REPORTABLE

CASE NO: SA 9/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between

TOTAL NAMIBIA (PTY) LTD **Appellant**

and

OBM ENGINEERING AND PETROLEUM DISTRIBUTORS CC **Respondent**

Coram: SHIVUTE CJ, CHOMBA AJA and O'REGAN AJA

Heard: **17 October 2014**

Delivered: **30 April 2015**

APPEAL JUDGMENT

O'REGAN AJA (SHIVUTE CJ and CHOMBA AJA concurring):

[1] This appeal arises from a dispute concerning a written agreement that was made an order of the High Court. The appellant, Total Namibia (Pty) Ltd, is a wholesale seller and distributor of petroleum products. The respondent, OBM Engineering & Petroleum Distributors CC, operates a depot in Otjiwarongo. Between 2003 and 2007, in terms of a supply agreement between the parties, the respondent purchased fuel products from the appellant in Walvis Bay, transported

the products to Otjiwarongo and distributed them to its clients, and also to clients of the appellant, in Otjiwarongo.

[2] During 2007, a dispute arose between the parties and the supply and distribution arrangement between them ended in August 2007. In November 2007, the respondent issued summons against the appellant for the sum of N$4 609 940,72. This amount apparently represented an amount of money levied by the appellant on the respondent as a 'transport differential' based on the quantity of fuel delivered to the respondent during the period 2005 – 2007. The appellant lodged both a plea and a counterclaim in the proceedings and then filed a notice in terms of rule 33(4) seeking a separation of issues. After the application in terms of rule 33(4) had been argued but before judgment was handed down, the parties met and entered into a written agreement on 27 October 2010 to establish a procedure to determine whether either was indebted to the other (the agreement). The agreement was made an order of court and the High Court proceedings were suspended *sine die* pending the conclusion of the procedure provided for in the agreement.

The agreement

[3] The agreement between the parties states that the parties' accountants 'will be instructed to verify all transactions underlying the current account of plaintiff with defendant (with reference to source documents) in order to determine, by agreement, any liability of defendant to plaintiff or *vice versa'.* The agreement also provides that the plaintiff (respondent) deems the opening balance to be zero as at 1 June 2005, but says that the defendant (appellant) may prove a different

opening balance by reference to source documents. It is also clear from the agreement that the plaintiff had tendered a verification annexed to a summary provided by its expert, Mr Dreyer. That summary formed part of the appeal record. The agreement affords the plaintiff an opportunity to reconsider that verification whereupon the defendant is to be afforded an opportunity to respond to the verification. The agreement further stipulates that both the plaintiff's amendment to its verification, if any, and the defendant's response to it, 'shall be valid only insofar as supported by verified source documents'. The agreement then provides that a meeting will be held between the legal representatives of the parties to discuss the defendant's response to the verification and to debate any issues raised, and compile a list of issues that the parties are unable to resolve. It also provides that the trial will continue for the purpose of adjudicating issues that remain in dispute, including the costs of litigation. It is clear therefore that the agreement provides a process to define and narrow issues in dispute between the parties, and possibly, but not necessarily, resolve them.

[4] The appellant insists that when the agreement refers to verification by way of 'source documents', the agreement refers to 'invoices, credit notes and debit notes' but not to delivery notes, while the respondent insists that the references to source documents in the agreement includes delivery notes. This dispute goes to the heart of the verification process contemplated in the agreement.

[5] Accordingly, the appellant launched motion proceedings in the High Court in July 2012, seeking the following relief –

(a) a declaration that the verification of transactions referred to in the agreement 'which relies on invoices, credit notes and debit notes properly complies with the . . . agreement . . . and need not be additionally supported by any proof of delivery'; alternatively,

(b) declaring that the agreement is of no force or effect, and rescinding the court order that made the agreement an order of court; alternatively

(c) rectifying and varying the agreement by inserting the words 'which need only to be invoices, debit notes or credit notes' after the words 'source documents' wherever they appear in the agreement.

[6] The respondent opposed the relief. Its deponent asserted that when the agreement was concluded, the precise ambit of the dispute between the parties was not clear, and asserted that there was a dispute between the parties relating to the accuracy of the appellant's invoices, and the question as to how much fuel had been delivered by appellant to respondent. The purpose of the agreement was to seek to undertake an agreed accounting process to determine whether either party was indebted to the other.

