IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO. 727/2011

In the matter between:

REHAU POLYMER (PTY) LTD	**PLAINTIFF**
and	
BRUNETTE ELECTRICAL	**1st DEFENDANT**
SCHNEIDER ELECTRICAL SOUTH AFRICA	**2nd DEFENDANT**
EASTERN SWITCHGEAR CC	**3rd DEFENDANT**
M&M FIRE PROTECTION CC	**4th DEFENDANT**
RICHARD NZUZA & ASSOCIATES CONSULTING ENGINEERS CC	**5th DEFENDANT**
COUGA DEVELOPMENT CORPORATION	**6th DEFENDANT**

RULING

ALKEMA J

[1] On 6 February 2010 a fire broke out in the low voltage room of Plaintiff's factory premises at Nelson Mandela Bay Logistics Park, Jagt Vlakte, Industrial

Area, Uitenhage, Port Elizabeth (the premises). At the time, Plaintiff, which is a duly constituted company, carried on the business of a polymer based automotive component manufacturer. It leased the premises from *Couga* Development Corporation, the Sixth Defendant. In consequence of the fire, substantial damage was caused to the Plaintiff in respect of the premises, the equipment, fixtures and fittings, and loss of income and profits. It instituted action against six defendants, claiming damages in an amount of R13,5 million.

[2] During the first Rule 37 Conference held on 9 May 2013 the Plaintiff, First Defendant, Second Defendant, Third Defendant and Fifth Defendant agreed that the merits and quantum be separated and that the quantum be stayed pending the final determination on the merits. The Fourth Defendant is not defending the action and Sixth Defendant's position on this issue of the merits is unresolved.

[3] At a subsequent Rule 37 Conference held on 2 October 2013 the parties agreed on a Statement of Facts, and further that certain questions of fact be separately decided in terms of Rule 33(4). Accordingly, and by agreement between the parties, the Court made an order in terms of Rule 33(4) per the agreed Statement of Facts and issues.

[4] For purposes of this hearing this Court is only concerned with the questions of facts separated under Rule 33(4).

[5] It is necessary to record fully the Agreed Statement of Facts and the separated issues as recorded in the Minute of 2 October 2013:

"1. The parties are agreed upon the following Statements of Facts:

1.1. The Sixth Defendant is the owner of the building situated at Nelson Mandela Bay Logistics Park, Jagt Vlakte, Industrial Area, Uitenhage ('the Premises').

1.2. The Plaintiff, at all material times, occupied the Premises in terms of a lease concluded with Sixth Defendant.

1.3. The Fire Department of the Nelson Mandela Bay Municipality required a fire suppression system to be installed in the Low Voltage room at the premises.

1.4. A fire suppression system was accordingly designed and installed by the Fourth Defendant, as per quotes to the Fifth Defendant.

1.5. The fire suppression system utilises a gas suppression process to suppress and extinguish fires, which system requires both electrical power to the system itself and the arming of the gas cylinders which form part thereof, in order to be fully operational and effective.

1.6. When armed and fully operational, the system designed and installed by the Fourth Defendant, would have suppressed and distinguished a fire in the low voltage room at the

Premises with limited damage, which in any event would have been confined to the panels, alternatively to the low voltage room.

1.7. *The fire suppression system, including the gas cylinders, was successfully tested during a presentation to the Fire Department of the Municipality on or about 18th September 2009, whereafter an occupation certificate was duly issued by the Municipality.*

1.8. *At the time of the fire which occurred in the low voltage room on the 6th February 2010 the fire suppression system in that room was connected to electrical power but the gas cylinders were not armed.*

1.9. *If the gas cylinders had been armed, then the damage to the premises and its contents, caused by the fire, would have been limited as set out above.*

1.10. *On or before 6 February 2010, the Plaintiff activated the low voltage capacitors contained in the power factor correction panels and related equipment within the low voltage room.*

2. *The parties further agree that having regard to the aforementioned facts and evidence to be led by the parties, the following additional questions of fact should be separately decided before all other factual and legal issues in dispute between the parties are to be determined, namely:*

2.1. Whether the gas fire suppression system was not activated after the acceptance of the system by the Fire Department on the instruction of the Plaintiff, represented by de Vrye, either on 18 September 2009 or 15 December 2009, as pleaded by the Fifth Defendant in paragraphs 22.3, 23, 25 and 28.2.4 to 28.2.4C of its proposed amended plea and as pleaded by the Second Defendant in paragraphs 17.3.4A-D of its amended plea, and as pleaded by Sixth Defendant in paragraph 20.4 of its proposed amended plea.

2.2. In the event that the facts set out in 2.1 above are established, whether:

2.2.1. Mr De Vrye was authorised to act on behalf of the Plaintiff in issuing such an instruction;

2.2.2. Whether the Plaintiff was authorised to issue such an instruction on behalf of the owners of the building, the Sixth Defendant.

2.3. Whether any of the parties, including the plaintiff, were causally at fault in respect of the non-activation of the gas fire suppression system, and if so, which parties were causally at fault.

2.4 Whether the Plaintiff was aware that the fire suppression system was not activated on 15 December 2009 or subsequent thereto.

2.5. If the Plaintiff was so aware, whether the Plaintiff should have activated the low-voltage capacitors contained in the power factor correction panels and related equipment within the low voltage room before the fire suppression system was activated."

[6] As appears from paragraph 2.1. above the words *"… on the instruction of the Plaintiff …"* are further qualified by the pleadings of the second, fifth and sixth Defendants. It also follows from the wording of this paragraph that the question posed therein must only be answered in relation to the second, fifth and sixth Defendants.

[7] The words *"causally at fault"* in para. 2.3, on my reading thereof, was intended to exclude claims based on contract. The Statement of Facts and the oral evidence placed before the Court relate solely to liability in delict and no evidence relating to the nature of any contractual relationship was placed before me, and nor was any argument relating to contractual liability addressed to me. I therefore assume that the parties did not intend that para.2.3 of the separated issues refer to any of the claims based on contract.

[8] In regard to the facts upon which I am called to base the findings I am asked to make, it is clear from para.2 of the Statement of Facts that I am, in addition to the agreed facts, also called upon to make certain factual findings from the evidence led before Court. I now turn to a consideration of such evidence, and deal first with the common cause facts.

[9] The electrical supply to Plaintiff's factory comes in through a 11 KVA sub-supply to transformers situated in a so-called Low-Tension or Low-Voltage room (the LV Room). From the transformers it passes through distribution panels in the LV Room to various points such as the paint plant, the infrared ovens, injection moulding, buzz bars and the like. One of the panels in the LV Room is a power factor correction panel which contains capacitors, the purpose of which is to smooth out peaks in demand and drops in the supply of electricity. Its purpose is to save costs of electricity, which savings are significant and running into several hundreds of thousands Rand.

[10] Following on an inspection by the fire department of the Nelson Mandela Bay Municipality during July 2009, it (the Municipality) required a gas fire suppression system to be installed in the LV Room. The contract for the installation of the fire suppression system in the L.V Room and the negotiations relating thereto were between the Sixth Defendant represented by its agent, the Fifth Defendant which acted as its consulting engineers; and the contractor, the Fourth Defendant, who designed and installed the system as per quotes to the Fifth Defendant. The Plaintiff was not a party to this contract, and save for being the occupier and tenant in accordance with a lease agreement with Sixth Defendant, it had no further interest in the works.

