\ihg CASE NO 206/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

METALMIL (PTY) LIMITED

Appellant

and

AECI EXPLOSIVES AND CHEMICALS LIMITED Respondent

CORAM: SMALBERGER, HOWIE JJA et MAHOMED AJA

DATE OF HEARING: 16 MAY 1994

DATE OF JUDGMENT: 1 JUNE 1994

J U D G M E N T

HOWIE JA et, MAHOMED AJA:

Appellant unsuccessfully sued respondent in the Witwatersrand Local Division for damages for breach of contract and now appeals with the leave of the trial Court.

On 23 April 1986, appellant, a dealer in scrap metal, entered into a written agreement for the supply, over three years, of scrap cable to respondent for use in its business as a manufacturer of chemicals and explosives.

Appellant's case was that the relevant agreement was repudiated; that it accepted the repudiation and cancelled; and that it had consequently suffered damages in the sum of Rl 047 340,18.

The trial Judge (Streicher J) held that although respondent had breached the agreement in a certain respect the evidence failed to show that such breach evinced the intention no longer to be bound. Appellant had accordingly failed to prove the alleged

repudiation. The learned Judge held, further, that appellant had in any event failed to prove its damages.

The relevant provisions of the agreement are these -

> "PREAMBLE
>
> The scope of this agreement provides for the supply by Metalmil of scrap cable to AECI (essentially for the winning of copper and lead which will be used as raw materials in AECI's business) - as per written instructions issued from time to time by AECI.

(1) Metalmil will procure scrap cable (containing copper and lead) and guarantees to be able to supply to AECI sufficient scrap cable to produce a maximum of 80 mt of copper per month. Actual quantities required by AECI will be specified by AECI monthly in advance and such quantities are expected to range between 40 and 80 mt of copper per month.

(2) In the event that Metalmil is unable to supply AECI's requirements of scrap cable, then AECI reserves the right to purchase the shortfall of scrap cable or copper elsewhere and charge to Metalmil any excess in price over the price ruling as per the price formulae agreed. In addition AECI reserves the right to procure scrap copper in other forms if it

desires at any time up to maximum of 10 mt per month of copper.

(3) PRICING

The scrap cable will be sold by Metalmil to AECI on the following price formulae. Price/t Delivered AECI's Modderfontein Factory = R0,8 (0,4 x Republic Copper Price + 0,2 Tsumeb Lead Price) - R110. This price is based on an average copper content of 40% and average lead content of 20% (in the scrap cable procured). The actual averages will be accurately measured and the formulae adjusted every quarter to take into account any variations. The methods of adjustment and measurement are detailed in Clause 6. Any action taken by Government such as the re-imposition of export restrictions or the imposition of an export tax which results in copper scrap prices being depressed will be compensated for in the formulae.

(4) Any by-product from the stripping operation becomes the property of AECI and will be marketed as follows:

6.1 Plastics will be marketed by AECI

6.2 Metalmil will have the first option to sell any metallic products not required by AECI. The price which Metalmil pays will be negotiated at the time of sale.

(5) Metalmil have an option to buy from AECI any excess arisings of recovered copper

scrap after AECI's requirements have been met. AECI will pay for scrap cable according to the formulae in Clause 3. Metalmil will pay to AECI 0,85 x Republic Copper Price for the copper which they buy back from AECI.

(6) The copper and lead contents in the cable will be measured in the following manner:

6.1 Incoming cable will be passed over AECI's Modderfontein Factory's weigh-bridge. This mass will be used to determine the price to be paid to Metalmil.

6.2 Incoming cable will as far as possible be kept in separate lots and will be used on a first in first out basis.

6.3 The mass of copper and lead will be determined on transfer to AECI's copper sulphate and lead nitrate plants by passing over AECI Modderfontein Factory's weigh-bridge

6.4 Metalmil have the right to be present at any mass determinations and audit any mass determination records.

6.5 The average copper and lead contents as determined above for a three month period will be used to adjust the formulae in Clause 3 to reflect the actual averages. This formulae will then be applied to the following quarter.

6.6 A retrospective adjustment will be passed each quarter.This amount will be determined by the difference

between the predicted average copper and lead contents and the actual average content determined by the mass balance.

(12) BREACH AND TERMINATION

In the event of either Party breaching a material term of this Agreement and failing to remedy such breach within 30 (thirty) days of being called upon in writing by the other Party to do so, such other Party shall be entitled, by notice in writing to the Party in breach, forthwith to cancel this Agreement without prejudice to any claim for damages or other relief to which it may be entitled."

In the particulars of claim, after summarising the salient terms of the agreement, appellant made the following allegations:

"5. At the time of entering into the agreement the parties contemplated:

5.1 that the defendant would monthly require a quantity of scrap cable necessary to produce between 40 and 80 tons of copper per month;

5.2 that the plaintiff would make a profit on the supply of cable and would suffer a loss if the

defendant should order no scrap cable at all; and the agreement was entered into on that basis.

6. The plaintiff was at all relevant times able to supply all scrap cable that the defendant required.

7. In breach of its obligations in terms of annexure "A", the defendant

7.1 at all relevant times since the conclusion of the agreement in annexure "A" purchased copper, alternatively scrap copper in excess of 10 metric tons per month from a third party; 7,2 after the 23rd January 1987 failed to specify any requirements for scrap cable at all; and 7.3 in a letter dated 21st July 1987 in writing stated:

7.3.1 Expressly, that the limitation of defendant's right to purchase elsewhere contained in Annexure "A" related only to the purchase of "scrap copper";

7.3.2 by implication, that it was entitled to purchase elsewhere copper, regardless of the volume and plaintiff's ability to supply defendant's requirements;

and thereby repudiated the agreement.

