IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE 6/9/13 **SIGNATURE**

CASE NO: 51106/2009

DATE: 20/9/2013

IN THE MATTER BETWEEN

DAYCOR PROJECT MANAGEMENT CC — PLAINTIFF

AND

TSHWANE GLASS & ALUMINIUM (PTY) LTD t/a INDUSTRIA GLASS & ALUMINIUM — DEFENDANT

JUDGMENT

PRINSLOO, J

[1] The plaintiff claims damages allegedly flowing from an oral agreement entered into with the defendant.

[2] Before me, Mr Riley appeared for the plaintiff and Mr Lubbe for the defendant.

Brief synopsis

[3] It is convenient, for illustrative purposes, to quote extracts from the particulars of claim:

"3.1 In and during June 2007 and at Bryanston, the plaintiff represented by David Day, and the defendant represented by Willie Kruger entered into an oral agreement in terms whereof the plaintiff engaged the defendant as a contractor to manufacture, supply and install agreed glass and aluminium windows and doors ('the work') for a new cluster home at 138 Mount Street Bryanston ('the home').

3.2 The aforesaid oral agreement was partly recorded in writing. The plaintiff attaches hereto:

3.2.1 ... a copy of the defendant's quotation which was accepted by the plaintiff in the amount of R595 019,15 (excluding VAT).

3.2.2 ... 15 pages consisting of copies of drawings of the glass and aluminium windows and doors required to be manufactured, supplied and installed in and at the home.

4. The material terms of the oral agreement were, *inter alia*, as follows:

4.1 The defendant would manufacture, supply and install the work as agreed.

4.2 The defendant would manufacture, supply and install the work for an amount of R595 019,15 (excluding VAT) as calculated in terms of annexure POC1 hereto.

4.3 The manufacture, supply and installation of the work would be performed by the defendant:

4.3.1 in a proper and workmanlike manner;

4.3.2 without any defects. (My note: up to this point, all the allegations are admitted in the plea.)

4.4 The manufacture, supply and installation of the work would be completed within a reasonable period of time. (My note: this is denied in the plea.)

4.5 The defendant would only be paid for the manufacture, supply and installation of work if it was completed in a proper workmanlike manner and without any defects. (My note: this is denied in the plea.)

6. Subsequent to the conclusion of the agreement, the parties as represented above and at Bryanston, orally varied the agreement by agreeing that defendant would manufacture, supply and install the following items and for the following amounts (my note: these are three additional items, mainly Louvre doors and windows) which the plaintiff contracted the defendant to install at an additional cost of R21 614 excluding VAT.

7. During the course of the manufacture, supply and installation of the work and additional items the plaintiff paid the defendant an amount of R476 315,79 (excluding VAT). (My note: it is common cause that the total contract cost came to R702 961,79 (VAT included) and that the plaintiff paid the defendant R526 482,64 leaving a balance of R176 479,15, which is the amount claimed by the defendant in a counter-claim. The allegations in paragraph 6, regarding the additional items installed, are admitted in the plea.)

7. During the course of the manufacture, supply and installation of the work and additional items the plaintiff paid the defendant an amount of R476 315,79 (excluding VAT). (My note: as I mentioned, R526 482,64 was paid after the VAT was added, so that this allegation in the particulars of claim is also admitted in the plea.)

8. Notwithstanding the content of paragraph 7, the defendant:

8.1 Failed to perform all its obligations in terms of the agreement, and

8.1.1 manufactured, supplied and installed defective work;

8.1.2 did not carry out its manufacture, supply and installation of the work in a proper and workmanlike manner. (My note: this is denied in the plea.)

9. The defendant has caused the plaintiff to hire third parties to complete the performance and remedy the poor and defective manufacture, supply and installation of the work. (My note: this is denied in the plea.)

10. A fair and reasonable time for the defendant to have completed the work as agreed was August 2008. (My note: this is denied in the plea.)

11. As a result of the defendant having failed to complete the work within a reasonable period of time and to perform the manufacture, supply and installation work in terms of the agreement, the plaintiff has suffered damages in the amount of R1 644 759,89 (excluding VAT) ...

12. In regard to the above, *inter alia*, the plaintiff:

    12.1 paid Sterling Glass and Aluminium an amount of R479 521,00 (excluding VAT) to remedy the poor and defective workmanship of the defendant such amount, being a fair and reasonable sum to do so;

    12.2 suffered a further loss of R121 390,00 (excluding VAT) being labour and materials in connection with re-plastering work, waterproofing, painting, re-tiling and project management at the home in order to complete all the agreed work of the defendant, the said loss being fair and reasonable in the circumstances. (My note: a further

amount of some R1.1 million was claimed in respect of alleged unnecessary interest paid on overdraft in order to hold the money for the contract available. This part of the claim was abandoned before the commencement of the proceedings.)"

[4] As a result of the amount having been abandoned, the plaintiff claims an amount of R600 911,00 (the sum total of the two amounts in 12.1 and 12.2 of the particulars of claim) plus interest and costs.

[5] In the particulars of claim, it is not pleaded that the plaintiff cancelled the contract, neither, for that matter, is it pleaded in terms that the defendant committed a material breach of the contract.

In *Amler's Precedents of Pleadings* 7th ed the learned author Harms says the following at 115:

"A party wishing to rely on the cancellation of a contract because of its breach must allege and prove:

(a) a breach of the contract;

(b) that the right to cancellation has accrued because, for example, the breach was material, ... or that the contract has a cancellation clause (*lex commissoria*) and its provisions (such as prior notice) have been complied with ...

(c) that clear and unequivocal notice of rescission was conveyed to the other party (unless the contract dispenses with such notice). The act of cancellation must be clear and unambiguous ..."

[6] There was no tender of restitution in the particulars of claim, neither was there a prayer for declaratory relief to the effect that the contract had been validly cancelled.

I add that these subjects were, to a greater and lesser extent, canvassed in correspondence and in evidence, but not in the pleadings.

I have mentioned details about the plea, and the counter-claim is only based on the outstanding balance on the contract price. The plea to the counter-claim refers back to the allegation in the particulars of claim (paragraph 8) to the effect that the defendant had failed to properly perform in terms of the contract and it is pleaded that the defendant is precluded from requiring performance from the plaintiff in terms of the agreement, "owing to the failure by the defendant to properly perform its own reciprocal obligations in terms thereof".

[7] So much for the pleadings, from which the nature of the dispute between the parties can be determined.

[8] Very broadly speaking (more details will be considered when the evidence is analysed) the issues and the contesting versions can perhaps be summarised as follows: the main witness on behalf of the plaintiff was Mr David Arthur Day ("Day") who is the sole member of the plaintiff close corporation and the driving force behind the plaintiff and this litigation. The name of Day is also built into his plaintiff corporation. Day says that soon after the defendant started with the installation early in 2008, he noticed that the work done was below standard and the materials supplied were of inferior quality. From an early stage, he complained to Mr Willie Janse Kruger ("Kruger"), the managing director of the defendant company, about these negative observations he had made but was given constant assurances by Kruger that any defects would be remedied in good time. This prompted him to pay the bulk of the contract price, some R543 000,00, between September 2007 and April 2008, but when he formed the impression that the defendant was quite unable to render proper and acceptable performance, he notified the defendant that he had terminated the contract, and engaged another contractor to remove the full installation done by the defendant and to replace all the items. The cost, as appears from the quoted passages from the particulars of claim, came to some R600 000,00, which does not fall far short of the original contract price of some R700 000,00. It is common cause that some of the installations made by the defendant, albeit only a few items, were retained by Day and not replaced in the re-installation process. Day also, initially, sued the defendant for an additional amount of some R1,1 million, as already explained, allegedly flowing from interest and other bank charges incurred in order to hold

the contract price available for payment. This portion of the claim was abandoned. As pointed out, the plaintiff also refuses to pay the outstanding balance on the contract coming to some R176 000,00 and representing the counter-claim. Day did not testify as an expert, neither was I at any stage urged to consider him as such. It is, however, clear from his evidence that he has been involved in property development for some time.

[9] Kruger, on the other hand, testified that the installation was of high quality which met industry standards. This meant that it met standards set by the South African Glass and Glazing Association ("SAGGA") and also the Association of Architectural Aluminium Manufacturers of South Africa ("AAAMSA"). Kruger said that the first installation of aluminium windows made by the defendant on site served as a "mock-up" for Day to inspect and decide whether or not he was happy with the quality so that the rest of the installation could be done. According to Kruger, Day gave his approval, and also had no difficulty paying the bulk of the contract price by April 2008. Relatively minor complaints raised by Day were addressed. The installation was completed by about May or June. Thereafter the defendant left the site for about three months or so, while the other contractors, pursuing other trades or disciplines towards completing the luxury home, continued to work on site and, in the process, the aluminium frames were damaged, particularly when contractors ran power leads through the frames and closed the windows over the cables to keep the cold out during winter time. This caused the aluminium frames to become damaged and twisted, particularly in the

lower corners. When Day complained bitterly about the alleged poor quality of the workmanship and materials, during August 2008, Kruger called for an expert employed by SAGGA and AAAMSA, one Mr Louis van Wyk ("Van Wyk") to visit the site with Kruger and Day, and to express an opinion about the quality of the workmanship. Van Wyk also testified. He indicated, in his report, that the workmanship met industry standards. Kruger said that he made determined efforts, also through his attorney, to agree with Day on a "snag list" so that perceived damages to the installation could be restored and repaired and the project finalised. He also suggested that the matter be referred to arbitration. According to Kruger, Day was not interested, and said that he would be instituting action. Kruger denies liability and testifies, in addition, that the perceived damage to the frames and other portions of the installation, although not caused by the defendant, could be repaired on site at relatively small expense, and that it was not necessary to remove the whole installation and replace it with a new one, as contended for by Day.

The *onus* of proof

[10] I have already referred to what a party wishing to rely on the cancellation of a contract because of its breach must allege and prove, when dealing with the remarks of the learned author Harms in *Amler's* at 115.

[11] At 118, the same author says the following:

"***Onus***: A party wishing to claim damages resulting from a breach of contract must allege and prove:

(a) the contract;

(b) breach of the contract (for example, that the other party was in *mora*), or repudiation of the contract;

(c) that the claimant has suffered damages;

(d) a causal link between the breach and damages;

(e) that the loss was not too remote."

