THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 483/02

In the matter between:

CONSOL LIMITED t/a CONSOL GLASS **APPELLANT**

and

TWEE JONGE GEZELLEN (PTY) LTD **FIRST RESPONDENT**

NICHOLAS CHARLES KRONE JUNIOR **SECOND RESPONDENT**

CORAM: HOWIE P, BRAND, CLOETE, HEHER JJA and VAN HEERDEN AJA
HEARD: 13 NOVEMBER 2003
DELIVERED: 28 NOVEMBER 2003

Summary:
Contract – interpretation of – whether provision imposes contractual obligation – whether compliance with the obligation is a precondition for reliance on indemnities – whether tacit term established – meaning of 'standard', 'written guarantee' and 'implied guarantee'.

JUDGMENT

BRAND JA/

BRAND JA:

[1] The issues in this matter turn on the interpretation of a written agreement between the parties. The appellant ('Consol') is a manufacturer of glass products, including wine bottles. The first respondent ('Twee Jonge Gezellen') produces wine and sparkling wine at its estate near Tulbagh in the Western Cape. The second respondent, Mr N C Krone Junior ('Krone'), is a shareholder in and director of Twee Jonge Gezellen.

[2] Since 1991, Twee Jonge Gezellen has from time to time purchased bottles for its wine production from Consol. These purchases were governed by the terms of a general supply agreement ('the supply agreement'). The terms of the supply agreement were contained in Consol's standard credit application form which was signed by Krone on behalf of Twee Jonge Gezellen in August 1991. At the same time Krone bound himself as surety and co-principal debtor to Consol for the payment of all amounts owing to it by Twee Jonge Gezellen.

[3] During 1999 Consol instituted action against Twee Jonge Gezellen and Krone in the Cape High Court. Its claim was for the purchase price of wine bottles sold and delivered to Twee Jonge Gezellen during 1998. Apart from a relatively minor discrepancy in relation to the amount thereof, Consol's claim was not disputed. The issues which arose for determination relate to Twee Jonge Gezellen's claim in reconvention.

[4] As will shortly be described in more detail, an important part of Consol's defence to the claim in reconvention was founded on the exemption and limitation provisions contained in the so-called 'claims

clause' of the supply agreement. At the commencement of the trial ten issues were identified by agreement between the parties for separate and prior adjudication, all of which arose from the terms of the claims clause. The remaining issues stood over for later determination. Immediately prior to judgment one of the ten issues was, again by agreement between the parties, excluded from the preliminary adjudication. In a judgment since reported as *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* 2002 (6) SA 256 (C), the Court *a quo* (Blignault J) found in favour of Twee Jonge Gezellen on six of the remaining nine issues. Consol's appeal is directed against these findings. The other three issues were decided against Twee Jonge Gezellen. The cross-appeal by the latter is against the findings on two of these issues. Both the appeal and the cross-appeal are with the leave of the Court *a quo*.

[5] Twee Jonge Gezellen's claim in reconvention, which eventually gave rise to the preliminary issues arose from the sale to it, during 1996 and in terms of the supply agreement, of 29 720 sparkling wine bottles. The bottles were used by Twee Jonge Gezellen for the production of its 1994 vintage Krone Borealis sparkling wine which was produced in accordance with a method known as *cap classique* or *méthode champenoise*. This method is characterised by a second fermentation of yeast in the bottled wine after the primary fermentation in tanks.

[6] It is common cause that, unbeknown to Twee Jonge Gezellen, the inside surface of these bottles had been treated by Consol, during the manufacturing process, with a gas called Freon 134A. The purpose of this treatment was to combat a phenomenon known as 'bloom' which sometimes occurs when bottles are placed in storage for periods in excess of three months. It appears as a haze on the inside of the bottle

making it unattractive to Consol's customers.

[7] When the bottles were used for their intended purpose Twee Jonge Gezellen experienced problems during the second fermentation process. As a consequence of these problems, so Twee Jonge Gezellen alleged in its pleadings, it lost a large portion of its 1994 vintage Krone Borealis and sustained additional losses listed under various heads. According to the claim in reconvention the damages suffered as a result of these losses added up to more than R10m in all. Twee Jonge Gezellen's case is, in essence, that the problems which were experienced in the second fermentation process of its 1994 vintage sparkling wine, and its consequent losses, must be attributed to Consol's use of Freon 134A during the manufacturing process. The claim is based on two alternative grounds. The main ground is Consol's alleged failure to comply with a provision of the claims clause that all bottles supplied 'are manufactured according to Consol's standard manufacturing procedures and techniques, utilising standard materials'. I will presently return to this provision. As an alternative ground Twee Jonge Gezellen relies on the allegation that Consol was the manufacturer or merchant seller of the bottles concerned.

[8] As indicated, Consol raised a number of defences to the claim in reconvention that were based on the provisions of the 'claims clause' in the supply agreement. Consequently, the provisions of this clause form the focal point of the appeal. It is therefore necessary to set these provisions out in some detail. The clause reads as follows:

"CLAIMS:

All goods supplied are manufactured according to the company's standard manufacturing procedures and techniques, utilizing standard raw materials.
No claims shall be recognised by the company unless lodged within 21 (twenty one) days after receipt of goods. If goods are damaged at the time of delivery the customer shall advise the customer's nearest sales office within twenty-four hours of delivery.
No guarantee or warranty regarding supply or quality is given or implied unless specifically stated in writing by an authorised company representative. Where any written warranty is given, the company's liability will be limited to replacement of defective goods on proven non-compliance with the warranty or accepted specification. Under no circumstances, with or without written guarantee or warranty, shall the company be liable for any consequential loss or damage howsoever arising.
The customer shall have no claim for short delivery unless the quantity short delivered is endorsed on all copies of a delivery note presented for signature. The company shall be the sole adjudicator in respect of all claims and any decision undertaken by the company in this regard shall be binding on the customer.'