8. The plaintiff accepted, alternatively hereby accepts, defendant's repudiation

and cancelled alternatively hereby cancels the agreement.

9. As a result of defendant's breach, the plaintiff has suffered and will in future suffer, damages in the amount of Rl 047 340,18 which amount is calculated as set out in the schedule attached hereto as Annexure "B".

Respondent's answer to these averments was formulated as follows in its plea:

"4. AD PARAGRAPH 5.1

The defendant denies these allegations and pleads that it "expected" to require scrap cable sufficient to enable it to recover "between 40 and 80 mt of copper per month".

5. AD PARAGRAPH 5.2

The defendant admits these allegations. The defendant pleads however that it was not obliged in any given month to order any scrap cable whatsoever from the plaintiff.

6. AD PARAGRAPH 6

The defendant admits that the plaintiff from time to time supplied certain quantities of scrap cable. The defendant states however, that the plaintiff was not able, in breach of the agreement, to supply sufficient suitable scrap cable for

processing by the machines procured by the defendant.

7 AD PARAGRAPH 7

(a) The defendant admits that it has from time to time purchased copper granules in excess of 10 metric tons per month from a third party.
The defendant states that it was not precluded in terms of the agreement from purchasing such copper granules.

(b) The defendant denies the allegations contained in paragraph 7.2 and pleads further

i) That is was not obliged to purchase any scrap cable during the course of any given month.

ii) That on several occasions and in particular in telexes dated 24 July 1987 and 26 August 1987, it offered to purchase 100 tons of scrap cable for delivery by the 28th August 1987 and during the month of September respectively.

iii) That on 10 June 1987, 8 July 1987 and 10 November 1987 it offered to continue with the contract which offer was wrongfully refused by the plaintiff.

(c) The defendant admits the writing of the letter dated 21 July 1987, the terms of which appear from the letter itself, but denies that what is stated therein constitutes a breach by the defendant of its obligations

or a repudiation of the agreement.

(c) bis. In fundamental breach of its obligations, the plaintiff has alleged that the defendant has repudiated the agreement and has purported to ' cancel the agreement and has stated unequivocally that it is not bound thereby.

(c) ter. In the circumstances the defendant, as it was lawfully entitled to do, by letter dated 19 November 1987 from defendant's attorneys to plaintiff's attorneys, cancelled the agreement, alternatively, hereby cancels the agreement.

(d) Save as aforesaid and save for stating that until the agreement was lawfully cancelled by defendant on 19 November 1987, defendant was at all material times willing and able to perform its obligations under the agreement, the defendant denies these allegations.

8. AD PARAGRAPH 8

The defendant admits that the plaintiff has purported to cancel the agreement but denies that it was entitled to do so and:

a) repeats its denial that it repudiated the agreement as alleged or at all;

b) denies that the plaintiff's purported cancellation of the agreement is effective, more particularly in that the plaintiff failed whether properly or at all to place the defendant in mora in terms of clause 12 of the agreement.

9. AD PARAGRAPH 9

The defendant denies these allegations.

10. Alternatively to paragraphs 7, 8, 9, 10, 11 and 12 above, and in the event of it being found that the defendant was in breach of its obligations in terms of the

> agreement and that the plaintiff has lawfully cancelled the agreement and has suffered damages as alleged or at all, then the defendant pleads that plaintiff could have mitigated its damages and suffered no damages whatsoever more particularly in that subsequent to the purported cancellation of the agreement by the plaintiff, the defendant has, unconditionally, offered to purchase from the plaintiff such quantities of scrap cable as it would have been obliged to purchase in terms of the agreement".

In addition to its plea, respondent filed a claim in reconvention. It contained three Separate counterclaims. Two were abandoned. The remaining counterclaim was for an order confirming that the respondent had validly cancelled the agreement. That prayer was granted by the trial Court.

On appeal argument was addressed by Counsel on four issues:

a) Whether appellant was correct in its contention that respondent had repudiated the agreement between the parties.

b) If so, whether the appellant had properly cancelled the agreement.

c) whether appellant had proved its claim for damages against respondent.

d) Whether appellant could and should have mitigated the damages alleged to have been suffered by it.

THE PROPER INTERPRETATION OF THE AGREEMENT.

In its plea and during the proceedings in the court a quo respondent contended that it was an implied term of the agreement that the cable to be supplied by appellant would be suitable for processing by machinery which was to be procured by respondent. Alternatively it was contended that the agreement should be rectified by inserting after the words "scrap cable" in paragraph 1, words to the effect that the cable to be so supplied would be suitable "for processing by machinery to be procured by the defendant, which machinery would be

capable of processing scrap cable which, or the individual strands of which, had a minimum diameter of 3/8". These contentions were correctly rejected by Streicher J and not persisted in on appeal by counsel for respondent. The rights and the duties of the parties in terms of the agreement must therefore be determined without reference to these contentions.

The attitude adopted by respondent in paragraphs 5 and 7 of the plea and in certain correspondence which preceded the action was that "it was not obliged in any given month to order any scrap cable whatsoever from the plaintiff" and that it was entitled to purchase copper granules in excess of 10 metric tons a month from a third party during the currency of its agreement even if appellant was, at the relevant time, willing and able to procure for respondent sufficient copper in the form of scrap cable to satisfy its objective requirements. This attitude was, in our view,

clearly untenable and based on a misinterpretation of the rights and duties of the parties in terms of clauses 1 and 2 of the agreement. The agreement indeed did not bind respondent to order a monthly minimum from appellant during the currency of the agreement but it did oblige respondent to order all its objective requirements of copper (except for the maximum of 10 metric tons per month referred to in clause 2) from appellant and it was prohibited from acquiring such supply from any third party whilst appellant was able to procure sufficient scrap cable to meet those needs. This was eventually conceded by respondent but only on the second day of the trial.

