

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

SITRUS KONSENTRAAT BEMARKING Appellant

VERSUS

DICKON HALL PRODUCTS (PTY) LTD..... Respondent

Coram: WESSELS, CORBETT, HOFMEYR, KOTZÉ, JJA, et
TRENGOVE, AJA.

Appeal heard on 7 September 1978.

Date of Judgment: 9 November 1978.

J U D G M E N T

CORBETT, JA:

This matter came before us as an application for condonation of a failure to note an appeal within the time limits laid down by Rule 5(1) of the Rules of this Court. Having regard to the relatively minor degree of non-compliance with the Rule which occurred in this case,

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it seemed to us that the application hinged on the applicant's prospects of success on appeal. Full argument was accordingly heard on the merits of the appeal and it was agreed by counsel that if the Court decided to grant condonation it should at the same time proceed to an adjudication of the appeal itself. (Cf. Federated Employers Fire & General Insurance Co. Ltd. and Another v McKenzie, 1969 (3) SA 360 (AD); Reinecke v Incorporated General Insurances Ltd., 1974 (2) SA 84 (AD).)

The facts relevant to the question of condonation, apart from the merits of the appeal, are shortly as follows. Judgment was given against applicant (appellant) - whom I shall call "Citrus" - in the Transvaal Provincial Division ("TPD") on 2 August 1977. After consulting its legal advisers, Citrus decided to appeal against the judgment but for reasons which are not altogether clear the legal advisers adopted the procedure of giving notice of an application to the TPD for leave to appeal to this Court.

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This notice was filed with the Registrar of the TPD and was served on the attorneys acting for respondent ("Dickon Hall") on 18 August 1977. On 2 September 1977 Citrus's attorneys received a letter from the attorneys for Dickon Hall pointing out that the notice was "a nullity". In the meantime the period for noting an appeal, as laid down by Rule 5(1), had expired on 31 August 1977. Thereafter Citrus filed a notice of appeal to this Court (which incidentally unnecessarily lists the grounds of appeal), together with an application for condonation of the late-filing thereof. The notice and the application were dated 9 September 1977. They were served on Dickon Hall's attorneys on the same date and filed with the Registrar of the TPD on 11 September 1977. In the course of September 1977 the notice and application were lodged with the Registrar of this Court but rejected on the ground that the application was couched in the form of a notice of motion instead of a petition. This was rectified on 27 September 1977.

It is thus evident that, although these facts reveal a surprising ignorance as to appeal procedures on the part of Citrus's legal advisers, the actual delay in noting the appeal was of short duration and no prejudice appears to have been suffered by Dickon Hall, which did not file any formal opposition to the application. Hence the procedure adopted by this Court.

I turn now to the merits of the appeal. In the Court a quo Dickon Hall sued Citrus for an amount of R11 431,00 (together with mora interest as from 30 October 1974 and costs of suit). This amount represented the balance of the purchase price of certain orange juice concentrate sold by Dickon Hall to Citrus and delivered in five separate consignments. Citrus resisted the action on the grounds that the concentrate delivered in certain of these consignments was not fit for the purpose for which it had been purchased; that this constituted a breach of a tacit term of the contract of purchase and sale entered

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into between the parties; that the amount claimed was that portion of the purchase price which related to the defective consignments, the balance owing having been paid; and that owing to deterioration of the concentrate no purpose would be served by tendering its return to Dickon Hall.

At the same time Citrus counterclaimed for an amount of R35 482,19, being damages alleged to have been suffered as a result of the delivery of the defective concentrate.

At a pre-trial conference held in terms of Rule 37 of the Uniform Rules it was agreed between the parties that at the hearing the trial Court be asked initially to confine its decision to the issue as to whether or not the concentrate was defective at the time of its delivery to Citrus and that only in the event of the Court finding that it was defective would the Court proceed to deal with the quantum of damages to which Citrus might be entitled in terms of its counterclaim. The trial Judge (VAN REENEN J) held, in favour of Dickon Hall, that the concentrate delivered

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had been shown to be free of any defect and granted judgment as prayed, save that the interest rate was increased, in terms of the Prescribed Rate of Interest Act, 55 of 1975, to 11% per annum. (Dickon Hall rightly abandoned this portion of the judgment in so far as it allowed interest at the prescribed rate for the period of mora prior to 16 July 1976, the date upon which Act 55 of 1975 came into operation.) Citrus appeals against the whole of the judgment and order of the Court a quo.

Many of the facts relevant to this dispute are either common cause or not seriously contested. Dickon Hall is a company which manufactures citrus concentrate from oranges, grape-gruit and lemons at its factory situated at Mataffin, near Nelspruit, in the Eastern Transvaal. It packages its products in small quantities for the retail trade and it also supplies concentrates in bulk to other concerns, who in their turn process and sell them to retailers. One such concern was Citrus, which at the time when Dickon Hall's cause of action is alleged to have arisen (i.e., in

the period January to April 1974), was a firm or partnership consisting of Mr G.A.C. Ehlers, Snr., Mr G.A.C. Ehlers, Jnr., and Mr H.L.W. Ehlers. Later (on 16 August 1974) the business was transferred to a private company and the partnership dissolved but in terms of Rule of Court 14(7) the partnership, consisting of the above-named partners, was cited as defendant when Dickon Hall instituted action in October 1974. Citrus had its head office in Pretoria but its processing plant was at a factory situated near Brits. There it canned concentrated fruit juices, which had been purchased from producers, and distributed this canned product to the retail trade under the trade name "Vita-C-Sap".

