THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 119/05
Reportable

In the matter between :

D & H PIPING SYSTEMS (PTY) LIMITED
APPELLANT

and

TRANS HEX GROUP LIMITED AND ANOTHER
RESPONDENTS

CORAM : HOWIE P, MTHIYANE, CLOETE JJA, MAYA *et* CACHALIA AJJA

HEARD : 27 FEBRUARY 2006

DELIVERED : 24 MARCH 2006

Summary: Contract – (1) purchase and sale: The concept of a 'manufacturing seller' liable for consequential loss arising from a latent defect in the article sold, defined and expertise held irrelevant; (2) incorporation of standard terms and conditions by a course of dealing on the basis quasi-mutual assent, discussed.

Neutral citation: This judgment may be referred to as *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* [2006] SCA 31 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The present appeal concerns primarily the liability of a manufacturing seller for consequential loss arising out of a latent defect in goods sold by him to a customer.

[2] The appellant manufactures concrete products including concrete pipes. It has for more than thirty years purchased dolomitic aggregate and sand from the respondent[1] for this purpose. The respondent's business is primarily the manufacture of lime products for the building industry. Aggregate and sand are also produced which are of no use to the respondent for its principal activity and these are screened out, stockpiled and sold to customers, such as the appellant. During the second half of 1998 the appellant purchased aggregate and sand from the respondent which it used to manufacture concrete sewerage pipes for one of its customers, a company in the Stocks group. The appellant alleges that the aggregate and sand purchased by it was latently defective, in consequence of which part of the pipes failed with result that it incurred liability of more than R13 million to its customer. The appellant claims this amount from the respondent.

[3] Certain issues were by consent separated out for decision and the court *a quo* (Van Zyl J) made the appropriate order in terms of rule 33(4). The learned judge then found for the respondent on these issues and refused leave to appeal. The appeal is accordingly with the leave of this court.

[4] It is necessary to set out in some detail the contractual relationship between the parties and the responsibilities of the appellant's three employees called to testify on its behalf. Mr Lombard was the works manager of the appellant. He was duly authorised to contract on its behalf with the respondent for the supply of aggregate and sand. He said that his practice was to contact a representative of the respondent

[1] The appellant sued two defendants in the court below but withdrew its claim against the first defendant during those proceedings. It is therefore not clear to me why the first defendant has been cited as the first respondent on appeal. I shall simply refer to the second respondent, Trans Hex Mining Limited who was the second defendant, as the respondent.

and agree a price for the supply of these products to the appellant for the ensuing six months. He would then send what was termed a 'bulk order', in which quantities were not specified, to the respondent. The bulk order in question, dated 3 July 1998, read:

'BULK ORDER FOR PERIOD JULY TO DEC 1995

DOLOMITIC SAND D-6
DOLOMITIC STONE 6-20
AS PER AGREED GRADING ENVELOPE'.

None of this evidence was challenged.

[5] After the order had been placed by Lombard the appellant's storeman, Mr Gordon, would from time to time telephone Ms Cynthia Hugo, the sales clerk of the respondent, and order specific quantities of the products referred to in the bulk order to be delivered to the appellant. On each occasion when aggregate and sand arrived at the appellant's factory, Gordon was presented with the respondent's delivery note. Gordon in turn filled in a goods received note and forwarded this document together with the respondent's delivery note to Ms Rust, the appellant's accounts clerk.

[6] Ms Rust would, in addition to the documents sent to her by Gordon, also receive invoices from the respondent. Ms Rust's function was to check that the information on the invoices accorded with the information on the goods received notes sent to her by Gordon and capture this information on her computer. She then waited for the respondent's monthly statement, reconciled what appeared there with the record on the computer, prepared a draft cheque for signature by Lombard and forwarded the cheque, the reconciliation and the respondent's statement to him. Neither the respondent's delivery notes nor its invoices were part of this bundle of documents.

[7] The correct analysis of the contractual relationship between the parties is this. During the six month period referred to in the bulk order, there was a *pactum de contrahendo*, ie an agreement to make a contract in the future, in existence. The respondent undertook to the appellant that it would supply such quantities of aggregate and sand, of the sizes specified at the price agreed, as the appellant

might order during the six month period.[2] All that remained for contracts of purchase and sale to come into existence, was for the amounts of aggregate and sand to be determined. That was done on each occasion when the appellant's storeman, Gordon, requested delivery of specified quantities by telephoning the respondent's sales clerk, Ms Hugo.

