



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

2024-02-08

DATE

SIGNATURE

Case Numbers: 54095/2013 and 90165/2015

In the matter between:

ANGLO OPERATIONS (PTY) LTD

Plaintiff

and

CATHOROS COMMODITIES (PTY) LTD

Defendant

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 8 February 2024.

JUDGMENT

POTTERILL J

Introduction

[1] The plaintiff, Anglo Operations (Pty) Ltd [Anglo] and the defendant, Cathoros Commodities (Pty) Ltd [Cathoros] concluded a written agreement respectively represented by Mr Zaheer Docrat and Mr Emmanuel Nzuma on 15 January 2013.

[2] The material terms of the agreement were *inter alia* that Anglo would supply to Cathoros coal sourced from the Landau Colliery for the period January 2013 to June 2013. The price for the coal would be R270 per ton (excluding VAT). I find it prudent to copy clause 2 of the contract specifying the coal qualities:

"Coal Qualities

The Coal sold under this agreement shall have the typical specification listed below, determined in accordance with ISO.

Coal Specification	Range Volatiles %	Range Ash %	Range Sulphur %	Range of CV MJ/kg
Kromdraai, Contaminated ROM (air-dried)	18.1-21.2	21.8-24.9	1.0-1.5	20.0-22.5

[3] Anglo claims that it complied with all its obligations in terms of the agreement, but Cathoros has despite demand not paid invoice 95240 dated 29 May 2013 in the amount of R5 505 907.93 as well as invoice 95334 dated 11 June 2013 in the amount of R2 540 221.07.

[4] Cathoros pleaded that Anglo breached the agreement because all the coal sold to Cathoros was contaminated and mixed with an inordinate amount of large and smaller rocks. This resulted in the coal having an average ash content of more than

50% and an average calorific value [CV] of 11,2 MJ/kg breaching the specifications in clause 2 of the agreement. Furthermore, the coal did not comply with the agreement in that the coal was according to the invoice "Excelsior Raw coal" and not "Kromdraai Contaminated ROM". Even if the coal was from Kromdraai then the actual CV of 11,2MJ/kg renders the amounts on the invoices incorrect because in terms of the agreement the amount per ton would be reduced to R134.40 per ton.

[5] Anglo has a second claim. This claim is in terms of verbal agreement between Anglo represented by Mr Murray Shaw, alternatively Mr Nomfundo Mbatha and Cathoros represented by Mr Peter Stiles, alternatively Mr Emmanuel Nzuma. In terms of the agreement Anglo would sell to Cathoros "Umlazi Duff" sourced from Landau Colliery at R554 per ton at the Umlazi section. Anglo would present to Cathoros consolidated invoices and the invoices would be paid within 30 days. Cathoros paid two invoices but has despite demand failed to pay 14 invoices for the period 29 May 2013 to 31 July 2013 totalling R3 079 817.61.

[6] To this claim Cathoros pleaded a bare denial. Cathoros did however file a counterclaim. In the counterclaim it relies on a further agreement concluded by the same parties on 18 January 2013 wherein it was agreed that the coal's ash content would range between 21,8% and 24,9% and the CV would range between 20.0 and 22.5 MJ/kg. Should the CV be less than 20,5 MJ/kg then the price per ton would be adjusted according to a formula. Furthermore, both parties can weigh the coal and if one party did not weigh the coal then the party that did record weights will be accepted as correct. Anglo breached this agreement by delivering coal with an average ash content of more than 60% and a CV of 11,2 MJ/kg and unilaterally invoicing Cathoros. Due to this breach Cathoros suffered damages in the amount of R3 906 620.

[7] Anglo filed a replication and plea in reconvention. In essence denying the averments in the counterclaim and putting Cathoros to the proof thereof. It pleaded the delivery of weight slips is not a defence as Clause 5 of the agreement provides

weight slips are not required for compliance with clause 5.1.2 and that in fact 81 631.14 tons of coal was collected form Landau colliery by Cathoros.

The issues to be decided

[8] On claim one the issues to be decided are whether the coal was supplied form the correct source, was the tonnage correctly billed and did the coal comply with the quality as agreed?

