THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 641/2018

In the matter between:

REHAU POLYMER (PTY) LTD	**APPELLANT**
and	
BRUNETTES ELECTRICAL (PTY) LTD	**FIRST RESPONDENT**
SCHNEIDER ELECTRIC SA	**SECOND RESPONDENT**
EASTERN SWITCHGEAR	**THIRD RESPONDENT**
M & M FIRE PROTECTION CC	**FOURTH RESPONDENT**
RICHARD NZUZA & ASSOCIATES CONSULTING ENGINEERS CC	**FIFTH RESPONDENT**
COEGA DEVELOPMENT CORPORATION	**SIXTH RESPONDENT**

Neutral citation: *Rehau Polymer (Pty) Ltd v Brunettes Electrical & others* (641/2018) [2019] ZASCA 101 (25 July 2019)

Coram: Ponnan, Swain, Mocumie, Makgoka JJA and Eksteen AJA

Heard: 24 May 2019

Delivered: 25 July 2019

Summary: Claim for damages – breach of contract – interpretation of document – whether breach of warranties established.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Alkema J sitting as court of first instance):

The appeal is dismissed with costs of two counsel.

JUDGMENT

Eksteen AJA (Ponnan and Swain JJA concurring):

[1] The appellant (Rehau) is the sub-lessee of factory premises situated in Uitenhage, Port Elizabeth, which it leases from the sixth respondent, Coega Development Corporation (CDC), the sub-lessor. On 6 February 2010 a fire broke out in the low voltage room (LV room) of the factory causing extensive damage. Rehau issued summons claiming damages in the sum of R13 407 025.38, from the respondents, jointly and severally, based on various causes of action. The fourth and fifth respondents were held liable in delict to Rehau in respect of the damage. Thereafter, Rehau's claim against CDC, which is based solely on contract, was separated from the remaining issues in the matter. On 26 June 2014 it was dismissed in the High Court, Port Elizabeth. The appeal is against the dismissal of this claim, and is with the leave of the court *a quo.* The first to fifth respondents abide by the decision of this court and have taken no part in the appeal.

[2] Rehau carries on business in East London and Uitenhage as a manufacturer of Polymer based automotive components. In August 2008 Rehau entered into a written agreement of sublease with CDC (the agreement). In terms of the agreement CDC undertook to construct and lease to Rehau a factory in Uitenhage. I shall revert to the

terms of the agreement later. Suffice it for present purposes to record that Rehau gave certain warranties in respect of the premises to be constructed as recorded in the agreement.

[3] Pursuant to the agreement CDC caused the factory to be erected on the premises. Prior to completion of the construction, the fire department of the Nelson Mandela Bay Municipality (the municipality) instructed that a gas fire suppression system had to be installed in the LV room. CDC accordingly procured the design and installation of a FM200 gas fire suppression system in the factory.

[4] Rehau, however, wished to take occupation of the premises and it was eager to put the facility into operation. It could not do so before the issue of a certificate of occupancy by the municipality in terms of the National Building Regulation and Standards Act 103 of 1977 (the Act).

[5] On 18 September 2009 an inspection of the works was carried out and the fire suppression system, duly installed, was tested by one Grobler, the authorised official on the fire safety division of the municipality, in order to procure the issue of the certificate of occupancy. A number of tests were carried out which satisfied Grobler of the functional capacity of the fire suppression system. He accordingly signed off on the certificate of occupancy on behalf of the fire safety division. Grobler was, however, under the apprehension that the fire suppression system would be fully activated and operational after the test. A certificate of occupancy was issued on 22 September 2009 and Rehau commenced full production in its factory. It is common cause that the gas fire suppression system required both electricity and gas to operate. At the time when the fire occurred the gas cylinders were not connected to the fire suppression system and therefore the system did not function. Had the system been functional much of the damage caused would have been averted.

[6] When the delictual claims against the fourth and fifth respondents were adjudicated, the parties agreed on a statement of facts. A trial ensued (the first litigation), evidence was led and further factual findings were made. An appeal to the full bench in

the Eastern Cape followed. For purposes of the present appeal, the parties agreed that the statement of facts and the factual findings made in the first litigation remain binding on the parties. The agreed statement of facts records:

'(a) The Sixth Defendant is the owner of the building situated at Nelson Mandela Bay Logistics Park, Jagt Vlakte, Industrial Area, Uitenhage ('the Premises').

(b) The Plaintiff, at all material times occupied the Premises in terms of a lease concluded with the Sixth Defendant.

(c) The Fire Department of the Nelson Mandela Bay Municipality required a fire suppression system to be installed in the Low Voltage room at the premises.

(d) A fire suppressions system was accordingly designed and installed by the Fourth Defendant, as per quotes to the Fifth Defendant.

(e) The fire suppression system utilises a gas suppression process to suppress and extinguish fires, which system requires both electrical power to the system itself and the arming of the gas cylinders which form part thereof, in order to be fully operational and effective.