Citrus juices, like many other natural products, are subject to deterioration caused by ever-present micro-organisms, including bacteria. The manufacturer of a citrus concentrate must, therefore, take steps to ensure that his product does not deteriorate through bacteriological and other action before it reaches the consumer or the

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purchaser to whom it is supplied. In regard to concentrates supplied in bulk, Dickon Hall adopted two different methods of countering the action of micro-organisms. The one was to freeze the finished product and keep it at a temperature well below freezing point until delivered to the purchaser; the other was to add a preservative to the finished product. One of the preservatives commonly used in the trade - and one used by Dickon Hall itself - is sulphur dioxide (SO_2). This gas figures prominently in this case.

In broad outline the factory procedures adopted by Dickon Hall - both at present and in 1974 when it supplied Citrus - in the processing of orange concentrates (the type of juice with which this case is concerned) are as follows. Oranges are purchased through the Citrus Board from growers in the Lowveld. Upon arrival at the factory they are tested for quality both by Dickon Hall employees and by Government inspectors. After being

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passed as fit for processing, the fruit is put into extractors, which extract the juice and separate pips and peels. The juice then passes through screens, called "finishers", under pressure to remove all residue of pip and peel. The juice is then pasteurized. The purpose of this is to destroy certain enzymes which would otherwise cause the juice to lose its "cloud" or opacity. Pasteurization also has the beneficial effect of destroying microorganisms. The pasteurized juice is thereafter concentrated by placing it at low temperature under a high vacuum in what is termed an "evaporator". Degree of concentration, or density, is signified by a scale called "Brix". The standard or stock concentrations produced by Dicken Hall are 65° Brix and 60° Brix. 60° Brix, for example, has the same specific gravity as a solution of sugar consisting of 60% sucrose. Once the juice has been evaporated it passes into special tanks where it is adjusted to the correct Brix by blending or dilution.

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From the blending tanks the concentrate which is to be frozen is passed through freezers which cool it down very rapidly to between 0° and -5° Celsius. Because of its high sugar concentration juice of 65° Brix and 60° Brix never actually freezes but becomes a thick slurry. After being cooled to the correct temperature the slurry is ready to be fed into drums. It is then checked for quality. A sample of every batch is taken to the factory laboratory where it is analysed and tested in various ways and assessed as to colour, absence of defects and flavour. Flavour is assessed by tasting. Once passed by the laboratory, the concentrate is fed into 200 litre drums and these drums are removed to deep freeze cold rooms, where they are maintained at temperatures of -18° to -20°C . Here they are kept stored until required. On the other hand, the concentrate which is to be preserved is pumped from the blending tanks to what are referred to as dosing tanks, where the preservative is added. SO_2 is introduced in the form of sodium metabisulphate, a powder. Once this is added to the concentrate

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and thoroughly stirred in, SO_2 is released and becomes incorporated into the concentrate. The adding of preservative is controlled and supervised by the laboratory staff at the factory. They weigh out in the laboratory the preservative required for a particular batch of concentrate and take it down to the factory in a sealed paper packet. A member of the factory personnel then adds the preservative to the juice in the dosing tank under the supervision of the laboratory staff. The concentrate is then apparently poured into specially lined 200 litre drums and stored in a separate part of the factory. The whole process, from the extraction stage to when the concentrate is taken into store, takes about half an hour.

At the relevant time, and at present, Citrus cans citrus concentrates by a process known as "hot canning". It receives the concentrate in a frozen form, i.e. as slurry. This it pours into a mixing tank, from where the concentrate is pumped into a pasteurizer. In the pasteurizer the con-

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concentrate is heated to between 83° and 87° C. After being pasteurized the hot concentrate passes on to a filling point. The empty cans are brought to the filling point on a conveyor, filled, closed off with a lid and sealed. After sealing the filled cans are turned upside-down in order to sterilize the lid. The cans are then placed in a sloping canal filled with running water, which causes them to roll down the canal into a water-tank. The water in the canal and the tank is kept at room or ambient temperature and this cools the cans and their contents fairly rapidly. After the cans have been in the water for about three-quarters of a hour they are removed and stacked to dry. Concentrate canned by this method has a "shelf-life" under reasonable conditions of approximately six months.

It is important that the concentrate used for this hot canning process should be the frozen form and not concentrate containing preservatives. Concentrate preserved with SO_2 is particularly unsuited to this process

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because of certain chemical reactions which result from the presence of the SO_2 and cause the deterioration of the concentrate. In brief what happens is that the SO_2 combines with water in the concentrate to form sulphureous acid (H_2SO_3), which in turn reacts with the tin lining of the can to form hydrogen sulphide (H_2S), an unpleasant-smelling gas. The H_2S further reacts with the iron of the can to produce ferro-sulphide (FeS), which takes the form of a black deposit on the inside of the can. Another product of these reactions is hydrogen gas (H_2) which causes the can to swell and sometimes burst at the seams. A burst can would let in micro-organisms, which produce other gasses, including carbon dioxide (CO_2). Even a small quantity of SO_2 in a can (as little as 15 parts per million, according to one expert witness) can produce these reactions.