As for claim 2 the issues are whether an oral agreement was indeed concluded to buy the Umlazi Duff and at what price?

The evidence

Plaintiff's evidence

[9] Anglo called Mr McGeorge as an expert witness. His qualifications and expertise was not in dispute. It is thus accepted that Mr McGeorge has 34 years' experience in mining engineering and specifically in coal underground-, open pit- and open cast mining. He has vast experience in truck shovelling, dragline operations and mine optimization. He has worked on coal projects in South Africa, other African countries, Colombia, Australia, Indonesia, Europe and the USA. He has production experience in numerous BHP Billiton colliers in South Africa and he knows the Landau Colliery well.

[10] He explained that the Landau Colliery stretched on both sides of the N4 highway and has a multitude of pits and washing plants. Landau is an old colliery with the number 1 seam mined 50 years ago. On the Northern side are the main pits of Kromdraai and Excelsior adjacent to each other. He concluded that the coal came from the Excelsior pit because it allows for trucks to obtain the coal directly from the pit. It would be dangerous for the smaller trucks to navigate the Kromdraai pit that was mined by means of a dragline with large mining equipment.

[11] The purpose of his report is to estimate the potential range of coal quality of the contaminated raw coal or Run of Mine [ROM] from the Excelsior pit, one of four pits in operation at Kromdraai colliery from where coal was supplied to Cathoros. When it was put to him that Cathoros avers that the ROM supplied had a 50% ash content and a CV of 11% he reacted visibly shocked and answered that such averment constitutes almost an impossibility.

[12] He explained that he used the geological model to establish the quality of the ROM supplied. From the geological model database administered by Anglo he found the figures relating to the Excelsior pit showing mining blocks, borehole positions and No 1 seam workings. He obtained the geological plan from Anglo setting out the actual boreholes of the mine. One can use this model with absolute certainty. The coal sample was extracted from the Excelsior pit. The process he used is also used for forecasting coal and the standards and the quality control used maintains a high precision in the forecasting of the quality of the coal. The process used is drilling holes into the overburden and the coal through to the basement. The coal that comes out is solid and the coal seams are sent to the lab and analysed for quality. It is analysed by means of surge points as to the length of the core and how thick the core is. Good coal has a high carbon value and little ash content. The lower the carbon the lower the CV and the higher the ash content. Coal is volatile due to the chemicals in it that can set carbon alight.

[13] He concluded that in the Kromdraai/Excelsior area the number 1 and 2 seams are well developed in thickness and coal quality and are separated by a moderately thin sandstone parting of 0.1-1.0m thickness. The typical number 1 seam is approximately 3.5 m thick and has a CV of 28-30Mj/kg. The number 2 seam is 5.3m thick and has a CV of 24-28Mj/Kg over the entire pit.

[14] He concluded that due to the very high coal quality and seam thickness the mining in 1950 was done by means of underground Bord and Pillar method where the coal is extracted in a sequence leaving pillars behind to support the overburden. Over

the number 1 seam 6 pillars of 6 x 6 metre square were left behind to a mining height of approximately 2.5-3.0m. He could identify the pillars on the underground plan. This means that in the Excelsior pit the coal that was not extracted in 1950 remained in the pillars and the roof seam.

[15] Excelsior is now mined as an opencast mine. This entails that there is blasting in the pillars and the coal is first extracted from seam 2, then the parting and then seam 1. The parting is made up of rock and with the washing process the rock is parted from the coal. The blast exposes the upper seam and the waste/overburden is removed by bulldozers to the adjacent strip leaving a clean surface to work from. He denied when confronted with a mandatory Code of Practice for Landau Colliery dated 1 January 2007 that in terms of that Code mining was done differently to what he had testified to.

[16] To determine the quality of the coal he used the boreholes that were used for this contract between the parties. There were 48 boreholes in 2013. According to the table the Mean [thickness] for seam 2 was 5.19 m with a range of 4.98 to 5.4 m. The Mean for seam 1 was 2.7. The parting had a Mean of 0.42 m. The CV of seam 2 had Mean of 25,56 and seam 1 Mean was 28,30.

