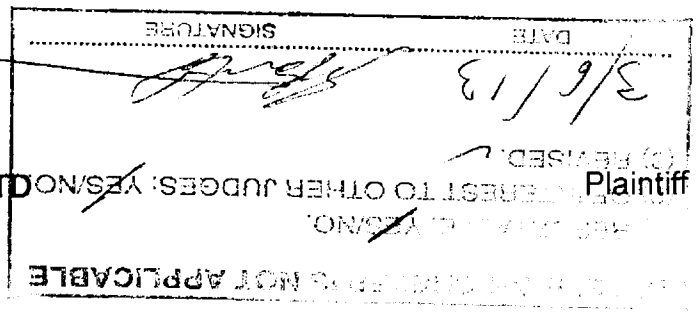
IN THE NORTH GAUTENG HIGH COURT, PRETORIA

HELD AT PRETORIA

Case No: 34312/10

In the matter between:



4/6/2013

MINERAL-LOY (PTY) LTD Plaintiff

and

EVRAZ HIGHVELD STEEL & VANADIUM CORPORATION LTD (formerly known as HIGHVELD STEEL AND VANADIUM LIMITED) 1st Defendant

TRANSALLOYS (PTY) LTD 2nd Defendant

JUDGMENT

The parties

1. The plaintiff is **MINERAL-LOY (PTY) LTD,** a company with limited liability duly registered and incorporated in terms of the company laws of the Republic of South Africa, with principal place of business at Iron Gate, 16 Stirrup Lane, Woodmead Park, Sandton.

2. The first defendant is **EVRAZ HIGHVELD STEEL AND VANADIUM LTD, (formerly known as HIGHVELD STEEL AND VANADIUM LIMITED)**, a public company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with registered address at Portion 83, Farm Schoongezicht, No 308JS, district Emalahleni, 1039.
3. The second defendant is **TRANSALLOYS (PTY) LTD**, a company with limited liability duly incorporated and registered in accordance with the South African company laws with principal place of business at Clewer Road, Emalahleni, Mpumalanga. The second defendant was previously known as Island House Trading 86 (Pty) Ltd.

The cause of action

4. The plaintiff relies for the relief it seeks, whether against the first or second defendant, in the first instance upon an agreement, said to be partially written, alternatively oral, entered into with the first defendant in October 1985. This agreement is described as a distribution agreement which was entered into while the plaintiff as represented by C Stofberg. The agreement was entered into with the first defendant's Transalloys Division, represented at the time by A L Melvill.
5. The written portion is alleged to be a letter signed by A L Melvill, who described himself as the General Manager, Ferro-Alloy Operations, dated the 11th October 1985. It is addressed to Mr C Stofberg at the plaintiff's postal address. The body of the letter reads as follows:

'Dear Chris,

This serves to confirm our recent telephonic discussion in which it was agreed that Transalloys would appoint Mineral-Loy as its sole distributor of medium carbon ferromanganese in South Africa, subject to Tranalloys having the right to exclude certain customers. Attached is a schedule of these exclusions.

It was further agreed that this arrangement would be based upon "Good Faith" and that there would be no formal agreement.

We are confident that this arrangement will work to the benefit of both parties and look forward to receiving your market reports in due course.'

6. Annexed to this letter was a list of consumers of medium carbon ferromanganese, consisting mainly of major participants in the steel manufacturing and steel industry, such as ISCOR (now known as Arcelor-Mittal).
7. Plaintiff further alleges that the 1985 agreement entitled it to exclusively promote the sale of medium carbon ferromanganese produced by the first defendant. As counter performance it would provide technical assistance to purchasers of these goods, irrespective of whether the ferromanganese had been purchased directly from the first defendant or from the plaintiff.
8. The technical assistance provided by the plaintiff did include, as part of plaintiff's express, alternatively implied, alternatively tacit obligations in terms of the parties' agreement, the provision of expert metallurgists who would assist the purchasers of first defendant's products to optimally use the material in the creation of manganese steel alloys. This assistance did extend to advice relating to the most economical method to use the product to maximum effect and financial benefit.

9. In addition, plaintiff promoted the use of the first defendant's pure ferromanganese as against ferromanganese extracted from recycled or 'scrap' materials that might have become contaminated by trace-elements that would negatively influence its quality, or might exhibit varying levels of ferromanganese concentration.

10. Plaintiff had to liaise with all customers concerning their product and technical needs to establish market trends, and report to first defendant theranent. At first defendant's request, specific market trends would be investigated. Plaintiff would further supply bi-annual market reports containing sales, production and marketing information of both ferromanganese and silico-manganese market conditions.

11. In return plaintiff would be entitled to a 2% commission on the invoice price on all sales effected by first defendant directly to its excluded customers. In order to calculate the 2% commission, first defendant would inform plaintiff telephonically at the end of each calendar month of the value of sales of ferromanganese effected by first defendant during the course of that month to its excluded customers, and of the commission payable to the plaintiff.

