THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 108/2004
Reportable

In the matter between

SEVEN ELEVEN CORPORATION OF SA (PTY) LTD **Appellant**

AND

CANCUN TRADING NO 150 CC **Respondent**

Coram**:** **Mpati DP, Farlam, Lewis, Heher, Ponnan JJA**

Heard: ***21 February 2005***
Delivered:

Summary: On a proper construction of a franchise agreement in respect of a Seven Eleven convenience store, the franchisee is not entitled to the benefit of rebates or early settlement discounts received by the franchisor from suppliers of goods: appeal against the decision to allow the benefit of rebates to a franchisee upheld and cross-appeal against decision not to allow benefits of early settlement discounts to a franchisee refused.

JUDGMENT

LEWIS JA

Introduction

[1] The dispute between the parties in this appeal turns on a franchise agreement. The appellant is a company that has operated ‘convenience’ stores, known as ‘Seven Eleven’ stores, primarily in the Western Cape, for many years. Most of the stores are operated by franchisees to whom the appellant has sold the business of a store and has given the right to manage the store subject to the franchise agreement in issue. The respondent is a close corporation, the sole member of which is Mr Herman Fouché.

[2] In July 1999 the respondent, represented by Fouché, purchased a store in Parow from the appellant and entered into a franchise agreement in respect of it. Some years later, the respondent sold the store back to the appellant and purchased another, bigger, store in Table View, entering into a new, and

different, franchise agreement with the appellant. The respondent remains the franchisee in respect of the Table View store.

[3] The dispute relates to various discounts that the respondent claims should have been passed on to it by the appellant over the period when he operated the store in Parow. In the court below (the Cape High Court) the respondent claimed the sum of R353 396.08, plus interest, representing such discounts, on four different, alternative, grounds. The court (per Mitchell AJ) found for the respondent on one basis, but, in terms of an agreement between the parties, referred the determination of the quantum payable to the respondent to a referee in terms of s 19*bis* of the Supreme Court Act 59 of 1959. The appellant appeals against the finding of liability, and the respondent cross appeals against the

finding that one particular class of discount ('early settlement discounts') should not have been afforded to the respondent.

The background to the contract in dispute

[4] The background to the conclusion of the sale and franchise contracts is briefly this. Early in 1999 Fouché was about to retire from public service and considered starting a business of his own, in particular to give employment to his son who is disabled. He consulted various documents available about franchise operations and investigated, amongst others, the franchise business run by the appellant. He contacted the public relations officer of the appellant, Ms Geraldine McConnagh, and met her to discuss the possibility of becoming a franchisee with the appellant. She described the business operation of the appellant to Fouché. At a subsequent meeting, having concluded that Fouché was seriously

interested in becoming a franchisee, she gave him what was termed a ‘disclosure document’.

[5] The disclosure document is important to the respondent’s action. It tells the prospective franchisee that it is not a contract, and cannot be relied upon to determine all the terms of the contract. It also advises that the contract itself should be carefully considered and referred to an attorney for advice. It describes, inter alia, the history of the appellant and of Mr George Hadjidakis, the managing director and founder of the appellant. It also gives details of the staff members responsible for different spheres of the operation; of the benefits of the franchise system (one being that maximum discounts are passed on to the franchisee, and which forms a significant element of the dispute to which I shall return); the training given to franchisees; the financial arrangements and

requirements; trademark registrations; and the respective obligations of the parties. In short, it tells a prospective franchisee how the system operates. Fouché received the document on 31 May 1999 and at about that date also discussed the possibility of buying a store and becoming a franchisee with Hadjidakis directly.

[6] Fouché, as advised, studied the document carefully, highlighting passages he regarded as important, as he did the franchise agreement. He met with Hadjidakis subsequently, and eventually made an offer to purchase the store in Parow, which took the form of the standard contract then used by the appellant. Fouché's impression created, he said, by discussions with Hadjidakis, and by the disclosure document, was that he was entitled to all the benefits obtained by the appellant as a result of bulk purchasing. At the time of entering into the contract, however,

he did not know of any benefits other than ordinary trade discounts and what Hadjidakis had referred to as ‘kickbacks’.

