IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 23391/2003

DATE: 30/11/2005

not reportable

IN THE MATTER BETWEEN:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	PLAINTIFF
AND	
THE UNIVERSITY OF THE NORTH	1ST DEFENDANT
THE UNIVERSITY OF THE FREE STATE	2ND DEFENDANT
EDENBLOEM (PTY) LTD t/a NASHUA BETHLEHEM	1ST THIRD PARTY
NASHUA LIMITED	2ND THIRD PARTY
TECHNOFIN (PTY) LTD	3RD THIRD PARTY

JUDGMENT

VAN DER MERWE, J

1. THE PARTIES TO THE ACTION

The plaintiff is the Standard Bank of South Africa Limited ("plaintiff"). The matter in question involves Stannic which is a division of the plaintiff.

The first and second defendants are respectively the University of the North ("first defendant") and the University of the Free State ("second defendant"). This matter concerns the Qwa-Qwa campus of the first defendant which was formally merged with the second defendant with effect from 1 January 2003 in terms of Government Notice 1397 published in *Government Gazette* 24033 of 6 November 2002. The plaintiff is suing the defendants in the alternative as, according to the plaintiff, there is uncertainty whether the merger referred to was entirely effective.

The first third party is Edenbloem (Pty) Ltd t/a Nashua Bethlehem ("Nashua Bethlehem") who was joined in the action by the defendants. Nashua Bethlehem was a Nashua franchisee and the supplier of the equipment which forms the subject-matter of twenty rental agreements upon which the plaintiff's cause of action is founded. Nashua Bethlehem is presently in liquidation, is not defending the action and is not represented in this trial. Mr Bert Deysel ("Deysel") was at all relevant times the managing director of Nashua Bethlehem.

The second third party is Nashua Limited ("Nashua"), who was joined by the second defendant. Nashua is the franchisor who awarded the Nashua franchise to Nashua Bethlehem. Nashua's concern in this trial is an oral indemnity it allegedly gave to the second defendant. It does not have a *lis* with any other party in this action.

The third third party is Technofin (Pty) Ltd ("Technofin") which was joined by the plaintiff. Technofin concluded twenty rental agreements with the first defendant in

respect of photocopying equipment and thereafter allegedly ceded its rights in those agreements to the plaintiff. Technofin is sued by the plaintiff in the alternative on the basis of breaches of warranties, alternatively indemnities. Technofin has an associated company called Technofin Leasing & Finance (Pty) Ltd ("Technofin Leasing") which will also be referred to. Technofin Leasing was for a period of about two years known as Technofin Gauteng North (Pty) Ltd ("Technofin Gauteng") before it changed its name back to Technofin Leasing & Finance (Pty) Ltd.

2. BUNDLES OF DOCUMENTS

A number of bundles of documents were handed in, some of which were used during the trial. For purposes of clarity the bundles are referred to hereunder:

2.1 Bundle A1: pleadings. (A1)

2.2 Bundle A2: pre-trial conference documents. (A2)

2.3 Bundle A3: expert notices and summaries. (A3)

2.4 Bundle B1: volumes 1 and 2: main bundle of documents in chronological sequence. (B1)

2.5 Bundle B2: consisting of twenty sections relevant to the twenty rental agreements. The twenty sections are marked B to U, following the annexure numbers in the particulars of claim. (B2)

2.6 Bundle B3: invoices and statements. (B3)

2.7 Bundles B4 and B5: extracts from other litigation. (B4 and B5)

2.8 Bundle C: volumes 1 and 2: notices. (C)

3. THE PLEADINGS

The pleadings in A1 run close to 500 pages. In what is to follow I will refer briefly to some of the pleadings, indicating where necessary, what the relevant allegations therein are. Amendments were made to the pleadings before the matter came to trial. I will not refer to such amendments. During the trial various amendments were sought. In the course of this judgment I will refer to the reasons for refusing some amendments, allowing one amendment as well as two consequential amendments. I will later herein refer to amendments sought during argument.

3.1 Particulars of claim

It is the plaintiff's case that:

3.1.1 Twenty rental agreements were concluded between Technofin and the first defendant. For practical reasons the agreements were divided into different groups. Agreements B and C were entered into on 30 May 2000. In annexure "A" to the particulars of claim agreement B is said to have been entered into on 22 May 2000. 0ne of the amendments sought during argument relates to this date. Agreements D to S were entered into on 1 June 2001. Agreements T and U were entered into on 28 June 2001. The "devices" in terms of the rental agreements are photocopying machines ("the machines") for use at the first defendant's Qwa-Qwa campus.

3.1.2 The period of rental would be sixty months commencing on dates set out in the agreements save for agreements B and U where the commencement dates were left blank.

3.1.3 The monthly rental payable would escalate annually after the first twelve months at 15% as set out in the agreements, save for agreement E where the escalation rate was left blank.

3.1.4 Penalty interest on arrear payments would be payable at a rate 4% higher than the prime overdraft rate charged by Technofin's bankers.

3.1.5 Rentals were based on prime interest rate and would increase in direct proportion to any prime interest rate increases.

3.1.6 In the event of a breach of contract the payment of arrear and future rentals would be accelerated.

3.1.7 Technofin's right, title and interest in and to the rental agreements were ceded to it in terms of what is called main cession agreements.

0ther provisions of the various agreements referred to above will, in so far as may be necessary, be discussed later herein.

The failure to insert the commencement dates in agreements B and U and the escalation rate in agreement E is, according to the plaintiff, due to a *bona fide* common error between Technofin and the first defendant.

The plaintiff then claims rectification of agreements B, E and U as well as payment of the amount of R3 833 757,26 plus interest and costs from the first, alternatively, the second defendant. The costs order will be discussed in more detail later.

3.2 The first and second defendants' plea.

It is the first and second defendants' case that:

3.2.1 During or about January 2001 Nashua Bethlehem, represented by Deysel, tendered to the Qwa-Qwa campus of the first defendant for the supply of a new set of machines to replace the existing machines.

3.2.2 Prior to 29 May 2001 the tender was accepted by the first defendant.

3.2.3 0n 29 May 2001 Nashua Bethlehem, represented by Deysel, and the first defendant, represented by Mr M T I Makume ("Makume") concluded a written agreement in anticipation of entering into new rental agreements. (This agreement in anticipation will be dealt with in more detail later herein.)

3.2.4 In the period 2 to 29 May 2001 and prior to the signing of agreements D to U, Nashua Bethlehem, represented by Deysel, represented to the first defendant, represented by Makume that:

3.2.4.1 the agreements to be concluded would be for a limited period, ie only for the period until such time as the Qwa-Qwa campus was incorporated into the second defendant;

3.2.4.2 the contracting parties would be the first defendant and Nashua Bethlehem.

3.2.5 Deysel failed to point out to Makume that:

3.2.5.1 the agreements submitted for signature did not accord with what the parties had agreed upon, ie as was represented to Makume;

3.2.5.2 the agreements presented for signature were for a sixty month duration and were Technofin contracts;

3.2.5.3 Nashua Bethlehem was acting as agent for Technofin.

3.2.6 As a result of the representations (which were, to the knowledge of Nashua Bethlehem, alternatively Technofin, false, material and intended to induce Makume to sign the agreements) the agreements were signed by Makume.

3.2.7 Agreements D to U are therefore void *ab initio*, alternatively voidable.

3.2.8 In the alternative, agreements D to U are void, alternatively voidable, because of justified unilateral error on the part of Makume caused by Deysel's said misrepresentations.

3.2.9 Makume's authority to sign the agreements were limited and he had no authority to sign sixty month rental agreements. (An amendment to include this allegation as paragraph 4.4 of the plea was granted during the trial.)

3.2.10 In a further alternative, that the agreements D to U were on 13 June 2001 novated, alternatively rectified, alternatively amended in terms of agreements UN2 to UN18 annexed to the plea together with an addendum to those contracts.

3.2.11 The amount claimed is not correct.

3.2.12 Agreements B and C were not ceded to the plaintiff but in any event, the payment responsibility passed to Nashua Bethlehem.

3.2.13 The machines in respect of agreements E, T and U were not delivered to the first defendant.

3.2.14 It is in any event not liable in terms of agreements B and U (because of no commencement dates) and agreements H and Q (because the machines were replaced and/or substituted).

3.2.15 The first defendant cannot be held liable because all assets, liabilities, rights and obligations of its Qwa-Qwa campus devolved on the second defendant as from 1 January 2003 in terms of Proclamation no1397 referred to in paragraph 1 above.