[7] The application was heard by the High Court on 26 November 2012 and on 28 January 2013, Miller AJ dismissed the application. The court found that the terms of the agreement were clear; that the phrase 'source documents' was not ambiguous, but were of wide import and would include delivery notes. The judge reasoned that if the parties had intended to exclude delivery notes they would

have made provision for that exclusion in the agreement. The High Court reasoned that in the absence of ambiguity, extraneous evidence of what the parties intended is not admissible. The High Court did not directly address the question whether the agreement should be declared to be of no force or effect, or the question whether the agreement should be rectified.

[8] Appellant appeals against the judgment of the High Court. The notice of appeal was lodged in time, as was the record. However, at the hearing of the appeal on 17 October 2014, the appellant sought leave to supplement the appeal record with two additional volumes that had been filed more than two months before the appeal hearing. The respondent did not oppose the application to supplement and the application to supplement was granted by this court at the hearing.

Appellant's arguments

[9] Appellant argues that the High Court erred in its approach to the interpretation of the agreement and adopted an approach that overlooked significant developments in the law relating to the interpretation of documents. In particular, the appellant argues that the High Court should have paid more attention to the context in which the agreement was reached. The appellant argues that if the correct approach to the interpretation of contracts had been adopted, the court would have concluded that the agreement did not stipulate that delivery notes were necessary for the verification process.

[10] Secondly, appellant argues that if the court accepts that the agreement does contemplate that delivery notes would be used in the verification process, then the agreement is void *ab initio* because of the absence of consensus. The appellant argues that its interpretation of the agreement is reasonable, albeit different to that of the respondent. Given that its interpretation is reasonable, it argues that its mistake was *iustus*.

[11] Thirdly, appellant argues that the written agreement does not reflect the true intention of the parties and should be rectified to reflect the true common intention of the parties.

Respondent's arguments

[12] Respondent argues that the conclusion of the High Court relating to the interpretation of the agreement cannot be faulted and that it is clear that the agreement contemplated that delivery documents were a form of 'source document'.

[13] Secondly, respondent argues that the appellant has not made out a case that there was *dissensus* between the parties. The respondent argues that the language of the agreement is clear; it contemplates that a source document includes a delivery note and does not indicate that the verification exercise should take place without reference to delivery notes. Given that the respondent signed the agreement, it cannot now be said to have signed the agreement on a mistaken basis.

[14] Thirdly, the respondent argues that the appellant has not made out a case for rectification because the person who signed the agreement on behalf of the appellant has not testified as to his understanding of the true intention of the parties.

Issues on appeal

[15] The following issues arise for determination:

(a) What is the proper approach to the interpretation of the agreement;

(b) Is Appellant correct that, properly interpreted, the reference in the agreement to verification by reference to ‘source documents’ means that the verification process need not refer to delivery notes;

(c) If not, can it be said that the agreement entered into between the parties was vitiated by *dissensus* with the consequence that no valid agreement was entered into;

(d) Should the agreement be rectified and varied by inserting the words ‘which need only to be invoices, debit notes or credit notes’ after the words ‘source documents' wherever they appear in the agreement; and

(e) What relief, if any, should follow?

The proper approach to the interpretation of the agreement

[16] Appellant argues that the High Court erred in its approach to the interpretation of the agreement. In particular, the appellant pointed to the High Court's reasoning that extraneous evidence as to the meaning of the contract was not admissible given the absence of ambiguity in the language of the contract.[1] The appellant pointed to recent developments in the United Kingdom[2] and South Africa[3] to propose that in interpreting contracts courts should always have regard to the broader context within which the contract was agreed and not only in circumstances where the language of the contract is found to be ambiguous. The respondent did not disagree with this approach but suggested that on this approach too the conclusions of the High Court were correct.

[17] In the *Investors Compensation Scheme* case in the House of Lords, Lord Hoffmann acknowledged that there had been 'a fundamental change' in the way in which courts approached the construction of contracts since the 1970s.[4] He summarised the new approach as follows –

[1]In reaching this conclusion, the High Court relied on three decisions of the South African courts: *Hadiaris v Freeman and Freeman* 1948 (3) SA 720 (W); *Sonarep (SA) (Pty) Ltd v Motorcraft (Pty) Ltd* 1981 (1) SA 889 (N) and *Scottish Union and National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 (AD) at 458.