[12] In the present case, a cancellation was not pleaded, neither was a breach, in so many words. The plaintiff, however, appeared to rely on a cancellation judging by some of the correspondence exchanged, and what was put to Kruger in cross-examination. On the weight of the evidence, the absence or presence of a cancellation appeared to remain in issue between the parties, judging by some correspondence, to which I will refer.

As to a breach of the contract, this remained in issue throughout. Indeed, on the overwhelming weight of the evidence, Kruger did his utmost to keep the contract intact, by appealing for a snag list so that the remaining issues could be resolved, and by even suggesting an arbitration.

[13] As to the counter-claim, and although the outstanding balance on the contract is common cause, the defendant has to prove that the outstanding balance is due and payable.

Some remarks about the expert witnesses, meetings held between them and hearsay evidence

(i) The plaintiff's expert witness Mr Gary Keith Louw ("Louw")

[14] In August 2011, the plaintiff gave notice of its intention to call Louw as an expert witness. The notice was given in terms of rule 36(9)(a) and (b).

According to the notice, Louw was a qualified architect. It is common cause that Louw was the architect involved in the design of the four cluster homes in Mount Street, Bryanston, one of which is the property forming the subject of this case. There is a photograph taken on behalf of the defendant, exhibit "G21", showing the names of the plaintiff and Garry Louw Architects displayed on a notice board outside the property. I have a clear impression, from the evidence of Day, that he and Louw were close friends and business associates.

[15] According to the rule 36(9)(b) summary of expert evidence, Louw conducted a visual inspection of the "near complete" residence at 138 Mount Street on 8 and 9 November 2008. He inspected the aluminium windows and doors manufactured, supplied and installed by the defendant in the particular residence. According to the rule 36(9)(b) summary, prepared by the plaintiff's attorney,

Louw would make some rather unflattering remarks about the quality of the installation. According to the summary, Louw was presented with a diagramatic schedule of the doors and windows by one Filip van Halter of the plaintiff close corporation ("Van Halter").

[16] Attached to the trial bundle, exhibit "A", as exhibits "A283" to "A423", one finds some 140 photographs taken in July 2012, after the new installation had been completed, displaying certain features of the new installation. These photographs received no, or very little, attention during the trial before me.

[17] Also forming part of trial bundle A, as exhibits "A461" to "A590", one finds a collection of some 129 photographs (referred to during the trial, at my suggestion, as "the pink photos" because of the colour of parts of the paper on which the photos were mounted). These "pink" passages on the paper contain descriptions of alleged defects as transcribed from a report by Louw evidently following his November inspection of the installation.

[18] These inscriptions, as well as the rule 36(9)(b) summary and any other reports by Louw clearly constitute evidence by Louw.

[19] When an attempt was made to lead Day, when giving evidence, to deal with the evidence of Louw, an objection was offered on behalf of the defendant on the basis that the evidence amounted to hearsay. The reason for this objection lies in

the fact that Louw, sadly, passed away in March 2012, more than a year before the trial came before me in May 2013. I heard full argument on this issue and thereafter ruled that Louw's evidence amounted to inadmissible hearsay evidence. I did this after due consideration of the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1988. The evidence of Louw is hotly contested by other experts, in this case in the form of Kruger and Van Wyk. One of the issues to be considered when deciding whether or not to allow hearsay evidence is "any prejudice to a party which the admission of such evidence might entail" – see section 3(1)(c)(vi) of Act 45 of 1988. In dealing with this issue, the following is stated by the learned authors Zeffertt and Paizes *The South African Law of Evidence* 2nd ed on p410:

> "As we have seen, the techniques designed for the purpose of detecting and exposing error can only be properly employed if directed at the person upon whose credibility the probative value of the evidence depends. The hearsay declarant or actor escapes the full force of their effective deployment. He or she does not testify in open court subject to the careful scrutiny of judge, triers of fact, adversary, counsel and spectators; there is no oath; no factual platform established from which to infer a capacity and an opportunity for accurate description; he or she does not speak in response to questions which give shape to his or her testimony and lend to it both context and coherence; and, perhaps most significantly, there is no cross-examination to clarify confusion, expose dishonesty or error, or

extract information favourable to the adversary which might act as a counter-weight to the original information."

Circumstances under which the prejudice may be offset, suggested by the learned authors by way of examples mentioned at 410 to 411, do not apply to the present case. In my view it would be extremely prejudicial to the defendant if its experts had to be subjected to cross-examination (like they were) but Louw's evidence had to be accepted under the circumstances illustrated by the learned authors. The playing field will not be equal. This is expert evidence. Under these circumstances, it will not be possible to properly and fairly weigh and consider the opinions of the opposing experts. I also rejected an argument by plaintiff's counsel that Louw's evidence can be admitted in terms of section 34(1) of the Civil Proceedings Evidence Act, No 25 of 1965, which I considered not to be applicable to the present situation.

I did, however, feel obliged to qualify my ruling as to the admissibility of the evidence of Louw under the following circumstances: the "joint minute of experts" is a nonsensical and unsigned "minute" of a meeting of experts held in September 2012. It simply states that the experts were unable to come to any agreement on any of the issues. It flies in the face of the provisions of rule 37 and the practice directive applicable in this division. It was received as part of the record as exhibit "B". I instructed the legal representatives to arrange an urgent

and more satisfactory meeting between the experts. They came up with a handwritten document, which I received as exhibit "C", which reads as follows:

"With reference to paragraph 6.13.6 of the practice directive the following order is made:

1. the experts of whom notice has been given are requested, having regard to the photographs contained in exhibit A461 to 590 (my note: these are the pink photos), to agree or disagree on the following:

   1.1 which damage (if any) was depicted in each photograph;

   1.2 what the likely cause of such damage (if any) could have been;

   1.3 could the damage (if any) have been rectified or should any items be replaced, what should be replaced;

   1.4 what the likely costs of such rectification and/or replacement will be;

   1.5 to which item supplied by defendant the photograph refers.

2. Whether the costs contained in the quotation of Sterling Glass and Aluminium dated 19 June 2009 (my note: this is the contractor engaged by the plaintiff to do the replacement installation) are market related and fair and reasonable costs relating to the terms contained therein.

3. Whether the costs contained in Van Halter's invoice dated 30 April 2009 are market related and reasonable costs relating to the items contained therein."

I made this order before I gave the ruling on the admissibility of Louw's hearsay evidence. In the result, the ruling which I made was the following:

"1. The evidence of Louw is ruled to be inadmissible hearsay evidence.

2. Inasmuch as evidence may be tendered only about the photos taken by Louw as described in exhibit C and given the provisions of the order exhibit C and depending on the nature of such evidence, the question of admitting or provisionally admitting such photos only as evidence will be further considered."

[20] In the event, the experts were allowed to deliberate about the pink photos and I allowed evidence about those photos. The weight attached to such evidence, and the impact it may have had on the conclusions which I ultimately arrived at, will be considered further when the evidence is evaluated.

(ii) The plaintiff's expert witness Mr Terence Rahme ("Rahme")

[21] Rahme was the only other witness, apart from Day, that was called by the plaintiff.

[22] The rule 36(9)(a) and (b) summary relating to Rahme, is a concise, two page affair. According to that document Rahme has "certification in the manufacture of Technal Aluminium in 2009".

Rahme's employment history is described as follows:

"2.1 Ellesse, Johannesburg – general manager.

2.2 Dynamic Entertainment, Johannesburg – managing member.

2.3 Platinum Voice, Johannesburg – managing member.

2.4 Euroline Group, Johannesburg – director."

It is then stated:

"3. As a result of the aforementioned experience, Mr Rahme is an expert in *inter alia* the requirements and needs of customers with regard to housing developments, and the manufacture, specifications and installation of aluminium windows, doors and other related building products.

4. At the hearing of this matter, Mr Rahme will testify that on 21 August 2012 he attended at the plaintiff's premises and inspected the building works, including the aluminium products *in situ* and the removed aluminium products which are on the premises.

5. He has also inspected the reports and photographs of Mr Gary Keith Louw, and the expert report of Mr Louw, and agrees with the contents thereof and the reasons therefore."

[23] Where Rahme relied on inadmissible hearsay evidence in the form of reports of Louw, the weight accorded to his evidence must, in my view, be compromised. His rule 36 summary is dated 30 August 2012. He was, undoubtedly, consulted after the unfortunate death of Louw. He inspected the premises including the removed installation of the defendant in August 2012, more than four years after the installation was completed. It is common cause that the frames and other articles installed by the defendant were removed by the plaintiff to make way for the new installation in about March 2009, more than three years before Rahme inspected those discarded items, stacked in heaps on the plaintiff's premises and lying in the open, exposed to the elements.

[24] The expertise of this witness was not contested by the defendant.

(iii) The defendant's first expert witness, Mr Louis van Wyk ("Van Wyk")

[25] It was not disputed that Van Wyk is an expert as far as the manufacture and installation of aluminium windows and doors in the building industry is concerned.

According to his employment history, attached to the rule 36(9) notice, he matriculated in 1965 and worked for Gundle Plastics from 1966 to 1972. From 1972 to 1981 he worked for Shatterprufe Safety Glass Co (Pty) Ltd and was promoted to area manager in the largest branch in Johannesburg. He was then transferred to the Plate Glass Holdings (Pty) Ltd group and promoted to the position of export manager of PG Glass Holdings export division. He was then headhunted by HL and H Building Suppliers where he worked from 1983 to 1984 when he had to leave because of a take-over by Federated Timbers. He then went to Insulation World (Pty) Ltd where his position became redundant and then to Kool Aluminium (Pty) Ltd in 1985 to 1986 whereafter he went to Wispeco as marketing manager from 1986 to 1995. He then went to Almar Aluminium Profiles from 1995 to 2001 when the company went into liquidation and from there to Henderson Sliding Door Gear where he was headhunted by the AAAMSA group where he started in 2001 and is still employed. His responsibilities include the training of building inspectors, glaziers and shopfitters in respect of glass and aluminium to conform to SANS 10400 – the National Building Regulations. He also conducts the regulation and inspection of glass and aluminium installations done by glaziers and shopfitters on building sites to ensure adherence to SANS 10400 – National Building Regulations. He advises property developers, architects, quantity surveyors, etc on the correct use of glass and aluminium.