With this factual background I come now to the contract between the parties. In December 1973 Mr G.A.C. Ehlers, Snr., on behalf of Citrus, approached Dickon

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Hall to find out whether the latter could supply Citrus with orange concentrate. At this time Citrus's regular suppliers did not have sufficient stocks to satisfy its needs. This was the first occasion upon which Citrus and Dicken Hall had had dealings with one another. After certain negotiations Dicken Hall indicated that it was prepared to supply Citrus upon certain terms. These were set out in a letter of 18 December 1973 written by Major D.D. Hall, sales director of Dicken Hall, to Ehlers. This letter confirmed a telephonic conversation and stated, inter alia, that Dicken Hall could supply 60° Brix orange concentrate preserved with SO₂ in 200 litre drums and also 60° Brix frozen orange concentrate with no preservative in 50 litre drums at quoted prices; and that the terms of payment were 30 days from date of statement. In pursuance of this Citrus from time to time placed five separate orders for various quantities of 60° Brix frozen orange concentrate. These orders were given verbally, though one of

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them was later confirmed by letter. It was stated in evidence by Ehlers that during the course of negotiations he made it clear to the representatives of Dickon Hall that he required the concentrate for hot canning in metal containers. There was no evidence from Dickon Hall's side to gainsay this and it was accepted by the Court a quo (rightly in my view) that Ehlers did in this way communicate to Dickon Hall the purpose for which the concentrate was required. Ehlers also averred that he instructed Dickon Hall not to deliver more than forty 50 litre drums of concentrate at a time as Citrus did not have the capacity to handle greater quantities than this. This too was not contradicted by Dickon Hall.

In implementation of orders placed, deliveries were made to Citrus on or about the following dates in 1974:

2 January, 10 January, 28 February, 8 March and 12 March.

The concentrate was delivered in a special refrigerated truck called a "scania", which travelled, usually overnight, from Dickon Hall's factory near Nelspruit to the premises of Citrus in Brits, a journey taking about 8 or 9 hours.

The dates given appear to relate to the date when the scania left Dickon Hall's factory and consequently the date of receipt would usually be the following day. On one occasion (the delivery of 12 March) the quantity delivered (143 drums) was in excess of what Citrus could handle and it was stored with Sims Cold Storage ("Sims") in Pretoria until Citrus was ready to take it. During this period from January to March 1974 Citrus did not obtain orange concentrate from any supplier other than Dickon Hall.

The concentrate received from Dickon Hall was processed by Citrus in accordance with the hot canning method described above and marketed to the retail trade. Part payments of the purchase price were made on 8 April and 23 August 1974. Sometime during the period March - April 1974 Citrus started receiving complaints from its customers, who were mainly large chain-store groups, about the quality of its product. Ehlers investigated the position and did certain sample tests. He found that the concentrate

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about which there were complaints had a bitter, unpleasant taste and that on the inside the cans showed dark, almost black, patches. It was clearly unfit for human consumption. As a result of these complaints Citrus was ultimately forced to pass large credits to many of its customers. Unsold or undelivered stocks went to waste and its reputation suffered to such an extent that it was forced to alter its label.

In the meanwhile Ehlers realised that he had a major problem on his hands. He got into touch with the Metal Box Company, the manufacturer of the cans, and asked them to do tests to ascertain the cause of the trouble. Some two months later Metal Box informed Citrus that it was not prepared to undertake the testing. Ehlers also approached Dickon Hall and one Demetriou collected a sample for testing. Ehlers did not hear from Dickon Hall what the result of the test was. Eventually in about October 1976 Citrus engaged the services of a consulting and analytical chemist, Mr R.O. Lazar. Three cans were submitted

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to him for investigation and analysis. By this stage Ehlers had noticed something on two of the delivery notes which accompanied the deliveries from Dicken Hall. In the note relating to the delivery of 10 January the goods were described as "60° Brix frozen Orange Concentrate, Preserved"; and in the note relating to the delivery of 12 March the description was "60° Brix Sweetened Orange Concentrate, Preserved". This led Ehlers to suspect that the concentrate supplied by Dicken Hall, or some of it, had contained SO_2 and that this was the cause of the problem. Lazar's analysis confirmed this suspicion. He found that each of the cans submitted to him for analysis contained SO_2 . It is this finding which forms the main basis of Citrus's defence to the action, although for reasons which remain obscure it was only when Citrus was asked for further particulars for purposes of trial that mention was made, for the first time, of the alleged presence of SO_2 in the concentrate. Prior to this Citrus had simply pleaded that the concentrate was not fit for the purpose for

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which it had been sold, namely, to be canned and distributed in the retail trade, and had added, by way of further particulars to its plea, that it became bad and bitter ("sleg en bitter") so that it was not fit for human consumption.