[17] The possible contamination of the coal can come from the floor of the No 1 seam when 10 cm of the floor material is picked up. The other possible contamination is from the parting material at the top of the pillars and the No 2 seam coal. He was adamant that contamination could only be between 5 to 10 cm and that is addressed by the buckets on the site that can only allow for 10 cm waste.

[18] He did the same exercise for Kromdraai and on that site there were 80 boreholes. The main difference between Kromdraai and Excelsior was that the parting at Kromdraai was thicker. He concluded that the CV for seam 1 was 21,39 and for seam 2 18,65.

[19] When referred to the joint minute he highlighted that Cathoros' expert did not use the geological model. He testified that it was by agreement recorded that if the CV value was only 11,2Mj/Kg that Anglo would be in extreme consternation and the coal would not be processed in the navigation plant. "Hence the potential quality could not be as low as indicated." Mr Chirimumimba had no criticism of the mining model simulation of the veracity of the data source with the result of the analysis being a probable estimation of the range of coal quality mined.

[20] Mr Chirimumimba determined the coal quality estimation by examining a mass flow balance of the coal and an energy balance. Mr McGeorge testified that the principle is sound provided that the items can be measured accurately. He testified that therein lay the problem because the balance coal could not be at a Zero value, this is inaccurate and led to an inaccurate estimate of the average coal quality. "To achieve a Zero heat value implies that the material is pure rock and has no carbonaceous content included ... This is clearly not the actual description of the balance of the coal."

[21] He reiterated that it was not possible that the ROM had an ash content of 50-60%. He agreed that there was a mistake on the invoice dated 29 May 2013, it was not only 7887.94 tons delivered to Cathoros but 17887.94. He denied that he did not know where the 48 boreholes were, he can show them on the map. He denied that water could cause spontaneous combustion. He denied that any combustion that had occurred would affect the quality of the coal simply because burnt coal would not be loaded. He testified that if the CV was indeed 11 then Anglo could never make money. He agreed that the laboratory report was good. When confronted with a photo showing large rocks as the ROM that was delivered, he testified that the mining method simply does not allow for such large rocks to be the ROM.

[22] Mr Van der Steen testified that in 2012 and 2103 he was the regional manager for mining for short, medium and long term planning for Coal Anglo in South Africa and

Columbia. He is a mining engineer and has a PPD in professional engineering with ECSA. Landau Colliery, Kromdraai and Excelsior formed part of his portfolio. His duty was to assure senior management that the planning was done properly, problem solving and he gave second opinions. He had intimate knowledge of Kromdraai and Excelsior.

[23] In 2012 Kromdraai and Excelsior practised open cast mining, both using a similar process, Kromdraai was larger than Excelsior. Seam 1 was mined during 1924-1960. In early 1990 mining started on the remaining pillars on seams 1 and 2. Seam 1 was 2¹/₂-3 metres and Seam 2 was 4-6 metres thick and the parting half a metre. The previous mining was done by means of Bord and Pillar. In open cast mining one had to be aware of safety and specifically collapse and spontaneous combustion.

[24] As far as contamination was concerned he testified there was 5% clean top of coal loss and an 8% extraction loss. As for the parting the bucket operated hydraulically and had the smallest gap so that big rocks could not fall out. He often stood watching and the operator had mastered this art. The parting consists of sandstone with a white to grey colour. The Grizzly effectively retains big pieces of material and the Bradford breaker at Kromdraai ensures that only coal and scale goes through. Anglo monitored the contamination on a weekly basis through a geologist. It was done to understand the yields. Between the Grizzly and the Bradford Breaker the percentage rock that was taken out was between 5 and 6 %. He testified that after the beneficiation at the navigation plant there was a further loss of between 5-6% and thus an average of 10-11% was normal at Kromdraai and Excelsior. He denied that the ash content was 50-60%. He called it ridiculous to have such kind of discard; it was totally impossible just from a logistical perspective; a 50% discard would render mining impossible.