(f) When armed and fully operational, the system designed and installed by the Fourth Defendant, would have suppressed and extinguished a fire in the low voltage room at the Premises with limited damage, which in any event would have been confined to the panels, alternatively to the low voltage room.

(g) The fire suppression system, including the gas cylinders, was successfully tested during a presentation to the Fire Department of the Municipality on/or about 18 September 2009, whereafter an occupation certificate was dully issued by the Municipality.

(h) At the time of the fire which occurred in the low voltage room on 6 February 2010 the fire suppression system in that room was connected to electrical power but the gas cylinders were not armed.

(i) If the gas cylinders had been armed, then the damage to the Premises and its contents, caused by the fire, would have been limited as set out above.

(j) On or before 6 February 2010 the Plaintiff activated the low voltage capacitors contained in the power factor correction panels and related equipment within the low voltage room.'

[7] Rehau's claim against CDC is founded upon the alleged breach of the warranties contained in the agreement. Two warranties were relied upon in the pleadings and in argument. The material portion thereof records:

'**WARRANTIES**

9.1 The sub-lessor warrants that:

9.1.1 The Lease Premises Structures (save for such items which are installed by the sub-lessee, its agents, contractors, or employees outside the scope of this agreement) to be erected on the Property will be fit for the purpose for which it is let to the sub-lessee in terms of this Lease and will be erected substantially in accordance with (and without any material deviation from) the Building Document.

. . .

9.1.8 [T]he Lease Premises Structures will comply with all the laws, legislation, regulations, rules and by-laws of all competent authorities relating to Fire and Health Safety;

. . .'

[8] Rehau's case, as pleaded, is that:

'In breach of the warranties aforesaid, the Sixth Defendant's agent, the Fifth and the Fourth Defendant designed commissioned and installed a gas fire suppression system which was not activated and neither the Fifth Defendant nor the Fourth Defendant, both being aware of the (fact) that the gas fire suppression system had not been activated, failed to inform the Plaintiff (care of its maintenance manager or any other responsible representative) that the gas fires suppression system had not been activated.'

[9] There was some debate during the argument before us as to whether the fourth and the fifth defendants acted as agents of CDC in failing to activate the system or to inform Rehau of the failure. By virtue of the conclusion I have reached on the interpretation of the warranties it is not necessary to consider the question of agency. Rehau does not contend that the gas suppression system was inappropriately designed, commissioned or installed. On the contrary, the statement of agreed facts acknowledges that the system which was designed, commissioned and installed would have suppressed and extinguished a fire in the LV room had it been armed and fully operational. In their heads of argument in this court, counsel on behalf of Rehau acknowledged that the construction and completion of the building was in terms of the local authority requirements. They argued, however, that the unarmed status of the fire suppression system was not. The central issue in the appeal is therefore whether the failure to activate the gas fire suppression system constituted a breach of the warranties which have been set out earlier. The answer requires an interpretation of the agreement.

[10] The agreement is a substantial document incorporating numerous annexures. A number of terms arising from the agreement are material to the obligation of CDC which is in issue in the present proceedings. The agreement defines the 'Lease Premises Structures', as referred to in the warranties as, 'those buildings and other structures, whether movable or immovable which exist or will be erected on the Lease Premises by the sub-lessor in accordance with the Building Documents'. The Building Documents, in turn, are defined as being the 'plans and specifications attached' to the agreement. There is no reference in the Building Documents to the gas fire suppression system as it was not envisaged at the time of the conclusion of the agreement. It only arose when the fire department of the municipality insisted on its installation a year after signature of the agreement.

[11] Clause 3 of the 'General Terms and Conditions of Sub-Lease', which is the first annexure to the agreement, sets out the obligation of CDC in respect of the construction of the Lease Premises. In clause 3.2 it places an obligation on CDC to ensure 'that the construction of the Lease Premises Structures in accordance with the Building Documents is done through to completion in accordance with the Terms and Conditions of the Development'. The 'Terms and Conditions of Development' is also defined in the agreement. It is annexed thereto and sets out the conditions upon which the CDC is obliged to erect or procure the construction of the Lease Premises Structures. It records:

'5.1 the sub-lessor shall:

5.1.1 ensure that all such consents, permits and approvals as are necessary for the construction of the Lease Premises Structures on the Property would have been obtained from the relevant authorities;

5.1.2 procure that the Lease Premises Structures is constructed in a good, proper and workmanlike-manner and in accordance with the plans;

. . .

5.1.7 ensure that the Lease Premises Structures are constructed and completed in a manner that conforms entirely to all statutory, local authority and other requirements concerning such construction and completion and in particular to the zoning specifications and rights granted to the Property'.