12. Reasonable notice would be given of any intention to cancel the agreement by either party.

13. Plaintiff further alleges that the agreement was orally amended to extend the services rendered by plaintiff in respect of ferromanganese to silico-manganese produced by the first defendant. Such amendment was effected orally while plaintiff was represented by Mr Stofberg and first defendant by Mr Winstanley. In return for these additional services first defendant would pay commission at 2% of the invoice price of sales by first defendant to Ozz

Industries, and 3% of the invoice price to all other customers, excluding sales by first defendant to ISCOR as ArcelorMittal was then known; and all sales to the Scaw Metal Group. Plaintiff was informed of all relevant sales of silico-manganese in the same fashion as in respect of commission-earning sales of ferromanganese.

14. Plaintiff would raise tax invoices in respect of the commissions as advised by the first defendant monthly in arrears and payment would be effected within 30 days from date of invoice.

15. In July 2007, the first defendant concluded a written purchase and sale agreement with the second defendant in terms of which first defendant's Transalloys division was sold to the second defendant with effect from the 1st July 2007. This agreement is common cause between the parties.

16. The plaintiff's case is further that it continued to render services in connection with its agreement with the first defendant to the latter, notwithstanding the sale of the said division, and that first defendant continued to effect payment to it from July 2007 to March 2008. In April 2008 the plaintiff still invoiced the first defendant after having been informed of the commission due to it in terms of the existing practice. During May 2008, however, the plaintiff was notified by one Claudine Wait on behalf of the first, alternatively the second, further alternatively on behalf of both defendants, while plaintiff was represented by Ms P Wright, duly authorised to do so, that plaintiff should re-issue its April 2008 invoice to the second defendant and should issue all future invoices to the second defendant.

17. During May to September 2008 the plaintiff fulfilled its contractual obligations as usual. One W Nkosi would inform it at the end of each month of the value

of sale effected by second defendant in respect of ferromanganese and silico-manganese and of the commission due to the plaintiff. Plaintiff was paid in respect of commission due to it for the period April 2008 to July 2008 inclusive.

18. The second defendant did, however, fail to pay the commissions due for the months of August and September 2008, which amounts remain unpaid.

19. Plaintiff further asserts that the second defendant assumed the first defendant's rights and duties of the agreement with the plaintiff, either in July 2007 or with effect from 1st April 2008 and therefore became obliged to notify the plaintiff monthly of the value of the sales of ferromanganese and silico-manganese and to pay the properly calculated commission in respect thereof to the plaintiff.

20. The assumption of the first defendant's rights and obligations under the contract also placed the duty upon the second defendant to give reasonable notice in the event of the second defendant being desirous to terminate the contract.

21. In its claim against the second defendant the plaintiff asserts that the former refused as from October 2008 to disclose the value of the direct silico-manganese sales effected by the second defendant or the commission due to the plaintiff. This conduct signified that second defendant did not intend to hold itself bound to the contract and therefore constituted a repudiation which plaintiff accepted and thereby terminated the agreement.

22. Plaintiff alleges that a reasonable notice period to terminate the contract would have been a period of twelve months and therefore claims the average monthly commission earnings for a year as damages.

23. In the alternative plaintiff alleges that second defendant interceded on behalf of the first defendant and agreed to be liable to plaintiff under the agreement jointly and severally with the first defendant, with the result that first and second defendants are jointly and severally, the one to pay, the other to be absolved, for the damages the plaintiff has suffered.
24. In an alternative claim against the first defendant the plaintiff alleges that, should the court find that the first defendant did not assign its rights and obligations in terms of the agreement with the plaintiff, the first defendant remained bound to inform the plaintiff of all relevant sales and remained obliged to pay plaintiff the agreed commission.
25. First defendant is then alleged to have failed to inform plaintiff of all relevant sales and of having failed to pay the agreed commission and since May 2008 to have failed to comply with its obligations, which conduct constituted a repudiation which plaintiff has accepted.
26. First defendant is in that event liable for plaintiff's damages, the plaintiff asserts.
27. Both defendants entered the lists in defending the action against them.
28. In its plea, the first defendant admitted that an oral agreement had been entered into between it and the plaintiff in 1985 appointing the plaintiff as sole distributor of medium carbon ferromanganese in South Africa, with the exclusion of certain customers. It admitted that the appointment would be based upon 'good faith' and admitted the letter written by its senior employee annexed to the particulars of claim, but denied the existence of a formal agreement. It also denied all the terms alleged by the plaintiff .as well as the alleged amendment of the contract the plaintiff relied on.

29. First defendant pleaded further that the sale agreement of the Transalloys division had transferred all its rights and obligations to the second defendant. Consequently, so it said, any services rendered by the plaintiff after the first of July 2007 until April 2008, were rendered to the second defendant, and any payments made by first defendant to the plaintiff in this period were made on the second defendant's behalf.

30. The arrangements made in April 2008, leading to the second defendant being invoiced by the plaintiff, were made at second defendant's request and all further transactions were concluded between the plaintiff and second defendant.

31. First defendant denied any further involvement with the plaintiff or the execution of the distribution agreement and disputed any liability toward the plaintiff, demanding the dismissal of all claims against it.

