

In the Supreme Court of South Africa  
In die Hooggeregshof van Suid-Afrika

( APPELLATE Provincial Division)  
Provinsiale Afdeling)

Appeal in Civil Case  
Appèl in Siviele Saak

CENTRAL CASH STORE Appellant,

versus

JOB AUCTION SALES (PTY) LTD. Respondent

Appellant's Attorney Lovius, Block M. & Respondent's Attorney [Signature]

Appellant's Advocate [Signature] Respondent's Advocate [Signature]

Set down for hearing on 3-11-1971  
Op die rol geplaas vir verhoor op 26-7-71

(W.L.D.)

Handwritten note: appeal dismissed with costs

[Signature]  
SECRETAR APPELLATIEVE DIVISION  
GRIFTER, HOOGGEREGSHOF  
BLOEMFONTEIN  
25-11-1971

Bills Taxed—Kosterekenings Getakseer

Writ issued  
Lasbrief uitgereik

Date and initials  
Datum en paraaf

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

CENTRAL CASH STORE ..... APPELLANT.

AND

JOB AUCTION SALES

(PROPRIETARY) LIMITED. ..... RESPONDENT.

Coram : Rumpff, Jansen, Trollip, Rabie et Muller, JJ.A.

Heard : 8 November 1971.                      Delivered : 29 November 1971.

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J U D G M E N T.

Muller, J.A. :

Appellant, an Indian by the name of Yessoph Mohamed Tilley, who carries on a retail business in Commissioner Street, Krugersdorp, under the name of Central Cash Store, appeals against an order of the Witwatersrand Local Division (Cillie, J.P.) directing him to pay to respondent, a company, the sum of R8 750-00, being the purchase price of a quantity of dresses [~~alleged to have been~~] sold to him by the said company, together with interest on the capital sum and costs.

A person by the name of Rashid Moosa Bulbulia, also an Indian, was at all times material the managing director and person in control of the respondent company, Job Auction Sales (Proprietary) Limited, which carries on business in Kort Street, Johannesburg, as auctioneers, job buyers and sellers and wholesale merchants. For convenience I shall refer to appellant (defendant below) as Central Cash Store or Tilley, as it may suit the occasion, and to respondent (plaintiff below) as Job Auction Sales.

Because of certain arguments propounded in the Court a quo, and repeated in this Court on appeal, it is necessary to refer to, and in certain respects analyse, the pleadings in somewhat more detail than would otherwise have been the case.

Summons was issued on 28 January 1970 in the name of Job Auction Sales against Central Cash Store for "payment of the sum of R8 750 being for goods sold on the 3rd December 1969, and delivered on the 15th December 1969" with interest a tempore morae and costs of suit. The material allegations in the declaration, dated 16 February 1970, were that

"3. On or about the 3rd day of December 1969 and at Johannesburg, pursuant to certain oral agreement between the Plaintiff and the Defendant, the former undertook to deliver, at the special instance and request of the Defendant, certain 5,000 "Kiddies" dresses, the agreed purchase price of the said dresses being the sum of R1-75 each and the total agreed purchase price for the said 5,000 dresses being the sum of R8,750.00.

4. In terms of the said agreement, and at the special instance and request of the Defendant, the Plaintiff undertook to deliver the said dresses to certain Metro Fashions of 90, President Street, Johannesburg."

It was further alleged in the declaration that payment was to have been made upon delivery of the dresses sold; that the dresses were duly delivered to Metro Fashions on 9 and 15 December 1969, but that payment was not forthcoming.

In reply to a request for further particulars, the legal representatives of Job Auction Sales informed the defendant (Central Cash Store), on 26 February 1970, that the agreement of sale was entered into between Bulbulia, acting for Job Auction Sales, and Tilley, acting for Central Cash Store; that Tilley was the person who requested that the dresses be delivered to Metro Fashions; that it was also Tilley who

undertook .... / 4

undertook that Central Cash Store would pay the sum of R8 750 and that he did so "verbally", "at the plaintiff's place of business on or about the 3rd December, 1969."

On 16 March 1970 a plea was filed on behalf of Central Cash Store denying that any agreement of sale had been entered into as alleged, and denying that Tilley had requested that the dresses be delivered to Metro Fashions or that Tilley had at any time undertaken that Central Cash Store would pay for the dresses.

The pleadings stood in that form until March 1971, when the matter first came to trial. At the commencement of the hearing Central Cash Store applied for leave to amend its plea by introducing an alternative defence. Upon such leave being granted, the plea was amended by the insertion of an additional paragraph 6, of which sub-paragraph (a) read as follows:

"(a) In the event only that the above Honourable Court finds that the Defendant bought the said dresses from the Plaintiff at the time and place and on the delivery conditions alleged (which is still denied by the Defendant) the Defendant pleads as follows:

- (i) The Plaintiff, through its duly authorised agent, one MOHAMED BODHANIA, on the 3rd day of December 1969 and at 22 President Street, Krugersdorp on behalf of the Plaintiff, offered to the Defendant represented by the said Tilley, 5,000 dresses for sale at Rl.75 per dress and expressly warranted that the said dresses would consist of 40 styles and would range from size 16 to size 32, and would be made from the same materials as the samples;
- (ii) that the entire consignment would be approximately evenly distributed over the range of samples exhibited."

In sub-paragraph 6(b) of the amended plea it was alleged that the dresses delivered to Metro Fashions were not in accordance with the samples exhibited to Tilley, the respects in which they allegedly did not conform being set forth in the plea, and in sub-paragraph 6(c) of the amended plea it was stated that "by reason of the foregoing the defendant on or about the 15th December refused to accept delivery of the said dresses, thereby cancelling the said sale."

To enable Job Auction Sales to replicate to the plea as amended, the trial was postponed. Before replicating, Job Auction Sales, by a request for further particulars,

elicited .... / 6

elicited from Central Cash Store, inter alia, the allegations (i) that the dresses were offered by Bodhania, at Krugersdorp, to Tilley personally, but, as Tilley is deaf, one Hassan Lorgat acted as "an intermediary" between Bodhania and Tilley, and (ii) that Central Cash Store had no part in the arrangements pursuant whereto the dresses were later delivered to Metro Fashions, and that such arrangements were made between Bodhania, acting as agent for Job Auction Sales, and one Ebrahim Lorgat acting on his own behalf.

When the hearing was resumed, on 3 June 1971, Job Auction Sales filed a replication alleging, inter alia, that the sale in question was concluded by:

- "(i) Mohamed Bodhania at about the end of November, 1969, at Tilley's residence (in Kruger<sup>5-</sup>dorp) with the said Tilley and Hassan Lorgat;
- (ii) The said sale was confirmed on or about the 3rd December (1969) by Bulbulia with Tilley by telephone conversation."