[8] The appeal raises the following issues:

(i) Whether it was a term of the contracts of purchase and sale between the parties that the respondent undertook to supply to the appellant dolomitic aggregate and sand for use in the manufacture of concrete piping.
(ii) Whether the respondent was a manufacturing seller of the aggregate and sand and therefore liable to the appellant for any consequential loss that the appellant might prove it suffered in consequence of alleged latent defects in the goods sold; or whether the respondent's general terms and conditions, which contain exclusion clauses in wide terms, formed part of the contracts of purchase and sale concluded by the parties.
(iii) Whether the parties tacitly agreed to exclude liability on the part of the respondent for consequential loss.

The appellant has sued in contract and claimed contractual damages. The basis of the liability of a manufacturing seller has not been authoritatively determined.[3] It was not argued in this appeal, it is not necessary for a determination of the issues raised and I shall accordingly refrain from expressing any view on the question.

[9] The first issue can be disposed of briefly. The appellant originally contended in its particulars of claim for an express, alternatively an implied, alternatively a tacit term that:

[2] See *Hirschowitz v Moolman and others* 1985 (3) SA 739 (A) at 765I-766D.
[3] See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 686F-687B.

'The defendant would supply to the plaintiff dolomitic aggregate and sand for use in the manufacture of concrete piping with a sacrificial layer of calcium aluminate cement.'

The allegation that the term was express, was abandoned in the court below. During the hearing before this court counsel representing the appellant sought an amendment to the formulation of the term to delete the words 'with a sacrificial layer of calcium aluminate cement' and a consequential amendment to the notice of appeal. Counsel representing the respondent found himself unable to contend that any prejudice to his client would result if the amendments were granted. There can be no doubt that in terms of the contractual arrangement between the parties the respondent expressly undertook to supply dolomitic aggregrate and sand to the plaintiff. Mr Conradie, the production manager of the respondent, said in his evidence in chief that it was generally known that the appellant manufactured concrete pipes and that the respondent knew this at the time relevant to the action. He in fact went further and said that he had known that the appellant manufactured concrete sewerage pipes. That disposes of the first issue. The amendments took up an insignificant amount of court time and no order as to costs in this regard is warranted.

[10] I now propose dealing with the question whether the respondent's general terms and conditions governed the contractual relationship between the parties. Those terms and conditions provided inter alia:

'7. Trans Hex [the respondent] does not give any warranty or guarantee or make any representations whatsoever in respect of the goods or the fitness of the goods or any part of it for any particular purpose whether or not that purpose is known to Trans Hex or accept any liability for any defect (latent or patent) in the goods or any part of it. Trans Hex does not give any warranty that any specifications, weights, dimensions or any technical information relating to the goods that may be given by Trans Hex to the purchaser is correct. In no event shall Trans Hex's liability exceed the liability to replace defective or wrongly delivered goods or the value thereof. All warranties or guarantees otherwise implied by common law or claims by the purchaser are hereby expressly excluded.

8. Trans Hex shall be exempt by the purchaser from and shall not be liable under any circumstances whatsoever for any direct, indirect or consequential damages of any nature whatsoever or any loss of profit or market share or any special damages of any nature whatsoever and whether in the contemplation of the parties or not, which the purchaser may suffer as a result of any breach by Trans Hex of its obligations under the contract or from the use or application of the goods.'

I pause to remark that the evidence did not establish for how long these clauses formed part of the respondent's general terms and conditions or even for how long

the respondent had general terms and conditions.

[11] The respondent's case was pleaded as follows: 7

'The general terms and conditions of sale were printed on the reverse of the Second Defendant's delivery notes and invoices. The documents in question will be discovered by the Defendants. The front of the delivery notes and invoices stated the following "*for branch addresses and conditions see reverse side*". As a matter of consistent practice the Plaintiff was provided with delivery notes and invoices containing the general terms and conditions of sale on the reverse thereof. The general terms and conditions of sale were incorporated in each agreement relating to the supply of dolomitic aggregate and sand. The Plaintiff was aware, **alternatively** is deemed to have been aware, that the supply of dolomitic aggregate and sand was subject to such general terms and conditions.'

The onus was on the appellant to prove that the general terms and conditions did not govern their relationship: *Topaz Kitchens (Pty) Limited v Naboom Spa (Edms) Beperk*;[4] *Stocks & Stocks (Pty) Limited v T J Daly & Sons (Pty) Limited*;[5] *Union Spinning Mills (Pty) Limited v Paltex Dye House (Pty) Limited and another*.[6]

[12] No-one on the appellant's behalf expressly assented to the incorporation of the respondent's general terms and conditions. The time for this to be done, was when the oral agreement which preceded the bulk order was concluded by Lombard, who had authority to agree to them; and his evidence, which was accepted by the court *a quo* and not challenged on appeal, was that he was unaware of their existence before this litigation.