[12] It is in the context of these provisions that the warranties were included in the agreement. The warranties relate to the condition of the Lease Premises Structures when complete. Those are the structures which CDC was required to construct as set out in the Building Documents. As recorded earlier, at the time when the agreement was concluded the Building Documents did not contemplate the installation of the gas fire suppression system. Clause 5.1.7 of the 'Terms and Conditions of Development' did however require of CDC to construct and complete the buildings contemplated in the Building Documents in a manner which conforms with all the local authority requirements. The installation of the gas fire suppression system was a requirement of the local authority and CDC was accordingly obligated to install such a system, which it did.

[13] It is not in dispute that CDC obtained all the consents, permits and approvals which were necessary for the construction of the Lease Premises Structures (clause 5.1.), including the certificate of occupancy. Neither is it contended that the Lease Premises Structures were not constructed in a good, proper and workmanlike manner in accordance with the plans (clause 5.1.2). The thrust of the argument on behalf of Rehau is that CDC had breached the warranty recorded in clause 9.1.8. The Lease Premises Structures, so it is argued, did not comply with all the laws, legislation, regulations, rules and by-laws of all competent authorities relating to Fire and Health Safety. This, it is contended, is so, because Grobler assumed when he signed off on the certificate of occupancy that the system would be activated at that stage.

[14] Grobler testified that in order to test the unit the cylinders need not be activated. He proceeded to state, however, that 'under normal procedures after the test has been conducted they take off the units, and they activate the system.' For this reason, he said, when he signed the document he left the premises with peace of mind that everything was operational. Later he testified that it would constitute a serious transgression not to activate the system after it had been tested and he said that if he had known that the system would not be activated he would have taken back the occupancy certificate, 'because the building is not compliant with the National Building Regulations'. He did not suggest which regulations would be contravened.

[15] In argument, counsel on behalf of Rehau suggested that it would contravene ss 14(1) and (2A) of the Act. For this argument, reliance is placed on the evidence of Grobler that he would have rescinded the certificate of occupancy had he known that the gas fire suppression system would not be activated.

[16] I revert to the warranty set out in clause 9.1.8. It requires the Lease Premise Structures to comply with all legal prescripts. These structures had been duly erected in accordance with the 'Terms and Conditions of Development' and the Building Documents contained in the agreement. The requirement of the municipality that a gas fire suppression system should be installed was complied with. Section 14 of the National Building Standards Act requires of a local authority to issue a certificate of occupancy in respect of a building 'if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of s 7'. Section 7 of the Act relates to the approval by local authorities in respect of the erection of buildings. It has not been suggested that any condition imposed in terms of s 7 of the Act was contravened. What s 14(1) requires is for the local authority to be satisfied that the building has been 'erected' in accordance with the provisions of the Act and the approval granted. It is not concerned with operational issues which occur after occupancy. Once it has been satisfied that the building has been erected in accordance with the provisions of the Act the fire suppression system could be activated or deactivated according to operational requirements. This does not affect the certificate of occupancy.

[17] Counsel also sought refuge in s 14(2A) of the Act which provides:

'Upon completion of the erection or installation of;

(a) the structural systems; or

(b) the fire protection system; or

(c) the fire installation system,

of any building the person appointed to design such system and to inspect the erection or installation, shall submit a certificate to the local authority indicating that such system has been designed and erected or installed in accordance with the application in respect to which approval was granted in terms of s 7'.

The section is concerned with the verification of the design, erection and installation of the system, not the operation thereof after installation has been properly verified. As recorded earlier, it was not suggested that the design, erection or installation was in any way defective.

[18] When challenged on this aspect, counsel on behalf of Rehau submitted that the evidence of Grobler in this regard was unchallenged and that the evidence therefore established that the system was non-compliant. The difficulty with this argument is that the interpretation of a statute is a matter of law and not of fact and, accordingly, the interpretation thereof is a matter for the court and not for witnesses.[1] On a consideration of the provisions of s 14(1) and 14 (2A) of the Act, I consider that Grobler's interpretation of the section, if it is what he had in mind, was wrong. No other breach of any legislation, regulation, rules or by-law of any competent authority was suggested. In the result I am driven to conclude that no breach of the warranty set out in clause 9.1.8 has been established.

[19] I turn to clause 9.1.1 which requires that the Lease Premises Structures erected on the property would be fit for the purpose for which it was let. As recorded earlier, it is not in dispute that the system was well designed and properly commissioned and installed. There was nothing intrinsically wrong with the system and it was not as a result of any intrinsic defect or malfunction that it was not operational at the time of the fire. The damage was caused by the negligent omission on the part of the fourth and fifth respondents to advise Rehau and CDC that the gas cylinders were not armed. On this basis they were held liable in delict. Such a failure is not however, covered by the warranty. In the result, in my view, no breach of the warranty set out in clause 9.1.1 was established.