[9] The formulation of the ten preliminary issues arising from Consol's

reliance on these provisions that were identified for separate adjudication is set out below. The paraphrased answer of the Court *a quo* on each issue which forms the subject matter of the appeal and the cross-appeal, is indicated in parenthesis:

'1. Whether in terms of the supply agreement, [Consol] was obliged to manufacture all bottles delivered to [Twee Jonge Gezellen] according to Consol's standard manufacturing procedures and techniques, utilising standard raw materials.
(Yes, Consol did have such obligations.)

2. Whether the bottles [in question] were manufactured by [Consol] according to its standard manufacturing procedures and techniques, utilising standard raw materials, in particular:

2.1 Whether at the time those bottles were made, internal treatment of *cap classique* bottles with Freon 134A gas was part of the [Consol's] standard manufacturing procedures and techniques.

(Yes, it was.)

2.2 Whether when manufacturing those bottles [Consol] applied Freon 134A gas in accordance with its standard procedures or techniques;

(By agreement between the parties, this issue was excluded from preliminary adjudication.)

2.3 Whether at the time the bottles were made, Freon 134A gas was a standard raw material for the manufacture of the bottles in question.
(Yes, it was.)

3. If such bottles were not manufactured by [Consol] according to its standard manufacturing procedures and techniques, utilising standard raw materials, whether [Consol] was entitled to rely on the further provisions of the clause of the supply agreement headed 'Claims'.

(No, in this event Consol would not be entitled to rely on the further provisions

of the claims clause.)

4. Whether the provision of the supply agreement that all goods supplied were manufactured according to [Consol's] standard manufacturing procedures and techniques, utilising standard raw materials, is a warranty as contemplated in the aforesaid clause.

(No, it is not such a warranty.)

5. Whether [Consol's] liability for the breach alleged by [Twee Jonge Gezellen] was limited to the replacement of bottles proven to have been defective.

(No, Consol's liability is not so limited.)

6. Whether [Consol] was exempted from liability in the event of [Twee Jonge Gezellen] not having lodged its claim within 21 days of delivery of the bottles in question, or whether it was a tacit term of the supply agreement that [Consol] would only be entitled to rely on the provision that no claim would be recognised unless lodged within 21 days after receipt of the goods if the circumstances giving rise to the claim were reasonably apparent to [Twee Jonge Gezellen] within 21 days of receipt of the allegedly affected bottles.

(No, Consol was not exempted, because there was such a tacit term.)

7. Whether [Consol] was exempted from liability for [Twee Jonge Gezellen's] claim set out in para 3 of the claim in reconvention [which rests on the basis that Consol was a manufacturer or merchant seller of wine bottles] unless an authorised representative of [Consol] specifically guaranteed or warranted the relevant quality of the bottles in writing.

(No, such a written guarantee or warranty was not a prerequisite for Consol's liability on this basis.)

8. Whether the damages claimed by [Twee Jonge Gezellen] constituted consequential loss or damage as contemplated in the aforesaid clause of the supply agreement.

(Yes, those claims are for consequential loss.)'

[10] Consol's appeal is directed at the decisions of the Court *a quo* in respect of the first and the third to the seventh preliminary issues. The cross-appeal is directed at the findings in relation to parts one and three of the second preliminary issue. As regards the eighth preliminary issue, the finding by the Court *a quo* to the effect that the damages claimed by Twee Jonge Gezellen were consequential in nature, is not appealed against by the latter.

[11] I now proceed to deal with the preliminary issues presented for adjudication on appeal in their numerical sequence.

The first preliminary issue

[12] For ease of reference, I will repeat the formulation of the issue. It is:

'Whether, in terms of the supply agreement, [Consol] was obliged to manufacture all bottles delivered to [Twee Jonge Gezellen] according to [Consol's] standard manufacturing procedures and techniques utilising standard raw materials.'

The issue arises from the introductory sentence of the claims clause which provides that 'All goods supplied are manufactured according to the company's standard manufacturing procedures and techniques, utilising standard raw materials.' Twee Jonge Gezellen contends that this sentence imposed an obligation on Consol. Consol denies that this is so. The contrary position for which it contends is that the sentence created no rights or obligations but that it is merely a recital in the nature of a preamble or an introduction to the operative provisions of the claims

clause.

[13] Provisions are sometimes inserted in written contracts by means of recitals or preambles which create no obligations for any of the contracting parties. The purpose of such provisions is, for example, to serve as an introduction to the rest of the contract or to record good intentions or pronouncements of good faith. The question whether a provision constitutes a mere recital, on the one hand, or a contractual obligation, on the other, is dependent upon the intention of the parties. Such intention is to be found in the language of the stipulation itself, read in its proper context and construed in accordance with the recognised tenets of construction. Consequently, an answer can rarely be transposed from one case to another unless their facts are almost identical. Nevertheless, considerations underlying the decisions in comparable cases may serve as useful guidelines.

[14] In *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) the bank sought to protect itself against liability for damages by way of an indemnity clause in its standard contract. The clause (quoted in para [3] 194C-D) provided, *inter alia*, that

'The bank hereby notifies its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody … whether the loss or damage is due to the bank's negligence or not.'