[11] A distinction must be drawn between a fire protection system on the one hand; and a gas fire suppression system in the LV Room as required by the fire department on the other hand. Fire protection systems were installed

throughout the Plaintiff's factory premises, which included smoke detection beams and, when activated, resulted in an audible alarm and water sprinkler system being activated.

[12] Since a water sprinkler system will have no effect on a fire caused by a short in electrical supply (an *"electrical fire"*) and may even aggravate the fire, a gas fire suppression system such as the one required by the fire department in the LV Room, is designed to extinguish an electrical fire by the release of gas. The system recommended by the Fourth Defendant and installed in the LV Room, is the FM200 system and it operates on the following basis.

[13] There are two smoke sensors in the LV Room which, on my understanding, separates the LV Room horizontally in two zones, with one smoke sensor in each zone. When the sensor in the lower zone 1 detects smoke, an audible alarm is activated. If the smoke rises further and enter zone 2, an audible siren will go off.

[14] Thereafter there is a 30 second delay. If the fire or the cause of the smoke is not extinguished within the 30 second period, the gas cylinders will be detonated. When the gas cylinders are detonated, gas capable of suppressing an electrical fire will be released into the LV Room in sufficient quantities to suppress and extinguish the fire. Simultaneously, the LV Room is sealed by certain dampers which would also close ventilation panels preventing the gas to escape and oxygen to enter. Accidental gas detonation must be prevented

if reasonably possible. Not only is the gas very expensive (R90 000,00 per gas cylinder), but may have hazardous effects and it takes time and costs to clear.

[15] Both the fire protection system (operated by water sprinklers) and the fire suppression system (operated by gas cylinders) require electrical current before it is operational. In addition, and in respect of the gas fire suppression system only, the gas cylinders must be connected to the system and armed. It is common cause that on the day of the fire on 6 February 2010 the fire suppression system was connected to electrical power but the gas cylinders were not armed (Para 1.8 of the statement).

[16] The Plaintiff, for obvious reasons, was keen to put its factory facility into operation as soon as possible and to commence full production. This it was unable to do without being issued with an occupation certificate issued by the Nelson Mandela Bay Municipality. And before issuing the occupation certificate, the Municipality had to be satisfied that the LV Room, including the gas fire suppression system, was fully operational and in good working order. For these purposes an inspection of the system by the fire department was arranged for 18 September 2009. The object of the inspection was to ensure that the gas fire suppression system was operational and that, accordingly, an occupation certificate may be issued.

[17] There is a factual dispute between the parties whether or not Mr *Hein de Vrey*, representing the Plaintiff, was present at the inspection on 18 September 2009. I will later in the judgment return to the events as they unfolded during

this meeting which are in dispute and which requires factual findings, but for present purposes the following are not in dispute.

[18] The electrical supply to both systems was available and connected on 18 September 2009 by the contractor, the Fourth Defendant. The inspection of the gas fire suppression system was conducted *Smit*, a technician employed by Fourth Defendant, and it proceeded in the following manner.

[19] *Smit* used an aerosol can containing smoke to release smoke in the LV Room. The smoke activated the sensors in both zones, and first the alarm and then the siren was duly activated.

[20] However, because the gas cylinders were not connected to the system (armed), the gas cylinders could not and would not be detonated after the 30 second delay. I will later return to the reasons not to connect the gas cylinders to the suppression system.

[21] The method used to determine if the cylinders would have been detonated had they been armed, was to connect a *"sounder"* (siren) to two points on the cylinder. A multimeter tester is then connected to the 24 volt DC electrical supply and to the *"sounder."* If the electricity is switched on, the siren will only go off if there is an electrical current going to the gas cylinder. If it does not go off, the gas cylinder would not have been activated.

[22] On 18 September 2009 the test described above was successfully carried out by *Smit*. *Grobler*, the Fire Protection Officer of the Municipality, was under the erroneous impression — that the gas cylinders were connected therefore that the system was operational. It is not disputed that *Grobler* was unaware that the gas cylinders were not connect (armed) during and after the testing, and in the *bona fide* but erroneous belief that the gas cylinders were connected and therefore that the system was fully operational, he issued the Certificate of Occupation. I will return in a moment to the state of mind of *de Vrey* on this issue.

[23] It is important to record that *Smit* of the Fourth Defendant had also installed a panel in the LV Room with a green and yellow light. The green light indicates that the electrical supply is on and connected, and the yellow light indicates that the electrical supply is not connected and the system is therefore not operational. It is common cause that after the successful testing of the gas suppression system on 18 September 2009 the green light remained on indicating the supply of electrical current to the system. As will be more fully discussed later, on his evidence *de Vrey* (and also at least two other witnesses, *Introna* and *Grobler*) believed the green light indicating that electrical supply was connected to the fire protection and suppression systems also meant that both systems were armed and fully operational. In truth and in fact, only the fire protection (sprinkler) system was operational, *Smit* having disconnected the gas cylinders to the system after the testing to prevent accidental detonation of the cylinders.

[24] Whether *de Vrey* knew that the suppression system was not operational after 18 September 2009, or should have known, or knew or should have known that the green light only referred to the fire protection system and not to the fire suppression system, are issues to be decided and to which I will return later in this judgment. For present purposes I merely record what I consider to be the common cause facts between the parties.

[25] Following upon the successful testing of the system, Plaintiff increased its production capacity and activated the low voltage capacitors where the fire started on 6 February 2010. On 15 December 2009, before the fire, there was another meeting with Fourth Defendant's representative during which Mr *de Vrey*, on his own evidence, was present. From the Fourth Defendant's perspective, it endeavoured to persuade Mr *de Vrey* to sign a final hand over certificate of the works. *De Vrey* refused. It remains an issue if *de Vrey* was told, or knew from this day, that the gas fire suppression system was not activated and therefore not operational. I will also return to this issue later in the judgment.

[26] Before considering the disputes relevant to the questions I am asked to determine, it is necessary to have regard to the pleadings in an attempt to define more precisely the meaning of the words *"… on the instructions of the plaintiff, represented by Mr de Vrey …"* in para.2.1 of the Statement.

[27] Plaintiff alleges in its particulars of claim that the fire started in the power factor correction capacitor panel which contain the low voltage capacitors, and

to which reference is made at the outset of this judgment. From there it spread to the adjacent panels and the timber roof supporting structure.

[28] The Second Defendant was the manufacturer and/or the supplier of *inter alia*, the low voltage capacitors. It is sued by the Plaintiff only in delict on the basis of the allegedly defective capacitors. Essentially, the claim pleaded by the Plaintiff against Second Defendant (i.e. paras 16.3 and 16.4 of the particulars of claim) is based on the implied warranty against latent defects of a manufacturer or dealer who publicly professes to have attributes of skill and expert knowledge in relation to the goods sold (the *actio empti*). The claim is judicially recognized as not being contractual, but rather delictual resulting in consequential damage. As such, the Second Defendant is entitled to raise a defence based on the application of the Apportionment of Damages Act 34 of 1956. (The Apportionment of Damages Act)

[29] This defence is pleaded as follows by the Second Defendant (para 17.3.4B of its Plea):

> *"At all material times … the gas fire suppression system was not activated* ***on the express instructions of the Plaintiff*** *represented by Mr De Vrey, and in any event was not activated to the knowledge of the Plaintiff."* (My emphasis).

