solar panels and 100 H55 solar panels.'

On issue 1.3 it was held as follows:

'The implications of the terms of the agreement between the parties are:

(a) The Defendant may raise a defence of non-payment due to an alleged defect in some of the solar panels in terms of the *exceptio non adimpleti contractus*.

(b) The Defendant may claim damages in the nature set out in the Defendant's counterclaim based on a contractual cause of action.

(c) No interest is payable on the payments which have been withheld until such time as the Plaintiff has performed its obligations in terms of the agreement.'

In the result the trial Court held that the plaintiff's standard terms did not apply to the agreement between them.

[7] With the leave of the trial Court the plaintiff appealed first to the Full Bench of the Transvaal Provincial Division and, when that appeal failed on a majority decision, it noted a further appeal, with special leave,

to this Court.

[8] The major issue between the parties at this stage of the proceedings is whether the standard terms applied to the sale. That dispute arose in the following circumstances. During August 1993 a meeting took place between representatives of the two parties. I shall refer to it as 'the prior meeting'. The defendant's representatives expressed interest in the H70 module which the plaintiff was then in the process of developing and which it was prepared to manufacture especially for the defendant. It was agreed that the plaintiff would provide five H70 sample panels free of charge to the defendant which the defendant would test for functionality in tandem with water pumps. Shortly before delivery of the sample panels to the defendant was due to take place, a Ms Gerber telephoned Mr Pichulik, the defendant's financial director. She introduced herself to him as a bookkeeper and credit supervisor in the plaintiff's employ. Neither of

them was present at the prior meeting. According to Pichulik she sought certain particulars from him about the defendant since the defendant was then still a relatively new concern, ('a start-up company', as Pichulik described it), about which the plaintiff, before committing five H70 panels valued at close to R5 000, required at least some information. It was therefore arranged that she would telefax a form for him to complete. According to him she said:

> 'I will send you our standard form to please fill in in order to - from an administrative point of view that you know I'm cleared of this.'

and again:

> '… she said she needed this to update her information because of the unusual situation that we were not paying for those panels.'

Pichulik testified that a one page document was received by him. It was headed 'Application for Credit Facilities', although the defendant had not applied for such facilities and no decision had yet been taken by the

defendant, pending the testing of the product in the field, to either apply for credit or to order any panels from the plaintiff. Pichulik put the document aside but after some further prompting from Gerber he completed it in part and faxed it back. On rereading the document he realised:

> 'Obviously I also saw when I read through this at a later date, that she also obviously wanted to check us out from a credit point of view, it was not just updating records, see who the directors are and things like that.'

He filled in the blank spaces with details about the defendant, its assets, its directors and management, its bankers and auditors, but left open the space for 'credit amount applied for' and to the question: 'Are directors/owners/ partners/members prepared to sign guarantees?', he inserted: 'To be negotiated'. He deleted the spaces below the question 'Particulars of fixed property offered as security'. Then followed a paragraph which he did not delete. It read:

> ‘All purchases will be made in terms of and subject to the conditions of trade of Helios Power (Pty) Ltd, [the then name of the plaintiff] as printed on the reverse hereof, which by signing this, I acknowledge having read, understood and accepted. I also warrant that I am authorised to sign this application.’

Pichulik inserted the date and signed it as ‘director’.

[9] Notwithstanding the words ‘as printed on the reverse hereof’ the reverse side of the document, according to Pichulik, was not faxed through to him at the time. He was accordingly unaware of the standard terms when he partially completed, signed and returned the page faxed to him; nor indeed when, some time later, an order for a number of H55 and H70 model panels was placed on behalf of the defendant. It is about the reverse side of the document, containing the plaintiff’s standard terms quoted later, that the battle rages. I shall refer to the contentious document faxed to and completed by him as ‘the document’.

[10] Gerber did not tell Pichulik that the document might be used for an

additional purpose but he inferred, so he said when asked about it, that apart from the document serving as ‘an information sheet’ ‘she obviously wanted to check us out from a credit point of view’, should the defendant ever apply for credit (‘just in case’). But that, according to him, would have required further negotiations between the parties and additional information to be furnished by the defendant. The document, according to Pichulik, served a dual purpose: as a data base to obtain information about the defendant to which the plaintiff was supplying five panels free of charge; and, in the long term, as the groundwork for the processing of an application for credit should such an application ever be submitted.

[11] The defendant’s technical personnel, having tested them, were happy with the performance of the H70 modules and an order for the supply of 500 H70 modules (at R1 133 per module) and 100 H55 modules (at R910 each) was thereupon placed with the plaintiff on 16 August 1993. This

was worth some R600 000, far in excess of the figure of R200 000 that someone on the plaintiff's side had written on the document. No formal application for credit facilities was thereafter made by the defendant nor were the terms on which the panels were supplied further discussed between the parties.

[12] During October 1993 the defendant began to receive complaints from customers that its pumps were under-performing. The defendant attributed this to the H70 panels. As Pichulik put it in his testimony:

> 'We saw that the panels were not producing enough power to keep our pumps going during very hot daytime temperatures, in a nutshell.'

Pichulik raised the problem with the plaintiff's people but, so he said, they insisted that the panels had been thoroughly tested and were functioning in accordance with the agreed specifications. On 25 October 1993 Pichulik faxed Dr Venter a letter confirming that the plaintiff was:

> ‘to hold off all further delivery of panels as of today, until our problem regarding insufficient voltage on the various sites already supplied, also any other problems we may find among the panels we have currently in stock, have been adequately verified and then rectified to our mutual satisfaction.’

