IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 67722/2015

In the matter between:

SF RECOVERY SYSTEMS (PTY) LTD Plaintiff

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

17/04/2018 ..... 17/4/18

DATE PC SIGNATURE

and

AMOREF (PTY) LTD 1st Defendant
PIERRE J ROUX 2nd Defendant

JUDGMENT

MURPHY J

1. The plaintiff, SF Recovery Systems (Pty) Ltd, ("SF Recovery"), a company conducting business in the recovery of minerals, has instituted action against the defendants for restitution and damages arising out of the sale and lease of certain equipment. The first defendant is Amoref (Pty) Ltd, ("Amoref"), a company which manufactures and supplies mining equipment. The second defendant is PJ Roux, the general manager of Amoref who represented himself to SF Recovery as an expert in the design, manufacturing and supply of mining equipment.

2. In January 2015 SF Recovery entered into a contract with Anglogold Ashanti ("Anglo") to recover gold from gold bearing material at the Savuka Plant in Carletonville ("the Anglo contract"). SF Recovery was required in terms of the Anglo contract to break up, crush and mill large sections of concrete flooring into which gold dust had syphoned or settled over time and to extract the gold residue. The work had to be completed by 30 March 2015. The contract price was fixed at R6 965 840.00 (VAT exclusive). The scope of the Anglo contract was defined to be:

> "The provision of all suitably qualified personnel, supervision, labour, materials, contractor's equipment and transportation necessary for the gold recovery project (uplift and process gold bearing material) at Savuka Plant..."

3. In order to fulfil its obligation under the Anglo contract, SF Recovery required a gold extraction plant with the capability of processing 15 to 20 tons per hour of raw material.

4. SF Recovery accordingly contracted with Amoref to supply it with a gold extraction plant ("the gold plant"). SF Recovery later also wanted to extract gold from the red soil below the concrete and needed a wash plant to do that. SF Recovery leased a wash plant from Amoref for that purpose. SF Recovery's action against Amoref comprises three claims, two related to the gold plant and one related to the wash plant.

The pleadings

5. The first claim is against both defendants. SF Recovery alleges that in February 2015 Amoref and Roux represented to SF Recovery that: i) the defendants had the required knowledge and skill to manufacture, commission and maintain a container housed gold processing plant (code named CGO3); ii) the gold plant would be capable of processing 15 to 20 tons per hour of gold bearing material such as concrete; iii) after commissioning of the gold plant the defendants would provide reasonable aftermarket assistance to keep the gold plant operational; iv) the manufacture of the gold plant would be completed and capable of performing at the

warranted capacity of 15 – 20 tons per hour, by no later than 27 February 2015; and v) the all-inclusive purchase price for the gold plant would be R 2 268 600.00 (VAT inclusive). SF Recovery alleged that the defendants misrepresented the truth about their own capabilities to design and deliver the gold plant and the capabilities of the gold plant to process 15 to 20 tons per hour raw material.

6. The gold plant was supposed to be delivered on 27 February 2015. However, it could only be assembled on the Anglo site during April-May 2015. Once on site, the gold plant was incapable of processing 15 – 20 tons per hour raw material.

7. The alleged misrepresentations resulted ultimately in SF Recovery cancelling the contract for the supply of the gold plant. SF Recovery thus firstly claims confirmation of the cancellation of the contract, the return of the purchase price of the gold plant (less 10% retention), being a total of R2 190 940.00, and tenders the return of the dysfunctional gold plant.

8. SF Recovery's second claim is for consequential damages. It alleges that when the defendants made the misrepresentations they were aware of the fact that time was of the essence in that performance in terms of the Anglo contract was due by 30 March 2015. The misrepresentations that Amoref could provide a gold plant with the stipulated capacity by no later than 27 February 2015, it alleges, caused the completion of the Anglo contract to be delayed by 133 days and SF Recovery to incur extra running costs in the amount of R1 079 893.00 and additional costs to make the gold plant operational amounting to R41 144.45. They also caused SF Recovery to be unable to complete the Anglo contract, resulting in Anglo cancelling the Anglo contract and causing SF Recovery a loss of R3 824 840.00. Thus SF Recovery claims consequential damages in the amount of R4 945 877.45. In the alternative in the event of it being found that the defendants did not misrepresent the truth, SF Recovery claims the same amounts from Amoref on the basis that the gold plant contract had been breached. SF Recovery has pleaded that it was within reasonable contemplation between the parties that SF Recovery would suffer consequential damages if the gold plant was not delivered, commissioned and supplied according to the agreed specifications.

