Case No 70/94 /mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

LOOMCRAFT FABRICS CC — APPELLANT

and

NEDBANK LTD — FIRST RESPONDENT

PERFEL PEREIRA AND FERREIRA LDA — SECOND RESPONDENT

CORAM: CORBETT CJ, HEFER, NESTADT, HARMS JJA et SCOTT AJA

HEARD: 15 SEPTEMBER 1995

DELIVERED: 17 NOVEMBER 1995

J U D G M E N T

SCOTT AJA/ ...

SCOTT AJA:

On or about 20 February, 1992, the appellant entered into an agreement of sale with the second respondent for the purchase of a quantity of voile fabric. The appellant carries on business in South Africa as a distributor of fabric. The second respondent, to which I shall refer as "Perfel", is a textile manufacturing company of Portugal. The purchase price of US$149,971-25 f o b was to be paid by way of a letter of credit. Pursuant to the agreement the appellant instructed the first respondent ("Nedbank") to open an irrevocable letter of credit in favour of Perfel. The credit was transmitted by Nedbank to Perfel's bank in Lisbon which served as an advising bank only. The credit made provision for deferred payment, ie 90 days after the date of the bills of lading, and for two bills, out of a set of three, to be included in the documents which had to be presented as a pre-condition of payment. The latest date for shipment of the goods was

stated in the credit to be 20 April 1992. The expiry date was 30 April 1992. Perfel indicated, however, that it would be unable to manufacture the fabric in time and by agreement the credit was amended by extending the expiry date from 30 April to 18 May 1992 and the latest date of shipment from 20 April 1992 to 8 May 1992. The goods arrived in Durban on 18 June 1992, and were presumably received by the appellant in Johannesburg shortly thereafter. The date of their arrival was later than the appellant had expected. The appellant was also not satisfied with their quality.

On 4 August 1992, the appellant launched an application as a matter of urgency in the Witwatersrand Local Division for an interdict restraining Nedbank from making payment in terms of the credit together with other ancillary relief. It alleged that the bills of lading presented to Nedbank for payment contained a fraudulent misrepresentation as to the date of shipment. I shall refer in more detail to the allegations of fraud

later in this judgment. The application was opposed by Perfel but pending finalisation of the matter certain interim relief was granted to the appellant. Nedbank took up the attitude that it would honour the credit unless restrained from doing so by an order of court. In due course Perfel filed opposing papers together with a counter-application in which it sought an order directing Nedbank to make payment in terms of the letter of credit. After hearing argument, Leveson J on 30 December 1992 dismissed the main application and set aside the interim relief granted on 4 August 1992. The appellant was further ordered to pay the costs of Perfel as well as those of Nedbank which had appeared to protect its interests. The present appeal is against the judgment of Leveson J including the order as to costs. Subsequent to the noting of the appeal the appellant petitioned this Court for leave in terms of s 22 of the Supreme Court Act 59 of 1959 to have further evidence received in the form of an affidavit or alternatively to have

the matter remitted to the Court a quo for further hearing. Before dealing with the petition I shall consider the merits of the appeal on the basis of the papers that were before the Court a quo.

The system of irrevocable documentary credits is widely used for international trade both in this country and abroad. Its essential feature is the establishment of a contractual obligation on the part of a bank to pay the beneficiary under the credit (the seller) which is wholly independent of the underlying contract of sale between the buyer and the seller and which assures the seller of payment of the purchase price before he parts with the goods forming the subject matter of the sale. The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or for that matter even the existence of the underlying contract, by issuing or confirming the

credit, the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary. This "established exception" to the bank's liability was formulated by Lord Diplock in United City Merchants (Investments) Ltd and others v Royal Bank of Canada and others [1982] 2 All ER 720 (HL) at 725 g as follows:

> "... where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his (the seller's) knowledge are untrue."