32. Second defendant, in turn, denied the existence of any agreement between the plaintiff and first defendant as well as any amendment thereof. It admitted the sale agreement between and the purchase of the Transalloys division from first defendant. The second defendant's plea adds that in terms of the said agreement of sale all the first defendant's existing contractual obligations were delegated to the second defendant in the manner and fashion provided for in the written sale agreement. It denied that any consent was procured from the plaintiff to the delegation of its agreement, if any, with first defendant and so disputed any liability even if an agreement did exist between plaintiff and first defendant. It denied having notified the plaintiff of the need to invoice the second defendant for any services rendered, admitted having made payments to the plaintiff after April 2008 but pleaded that this payments were

made in the *bona fide* and reasonable, but mistaken belief that these payments were due, which they were in fact not.

33. Second defendant therefore denied any liability toward plaintiff.

34. It added that it had concluded a tolling agreement with a third party in September 2008, effective 1st July 2008, in terms of which second defendant would process ore exclusively for the third party. It therefore ceased any sales to any customers falling within the terms of plaintiff's alleged agreement with the first defendant and consequently the plaintiff would in any event not have earned any commission after the first day of July 2008.

35. Second defendant therefore demanded the dismissal of plaintiff's claim and instituted a counterclaim for the repayment of all payments made to plaintiff after the first day of May 2008. Plaintiff reiterated its averments in its plea to the counterclaim. It further pleaded that the second defendant had received the benefit of its services and was not entitled to repayment of any sum paid to plaintiff. It prayed that the counterclaim be dismissed.

36. Prior to the commencement of the hearing the parties argued a proposed limitation of the issues for decision by this court. Fabricius J issued an order limiting the present disputes for decision to all those relating to the merits of the disputes as set out above, but excluding any consideration of what would constitute a reasonable notice period for the termination of plaintiff's agreement with the first defendant, (if any), and any potential damages suffered by plaintiff if its factual averments were to be accepted. Any reference to the tolling agreement was also excluded.

The evidence

37. The plaintiff's first witness was a former general manager of the first defendant's Transalloys division, Mr Simon Hendrik van Niekerk, who had already retired from this position, He confirmed that Mr Winstanley had been his predecessor. He had in turn been preceded by Mr Melvill.
38. Mr Van Niekerk found an existing agreement with the plaintiff when he became general manager of the Transalloys division. Monthly reports of sales would be prepared by the Highveld Finance division of the first defendant, which plaintiff received and used to prepare invoices. These were in turn sent to the finance division, where payment was effected.
39. He confirmed that plaintiff did market research and advised the first defendant in respect of price structures, possible adjustments thereof, purchases by various clients and analyses of potential future developments. When the internal shareholding of the plaintiff company changed, first defendant was advised thereof during 2006 and he arranged a meeting with the members of the plaintiff. Chris Stofberg had been an expert on the foundries using first defendant products, and the new chief executive officer and managing director, Mr Duff, needed to be introduced to cement the future relationship.
40. On the 21st December 2006, the first defendant's Transalloys division's sales department addressed a memorandum to the witness detailing the clients in respect of whom the plaintiff was entitled to a 2% commission and laying down the procedure to be followed in preparing invoices together with monthly visitation reports to the first defendant's clients.

41. The witness did not know whether the memorandum had been presented to the plaintiff, but underlined that he had never had any problems with the services the plaintiff provided.

42. He confirmed that the Transalloys division was sold to an overseas company on 2007. Some of its employees moved with the division to become employees of the new owner, others like himself did not. He moved back to the mother company. Up to that stage he was satisfied with the service he received from the plaintiff.

43. The first defendant declined the opportunity to cross-examine the witness, but second defendant did so.

44. In cross-examination Mr Van Niekerk was unable to state whether the first defendant regarded the agreement of 1985 as legally binding but continued to do business with plaintiff while he was in control of the Transalloys division. He was unaware of the fact that plaintiff claimed commission for sales to the excluded clients, but was of the view that they were entitled to commission on sales to their own clients while rendering the services that he had detailed in his evidence in chief. He agreed that if no services were rendered, no commission was payable. He also agreed that plaintiff was not involved in export sales, but only in supply to local clients, and was therefore not entitled to commission on exports.

45. He was not involved in the negotiations preceding the sale agreement of the Transalloys division, but was involved in the due diligence investigation preceding the actual transfer of the business to the purchaser.

46. His attention was drawn to the terms of the latter agreement, and the list of principal contracts the division was bound to honour. The plaintiff's contract

was not included in this list and it was suggested to the witness that the first defendant did not regard the agreement alleged by plaintiff as such. The witness could – obviously – not comment on this suggestion, nor would his evidence have been admissible had he ventured an opinion.

47. Plaintiff's next witness was Ms Patricia Margaret Wright, long standing secretary and sales consultant in plaintiff's service. She was responsible for obtaining the sales result figures at the end of each month from the first defendant, normally from Mr Nkosi. She would work out the 2% commission, prepare an invoice that would be signed off by Boet de Beer and would submit the same to Nkosi for payment.