REPUDIATION.

The agreement was concluded on 23 April 1986. From May 1986 to January 1987 respondent ordered and appellant delivered scrap cable to respondent. Any shortfall in the quantities delivered had been rectified

by an additional delivery made in November 1986. No delivery effected by appellant was ever rejected by respondent. Throughout this period from May 1986 to January 1987 the objective requirements of respondent for copper were greater than the amount ordered from appellant. Respondent met its total needs for this period by purchasing copper granules from a third party. Its purchases in each month during this period (except for June 1986) exceeded the maximum of 10 metric tons referred to in clause 2 of the agreement. After the end of January 1987 respondent ceased to order any cable whatever from appellant and satisfied all its objective needs for copper by purchases of copper granules from third parties.

Appellant sought to justify its conduct in acquiring copper from third parties on two grounds. The first ground which is articulated in paragraph 6 of the respondent's plea was that appellant "was not able ....

to supply sufficient suitable scrap cable for processing by the machines procured by the defendant". The agreement between the parties, however, imposed no obligation on appellant to supply scrap cable which was suitable for processing by the machines which respondent procured. It obliged appellant only to procure "sufficient scrap cable to produce a maximum of 80 metric tons of copper per month". Respondent failed to establish the implied term or the grounds for rectification which could have established that appellant was obliged to ensure that the cable which it supplied to respondent was suitable for processing by the machinery which respondent had procured.

The second ground upon which respondent sought to justify its purchase of copper granules from third parties to satisfy its objective copper needs during the currency of the agreement was that on a proper construction of the agreement it was always entitled at

its own option to satisfy its objective needs for copper from any source it chose. This stance manifests itself in certain portions of the plea, in its conduct throughout the relevant period and in certain correspondence between the parties or their representatives which preceded the trial.

Not only did respondent continue to acquire large quantities of its objective copper requirements from third parties throughout the relevant period, but from February 1987 it ceased to order any cable whatever from appellant notwithstanding appellant's requests that it should do so. On 20 May 1987 the attorneys acting for appellant wrote to respondent recording that in the preceding three months respondent had not specified any quantities of scrap cable which it required, that during this time appellant had at all times procured sufficient quantities of scrap cable to discharge its obligations in terms of the agreement and that respondent had repudiated

the agreement by failing to specify to appellant the quantities of scrap cable which it required and by obtaining "same" from another supplier during this period. The letter stated that appellant was accepting that repudiation.

The reaction of respondent to this letter was set out in a letter dated 10 June 1987 from respondent's attorneys. It denied that respondent had repudiated the agreement and asserted that respondent was not bound to purchase any minimum quantity from appellant if "it did not require scrap cable for any period of time". It went on to record that respondent had not purchased any scrap cable from any other source but failed to disclose that respondent had satisfied its objective requirements of copper by purchasing copper granules from other suppliers. Appellant's attorneys reacted to this letter on 1 July 1987 disputing respondent's interpretation of its obligations in terms of the agreement and repeating

appellant's contention that respondent had repudiated the agreement. It recorded that employees of respondent had admitted to appellant that respondent had been buying copper granules from other suppliers in excess of 10 metric tons per month. It accepted that respondent had not been buying scrap cable from any other source but it drew the attention of respondent to the fact that clause 2 of the agreement prohibited respondent from procuring copper in excess of 10 metric tons in any month. The attorneys for respondent replied to this letter on 8 July 1987. They did not deal with the appellant's interpretation of the agreement or its averment that respondent had repudiated the agreement by acquiring copper from other suppliers in excess of the maximum permitted to it in terms of clause 2 of the agreement. They also gave no undertaking that respondent would refuse to do so in the future. But the letter does contain a sentence to the effect that respondent was

"quite prepared to abide by the agreement". This letter was followed by a further letter from respondent's attorneys dated 21 July 1987 referring to the previous correspondence including the letter from appellant's attorneys dated 1st July 1987 and it contains the following paragraph:

> "We do not propose replying to your letter under reply in detail save to say that the limitation imposed upon our client in clause 2 of the agreement relates to the purchase of scrap copper. Our client has not purchased scrap copper".

What all this conduct and correspondence manifests is that respondent was not in fact ordering from appellant its objective needs for copper in excess of the maximum of 10 metric tons per month provided for in clause 2 of the agreement, that it had consistently been acquiring copper from other suppliers in excess of that maximum, and that on its interpretation of the agreement it was perfectly entitled to do so and that it had the right to choose when and how much scrap cable

containing copper it would order from appellant, regardless of its objective needs. For the reasons which we have previously referred to this is clearly an incorrect interpretation of its obligations in terms of the agreement. Its consequential conduct, (based on this misinterpretation), in acquiring its objective requirements of copper in excess of the maximum provided for in the agreement from other suppliers, its insistence that it was entitled to do so and its refusal to place with appellant sufficient orders for scrap cable to accommodate its needs in excess of the maximum referred to in clause 2, constituted in our view a clear and material breach of its obligations in terms of the agreement.