[30] The defence as pleaded on this issue is based on two legs, couched in the alternative. The first is the express instructions of *de Vrey* not to activate the

system; and the alternative is that, to the knowledge of *de Vrey*, the system was in any event not activated. The alternative plea is premised on the failure of *de Vrey* to ensure that the system is activated in circumstances where he knew such failure may constitute a fire hazard (paras 17.3.4C and 17.3.4D of second Defendant's plea).

[31] The Plaintiff's claim against Fifth Defendant is based in delict. It claims negligence on the part of Fifth Defendant in a number of respects, including that it did not ensure that the gas suppression system was operating properly; alternatively, was aware that the gas fire suppression system was not activated, and in breach of its duty of care to Plaintiff it failed to inform it – in particular *de Vrey* – that the system had not been operated. As in the case of Second Defendant, the Fifth Defendant was entitled to invoke the Apportionment of Damages Act as a defence, and in this regard it pleaded as follows:

> *"22.3 The Fifth Defendant avers further that the fire suppression system was not activated* ***on the express instructions of the Plaintiff*** *represented by one Mr de Vrey, and that the Plaintiff was accordingly at all relevant times aware of that fact.* (My emphasis).

[32] The other paragraphs in Fifth Defendant's Plea and referred to in para 2.1. of the Statement of Facts, are essentially a repetition of para 22.3 of the Plea as quoted above. The Plea is not, as opposed to Second Defendant's Plea, a Plea in the alternative. It follows as a matter of logic that if *de Vrey* gave

express instructions not to activate the system, he must have had knowledge of such fact.

[33] The Plaintiff's claim against Sixth Defendant is entirely based in contract. It follows that it is not open to Sixth Defendant to raise apportionment as a defence to Plaintiff's contractual claim. (See *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 589E-590D and 598B).

[34] The Sixth Defendant pleaded *inter alia* the following defence to Plaintiff's claim:

> *"20.4. Further and more particularly the Sixth Defendant pleads that:*
>
> *20.4.1. On or about 18 September 2009 the gas fire suppression system was inspected and approved by the Community Fire Safety Division of the Municipality, as verified by the certificate of occupancy attached hereto as 'CDC3', and more particularly in the person of Mr Eben Grobler.*
>
> *20.4.2. On or about 15 December 2009 and despite being requested by Mr Quinton Smit of the Fourth Defendant to do so, Mr Hein de Vrey of Plaintiff refused to activate the gas fire*

suppression system. The reason for refusing was that Mr de Vrey apparently wanted a weather cowl fitted over an opening in the wall.

20.4.3. Mr de Vrey also refused to sign the necessary handing-over certificate, annexure 'CDC4' hereto.

20.4.4. The Sixth Defendant therefore denies being liable to the Plaintiff for any damages."

[35] The defence pleaded in the above paragraphs is not, and in law may not be, based on apportionment under the Apportionment of Damages Act. Rather, it is a defence concerning causation.

[36] The question of causation arises under para 2.3 of the Statement of Facts. I am not required to determine the degree or extent of the fault. All I am required to do under para 2.3 of the Statement is to determine the issue of causality on the agreed facts and on the evidence before me. This I can only do after a consideration of all the evidence in the light of the agreed facts.

[37] At the heart of the factual disputes between the parties are the issues:

(1) Whether or not *de Vrey* knew, or ought to have known, that the suppression system was not operational; and

(2) Whether or not he gave instructions, express or implied, not to activate the system.

The only witnesses who gave direct evidence on these issues are *de Vrey* on behalf of the Plaintiff, *Smit* of the Fourth Defendant, and one *Moodaley* on behalf of Fifth Defendant. I now turn to an analysis of the evidence of those three witnesses.

[38] Mr *Hein de Vrey* testified that at all material times he was, and to this day remains, the maintenance manager employed by the Plaintiff at the factory site in Uitenhage in Port Elizabeth. His direct supervisor was Mr *Introna* who was stationed in East Londen and to whom he reported. In the words of *de Vrey*, he (*de Vrey*) was the *"eyes and ears"* of Mr *Introna* on the factory site.

[39] *De Vrey* testified that he was aware of the requirement by the Municipal Fire Officer to install a gas fire suppression system in the LV Room, and he knew of such technology. He was also aware of the inspection of the system on 18 September 2009, and although he was on site that day, he was not asked to and nor did he attend the inspection. In this regard it must be borne in mind that the Plaintiff was not a party to the contract between Sixth Defendant and the contractor, Fourth Defendant, and other than being the occupier and tenant, it had no interest in the meeting. Theoretically, the certificate of occupation had to be issued to the Sixth Defendant as owner, and not to the Plaintiff as the tenant. It would occupy the premises through the

Sixth Defendant, and not of own right. There was therefore no need for *de Vrey* to attend the meeting or to observe the test.

[40] After the inspection on 18 September, *de Vrey* saw a panel indicating a green light fixed to the outside of the LV Room. He had heard, and it was common knowledge, that the test on the system was successfully carried out. He assumed, as a qualified electrician, that the green light indicated that the electrical supply was connected to the gas fire suppression system, that the gas cylinders were activated and that the system was therefore fully operational.

[41] *De Vrey* testified that the Fourth Defendant was the contractor responsible for the installation and preparation of the LV Room, which included the installation of the fire suppression system. This is common cause. He knew that throughout 2009 there was work in progress by Fourth Defendant's representatives in the LV Room. As confirmed by *Smit*, the inspection of 18 September 2009 was solely aimed at testing the fire suppression systems, and was not a hand-over of the works by Fourth Defendant to either the Plaintiff or the owner, the Sixth Defendant. The work continued during September, October and November 2009 until the plant shut-down during the middle of December 2009. During this period there was no hand-over of the works by Fourth Defendant; no training was given by Fourth Defendant to Plaintiff's officials as required by the contract; no manuals were given to the Plaintiff and all knowledge of operational and emergency procedures in the case of a fire remained vested in the Fourth Development. As far as *de Vrey* was concerned, the fire suppression system was operational

since September 2009, but remained under the control of the Fourth Defendant who was still engaged in ongoing work.

[42] *De Vrey* was well aware of the potentially dangerous and costly consequences of accidental detonation of the gas cylinders which could be activated by ongoing work in progress, but on his evidence he was not unduly concerned because the LV Room constituted a *"controlled"* area. By this he meant the LV Room was a restricted area which remained locked at all times, 24 hours per day. Only he, *de Vrey*, and Security had keys to the LV Room. If Fourth Respondent needed access to the LV Room to undertake or continue with the works, its officials needed to obtain the keys either from him or from Security. No one else was given access to the LV Room. As the experts, he assumed Fourth Defendant's officials knew what to do to prevent accidental detonation whilst undertaking work in progress. In this sense it was a controlled area where risks were minimized, and he assumed the Fourth Defendant's technicians could and would have de-activated the gas cylinders during work in progress. For these reasons he was not unduly concerned about accidental detonation of the gas cylinders during work in progress.

