IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 5655/2013

In the matter between:

COMO OILS (PTY) LTD **PLAINTIFF**

and

LAURMO OILS CC **DEFENDANT**

JUDGMENT

SISHI J

<u>Introduction</u>

[1] The plaintiff instituted two claims against the defendant, the first claim is for the repayment of an amount of R595 967.59, in respect of monies lent and advanced by the plaintiff to the defendant. The second claim is for the payment of the purchase price of R741 798.00 representing the agreed purchase price of 143.32 metric tons of neutralised coconut oil at R11 250.00 per metric ton plus vat.

[2] The defendant denies liability and bases its defence to each claim on alleged oral terms agreed between its managing director and, Johannes

Wilhelmus Swart and the plaintiff's former director, Uwe Walter Lanzendorff who passed away on the 2nd of July 2012.

[3] The plaintiff, Como Oils (Pty) Ltd is a company with limited liability which has its registered office at 8th floor, 135 Musgrave Road, Durban, KwaZulu-Natal.

[4] The defendant, Laurmo Oils CC is a registered close corporation, having its principal place of business and registered office at 23D Blue Street, Isithebe, KwaZulu-Natal.

Common Cause Facts

[5] The plaintiff and the defendant are both companies that conducted business in the coconut oil industry. The defendant is a close corporation and the plaintiff a closely held company.

[6] The defendant's business was to procure copra (coconut flesh) from growers in Mozambique and to refine it to produce neutralised coconut oil.

[7] The plaintiff's business was to sell neutralised coconut oil to product manufacturers in South Africa. Neutralised coconut oil is used in the manufacture of various food and beauty products.

[8] The defendant was the plaintiff's sole supplier. The plaintiff and the defendant were neighbours – their business premises were adjacent to each other. The late Mr Lanzendorff and Mr Swart were friends.

[9] There was a close commercial relationship between the plaintiff and the defendant, and also a personal friendship between their respective manager/directors.

<u>The Pleadings</u>

[10] The plaintiff's claims are set out as follows in the pleadings:

<u>Claim 1</u>

[10.1] The defendant is indebted to the plaintiff in the amount of R595 967.59 in respect of monies lent and advanced by the plaintiff to the defendant.

[10.2] The loan agreement was concluded between Uwe Walter Lanzendorff representing the plaintiff and Johannes Wilhelmus Swart representing the defendant in Isithebe on a date that is unknown to the plaintiff.

[10.3] The defendant acknowledged its liability in writing on 3 April 2012, and a copy of the written acknowledgement of liability is attached marked "A"

[10.4] It was an express or tacit term of the agreement that the debt would be repayable on demand. The plaintiff made written demand to the defendant on the 6th of March 2013. A copy of the letter of demand is annexed hereto marked "B".

Claim 2

[10.5] During or about February 2012 and at Isithebe, the plaintiff represented by Uwe Walter Lanzendorff and the defendant represented by Johannes Wilhelmus Swart concluded an oral agreement for the supply of neutralised coconut oil that had the following express, implied or tacit material terms:

10.5.1 "the plaintiff would supply to the defendant 143.32 metric tons of neutralised coconut oil as and when required by the defendant for delivery to the defendant's customers;

10.5.2 the defendant would collect the oil from the plaintiff's premises at 23C Blue Street, Isithebe, KwaZulu-Natal;

10.5.3 the defendant would replace the exact quantity of neutralised coconut oil taken by it upon demand from the plaintiff, failing which the defendant would pay for the coconut oil taken by it at a price of R11 250,00 per metric ton plus Value Added Tax.

[10.6] Acting in accordance with the agreement, the plaintiff delivered 143.32 metric tons of neutralised coconut oil to the defendant over the period March 2012 up to and including 6 June 2012. Copies of each invoice and delivery note are annexed hereto marked "C1-C14".

[10.7] The plaintiff made demand for delivery of the oil by way of an email dated 15 June 2012 (which is annexed hereto marked "D") which was accepted by the defendant but notwithstanding such acceptance the defendant has failed to replace a total of 57.84 tons of neutralised coconut oil, being the consignments of oil reflected in the plaintiff's invoices annexures "C11" and "C13" hereto.

[10.8] The defendant has accordingly become liable to pay for the oil taken by it at the agreed rate, and it accordingly indebted to the plaintiff in the total amount of R741 798.00, representing the agreed purchase price of 143.32 tons of neutralised coconut oil at R11 250.00 per ton plus Value-Added Tax. Notwithstanding written demand (annexure "B" hereto) the defendant has failed to pay the plaintiff."

[11] In response thereto, the defendant has pleaded as follows:

[11.1] The plaintiff in fact never loaned any money to the defendant;

[11.2] However, the plaintiff, with the consent of the defendant, created a book entry in its financial statements suggesting that money was loaned by the plaintiff to the defendant, which in fact was not the case.