9. During March 2015, when it became clear that the gold plant would not be delivered on time, SF Recovery and Amoref entered into an oral agreement in terms of which Amoref would supply SF Recovery with an operational wash plant to extract gold from red soil ("the wash plant contract"). The material terms of the wash plant contract were alleged by the plaintiff to be: i) the wash plant would be fit for the purpose of extracting gold from red soil; ii) SF Recovery would pay R75 797.37 to Amoref, which Amoref required to repair the wash plant; iii) as consideration for the payment, SF Recovery would be entitled to use the wash plant for a period of between 10 to 15 days to extract gold from red soil; and iv) the wash plant would be operational by no later than one week after receipt of payment by Amoref.

10. SF Recovery pleaded that pursuant to the wash plant contract it paid R75 797.37 to Amoref on 19 May 2015, but Amoref repudiated the contract by failing to supply the wash plant in a fully functional condition and consequently SF Recovery was unable to use the wash plant for the agreed period. SF Recovery accepted the repudiation and cancelled the wash plant contract. In an attempt to make the wash plant operational, and to mitigate the damages which SF Recovery stood to suffer as a result of the repudiation of the wash plant contract, SF Recovery incurred necessary expenses amounting to R 13 054,00. As a result, SF Recovery claims contractual damages in the amount of R88 851.37.

11. The defendants in their plea admitted that following the representations made by them, the parties entered a partly oral, partly written contract in terms of which Amoref agreed to manufacture and commission a gold plant having the aforementioned capabilities at a site of SF Recovery's choice by no later than 27 February 2015. They moreover admitted in their initial plea the allegations in the particulars of claim regarding the representations but added that "the plant functioned in perfect order if operated correctly". They also admitted that the representations were material to the gold plant contract, but denied that the representations were false and further denied that the representations had induced SF Recovery to enter into the gold plant contract. They averred that the defendants "at all times reacted and acted on the instructions and mandate of plaintiff".

12. The defendants pleaded that they performed in terms of the agreement and deny that SF Recovery was entitled to cancel the agreement. The gold plant, they averred, was delivered in accordance with the payments made by SF Recovery to Amoref. The "full deposit" was paid on 15 April 2015 and that the "delayed payment caused a delay in delivery of the plant". The defendants denied that they delivered an inoperative gold plant and alleged that it was due to SF Recovery's "own ineffectiveness and incompetence" in operating the plant that damages if any were suffered.

13. During the course of the trial, the defendants sought a postponement for the purpose of amending their plea. The amended plea puts up two different defences in the alternative.

14. In paragraph 3.8.1 of the amended plea the defendants acknowledged that they represented to SF Recovery that they "had at all times the required knowledge and skill to manufacture, commission and maintain a container housed gold plant which was capable to process 15 to 20 tons per hour of gold bearing material such as concrete". However, as to any other representations, they pleaded that such were "merely conversation".

15. The first defence is based on the existence of a dealership agreement between SF Recovery and an entity known as Vitex Distribution & Logistics (Pty) Ltd ("Vitex" and "the Vitex agreement"). In terms of the Vitex agreement, signed on 3 June 2015, SF Recovery became the *"dealer"*, responsible for the distribution of Amoref's products. Amoref was not a party to the Vitex agreement. Clause 2.1 of the Vitex agreement provides:

> "Vitex hereby appoints the dealer as a 'certified dealer' of the goods listed in Schedule A to this Agreement and any products that Vitex may add to this list (hereinafter referred to as "distributed products"), and the dealer accepts such appointment. The appointment of the dealer is non-exclusive and does not imply the granting of a specific geographic area."

16. Although not clear from the plea itself, it emerged during evidence that the defendants contend that clause 12.8 of the Vitex agreement renders the agreement between SF Recovery and Amoref for the purchase of the gold plant invalid. Clause

12.8 provides:

> "Dealers may not distribute products for personal use under the pretence that it is for a client. This will lead to an immediate termination of this Agreement and the commission will be recovered from the dealer."

17. In the amended plea the defendants allege that SF Recovery misled the defendants, was not entitled to use the gold plant for its own purposes and thus breached the Vitex agreement. They specifically pleaded that they "had no obligation to perform other than referring the plaintiffs to the dealership agreement."

18. Moreover, the first defence raised in the amended plea rests in part on clause 5.4 of the Vitex agreement which provides:

> "The dealer shall provide prompt and efficient after sale service of all the distributed products under original warranty, covered by the extended warranty or by a service contract, whether or not such products were sold by the dealer. The dealer shall also deal with all customer claims and complaints, both prior to and after the sale. The dealer shall be credited for, Vitex authorised work, and the defective parts returned, at the rates indicated in the service reimbursement schedules, in force at the time such services were rendered."