[13] Nor can there be any question of the appellant's other two employees tacitly consenting to the respondent's general terms and conditions. The individual orders placed by Gordon were made pursuant to the oral agreement confirmed (in part) in the bulk order by Lombard. Gordon merely had to fix the quantities to be supplied from time to time and acknowledge receipt of what was delivered. The delivery notes received by Gordon and sent by him to Ms Rust and the invoices received by Ms Rust from the respondent did have the words pleaded by the respondent at the foot of the front page; but only the invoices had the respondent's general terms and conditions printed on the back. Gordon said that he never saw the writing at the foot of the delivery notes and he was believed by the court *a quo*. It was nevertheless submitted by the respondent's counsel that he probably did. The evidence of Ms

[4] 1976 (3) SA 470 (A) at 474A-C.
[5] 1979 (3) SA 754 (A) at 762E-767C.
[6] 2002 (4) SA 408 (SCA) para 6 at 441A.

Rust was that she must have been aware that something was printed on the back of the invoices but she paid no attention to what this might be; and she did not realise that the printing set out contractual terms. She was unable to say whether she had noticed the reference to the terms and conditions at the foot of the front page of the invoices. But even assuming that both Gordon and Ms Rust knew that the respondent had standard terms and conditions, this takes the matter no further for the respondent. Lombard's evidence that neither Gordon nor Ms Rust had authority to bind the appellant to any terms and conditions went unchallenged. If they knew of the existence of the respondent's terms and conditions, such knowledge cannot accordingly be attributed to the appellant.

[14] No ostensible authority on the part of Gordon or Ms Rust was relied on and no estoppel was raised. The question then arises whether the respondent was reasonably entitled to assume that the appellant assented to the respondent's general terms and conditions. The answer depends upon whether in all the circumstances the respondent did what was reasonably sufficient to give the appellant notice of them ─ an objective test: *Durban's Water Wonderland (Pty) Ltd v Botha and another*.[7]

[15] Neither a delivery note nor an invoice is a contractual document ie the type of document in which the recipient would expect to find terms and conditions intended to form part of the contract between the sender of the document and the recipient.[8] Both the delivery notes and the invoices received by the appellant's employees reflected performance, or part performance, of a contract already concluded. Neither constituted an offer to do business. They would therefore not have required the attention of a person authorised by the appellant to negotiate and agree to the terms of any contract with the respondent. The respondent could accordingly not reasonably have expected that they would come to the attention of such a person, as

[7]1999 (1) SA 982 (SCA) 991G-992A; and see also *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA) para 22.

[8] *Union Spinning Mills (Pty) Limited v Paltex Dye House (Pty) Limited* (above n 6) para 6 at 411B; *Micor Shipping (Pty) Limited v Treger Golf and Sports (Pty) Limited and another* 1977 (2) SA 709 (W) at 716A-B.

opposed to the person(s) who would acknowledge receipt of goods delivered or process invoices for payment; and this is particularly so both because the respondent must have known that the appellant is a large company, with different employees authorised to perform different functions on its behalf and also because, to the knowledge of the respondent, the terms of its contractual relationship with the appellant had already been negotiated with Lombard. Once it is established that no person authorised to bind the appellant to the respondent's general terms and conditions ever became aware of them, or could reasonably have been expected to do so, it does not avail the respondent to point to the number of occasions on which such documents were sent to the appellant or the period of time over which this was done.[9]

[16] The respondent's counsel relied in argument on the English case of *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Export)*.[10] The facts in that matter were the following. The plaintiff was a freight forwarding agent. The defendant was an exporter of various goods. The defendant in a counterclaim sued for the loss of goods which the plaintiff had agreed to export. The plaintiff pleaded that the defendant's loss was covered by certain clauses in the standard conditions of the Institute of Freight Forwarders (IFF), which the plaintiff contended were incorporated into the contract between the parties. The test applied by the court was whether the plaintiff had given reasonable notice of the terms in question. The court held that it had, inter alia because eleven invoices had been sent to the defendant on previous occasions, all of which referred to the IFF terms.

[17] Taylor LJ said:[11]

'[I]t is not necessary that notice of the conditions should be contained in a contractual document where there has been a course of dealing.'