The autonomous nature of the obligation owed by the bank

(whether the issuing bank or, if there is one, the confirming bank) to the beneficiary under a credit has been stressed by courts both in South Africa and overseas. (As to the former, see for example, Phillips and Another v Standard Bank of South Africa Ltd and Others 1985 (3) SA 301 (W); Ex Parte Sapan Trading (Pty) Ltd 1995 (1) SA 218 (W) at 224 I - 225 G.) An interdict restraining a bank from paying in terms of a credit will accordingly not be granted at the instance of the buyer (the bank's customer) save in the most exceptional cases. The approach of the courts with regard to such an interdict was stated by Kerr J in R D Harbottle (Mercantile) Ltd and another v National Westminster Bank Ltd and others [1977] 2 All ER 862 (QB) at 870 b - d to be as follows:

> "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will

> leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

This statement of principle was expressly approved by Browne LJ in

Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978]

1 All ER 976 (CA) at 983. The importance of allowing banks to honour

their obligations under irrevocable credits without judicial interference has

been repeatedly stressed in subsequent cases. In Intraco Ltd v Notis

Shipping Corporation (The "Bhoja Trader") [1981] 2 Lloyd's Rep 256

(CA) Donaldson LJ, after upholding the refusal of the court below to

interfere with the seller's right to call upon a bank to make payment under

its guarantee where fraud was not involved, observed at 257:

> "Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable letter of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the Courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand."

Lord Denning MR in Power Curber International Ltd v National Bank of Kuwait SAK [1981] 3 All ER 607 (CA) at 613b sounded a similar warning:

> "No foreign seller would supply goods to that country on letters of credit because he could no longer be confident of being paid. No trader would accept a letter of credit issued by a bank of that country if it might be ordered by its courts not to pay."

In Bolivinter Oil SA v Chase Manhattan Bank, Commercial Bank of Syria and General Company of Horns Refinery [1984] 1 Lloyd's Rep 251 (CA) at 257 Donaldson MR pointed out that the granting of an interdict against a bank at the instance of a dissatisfied customer served to undermine not only the value of irrevocable credits but also the reputation of the bank:

> "If, save in the most exceptional cases, he (the bank's customer) is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined."

(See also Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd and others [1994] 4 All ER 181 (QB) at 194 -195 and the authorities there cited.)

Nonetheless, it is now well established that a court will grant an interdict restraining a bank from paying the beneficiary under a credit in the event of it being established that the beneficiary was a party to fraud in relation to the documents presented to the bank for payment. For, as was observed by Lord Diplock in the United City Merchants case, supra. at 725j:

> "'... fraud unravels all'. The courts will not allow their process to be used by a dishonest person to carry out a fraud".

But the fraud on the part of the beneficiary will have to be clearly established. Tukan Timber Ltd v Barclays Bank PLC [1987] 1 Lloyd's Rep 171 (QB) at 175. The onus, of course, remains the ordinary civil one which has to be discharged on a balance of probabilities but as in any other case where fraud is alleged, it will not lightly be inferred. See Gates v Gates 1939 AD 150 at 155; Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris N O and Another 1990 (2) SA 217 (SE) at 226A.

Before turning to deal with the set of bills of lading issued in the present case and the alleged fraudulent misrepresentation, it is necessary to revert to the letter of credit in order to set out, and where appropriate, comment on the terms which are relevant.

The provisions of the letter of credit include the following:

"transshipment : ALLOWED
on board/disp/taking charge : ANY MAIN PORT IN PORTUGAL

for transportation to : JOHANNESBURG VIA DURBAN RSA

latest date of shipment : 920420 (20 April 1992)"

As previously indicated, the "latest date of shipment" was subsequently changed to 8 May 1992.

The description in the credit of the goods which formed the subject matter of the sale contains a statement to the effect that they were to be transported:

"IN (A) 20 FT CONTAINER BY CONFERENCE AS PER LETTER DATED 20 FEB 1992"

The letter referred to does not form part of the documents placed before the Court a quo, but it appears from the papers, and was not in dispute, that the words "by conference" referred to a conference line vessel which in the

context of the present case meant any carrier which was a member of the South African European Container Service ("SAECS").

The letter of credit also sets out the documents which were required to be presented as a prerequisite for payment. These included:

"2/3 CLEAN NEGOTIABLE COMBINED TRANSPORT DOCUMENTS MADE OUT TO ORDER OF APPLICANT NOTIFY TRANSKIP PTY LTD P O BOX 174 BEDFORDVIEW 2008 RSA MARKED FREIGHT COLLECT."