[20] Reference was made during argument to clause 9.1.3 whereby CDC warranted that it was not in breach of any obligation it had in respect of the property. Notably this

[1] *KPMG Chartered Accountants (SA) v Securefin Limited* & another [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39.

warranty is couched in the present tense at the time of the signature of the agreement. In this sense it is in contrast to the remaining warranties set out in clause 9.1, all of which were couched in the future tense thereby referring to the completion of the building. The warranty in clause 9.1.3 does not relate to the “Lease Premises Structures” but to the property. The property is defined in the agreement as the immovable property identified in the schedule to the agreement. It finds no application to the fire suppression system.

[21] In conclusion, on a proper interpretation of the agreement, the activation of the gas cylinders forming part of the fire suppression system does not fall within the scope of the warranties. It was properly designed, constructed and installed. In the result the appeal must fail.

[22] Accordingly the following order is made:
The appeal is dismissed with costs of two counsel.

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J Eksteen
Acting Judge of Appeal

Mocumie JA dissenting

[23] I have had the benefit of reading the judgment of my colleague Eksteen AJA in which my other colleagues concur. However, I find myself in respectful disagreement with his conclusion that the activation of the gas cylinders forming part of the fire suppression system does not fall within the scope of the warranties.

[24] My colleague correctly states that Rehau’s claim against CDC is based purely in the law of contract and is founded upon an alleged breach of the warranties contained in

the written contract. However, for the reasons that follow, I am not persuaded that the court a quo was correct in dismissing the claim against CDC. The salient facts, which for the most part are common cause or undisputed, are set out in the judgment of my colleague and need no repeat.

[25] There are two crisp issues for determination in this matter. The first is whether CDC breached the warranties pertaining to the leased premises' statutory compliance with all fire and health safety provisions ie clause 9.1 .1 and 9.1.8. In particular, in clause 9.1.8 of the agreement (cited in para 7 of the majority judgment above), Rehau warranted that the leased premises would comply with 'all of the laws, legislation, regulations, rules and by-laws of all competent authorities relating to fire and health safety.' As I see it, clause 9.1.8 cannot be read in isolation from other clauses in the agreement as they impact on its interpretation. These include clause 5.1.7 which imposes upon CDC the duty to:

'Ensure that the Lease Premises Structures are constructed and completed in a manner that conforms entirely to all statutory, local authority and other requirements concerning such construction and completion and in particular to the zoning specification and rights granted to the property.'

[26] Further, clause 5.1.9 of the lease agreement imposes the duty upon CDC to:

'Obtain as soon as reasonably[y] possible after the Practical Completion Date, all necessary consents, permits and approvals required under [the] applicable laws and regulations from the relevant authorities to allow the Lease Premises Structures to be occupied by the [Rehau] including, without limitation, an occupation certificate and the [CDC] indemnifies the [Rehau] against all claims of whatsoever nature made against the [Rehau] as a result of the failure by the [CDC] to obtain[n] any such consents, permits or approval.'

[27] The second issue is whether, if a breach is found, Rehau is entitled to make a claim for contractual damages in light of the indemnity clause 16.1 which clause provides as follows:

'The Sub-Lessee shall not, under any circumstances, have any claim or right of action whatsoever against the Sub-lessor for damages, loss or otherwise that occurs on the Lease Premises or the

Supplier Park save for damages or destruction directly caused by any act or omission of the Sub-Lessor, its employees, servants or agents.'

[28] The principle on the enforceability of an express warranty is stated as follows in *Evans & Plows v Willis & Co*:[2]

'[I]n our law if an express warranty as to the quality of the article sold has been given by the seller and this turns out to be untrue an action for damages for breach of contract lies... The liability in the… case… is independent of *mala fides*, but depends upon what he has expressly taken upon himself by his contract'.

[29] As a general principle, in order to determine whether an express warranty is binding, a court, if called upon to do so, must consider whether the parties intended it to be so, which can be elicited through a process of contractual interpretation as set out recently by this court in several cases and need no repeat.[3]

[30] When the lease agreement with the accompanying appendixes thereto was concluded, the 'intended purpose' for which the premises was leased to Rehau was at the heart of the agreement. The intended purpose was that '[i]t would be a factory building with double storey administration block and Gatehouse, constructed on steel and masonry with timber trusses, and with a level of finish above average for a typical building of that nature', suited, for the business of the appellant – as manufacturer of polymer based automotive components Petroleum is the principal raw material polymers are derived from. Petroleum is 'any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas, which gas has in any manner been returned to such natural condition, but does not include coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation or gas arising from a marsh or other surface deposit.'[4] Science, if not common sense, dictates that it is highly flammable. This means,

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[2] *Evans & Plows v Willis & Co.* 1923 CPD 496 at 502.
[3] *Natal Joint Municipality Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18. See also *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) paras 26-28 and 31.
[4] As defined in the South African Mineral and Petroleum Resources Development Act 28 of 2002.

as I will demonstrate in this judgment, that the fire and safety compliance provisions were inextricable material terms of the lease agreement. That is why the parties – in particular CDC as the owner of the lease premises – was obliged to ensure that the conduct of all concerned was compliant with all laws, regulations and by-laws applicable to fire, health and safety as prescribed by all relevant institutions including the municipality under which jurisdiction the lease premises resided. To that extent the parties deemed it necessary to revise these inherently hazardous conditions in phases to ensure compliance from the time of commencement of construction of the factory until its completion.