[7] At one of the discussions about becoming a franchisee, Hadjidakis had mentioned to Fouché that there were a number of franchisees who were dissatisfied with the business because they believed they were not getting all the benefits to which they were entitled. Indeed there had been press coverage about the dissatisfaction before Fouché entered into discussions with representatives of the appellant. And Fouché was invited to attend a meeting between the appellant and franchisees at which the dissatisfaction about not getting the benefit of rebates and early settlement discounts was expressed. He did not attend the meeting himself – but members of his family did. Aware of such dissatisfaction on the part of franchisees, Fouché nonetheless, on

behalf of the respondent, entered into the contract of sale and the franchise contract with the appellant.

[8] The disclosure document, in dealing with the advantages of being a Seven Eleven franchisee, states that one of the benefits of the franchise system of the appellant was that 'maximum discounts' would be passed on to franchisees. Trade discounts were indeed passed on to the respondent. Fouché subsequently discovered, however, that the appellant received other reductions in the prices payable to suppliers of the goods sold in the store: what were termed 'early settlement discounts', which the court below decided were not payable to the respondent, and certain rebates given to the appellant by suppliers, which the court held should have been passed on to the respondent. It is the respondent's entitlement to rebates that forms the subject of the

appeal, and the entitlement to settlement discounts that forms the subject of the cross appeal.

[9] Fouché did not succeed in running the store in Parow at a profit. He testified that although he and his family worked long and hard the respondent was in financial difficulty. And so, he said, despite not getting the benefit of the discounts to which he thought the respondent was entitled, Fouché approached Hadjidakis to discuss the problems that he was encountering in running the Parow store. Hadjidakis advised him to take on a second franchise or to buy a bigger store with a bigger turnover. Fouché opted for the second route.

[10] In August 2001 the respondent sold the Parow store back to the appellant, and bought a new business in Tableview. He also

entered into a new franchise agreement. It is significant that the terms of the franchise agreement are different: in particular, it states that 'the franchisor shall in its sole and absolute discretion afford the franchisee the benefit of trade discounts received by it as a result of bulk purchases for goods and merchandise purchased on the franchisee's behalf'. The action against the appellant relates, however, to the first franchise agreement, which makes no mention of any kind of discount at all.

The sale and franchise contracts and the alternative grounds for the claim

[11] The sale agreement between the parties is not in contention, although it is relevant to the business scheme governing the relationship between the parties. The respondent purchased the business of the store in Parow, including goodwill, fixtures, fittings,

furniture, appliances and stock – a fully stocked convenience store. The purchase price of the store was payable over a period of three years and is discussed more fully below.

[12] The franchise agreement that regulates the relationship between the parties is central to the action. It is silent on the question of discounts to which the respondent might have been entitled. The respondent claimed the discounts to which it considered it was entitled on four alternative grounds. The first was that it was entitled, on an interpretation of the franchise agreement, to receive the benefit of any discounts 'negotiated' with suppliers (wholesalers). The second ground was that as a result of 'quasi mutual assent' the contract provided that the appellant would pass on to the respondent any discounts so negotiated. Thirdly, that there is a tacit or implied term to the effect that any discounts

would be passed on to the respondent; or, in the fourth place, that Hadjidakis, the managing director of the appellant, had falsely misrepresented to Fouché that discounts negotiated with suppliers would be passed on to the respondent. Before turning to each ground I shall deal with the structure of the business strategy put in place by the appellant, to which effect was given by the franchise agreements between the appellant and its franchisees.

The appellant's business strategy

[13] The way in which the appellant operates is to a large extent explained in the franchise agreement itself and the disclosure document, and emerges also from the evidence of Hadjidakis and Mr Russell Cameron, the chief buyer for the appellant.

[14] On conclusion of a franchise agreement the franchisee is placed in control of a fully stocked Seven Eleven convenience store. That stock is paid for by the appellant, and the franchisee is given a period of three years in which to pay for it, no interest being charged. The franchisee is obliged to pay 75 per cent of its weekly turnover to the appellant in the week following the purchase of stock. (In the respondent's case this was amended to the sum of the total purchase prices plus R1 000 a week.)