3.2.16 Makume was not authorised in terms of section 40(2)(a) of the Higher Education Act, 1997, to sign any agreement.

3.2.17 No lawful cession took place between plaintiff and Technofin concerning agreements D to U.

In its plea the second defendant tendered the return of the machines in its possession to the party establishing title thereto.

3.3 The first, alternatively the second defendant's conditional counter-claim.

An amount of R181 875,60 with interest and costs are claimed in respect of agreements E, T and U in respect of which the machines were not delivered. It is not necessary to discuss the cause of action of the counter-claim in any more detail at this stage.

3.4 The plaintiff's replication to the defendants' pleas.

During the trial leave was granted to the first defendant to include a paragraph 4.4 in its plea alleging that Makume's authority was limited to the conclusion of short term rental agreements and denying that he had authority to conclude or sign sixty month rental agreements. (See paragraph 3.2.9 above.)

The plaintiff's replication was thereafter consequentially amended.

In the replication the plaintiff:

3.4.1 denies that Nashua Bethlehem was authorised to act on behalf of Technofin or to represent Technofin;

3.4.2 in the event of it being held that Makume's authority to enter into rental agreements was limited the plaintiff avers that:

3.4.2.1 such limitation constituted a private instruction by the first defendant to Makume and is therefore not entitled to rely thereon;

3.4.2.2 the first defendant is estopped from relying on such limited authority;

3.4.2.3 first and second defendants ratified Makume's actions in concluding agreements D to U.

3.5 The defendants' third party notice to Nashua Bethlehem and Nashua (the first and second third parties).

3.5.1 The first defendant relies in its third party notice against Nashua Bethlehem (which has been liquidated and is not taking part in the trial) on indemnifications contained in

three written agreements entered into between them on 29 May 2001, 13 June 2001 and 14 April 2003. The agreement dated 29 May 2001 is the agreement in anticipation referred to in paragraph 3.2.3 above. The agreement dated 13 June 2001 is the addendum referred to in paragraph 3.2.10 above. The agreement dated 14 April 2003 is a so-called settlement agreement. All three agreements were referred to in evidence and will be dealt with in more detail later herein.

3.5.2 The second defendant relies in its third party notice against Nashua on an oral indemnity given to it, represented by Mr Hentie Cilliers ("Cilliers") by Mr Phil West ("West") duly authorised thereto.

The contents of the oral indemnity is that Nashua would honor the indemnification given by Nashua Bethlehem on 13 June 2001, the addendum referred to in paragraph 3.2.9 and paragraph 3.5.1 above.

3.6 Nashua's plea to the third party notice.

Nashua denies that the first defendant is liable to the plaintiff and that West was authorised to represent it and/or to give an oral indemnity as alleged by the second defendant.

3.7 The second defendant's replication to Nashua's plea.

The second defendant alleges that Nashua is estopped from denying the authority of West. This will be dealt with later herein.

3.8 The plaintiff's third party notice to Technofin (the third third party).

The plaintiff relies in its third party notice on an indemnification contained in the main cession agreements referred to in paragraph 3.1.7 above. (It is to be noted that on p225 of the pleadings reference is made to an amount higher than that claimed by the plaintiff from the defendants. It appears that this figure slipped the attention of plaintiff's legal representatives when amending the pleadings.)

3.9 Technofin's plea.

Technofin filed a comprehensive plea to the third party notice as well as to the first and second defendant's conditional counter-claim.

It is not necessary to deal with the contents of the plea in detail at this stage. What is of importance is that Technofin alleges that the first, alternatively the second defendant, are estopped from denying that they received delivery of the machines.

3.10 Technofin's replication to the first and second defendants' plea.

The replication was amended consequentially as a result of the amendment to the first and second defendants' plea by the inclusion of paragraph 4.4 therein. (See paragraph 3.2.8 and paragraph 3.4 above.) It is a comprehensive replication. Many of the allegations contained therein will feature in the evidence which will be discussed presently as well as the discussion of counsel's submissions. I will therefore deal with it in more detail later. 0f importance, however, is the fact that Technofin denies that Deysel or Nashua Bethlehem were authorised to act on its behalf as its agent(s) or at all and that Deysel and/or Nashua Bethlehem acted on its behalf when concluding the rental agreements. Estoppel in respect of delivery was again raised as referred to in paragraph 3.9 above.

Technofin also relies on estoppel, ratification and the allegation of a private instruction referred to in the plaintiff's amended replication. (See paragraph 3.4 above.) In addition Technofin

relies on the first and second defendants' alleged waiver of their rights to rely on the alleged limitation of Makume's authority.

3.11 First and second defendants' rejoinder to Technofin's replication to the plea of the first and second defendants.

The only aspect in this pleading of importance which will feature in this judgment is the defendants' allegation that Technofin is estopped from denying the authority of Nashua Bethlehem, alternatively Deysel, to act on behalf of Technofin as its agent and that Nashua Bethlehem alternatively Deysel, acted on behalf of Technofin when concluding the rental agreements.

4. THE ISSUES.

As can be seen from the above brief analysis of the pleadings the issues are intricate and multiple. Different issues exist between different parties. I am of the view that instead of trying to list the issues, it will be better to summarise the evidence and then to return to the issues again.

5. THE EVIDENCE.

5.1 General.

The plaintiff availed itself of its rights under rule 39(13), (14) and (15) of the Uniform Rules of Court to lead evidence only on those issues in respect of which it bears the duty to adduce evidence and then to close its

case, with the right to lead evidence in rebuttal on issues in respect of which the defendants and Technofin bear the *onus*. It so happened that the plaintiff decided not to lead evidence in rebuttal.

The plaintiff called Ms C A Rademan ("Rademan"), Mr G J Wels, Mr Y Roopchand ("Roopchand") and Ms Erasmus ("Erasmus"). The defendants called Mr T I Makume, Mr T N Quinn ("Quin") and Mr H J Cilliers. The defendants thereafter closed their cases. Mr P West testified for Nashua and its case was thereafter closed. Technofin did not lead any evidence before closing its case. I will first deal with Wels' evidence and then with that of Erasmus, Rademan, Roopchand, Makume, Quinn, Cilliers and lastly West.

5.2 Evidence of Wels.

Mr Wels was first employed by Technofin during 1996. Presently he is a director of Technofin. A related company of Technofin is Technofin Leasing. He became a director of Technofin Leasing during 1996. Technofin Leasing's name was changed on 8 June 1999 to Technofin Gauteng North (Pty) Ltd. 0n 5 January 2001 Technofin Gauteng's name was once again changed to Technofin Leasing. Technofin Leasing company has become dormant. It has not been de-registered and Wels may still be a director of Technofin Leasing.

Technofin does business as a finance house. It can do business in one of two ways. Firstly the supplier of goods, eg Nashua Bethlehem, can enter into a rental agreement with a client, the so-called end-user, eg the first defendant, and then cede its right, title and interest in the contract and the goods to Technofin. Approximately 1% of Technofin's business is done in this way. Secondly Technofin can buy the goods directly from the supplier, enter into a rental agreement with the end-user and then on-cede the agreement to a bank or other financial institution. Most of Technofin's business is done in this way. 0nce Technofin receives a credit application from an end-user, it is normally referred to more than one bank for approval. The bank's own credit committee considers the application and can accept or decline the application.

Technofin does business with what it regards as reputable suppliers because normally soft goods and services will have to be supplied and rendered to the end-user on an ongoing basis by the supplier.

The supplier of goods cannot do the credit rating of the end-user.

Technofin has no agents. The supplier cannot bind Technofin in any way without its written consent. The supplier cannot sign any contract on behalf of Technofin. The supplier can also not choose the bank or

financial institution to whom Technofin sends an end-user's credit application. In respect of agreements D to U approval was sought from three banks, one of which was the plaintiff.

When Wels joined Technofin, Nashua Bethlehem was already a client of Technofin. A discounting agreement was entered into between Technofin and Nashua Bethlehem on 18 September 1998. Clause 11 of that agreement deals with warranties. Clause 11.12 reads as follows:

> "Warranties by supplier.
>
> In respect of each separate discounting transaction to be entered into, the supplier warrants, and such discounting transaction will be entered into on the basis of such warranties, that:
>
> 11.12 nothing contained therein or otherwise shall be deemed or construed as constituting or authorising the supplier to act or to hold itself out as the agent of Technofin. The supplier agrees that for all purposes of these terms and conditions it shall be deemed to act as agent for any intending customer referred by it to Technofin."

Wels said that a similar provision was agreed upon with all other suppliers.