[26] Van Wyk inspected the Bryanston residence at the request of Kruger on 14August 2008 when Kruger wanted guidance from SAGGA and AAAMSA in an effort to resolve the complaints raised by Day and with the view to signing off the contract. I will revert to a brief analysis of Van Wyk's evidence but part of his rule 36(9)(b) summary reads as follows:

> "Based on Mr Van Wyk's aforesaid inspection of the aluminium doors and windows manufactured, supplied and installed by the defendant in the residence, Mr Van Wyk came to the conclusions as set out in annexure LW2. The defects contained in annexure LW2 are in the opinion of Mr Van Wyk of a minor cosmetic nature and can be rectified without the necessity of replacing the windows and doors.
>
> He will testify that the work referred to in 3.2 conducted by the defendant was done in a proper and wormanlike manner and complies with industry standards, more specifically with the standards determined by AAAMSA."

I will deal with the report LW2 when considering the evidence of Van Wyk.

(iv) The defendant's second expert witness, Willie Janse Kruger ("Kruger")

[27] Kruger is the main official of the defendant, and presumably the managing director, although I could not find evidence to this effect. His expertise was not questioned by the plaintiff. He testified as an expert.

[28] According to Kruger's work history, attached, in summary, to his rule 36(9) notice, he matriculated in 1975 and graduated in 1981 at the Free State university as a quantity surveyor with a B.Sc (q.s.) degree. He then worked for well-known quantity surveyors in Pretoria and Johannesburg, and is a member of the Association of South African Quantity Surveyors. He is also registered with the South African Council of Quantity Surveyors. He also worked for LTA Construction as a project quantity surveyor and is now the "CEO and owner" of the defendant company. He started the company in 1997 and presently employs 100 people and has successfully completed 1450 projects, including prestigious contracts for the National Library, Sanral, the Department of Education, Civitas and the Department of Foreign Affairs to name a few. According to the summary, the defendant is highly regarded throughout the South African construction industry and its name is associated with prominent construction companies including WBHO, Grinaker-LTA, Group Five Building, Murray & Roberts and Stefanutti Stocks. The summary states that during his thirty year working career in the construction environment Kruger gained invaluable and in depth knowledge of the construction industry and quality standards.

(v) More minutes of more expert meetings held during the course of the trial

[29] I have referred to the unsatisfactory minute, exhibit "B" and my order exhibit "C".

[30] Exhibit "D" is a minute of a meeting held during the course of the trial on 7 and 8 May between Mr Good (who did not testify and who was involved with the

re-installation), Rahme and Kruger. Van Wyk was absent. Exhibit "E" is the same minute, but sporting a number of notes, in manuscript, evidently by Kruger. There are also some deletions. There are clear signs of disputes between the experts. For example, paragraph 7 states that the experts could not agree on the reasons for dents to the framework, scratches to the framework, broken glass panes (if any) and paint on the framework (if any). Exhibits "D" and "E" are of little if any assistance for purposes of deciding this dispute. Exhibit "F" appears to be a computation of what it would cost to replace the installation if the defendant were found to be liable for such costs. This did not receive any attention during the trial. Exhibit "G" is a rule 36(10) notice containing photos taken by the defendant after it was authorised by a court order to attend the premises and take photos. Initially, such permission was refused by the plaintiff. The photos are "G1" to "G21".

Exhibit "H" is a handwritten document handed up by counsel stating:

"1.1 The following is common cause between the three experts.

1.2 The amount of R440 772,00 is fair and reasonable if it should be found by the court that the defendant was liable to replace all the frames including glass.

1.3 The amount of R198 645,80 is fair and reasonable if it should be found by the court that the defendant was liable to replace the nine frames mentioned in expert reports."

The last-mentioned topic received no further attention during the trial, and the first-mentioned figure is confirmed in the following minute exhibit "J", which is a minute of a meeting held on 13 May 2013, four days before the conclusion of this ten day trial. The minute records Rahme's opinion that the damage, defects, scratches and dents that he found in the aluminium frames/doors during his inspection in August 2012, three years after the installation was removed and stacked as I have described, was such that it was necessary to remove and replace all these items. Exhibit "J" then records that the defendant's experts disagreed recording their belief that repairs could have been made to the windows thereby avoiding their removal.

The following is then minuted as having been agreed between the experts:

"1. That the prices for the replacement of the windows/doors contained in the Sterling quotation are reasonable and fair. Furthermore, such prices would be applicable to all repairs and/or replacements that are necessitated (my note: this relates to the charges of the contractor who did the re-installation).

2. The parties are in agreement that in the event of the court finding that it was not necessary to remove all the frames and that the defendant is liable for the repairs and damages, that the cost of repairs thereto would be R117 792,00 excluding VAT and excluding the costs of Van Halter. A breakdown of the costs is reflected in annexure "A" hereto.

3. The experts further agreed that the quotation consists of the following elements:

3.1 costs of glass: 35% of the total Sterling quotation;

3.2 costs of aluminium frames: 55% of the Sterling quotation;

3.3 costs of servicing, beading etc: 10% of the Sterling quotation.

4. The experts further agreed that in the event of the court finding that all of the windows/doors had to be replaced, and that defendant was liable for defects and damages thereto the cost thereof would be R440 772.00 excluding VAT."

[31] I now turn to an evaluation of the evidence. The versions of Day and Kruger have already been briefly outlined and some of the issues were highlighted when the expert summaries were dealt with. I propose concentrating on what I consider to be the main features of the evidence.

A brief analysis of the evidence

(i) David Arthur Day

[32] He is the sole member of the plaintiff. He confirmed the oral agreement which is common cause on the pleadings. It was put to him in chief that the defendant denies the alleged term in the agreement that the defendant would only be paid once the work is completed in a proper workmanlike manner and without defects. Day said that that was indeed the agreement. The first delivery came in the first

week of March. He was suspicious about the quality of the work from the beginning and voiced his concerns to Kruger who said that all defects would be rectified. He confirmed the progress payments made, the last being on 4 April 2008. He made somewhat generalised statements about "dented frames, scratched frames, daylight through windows, sticky residual from tape, bad joints, wrong sized sashes for outer frames" and so on. It was common cause before me that Day was not testifying as an expert. As will appear later, his evidence about the quality of the work dramatically differs from the evidence offered on behalf of the defendant. The "opening sashes" are the inner frames housing the glass windows that open and close inside the outer frames which in turn are cemented into the walls. Day made dramatic statements such as "not a single window functioned as it should have". He wrote very long letters containing derogatory remarks about the quality of the workmanship and when asked questions, both in chief and in cross-examination, he would make long speeches containing what I consider to be general statements about alleged poor workmanship on the part of the defendant and somewhat insulting and derogatory allegations to the effect that the defendant's workers were quite unable to do proper work. In my view, Day displayed extraordinary levels of aggression and, on his own version, his relationship with Kruger, the CEO of the defendant, was very poor. He said that remedial teams sent to the site by the defendant to rectify alleged defects, were quite unable to make any discernable progress. He said that it was necessary to replace the whole installation. According to him, only two of the installed windows were "acceptable". He retained the Louvres which went into the

generator house. These would from part, if I understand it correctly, of the additional installations agreed on after the original contract was entered into.

[33] I turn to some documents and correspondence contained in trial bundle "A", the contents of which was canvassed with Day during his evidence and also with other witnesses.

Already on 17 July 2008 Kruger wrote to Day dealing with some outstanding issues and requesting a payment which according to him was due subject to a 5% retention deduction pending the signing off after snagging had been completed. The letter refers to a meeting with Day on site on 9 July 2008. This meeting would have taken place after the three month period, referred to earlier when dealing with some aspects of the expert evidence, during which the defendant was off site after completing the installation but while other contractors were carrying on with the work and, according to Kruger, damaging some of the installations and, particularly, the aluminium frames. This letter is exhibit "A32". Kruger refers to a certain frame (D28/54) which had been altered on site which affected the quality of the frame and Kruger undertook to replace it with a new frame by 25 July 2008. As to the folding doors, also complained about by Day, Kruger makes the statement that the difficulty lies with the floor tiling which would have to be rectified to ensure smooth running of the folding doors. With regard to what turned out to be the main bone of contention between the parties, namely damage

to the window frames, and particularly the frames housing the moving parts or "openers" Kruger says the following:

> "Openers
>
> Leads pulled through openers cause serious damage to bottom corners of window openers. Openers closed with leads still in one corner also bends the openers and the friction stays. Even with the best effort, it is not possible to repair bent openers and frames to their original state. Cannot accept responsibility for the quality of the openers, since damage was caused by others."

It is, in my view, noteworthy that Kruger raised this argument at such an early stage. It was clearly not an afterthought. I consider it inherently improbable, given the quality of the qualifications and employment history of Kruger, and the good reputation of his business, already referred to, that he would simply fabricate such a story. It was common cause that leads were indeed run through the open windows. In a letter, Day even conceded that this was an unsatisfactory practice, but he insisted that the leads could not damage the frames. I could not find an answer to "A32" by Day in the trial bundle "A".

I assume that this letter was followed by the inspection conducted by the expert Mr Louis van Wyk, already referred to, on 20 August 2008. I already pointed out that Van Wyk was employed by SAGGA and AAAMSA. He was called to the site to express an opinion about the workmanship in an effort by Kruger to

amicably dispose of the contract and any outstanding complaints by Day. I have already referred to the letter written by SAGGA under the pen of one Mr Hans Schefferlie ("Schefferlie") the executive director of SAGGA, in which he refers to the inspection conducted by Mr Louis van Wyk. This letter, "A33", received a great deal of attention during the trial. It is dated 20 August 2008, and is addressed to the defendant, and also sports the AAAMSA logo. It is convenient to quote the contents:

> ":**Re: inspection of installed glazing materials at house David Day – 138 Mount Street Bryanston**
>
> We thank you for your request to inspect the glazing materials installed at the abovementioned location.
>
> The inspection has been conducted to establish compliance, or lack thereof, with the requirements contained in DSS SANS 10400 part N 2006 third edition (my note: I have already pointed out that this is a reference to the National Building Regulations).
>
> We have observed the following:
>
> **Glass comments:**
>
> 1. The west facing ground floor windows require back wedges.
> 2. The horizontally butt jointed window on the left hand side on the staircase has an unacceptable gap and must be re-done to match the right hand pane.