[11.3] The aforesaid book entry created by the plaintiff was done to improve the plaintiff's apparent profitability reflected in its financial statements.

[11.4] In order to complete the appearance of a genuine loan the defendant acknowledged liability, annexure "A".

Alternatively

[11.5] If is found that the loan was a genuine loan, which is disputed, the defendant pleads that as at the date of demand the loan was extinguished by set off;

[11.6] The set off came about as follows:

[11.7] The defendant provided storage to the plaintiff for its coconut oil;

[11.8] The value of the storage provided by the defendant to the plaintiff as at the date of demand amounted to R2 753 700,00;

[11.9] The defendant pleads that a storage amount, equal to the plaintiff's claim, became payable by the plaintiff to the defendant, when the plaintiff made its demand on 6 March 2013;

[11.10] In the premises as at the date of demand, the defendant's indebtedness to the plaintiff was extinguished by set off leaving the plaintiff indebted to the defendant for the balance of R2 157 733,00;

[11.11] The balance is payable when both the plaintiff and the defendant sold their businesses."

[12] In the pleadings, the defendant has admitted that the plaintiff would supply the defendant 143.32 metric tons of neutralised coconut oil as and when required by the defendant for the delivery to the defendant's customers.

[13] The defendant has also admitted that, in terms of the agreement, it would collect oil from the plaintiff's premises at 23C Blue Street, Isithebe, KwaZulu-Natal.

[14] What emerges from the pleadings and the evidence is the following:

[14.1] The defendant, relying on the evidence of Blackie Swart and his daughter, disputes its liability to the plaintiff. In respect of the loan, Mr Swart alleges that there was never a loan and the four acknowledgements of liability signed by him in each year from 2008 to 2012 are incorrect and fraudulent.

[14.2] In respect of the goods sold and delivered the defendant relies on alleged oral agreement between Mr Swart and Mr Lanzendorff that the defendant would not be liable to pay, but only to replace the neutralised coconut oil taken by it, and then only when the defendant had surplus of neutralised coconut oil.

[14.3] As an alternative defence, the defendant asserts an alleged claim against the plaintiff for "the value" of certain storage allegedly provided by the defendant for the plaintiff's coconut oil.

[15] The plaintiff submitted, correctly in my view, that as with the two other defences mentioned above, this claim depends solely on Mr Swart's evidence of an agreement or arrangement concluded between himself and Mr Lanzendorff. There is no contemporary record of any such agreement, and no objective evidence of any storage amount ever being claimed by the defendant or paid for by the plaintiff in the ordinary course of business.

[16] It is clear from the evidence that in respect of both claims, the Court has been presented with mutually destructive versions.

[17] The plaintiff submitted, correctly in my view, that the unusual feature relating to claim 1 is that both of those version emanate from the same witnesses but at different points in time. The plaintiff relies on its own contemporaneous records, but also on an explanation previously given to an

audit clerk by Anne-Marie Viljoen, a former manager of the plaintiff, and on Mr Swart's own signed statements acknowledging indebtedness.

[18] Both Ms Viljoen and Mr Swart, in evidence, contradicted their previous statements. The question is, should they be believed now, or should their earlier statements be believed.

[19] The defendant has contended that in evidence it emerged that the loan was in fact rather an enrichment claim which, according to the plaintiff arose when the plaintiff overpaid the defendant for certain oil purchased from the defendant, this emerged from the evidence of the auditor Mr Elsworth.

[20] In respect of claim 2, the question is whether Monique Snyders, and or Mr Swart should be believed.

<u>The Issues</u>

[21] The issues to be decided in this matter are:

[21.1] Firstly, whether or not there was a loan between the plaintiff and the defendant as alleged in the plaintiff's particulars of claim.

[21.2] Secondly, whether there was an agreement between the parties to replace the oil or to repay the debt within a reasonable time.

[21.3] Thirdly, whether the defence of set-off has been established by the defendant.

Claim 1 – The Loan

[22] In the particulars of claim, the plaintiff alleges that the defendant is indebted to the plaintiff in the amount of R595 967,59 in respect of monies lent and advanced by the plaintiff to the defendant.

[23] The defendant in its plea and in evidence denied that the plaintiff in fact ever loaned any money to the defendant. The defendant in its explanation, stated that the plaintiff with the consent of the defendant, created the book entry in its financial statement suggesting that money was loaned by the plaintiff to the defendant, which in fact was not the case. The defendant has alleged that the book entry created by the plaintiff was done to improve the plaintiff's apparent profitability reflected in its financial statements.

[24] There are a number of documents and acknowledgments of debt signed by Mr Swart of the defendant acknowledging the debt. There were in fact four acknowledgments of debt signed by Mr Swart acknowledging the existence of the debt.