[13] During November 1993 Pichulik received, instead of a satisfactory response to his various complaints, a telephone call from someone in the plaintiff’s office demanding immediate payment. He believed it to have been Gerber but later events showed that he was mistaken and that it must have been someone else, perhaps a Mrs Ellis, who was not, however, called as a witness by the plaintiff. He testified:

> ‘… she told me that according to the terms of the sale that I signed … I was not allowed to withhold any money, to which I retorted I cannot remember signing any terms of sale or - in any way whatsoever, would she please send these terms that I allegedly signed to me and she sent me a fax which basically substantially [was] … the standard conditions of trade.’

And that, said Pichulik, was the first time that he ever had sight of the plaintiff’s standard terms.

[14] The standard terms read as follows:

> ‘1. All photovoltaic modules manufactured or supplied by Helios Power are guaranteed for a period of 10 years against faulty materials and/or workmanship.
>
> 2. All other products supplied and installed by Helios Power are guaranteed for a period of 12 months against faulty materials and/or workmanship.
>
> 3. Helios Power will replace or repair all faulty equipment at its sole discretion, free of charge to the owner. The owner is, however, responsible to pay for transportation and delivery to the Helios Power factory and back to the owner after replacement or repair. The owner is also responsible for transportation and accommodation costs of technicians when called out to service or repair any installation on site.
>
> 4. This warranty will be null and void if the products have been subjected to misuse, negligence or accident or if the products have been struck by lightning or tampered with in any way.
>
> 5. Although all reasonable care will be taken during manufacturing and installation, Helios Power does not accept any responsibility whatsoever, for loss of the buyer’s profit or for any consequential, direct, indirect or other injury, damage or death of any nature and whatever cause.
>
> 6. Helios Power also does not accept any liability for loss of the buyer’s profit or any other damages caused by late and/or incorrect delivery of goods.
>
> 7. All prices published or quoted are for cash ex-works, unless specified otherwise in writing.

8. Transportation and delivery costs are for the account of the buyer, including any special packing required for transportation, unless specified otherwise in writing.

9. All risks are transferred to the buyer, as soon as the goods are accepted by the buyer's representative or leave the Helios Power factory building for transportation to the buyer, whichever occurs first.

10. All credit applications must be made on the official Helios Power credit application form. Personal guarantees by directors/ owners/ partners/ members may be required before approval of a credit application.

11. Approved credit is up to the specified limit only and for a maximum period of 30 days after delivery of goods, unless specified otherwise in writing.

12. Notwithstanding the approval of credit facilities, Helios Power will be entitled at any time and in its sole discretion to withdraw such facility and demand immediate payment in settlement of any outstanding amount.

13. Interest at the maximum allowable rate will be charged on all amounts outstanding for longer than 30 days after delivery of goods.

14. All goods delivered remains the property of Helios Power until it has been paid for in full, including any interest charges.

15. As the manufacturer and owner of all goods until it has been fully paid for, Helios Power will have the right to claim the full benefit awarded through the General Export Incentive Scheme (GEIS) as instituted by the South African Department of Trade and Industry, unless otherwise agreed to in writing.

16. Helios Power will have the right to reclaim or remove any

material which have been delivered or installed, if the buyer can not settle his account within 90 days after delivery or installation of any goods.

17. All companies, persons or other institutions which make use of approved credit facilities awarded by Helios Power are obliged to advise Helios Power forthwith, should its business or financial situation, ownership, management or control change in any way that would adversely affect the risk of Helios Power to provide credit.

18. The buyer undertakes to pay all legal expenses incurred in connection with the recovery of any outstanding debts, including all collection charges, as between attorney and client, which may be payable in respect of the collection of such an account.

19. …

20. …

21. …'

[15] Pichulik testified that he was incensed when he was suddenly confronted with a supposed agreement he had never seen before. The word he used was 'horrified'. In his evidence he explained that he did not believe that Gerber had deliberately set a trap for him at the time, but that the plaintiff was now opportunistically taking advantage ('by slipping something in … through the backdoor') of the reverse side of a document

of which Gerber knew that he was unaware at the time and which, to her knowledge (as he believed), was in any event never intended by either of them to function as a binding contract.

[16] According to Pichulik he telephoned the plaintiff on 7 December 1993 and spoke to the lady he thought was Gerber.

> 'I said you know I never signed this, this is just an empty piece of paper and then she mentioned that this was the second page of the credit application. I said but you only sent me the first one. And in any event you know, when you sent me the first one you were updating your records. I was not contracting with you in any way, definitely not on the terms of these conditions. Had I known that they existed I would have never signed the first page. I mean we are not in the habit of allowing potential creditors to you know, impair our common law rights, I never sign things like that.'

And when he continued to protest the lady told him that Venter instructed her to make the call.

[17] And there, according to Pichulik, the matter rested for the time being until, having discussed the impasse between the parties with De Villiers,

he wrote a letter, dated 14 December 1993, stating:

> 'Enclosed please find a cheque for R84 642,15, being 50% of the outstanding amount of R169 284,30.
>
> We have decided to keep the other 50% owing as retention for the time being, until we have verified the exact magnitude of an unacceptable power loss in the HS70 panels purchased from you to date, and full damages are capable of being assessed.
>
> We have monitored a limited number of sites where we have installed HS70 panel arrays. On all those sites, so far, the power loss in the panels at cell temperatures taken at 50°C and above, has been in excess of 13,50% below the nominal warranted output power.
>
> For example: At our own test installation (a 5 x 70W panel array) at a cell temperature of 55,30°C the maximum power available was 52,9 Watts per panel (17,64 Volt at 3.0 Amps) and 51,97 Watts per panel (16.51 Volts at 3.147 Amps) respectively.
>
> This result represents a loss of 15.45% compared with your own warranted nominal power output claims.
> As a result, our 3 and 4 panels arrays have now to become 4 and 5 panel arrays respectively if we want to achieve our claimed water output figures. On our 1 and 2 panel systems, we are considering to either change our claims or to sell the systems involved at discount.

