REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

14/12/18 Vally

DATE SIGNATURE

Case No.: 08179/14

In the matter between:

Drummond Cable Concepts **Defendant/Excipient**

and

Advancenet (Pty) Ltd **Plaintiff/Respondent**

JUDGMENT

Vally J

[1] On 5 March 2014 the plaintiff/respondent served summons on the defendant/excipient seeking payment of monies from the excipient/defendant it claims is due to it. Having received and considered the claim the defendant excepted on the grounds that it failed to disclose a cause of action. For ease of reference the parties in this judgment will be referred to as plaintiff and defendant instead of excipient and respondent.

The claim

[2] The claim has its origins in a partly written and partly oral contract that was concluded between the plaintiff and the defendant on or about 23 October 2012. The particulars of claim (POC) identifies the following as the key terms of the contract as well as the key elements of the claim:[1]

> 3. In and during August 2012 the plaintiff provided the defendant with a document that became known as the project scope in order to allow the defendant to furnish a quotation for work to be completed by the defendant should the plaintiff accept the quotation.
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> 4. On 23 October 2012 the defendant furnished a written quotation to the plaintiff.
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> 5. On the same day the plaintiff accepted the quotation.
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> 6. Thereafter a partly oral, partly written contract was concluded between the plaintiff and the defendant.
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> 7. The key terms of the contract were that (i) the defendant would install electrical equipment at the premises of a client of the plaintiff, which equipment would comply with the Molex Cabling standard; and (ii) the plaintiff would pay the defendant certain amounts for the work.
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> 8 and 9. The plaintiff performed all its obligations, which included paying the defendant a sum of R357 521.10.

[1] The numbering here reflects the paragraph numbering in the POC. But, as the contents of the paragraphs have not been copied verbatim from the POC, the customary practice of placing them within inverted commas has not been used here.

10. The defendant breached the contract by failing to comply with the "Molex Cabling Agreement". [2]
11. In and during November or December 2013 the plaintiff afforded the defendant an opportunity to remedy the breach by performing remedial work at the client's premises.
12. The defendant failed to take advantage of this opportunity.
13. The plaintiff was therefore obliged to employ a third party to "*remedy the defendant's breach*".
14. By virtue of concluding the "*Cabling Agreement*" the plaintiff paid the defendant the sum of R 357 521.10.
15. As a result of the defendant's breach "*the plaintiff has suffered damages amounting to R 357 521.10 being the total amount paid by the plaintiff to the defendant in respect of the Cabling Agreement.*"

[3] Accordingly, the plaintiff claims the sum of R357 521.10 together with costs from the defendant. There is no tender to return whatever the plaintiff received from the contract. Nor is there any averment to the effect that this amount constitutes the nett effect on its *patrimonium* had the breach not occurred.

[2] It is to be noted that in para 7 of the POC the plaintiff makes reference to a "Molex Cabling Standard", but in this para (para 9) the POC makes reference to a "Molex Cabling Agreement".

The defendant's exception

[4] The defendant contends that as the plaintiff accepts that work was done which was not *"wholly unsuitable for its purposes"*, the plaintiff cannot claim the full contract price it paid. In a nutshell, the full contract price cannot be the damages the plaintiff is alleged to have suffered by virtue of the alleged breach of the defendant. Hence the defendant claims that the plaintiff fails to plead, as it is required to do:

a. what remedial work it had secured and/or what goods it had purchased or supplied in order to remedy the work performed by the defendant; and,
b. what costs it incurred to have the work remedied.

[5] Consequently, the POC does not identify a nexus between the remedial work undertaken and/or the costs incurred and the amount claimed. This lack of a nexus deprives the POC of the necessary averments to sustain a cause of action.

[6] The plaintiff disagrees with this contention and maintains that its claim is based on the damages it suffered by virtue of the contract being concluded. It seeks to recover those damages by being placed in the position it would have been in had the contract not been concluded at all. This it says is legally competent and is the claim that is captured in the POC. In short, it is entitled to claim the full amount of the contract price paid to the defendant and is therefore not obliged to plead a nexus between the amount paid for the remedial work and amount claimed. In this approach the amount paid for

remedial work is irrelevant. Similarly, with the benefit it received by dint of the work (albeit defective) and the goods (notwithstanding the fact that no value is placed on them) supplied by the defendant, these, too, are irrelevant to its claim.