[25] There is a written acknowledgement of liability dated 3 April 2012, printed on the letterheads of Laurmo Oils, addressed to the plaintiff's auditor and signed by Mr Swart. It simply states:

"*We, herewith acknowledge outstanding debt to Como Oils (Pty) Ltd in total of R595 967,59. As per 29 February 2012.*

[26] Evidence established that this acknowledgment of debt was the last in its series of such acknowledgment signed by Mr Swart on 5 April 2012, the first of such is dated 19 March 2008, the second dated 2 April 2009 and the third dated 5 April 2012.

[27] The first in this series dated 19 March 2008 is for an amount of R630 232,59 and explains the *causa* for the debt in paragraph 1 thereof. It would be perhaps be appropriate to set out the full content of this letter.

[28] This is addressed to the plaintiff's auditor and it reads:

"COMO OILS (PTY) LTD

LOAN CERTIFICATE: YEAR ENDED 29 FEBRUARY 2009

"I hereby certify that I owe the amount as reflected in the books of the above company amounting to R630 232,59 as at 29 February 2009 is correct and I further certify that: -

(1) The aforesaid balance is in respect of the difference between the amount charged for good, and the contractual amount agreed upon with the above company;

(2) I am satisfied with the method used by the above company, to determine the aforesaid balance; and

(3) The above amount will be paid back to the above company within the next financial year, or twelve consecutive months subsequent to year end, or settled in exchange for product.

Yours faithfully
Blackie Swart"

The letter is signed by Blackie Swart on behalf of Laurmo Oils CC.

[29] This letter not only acknowledges the defendant's indebtedness to the plaintiff, and the amount thereof, but also contains an undertaking to repay within the next financial year or twelve consecutive months subsequent to the year-end or settled in exchange for product.

[30] Four of these acknowledgments of debts by the defendant were signed by Mr Swart year after year.

[31] The defendant has contended that in evidence it, however emerged that the loan was in fact rather an enrichment claim which arose, according to the plaintiff when the plaintiff paid the defendant for certain oil purchase from the defendant.

[32] According to the defendant, the allegation that there was an overpayment is based solely on the manuscript note appearing in the ledger of the plaintiff. It is common cause between the parties that this note originated from a former manager of the plaintiff, Mrs Viljoen (she gave the information contained in the note to an audit clerk who recorded it on the relevant ledger page).

[33] Because of the allegation that the acknowledgment of debt relied on by the plaintiff was a sham, the plaintiff went further in its evidence in chief and proved the underlying transaction that was the *causa* for the debt.

[34] Mr Elseworth's evidence established that during the audit carried out in respect of the 2008 financial year, the audit clerk sought and obtained explanations from the management of the plaintiff regarding how this debt came about.

[35] A summary of the explanation is contained in the plaintiff's bundle (page 39) where the audit clerk noted *"this amount is as a result of a shortage of oil experienced by the client's supplier, Laurmo Oils CC. Because of this shortage, supplier had to charge client more than the contractually agreed amount. The difference (net of vat) between the amount charged and the contractual amount has been reflected as a current debtor, which is expected to be recovered".*

[36] The audit working papers as set out in the plaintiff's bundle, identify these specific transactions in issue and verify the quantum of the advance.

[37] It is clear from the evidence and the documents that by agreement the defendant overcharged the plaintiff for oil. The plaintiff paid the inflated price and the defendant undertook to repay the excess. Plaintiff has submitted correctly that by the deliberately paying an amount over and above the true

agreed price, the plaintiff made an advance to the defendant which defendant undertook to repay. This clearly amounts to a loan.

[38] Evidence established that the amount of the loan was increased by an amount of R39 900,00 being the purchase price of the truck sold by Como Oils (Pty) Ltd to Laurmo Oils CC. The purchase price of R39 900,00 was added to the loan amount.

[39] As indicated above, the debt was expressly acknowledged by Mr Swart, year to year on four separate occasions.

[40] Further corroboration of these facts appears from the defendant's sales record. The defendant's price increased to coincide with the advances described above. The explanation for the increase is that the additional loan amount had to be added to the true contract price.

[41] The defendant in its own financial statements, recorded this loan as a debt owing by the defendant to the plaintiff.

[42] Mr Swart's evidence was that the recordal of the loan owing by the defendant to the plaintiff was an entirely ficticious entry in the books and the records of the plaintiff. He stated that the purpose behind this was to inflate the plaintiff's profitability in order to make it more attractive to a possible buyer.

[43] Mr Swart accepted in cross examination that during 2008 and over the subsequent period, he and Mr Lanzendorf had in mind to sell their businesses jointly to a single buyer. He had no explanation for the proportion that if the loan was indeed a sham, it would have no beneficial effect on the profitability of the two companies jointly. It would have no net effect, because the debt owing to the plaintiff corresponds exactly to an equal debt owing by the defendant. The plaintiff submitted, correctly in my view, that the reason proffered by Mr Swart for the sham was therefore implausible and unconvincing.