Finally, the letter of credit in its penultimate paragraph stated the credit to be:

"SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS 1983 REVISION ICC PUBLICATION 400 AND IS HEREBY OPERATIVE."

(I shall refer to this document as "the UCP".)

It is clear from the terms of the credit that the presentation of what is referred to in the UCP as a "marine bill of lading" was not required. This is also apparent from the appellant's written application to Nedbank for

the opening of the credit. The request which was expressed to be for a letter of credit "subject to the (UCP)", required the documents which had to be presented for payment in terms of the credit to include a "Full set of negotiable Combined transport documents", as opposed to a "Full set of clean on board marine Bills of Lading" which was indicated as not being required. The choice which the appellant was required to exercise when making the request was in effect a choice between the combined transport document referred to in Article 25 of the UCP and the marine bill of lading referred to in Article 26.

The combined transport document is a product of the advances made in transport technology in more recent times. It is intended to be what has been described as a "start-to-finish" document and to make it unnecessary to issue separate documents for every stage in the carriage of goods involving more than one stage, known as multimodal or combined

transport. This form of transport today plays a major role in the international transport of goods and is effected largely by the use of containers. Their obvious advantage in multimodal transport is that if the goods have to be carried, say, first by land, then by sea, and again by land, they will travel in the same container from start to finish with an obvious saving in labour and costs. By issuing a combined transport document the carrier, or the "combined transport operator" as he is frequently called, accepts full responsibility for the performance of the combined transport. The advantage of this method of transport to an exporter is that it will ordinarily permit him to send his goods to the nearest container loading depot. These depots, or "container freight stations" as they are called, are situated in most major industrial centres. See generally: Schmitthoff Schmitthoff's Export Trade: The Law and Practice of International Trade 9 ed 609 - 615.

A further consequence of this development in the transport of goods has been the division of bills of lading into two kinds: the traditional ship bill of lading, and the combined transport kind. See Gutteridge and Megrah The Law of Bankers' Commercial Credits 7 ed at 126. This distinction is embodied in the UCP.

As indicated above, the transport document required in the present case is one which falls within the ambit of Article 25. The relevant part of the article reads as follows:

> "Unless a credit calling for a transport document stipulates as such document a marine bill of lading (ocean bill of lading or a bill of lading covering carriage by sea), or a post receipt or certificate of posting:
>
> (a) banks will, unless otherwise stipulated in the credit, accept a transport document which: (i) appears on its face to have been issued by a named carrier, or his agent, and (ii) indicates dispatch or taking in charge of the goods, or loading on board, as the case may be, and (iii) consists of the full set of originals issued to the consignor if issued in more than one original, and

(iv) meets all other stipulations of the credit.

(b) Subject to the above, and unless otherwise stipulated in the credit, banks will not reject a transport document which:

(i) bears a title such as 'Combined transport bill of lading', 'Combined transport document', 'Combined transport bill of lading or port-to-port bill of lading', or title or a combination of titles of similar intent and effect, and/or

(ii) indicates some or all of the conditions of carriage by reference to a source or document other than the transport document itself (short form/blank back transport document), and/or

(iii) indicates a place of taking in charge different from the port of loading and/or a place of final destination different from the port of discharge, and/or

(iv) relates to cargoes such as those in Containers or on pallets, and the like, and/or

(v) contains the indication 'intended', or similar qualification, in relation to the vessel or other means of transport, and/or the port of loading and/or the port of discharge.

(c) ....

(d)........ "

In the context of the present case, it follows that where a credit calls for a combined transport document and the other stipulations of the credit are met, a bank will accept a transport document which (i) appears to have been issued by a named carrier or his agent; (ii) indicates a taking in charge of the goods and (iii) consists of a full set of originals issued to the consignor. Subject to the other stipulations of the credit, the bank may not reject the transport document because it indicates a place of taking in charge different from the port of loading (cf Halsbury's Laws of England 4 ed Reissue Vol 3(1) para 268).