[25] Mr Shaw testified that for the period 2012 to 2013 he was the marketing manager for domestic coal products for Anglo. He had two marketing managers

working under him. Anglo and Cathoros had concluded a number of contracts wherein he played a part.

[26] There was a complaint from Cathoros that there was contamination of the coal. As the coal had already left the premises and Cathoros was an existing client he reduced the tonnage with a consequent price reduction of 15%. He confirmed that this arrangement was confirmed in writing as follows:

“ATTC has conceded to a reduction of tonnages from 42 000t of coal from 31 708 to 26 951t in the interest of good faith, relations and the recognition of the impact that the large rock batch supplied has caused in Cathoros Commodities business.”

He said that Cathoros proceeded to continue with the contract and placed further orders and made partial payment.

[27] While he was on vacation Cathoros by email in April 2013 urgently sought to provide Highveld Steel with Umlazi Duff. His managers do not have the authority to negotiate a price, only he could. Thus without a price being fixed, or a written agreement, Cathoros was supplied with the Umlazi Duff within three days after their request. He agreed that for Anglo not to have a written contract was exceptional, but because they were clients and urgently needed the Duff an exception was made. The first invoice does not reflect a price. Once the price was agreed the invoices reflected the price as agreed. Once he was back he had discussions with Cathoros and the price was agreed to be the same price that the Umlazi Duff was supplied to them in 2012. A written contract was then concluded setting out the price, after some of the deliveries had already taken place, but was for all the Umlazi Duff supplied for the period April, May and June 2013. He confirmed the content of Exhibit A setting out all the purchase orders from Cathoros for which delivery was taken. The later invoices from Anglo reflect the price as agreed and there was partial payment thereon.

He handed in Exhibit A which set out the correlation between the order placed, the weight slips in relation thereto and the invoices pertaining thereto.

Defendant's evidence

[28] Mr Karinga is employed by Cathoros as a site supervisor at Kromdraai. He is based at the loading area and is responsible to write the weight slips for Cathoros. He did not see the loading of the ROM at Kromdraai. He introduced a photograph of large rocks. He took the photograph at Bosboklaagte, a washing plant. He did not work at Bosboklaagte and had no personal knowledge of the source of coal supplies dumped at Bosboklaagte. He however thought it came from Kromdraai.

[29] Cathoros' expert, Mr Chirimumimba testified and his expertise and qualifications were not in dispute. No CV was provided, but he has an engineering degree and an MBA. He is a mining engineer and project management consultant. He did not undertake any site visits or field work, affording him no personal knowledge of the mining done at Kromdraai or Excelsior. He did not do any sample testing from the sites.

[30] His evidence was that in assessing the quality of the coal he worked from the figures supplied to him by Cathoros. He accepted that out of the 63 700 tons of coal supplied 31 400 was discarded as waste material. He worked from the premise that this discarded waste had no CV and awarded it a zero CV. He did not base this on any scientific assessment, but did so because it had no economic value to Cathoros. In determining the coal quality, he examined the mass flow balance and the coal and the energy using this Zero value.

[31] His process was as follows:

- "1. Volume of coal collected and measured by the weighbridge = 63 700t
2. Volume of screened out waste material at Blesboklaagte Processing Plant = 31 400t
3. Volume of coal fed into the Blesboklaagte Processing Plant = 32 300t

4. Quality of coal fed into the Blesboklaagte Processing Plant = 22.14MJ/kg
5. Volume of sales product from Blesboklaagte Processing Plant = 20 300t
6. Quality of sales product from Blesboklaagte Processing Plant = 26.5 MJ/kg
7. Volume of tailings discard Blesboklaagte Processing Plant = 12 000t
8. The calculated quality of tailings discard from Blesboklaagte Plant = 14.76MJ/kg.
9. The back calculated quality of ROM collected is 11.2 MJ/kg which outside the contractual range of 20.5-22.5 MJ/kg. The coal collected did not meet the contractual conditions.”

[32] He also used a lab report supplied to him. This lab report does not reflect where the coal came from that was tested, but shows CV values far in excess of the contractual specifications. When he was confronted with this he answered it was because the coal had been washed. Confronted with the fact that even discarded coal would have a CV he gave no comment.