In *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (A) the relevant part of the clause concerned (quoted at 427D-E) reads as follows:

'Whilst reasonable care will be taken to ensure that first class materials and workmanship will be used in the execution of the contract IMS will not be liable for any loss or damages whatsoever, … due to … defective, faulty or negligent workmanship or material …'

[15] In both cases this Court held that the provisions introduced by 'while' and 'whilst' in the respective clauses concerned, constituted no more than a recital which imposed no contractual obligation on the promisor. Broadly stated, both decisions appear to have been influenced by two central considerations. The first was that the provisions in issue were ushered in by 'whilst/while' which is indicative of a mere introduction signifying no more than 'notwithstanding that'. The second consideration was that if the stipulations concerned were interpreted as creating contractual obligations such interpretation would result in a clear antithesis between the introductory words and the operative parts of the indemnities (see *Elgin Brown & Hamer (Pty) Ltd* at 428C-429B-D and *First National Bank of SA Ltd* at 198G-J).

[16] Based on the latter consideration, it was argued on behalf of Consol that, if the first sentence of the claims clause is to be construed as imposing contractual obligations it would likewise create an antithesis

with the operative part of the indemnity clause. More particularly, this argument relied on the specific exclusion in the remainder of the clause of any 'guarantee or warranty regarding quality'. I do not agree with this approach. The antithesis contemplated in the two decisions of this Court would require that Consol is placed under a particular obligation but, at the same time, exonerated from any breach of that obligation. The first sentence of the claims clause could not produce this result. Even if the first sentence is understood to impose an obligation on Consol to ensure that its standard manufacturing procedures and techniques are applied and that it utilises standard raw materials, it would not create any warranty of *quality* with regard to the products themselves. If the use of standard procedures and materials resulted in a product of inferior quality that is what customers would have to accept. If customers wanted a warranty as to quality they would have to obtain one in writing as contemplated in the later provisions of the clause.

[17] With regard to the particular wording of the first sentence, it gives no indication, unlike words such as 'while' or 'whilst' or 'notwithstanding', that it is of an introductory nature. The sentence contains a positive statement of fact relating to matters which could, in their ordinary context, be expected to form the subject matter of a contractual obligation undertaken by Consol.

[18] Significantly, in my view, other clauses in the same document are, in contradistinction to the first sentence of the clause, indeed prefaced by 'while' or 'whilst'. So, for example, the clause under the heading 'packing' begins as follows:

'Whilst the company will have regard under this heading, to any preference by the customer, the method of packing shall be determined by the company … '

And under the heading 'Force Majeure' the document provides that:

'While the company will use every endeavour to execute orders in accordance with the terms and conditions thereof, it will not be responsible for any delays or non-deliveries due to … circumstances over which it has no direct control.'

In contrast with the first sentence of the claims clause, it is in my view quite clear from the ordinary language used in these provisions that they were not intended to impose any contractual obligation on Consol but to

serve as a mere introduction to the operative parts that follow them. Though mindful of the fact that I am not dealing with the interpretation of a statute, it appears to be a fair inference that a deliberate change of expression in a carefully prepared document such as this was intended to indicate some change of intention on the part of the *stipulator,* i e Consol.

[19] In the final analysis one wonders why, if the provision under consideration was not intended to impose any contractual obligation, such a recital would be necessary at all. What does it contribute? It serves no introductory function and a customer could hardly derive any comfort from a 'promise' that Consol will apply its standard manufacturing procedures and utilise standard raw materials if Consol is not bound at all by that promise. Consequently I find myself in agreement with the decision of the Court *a quo* that the first sentence in the claims clause does impose a contractual obligation on Consol, which means that the appeal against this decision must fail.

The second preliminary issue

[20] The second preliminary issue raises two questions. Firstly, whether internal treatment of *cap classique* bottles with Freon 134A gas was part of Consol's 'standard manufacturing procedures and techniques'; and secondly, whether Freon 134A could be described as one of Consol's 'standard raw materials' for the manufacture of these bottles as contemplated by the first sentence of the claims clause. The Court *a quo* decided both questions in Consol's favour. Twee Jonge Gezellen contends that these decisions were not supported by the facts. A consideration of this contention consequently requires a somewhat

more detailed analysis of the evidence.

[21] As indicated, Freon 134A was used for the prevention of a phenomenon called bloom. Bloom has always been a problem for Consol, particularly at its Bellville factory. The reason why bloom formation is more prevalent in the Western Cape than in Gauteng, where Consol's other three factories are located, has to do with the difference in climate between the two areas. About 1993, bloom took on what Consol regarded as alarming proportions. Consequently Consol's technical experts were enjoined to do something about the problem. One of these technical experts was Consol's laboratory services manager, Mr J Polasek who gave evidence on behalf of Consol at the trial. At that stage, it had been known in the industry for quite some time that formation of bloom could be prevented by neutralising the alkalinity of the inside surface of newly manufactured glass bottles. The method for achieving this result, which had also been known for over thirty years, was to treat the inside of the bottles with a fluorine-containing gas compound, called Freon. Amongst the glass manufacturers applying this method was a company in the United States of America, Owens Brockway. This company is one of the two largest manufacturers of glass containers in the world. It also holds 19% of the shares in Consol. Because of this relationship, Owens Brockway and Consol have a so-called 'technical agreement', in pursuance whereof Owens Brockway renders technical assistance to Consol on a regular basis.