[2]See, for example, *Kirin-Amgen Inc & Others v Hoechst Marion Roussel Ltd & Others* [2004] UKHL 46 2005 (1) All ER 667 (HL) where Lord Hoffmann spoke of the rule of construction that required ambiguity before turning to context as follows: 'These rules, if remorselessly applied, meant that unless a court could find some ambiguity in the language, it might be obliged to construe the document in a sense which a reasonable reader, aware of its context and background, would not have thought the author intended. Such a rule, adopted in the interests of certainty at an early stage in the development of English law was capable of causing considerable injustice and occasionally did so'. (Para 29); *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at p 912; and *Chartbrook Ltd v Persimmon Homes Ltd and Others and Another* [2009] UKHL 38 [2009] 1 AC 1101 (HL).

[3]See, for example, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 19 and *KPMG Charter Accountants (SA) v Securefin Ltd and Another; KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) at para 39.

[4]See *Investors Compensation Scheme v West Bromwich Building Society,* cited above n 1, at p 912. Whether Lord Hoffmann was correct to identify the shift as a fundamental change has been a matter of some debate. See Wallis 'What's in a word? Interpretation through the eyes of ordinary readers' 127 (2010) *South African Law Journal* 673–693 at 691–692.

‘1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they are at the time of the contract.

2. The background was famously referred to by Lord Wilberforce as the “matrix of fact” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely everything which would have affected the way in which the language of the document would have been understood by a reasonable man.

3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

4. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945).

5. The “rule” that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background

> that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.'[5]

[18] South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality* Wallis JA usefully summarised the approach to interpretation as follows –

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'[6]

[19] For the purposes of this judgment, it is not necessary to explore fully the similarities and differences that characterise the approaches adopted in the United Kingdom and South Africa. What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the

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[5] At pp 912–913.

[6] Cited in n 3 above para 19.

language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.

[20] It is significant to note that this shift had precursors in the law of both the United Kingdom and South Africa.[7] For example, in a famous passage in *Jaga v Dönges NO & Another,* Schreiner JA encapsulated the two approaches as follows-

> '[T]he approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.'[8]

[21] A related development in South Africa has been the abandonment by the courts of a distinction previously employed between 'background circumstances', evidence of which was always admissible as an aid to interpretation and 'surrounding circumstances', evidence of which was only admissible in the case of ambiguity.[9]

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[7]See the fuller discussion in Wallis 'What's in a word? Interpretation through the eyes of ordinary readers' 127 (2010) *South African Law Journal* 673–693; and Lord Bingham of Cornhill 'A new thing under the sun: the interpretation of contract and the ICS decision' (2008) 12 *Edinburgh LR* 374.

[8]1950 (4) SA 653 (AD) at 662H-663A.

[9]See *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768A–E. See also the helpful discussion in Hutchison and Pretorius *The Law of Contract in South Africa* 2 ed (2012: Oxford University Press) at 260–265.

[22] In *KPMG Chartered Accountants (SA) Ltd v Securefin Ltd*, Harms JA suggested that the terms 'background circumstances' and 'surrounding circumstances' were 'vague and confusing' and that there was little merit in attempting to distinguish them.[10] It is now clear that the South African Supreme Court of Appeal considers this approach to 'be no longer consistent with the approach now adopted by South African courts in relation to contracts or other documents . . . '.[11]

[23] Again this approach seems to comport with our understanding of the construction of meaning, that context is an important determinant of meaning. It also makes plain that interpretation is 'essentially one unitary exercise[12] in which both text and context, and in the case of the construction of contracts, at least, the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing the contract. This unitary approach to interpretation should be followed in Namibia. A word of caution should be noted. In accepting that the distinction between 'background circumstances' and 'surrounding circumstances' should be abandoned, courts should remember that the construction of a contract remains, as Harms JA emphasised in the *KPMG* case, 'a matter of law, and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses'.[13]

Cited above n 3.

[10]Id. At para 39.

[11]See *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12 where Wallis JA continued by saying that the distinction 'has fallen away' and '[i]nterpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".' (para 12).