Because of these allegations in the replication, Job Auction Sales at the same time, applied for, and obtained, leave to bring about consequential amendments to its earlier pleadings (declaration and further particulars thereto) whereby, in

effect, its claim was then based on a sale allegedly concluded at or about the end of November 1969 at the house of Tilley in Krugersdorp between Bodhania, acting as agent for Job Auction Sales, and Tilley acting personally but assisted by Hassan Lorgat, alternatively, on a sale allegedly concluded on or about 3 December 1969 at Johannesburg by way of a telephone call between Bulbulia and Tilley.

From the above it is clear that there were material changes in the case of each of the parties during the pleading stage. Whereas the plaintiff (Job Auction Sales) originally relied on an agreement of sale alleged to have been concluded between Bulbulia and Tilley on or about the 3 December 1969 at the plaintiff's place of business in Johannesburg, it eventually amended its pleadings so as to enable it to prosecute its claim on the alternative bases mentioned above. And, whereas the defendant (Central Cash Store) was at first content to rest its case on a denial that any agreement of sale had been concluded, it eventually thought fit to introduce an alternative defence intended to serve as justification for its



alleged cancellation of the sale in the event of it being found that a sale had in fact been concluded between the parties.

At the trial only two witnesses were called on behalf of the plaintiff, Job Auction Sales, namely, Bulbulia and Bodhania, both of whom have already been mentioned in the <sup>above</sup> analysis of the pleadings. With the object of following the sequence of events in chronological order, it will be convenient to deal first with the evidence of Bodhania.

Bodhania, also an Indian, is, and has been for many years, a travelling salesman for a large firm of wholesalers. He has known Bulbulia for at least ten years, and is even better acquainted with Tilley, who, up to the time of the present action, had for some years been a regular customer of his. As a traveller he used to call at Tilley's shop, Central Cash Store, in Krugersdorp, regularly ("once or twice a week"), on which occasions he would also lunch at Tilley's home. According to Bodhania he had in the past done substantial business with Tilley. Bodhania is also related to Hassan Iorgat who is an assistant in Tilley's shop; the said

Hassan Lorgat being his brother-in-law.

~~Bodhania testified that one afternoon towards~~  
the end of November or beginning of December 1949 Bulbulia told him that he had a clearing line of a job lot of dresses for sale. These dresses, 5 000 in number, were childrens dresses of a well-known make - " Teeny Tages" - which Bulbulia had purchased from the manufacturers in Cape Town. Bulbulia asked the witness whether the latter could dispose of the dresses on his behalf. The price would be R1.75 per dress if purchased as a lot, and Bodhania's commission on such a sale would be R200. Bulbulia explained that the dresses were to be railed from Cape Town but gave Bodhania 40 dresses which he had, on a visit to Cape Town, picked at random from the job lot of 5 000. Bodhania agreed to try to find a purchaser.

As to the price of R1.75 per dress, Bodhania explained that it was well below the wholesale price for ~~dresses of that manufacture and type and could only be sold~~ at such a very reduced price because they were a job lot of a clearing line. Asked what a job lot of a clearing means,

Bod<sup>h</sup>ania explained that towards the end of each year dress manufacturers clear out what they regard as excess stock of summer dresses. These are then sold at a <sup>much</sup> very reduced price as a job lot i.e. a mixed lot of dresses made of various fabrics in different sizes, designs and colours.

According to Bodhania, he took the 40 dresses which Bulbulia had shown him and that same evening went to Tilley's house in Krugersdorp. He was accompanied by two of his friends, Ahmin Boeta and Achmed Kajee, the intention being that, after visiting Tilley, the three of them would attend a religious service at a mosque in Krugersdorp. It was in the month of Ramadan. Bodhania and his companions arrived at Tilley's house at approximately 7.40 p.m. They entered and found Tilley there. Also present was Hassan Lorgat, Tilley's assistant. According to Bodhania, he showed Tilley and Hassan Lorgat the 40 sample dresses, which he had with him, and offered the 5 000 dresses as a lot to Tilley at R1.75 per dress. Tilley at first stated that 5 000 dresses were too much for him. Thereafter Tilley and Hassan Lorgat went into another room and,

when they returned, Hassan Lorgat said "it's bought" and told Bodhania to leave the 40 dresses there and that "they will confirm with Mr. Bulbulia." After explaining that the rest of the dresses would still have to be railed from Cape Town to Bulbulia in Johannesburg, Bodhania and his two companions left Tilley's house, attended the religious service at the mosque, and then went home.

In cross-examination Bodhania denied that he and his companions first attended the religious service at the mosque before going to Tilley's house where, so it was put by counsel for Central Cash Store, they arrived after 9 p.m. Bodhania also denied that one Ebrahim Lorgat, a brother of Hassan Lorgat, was present on that occasion or that it was arranged at Tilley's house while he (Bodhania) was present that Ebrahim Lorgat would offer the dresses to Metro Fashions.

With regard to Tilley's ability to hear, Bodhania, although admitting that Tilley was very hard of hearing, stated that one could still (in 1969) converse with him and that he (Bodhania) had often transacted business with Tilley by conversation.

A statement made by Bodhania to counsel for Central Cash Store some time before the trial was put to Bodhania in cross-examination. He admitted that he had made the statement which, in general, is in conformity with his testimony in court. I shall deal later with a suggestion by counsel that the said statement is, in a particular and material respect, in conflict with Bodhania's evidence in court.

The other witness for the plaintiff, Bulbulia, confirmed that he had requested Bodhania to try to sell the 5 000 dresses and that he had handed to Bodhania 40 dresses picked at random from the lot to show to prospective purchasers. He explained that his discussion with Bodhania must have taken place at or about the end of November 1969, because he (Bulbulia) had purchased the dresses in Cape Town and arrived back in Johannesburg shortly before the end of November. On the same day that he spoke to Bodhania, he received a telephone call at approximately 8.30 p.m. from Hassan Lorgat, who informed him that Bodhania had sold the dresses to Tilley of Central Cash Store. Hassan Lorgat asked Bulbulia what commission he

(Hassan Lorgat) would get out of the sale and, according to Bulbulia, he explained that he could not think of paying Hassan Lorgat any commission because the dresses were sold at a very low price.

Bulbulia testified further that Bodhania called on him the next day and informed him that he had sold the dresses to Tilley of Central Cash Store; that Tilley would contact him, and that the 40 sample dresses had been left with Tilley. Bulbulia then advised Bodhania that Hassan Lorgat had already contacted him the previous evening. According to Bulbulia, he not only knew who Tilley was and the kind of business carried on by him in Krugersdorp, but had indeed met Tilley some 6 to 9 months earlier at a dinner party in the Coloured township at Athlone, near Cape Town, where he conversed with Tilley for some time.

A few days after the telephone call by Hassan Lorgat, his brother Ebrahim Lorgat, who was not known to Bulbulia, called at the latter's place of business. Ebrahim Lorgat enquired whether the dresses had arrived from Cape Town.