[22] The Freon gas compound utilised by Owens Brockway for the internal treatment of glass bottles has always been Freon 152A. In 1993, when Consol decided that something had to be done about the prevention of bloom Freon 152A was therefore the known remedy. Consol's problem was, however, that Freon 152A was virtually unobtainable in this country in commercially viable quantities. A solution to this problem was suggested in a memorandum prepared by one of Consol's technical personnel in February 1994 after a visit to the technical centre of Owens Brockway in Toledo, Ohio. According to the memorandum it had been experimentally established in the laboratories of Owens Brockway that Freon 152A could be replaced in the internal treatment process with another fluorine-containing gas called Freon 134A. Although Owens Brockway itself consistently used Freon 152A and had never substituted Freon 134A for it, it is claimed in the memorandum that 'Freon 134A is a direct equivalent of Freon 152A and is used to replace the CFC refrigerant in the automotive and industrial air conditioning industry'.

[23] As far as Consol knew Freon 134A had not been used by anyone

else in the world for the internal treatment of glass bottles. Because of its application in the refrigeration industry it was, however, more freely available than Freon 152A. Solely for reasons of availability, Consol therefore decided to integrate the internal treatment system developed by Owens Brockway into the production lines of its Bellville factory but to adapt that system by substituting Freon 134A for Freon 152A.

[24] Treatment with Freon 134A was introduced in Consol's Bellville factory in about March 1994. The *cap classique* bottles that eventually gave rise to Twee Jonge Gezellen's claim for damages were manufactured in that factory during February 1996. By that time the system had therefore been in operation for almost two years. In the meantime Consol had installed a system of internal treatment with Freon 134A into all but one of its other factories. The exception was the factory at Clayville in Gauteng which manufactured beer bottles only. Since bloom formation is associated with storage for periods in excess of three months and the turnover period of beer bottles is much shorter, it was unnecessary to treat these bottles for the prevention of bloom.

[25] Because internal treatment with Freon 134A, as opposed to Freon 152A, had not been utilised at a production level before, the system at the Bellville factory was reviewed on a regular basis. Polasek was responsible for these reviews. The main purpose of the reviews was to assess how successful the system had been in achieving the prevention of bloom. From the reports filed by Polasek on his reviews of the Bellville system at regular intervals, it appears that Consol never really succeeded in applying Freon 134A to the inside of all manufactured bottles on a consistent basis. So, for example, Polasek's report of 30 November 1994 stated:

'It is clear from recent observations at the factory and analysis that the bloom protection through Freon treatment is lacking.'

And:

'The suspicion falls clearly on the choice of Freon as the major deviation from the [Owens Brockway] process manual.'

[26] The technical difficulties giving rise to the problem of inconsistent treatment were associated with the way in which the Freon gas was physically injected into each bottle. What contributed to the problem was the fact that Freon is an invisible gas. Operators on the production line therefore had no way of knowing whether every bottle actually received its prescribed dose of the gas or was over- or under-treated. With Freon 152A this quality was, however, of lesser consequence than with Freon 134A. The reason is that Freon 152A is considerably more inflammable

than Freon 134A. Because Freon 152A has a relatively low point of combustion it creates an unmistakable blue flash when injected into the bottle. As a consequence, the success or otherwise of a particular injection can be determined by operators through visual inspection. Freon 134A, on the other hand, does not create such a flash. On the production line this difference is of vital importance.

[27] The last available report by Polasek relates to a review which he did in July 1997. In this report he summarised the problems encountered with Freon 134A treatment as follows:

'There is a concern that internal treatment (I T; freon treatment) of ware is inadequate to provide long term protection against bloom …

There is a perspective that I T application [with Freon 134A] is synonymous with bloom protection. This is a very hopeful view … The technology is thirty years old and our experience is three, with systems that have a large element of our own design and practice. … I T has never really worked at Bellville at all since its inception. There is in fact ample evidence that ware has been treated properly but not always consistently.

…

The overall finding is that I T application is still erratic, not much changed from what has been seen before and pointed out in earlier reviews.'

As the primary solution to the problem, Polasek recommended a 'switch to Freon 152A'.

[28] Towards the end of 1997, Freon 152A became more freely available in this country. In the result, Polasek's recommendation that Freon 134A should be replaced with 152A in the internal treatment system was ultimately implemented by Consol. In cross-examination Polasek conceded that Consol's use of Freon 134A never reached the stage where the results achieved were considered to be satisfactory. He also conceded that Consol's use of Freon 134A was 'part of a learning curve' and that this learning curve continued for the whole period during which this gas was used, until the time when usage thereof was discontinued towards the end of 1997.

[29] Against this background I now turn to the questions raised by the issue under consideration. The answer to the questions relating to both procedure and raw material depends, firstly, on whether the relevant 'standard' refers to the situation in 1991, when the supply agreement was concluded, or to 1996 when the bottles were sold. Twee Jonge Gezellen's contention is that the enquiry is to be directed at Consol's 'standards' as they existed in 1991. Since it is common cause that in 1991 Consol used no Freon 134A at all it is apparent that if this contention is held to be correct, the issue must be decided in Twee

Jonge Gezellen's favour. However, I find myself in agreement with the finding by the Court *a quo* (at 273A-E) that this result could not have been intended by the parties. It must be borne in mind that the supply agreement did not, in itself, constitute an agreement of sale. It contemplated that there would be sales from time to time and provided that the standard terms set out in the supply agreement would then be incorporated into these future sales. Accordingly, when the contract of sale pertaining to the bottles concerned was concluded in 1996, these predetermined provisions were embodied in the contract. Nevertheless, these provisions can only be construed as part of an agreement that came into existence in 1996.