[15] The franchisee undertakes to make purchases for the store only from the appellant or from its nominated suppliers. Crucially, the appellant pays all suppliers itself, although the franchisee receives an invoice from suppliers on delivery. The suppliers then, at the end of each month, send a consolidated statement reflecting the supplies to each franchisee to the appellant. A specially

designed computer programme enables the franchisee to inform the appellant of its purchases from each supplier: if the supplier's statement tallies with that of the franchisees, the appellant pays the supplier.

[16] The goods stocked by the franchisees, in accordance with the franchise agreements, are limited. As indicated, the franchisees may purchase only from approved suppliers, and in respect of certain items, such as meat and bakery products, the appellant is itself the supplier.

[17] All negotiations, especially as to prices and discounts, for the purchase of goods stocked in the Seven Eleven stores are done by the appellant directly with the suppliers. And the franchisees

play no role in the payment arrangements between the appellant and the suppliers.

[18] The business model on which the appellant relied entailed that the franchisees mark up the price of goods sold by an average of 39 per cent. Projections on yearly turnover in any store would, provided the store was run in accordance with the principles laid down by the appellant, yield an annual gross profit of 10 per cent. The projections in respect of the Parow store first acquired by the respondent were made available to Fouché before the contract was concluded. These make no provision for settlement discounts or rebates. However, on certain invoices actually received by the respondent the supplier did indicate the extent of a rebate.

The claim based upon the interpretation of the franchise agreement

[19] The court below found that on an interpretation of the franchise agreement, having regard to the disclosure document as a background circumstance, the respondent had been entitled to the benefit of rebates that the appellant received from suppliers. As previously stated, no mention is made in the agreement of the right of the respondent to benefit from any discount afforded the appellant. Indeed the word ‘discount’ appears nowhere in the agreement. The respondent argued, however, that such right could be found by having regard to the background circumstances of the contract. The court below found that a section in the preamble to the contract could not be given meaning without reference to background circumstances. Such meaning was found by the court in the disclosure document. The respondent relied also on clauses

14.1 and 14.2 of the contract to bear out the meaning for which it contended. Clause 14 deals with the goods that may be sold by the franchisee. Clause 14.1 reads:

'In order to ensure uniformity in specification compliance and control, the Licensee [franchisee] agrees to handle, promote and/or sell only those items approved by the Licensor [franchisor] purchased only from the licensor and/or such wholesalers and/or suppliers as are approved and/or nominated by the Licensor.'

Clause 14.2 provides:

'The Licensee shall consult with the Licensor in regard to pricing policies recommended by the licensor in relation to the products and will adhere to any recommended prices stipulated by the Licensor.'

It is immediately apparent that these clauses have no bearing at all on the question whether the respondent was entitled to discounts on the goods that it purchased for sale in the store.

[20] The court below did, however, consider that words in the preamble to the contract were unclear and thus subject to interpretation. The preamble records the background to the agreement and certain facts about the appellant's franchising operation. It does not impose obligations on either party, as counsel for the respondent conceded in argument before this court. The clause relied upon reads as follows, the words emphasised being those the court considered uncertain:

'(c) The licensor is engaged in providing entities and individuals with a unique and successful *business support system*, hereinafter referred to as the system including information and analysis of researches in regard to equipping, planning, financing, furnishing and establishing SEVEN ELEVEN Convenience Stores, wholesale purchasing and retail marketing of stock in trade, management expertise, knowledge and information and unique design and set up of each SEVEN ELEVEN Convenience Store, inventories and control systems, colour schemes and individually designed patterns of layout of SEVEN ELEVEN Convenience Stores.'

[21] The court considered that in determining the meaning of 'business support system' it should have regard at least to background circumstances – those facts known to all parties and that are not in contention. The most important circumstance in this matter, said Mitchell AJ, was the disclosure document prepared by the appellant for prospective franchisees. That document states that 'the benefits of belonging to the group are enormous'. One of the reasons advanced for this is that 'Head Office buys in bulk and negotiates maximum discounts, which are passed on directly to the franchisee'. Much of the argument on the four alternative grounds for the claim was directed to this statement.