> We feel, unless it is otherwise proven, that we have suffered damages due to the dubious quality of your solar panels.'

The amount he paid, fifty percent of what was then owing, 'as retention for the time being', was not the result of a mathematical calculation; it was simply based on his 'gut feel' (a 'bargaining chip' as he later described it.) At that stage the relationship between the parties was still comparatively cordial. His purpose was to bring the dispute to a head or, as he put it, to bring the plaintiff 'to the party'. He had no intention to precipitate litigation but, as he described it rather laconically:

> 'I thought that would get some action out of them and well, it did not really, it got another action out that I did not expect.'

[18] In that action Gerber was called as a witness for the plaintiff. She had in the meantime left the plaintiff's employ and was then known by her married name as Mrs De Wet but I shall continue to refer to her as 'Gerber'. She had no independent recollection of 'the incident'. Nor of

what happened to the form when it was telefaxed back to the plaintiff, although it was the practice to place such documents in a file and it would in the normal course of events have come to the attention of the managing director. Asked about Pichulik's evidence that the prime reason for the document was the imminent delivery of the five sample panels free of charge, she said:

> 'Ek sou dink dit kon gebeur het veral as dit nou die eerste vyf panele is wat hulle dan basies op goedertrou vat. Hulle betaal nie daarvoor nie en ons kan dit darem seker nie net vir enige vreemde maatskappy sê: vat maar vyf panele sonder ten minste darem enige inligting van hulle nie. So ek sal dink dat dit logies was dat ons vir hom gevra het: voltooi darem net eers die vorm voordat ons dan nou die panele (onduidelik).'

And again:

> 'Maar u hoof moeite was om daardie informasie te kry. Met ander woorde die eerste bladsy was die belangrikste ding wat u aanbetref het. -- Vir my om terug te kry en op my lêer te plaas, ja, die voorblad.'

She could not dispute Pichulik's evidence that he did not receive the

reverse side of the document, although she emphasized that it was company policy to photocopy and then fax both sides of the credit application to a potential customer. In a sense this piece of evidence (that only the obverse side of the document was faxed through to him) fortifies Pichulik's version that this was 'an unusual administrative situation' as he described it and not the usual situation where a customer would apply for credit so as to order goods from the plaintiff. The exchange took place primarily for the specific purpose of providing the plaintiff with details of the defendant as a new concern before the five test panels were released to it - to establish its credentials rather than its credit. She further explained that the amount of R200 000, later inserted into the 'credit application', did not emanate from her. She thought it may have been Venter's handwriting.

[19] The trial Court held that

> 'Mr Pichulik's version regarding the circumstances under which he received the frontispage of Annexure A [the document] is uncontested, as is his version regarding the circumstances surrounding his receipt of the reverse side of Annexure A'

and that his evidence was accordingly to be accepted. In the result the trial Court found that Pichulik's error (in not 'scoring out the paragraph immediately before his signature') was caused by Gerber both by informing Pichulik that the document was intended for information and by sending him only part thereof which was in any event inappropriately worded for its stated purpose. That *error*, so it was held, was material and was not, having regard to all the circumstances, *injustus.* Hence it was found that the reverse side of the document did not bind the defendant.

[20] The majority of the Full Bench (Van der Walt and Roos JJ) in an *ex tempore* judgment dismissed the appeal. It said:

> ' … where a document specifically states 'the conditions on the reverse hereof' you have the opportunity to read those conditions. If you choose not to read them or if the conditions appear above in the

> document, in the contract, you are able to read them, then you are bound. That is logical. But if the document specifically states as Annexure A does 'as printed on the reverse hereof' and there is no printing on the reverse, no matter how lame the excuse of the secretary as to why he signed or why he did not read the clause the factual position is there is no printing to which he has subscribed. And lacking such printing, he may be criticised for not inquiring after the printing, but he cannot held to be bound by something which he has not seen, and that is the simple issue as far as I am concerned.'

(The proposition may have been too broadly stated if it was intended to relate to third parties; what the majority probably had in mind was that this was not a case relating to a misinformed third party but to an informed immediate party to the agreement, a point to which I return in para 31 below.)

[21] The minority (Southwood J) did not, on the probabilities, accept Pichulik's explanation as to why he signed the document without deleting the last paragraph above his signature. And to the extent that he expressly acknowledged having 'read, understood and accepted' the terms on the

reverse side thereof, it was not open to him to shelter behind his failure to do so. Southwood J was accordingly of the view that judgment should be granted in favour of the plaintiff for the full amount claimed.

[22] This part of the case can therefore be reduced to an issue of credibility: was the trial Court's finding correct, firstly, that only the frontispage of the document was telefaxed to Pichulik and secondly, that he volunteered the information to Gerber at her request for administrative purposes? It was those credibility findings that were rejected by Southwood J in the Court *a quo* and that were again contested in argument on behalf of the plaintiff in this appeal.

[23] Not all of Pichulik's evidence reads convincingly. His failure to delete the certification paragraph before returning the document to the plaintiff, a foolish omission for someone priding himself on being an experienced businessman, was an embarrassment to him. Nevertheless I

have not been persuaded that the trial Court erred in believing his explanation that he received only one page of the document and that, in the light of Gerber's explicit request to him, he attached no importance to the undeleted last paragraph thereof. I say so for reasons that follow.

[24] In contrasting Pichulik's and Gerber's versions Pichulik was clear as to what was said between them and Gerber was not. Gerber was unable to recall any telephonic conversation with Pichulik, nor could she recall whether she telefaxed him the reverse side of the contentious document. Indeed she could not remember "any specific incident". She was therefore in no position to dispute Pichulik's evidence, except on the broad basis that aspects thereof would have been against plaintiff's "normal practice" at the time and as such was improbable.

