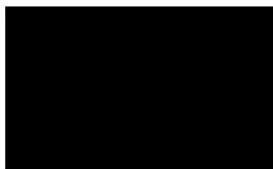


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2022/007321

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED YES/NO
	
<u>SIGNATURE</u>	<u>11/04/2024</u> DATE

In the matter between:

TRANSNET SOC LTD

Plaintiff/**Respondent**

and

TOTALENERGIES MARKETING SOUTH AFRICA (PTY) LTD

First Defendant

SASOL OIL (PTY) LTD

Second Defendant/**Applicant**

**NATIONAL PETROLEUM REFINERS
OF SOUTH AFRICA (PTY) LTD**

Third Defendant

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA

Fourth Defendant

Coram: Ingrid Opperman J

Heard: 14 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 11 April 2024

Summary: Targeted Discovery in terms of Rule 26 of the Commercial Court Rules considered – Parties initiated proceedings in terms of the Uniform Rules of Court (*URC*) and then applied for such proceedings to be certified in terms of the Commercial Court Rules (*CCR*) – Pleadings filed in terms of *URC* incorporated into *CCR* pleadings – replication amended after conversion to Commercial Court matter - alternative cause of action introduced in replication which constituted a departure – not competent - court looking at substance of case pleaded and not form to distil the issues – court holding that the flexibility and objects of the Commercial Court Rules permits the court to take a pragmatic approach in line with broad principles of fairness, efficiency and cost-effectiveness – relevance established and targeted discovery ordered.

ORDER

- 1.1. Transnet is directed to deliver to Sasol, within 15 days of the granting of this order, the documents identified under the following paragraphs of the First Category of the Rule 26 Notice delivered by Sasol on 26 January 2024 (*'the second notice'*): 1.1, 1.2.1 to 1.2.7, 1.3, 1.4, 1.7.1 to 1.7.7, 1.8, 1.9.1 to 1.9.4, 1.10, 1.11.1 to 1.11.4, 1.12.1 to 1.12.4.
- 1.2. The confidentiality regime in place in the consolidated matter before Judge Wepener shall apply to the documents to be delivered and listed in paragraph 1 of this order. Such regime is to be reduced to writing and committed to a draft order which is to be made available to the secretary of Opperman J, Ms Z Twaku, within 3 days of the granting of this order and shall be deemed to have been incorporated into this judgment.
- 1.3. Transnet is directed to deliver to Sasol, within 15 days of the granting of this order, the documents identified under the following paragraphs of the second notice: paragraphs 1.13.1 to 1.13.3 and 1.14.1 to 1.14.3.

- 1.4. The costs of this application shall be costs in the main action which costs shall include the costs of three counsel where so employed.
- 1.5. Transnet and Sasol are to present an agreed list of triable issues or, absent agreement, each party's identification of the triable issues within 10 days of the granting of this order or within such extended period as they might agree upon. The issues in dispute are to be described with reference to the exact nature of the disputes of fact and the disputes of law and the exact contentions of each party in respect of that issue.
- 1.6. Total, who was not a party to the current application, is requested to participate in the process contemplated in paragraph 1.5 hereof.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is the second application in this action brought by Sasol to compel the production of documents under Rule 26 of the Commercial Court Rules. The background to the dispute and the issues as they had crystallised at that stage in respect of the first application (*'the first application'*), are contained in the judgment delivered on 23 August 2023 (*'the previous judgment'*), the content of which should be read herewith.

[2] It is important to record that Transnet has insisted that this action is a simple one, with limited issues, requiring very few documents and limited evidence. This position was underscored in its statement of case delivered on 15 June 2023 in which it indicated that the 'essential documents' on which it intends to rely are limited to two items being Transnet's licence to operate a petroleum pipeline and the invoices on

which short payments were made by Sasol and Total for the period December 2020 to May 2023.

Events post the previous judgment

[3] Between August 2023 and October 2023, Transnet sought to introduce approximately 15 000 pages of new documents into the trial bundle. On 16 October 2023 Transnet delivered a request for targeted disclosure of documents from Sasol that appeared to be directed at addressing the issue of the “quantum meruit” in relation to what it contended was “just and equitable relief” in (the previous iteration of) its replication. Between 16 and 18 October 2023, Transnet delivered two expert reports, prepared by Dr. R Crompton and Mr Anton du Plooy. On 22 November 2023, Transnet amended its replication.