[33] Cathoros subpoenaed Ms T Maseko to testify. During 2013 she was involved with the safety production as mining manager of Landau Colliery. She confirmed that Landau had 4 pits: Kromdraai, Excelsior, Schoongesicht and Umlazi Duff. She confirmed the mining process as explained by Messrs McGeorge and Dr Van der Steen at Kromdraai and Excelsior in that the topsoil is removed and then blasted in the pillars of the earlier mining first seam 1, then parting, then virgin seam 2. The dragline removes all of the overburden until seam 2 is exposed. The KPI ensures that coal is as clean as possible and the geologist manages the process to ensure very little contamination. There was a destoning plant where the largest rocks were removed. The method of blasting took into account the voids between the pillars.

Was the coal delivered from the correct source as specified in the contract?

[34] Cathoros denies liability because the coal was sourced and supplied from Excelsior and not Kromdraai as the contract stipulated. The relevant clause reads as follows:

“LANDAU COLLIERY – OFFER KROMDRAAI RUN OF MINE (ROM)

Anglo Operations Limited, acting through its Anglo American Thermal Coal division (“AATC”) would like to make the following offer of Kromdraai Raw coal “Coal”) to Cathoros Commodities (Proprietary) Limited (the “Client”).

1. Coal Source and Quantity

The Coal will be sourced at Landau Colliery (the “Colliery”). The quantity of the Coal is up to 42 000 tons (Forty Two Thousand Tons) in total to be sold in the period January 2013 to June 2013. The monthly tons (in an amount as agreed between AATC and the Client) need to be moved on a date to be agreed by AATC and the Client. In the event that the Coal is not moved on such date agreed by AATC and the Client, AATC shall be entitled to sell the Coal to a third party and the Client shall not have any recourse against AATC.”

Its argument is simply that the coal was to be delivered from Kromdraai and not Excelsior and therefore there was breach of the contract.

[35] In interpreting the contract the Court has to read the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence.¹

[36] The language used is clear. The heading sets out that the coal source and quantity would be from Landau Colliery. Excelsior where the coal was delivered from is a pit situated at Landau Colliery. Kromdraai is also a pit within Landau Colliery. The coal must thus be sourced from Landau Colliery with no specification from which pit. The quantity of the coal is to be up to 42 000 tons for a specified period. The ordinary rules of grammar and syntax allows for no other interpretation but that the coal must

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) par [18]

be sourced from Landau Colliery. There is no other context in which this heading and the paragraph under it can be understood. Sourcing the coal from Excelsior which is a pit in Landau Colliery can thus not constitute breach of contract.

[37] The argument went that the second clause of the contract must be interpreted as specifying that the coal was to be sourced from Kromdraai. This clause has the heading “Coal Qualities” and sets out that the coal will have the “typical coal specification listed below, determined in accordance with ISO.” In the table that follows the first column has the heading “Coal Specification”, which is indicated as being “Kromdraai, Contaminated ROM(Air-dried).”

[38] Upon an interpretation of this clause it does not relate to the source of the coal, but the quality of the coal. The coal sourced from Landau colliery must have the quality of that typically found at Kromdraai with a CV range of 20 to 22.5MJ/kg. If the coal did not have the qualities specified in the contract, then there would be breach of the contract. That clause cannot be interpreted as that the source of the coal must be from Kromdraai, the coal must just have the qualities of the coal typically found at Kromdraai. The contract thus sets Kromdraai’s coal quality as a benchmark for quality. It does not render Kromdraai the pit from which it must be sourced. This interpretation is fortified by the evidence of Mr McGeorge, Mr Van der Steen and Ms Maseko that as the agreement was that the coal was to be picked up with Cathoros’ trucks, it would be too dangerous to do so from Kromdraai, with the heavy equipment operating at Kromdraai. This was never denied and are circumstances attendant upon its coming into existence which the Court must utilise in interpreting the contract.