The agreements *in casu* also contain provisions which make it clear that the supplier, Nashua Bethlehem *in casu,* does not act as Technofin's agent. See for example clause 4 which deals with "delivery and acceptance". Clauses 4.1, 4.2, 4.3 and 4.4 read as follows:

> "4. Delivery and acceptance
>
> 4.1 The device has been or will be purchased by Technofin from the supplier at the hirer's request and solely for the purpose of renting the device to the hirer in terms of this agreement.
>
> 4.2 The device and the supplier have been selected by the hirer.
>
> 4.3 Technofin makes no warranties or representations whatsoever whether express or implied to the hirer as to the conditions of the device and the supplier, singly or as a group as to their fitness for any purpose whatsoever.
>
> 4.4 The hirer shall, at its own cost, obtain and take delivery of the device from Technofin or the supplier. Where the hirer takes delivery from the

> supplier or its agent, the hirer shall take delivery on Technofin's behalf so that the ownership of the device shall pass to Technofin; the hirer shall also hold the device on Technofin's behalf for the duration of the contract period."

As will be seen from the evidence of Quinn, who was employed by Nashua Bethlehem at the relevant times and who was called as a witness by the defendants, he denied that Nashua Bethlehem ever acted as Technofin's agent.

0nce the end-user's application is approved by the bank the agreement is signed by Technofin which is always later than the date on which the hirer signed the agreement.

Wels testified that due to a *bona fide* error the commencement dates in agreements D and U were left blank. In both agreements the commencement dates should correspond with the dates on which Technofin signed the agreements namely 22 May 2000 in respect of agreement D and 28 June 2001 in respect of agreement U. He further said that the escalation clause in agreement E was left blank due to a *bona fide* error and should have been 15% as in all the other agreements.

Wels testified that the machines were delivered in respect of all the agreements. It is not necessary to deal with his evidence on each and every agreement. Delivery was effected and checked in the same manner in each instance.

Subclause (6) of clause 4 of the agreements referred to above reads as follows:

> "4.6 By signing the certificate of acceptance, the hirer certifies that it has inspected and/or tested the device to its exclusive satisfaction, further that such device is in good order and condition and free from defect and that the hirer is satisfied with device in every respect."

Each agreement contains a certificate of acceptance which reads as follows:

> "Certificate of acceptance
>
> Hirer hereby irrevocably declares to Technofin that the goods described in the transaction schedule have:-
>
> a) been delivered and installed in accordance with the conditions of the agreement (specifically as this relates to clause 4 of such agreement headed delivery and acceptance),

b) where applicable been subjected to all field operating and/or similar tests which have now been completed and the results are to the hirer's satisfaction, and

c) been inspected and are in good order and condition, free from defect and are ready for use in every respect."

The certificate of acceptance in respect of each and every agreement is signed. It is common cause that Mr Masulubele signed agreements B and C as well as the certificates of acceptance thereon. It is also common cause that Makume signed annexures D to U and the certificates of acceptance thereon.

In spite of the signing of the acceptances of delivery, delivery of five machines was placed in issue on the pleadings, that is the machines which form the subject-matter of agreements B, C, E, T and U. An attempt was made at the pre-trial conference to put the delivery of the other machines in dispute as well.

0ver and above the certificates of acceptance Technofin put certain procedures in place to confirm independently that delivery has in fact taken place. Wels testified that he and Ms Ellen Erasmus made telephonic enquiries about delivery. He is satisfied that all machines were delivered.

As further confirmation Wels sent a document to Ms E M Nchapi, the acting principal accountant at the time in the employment of the first defendant. She confirmed in writing that all the machines had in fact been delivered.

As will be seen from the evidence of Makume and Quinn, delivery of the machines was not in issue. Cilliers testified that as far as he was concerned all the machines, save for that in agreement E, had been delivered and installed. He could, however, not deny that it had in fact been delivered and installed.

The plaintiff alleged that the first main cession agreement between it and Technofin Leasing was signed on 20 December 1996. The defendants denied this. Wels testified that a certain Paul Buckle signed the first main cession agreement on behalf of Technofin Leasing. Wels identified Buckle's signature as well as that of Willem Lyon, the managing director of Technofin Leasing who signed the resolution authorising Buckle to sign on behalf of Technofin Leasing. Mr Ypal Roopchand, employed by the plaintiff at the time, signed the first main cession agreement on behalf of the plaintiff on 20 December 1996. When he signed the agreement it had already been signed on behalf of Technofin Leasing.

0n 2 January 2000 a sale of business agreement was concluded between Technofin Gauteng as seller and Technofin as purchaser in terms whereof Technofin bought Technofin Gauteng's business (including assets) as a going concern. The purchase price is stated in the agreement to be the "net amount of the net book value as listed in annexure 'A'". It is common cause that no annexure "A" was attached to the agreement.

Wels was a witness to the signatory for both parties. He confirmed that the agreement was entered into and that it was implemented despite the absence of annexure "A". He confirmed that *inter partes* the parties had performed in terms of the agreement and that Technofin took over the entire business operation of Technofin Gauteng. As stated above Gauteng North had become dormant in the meantime.

I have also referred hereinbefore to the change of name of Technofin Leasing and Technofin Gauteng.

The effect of the sale agreement was *inter alia* that on the effective date, ie close of business as at 1 January 2000, Technofin Leasing transferred its rights and obligations in and to the first main cession agreement to Technofin. Wels confirmed this in his evidence. There is no dispute between Technofin and Technofin Leasing that this in fact took place.

Wels testified that pursuant to the first main cession agreement the plaintiff took cession of Technofin's rights in and to agreements B and C. The documents required by the plaintiff for an effective cession were forwarded to the plaintiff who in turn effected payment to Technofin. As between the plaintiff and Technofin there is no dispute regarding the cession of Technofin's rights in and to agreements B and C.

0n 7 May 2001 the plaintiff and Technofin concluded the second main cession agreement. Pursuant to this cession agreement plaintiff took cession of all of Technofin's rights in and to agreements D to U.

Wels also testified that Technofin had furnished all documents needed by plaintiff for the cession to it, that plaintiff had paid Technofin and that there is no dispute between plaintiff and Technofin in regard to these cessions.

Wels testified that during 2003 he was present at two meetings, namely on 23 January and 17 February where representatives of the first defendant were also present. At no stage were any of the defences now raised in the pleadings referred to in these meetings. Wels also had discussions with representatives of the second defendant. Save for reference to a missing machine in respect of agreement E, no further defence referred to in the pleadings was raised.

I do not find it necessary to deal with Wels' cross-examination on behalf of the defendants in detail. The most important aspects will, however, be referred to.

It is so that Nashua Bethlehem was in possession of Technofin's credit application forms, lease agreements and factor sheet. Wels stated that that is the position with all Technofin's other suppliers as well. Never has it been alleged that a supplier was acting as Technofin's agent. Wels reiterated that Nashua Bethlehem was not Technofin's agent. He denied that because Nashua Bethlehem delivered the machines to first defendant, Nashua Bethlehem was Technofin's agent. Delivery is *inter alia* regulated by the provisions of the agreements. The fact that Nashua Bethlehem invoiced the first defendant is also not indicative of a relationship of agency between Technofin and Nashua Bethlehem.

Wels was referred to the second defendant's plea containing a tender to return the machines to the party entitled to possession thereof. It was put to Wels that the plaintiff could have taken possession of the machines and could have minimised its damages. Counsel for the plaintiff objected to this line of questioning because it was irrelevant. I ruled it to be irrelevant and gave short reasons for my ruling. I indicated that I would later give more detailed reasons. I do not think it is necessary to do so. I am

satisfied that plaintiff is pursuing a contractual claim. This is not a case where a court is entitled to exercise a discretion to grant a claim for specific performance or not. It was not the defendants' case. In any event did the defendants not plead that the plaintiff failed to minimise its damages.

In cross-examination by Nashua's counsel Wels stated that Technofin was unaware of an agreement dated 29 May 2001 entered into between Nashua Bethlehem and the first defendant appearing at p180 of B1. Reference will later be made to this agreement in more detail. A set of agreements signed by Rhode on 13 June 2001 was never given to Technofin for signature.

In cross-examination by counsel for Technofin, Wels stated that at the request of the plaintiff a letter dated 29 May 2001 signed by Prof S R Motshologane, the assistant to the administrator of the first defendant, was received. This letter reads as follows:

> "RENTAL AGREEMENT WITH THE UNIVERSITY OF THE NORTH – QWA QWA
>
> I hereby confirm that the rental of office equipment supplied by Nashua Bethlehem falls within the ambit of section 40 (as amended) of the Higher Education Act of 1997 (Act 101).

a) The value of the rental agreement falls within the allowed amounts raised as prescribed by the Minister of Education in terms of the Act for the current financial year.

b) This agreement has been authorised by way of resolution of the university council as prescribed by the Act.

c) The authorised signatory of the agreement in terms of the university's delegation of authority is Mr T I Makume."