Transnet’s replication at the time and after the previous judgment and Sasol’s response thereto

[4] The relevant paragraph of Transnet’s replication at the time of the previous judgment, read as follows:

‘11.2 In the event that it be concluded (contrary to Transnet's stance) that a discretionary power existed to impose a tariff other than the one imposed by NERSA, and that Transnet's conduct is irregular in any material respect, then Transnet pleads that the tariffs imposed by NERSA constitute an appropriate *quantum meruit* to which it is entitled as just and equitable relief, whether under section 172 of the Constitution, section 8 of PAJA or otherwise.’

[5] The relevant amended paragraphs now read:

14. In the event that it be concluded (contrary to Transnet's stance) that Transnet was obliged to consider imposing a tariff other than the one imposed by NERSA, it is

just and equitable under section 172 of the Constitution and/or section 8 of PAJA to require SASOL to pay the full NERSA-set tariff given that:

14.1 NERSA is an independent and specialised regulator that determined a tariff methodology that is used for calculating allowable revenue and the tariff, which is a methodology that Transnet and other licences are bound to.

14.2 NERSA made considered tariff decisions, following a public consultation process and having regard to multiple stakeholders, based on its assessment of what an appropriate tariff is for use of a pipeline in line with the considerations prescribed by the Act and its regulations;

14.3 SASOL failed to exercise its remedies under the Act (section 23(1)(e) and section 31(1) to ameliorate the impact of the tariffs charged by Transnet.

14.4 It would be inimical to the Act and inappropriate for the court to determine a tariff without the input or approval of NERSA.

14.5 The determination of an appropriate tariff is a complex and polycentric exercise.

14.6 The passage of time makes the determination of a different tariff to the years relevant to the dispute undesirable.

14.7 Sasol and Total engaged in self-help in unilaterally short-paying the invoices issued by Transnet.

15. In the alternative, the matter should be remitted to Transnet. ‘

[6] The amendment introduced several changes but relevant for present purposes is the change to the case Transnet advances if Sasol's collateral challenge succeeds.

[7] Before the amendment, Transnet contended in its replication that if Sasol's collateral challenge were to succeed, it would be appropriate for the trial court to impose the NERSA tariff because that tariff ‘*constitutes an appropriate quantum meruit to which it [i.e. Transnet] is entitled as just and equitable relief, whether under section 172 of the Constitution, section 8 of PAJA, or otherwise.*’

[8] Transnet amended the replication to remove the reference to the concept of a ‘*quantum meruit*’ as a justification of the appropriate measure of the tariff. Transnet now contends in its replication that if Sasol's collateral challenge is upheld, it would be

‘just and equitable under section 172 of the Constitution and/or section 8 of PAJA to require Sasol to pay the full NERSA-set tariff....’

[9] Transnet states that it effected the amendment not to broaden the scope of the dispute, but *‘to streamline the issues at hand and provide clarity to both the parties and the Court regarding the nature of the dispute’*.

[10] Sasol argued that the amendment, far from narrowing the dispute, broadened the scope in that the just and equitable considerations were previously limited to the reasonable value of the services (the *‘quantum meruit’*) issue only which has now been replaced with seven other considerations.

[11] Much time and energy was devoted to the issues as distilled by the pleadings as amended. Sasol was criticized for not having filed a rejoinder. Mr Turner SC, representing Sasol contended, in the heads of argument filed on its behalf, that the absence of a rejoinder did not mean that Transnet’s allegations are unchallenged but rather that the allegations in the replication are denied. It was submitted that on the pleadings, the trial court would recognise that Sasol denies and resists Transnet’s proposed remedy in the replication and the allegations relied on to support that remedy.

[12] Ms Pillay SC, representing Transnet, argued that were Sasol desirous to raise other considerations to the seven listed by Transnet in its replication, it would be incumbent on Sasol to have pleaded such facts in a rejoinder. Having failed to do so, Sasol is precluded from leading evidence in respect of other factors it contends the court should consider.