48. On the 7th May 2008 she was informed by one Sandra McKenzie of the first defendant that invoices had to be submitted from April 2008 to second defendant. She was requested to issue a credit note to first defendant for the last month, April 2008 and to issue an invoice to second defendant. She complied with this request and faxed an invoice to Claudine Wait for payment. The following invoices were also submitted to Mr Nkosi, now acting for the second defendant. This procedure was followed until October 2008, when no more sales figures or payments were forthcoming.

49. She was referred to a senior gentleman in second defendant's service, who informed her that the plaintiff had no contract with the second defendant and that no business would be done with the plaintiff. She referred the matter to Mr De Beer.

50. Again, first defendant did not cross-examine, Second defendant put it to her that the defendants had agreed that first defendant would manage the business of Transalloys for a year after the purchase and sale thereof on

behalf of the second defendant. The witness bore no knowledge of this averment.

51. Lastly plaintiff called Mr Robert Charles Duff, plaintiff's executive director. He had acquired shares in plaintiff through his family trust and had become involved in plaintiff in 2006. A due diligence was performed when he acquired the shares from Mr Stofberg, who unfortunately passed away shortly before the trial, and Stofberg's co-director. During this process he was informed of the existing agreement with the first defendant and sought a meeting with first defendant's Mr Van Niekerk and Mr Pienaar, who was the first defendant's executive director at the time. He was assisted by Mr Boet de Beer, who possessed the institutional knowledge of plaintiff's affairs and its relationship with the first defendant. Mr Boet de Beer was aready seventy years old at the time of the trial and was not well enough to attend or to testify.

52. The relationship between the two parties was confirmed during the due diligence process. Plaintiff would be the first defendant's eyes and ears in the market, would service clients, study market trends and report to first defendant on all matters germane to the manganese ore trade, including the activities of competitors.

53. Plaintiff duly performed its functions and earned its 2% commission as the past practice had been, which he had established during the due diligence process. This business relationship continued through 2007.

54. During this year he was informed that an unbundling had taken place at first defendant and that the Transalloys division had been sold to a new owner. He was never informed by either the first defendant or the new owner of any material change that had taken place and business continued as usual. He

never saw the agreement in terms of which Transalloys changed hands until it was discovered during the litigation process.

55. In July 2008 the payments for plaintiff's services stopped without any prior notification and for no apparent reason. He sought a meeting with second defendant's senior official, Mr Kriek, who agreed to a meeting at which he denied any knowledge of any agreement with plaintiff. He told Duff that he had never seen any market report, denied any business relationship and practically showed Mr Duff the door. He sent copies of past market reports to Kriek to no avail.

56. The agreement was therefore at an end. Plaintiff accepted that the situation could not be improved and litigation ensued.

57. In cross-examination he was first confronted by second defendant's counsel – first defendant again having failed to put any questions to the witness – with the fact that the plaintiff had been a close corporation until 2007 when it was transformed into a company and that plaintiff could therefore not have entered into an agreement with first defendant in 1985. Nothing much was made of this point, though, and rightly so.

58. The witness confirmed that plaintiff was entitled to commission as set out before for the services it rendered to the first defendant and thereafter to the second defendant. He denied that commission was only payable of actual advice and assistance had been given to specific clients, as suggested by second defendant's counsel. Part of plaintiff's service was its constant availability to clients by expert metallurgists who could be consulted at any time.

59. The clients on the so-called exclusion list who received their purchases of ferromanganese directly from the first or second defendant did not always remain the same as the list was adapted from time to time. It was put to the witness that plaintiff was not the sole distributor appointed by the first defendant, which he denied.

60. It was common cause that the Transalloys business was bought from first defendant by the second defendant. The witness obviously had no personal knowledge of this contract, the terms of which will be discussed in more detail below. The witness could not confirm or deny that the agreement between the defendants was in terms thereof effective from 1st July 2007.

61. He also had no knowledge of a tolling agreement allegedly entered by second defendant with another company, Afro Minerals Trading AG (ATM), which was said to provide that second defendant would sell its entire ore production to this company. This agreement, it was put to Mr Duff, was effective as from the 1st July 2008. Although the witness had no knowledge of this agreement, he had no doubt about the fact that plaintiff's rights would be infringed if second defendant bound itself in this fashion and ceased to supply the plaintiff without proper notice of termination of the existing agreement. As the ATM agreement falls outside the issues the court has been requested to determine, no further reference is necessary to its terms and its potential effect upon the relationship between the plaintiff and the defendant.

62. In re-examination Mr Duff explained why he regarded the notice period of twelve months, alleged to be reasonable in the pleadings, as the appropriate notice period. This was mainly because of the fact that the South African

manganese market is very small with only a few producers and a limited number of foundries.

63. It emerged in further cross-examination that plaintiff had purchased minerals from AMT.

64. Mr Duff concluded his evidence with an affirmation that there existed a contractual relationship between plaintiff and first defendant since 1985, and after April 2008 with the second defendant.

65. This evidence concluded plaintiff's case.

66. Second defendant applied for absolution from the instance, which application was refused.

67. First defendant thereafter closed its case without leading evidence.

68. Second defendant called its administrative manager, Mr Steyn, as its witness. He had held his appointment since the beginning of November 2007. His responsibilities included finance, costing, IT, procurement and stores. He testified that the business of the first defendant's Transalloys division was transferred to the second defendant as from August 2007.