3. Mr Day is complaining about the grey woolpile fitted to the stack-away door to the patio. Black woolpile is available from Messrs Sheerline.
4. The right hand stack-away door must be adjusted and the brush pile at the bottom of the door lowered.
5. The cover plates on some door handles are out of alignment and must be levelled.
6. Pop rivets on the pull handles and scratches must be touched up.
7. The workmanship is of a high standard and meets industry standards.
8. It is suggested that a snag list is drawn up in writing by both parties and signed off on completion.

The above inspection has been conducted by our Mr Louis van Wyk, who may be contacted on cell: 0825857341 should any further assistance be required.

Yours faithfully

AAAMSA

Hans A Schefferlie

Executive Director"

The next day, 21 August 2008, Kruger sent Day a copy of this report pointing out the statement in the report that the workmanship was of a high standard which

met industry standards and asking for a further payment less retention. As far as the six items raised in the report were concerned, which require further attention, Kruger said that his finishing team would be on site on the same day to attend thereto. He also undertook to "again service all the frames and opening sections in order to ensure that all frames meet our clients' requirements".

The result of this was a very strongly worded letter, "A35", which Day wrote to the defendant and copied to, *inter alia,* Gary Louw Architects and SAGGA, for attention Schefferlie. The letter is dated 3 September 2008. Day stated that the practice of running leads through the aluminium frames "whilst not ideal" could not cause the damage to the frames. He stated that it was not possible, in his opinion, for the defendant to "raise the standard of quality of many of the units to an acceptable level by work on site" and that some of the installations would have to be removed and re-manufactured. At the same time Day said that he was giving notice of termination of the contract and reserving all his rights to claim damages. He said he would be calling for quotations from "proven suppliers" to replace the installation and he would be claiming the costs from the defendant. As to the contents of the AAMSA or SAGGA report, "A33", this was rejected out of hand by Day. He also stated that there was "complicity between the two parties and an obvious prior arrangement to minimise and/or dismiss the majority of defective issues raised". This is a reference to Kruger and Van Wyk. This allegation was denied by both Kruger and Van Wyk as will appear from my evaluation of their evidence. Schefferlie did respond to this letter on 19

November 2008 ("A56") stating that it has become clear that the site investigation conducted by Mr Van Wyk was not to Day's satisfaction and confirming that Van Wyk's comments were withdrawn in the circumstances and expressing regret that "this report was inadvertently forwarded to you", a nonsensical remark. Van Wyk testified that Schefferlie never discussed the issue with him and Schefferlie was not called as a witness by the plaintiff.

Indeed, Day repeatedly stated that all the other experts he invited to quote for the reinstallation roundly condemned the work done by the defendant. Despite this, not a single one of these alleged experts was called to give evidence. The best Day could do was to call Rahme, who inspected the removed installations, stack-piled on site in the open and exposed to wind and weather, four years after the installation and about three years after the installation was removed. Moreover, I consider it probable that any contractor worth his salt, invited to tender for a lucrative reinstallation like this, was more likely to criticise the condemned installation rather than to praise it, thereby losing the opportunity to conduct the re-installation.

Day followed up "A35" with another letter, "A39", copied to the same parties, and dated 8 September 2008 in which he actually concedes that "certain of the units supplied are of a reasonable standard, (but) these are largely confined to fixed windows and internal screens". He then goes on to state that further site inspections and "further informed opinion" suggested that the installation would

have to be removed and remanufactured. On a general consideration of Day's evidence, I am left with the clear impression that he was absolutely determined, from the outset, to replace the whole installation. It was also put to him in cross-examination that he was on a frolic of his own when he decided to "rip 63 windows out of the walls". This attitude of Day probably explains his refusal to settle the case amicably or to properly refer it to arbitration as will appear from the discussion hereunder of further correspondence.

[34] Following Day's last letter, "A39", it appears that a "telecom" was held by the defendant's attorney with Day (and perhaps others) on 9 September 2008. This is referred to in a letter by the defendant's attorney to Day, dated 11 September 2008 which is "A41". In "A41" the defendant's attorney refers to this telecom and makes the following proposal in order to reach an amicable and practical conclusion: a site meeting between Gary Louw Architects, Van Halter and Glen Roodt (then representing the defendant as site manager). At the site meeting Gary Louw would compile a final retention list of items to be rectified by the defendant. The outstanding balance of the contract was to be paid into trust with the plaintiff's attorneys within a certain time, the defendant would attend to the retention list, a second site meeting would be held to tick off items on the retention list completed to the satisfaction of the architect and thereafter the architect would determine the amount due to the defendant taking into consideration all defects not rectified or incomplete items and the architect would certify this amount. Thereafter payment would be made from the trust account of

the plaintiff's attorneys. The defendant would have a finishing foreman available until 10 October 2008 to attend to the retention list.

This, what I consider to be a reasonable, offer was rejected out of hand by Day in a letter of 15 September 2008 ("A43"). He said that he was in the process of documenting all defects "together with independent reports" which would form the basis of his claim against the defendant which would probably be far in excess of any amount which would otherwise have been due in terms of the "now cancelled" contract. It seems that Day went ahead without any delay to get quotations from the other potential reinstallers. One such a quotation, "A46", is dated as early as 2 October 2008. On 6 October 2008, the defendant's attorney responded to Day's rejection of his settlement offer. The letter is "A48". I find it convenient to quote the contents:

> "1. We refer to your letter dated 15 September 2008. Our client's rights to reply thereto are reserved to do so at the appropriate forum.
>
> 2. It is noted that you are not interested in coming to an amicable settlement.
>
> 3. In paragraph 7 you refer to the 'now cancelled contract'.
>
> 4. We are not aware of such cancellation. Please advise when and how the contract was cancelled.
>
> 5. Our instructions are to advise as follows:

5.1 It is noted that you intend to claim from our client. Our client proposes that the matter be referred to arbitration and that the arbitrator be agreed between the parties, failing which the arbitrator be appointed by the Chairman of the Association of Arbitrators Southern Africa;

5.2 Should you fail to agree to arbitration, our client awaits the summons.

6. Our client hereby requests access to the site to take photographs prior to any remedial work be done by you. Please advise date and time, our client requires about one hour.

7. We wait to hear from you within the next ten days."

[35] It is common cause that Day refused the defendant access to inspect the property and take photos. The defendant had to approach this court for an order to bring about such an inspection. However, the inspection and the photographing session only took place after the reinstallation.

[36] On 9 October 2008, in "A50", Day replied to the aforesaid letter from the defendant's attorney. He again decried the shortcomings of the installation and referred to the "very obvious collusion" between Kruger and Van Wyk. He said that his statement in "A43" that he was documenting defects and independent reports with regard to the "now cancelled contract" should be seen as cancellation of the contract. In reply to the proposal to go to arbitration he says the following:

> "In principle we have no problem with abiding by the ruling of a professional arbitrator but subject to our consulting with our own lawyers. Our concern being that our claim against your client will consist *inter alia* of a refund of all monies paid to your client to date; a refund of all plastering, tiling, partitioning, brick work and painting costs incurred as a result of having to remove and re-install all window and door units; legal and other administrative costs incurred as a result of our action against your client, consultant fees incurred in compiling our case, recovery of abovementioned security guard costs and compensation for construction delay including lost income and holding costs based on current interest rates. The latter probably being the greater of the costs incurred, but all of which we would need to know will fall under the ruling of an arbitrator failing which if your client declines to accept liability we will need to continue with preparation of our high court action. We will revert to yourselves on this issue shortly." (Emphasis added.)

As far as I can make out, Day or his attorneys never "reverted to" the defendant on the question of arbitration. In any event, it is patently clear that this response did not amount to a consent to arbitration. Quite the contrary: it seems that an acceptance of liability was set as a pre-condition to arbitration. Day's evidence before me, that he had "no problem with arbitration" is rejected out of hand.

As far as the request to take photos is concerned, Day wrote that he was compiling a comprehensive set of photographs which would "presumably, relieve your client of having to take his own photographs".

[37] Day testified that Van Halter was his project manager on site permanently. Included in his damages claim, is also a substantial account by Van Halter. For some reason, which was never explained, Van Halter was not called as a witness. I add that Mr Glen Roodt, who was the defendant's site manager, and who, according to Day, regularly conceded the flaws and shortcomings of the installation, was also not called as a witness by the plaintiff and neither was he called by the defendant. If I understood the evidence correctly, he left the defendant's employ and was somewhere in the Cape when the trial was conducted. Nevertheless, one would have expected the plaintiff to call Roodt to lend his support with regard to the alleged agreement about the defects.

[38] Day testified that the plaintiff was a registered VAT vendor, and actually re-claimed the VAT paid to the defendant from the Income Tax authorities.

[39] Before he was cross-examined, Day confirmed that he tendered back the removed items of the defendant's installation to the latter.

[40] It emerged from the cross-examination that Day initially refused permission to the defendant to inspect the premises and take photographs of the installations. This

was finally authorised through a court order dated 9 September 2011 and when the inspection was conducted, about a year later, Day was present.

It was put to Day that, in terms of AAAMSA guidelines, defects on installations must be judged from a distance no closer than three metres and the pink photos were taken much closer up. It was put to Day that many of the frames installed by the defendant were damaged because they were covered by cement or Rhinolite because of work done after the installation. Day disputed this. Day also denied that Kruger installed a mock-up at the beginning of the operation for Day to approve before the rest of the installation was conducted. His denial was unconvincing because he said he had "no recollection" thereof. In any event, he denies having approved any mock-up. This again raises the question as to why, on the probabilities, if he was deeply disturbed by the quality of the work, he would have made substantial payments up to April and also agreed for further installations to be made. He agreed that some of the installations were fitted as late as May and June. It was put to him that some of the spaces ("reveals") where the windows had to be fitted, were only complete for fitting by September 2008. This he denied. There were many factual disputes which emerged from all the evidence: the one is whether or not there was a mock-up at the beginning of the operation which Day approved. Another is whether or not the frames were damaged by the other contractors after the defendant initially left the site post installation. According to the defendant, the damage was caused by spilling cement and/or Rhinolite on the frames and also, as I have described, by running

cables through the frames and closing the windows over the cables to keep the elements out. Day was the only witness on behalf of the plaintiff that could testify about what actually happened. He was not on site every day. His project manager, Van Halter, was not called as a witness for a reason which remained unexplained. I have already expressed the view that I consider it inherently improbable that Kruger, given his pedigree in the industry and the way I judged him in the witness-box, would have fabricated all this evidence about a mock-up, damage caused by cement, damage caused by cables and so on. In the latter regard, it is also useful to revisit "A32", *supra*, in which letter Kruger already wrote to Day on 17 July that the frames ("openers") were damaged because of leads pulled through them. The *onus* is on the plaintiff. The issues that have to be proved by claimant for alleged damages flowing from the alleged breach of a contract which was allegedly cancelled are stipulated in the extracts from *Amler's*, quoted above. If the defendant's performance was so appalling (Day's choice of wording) and obviouly below standard, one would have expected Day to jump at the opportunity to present the facts to an expert arbitrator when he was called upon to do so already in October 2008 ("A48" *supra*). Instead, he opted for expensive and aggressive litigation, culminating in a ten day trial five years after the event and after the passing of one of his expert witnesses, architect Louw.