[31] The majority judgment is based mainly on the National Building Regulations and Building Standards Act 103 of 1977 (the NBRBS Act). However, in my view, the Nelson Mandela Bay Metropolitan Municipality by-law relating to fire safety (2007) (the by-law) is more relevant and provides a better understanding of the scheme of the duty imposed on an owner of the premises/landlord or person in charge in the context of the warranties provided for consciously between the parties in the lease agreement. The by-law was adverted to by Rehau in its heads of argument, and this point was further argued before us. It is this point I now turn my attention to.

[32] The by-law under s 21 provides as follows:

‘21. Testing and maintenance of fire-protection systems

(1) A fire-protection system must be tested and maintained on a regular basis and the owner or person in charge of the premises must keep a detailed record of the test and maintenance of the system.

(2) A person may not test a fire-protection system before notifying the occupants of the premises concerned of the starting and completion times of the test and where applicable the parties who monitor the fire protection system.

(3) A fire-protection system designed for detecting, fighting, controlling and extinguishing a fire must be maintained in accordance with the National Building Regulations (T2), read in conjunction with a recognised national code or standard, and in the absence of a national code or standard, an applicable international code or standard must be used.

(4) A fire protection system may not be installed, dismantled, recharged, disconnected, serviced, modified, repaired or tested in any area where such action would create a danger or hazard.

(5) *The person carrying out the maintenance of a fire protection system must inform the owner or person in charge of the premises in writing, of any defects discovered, maintenance performed or still outstanding and where the person in charge has received such notice, he must without delay inform the owner accordingly*.

(6) *The owner or person in charge of the premises must immediately notify the controlling authority when the fire protection system, or a component thereof, is rendered inoperable or taken out of service and must notify the controlling authority as soon as the system is restored.*

(7) The owner or person in charge of the premises must take all steps deemed necessary by the controlling authority to provide alternate equipment to maintain the level of safety within the premises.' (Emphasis added.)

[33] Section 21, in its plain and simple language, places an obligation on the owner of the premises or the person in charge thereof not only to install but also to: maintain a fire-protection system;[5] and to notify the controlling authority if the fire-protection system is rendered inoperable or taken out of service.[6] On the basis of this by-law, read cumulatively with all the relevant clauses of the agreement – clause 9.1.1 and 9.1.8 referred to in the main judgment, the sixth respondent as the owner of the lease premises was obliged to discharge the aforesaid obligations. That is however not the end of the inquiry.

[34] The question which begs an answer is whether the sixth respondent can be held liable where, as the parties agreed, the sixth respondent and the appellant were unaware of the omission of the fourth and fifth respondent on the day the fire broke out and caused the damages the appellant suffered. The subsequent argument which arose was whether the sixth respondent can be held liable even when it was unaware of the omission by the fourth and fifth respondent.

[35] The appellant pleaded agency in its particulars of claim which Rehau disputed in its plea. However, agency was not a fact agreed upon by the parties in their Statement of Facts before the court a quo. Although the issue of agency was raised in the high court,

[5] Section 21(3) By-law relating to fire safety (2007).
[6] Section 21(6) By-law relating to fire safety (2007).

it was confounded by the separation of issues that required adjudication through two judgments of Alkema J (delivered on 26 June 2014 and on 22 August 2017). In the first judgment concerning the delictual liability of the fourth and fifth respondent, Alkema J, in *obiter,* described the fourth and fifth respondents as agents of CDC. In this judgment, Alkema J held that only the fourth respondent was liable in delict. On appeal to the full bench, the liability of the fifth respondent was raised as a ground for appeal. The full bench confirmed the liability of the fourth respondent and extended delictual liability to include the fifth respondent.

[36] In the second judgment concerning the contractual liability of CDC, Alkema J held that the damage was caused not by an act or omission of CDC as contemplated by the indemnity clause but by the negligent omissions of 'other parties.' Alkema J, does not expressly make the finding that the fourth and fifth respondent are agents of CDC as contemplated by the indemnity clause. However, for the reasons that follow, this is a finding with which I am unable to agree.

[37] At the outset I must state that it is evident on the papers that Rehau relied on agency. Before us, counsel was requested to address the court on whether agency was a requirement to succeed in the claim for contractual damages. After initially responding in the negative counsel was constrained to concede that it was in fact a requirement. However, as I will demonstrate hereafter, the failure to elaborate on the course and scope of the alleged agency is not fatal to Rehau's case.