Bulbulia asked him who he was and Ebrahim Lorgat explained that he was the brother of Hassan Lorgat and that he was employed by Metro Fashions. He told Bulbulia that upon arrival of the dresses in Johannesburg from Cape Town they should be delivered to Metro Fashions, but charged to Central Cash Store and that Bulbulia could confirm this with Tilley. Bulbulia, according to his testimony, thereupon put through a telephone call to Central Cash Store in Krugersdorp, asked for Tilley, who was called to the phone, and he informed Tilley of what he had been instructed to do by Ebrahim Lorgat. Tilley confirmed the instructions and asked whether payment for the dresses could be on terms, to which Bulbulia replied that it was a cash transaction; that as he had sold the dresses at a "ridiculous price" he could not allow terms, and that "it was to be cash on delivery."

On the same day, according to Bulbulia, he made out an invoice in triplicate in the invoice book of Job Auction Sales, also known as Job Wholesalers. This invoice, the triplicate copy of which was handed into court as Exhibit A, reads as follows:

"

Invoice.

1(a), Kort Street  
Johannesburg.

No. 564.

3.12.69

JOB WHOLESALERS  
Auctioneers.  
Cash Job Buyers and Sellers  
Wholesale Merchants and Importers.

Central Cash Store,  
196(a) Commissioner Street, Krugersdorp.

5000 Only Kiddies  
All Ass. Dresses  
Make Teeny Tages @ R1.75 = R8750.00

R8750. 00  
Nett Cash "

Bulbulia testified that the original invoice was posted by him to Central Cash Store.

The duplicate invoice, also termed a packing slip, was, as appears from the evidence of another witness, Katz, sent to Metro Fashions when the first quantity of dresses were delivered. Delivery of the dresses by Job Auction Sales to Metro Fashions took place, as to part, on 9 December 1969, and the balance on 15 December 1969. With each delivery a

delivery .... / 16



delivery slip, Exhibits B and C, respectively, accompanied the  
the parcel of dresses delivered. These delivery slips were,  
on receipt of the goods, signed or initialled by one Cooperman,  
at the time a director of Metro Fashions. The delivery slips,  
so signed or initialled read as follows:

"	<u>Exhibit B.</u>	<u>Exhibit C.</u>
	40. 9.12.69	42. 15.12.69
	Central Cash Store 196 Commissioner St., Krugersdorp. Job Wholesalers 1A Kort St., JHB.	Central Cash Store 196 Commissioner St., Krugersdorp. From Job Wholesalers, 1A Kort St., JHB.
	Cartons dresses assorted. Packing slip No. 564.	Delivered to Metro Fash- ions.
31	Cartons Delivered To Metro Fashions 90 President St.	16 Cartons Dresses.
	Received 9.12.69. 31 Cartons not checked G. Cooperman.	Packing Slip No. 564.
24	Cartons Not checked Cartons open and damaged. G.C.	Not checked. G.C. "

The copy of the invoice of 3 December 1969, packing slip 564,  
accompanied the delivery of 9 December (vide Exhibit B) and  
remained in the possession of Metro Fashions.

After delivery of the goods Bulbulia, according  
to his testimony, phoned Tilley on more than one occasion for  
payment. Tilley promised that a cheque would be posted, but

payment was never made. Eventually a Mr. Katz of Metro Fashions phoned Bulbulia to say that the dresses delivered were not according to sample and that Job Auction Sales should take them back. Bulbulia refused to do so, stating that the dresses delivered "were according to sample as I sold a job lot of Teeny Tage dresses, and all are Teeny Tage dresses which I had delivered."

It appears from the record that Metro Fashions thereupon called upon Central Cash Store to remove the dresses, which Tilley refused to do, stating, as per his letter of 22 December 1969 (Exhibit E) addressed to Metro Fashions:

"I at no stage have authorised you to accept goods on my behalf from anybody whatsoever, nor did I instruct M/s Job Wholesalers to deliver goods to you on my behalf, nor was any goods purchased by myself from M/s Job Wholesalers for delivery to yourselves."

On 2 January 1970 a letter was addressed by an attorney acting for Metro Fashions to Job Auction Sales, which letter

(Exhibit G) reads as follows:

"My clients have advised me that you have delivered a parcel of Children's dresses to them on account Central Cash Store, Krugersdorp. My clients have accepted the said parcel in good faith, and after

communicating with Messrs. Central Cash Store were advised that the goods supplied were not according to sample and that same should be returned to yourselves.

Mr. Katz of my client's firm has duly communicated with you to advise you accordingly and you have refused to accept the return of the said parcel of dresses.

In the circumstances, my clients have been compelled to insure the said parcel of dresses, and you will be charged with the cost of such Insurance, as same has been effected to protect your interests.

In addition, should you not uplift the said goods on or before MONDAY the 5th JANUARY at 12.00 NOON, my clients will charge you the amount of R50.00 per day storage in respect of the said parcel of dresses."

To this letter the attorneys acting for Job Auction Sales replied (letter dated 5 January 1970, Exhibit H) :

"Our clients have had no dealings with your clients whatsoever. A person employed by Metro Fashions on behalf of Central Cash Store asked our clients to deliver the goods at Metro Fashions so that he, the person employed there could take them to Central Cash Store, and therefore our clients never dealt directly with yours, and for that reason, they are not prepared to pay your clients any storage charges whatsoever, and as far as the R50.00 per day is concerned, this is obviously a nonsensical amount.

In any event, our clients state that Central Cash Store had no right to repudiate the goods, and from the wording of your letter it would appear that they never even looked at the goods, as obviously they never ever took them away from Metro Fashions. Our clients say in any event, that the goods are

according to sample and for all the above reasons, our clients will defend any action instituted against them by your clients."

Later in January 1970, as I have already stated, action was instituted.

Bulbulia was cross-examined at length on nearly every aspect of his evidence. At the outset it was put to him that his evidence to the effect that he had met Tilley at Athlone, near Cape Town, some six to nine months before November 1969, and that on that occasion they were guests at a dinner party, was untrue and that Tilley would deny ever having met Bulbulia in Cape Town. Bulbulia, however, was adamant that such a meeting had taken place. He thought it was in the beginning of 1969 but was very uncertain as to the time. He mentioned the names of other guests present at the dinner, including Hassan Lorgat, and volunteered to call witnesses who could bear him out. When the cross-examination was resumed the following day there was a significant change of position by Tilley. His counsel then stated that Tilley would admit that he and Hassan Lorgat were in the Coloured township .... / 20

township at Athlone, near Cape Town, during August 1968, but that Tilley could not remember whether he met Bulbulia there. Bulbulia insisted that they did meet and that he indeed had quite a lengthy conversation with Tilley on that occasion.