[25] As it happens there is a fair amount of support in her evidence for much of Pichulik's testimony. So, for example, the initiative for the

completion of the document clearly came from Gerber. The reason for the request for information was that the plaintiff was about to deliver valuable property to a company of which it knew very little. Gerber conceded as much. On the issue whether both pages of the document, the frontispage and its reverse side, were telefaxed to Pichulik she conceded that the frontispage was the only part in which she would have been directly interested at that time, as that contained the information about the defendant which the plaintiff wanted on record. The placing of an order by the defendant was, to her knowledge, by no means a foregone conclusion and was dependant on a decision yet to be taken some time in the future, so that, as a contract, the document was of no inevitable or immediate significance to the parties.

[26] Pichulik, notwithstanding a prolonged, excessively repetitive and at time badgering cross-examination to which, stretching over many days, he

was subjected and which the trial Court perhaps too indulgently allowed, remained consistent in his version. Such cross-examination enhanced rather than detracted from his credibility.

[27] In contrast to Pichulik's evidence, Gerber's was largely based on speculation as to what she would have done or thought at the time. So, for instance, it was put to her during her evidence-in-chief that the defendant's version about the document was that 'u het dit maar net nodig vir inligtingsdoeleindes', to which she replied:

> 'Ek kan nie dink dat ek vir hom so iets sou gesê het, 'n kredietaansoek sou gevra het om volledig te voltooi as ek net inligting wou gehad het nie. As ek net sy adres of sy telefoonnommer wou gehad het sou ek hom sommer mondelings gevra het. Dit sou nie nodig gewees het om so 'n amptelike dokument … (stem sak)'

Under cross-examination she was again asked:

> 'Hy het gedink dat jou doel was om net daardie informasie in te win. Nou is dit korrek of is dit nie korrek nie? Wil u informasie hê? -- Dit hang af hoe - ek kan nie dink dat hy dit so kon insien dat hierdie hele vorm, hy vra spesifieke vrae, vrae soos of die geboue en die

masjiene deur die maatskappy besit word. Soos wat ek reeds gesê het, as ek net basiese inligting wou hê dan wil ek nie sulke tipe goed weet nie.'

[28] Gerber did not venture to suggest that she asked Pichulik to complete the form as a proper application for credit. She could hardly have done so as the possibility of a sale, let alone an application for credit, was at that stage by no means confirmed. In the absence of any other explanation for the furnishing of the document, Pichulik's evidence, that it was required as an information sheet for record purposes, accordingly stands unchallenged. The trial Court accepted it and no compelling reasons have in my opinion been advanced why this Court should depart from that finding.

[29] Gerber did not concede that she must have known that Pichulik had no *animus contrahendi*. Once again she could hardly have done so since she had no recollection of the entire incident. But if she said to him, as it

must be accepted that she did, that the contentious document was required by the plaintiff for information purposes because the defendant to whom the plaintiff was entrusting valuable goods was an entity unknown to the plaintiff; and that the reverse side of the document was not faxed to the defendant at a time when it was still undecided whether the defendant would order and the plaintiff would supply panels to it, whether on credit or not; it is fair to accept that a document which was required and produced at Gerber's insistence and to her knowledge for a limited pre-contractual purpose, was not without further input intended by either party to function as a contract between them.

[30] Moreover, and to the extent that Gerber faxed him a standard form that, strictly speaking, was inappropriate for her stated limited purpose, she was primarily responsible for the potential misunderstanding as to what Pichulik intended when he signed and completed it. Because of what

Gerber told him Pichulik was not on his guard, when he returned the partly completed document, that he might be committing himself to a future contractual relationship with the plaintiff.

[31] Gerber's knowledge became that of her principal, the plaintiff. She acquired it while acting within the scope of her official duties and it was clearly something that ought to have been conveyed to her superiors, such as De Villiers and Wolf. On the evidence there was a lack of proper communication between them and Gerber. This is not, therefore, an instance, as in many reported cases, where a third party was reputedly misled. The plaintiff was not a third party *vis-à-vis* the defendant: it was a direct and immediate party.

[32] By the same token the document could also not be construed as an offer to the plaintiff which it was open to Wolf, unaware of the true basis on which the document was completed and forwarded to the plaintiff, to

accept, either as an application for credit or as the terms on which panels were to be supplied in future. In fact, the evidence was that Wolf was not even aware of its existence when, on the strength of his own independent enquiries and without ever informing the defendant, he approved and processed credit for the defendant to the tune of R200 000, which was not an amount asked for by the defendant. The same consideration likewise precludes any conceivable reliance by the plaintiff on estoppel as the answer to the defendant's defence of absence of proper consensus. (Cf *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375 (W) at 381I-J.)

[33] Pichulik's explanation was that he had no *animus contrahendi* in completing and returning the document. The onus was on the plaintiff to prove the contract on which it relied. Proof of the terms of the contract included proof of the anterior question whether both parties had the

requisite *animus contrahendi*. The production of the document, signed by Pichulik, would of course be a telling indication that the defendant had the necessary *animus*. But that factor is counterbalanced by Pichulik's evidence that the document, to the knowledge of Gerber, was produced for a specific limited purpose. That evidence is credible. There is no counter to it. If, at the end of all the evidence, there is uncertainty as to whether *animus contrahendi* on the part of both parties had been established, the plaintiff, on that particular issue, had to lose. In my view this is precisely such a case. There is, furthermore, support in the evidence (for the reasons mentioned in paras 19 and 30 above) for the analogous approach adopted by the trial Court, leading to the same conclusion.