Thus, it was contended that SF Recovery assumed all responsibility to provide after sale service.

19. The defendants also persisted with the position that any damages which were caused to SF Recovery were due to its "own ineffectiveness and incompetence in operating the plant." They also denied that the gold plant "consisted of an inherent ineffectual design".

20. The second defence pleaded in alternative in paragraph 37 of the amended plea is that if the Vitex agreement did not apply, then the agreement of sale between the parties was governed by the terms and conditions found on the website of Amoref of which Annexure B to the amended plea is a copy.

21. The particulars of claim aver that the written portion of the gold plant contract is contained in Annexures POC1 and POC2 of the particulars of claim (being

respectively the order made by SF Recovery and the quotation by Amoref). Annexure POC2 introduces the following term:

> "On acceptance of this quotation Amoref is assured that you have read, understood and agreed to the terms of our warrantee and agreement of sale available for viewing and printing on our website."

The quotation then provides the full website address.

22. Annexure B to the amended plea is titled: "Agreement for sale of Amoref plant and equipment". The badly drafted amended plea in paragraph 37.3 refers to "the relevant terms" of the agreement without specifically referring to the clauses of the agreement. However, the following seem to be relevant.

23. Clause 1.1 of Annexure B provides:

> "The Vendor hereby sells to the Purchaser and the Purchaser hereby purchases from the Vendor the Plant Equipment pictured in Schedule 1 hereto...at a purchase price set out on the invoice."

There is no evidence on record containing Schedule 1 depicting the Plant Equipment which is the subject of the sale purportedly in terms of Annexure B.

24. Clauses 2.2 – 2.4 of Annexure B read:

> "2.2 The Purchaser is purchasing the Plant Equipment entirely in reliance on its own skill and judgment, and not in reliance on any representations, warranties, statements, agreements or undertakings of any nature made by or on behalf of the Vendor or its employees or agents except to the extent that those representations, warranties, statements, agreements or undertakings (or any of them) are expressly set out in this agreement.
>
> 2.3 The Purchaser acknowledges that it has entered into this Agreement entirely on its own judgment, and not based on any descriptions of the Plant Equipment, since same are for reference purposes only.
>
> 2.4 The Purchaser acknowledges that he will inspect the Plant Equipment prior to shipping in order to confirm that he is satisfied with its condition, and that he will not be able to claim any

refund of the purchase price and/or damages should it afterwards appear that he is not satisfied with the condition of the Plant Equipment."

25. After alluding to these clauses, the defendants in paragraph 37.3.7 of the amended plea plead "the incorporation of Annexure B....herein as specifically pleaded.." Paragraph 37.3.8 of the amended plea concludes this line of defence as follows:

"The Defendant specifically denies that any misrepresentations were made to the Plaintiff in adducing him to enter into an agreement alternatively specifically pleads that the onus rested on Plaintiff to ensure the ability of the plant it purchase (sic) further alternatively pleads that the incompetence and inability of the Plaintiff to correctly operate the product caused the damages as claimed if any."

26. These pleaded averments must be read with paragraph 37.1 of the amended plea which reads:

"AD claims 1, 2 and alternative claims 1 and 2 the Defendants admit representation to the Plaintiff and specifically plead in this regard as follows:"

During cross-examination, Mr Roux conceded that paragraph 37.1 of the amended plea meant that the representations alleged in paragraphs 5.1 to 5.5 of the particulars of claim were in fact admitted. Moreover, paragraph 37 of the amended plea includes no averment placing reliance upon clauses 2.2-2.4 of the internet agreement in support of a plea that the defendants were exempted from liability for any misrepresentation. In paragraph 37.3.8 the pleaded defence is limited rather to a denial of any misrepresentation and an alternative plea that SF Recovery bore the onus of ensuring the ability of the gold plant and a further alternative that the damages were caused by the incompetence and inability to correctly operate the plant.

27. As regards SF Recovery's third claim arising out of the wash plant contract, the defendants admitted that the parties entered into an oral agreement for the supply an operational wash plant to extract gold from the red soil. They however baldy denied and put SF Recovery to the proof to establish all the allegations pertaining to the

terms of the agreement, payment of R75 797,37, the condition of the wash plant, the inability to use it effectively, the additional necessary expenses incurred in an attempt to get it operational, the repudiation and the damages suffered.