[38] The case of *Chartaprops Pty Ltd & another v Silberman*[7] is of relevance to answer the question posed, ie whether the fourth and fifth respondents were the agents of CDC and flowing from that, whether CDC can be held liable for the omission of the fourth and fifth respondents.

[7] *Chartaprops Pty Ltd & another v Silberman* 2009 (1) SA 265 (SCA); [2009] 1 All SA 197 (SCA); (2009) 30 ILJ 497 (SCA); [2008] ZASCA 170; [2008] ZASCA 115.

[39] In *Chartaprops*, Mrs Silberman was injured when she slipped and fell in a shopping mall owned by Chartaprops which had appointed a company, Advanced Planning, to do the cleaning of the mall. A slippery substance was left undetected by the employees of Advanced Planning; Mrs Silberman sustained an injury as a result and sued both companies-Advanced Planning on the basis of negligence of its employees in failing to detect and remove the substance, which had been lying on the floor for about thirty minutes. There was however evidence that Chartaprops was in the habit of checking on and inspecting Advanced Planning's activities. But Chartaprops, too, had failed to detect the substance. In the court a quo, both respondents were found to be liable, jointly and severally. On appeal, Nugent JA, in his minority judgment disagreed with the court a quo which he said erred in holding Chartaprops liable vicariously for the negligence of Advanced Planning. According to Nugent JA, liability could be found elsewhere, not on the basis of vicarious liability. He stated: 'Where liability arises vicariously it is because the defendant and the wrongdoer stand in a particular relationship to one another.' According to him, the rules which applied in the case did not involve the role of independent contractor. He stated further that the employer is not and ought not to be held responsible for the actions of an independent contractor. The defendant might be responsible for its own omission, its own failure to act, or to perform its own legal duties, taking reasonable steps as articulated in *Kruger v Coetzee.*[8] He stated that there was a duty on Chartaprops, as owner of the mall, to ensure that its visitors were reasonably safe. It could not shift this responsibility to the cleaning company. Therefore liability rested on Chartaprops as owner of the premises.

[40] The majority judgment penned by Ponnan JA, disagreed with Nugent JA. Ponnan JA, with reference to *Langley Fox Building Partnership v De Valence*[9]*,* held like Nugent JA that the principal is not liable for wrongs committed by an independent contractor or its employees, and that the principal would only be liable if personally at fault. He also referred to the classic test in *Kruger*, but applied it differently. According to him, there was no justification for making an exception in the case under consideration, in order to allow

[8] *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-H.
[9] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) 8F-H.

a person who is injured to recover from a principal in addition to the normal rights which an injured person should enjoy against the independent contractor. He also pointed out that there was no justification, in the fiction of the principle of non delegability, for shifting the economic cost of the negligent acts of Advanced Planning, which was primarily responsible for the damages, to Chartaprops. He held in conclusion that '[w]here, as here, the duty is to take care that the premises are safe I cannot see how it can be discharged better than by the employment of a competent contractor. That was done by Chartaprops in this case, who had by no means of knowing that the work of Advanced Planning was defective.'

[41] At paragraph [48] he held further,

'Chartaprops was obliged to take no more than reasonable steps to guard against foreseeable harm to the public.'

[42] Against this background and on the principles set out in *Chartaprops*, it is important to always take into account that whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and the circumstances of the case.[10]

[43] On the question of whether the fourth and fifth respondents were agents of CDC, there was evidence tendered on the nature of the relationship between the fifth respondent and CDC. Mr Moodley, an employee of the fifth respondent, testified in detail on the relationship between the fifth respondent and CDC which cannot be described otherwise than that of agency. In this court, to underscore this point, the appellant handed up an addendum taken from the transcribed record which depicted several instances of Mr Moodley's evidence which demonstrated that the relationship was of agency. This is despite the misgivings that the court a quo had with Mr Moodley's evidence. This relationship is further borne out by the Service Agreement which was concluded between CDC and the fifth respondent prior to the construction of the lease premises. In Appendix A there is express provision for the appointment of the fifth respondent as CDC's

[10] *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55H-56C.

consulting engineer to provide 'professional services for the electrical and mechanical planning, design and construction monitoring' of the lease premise. This constituted a mandate. The scope and the extent of the mandate is clearly express in the terms of this Service Agreement.

[44] Furthermore, subsequent to the acceptance of the mandate, the municipality imposed the requirement of a fire protection system in respect of the lease premises. The fifth respondent advised CDC of this and the mandate was extended on the same terms to make provision for the installation of a fire protection system on the lease premises. In the discharge of this mandate, the fifth respondent engaged and employed the fourth respondent to install the fire protection system. According to Kerr,[11] an agent in our law is the principal's authorised representative in effecting the principal's legal relationships with third parties. As in this case, and it is not in dispute, CDC declared its intention to be bound by the fifth respondent's acts performed within the scope of the authority in clear, direct and definitive terms set out in the agreement and even extended as alluded to in paragraph 43 above.