Wels said that the wording of the letter was suggested by Technofin but it was not a party to any decision taken by the first defendant or the administrator or Motshologane. The same is true in respect of the extract from the minutes of a meeting of the first defendant signed by Ms Nchapi confirming that Makume was authorised to sign the rental agreements.

5.3 Evidence of Erasmus.

Ms Erasmus was called to prove delivery of the machines which formed the subject-matter of agreements T and U. She testified that she telephoned Mr Makume who confirmed that both machines had been delivered. In view of the evidence already referred to it is not necessary to discuss her evidence in more detail.

5.4 Evidence of Rademan.

The plaintiff called Ms Cornelia Aletta Rademan as an expert witness. The witness has been involved in the financing industry for the past fourteen years. She was previously employed by and was a director of Union Finance Holdings (Pty) Ltd. She is currently employed as a marketing director/general manager of Absa Bank Ltd ("Absa"). She was seconded by Absa to its wholly owned subsidiary Absa Technology Finance Solutions (Pty) Ltd ("ATFS"). ATFS does the same type of business as Technofin. Rademan's evidence supports that of Wels in that she said that a supplier such as Nashua Bethlehem, though in possession of Technofin's rental agreement, credit application form and factor sheet, under normal circumstances does not represent a finance house such as Technofin as agent. She also confirmed the two methods of doing business by an institution like Technofin, referred to earlier herein.

She also testified that the method of enquiry about delivery of the equipment as was done by Technofin is the norm in the industry.

5.5 Evidence of Roopchand.

I have already referred to the evidence of Roopchand. There was an attempt by counsel for the defendants to cross-examine Roopchand on pleadings in a different matter. 0bjection was made because the cross-examination was based on pleadings that had already been amended or

which was about to be amended. Cross-examination as a result was not proceeded with.

Subject to the calling of evidence in rebuttal (which was not done) the plaintiff closed its case.

5.6 The evidence of Makume.

The defendants called Mr Taunyane Isaac Makume as their first witness.

Makume was the acting deputy registrar of the first defendant's Qwa-Qwa campus. He was responsible for the entire administration at the said campus. He was also a member of the executive council.

In 2001 there was a pending merger of the Qwa-Qwa campus with the second defendant. It was a talking point and it was expected to happen by 1 January 2002. Because of that merger the administrator of the first defendant, Prof Fitzgerald, issued an instruction that contracts should not be entered into which would run beyond end December 2001.

In 2001 the Qwa-Qwa campus had thirty four machines in use. It wanted to reduce it to seventeen and save expenses. Tenders were invited for the supply of new machines. Four tenders were received. Makume was the chair person of the tender committee. The tenders were considered and

that of Nashua Bethlehem was accepted. The proposal by Nashua Bethlehem was signed by Quinn, whose evidence will be dealt with later herein.

A meeting took place between Deysel and Makume. Deysel came to the meeting with a contract which Makume realised was for a period of sixty months. He told Deysel that in view of the pending merger he could not enter into a long term contract.

As a result of the discussion Deysel addressed a letter dated 2 May 2001 for the attention of Makume. The contents of this letter is as follows:

> "Herewith our written confirmation on the contract period as discussed in our meeting earlier today.
>
> 1. We know that the Uniqwa campus may become a satellite campus of the University of the Free State in approximately 9 months.
> 2. When you enter into the new contract with Nashua Bethlehem, we will cancel all our other contracts between our self and Uniqwa.
> 3. We will also pay out and settle all other supplier contracts of the university.

4. When the Uniqwa campus becomes part of the Free State University, we will negotiate with them to take over the responsibility of the existing contracts.
5. In the event that the University of the Free State do not want to take over the remaining responsibilities of the contracts and equipment, we will cancel all agreements between Nashua Bethlehem and the University of the North 'Uniqwa campus'.
6. We will enter into negotiations with the new satellite campus on equipment and contracts.
7. We will not hold the University of the North liable for the new contracts entered into by yourself."

The contents of this letter will be discussed in more detail when I deal with Makume's cross-examination.

0n 3 May 2001 Makume reported in writing to the assistant to the administrator. He testified that he had to do that because he had to keep the administrator up to date of all dealings. 0ne paragraph of the letter reads as follows:

> "Having looked at the tenders submitted, the committee agreed on accepting the Nashua tender. However, there was a concern as to whether the university can enter into an agreement that would be in

> force for at least sixty (60) months at this stage. The agreement was that the recommendation should be submitted to your office so that the administrator should give us direction."

0n 8 May 2001 Makume addressed a letter for the attention of Mr Rhode. In this letter he *inter alia* refers to the tender procedure and the pending merger and then states as follows:

> "Attached also find a copy of an undertaking by Nashua on conditions that will prevail should we enter into a contract with them. At this stage I have made it clear to them that we cannot enter into any contract without express and written permission of the university administrator or his representative."

The reference to the undertaking can only be a reference to the letter of 2 May 2001 referred to earlier.

Makume testified that on the morning of 29 May 2001 Deysel arrived shortly after 08:00. He had a copy of a letter with him which, according to Makume, had to be put on a letterhead of the first defendant and addressed to Technofin. That is the draft which resulted in the letter dated 29 May 2001 signed by Motshologane and to which reference was made earlier herein.

Because of the contents of Motshologane's letter Makume said that he accepted that he had authority to sign contracts on behalf of the first defendant.

At approximately 16:30 on 29 May 2001 Deysel again visited Makume. Deysel had various documents with him. 0ne of these documents is an agreement between Nashua Bethlehem and the first defendant which was signed by Deysel and Makume. Because of the importance of this agreement the essential portions thereof are quoted. It reads as follows:

"1. Nashua and the university are currently involved in negotiations concerning the placement and replacement of certain equipment in use at the university and to enter into a new agreement/contract for the use and rental of such equipment. Nashua hereby undertakes to:

a. cancel all existing contracts between Nashua and the university from the date of entering into a new contract between Nashua and the university for the rental of the new equipment;

b. negotiate a replacement contract with a new entity should the legal status of the university change within the period of the rental/contract that will be entered into;

c. to cancel the new contract in the event that the new entity would not be interested in replacing, extending, negotiating or taking over the contracts entered into between Nashua and the university, and to hold the university harmless in respect of any claim by or against the university arising out of the cancellation of this new contract;"

It is common cause that the other documents were the rental agreements and service contracts. It is common cause that Makume signed both these sets of agreements. Makume testified that he saw the word Nashua on the cover-page and was under the impression that it was a Nashua document. He did not see the name Technofin on the cover-sheet and he did not see Technofin's name appearing elsewhere in the agreement.

Makume was interested in the description of the machine and the rental. That he said was completed. The serial numbers were not completed. The period of the contract, namely sixty months, as it now appears on the contracts, was not filled in. According to Makume Deysel said that the blank portions would be filled in by himself and that Makume could in the meantime sign the agreements. Makume said that had the period of sixty months been filled in he would not have signed the agreement.

The commencement date was according to Makume also left blank.

The service agreements were also put before Makume to sign which he did. His only interest in these agreements was to see how many free copies could be made.

Deysel did not sign the agreements and took it away but he did not tell Makume what he wanted to do therewith.

Makume confirmed that Ms Erasmus phoned him to enquire about the delivery of the photocopy machines. According to him he was asked whether all the machines had been delivered. He said that he told her that all the machines had been delivered but that there was a problem with one which was not working. Makume said that he personally phoned Nashua to inform them that the machine had not been installed. Eventually it was installed.

In cross-examination by counsel for the plaintiff Makume conceded that all the tenderers could have understood that the normal sixty month period would be applicable to the tenders. He himself as the chair person of the tender committee did, however, not understand the tenders to be for sixty months. Makume was then referred to the contents of his letter of 3 May

2001 addressed to the assistant to the administrator where he himself refers to contracts for a period of sixty months.

In cross-examination Deysel's letter dated 2 May 2001 was discussed with Makume in detail. It was put to Makume that Deysel must have had a long term contract in mind which could be re-negotiated once it became necessary as a result of the merger. Makume eventually conceded that Deysel had a sixty month agreement in mind when he wrote the letter of 2 May 2001.

It was pointed out to Makume during cross-examination that in the defendants' plea it was stated that Deysel failed to point out the fact that the agreements submitted to Makume for signature were for a sixty month duration. Makume persisted with his evidence that the period of the agreement was left blank. Makume also said that he did not see that the service agreements were also for a period of sixty months.

From Makume's cross-examination it appears that he has no problem with the plaintiff's request for rectification of the three agreements referred to. It is also clear that Makume has no problems with the replacement of the machines in respect of agreements H and Q.