[22] There is no doubt, in my view, that the trial judge, in interpreting the contract, was entitled to have regard to the

disclosure document as one of the circumstances forming the background.[1] The document was a factor known to the representatives of each: it had been prepared by the appellant and given to Fouché by McConnagh before he had decided whether to enter into the sale and franchise agreements on behalf of the respondent.

[23] There are, however, two difficulties with the approach taken by the court below. First, the words regarded as uncertain were in the preamble to the franchise contract, and were conceded by the respondent not to impose any obligations on the appellant.[2] The justification for having regard to the disclosure document was thus flawed since no light was thrown on the obligations of the appellant.

[1] See for example *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767I-768E.
[2] See *ABSA Bank Ltd v Swanepoel NO* 2004 (6) SA 178 (SCA)at 181D-G.

[24] Secondly, the court examined the words in isolation, without having regard to the document as a whole. Particular attention was paid to dictionary definitions of the words 'discount' and 'rebate', without considering the entire business system set out in the document and in the projections on turnover and profit given to Fouché before the contracts were concluded. The court considered that the word 'discount' included rebates. It is true that the dictionary definitions of rebate indicate that it is a retroactive discount.[3] Indeed, the Concise Oxford English Dictionary[4] gives as one of its meanings 'a deduction or a discount on a sum due' without reference to the aspect of retroactivity. But dictionary definitions, as has so often been said by this court, are not always helpful, let alone conclusive. In *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer*[5] Hefer JA stated:

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[3] The New Shorter Oxford English Dictionary 4 ed (1993).
[4] 10 ed 2002.
[5] 1997 (1) SA 710 (A) at 726H-727B.

'Recourse to authoritative dictionaries is, of course, a permissible and often helpful method available to the Courts to ascertain the ordinary meaning of the words . . . . But judicial interpretation cannot be undertaken, as Schreiner JA observed in *Jaga v Dönges NO . . . .*1950 (4) SA 653 (A) at 664H, by "excessive peering at the language to be interpreted without sufficient attention to the contextual scene".'

Similarly, in *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka*[6] Nicholas J said, in relation to the interpretation of a patent specification:

'A dictionary meaning of a word cannot govern the interpretation. It can only afford a guide. And, where a word has more than one meaning, the dictionary does not, indeed it cannot, prescribe priorities of meaning. The question is what is the meaning applicable in the context of the particular document under consideration.'

Both these statements were referred to with approval by Harms JA in *Monsanto Co v MDB Animal Health (Pty) Ltd (Formerly MD*

[6] 1980 (2) SA 191 (T) at 196E-F.

Biologics CC).[7] Moreover, as Lord Steyn said in *R v Secretary of State for the Home Department, ex parte Daly*[8] 'in law context is everything', a statement referred to by Nugent JA with approval in *Aktiebolaget Hässle v Triomed (Pty) Ltd*.[9]

[25] The proper question to be posed then, when having regard to the entire context in which the parties found themselves at the time of negotiating the contracts, is what was meant by the parties. This enquiry requires a consideration of the whole disclosure document which explains the appellant's method of operation as a franchisor. That document, the franchise contract, and the evidence of Hadjidakis and Fouché, explain the context.

[7] 2001 (2) SA 887 (SCA) at 892A-E.
[8] [2001] UKHL 26 para 28; [2001] 3 All ER 433 (HL) at 447a.
[9] 2003 (1) SA 155 (SCA) at 157G.

[26] The evidence of Hadjidakis and of Cameron was that trade discounts that were passed on to franchisees were of a completely different nature from rebates. Both testified that a discount is negotiated with a supplier before sales are made to the franchisees, and are thus reflected on the invoices given to the franchisee when goods are delivered to it. Rebates, on the other hand, are given by manufacturers or suppliers after sales have been made. They are given for reasons unrelated to the individual franchisees: in general, they will be given to a purchaser as a reward for growth, for example, reaching a target of a certain number of stores, or because the purchases made over a period have grown. The fact of a rebate, and its quantum, are generally regarded as confidential. The major supermarket chains do not know what rebates are given to others, and Hadjidakis said that even the managing director of a major chain might not know what

rebates had been given – only the person in direct control of buying would be aware of the full extent of it. Rebates, he testified, were an important source of profit to the appellant.