[41] When cross-examined, Day was not prepared to make reasonable concessions: it was put to him that Kruger offered to do the final snagging but wanted the damage caused to the frames by other contractors first to be sorted out. Day

denied that such a conversation took place, yet the version put to him is corroborated by what is stated in the letter "A32" already written to him on 17 July 2008 and recording what was discussed at a meeting with Kruger on 9 July 2008. It was put to him that Kruger would testify that he was prepared to remedy any defects and do snagging, but that Day would not let him and threatened to sue him for R1,5 million. This was also denied. At times, in cross-examination, Day conceded that at least some of the indoor frames presented no problems and thereafter his attitude hardened and he said not one of the frames was acceptable. The same applied to his evidence that not one of the windows opened and closed properly. It was also put to him that the frames were properly protected when they were transferred to the site. This he denied, despite conceding that he was not an expert on transporting frames. When it was put to him that the defendant had done more than 1600 installations without any of the problems alleged by Day, he said that he also wondered why the installation was so bad and he had been told that the defendant may have used large quantities of waste or inferior material to do the installation. This was a new angle, not mooted anywhere in earlier pleadings or correspondence. Other factual disputes which emerge from Day's cross-examination included his flat denial of the following propositions put to him: that he initially had no complaints about the frame sizes, that the joints of the frames were perfectly done and that the type of frame was approved by him. It was put to him that there were no plans in place to isolate areas like those where aluminium frames had already been installed for protection against the activities of other contractors. His answer was that there was nothing

to protect the frames from other than taking due care. It was put to him that there were no co-ordination meetings or fixed schedules. This he denied, stating that Van Halter was managing the project on a full time basis. As I indicated, Van Halter was not called to testify. Another major factual dispute which emerged from the cross-examination is the question whether or not the perceived defects (also the damages caused by the contractors on the defendant's version) could be repaired on site for a fraction of the costs flowing from a complete re-installation. Day, not testifying as an expert, insisted that a re-installation was necessary but, as I pointed out, Day never called any of the experts invited to tender for the re-installation to support him on this point. The version of the defendant is that the defects could be repaired on site.

[42] For the reasons I have mentioned, I was not impressed by Day as a witness.

(ii) Terence Michael Rahme

[43] I have dealt with his qualifications and employment history.

[44] I have mentioned that he was only called in to testify as an expert after the unfortunate passing of Architect Louw. He only inspected the frames installed by the defendant approximately four years after the installation was done and approximately three years after the frames and the rest of the installation were removed and replaced. His inspection was conducted in August 2012. He

inspected stacks of the removed frames piled on top of each other on the premises of the plaintiff and exposed to the elements for that period of at least three years.

[45] He relied, to some extent, on the report and other notes of Architect Louw, which I ruled to be inadmissible hearsay evidence.

[46] Rahme said that the damage he saw on the frames was, in some cases, consistent with bad milling (cutting) exposing the raw aluminium. There were dents, scratching and "manipulation" to the frames. He expressed the view that all the windows he inspected had to be removed. He confirmed that the amount of R117 792,00, mentioned in exhibit "J", is the amount of damages visible from the pink photos, if found to have been caused by the defendant, which would represent repair work that could be done on site. The agreement between the experts was that if it could have been repaired on site, it would have cost R117 792,00. It, however, remained in dispute between Rahme on the one side and Van Wyk and Kruger on the other side whether the repairs could be done on site or whether a re-installation was required. The objective position is that Rahme only inspected the damaged stock-piled installation items four years down the line whereas Kruger did the actual work. Kruger is supported, in all material respects, by Van Wyk. On the available evidence, and under these circumstances, I am unable to find on the probabilities that the version of Rahme is to be preferred ahead of that of Kruger and Van Wyk.

[47] As to the actual damages to the frames, Rahme testified that the dents were all in the same areas namely the corners of the sash frames. According to Rahme this was caused by "overcrimping" with a tool, applied with too much pressure and causing the aluminium to cink (bend). As will appear from the evaluation of the defendant's evidence, this statement is hotly disputed. Rahme testified that the frames were scratched and he postulated that the scratching was caused during the transportation process. According to him, the scratches would necessitate the removal and replacement of all the frames. The milling (cutting of the aluminium) was also not properly done and left gaps which exposed the raw aluminium. This also could not be fixed on site and had to be removed. The Mitre joints were inconsistent and not closing to 45° so that daylight was shown through the joint and this also had to be removed and could not be repaired on site. The glass could not be re-used. A new manufacturer would not be able to size the frames around the existing glass.

[48] As to the value of the salvage, Rahme testified that the glass now on site can be utilised because if the existing glass is used for a new design it can be cut into smaller pieces to suit a new schedule. A new designer could design the frames first and then cut the glass to fit. Rahme, if I understood him correctly, conceded that in such a case there would be a high volume of wastage due to cracks. Rahme then referred to the agreement between the parties (exhibit "J") that 35% of the total of the Sterling quotation was attributed to the cost of glass. Rahme said this represented the figure of approximately R154 000,00. According to my

calculations, with the Sterling quotation (without VAT) coming to R479 521,00 ("POC3" to the summons) 35% thereof would come to R167 832,00. To this Rahme wanted to add R25 000,00 as scrap value for the aluminium frames.

On Rahme's approach, the salvage could look like this:

35% of the Sterling quotation representing glass		R167 832,00
50% thereof if allowance is made for high wastage or other contingencies such as that the glass is never used in another design		R 83 916,00
plus salvage value of aluminium		R 25 000,00
	TOTAL	R108 916,00

This evidence of Rahme was not challeged in cross-examination, although Kruger said in his evidence that the salvage had no commercial value. Where the experts did not deem it appropriate, it seems, to assist the court by dealing with the salvage value, I must make the best I can and adopt a robust approach. Such an approach yields the figure of R108 916,00 for the salvage as tabulated above.

[49] From his cross-examination, it appeared that Rahme did not deem it necessary to take further photos of the allegedly damaged frames when he conducted his inspection in August 2012, about four years after the pink photos were taken. On a general consideration of his evidence, it appears that he relied rather heavily on the architect's report of the late Mr Louw. This, as I have said, has been ruled to be inadmissible hearsay evidence. Rahme took no notes during his inspection

of August 2012. He was also not present when the frames were removed by the plaintiff in March 2009. He conceded that the frames would have been damaged (particularly the outer frames) when removed from the walls. According to him, he "ignored" this outer frame damage for purposes of his evidence. He clearly could not know to what extent the frames were damaged during the removal operation or during the period March 2009 to August 2012 when stacked outside in the elements. Under these circumstances he certainly could not give authoritative evidence, in my view, on whether, and to what extent, the frames were damaged after installation by the other contractors as already complained about in writing by Kruger in July 2008.

Rahme conceded that the preparation of a proper snag list is an important step in a dispute resolution process in the building industry. It is a crucial step to inform the defendant what to attend to and there must be proper communication between the parties. In this case there was no snag list. It is quite clear that the defendant made *bona fide* attempts to persuade Day to agree to the preparation of a proper snag list but Day rejected this offer. This appears from the contents of "A41" which is a letter of the defendant's attorney, *supra*, proposing such a snag list for managing and final signing off by Architect Louw. Indeed, when Day was still testifying in chief, and dealing with "A50" and "A51" (already dealt with and the letter in which he effectively turned down the request for the matter to go to arbitration) he emphatically stated that he was not prepared to settle the case.

[50] When Rahme was cross-examined about "A33", the Van Wyk report, *supra*, of 20 August 2008, he effectively conceded that the six items listed therein which, according to Van Wyk, represented the complaints offered by Day during his inspection, could be repaired on site. Rahme used exhibit "1" (a 38cm aluminium frame fitted with an inner or moving sash) to demonstrate how a damaged segment of a frame can be replaced by another. The new segment gets cut in a factory and then fitted on site. Rahme expressed reservations about whether the electric cables or leads could damage the aluminium frames. It was put to him that the damages in question were caused to wider frames and not a smaller frame like exhibit "1". Van Wyk's testimony was to the effect that the wider, or longer, the frame the more likely the damage or twisting that may be caused by running a cable through the frame and thereafter closing the window on the cable. It was put to Rahme that the defendant is a registered AAAMSA contractor and the defendant's frames have been extensively tested in terms of AAAMSA's standards for quality and particularly for water penetration, strength and air penetration. Rahme offered no comment on this. Returning to the salvage value, Rahme conceded that the aluminium frames could not be used in another project, but restated his evidence that they could be sold to a scrap dealer for an estimated figure of R25 000,00. This was never disputed. He conceded, by referring to the stack-piled removed frames, that if they were to be moved and stacked against the wall there would be scratch damage. He conceded that without the Louw report it may have been more difficult to express a view on the matter. He had this report available when he did his August 2012 inspection. In responding to the

proposition put to him that the frames were damaged by other contractors after the defendant had left the site, he said if the frames had been properly protected by the factory they would not get this type of damage even if the builders worked around it. He felt that the defects were the result of poor workmanship and poor site installation. He conceded that he was never on the site before August 2012.

[51] After the evidence of Rahme, the only expert witness called by the plaintiff, I was left with the impression that he simply could not do enough to support the plaintiff's case. He had the disadvantage of only arriving on site four years after the installation had been made, and three years after it had been removed and stacked against a wall. He had to rely heavily on the evidence of the late Architect Louw. He took no photos at his inspection, neither did he make notes. He made some telling concessions, to his credit, in cross-examination.

(iii) Louis Donald van Wyk

[52] His expertise was not challenged. I have already referred, at some length, to his impressive work history in this particular industry. His organisations, AAAMSA and SAGGA, have guidelines which work to the SA National Standards contained in the DSS SANS 10400 and the various parts thereof to which I have referred. For example, part N deals with glazing.