[12]Id.

[13]Id.

[24] The approach adopted here requires a court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate textual context, as well as against the broader purpose and character of the document itself. Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears ambiguous. Consideration of the background and context will be an important part of all contractual interpretation.

The proper approach to the interpretation of the phrase 'source documents' in the agreement

[25] I turn now to the interpretation of the agreement. Appellant asserts that the agreement needs to be interpreted in terms of the dispute between the parties in the litigation that resulted in the agreement being concluded. In particular, the appellant asserts that the agreement should be limited to the scope of the dispute as pleaded in the earlier litigation. It is common cause that, initially the litigation related in the main to the question whether the appellant was liable to repay amounts relating to the 'transport differential' to the respondent. The respondent had paid these amounts (calculated at N$0,163 per litre of fuel) to the appellant, allegedly on the basis that it would be refunded these amounts by the Namibian Government. The appellant asserts that the amount of fuel delivered to the respondent was not in issue between the parties in the initial High Court proceedings but simply the question whether the transport differential should have been paid. Accordingly, says the appellant, it never considered that the amount of fuel that respondent took delivery of from appellant would be an issue in the

verification process. Appellant accordingly argues that the agreement, properly interpreted, does not require verification by reference to delivery notes.

[26] Respondent asserts, however, that during the litigation proceedings, the nature of the dispute between the appellant and respondent expanded to include the calculation by the appellant of the respondent's indebtedness to the appellant. In particular, the respondent asserts that when it instructed an accountant to reconcile the amounts it had paid to the appellant with the source documents; it discovered errors in the appellant's calculations as set out in the invoices.

[27] A reading of the agreement makes plain that it is concerned in the main with the verification 'of all transactions underlying the current account of plaintiff with defendant (with reference to source documents) in order to determine, by agreement any liability of defendant to plaintiff'. Moreover, the agreement also makes plain that there is a potential dispute about the opening balance as at 1 June 2005, and the agreement provides a procedure to seek to settle that dispute. Accordingly, the procedure contemplated by the agreement appears to be far broader than the dispute relating to the payments for the 'transport differential' to which appellant refers, as the High Court judge pointed out in his judgment at para 12. If the purpose of the verification procedure was simply to determine the liability of the appellant to refund the respondent the 'transportation differential' one would have expected the terms of the agreement to be formulated more narrowly.

[28] Accordingly, a reading of the full text of the agreement suggests that the purpose of the verification process was broader than the issue of the

reimbursement of the ‘transportation differential’ and instead sought to determine any liability of either of the parties to the other in relation to the supply agreement between them. The precise ambit of the dispute between the parties is not clear from the agreement, but it cannot be said that on a reading of the agreement, the parties had excluded disputes relating to the quantum of fuel delivered by the appellant to respondent. Reference to delivery notes would be one of the documentary mechanisms that might be used to verify indebtedness in such circumstances. The language of the agreement itself therefore does not support appellant’s contention that it should be read narrowly to be limited to the ambit of the pleadings in the earlier litigation.

[29] Appellant’s argument that the terms of the pleadings necessarily bound the terms of the agreement can also not be accepted. It is not unusual for a dispute between parties in litigation to alter as the litigation process develops. To accommodate the changing ambit of the dispute, a court may permit amendment of pleadings till late in the litigation process. Moreover, there is no legal bar to a settlement agreement regulating issues other than those traversed on the pleadings. South African courts have long recognised that agreements that are entered into during the litigation process might well canvass issues that do not appear on the pleadings. In *Van Schalkwyk v Van Schalkwyk*, for example, Horwitz AJ noted that –

> ‘Where, however, the parties arrive at a compromise or an agreement on, or in relation to, an issue so pending and triable then that compromise or agreement

> can be fittingly embodied in an order of Court even though it includes terms which were not directly in issue before the compromise or agreement was arrived at.'[14]

See also *Sadie v Sadie; Waldman v Waldman*.[15]

[30] Given the breadth of the verification exercise that appears to be contemplated in the agreement, can the appellant's argument that when the agreement stipulates that the verification process will take place by reference to 'source documents', a verification process that relies on invoices, credit notes and debit notes will suffice and delivery notes are not necessary be sustained?