69. When he arrived at the second defendant's offices he conducted a feasibility study of all services agreement, although the first defendant was still contractually obliged to continue providing management support to second defendant. At that stage the general manager, Mr Van Niekerk, left the second defendant to be replaced by Mr Rademeyer. Although management was still in the hands of the first defendant, Steyn was tasked with investigating the state of the business and to make recommendation regarding its conduct to the new owners.

70. Stores personnel and other employees such as Mr Nkosi and Sandra McKenzie transferred to the new employer when the purchase agreement became effective. The purchase and sale agreement provided for the transfer of existing contracts of which a large number had been listed as an annexure to the contract document. Steyn, the general manager and the legal advisor had to approach the third parties who had contracted with the first defendant and had to obtain their consent to the assignment of the rights and obligations arising from these contracts from first defendant to second defendant. This was a lengthy process.

71. The agreement allegedly concluded between plaintiff and first defendant was not listed in the annexure to the purchase agreement and as far as Steyn was concerned, was never disclosed. He was further of the opinion that the plaintiff never consented to the transfer or assignment of its agreement – if it did exist – and therefore it never became the second defendant's obligation in any event.

72. In his view the first defendant's sales office erroneously gave information regarding plaintiff's contract to Ms Wright, which resulted in monthly calls being made to Mr Nkosi. As far as Steyn was concerned, no invoices were received from plaintiff and no market reports were made to second defendant. Mr Kriek discovered the commission payments that had been made and was given a report by Nkosi and Wright, but nobody had any further information, which resulted in an instruction that no further contact was to be had with plaintiff and that no further payments were to be made to it.

73. In cross-examination Steyn confirmed that he came to the second defendant as a complete outsider with no knowledge of any of its business. Only after

the second defendant took over the running of its business from the seller at the beginning of April 2008 did he commence with a creditors' check and saw to it that creditors were advised that they should invoice the second defendant as from that date, while the first defendant had to account to second defendant for its administration of the business until that date.

74. After the agreement with AMT was drawn up the entire production was sold to this company. He spoke only to clients who called to discuss the situation.

75. Ms Claudine Wait was the second defendant's debtors' clerk. She was unaware of the contractual relationships between the parties to the sale of the division and the sale of its products, as far as Steyn knew.

76. When the second defendant stepped into the shoes of the first defendant he had to acquaint himself with all existing commercial relationships and had to analyse what support services the second defendant might require. He had to make recommendations, originally to Mr Basson of the first defendant's executive committee. Whereas Mr van Niekerk had been responsible for first defendant's marketing Mr Kriek was made responsible for the second defendant's activities in this sphere from July or August 2008.He would fly in once a month from the Golf Estate upon which he resided and would consult Van Niekerk.

77. Steyn was of the view that there was no agreement in existence between the plaintiff and the first defendant. This view he appeared to hold because of the fact that he never saw a written agreement and did not come across one in the first defendant's data room when the due diligence inspection was performed. He conceded that oral agreements were as binding as those reduced to writing, and he also had to admit that the list of agreements

annexed to the sale contract was not an exclusive record of all contracts first defendant had entered into. Steyn remained unwilling, however, to accept that there was any contractual arrangement between the first defendant and the plaintiff because he never saw any documentation that might have had a bearing on such an oral contract. In terms of the sales agreement all relevant documentation should have been made available to the purchaser.

78. The first time he became aware of any payments to the plaintiff was in July 2008, He was had no knowledge of any list of non-material contracts the first defendant might have entered into and which were not listed in the contract document's annexure. When it was pointed out to him that the first defendant was in possession of numerous invoices it had received from plaintiff over the years at the time the due diligence was performed, Steyn answered that he had not seen any of these and couldn't comment on documents that might have been available. He himself had not been involved with the persons who carried out the due diligence investigation While he could not deny that staff members and clerks were aware of the payments being made to plaintiff, he saw no reason to make any payments to the latter as nobody had informed him that a valid agreement did exist. He denied that second defendant had taken over or had the plaintiff's contract assigned to it. There was a written record of all assignments, which did not include the plaintiff's contract. As plaintiff's contract was not on that list, it either did not exist or had not become the second defendant's obligation. He discussed the matter with Kriek who told him to investigate further. He spoke to persons at the first defendant and to Mss Wait and McKenzie, who could not provide him with a valid reason to make any payments to the plaintiff.

79. When he was questioned on his failure to contact the plaintiff directly to discuss the reasons for the invoices that had been issued, he replied that it was not his duty to chase up creditors. If he instructed the staff to stop paying creditors whose claims he doubted, and told them to stop supplying their goods or services, '*...the cockroaches would come out of the woodwork.*' When the court put it to him that he might be infringing the creditors' rights by treating them like cockroaches he answered that stopping payment was the best way to get a reaction from them.

80. Pressed further on the fact that there was documentary proof of at least five clients having been serviced by the plaintiff, he adopted the attitude that these might have been historical clients of the first defendant who did not concern the second defendant. Earlier payments effected by the first defendant to the plaintiff appeared to him to have been a '*cosy arrangement*' through which plaintiff obtained money from the first defendant without any counter performance. He also felt in no way obliged to debate the matter with the plaintiff's directors as the second defendant had no need of their services. He also did not see any need to establish what these services were.