[53] Van Wyk testified about his 14 August 2008 inspection summarised in the report, "A33", of 20 August 2008, the contents of which have been quoted. He addressed

the concerns raised by Day during the inspection. These are referred to in the report ("A33"). Before me, Van Wyk went through all these items. He expressed the belief that a snag list should have been drawn up. The installer should have been given the opportunity to rectify and correct what Day was unhappy with. That is the normal contractual procedure. The problems listed in "A33" are considered as small problems. They could all be fixed on site. When he conducted the inspection, the glass and aluminium had been installed and further finishing still had to be done. The DSS SANS refers to the National Building Regulations, which ensure that correct procedures and quality are enforced in the building industry. A Draft Standard ("DSS") was approved as a fully fledged Standard at the end of 2008/early 2009 by the Department of Trade and Industry under which the South African Bureau of Standards falls. Van Wyk was of the view that the standards were met, and safety glass installed in the correct areas. The issues at hand are quality issues. Van Wyk considered himself qualified to pronounce on whether these standards were complied with.

[54] In cross-examination he said that he conducted the inspection with Kruger and Day and the latter pointed out the problem areas which are dealt with in the report "A33". It was put to Van Wyk, somewhat surprisingly, that he refused to allow Day to accompany him and Kruger on the inspection. This was strongly denied. The witness said without Day he would not have known what the complaints were.

[55] He was referred to the AAAMSA guidelines (paragraph 1.6.3) to the effect that exposed aluminium ought to be protected by means of adhesive tape against mortar droppings and other non-mechanical damage. He conceded that what he inspected had no protective covering on. On the other hand, of course, it should be remembered that Day stated emphatically that there was no question of cement having been dropped on the frames.

[56] He conducted the inspection as a representative of both SAGGA and AAAMSA. He compiled the report "A33". It was signed by Schefferlie as the executive director.

When asked how many windows he inspected, he said he inspected those pointed out by Day. In this case there were two windows. I add that Kruger testified that Van Wyk inspected all the windows but only dealt with the two flowing from the complaint offered by Day. Van Wyk said he made notes at the inspection and they were available at his office in Midrand. This issue was not pursued by the cross-examiner. He spoke about the three metre test, *supra*, for the detection of flaws in an installation. The workmanship which he declared to meet industry standards (paragraph 7 of "A33") were standards according to the guidelines published in the AAAMSA book. The issues raised in "A33", paragraphs 1 to 6, were those raised by Day. He does not recall that Day raised any other issues. He suggested, in paragraph 8, that a snag list should be drawn up. This was necessary to try to resolve whatever issues there were and standard contract

procedure. It is also a condition to be found in the Master Builders draft agreement. The same applies to the Joint Building Construction Contract. The snag list should be drawn up by both parties, or by the aggrieved party, and should be in writing to avoid later arguments. When asked whether it was reasonable for an aggrieved party to give the other party three opportunities to remedy the defects (as claimed by Day) the witness said that it depended on the severity of the problems and the size of the contract. He said Day was "abusive" about the quality of the workmanship. He invited Day to point out what the problems were whereupon Day mentioned the six points reflected in "A33". Where he dealt meticulously with the six points, and where Day never denied having pointed out those perceived problems, I consider it inherently improbable that Van Wyk would have omitted any other complaints from his report, had such additional complaints been raised by Day.

Van Wyk admitted that Day invited him to inspect other projects involving other contractors for comparative purposes and that he declined to do so. He said that whatever an acceptable standard may be is in the eyes of the beholder. Three different spectators may have three different views on what is acceptable and what is not. The purpose of the visit was to assist Kruger in trying to resolve the complaints. Kruger is one of their members. They assist where possible. When pressed on his refusal to go to inspect other sites, he said that had he gone there he was sure that he could have found faults in those installations as well. In addition, he suggested the snag list, for reasons already mentioned. He insisted that when

he does these inspections in the capacity as the representative of SAGGA or AAAMSA, the inspections are done on a totally unbiased basis, irrespective of whether a member or a non-member is involved. The integrity of the organisations is at stake. He was there to assist Kruger and to protect the integrity of the two bodies. He denied any collaboration or complicity with Kruger. He said that members would not be protected where they offered poor workmanship. As I already pointed out, Schefferlie never discussed the issue with him, even after he "withdrew" the report. This I already mentioned in some detail. He insisted that the work was of a high standard when he conducted the inspection and as stated in "A33". This state of affairs may have changed if subsequent damage took place when the windows were removed or after his inspection. Looking at the pink photos, all the workmanship can no longer be described as having been of a high standard.

He strongly disputed the evidence of Rahme that some of the dents on the frames would have been caused by "overcrimping". He said that crimping is done on a special machine. He demonstrated his evidence by referring to exhibit "1". The tool used for the crimping does not come into contact with the frame. There is no possibility of "overcrimping" because the special tool is used. Overcrimping can only come into the equasion if it is done by means of a hammer and a punch, which was not the case here. The defendant has a production line set up which Van Wyk has seen and he has a proper tool or "crimping jig". The crimping jig

cannot cause overcrimping because it is pre-set. It is pre-set by the manufacturer of the crimping tool.

[57] In cross-examination it was put to the witness that the window frame is extruded aluminium. The witness confirmed that the aluminium arrives in a billet (like a block) and under pressure it is put through a dye to get different shapes. Heat is involved. The extrusion process cannot damage the aluminium because of quality control at the extrusion process and at the manufacturer. What was extruded goes out on a run-out table and then stretched and cut to length and put into an "ageing oven" to ensure correct hardness. The stretching process should ensure that there are no kinks or dents in die product. When asked whether the aluminium can possibly be damaged in the extrusion process, the witness, emphatically, said no. Controls at the extrusion process are extremely tight.

[58] With reference to some of Day's complaints about sliding doors not functioning properly, the witness, referring to paragraph 4 of "A33", said that the tiles were uneven. Measurements were taken in the presence of Kruger and Day during the inspection. The doors were approximately 2mm out of square and showed daylight underneath. The remedy, relating to the adjustment and the lowering of the brush pile, appears from paragraph 4 on "A33". There are adjustable rollers on sliding doors and stack-away door systems. This can be done on site.

[59] On the contentious issue of damage caused to the aluminium frames by passing electrical cables through them, the witness was confronted with the evidence of Rahme to the effect that this cannot happen. The witness disputed this and said that he had peronally seen this happen on building sites. It depends on the width of the window. In this case they were top hung windows with the hinges at the top. The wider the window the more the likelihood of damage to the frame. The wider the window, the greater the possibility of achieving a twist. He has actually witnessed this. If you force the window to close over the cable you can cause twisting or deformation. The damage is more likely to be caused on the sash frame (the moving part) because the fixed part is stronger. The witness demonstrated his evidence by referring to exhibit "1". The frame of the sash of exhibit "1" was only about 20cm long. No damage was caused when the lead was run through the frame because the window was not forced closed. In the demonstration, the particular cable was not cut either. The witness said that windows of about 900mm (such as some of those fitted in the particular house) could possibly have been deformed or twisted under these circumstances. During his inspection Kruger showed him cables through windows where such damage could have been caused. He did not discuss it with Day at the time because he was asked to look at the complaints which Day raised.

[60] In re-examination, he was confronted with a concession he had made to Day that, in present times, the absence of skilled labour and the dropping of standards may serve as mitigation for poor workmanship. What he meant with "poor

workmanship", in this sense, was a lack of attention to detail, something that could be remedied on site.

[61] Importantly, the witness said that the flaws visible on the pink photos, taken in November 2008, were not comparable with what he saw of the installation during his inspection in August 2008. At that stage, the frames were reasonably clean and, on a general overview of the pink photos, one sees damage which appears to have been caused since his inspection and some of the frames were full of cement and Rhinolite.

[62] The evidence of this witness strongly corroborated that of Kruger on a number of material issues.

[63] I considered Van Wyk to be an impressive and sincere witness.

(iv) Willie Janse Kruger

[64] He also testified as an expert, and his expertise was not placed in dispute.

[65] I have dealt, at some length, with the qualifications and professional history of this witness. His company was referred to the plaintiff by a company which supplies aluminium profiles called Fentech. The quotations he submitted were approved and that is how the agreement came about.

[66] The installation started early in 2008 in the garage area. This was the first area which was ready for installation, with the plastering having been completed.

[67] They installed two windows, one opening window and a fixed U-shape window. It is standard practice for all projects, whether commercial or residential, to start off with a "mock-up" installation which can always be referred back to for colour, quality and so on. Before preparing the quotation, he met Day to agree on the type of frame system, the powder coating colour, the type of glass and in this case the issue about the opening sash of the windows. The standard was based on the AAAMSA guidelines. The sash issue entailed the fact that Day wanted the defendant to use a heavy duty opening sash frame and he quoted accordingly. After the mock-up was completed, he contacted Day, and they met on site to look at the installation. At this meeting he asked Day to look at the installed products and confirm that he was happy with the product installed including the powder coating colour and the glass concerned. Day confirmed that all was acceptable and that the defendant could continue with the rest. As already indicated, I find this evidence convincing and I accept it. In my view it is inherently improbable that Kruger, given his background and his standing in the industry, which is undisputed, would fabricate the whole version about the mock-up and what it entailed. The evidence of Day, who first said that he had "no recollection" of the mock-up and later denied the existence of the mock-up altogether is unconvincing and improbable.

[68] According to Kruger, the installation got underway without any problems. He saw Day on site from time to time and spoke about the installation. Small details were mentioned. Nothing major. When the internal sliding doors were installed there was an issue about detail for the locking stiles on the wall where the door slides into. When he met Day on site, they would discuss the installation and no real problems or issues were raised. Of course, this is another contradiction of Day's evidence who said that he was upset and concerned from the start and that he raised serious complaints right from the beginning. I already expressed the view that this evidence of Day is inherently improbable, considering the fact that he made substantial payments (the bulk of the contract price) up to April and that he also engaged the services of the defendant to do additional work.