[30] If Twee Jonge Gezellen's contention were to be upheld it would render Consol's position impossible. Its options would be either to apply in perpetuity its standard procedures and use its standard raw materials, as they were in 1991, or it would have to seek and obtain the approval of Twee Jonge Gezellen and, presumably, of all its other customers, each time it tried to improve or change its standard procedures or raw materials. I do not believe that the parties could have intended their agreement to have these impractical results. The questions relating to Consol's standard procedures and to standard raw materials should therefore be determined with reference to the situation which pertained in 1996.

[31] I deal first with the question relating to standard procedures. Twee Jonge Gezellen's one contention in this regard was that since, on Consol's own showing, it was never really satisfied with the results obtained with its Freon 134A treatment, it cannot be said that Consol ever accepted this treatment as its 'standard procedure'. This contention obviously involves 'standard procedures' as conveying some criterion of quality. It therefore appears to be based on the misconception that the term 'standard' is used in the sense of a 'measure to which others conform', or 'a degree of excellence for a particular purpose', i e, as synonymous with 'a yardstick' or a 'benchmark'. There is no doubt that the term 'standard' can have this meaning, particularly when used as a noun (see e g *The Concise Oxford English Dictionary* (2002)). However, I find myself in agreement with the Court *a quo* (at 274A-F) that this meaning cannot sensibly be reconciled with the rest of the provision concerned. Read in the context of the provision as a whole, where the term 'standard' is used as an adjective and in conjunction with a reference to 'the company', a more appropriate meaning would appear to be the one given in e g Collins' *Dictionary of the English Language* (1979), namely to denote what is 'normal', 'usual' or 'regular'. According to this interpretation, the first sentence of the claims clause imposes no

greater burden on Consol than to manufacture the bottles sold in accordance with its normal and usual procedure. Another reason why the interpretation contended for by Twee Jonge Gezellen is untenable, is that it would bring the undertaking contained in the first sentence into conflict with the express provision appearing later in the claims clause, that 'no guarantee or warranty regarding quality is given or implied'.

[32] Twee Jonge Gezellen's further contention was that, even if 'standard' means 'normal' or 'usual', Consol never reached the stage where it accepted Freon 134A treatment as its 'normal' or 'usual' procedure. In support of this contention, reference was made to the evidence from which it appears that throughout the entire period, during which Freon 134A was used from 1994 to 1997, the procedure was subject to constant review and change, and that the reason for these changes was because the treatment produced inconsistent results. In the end, so Twee Jonge Gezellen argued, Polasek conceded that, right until the time when Consol was constrained to give up the practice, it was still involved in an experimental process or 'learning curve'. I cannot agree with this argument. In my view it is based on a *non sequitur*. Neither the fact that the procedure required constant amendment and change because the results were inconsistent or otherwise unsatisfactory, nor the fact that Consol was eventually driven to give up the procedure, justifies the conclusion that it was never adopted by Consol as its standard or normal procedure. On the contrary, by the time the offending bottles were manufactured in 1996, Freon 134A had been used by Consol for a period of about two years in all its factories, bar one, as part of its normal and regular manufacturing process. The only factory where it was not used was where bloom was not a problem. The procedure was consistent, though the results were not. Moreover, until the end of 1997, Freon 134A was the only gas used by Consol as a source of fluorine. In the circumstances, there was no other treatment to combat bloom which presented itself as a 'standard' procedure. I therefore agree with the finding by the Court *a quo* that, when the bottles were manufactured in February 1996, treatment with Freon 134A was part of Consol's standard procedure, albeit that the results obtained were not uniform or satisfactory.

[33] This brings me to the next question, namely, whether at the time that the bottles were made, Freon 134A gas met the requirements of a 'standard raw material'. Twee Jonge Gezellen's submission in this regard was that, since the word 'company's' in the claims clause qualifies 'standard procedure' but not 'standard raw materials', it means that the latter must be of a more general standard than merely Consol's own standard. In view of the evidence that no-one except Consol used Freon

134A, so Twee Jonge Gezellen argued, this material must fail the 'standard' test. Though the argument seems to derive support from a literal interpretation of the provision concerned, the problem which arises with such a literal interpretation is that it would render the meaning of the provision so vague that it would become virtually meaningless. So, for example, a literal interpretation immediately invites the question whether the requirement is that Consol can only use raw material which is standard in the rest of the world. If so, Consol would be in breach if it used any locally available materials differing from those used in other parts of the world. Or would it suffice if the raw material used is standard in South Africa? If so, would Consol then be entitled, for example, to use lime derived from sea shells in the Western Cape (as it did in its Bellville factory) despite the fact that this source of lime was not used in the rest of the country? In the circumstances I am satisfied that the provision cannot bear its literal meaning.

[34] In the context of this case I find myself in agreement with the view expressed by the Court *a quo* (at 276A-C) that, if the use of Freon 134A qualifies as a standard procedure, then Freon 134A, which constitutes an essential part of that same procedure, must necessarily qualify as a standard raw material. In the present context, the expression 'standard raw material' therefore does not create any additional requirement.

[35] In the circumstances, the second issue, in both its constituent parts, was in my view rightly decided in favour of Consol and the cross-appeal cannot succeed.

The third preliminary issue

[36] It will be remembered that the third issue was formulated as follows:

'If such bottles were not manufactured by [Consol] according to its standard manufacturing procedures and techniques, utilising standard raw materials, whether [Consol] is entitled to rely on the further provisions of the clause of the supply agreement headed 'Claims'.'