81. On the morning of the 20th March 2013, while still under cross-examination, he belatedly expressed regret at having referred to the plaintiff as cockroaches, adding that the term had been used figuratively.

82. In re-examination he insisted that second defendant had not infringed any of the plaintiff's rights as these were never transferred to the second defendant. His evidence concluded the case for the second defendant.

The purchase and sale agreement

83. Before analysing the evidence attention must be paid to the agreement entered into between the first and second defendants in terms of which the Transalloys division was sold. It was common cause between the parties. The following clauses are of importance for purposes of the present dispute:

a) "Contracts" is defined as

all written contracts with customers and suppliers of the Business, all orders placed in connection with the Business with suppliers and all other contracts entered into in connection with the Business as at the Effective Date, including, but not limited to, the Material Contracts....

b) The effective date is the 1st July 2007;

c) 'Material Contracts' are those listed in the Schedule to the agreement;

d) 'Sale Assets' include the contracts as defined;

e) The agreement provides in clause 13.1 and 13.2 thereof that

13.1 The Agreement constitutes the necessary cession and delegation of the Contracts as at the Effective Date to the Purchaser. On or as soon as possible after the Closing Date, the Seller shall deliver to the Purchaser such documents, duly prepared and completed by the relevant third parties at the Purchaser's own cost as may be necessary and/or required to cede and delegate to the Purchaser all the Seller's rights and obligations respectively under such Contracts and to vest ownership in and to such Contracts in the Purchaser with effect from the Effective Date

13.2 Both the Seller and the Purchaser undertake together to approach the other party or parties to any of the Contracts as at the Effective Date to which the Seller is a party with a view to procuring the consent of such other party or parties....

84. There can be little doubt that, if it were to be held that a contract did in fact exist between the plaintiff and the first defendant as at the Effective Date of the purchase and sale agreement, such contract would be included in clause 13 thereof.

Assessment of the evidence

84. Mr Van Niekerk and Mr Duff were patently honest witnesses who conveyed their observations, convictions and opinions and the facts as they were known to them in a simple and unadulterated fashion. From their account there can be no doubt whatever that the plaintiff and the first defendant did business with one another from about 1985 continuously until the sale of the business of Transalloys to the second defendant. For months after the effective date of that sale the same persons who had dealt with one another in the pursuit of the mutual relationship continued to do business in the same fashion as they had done for more than two decades until April 2008.The same persons who had represented first defendant in the regular transactions with the plaintiff then informed the latter that the second defendant should be invoiced for the

work done to date for the first defendant against the background of the transfer of the business to second defendant.

85. Mrs Wright's evidence in this regard was not challenged in any meaningful fashion.

86. The second defendant's Mr Steyn did not make a positive impression upon the court. On the contrary, he came across as arrogant, self-satisfied, rude and opinionated, a bully totally dismissive of the rights of others who was willing to run the risk of breaching existing agreements to see whether the '*cockroaches*' would come out of the woodwork to protect their interests. He was unwilling to take the elementary trouble of establishing the nature of the first defendant's relationship with the plaintiff from those who had been involved in the transactions and arrogated the power to himself to do away with existing services without a second thought – as long as these services were supplied by entities who were small in comparison to the second defendant. Gentlemen's agreements entered into with a handshake and in good faith are concepts that are clearly alien to him. Although he attempted to erase the excruciatingly poor impression created by his use of the term '*cockroaches*' to describe the plaintiff, it exhibited complete disdain for the interests and rights of businesses that had been associated with first defendant for decades.

87. Unless his evidence is supported by objective fact it has to be dismissed wherever it conflicts with that given on behalf of the plaintiff.

The resolution of the issues

88. From the evidence set out above the following conclusions emerge and are accepted as established on a balance of probabilities:

1. The plaintiff and the first defendant did conclude an agreement during about 1985 on the terms and conditions alleged by the plaintiff. Plaintiff was appointed as sole distributor for first defendant' ferromanganese products, with the exception of some excluded clients to whom first defendant would deliver directly. Plaintiff would render support and expert metallurgical services to all the first defendant's clients and would report regularly to the first defendant on market conditions in South Africa and would advise and make suggestions regarding the ferromanganese trade to first defendant. In return, commission calculated at 2% of all sales to the excluded clients by first defendant would be paid to the plaintiff on a monthly basis.
2. The agreement was amended to include silico-manganese as well for which commission would be calculated at 2% for sales to Ozz Industries and 3% to all other customers, excluding ArcelorMittal and Scaw Metals.
3. Plaintiff continued delivering its services to the first defendant from July 2007 to March 2008; invoiced the first defendant and was paid by the latter – although the latter was then acting as manager of the business that belonged to the second defendant;
4. Plaintiff similarly rendered services in April 2008 to first defendant and invoiced first defendant as usual after having been advised of the sales figures as usual;