[31] A source document is an accounting term. Given the verification process that was being regulated by the agreement, the term was used with its accounting connotations. As Yekiso J held in the Western Cape High Court decision of *Garden Cities Inc v City of Cape Town* 2009 (6) SA 33 (WCC) para 20, 'a source document can be in the form of an invoice, a tax invoice or any document of prime entry, no matter what label it carries'. A delivery note would ordinarily be considered to be a document of prime entry and the appellant did not argue that a delivery note, ordinarily understood, was not a source document. It argued instead that in the context of this case, the phrase 'source documents', where it appeared in the agreement, should be given a narrow meaning to exclude the need for verification by way of delivery notes.

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[14] 1947 (4) SA 86 (O) at 98–99.
[15] 1953 (4) SA 39 (W) at 42F–G.

[32] The only reason that appellant proffered for the unusually narrow meaning it suggested be attached to ‘source documents’ in the agreement was the fact that the issue of the quantity of fuel received by the respondent was not an issue in the litigation that preceded the signing of the agreement. Yet, as discussed above, the terms of the agreement appear to require an exercise far broader than one determining whether the appellant should reimburse the respondent for the transport differential amounts paid by respondent. Indeed, the terms of the agreement contemplate a wider investigation of the question of indebtedness by both parties. The agreement makes plain for example that there is a dispute between the parties as to the extent of indebtedness (‘the opening balance’) on 1 June 2005. Given the breadth of the verification exercise contemplated in the agreement, as well as the fact that there is no textual basis in the agreement that suggests that the amount of fuel delivered by appellant to respondent is not in dispute, the appellant’s argument that it is entitled to a declaratory order that the agreement does not require reference to delivery notes cannot be upheld.

Was the agreement void because of dissensus?

[33] Appellant argues in the alternative that if the agreement, properly interpreted, contemplates reference to delivery notes as part of the verification process, then the agreement is void *ab initio* because of the absence of consensus between the parties. Appellant notes that the agreement constitutes both a contract between the parties and an order of court. In that sense it is a ‘hybrid’.[16]

[16]For a consideration of the nature of a settlement agreement made a court order, see the full and illuminating discussion in Dale Hutchison ‘Contracts embodied in orders of court: the legal nature and effect of a judgment by consent’ in Kahn (ed) *The Quest for Justice: essays in honour of MM Corbett (*1995: Juta*)* at 229–263, and especially at 243–246.

[34] The precise legal character of an agreement that is made an order of court is not certain.[17] However, whatever the precise legal character of an agreement that is made an order of court by consent, it is clear that if the original agreement was vitiated by mistake, then a court may set aside the order that made that agreement an order of court. In the South African Appellate Division decision of *Gollach & Gomperts (1967) (Pty) Ltd and Others v Universal Mills and Produce Co (Pty) Ltd and Others*, Miller JA reasoned that an agreement made a court order may –

> '. . . be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why *justus error* should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.'[18]

[35] Appellant argued that, if the contract properly interpreted contemplates the possibility that the verification exercise would require the use of delivery notes, it 'would never have agreed to that'. Appellant argues therefore that the contracting parties were at cross-purposes and no consensus existed between them in signing the agreement. Appellant argues that it never intended to agree that the verification exercise would require the use of delivery notes, whereas the respondent did intend the use of delivery notes to verify the question of indebtedness.

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[17] Id. At 245–246.

[18] 1978 (1) SA 914 (A) at 922G.

[36] In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*, the South African Appellate Division set out the approach to unilateral mistake as follows –

> '. . . the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?'[19]

[37] The first question is whether there was a misrepresentation to the respondent regarding appellant's intention and the second is who made that misrepresentation. In this case, appellant signed an agreement that, properly construed, provided for a process to determine on the basis of source documents the extent of liability of either of the parties to the agreement to the other. In signing that agreement, which does not exclude delivery notes from the purview of the verification process nor does it limit the process to the question of the transport differentials, the appellant indicated its intention to follow the process provided for in the agreement. The respondent relied upon the appellant's signature of the agreement. It was not unreasonable for the respondent to rely on the misrepresentation or error made by the appellant.

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[19] 1992 (3) SA 234 (A) at 239J –240A.