The legal principles

[7] This being an exception to the POC it has to be adjudicated on the basis of the entire POC as it stands[3], that each and every factual averment pleaded in the POC is true[4] and that upon every reasonable interpretation of the POC no cause of action is disclosed.[5] The POC must contain every fact (*facta probanda*) that is necessary for the plaintiff to prove. It does not, and is not required to, contain every piece of evidence (*facta probantia*) that is required to prove the fact.[6] Should all the facts required to prove the claim be pleaded in the POC a cause of action would be disclosed. The question that arises from this legal requirement is, what facts are necessary to ensure that the cause of action has been disclosed? The answer depends on the nature of the claim – a claim arising from a breach of contract requires different facts from a claim based in delict.

[8] The question that is pertinent here though is what must a plaintiff who sues for damages arising from a breach of contract plead in her POC to

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[3] *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G-H; *Baliso v Firstrand Ltd t/a Westbank* 2017 (1) SA 292 (CC) at [33]
[4] *Champion v J D Cilliers & Co Ltd* 1904 TS 788 AT 790-1; *Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 421H
[5] *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F
[6] *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E-F

ensure that all the *facta probanda* are placed before court? An omission of any of the required *facta probanda* could render the POC excipiable. It is basic rule of the law of contract that a party that sues for damages arising from a breach of contract is entitled to all the damages she has suffered in consequence of the breach. She should be placed in a position she would have been in had the contract not been breached. This according to van Heerden JA means the innocent party is asking to be compensated for her "*bargain*":

> "A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind."[7]

[9] This rule was expanded upon in the well-known *dicta* of Corbett JA (as he then was) which read:

> "The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been property performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party. (see *Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd.*, 1915 A.D. 1 at 22; *Novick v Benjamin,* 1972 (2) SA 842 (A.D.) at p 860). To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to mitigate his loss or damage and, in addition, the defaulting party's liability is limited in terms of the broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of the breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending to the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach. The two limbs, (a) and (b), of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of *Hadley v Buxendale* ..."[8] (Underlining added)

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[7] *Trotman v Edwick* 1951 (1) SA 443 (A) 449B
[8] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977 (3) SA 670 (A) at 687B-F

It is of fundamental significance that Corbett JA while expanding on the *dictum* of van Heerden JA in *Trotman* highlights its source as resting in a *dictum* of Innes CJ in *Victoria Falls.*[9] Corbett JA does not reinvent the wheel, he reiterates what Innes CJ held and what had established authority over the years.

[10] Emanating from this rule is the requirement that the *facta probanda* in the POC should specify the amount of damages that arose "*naturally and generally from the kind of breach of contract in question*" or the amount of damages she endured which though "*too remote to be recoverable*" were "*actually or presumptively contemplated*" to be the probable result of the breach. Regardless of whether she relies on the first or the second limb the plaintiff (innocent party) still has to plead factually what steps she took, or to put it differently what remedies she adopted, to mitigate her loss. Should the defendant contend that there were less costly remedies which the plaintiff

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[9] The full citation of *Victoria Falls* is to be found in the body of the quotation. The entire *dictum* of Innes CJ reads:

> "The agreement was not one for the sale of goods or of a commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact - the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. The reinstatement cannot invariably be complete, for it would be inequitable and unfair to make the defaulter liable for special consequences which could not have been in his contemplation when he entered into the contract. The laws of Holland and England are in substantial agreement on this point. Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (see *Voet* 45.1.9; Pothier *Oblig* sec 160; *Hadley v Baxendale* 9 Exch 341; *Elmslie v African Merchants Ltd* 1908 EDC 82, etc)."

ought to have adopted then it would bear the onus of showing that there were such remedies open to the plaintiff. The onus is not easily discharged.[10]