[9] Cf *Dyer v Melrose Steam Laundry* 1912 TPD 164 at 167-8; *R v Thompson* 1926 OPD 141 at 143; *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C) at 723-4; the *Micor Shipping* case (above, n 8) at 717H; *Bok Clothing Manufacturers (Pty) Ltd and another v Lady Land (Pty) Ltd (under provisional judicial management)* 1982 (2) SA 565 (C) at 569E-57C; Christie *The Law of Contract* 4 ed p 207.

[10] [1988] 2 Lloyd's LR 427 (CA).

[11] At 433 col 2.

In the absence of actual knowledge of conditions this statement does not reflect the South African law, which is as stated in para [15] above.

[18] The *Circle Freight* case is also distinguishable on the facts on three bases. The first is that in that matter the trial judge had found,[12] and the Court of Appeal accepted,[13] that the defendant's managing director Mr Zacaria knew that freight forwarders (such as the plaintiff) normally dealt on standard terms. In the matter before this court there was no cross-examination whatever directed at Lombard to establish that he knew that there were usual terms and conditions for the type of business carried on by the respondent. The second point of distinction appears from the judgment of Bingham LJ[14] as follows:

'[H]e [ie Mr Zacaria] must have seen some writing on the invoice.'

In the present matter, the person authorised to contract on behalf of the appellant, ie Lombard, did not even see the invoices or the delivery notes. The third point of distinction is that the plaintiff in the English case, unlike the present appellant, was a small company which employed only four people.[15]

[19] I therefore conclude that the court *a quo* was wrong in finding that the respondent's general terms and conditions formed part of the contracts of purchase and sale concluded by the parties.

[20] The next question is whether the respondent manufactured the aggregate and sand which it sold to the appellant. The appellant alleged in its particulars of claim that the respondent 'produced' the aggregate and sand and in the alternative, that the respondent 'publicly held itself out to be an expert seller of the dolomitic aggregate and sand for use in concrete products'. The appellant abandoned reliance on the second allegation in the court *a quo*. So far as the first allegation is concerned, although 'produce' is a wider concept than 'manufacture',[16] it is clear from

[12] See 429 col 2.

[13] Taylor LJ at 433 col 2; Bingham LJ at 435 col 2 – 436 col 1.

[14] At 435 col 1.

[15] See 429 col 1.

[16] *Berman Brothers (Pty) Limited v Sodastream Limited and another* 1986 (3) SA 209 (A) at 244A-B: '"Produce" is a wider concept than "manufacture". It would include the fabrication or manufacture of goods, but it would also include, for example, the raising of animal products and the growing of agricultural products (operations which would not fall under the description of "manufacture") ....'

the approach followed in the court *a quo* and the argument advanced in this court that the appellant seeks to hold the respondent liable as a manufacturing seller. Two questions arise:

(i) Does liability attach to a manufacturing seller without more for consequential damages caused by a latent defect in the article sold? If so:
(ii) Did the respondent manufacture the aggregate and sand it sold to the appellant?

[21] It would be convenient before considering these questions to set out the process which was followed by the appellant at the relevant time at its factory. Dolomitic rock mined from a quarry was delivered by trucks where it was tipped into a bin. The rock in the bin was pushed into a crushing machine which crushed the larger rocks. Once the rock had been crushed it was fed onto a conveyor belt. The conveyor belt transported the rock to the top of a screen house. At the top of the screen house were two vibrating screen tables, each of which was fitted with two different size screens. The one set of screens had a coarse screen with holes in it that permitted stones 20 millimetres or less to pass through, and a fine screen situated below the coarse screen with holes in it that permitted stones of six millimetres or less to pass through. The other set of screens had a coarse screen that permitted stones of less than 16 millimetres to pass through and a fine screen that permitted stones six millimetres or less to pass through.

[22] Stones that were larger than 20 millimetres or 16 millimetres were transported by a conveyor belt to a stockpile and were later used to make lime. Stones that were six millimetres or less were designated as crusher dust and transported via a conveyor belt to a stockpile; it was from this stockpile that the respondent supplied the appellant with the ‘dolomitic sand D-6’ referred to in the bulk order. (The ‘D’ obviously refers to dust and the ‘6’ to 6mm.) Stones that were between six and 20 millimetres and between six and 15 millimetres were stockpiled separately. It was from these two stockpiles that the respondent supplied the appellant with the ‘dolomitic stone 6-20’ referred to in the bulk order.