[38] Appellant seeks to rely on facts surrounding the signing of the agreement to assert that its mistake in assuming the agreement had a narrower purport was reasonable. Even assuming that this evidence should be admitted, something which we expressly choose not to decide, it would not assist the appellant for there is a dispute of fact on the papers as to what happened at the meeting where the agreement was negotiated. On behalf of the appellant, it is asserted that the respondent's expert had conceded that his calculations that were based on delivery notes 'were likely to be incorrect and that his calculations ought rather to be based on invoices'. This averment is firmly denied on behalf of the respondent. Instead, the respondent asserts that it was agreed that appellant would be given an opportunity to challenge respondent's expert's conclusions and that the verification could *not* proceed simply on the basis of invoices. These allegations are denied by the appellant without any further elaboration. It is noteworthy that, as the agreement makes plain, the appellant was to be given an opportunity to comment on the respondent's expert's verification exercise. The agreement expressly provides that the appellant will be given an opportunity to respond to the verification process conducted by the respondent's expert after first giving the respondent an opportunity to reconsider its verification.

[39] In conclusion, in determining whether there was a *dissensus* between the parties at the time the agreement was signed, it is important to note that the ordinary meaning of 'source document' in the agreement would have included delivery notes. In the absence of an explicit limitation of the term 'source document', the respondent was entitled to assume that delivery notes would be useful and relevant to the verification exercise. Appellant suggests, nevertheless,

that it would not have signed the agreement if it knew that the agreement would have required reference to delivery notes. The difficulty for the appellant is that it signed the agreement and the meaning which the appellant seeks to attach to the agreement is inconsistent with the language of the agreement. It was not unreasonable for the respondent to rely on appellant's signature of the agreement and expect appellant to be bound by the written terms of the agreement.

[40] Moreover, given that the appellant chose to institute these proceedings by way of motion, any dispute of fact between the parties must be determined on the basis of that portion of the applicant's (here the appellant's) version as is not put into genuine dispute by the respondent, according to the well-established rule in motion proceedings (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I–635A). In this case, appellant's version of the negotiations surrounding the signature of the agreement is firmly disputed by the respondent. According to the respondent, both parties understood at the time the agreement was drafted that delivery notes would have been relevant to the verification exercise, and that understanding is consistent with the language of the agreement. In the light of the respondent's version of the events, the appellant's submission that there was *dissensus* between the parties at the time the agreement was signed cannot be sustained.

Rectification of the agreement

[41] The third and final question that arises for consideration is whether the Court should rectify and vary the agreement by inserting the words 'which need only to be invoices, debit notes or credit notes' after the words 'source documents'

wherever they appear in the agreement. The general principle is that there are only narrow circumstances in which an order of court may be varied.[20] Moreover, it is not clear to what extent a court will have the power to vary an order made by consent.[21] It is not necessary to determine this question here. Given the conclusion reached earlier in this judgment, that, properly construed, the agreement does not mean that the verification exercise need only proceed by way of reliance on invoices, credit notes and debit notes, there is no basis for a rectification of the contract as sought by the appellant.

[42] In the circumstances the appeal fails.

Costs

[43] There is no reason why costs should not follow the result. The appellant should be ordered to pay the costs of the respondent in this court on the basis of one instructing and two instructed counsel.

Order

[44] The following order is made –

1. The appeal is dismissed.

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[20]See *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304E. See also *Fish Orange Mining Consortium (Pty) Ltd v !Goaseb* 2014 (2) NR 385 (SC) para 22.

[21]See the discussion in Dale Hutchison "The Legal Nature and Effect of a Judgment by Consent" in Kahn (ed) "*The Quest for Justice: Essays in Honor of Michael McGregor Corbett Chief Justice of the Supreme Court of South Africa"* (1992 Juta) at 256–258.

2. The appellant is ordered to pay the costs of the respondent on the basis of one instructing and two instructed counsel.

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O'REGAN AJA

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SHIVUTE CJ

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CHOMBA AJA

APPEARANCES

APPELLANT:	S du Toit, SC (with him J J Meiring)
	Instructed by Fisher, Quarmby & Pfeifer
RESPONDENT:	R Heathcote (with him B de Jager)
	Instructed by Ellis Shilengudwa Inc.