28. Both defendants instituted a counterclaim against SF Recovery for rental of the wash plant for a period of 74 days at a rate of R51 600.00 per day, being a total of R3 818 840.00. The counterclaim is founded on the allegation that there existed an agreement between the parties that SF Recovery would pay the amount of R51 600.00 per day if the wash plant was used for longer than 15 days. The counterclaim alleged that SF Recovery agreed to pay Amoref an amount equivalent to 50% of Amoref's potential daily income from the wash plant's extraction of gold, which was calculated to be R103 200.00. The defendants maintain that SF Amoref was obliged to return the wash plant on 17 July 2015 (being 15 days after it was collected on 27 June 2015) but failed to do so until 29 September 2015 and thus the defendants claim in reconvention for 74 days rental at R51 600.00 per day.

29. SF Recovery denied that Mr Roux has *locus standi* to be a claimant in reconvention. SF Recovery further pleaded that Mr Roux has failed to plead facts to sustain any cause of action against SF Recovery. Save to admit that an oral agreement was entered into between SF Recovery and Amoref in terms of which Amoref would supply SF Recovery with an operational wash plant to extract gold from red soil, SF Recovery denied the allegations on which the counterclaim is founded and reiterated its cause of action as pleaded in the particulars of claim.

The evidence in relation to the functioning of the gold plant

30. Considering that the defendants must be taken to have admitted that the alleged representations were made, the issues requiring determination in the first and second claims are whether the representations were false, negligently made, induced the contract and caused the consequential damages.

31. Mr Steph Rademan, a director of SF Recovery, Mr Jan Fourie, an employee of Amoref during 2015 and Mrs Esra Rademan testified on behalf of SF Recovery.

32. Mr Rademan confirmed that the plant had been delivered late and that it was never able to perform at the promised processing rate of 15–20 tons of raw material per hour. At best the gold plant could process about 2–3 tons per hour. The gold plant ran in total for about 20 hours from its arrival on site until 8 August 2015 and was able to crush only about 8 tons of material resulting in the extraction of 300 grams of gold. The Anglo contract required SF Recovery to process about 1000 tons of concrete material.

33. As a result of the late delivery of the inoperative gold plant the Anglo contract was cancelled. SF Recovery therefore rescinded the gold plant contract on the grounds of misrepresentation, claimed the return of the payment of R2 190 940.00 and tendered the return the gold plant.

34. Mr Rademan also confirmed the consequential damages resulting from the misrepresentations as amounting to a total of R4 945 877.45. The computation of the consequential damages was not challenged in cross examination.

35. Mr Fourie is a technical expert with training as a fitter and turner and in mechanical engineering, management and plant equipment design in the mining industry. He was employed by Amoref as workshop manager during 2015. His job description included the design of products and plant equipment, including jaw crushers for small scale mining. He testified in relation to his own factual observations and gave expert opinions about technicalities and the inadequacies of the gold plant. His expertise was not challenged during cross examination. He corroborated the evidence of Mr Rademan in all material respects and in particular confirmed that the gold plant on which he worked had not been able to perform as represented. Firstly, the gold plant could not have been reasonably assembled in 14 days and secondly the gold plant which had been designed and delivered could not process 15–20 tons per hour of raw material.

36. Mr Fourie testified that for the gold plant to function in the promised manner it needed to consist of the following basic components: i) a loading bin and jaw crusher to break down the raw material to particles of between 19–25 mm; ii) an impact crusher to break down the raw material further to particles of between 8–10 mm; iii) a

screw conveyer through which the particles from the impact crusher were carried to a rod-mill crusher; iv) a rod-mill crusher, driven by an electrical motor, to break down the particles to a size of -75 microns; v) a pump to pump the broken down material to the concentrator – a peristaltic pump was used in the gold plant; vi) a concentrator which is a cylindrical component for separating the heavier (metal containing) particles through centrifugal force; and vii) two wash tables where the final heavier particles are washed over.

37. Mr Roux designed and specified the components of the gold plant, with the exception of the jaw crusher, which had been specified by Mr Fourie. The jaw crusher, itself, was capable of processing 30 to 40 tons per hour raw material.

38. Mr. Fourie testified that the gold plant could not be manufactured within 14 days because of the general complexity of the gold plant and the fact that the components of the gold plant were not readily available in the market. According to Mr Fourie an assembly of this kind would take at least 90 days. The gold plant contract required delivery of a functional plant on 27 February 2015 (15 days after the conclusion of the contract). It was in fact delivered on site in late March 2015 and only assembled fully at the end of April 2015.