5. Plaintiff invoiced first defendant in respect of commission as usual;
6. Plaintiff was notified in May 2008, not by Claudine Wait as alleged, but by Ms McKenzie on behalf of first and second defendants that plaintiff was required to te-issue the invoice for April 2008 directed to first defendant to second defendant;
7. All further invoices were to be issued to second defendant represented by Claudine Wait;
8. The instruction to plaintiff to direct future invoices to the second defendant was the final step that had to be performed by first and second defendants to cede and assign the plaintiff's contract to second defendant. In terms of clause 13 of the sale and purchase agreement as quoted above, the second defendant was obliged to accept the assignment of plaintiff's contract. The individuals who informed the plaintiff to redirect invoices to second defendant and to continue to deliver services to the second defendant were authorised to act on behalf of the second defendant – whatever Mr Steyn may have said about a contract he knew nothing about and did not take the trouble to inform himself of. The plaintiff's contract was therefore duly assigned to the second defendant, the plaintiff having agreed to render future services to the latter. The second defendant was at all times thereafter obliged to comply with the terms of this agreement;
9. Plaintiff rendered services to second defendant from May to September 2008;
10. Plaintiff was informed as usual by Mr Nkosi, now acting for the second defendant, during this period at the end of each month of the value of

sales by second defendant of silico-manganese and ferromanganese and the amount of commission payable to the plaintiff;

11. It is common cause that the second defendant failed to pay any commission for August and September 2008 and thereafter;

12. It is also common cause that the second defendant refused from October 2008 and thereafter to disclose the volume of sales of silico-manganese and the commission due to the plaintiff, and refused to effect any further payments to the plaintiff.

13. The second defendant submitted in argument that its actions did not amount to a repudiation of the contract and that the plaintiff was therefore not entitled to accept such repudiation and terminate the contract. Given the factual background of the parties' relationship the refusal to comply with the second defendant's obligations was compatible with one intention only – to terminate the relationship between the parties. As Nienaber J said in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at:

> *[16] "Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated ..." (per Corbett JA in Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A) at 22D-F). This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission with its emphasis on the guilty party's intention and the innocent party's acceptance. At the same time this court has repeatedly stated that the test for repudiation is not subjective but objective (Ponisammy and Another v Versailles Estates (Pty) Ltd 1973 (1) SA 372 (A) at 387A-C; Stewart Wrightson (Pty) Ltd v Thorpe, supra, at 953E-H; Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou, supra, at 845A-846G; Tuckers Land and Development Corporation (Pty) Ltd v Hovis, supra, at 653B-G; OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and*

Another 1993 (3) SA 471 (A) at 480I-481H; Highveld 7 Properties (Pty) Ltd and Others v Bailes 1999 (4) SA 1307 (SCA) at 1315F-G; 1318A-E; 1318H-J). Thus it has recently been said in Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A) at 684I-685B:

"It is probably correct to say that respondent was bona fide in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however bona fide it might have been in its belief that it was not."

Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.

[17] As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.

[18] The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, i e not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is "a serious matter" (cf Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60 (HL) at 72B; Metalmill (Pty) Ltd v AECI Explosives and Chemicals Ltd, supra, at 685B-C), requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.

[19] Since the test is objective and the matter is to be approached from the vantage point of the innocent party (in this case the defendant) it follows that evidence of Hill, the author of the letters RW8 and RW9, as to what the plaintiff had in mind when he drafted them, would have been irrelevant. By the same token the evidence of the defendant's witnesses, Wachsberger and

Mayer, as to what they understood by, and how they reacted to, the letters was not irrelevant. But such evidence, although relevant, would not be conclusive since the approach is that a court, faced with the enquiry of whether a party's conduct amounted to a repudiation, must superimpose its own assessment of what the innocent party's reaction to the guilty party's action should reasonably have been.

[20] Consistent with that approach it further follows that a court in making its assessment must take into account all the background material and circumstances that should have weighed with the innocent party. Such circumstances would in the present case include:

> *i) the rumours that were current at the time that ICS had been taken over by the Eichoff Group; that a restructuring and rationalisation of its commercial interests in Southern Africa was imminent; and that there was a realistic possibility that the defendant's distributorship might be terminated;*
>
> *ii) the meeting which Mayer had with Cornelius in Frankfurt early in June 1991 which left Mayer with the uneasy feeling that the defendant might have missed the boat;*
>
> *iii) the telephonic conversation which Cornelius had with Mayer on 17 June 1991 when the latter was informed that the decision had been taken "to go" with Gosling's company and that the defendant would in due course be formally notified of that decision. No mention was made in the course of that conversation of a period of notice;*
>
> *iv) and finally the two crucial letters, RW8 and RW9, quoted earlier, which were telefaxed to the defendant, the one dated 24 June 1991 and the other 25 June 1991, both signed by Hill, both reaching the defendant at more or less the same time, probably on 25 June 1991, and then forwarded by the plaintiff by registered post in compliance with clause 23 of the agreement.*

[21] Much debate was devoted in both courts below and in this one as to the sense of, and the correlation between, these two letters. RW9 was "an official letter of termination". It was so described in the other letter, RW8 (addressed to "Dear Steve"). As such RW9 would have been accorded, in the eyes of a reasonable person standing in the defendant's shoes, at least some precedence, in keeping with the plaintiff's own ranking thereof. Reading it on its own both its formal tone and its contents would have conveyed the message that the agreement between the parties, far from continuing into the future for at least another twelve months, has been brought to an abrupt end. But of course the reasonable reader would not have read the letter in isolation. He would have taken account of RW8 as well. RW8 is written in an entirely different style and tone. While I agree that the two letters must be read together, each conveying its own separate impression, I do not agree with the submissions of plaintiff's counsel that they must be conflated into a single letter with a reconstructed sequence of sentences. Ultimately it remains a question of what the reasonable reader in the defendant's position would have made of it; of the collective and cumulative impression created when the two letters are read in tandem.