The following was then put by cross-examining counsel:

"But what I put to you, also is a lie, is that you communicated with him normally. You spoke to him normally and he spoke to you normally. You see, Mr. Tilley has been stone deaf - one hundred percent stone deaf for several years. Dr. Hymie Penn, an eminent ear, nose and throat surgeon of Johannesburg, examined him last year; a certificate to that effect was issued. Mr. Tilley will again be examined today, and if necessary Dr. Hymie Penn will be subpoenaed to give evidence in this court. Mr. Tilley has not answered a telephone for years. He cannot hear a telephone ring. And I put it to you it is a lie and a fabrication that you spoke to him on the telephone. What do you say about that?"

The reference to speaking on the telephone related to Bulbulia's evidence that he spoke to Tilley on the telephone on 3 December 1969 and again thereafter. Bulbulia, in reply to counsel, persisted that he did have a conversation with Tilley at the dinner party in Cape Town, stating that Tilley then used a hearing aid ("earphone"), and he also persisted in his testimony

that he did speak to Tilley on the phone in December 1969  
"not once, but a few times."

Bulbulia was also cross-examined on his evidence relating to the invoice of 3 December 1969. Some invoices in the invoice book were not in strict chronological order, <sup>but</sup> ~~although~~ the particular invoice (Exhibit A) could not be said to be out of such order. Bulbulia explained why some invoices did not follow in strict order of time. A suggestion by cross-examining counsel that the invoice in question was made out by Bulbulia, not on 3 December 1969, but on a later date, in order to "make a case" and that the original invoice was never posted to Tilley, was strenuously resisted by Bulbulia. Despite lengthy cross-examination, he persisted in his testimony concerning the telephone call by Hassan Lorgat that the dresses in question had been bought by Central Cash Store, concerning the instructions given by Ebrahim Lorgat that delivery should ~~be made to Metro Fashions and concerning the telephone call~~ thereafter, on 3 December 1969, to Tilley who confirmed the sale and the delivery instructions.

The first witness for the defendant was Tilley himself. Difficulty was experienced in the presentation of

the evidence of this witness inasmuch as, at the time of the trial (June 1971) he was, as the learned trial Judge found,

"a hundred per cent deaf and that his deafness has increased gradually over the years until he has reached this stage, for I do not think that when he gave evidence in this court he was in any way malingering."

The procedure adopted in presenting his evidence was that in chief he simply told his own story without being led by counsel, and, for the purpose of cross-examination, a series of written questions were prepared beforehand by cross-examining counsel, which questions were read out seriatim to the Court by counsel and replied to by the witness after he had himself read each question put. In the nature of things this method of cross-examination can hardly be effective, particularly where, as seems from the record to have happened at times in the instant case, the witness is inclined to avoid the pith of the questions or to sidetrack the real issue involved in a particular question. However, Tilley's evidence, in chief and in cross-examination,

came to the following. Deafness is hereditary in his family.

He became afflicted with it in 1941 at the age of 27; by 1947 his hearing was such that he had to use a hearing aid, which he did until 1957 when he found such aids to be of no use any more. He told the court that he had undergone two operations and had seen "many, many specialists", but that he had been informed that nothing could be done for him. He was totally deaf, and could not carry on any conversation. This had been the position for some years prior to 1969. He was not able to lipread and could be communicated with only with the aid of written notes or through an "interpreter". In the circumstances he, though conceding that he could have met Bulbulia at a dinner party at Athlone during August 1968, denied that there could have been any conversation between them as testified to by Bulbulia.

With regard to using the telephone he explained

"My difficulty is this, I cannot hear what the other person says. In order to avoid embarrassment, in order to avoid disputes, it is my practice only to make purchases by ... and by written order and by inspection and I do'nt do anything on the telephone. Only in special circumstances ....."



When pressed in cross-examination as to whether he could produce any medical report on his condition prior to November 1969, his reply was:

"They dont give us a written report. They tell us on a piece of paper. That paper is destroyed. What do you mean by report?"

Pressed further to furnish the name of any specialist or doctor from whom information could be obtained as to his condition in or prior to 1969, he could not do so. He did mention a Dr. Jackson (who had died), a Dr. Labuschagne, formerly a specialist in Krugersdorp (whose whereabouts at the time of the trial were unknown) and a Dr. Penn (who examined him in July 1970 i.e. after the action had been instituted and after he had been called upon to make discovery in terms of Rule 35).

With regard to the contract in issue, he told the court that on the evening of 3 December 1969 he returned to his home after attending a service at a mosque. At home he found Bodhania, Ahmin Boeta, Achmed Kajee and Hassan Lorgat. Bodhania had 40 sample dresses which he exhibited to the witness. Bodhania said that the 40 samples were representative

of a parcel of 5 000 dresses, which Bodhania offered to the witness at Rl.75 per dress. Tilley replied that he was only interested in taking 500 to 1 000 of the dresses, but Bodhania explained that the 5 000 dresses could only be purchased as a lot. He (Tilley) was, however, not prepared to buy the lot and informed Bodhania accordingly. In these negotiations communication between him and Bodhania took place through Hassan Lorgat with the aid of written notes.

Tilley testified further that during the course of these discussions, Ebrahim Lorgat, a brother of Hassan, entered the room. Ebrahim Lorgat is a travelling salesman for Metro Fashions. He saw the 40 sample dresses, became interested, and suggested to Bodhania that he (Ebrahim Lorgat) should be permitted to take the sample dresses in order to show them to his employers who would perhaps be interested in buying the lot. At the same time Ebrahim Lorgat stated that, if his employers agreed to buy the lot, he would try to arrange with them that Tilley be allowed to select 500 to 1 000 of the dresses for his own business. Bodhania agreed to Ebrahim Lorgat's proposals, whereupon, according to Tilley, all his visitors

left; Ebrahim Lorgat taking the 40 sample dresses with him.

Tilley, in his testimony, was emphatic that he at no stage agreed to buy 5 000 dresses. Indeed, as explained by him in his evidence, his bank account was at that time so much overdrawn that he would not have been able to finance the deal. He also denied that Bulbulia had at any time thereafter communicated with him on the telephone. He subsequently made no enquiries as to whether Ebrahim Lorgat had succeeded in bringing about a sale of the dresses to Metro Fashions and, if so, whether Metro Fashions was agreeable to his selecting 500 to 1 000 of the dresses. He did not receive any invoice from Job Auction Sales, and had no knowledge of the fact that the dresses had been delivered to Metro Fashions until he received the letter dated 19 December 1969 from Metro Fashions (Exhibit D) advising him that they were holding the dresses on his behalf; to which he promptly replied by letter dated 22 December 1969 (Exhibit E), the material portion of which has been quoted above.

Tilley was also asked why, if he was so convinced that no sale had taken place, ~~did~~ he amend<sup>ed</sup> his pleadings by .... / 27

by introducing an alternative defence to the effect that the dresses delivered to Metro Fashions were not according to sample. His answer was that his legal advisers suggested such a course.