Makume conceded that it was his fault that he did not see that Technofin was the contracting party. He had time to read the agreements had he wanted to do so.

During the cross-examination by counsel for Technofin reference was again made to Deysel's letter dated 2 May 2001. In spite of the obvious meaning of the contents of the letter Makume time and again said that he could only enter into twelve month contracts. Eventually he said that he could now see that there was an escape clause referred to in the letter had a sixty months agreement been entered into.

Makume was also referred by counsel for Technofin to a letter by Rhode dated 24 May 2001 informing Makume that the final administrative arrangements for the signing of the Nashua agreement would be attended to by a Mr Du Toit. This letter is in reply to Makume's letter dated 8 May 2001 addressed to Rhode in which letter he refers to Deysel's undertaking contained in the letter of 2 May 2001 and the permission he was seeking from Rhode. Makume conceded that from Rhode's letter dated 24 May 2001 it appears that consent was given to Makume to enter into the agreements Deysel had in mind and that the necessary authority and resolution would be forthcoming. Makume said that anybody contracting with him would have understood that he had the necessary authority to enter into a contract. In fact, Makume was adamant about the fact that had

he himself not believed that he had the necessary authority he would not have signed any agreement.

Counsel for Technofin referred Makume to the first and second defendants' rejoinder to Technofin's replication to the plea of the first and second defendants where the defendants rely on estoppel in order to prevent Technofin to deny that Nashua Bethlehem, alternatively Deysel, acted on behalf of Technofin when concluding the agreements. Makume said that Deysel never represented to him that he was representing Technofin.

It was pointed out to the witness that the monthly rental in terms of a sixty month contract and a twelve month contract would differ dramatically. The witness conceded that that would be the position.

Counsel for Nashua informed me that three files containing certain documents were handed to him by the defendants. Counsel asked for permission to put further questions to Makume. This was granted. The general line of the further cross-examination was to question Makume's authority to sign any contract whatsoever.

Counsel for the plaintiff objected to this line of cross-examination and referred to Nashua's plea. Nashua never pleaded to the plaintiff's

particulars of claim and Makume's authority was never put in issue by Nashua. Counsel for Technofin supported plaintiff's counsel's objection. Counsel for the defendants reacted by stating that the defendants in their plea put Makume's authority in question, that Makume was cross-examined on his authority and that further cross-examination on behalf of Nashua was therefore admissible. After having heard argument I disallowed the line of questioning by counsel for Nashua. The basis of the ruling was that Nashua never put Makume's authority in issue. In fact it was accepted by Makume that he had the necessary authority and that anyone dealing with him would have accepted that he had the necessary authority. Again I indicated that I would provide further reasons in this judgment. I do not think it is necessary.

5.7 The evidence of Quinn.

Mr H T N Quinn then testified on behalf of the defendants.

It transpired that this witness was paid an amount of R4 000,00 by the defendants to consult with their legal team and to give evidence in court. He was also asked by the plaintiff's legal team to consult with them and he rendered an account of R4 250,00 for such proposed consultation. Quinn refused to consult with plaintiff's legal team when plaintiff's attorney refused to pay the amount. Quinn, however, denied that he was giving evidence in support of the defendant.

Quinn started as an employee of Nashua Bethlehem in August 1993. Quinn was responsible for the preparation of the tender document. He conceded under cross-examination that it is possible that the plaintiff's factor sheet was not used to calculate the monthly rental as set out in the agreements.

Quinn was asked by Deysel to assist in completing the agreements D to U. Quinn initially said that the description of the device, the serial number as well as the period of the contract and the escalation were completed. He immediately then added that he was not sure about the period of the contract and the escalation.

Quinn was also referred to the so-called twelve month period contracts and he stated that he was asked by Deysel to assist in completing those agreements because he wanted to negotiate new contracts with the first defendant.

Under cross-examination by plaintiff's counsel Quinn conceded that on the probabilities the sixty month period and the escalation percentage were filled in at the time when the agreements were presented to Makume for signature. He based this concession on the fact that the rental agreements are normally for sixty months and the normal escalation is 15%.

Quinn was referred to the agreement entered into between Nashua Bethlehem and the first defendant on 29 May 2001, referred to and quoted above. Quinn signed the agreement as a witness. He read the agreement in court again and confirmed that the idea behind the agreement was to enter into sixty month agreements.

At the end of Quinn's evidence counsel for the defendants asked for an amendment. The defendants intended renumbering the existing paragraph 11 as paragraph 11.2 and introducing a new paragraph 11.1 reading as follows:

> "11.1 Alternatively to the denial of Mr Makume's authority as referred to in paragraph 10.5 *supra*, the defendants deny that Mr Makume was empowered and/or authorised to sign the agreements, annexures "D" to "U" to the particulars of claim on behalf of the first defendant and the agreements are in the premises null and void."

It appears that the amendment sought by the defendants was similar to the line of cross-examination Nashua's counsel wanted to follow.

I heard full argument on the application for amendment which was opposed by counsel for the plaintiff and Technofin. It was supported by counsel for Nashua.

I refused the amendment and gave short reasons and again said that I would give reasons in more detail later. I had considered the position. I am satisfied that defendants never put Makume's authority in general in dispute. It merely said that Makume was entitled to enter into twelve month agreements and not sixty month agreements. It did place Makume's authority in general in dispute but that was only based on the provisions of section 40(2)(a) of the Higher Education Act.

The amendment sought was at a very late stage. If the amendment was granted it would have prejudiced at least the plaintiff to such a degree that a mere postponement or an order for costs would not have compensated the plaintiff for any prejudice suffered. Had the amendment been granted it would have meant a reconsideration of the matter by all parties concerned, extensive amendments to the pleadings, and practically a new case on new pleadings where everything done up to that stage could have been ignored.

I do not find it necessary to provide any further reasons for the refusal of the amendment. It is also not necessary to repeat the costs orders made at the time.

5.8 The evidence of Rhode.

The defendants then called Mr Hermanus Christophel Rhode as a witness. Rhode was at all relevant times the acting director for finance of the first defendant.

Rhode described the problems that existed at the first defendant and the reasons why an administrator was appointed to take control of the activities of the first defendant. The administrator centralised all decision-making. 0nly certain people could sign cheques and contracts. From the moment the administrator was appointed the merger of the Qwa-Qwa campus of the first defendant with the second defendant was imminent. It was expected that the merger would take place on 1 January 2002. It eventually took place on 1 January 2003.

According to Rhode the administrator did not want the first defendant to incur long term liabilities which would go beyond the date of the expected merger.

Rhode admitted having received Makume's letter dated 8 May 2001 in which Makume referred to a memo to the assistant to the administrator and an undertaking by Nashua Bethlehem. In cross-examination the witness conceded that the memorandum is the document dated 3 May 2001 sent by Makume to the assistant to the administrator where he refers to a sixty month agreement. Rhode also conceded that the undertaking referred to was the one contained in Deysel's letter dated 2 May 2001 addressed to Makume, the contents of which is quoted herein above.

It therefore transpired that Rhode was from the outset aware of the fact that Nashua Bethlehem had submitted sixty month agreements to Makume.

I will later herein return to the cross-examination of Rhode on these documents.

In evidence in chief Rhode said that he was aware that Technofin in a letter dated 6 June 2001 to the Department of Education notified the said department that agreements had been entered into between Technofin and the first defendant which agreements had been "sold" to the plaintiff "for the funding of" the transaction. As a result of that letter, which was referred to the administrator's legal advisor, Adv Goldblatt, a meeting took place on 11 June 2001 where Makume, Deysel, Rhode and Goldblatt were

present. At that meeting Deysel indicated that he was prepared to enter into twelve month agreements. Such contracts were in fact presented to Rhode on 13 June 2001 which he signed. Those agreements were not signed by Deysel but he said that he would take it to Technofin for signature. Rhode initially said that he then realised that Technofin was a contracting party. He, however, had to concede under cross-examination that he was already aware of the fact that Technofin was involved because of the contents of Technofin's letter to the Department of Education which came to the knowledge of Rhode.

Rhode also conceded that in view of the contents of Deysel's letter dated 2 May 2001 there was no problem for the first defendant to enter into a sixty month agreement. He conceded that there would be no financial risk involved and it would not have affected the second defendant. The only risk, he said, would have been a reputational risk because, according to him, the minister's approval would have been needed.

Under cross-examination Rhode also conceded that his advice was sought on the sixty month agreements and that he advised Makume that Du Toit would attend to final administrative arrangements. He further conceded that in his letter to Makume dated 24 May 2001 he did not inform Makume that he could not enter into a sixty month agreement. He also conceded that Adv Goldblatt also did not put any limitation on the period

of the agreement Makume could enter into. Goldblatt's only concern was that the Qwa-Qwa campus itself should enter into the agreements.