39. When the gold plant was delivered on site, according to Mr Fourie, it failed to function for various reasons. The impact crusher was incapable of processing between 15 to 20 tons per hour raw material and jammed up because it could not handle the pre-crushed material passing through it. The screw conveyor consistently jammed up because it could not handle volumes as between 15 to 20 tons per hour raw material. The rod-mill broke down the material to 500 microns and not 75 microns. The rod-mill motor burnt out because it could not process between 15 to 20 tons per hour raw material. According to Mr Fourie, the rod-mill should have been fitted with a stronger electrical motor or a motor with a reduction gearbox in order to cope with the volumes of material required. Eventually, SF Recovery installed a stronger electrical motor. But still, the plant could at best process 2 to 5 tons per hour raw material.

40. Moreover, from the onset the peristaltic pump did not function properly because it could not cope with the demands of a gold recovery plant having to process 15 to 20 tons per hour raw material. According to Mr Fourie a robust slurry pump, equipped with an impeller mechanism should have been used.

41. Therefore, in the expert opinion of Mr Fourie, the components used in the design and manufacture of the gold plant were inappropriate for processing 15 to 20 tons per hour raw material. A gold processing plant with that capacity would have a cost far in excess of the R2 million at which Amoref sold the gold plant to SF Recovery. More effective and expensive components should have been used. The non-performance was the result of bad design and the use of unsuitable components in the manufacture of the gold plant. It was consequently unable to constantly feed and process the raw material.

42. A line of defence that emerged during the cross examination of Mr Rademan and Mr Fourie was that the gold plant did not function properly on account of it having been fed negligently by the employees of SF Recovery with uncrushable steel material. It is common cause that the broken down concrete contained steel matting and if fed into the gold plant might have caused it to break down or damaged its components. The evidence in this regard is relevant to Amoref's plea that it did not deliver a dysfunctional gold plant, or one of inherent ineffectual design, and that it was due to SF Recovery's "own ineffectiveness and incompetence in operating the plant" that damages were suffered.

43. Mr Rademan testified that he knew of two instances of uncrushables being removed from the plant. Mr Fourie referred to three instances. There are three reports in the site work book completed by Mr Barker, an employee of Amoref, recording that steel material had been discovered in the plant. Both Mr Rademan and Mr Fourie said that the consequences of these instances were minimal. The steel was removed from the plant and according to Mr Fourie "that was it".

44. Both witness confirmed that the concrete fed into the gold plant was routinely pre-crushed with jack hammers and any steel reinforcing in the material was removed by hand before the material was fed into the jaw crusher. In addition, the

jaw crusher had a built-in toggle plate which would break if large uncrushable material entered the jaw crusher. Mr Fourie also explained that the screens placed in the gold plant after each crusher or mill operated to prevent the uncrushables from causing any serious problem in the gold plant. He was adamant that the three instances where uncrushable material was found the plant had no bearing on the fact that the gold plant could not process 15-20 tons per hour of gold bearing material.

45. Mr Roux claimed during his evidence-in-chief that despite only three written reports being recorded in the site work book, uncrushables found their way into the plant at least every 20 minutes and that his personnel at the site telephonically reported such events to him daily. This version was not put to the plaintiff's witnesses during cross examination. However, during the cross-examination of Mr Fourie it was intimated that there had been more instances but that only three were reported in the site work book because SF Recovery refused to sign the report sheets. The court was assured that Mr Barker would be called to confirm this. However, Mr Barker was never called to testify and Mr Roux conceded in his testimony that he had never attended the site and thus had not personally witnessed uncrushables impeding the performance of the plant on a daily basis.

46. The defendants offered no explanation why Mr Barker was not called as a witness. All indications are that that he was available to testify in that instructions were taken from him during the course of the trial. It is accordingly permissible for an adverse inference to be drawn from the failure to call him.[1]

47. In the result, the version of Mrs Rademan and Mr Fourie that there were only three instances of uncrushables in the jaw crusher and that such were not the reason for the non-performance of gold plant must be accepted.

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[1] *De Sousa and Another v Technology Corporate Management (Pty)* Ltd and others 2017 (5) SA 577 (GJ para 115; *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A) at 715F – G; *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) at 750; *and Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133E.

48. Both Mr Rademan and Mr Fourie confirmed that the gold plant had been properly secured on a crushed and compacted concrete bed with pylons driven into the ground to which the components of the gold plant were attached. It thus operated on a stable base.

49. Mr Roux, who was the only witness to testify on behalf of the defendants, confirmed that he is the general manager of Amoref. The only director and shareholder of Amoref is his wife. Mr Roux identified himself as an entrepreneur who uses Amoref as a vehicle for his business activities. Mr Roux did not confirm the existence of his university qualifications and did not attach a *curriculum vitae* to his rule 36(9)(b) summary which impeded SF Recovery in testing his experience and qualifications.