[43] *De Vrey* was adamant in his evidence that if he was advised or knew that the fire suppression system was not activated or operational, he would immediately have reported this to his superior, Mr *Introna*. His evidence in this regard is the following:

> *"At Rehau (Plaintiff) we have a very clear sequence of events if there is any impairment to any protection system. Which is directly escalated to*

your first line manager, via e-mail and cell phone. If this was the case, if this thing was not active, and I knew about it, or was otherwise informed, this escalation could have instantaneously happened. I was not informed about the system not being armed."

[44] By *"escalate" de Vrey* meant *"reporting to your superior."* He testified that if he was advised that the gas cylinders were not activated, he would immediately have reported (escalated) it to Mr *Introna* and advised him of the safety risks. The insurers would also have been advised, and steps could and would have been taken to eliminate the safety risks.

[45] According to *de Vrey*, this was his state of mind until 15 December 2009. His evidence in regard to what happened on 15 December 2009 is the following.

[46] The 15th December 2009 was a Tuesday. The plant had formally shut down for the Christmas period the previous Friday 11 December 2009. Although the plant had shut down, *de Vrey* was on site on Tuesday 15 December. He received a message from security at the gate to the effect that two representatives from Fourth Defendant wanted to meet with him at the LV Room. He knew that Fourth Defendant as the contractor was still engaged in on-going work in progress in the LV Room, and agreed to meet with them. The meeting had not been arranged and he was not given prior notice thereof. He did not know what the purpose of the meeting was.

[47] He thereupon met with Messrs *Moodaley* and *Smit* in the LV Room. Mr *Moodaley* was an engineering technologist in the employ of Fifth Defendant, who acted as the consulting engineering firm appointed by Sixth Defendant in respect of the construction of the factory. However, Fifth Defendant was not involved in the electrical reticulation system, or in the design and installation of the electrical equipment in the LV Room which was the responsibility of the Fourth Defendant. Fourth Defendant was engaged by the owner, *Couga* Development. There was therefore no privy of contract between Plaintiff and Fourth Defendant who had conducted the inspection and tests on 18 September 2009, or between Plaintiff and Fifth Defendant.

[48] It soon became evident that the sole purpose and object of the meeting on 15 December 2009 was for *de Vrey* to sign, on behalf of *Couga* Development, the Completion Certificate in respect of the works undertaken by Fourth Defendant, obviously to enable Fourth Defendant to receive payment from *Couga* of the balance of the contract price before year-end. This, according to *de Vrey*, he was unable to do and he refused to sign the Completion Certificate as requested by *Smit*, supported by *Moodaley*.

[49] *De Vrey*'s refusal to sign was based on his belief that the works were not yet complete. In addition, no formal hand-over of the fire suppression and prevention systems had taken place; no formal training of the Plaintiff's staff regarding the operation of the fire suppression system had occurred as required by the terms of the contract, no training manuals were handed to

Plaintiff and its staff remained in the dark in regard to operational procedures of the system. In regard to incomplete work, in particular, *de Vrey* insisted that a weather cowl be installed on the outside of a ventilation hole to prevent the ingress of rain, insects, birds and the like.

[50] In response, *Smit* and *Moodaley* pointed out that the Fire Department of the Municipality had issued an occupational certificate on the strength of the successful testing of the fire suppression system on 18 September which indicated that the works are complete and fully operational. This information strengthened *de Vrey*'s belief that the fire suppression system was operational and activated, but he nevertheless refused to sign the completion certificate pending completion of the works and a formal handing over and training of Plaintiff's staff on the operation of the fire suppression system. Further discussions followed in an attempt to persuade *de Vrey* to sign the completion certificate but save for saying that he persisted in his refusal to sign, it is unnecessary to detail those discussions.

[51] *Moodaley* and *Smit*, somewhat unhappily, left the site with the unsigned certificate. This left *de Vrey*, according to him, still suffering from the belief that the fire suppression system was not only operational, but also — as indicated by the green light — connected and activated. This remained his state of mind until the fire broke out on 6 February 2010, when he for the first time realized that the gas cylinders were never connected or activated.

[52] The general tenor of *de Vrey*'s evidence is that he accepted that if work in the LV Room undertaken by or on instructions of Plaintiff resulted in accidental detonation, then Plaintiff would be liable for such losses. However, if accidental detonation occurs during work in progress undertaken by Fourth Defendant who, as the experts should de-activate the system during that time, then Fourth Defendant would be liable.

[53] The evidence of *de Vrey*'s immediate superior, Mr *Introna*, to some extent and indirectly corroborates some aspects of *de Vrey*'s evidence. *Introna* testified that, having observed the green light showing in the panel outside the LV Room, he also assumed the electricity was connected and the gas fire suppression system was active and armed, ready and prepared in the event of a fire. He was never advised otherwise. He made exactly the same assumption as *de Vrey*, and based such assumption on the same fact of the indicator light in the panel. *De Vrey* is a qualified electrician, and there is nothing on the evidence to suggest that both he and *Introna* acted unreasonably in holding the belief that the system was operational from 18 December 2009.

[54] In fact, the belief held by *Introna* and de Frey was shared by *Eben Grobler*, the Senior Fire Safety Officer of the Metro Municipality who attended the meeting and inspection on 18 December 2009. The evidence of *Grobler* also, perhaps indirectly, corroborates the evidence of *de Frey*. *Grobler* testified that he could not recall *de Frey* being present at the inspection. It was not

important for any representative of the Plaintiff to be present. The occupation certificate is issued to the owner, namely *Couga* the Sixth Defendant.

[55] *Grobler* testified that the system was tested in his presence up to cylinder head and he was satisfied that the system was fully operational and active. He issued the occupation certificate to Sixth Defendant in the belief that the cylinders were connected and the system was operational. Had he known that the cylinders were not connected, or that further work needed to be carried out, he would not have issued the certificate. If he was subsequently told that the system was not activated, he would have revoked the occupation certificate. It was never suggested that *Grobler* had acted unreasonably in holding this belief.

[56] Like *Grobler*, both *Introna* and *de Vrey* were acutely aware of the high risk of fire in the LV Room. They were both concerned that the gas cylinders had not detonated during the fire, and they both expressed surprise when they learned that the cylinders were not connected and the system was never activated. All three stated that until formal hand-over and training, the operation of the system rested with the installer, namely Fourth Defendant.

[57] The argument that *de Vrey* knew there was still outstanding work to be done in the LV Room which could cause accidental detonation and, for this reason, he should have known that the system could not be activated on 18 September 2009, is with respect devoid of any merit. The outstanding work was minimal and confined to the construction of a ventilation hole with

dampers on the inside and a weather cowl on the outside. It was Fourth Defendant's responsibility to install the ventilation with dampers. The LV Room remained locked and only *de Vrey* and the Security had the keys thereto – it was a *"controlled"* area. As experts, Fourth Defendant would reasonably be expected to de-activate the system during work in progress in the LV Room. No other contractor had access thereto. The chances of accidental detonation were therefore minimal and did not present a risk factor.