The agreement entered into between Nashua Bethlehem and the first defendant on 29 May 2001, quoted above, was discussed in detail with Rhode during cross-examination. He conceded that in view of the contents thereof there was no problem if a sixty month agreement was entered into.

According to Rhode Makume was confronted at the meeting of 11 June 2001 with the fact that he had entered into sixty month agreements. Rhode said that he was agitated because Makume merely shrugged his shoulders and said that he knew he was supposed to sign twelve month agreements.

Rhode was under cross-examination referred in detail to the so-called addendum to the main agreement which was signed by Deysel for and on behalf of Nashua Bethlehem and Rhode for and on behalf of the first defendant. Rhode conceded that the main agreement referred to had to be the one between Technofin and the first defendant and was surprised to note that the addendum was entered into between Nashua Bethlehem and the first defendant. Rhode then tried to bind Technofin to the agreement by stating that Deysel acted as Technofin's agent. Rhode was then

confronted with the fact that Deysel told Rhode that the twelve month agreements would have to be signed by Technofin and that he was taking it to Technofin for signature. Again Rhode seemed to realise that had Deysel acted as Technofin's agent he would have been entitled to sign the agreements on behalf of Technofin.

Clause 4 of the addendum reads as follows:

> "The parties agree that the main agreement can be re-negotiated after a period of twelve months from the commencement date, terms and conditions to be agreed upon."

Eventually Rhode had to concede that that clause makes provision for the re-negotiation of agreements for periods longer than twelve months.

As stated earlier Rhode was well aware of the fact that sixty month agreements were entered into by Makume. According to Rhode Makume himself told him of the sixty month period. Rhode also said that he received a call from Ms Boshoff of the Department of Education who also informed him of the sixty month period. At a stage Rhode said that the tender documents referred to sixty months period and he therefore took it for granted that Makume had entered into long term agreements. It was pointed out to Rhode that the tender documents do not refer to sixty months.

At the end of plaintiff's counsel's cross-examination plaintiff's case was put to Rhode in broad outlines. In summary Rhode agreed that as a result of the tender sixty month agreements were received and that Makume asked for directions concerning the period of the agreements. Rhode also agreed that the only directive Makume received was from Goldblatt who said that everything was in order as long as the Qwa-Qwa campus itself entered into the agreements which was obviously wrong. Rhode also confirmed that Makume never received a letter stating that he could only enter into twelve month agreements.

It is not necessary to refer in detail to Rhode's evidence under cross-examination by Nashua's counsel and Technofin's counsel. What, however, transpired was that Makume was authorised to enter into the agreement between Nashua Bethlehem and the first defendant on 29 May 2001. Rhode agreed that the indemnity referred to in subparagraph (c) of that agreement only makes sense if a third party was involved in the transaction.

At the end of Rhode's evidence counsel for the defendants applied for an amendment to their plea by the inclusion of a new paragraph 4.4 therein and a new paragraph 3.5 to the counter-claim. This application was opposed on behalf of the plaintiff and Technofin but not by Nashua.

The new paragraph 4.4 reads as follows:

> "4.4 Mr Makume's authority was limited to the conclusion of short term rental agreements. It is specifically denied that he had authority to conclude or sign sixty month rental agreements."

The new paragraph 3.5 to the counter-claim reads as follows:

> "3.5 Mr Makume had the necessary authority to conclude sixty month rental agreements."

The amendments were granted. The main reason for that being, as stated at the time, that the limited authority of Makume was thorougly investigated. In my judgment the plaintiff and Technofin were not prejudiced by the granting of the amendment. Consequential amendments were made by the plaintiff and Technofin to which I have referred earlier in this judgment. Again it is not necessary to repeat the costs orders made at the time.

5.9 The evidence of Cilliers.

The last witness for the defendants was Mr Hendrik Jacobus Cilliers. Cilliers confirmed that when the Qwa-Qwa campus of the first defendant merged with the second defendant there was chaos at the Qwa-Qwa

campus. It was difficult to find the assets of the said campus. Eventually Deysel handed sixty month rental agreements to him. It seemed to be in order.

Cilliers was satisfied that all the machines were delivered by Nashua Bethlehem, some of which were exchanged. The Aficio 700 machine was missing. At a stage Cilliers intended instituting an insurance claim for the recovery of the value of the Aficio 700 machine.

At a stage West of Nashua head office came to see Cilliers. Cilliers said that West on behalf of Nashua undertook to indemnify the second defendant as was undertaken by Nashua Bethlehem in the so-called addendum agreement dated 13 June 2001.

It is not necessary to deal in all detail with Cilliers' evidence either in chief or under cross-examination. It appears that Cilliers was satisfied that the sixty month rental agreements were valid and that the second defendant was liable in terms of those agreements. The second defendant therefore started paying the monthly rentals until it was advised by its legal representatives to stop. That happened at a stage when Cilliers was made aware of so-called twelve month agreements and he was under the impression that some sort of double discounting took place. The

university continued using the machines and they are still using them today. Some machines are not operative at present.

By 11 April 2003 Cilliers was satisfied that the second defendant was liable to the plaintiff and therefore prepared a letter dated 11 April 2003 addressed to Nashua Bethlehem where it is stated that all obligations "prior to the take-over by the University of the Free State are to be borne by the University of the North". All other obligations would be met by the second defendant.

Had Cilliers not been advised by the legal representatives to stop paying he would have paid the rentals as it became due.

Cilliers had a strange view of legal entities. To him Nashua Bethlehem and Nashua Ltd was one and the same legal entity. He was very vague as to the indemnity allegedly given by West on behalf of Nashua Ltd but eventually he based it on his allegation that Nashua head office was responsible also for any undertaking given by another legal entity supplying Nashua machines.

The second defendant closed its case.

5.10 The evidence of West.

Philip Thomas West was the only witness called on behalf of Nashua. West is employed by Nashua as an area sales manager and was also so employed in 2003. His function was to assist franchisees with sales, training and problems that affect their profitability. In 2003 Nashua Bethlehem did not fall in the area he was responsible for.

Because Nashua Bethlehem encountered financial difficulties West was a member of a team sent to assist Nashua Bethlehem. West's function was in particular to assist Quinn with reorganising the sales force.

West's first visit to Nashua Bethlehem was during January 2003. He was so involved until 4 June 2003 when Nashua Bethlehem was closed down.

It was not uncommon for Nashua to send a team to a branch to assist it.

The team assisted Nashua Bethlehem with Deysel's consent.

West met Cilliers who was in the procurement division of the second defendant, during April 2002. At that stage West accompanied Nashua Bloemfontein to Cilliers to promote a scheme offered to the University of Potchefstroom.

During 2003 West also visited Cilliers.

West was adamant that whenever he communicated with Nashua Bethlehem clients he did so on behalf of Nashua Bethlehem and not on behalf of Nashua. West stated emphatically that he did not have the authority to bind Nashua at all.

Under cross-examination by defendants' counsel West admitted that he tried to locate the Aficio 700 machine. He could trace it up to the point where it left Nashua's stores to Nashua Bethlehem. He does not know what happened to the Aficio 700 thereafter.

Nashua closed its case. Technofin closed its case without leading any evidence.

6. DISCUSSION.

All parties prepared written heads of argument. In what is to follow I will not deal in detail with the heads of argument. I intend dealing with the issues, the defendants' defences, the defendants' conditional counter-claim and other matters that need be discussed. I will not repeat the evidence discussed above but will indicate what my conclusions are on the evidence. In so far as certain evidence was not referred to hereinbefore, I will refer to it in what is to follow.

6.1 Conclusion of the rental agreements.

It is common cause that agreements B and C were signed by Masulubele on behalf of first defendant and therefore validly concluded between first defendant and Technofin.

It is also common cause that Makume signed agreements B to U. Wels confirmed that the agreements were signed on behalf of Technofin save agreements B and U which were not signed. I agree that the fact that agreements B and U were not signed on behalf of Technofin is of no consequence as there is no requirement, either in law or according to the provisions of the agreements themselves, that it be signed in order to be binding between the parties. It is further common cause that all the rental agreements were implemented and performed on both sides.

6.2 Rectification of annexures B, E and U.

As stated above annexures B and U do not contain commencement dates and annexure E no escalation clause.

The evidence of Wels makes it clear that plaintiff is entitled to rectification of these three agreements. Makume in fact supported plaintiff's case for rectification in respect of agreements E and U.