[23] I turn to consider the concept of a manufacturing seller. The learned judge in

the court *a quo* held that the production of aggregate and sand by the respondent 'could not have required any special skill or expertise such as that envisaged by Pothier' in para 214 of his work on sale (quoted in para [25] below). The respondent's counsel submitted (I quote from the heads of argument filed in this court):

'The aggregate and sand is not the result of any process of manufacture of these products involving a degree of expertise.'
The question which arises is whether the passage in Pothier must be interpreted as requiring a manufacturing seller to have these attributes.

[24] Voet in his chapter on the Edict of the Aediles, redhibition and the *actio quanti minoris*, says:[17]

'A seller however who was aware of a defect is held liable in addition to make good the whole loss which has been inflicted upon the purchaser as a result of the defective things; though one who was ignorant is not put under obligation for this unless he was a craftsman.'

The word translated by Gane as 'craftsman' was *artifex* in the original text and it implies skill.[18] It is a combination of *ars* (skill) and *facere* (to make) and may be contrasted with *opifex*, a workman, which is a combination of *opus* (work) and *facere*.

[25] Pothier in para 214 of his treatise on sale to which the learned judge *a quo* referred is wider than Voet in two respects: he includes the *artifex*, but adds a merchant who sells articles of his own manufacture as well as a merchant who sells articles of commerce which it is his business to supply, as being persons liable for consequential loss. Pothier's para 214 was translated by Jones J (with whom

[17] *Ad Pandectas* 21.1.10, Gane's translation vol 3 p 655.

[18] Cf Voet 19.2.14 Gane's translation vol 3 p 419 under the heading 'Damages for defect when lessor a craftsman, or knew of defect':
"Fourthly and finally the object [of the *actio conducti*] is the making good of reparation for the whole of the loss which the lessee has suffered from a defect in the property hired. As often as the property let is concerned with craftsmanship, and the lessor is a craftsman [*artifex*], this applies whether the lessor knew or did not know of such a defect; inasmuch as in such a case he certainly ought to have known things which were part of his craft. Here belongs what the jurist says of defective jars from which wine has flowed away being let out, namely that the ignorance of the lessor was by no means excused. But if a thing has been let out in regard to which no profession of craft is usually concerned, as when it was a glade for pasturage where ill weeds were growing which caused the dying off or worsening of the lessee's animals, the lessor can only be sued for damages if he knew that the defect existed. If he did not know he is relieved to this extent, that he is freed by a remission of rent."

Centlivres J agreed) in *Young's Provision Stores (Pty) Limited v Van Ryneveld*[19] as follows:

'[T]here is one case, in which the seller, even if he is absolutely ignorant of the defect in the thing sold, is nevertheless liable to a reparation of the wrong which the defect caused the buyer in his other goods; this is the case where the seller is an artificer, or a merchant who sells articles of his own make, or articles of commerce which it is his business to supply[20]. The artificer or tradesman is liable to a reparation of all the damage, which the buyer suffers by a defect in the thing sold in making a use of the thing for which it was destined, even if such artificer or tradesman were ignorant of the defect. For example, if a cooper or a dealer in casks sells me some casks, and in consequence of defects in any of the casks the wine which I put in them is lost, he will be liable to me for the price of the wine which I have lost. Similarly if the wood of the cask, by its bad quality, communicates a bad odour to the wine, the custom is in such a case that the seller is condemned to take the damaged wine for his own account and to pay me for it according to the price of that which remains undamaged.

The reason is that the artificer by the profession of his art *spondet peritiam artis*. He renders himself in favour of those who contract with him responsible for the goodness of his wares for the use to which they are naturally destined. His want of skill or want of knowledge in everything that concerns his art is imported to him as a fault, since no person ought to publicly profess an art if he does not possess all the knowledge necessary for the proper exercise: want of skill is attributed to him as a fault (Dig. 50.17.132). It is the same in regard to the merchant whether he makes or does not make the article which he sells. By the public profession which he makes of his trade he renders himself responsible for the goodness of the merchandise which he has to deliver for the use to which it is destined. If he is the manufacturer, he ought to employ for the manufacture none but good workmen for whom he is responsible. If he is not the manufacturer he ought to expose for sale none but good articles; he ought to have knowledge of his wares and ought to sell none but good.'

[26] Pothier's third category, that of the merchant seller, was considered by this court in *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha and another*.[21] Holmes JA said:[22]

'Reviewing all the foregoing, it seems to me that it can safely be said that, as a general proposition, sec.214 of Pothier on *Sale*, in so far as it deals with the liability of a merchant seller, is recognised as being part of our law'

but limited the field of application of the rule by saying:[23]

[19] 1936 CPD 87 at 91-2.