The evidence of two other witnesses called by the defendant, Patricia de Valence and Mohamed Nanabhai, was directed solely at the question of Tilley's deafness. Mrs. de Valence practises as an audiologist or audiometrician. Patients are referred to her by specialists for hearing tests and diagnosis of the cause of their deafness. According to this witness, Tilley was referred to her by Dr. Penn on 16 July 1970. She conducted certain tests which indicated to her that there was one hundred per cent loss of hearing. Tilley, she said, suffered <sup>from</sup> ~~of~~ nerve deafness, a condition which gets progressively worse until total deafness is experienced. This is what had happened in Tilley's case. Asked if she could tell the court what Tilley's condition was in November 1969, she replied "one cannot say for sure", and later answered as follows to further questions:

"Would you say that in December 1969, just on the probabilities, it is probable that he could have heard a telephone conversation and an ordinary conversation? --- This is a very difficult question. I would say he probably could'nt but this is probably ...

Yes, on the probabilities. --- But one cannot be sure in all honesty, but the condition of his voice at the time - it was disaudic already. It takes quite a while for a voice to get as bad as this even with severe deafness.

How long would you say? A matter of years or ..? ---Perhaps a year or two at the minimum."

The witness Nanabhai is a nephew of Tilley. He has known Tilley intimately since 1942 and had for many years been employed as manager of Tilley's business. According to Nanabhai, Tilley consulted a Dr. Labuschagne sometime between the years 1951 to 1954 because of deafness, thereafter (in 1955, 1956 or 1957) he consulted a Dr. Fine, after which he used a hearing aid for some years, but later discontinued doing so because he derived no assistance from it. In or about 1960 he was operated on in Durban. His hearing gradually deteriorated and, in the opinion of the witness, he would not have been able in 1969 to hear a voice either in normal conversation or on the telephone.

Nanabhai could not furnish the name of any



doctor who had been consulted by Tilley after 1960, save that of Dr. Penn who saw Tilley, as I have already stated, in 1970 after the present action had been instituted.

Hassan Lorgat also testified on behalf of Tilley. He has been in Tilley's employ for approximately 14 years. According to his evidence, Tilley had been "completely deaf" for "the last three to four years". In conversation he requires an "interpreter" or notes are written for him.

Although Hassan Lorgat admitted that he and Tilley were present at the dinner party at Athlone in 1968, as testified to by Bulbulia, and that he (Hassan) remembered meeting Bulbulia there, he stated that, because of Tilley's condition, there could not on that occasion have been any conversation between Bulbulia and Tilley. His attention was, however, drawn to the evidence of Bodhania who said that, although Tilley was very hard of hearing, one could still, even in 1969, converse with him, and thereafter the following questions were put to and answered by Hassan:

"And .... / 30

"And they (Bodhanian and Tilley) would be able, after their own fashion, let us accept the position that Mr. Tilley is very deaf, there would be able to be some communication between them? --- Well I would'nt say a lengthy communication.

Well let's say a short communication. --- Very short.

Very short, of buying and selling goods, and that kind of thing. That is, after all, what their business dealings are every day? --- Yes.

Hassan Lorgat's version of what took place between Bodhanian and Tilley at the latter's house was as follows. The date he said was 3 December 1969. Bodhanian arrived after the service at the mosque i.e. after 9 p.m., accompanied by Ahmin Boeta and Achmed Kajee. Bodhanian had 40 sample dresses which were shown to Tilley. He informed Tilley that he had 5 000 dresses for sale at Rl.75 per dress. Tilley and Hassan Lorgat retired to another room to discuss the offer. When they returned Tilley told Bodhanian that he was interested in buying 500 to 1 000 of the dresses, whereupon Bodhanian replied that the 5 000 dresses could only be bought as a lot. This Tilley was not prepared to do and that was the end of the negotiations. In these negotiations he, Hassan Lorgat, wrote notes for Tilley in order



that the latter could follow the conversation. When the negotiations between Bodhania and Tilley had come to an end, Ebrahim Lorgat came in. He told Bodhania that he would try to sell the 5 000 dresses if Bodhania would allow him to take the 40 sample dresses for that purpose. Bodhania agreed. By that time Tilley had retired to his bedroom and could not have heard what was discussed between Bodhania and Ebrahim Lorgat. Shortly afterwards all the visitors left. Bodhania and Ebrahim Lorgat had a discussion outside Tilley's house but Hassan Lorgat did not know what was discussed between them. He denied that he had spoken to Bulbulia on the telephone that evening or thereafter. He had no knowledge of any efforts made by Ebrahim Lorgat to sell the dresses, nor of any arrangements made by Ebrahim Lorgat with Metro Fashions, nor did he know that any dresses had been delivered to Metro Fashions.

In cross-examination he stated that to his knowledge there was no arrangement whereby Tilley would, upon a sale of the dresses being negotiated by Ebrahim Lorgat, be entitled to select a quantity of dresses for his own business.

Ebrahim Lorgat, Hassan's brother, was also called to testify on behalf of the defendant. He stated that he knew Tilley very well and often visited him at his house in Krugersdorp. As to Tilley's deafness, Ebrahim Lorgat answered as follows to questions put to him:

"Now, what do you know about Mr. Tilley's ability to hear conversations? --- Not much because I hardly speak with him.

You hardly speak with him? --- I hardly speak with him.

Can you speak to him directly? --- No.

How must you communicate with him? --- Well, whenever I've got a line to sell him I take down samples and I show him the price, and most of the time I write or speak to Hassan."

According to the witness, he called at Tilley's house after 9p.m. on 3 December 1969 to fetch his brother Hassan. When he entered the room in which Tilley and his visitors, Bodhania, Ahmin Boeta, Achmed Kajee and Hassan were, he noticed the 40 sample dresses. Hassan informed him that Bodhania had 5 000 such dresses for sale as a lot at R1.75 per dress, but that Tilley was not prepared to buy such a large quantity. He was interested in buying only 500 to 1 000

and wanted particulars of the ranges of sizes and colours of the dresses offered for sale. At that stage Tilley left the room, entered his bedroom and did not thereafter reappear.

In the absence of Tilley, he, Ebrahim Lorgat, suggested that Bodhania should give him the samples so that he could show them to his employers at Metro Fashions, who would possibly be interested. Bodhania agreed. They all then left Tilley's home.

According to Ebrahim Lorgat, he and Bodhania privately arranged between them that the 5 000 dresses would be offered to Metro Fashions at Rl.95 per dress. The difference between Rl.75 and Rl.95 per dress would then be shared between them as a secret commission.

Ebrahim Lorgat testified further that he showed the sample dresses to his employers (Metro Fashions) and told them that Tilley was interested in buying 500 to 1 000 of the dresses offered for sale provided he could select what he wanted. His employers later told him that they would like to see all the dresses. Consequently he went to Bulbulia. He hardly

knew Bulbulia, never having spoken to him before. Nevertheless, he went to Bulbulia, and told him that Metro Fashions would like to see the dresses, whereupon Bulbulia stated that the dresses were still on rail but would, on receipt by him, be sent over to the business premises of Metro Fashions.