To sum up thus far, it is common cause that there was a contract for the supply of 60°Brix orange frozen concentrate in the quantities alleged by Dickon Hall; that Dickon Hall did deliver concentrate in these quantities; and that if the concentrate delivered complied with the contract requirements, Dickon Hall was entitled ^{the} to/judgment granted in the Court a quo, as modified by Dickon Hall's abandonment in relation to the question of interest. The essential issue is whether the concentrate measured up to the contract requirements.

In this connection it was not disputed, at the appeal stage at any rate, that:

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- (1) The contract was in fact subject to a tacit term to the effect that the concentrate should be fit for the purpose for which it was required, viz. for canning in metal containers by the hot canning process and subsequent sale and distribution to the retail trade. The only circumstance relied upon to establish this tacit term was the communication of this purpose by Ehlers to Dickon Hall's representatives at the time when the transaction was negotiated. It might perhaps have been argued with some cogency that this communication did no more than define the purpose for which the goods were sold so as to constitute any abnormal attribute or quality which rendered the goods unfit or ineffective for this purpose a latent defect (cf. Holmdene Brickworks (Pty.) Ltd. v Roberts Construction Co. Ltd., 1977 (3) SA 670 (AD), at p 683 in fine);

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but it was not. And prima facie some support for the importation of such a tacit term would seem to be provided by the decision in Krooner v Hess & Co. 1919 AD 204. Be that as it may, this aspect of the matter was not in issue before this Court and I shall accordingly proceed on the premise that, as held by the Court a quo, the contract between the parties was subject to such a tacit term.

- (2) The onus was on Dickon Hall to establish that the concentrate delivered by it satisfied this tacit term. This would seem to follow from the fact that the tacit term forms part of the contract (Minister van Landbou-Tegniese Dienste v Scholtz, 1971 (3) SA 188 (AD), at pp 196-8; A. McAlpine & Son (Pty.) Ltd. v Transvaal Provincial Administration, 1974 (3) SA 506 (AD), at pp 531-3) and serves to some extent to define the contract goods. At any rate, seeing that the parties were agreed upon the

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question of onus it is not necessary to express a positive view thereon.

- (3) Concentrate which contained or was contaminated with SO_2 would not comply with this tacit term.
- The reason for this appears clearly from the foregoing recital of the facts and more particularly from the facts relating to the chemical reactions which are likely to take place when concentrate containing SO_2 is placed in a metal container.
- (4) The first two deliveries of concentrate were in order. This was conceded by Ehlers in evidence.
- The concession is supported by the evidence. Each can produced by Citrus carries on it a code number which indicates the date of canning. Since it was the practice of Citrus to can deliveries of concentrate as soon as possible after their arrival at its factory, there is a correlation between the code

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number on a can and a particular delivery (or group of deliveries) to Citrus. Defective cans which were tested by Lazar and by Dickon Hall and its expert bore a code number indicating 12 March or 14 March as the date of canning. Ehlers cannot recall coming across defective cans bearing a date (in code) earlier than March. In addition the complaints of customers started coming in only in the period March/April. Had the January deliveries been defective in any way, then it is likely that complaints would have reached Citrus before March. Ehlers stated that it was because there appeared to be no complaint about the January deliveries that part payment of the purchase price was made. In fact the payments made cover the price of the two January consignments and portion of the price of the consignment of 28 February. The position in regard to this latter consignment is unclear.

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In point of time it is closely associated with the March deliveries; on the other hand, Ehlers did at one stage in his evidence exclude it from the deliveries alleged to be defective. No point was made of this on appeal, however, and I shall proceed on the basis that Citrus paid in full for deliveries not alleged to be defective.

- (5) Concentrate canned and distributed by Citrus in about March 1974 was found to be defective and unfit for human consumption on an extensive scale. This concentrate had all originally been supplied by Dickon Hall - for Citrus had no other supplier of orange concentrate over this period - and must be attributed to the two March deliveries and, possibly, that of 28 February.

One arrives, therefore, at the position that concentrate supplied to Citrus by Dickon Hall was found, after having been processed and canned by Citrus,

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to be defective and unfit for human consumption. As to the cause of such defectiveness there are thus only two possibilities: (i) that at the time of delivery to Citrus the concentrate was defective or contained some ingredient, such as SO_2 , which would result in its becoming defective after having been processed and canned; or (ii) that the concentrate delivered was up to standard and in accordance with the contract, but that faulty procedures in the canning process rendered the product defective. It was to this basic issue that much of the evidence in the Court below was directed. I now proceed to consider this evidence, bearing in mind at all times that the onus was on Dickon Hall to show that it had satisfied the tacit term which required it to deliver concentrate which was fit for canning in metal containers by the hot canning process.

Although counsel for Citrus maintained that his client's case did not rest solely upon an alleged presence of SO_2 in the concentrate claimed by Citrus to

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have been unfit or defective, but upon a general averment of unfitness, the only defect seriously suggested by Citrus was the presence of SO_2 . I am consequently of the view, as was the Court a quo, that this is the only possible defect that need be considered. And, in any event, it seems to me that the evidence led by Dickon Hall satisfactorily rules out other possible defects, such as poor quality fruit or failure properly to clean and maintain its plant. I have referred to the quality tests applied to the fruit processed by Dickon Hall. Mr J.M. Crewes, the chief chemist at Dickon Hall, who gave evidence on its behalf, described the precautions taken to ensure that the plant is kept clean and free of micro-organisms. This evidence was not contested.