Against this background I turn to the bills of lading issued in the present case. (A set of three bills was issued but for convenience I shall refer to the bill in the singular.) It was on a SAECS printed form bearing the heading "BILL OF LADING FOR COMBINED TRANSPORT

SHIPMENT OR PORT TO PORT SHIPMENT". The carrier was stated to be Compagnie Generale Maritime which, it was accepted by counsel, was a member of the SAECS. The place of receipt (stated to be applicable only when the document is used as a combined transport bill of lading) was given as "LEIXOES CY", the letters CY standing for container yard. The vessel and voyage number were given as "Nuova Europa 219" and the port of loading, "Lisbon". The space on the printed page for the insertion of a description of the goods proved insufficient and a second printed page identical to the first was used to complete the description of the goods. The particulars to which I have referred were again filled in on page 2. The only difference related to the box at the foot of the page which makes provision for the insertion of the place and date of issue of the bill and, below a horizontal line dividing the box into two, the signature of the person signing the bill on behalf of the carrier. The box that was

completed was the one on page 2. In the upper section of the box the place

and date of issue were given as "Leixoes, 08 May 1992". It appears from

he photo-copy of the original bill which forms part of the papers that the

document was stamped partly over the upper section of the box with a

round seal bearing the words "correction approved" and what would seem

to be the letters "C.G.M.". In the lower section of the box are printed the

words:

> "IN WITNESS of the contract herein contained the number of originals stated opposite have been issued, one of which being accomplished the others to be void."

There is a space beneath these words followed by the printed words "For

the Carrier". The bill was signed by one Victor Teixeira whose signature

appears immediately below the words "For the Carrier". The words

"ACTUALLY ON BOARD" are stamped in the space immediately above

the words "For the Carrier".

The appellant's case, as made out in its founding papers, was that the goods could not have been actually on board the "Nuova Europa" on 8 May 1992 in Lisbon as indicated by the bill of lading because that vessel did not call at Lisbon in the course of voyage 219. It was alleged that the goods had been loaded on board another vessel, the "Europa", on 30 May 1992 and taken to Barcelona where they were transshipped onto the "Nuova Europa" on 2 June 1992. It was further alleged that Perfel had "procured" the issuing of the fraudulent bill of lading in order to create the impression that it complied with the requirement of the letter of credit that the goods be shipped on board a vessel by not later than 8 May 1992. The contention that this is what was required by the credit was fundamental to the allegation of fraud in so far as the notation "Actually on board" was concerned. The appellant in its replying affidavits altered its stance somewhat as to what had actually transpired. It no longer contended that

the goods had been transshipped at Barcelona but averred instead that they had been loaded on board the "Nuova Europa" in Lisbon on 12 May 1992 in the course of her northbound voyage no 175 to La Spezia, Italy, and from there carried on her southbound voyage no 219 to Durban. It alleged that the reference to voyage 219 on the bill of lading was a fraudulent misrepresentation to which Perfel was also a party.

The allegations of fraud were denied by Perfel. Initially, and presumably because the application was brought as a matter of urgency, an answering affidavit deposed to by Perfel's attorney in South Africa was filed together with a short confirmatory affidavit deposed to by Perfel's managing director, Mr Pereira. Subsequently, a further and more comprehensive affidavit by Mr Pereira was filed. The explanation which was given in these affidavits for the notation "Actually on board" is the following. It was alleged that Leixoes is a main port in northern Portugal

and the closest port to Perfel's principal place of business at Santo-Tirso. The affidavits, it should be noted, contain no details as to the precise whereabouts of Leixoes. (Further information is given in the affidavit filed in response to the petition.) It appears, however, from the description which Mr Pereira gives of the use which Perfel customarily makes of Leixoes for exporting goods when multimodal transport is permitted that it was not intended to allege that Leixoes is anything other than a container depot, or container freight station. It was explained that on 7 May 1992 the goods were delivered at Leixoes where they were cleared by customs and taken in charge by the carrier's agents. The following day they were railed from Leixoes to Lisbon which, it was contended, was permissible in terms of the multimodal form of transport authorised in terms of the letter of credit. On 12 May the goods were loaded on board the "Nuova Europa" at the port of Lisbon. The following day, ie 13 May 1992, the carrier's

agents stamped the date on the bills and also added the notation "Actually on board", as by then the goods were indeed on board. Subsequently, it was noticed that the endorsement was not correct as the goods had been delivered to the carrier at Leixoes on 7 May 1992 and that the bills required correction. The carrier's agents corrected the date and stamped "correction approved" on the bills in the manner previously described. It was alleged that "unfortunately" and "in error" the words "Actually on board" were not deleted. In support of this explanation it was contended on behalf of Perfel both in the affidavits and in argument that as the letter of credit did not require shipment of the goods on board a vessel there was no reason for Perfel to be a party to any fraudulent misstatement to this effect.