CANCELLATION

It was contended on behalf of respondent, however, that even if it had acted in breach of the agreement, appellant was not entitled to cancel the

agreement, as it purported to do, without placing respondent in mora by giving to it a notice in terms of clause 12 of the agreement calling on it to remedy such breach. No such notice was given by appellant in the present matter.

Clause 12 of the agreement creates a contractual ground for cancellation by the innocent party where the defaulting party has failed to remedy the breach of a material term within thirty days after being called upon to do so by the innocent party. The innocent party is not compelled, however, to comply with the machinery created by clause 12 if the conduct of the defaulting party is such as to constitute a repudiation of the contract. The innocent party has in such circumstances the option to insist on the performance of the contract or to accept the repudiation and cancel it. If it elects to cancel the contract it has no obligation to put the defaulting party in mora in terms of a

contractual provision which would otherwise require it to do so where the defaulting party is in breach of a material term. [Landau v City Auction Mart 1940 AD 284; Van Achterberg v Walters 1950 (3) SA 734 (T) at 743 H; Moodley and Another v Moodley and Another 1990 (1) SA 427 (A) at 431 A-I].

Counsel for the respondent submitted, however, that Streicher J was correct in concluding that respondent had not, in fact, repudiated the contract.

In seeking to sustain that submission counsel for respondent was confronted with the difficulty that respondent had not only consistently acquired supplies of copper from other suppliers in breach of its obligation towards appellant but that it had maintained that it was entitled to do so and that it was not obliged to place any orders with appellant to meet respondent's objective requirements of copper in excess of the maximum of 10 metric tons per month provided for in clause 2 of the

agreement. Counsel sought to meet this difficulty by referring to evidence and documents which were said to be supportive of the inference that respondent had never intended to sever its contractual ties with appellant. Our attention was in this regard drawn to a statement made in the letter dated 10 June 1987 from respondent's attorneys to appellant's attorneys in which it was said that the reason why no orders for scrap cable had been placed with appellant was because there was a backlog of such scrap cable which was being processed and that once this had been completed respondent would again commence ordering scrap cable from appellant. This reference is fortified by other references to the oral testimony of witnesses on behalf of respondent who said that the problem which respondent experienced with the scrap cable which appellant had delivered was that it was much too thin for processing by the machinery which respondent had procured.

There is indeed evidence on the record which supports the suggestion that the real reason why respondent stopped ordering supplies of scrap cable from appellant was because it considered that the cable which appellant had supplied was not suitable for processing by the machinery which respondent had and that it sought and acquired cheaper and more efficient sources of copper from other independent suppliers, because on its interpretation of the agreement, it had a right to do so and appellant was under an obligation to ensure that the cable which it supplied to respondent was suitable for processing by respondent's machinery. It was an incorrect view but it constituted the essential basis upon which respondent wanted to continue business relations with appellant. It is perfectly true that respondent never said and never intended to say that it would not acquire scrap cable from appellant and it might indeed have been anxious to retain appellant as a source

of supply but the attitude which it manifested was that it would continue business with appellant on respondent's interpretation of the agreement: it was free to acquire concurrent supplies in excess of the maximum referred to in clause 2 from other independent suppliers, it could at its discretion also order supplies of cable from appellant and appellant was obliged to ensure that such cable was suitable for processing by respondent's machinery. Regard being had to context and the objective circumstantial evidence, this was the true meaning of the assertion that respondent was "quite prepared to abide by the agreement", contained in the letter from respondent's attorneys dated 8 July 1987.

It is probably correct to say that respondent was bona fide in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct

constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect it was insisting on a different contract however bona fide it might have been in its belief that it was not. As was stated by Lord Wright in the case of Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All E R 60 (H L) at 72 B -

> "I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and not in any other way".

The objective conduct of respondent in this case, in our view, entitled appellant to cancel the contract on the grounds that respondent had repudiated it even if respondent believed that it was abiding by the

contract,

> "Om 'n ooreenkoms te repudieer, hoef daar nie, soos in die aangehaalde woorde uit Freeth v Burr te kenne gegee word, 'n subjektiewe bedoeling te wees on 'n einde aan die ooreenkoms te maak nie. Waar 'n party, bv, weier om 'n belangrike bepaling van 'n ooreenkoms na te kom, sou sy optrede regtens op 'n repudiering van die ooreenkoms kon neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom". [Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou 1978 (2) SA 835 (A) at 845 in fine to 846 A],

The test which must be applied is whether respondent "acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract" [Universal Cargo Carriers Corporation v Citati [1957] 2 Q B 401 at 436; Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou (supra) at 845 A - C]. In our judgment a reasonable person in the position of appellant in the present case was, in all the circumstances, entitled to infer from the conduct of respondent that it did not intend to fulfil its duties in terms of the objective and correct interpretation of the

contract and was only prepared to abide by its interpretation of the contract. Appellant was therefore entitled to put the contract at an end by cancelling it.

The purported cancellation was first effected by the letter from appellant's attorneys dated 20 May 1987 on the grounds that the conduct of respondent in the preceding period constituted a repudiation of the agreement. This was followed by the further exchange of correspondence between the parties to which I have referred in which respondent persisted in its interpretation of the agreement. Counsel for appellant nevertheless relied on a telex dated 24 July 1987 ordering a further supply of scrap cable and specifying that it had to be "only scrap cable in accordance with our contract". Reliance was placed on this order and a further order by telex on the 26 August 1987 for 100 tons of scrap cable, in support of the contention that respondent did not intend to repudiate the agreement.