[26] Furthermore, whereas trade discounts negotiated ahead of a purchase, were taken into account when making the financial projections for a potential franchisee, and in respect of which the respondent obtained the benefit, rebates could never have been part of the projections because they were not known when these were calculated. And how, asked the appellant, if rebates were to be passed on to franchisees, would this be done? Rebates were not linked to sales made to individual franchisees: they were linked to the franchisor's operation and growth.

[27] If one has regard to the contract in question, the disclosure document and the evidence of Hadjidakis, it becomes apparent that it could never have been intended that rebates be passed on to the respondent or any other franchisee. In any event, in so far as Fouché's intention is concerned, he testified that at the time of entering into the contract he had not been aware of the existence of rebates. Obviously, then, he could not have expected to get the benefit of any.

[28] In so far as early settlement discounts were concerned, no provision was made in any of the documents concerned for passing on the benefit of these to franchisees. It will be recalled that all payments for goods sold to franchisees by suppliers are paid for by the appellant. In certain cases if payment was made promptly or before due date a discount would be given to the

appellant. The court below concluded that such discounts did not relate to bulk purchasing: they were a function of payment made timeously or early by the appellant. They therefore did not accrue to the respondent on any interpretation of the franchise contract.

[29] In my view, having regard to the terms of the franchise contract and the disclosure document it is clear that the parties did not intend that such discounts enured for the benefit of the respondent. The claim on this ground must thus fail.

The claim based on quasi-mutual assent

[30] The first alternative claim made by the respondent was that, prior to the conclusion of the franchise contract, the appellant had led the respondent, represented by Fouché, reasonably to believe

that any discounts negotiated with suppliers would be passed on to the respondent. The response to that claim was that the contract expressly excluded liability for representations or warranties made by the appellant. The respondent then amended its claim to aver fraudulent misrepresentations made by Hadjidakis to Fouché. I shall deal with that ground in due course.

[31] In my view, the claim based on quasi-mutual assent is in any event misconceived. In order to rely on quasi-mutual assent one must show that the person who has relied on terms different from those appearing in the contract has done so reasonably.[10] One must ask first whether there has been a misrepresentation as to one party's intention; secondly, who had made that representation, and thirdly, whether the other party was misled. Thus the essential question is whether, as a result of misrepresentation, the contract

[10] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239J-240A.

is different from what it appears to be. This approach requires that one looks for a misrepresentation as to the terms of the contract. Apart from the fact that there was no credible evidence to show that Fouché had indeed been misled, the contract itself precluded reliance on any misrepresentation, in the absence of fraud. The action must thus fail on this ground too.

The claim based on an implied or a tacit term

[32] The distinction between implied and tacit terms is now trite. The former is a term implied by the law, the latter a term implied by the facts.[11] It was not argued by the respondent that there is any term relating to special forms of discount that must be available to a franchisee implied by law. But it was argued that the parties had tacitly agreed that the respondent would receive the benefit of all discounts given to the appellant by suppliers. Hadjidakis denied

[11] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).

that he would have agreed to such a term. It was the essence of his business strategy that the appellant alone would be the beneficiary of rebates and early settlement discounts. And Fouché could hardly contend that he intended to get such discounts given that he did not know of their existence at the time of entering into the contract.

[33] The principle applied over many years is that the term to be incorporated in the contract must be necessary, not merely desirable.[12] The classic tests used to give effect to this principle do not, however, take into account the actual intentions of the respective parties. They require the court to consider whether the term contended for would give 'business efficacy' to the contract;[13] or to ask what the 'officious bystander' – a person who is not a

[12] *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105; *West End Diamonds Ltd v Johannesburg Stock Exchange* 1946 AD 910; *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A); *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 142B-E.
[13] See *Alfred McAlpine* above at 532 in fin-533B, where Corbett JA relied on a statement of Scrutton LJ in *Reigate v Union Manufacturing Co* [1918] 1 KB 592 (CA) at 605; 118 LT 479 (CA) at 483.

party to the contract but asked whether the term is necessary – would say.[14] These are objective tests. On either test, when one asks whether it was necessary to incorporate a term in the franchise contract that the franchisee would receive the benefits of all discounts obtained by the franchisor, the answer must be that such a term was not necessary. On the contrary: it was fundamental to the appellant that it received the early settlement discounts and the rebates for its own benefit. These discounts were what made the appellant's business profitable.