[13] In Mr Turner’s argument in reply, he conveyed the following insight: The fundamental flaw with the rejoinder point is that it assumes that Transnet could raise

a new cause of action in its replication¹. A departure is not permissible. I agree and it would appear that it was something which was previously overlooked by all and which clarifies the dilemma currently facing the parties.

[14] The cause of action in the particulars of claim is based on a relationship governed by the provisions of the Petroleum Pipelines Act 60 of 2003 (*'the PPA'*) and the relevant licencing conditions imposed under it (*'the PPA cause of action'*). The alternative cause of action introduced in the replication is one based on a successful collateral defence or challenge² (*'the collateral challenge'*). The alternative cause of action is one in which Transnet invokes the provisions of section 172 of the Constitution and/or section 8 of PAJA to require SASOL to pay the full NERSA-set tariff (*'the alternative cause of action'*).

[15] The alternative cause of action ought strictly speaking to have been introduced by way of an amendment to the particulars of claim. This did not occur. In my view though, the Commercial Court Rules permit this court to take a holistic view of the pleadings and to assume that the alternative cause of action was raised in the particulars of claim. Such assumption would require this court to consider the averments pleaded by Sasol in its plea. I agree with Sasol that it has pleaded to the alternative claim albeit not in a conventional way ie ad seriatum, but certainly substantively.

[16] Paragraph 1 of Chapter 1 of the Commercial Court Rules provides that the '*Commercial Court aims to promote efficient conduct of litigation in the High Court and resolve disputes quickly, cheaply, fairly and with legal acuity.*' Aligned with that are the provisions of paragraph 18 which reads: '*Matters heard in the Commercial Court will*

¹ Erasmus Superior Court Practice, D1 Rule 25-2

² *City of Tshwane Metropolitan Municipality v Cable City*, 2010 (3) SA 589 (SCA) at para [13] explains a classical collateral challenge.

be dealt with in line with the broad principles of fairness, efficiency and cost-effectiveness’.

[17] The paragraphs in the plea which I consider to be a response to the alternative cause of action and which was claimed by Mr Turner to be just that, is that which has been pleaded in paragraphs 8 to 11, 21 and 23.1 of the plea (*‘the defence to the alternative cause of action’*).

[18] The procedurally correct ruling would be to find that the alternative cause of action has not been properly introduced into this litigation. Such a finding though would be counter-productive and time consuming as Transnet could simply apply to amend its particulars of claim which amendment should follow as the prejudice to Sasol is difficult to fathom if Sasol is permitted to raise that which it contends is relevant to the ‘new’ alternative cause of action. In my view the flexibility and objects of the Commercial Court Rules permits this court to take a pragmatic approach in line with broad principles of fairness, efficiency and cost-effectiveness. I intend doing just that.

[19] Ms Pillay was at pains to emphasise that the authorities are clear being that a court is to adjudicate upon the disputes brought to it and that a Court is not to delve into issues not pleaded, referring to many authorities supporting this proposition.³ I did not understand Mr Turner to have taken issue with the general principle advanced by Ms Pillay but he argued that Sasol has pleaded the issues in respect of which it seeks information but not in a rejoinder but rather in its plea in the paragraphs identified and labelled ‘the defence to the alternative cause of action’ previously herein.

³ *Naidoo and Another v Sunker and Others* [2011] ZASCA 216 at para 19; *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC); *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA).

[20] Approaching the pleadings in line with the spirit of the objectives sought to be achieved in Commercial Court matters, I will test the relevance of the information sought against the defence to the alternative cause of action.

[21] The documents Sasol seeks relate to Transnet's financial information including data on the costs, revenue and resources associated with operating its petroleum pipelines, and in particular the COP. These documents are similar to those that were the subject of Sasol's first request for targeted disclosure and which was refused in the previous judgment.