30 There are, in our view, two answers to the reliance based on the orders which respondent had purported to place on 24 July and 7 August 1987. In the first place respondent did not abandon its interpretation of the agreement, and the limited nature of its duties based thereon, when it sent these telexes. In the letter of 21 July 1987, very shortly before the order sought to be placed on 24 July, respondent was still maintaining the attitude that its right to purchase copper from independent sources was not a breach of the agreement because it only "relates to the purchase of scrap copper. Our client has not purchased scrap copper". Respondent in the meanwhile continued such purchases from other sources. There were therefore reasonable grounds for appellant to conclude that respondent had not abandoned its previous attitude and that it was only offering to make purchases from appellant on the interpretation of the agreement it had previously advanced and which it in

fact continued to advance until the second day of the trial.

The second answer is that the order of 24 July 1987 was placed after appellant had cancelled the agreement on 20 May 1987. If this was a valid act of cancellation, there was no subsisting obligation on appellant to effect any further supplies pursuant to this order and this is exactly what respondent said in a telex dated 7 August 1987.

> "We regard the agreement as cancelled as a result of your repudiation thereof and are therefore not prepared to deliver any scrap cable to you".

The further order on 26 August 1987 was after that reaction and therefore also after the purported cancellation.

It was contended on behalf of respondent, however, that the purported cancellation of the agreement by appellant on 20 May 1987 was premature and therefore

ineffective. Counsel for appellant said that the letter of 20 May 1987 might have been premature but that in any event a valid cancellation had been effected in respondent's telex dated 7 August 1987 which I have quoted.

We are not persuaded that the purported cancellation of 20 May 1987 was indeed premature. Respondent had consistently been acquiring a part of its objective needs for copper from other sources during virtually the whole of the preceding twelve months, it had ceased placing any orders with appellant in the preceding three months, it had earlier in the year in communications to appellant made it perfectly plain that on its interpretation of the agreement respondent was not obliged to accept deliveries of cable "containing copper with specifications that are not acceptable to us which cable we are unable to process with our equipment". The objective facts which existed at the time when the letter

of 20 May 1987 was written therefore justified appellant in concluding that respondent had no intention of carrying on business with appellant except on its own terms based on its interpretation of the agreement.

Even if we are wrong in that conclusion, we are satisfied that the telex of the appellant dated 7 August 1987 constituted a valid act of cancellation because the persistent conduct of respondent in the interim in continuing to obtain supplies of copper from independent sources in breach of its obligations in terms of the agreement and its insistence in the correspondence on its version of the agreement, reasonably justified appellant in concluding that respondent was not intending to abide by its duties cm a proper interpretation of the agreement. Counsel for respondent sought to avoid this conclusion by arguing that the telex of 7 August 1987 did not constitute an act of cancellation at all because it simply stated that "we regard the agreement as

cancelled". This, it was submitted, was simply a reference to the previous purported cancellation of 20 May and not a fresh cancellation. We are unable to agree. There is no reference in this telex to the previous letter of 20 May 1987. It says in simple terms that appellant regards the agreement as cancelled. It is, in my view, a sufficient indication of appellant's state of mind that it regarded the contract as being at an end.

> "The inquiry is not whether he has 'accepted' the repudiation but whether he has elected to keep the contract in being or to cancel it" - [Kerr, The Principles of the Law of Contract Fourth Edition page 436]

What the telex of 7 August 1987 makes clear is this very election. It is made known to respondent that appellant has elected not to keep the contract alive but to cancel it.

It accordingly follows that in our judgment respondent did repudiate the contract and that appellant

was entitled to cancel the contract as it in fact did without giving to respondent a notice in terms of clause 12 of the agreement.

DAMAGES

The next question to be considered is whether appellant succeeded in establishing damages.

At the start of the trial two spreadsheets of figures were handed in by consent. Designated C1 and C2 respectively, they had been prepared by one Vorster, the accountant in respondent's chemicals division. They represented the result of Vorster's calculation of appellant's alleged damages, which calculation was based on a variety of facts and assumptions. C1 and C2 were annexed to a Rule 36(9) notice in which respondent signified its intention to call Vorster as a witness and in which his proposed evidence was summarised.

For reasons to which I shall come, it is

unnecessary to explain the respect in which C1 differs from C2. They can, by referring to them, for convenience, as "the schedule", be taken for present purposes as identical.

In a pre-trial minute, the parties recorded that the schedule represented Vorster's

> "... calculations of the quantum of plaintiff's damages ...."

and that the significance of the various figures, columns and other data in the schedule would be "explained during the course of the trial." The minute then proceeded to record that, subject to two qualifications, certain specified figures in the schedule were correct. These qualifications were, firstly, that the figures concerned were to be read with the explanation given in the summary of Vorster's intended evidence and, secondly, that it was assumed that respondent had breached the agreement as alleged by appellant. Then followed this paragraph:

> "8. The arithmetical calculations, based on the figures and assumptions referred to (above), including the assumption that defendant was in breach in respect of any given month, are correct."

Appellant's counsel contended that on a proper reading of the plea and this minute, not only had respondent admitted that appellant had suffered damages but the parties had finally agreed on the quantum of such damages. This argument is unsound. To the extent that in the plea respondent admitted appellant's allegation that it was within the parties' contemplation that appellant would make a profit if it supplied respondent with scrap cable but would suffer a loss were the latter to order nothing, this allegation was no more than a commercial truism. The parties' contemplation was obviously an invalid basis on which to establish that as a proven fact appellant did suffer damages.