[69] The first frame that became an issue was a U-shaped frame in what Kruger remembers to be the braai area. Day was not happy with the configuration (that is the shape) of the window and asked Kruger to change it which was done. The initial configuration was in accordance with the agreed schedule. The additional work that had to be done was at the gate house area ("the transformer room") involving louvres and a glass screen and doors. From what Kruger remembers, once the gate house installation was complete, most of the installation in the main house had also been done. It must constantly be borne in mind that all the witnesses before me gave their evidence about five years after the event. The installation of the main stacking door had to be held in abeyance because the

defendant had to wait for the plastering to be completed in that area. They had to wait for about three to four months.

[70] Kruger testified about the contentious issue of the protection of the frames. All the frames leave the factory with protective tape on both sides. The tape remains on the frames while installation takes place. One cannot leave the tape on the frames for months on end because the glue will damage the powder coating. Once the frames are installed, it is better to remove the tape because it is easier to clean cement droppings from the frame without the tape. The tape would also not protect the frames from impact damage or damage caused by cables running through the openers. The best form of protection is to co-ordinate the works on site to ensure that you do not have wet trays, trowels and plaster work in the completed areas. As far as the completed areas are concerned, protection on site is a major issue in any operation. The way that is done is by co-ordinating the work by having the plaster work, tiling and the first coat of paint completed by the time you install the window. Then you have a minimum amount of finishing around the windows and those finished areas will then be isolated or locked up. Site co-ordination and meetings in this regard are crucial. In this case the finished areas were not locked up or isolated. It is common cause that work carried on around the windows after installation and that leads were run through the windows.

[71] Kruger testified about the events which led up to the Van Wyk inspection. When he met Day on site in about August 2008 the latter was unhappy about the quality of the frames. They walked through the house where Day said repeatedly that he had no problem with the internal frames but he was unhappy about the external frames. As far as Kruger could remember, there was a problem with the frame in the library which had been damaged during installation and this was replaced by the defendant. Day also raised the issue about the openers (the same as the sashes or the moving parts or windows inside the main frames). The bottom corners were bent and when an opener was closed, it did not seal properly and light was coming through. Kruger responded that these openers were damaged on site and there were also quality issues for example some of the folding doors were not locking. There were areas of poor fixing of frames to walls and one or two lock stiles had to be replaced. A lock stile is the vertical member of the door frame housing the lock. Kruger asked Day to co-operate with the drawing up of a snag list window by window. In that way they could assess the extent of remedial work and finishing to be done and also come to an agreement and work out a program to complete the work. Day's response was that he was not interested and would sue the defendant for R1,5 million. I add that Day denied this part of the evidence when it was put to him in cross-examination. Again, given the weight of all the evidence, I find it inherently improbable that Kruger would fabricate a version like this. On his own version, as I have indicated, Day said that he was not prepared to settle the case. It is clear from all the evidence that Day adopted an uncompromising and aggressive attitude throughout. I have already touched on

this subject. Day made insulting and derogatory remarks about the quality of the defendant's performance. What he failed to do, was to present any convincing and credible evidence to support the stance that he adopted. As I already mentioned, it is clear that Day was absolutely determined, from the beginning, to replace the installation. Of course one cannot be sure, but it occurs to me that what may have inspired Day was a desire to get a new installation with a different character. Kruger's evidence (not challenged in cross-examination) was that, when he finally obtained permission from the court to inspect the site post re-installation, he noticed marked changes from the installation of the defendant: the gloss charcoal powder coating was now replaced with mat finish. Square beadings became splayed beadings. Heavy duty opening sashes were replaced with light duty sashes. There was some changes to the configurations of the frames, for example windows at the roof level had been changed from windows with openers to fixed pane windows. Moreover, Day's denial that he threatened to institute action is gainsaid by the fact that he indeed instituted this action as early as August 2009 already.

[72] I return to Kruger's evidence about the events leading up to the Van Wyk inspection. When Day threatened to institute action, Kruger suggested to Day that they should consider getting an opinion from AAAMSA to see if they can find a way forward based on an expert report. This Day agreed to. In the event, Van Wyk also recommended the snag list as is evident from his report, "A33", and his evidence. According to Kruger, the rejection by Day of this proposal was

unfortunate because the final finishing could have been done on site to the satisfaction of all concerned. The bottom corners of the openers (the frames of the sashes or openers) were damaged by electrical cables over the three to four months already referred to. Kruger also testified, as already mentioned, that the workers probably pulled the cables through the windows and closed them because of the harsh winter conditions. Nevertheless, Kruger did not regard the damage to the frames as a major issue. One could cut and crimp new openers from the job cards and replace them on site with no disruption in the same manner that the defendant could repair, replace or fix anything else that was an issue. Kruger reminded the court that the defendant manufactured these frames and can therefore repair them as well. There is nothing that cannot be repaired on the frames. It is not a welded product like steel. It is an assembled product. Any part, frame or style can be cut from the job card and replaced on site. If an outer frame is damaged by whatever cause or person, it may have to be removed from the wall but it can be re-installed on site. I find this evidence compelling. It comes from the manufacturer himself. It is supported, in large measure, by the evidence of Van Wyk. Rahme made telling concessions on this particular subject. All this militates against a conclusion that a total re-installation was indicated or justified.

Of course, it does not follow from a finding that the remedial work could have been done on site that the defendant must be held liable to pay the amount of some R117 000,00 (mentioned in exhibit "J") which the experts agreed it would

cost to remedy defects gleaned from the pink photos. As appears from the authorities quoted, the plaintiff has to prove that the defendant caused such defects or damages. Of course, this allegation is hotly disputed by Kruger and the supporting evidence of Van Wyk. In my view, the plaintiff failed to prove a causal link between the agreed damages of R117 000,00 and the conduct of the defendant.

[73] As to the Van Wyk inspection itself, Kruger testified that a fair amount of time was devoted to the stack-away door mentioned in paragraphs 4 and 5 of "A33". Van Wyk took measurements of the door and the overall opening size and pointed out to Day that the floor is sloping down from left to right when one stands on the inside. This is not the fault of the defendant. The remedy is neatly verbalised in paragraph 4 of "A33". According to Kruger, the three of them proceeded to walk through the house. They inspected "a lot of windows". He cannot remember if they inspected all the windows. Van Wyk repeatedly asked Day to point out errors in the installation. The items pointed out by Day are those listed in "A33". Kruger pointed out to Van Wyk that the damage to the corners of the openers was due to electrical cables. Van Wyk said those were issues relating to damage and not workmanship and he would not include it in his report.

[74] Kruger conceded that he was not interested in visiting other sites as suggested by Day. He felt that the required standard was determined and agreed with the

mock-up. The purpose of the mock-up was specifically to establish the quality of the finish and the other aspects of the installation.

[75] In September 2011 the court granted an order authorising the defendant to inspect the site, although this was well after the re-installation. A small part of the installation, mainly the agreed extras, was not removed. The windows that were removed were stacked on top of each other. He took photographs. "G11" is an example. The joints made on the frame visible on the photo during the defendant's manufacturing process are still near perfect. As to the salvage, Kruger testified that the frames have no commercial value. They can be sold as scrap but the return from such a sale would basically cover the costs of removal. The glass is also not worth anything if used on another project. This is in contrast to what Rahme said about the salvage value. The evidence of Rahme on this subject was not challenged in cross-examination. In the circumstances I must be slow to reject the evidence of Rahme. See *Small v Smith* 1954 3 SA 434 (SWA).

Kruger testified that if repairs were done on site to the frames, as he suggested, the glass could have been re-used. This could have been done even if Day had decided to employ another contractor to do the work because they would have worked off the job cards for these particular frames. All the work could have been done on site. The new frames installed is also exactly the same "casement 38 system" which is the most common system used in the market.

[76] I have already dealt with the changes to the characteristics of the new installation as compared to the old installation done by the defendant.

[77] Significantly, Kruger testified (as did Van Wyk) that there is a vast difference between the quality of the installation depicted on the pink photos and what was seen during the last visit of Kruger to the site pre-re-installation, which was on the occasion of the Van Wyk inspection. On the pink photos, many of the frames were now damaged by cement, rubbers were missing and beadings were loose or missing. Some of this damage was illustrated by Kruger in his evidence by referring to some of the pink photos. One example is "A466".

[78] Kruger repeated his denial that the defendant caused the dents and scratches on the frames. The photos show evidence of cement on the frames and in the joints. When one removes the cement or the Rhinolite, scratches are caused on the frames. When cement is dropped on the frame, it normally sticks on the beading. This problem could have been resolved by changing the beading at a relatively small cost.

[79] Kruger was subjected to lengthy and intensive cross-examination. In my view, he was not in any way discredited.

[80] He was confronted with the fact that Schefferlie "withdrew" the Van Wyk report. I have dealt with this issue. Kruger pointed out, correctly in my view, that the fact

that the report was "withdrawn" does not detract from the details therein contained. Schefferlie never contacted Kruger, although the defendant is a member of AAAMSA and, for that reason, also of SAGGA. As I already pointed out, Schefferlie also never discussed the subject with Van Wyk.

[81] Kruger could not issue a so-called "AAAMSA certificate" to the plaintiff because of Day's actions in refusing to see through the contract to finality. The AAAMSA certificate confirms that the glazing and the rest of the installation were done in terms of the standards set in the National Building Regulations. The glass installations are also edged with a stamp containing the "signature" of the defendant once the contract is signed off. This could not be done in the present instance for the same reason. Kruger said that the final payment is due once the snag list is complete and the contract signed off. Again, this could not be done because of the actions of Day. Generally, the owner would also be entitled to a 10% retention until the project is satisfactorily completed.

[82] Kruger, in cross-examination, also illustrated visible damage to the openers by referring to some of the pink photos. An example is "A544" where damage is visible to the left corner which, according to Kruger, was caused by a cable. There is no damage to the transon which is the horizontal rail in the centre of the frame. Another example is "A545". Kruger said on more than one occasion that his company does not make frames that look like that. In other words, the defendant does not manufacture damaged and twisted frames. This evidence, on

the probabilities, given the standing and background of the defendant, must be correct. Referring to the pink photos, Kruger also said that if a glass and aluminium expert (and not an architect like the late Mr Louw) had compiled the photos and introduced the comments dealing therewith, he or she would probably have stated what the required remedial action would be. Taking "A45" as an example, remedial action would probably have been to replace the sash frame. This would have made it clear that only the sash frame had to be removed and not the whole frame including the glass. Kruger also said, as did Van Wyk, that a larger sash or frame will be more likely to twist and become deformed if closed on a cable. If you force the opener on the cable you will damage the transon as well. The pink photos also demonstrate that even in cases where the sash frame is damaged and twisted, the joint manufactured by the defendant is still in perfect condition.