[22] Transnet thus argued that the issue was *res judicata* and that this court was bound by its own interlocutory ruling. I disagree. In the previous judgment this court recognised that the ruling could be revisited as matters unfolded and pleadings were amended but even in the absence of such a place holder, an interlocutory order can be reconsidered at any stage before final judgment⁴. The amendment to the replication and the shift in the focus highlighted hereinbefore, justifies the current reconsideration and insofar as I need to find good cause to deviate from my previous judgment, I conclude that good cause has been shown.

[23] I interpose to draw attention to the finding made in the previous judgment that the concept of relevance has been somewhat widened if regard is had to Rule 26 of the Commercial Court Rules which provides:

‘[T]he judge may allow for the **targeted disclosure** of documents. If permitted, a request for disclosure must be made concerning specific documents or classes of documents that are relevant to the dispute **as defined in the statement of case or responsive statement of the case.**’ (emphasis added)

⁴ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*, 1977 (3) SA 534 (A) at 550H. In *Zondi v MEC, Traditional and Local Government Affairs, and Others*, 2006 (3) SA 1 (CC) at [28] to [30] it appears as though the Constitutional Court qualified the general right to amend at any time before final judgment to cases in which ‘good cause’ has been shown.

[24] The 'statement of case', in this case, includes Transnet's amended particulars of claim, its amended replication, the summary of the claim contained in the statement of case, the essential documents listed therein and the summary of the evidence. Similarly, the 'responsive statement' includes Sasol's amended plea, the essential documents listed therein and the summary of the evidence.

[25] A list of triable issues appears to have been included in an agenda for a meeting at some point prior to the previous judgment. It was, however, never finalised. I am going to insist on strict compliance with paragraph 23 of Chapter 5 of the Commercial Court Rules being the presentation of an agreed list of triable issues or, absent agreement, each party's identification of the triable issues so that there can be no dispute on what the issues are going forward. I intend adding to this requirement in the following way: The issues in the case that are in dispute are to be described with reference to the exact nature of the disputes of fact and the disputes of law and the exact contentions of each party in respect of that issue.

[26] This must be ironed out before the trial starts. All indications are that relevance will feature prominently in the trial and the litigation cannot be permitted to limp along with reference to a multitude of documents determining the issues. It is a consequence of the conversion of the trial from one under the Uniform Rules of Court to one run under the Commercial Court Rules. No party can be prejudiced if all triable issues are clearly defined and laid on the table.

Relevance

[27] The enquiry in paragraph 14 of Transnet's replication will only arise should the Court find that Transnet acted unlawfully when it applied the NERSA maximum tariff blindly — without making a decision — and that Transnet was required to make an

independent decision. Implicit in this finding is that: a) Transnet failed to consider additional factors beyond the NERSA maximum tariff and failed to take an independent decision; b) Transnet was obliged to consider other factors, in addition to the maximum tariff, before deciding what amount to charge Sasol for conveying crude oil in the COP; c) Charging the NERSA maximum tariff without considering other factors and making a decision, was unlawful.

[28] In my view, paragraph 14 of Transnet's amended replication requires a Court directly to determine a just and equitable tariff. In Transnet's view, as pleaded in the replication, the "just and equitable" amount payable by Sasol is the full NERSA maximum tariff each year, being: In the 2020/21 tariff year R467.71 per m³; In the 2021/22 tariff year R478.91 per m³; and In the 2022/23 tariff year R517.30 per m³.

[29] Transnet has set out why it contends the full NERSA maximum tariff is the just and equitable tariff. However, in making the determination of what is just and equitable, the Court will have regard to multiple factors, including potentially questions relating to the fairness and reasonableness of the tariff. Where the Court has been asked to engage in that inquiry, Sasol is entitled to identify and address factors which it contends should be taken into account in making that assessment. Transnet cannot restrict the scope of the enquiry.

[30] The essence of Transnet's submission is that when the Court makes a determination to impose the NERSA maximum tariff as a just and equitable tariff, it should do so without assessing whether such a tariff would be fair, correct or reasonable. The trial court could: i) grant the remedy proposed by Transnet; ii) grant a remedy other than the remedy proposed by Transnet; or iii) grant no remedy at all. Once it has assessed all the evidence presented for and against the remedy

formulated by Transnet, the trial court would be entitled to conclude that it is not just and equitable to subject Sasol to the NERSA maximum tariff.