According to Ebrahim Lorgat, after all the dresses had been delivered to Metro Fashions, he was informed by Mr. Katz of Metro Fashions that the dresses were not according to sample.

This Mr. Katz, a director of Metro Fashions, was called as a witness. He told the court that 55 cartons of dresses were delivered by Job Auction Sales to Metro Fashions on 9 December 1969, and 16 cartons later, on 15 December 1969. Asked how it came about that such a delivery was made, he explained that Ebrahim Lorgat, an employee of Metro Fashions, had some time before delivery of the dresses shown him the 40 sample dresses. Ebrahim Lorgat informed him that 5 000 dresses, of which the samples were said to be representative, had been offered<sup>c</sup> to Tilley, who was interested

in buying not more than 1 000 of the dresses. The whole parcel of dresses had, however, to be sold as a lot. The price mentioned by Ebrahim Lorgat was RL.95 per dress. Tilley was known to Katz as his firm (Central Cash Store) was a regular and good customer of Metro Fashions. Katz informed Ebrahim Lorgat that he would like to see the whole parcel of dresses; and it was because of that request that Metro Fashions later took delivery of the 71 cartons of dresses from Job Auction Sales.

According to Katz, the dresses delivered on 9 December 1969 came up to expectations and would have been acceptable to him, but the quantity of dresses delivered on 15 December 1969 were not acceptable - they were "all one style .... in a seersucker material far inferior to any of the samples that had been offered to us." Katz thereupon got in touch telephonically with Bulbulia of Job Auction Sales and with Tilley of Central Cash Store. He could not remember whether he first contacted Bulbulia or whether he first spoke to Tilley. However, Bulbulia's attitude was that the goods had been sold

to Central Cash Store and that Job Auction Sales would not accept return of the goods. Tilley's attitude was as expressed in his letter of 22 December 1969 (Exhibit E), to which reference has already been made.

The attention of Katz was drawn to the following passage in the letter of 2 January 1970 (Exhibit G) written by the attorney for Metro Fashions to Job Auction Sales:

"My clients have advised me that you have delivered a parcel of Children's dresses to them on account Central Cash Store, Krugersdorp. My clients have accepted the said parcel in good faith, and after communicating with Messrs. Central Cash Store were advised that the goods supplied were not according to sample and that same should be returned to yourselves."

Katz explained that this must have been a mistake made by the attorney as, according to Katz, it was Metro Fashions that advised Central Cash Store that the goods supplied were not according to sample.

On the evidence, as outlined above, the trial  
Court found in favour of the plaintiff, Job Auction Sales.  
The Court accepted the evidence of Bodhania that, at the

meeting at Tilley's house, the latter had agreed to buy the whole parcel of dresses a Rl.75 per dress, and accepted the evidence of Bulbulia that Hassan Lorgat had confirmed the sale by telephone and Bulbulia's further evidence that ~~also~~ Tilley in person had <sup>also</sup> confirmed the sale in a later telephonic discussion between Bulbulia and Tilley.

As to the alternative defence, namely, that the goods delivered were not in accordance with the samples shown to Tilley, the trial Court found that there was no substance in that defence; the learned Judge a quo stating, inter alia, in his judgment:

"The Defendant claims that there was an express warranty that the goods would cover the samples, and that it would be evenly distributed as far as size, colour, cut and material were concerned. On the other hand, it is clear that the parties knew that they were dealing with a so-called job lot, or that this was a "seasonal clearing" sale, that the factory had got rid of these dresses, that they were assorted, and that there would be no guarantee as to any particular colour, or cut, or material."

I must state at once that it is not surprising that the Court's finding on the alternative plea was not attacked in argument on appeal before us. Indeed, on Tilley's own evidence, there

was no merit in the alternative defence pleaded. His testimony on this aspect of the case was as follows:

"The samples looked attractive to me, for that reason I asked him (Bodhania) how many of each style and size you have (sic). He was unable to provide me with any details."

It is also significant that Ebrahim Lorgat's understanding of the situation (on information furnished by Hassan Lorgat immediately after the negotiations between Bodhania and Tilley had come to an end) was that Tilley was not prepared to buy the 5 000 dresses offered for sale for two reasons, namely, "Mr. Tilley wanted the details of sizes, colours and all this, and he said the quantity was too big."

The evidence of Tilley and Ebrahim Lorgat on this aspect of the case, read in the light of the fact that the dresses in question were a job lot sold by the factory for seasonal clearance of excess <sup>s</sup>stock, and were offered to ~~Tilley as such, belies the allegation in defendant's plea,~~ which was amended so as to introduce the alternative defence, that Bodhania had, on the occasion in question,



"expressly warranted that the said (5 000) dresses would consist of 40 styles and would range from size 16 to size 32, and would be made from the same materials as the samples" and, "that the entire consignment would be approximately evenly distributed over the range of samples exhibited."

However, as no argument was addressed to us on the alternative defence, nothing further need be said with regard thereto.

The only question therefore, is whether the finding of the trial Court that a binding contract of sale had been concluded between the parties was justified on the evidence. On that aspect of the case, the judgment of the learned Judge a quo was, on appeal before us, attacked on various grounds. The arguments advanced by counsel for the appellant can conveniently be dealt with under the following heads:

- (a) The allegations made in the pleadings.
- (b) The evidence of the witnesses.
- (c) The documentary evidence.
- (d) The general probabilities.

The allegations made in the pleadings.

Counsel for the appellant submitted that there was a conflict in material respects between certain allegations made in the pleadings of Job Auction Sales and the evidence given by Bulbulia, and he argued that this must seriously affect Bulbulia's credibility. A similar argument was addressed to the learned Judge a quo after his attention had been drawn to the fact that the summons alleged an agreement of sale on 3 December 1969; that the original declaration alleged a sale on that date concluded at Johannesburg, and that, in reply to a request for particulars to the declaration, it was stated that the agreement of sale had been entered into between Bulbulia, acting on behalf of Job Auction Sales, and Tilley in person, and that, on 3 December 1969 at plaintiff's place of business in Johannesburg, Tilley verbally undertook to pay the purchase price. These allegations are clearly in conflict with the facts as testified to by Bulbulia. Bulbulia, however, in the course of his evidence tendered

an explanation for the mistakes made in the aforementioned pleadings, namely, that he, in the first place, merely handed a copy of the invoice of 3 December 1969 (Exhibit A) to his attorney with instructions to issue summons, and that, at the time when the declaration was filed and also when the further particulars were furnished, he was overseas on a pilgrimage to Mecca. The only explanation for the errors in the pleadings could, according to Bulbulia, be that his attorney had, in his absence, obtained wrong information from the person then in charge of his (Bulbulia's) business. The learned trial Judge accepted this explanation; and no valid reason has been advanced why he should not have done so. As I have already stated earlier in this judgment, the plaintiff's pleadings were eventually amended so as to allege that an agreement of sale had been concluded towards the end of November 1969 at Tilley's home in Krugersdorp or, alternatively, later, on 3 December 1969, in a telephone discussion between Bulbulia and Tilley. And the evidence of Bodhania and Bulbulia at the trial was in line with the pleadings as amended.