[45] The court a quo found albeit *obiter* that the fifth respondent was CDC's agent and thus liable in damages to the appellant. The full bench on the first appeal extended that liability to the fourth respondent. It concluded, which conclusion I affirm:

'the fifth respondent knew or ought to have known, that the gas fire suppression system was not operational at the relevant time, and hence fifth respondent was causally at fault in respect of the non-activation of the gas fire suppression system.'

These two findings were never challenged by CDC. It is thus absolutely safe to confirm these findings.

[46] Taking into consideration the facts of this case, it must be taken into account that before the by-law came into effect CDC, as the owner of the premises in issue, warranted under clause 9.1.8 that the lease premises was compliant with the national and municipal building regulations and by-laws on fire safety legislation which required the installation,

[11] A J Kerr 'Mandataries and Conductores Operis' (1979) 96 *SALJ* at 323.

maintenance and, by implication, the operation of a fire protection system. This placed the responsibility for compliance with all the laws, legislation, regulations and by-laws of the competent authorities that relate to fire and health safety squarely on CDC. As the parties agreed in their statement of facts, from the onset when the parties concluded the lease agreement the obligation to comply with the by-laws was the responsibility of CDC.

[47] I take the precaution laid bare in the majority judgment in *Chartaprops* that the application of non delegability is undesirable and I do not intend to deviate from this precedent setting judgment. But I also take heed of what Nugent JA stated in his minority judgment of the same judgment at paragraph [14] that:

'There will be no doubt be cases – particularly where skill is required for precautions to be taken – where no more is required of a reasonable person but to appoint a competent person to guard against the harm. As Van Wyk J said in *Rhodes Fruit Farms Ltd v Cape Town City Council*[12]in a passage that was cited with approval in *Langley Fox*:

"It is the duty of the employer to take such precautions as a reasonable person would take in the circumstances. I do not, however, consider Dukes' case as an authority for the proposition that the employment of a skilled independent contractor, where the extent of the danger and the reasonably practical measures to minimise it can only be determined by such skilled person, cannot in any circumstances constitute a discharge of the employer's aforesaid duty. … There may well be situations in which a reasonable person would rely solely on an independent skilled contractor to take all reasonable precautions to eliminate or minimize damage to another, and in such circumstances it could not be said that he was negligent if such contractor fails to act reasonably. In my opinion, therefore, the duty to take care where the work undertaken is per se dangerous could in some cases be discharged by delegating its performance to an expert."'

[48] He further added that:

'But there are other cases, as I hope I have made clear, in which a reasonable person in the position of the defendant is expected to ensure that reasonable precautions are taken to avoid harm. The defendant is free in those cases to appoint someone else to take those precautions but that by itself will not discharge the defendant's duty. As pointed out in the passages from *Langley Fox* and *Kruger v Coetzee* to which I referred earlier that the standard of care that is required of the defendant will be determined by the circumstances of the particular case.'

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[12] *Rhodes Fruit Farms Ltd v Cape Town City Council* 1968 (3) SA 514 (C) at 519.

[49] In my mind the relationship between the appellant and CDC was which Nugent JA referred to as 'a relationship of special dependence or vulnerability' when a person:

'is specially vulnerable to danger if reasonable precautions are not taken in relation to what is done on the premises. He or she is specially dependent upon the person in control of the premises to ensure that such reasonable precautions are in fact taken. Commonly, he or she will have neither the right nor the opportunity to exercise control over, or even foreknowledge of, what is done or allowed by the other party within the premises.'

It indeed calls for a higher standard of care.

[50] Reverting to the facts of this case, as at the time the agreement was concluded the parties were conscious of the purpose for the construction of the factory for the manufacture of polymer for automotive components which by its very nature – use of highly flammable material – created hazardous conditions. They were aware that CDC had to comply with all the applicable legislations, regulations and by-laws of the municipality under which the lease premises was located on – importantly the fire and health safety by-laws. That is why the fifth respondent upon seeking advice from the local municipality, was made aware of the fire system compliance provisions and it in turn made CDC aware and its mandate on the installation and maintenance of the fire system was extended.

[51] At the time the fire broke out and caused damages, the suppression system was deactivated through the omission of the fourth and fifth respondent. CDC through its agents – the fourth and fifth respondent – failed to notify the controlling authority that the system was rendered inoperable because the gas cylinders were not fitted which would result in the fire-protection system not being activated. In the circumstances, CDC was not in compliance with the by-laws. In this sense the warranties were breached. It is of no consequence that the fourth or fifth respondents did not inform CDC that the system was deactivated after the installation. What is clear is that CDC failed to ensure that reasonable precautions were taken and is liable for the consequent damages.