[31] Crucial too is that Transnet in its recent amendment to its replication, requested as a further alternative a referral back to Transnet to take a decision. If the court remits it back, it should give direction to Transnet as to what factors it should be considering. How will the court be able to do so if the court does not know what all the relevant considerations are?

[32] It follows that evidence in support of, and against, each outcome would be relevant in the inquiry at trial. The court would be compelled to look at the interests of the parties on both sides of the litigation having regard to all relevant factors⁵. This would include evidence of the financial information contained in the documents Sasol seeks.

[33] It is well established that the principal purpose of an administrative law remedy is to vindicate effectively the right violated. In my view, the trial court could not meaningfully perform this analysis under the just and equitable enquiry without Sasol having been granted a proper opportunity to present its case on what additional relevant factors ought to have been taken into account and what the tariff might have been had Transnet acted lawfully.

[34] The documents Sasol seeks potentially throws light on the question what the tariff would have been had Transnet acted lawfully and also whether the amounts claimed by Transnet would produce a fair and just result if imposed by the trial court. It follows, therefore, that the documents are relevant.

[35] As this court found in the previous judgment, the relevance of the documents sought should be assessed in light of the relief sought in the trial and to the extent that

⁵ *Economic Freedom Fighters v Gordhan and Others*, 2020 (6) SA 325 (CC) at para [115]

the relevance of the documents may not have been apparent before, the amendment to the replication has made their relevance clear.

[36] The success of the collateral challenge depends, amongst other things, on the trial court finding that Transnet was empowered to determine and charge a tariff lower than the NERSA-set maximum tariff, and that it acted unlawfully by failing to have taken a decision (independently) taking all relevant factors into account. In the replication, Transnet says that even if it did act unlawfully in imposing the NERSA-set maximum tariff as a charge for conveyance each year, those charges are nevertheless "fair and just" charges. Consequently, it asks the Court, exercising powers under the Constitution, to impose those charges as "just and equitable" relief. Sasol denies that imposing the charges Transnet claims would be just and equitable. At trial, the trial court would be obliged to consider evidence that undermines Transnet's claim that the charges are fair and just. Sasol would be entitled to present evidence on the factors it asserts should be considered by the Court before imposing those charges. These may be the same factors that Transnet ought to have considered if it had made a lawful decision. This evidence will influence whether a charge lower than the NERSA-set maximum tariff should have been charged. The documents will shed light on the materiality of the considerations. By way of example: Sasol contends that charging a lower tariff for the COP would not be

discriminatory because, amongst other reasons, the services are non-equivalent and the cost of supplying and operating COP is far lower than transporting white fuel via the Multi-Product Pipeline (MPP). The documents will prove or disprove this proposition and cast light on the materiality of the difference, if any.

[37] I thus conclude, the documents sought are relevant to Sasol's defence to the alternative claim and Transnet is obliged to produce them.

Request is overbroad

[38] Transnet argues that Rule 26 expressly states that a request for disclosure must be made concerning specific documents and because Sasol has asked Transnet to produce documents reflecting information on a host of topics, Sasol has effectively sought general discovery which is prohibited by the rules and case law⁶.

[39] In the previous judgment I found that if the documents are relevant, it is perfectly permissible to describe them in categories as Sasol has done. Nothing argued has persuaded me that if you have not named a document it cannot be ordered to be produced in terms of Rule 26 of the Commercial Court Rules. I have also not been persuaded that the view expressed in the previous judgement that *'It is difficult to ask for that which one doesn't have and to describe where to find that which one does not even know whether it exists.'*⁷ is wrong. What the court is called upon to do should section 172(1)(b) of the Constitution come into play is *'bounded only by considerations of justice and equity'*⁸. Courts are cautioned not to *'self-censor'*⁹. The remedy is very wide and what constitutes an appropriate order is determined by the facts. I conclude that Sasol by categorising the documents as it has, has brought itself within the four corners of 'targeted' as provided for in Rule 26. The circumstances of this case demands a different application of the Rule having regard to the expansive remedy invoked by Transnet should the alternative cause of action come into play.