[11] Thus far, the law on this issue seems to be simple and straightforward. But then came along *Probert*[11] and judicial controversy was born, stimulated to some extent by academic criticism of the holding in *Probert*. Drawing from an analysis of law on the calculation of damages for breach of contract Nienaber J (as he then was) in *Probert* held that a claim for damages postulated on the negative *interesse* of the plaintiff is recognised as part of our law of contract.[12] To make sense of this holding it is necessary to take a step back, as Nienaber J did. Recognising that our law allows a plaintiff suing for damages on a breach of contract (which has been cancelled in consequence of the breach) is entitled to claim everything she would have gained had the contract been performed (as recorded by Corbett JA in the quote in [9] above), Nienaber J saw value in referring to these damages as the positive *interesse* of the plaintiff. These damages, according to the learned Judge, are to be distinguished from negative *interesse* of the plaintiff. Negative *interesse* constitutes those damages the plaintiff suffered by virtue of the contract being concluded. Such damages are to be calculated on the basis that the plaintiff is entitled to be placed in the position she would have been in had the contract not been concluded at all. The need for this distinction arose in Nienaber J's view because the facts before him did not make room for the relief sought by the plaintiff but which should be granted to the plaintiff. The facts were these: the plaintiff paid the purchase price of a share block to an estate agent who

[10] *Id.* at 689D-E
[11] *Probert v Baker* 1983 (3) SA 229 (D)
[12] *Id.* at 235G

was to facilitate the transfer of ownership of the share block to the plaintiff. The defendant who sold the share block did not receive the monies paid by the plaintiff and therefore did not transfer ownership to the plaintiff. The failure to transfer the ownership constituted a breach of the contract. After receipt of the money the estate agent was declared insolvent. The plaintiff registered a claim with the insolvent estate for the return of her money. The claim yielded nothing as no dividend was declared upon the winding-up of the insolvent estate. The plaintiff cancelled the contract with the defendant and sued him in Nienaber J's court for the return of her money. She did not claim nor prove that the purchase price constituted the damages she suffered. The defendant having not received the money resisted the claim. The plaintiff contended that the estate agent was the agent of the defendant (seller) and that payment of the money to it represented payment to the defendant. Finding that the estate agent was not an agent of the defendant, but rather a stakeholder, Nienaber J identified the question before him as being:

> "Who is to bear the loss, the plaintiff as purchaser, or the defendant as seller?"[13]

[12] The answer, according to Nienaber J, lay in the distinction between positive and negative *interesse*. The plaintiff, he found, had calculated her damages on the basis of the position she would have been in had the contract not been concluded at all as long as she had cancelled the contract.[14] A claim based on negative *interesse* is another form of a claim for "*restitutional damages*", which has been recognised by our courts.[15] I must record though

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[13] n 11, at 231D
[14] *Id.* at 234A
[15] Id at 234C and the cases there cited

that, in my view, the two forms of relief (damages and restitution) must not be conflated. In sum, Nienaber J's approach is captured in the following *dicta*:

> "Cancellation of the contract does not of course preclude a claim for damages computed on the basis of positive *interesse*. That much is trite. The aggrieved party is perfectly entitled to cast his eyes forward to the position he would have occupied had the contract been fulfilled. But it may suit his purpose to look backwards instead, to the position in which he would have been if no contract had been entered into at all. By the very act of cancelling the contract the aggrieved party is trying to sever all contractual links and to divest himself of the consequences of the contract. There would be no inconsistency in granting him the right, at his election, to turn the clock backwards instead of forward in an effort to restore the *status quo* by means of a claim for damages. Upon cancellation the parties are liable, in so far as it may be feasible to enforce it, to effect restitution of what each has received: a claim for damages, calculated along the lines of negative *interesse*, would therefore simply be following suit.
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> Indeed, it may be to his advantage to do so. Perhaps, for example, he has suffered no loss of profit at all (a form of positive *interesse*) because he entered into a bad bargain, although he had extensive out of pocket expenses (a form of negative *interesse*). According to the usual method of computing damages he has suffered no loss. Or he may be unable, for some or other reason, to prove a loss of profit adequately. Or his out of pocket expenses may exceed the loss of profit he is able to prove. The examples can be multiplied. Why should he be prevented from claiming damages on the alternative basis? The guilty party has no cause for complaint: these are real and not imaginary losses. suffered by the aggrieved party. They were incurred (or, as the case may be, the opportunity for gain was neglected) in the expectation that the contract would be performed. If the contract had been performed there would not have been losses. They qualify as losses for the very reason that the contract has been cancelled. Cancellation is the legitimate consequence of the other party's breach of contract. These losses therefore flow from the other party's breach. No reason is apparent why the guilty party should be protected from compensating his opposite number for such losses."[16]