[34] In the result the plaintiff's standard terms were in my opinion not of application to the supply of the panels that the defendant ordered from the plaintiff. It follows that those terms could not serve to prevent the

defendant from resisting a claim for payment with the *exceptio non adimpleti contractus,* or from advancing a counterclaim. It also follows that the matter cannot be disposed of on the rudimentary basis (as the plaintiff would have it and as Southwood J held) that judgment be granted to the plaintiff as prayed. Moreover, for purposes of the Rule 33(4) ruling, the terms of the agreement between the parties are to be sought in the evidence of the prior meeting between the respective representatives as well as in the correspondence. Details about the goods ordered, the prices quoted, the terms of payment (‘nett 30 days’) and the guarantee all appear from the correspondence. It was common cause that the specifications applied in respect of the H70 panels. These were all findings made by the trial Court (see para 6 above). They were not, as such, challenged on appeal.

[35] That leaves for consideration the question whether non-compliance

with the specifications would entitle the defendant to pursue the parallel remedies of withholding part-payment *pro tem* (and if so, to what extent) and of claiming damages for breach of contract. Those issues will, however, only arise if it is established that the panels were in fact defective in not conforming to the specifications. That is an issue that the trial Court, which is still seized of the matter, will have to determine. Depending on that finding the trial Court will doubtless apply the principles developed in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) and subsequent decisions of this Court.

[36] Finally I wish to say something about two procedural matters. The first is the manner in which this trial was unduly prolonged by the prolix cross-examination by counsel for the plaintiff of some of the defendant's witnesses. The second is the non-compliance by the parties of certain

rules and directives of the Supreme Court of Appeal relating to the core bundle and the practice note.

[37] I remarked earlier in para 26 on the inordinate, tiresome and protracted cross-examination of Pichulik. The same is true for the cross-examination of De Villiers. Proper cross-examination does not consist, under the guise of testing credibility, of rehashing with a witness, repetitively and obstinately, his evidence-in-chief in an apparent attempt to wear him down so as to unearth discrepancies that can then become the source of a submission that the witness should for that reason be disbelieved. Cross-examination is not supposed to be a test of stamina. I do not believe that I am being unfair to counsel for the plaintiff if I say that his questioning of De Villiers and Pichulik, even in the face of remonstrations from the Bench, was the personification of that particular style of cross-examination. To a significant degree this contributed to an

increase in both the duration and the record of the proceedings which ultimately escalated to some twenty-one volumes. Counsel for the respondent estimated that the trial was unnecessarily prolonged by at least one third. That estimate is not, in my opinion, an exaggeration. The question, then, is what sanction, if any, is to be applied? The appellant cannot be deprived of any costs since, in the light of the order I am about to make on the appeal as such, it will in any event be liable for the costs of appeal. Instead I propose to order that one third of the latter costs be paid on the scale as between attorney and client.

[38] The second point relates in the first instance to the preparation of the appeal record. In granting special leave to appeal on petition this Court said:

> 'The parties are ordered to limit the appeal record to what is strictly necessary for the determination of the appeal issues. Failure to do so may result in a punitive cost order.'

There is nothing in the record to suggest that either of the parties made any attempt to comply with Rule 8(9) of the Rules of the Supreme Court of Appeal in preparing the record. That sub-rule reads:

> '9(a) Whenever the decision of an appeal is likely to hinge exclusively on part of the record in the Court *a quo* the appellant shall within 10 days of the noting of the appeal request the respondent's consent to omit the unnecessary parts from the record, failing which the respondent shall, within 10 days thereafter make a similar request to the appellant.
>
> (b) The respondent or the appellant as the case may be, shall within 10 days agree thereto or state the reasons for not agreeing to the request.
>
> (c) The request and the respondent's response shall form part of the record.
>
> (d) The Court may make a special order of costs if no request was made or if either of the parties was unreasonable in this regard.
>
> (e) If the parties agree to limit the record, only those parts of the record of the proceedings in the Court *a quo* as are agreed upon shall be contained in the record lodged with the registrar: Provided that the Court may call for the full record and may order full argument of the whole case.'

[39] Moreover, sub-rule 8(7) provides as follows:

> '(7)(a) A core bundle of documents shall be prepared if to do so is appropriate to the appeal.
>
> (b) The core bundle shall consist of the material documents of the case in a proper, preferably chronological, sequence.
>
> (c) Documents contained in the core bundle shall be omitted from the record, but the record shall indicate where each such document is to be found in the core bundle.'

Sub-rule 8(7)(c) makes it plain that the core bundle is to be prepared as an adjunct to the appeal record. In the light of the instruction of this Court when leave was granted it cannot be said that it would not have been 'appropriate' to have prepared a core bundle. It should have consisted of a conveniently arranged and accessible collection of those documents to which it was anticipated special reference would be made during the hearing of the appeal. Once again there is no indication in the record itself that any consideration was given to the preparation of such a bundle. In the event no core bundle was submitted.

[40] These sub-rules are augmented by the requirement for a practice

note issued by the Chief Justice and published in 1997. One of the items to be dealt with in the practice note, which is to accompany counsel's heads of argument, is 'a list reflecting those parts of the record that, in the opinion of counsel, are not relevant to the determination of the appeal.'

[41] In his practice note, submitted so it would seem during July 2001, counsel for the plaintiff recorded the following:

> '5. REASONS FOR THE ESTIMATED DURATION:
>
> Although the record is voluminous, the parties have by agreement excluded major portions thereof as directed by this honourable court in its order granting leave to appeal. Reference will therefore only be made to certain portions of the record and the documents contained in the different volumes.
>
> …
>
> 7. RELEVANCE OF THE RECORD:
>
> The portions of the record which the parties have agreed not to be relevant have been marked accordingly by a red line drawn across the portions which are not deemed relevant. Minutes of the meeting confirming this arrangement will be submitted to this honourable court.'

The practice note of counsel for the respondent, dated 3 September 2001,

contains a corresponding statement, *viz.*:

> 'As soon as the core record is finalised the record will be suitably marked by lining through the pages which are not relevant and in addition by placing coloured tabs in the record.'

No such 'core record' (as opposed to a 'core bundle') was, however, submitted at the time or for that matter thereafter.