On appeal counsel for Citrus referred to the consignment of concentrate which went to Sims and contended that this might have been the cause of the defective state

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of the concentrate. The suggestion was that this consignment might not have been kept properly frozen by Sims (Dickon Hall had at any rate not shown that it had been kept properly frozen) and since it was Dickon Hall's responsibility while stored at Sims, resultant defects such as fermentation or other activity by micro-organisms had to be laid at the door of Dickon Hall. There is no substance in this submission. One of the matters agreed to at the afore-mentioned pre-trial conference was that the citrus concentrate forming the subject-matter of the action was received by Citrus at a sufficiently low temperature and that such concentrate had at all times prior to such receipt been kept at such temperature. Consequently, even if Sims did hold the concentrate on behalf of Dickon Hall and delivery to Citrus took place when it received the concentrate from Sims, the pre-trial agreement precludes Citrus from suggesting a deleterious thawing of the concentrate while in storage.

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Was the cause of the trouble then the presence of SO₂ or faulty procedures on the part of Citrus? In order to establish the presence of SO₂ Citrus led the evidence of Lazar as to the sample tests performed by him; to negative it Dickon Hall led the evidence of Crewes, who had done similar analyses on sample cans. Two other experts were called, Mr M. Milner, a chemical and analytical consultant, who gave evidence on behalf of Dickon Hall, and Mr A.J. Venter, an expert in the field of food science and the manufacture and packaging of citrus concentrates, who testified on behalf of Citrus. Milner had also done an analysis on a sample can. Venter did no analysis but gave expert evidence of a general nature. The trial Judge carefully considered all this evidence and came to the following conclusion:

"Taking these chemical analyses as a whole, it has not in my view, been established that the cans tested which were samples of the defendant's product which had deteriorated, had contained sulphur dioxide".

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I do not think that this finding can be faulted, but I would add that, in my view, the expert evidence was wholly inconclusive in this regard: it neither proved nor disproved the presence of SO_2 at the time when the concentrate was delivered to Citrus. I say this for the following reasons.

To determine the absence or presence of SO_2 in the samples tested two different procedures were available: the iodine titration method and the Monier-Williams distillation method. The iodine titration method is merely a quantitative test. It relies on the fact that SO_2 is what chemists term a reducing agent, i.e., it readily combines with oxygen if this is present in an available form, and this procedure determines the amount of SO_2 present in a substance by measuring the quantity of oxygen which it will absorb. Of course, if other reducing agents are present in the substance to be tested, then this method may be

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inconclusive because it does not distinguish between SO_2 and other reducing agents. If, however, the total quantum of all other reducing agents likely to be encountered in the substance is known with a reasonable degree of accuracy, then a reading substantially in excess of this quantum could justify an inference that SO_2 was present in the substance. The Monier-Williams method, on the other hand, is both a quantitative and a qualitative test. It is, however, a time-consuming and fairly intricate procedure.

On 15 October 1976 Lazar examined three sealed cans of Vita-C-Sap, one of which bore the production date 12 March and the other two 14 March. All the cans were "somewhat blown" and when opened released appreciable pressure. In each case the contents consisted of a brownish viscous concentrated citrus product. It had a bad smell. He subjected the contents of each tin to the iodine titration test and found the following quantities of what he took to

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be SO_2 : 275 parts per million ("p.p.m."), 198 p.p.m. and 134 p.p.m. Under cross-examination he conceded that he thought of applying one of the distillation procedures but did not do so because he was pressed for time. For the reasons already explained Lazar's results, based as they are solely on the iodine titration test, are inconclusive unless it is shown that the quantities of reducing agent found sufficiently exceed the quantities of reducing agents naturally present in citrus concentrate to lead to the inference that portion of the amount of reducing agent found must be SO_2 . Lazar himself gave no evidence on this point. In the course of his expert testimony Venter, who impressed the trial Judge with his "skill, knowledge and experience" in the field of fruit juice chemistry and technology, stated that in order to determine with any degree of accuracy the quantum of the reducing agents naturally present in orange concentrate (mainly sugars and vitamin C) experiments should be done with samples of fresh concentrate and tinned concentrate five or six

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months old and comparisons made. This he had not done. He did essay a tentative opinion as to the quantity of reducing agent in citrus concentrate which would be attributable to sugars, etc. At one point in his evidence he appeared to put this at about 300 p.p.m. and at another at 150 p.p.m. He conceded, in any event, that the amount could vary from season to season and from region to region. Asked about a reading of 275 p.p.m. obtained by the iodine titration method, he said that in such a case he would do further tests. Neither Crewes nor Milner gave any estimate of what the quantum of naturally occurring reducing agents orange concentrate was likely to contain, but it is of some significance that a sample tested by Milner and found to contain 157 p.p.m. of reducing agent by the iodine titration method, was found by the Monier-Williams test to contain no SO_2 , and that, similarly, tests performed on two cans analysed by Crewes showed reducing agent levels of 134 p.p.m. and 166 p.p.m. (this

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latter can being a grapefruit concentrate and therefore not derived from Dickon Hall) by the iodine titration method and negative results for SO_2 by the Monier-Williams test. In my view the conclusion to be drawn from this evidence is that it cannot be said that the amounts of reducing agent found by Lazar in the cans tested by him, viz. 275 p.p.m., 198 p.p.m. and 134 p.p.m., are such as to justify an inference that any one of the cans contained SO_2 . In the case of the can found to contain 275 p.p.m., the level was sufficiently high to warrant further investigation by the Monier-Williams test, but this was not done. As proof that the sample tins examined by him contained SO_2 Lazar's evidence was accordingly inconclusive.