It is apparent from the aforegoing that underlying the appellant's allegation of fraud in relation to the notation "Actually on board" is the contention that the credit required the goods to be shipped on board

a vessel by not later than 8 May 1992. Underlying Perfel's explanation, on the other hand, is the contention that Leixoes is a "main port in Portugal" within the meaning of the credit and that having regard to the multimodal form of transport authorised by the credit, actual shipment on board a vessel was not required. This issue, of course, involves the proper construction of the letter of credit.

Certain features of the explanation tendered by Perfel are admittedly less than satisfactory. It is not clear when and where the bills were signed or why, if the carrier took charge of the goods at Leixoes, the bills were not issued to Perfel at that stage. Much of the explanation is couched in the passive and no details are given, for example, as to who noticed the error and at what stage. Nor is it quite clear when Perfel subsequently discovered that the words "Actually on board" had in error not been deleted. As previously indicated, no details are given as to the precise

whereabouts or status of Leixoes. There is merely an assertion that it is "a main port in northern Portugal". If it is not - and this allegation is denied by the appellant - it would, of course, be in the interests of Perfel for the bills of lading to show that the goods were in any event actually on board the vessel at the port of Lisbon by 8 May 1992.

On the other hand, the explanation is supported by a photocopy of a customs document annexed to the papers which indicates that the goods were cleared at Leixoes on 7 or 8 May 1992. (The document is dated 7 May 1992 but is stamped 8 May 1992.) The photocopy of the bill of lading annexed to the appellant's papers also bears the "correction approved" stamp to which reference has been made. Furthermore, the bills clearly specify Leixoes (which is indicated as a container yard) as being the place of receipt of the goods while Lisbon is specified as the port of loading. If Leixoes, as suggested, is inland and some distance from Lisbon,

the goods could not have been on board the "Nuova Europa" when the bills were issued at the place of receipt, ie Leixoes on 8 May 1992, which is what the bills would appear to indicate. This suggests an error rather than fraud.

As far as the alleged fraudulent misrepresentation in respect of the voyage number is concerned, there is nothing in the papers to suggest that Perfel was in any way a party to this apparent misstatement. The bills of lading were issued on behalf of the carrier who was the appellant's agent. It was at no stage suggested that the carrier was not a member of the SAECS and hence not a carrier within the class required by the letter of credit. Nor, would it seem, did Perfel stand to gain anything by having the goods transported in a vessel proceeding to Durban via La Spezia.

In order to succeed on the grounds of fraud, the appellant had to prove that Perfel, acting through its agents, and with the purpose of

drawing on the credit, presented the bills of lading to the bank knowing that they contained material representations of fact upon which the bank would rely and which they (the agents of Perfel) knew were untrue (see the United City Merchants case, supra, at 725 g). Mere error, misunderstanding or oversight, however unreasonable, cannot amount to fraud (see Rex v Myers 1948 (1) SA 375 (A) at 383). Moreover, as previously indicated, fraud will not lightly be inferred, particularly when, I should add, it is sought to be established in motion proceedings. As far as the various disputes of fact are concerned, it must not be overlooked that the appellant sought a final order. To succeed it accordingly had to show that it was entitled to an order on the basis of the facts alleged by Perfel together with the admitted facts in the affidavits filed on its own behalf, subject only to any denial by Perfel being insufficient to raise "a real, genuine or bona fide dispute of fact" (see Plascon-Evans Paints Ltd v Van Riebeeck Paints (Ptv) Ltd 1984