[58] On all probabilities, and having regard to the fact that *Introna, de Vrey* and *Grobler* were very aware of the risk in the LV Room if the system was not activated, *de Vrey* would immediately have reported the risk to *Introna* if he knew the system was not activated. *Introna* would have reported the risk to Plaintiff's insurers and to his superior and remedial action would have been taken. *Grobler* would not have issued the operation certificate.

[59] Given the above circumstances, I find it improbable in the extreme that *de Vrey* would not have reported it to *Introna* and taken remedial action if he had known that the system was not activated. There is simply no reason for him to have ignored such a serious potential risk factor.

[60] For the same reasons advanced above, I find it improbable in the extreme that *de Vrey* would have given express instructions at the meeting of 18 September 2009, even if he was present, not to connect the system due to the work in progress. Compared to *Moodaley* and *Smit, de Vrey* impressed me as a credible and responsible employee. There is simply no reason for him to give

such instructions given that he was acutely aware of the high fire risk in the LV Room.

[61] For the reasons which follow, I found *Moodaley* to be a poor, unreliable and untruthful witness and *Smit* not much better. I now turn to the evidence of *Smit* and *Moodaley*, starting with the evidence of *Moodaley* compared with the evidence of *de Vrey*, *Introna* and *Grobler*.

[62] *Moodaley* testified that he was asked to represent Fifth Defendant at the meeting and testing of the fire suppression system on 18 September 2009. Present were the Chief Fire Officer of the Municipality, Mr *Eben Grobler*, Mr *Quinton Smit* from Fourth Defendant, the architect whose name he cannot remember, Mr *Grant Wade* the representative of the principal agent, he, *Moodaley* and Mr *Hein de Vrey* representing the Plaintiff.

[63] *Smit* successfully performed the necessary tests to the satisfaction of *Grobler*. Being satisfied that the fire suppression system was operational and activated, *Grobler* signed the occupational certificate and left.

[64] Before *Grobler* left he required a ventilation system with damper to be installed in the LV Room. This was done by *Smit* on behalf of the Fourth Defendant between 18 September and 15 December 2009. I believe this is the ventilation in respect of which *de Vrey* required *Smit* to fit a weather cowl on the outside of the building.

[65] After *Grobler* left the meeting there was a discussion as to whether or not the gas cylinders should be connected and activated. Because there was still outstanding work to be done relating to the ventilation system, *de Vrey* feared accidental detonation of the gas cylinders and instructed that the gas cylinders not be connected. On his express instructions, the gas cylinders were therefore not connected. The discussion about connecting the gas cylinders when *de Vrey* gave these instructions, on the evidence of *Moodaley*, took place on the landing outside the LV Room. As indicated, this evidence is denied by *de Vrey.* As I will demonstrate later, it is also not corroborated by *Smit.*

[66] In regard to the events and the meeting of *de Vrey* with *Moodaley* and *Smit* on 15 December 2009 when *de Vrey* refused to sign the completion certificate, *Moodaley* corroborated the version of *Smit* to the fact that *Smit* said if *de Vrey* refused to sign the completion certificate, then he (*Smit*) was not allowed to connect the gas cylinders. In his view, when he and *Smit* left the factory premises on 15 December 2009, *de Vrey* knew that the gas cylinders were not connected and therefore not activated.

[67] When it was put to *Moodaley* by Mr *Buchanan* SC that *de Vrey* refused to sign the completion certificate because, *inter alia*, the Plaintiff's staff had not received any training on the operational requirements of the fire suppression system, *Moodaley* said *Smit* had in fact trained *de Vrey* on the operational requirements on 15 December. This was never mentioned by him in evidence-

in-chief, and nor was it put to *de Vrey* under cross-examination. This evidence also contradicts *Smit*'s evidence on this issue.

[68] On 8 February 2010, two days after the fire, *Moodaley* prepared and submitted a written report on the possible causes of the fire to his firm's client, *Couga*. In this report *Moodaley* states:

> *"The fire protection system was inspected and accepted by the Uitenhage Fire Department on the 18th September 2009. The building occupancy certificate was signed by the Uitenhage Fire Department. The fire protection suppression system was fully operational at this time."*

[69] Mr *Moodaley* was constrained to concede under cross-examination that the last sentence quoted above was to his knowledge, factually incorrect and contain a misleading statement to his client. On his evidence, *de Vrey* gave express instructions not to connect the gas cylinders. To his knowledge, the gas cylinders were never connected and activated, and the system was not fully operational. Nowhere in his report does he disclose that *de Vrey* gave, for whatever reasons, express instructions that the gas cylinders be disconnected.

[70] On 13 May 2011, and in response to a request from *Coega* on further and more detailed information on the cause of the fire, *Moodaley* prepared a further report to his client. In this report he repeats that the fire suppression system was fully operational on 18 September 2009. The report is misleading in two material respect: First, to his own knowledge, it was not fully

operational as conveyed by him to his client. Second, no mention is made of the crucial information that the gas cylinders were disconnected on the express instructions of *de Vrey* on 18 September, and that to the knowledge of *de Vrey* and because he refused to sign the completion certificate, it remained disconnected after the meeting of 15 December 2009 and was therefore not operational on the day of the fire on 6 February 2010. Coupled to this is also the failure to mention, as he did under cross-examination, that on 15 December 2010 *Smit* gave *de Vrey* a demonstration on the operational procedures of the suppression system.

[71] The above features in the report create the inference that these facts were not disclosed simply because they did not happen. There is no reason why *Moodaley* would have deliberately misled his client, *Couga*. I believe it is reasonable to assume that *Moodaley*, like *de Vrey*, *Introna* and *Grobler*, also suffered under the misapprehension that the system was fully operational and this accounts for his reports to *Couga*.

[72] The position is no different after the meeting of 15 December 2009. If anything, the confusion continues. In his evidence, *Moodaley* said that at the meeting of 18 September *de Vrey* gave express instructions not to connect the gas cylinders; in his report dated 8 February 2010 (2 days after the fire) to the Sixth Defendant he contradicts this statement by recording that the suppression system *"… was tested, installed and commissioned on 18 September 2009 …"* He concluded the paragraph with the words *"… The fire protection/suppression system was fully operational at this time …"* (18

September 2009). In his evidence, *Moodaley* said that at the meeting of 15 December 2009 *Smit* told *de Vrey* explicitly that unless he signs the *"hand-over"* certificate the policy of the Fourth Defendant is that the gas cylinders will not be connected, is again contradicted by *Moodaley* in his report to the insurers dated 8 September 2010 (after the fire) where he reported:

> *"… 1. The building was handed over in 2009 fully operational. This includes the fire detection system. Rehau* (the Plaintiff) *was 100% protected at all times from hand over …"*

And *a*gain:

> *"… At the time of the fire that took place at end February 2010* (sic) *the system worked perfectly and valuable date was retrieved from the fire Detection Panel …"*

These statements are misleading, if not blatantly untruthful.