50. The defendants also failed to make discovery of any documentation indicating the number, range and kind of mining equipment sold by Amoref in support its claim to possess the necessary skill and experience to design and manufacture mining equipment.

51. In the circumstances, Mr Roux did not establish sufficiently that he had the required qualifications and experience to design mining equipment. Nor did he adduce cogent proof of his expertise to design and manufacture the gold plant. The opinion of Mr. Fourie that the gold plant was poorly designed and unsuited for purpose was left essentially unchallenged. The only explanation Mr Roux offered for the non-performance of the plant was the alleged feeding of uncrushables into the plant, which has been shown to be improbable and not credible.

52. It matters not whether the defendants intentionally or negligently misstated the truth. The negligent misstatement of the truth gives rise to a claim for damages under the *actio legis aquiliae*. The misrepresentations materially influenced SF Recovery to enter into the gold plant contract. It required a gold plant with a capacity to process 15 to 20 tons per hour because it had to complete the contract with Anglo within an agreed limited time period. The representation by Amoref that it could provide the gold plant within two weeks persuaded SF Recovery to contract with Amoref.

53. The falsity of the representations has been established in that the gold plant quite evidently could not perform at the promised rate of 15 to 20 tons per hour and the defendants lacked the skill and knowledge to design and supply such a gold plant. A specialised manufacturer-merchant such as Mr Roux is required to know his products but he offered no evidence that he verified the correctness of his representations. The only documents in relation to the gold plant made available during the trial were two unclear pictures published on the website of Amoref. The specifications were stated to be on the website, but were never offered into evidence.

54. The capacities of the various components of the gold plant, against which the overall potential performance of the gold plant could be assessed, were not disclosed before or after the sale of the gold plant. Nor did Mr Roux offer any analysis of the operating capacities of the individual components of the gold plant during his testimony; while Mr Fourie, on the other hand, convincingly explained why the specified components, excepting the jaw crusher, were not able to produce a 15 to 20 tons per hour gold plant. Mr Roux also never visited the site, despite many reports by Mr Fourie that the gold plant did not perform to the promised specification.

55. Moreover, no evidence (accept the say-so of Mr Roux) was offered by the defendants to confirm that the same type of plant had been delivered to other customers who had processed 15 to 20 tons per hour with it. Such evidence would have supported the defendants' assertion that the capabilities of the plant were misstated by the plaintiff.

56. Finally, the fact that the plant was promised to be delivered within two weeks, with the defendants ultimately conceding that the time line was impossible, confirms that the defendants opted not to verify the correctness of their representations at the time of making them.

57. In short, the admitted representations that the defendants had the required knowledge and skill to manufacture, commission and maintain a container housed gold processing plant capable of processing 15 to 20 tons per hour of gold bearing

material such as concrete, by no later than 27 February 2015, have been established by the plaintiff to be false. These material representations were made with the object of inducing SF Recovery to enter into the contract to purchase the gold plant. The misrepresentations accordingly entitled SF Recovery to terminate the gold plant contract. Furthermore, the evidence of the plaintiff satisfactorily proved the consequential damages which followed from the misrepresentations.

The Vitex and internet agreement defences

58. In argument the defendants focused almost entirely on the additional defences pleaded for the first time in the amended plea.

59. As discussed earlier, the defendants alleged the existence of a dealership agreement, the Vitex agreement, and that clause 12.8 of it caused the gold plant contract to be invalid. In terms of the Vitex agreement SF Recovery became a dealer responsible for the distribution of Amoref's products and clause 12.8 provided that a dealer may not distribute products for personal use under the pretence that it is for a client, entitling Vitex in such event to terminate the contract and to recover the commission from the dealer. The defendants alleged that as a result of the existence of the Vitex agreement SF Recovery was not entitled to use the gold plant for its own purposes, had misled the defendants and was is in breach of the Vitex agreement.

60. Mr Rademan testified that the Vitex agreement related to a bid by SF Recovery to be awarded a small scale mining project for the Suriname Government and where SF Recovery was intended to play a role distributing Amoref's mining equipment in the region. The Suriname project never came to anything and the Vitex agreement fell into insignificance.

61. The obligations under the Vitex agreement included a requirement that the dealer maintain appropriate premises for the sale of Amoref products, train staff, display the products in an appropriate and attractive environment, and furnish customers with technical assistance. It is recorded that the distributed products remain the property of Vitex until the client has paid the purchase price. The contract read as a whole indicates that the intended arrangement involved Vitex obtaining products from

Amoref, the dealer liaising with the client, Vitex selling the goods to the dealer or directly to the client and the dealer receiving commission in the difference between the price of buying the goods from Vitex and the selling price to the ultimate customer.