[42] What does appear from correspondence placed before us, supplemented by what we were told from the Bar, was, first, that the legal representatives of the parties met during October 2001, long after the record had already been submitted, with a view to preparing a so-called core record, and secondly, that while still engaged on its preparation, they received notification from the Registrar of the Court on 28 November 2001 that the matter had been enrolled for hearing on 25 February 2002.

[43] The preparation of the proposed list was apparently completed on 12 December 2001. It consisted of the selection of those pages in each

volume that the parties regarded as relevant for the purpose of the hearing of the appeal. For some unexplained reason that list only reached the Registrar, according to a date stamp on a letter addressed to her, on 25 January 2002. It reached the members of the Court shortly thereafter. By then all the members of the Court had completed their reading of the full record, including those parts that the parties considered to be inessential. It was accordingly of little assistance in facilitating the preparation of the appeal by the members of the Court.

[44] The upshot of what has been stated above is that there was compliance with neither the Rules of the Supreme Court of Appeal relating to the reduction of the record and the preparation of a core bundle nor with the directives about the practice notes relating to the exclusion of non-essential material; and that the members of the Court were undoubtedly inconvenienced thereby.

[45] Once again there is the question of what sanction to impose. The primary obligation to prepare the record rested with the appellant. But in this case counsel for the respondent very fairly conceded that both sides were equally to blame for the non-compliance with the above mentioned procedural directives. In both *Caterham Car Sales Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) at 954H-955B and *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 434D-G, it was emphasised that practitioners may in appropriate circumstances be penalised if practice directives are ignored. I have considered whether some or other punitive order for costs should not be made in the circumstances outlined above, but in view of the fact that both parties were at fault about the preparation of the record and were in the process of complying, albeit belatedly, with the practice note requirement when the matter was unexpectedly enrolled, it seems to me on

reflection that a special cost order against either of them is not clearly warranted.

[46] To recapitulate. The appeal must fail. That means that the order of the trial Court is to stand, including the findings as to the true terms of the agreement between the parties, which, but for the issue of the standard terms, were not seriously in dispute. In the end result the matter will have to revert to the trial Court to resume the hearing, this time on the issues that remain.

[47] The following order is made:

> The appeal is dismissed with costs, a third of which costs is to be taxed on the scale as between attorney and client.

…….
NIENABER JA
JUDGE OF APPEAL

Concur:
Olivier JA
Farlam JA

STREICHER JA:

[1] I have read the judgment by Nienaber JA but cannot agree that the appeal should be dismissed. My reasons are substatially the same as those given by Southwood J for disagreeing with the majority judgment in the court *a quo.*

[2] At the request of the parties the trial court ordered that the following issues be decided first:

> ‘1 Whether the plaintiff’s action has been compromised as alleged in defendant’s special plea;
> 2 By whom the plaintiff was represented in concluding the agreement of sale with the defendant, and what the terms of the agreement between the parties were upon which the dispute should be adjudicated;
> 3 The implication of the terms of the agreement between the parties, in particular:
> (a) Whether the defendant is precluded from raising a defence of non-payment due to an alleged defect in some of the solar panels; and
> (b) Whether the defendant is precluded by such terms from claiming damages in the nature set out in defendant’s counterclaim.’

In my view the issues were formulated too widely. The real issues between the parties, apart from the compromise issue, were whether the standard conditions

of trade of the appellant applied to the sale of solar panels by the appellant to the respondent, whether the respondent was contractually precluded from raising a defence of non-payment due to a defect in the solar panels and whether the respondent was contractually precluded from claiming consequential damages as a result of such a defect. The parties were entitled to a determination of those issues and not to a determination of each and every term of the contract and of whom represented the parties in respect of each such a term. The trial court should only have decided the real issues between the parties and those are the only issues that I will address in this judgment.

[3] As stated by Nienaber JA the major issue between the parties at this stage of the proceedings is whether the standard conditions of trade of the appellant applied to the sale of solar panels by the appellant to the respondent. He, as well as the majority of the court *a quo,* are of the view that Pichulik, a director of the respondent, never agreed that the standard conditions would apply.

[4] The following facts are not in dispute:

1 The appellant is a company within the Marvol group of companies.

2 During the period June to August 1993 the parties were negotiating a sale of solar panels by the appellant to the respondent.

3 On 28 June 1993 the appellant, in writing quoted for the supply of solar panels to the respondent. In terms of the quotation the appellant offered a 10 year guarantee on all solar modules. The quotation stated that the payment terms were to be discussed.

4 The parties agreed that five panels would be delivered to the respondent for testing purposes.

5 The respondent contemplated that a purchase of the solar panels would be on credit.

6 On 4 August 1993 Ms Gerber, a bookkeeper and credit supervisor in the employ of the appellant, faxed a document to the respondent. The document was headed '**APPLICATION FOR CREDIT FACILITIES**'.

7 On 9 August 1993 the director responsible for the financial side of the respondent's business, Mr Pichulik, signed the document and returned it to the appellant. Pichulik's signature appears immediately below the following paragraph:'All purchases will be made in terms of and subject to the conditions of trade of Helios Power (Pty) Ltd, as printed on the reverse hereof, which by signing this, I acknowledge having read, understood and accepted. I also warrant that I am authorised to sign this application.'

8 In terms of the standard conditions of trade 'approved credit' is for a maximum period of 30 days after delivery of goods unless specified otherwise in writing.

9 The respondent did not otherwise apply to the appellant for credit.

10 The question whether the appellant should grant credit to the respondent was taken up with Dr Venter, the managing director of the appellant, but he was not prepared to grant credit facilities to the

respondent. Thereupon the matter was taken up with Mr Wolf, the financial director of the Marvol Group. He decided that the respondent was good for credit and conveyed his decision to the management of the appellant.