[73] Not only are there material discrepancies between *Moodaley*'s evidence-in-chief and his evidence under cross-examination, but he also testified about matters under cross-examination (such as the alleged training on the system given by *Smit* to *de Vrey* on 15 December 2009) which he failed to mention in evidence-in-chief and on which *de Vrey* was never cross-examined.

[74] In my view, the most damning feature of *Moodaley*'s evidence is the contradiction between his evidence and what he told his firm's client, *Couga*. He told this Court that to his own knowledge and that of *de Vrey*, they both knew from 18 September 2009 that the system was not armed and therefore

not operational. However, two days after the fire, he told *Couga* that the system was at the time of the fire *"fully operational."* This contradiction cannot be a mistake, oversight or, as he wants this Court to believe, an incomplete report. It is a false statement – either to this Court or to *Couga*.

[75] *Moodaley* was very aware of the risk of an "electrical" fire in the LV Room. He knew the Plaintiff was increasing its production capacity. As a consulting engineer it is probable that he would have reported to *Couga* that the Plaintiff was operating in the face of a very real fire risk if he knew the system was not operational. It is inconceivable and inexplicable that he would not have done so. I am inclined to the view that *Moodaley* too, like *de Vrey*, *Introna* and *Grobler*, suffered under the impression that the gas cylinders were armed, and this explains his reports to *Couga.*

[76] I formed the impression that Moodaley is an intelligent man. However, in giving evidence he was evasive, unimpressive and untruthful. I am unable to attach any weight to his evidence at all, and I reject his evidence *in toto.*

[77] *Smit* was a somewhat better witness but with respect, not nearly of the same intellectual capacity as *Moodaley*. He had difficulty in articulating his thoughts and gave evidence in a somewhat incoherent manner with no sense of chronology or detail. There are material discrepancies between his evidence-in-chief, his evidence under cross-examination, and his written statement to the answers to which I will refer.

[78] In regard to the meeting of 18 September 2009, he said *de Vrey* was present but he had no recollection of *de Vrey* giving any instruction, either expressly or by implication, that the system not be activated. He knew nothing about a meeting outside on the landing when *de Vrey*, according to *Moodaley* allegedly gave such instructions. The evidence of *Smit* therefore does not take the issue whether or not *de Vrey* gave such instructions on 18 September 2009, any further.

[79] Under cross-examination *Smit* testified that in regard to the meeting of 18 September his only function was to demonstrate that the fire suppression system was operational. He was not involved in any meeting and cannot say what was said by others present. He states as follows in para 6 of his statement: *"… I do not recall whether I made comment* (sic) *that I had not armed the gas detonators and would not do so until Messrs. Rehau had completed a hand-over certificate."* He does recall, however, that *de Vrey* was present when he tested the system. The evidence of *Smit* therefore does not corroborate *Moodaley*'s evidence regarding the meeting of 18 September; namely that *de Vrey* gave express instructions not to connect the gas cylinders.

[80] In regard to the meeting of 15 December 2009, the evidence of *Smit* on the issue of whether or not *de Vrey* knew that the gas cylinders were not connected, is contradictory and unsatisfactory. In his evidence-in-chief he said he explicitly told *de Vrey* that unless the latter signs the hand-over certificate, he was not going to connect the gas cylinders. Under cross-examination by Mr

Buchanan SC this evidence was so diluted that no reliance at all can be placed on his evidence on this issue. He said he actually addressed *Moodaley* when he said this, and because *de Vrey* was in the room, he *"assumed" de Frey* had heard what he said to *Moodaley*.

[81] It appears that *Smit* made a written statement to Plaintiff's insurers during November 2012, which he confirmed was factually correct. Whereas he quite clearly said in his evidence-in-chief that he told *de Vrey* directly that unless he (*de Vrey*) signs and hands over the completion certificate, he (*Smit*) was not going to connect the gas cylinders, *Smit* said in his written statement to the insurers that he recalls having *"commented"* to *Moodaley* that until such time as Plaintiff accepts responsibility for the gas system (by signing and handing over the completion certificate) then he (*Smit*) was under strict instruction by his employer not to arm the gas detonators. In his evidence under cross-examination, *Smit* said that he *"assumed" de Vrey* had heard the comment and understood what he said. *Smit* confirmed in his evidence under cross-examination that he was not speaking specifically to *de Vrey* but made the comment *"… in the room …"* and if *de Vrey* was there he would have heard the comment. This is a very different version from his evidence-in-chief. Assuming that *de Vrey* heard what he said to someone else is a far cry from having explicitly told *de Vrey*, and is in any event no evidence that *de Vrey* overheard his comment to *Moodaley*.

[82] The end result of *Smit*'s evidence is that, at best for Defendants, he corroborates the version of *Moodaley* to the effect that *de Vrey* was present at the demonstration on 18 September 2009, but it is neither corroboration that *de Vrey* gave instructions (express or implied) on that day that the cylinders be

not connected, nor that he told *de Vrey* on 15 December that unless he signs the completion certificate he (*Smit*) was not going to connect the gas cylinders.

[83] In regard to the meeting of 15 December 2009, *de Vrey* denies that *Smit* told him that unless he signs the hand-over certificate he (*Smit*) had strict instructions not to connect the gas cylinders. Notwithstanding, he conceded that *Smit* told him that Fourth Defendant would not take responsibility for losses due to accidental detonation caused by work in progress. In the evaluation of the evidence of *Smit*, *Moodaley* and de *Vrey*, I have no difficulty for the reasons mentioned in accepting the evidence of *de Vrey* and rejecting that of *Smit* and *Moodaley* where it differs from *de Vrey*. I find the evidence of *Moodaley*, in particular, to be untrustworthy and unreliable.

[84] This brings me to the debate concerning wrongfulness and whether or not *de Vrey* ought to have known that the system was not operational, and should therefore have taken preventative measures.

[85] The Second Defendant in its pleadings, referred to earlier, rely in the alternative on *de Vrey*'s alleged negligent failure to ensure that the system was activated in circumstances where he knew such failure may constitute a fire hazard. In delict, failure (*omissio*) to act can only be actionable if there is a legal duty to act, and where the perpetrator in breach of such duty fails to act. A legal duty to act is established by the legal convictions of society and establishes wrongfulness. Because our law does not recognize negligence *"in the air,"* it is now established law that in cases of reliance on an *omissio* the

issue of wrongfulness must be determined anterior to the question of fault. The element of fault is only capable of being legally recognized if the omission can be termed as legally wrongful. In cases of *omissio*, the absence of wrongfulness, the issue of fault does not even arise. These are two separate and distinct elements of the same delict, each requiring its own test and approach, and not to be confused or conflated. See *Administrator, Transvaal v van der Merwe* 1994 (4) SA 347 (A) at 364; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441E-442B (para 12).

[86] In *Van Duivenboden* (*supra*) *Nugent* JA commented:

> *"Negligence, as it is understood in our law, is not inherently unlawful—it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability—it will attract liability only if the omission was also culpable as determined by application of the separate test that has consistently been applied by this court in Kruger v Coetzee namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it."* [at para 12]]

[87] *De Vrey'*s failure (omission) can only be termed wrongful if there was a legal duty to take evasive action. And a legal duty can only be imposed by the legal convictions of society. See *Cape Town Municipality v Bakkerrud* 2000 (3) SA 1049 (SCA) at para 14, 1056E-H; *van Duivenboden* (*supra*) at 442B; *Wingaardt and others v Grobler and Another* 2010 (6) SA 148 (ECG).