The tests performed by Crewes and Milner, referred to above, did establish by the Monier-Williams method that the cans examined by them were free of SO_2 . One of the cans tested by Crewes contained orange concentrate which had been canned on 14 March 1974. The can

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of orange concentrate tested by Milner bore the same date code. Prima facie this evidence would seem to refute Citrus's case, but unfortunately for Dickon Hall it also cannot be regarded as conclusive. These tests were performed several years after the concentrate in question had been canned: those by Crewes on 6 April 1977 (± 3 years) and those by Milner on 19 October 1976 ($\pm 2\frac{1}{2}$ years).

(I might add that the sample collected by Demetriou and examined by Crewes, apparently towards the end of 1974, was not submitted to any tests for SO_2 contamination.)

Venter stated in evidence that it was to be expected that after this lapse of time any SO_2 which might have been present in the concentrate at the time of canning would have disappeared as a result of the chemical reactions which had taken place in the can. These reactions have already been described. Crewes appeared to dispute this, saying that at a certain point he would expect an equilibrium to be reached. The Court a quo did not resolve this dispute

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and on the recorded evidence, which is far from clear,
I am unable to do so. It follows that the Crewes and
Milner tests cannot be taken to establish affirmatively
that the cans examined by them at no stage contained SO_2 .
Generally, therefore, the evidence of chemical analyses must
be regarded as having been inconclusive, one way or the
other.

The suggestion that certain of the concentrate
delivered by Dicken Hall to Citrus contained SO_2 derives,
of course, from the fact that Dicken Hall does use SO_2
in the production of preserved concentrate. The possibi-
lities which flow from this are: (i) that as a result of
confusion in the production process one or more drums of
preserved concentrate (containing SO_2) found their way into
the refrigerated store housing the frozen concentrate and
were delivered to Citrus; (ii) that owing to an error
in the despatching process (which necessarily included

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transferring concentrate from 200 litre to 50 litre drums) one or more drums of preserved concentrate were included in the deliveries to Citrus; or (iii) that the plant producing frozen concentrate was in some way contaminated with SO_2 , e.g. by SO_2 being put into the wrong tank. And in this connection it may be pointed out that, according to the evidence, a drum of preserved concentrate could have become frozen in the scania during the course of the journey from Mataffin to Brits, which took 8 or 9 hours.

In the Court below there was some dispute as to whether it was open to Citrus on the pleadings to advance a case based upon possibility (ii) above. Counsel for Dickon Hall objected to Citrus doing so on the ground that it was admitted in the plea that the goods (i.e., the concentrate) as set forth in the relevant invoices had been delivered to Citrus. The invoices stated the quantities of concentrate delivered and also described it

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in each case as 60° Brix frozen orange (or orange concentrate).

The trial Judge overruled the objection and permitted Citrus to advance possibility (ii) above. Dickon Hall did not seek (as its counsel at one stage suggested it might) a postponement of the trial in order to obtain additional evidence; nor did its counsel contend on appeal that the trial Court's ruling was wrong. I shall, therefore, proceed to consider all three possibilities.

It was contended on appeal by Citrus's counsel that the only person who gave any evidence in regard to Dickon Hall's production procedures was Crewes; that Crewes's particular responsibility was quality control; that he had no real knowledge of how the concentrate was stored or despatched to customers and that there were also gaps in his knowledge of, and control over, the actual production process; that the onus on Dickon Hall to establish that the concentrate delivered to Citrus did not contain SO₂ involved ruling out, upon a preponderance of probability, the possible sources of error listed (i),

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(ii) and (iii) above; and that, because of its gaps and deficiencies, the evidence of Crewes failed to discharge this onus.

There is undoubtedly some substance in this argument. The evidence of Crewes was punctuated by disavowals of knowledge of certain aspects of Dickon Hall's operation. For instance, he emphasized on no less than eight occasions that he had no knowledge of what happened to the concentrate after it had gone into the refrigerated store or how it was despatched to purchasers; that he had no responsibility for storage or delivery. When cross-examined as to the use of the tanks in the factory and as to whether two specific tanks only were utilised for the production of preserved concentrate, Crewes pointed out twice that he was not the factory manager and that he did not know everything that the factory manager did. Despite these gaps in Crewes's knowledge and responsibility, I am of the view that his evidence rules out, as a matter

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of probability, the likelihood of frozen concentrate becoming contaminated with SO_2 , i.e., possibility (iii) above. Crewes stated that the pouring of preservative into the wrong tank, though possible, was "wildly improbable" and that the quality tests, particularly in regard to smell and flavour would probably reveal the presence of SO_2 in frozen concentrate, unless the quantum was "at an extremely low level". This evidence, together with the evidence as to the care taken, particularly by the laboratory staff, in handling and adding preservatives, convinces me that here the probabilities favour Dicken Hall.