Plaintiff seeks an amendment in the heads of argument in respect of the commencement date of agreement B where it appears in paragraph 6A.2.1 and 6A.3.2 and prayer 1.1 of the particulars of claim. The evidence establishes that plaintiff is entitled to such an amendment.

6.3 Delivery of the machines.

In my judgment the plaintiff proved that delivery of all the machines took place.

Quinn confirmed that the machines in respect of agreements B and C are referred to in the tender document and were on the Qwa-Qwa campus as at February 2001. The evidence of Wels, Erasmus and Makume makes it clear that delivery did take place. As far as the machine in respect of agreement E is concerned, Makume said that though the machine was delivered, it was not installed. After he had asked Nashua Bethlehem to install the machine, no further complaint was received from the staff at the Qwa-Qwa campus.

The evidence of Cilliers and Wels warrants the conclusion that the machine in respect of agreement E did leave the premises of Nashua, obviously on its way to Nashua Bethlehem. In the light of Makume's evidence one can safely conclude that that machine was also delivered.

6.4 The cession of Technofin's rights to the plaintiff.

It is clear from the evidence that Technofin's rights were ceded to the plaintiff in terms of the two main cession agreements. The defendants' allegation that the sale of business agreement entered into on 2 January 2000 between Technofin Leasing and Technofin is void because no annexure A was attached to the agreement establishing the purchase price, is without merit.

6.5 The first defendant's breach of the agreements.

0nce it is found that sixty month agreements were entered into, the evidence establishes a breach of contract. There is also, at the end of the case, no dispute that the plaintiff was entitled to and did invoke the acceleration clause in each agreement.

6.6 Calculation of the amount due.

Although the amount due was put in dispute the calculation thereof at the end of the case appears to be common cause. It is a mathematical calculation.

6.7 The prime overdraft rate.

The prime overdraft rate of Technofin's bankers, Standard Bank, is common cause. I have earlier herein referred to the fact that plaintiff is entitled to charge interest on overdue amounts at 4% above the prime rate

charged from time to time by Technofin's bankers. Where applicable the prime rate set out on A2, p60, will be used.

6.8 The incorporation of the Qwa-Qwa campus of the first defendant into the second defendant.

The plaintiff has sued the first and second defendants in the alternative, because, so it was submitted, uncertainty was created by the wording of Government Notice 1397 referred to above. The relevant portion of the schedule to the notice reads as follows:

> "The Qwaqwa Campus, an identified subdivision of the University of the North, becomes part of the University of the Free State while the latter institution's legal personality as contemplated in section 20(4) is not affected by the merger process.
>
> The assets, liabilities, rights and obligations of the subdivision devolve upon the University of the Free State.
>
> ...
>
> Any agreement lawfully entered into by or on behalf of the subdivision is deemed to have been concluded by the University of the Free State."

The clear intention of the notice was to transfer the Qwa-Qwa campus of the first defendant, described as "an identified subdivision" of it, even though it is not a separate legal entity, together with all the rights and obligations related to it, to the second defendant. All the outstanding obligations in terms of *inter alia* the rental agreements referred to in this matter, would have passed to the second defendant on 1 January 2003.

6.9 The defences pleaded by the defendants.

6.9.1 Agency.

The question of agency is central to most of the defendants' defences. The defendants alleged that Nashua Bethlehem, represented by Deysel, was Technofin's agent. The defendants pleaded both actual authority and replicated an estoppel in relation to authority.

I agree with the following submissions made on behalf of the plaintiff:

1. The defendants have to prove actual authority on the part of Nashua Bethlehem or that the plaintiff is precluded from denying such authority by virtue of the principles of estoppel.

2. Actual authority may be either express or tacit/implied and may be established by direct proof of an express authorisation by the principal to the agent to conclude the particular agreement, or by way of inference, on a balance of probabilities on all the admissible facts given in evidence.

3. To establish an estoppel the defendants have to establish:

   3.1 a representation;

   3.2 that it reasonably acted or relied upon the representation;

   3.3 that it acted or relied upon the representation to its detriment; and

   3.4 that the person who made the representation could bind Technofin by means of a representation.

As stated earlier herein, the evidence of Wels, confirmed by that of Quinn, was that Nashua Bethlehem was at no stage Technofin's agent.

I am therefore satisfied that actual authority, whether in the form of express or tacit/implied authority, has not been established by the defendants.

I am also satisfied that the defendants cannot rely on an estoppel. Makume's evidence was clear namely that he thought and believed that Nashua Bethlehem, as represented by Deysel, acted as principal. Makume at no stage thought or believed that Nashua Bethlehem had acted as an agent for any party. In fact, Makume testified that he was totally unaware of the involvement of Technofin in any of the agreements. No representation was established nor any reliance on a representation. The defendants cannot rely on estoppel.

As also pointed out above Rhode conceded that he was wrong in his assumption that Technofin was represented by Nashua Bethlehem. He conceded that had Nashua Bethlehem acted as Technofin's agent, Deysel could have signed the agreements.

0n behalf of the defendants it was submitted that Nashua Bethlehem acted as Technofin's agent because Nashua Bethlehem was in possession of Technofin's credit applications, rental agreements and factor sheets. It was also submitted that Nashua Bethlehem requested the necessary authorisation and extract from minutes of the first defendant confirming Makume's authority.

I have dealt hereinbefore with the evidence of the various witnesses including the evidence of Rademan.

I am not persuaded that Nashua Bethlehem and/or Deysel acted as agent on behalf of Technofin.

6.9.2 Fraudulent misrepresentation.

In paragraph 3.2 above I discussed the first and second defendant's plea in detail and also referred to the alleged misrepresentation.

The defence of fraudulent misrepresentation is only viable if Nashua Bethlehem was Technofin's agent. In paragraph 6.9.1 above I have dealt with the question of agency. As agency has not been established, the defence of fraudulent misrepresentation must also fail.

0f importance, however, is the fact that the defendants are entirely reliant on the evidence of Makume to establish any fraudulent misrepresentation. As can be seen from the discussion of Makume's evidence above his evidence does not coincide with the allegations as pleaded. Makume at no stage stated what was alleged in the defendants' plea.

6.9.3 *Justus error*.

This defence is also only viable if Nashua Bethlehem was Technofin's agent. It is furthermore only viable if misrepresentations were made.

Makume's evidence is to the effect that he had not read the agreements due to his own fault and that it was not caused by anything that Deysel had done. Makume readily conceded that there was nothing stopping him from reading the agreements fully and thoroughly. Makume said that Deysel informed him that the agreements were in the usual form and therefore did not represent to him anything about the content of the agreements.

In my judgment the defendants have not established *justus error* as a defence.

6.9.4 Novation in respect of agreements D to U.

This defence was referred to in paragraph 3.10 above. This defence also relies on the fact that Nashua Bethlehem was acting as Technofin's agent.

There is no evidence that agreements UN2 to UN18 (UN18 not being annexed to the pleadings) were signed on behalf of

Technofin. Wels denied any knowledge of these documents at the time. Rhode never received these documents signed by Technofin.

6.9.5 Novation in respect of agreements B and C.

This defence was dealt with in paragraph 3.2.12 above. There was no evidence to support this defence.

6.9.6 No commencement date in respect of annexures B and U and the fact that agreement U was not signed.

As stated earlier agreement B was also not signed. I have already indicated that the plaintiff is entitled to rectification and that there is no merit in the defence that the two agreements were not signed and two had no commencement dates.

6.9.7 Two machines were substituted.

I have referred to this defence in paragraph 3.2.14 above. It is common cause that two machines were substituted. Both Wels and Makume testified about this and it is clear that it was of no consequence to either party. The substitution also did not cause Cilliers any concern.

6.9.8 Non-compliance with section 40(2)(a) of the Higher Education Act, 101 of 1997.

Section 40(2)(a) of the Higher Education Act reads as follows:

> "(2)(a) Subject to paragraph (b), a public higher education institution may only with a resolution of its council, not taking into account any vacancy that may exist, enter into a loan or an overdraft agreement."

Although reference was made during argument to the provisions of section 40(2)(b) and section 40(3)(a)(iii) it is not necessary to deal therewith.

The issue to be determined is simply whether a rental agreement constitutes a loan or an overdraft.

0n behalf of the defendants it was submitted that by definition a rental agreement constitutes a loan.

Rhode testified that the rentals payable in respect of the rental agreements in question constituted a budgetary line expense and was accordingly an operating expense. Rhode also conceded during cross-examination that the twelve month rental agreements

allegedly entered into did not constitute a loan or overdraft but only the sixty month rental agreements.

It is noteworthy that the first defendant does not allege that a council resolution was required or obtained when agreements B and C were concluded.