[13] A scholarly but trenchant criticism of the judgment was mounted by Prof G Lubbe.[17] At heart the criticism focussed on the fact that the plaintiff is not

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[16] Id. at 234E-235B

[17] *The assessment of loss upon the cancellation for breach of contract.* (1984) 101 *SALJ* 616 – 640.

allowed to claim damages she would not have suffered had the contract been performed. The criticism it has to be said is not without merit.

[14] There has been other commentary by academics which has been no less critical of the approach adopted by Nienabler J than Prof G Lubbe had been.[18] The common theme pursued by all of the learned authors is on the usefulness of the concept negative *interesse* in assessing damages for a contractual breach. They all share a discomfort with the departure of this approach from the rule that damages are calculated on the basis of the position the plaintiff found herself in, in direct contrast to the position she would nominally have found herself in had the contract been performed.

[15] *Probert* was taken on appeal to the then Appellate Division (AD).[19] The AD was aware of the criticisms.[20] However, it found that Nienaber J was misdirected in his finding that the estate agent was not an agent of the defendant. It found that on the facts the estate agent was clearly an agent of the defendant,[21] and that payment to the estate agent constituted payment to the defendant in discharge of the plaintiff's contractual obligation to the defendant.[22] The AD decided the appeal purely on this conclusion and elected to abstain from dealing with the issue of whether Nienaber J was correct in his characterisation of our law regarding calculation of damages for breach of contract. Thus, it made no comment on the whether damages can

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[18] *D J Joubert* 1983 *De Jure* at 373; *A J Kerr* 1984 *THRHR* at 460; *J S McLennan* (1984) *SALJ* 39; *S W J van der Merwe and M F B Reinecke* 1984 *TSAR* at 85
[19] *Baker v Probert* 1985 (3) SA 429 (A)
[20] *Id.* at 436D
[21] *Id.* at 441G
[22] *Id.* at 445D

be calculated on the basis of a negative *interesse*. It, however, accepted that the damage sustained by the plaintiff was equal to the amount she paid to the estate agent. It deliberately avoided saying that this damage was calculated on the basis of her negative *interesse*. It seems to have accepted that these damages flowed "*naturally and generally from the kind of the breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach*"[23] .

[16] The issue resurfaced in front of a full court of this Court in *Hamer*.[24] The Court, consisting of Eloff JP, Strydom and Goldstein JJ, had the opportunity to consider the *ratio* in *Probert.* After due consideration the bench was divided, with Strydom J supporting the *ratio*, while Eloff JP and Goldstein J (the majority judgment) rejected it. The majority judgment was penned by Goldstein J. The plaintiff and the defendant concluded a partnership agreement during January 1989. In terms of the agreement the plaintiff was to commence working for the partnership from 1 March 1989. To this end he resigned from his employment. The defendant repudiated the agreement, which the plaintiff accepted. The plaintiff sued him for the loss of one month's salary as well as the annual increase he would have earned with his previous employer. His damages were calculated on the basis of his negative *interesse* as explained in *Probert*. The court a *quo* granted absolution from the instance against the plaintiff. On appeal, Strydom J held that the law as set out in *Probert* was correct and that the appeal should succeed with the plaintiff being

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[23] *Holmdene Brickworks (Pty) Ltd* n 8 above. See also the accompanying quotation in [10] above
[24] *Hamer v Wall* 1993 (1) SA 235 (T)

entitled to an order in terms of his claim. The majority disagreed. In the words of Goldstein J:

> "I am of the respectful view that Nienaber J erred in finding that the plaintiff may elect to pursue either his negative or positive *interesse*. The learned Judge's approach negates the effect of a contract on a plaintiff's *patrimonium*. The act of contracting necessarily changes a plaintiff's *patrimonium* and a court cannot ignore such change. I would dismiss the appeal with costs."[25]

[17] I am bound by the majority decision in *Hamer*, though I must say this causes me no anxiety. However, it bears noting that a few years later the issue arose before Farlam J (as he then was) in *Mainline*[26] which was heard in the Cape Provincial Division. Farlam J was not bound by the decision in either *Probert* or *Hamer*. Here the issue was analysed through the lenses of terms such as "*reliance interests*" (which is the same as negative "*interesse*", "*fulfilment interest*" (which is the same as positive "*interesse*"), "*expectation interest*" (which as far as I can discern is the same as positive "*interesse*"), restitution interest (which as seen in [12] above could be easily be interpreted as negative "*interesse*", though in my view, the pleadings and the evidence to be led is not the same in each case) as well as the overlap[27] of these terms in certain claims. All the terms are used as descriptive of a particular claim rather than as analytical concepts. In this sense they are really labels. Most of them are commonly used within the Anglo American systems of law. I comment on the utility of these terms in [21] below.

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[25] *Id.* at 240G-H
[26] *Mainline Carriers (Pty) Ltd v Jaad Investments CC and Another* 1998 (2) SA 468 (C)
[27] One of the overlaps that has been identified in the judgment is that of "*restitution interest*" with that of "*reliance interest*". Here, in the words of Farlam J the overlap is "*to a considerable extent.*" At [19]

[18] Bearing in mind that an overlap in the description of a claim can arise in a particular case and drawing from the academic analysis of Sir Guenter Treitel on remedies for breach of contract, Farlam J warned against drawing conclusions about the validity of the claim by relying on "*a priori arguments*".[28] And, from this he concludes:

> "... the *Hamer* position, that *only* the positive interest can be claimed where damages are sought for breach of contract, and the *Probert* position, that the negative interest can be claimed but only where the contract has been cancelled, rest on *a priori* arguments.
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> ...
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> It follows that if one were to hold that either *a priori* position has been adopted for our law, it would mean that our law would be in splendid isolation from both of the systems from which elements of our law of damages have come."[29]

[19] Noting that *Hamer* followed the dictum of Innes CJ in *Victoria Falls and Transvaal Power* for its inspiration, Farlam J held that Innes CJ referred to "*the general principles*" and therefore, "*cannot be used as authority for a decision that there has been an a priori assumption on the part of our law on the point presently in issue*"[30], i.e. that only positive *interesse* can be claimed by a plaintiff suing on a breach of contract. As for the holding in *Probert* Farlam J concludes that as a claim for "*reliance interest*" (negative *interesse*) is recognised in these Anglo-American systems it is part of our law[31], save for the fact that he does not agree with Nienaber J that "*cancellation is not a prerequisite for the recovery of reliance loss*".[32] Finally, for Farlam J a claim for "*reliance interest*" is restricted to the extent that it cannot exceed the

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[28] *Id.* at [20]
[29] *Id.* at [21] – [22]
[30] *Id.* at [30]
[31] Given that our law is a hybrid between Roman-Dutch and English law
[32] n 26, at [58]

"*expectation interest*" (which as far as I could fathom is the same as positive *interesse*).[33] So, while the learned judge allows for a claim in terms of negative *interesse* he qualified this claim by placing an upper limit to the claim: that of a positive *interesse*. This it would appear is necessary to prevent the plaintiff from being overcompensated. The problem, however, with this approach is that to determine this issue one has to know what the positive *interesse* is. If this is so, then the question that arises is: is this not a claim in terms of the positive *interesse*, albeit one that does not cover the entire positive *interesse* because the plaintiff saw fit to claim a lesser amount?