11 On 16 August 1993 the respondent wrote to the appellant in a letter faxed to Mr Mac Micciarelli:

> 'With regard to our telephone conversation this morning, I confirm the following:
> (a) the prices of your modules are R1 133,00 for the HTO, and R910,00 for the H55S nett 30 days.
> This is an official order for the following quantities . . .'

[5] Pichulik's evidence was to the effect that he did not consider the document that he signed to be an application for credit facilities, nor did he intend to contract on the basis set out in the document. According to him Gerber had telephoned him before the test panels were delivered to the respondent. She said that it was an unusual situation in that the respondent was going to receive panels without paying for them and that she needed

some information about the respondent in order to update her records. For this reason she was going to send him the appellant's standard form which he should fill in. When Pichulik received the form he did not think that the relevant paragraph quoted above applied because there was no purchase yet. He thought that the second page had not been sent because it was not in the minds of either Gerber or himself to enter into a contractual arrangement.

[6] Gerber's evidence was that it was the appellant's practice to fax both the front page and the back page of the credit application form to applicants for credit facilities. Upon receipt of the application her secretary would make the necessary enquiries whereafter the form would come back to her. She would then have taken it up with Venter. She could not remember precisely what happened in this case but could remember that Venter was not satisfied, that Wolf got involved and that Wolf authorised the grant of credit facilities to the respondent. It is implicit in her evidence that she could at least remember that

there was a credit application. She could not think that she would have said that the document was required merely for information purposes.

[7] The trial court held that Pichulik's evidence regarding the circumstances under which he received the front page of the document purporting to be an application for credit facilities was uncontested and that his evidence was accordingly to be accepted. Nienaber JA, after an examination of the evidence, concludes that:

> 'In the absence of any other explanation for the furnishing of the document, Pichulik's evidence, that it was required as an information sheet for record purposes, accordingly stands unchallenged. The trial Court accepted it and no compelling reasons have in my opinion been advanced why this Court should depart from that finding.'

[8] In my view it is so improbable that Pichulik did not intend the document to be considered as an application for credit that his evidence in this regard should have been rejected out of hand. In any event I do not agree with the trial court and Nienaber JA that his evidence stands unchallenged.

[9] I consider Pichulik's evidence to be improbable in the light of the facts

stated above, more particularly the fact that the document was headed ‘Application for credit facilities’ in bold capital letters, the fact that Pichulik appended his signature below words to the effect that the respondent intended to make all purchases in terms of and subject to the conditions of trade of the appellant, the fact that the parties, at the time, were negotiating a sale of solar panels and the fact that the terms of payment still had to be negotiated. It is even more improbable in the light of Pichulik’s own evidence to the effect that:

1 It was contemplated that the respondent would buy on credit.

2 He must have read the document. He normally does not sign documents that he has not read.

3 It was obvious to him that the appellant wanted to ‘check’ the respondent ‘out from a credit point of view, it was not just updating records’.

4 He anticipated that the information contained in the form ‘would be used and probably incorporated into the decision’ to grant the

respondent credit. Moreover, he knew that the information sought would be used for purposes of deciding whether or not to give credit to the respondent should the respondent do business with the applicant.

5 His role in the respondent was that of ‘director for everything, except for the technical execution of the company’.

6 When presented with standard conditions of trade he normally scratches out all those paragraphs which are not to his liking.

7 He drew a line through the space provided for trade references and wrote ‘New Company’.

8 He drew a line through the words ‘YES/NO’ in respect of the question whether the directors were prepared to sign guarantees and wrote ‘to be negotiated’.

9 He drew a line through the space provided for particulars of fixed property offered as security.

10 He did not delete the words ‘application for credit facilities’ or the statement that purchases would be made subject to the conditions of trade of the appellant.

11 The granting of credit would have required further negotiations between the parties and additional information. Yet, he did not suggest that any such further negotiations took place before credit was granted to the respondent.

[10] In the light of all these facts Southwood J held:

‘Mr Pichulik’s evidence about his intention not to enter into a contract cannot be accepted at face value. He was an experienced busninessman. He was described and described himself as a punctilious person. He confirmed that he never signs any document without reading it first. He testified that if there are terms in a document which are not to his liking he deletes them. He confirmed that in this case he read the application for credit facilities carefully and entered information and made deletions and amendments where appropriate. It is obvious that the application has a serious commercial purpose and he confirmed that it would be used for the basis of granting credit.

If Mr Pichulik had really not intended to bind the respondent to the appellant’s conditions of trade then the overwhelming probability is that

two things would have happened.

First: He would not have signed the document as it stood. On his evidence there was no need to sign the document. All that the appellant wanted was certain information.

Second: He would have deleted the certificate or undertaking as was his wont. On his evidence that is what he did when he did not find terms in an agreement to his liking.

The fact that he signed the document just below the certificate after carefully reading and amending the document is overwhelming evidence that he intended to bind the respondent to the conditions of trade.'

I agree.

[11] For the reasons that follow I do not agree with Nienaber JA and the trial court that Pichulik's evidence stands uncontradicted. Pichulik's evidence was challenged in cross-examination. In a laborious cross-examination over a number of days the improbabilities in his version were exposed. It should and could have been done in an hour or two. In the light of Gerber's evidence that she often faxed the document to customers her evidence that she could not specifically remember her conversation with Pichulik is not surprising and affords no justification for finding that Pichulik's evidence stands uncontradicted. On her evidence it is improbable that she would have told

Pichulik that she merely wanted information. Not only did she say so, she also dealt with the form as if it was an application for credit facilities as is confirmed by the evidence of Venter and Wolf. Although Venter was uncertain as to whether he had seen the specific document and Wolf could not recall having seen the written credit application both of them confirmed that they dealt with a credit application by the respondent. Nobody suggested that there was another credit application and no reason was advanced as to why the evidence of Venter and Wolf should not be accepted. The fact that the respondent had not yet finally decided to buy does in my view not make it improbable that Gerber would have asked Pichulik to complete a credit application. By that time the parties had been negotiating since June 1993, the appellant had been asked to quote for the supply of solar panels and in the appellant's quotation dated 28 June 1993 it was stated that payment terms had to be discussed. It does not seem to me improbable at all that the respondent would have applied for credit facilities on 9 August 1993, some 7 days before an order was eventually placed.