[34] Whether one looks at the matter on a subjective basis – what the parties actually thought at the time of entering into the contract – or on the objective tests applied over many decades, the answer

[14] See the dictum of Mackinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA) at 227, and *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25 at 31-32 where Stratford JA too had regard to what an independent person would say about the necessity of incorporating the term in question. However, Stratford JA also stated that the 'true view' is that 'you have to get at the intention of the parties in regard to a matter which they must have had in mind, but which they have not expressed'. He considered therefore that one had to have regard not only to objective tests but also to what the parties claimed to have intended.

is clear. There was no tacit term that the respondent was entitled to the benefit of early settlement discounts or of rebates.

The claim based on fraudulent misrepresentation

[35] The particulars of claim were amended, as I have said, to allege fraud on the part of Hadjidakis when the appellant relied on the clauses in the franchise contract that excluded liability for misrepresentations. But such exemption clauses do not avail a party who has made fraudulent misrepresentations to the other.[15] The court below found that Hadjidakis had not made any fraudulent misrepresentations on which the respondent could rely. There was no proof that Hadjidakis had told Fouché that all discounts obtained by the appellant would be passed on to the respondent, let alone proof that he had done so deliberately in order to mislead. At all times Hadjidakis had believed, the court

[15] *Wells v SA Alumenite Company* 1927 AD 69; *Reeves v Marfield insurance Brokers CC* 1996 (3) SA 766 (A) at 775C-H.

found, that a distinction was to be drawn between discounts negotiated in advance with suppliers, and which were thus for the benefit of franchisees, and rebates and settlement discounts which allowed the appellant to operate at a profit. Moreover, Fouché conceded that he had not been aware of the existence of these latter benefits when negotiating the contract. It would thus be absurd to suggest that Hadjidakis had told him otherwise, or even that he had a duty to disclose to Fouché that certain discounts would not be passed on to the respondent.

[36] Moreover, Hadjidakis had told Fouché that there were several dissatisfied franchisees before the contract was concluded, and had invited Fouché to attend a meeting at which complaints about not getting the benefit of rebates and early settlement discounts were aired. Although Fouché had not attended the

meeting, members of his family had done so. And Fouché had been put in touch with another franchisee, who was vociferous in his complaints about the appellant, in order to receive training. It is highly unlikely therefore that he believed, whether as a result of a misrepresentation or a failure to disclose that certain discounts would not enure for the respondent's benefit, that the respondent was entitled to rebates and early settlement discounts.

[37] In any event, even if there had been a misrepresentation, or non-disclosure, fraudulent, negligent or innocent, it is apparent that Fouché had not relied, to his detriment, on such misrepresentation or non-disclosure, in entering into the contracts in respect of the Parow store. For at the stage when he was fully aware that franchisees were not getting the benefits for which they were clamouring, he nonetheless entered into a new arrangement with

the appellant, purchasing a different store and concluding a new franchise agreement which expressly stated that the franchisor 'shall in its sole discretion afford the franchisee the benefit of *trade discounts* received by it as a result of bulk purchases for goods and merchandise purchased on the franchisee's behalf' (my emphasis).

[38] The finding of the trial court that Hadjidakis had not acted fraudulently is thus correct. To this is added that Fouché had not relied on any misrepresentation, if such there was, in entering into the franchise contract. This claim is thus also unfounded.

[39] In summary: the respondent did not establish in the court below that it was entitled to payment of any amount representing

the benefits of rebates or early settlement discounts afforded to the appellant on any of the grounds alleged.

[40] It is ordered that:

1 The appeal is upheld with costs, including those consequent on the employment of two counsel;

2 The order of the court below is set aside and replaced by: 'The Plaintiff's claim is dismissed with costs including those consequent upon the employment of two counsel.'

3 The cross appeal is dismissed with costs.

C H Lewis
Judge of Appeal

Concur:
Mpati DP
Farlam JA
Heher JA
Ponnan JA