[88] I have already found that *de Vrey* acted reasonably in his belief that the system was fully operational, and also that he did not give any instructions not to activate the system. In these circumstances the legal convictions of society, and considerations of reasonableness, do not require that he ought to have taken preventative measures. In these circumstances the culpability of his *omissio* does not even arise. On the facts found proven by me, no legal duty was imposed on *de Vrey* to take any preventative measures and his omission to do so cannot, in my view, be termed wrongful. Therefore, the issue of fault or negligence on the part of *de Vrey* never arose.

[89] I therefore do not believe that the Second Defendant can successfully rely on its alternative plea, and this defence must fail. The same reasoning applies to Sixth Defendant's Plea where it too relies on the alleged omission of *de Vrey* to activate the system, and such defence must also fail.

[90] In regard to Second Defendant's, Fifth Defendant's and Sixth Defendant's main pleas, I find as a fact that *de Vrey* never gave express (or implied)

instructions not to activate the gas fire suppressant system, either on 18 September 2009 or 15 December 2009 as pleaded by:

1. Fifth Defendant in paras 22.3, 23, 25 and 28.2.4 to 28.2.4c of its Plea;

2. Second Defendant in paras 17.3.4 A-D of its amended Plea; and

3. Sixth Defendant in paras 20.4 of its amended Plea.

[91] In view of the above finding, paras 2.2 of the Statement of Facts falls away. In regard to paras 2.3; namely whether any of the parties, including Plaintiff, were causally at fault in respect of the non-activation of the gas fire suppressant system, it is convenient to deal with each Plaintiff separately.

The First Defendant

[92] The question of the non-activation of the suppressant system is not raised by the Plaintiff against First Defendant. The latter is only sued in contract for a breach of warranty relating to the allegedly defective capacitors. It follows that First Defendant cannot raise apportionment under the Apportionment of Damages Act against the Plaintiff (*Thoroughbred Breeders* (*supra*)).

[93] The defence pleaded by the First Defendant is that the Plaintiff negligently failed to operate the fire suppressant system; alternatively, with knowledge that the system was not activated, it activated the low voltage capacitors contained in the power factor correction panels within the LV Room before the

fire suppression system was activated. Essentially, this defence is based on an allegation of exclusive causal fault on the part of Plaintiff. The *onus* to prove such fault rests on the First Defendant. Such a defence, as a matter of law, is competent (*Thoroughbred Breeders* (*supra*)).

[94] For the reasons mentioned, any failure on the part of the Plaintiff to operate the system which can be said to constitute negligence (fault), can only arise if there was a legal duty on the Plaintiff to act (wrongfulness). I have already found that in the reasonable belief that the system was operational, there was no legal duty on *de Vrey* to either operate the system, or not to activate the low voltage capacitors. In any event, in the absence of a formal hand-over of the system by Fourth Defendant to Plaintiff — including the contractual duty to train its staff on the operation of the system — the responsibility for the operation of the system remained vested with the Fourth Defendant and not the Plaintiff. Therefore, there was no legal duty on the Plaintiff to operate the system and the issue of its failure to do so (fault) does not arise.

[95] In regard to the alternative defence, it can only succeed if the Plaintiff knew or reasonably should have known that the system was not operational. For the reasons mentioned, I find that the Plaintiff, through *de Vrey*, had no such knowledge.

[96] The defence pleaded by First Defendant must accordingly fail. That is not to say, of course, that it may not be liable on breach of warranty. However,

that issue is not before me and I cannot make any finding on contractual liability.

The Second Defendant

[97] I have already indicated that the Plaintiff's claim against Second Defendant is based on the *actio empti* which is regarded as a delictual claim for consequential damages. The Second Defendant has pleaded negligence on the part of *de Vrey* based on the non-activation of the system. In addition, Second Defendant pleaded that the Plaintiff permitted the plant to be operated in breach of the regulatory regime (The Occupational Health and Safety Act).

[98] The liability or otherwise of the Second Defendant under the *actio empti* raise issues which are not before me in this enquiry, and I make no findings in relation thereto.

[99] In regard to its plea raising negligence on the part of *de Vrey* (either for purposes of establishing sole causation or for apportionment of damages under the Apportionment of Damages Act), I have already found, as a fact, that *de Vrey* never gave express instructions not to activate the system. In regard to the alternative plea based on his failure to take preventative steps in circumstances where he ought to have known that the system was not activated, I have also already found that his belief that the system was activated, was reasonable, and accordingly no legal duty arose to take evasive action.

[100] In regard to the plea that the Plaintiff was negligent in operating the system in breach of the regulatory regime, the first question is whether the Occupational Health and Safety Act (the Act) and the Regulations promulgated thereunder, find any application on the facts of this case where the Plaintiff claims patrimonial loss from the Defendants based on delict and, in some instances, on contract.

[101] The answer to the above question is whether the Act or Regulations, on a proper construction of the statute as a whole and having regard to its objects and provisions and mischief it was designed to prevent, was intended to confer a right of action on a claimant in a civil action. (See generally, Joubert (ed) *The Law of South Africa LAWSA*) first reissue vol.8 part 1 para 96 by *J.C. van der Walt*, revision by *JR Midgley*)

[102] I have had regard to the Act and the Regulations, its object and purpose, and the circumstances and mischief it was designed to address and protect, and also to the various provisions thereof referred to in Second Defendant's Heads of Argument, and am unable to find that such regulatory regime finds application to this claim, or confer a right of action or defence to any of the parties to these proceedings, nor did I understand Mr *Butler* SC on behalf of Second Defendant to submit that it does so.

[103] Mr *Butler* SC submitted, however, that the assessment of Plaintiff's fault, or negligence, in relation to the issue of the non-activation of the system, the Court is obliged to also have regard to the provisions of the Act and Regulations. Put differently, in the assessment of the reasonableness of *de Vrey*'s actions or inaction, the Court must have regard to the Act and Regulations. He referred in particular, to s.8 of the Act which obliges an employer, such as the Plaintiff, to provide and maintain a work environment that is safe and without risk to the health of his employees. Such duties include, in particular, establishing what hazards are attached to any work which is performed, and what precautionary measures should be taken in respect to such hazards and work (s.8(2) (d)).

[104] In cases where reliance is placed on the *omissio*, in this case the non-activation of the system, a legal duty to act must first be established. This process involves the Court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community. These considerations not only include the norms, values and principles contained in the Constitution, but also those norms and values contained in other statutory regimes which may be relevant to the particular circumstances and facts of the case under consideration. In this sense I agree with Mr *Butler* SC. See: *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA) at 1256B-1258F. And the Act and Regulations relied on by Second Defendant are indeed relevant to the broad consideration of whether or not a legal duty was imposed on *de Vrey* to act. If so, then the question arises whether he was negligent in failing to act.