Equally unhelpful to appellant are the terms of the minute. Read in context, the reference to "the

quantum of plaintiff's damages" was clearly intended to mean the alleged damages. The other terms of the minute make it equally plain that the parties' agreement extended no further than to the correctness of certain figures and the correctness of Vorster's calculations. There was therefore no agreement such as was contended for by appellant's counsel and regard must be had to the relevant evidence.

The findings of the trial Judge in relation to the damages question may be summarised as follows. Fundamental to the claim for damages was the factual premise that respondent's breach had caused appellant to lose profits; such loss was the difference between the selling price to respondent and the maximum price at which agents employed by appellant had been instructed to buy scrap cable; appellant had failed to show that it "would have been able" to acquire cable at less than the selling price to respondent; as evidence to that effect

was probably available, but not adduced, the present was not a case in which the Court was, on the authority of cases such as Hersman v Shapiro & Co 1926 TPD 367, bound to do it best on the evidence to come to some assessment; in the circumstances appellant had failed to prove its damages.

From the trial Judge's reasoning, and particularly his reference to the price at which appellant "would have been able" to buy cable, it appears that he confined his attention to the period between the termination of the agreement and the date on which it would have terminated had it runs its course. For convenience I shall call this "the post-cancellation period." He does not seem to have considered whether appellant proved any damages in relation to the pre-cancellation period.

As far as the post-cancellation period is concerned the Court a quo was justified in coming to the

conclusion it did. The only witness to testify for appellant was one, Jullienne, who was one of its members and directors. Although well versed in matters pertaining to the scrap metal trade and still involved in that trade throughout the post-cancellation period, Jullienne gave no evidence as to the average monthly or even annual prices at which he would have been able to acquire scrap cable over that period and what, based on his own knowledge and experience, the average copper content of such cable would probably have been. Nor did appellant attempt to obtain such proof from any other scrap metal dealer or from the major sources of scrap cable such as the mines and Escom. The missing evidence as to prices must, as an historical fact, have been available and a suitably qualified expert could have analysed the copper content of the standard forms of cable used by major sources, which standard forms would no doubt have made up the bulk of the cable which

appellant could have delivered. The only explanation ventured by appellant's counsel for the omission to present such evidence was that invoices reflecting scrap cable sales almost invariably failed to show the copper content of the purchased load, thus making it impossible to ascertain what had been paid specifically for the copper. This is no doubt true. One finds it well illustrated by the summary, handed in as exhibit B, in which are set out the details of the invoices reflecting appellant's own cable purchases during the pre-cancellation period. However, this difficulty was no bar to the presentation of the sort of evidence to which we have referred. Jullienne's uncontradicted evidence was that he would have been able to supply whatever respondent required but without any evidence as to the price at which appellant would have been able to acquire scrap cable, or as to the likely copper content in such cable, one cannot find that appellant would have made any

profit at all during the post-cancellation period. To essay a finding favourable to appellant in this regard would necessarily involve unwarranted speculation. From attempting this exercise the trial Judge rightly refrained.

As the difference between spreadsheets C1 and C2 pertained only to certain data relative to the post-cancellation period, such difference is, for the aforegoing reasons, presently immaterial.

In so far as the pre-cancellation period is concerned, however, we consider that appellant did prove that is had suffered damages and that, on the evidence, the quantum of such damages was sufficiently established.

Before discussing the relevant evidence it is necessary, perhaps, to emphasize that that although the focus in the trial Court's judgment, as also in counsel's arguments on appeal, was upon the post-cancellation

43 period, it is quite clear that the damages claim was intended by appellant, and always understood by respondent, to embrace the entire contractual period. This is manifest from the following: (i) The allegation in para 7 of the particulars of claim that respondent breached the agreement from its inception; (ii) The allegation in para 9, and the accompanying reference to the total in column 21 of the schedule, which indicate that the sum claimed included losses during the pre-cancellation period; and (iii) The absence of any suggestion by or on behalf of respondent, either in the pleadings, the evidence or in argument, that appellant was not entitled to damages in respect of that period. As to the duration of the pre-cancellation period, it must be taken to have ended on 20 May 1987.

Even if the cancellation by appellant were to be found as having been effected only later, it was on 20 May 1987 that appellant declared its intention to supply no more cable and damages cannot be awarded in respect of any period beyond that date.

Turning to the evidence, it is manifest that appellant was making a profit in respect of the scrap cable which it sold to respondent. These invoices, the contents of which are summarised in exhibit B, were discovered and made available prior to the trial by appellant. As is clear from the record, they were accepted on respondent's behalf as admissible and relevant. Exhibit B was in fact compiled by respondent's legal advisers and introduced into the evidence by respondent's counsel during Jullienne's cross-examination.

Those invoices which do reflect tonnages and prices per ton reveal that between June 1986 and February

1987 appellant bought 922,77 tons of scrap cable for an average price of R518,95 per ton. Although Jullienne testified that the price of scrap cable varies greatly - as exhibit B bears out - and is not based on its copper content, if the prices he paid were intended to relate not only to the copper content but to other components as well, it simply means that the copper content was being acquired even more cheaply than R518,95.

Vorster's calculation of appellant's copper claim was based on two important assumptions: that appellant would never have paid more for copper than 0,7 of the Republic Copper Price ("RCP") and that the cable so bought would have had a copper content of 0,4. As appellant was selling copper to respondent at 0,8 RCP his calculation formula was: claim tonnage x 0,1 x RCP x 0,4. The next question, therefore, is whether Vorster's assumptions were justified.