[37] What will also be recalled is that Consol's undertaking to which reference is made, performs a dual function in Twee Jonge Gezellen's case. In the first place, the undertaking serves as the foundation on which its main claim for damages is based. The second role which Twee Jonge Gezellen seeks to attribute to the undertaking is that of a condition precedent for Consol's right to rely on the indemnities contained in the remainder of the claims clause. There is no doubt that the undertaking can, in principle, perform the first function. It is the second role which gave rise to the third issue.

[38] Perhaps as a result of the way in which the matter was argued before the Court *a quo*, the learned Judge (at 279D-G) dealt with this

issue essentially on the basis that it follows the answer to the first issue as a matter of course. In the event, his answer in favour of Twee Jonge Gezellen on the first issue automatically attracted a similar response on the third.

[39] In this Court Consol's contention was that the first and third issues are not necessarily interlinked. In principle, I agree with this contention. The fact that the first sentence of the claims clause is understood to be a contractual obligation, as opposed to a mere introductory recital, does not inevitably give rise to the inference that it also constitutes a precondition for Consol's reliance on the indemnities in the rest of the clause. There appears to be no reason in principle why the two concepts cannot operate independently of each other.

[40] Twee Jonge Gezellen found authority for the existence of a preconditional interlink between the two concepts in *Minister of Education and Culture (House of Delegates) v Azel and Another* 1995 (1) SA 30 (A). In that matter this Court (at 33G-H) found the undertaking by the Minister contained in the clause concerned (which is quoted at 33C-E) to constitute a precondition for his reliance on the indemnities embodied in the rest of the clause. It is apparent, however, that the decision in that case was based entirely on the wording of the contractual provisions involved. This is hardly surprising. The answer to a question such as this is dependent on the intention of the parties to the contract concerned, as it appears from a proper interpretation of the written language used by them. That, in my view, is precisely where the present case differs from *Azel.* Unlike the clause concerned in *Azel*, the clause *in casu* gives no indication, either in its language or in the way in which it is formulated, of a link between the undertaking and the indemnities. Purely as a matter of construction, there appears to be no room for the reading in of a phrase such as 'provided that' or 'on the understanding that', as an introduction to the undertaking in the first sentence of the clause (cf *Azel* at 33G-H).

[41] However, what weighs even more heavily against the interpretation contended for by Twee Jonge Gezellen, is that it will give rise to anomalous situations which could not, in my view, have been intended by the parties. The thrust of the indemnities which follow upon the undertaking is obviously to limit Consol's potential liability for claims by purchasers of its glassware. Broadly stated, they do so in three ways: Firstly, by imposing a time limit of 21 days after receipt of the goods within which claims must be made, failing which Consol would not be liable. Secondly, by differentiating between the ordinary or normal situation where the purchaser buys standard bottles from the run of the production process and special cases where a written warranty of quality

is given. In the ordinary or normal situation, Consol explicitly excludes any guarantee, express or implied, regarding quality. It can therefore not be held liable for any deficiencies. In those cases where an express warranty of quality is given, liability is limited to replacement of the defective goods. The third way in which Consol seeks to limit its liability is by providing that Consol shall not, under any circumstances, with or without a written guarantee or warranty, be liable for any consequential loss or damage.

[42] If the undertaking in the first sentence is to be construed as a precondition for Consol's reliance on these indemnities, it will not only undermine the whole scheme and purpose of the clause, but it will result in glaring inconsistencies. So, for example, if Consol is in breach of a written guarantee, its liability will be limited to replacement of the goods. If, on the other hand, it failed to comply with its undertaking in the first sentence, it will be exposed to liability for consequential damages. Moreover, if the purchaser relies on breach of a written guarantee, but can prove that at the same time Consol had failed to follow its standard procedures in the manufacture of the goods, Consol would lose all the protection that it derives from the indemnity clause. In this hypothetical case it would make no difference that Consol's deviation from its standard procedure had nothing to do with its non-compliance with the written guarantee. Nor would it matter that there was no causal link between Consol's non-compliance with its undertaking and the damages claimed.

[43] Contrary to the finding by the Court *a quo*, I am therefore of the view that the third issue should have been decided in favour of Consol, which means that, on this issue the appeal must succeed.

The Fourth and Fifth Preliminary Issues

[44] For reasons that will soon be apparent, I find it convenient to deal with the fourth and fifth issues as one. They were formulated as follows:

'4. Whether the provisions of the supply agreement that all goods supplied are manufactured according to [Consol's] standard manufacturing procedures and techniques, utilizing standard raw materials, is a 'warranty' as contemplated by the [claims] clause.

5. Whether [Consol's] liability for breach alleged by [Twee Jonge Gezellen] is limited to the replacement of bottles proven to have been defective.'

Both these issues arise from the provision in the claims clause that:

'Where any written warranty is given, the company's liability will be limited to replacement of defective goods on proven non-compliance with the warranty … '

[45] With reference to this provision, Consol argues that, since the words 'any written warranty' are of wide import, they include the obligation imposed upon it by the first sentence of the claims clause. I do not agree with this argument. The stipulation relied upon is preceded by the provision that:

'No guarantee or warranty regarding … quality is given or implied unless specifically stated in writing by an authorised company representative.'

[46] Read in the context of the latter provision, it is apparent, in my view, that the provision relied upon by Consol does not refer to the undertaking in the first sentence of the claims clause but to a 'warranty regarding quality' specifically given 'in writing by an authorised company representative'. Since, apart from anything else, the undertaking in the first sentence does not constitute a warranty of quality (see para [16] above), it is clear that the fourth issue should be decided in favour of Twee Jonge Gezellen. Since the determination of the fifth issue is dictated by the conclusion reached on the fourth issue, the decision of the Court *a quo* on both issues should, in my view, be confirmed.