⁶ *Lombard Insurance Company Limited v McCrae*, 2022 JDR 2900 (GJ) at paras [38] to [41]

⁷ Previous Judgment – paragraph [35]

⁸ *Electoral Commission v Mhlope and Others*, 2016 (5) SA 1 (CC) at paragraph [83]

⁹ *Electoral Commission* Ibid at para [83]

Compelling the creation of documents which do not exist

[40] Transnet argued that the law does not authorise one party to compel another, under the pretext of discovery or disclosure, to produce something that does not exist¹⁰.

[41] It also contended that Sasol's request in part pertained to further particulars in accordance with Rule 21 of the Uniform Rules of Court and that the Commercial Court Rules do not permit such a request.

[42] Sasol accepts that it cannot seek documents that do not exist.

[43] Sasol insists that it is entitled to access whole databases to acquire information where Transnet has stated that the information may exist but it does not appear in the documentary form as requested. Ms Pillay argued that the Commercial Court Rules do not require Transnet to create documents. Rule 26 only permits 'the targeted disclosure of documents' and this category of information sought falls outside this description.

[44] Mr Turner placed reliance on the judgment of *Makate v Vodacom (Pty) Ltd*¹¹ in which reliance was placed on *Le Roux and Others v Viana NO and Others*¹², where a document was described as '*a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record.*'

[45] The documents falling within this category are those referred to in paragraphs 1.7.1 to 1.7.7 and 1.9.1 to 1.9.4 of the second notice.

[46] Paragraphs 1.7.1 to 1.7.7 call for the payroll list or similar document recording the names of the employees employed within Transnet Pipelines(TPL) division, their

¹⁰ Erasmus Superior Court Practice -

¹¹ 2014 (1) SA 191 (GSJ) at paragraphs [37] to [39]

¹² 2008 (2) SA 173 (SCA) at paragraph [10]

monthly or annual salaries and the area within which they work. These requests are repeated in all 7 paragraphs the only distinguishing feature is the pipeline/facilities to which they relate being the COP, the Multi-product pipeline, Jameson Park trunk line, Northern network, Refractory at Tarlton, Accumulation infrastructure at Durban and Jameson Park and Tightlining infrastructure at Durban.

[47] This information can be extracted by means of commands through a filter process. I am satisfied that this process of retrieving stored data through a filter process or data search, is discoverable within the meaning of Rule 26 of the Commercial Court Rules and that such process produces a 'document' as understood in Rule 26.

[48] Paragraphs 1.9.1 to 1.9.4 call for Financial statements, declarations, disclosures and internal spreadsheets reflecting total volumes, by fuel type (crude, petrol, diesel and avtur) conveyed during 2020, 2021, 2022 and 2023 along each pipeline route. These requests are repeated in all 4 paragraphs with the only distinguishing feature being what it should include being Durban to Natref/Sasolburg on the COP, Sasolburg to each pipeline end point (via the northern network), Durban to each pipeline endpoint on the Durban and Jameson Park and Durban to Jameson Park and each pipeline endpoint on the Multi-product pipeline.

[49] This information too ie the total volumes by fuel type, can be extracted by means of commands through a filter process. I am satisfied here too that this process of retrieving such stored data through a filter process or data search, is discoverable within the meaning of Rule 26 of the Commercial Court Rules and that such process would produce a 'document' as understood in Rule 26.

Documents referred to on Transnet's website

[50] In respect of certain documents Sasol has requested, Transnet refers Sasol to Transnet's website. Sasol contends that this response is inappropriate. I agree.

[51] Transnet is obliged to produce relevant documents in its possession. The documents are stored electronically on Transnet's servers, which are under its control. It is necessary for Transnet to produce the documents to avoid disputes about authenticity if Sasol seeks to use the documents at trial.

[52] This court will order Transnet to produce the documents that are available on its website. These documents are those referred to in paragraphs 1.13.1 to 1.13.3 and paragraphs 1.14.1 to 1.14.3 of the second notice.

Confidentiality

[53] The parties were in agreement that in the event that the court orders the delivery of the documents it should do so subject to a confidentiality regime similar to the one in place in the consolidated matter before Wepener J which essentially makes the production of the documents available to the legal representatives, subject to the signing of a confidentiality undertaking, but not to the parties.