In Julliennes's evidence he sought to allege

that the copper content of the cable he delivered to respondent would indeed have been of the order of 40%. Although appellant's counsel contended that Jullienne's evidence, particularly in this regard, should be accepted because it was uncontradicted, it seems to me that the witness's evidence on this score was at times both unconvincing and ostensibly improbable. However, assuming in his favour that his assertions were the product of bona fide recollections concerning the results of analyses which he said his own staff performed on the cable which was later delivered to respondent, such assertions clash with the results of analyses performed at various times during the pre-cancellation period by respondent's staff on that same cable. The results of these analyses were introduced in evidence though Trickett who had personal knowledge of the conduct and results (if not the performance) of the analyses. In any event there can be no question of respondent's not being

bound by the data thus evidentially adduced through him.

There are two documents relevant in this regard. One was that Trickett said reflected an exercise he performed in an attempt to ascertain to what degree the copper content of appellant's cable fell short of 40%, thus warranting a credit adjustment in respondent's favour. In his report in this regard (p 1375 of the record) he stated the results of respondent's analyses (up to the end of February 1987) of the respective copper and lead components of the cable delivered. The copper percentage appears there as 29,8% and the lead content as 9,5%. The other document (at p 1386) records the yields obtained by respondent in samples of altogether 179 tons of cable analysed up to the end of March 1987. There, the copper content appears as 28,5% and lead as 7,8%. Those very percentages were clearly the basis of a calculation on the strength of which respondent, in its attorney's letter of 8 May 1987 (p 1382), claimed

reimbursement from appellant.

In these circumstances there is no reason to doubt the authenticity of respondent's figures or their essential reliability.

It would be taking it at its best for respondent and at its worst for appellant if one concluded on this evidence that, on broadly reliable average, the copper and lead content of the cable delivered by appellant, and the cable which would have been delivered during the pre-cancellation period had respondent complied with the contract, as 28% in respect of copper and 7% as regards lead. The possibility that respondent's analyses were somewhat less than totally - reliable, can be catered for by a contingency allowance.

Admittedly this is not the most conclusive evidence of copper content over the pre-cancellation period but Jullienne said that the records of appellant's own analyses had been lost and there is therefore no

better evidence that would have been presented. In the circumstances it is appropriate to apply the Hersman v Shapiro approach to the assessment of the pre-cancellation damages.

Between June 1986 and February 1987 the average RCP (taking the agreed figures in column 13 of the Schedule) was R3 134,45 per ton. At a maximum average price for copper of R518,95, the appellant was, on the copper content finding of 0,28, paying 0,59 RCP.

One is therefore justified in accepting Vorster's assumed maximum acquisition price of 0,7 RCP as one of the foundational factors in the calculation of appellant's pre-cancellation copper claim even if the copper content of the cable supplied to respondent was 0,28 and not 0,4.

Moreover it is significant that respondent's principal witness, one Trickett, manager of the chemicals division at the factory where the scrap cable sold by

appellant was delivered, conceded in evidence that he had pointed out in an internal memorandum early in 1987 that the cable respondent was buying from appellant at about Rl 000 per ton was available at less than R500 per ton. Of no less significance was the remark by respondent's counsel when cross-examining Jullienne.

> "....that you had a favourable rate there is no doubt, in this contract?"

Whether appellant would have been able to maintain an average acquisition price of R518,95 per ton until May 1987, or, in any event, a price below the R0,7 RCP level, one obviously cannot say for certain but, given the pattern demonstrated by the figures in exhibit B, and the short duration of the period from February to May 1987, it is more likely, in our view, than not. However, in fairness to respondent it would be proper to make some contingency allowance for the contrary

possibility.

The question whether appellant would have been able, other than in May and June 1986, to fulfil respondent's copper requirements, is not really an issue. Jullienne gave an affirmative answer and there is no good reason, on this point, to doubt what he said.

As to the monthly claim tonnage, this is arrived at, firstly, by taking the tonnage of copper which respondent acquired other than from appellant and deducting the 10 tons which respondent was entitled to buy elsewhere. This gives one the tonnage that respondent required and was bound to buy from appellant. Then one calculates what tonnage of cable was needed to produce the amount of copper that respondent was thus obliged to buy from appellant. These figures are in columns 7, 8 and 9 respectively of the schedule and were all agreed.

The difference between the theoretical maximum

tonnage which appellant could have been called on to sell to respondent and the tonnage actually delivered, is shown in column 3 of the schedule. The tonnage delivered is shown in column 1 of the schedule and the figures there are taken from respondent's weighbridge tickets. At the pre-trial conference respondent took up the attitude that it accepted its weighbridge figures yet did not admit that those quantities had in fact been delivered. This stance warrants short shrift. Delivery to the weighbridge, and the recording there of the tonnage weighed, was exactly what the parties' agreement required. Prima facie at least, appellant delivered the tonnages measured and in the absence of any worthwhile evidence from respondent's side to cast any real doubt on the conclusion to be drawn from the weighbridge records, it must be found that the agreed tonnages reflected in column 1 of the schedule were indeed delivered.

The second step in getting to the monthly claim

tonnage of cable is to take the lesser of the respective amounts in columns 3 and 9. The claim tonnage is reflected in column 10 and is, as already mentioned, one of the factors in the copper claim calculation. In column 10 a copper content of 40% is assumed and the same assumption underlies the use of the factor 0,4. For the reasons already given, Vorster's formula must be applied using a copper content factor of 0,28 instead of 0,4. That change necessitates corresponding alterations to Vorster's figures in columns 3, 9, 10 and 15. Such alterations are mere matters of calculation.