62. The Vitex agreement refers to various schedules. Clause 2.1 appoints the dealer as a certified dealer "of the goods listed in Schedule A" to the agreement. It also provides that the dealer shall not offer the distributed products for sale at any outlets other than those set out in Schedule B to the agreement. Clause 7.5 provides that the difference between the dealer's retail price lists and the price at which the dealer buys the products from Vitex is the dealer's commission "as referred to in Schedule C". Clause 8 records that the retail selling prices, "as they appear in Schedule D – Retail Price List" are the recommended retail prices.

63. Clause 3 of the Vitex agreement stipulates four suspensive conditions "that must be met before a dealership will finally come into effect". Clause 3.1 provides that the dealer or his nominee must successfully complete the prescribed technical training on the basic range of Amoref equipment. Clause 2 provides that the nominated "Certified Dealership Outlet" listed in Schedule B must display the SF Recovery branding.

64. Mr Rademan was adamant in his testimony that the suspensive conditions in clauses 3.1 and 3.2 were never fulfilled, with the consequence that the contract did not finally come into effect. He also insisted that Schedules A to D, which form a vital part of the Vitex agreement, did not exist, and were not brought to his attention.

65. Mr Rademan acknowledged that during May to June 2015 Mr Viljoen (of Vitex) wanted to speak to him about commission for the gold plant. Mr Rademan made it clear in an email that SF Recovery would not pay commission to Mr Viljoen, because Vitex was never involved in the purchasing of the gold plant. In any event, any commission under the Vitex agreement would have been payable to SF Recovery and not Viljoen.

66. Mrs Esra Rademan testified about emails which were sent to her by Mr Viljoen during February 2015. She was under the impression that Mr Viljoen was acting merely as representative of Amoref who wanted to confirm the purchase order of the gold plant.

67. SF Recovery therefore maintains that the Vitex agreement never came into existence because of the non-fulfilment of the suspensive conditions and the fact that no consensus could have been reached because Schedules A to D did not form part of the Vitex agreement. An agreement which is incomplete because the parties do not reach consensus on an essential or material aspect of the contract is void for vagueness and incapable of being enforced.

68. Despite the clear requirement in clause 3 of the Vitex agreement that the "prescribed technical training on the basic range of Amoref equipment" had to take place Mr Roux maintained that the clause was irrelevant. Mr Roux could offer no satisfactory response when confronted with clause 5.4 of the Vitex agreement requiring the dealer to render after sales service. It stands to reason that without the required training a dealer would be unable to perform in terms of clause 5.4 of the Vitex agreement. The condition is fundamental to the contract and deliberately included. Mr Roux was unable to offer any evidence that the suspensive condition had been fulfilled.

69. Mr Roux was also confronted with the fact that the uncontested evidence of Mr Rademan was that when the Vitex agreement was signed on 3 June 2014 none of the schedules referred to therein were available. He conceded that the schedules formed a vital part of the Vitex agreement but on no good grounds refused to accept that their absence rendered the contract void for vagueness. Schedule A, listing the distributed products, was of critical importance because without it the SF Recovery could not receive the "prescribed technical training" referred to in clause 3.1.

70. In the premises, the Vitex agreement never came into effect, or, alternatively, in the absence of the schedules, the agreement is void for vagueness. It accordingly provides no defence to the claims of SF Recovery in relation to the gold plan contract.

71. But even if that were not true, the defence would have been without substantive merit. The defendants rely on clause 12.8 for the proposition that SF Recovery could not purchase the gold plant directly from Amoref. It is clear from the wording of the Vitex agreement that if SF Recovery purchased the gold plant under the pretence that it was for a customer the applicable remedy could be invoked only by Vitex. Hence the clause is of no assistance to the defendants.

72. Moreover, the objective common cause facts confirm that the gold plant was ordered by SF Recovery directly from Amoref and that Vitex was never in the picture. The actual quotation for the gold plant prepared by Amoref, the subsequent placement of the order and the direct payment to Amoref, all offer the clearest confirmation that Vitex played no role and that the purchase of the gold plant was never intended to be done along the lines of the ineffective Vitex agreement. If the Vitex agreement did exist, and if the order of the gold plant had been placed through Vitex, then the payment of commission may have been relevant. Mr Roux confirmed that Amoref paid no commission to Vitex in respect of the gold plant, such too being cogent evidence that the Vitex agreement was not in consideration when SF Recovery ordered and purchased the gold plant from Amoref.