[20] The three categories in the original French (taken from Pothier's *Oeuvres: Les Traités du Droit Français* compiled by Dupin) are: 'c'est le cas auquel le vendeur est un ouvrier, ou un marchand qui vend des ouvrages de son art, ou du commerce dont il fait profession'. Cushing translates this passage as 'and this is the case, where the seller is an artisan, or a tradesman who sells the manufactures of his own trade, or of the kind of dealing of which he makes a business.' (That Pothier has the *artifex* in mind as constituting the first category, appears from the second part of para 214 where the reasons for holding such a person liable, are set out.)

[21] 1964 (3) SA 561 (A).

[22] At 571E.

[23] At 571G-H.

'In my opinion the preponderant judicial view, and which this Court should now approve, is that liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold.'

[27] The conclusion reached in the *Kroonstad* case was questioned in *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk*[24] but the correctness of the decision was not debated before us, nor is it necessary to consider it for the purposes of deciding the present appeal. What is of importance, however, is the statement in the *Langeberg* case[25] repeated by this court in *Graf v Buechel*[26] that, where a rule of law is clear and in general terms, it is unnecessary to enquire in each instance whether the considerations which motivated the rule are present. Pothier in the first part of para 214 states the rule in regard to the three categories of persons and then goes on in the second part to give the reason why each category of person he identifies, is liable. The approach of the court *a quo* and of the respondent's counsel elevates the reasons for the rule (want of skill or want of knowledge) to part of the rule itself, which is not correct.

[28] In three decisions of this court Pothier's second category has been accepted without the qualification that the manufacturing seller has to possess, much less publicly profess, attributes of skill and expert knowledge in relation to the goods he sells. In the *Holmdene Brickworks* case[27] Corbett JA said:

'The legal foundation of respondent's claim is the principle that a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls into one of the abovementioned categories, the law irrebuttably attaches this liability to him, unless he has expressly or impliedly contracted out of it . . . . The liability is additional to, and different from, the liability to redhibitorian relief which is incurred by any seller of goods found to contain a latent defect . . . .'

In *Sentrachem Bpk v Wenhold*[28] F H Grosskopf JA said:[29]

'Die Hof *a quo* het bevind dat die eiser hom ook op 'n ander skuldoorsaak kon verlaat het, nl op die

[24] 1996 (2) SA 565 (A), Hefer JA at 568J and Schutz JA at 570ff.
[25] At 570I and 571D-E.
[26] 2003 (4) SA 378 (A) para 15.
[27] Above n 3,at 682 *in fine* – 683C.
[28] 1995 (4) SA 312 (A).
[29] At 318H-I.

basis dat die verweerder, as handelaar wat openlik voorgegee het dat hy oor bedrewendheid en deskundige kennis met betrekking tot die produk beskik, regtens aanspreeklik is vir enige gevolgskade veroorsaak deur 'n verborge gebrek in die produk wat hy verkoop het . . . . Die verweerder kon natuurlik ook vir gevolgskade aangespreek word op grond van die feit dat hy die vervaardiger was van die Classic [the product sold to the plaintiff by the defendant] wat hy verkoop het.'

In *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and another*[30] Brand JA said:[31]

'It will be remembered that Twee Jonge Gezellen relies, as an alternative basis for its damages claim, on the principle of our law of contract that merchants who sell goods of their own manufacture or goods in relation to which they publicly profess to have attributes of skill and expert knowledge, are liable for consequential damages caused to the purchaser by reason of a latent defect in the goods ….'

[29] There does not appear to be any academic criticism of the rule as formulated by this court. On the contrary, academic authors have accepted it without adverse comment.[32]

[30] The liability of a manufacturing seller as stated by this court is clear. The addition of qualifications requiring such a person to have some degree of skill or expertise would lead to confusion and uncertainty and there is no warrant for it. The respondent's counsel submitted that such a conclusion would expose manufacturing sellers to enormous risk. The answer is that they are free to contract out of it.

[31] I therefore conclude that a vendor who sells goods of his own manufacture is liable for consequential loss caused by a latent defect in the goods sold even if he is ignorant of the latent defect, irrespective of whether he is skilled in the manufacture of such goods and irrespective of whether he publicly professes skill or expertise in that regard.

[32] The next question is whether the respondent was a 'manufacturer' of the

[30] 2005 (6) SA 1 (SCA).

[31] Para 56.