[39] But, even I am wrong and the contract must be interpreted as that the coal had to be sourced from Kromdraai, then Cathoros has not proven how this positive malperformance was material. It accepted the coal from Kromdraai, it made part payment, it sought a reduction in price and then proceeded to order coal again. It did not plead that because the coal was from Excelsior the CV was lower, or had more ash content, or was rock with no CV. It could not do so because it was common cause that the coal from Excelsior is superior to that mined from Kromdraai. It did not aver it affected the price it was charged. There was no evidence led or a single question put to witnesses as to how the coal from Excelsior constituted breach of contract. No

witness testified as to why Cathoros' intention was to only buy and accept coal from Kromdraai and for what purpose.

[40] But, more importantly, it founds its counterclaim on the coal delivered from Excelsior. It did not base its counterclaim on damages suffered because the coal came from Excelsior and not Kromdraai. Its counterclaim is based on the coal from Excelsior being substandard.

[41] I am satisfied that there was no breach of contract because the coal provided to Cathoros was from the Excelsior pit and not Kromdraai.

Did Anglo fail to prove delivery of the coal and was the tonnage claimed correct?

[42] In argument on behalf of Cathoros much reliance was placed on the fact that Anglo had not called as witnesses the authors of the invoices and weight slips and that the Court was left with inadmissible hearsay evidence. On behalf of Cathoros this argument was driven so far as; due to Cathoros not calling their witness on the documents pertaining to the counterclaim, Cathoros also did not prove its counterclaim. I was referred to the matter of *Rautini v Passenger Rail Agency of South Africa* (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021) to sustain this argument.

[43] On behalf of Anglo I was referred to pre-trial conferences wherein the parties on 15 February 2018 had agreed as follows:

"14. Status of documents:

The parties agree as follows:

- 14.1 Documents and copies of documents and extracts from documents and copies of extracts from documents may be used in evidence without the necessity of formal proof thereof and on the basis that they are what they purport to be, were written by the apparent author thereof to the apparent addressee thereof and on or about the date contained therein (if any).
- 14.2 The aforesaid pragmatic arrangement does not mean that any party thereby admits the correctness of the contents of any document so used.

- 14.3 Any party may notify any other party at least three clear court days before the commencement of the trial that a specific document must be proved in the ordinary course as if the foregoing arrangement had not been concluded and/or it require that the original of any document or the original of any extract of any document be proved or that evidence be adduced to explain why same cannot occur.
- 14.4 Documents contained in the trial bundle but not referred to during the trial, shall have no probative value and shall be regarded as pro non scripto in deciding the disputes between the parties.”

These exact terms were again agreed to on 8 June 2020.

Cathoros had not objected or gave notice that the authors must be called.

[44] It is undisputed that Anglo invoiced Cathoros on a monthly basis based on the weight slips for each month. In terms of invoice 95247 Anglo claimed it delivered 17 887.94 tons. Cathoros admitted receiving this amount on its own documents as testified to by Mr Shaw when he was referred to Cathoros’ reconciliation. No objection was made when this evidence was led. In terms of invoice 10095334 Anglo sets out that the tonnage delivered was 8 252.83. Once again Mr Shaw confirmed the delivery thereof and testified to Cathoros’ reconciliation reflecting the exact same tonnage delivered. Mr Shaw testified to Exhibit A wherein the invoices and Cathoros’ recons were set out. No objection was made to this evidence and the documents set out therein has the status of being correct and can be used as evidence without the authors being called. Exhibit A also sets out the correlation between the purchase orders, the invoices and the weight slips. The court can accept this as evidence and there was no evidence to contradict this.

[45] These defences are red herrings and require no further address.

Did the coal delivered comply with the quality as specified in the contract?

[46] Counsel for Cathoros in argument did not make a single submission pertaining to this issue. I hazard to say, because none could be made. In assessing expert

evidence, a court must evaluate the evidence of the opposing experts. This evaluation takes place in the contextual matrix of the matter and the quality of the experts' evidence. The court will analyse the premise on which the process of reasoning is based and the reasoning itself.²

[47] The premise from which Mr McGeorge worked was sound. He knew the colliery and pits from a site visit. He could in detail describe the mining process confirmed by Mr Van der Steen who had intimate knowledge of the mining process at the Landau Colliery. He highlighted how contamination could take place and what percentage of contamination there could be. He used the geological plan which is accepted as being absolutely reliable. He used the core results obtained by means of boreholes rendering the most accurate predictor of the CV of the coal at Kromdraai and Excelsior.