When one comes to possibilities (i) and (ii) however, the position is somewhat different. When asked whether it was possible for preserved concentrate to find its way into the refrigerated storeroom, Crewes replied in the negative and said that there were two distinct, well-defined routes, one for the frozen concentrate and the other for the preserved concentrate. He also pointed out that the factory was on a split level, comprising a top

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floor, housing the evaporators, dosing tanks and blending tanks, and a lower floor where the frozen concentrates were stored and handled. At some stage, too, the drums of concentrate were marked with different coloured strips of plastic tape to distinguish preserved from frozen concentrate. But it is not clear from his evidence where the preserved concentrate was stored and whether the procedures adopted were calculated to prevent drums of preserved concentrate from being put, at any stage, into the refrigerated store or from being incorrectly marked.

The impression I gain is that this was really beyond his ken. More importantly, and here Crewes confessed to almost complete ignorance, there is no evidence as to how orders are made up, despatched and delivered.

There is thus no information upon which the trial Court could, or this Court can, assess the probabilities or improbabilities of confusion and error occurring at some stage in the process of executing an order placed by a

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customer. Counsel for Citrus suggested various ways in which an error could occur, e.g. the wrong concentrate being used to decant from the 200 litre drums into the 50 litre drums used for delivery, preserved concentrate being put into the scania in place of frozen, the wrong concentrate being delivered to Citrus where more than one consignment was being conveyed in the scania and so on. He argued that in order to rebut these possibilities Dickon Hall should have called evidence from persons such as the storeman and the truck-driver(s) responsible. He contended too that Dickon Hall should have produced its records to show in fact which drums of concentrate were delivered to Citrus and what they are recorded as having contained. There is force in all these arguments, though to my mind they are not decisive. What it really all means is that there are certain areas, highly relevant, which are not covered by Dickon Hall's evidence. Whether this is fatal to Dickon Hall's case must depend upon a

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weighing of all the evidence and the probabilities and in this regard one of the factors to be considered is the fact that there are gaps in the evidence led by Dickon Hall, upon whom the onus lies.

I come now to the reverse side of the coin, i.e. the possibility that Citrus's procedures may have been at fault. This case is unusual in that the defect in the goods was not discovered until after the goods had been processed by the purchaser. The likelihood of the defect having been caused by errors in that process must, therefore, be considered and put into the balance.

To begin with, it is clear that no SO₂ contamination could have occurred at the Citrus factory. Citrus did not produce preserved concentrate and no preservatives were purchased or kept on the premises. The hot canning process can, however, produce unsatisfactory products if incorrectly practised. Two important sources of trouble are overheating at the pasteurization stage

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and a failure to cool the canned product sufficiently swiftly. De-aeration was another topic canvassed in evidence but the experts were not in agreement about this. Ehlers stated that in the pasteurization stage the concentrate was heated to between 83 and 87°C. Venter confirmed that this was a correct practice, adding that he would regard a temperature of above 95°C as overheating. Whether the workmen at the factory always adhered to this practice is another matter. Ehlers averred that he personally supervised every canning operation but it is not clear whether he constantly checked the pasteurization temperature. The cooling procedure at the Citrus factory took about three-quarters of an hour. Venter expressed the view that three-quarters of an hour to an hour and a half was too long a cooling-off period but qualified this by saying that three-quarters of an hour for a large can was not unreasonable. For the small can the

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period ought to be 30 to 35 minutes. The procedures followed by Citrus, as far as cooling was concerned, appear thus to have been on the borderline between what was acceptable and what not. According to Venter overheating and delayed cooling tend to have similar effects on the concentrate. He would expect signs of browning or caramelization and the taste of the concentrate to be unpleasant, possibly bitter. The evidence would thus seem to indicate the possibility of overheating or delayed cooling as a cause of the defective condition of the concentrate in issue but the question is where do the probabilities lie?

In regard to the general probabilities of the case the following points appear to be relevant and of some importance:

- (a) The symptoms, i.e. the appearance and taste of the defective concentrate, appear to be broadly consistent with either SO₂ contamination or with faulty canning procedures, such as overheating

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or delayed cooling. In fact Crewes's diagnosis of the contents of the can fetched by Demetriou, which showed signs of browning and degeneration of appearance and taste, was that it had been overheated and/or improperly cooled. Faulty canning procedures would not, it seems, account for the black marks which Ehlers claims to have found on the inside of cans found to be defective but it would be unsafe, in my view, to place too much reliance solely upon this. The symptoms are, therefore, inconclusive.

- (b) Ehlers and the other members of Citrus's factory staff did not notice anything untoward when the concentrate alleged to be defective was being processed. This is significant because, according to the expert evidence concentrate containing SO_2 would then have given off a characteristic pungent smell, especially when being heated, and this would have been apparent to a knowledgeable.....

able person ("kenner"). This is a pointer to there having been no SO_2 in the concentrate delivered by Dickon Hall, but the strength of the inference which can be drawn from these facts is weakened to some extent by Ehlers's evidence that he had limited experience of hot canning (at that stage he had been carrying out this process for only nine months) and that he had no knowledge of SO_2 or its effect upon a citrus concentrate.