[32] See eg De Wet & Van Wyk *Kontraktereg en Handelsreg* 5 ed p 341; Gibson *South African Mercantile and Company Law* 8 ed pp 140 and 143; Lotz in Zimmerman & Visser (eds), *Southern Cross, Civil Law and Common Law in South Africa* p 379; Mackeurtan's *Sale of Goods in South Africa* 5 ed by Hackwill para 11.4 p 162; McQuoid-Mason in McQuoid-Mason (ed) *Consumer Law in South Africa* p 89; Wille's *Principles of South African Law* 8 ed by Hutchison, Van Heerden, Visser & Van der Merwe p 538.

aggregate and sand it sold to the plaintiff. There appear to be no decided cases on the point in the context of liability for consequential loss. It is not necessary or desirable to attempt a comprehensive definition. Some guidance is to be found in income tax cases which deal with the phrase 'process of manufacture' which occurs in the Income Tax Act.[33]

[33] In *Secretary for Inland Revenue v Hersamar (Pty) Limited*[34] Williamson JA said:[35]

'Some judicial *dicta* seem to emphasise "a change of the character of the raw materials" out of which something is made. Others again state that the "difference" must be "substantial" or "essential"'

and went on to say:[36]

'But it must be recognised that the term "essentially" obviously imports an element of degree into the determination of the sufficiency of the change that must be effected for a process to be one of "manufacture". As a result of being processed, a change may take place in regard to the nature or form or shape or utility, etc., of the previous article or material or substance. There can be no fixed criteria as to when any such change can be said to have effected an essential difference. It is a matter to be decided on the particular facts of the case under consideration. The most exhaustive examination of imaginary examples of change really does not carry the matter further.'

The learned judge did however refer[37] to two examples taken from the judgment of Van Winsen J in *ITC* 1052:[38]

'The one is that of the nail made out of wire. The physical make-up or nature of the wire is in no way altered; merely the shape or form of a small segment is altered by being flattened on one end and sharpened on the other, but, though it is the same piece of steel wire, it is clearly a different thing that has eventuated – a thing with a definitely different utility and object. It can be said therefore to be essentially different. The freezing of water into blocks of ice for sale or for commercial or industrial use is also the making of an article essentially different.'

[34] In *Secretary for Inland Revenue v Safranmark (Pty) Ltd*[39] Galgut AJA[40] quoted with approval the following remarks of Miller J in *ITC* 1247:[41]

'That the ordinary connotation of the term "process of manufacture" is an action or series of actions directed to the production of an object or thing which is different from the materials or components which went into its making, appears to have been generally accepted. The emphasis has been laid on the difference between the original material and the finished product.

[33] Act 58 of 1962 s 11.
[34] 1967 (3) SA 177 (A).
[35] At 187B-C.
[36] At 187C-E.
[37] At 182F-G.
[38] 26 SATC 253 at 255-6.
[39] 1982 (1) SA 113 (A).
[40] At 122G – *in fine*.
[41] 38 SATC 27 at 31 and 32.

. . .

Invariably, in cases in which plant or machinery has been found to have been used in a process of manufacture, the result of such process has been the creation of a substance or an article which, although it might have contained all the various components from which it evolved in the process of manufacture, became upon completion an essentially different entity in its own right.'

[35] I turn to the facts of the present matter. The respondent did not simply dig up sand or pebbles from a riverbed. The processes used by the respondent at its factory changed the nature of the rock which arrived from the quarry from uneven lumps of stone into (amongst other things) stockpiles of dust and sand. The dust and sand had a commercial utility which the raw material did not, as is evidenced by the fact that there was a market for these products: apart from the appellant, customers who purchased them included Frazer Fyfe and Cape Concrete who manufactured concrete products, and Kynoch who manufactured fertilizer from them. Because the aggregate and sand were separated into different stockpiles of consistent size (D-6 millimetres; 6-15 millimetres and 6-25 millimetres) customers of the respondent could select and specify the size suitable for their requirements; and this is precisely what the appellant did.

[36] It was submitted on behalf of the respondent that it manufactured lime products (as held by this court in *Secretary for Inland Revenue v Cape Lime Co Limited*[42] — it was the respondent in that matter) and that because the aggregate and sand sold to the appellant were merely by-products of this process, the appellant did not manufacture either. It is true that the aggregate and sand in question were screened out of the lime production process. But it does not follow that because a process is designed to manufacture one product, another product which is produced incidentally as part of the process is not also manufactured. It is the result, not the intention of the producer or the primary purpose of the process, which is relevant; and here, as I have said, the result of the respondent's process is the production not only of lime but also of sand and aggregate which are different in nature to the original raw material from which they were produced and which have a commercial

[42] 1967 (4) SA 226 (A).

utility in consequence of the process to which they were subjected.