(3) SA 623 (A) at 634 E - 635 C). Having regard to the aforegoing, I am unpersuaded that on the papers the appellant succeeded in discharging the burden of proving the falsity of the explanation given by Perfel in respect of the notation "Actually on board" or, in other words, that the bills of lading contained a fraudulent misrepresentation. The explanation is, of course, tied up with Perfel's contention that Leixoes is "a main port in Portugal" within the meaning of the credit and that contrary to the construction placed by the appellant on the words "latest date of shipment", the credit did not require the goods to be actually loaded on board a vessel by 8 May 1992. In order to establish fraud, it was not enough to show that Perfel's contention was incorrect. The appellant had to go further and show that Perfel knew it to be incorrect and that the contention was advanced in bad faith. For the purpose of the present inquiry, therefore, it is unnecessary to have to decide upon the correctness or otherwise of the

different constructions sought to be placed on the credit by the parties. It is sufficient to observe that it has riot been demonstrated that in taking up the attitude it did with regard to the interpretation of the credit, Perfel was acting in bad faith.

Mr Sub el. who appeared for the appellant, submitted in the alternative that the construction which Perfel sought to place on the credit was indeed incorrect in law and that accordingly once it was acknowledged that the notation "Actually on board" was erroneous and the words were to be ignored, it followed that the bills did not conform with the requirement of the credit with regard to the latest date for shipment. He submitted that the explanation offered by Perfel therefore did not assist it and that even in the absence of fraud the Court a quo should have granted an interdict restraining Nedbank from paying Perfel in terms of the credit.

The present case, of course, must be distinguished from the

case in which the beneficiary in terms of a credit claims that he was aware of the misstatement but believed it to be accurate and was himself deceived by it. (Cf the United City Merchants case, supra, at 725 j.) Perfel says in effect that the failure to delete the notation was an oversight but that it was in any event immaterial in so far as the bank's duty to honour the credit was concerned. The argument advanced by Mr Subel in the alternative was that the explanation, if true, showed that the bills did not conform with the credit.

Whether Nedbank would be prepared to honour the credit or not would depend, therefore, on whether it considers that even in the absence of the notation, the bills conform with the requirements of the credit. If on this basis, it considers itself obliged to honour the credit it is difficult to see on what grounds the appellant could obtain an interdict against the bank restraining it from doing so. If Nedbank is wrong, the

appellant would have its ordinary contractual remedy against it. No case was made out that the appellant would be unable to obtain relief from Nedbank in the event of the latter acting in breach of its contract with the appellant. It is trite law that an applicant for a final interdict must establish that there is no other satisfactory remedy available to him. (See Erasmus, Superior Court Practice E 8 - 7 and the authorities there cited.) Nor was any other reason advanced why, in the absence of fraud, the Court a *quo* should have been required to interfere with the freedom of the bank to decide for itself whether to honour its credit or not. (See the cases previously cited with regard to the undesirability of a court restraining a bank from honouring its credits, save in the most exceptional circumstances.)

It follows that in my view the Court a *quo* was correct in dismissing the application with costs.

No order was made by the Court a quo with regard to Perfel's counter-application in which an order was sought directing Nedbank to make payment in terms of the letter of credit. The application consisted merely of a notice of motion and no separate affidavits were filed in support of it. There is, however, no cross-appeal and it is unnecessary to have to consider the matter further.

I turn finally to the petition. The affidavit which the appellant seeks to have admitted is that of a Mr Jose Correia Esteves who describes himself as a former joint managing director, together with Mr Pereira, of Perfel. According to the petition Mr Esteves had certain discussions in 1994 with Mr Hompes (who is the sole member of the appellant) which culminated in Mr Esteves divulging the information set forth in his affidavit which was deposed to on 30 September 1994 in Johannesburg.