[20] I have difficulty with Farlam J's conclusion that the holding in *Hamer* was derived from an *a priori* assumption. Innes CJ's *dictum* was not a statement of general principle of our law. It is an articulation of, in the words of Corbett JA, "*a fundamental rule*".[34] This rule was merely applied in *Hamer* where Goldstein J said that in our law the impact on the plaintiff's *patrimonium* by the breach (the learned Judge referred to it as the impact of the "*act of contracting*") must be taken into account when calculating the damages endured by the plaintiff. This is consistent with long-standing authority to the effect that a plaintiff is not entitled to be overcompensated. And so, an integral part of the "*fundamental rule*" is that the losses endured or that would have been endured by the plaintiff have to be taken into account when assessing the value of her claim. This is emphasised by Schreiner JA in *Lammers*:

> "I can see no reason why the appellants should have to pay the respondent more than the value of the car at the date of the eviction, no matter what the cost of the improvements had been. He lost by

[33] *Id.* at [57]
[34] Quoted in [9] above

> the eviction the value of the car at that date; that he can recover. He lost, according to the evidence, further substantial sums by buying spare parts and putting them to uneconomic use; that he cannot recover."[35]

[21] Before leaving this issue it would be appropriate to say something about the utility of the descriptive terms relied upon Farlam J in *Mainline.*[36] The importation of the terms into our law may well describe how a claim in a particular case was assessed by the court in the course of giving practical effect to the consequence of a breach, but they do not alter the fact that the claim must be assessed on the basis of the "*fundamental rule*" that only losses occasioned by the breach can be compensated and that the plaintiff is obliged to mitigate her loss. That said, in my view these descriptive terms have served to confound rather than clarify the status of our law. Remaining focussed on the simple approach summarised by Corbett JA (quoted above in [9] and which draws from the *dictum* of Innes CJ) is the most useful way of approaching this issue. I am of the view that the utility of different descriptive terms is at best minimal, especially when at times different terms are used by different authors to mean the same thing. The proliferation of descriptive terms has not really advanced our understanding of the law of damages for contractual breach. What is of greater concern is the fact that the use of these descriptive terms can, if care is not taken, result in a modification of the "*fundamental rule*" regarding the assessment of damages for contractual breach in a radical manner. I do not discount the fact that such a modification may be necessary in the light of the transformation of our entire legal system

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[35] *Lammers and Lammers v Giovannoni* 1955 (3) SA 385 (A) at 394A-B
[36] See [17] above

by the enactment of the *Constitution of the Republic Act, 108 of 1996* (the Constitution), or in light of the evolution of our *mores* as reflected in public policy, or even in light of our economic development. But, in that event, a proper case has to be made out and the *ratio* must be based on such transformation, evolution or development, which must show that the "*fundamental rule*" no longer serves its purpose.

[22] In conclusion on this issue it is appropriate to return to *Probert*, which is the *fons et origo* of this lively and robust debate. On the facts of *Probert*, the law would entitle her to claim more than she has paid to the estate agent, (on the assumption that the price of the share block had increased since her payment, i.e. it may have been a "*good bargain*"), but it also compels her to claim less than she paid (on the assumption that the price of the share block (or shares) had decreased since payment, i.e. it may have been a "*bad bargain*"). She is, of course, entitled to claim the full amount she paid, if that is the difference between what she paid and what she would have received had the contract been performed (on the assumption that the price of the share block had neither increased nor decreased, i.e. it may have been a "*neutral bargain*"). In other words, she is only entitled to claim the amount she would have received had the contract run its course. No more and no less, unless she herself foregoes part of her loss (i.e. claims less than the entire loss caused by the breach – this could result from the value of the share block increasing in value but upon her election she only wishes to claim the amount

she paid, which represents only part of her loss[37]). Howsoever she crafts her claim, she nevertheless is required to make the necessary averments in her POC and prove their correctness at trial in order to succeed in her claim. Whether this approach is referred to as a claim based on positive *interesse*[38] or something else is of no material import. The reality is that our law on the measure of contractual damages allows a plaintiff to only recoup losses occasioned by the breach. Approaching the matter this way, ensures that the plaintiff is not out of pocket for any of her losses, nor is the defendant out of pocket by being made liable for losses that have no bearing on the breach.