- (c) Apart from minor complaints about cans which had become damaged, with resultant deterioration of the contents, Citrus had not previously had any problems with its product. It used a standard process and a standard type of plant. According to Ehlers, Citrus had built up a good reputation for its product, which was widely marketed. The fact that the problems giving rise to the dispute

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between the parties arose shortly after Dickon Hall had started supplying Citrus for the first time is consequently a factor of some significance.

- (d) Another factor favouring Citrus is the fact that in the two delivery notes, to which reference has already been made, the concentrate description contained the word "preserved". Counsel for Citrus laid considerable emphasis upon this factor but to my mind it is of limited cogency. In the first place, one of the delivery notes related to a January delivery, which it is common cause was not defective. And in the second place it seems hardly likely that an entire consignment of preserved concentrate would have passed unnoticed. On the other hand, no proper explanation of these notes was given by Dickon Hall. Crewes merely passed them off as "clerical mistakes" and added - "... we have our difficulties with staff unless one helps them they make a lot of mistakes, that's all".

Of course, if staff do make mistakes these may not necessarily be confined to clerical errors.

- (e) In February 1974 Citrus sent a consignment of canned orange concentrate by ship to Japan.

The code numbers on the tins indicated that the consignment was canned on 4 January 1974. According to Ehlers the concentrate used was obtained from Dickon Hall. Upon its arrival in Japan at the end of March the concentrate was found to be defective and unfit for human consumption. According to a survey report dated 20 November 1974, relating to a survey made on 5 November 1974, the cans were found to be bulged or swollen and the contents a thick muddy liquid, dark brownish in colour and without the characteristic odour of citrus fruits. The conclusion of the surveyors was that the swelling of the tins was presumed to have resulted from "warm climatic condition during storage / stowage at unknown stages of transit prior to /-discharge....

discharge from the carrying vessel at Yokohama". The Court a quo pointed out that the description of the cans and their contents given in the survey report was very similar to that given of defective cans in South Africa and, as I shall show, used this incident as a factor in Dicken Hall's favour. To my mind, the incident is a wholly neutral factor. It is true that the consignment sent to Japan consisted of concentrate derived from a January delivery from Dicken Hall, concerning which there is no complaint, but, in so far as one can have regard to the survey report as being admissible evidence, it is reasonably clear that the conditions under which the consignment was carried by ship to Yokohama were a more likely cause of the deterioration of the goods than defective canning by Citrus.

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Weighing all the evidence and the aforementioned factors relevant to the probabilities, I can discern no preponderant tilt in favour of either party. It seems to me that the issue is evenly balanced. None of the factors considered is decisive and there are pointers or probabilities both ways. The defective condition of the Vita-C-Sap complained of could have been due to the presence of SO_2 in some of the concentrate supplied by Dickon Hall, but it could equally have been due to faulty canning procedures on the part of Citrus. I am, therefore, of the view that Dickon Hall failed to discharge the onus of satisfying the Court that all the concentrate supplied by it to Citrus complied with the tacit term of the contract.

In coming to the conclusion that Dickon Hall had discharged the onus, the trial Judge appears to have placed considerable reliance upon (i) a finding (quoted above) that the chemical analyses failed to establish the presence of SO_2 in the samples of Vita-C-Sap

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which were tested; (ii) the Japanese consignment; (iii) the failure by Ehlers to notice anything unusual while the canning was in process; and (iv) the fact that overheating or delayed cooling could have caused the deterioration complained of. As to (i), it should be emphasized that the analyses also did not establish affirmatively the absence of SO_2 and are thus a neutral factor. For the reasons already given, I do not think that the Japanese consignment really assists Dickon Hall's case; and I am of the view that only limited weight should be given to (iii) above. Point (iv) is indisputable, but the question is whether the evidence and the probabilities point sufficiently strongly to this as being the cause of Citrus's troubles for one to say that Dickon Hall discharged the onus resting upon it. Furthermore, the Court a quo does not appear to have given much weight to the gaps in the evidence led by Dickon Hall, or to the factor which I have tested under (c) above.

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For these reasons I am of the opinion that, instead of giving judgment for Dicken Hall, the Court a quo should have decreed absolution from the instance.

Although this matter does not arise for decision, the finding of this Court would also seem to dispose of the counterclaim. It follows that the application for condonation held out a reasonable prospect of success on the merits and should be granted, but that Citrus should pay the costs thereof; and that the appeal itself must succeed.

It is accordingly ordered:-

- (1) That the application for condonation of Citrus's failure to file the notice of appeal within the time limits laid down by Rule 5(1) of the Rules of this Court be granted.
- (2) That Citrus is to pay any costs incurred by Dicken Hall in regard to this application, as distinct from the costs of appeal.
- (3) That the appeal be allowed with costs and the order of the Court a quo be altered to read:

"Absolution from the instance with costs".

WESSELS, JA)
HOFMEYR, JA)
KOTZE, JA)
TRENGOVE, AJA)

CONCUR.

M.M. Corbett
M.M. CORBETT