This defence apparently has its origin in Rhode's belief at the time that, because the machines were financed, a loan was involved. Rhode conceded that the rentals were operating rentals and not loans.

In my judgment there is no merit in this defence.

6.9.9 Makume's limited authority.

The defendants, by way of an amendment, alleged that Makume had authority only to sign short term rental agreements. It is specifically denied that Makume had authority to conclude sixty month rental agreements.

I have also referred to the consequential amendments made by plaintiff and Technofin relying on estoppel.

I need not dwell long on this topic. Makume and Rhode conceded that *ex facie* the letter sent by Goldblatt to Makume dated 20 May 2001, Makume had authority to conclude sixty month rental agreements. It was pointed out by counsel for Technofin that this evidence must be seen in the context of the concession made by Rhode that both he and Goldblatt were aware that a sixty month contract was contemplated and that Goldblatt had possession of the agreement signed by Deysel and Makume on 29 May 2001 which only made any commercial sense if a sixty month contract had been contemplated.

Furthermore, documents were created by the first defendant representing to the outside world that Makume had the necessary authority to conclude sixty month rental agreements.

6.10 The defendants' conditional counter-claim.

The counter-claim is dependent on a finding that the machines relating to agreements E, T and U were not delivered. I have dealt with delivery above. There is no merit in this conditional counter-claim.

6.11 Comments on the witnesses.

This matter is really a factual dispute. The witnesses' evidence tested against the documents, provide answers and point to probabilities. It is, however, necessary to state what my impression of the witnesses is.

Wels was an outstanding witness. He appeared to be honest in all respects. It is true that he testified for the plaintiff while he is employed by Technofin. He made it clear that he was testifying about facts and that he was objective. I find that he was objective and honest in all respects. The same can be said of Ms Erasmus' evidence. She had little to testify about and there was no reason to doubt her honesty.

Rademan is an expert witness who said that Technofin is in fact Absa's opposition. She was an honest witness and described her experience in practice to the court.

Roopchand testified about very little. He is an interesting person with a clear memory and there is no reason to doubt his honesty.

Makume had one thing in mind and that is that he was not entitled to enter into agreements for longer than a period of twelve months. It did not matter what documents were put before him and what concessions he was invited to make of necessity in view of certain documents. Makume had

to defend a limited authority. Though Makume came across as an honest person, Makume did not make a favourable impression especially on the basis that he was not prepared to concede the obvious.

Quinn appeared at the beginning of his evidence to be intentionally favouring the defendants. As his evidence, especially in cross-examination, progressed it appeared that he was in fact giving factual evidence. Although Quinn did not make a particular good impression I have no reason to doubt his evidence.

Cilliers, with all respect, did not come across as a very intelligent witness. I have no doubt that he is a good employee following rules and regulations but, just as Makume, he was not prepared to make obvious concessions. In Cilliers' case I think it is due to the fact that he on many occasions did not really understand what it was all about.

West was an outstanding witness. He listened to questions and knew what it was all about. I have no reason to doubt West's honesty.

7. NASHUA'S LIABILITY TOWARDS THE SECOND DEFENDANT.

In Nashua's plea reference is made in paragraph 3.2 thereof to an action instituted by the plaintiff against the first defendant. It was pointed out that it should be a reference to an action instituted against the first "third party", ie Nashua. Leave to amend was

accordingly sought. Nashua is entitled to the amendment as it is clearly a wrong reference. It is not necessary to formally grant the amendment. Note is taken of the mistake.

In my judgment the second defendant, if it is held liable to the plaintiff, has no claim against Nashua.

The second defendant relies for its claim against Nashua on the contents of the so-called addendum to the main agreement signed by Rhode for the first defendant and Deysel for Nashua Bethlehem. The indemnity therein contained was according to the second defendant's case affirmed by West on behalf of Nashua towards the second defendant.

In view of the evidence referred to above Cilliers' evidence cannot be accepted.

A further obstacle for the second defendant to succeed against Nashua was referred to by Nashua's counsel in his heads of argument. The so-called addendum to the main agreement was according to Rhode not intended to be an addendum to the sixty month rental agreements but to the twelve month rental agreements. It therefore never had any contractual force independent of the main agreement being the twelve month agreements. This effectively nonsuits the second defendant against Nashua.

8. CONCLUSION.

In my judgment the plaintiff succeeds against the second defendant.

The plaintiff notified the second defendant of its intention to ask for a punitive costs order. So did Nashua and Technofin. In terms of the agreements plaintiff is entitled to costs on the scale as between attorney and client. Plaintiff asked for costs on the scale as between attorney and own client. This special costs order is based on the allegation that the second defendant raised spurious defences which could not be sustained. It was also submitted that the witnesses called by the second defendant did not support the defences and that therefore the defences were vexatious.

The request for a punitive costs order on the scale as between attorney and own client by Nashua and Technofin was based on exactly the same submissions.

I am not prepared to grant costs on the scale as between attorney and own client. The plaintiff is entitled to costs on the scale as between attorney and client and I can see no reason why the costs of Nashua and Technofin should not be paid on the same scale.

The plaintiff was forced by the defences raised by the defendants to join Technofin. In my judgment the second defendant is liable to pay Technofin's costs.

The second defendant itself joined Nashua. The second defendant is also responsible for Nashua's costs.

0n behalf of the plaintiff it was submitted that it was unnecessary to force the plaintiff to call Mr Roopchand and that the second defendant should be ordered to pay the costs incurred by the calling of Mr Roopchand on the scale as between attorney and own client. Again that order is also not warranted but Mr Roopchand will be declared a necessary witness.

It is common cause that the employment of two counsel by the plaintiff and Technofin was warranted. Therefore the employment of senior counsel by Nashua was also warranted.

The plaintiff was entitled to join both defendants. The plaintiff cannot be held liable for the first defendant's costs. Those costs will have to be paid by the second defendant but on the scale as between party and party.

The counter-claim will have to be dismissed with costs. Both the first and second defendants instituted the counter-claim and they should be ordered to pay the costs jointly and severally also on the scale as between attorney and client.

9. ORDERS.

1. Annexures B, E and U to the particulars of claim are rectified in the following respects:

1.1 the commencement date in annexure B shall read 22 May 2000;

1.2 the increase in hire charges in annexure E shall read 15%;

1.3 the commencement date of annexure U shall read 28 June 2001.

2. The second defendant is ordered to pay to the plaintiff-

2.1 the sum of R3 833 757,26;

2.2 interest on the aforesaid sum at the following rates-

2.2.1 21% from 1 June 2003 to 12 June 2003;

2.2.2 19,5% from 13 June 2003 to 17 August 2003;

2.2.3 18½% from 18 August 2003 to 14 September 2003;

2.2.4 17½% from 15 September 2003 to 19 0ctober 2003;

2.2.5 16% from 20 0ctober 2003 to 14 December 2003;

2.2.6 15½% from 15 December 2003 to 15 August 2004;

2.2.7 15% from 16 August 2004 to 17 April 2005; and

2.2.8 14½% from 18 April 2005 to the date of payment.

2.3 Costs of suit on the scale as between attorney and client, such costs to include-

2.3.1 the costs of two counsel;

2.3.2 the qualifying fees of the expert witness, Cornelia Aletta Rademan; and

2.3.3 the costs associated with the calling of Mr Roopchand, who is hereby declared as a necessary witness.

3. The second defendant is ordered to pay the costs of the first defendant on the scale as between party and party.

4. The second defendant is ordered to pay the costs of the third third party (Technofin) on the scale as between attorney and client, such costs to include the costs of two counsel.

5. The conditional counter-claim is dismissed with costs on the scale as between attorney and client which costs will include the costs of two counsel and be paid jointly and severally by first and second defendants.

6. The second defendant's claim against the second third party (Nashua) for an indemnification is dismissed with costs on the scale as between attorney and client, such costs to include the costs consequent upon the employment of senior counsel.

W J VAN DER MERWE
JUDGE OF THE HIGH COURT

23391-2003

HEARD ON: 7-10 NOVEMBER 2005
FOR THE PLAINTIFF: ADV A GAUTSCHI SC, ADV N KONSTANTINIDES
INSTRUCTED BY: ROY SUTTNER
FOR THE DEFENDANTS: ADV H VAN R WOUDSTRA SC, ADV E C LABUSCHAGNE
INSTRUCTED BY: ROOTH & WESSELS INC
FOR THE SECOND THIRD PARTY: ADV T W BECKERLING SC
INSTRUCTED BY: N J GROBBELAAR
FOR THE THIRD THIRD PARTY: ADV R MEYER SC, ADV A G SOUTH
INSTRUCTED BY: EDELSTEIN-BOSMAN