[12] There is yet another reason why Pichulik's evidence should have been rejected. According to him he was horrified when the appellant claimed that he was bound by the standard conditions and a copy thereof was sent to him. However, in an application for the rescission of a default judgment granted to the appellant in this very matter De Villiers, another director of the respondent, deposed to an affidavit in which he said that when the respondent first did business with the appellant a credit application form was filled out and signed by the directors of the respondent but that as far as could be recalled the terms and conditions of contract referred to therein were not attached at the time of signing thereof. Pichulik was the person who gave the instructions to the attorney who drafted the affidavit and when he subsequently read the affidavit there was, according to him, nothing in the affidavit which struck him as being incorrect. If Pichulik had not intended the relevant document to be a credit application and if he was horrified to hear that it was considered to be such it is inconceivable that the statement in the affidavit would not have struck him as

being incorrect.

[13] In my view the trial court erred by failing to recognise that Pichulik's evidence was highly improbable and by considering his evidence to stand uncontested.

[14] In any event, I agree with Southwood J that the document is clear and unambiguous and that there is no room for mistaking its import. Even if Gerber told Pichulik that she wanted him to fill in a form for information purposes, it would have been clear to him, when he received the form, that she wanted him to submit a credit application when he received the form. There could, therefore, have been no doubt in his mind that the document he returned constituted an application for credit facilities and an undertaking to be bound, for the future, by the standard conditions of trade,

[15] Pichulik signed a credit application in which he said that purchases would be made in terms of and subject to the conditions of trade of the appellant as printed 'on the reverse hereof'. The reference was clearly to

the reverse of the original document. Pichulik never said that he understood the reference to be to the reverse of the fax. If the reverse was not faxed to him and not known to him he could have called for a copy. By not doing so he indicated that he was nevertheless prepared to contract on the basis of the appellant's standard conditions. The full court erred in holding that a person 'cannot be held to be bound by something which he has not seen'. If a person is prepared to contract subject to standard conditions which he has not seen there is nothing preventing him from doing so.

[16] In my view the following evidence established that the application for credit facilities submitted by Pichulik to the appellant was granted by the appellant. Gerber said that she would have referred the credit application to Venter and that she would have given the form to him. Venter testified that a credit application by the respondent was submitted to him although he could not

be sure that he had seen the specific document signed by Pichulik. He was not prepared to grant credit. Wolf then became involved and he authorised the grant of credit to the respondent. On the 16th of August 1993 the respondent was advised by Mr Mac Micciarelli that the respondent could buy solar panels on 30 days credit.

[17] The question then arises whether the respondent was contractually precluded from raising a defence of non-payment due to a defect in the solar panels and whether the respondent was contractually precluded from claiming consequential damages as a result of such defect. Clauses 1, 3 and 5 are relevant in this regard. They are quoted in Nienaber JA's judgment.

[18] The respondent contends that the solar panels delivered by the appellant were defective and did not comply with the specifications in that 'the output of electricity given was, 15 to 21% below that which (was) laid down in the specification'. It tendered to return to the appellant the panels it still had in stock.

[19] The appellant did not submit that the conditions relieved him from the obligation to deliver solar panels complying with the specification and the clauses clearly did not have that effect. What the appellant did submit was that, in terms of the standard conditions, the respondent was not obliged to pay the purchase price but that to the extent that the panels became defective subsequent to delivery clause 3 of the standard conditions applied. The respondent, on the assumption that the standard conditions applied submitted that to the extent that the panels became defective before payment had to be made i.e. within the 30 day credit period, it was not obliged to pay the purchase price. In my view the standard conditions are clear. The appellant's obligation was to deliver solar panels complying with the specification. After delivery of panels complying with the specification the appellant had a discretion to either replace or repair them in the event of them subsequently becoming defective.

[20] Clause 5 of the standard conditions excludes liability on the part of the appellant for consequential damages.

[21] I agree with Nienaber JA that the appellant should be sanctioned for the inordinate, tiresome and protracted cross-examination of Pichulik and De Villiers. A proper sanction would be not to accede to the appellant's request that costs be granted on the attorney and client scale and to deprive the appellant of a third of its costs of appeal.

[22] The parties agreed that if the appeal were to be upheld the respondent would be liable to pay the wasted costs of the postponements of the trial of this matter on 5 August 1996 and 29 August 1997.

[23] In my view the following order should be made:

1 The appeal is allowed.

2 The respondent is ordered to pay two thirds of the appellant's costs of appeal.

3 The order made by the court *a quo* is set aside and replaced with the following order:

'1 The appeal is allowed with costs.

2 Paragraphs 2 to 5 of the order of the trial court are replaced with the following paragraphs:

"2 It is declared:

1. That the sale of solar panels by the plaintiff to the defendant was in terms of and subject to the plaintiff's standard conditions of trade as set out in annexure A to the plaintiff's declaration.

2. That, to the extent the solar panels sold and delivered to the defendant by the plaintiff became defective after delivery the defendant is precluded from raising a defence of non-payment due to such defect.

3. That the defendant is in terms of clause 4 of the standard conditions precluded from claiming consequential damages as a result of defective

panels from the plaintiff.

4 The defendant is ordered to pay the wasted costs of the postponements of the trial set down for 5 August 1996 and 29 August 1997."'

P E Streicher
Judge of Appeal

Nugent, JA) concur