Counsel also commented on the fact that the pleadings made no mention of the alleged confirmation of the sale by Hassan Lorgat in a telephone discussion with Bulbulia, as testified to by the latter. In my view, there is no merit in the argument addressed to us on this point. On Bulbulia's evidence, his discussions on the telephone (first with Hassan Lorgat and thereafter with Tilley) were both, in effect, confirmatory of a sale having been concluded. In pleading, Bulbulia, or his legal advisers, must have thought fit to rely on the later discussion with Tilley in person rather than on the earlier discussion with Tilley's employee, and for that reason, it would seem, made no mention in the pleadings of the earlier discussion with Hassan Lorgat. I can find no fault with such conduct.

The evidence of the witnesses.

On behalf of the appellant, Tilley, it was contended on appeal that the learned Judge a quo should not have accepted the evidence given by the plaintiff's witnesses.

In particular, it was submitted that he should have rejected Bodhania's evidence that, on his visit to Tilley's home, the latter had agreed to buy the parcel of 5 000 dresses, and that he should likewise have rejected Bulbulia's evidence that he later had a discussion with Tilley on the telephone which, in effect, was confirmatory of the alleged agreement testified to by Bodhania.

In argument several points of criticism were directed against Bodhania as a witness. In some respects the criticism was not without merit, but, on the evidence as a whole, I am not satisfied that the learned Judge a quo erred in accepting Bodhania's evidence. In view of Bodhania's business association with Tilley and his family connection with the Lorgat brothers, it seems most unlikely that he would have been prepared to concoct a story which would not only tend to estrange him from his brothers-in-law, the Lorgats, but also cause him to lose such a good customer as Tilley - and that merely in order to gain a commission of R200 which Bulbulia had agreed to pay in the event of a sale of the dresses being negotiated by Bodhania.

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In one particular respect counsel insisted ~~that there was clear proof that Bodhania had not been honest~~ with the Court. I have already indicated that counsel for Tilley had in his possession a written statement taken from Bodhania, which was put to Bodhania in cross-examination. Bodhania confirmed that he had made such a statement. As would appear from the cross-examination, this statement, after reciting what had taken place at Tilley's house, concluded as follows:

"If it (the sale) was confirmed there was a deal. If it was not confirmed there would be no deal and I would try and sell it (the 5 000 dresses) elsewhere."

It was suggested to Bodhania by cross-examining counsel that the above passage in the statement was clearly in conflict with his testimony that an agreement of sale had been concluded at Tilley's home; and so it was also argued before us.

Apart from the passage quoted above, the statement, as I read the cross-examination of Bodhania, appears to be in conformity with his evidence; in particular it

contains a passage to the effect that at Tilley's house

Hassan Lorgat told Bodhania:

"Well it (the parcel of dresses) is bought. We will confirm tomorrow with Mr. Bulbulia."

In the light thereof, it would appear that the concluding passage in the statement, quoted above, was not intended to convey something that was said between the persons present at Tilley's house, but merely to indicate what Bodhania thought would have happened if Tilley did not confirm with Bulbulia, namely, that he would then have sold the dresses to someone else; and I think that was what Bodhania meant when, in reply to cross-examining counsel, he explained:

"I said (when making the statement) that if they bought the dresses it was a deal, and if they didn't, I would have sold it to somebody else."

In the premises, I do not think that Bodhania's statement in any way detracts from his testimony.

On the other hand, the defendant, Tilley, and the witnesses who were called to testify on his behalf with regard to the negotiations at Tilley's house, were found by the learned Judge a quo to have been "disingen<sup>u</sup>s" in their

testimony. I must agree with the learned Judge. Not only was there a serious conflict between Tilley and the two Lorgat brothers as to what had in fact transpired at Tilley's house - particularly on the question whether there was any talk of making an arrangement with Metro Fashions that Tilley should be entitled to select a quantity of dresses - but there was also a sharp conflict between Tilley, on the one hand, and, on the other hand, Hassan and Ebrahim Lorgat as to the reason for the latter's presence at Tilley's house on that occasion. Bodhanian had strenuously denied in evidence that Ebrahim Lorgat was there. Tilley's explanation that Ebrahim, at that time, lived across the road and had simply looked in on him was, as appears from other evidence, false. Ebrahim Lorgat, at that time, lived in Randfontein. His own explanation was that he called at Tilley's house to collect and take his brother Hassan home to Elandsvlei, as he regularly did, so he said, on weekdays over the period of Ramadan. From the cross-examination of the Lorgat brothers ~~also~~ this explanation



<sup>also</sup>  
would appear to have been fabricated. Time and space do not permit of a detailed analysis of such cross-examination.

Counsel for the appellant submitted that, on the question of the credibility of Bodhania, an inference unfavourable to the respondent (plaintiff) should be drawn from the fact that neither Ahmin Boeta nor Achmed Kajee were called to testify for the plaintiff. In the particular circumstances of this case I do not think that the drawing of any unfavourable inference is warranted. Boeta had given a statement to counsel for the defendant, who announced in court that he might have to consider calling Boeta as a witness. Boeta was not called. It is significant that counsel for the defendant did put to Bodhania something contained in Boeta's statement, but nothing was put, relative to Boeta's statement, which can be regarded as contradictory of Bodhania's evidence.

With regard to this aspect of the case the learned Judge a quo commented as follows in his judgment:

"This (the fact that neither Boeta nor Kajee were called) is not strange, as it appears that they made statements or had consultations with both sides, and  
if .... / 48

if they had been called, it is clear that they would, unfortunately, like some of the other witnesses to the negotiations, have been compelled to commit perjury."

I agree with counsel that there was no justification for the remark that the said two persons, if called, would have been compelled to commit perjury. However, in view of the finding of the trial Court that the sale was later confirmed by Tilley himself, the fact that neither of the two witnesses, Boeta or Kajee, were called, becomes relatively unimportant.

It was, however, contended before us that the trial Court erred in accepting Bulbulia's evidence that he spoke to Tilley on the telephone and that Tilley then confirmed the sale. This contention was based mainly on a submission that, according to Tilley and the witnesses Patricia de Valence and Nanabhai, Tilley was not able, as at December 1969, to follow any conversation on the telephone. I am not satisfied that the trial Court erred in accepting Bulbulia's evidence on this aspect of the case. Although the learned Judge a quo failed to deal in his judgment with the evidence

of Nanabhai, a reading of the evidence as a whole, satisfies me that, on a balance of probabilities, Tilley could still, albeit with difficulty, have followed some conversation in 1969.