[54] This arrangement disregards the need to obtain instructions and to brief experts. I was reassured from the bar that this too is catered for in the other confidentiality regime whereby permission is sought and granted to disclose information to the parties on an ad hoc basis as and when the need arises.

[55] I request and direct that the parties are to prepare a draft order so that the regime they agree upon may be incorporated into this judgment.

[56] This regime will govern the documents to be provided under the following paragraphs of the First Category of the Rule 26 Notice delivered by Sasol on 26

January 2024 (*'second the Notice'*): 1.1, 1.2.1 to 1.2.7, 1.3, 1.4, 1.7.1 to 1.7.7, 1.8, 1.9.1 to 1.9.4, 1.10, 1.11.1 to 1.11.4, 1.12.1 to 1.12.4.

Costs

[57] One might argue that Sasol has been substantially successful and ought to be entitled to the costs of this application. As concluded previously, the parties find themselves in this predicament partly by virtue of the conversion of the action from one, initiated in terms of the Uniform Rules of Court to one continued in terms of the Commercial Court Rules which has its limitations such as the absence of an exception procedure or irregular step proceeding which could conceivably have been utilised to excise the alternative cause of action from the replication which might have forced an amendment to the particulars of claim to introduce the alternative cause of action where it properly belongs.

[58] A plan has been put in place to prevent this situation from arising again. In exercising my discretion, which I have in respect of the award of costs, I hold the view that it is difficult to lay the blame exclusively with one party or to even apportion blame appropriately, this is particularly so as the insight to the cause of the conundrum (being the introduction of the alternative cause of action in the replication) was only identified during Mr Turner's argument in reply. In my view, the appropriate costs order under these circumstances is to make the costs of this application, costs in the cause as these types of glitches are part and parcel of the hurly burly of litigation and in my view should be born by the ultimate defeated party.

Order

[59] I accordingly grant the following order:

- 59.1. Transnet is directed to deliver to Sasol, within 15 days of the granting of this order, the documents identified under the following paragraphs of the First Category of the Rule 26 Notice delivered by Sasol on 26 January 2024 (*the second notice*): 1.1, 1.2.1 to 1.2.7, 1.3, 1.4, 1.7.1 to 1.7.7, 1.8, 1.9.1 to 1.9.4, 1.10, 1.11.1 to 1.11.4, 1.12.1 to 1.12.4.
- 59.2. The confidentiality regime in place in the consolidated matter before Wepener J shall apply to the documents to be delivered and listed in paragraph 60.1 of this judgment (and paragraph 1 of this order). Such regime is to be reduced to writing and committed to a draft order which is to be made available to the secretary of Opperman J, Ms Z Twaku, within 3 days of the granting of this order and shall be deemed to have been incorporated into this judgment.
- 59.3. Transnet is directed to deliver to Sasol, within 15 days of the granting of this order, the documents identified under the following paragraphs of the second notice: paragraphs 1.13.1 to 1.13.3 and 1.14.1 to 1.14.3.
- 59.4. The costs of this application shall be costs in the main action which costs shall include the costs of three counsel where so employed.
- 59.5. Transnet and Sasol are to present an agreed list of triable issues or, absent agreement, each party's identification of the triable issues within 10 days of the granting of this order or within such extended period as they might agree upon. The issues in dispute are to be described with reference to the exact nature of the disputes of fact and

the disputes of law and the exact contentions of each party in respect of that issue.

- 59.6. Total, who was not a party to the current application, is requested to participate in the process contemplated in paragraph 59.5 hereof.



INGRID OPPERMAN J
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the applicant (Sasol): Adv D Turner SC, Adv M Seape, Adv G Singh and Adv A Ngidi

Instructed by: Mchunu Attorneys

Counsel for the Respondent (Transnet): Adv K Pillay SC, Adv R Tulk, Adv YS Ntloko, Adv N Nyembe and Adv M Dafel

Instructed by: Webber Wentzel

Date of hearing: 14 March 2024

Date of Judgment: 11 April 2024