[48] His reasoning was accepted in the joint minute by Mr Chirimumimba that the potential quality of the coal could not be as low as 11.2 because then Anglo would not even process the coal in the navigation plant. He was supported in his evidence by Mr Van der Steen that there could never be 50% contamination of the coal simply because the sheer volumes created by a 50% discard would render mining improbable and logistically impossible.

[49] Mr McGeorge agreed that the method used by Mr Chirimimimba could be used to determine the potential quality of the coal, but only if the items were measured accurately. Mr Chirimimimba made a vital mistake in awarding to the balance of the coal a Zero value. This is an inaccurate description of the balance of the coal and renders his assessment of the quality of the coal with a CV of 11.2 incorrect.

² *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371F-G. See also *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33; 2015 (12) BCLR 1471 (CC); 2016 (1) SA 325 (CC) para 36, quoting with approval *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* (1) [2001] ZASCA 12; [2002] 1 All SA 384 (A) paras 34-40; *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another* [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) paras 97-99

[50] I can readily accept the evidence of Mr McGeorge. He was reliable and the premise he worked from was sound. His reasoning was sound. Mr Chirimimba gave a wrong value to the balance of the coal and his reasoning is thus flawed. His acceptance of the figures provided to him by Cathoros that there was 50% discard led to an improbable determination of the CV content of the coal. His concession that coal with a CV of 11.2 would lead Anglo to complete consternation is damning.

Claim 2

[51] Counsel for Cathoros submitted that since no price was agreed, no contract was concluded. To this claim a bare denial was pleaded. He further submitted that no tacit term was agreed to pertaining to the price and therefore no contract was concluded.

[52] It is trite that without a price there could be no contract of sale. As our current law stands that is correct. With no evidence to contradict the evidence of Mr Shaw I accept that the coal was delivered, but with a price still to be determined pursuant to negotiation. This finding is fortified by Cathoros' own purchase order whereon Mr Shaw was led in evidence in reflecting that a purchase order dated 29 April 2013 was placed for 800 tons of Umlazi Duff, but with the unit price left blank. Mr Shaw's evidence that the negotiations led to a price based on the previous price charged for the Umlazi Duff ordered by Cathoros, is fortified by the contract referred to where the Duff price was set as R540.00 per ton and the Duff in dispute was charged at R545.00 per ton. A price was thus negotiated and was not determined unilaterally. His evidence is corroborated by an email trail to which he testified to. The fact that the price was not determined when the first delivery took place does not render the agreement invalid or void.

[53] I am satisfied that Anglo has proven claim 2.

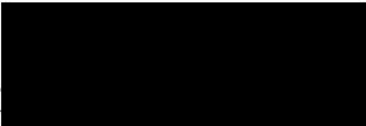
[54] I accordingly order as follows:

[54.1] The defendant is ordered to pay the plaintiff the amount of R8 046 129.00 together with *mora* interest, *in duplum* of the aforesaid amount;

[54.2] The defendant is ordered to pay the plaintiff the amount of R2 873 546.68 together with *mora* interest, *in duplum* of the aforesaid amount.

[54.3] The defendant is to carry the costs, including costs of senior counsel.

[54.4] The counterclaim is dismissed with costs, including costs of senior counsel.



S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 54095/2013 and 90165/2015

HEARD ON: 1-3 November 2023

FOR THE PLAINTIFF: ADV. E.C. LABUSCHAGNE SC

INSTRUCTED BY: Savage Jooste & Adams Inc.

FOR THE DEFENDANT: ADV. S. VAN RENSBURG SC

ADV. J.C. PRINSLOO

INSTRUCTED BY: Van Rensburg Kruger Rakwena Inc c/o Van Zyl Le Roux Inc.

DATE OF JUDGMENT: 8 February 2024