[22] Various constructions have been placed on the two letters when read in

conjunction with one another. These may be grouped together as follows:

i) In terms of the letters "the plaintiff gave notice to the defendant terminating the agreement with immediate effect". That was the construction placed on them by the defendant in its counterclaim which was initially admitted by the plaintiff in its plea thereto. During the cross-examination of the defendant's witnesses the plaintiff, however, sought an amendment which despite opposition was eventually granted. It is quoted in the next sub-section.

ii) "The plaintiff avers that the letters 'RW8' and 'RW9' were intended to terminate the agreement as provided for in clause 16(a) with the requisite twelve months notice". This amendment was in line with the construction earlier placed on RW8 and RW9 by the plaintiff in its letter of cancellation of 19 July 1991, quoted in para 10 above.

iii) The letters served as due notice of twelve months but with an open invitation to the defendant to negotiate a reduced period if that would suit its convenience. That would seem to have been the interpretation favoured by Heher J.

iv) The letters "confirmed" the plaintiff's decision not to continue with the defendant as its chosen distributor; otherwise they represented nothing more than an invitation to the defendant to negotiate a premature termination of the agreement. As such the plaintiff did not repudiate the agreement. That was the interpretation advanced on behalf of the plaintiff in argument before this court.

v) The letters purported to terminate the agreement forthwith, with the consequence that no further orders would be executed by the plaintiff; the plaintiff was nevertheless prepared to allow the defendant time to close down their common business and to tie up loose ends such as the return of stock and the demonstration model still in the defendant's possession. That was essentially the effect of the evidence of Mayer and was the interpretation advanced on behalf of the defendant in argument.

[23] Counsel for the plaintiff advisedly did not seek to support the assertion in the plaintiff's own amended pleadings that the letters constituted due notice in terms of clause 16(a). In none of the prior conversations between Cornelius and Mayer, nor in the letters themselves, was there any mention of the clause. The clause, moreover, did not provide for a notice period of twelve months but for a notice period of not less than twelve months. RW8 and RW9 are entirely silent as to what the notice period was supposed to be and when it was supposed to expire. The view advanced in the plaintiff's own pleadings and correspondence that due notice was given can accordingly be dismissed as fanciful. ....

[25] In my opinion the two letters, read together against the background of the prior exchanges between the parties, would convey to the reasonable person looking at the matter from the perspective of the defendant that the termination of distributorship was a fait accompli and that no notice in terms of clause 16(a) would be forthcoming, regardless of how the defendant responded to the invitation contained in RW8. The clear impression is that the plaintiff was indifferent to, and did not propose to comply with, clause 16(a).

The dominant message which the two letters conveyed was that the defendant would not enjoy at least a further twelve months before the agency agreement with the plaintiff was brought to a conclusion. In my view that was tantamount to an unequivocal intimation on the part of the plaintiff that it did not propose to perform its part of the agreement for the remainder of the stipulated notice period. As such it was a wrongful repudiation of sufficient seriousness as to justify cancellation of the agreement by the defendant.'

14. The failure to provide the sales figures, coupled with the failure to effect payment of services rendered, and the intimation to plaintiff's Ms Wright that there would be no further contact between the parties clearly conveyed the second defendant's true intention not to be bound by any existing agreement. This was a clear-cut repudiation.
15. The plaintiff, after seeking an interview with Mr Kriek, in which Mr Duff was treated in the spirit displayed by Mr Steyn and was rudely shown the door, was entitled to and did in fact accept the repudiation set out above. This terminated the agreement and may, depending on further evidence, entitle plaintiff to damages.
16. It is clear that the second defendant's counterclaim must be dismissed.
17. It is also clear that there is no case against the first defendant.

89. The following orders are made:

1. Plaintiff succeeds against the second defendant in respect of each and every issue identified in the Order of this Court on the 14th March 2013 in paragraphs 1.1 to and including 1.19 with costs, such costs to include the costs of the earlier postponement;

2. The issues identified in paragraphs 1.23 to and including 1.27 are decided against the second defendant in favour of the plaintiff; with costs, including the costs of the earlier postponement;
3. The issues recorded in par 1.20 fall away;
4. The issues identified in par 1.21 .1 to 1.21.4 are decided in favour of the first defendant with costs, such costs to include the costs of the earlier postponement.

Signed at Pretoria on this 3rd day of June 2013.

E BERTELSMANN

Judge of the High Court.