The Sixth Preliminary Issue

[47] The sixth preliminary issue is:

'Whether [Consol] was exempted from liability in the event of [Twee Jonge Gezellen]

not having lodged its claim within 21 days of delivery of the bottles in question, or whether it was a tacit term of the supply contract that [Consol] would only be entitled to rely on the provision that no claim would be recognised unless lodged within 21 days after receipt of the goods if the circumstances giving rise to the claim were reasonably apparent to [Twee Jonge Gezellen] within 21 days of receipt of the allegedly affected bottles.'

[48] The issue arises from Consol's contention that it is exempted from liability because Twee Jonge Gezellen had failed to lodge its claim within 21 days of delivery of the bottles concerned. It is common cause that the defects relied upon by Twee Jonge Gezellen would not have been reasonably apparent to it within the 21-day period. In these circumstances, Twee Jonge Gezellen contends that Consol is precluded from relying on the 21-day provision by a tacit term of their agreement. According to the tacit term advanced by Twee Jonge Gezellen, Consol could only rely on the 21-day provision if the circumstances giving rise to the claim would be reasonably apparent to Twee Jonge Gezellen within 21 days of receipt of the goods.

[49] The Court *a quo* decided this issue in favour of Twee Jonge Gezellen (at 278D), *inter alia*, on the basis of the *contra proferentem* rule. I do not believe, however, that any assistance can be derived from this rule in resolving the present problem. The rule is one of construction and it only comes into play where the difficulty lies in resolving an ambiguity. Such a difficulty does not arise in the present context. The express provisions of the contract are clear. The answer to the question raised by this issue is therefore not dependent on rules of construction but on whether the requirements for the existence of a tacit term have been met.

[50] The test for establishing the existence of a tacit term, which this Court has often recognised and applied in the past, is the so-called 'bystander test' (see e g *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 533A-B; *Wilkens NO v Voges* 1994 (3) SA 130 (A) 137A-D; *Botha v Coopers & Lybrand* 2002 (5) SA 347 (SCA) 359G-J.) The test has its origin in the following *dictum* by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd and Elton Cap Dyeing Co Ltd* [1918] 1 KB 592 (CA) 605:

'A term can only be applied if ... it is such a term that it can confidently be said that if at the time the contract was being negotiated someone has said to the parties: "What will happen in such a case" they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties have not expressed.'

[51] Over the years the courts have, through refinement, enhanced the practical functionality of this test. So, for example, it was decided by Colman J in *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W)

236H-237A that the inference of a tacit term can only be justified if the bystander's question 'would have evoked … a prompt and unanimous assertion of the term' from both the contracting parties. If the inference is that one of the parties would have sought some clarification or some time to consider before giving an answer, the tacit term suggested would not pass the bystander test. A further requirement that has developed appears from the following statement by Trollip JA in *Desai and Others v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) 522H-523A:

'… I do not think that it is either clear or obvious which of those forms of the term should prevail, and hence none of them can be implied. The reason is that the implication of a term depends upon the inferred or imputed intention of the parties to the contract … and "once there is difficulty and doubt as to what the term should be or how far it should be taken it is obviously difficult to say that the parties clearly intended anything at all to be implied".'

[52] In finding for Twee Jonge Gezellen on this issue, the Court *a quo* was influenced (at 278D) by the consideration that, without the suggested term, the 21-day clause could operate extremely harshly on the purchaser of bottles, in that he would be deprived of all redress in the case of latent defects which he could not possibly discover within the 21-day period. That is undoubtedly so. It can accordingly be accepted with confidence that Twee Jonge Gezellen's response to the bystander's enquiry regarding the existence of the suggested tacit term would have been a positive one. That, however, is not the end of the enquiry. The further step is to establish what Consol's response would have been. Consol's problem with the effect of the suggested (tacit) term would in all likelihood have been that, once the defects are of a kind that cannot reasonably be recognised within 21 days, there would be no time bar at all. Though Consol may well have conceded that the 21-day provision was to be amended or ameliorated if the circumstances giving rise to the claim were not reasonably apparent within 21 days, it cannot be assumed that Consol would have agreed to the suggestion that in those circumstances there would be no time limit at all. At best for Twee Jonge Gezellen, the inference could be that Consol would have asked for time to consider or that it would have insisted that in these circumstances the claim should at least be instituted within 21 days of the alleged problem having manifested itself. In these circumstances the tacit term suggested by Twee Jonge Gezellen cannot be inferred.

[53] The problems experienced by Twee Jonge Gezellen in establishing the tacit term for which it contends, are similar to those encountered by the insured in *Union National South British Insurance Co Ltd v Padayachee* 1985 (1) SA 551 (A). In terms of the insurance policy concerned in that case, all claims under the policy had to be instituted within 12 months from the happening of the loss. Like Twee Jonge

Gezellen, the insured, who had failed to institute his action within 12 months, sought to avoid the consequences of this contractual time bar by means of a tacit term. Upon application of the bystander test, this Court came to the conclusion that the inference of the tacit term contended for could not be justified. From the judgment of Miller JA (at 560A-G) it appears that the considerations which led to that conclusion were essentially the same as those which have persuaded me that the tacit term relied upon by Twee Jonge Gezellen cannot be inferred. Accordingly, the sixth issue should, in my view, be decided in favour of Consol which means that, on this aspect, the appeal must succeed.