Although Tilley testified that he had consulted "many, many specialists" with regard to his loss of hearing, neither he nor Nanabhai could name any person consulted between the years 1960 and 1969. Moreover, there is a clear conflict between Tilley and Nanabhai as to the progressive loss of hearing on the part of Tilley. According to Tilley, he started using a hearing aid during or about 1947 and discontinued doing so in or about 1957. On Nanabhai's evidence, however, Tilley only started using a hearing aid after he had consulted Dr. Fine, which consultation, so Nanabhai said, took place some time between the years 1954 and 1957, and that Tilley used a hearing aid for some years thereafter.

With regard to Mrs. de Valence, I have already indicated, by quoting excerpts from her evidence, that she was extremely reluctant to express an opinion as to Tilley's ability to follow a conversation in 1969. The high water

mark of her evidence was that, as a probability, she considered that Tilley would not, in 1969, have been able to hear a voice in conversation. Against that there was the admission by Hassan Lorgat, in cross-examination, that Tilley could (as at 1969) still be conversed with in a "short" discussion.

As to Tilley's own evidence, there was, as I have indicated, his significant change of position concerning Bulbulia's evidence that they had met in Cape Town. His counsel originally stated that Tilley would deny having met Bulbulia in Cape Town. Later it was conceded that he could have met Bulbulia, but could not then have conversed with him. Secondly, there is the point, made in the judgment of the learned Judge a quo, that Tilley in <sup>his</sup> evidence stated that the reason why he did not return to Dr. Penn was because he was informed by the "doctor at the clinic" that

"Your hearing has gone a hundred percent, you are wasting your money."

It was argued, with reference to the fact that Tilley had stated "I asked him (the "doctor at the clinic") what are the possibilities of success", that Tilley was not then referring

to Mrs. de Valence, who denied having made any such statement, but was referring to a male doctor at the clinic. I cannot accept that explanation. Tilley's reply was given specifically to questions concerning the report of Mrs. de Valence and, on the record, there is no indication that, on that occasion, another person, a male doctor, was at all concerned with the tests conducted on Tilley at the clinic.

On the evidence as a whole I am, therefore, in agreement with the learned Judge a quo that, on a balance of probabilities, Tilley could in 1969 still have followed some conversation on the telephone. On that aspect, due regard must also be had to the fact that the learned Judge a quo had the advantage of seeing the witnesses and judging their demeanour, which placed him in a better position than this Court to evaluate the evidence of the different witnesses.

The documentary evidence.

In the first place, there is the invoice of 3 December 1969 (Exhibit A), which, in terms, records a sale to defendant of the dresses in question. It was argued that this invoice was "fabricated" by Bulbulia in order to "make a case". I am not enamoured of this argument. There could perhaps have been some merit in the argument if a copy of the invoice (the packing slip) had not been attached to the delivery note dated 9 December 1969 (Exhibit B), which accompanied the dresses delivered to Metro Fashions on that date. If Bulbulia had schemed to "make a case" there was no need to date the invoice 3 December 1969. He could with equal effect have dated the invoice 9 December 1969 and later testified that he spoke to Tilley on the telephone on that date, being the date of the first delivery of a quantity of dresses to Metro Fashions.

Counsel for the appellant argued that the letter of 5 January 1970 (Exhibit H), written by the attorneys for Job Auction Sales to the attorney for Metro Fashions, reflects

~~an inherent improbability in Bulbulia's evidence.~~ This, it was stated, was evidenced by the passage reading:

"A person employed by Metro Fashions on behalf of Central Cash Store asked our clients to deliver the goods at Metro Fashions so that he, the person employed there, could take them to Central Cash Store! (My underlining).

Bulbulia, so it was argued, could hardly have been requested to deliver the goods to Metro Fashions simply for the purpose of further delivery to Central Cash Store. There is some merit in this argument, but it loses impact if regard is had to the fact that Bulbulia, on his testimony, had no knowledge of the arrangements made between Ebrahim Lorgat and Metro Fashions and could very well have thought that the dresses would eventually go to the purchaser, Central Cash Store.

What is of particular significance in the documentary evidence is the statement in the letter of the ~~attorney for Metro Fashions dated 2 February 1970 (Exhibit G)~~ that:

"My clients have advised me that you have delivered a parcel of Children's dresses to them on account

Central Cash Store, Krugersdorp. My clients have accepted the said parcel in good faith, and after communicating with Messrs. Central Cash Store were advised that the goods supplied were not according to sample and that same should be returned to yourselves." (My underlining).

This statement, if correct, could only mean that Tilley had refused to accept the dresses, not because an agreement of sale had not been concluded, but because the dresses delivered were not "according to sample". Katz, as I have already stated, tendered the explanation that the attorney for Metro Fashions must have made a mistake in so stating, because, as he explained, it was he who advised Tilley that the dresses delivered to Metro Fashions were not "according to sample". This explanation is hardly acceptable in the light of the context in which the particular sentence appears and in view of a similar statement made in the later letter of 10 January 1970 (Exhibit I).

It was argued that Tilley could not have informed Metro Fashions that the dresses delivered were not "according to sample" as he (Tilley) had not seen the dresses



at all. The answer, of course, is that Katz told Tilley what had been delivered, and that he (Katz) was not satisfied with the dresses, whereupon Tilley could very well have informed Katz that the dresses as described by Katz were not in conformity with the samples shown to him (Tilley).

On the whole, I therefore agree with the learned Judge a quo that "the evidence of plaintiff (Bulbulia) and Bodhania fits the documents without giving the impression that they had changed their evidence so as to make that possible." The same cannot be said for the defendant (Tilley) and his witnesses.

The General Probabilities.

It was argued that, in view of Tilley's evidence as to the limited turnover of his retail business and the state of his bank account at the time, he could not then have afforded to buy 5 000 dresses. That may be so, but this argument loses its force when regard is had to the fact that the dresses in question were offered as a job lot

at less than half their normal wholesale price. Tilley could well have thought that he would without difficulty be able to resell the dresses quickly as a lot to a wholesaler, such as Metro Fashions, without making any call on his bank account.

The general probabilities, I think, favour the plaintiff in that it seems very unlikely that Bulbulia would have gone to the trouble and expense of delivering 71 cartons of dresses (5 000 dresses approximately) to Metro Fashions merely for the purpose of inspection thereof, when the said parcel of dresses could easily have been inspected at the premises of Job Auction Sales.

For all the above reasons, I consider that the Court a quo was fully justified in finding in favour of the plaintiff.

The appeal is dismissed with costs.

  
G. v. R. Muller, J.A.

RUMPF J.A. }  
JANSEN J.A. } Concur.  
TROLLIP J.A. }  
RABIE J.A. }