In summary, the allegations made by Mr Esteves are the

following. He says that as a result of "differences" between himself and Mr Pereira he resigned from Perfel in June 1994, ie after the events relating to the proceedings which form the subject matter of the appeal, and that it was he who represented Perfel in giving instructions to Perfel's attorneys of record. He says that in consequence of a delay in production, the fabric ordered by the appellant was only loaded into a container at Perfel's premises a few days after 8 May 1992 and probably on 11 May 1992. Perfel's forwarding agent then took charge of the container and in due course furnished Perfel with "the original bill of lading" for onward transmission to its bankers. Mr Esteves says that he and Mr Pereira then noted that the date reflected on the bill as the date of issue was after 8 May 1992 and as this did not conform with the requirements of the letter of credit, he, Esteves, personally instructed the forwarding agents to alter the date to read "8 May 1992". In an answering affidavit filed on behalf of

Perfel, it is admitted that Mr Esteves played a major role in the preparation of Perfel's answering affidavits filed in the main application and that the subsequent departure of Mr Esteves from Perfel had been "less than amicable". For the rest, the allegations made by Mr Esteves are strenuously denied.

In terms of s 22 of the Supreme Court Act of 1959 this Court is afforded a wide power to admit further evidence. Nonetheless it has been established in a series of decisions that in the interests of finality further evidence will be allowed only in special circumstances. The formulation of the test to be applied which is perhaps most often quoted is that of Holmes JA in S v De Jager 1965 (2) SA 612 (A) at 613 C - D:

> "(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
>
> (b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

While in the past the requirements have not always been formulated in the same words, the underlying approach to the inquiry has been essentially the same. In Staatspresident en 'n Ander v Lefuo 1990 (2) SA 679 (A), for example, Vivier JA at 692 B formulated the requirements as follows:

> "Eerstens moet die applikant 'n redelik aanvaarbare verduideliking verskaf waarom die getuienis nie by die verhoor van die saak gelei is nie; tweedens moet die betrokke getuienis van wesenlike belang in die saak wees en derdens moet dit waarskynlik die uitslag van die saak kan verander ..."

The apparent difference between the second requirement in Holmes JA's formulation and the third requirement in that of Vivier JA is of no real consequence. (The other two are essentially the same.) Whether there is a prima facie likelihood of the evidence being the truth or whether it is probable that the evidence will result in the outcome being changed, amounts in effect to the same inquiry. If there is no prima facie likelihood

of the evidence being the truth it must follow that it is improbable that the evidence will cause the result to be altered.

In my view, the requirement, just mentioned has not been met in the present case. My reasons are the following.

(1) Mr Esteves is a person who on his own admission is prepared to give false instructions to his attorney with the object of misleading the court. He did this for no better reason than to ensure that the company of which he was then a joint managing director received payment for a consignment of fabric which was being exported.

(2) Between the time of giving those instructions and the time of deposing to the affidavit in question Mr Esteves left the employment of Perfel as a result of what he described as "differences" between himself and the remaining managing director, Mr Pereira. In addition

to alleging that Mr Pereira was a party to a fraudulent tampering with the date of the bills of lading, Mr Esteves found it necessary, although irrelevant to the present proceedings, to go further and suggest in his affidavit that Mr Pereira had fraudulently sent the appellant inferior quality fabric. The possibility of Mr Esteves acting out of vindictiveness would seem in the circumstances to be a real one. (3) The allegation that the goods were loaded into a container at Perfel's premises a few days after 8 May 1992 and probably on 11 May 1992 is inconsistent with a photocopy of a customs document annexed to the papers which was issued at Leixoes and which bears a customs stamp as well as a stamp reflecting both a serial number and the date, 8 May 1992. Mr Esteves makes no reference to this document in his affidavit and counsel for the appellant found himself

obliged to suggest that it must be a forgery. No attempt, however, has been made to explain when, how and by whom it was forged.

(4) It appears from the affidavit of Perfel's attorney filed in response to the petition that Perfel's premises are some 30 kilometres from Leixoes which in turn is about 350 kilometres from Lisbon. She makes the point which is not without merit that had the goods left Perfel's premises on 11 May 1992 it is improbable that they could have been received at Leixoes, taken through customs, railed to Lisbon and loaded on board the Nuova Europa by 12 May 1992.

There are no other special circumstances which would justify the granting of the petition notwithstanding its failure to comply with the requirement considered above.

In the result the petition is refused and the appeal is dismissed

with costs, including the costs of the petition.

D G SCOTT

CORBETT CJ)
HEFER JA) - CONCUR
NESTADT JA)
HARMS JA)