[52] What solidifies the case of the appellant and distinguishes this case from *Chartaprops* is that in addition to all the legislation, regulations and by-laws which

imposed a duty on CDC to ensure that the lease premises is safe for the purpose for which it was leased, CDC warranted its safety in respect of inter alia fire. A warranty is a contractual term by which a party to a contract assumes absolute or strict liability for proper performance, to the extent that he cannot rely on impossibility of performance or absence of knowledge of fault to escape liability.[13] Put differently, the warranties were an additional guarantee to the terms of the agreement between the parties ie apart from the legislative provisions referred to above. The warranties were therefore binding on CDC as arising from the agreement. CDC, cannot therefore escape liability.

[53] In my view, CDC must make good on the warranties it provided not only upon handing over of the lease premises but, as it must follow axiomatically, throughout the entire period of the lease because, as the court stated in *Bell v Ramsay*,[14] almost a century ago which is still good law today: 'it makes no difference whether it is stated in so many words to constitute warranties or not, so long as it was intended to convey to the mind of the [lessee] that the [lessor] intended the affirmation to constitute a promise.' CDC must be held bound to such affirmations because they led Rehau to conclude the agreement.

[54] In the light of what I have stated above, I am ineluctably led to conclude that the activation of the gas cylinders forming part of the fire suppression system falls within the scope of the express warranties – in particular clause 9.1.8. In my view, therefore, the court a quo erred in holding otherwise.

[55] Even the indemnity clause CDC attempted to rely on which makes provision for the limitation of CDC's liability in a claim for damages, cannot – on the findings I have made – assist CDC. Rehau has also succeeded in locating the breach of the warranties within the four corners of the indemnity clause. Accordingly, CDC is liable to Rehau in contract for the damages caused by the fourth and fifth respondent as its agents.

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[13] See Van der Merwe SWJ et al *Contract General Principles* 4 ed (2012) at 256.
[14] *Bell v Ramsay* 1929 50 NPD 265 at 272 with reference to *Naude v Harrison* 1925 CPD 84 at 90 and other cases cited therein.

[56] In the result I would set aside the finding of the court a quo and substitute same with the following:

'1 The sixth respondent is liable in contract for any and all damages suffered by the appellant arising out of the fire in the low voltage room on 6 February 2010.

2 The sixth respondent to pay the appellant's costs, including costs consequent upon employing two counsel.'

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B C Mocumie

Judge of Appeal

Makgoka JA dissenting

[57] I have had the benefit of reading the judgments of my colleagues Eksteen AJA and Mocumie JA. Eksteen AJA concludes that once the municipality had satisfied itself that the building had been erected in accordance with the provisions of the National Building Regulations and Building Standards Act 103 of 1977 the fire suppression system could be activated or deactivated according to operational requirements. Thus, he concludes, this does not affect the certificate of occupancy.

[58] In my view, this conclusion does not sufficiently take into account the context of the warranties. It is now settled that when interpreting a contractual provision, the context in which the provision appears, and the apparent purpose to which is directed are among the factors to be considered.[15] In the present case, the context is this. The nature of the

[15] *Natal Joint Municipality Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176;

lease premises – a factory building constructed of steel and masonry with timber trusses – required fire and safety compliance. Thus, the municipality required the installation of a gas fire suppression system, to render the lease premises compliant. Even though the agreement initially did not contemplate the installation of the gas fire suppression system, clause 9.1.8 of the warranties did require the lease premises to comply with fire and health safety.

[59] When the municipality required the installation of the system, that requirement was suffused into the agreement. Accordingly, CDC's responsibility did not start and end with the installation of the system. It had the obligation to ensure that the system achieved the purpose for which it was installed. Otherwise, the purpose of the warranty would be undermined. Seen in this light, CDM's obligation in respect of the gas fire suppression system was not a once-off event. It was ongoing, and continuous for the entire duration of the lease agreement.

[60] From the evidence, it is clear that had the municipality been aware that the fire suppression system was not activated at the time of inspection, the certificate of occupancy would not have been issued. And because the fire suppression system was a continuous safety consideration, if at any time the municipality became aware that the installed fire suppression system would not perform the function for which it was installed, it would have withdrawn the certificate of occupancy. In both instances CDM would have been required to take steps to ensure that the system was fit for purpose. Otherwise, the occupancy certificate would have been withheld for non-compliance, and the agreement between the parties would have been impossible to implement. This is how central a functioning gas fire suppression system was to the agreement.

2014 (2) SA 494 (SCA) para 13; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165 (CC) para 29.

[61] It follows that CDM cannot escape liability merely on the basis that it had installed a fire suppression system, without ensuring that it was fit for purpose. For these reasons I agree with the conclusion reached by Mocumie JA.

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T M Makgoka

Judge of Appeal

APPEARANCES:

For Appellant:	RG Buchanan SC, with him BC Dyke SC
Instructed by:	Pagdens Attorneys, Port Elizabeth
	Claude Reid Attorneys, Bloemfontein
For Sixth Respondent:	BJ Pienaar SC, with him M Pango
Instructed by:	Smith Tabata Inc, Cape Town
	Webbers, Bloemfontein