73. Lastly, Mr Roux also attempted to convey that the gold plant was intended to be acquired by Anglo as the ultimate customer with SF Recovery acting as the dealer. This fabrication is contradicted by the objective fact that the Anglo contract expressly required SF Recovery to supply the equipment for the gold recovery project.

74. In the result, the plea based on the Vitex agreement is wholly without merit.

75. As regards the terms on the internet, as mentioned, Mr Roux conceded that paragraph 37.1 of the amended plea meant that the representations alleged in paragraphs 5.1 to 5.5 of the particulars of claim were in fact admitted. Moreover, paragraph 37 of the amended plea places no reliance upon clauses 2.2-2.4 of the internet agreement in support of a plea that the defendants were exempted from liability for any misrepresentation. It is in any event more than doubtful that the gold plant contract was governed by the internet terms. Annexure B applies in respect of

a sale of plant equipment "pictured in Schedule 1". No such schedule depicting the equipment was offered into evidence. Without the schedule it cannot be conclusively determined if the terms applied. The defendants have failed to discharge their evidentiary burden in that regard.

The wash plant and the counterclaim

76. SF Recovery's claim concerning the wash plant for extracting gold from the red soil beneath the concrete is only against Amoref. The material facts are common cause. SF Recovery agreed to pay R75 797.37 to repair the wash plant and as consideration SF Recovery would be entitled to use it for 10 to 15 days. It was agreed that the wash plant would be operational by no later than one week after receipt of payment by Amoref and that it would be fit for the purpose of extracting gold from the red soil. Despite payment Amoref failed to supply the wash plant in a fully functional condition and SF Recovery was unable to use the wash plant. In an attempt to make the wash plant operational SF Recovery incurred expenses amounting to R 13 054,00. When that did not help, SF Recovery cancelled the contract. Both the defendants have instituted a counterclaim against SF Recovery for an amount of R3 818 840.00 for rental of the wash plant for a period of 74 days.

77. It is common cause that the wash plant was tested with a dry run at the Amoref plant. However, when it arrived at the Anglo site, according to the plaintiff's witnesses, it never functioned. Because Mr Roux did not visit the Anglo site, he could not convincingly contradict the evidence of Mr Rademan and Mr Fourie that the wash plant was never operational on site. The defendants did not call any other witness to contradict the evidence that the wash plant did not work, despite Amoref employees being on site for many weeks. In the circumstances, it is permissible to draw an adverse inference that such persons could not have contradicted the evidence either. Hence, it has been established beyond a balance of probabilities that the wash plant was not delivered in a functional state and was never operational on site.

78. Mr Roux conceded in cross-examination that despite initially assuming that a written agreement for rental beyond the initial period had been signed by SF Recovery no written agreement was in fact concluded. The attorneys of the

defendants did draft an agreement but Mr Rademan refused to sign it. The defendants failed to prove that the terms of contract alleged in the counterclaim were agreed to by SF Recovery. There is no contemporary documentation or correspondence supporting the contention that SF Recovery agreed to pay R51 600 per day for the wash plant after the expiry of the 15 day period. It is improbable it would have done that in light of the difficulties it experienced in getting both the gold plant and wash plant operational. The only evidence to that effect is that of Mr Roux. In light of Mr Rademan's undisputed refusal to sign the memorandum of agreement prepared by the attorneys, the evidence is insufficient to conclude that such an agreement was ever reached. Moreover, it was not SF Recovery, but Anglo who caused the plant to be detained at the Anglo site more than the agreed 15 days. After termination of the Anglo contract, SF Recovery was denied access to the site. In the result, the counterclaim must be dismissed.

Relief

79. In the premises the following orders are made:

79.1 The defendants are ordered to pay the plaintiff, jointly and severally, the amounts of R2 190 940.00 and R4 945 877.45 (being R7 136 817.45) together with interest calculated at a rate of 9% from date of summons to date of payment.

79.2 The first defendant is ordered to pay the plaintiff the amount of R88 851,37 together with interest calculated at a rate of 9% from date of summons to date of payment.

79.3 The counterclaim is dismissed.

79.4 The defendants are ordered jointly and severally to pay the costs of Claim 1 and 2 as pleaded in the particulars of claim.

79.5 The first defendant is ordered to pay the costs of Claim 3 as pleaded in the particulars of claim as well as the costs of the counterclaim.

JR Murphy
Judge of the High Court

Date heard:	31 August 2017, 1 - 5 September 2017, 5 December 2018,15 January 2018
For the plaintiff:	Adv HH Cowley
Instructed by:	Johan van Huyssteen Attorneys
For the defendants:	Adv J Gouws
Instructed by:	Macintosh, Cross & Farquharson
Date of judgment:	17 April 2018