[37] There is one final matter which must be dealt with. The respondent's counsel submitted — for the first time on appeal — that the respondent should not be held liable for consequential loss as a manufacturer because such liability was excluded either tacitly or on the basis referred to by Macdonald ACJ in *J K Jackson (Pvt) Limited v Salisbury Family Health Studios (Pvt) Limited*,[43] namely:

'The second class comprises those cases where the exclusion arises not from the contract itself as alleged in the declaration but from the facts of the case on which the defendant relies. Those facts would properly comprise the terms, the subject matter and the nature of the contract: the circumstances surrounding its formation, the position and means of knowledge of the parties, the nature of the defect and any "other facts relevant to the question of exclusion".'

The learned Acting Chief Justice went on to say:[44]

'In the circumstances of this case, the parties could not, in my judgment, have intended the contract to be subject either to the normal warranty against latent defects or the manufacturer's or merchant's warranty. Both these warranties were excluded tacitly as well as by necessary implication arising out of the surrounding circumstances.'

It must be accepted, in view of the passage in the *Holmdene Brickworks* case quoted in para [28] above, that the liability which attaches to a manufacturing seller can be excluded expressly or tacitly. But I have, with respect, difficulty with the phrase 'as well as by necessary implication arising out of the surrounding circumstances' in the passage just quoted from the judgment of Macdonald ACJ. Either the plaintiff was a manufacturing seller or he was not; and if he was, then, as appears from the same passage in the *Holmdene Bricks* case, the law irrebuttably attaches liability to him or her for consequential loss flowing from a latent defect unless he or she has contracted out of it. The 'surrounding circumstances' to which Macdonald ACJ refers are relevant only in deciding whether or not there has been a tacit exclusion.

[38] It is not open to the respondent to contend for a tacit exclusion in this case. Despite the argument to the contrary advanced by the respondent's counsel, there is an obvious difference between a denial that the respondent was a merchant seller, which was pleaded, and the assertion that if it was, liability was tacitly excluded — which was not. Nor was the issue canvassed in evidence. It is too late to raise it in argument before this court. As Christie says:[45]

'Because the surrounding circumstances have to be investigated it is difficult to see how the issue of a tacit term could ever be raised successfully for the first time on appeal.'

[43] 1974 (2) SA 619 (R, AD) at 623E-G.
[44] At 623G.
[45] In the work referred to in n 9 above, p 198.

[39] To sum up: It is clear that the respondent agreed to supply dolomitic aggregate and sand to the appellant for use by the appellant in the manufacture of concrete piping. The respondent was a manufacturing seller and its liability as such to the appellant for consequential loss rising out of any latent defect(s) in the goods sold was not excluded by the provisions of the respondent's general terms and conditions, because they did not form part of the contracts between the parties; and the respondent cannot now contend for a tacit exclusion of such liability. The appeal must accordingly succeed, with costs. The appellant's counsel asked in this event for the costs of the hearing to date in the court *a quo* to be awarded to his client. The respondent's counsel made no submission in this regard but I did not understand him to have conceded liability for such costs. The appellant has a number of hurdles still to overcome before the relief it seeks can be awarded to it. It may not succeed in recovering anything at all. I cannot conceive of any prejudice to either party if the costs of the hearing on the preliminary issues in the court below were to be made costs in the cause.

[40] The following order is made:

1. The appeal succeeds, with costs, including the costs of two counsel.
2. The order of the court *a quo* is set aside and the following order is substituted:

'(a) It is declared

(i) that it was a term of the contracts of purchase and sale concluded by the plaintiff and the second defendant that the second defendant would supply to the plaintiff dolomitic aggregate and sand for use in the manufacture of concrete piping;

(ii) that the second defendant's general terms and conditions did not form part of the contractual relationship between the plaintiff and the second defendant; and

(iii) that the second defendant is liable to the plaintiff as a manufacturing seller for any consequential damages which the plaintiff might prove it suffered in consequence of any latent defect(s) which the plaintiff might establish existed in the said goods.

(b) The costs of the hearing to date are made costs in the cause and the costs of two counsel shall be allowed on taxation.'

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T D CLOETE
JUDGE OF APPEAL

Concur: Howie P
Mthiyane JA
Maya AJA
Cachalia AJA