The results of the calculation of the copper claim on the aforegoing basis are set out in Annexure "A" attached to this judgment. No claim is properly maintainable in respect of May and June 1986 for appellant was not able, according to Jullienne, to deliver more than it did in those months and there can therefore be no question of any contractual obligation on

respondent to buy more than was delivered. Nor is a claim maintainable in so far as September 1986 is concerned because in that month more was delivered than the contractual maximum saleable cable of 250 tons. On the agreed and calculable data, therefore, and subject to contingencies, appellant is entitled in respect of its copper claim to R94 725,08.

As far as the lead claim is concerned, once on finds, as is the case in respect of the copper claim, that appellant was contractually entitled to have respondent buy the quantity of cable reflected in the claim tonnage (column 4 of Annexure "A") i e 1135,91 tons, the next question is what percentage of lead that quantity of cable would have contained. As already explained, the evidence warrants the conclusion that, subject to contingencies, the lead content of the cable which was delivered, and thus the likely lead content of the unbought cable that would have been delivered, was

7%.

Subject to altering the lead content factor from 0,2 to 0,07, Vorster's formula for calculating the lead claim, was this: claim tonnage x 0,8 x Tsumeb lead price x 0,07. The first and last of these four factors we have already dealt with. 0,8 was the contractually agreed portion of the Tsumeb lead price which respondent undertook to pay. The Tsumeb lead price from month to month was agreed. One is therefore able to apply the formula and so calculate the lead claim, again subject to contingencies. The monthly claim tonnages are set out in column 4 of Annexure "A" and the lead price is shown in column 14 of the schedule. The result of the calculation, shown on a month by month basis is as follows:

1986	July	R 424,89
	August	2 237,31
	October	11 777,56
	November	6 295,55
	December	4 286,84
1987	January	7 718,36
	February	9 607,78
	March	7 188,90
	April	5 242,41

May 10 728,03 R65
507,63

Appellant's counsel conceded the possibility that appellant might have had to buy in lead with which to supply respondent if the cable delivered contained less than 20% by weight of lead. Me do not see the position that way. Respondent's counsel argued, rightly. We think, that appellant was not entitled to compel respondent' to take more lead if the contractual provisions regarding copper supply had been complied with. If enough cable had been delivered to fulfil respondent's copper requirements, then neither party could demand that any lead shortfall below 20% be remedied. The contractual obligations of the parties focused solely on the copper quantity. The only provision regarding the lead content was that it was expected to be 20% but that quarterly analyses would be undertaken and any lead shortfall dealt with by way of a

credit adjustment in favour of respondent. The latter therefore simply had to pay for such lead as it received. It had no greater remedy, and appellant no greater obligation.

Then, in so far as it might seem anomalous that the lead claim, as calculated, is as large as it is when the lead content of the cable was far less than the copper content and lead was roughly only one-third of the price of copper, it must be remembered that appellant was having to pay for the copper but was getting the lead for nothing. This much is the effect of Jullienne's evidence. Alternatively, if the price at which appellant bought cable covered not only the copper in the cable but also the lead contact, then, although the lead claim would be less, the copper claim would proportionally be greater. Accordingly the copper and lead calculations recorded above can, subject to what follows, be left as they are. They add up to R160 232,71.

To that sum must be added R62 475,05. This reflects the R55 difference between the respective costs components of the contract price formula, [ROB (0,4 RCP + 0,2 T lead price) - 110] and the assumed maximum price at which appellant would have bought cable [R07 (0,4 RCP) - 165], i e R165 - R110. This sum of R55 must then be multiplied by the number of tons in column 4 and Annexure "A". Although appellant's agents bought nothing of any relevance to this case they nontheless had to be paid their basic remuneration. R62 475,05 plus the copper and lead claims amount to R222 707,76.

From this sum must be deducted R62 150,00 being the total over the period July 1986 to Nay 1987 of the monthly amount of appellant's other costs. These figures are in column 20 of the schedule and were agreed. The overall claim, without a contingency allowance, is thus R160 557,76.

As for a contingency deduction, there are a

number of considerations to be borne in mind. Firstly, the contract did not run until the end of May 1987, it terminated on 20 May. Secondly, it is possible that the cable analyses performed by respondent were not wholly accurate or completely representative. Thirdly, scrap cable price trends may have altered to appellant's disadvantage in the period February to May 1987, contrary to the probability expressed earlier in this regard.

The extent of the contingency deduction is a factor incapable of calculation. It is simply a question of what seems to the Court to be reasonable in the circumstances. To my mind a deduction sufficient to reduce the total claim to R136 000,00 (a deduction of very nearly 15%) would meet the justice of the case and appropriately finalise the quantification of appellant's damages.

The defence of mitigation has no bearing upon the pre-cancellation period and can be ignored.

60 For these reasons appellant, in our view, established its entitlement to damages in the sum of R136 000,00. It follows that the claim ought to have succeeded, that respondent's counterclaim A ought to have failed and that the appeal must succeed. The following order is made:

1. The appeal is upheld, with costs.

2. The order of the Court a quo is set aside and substituted therefore is the following:

(a) Plaintiff's claim is upheld, with costs, and defendant is ordered to pay plaintiff R136 000,00 as and for damages.

(b) The costs referred to in (a) above will include the costs of two counsel and the costs reserved on 23 April 1990.

(c) Defendant's counterclaims A, B and C are dismissed with costs, including the costs of two counsel.

C T HOWIE JA

I MAHOMED AJA J

W SMALBERGER Concurs

SEE ORIGINAL
JUDGMENT TABLE