Application of these legal principles to the present case

[23] The plaintiff's claim is that the defendant breached the contract by failing to install data cabling and electrical equipment that complied with the Molex Cabling standard at the premises of the plaintiff's client. It paid the defendant R 357 521.10. to perform this work and supply the equipment. The defendant supplied electrical equipment which did not comply with the standard. Non-compliance with the standard constituted its breach. As a result the plaintiff, after affording the defendant an opportunity to remedy the breach, cancelled the contract and employed a third party to do the necessary "*remedial work*" required to ensure compliance with the standard. It seeks return of the full amount paid, but does not tender the return of whatever it

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[37] The effect of this particular scenario is often referred to as her claim being one of restitutionary damages, but this can be a misnomer for it is not really a claim for damages. A claim for restitution is distinct and different from a claim for damages. This is dealt with in more detail in the body of the judgment at [24].

[38] The fact that these descriptive terms are not useful assessment tools is underscored in a comment by Prof Lubbe, to the effect that the distinction between negative and positive *interesse* is more apparent than real, G Lubbe, n 16, at 627

received in terms of the contract. Nor does it say what the price of the remedial work was.

[24] At the hearing Mr Cremen for the plaintiff claimed that the plaintiff's claim was for restitution of the price paid. A claim for restitution is not a claim for contractual damages. It is a separate and distinct contractual remedy.[39] For a claim of restitution (or rescission as it is sometimes referred to) to succeed the plaintiff must in her pleadings tender return of whatever she has received from the bargain.[40] If she received no benefit at all as had occurred in *Probert*, she must plead this fact. Further, the plaintiff is also relieved of this duty to restore any benefit received on the ground of impossibility.[41] In this case she must plead the impossibility. None of this is in the pleadings of the plaintiff in this case. Absent averments to this effect, the cause of action relied upon cannot be sustained. Hence, the exception has to succeed.

[25] If, on the other hand, the claim is to be assessed on the basis that it is one for damages, then having regard to the discussion in [7] – [22] above, it too fails to contain the necessary averments to sustain a cause of action. The plaintiff must indicate what the value of its *patrimonium* is as a result of the breach and what it would have been had no breach occurred. This it has not pleaded.

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[39] *Baker v Probert*, n 19, at 439A-B; *National Sorghum Breweries Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at [4] of the judgment of Olivier JA at 239I-J

[40] *Custom Credit Corporation Ltd v Shembe* 1972 (3) SA 462 (A) at 470C and the cases there cited; *Probert,* n 11, at 233C

[41] *Marks Ltd v Laughton* 1920 AD 12 at 21

Costs

[26] Both parties agree that costs should follow the result. However, the sum claimed falls within the jurisdiction of the Magistrates Court. This raises the question: should the costs be awarded on the basis that it be taxed on the Magistrates Court's scale? The defendant submitted that the answer depended on which party was successful in these proceedings: if the plaintiff was successful it should be allowed to only recover the costs that it would have been allowed in the Magistrates Court as it, being *dominis litis*, had elected to come to the High Court. However, should the defendant be successful it should be allowed to recover its costs on the High Court scale as it was brought to the High Court by the plaintiff. The plaintiff did not make any submission that undermined the persuasive force of the defendant's submission. Accordingly, an order consistent with this logic will be made here.

Order

[27] The following order is made:

1. The defendant's exception is upheld.
2. The plaintiff's particulars of claim are struck-out.
3. The plaintiff may deliver amended particulars of claim within 10 (ten) days from the date of this order.
4. The plaintiff is to pay the costs of this exception.

Vally J

Dates of hearing:	1 November 2018
Date of judgment:	14 December 2018
For the Plaintiff/Respondent :	Craig Cremen
Instructed by:	Frederick P Rall Attorneys
For the Defendant/Excipient:	Cherie de Villiers-Golding
Instructed by:	Shaban Clarke Coetzee Attorneys