[83] In cross-examination, Kruger insisted, as he did in his chief examination, that, at his meeting with Day on site before the Van Wyk inspection, he suggested the preparation of a comprehensive snag list, frame by frame, and a program to attend thereto. He insisted that Day said that he was not interested but would rather sue for R1,5 million. That is when Kruger proposed that an AAAMSA expert be consulted for an opinion. I have already expressed the view that it is inherently improbable that Kruger would have fabricated this evidence.

[84] Kruger was asked whether he accepted that the contract was cancelled. He said (I paraphrase my notes): "I do not think so. We are always willing to meet on site to find a solution." His counsel also referred to "A48", *supra*, where Kruger's attorney says that he was not aware of any cancellation. Kruger was pressed by the plaintiff's counsel referring to "A51" where Day said that his reference to the "now cancelled" contract in "A44" should be regarded as cancellation. Kruger answered (I paraphrase): "If you say so, it must be true. You can catch me out on these legal issues. We are always prepared to meet and go forward ..." I do not regard this as a concession that the contract was cancelled. Quite the contrary. In any event, a cancellation was not pleaded. I have dealt with this issue, as well as the *onus* and what a claimant relying on a cancellation has to prove. Kruger pointed out that the defendant had done almost 1700 contracts and this was the first time they got involved in a "legal battle".

[85] Kruger insisted that a mock-up was prepared. It was not in the garage but in that vicinity. He insisted that they had to wait three to four months for the plastering to be done at the point where the large stacking door had to be installed. He insisted that Day said on more than one occasion that the internal frames were in order. He insisted that he saw frames that had been damaged by electrical cables. His then site manager, Roodt, also pointed out such damage to him and expressed concern in connection therewith. One could clearly see the damage at the bottom corner of the frame. Some of the frames were twisted and they could not be closed properly. It was put to him that this was a fabrication, a statement which

he emphatically denied, saying that he saw it with his own eyes and it was of concern to him. I consider it to be inherently improbable that Kruger would have fabricated this evidence. The same applies to his evidence, as I already pointed out, that the defendant does not manufacture and install frames in that condition.

[86] Kruger was cross-examined at some length about the Van Wyk meeting. He said that AAAMSA inspectors go out daily to sites and will give a report to confirm whether or not the installation complies with National Standards and Quality Guidelines. It was put to Kruger that his "entire evidence regarding the Van Wyk meeting was a complete fabrication and untrue". This Kruger, understandably, emphatically denied. In any event, his evidence is corroborated by Van Wyk. It is also inherently improbable that both of them would have fabricated such evidence. He was confronted with the fact that Van Wyk said that he only inspected two or three windows. Kruger said that Van Wyk only reported on those windows because they were the only ones complained about by Day but he looked at all the windows as they inspected the site. He asked Day to point out the items that he was unhappy with. This, of course, is confirmed by Van Wyk. Kruger pointed out that some damage was visible, but the workmanship was of an acceptable standard. It will be recalled that Kruger already complained about the cable damage when writing to Day on 17 July 2008 ("A32"). He sent his remedial team to the site after the Van Wyk meeting but the team was told to leave by Day. Whatever defects appeared from the inspection with Van Wyk, could easily be remedied on site. For example, some of the locks in the doors

were of different makes and Day insisted that all locks must be from the same manufacturer. As to the question of protection, Kruger repeated, in emphatic terms, his earlier evidence that the protective tape cannot be left on the frames for months on end. The only way to protect the frames is to co-ordinate the work on site in such a way that the finished areas are protected. Regular co-ordination meetings should be held and the proceedings at those meetings should be minuted. Kruger denied that there were "three failed attempts" by his teams to remedy the defects. While his team installs new frames that are delivered at the site, they, at the same time, finish off the already installed windows.

[87] In re-examination, Kruger again stated that he was not aware that the contract had been cancelled. He dealt with the efforts to arrange for a proper snagging list to be prepared and the refusal by Day to co-operate in this regard.

[88] Kruger struck me as a truthful and impressive witness. He clearly knew what he was talking about. I have dealt with his impressive CV, which was not placed in dispute. It is obvious that he always acted in a *bona fide* manner and had a genuine desire to bring the contract to a satisfactory conclusion. To me it was obvious that he was quite capable of doing so, had he received the necessary co-operation from Day. He was prepared to call in the AAAMSA expert to inspect his work and furnish a report. Day rejected this. He was quite happy to refer the matter to arbitration and made such a proposal through his attorney. This was also rejected.

In my opinion, the inherent probabilities favour the version of Kruger, materially supported by the evidence of Van Wyk, on the contentious issues. My reasons for this conclusion appear from the analysis of the evidence.

Conclusionary remarks

[89] In my view, and for the reasons mentioned, the plaintiff has failed to prove its case against the defendant. The plaintiff has failed to discharge the *onus* of proving what was necessary to succeed with a claim of this nature. The requirements, as to *onus*, were considered with reference to the relevant passages in *Amler's, supra.*

[90] For the reasons mentioned when analysing the evidence, I find no basis for preferring the version offered by the plaintiff, such as it is, to that of the defendant. The evidence given by Day was unsatisfactory in material respects. The evidence of the expert Rahme was plagued by insurmountable disadvantages. Those I have listed and discussed. The version of the defendant was satisfactory and supported by the inherent probabilities.

[91] In the circumstances, the claim must fail.

[92] I turn to the counter-claim. A lawful cancellation of the contract was not pleaded, let alone proved. Indeed, a breach of contract was not specifically pleaded either,

neither was it proved. The counter-claim represents the outstanding amount on the contract namely R176 479,15. This outstanding balance is not disputed. Given my findings on the merits of the case, I am consequently of the view that the defendant is entitled to payment of the outstanding contract balance subject to deduction of the salvage value of the removed installation. I have also come to the conclusion that it would be equitable to deduct 10% from the amount claimed in respect of retention monies because the contract was never signed off. In a sense, this is in line with the evidence of Kruger. I have decided to allow this deduction, despite my finding that the defendant was quite prepared and capable of completing the contract but prevented to do so by the conduct of Day. I am mindful of the following passage from Christie's *The Law of Contract in South Africa* 6th ed p493 which I was referred to by defendant's counsel:

> "Self-created impossibility, that is impossibility resulting from the act of one of the parties, does not discharge the contract, but leaves the party whose act created the impossibility liable for the consequences."

See also the authorities there quoted.

[93] As to the calculation of what appears to be an appropriate award in respect of the counter-claim, I have already dealt with what I consider to be a reasonable computation of the salvage value. I did this when dealing with the evidence of Rahme. The details need not be repeated. The amount comes to R108 916,00. As I mentioned, the evidence of Rahme dealing with the salvage value was not

challenged in cross-examination. I have referred to *Small v Smith, supra*. I have decided to prefer the figure mentioned by Rahme to that suggested by Kruger in the circumstances.

[94] Consequently, an appropriate tabulation of the figure to be awarded in respect of the counter-claim, would appear to be the following:

Amount of the counter-claim (outstanding contract balance)		R176 479,15
Minus 10% retention		R 17 647,91
	TOTAL	R158 831,24
Less salvage		R108 916,00
	TOTAL AWARD	R 49 915,24 (R49 915,00)

[95] The costs

The costs should follow the result. I see no basis for deviating from this general rule. The costs should also include the qualifying and reservation fees of the experts Van Wyk and Kruger.

I turn briefly to additional arguments as to costs flowing from previous interlocutory proceedings.

(i) The proceedings of 9 September 2011 (exhibit "K")

[96] This was an application by the defendant to compel the plaintiff to comply with a rule 35(3) notice and a rule 21 request for particulars for trial. I was not referred to any opposing affidavit. The correspondence attached to the founding affidavit would appear to support a conclusion that a proper case was made out. The

application was enrolled for 9 September 2011 and on the same day, an order was made ordering compliance with the rule 35(3) and rule 21 notices and also ordering the plaintiff to afford the defendant's representatives the opportunity to inspect the premises. The costs were reserved. It would seem to be appropriate to order the plaintiff to pay these costs.

(ii) The proceedings of 26 April 2013 (exhibit "H")

[97] This appears to be an application to compel proper compliance with the rules 35(3) and 21 applications dating back to 2011, and referred to in exhibit "K", *supra*. The main thrust of the application seems to be an effort to force the plaintiff to supply particulars relating to the claim for alleged damages flowing from interest, bank charges and holding costs which, as I have pointed out, was abandoned well before the trial.

[98] I was not referred to any order that was made on 26 April 2013 or thereafter with regard to this application. I see no sign of such an order mentioned on the court file or inside the court papers. This issue of the alleged need for particulars relating to the abandoned claim was not raised during the trial before me. It is true that the order of 9 September 2011, *supra*, resorting under the proceedings in exhibit "K" directed the plaintiff to furnish particulars despite the abandonment of the aforesaid damages claim. Nevertheless, where this issue was not canvassed before me during the trial, and played no role as far as the adjudication of the

dispute was concerned, it seems to me that it would be reasonable to order each party to pay its own costs flowing from the proceedings referred to as exhibit "H".

The order

[99] I make the following order:

1. The claim is dismissed.

2. In respect of the counter-claim, judgment is granted in favour of the defendant in the amount of R49 915,00.

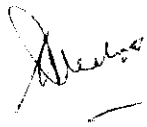
3. The defendant is given leave, if so advised, to remove, at its own expense, the salvage of its installation from the plaintiff's premises within thirty calendar days from the date of this order, or an extended period which may be agreed upon, subject to proper prior arrangement. If the defendant fails to do so, this part of the order will lapse.

4. The plaintiff is ordered to pay the defendant's costs which will include the following:

   4.1 the qualifying and reservation fees of the experts Van Wyk and Kruger; and

   4.2 the costs flowing from the proceedings of 9 September 2011 (exhibit "K").

5. In respect of the costs flowing from the proceedings of 26 April 2013, exhibit "H", each party is ordered to pay its own costs.



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

51106-2009

HEARD ON: 6 – 17 MAY 2013
FOR THE PLAINTIFF: ADV RILEY
INSTRUCTED BY: MICHAEL KRAWITZ & CO
FOR THE DEFENDANT: G LUBBE
INSTRUCTED BY: E W SERFONTEIN & ASSOCIATES INC