The Seventh Preliminary Issue

[54] This issue is:

'Whether [Consol] is exempted from liability for [Twee Jonge Gezellen's] claim set out in para 3 of the claim in reconvention [which relies on the alternative basis that Consol was the manufacturer or merchant seller of the bottles concerned] unless an authorised representative of [Consol] specifically guaranteed or warranted the relevant quality of the bottles in writing.'

[55] The issue arises from the provision in the claims clause that

'no guarantee or warranty regarding … quality is given or implied unless specifically stated in writing by an authorised company representative'.

[56] 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 (see e g *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha and Another* 1964 (3) SA 561 (A) 571G-572A; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) 17H-18D; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) 465G-466H).

[57] Consol's contention is that since the basis of this claim amounts to

an implied warranty of quality it is expressly excluded by the aforementioned provision of the claims clause. Twee Jonge Gezellen's answer to this contention is that, although the seller's liability for latent defects is often loosely described as being derived from an 'implied warranty against latent defects', this is a misnomer because such liability is not dependent on any guarantee given by the seller, implied or otherwise. It is imposed upon the seller by law. Accordingly, so the argument went, it cannot be said that Consol's liability for latent defects is excluded by a provision which relates to 'implied warranties'.

[58] Though this argument by Twee Jonge Gezellen found favour with the Court *a quo* (at 278G-279D), it is, to my mind, not well-founded. The statement that the seller's liability for latent defects is imposed by law and is therefore not dependent upon any contractual *consensus* between the parties, is correct. As a consequence it might, from a jurisprudential point of view, be inappropriate to describe the basis of this liability as an implied warranty (see e g *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) 416H; De Wet en Van Wyk *Kontraktereg en Handelsreg* 5 ed 342-3). That, however, is not really the issue. The real issue is what the parties intended when they referred to 'an implied warranty of quality' in their written agreement. In answering this question, it is to be borne in mind that the seller's liability for latent defects has invariably been described, also by this Court, as being derived from an implied warranty. In fact, I venture to suggest that in ordinary legal parlance, one of the best known examples of what is meant by an 'implied term' is the seller's 'implied warranty against latent defects' in contracts of sale. (See e g *Hackett v G&G Radio and Refrigeration Corporation* 1949 (3) SA 664 (A) 667; *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration supra* 531E-G; 532C-G.)

[59] In these circumstances it must, in my view, be accepted that when the parties agreed to exclude liability for any 'implied warranty of quality', they intended that exclusion to pertain to this most commonly known 'implied warranty' as well (see also *Greyling v Fick* 1969 (3) SA 579 (T) 580G-581B and compare the difference in the wording of the contract in *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) 470A-E). The purpose of the clause is to exclude liability not expressly undertaken and its proper interpretation therefore excludes both a tacit term as to quality as well as a term implied by law. For these reasons, the seventh issue should be decided in favour of Consol, with result that the appeal on this issue must succeed.

[60] In summary, I therefore hold the view that the appeal on issues 3, 6 and 7 should be upheld while the appeal on issues 1, 4 and 5, as well as the cross-appeal must fail. As to the question of costs, Consol has been

substantially successful in the appeal and it has succeeded entirely in the cross-appeal. I can find no reason why costs should not, in both instances, follow the event. Moreover, since I consider that Consol was justified in instructing two counsel, I intend to include these costs in the order that I propose to make.

[61] In the Court *a quo,* no costs order was made because the learned Judge thought it prudent (at 280E) to let all questions of costs stand over for later determination. Although Consol has now on appeal achieved a greater measure of success than in the Court below, there are still some outstanding issues which can, at least in theory, lead to further proceedings. In the circumstances, I consider it wise not to interfere with the costs order by the Court *a quo*.

[62] The following order is made:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The cross-appeal is dismissed with costs, including the costs of two counsel.

(c) The findings of the Court *a quo* in regard to preliminary issues 1 to 7 are amended. As amended the findings read as follows:
'Issue (1): In terms of the supply agreement, plaintiff was obliged to manufacture all bottles delivered to first defendant according to plaintiff's standard manufacturing procedures and techniques, utilising standard raw materials.

Issue (2) part 1: At the time when the bottles in question were made, internal treatment of *cap classique* bottles with Freon 134A gas was part of plaintiff's standard manufacturing procedures and techniques.
Issue (2) part 3: At the time when the bottles were made, Freon 134A gas was a standard raw material for the manufacture of the bottles in question.
Issue (3): Even if the bottles were not manufactured by plaintiff according to its standard manufacturing procedures and techniques, utilising standard raw materials, plaintiff would still be entitled to rely on the further provisions of the clause of the supply agreement headed 'Claims'.
Issue (4): The provision of the supply agreement that all goods supplied

are manufactured according to plaintiff's standard manufacturing procedures and techniques, utilising standard raw materials, is not a warranty as contemplated in the claims clause.
Issue (5): Plaintiff's liability for the breach alleged by first defendant is not limited to the replacement of bottles proven to have been defective.
Issue (6): Plaintiff is exempted from liability in the event of first defendant not having lodged its claim within 21 days of delivery of the bottles in question.
Issue (7): Plaintiff is exempted from liability for first defendant's claim set out in para 3 of the counterclaim on the ground that no authorised representative of plaintiff specifically guaranteed or warranted the relevant quality of the bottles in writing.

……..

F D J BRAND
JUDGE OF APPEAL
Concur:
HOWIE P
CLOETE JA

HEHER JA

VAN HEERDEN AJA