[105] There can be no doubt, as the Act and Regulations make it clear, that the concentration of electrical supply to the entire factory in the LV Room with its low voltage capacitors and panels, constitute a great potential fire hazard in respect of which precautionary measures must be put in place. There can be no argument that Plaintiff's management, such as *Introna* and *de Vrey*, must have been aware of such hazard and should have put precautionary measures in place. In fact, both *Introna* and *de Vrey* conceded this point in evidence, and it is quite clear from their own evidence that they were both acutely aware of such potential hazard.

[106] I have already found that neither *Introna* and *de Vrey* knew, or reasonably should have known, that the system was not at all times operational. It was reasonably for them — as it was for *Grobler* (and probably also for *Moodaley*) — to suffer from the misapprehension that the system was activated. No legal duty therefore arose to take any evasive action, and the issue of their culpability never arose.

The Third Defendant

[107] The Third Defendant is sued by the Plaintiff on the same ground (the *actio empti*) as Second Defendant, and it raises essentially the same defence based on absence of causation and apportionment of damages (para 19.5.3 of its Plea). My remarks in relation to Second Defendant apply equally to Third Defendant.

The Fourth Defendant

[108] Since there is no contractual relationship between the Plaintiff and the Fourth Defendant, the Plaintiff sued Fourth Defendant in delict only. It claims (para 18.6 18.7 and 18.8 of its particulars of claim) that in breach of its duty of care to Plaintiff it failed to activate the system; alternatively, it failed to inform Plaintiff that it had not activated the system. The Fourth Defendant is not defending the claim and had not filed a Plea.

[109] Having regard to the increased supply of electricity to the LV Room as production increased, coupled with the increased risk of an *"electrical fire"* in the LV Room and coupled further with the insistence of the Fire Department of the Municipality to install and operate a gas fire suppression system, I have no doubt that after the successful testing of the system on 18 September 2011 and the issue by the Municipality of an occupation certificate to Sixth Defendant, there was a legal duty on Fourth Defendant to either activate the system; or, if it could not or did not want to do so, it had a legal duty to inform the Plaintiff accordingly. To the knowledge of *Smit* on behalf of the Fourth Defendant, it knew that the system was not activated on 18 September 2011 and its policy was not to activate it until a completion or hand-over certificate was signed. And such certificate was outstanding until the day of the fire on 6 February 2012.

[110] For the reasons mentioned, I have already found that *Smit* did not inform *de Vrey*, either on 18 September 2011 or 15 December 2011, that the system

was not activated. In this regard I do not necessary attach any negligence to *Smit*. He is an artisan and technician, not an administrative manager. The duty to advise Plaintiff rested with the administrative management of Fourth Defendant, and given the seriousness of the situation, preferably by notification in writing. It is reasonable to expect that Fourth Defendant, given the particular facts and circumstances, ought to have known that *de Vrey*, and many others such as *Introna*, *Grobler* and perhaps even *Moodaley*, may suffer under the wrong impression that the system was activated on 18 September 2011 and remained to be activated. Its policy not to do so until the hand-over certificate is signed should reasonably have been conveyed to Plaintiff.

[111] Having regard to the legal duty to do so, its failure to advise Plaintiff in clear terms constitute delictual negligence. I therefore find that Fourth Defendant was causally at fault in delict to the Plaintiff for the damage caused by fire.

The Fifth Defendant

[112] The Plaintiff sued the Fifth Defendant in delict by breaching the duty of care it owed to Plaintiff by:

1. Failing to design a system that would function in the case of a fire (para 19.11.1 of its Particulars of Claim;
2. Altering the design of the LV Room;
3. Failing to inform Plaintiff (*de Vrey*) that the system had not been activated.

[113] Issues 1 and 2 above fall outside my terms of reference and I do not intend to deal with those grounds of negligence. No evidence in this regard was placed before me, and nor was any argument relevant to these issues addressed to me.

[114] In regard to issue 3, the *omissio* relied upon can only attract a duty if Fifth Defendant knew, or ought to have known, that the system was not operational. I am unable to make such a finding on the evidence before me.

[115] The fact that *Moodaley*, on his own evidence, was aware on 18 September 2009 that the system was not activated, is neither here nor there. He was, for the reasons mentioned, such a poor, unsatisfactory and untruthful witness that no reliance at all can be placed on any of his evidence, even his evidence that he knew. For the reasons mentioned, I am inclined to the view that on the probabilities he did not know — like *Introna*, *de Vrey* and *Grobler*, — but in the misguided belief that he may save his own bacon, he falsely testified that he did know. Due to the quality of his evidence (or lack thereof,) I am unable to find as a fact that he knew on 18 September 2009.

[116] I am also unable to find that *Moodaley* ought to have known on 18 September 2009. He finds himself in the same position as *de Vrey*, *Introna* and *Grobler* and for the reasons mentioned I believe such belief was reasonable.

For the reasons already mentioned, no reliance can be placed on his evidence that he knew the system was not activated.

[117] I accept that the Plaintiff bears the *onus* of proving negligence on the part of any of the Defendants. Since it relies on Fifth Defendant's failure to inform it (*de Vrey*) that the system had not been activated, it must first prove the legal duty to do so and this it can only do if it proves that to the knowledge of Fifth Defendant it knew or ought to have known that the system had not been activated. And the only person, on the available evidence to whom such knowledge or implied knowledge can be imputed, is *Moodaley.* The problem faced by Plaintiff is that on this issue, for the reasons mentioned, the evidence of *Moodaley* is so contradictory and unreliable and thus unhelpful, that it is simply impossible to make any findings on the evidence of *Moodaley.* I am thus unable to find, on a balance of probability, that *Moodaley* and therefore Fifth Defendant, knew and thus had legal duty to inform the Plaintiff.

The Sixth Defendant

[118] As stated earlier, the Sixth Defendant is sued in contract and, accordingly, it cannot raise apportionment under the Apportionment of Damages Act. However, it was entitled to, and did, plead causation based on *de Vrey*'s alleged refusal to activate the system. For the reasons mentioned, this defence must fail. I make no findings on Sixth Defendant's alleged liability in contract.

[119] In regard to costs and notwithstanding that these proceedings will not finally settle the dispute, there is no reason why the usual order in regard to costs should not be made with reference to these proceedings only. Because the Fourth Defendant did not participate in these proceedings, no order regarding costs will be made against it.

[120] For the reasons mentioned and having regard to the facts found proved by me, I accordingly make the following Rulings in response to the questions posed in the Statement of Facts dated 2 October 2013.

Ad Para. 2.1.

No. *De Vrey* did not give such instructions.

Ad Para. 2.2.

Falls away.

Ad Para. 2.3.

Yes. On the evidence, and in delict only, the Fourth Defendant was causally at fault.

Ad. Para. 2.4.

No. The Plaintiff was not aware.

Ad. Para.2.5.

Falls away.

Costs

[121] The First, Second, Third, Fifth and Sixth Defendants are ordered to pay Plaintiff's costs jointly and severally, the one paying the others to be absolved, such costs to include the costs of the two counsel.

_____

ALKEMA J

Heard on 29 January 2014

Delivered on 26 June 2014

Counsel for the Plaintiff	:	R. C. Buchanan SC
		with B.C Dyke
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