[44] Furthermore, if the plaintiff's business was to have been sold alone, the sham would have been discoverable immediately by a purchaser of the plaintiff's business.

[45] The purchaser would then have been entitled to cancel the sale agreement because of the material misrepresentation inducing the contract or they would have been entitled to sue for damages of or performance of warrantees.

[46] The plaintiff submitted that in cross examination Mr Swart could offer no explanation for the ineptitude of the attempted fraud that he alleged. For his version to be believed, the Court would have to accept that the late Mr Lanzendorff took steps towards the perpetration of a serious fraud that was deemed to be a failure from the onset because it would be easily discovered.

[47] The defendant submitted that the plaintiff has not produced any evidence whatsoever to contradict Ms Viljoen's evidence. The plaintiff's case, however, is that the Court should accept that which Mrs Viljoen noted in the plaintiff's ledger "at page 39 of the plaintiff's bundle" and reject Mrs Viljoen's evidence on oath and in Court that the note was designed to mask the losses which the plaintiff suffered when the relevant sales took place during October 2007 to February 2008.

[48] The defendant submitted that Mrs Viljoen was an excellent witness. That, far from rejecting her evidence as false, this Court should accept it. Mrs Viljoen was candid enough to make an admission against self-interest, namely that Mr Lanzendorff and herself manipulated the plaintiff's financial statements by hiding losses which the plaintiff suffered during October 2007 to October 2008. These book entries were done to improve the apparent profitability of her employer's business at the time when her employer was attempting to sell the business.

[49] In short then, the two contradictory versions are whether there were overpayments or whether there were losses suffered. The actual sales figures and calculations done by Mrs Viljoen are consistent with either of the above two versions. Both versions however come from Mrs Viljoen. It is not clear on what basis the Plaintiff wants this Honourable Court to accept the one version rather than the other. It is reiterated that both versions come from Mrs Viljoen. Mrs Viljoen however in Court and on oath explained that the version in the papers was a fabrication. Defendant submitted that there is no

reason to reject this explanation. There is absolutely no evidence whatsoever to contradict that which Mrs Viljoen testified as to the reason why the false note was made and what those entries intended to achieve. The probabilities favour Mrs Viljoen's evidence in court. It is common cause between the parties that Mr Lanzendorff was attempting to sell the plaintiff's business. Therefore a trade profit was always going to look much better than a loss.

[50] The defendant submitted that ultimately the version given by Mrs Viljoen in Court is supported by the direct evidence given by Mr Swart. Mr Swart testified that there were never any overpayments. That the prices which the plaintiff was charged were in fact lower than the general market price at the time. He pointed out that during the relevant period the defendant sold oil to the plaintiff at R6 500,00 per unit which was lower than the price the plaintiff was paying for palm kernel oil which was purchased for R8 280,00 per unit.

[51] Defendant further submitted that even if it is however assumed that there was a genuine overpayment by the plaintiff to the defendant, there was no evidence whatsoever that Mr Lanzendorff and Mr Swart had agreed that this overpayment would constitute a loan or that this debt would be repaid by the defendant.

[52] The only evidence of any discussion between Mr Lanzendorff and Mr Swart on this issue came from Mr Swart. And his evidence was that the auditor required the acknowledgment of debt. The undisputed evidence of Mr

Swart was that Mr Lanzendorff never in fact claimed that there was any overpayment or that the plaintiff required any amount to be repaid by the defendant.

[53] I have already indicated earlier on in this judgment that this Court has been presented with mutually destructive versions. There are material disputes of facts in this matter.

[54] On the approach to be adopted in resolving factual disputes, plaintiff has referred to *Stellenbosch Farmers Winery Group Limited v Martell and Cie*[1] The Court held that the technic generally employed by Courts in resolving factual disputes of this nature, may conveniently summarised as follows:

> "To come to the conclusion on the disputed issues:
>
> (1) The Court must make findings on:
>
> a. Credibility of the various witnesses;
> b. Their reliability; and
> c. The probabilities.
>
> (2) In assessing credibility, a court will have regard to a wide range of factors including:
>
> i) The witness' candour and demeanor in the witness box;
>
> ii) His bias, latent and blatant;
>
> iii) Internal contradictions in his evidence;

[1] 2003 (1) SA 11 (SCA)

iv) External contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions;

v) The probability or improbability of various aspects of his version;

vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the same incidents or events.

[55] In this case the SCA emphasised that when all factors are equipoised, the probabilities prevail.

[56] It was stated in National Employers General Insurance Limited v Jagers[2] that an estimation of the credibility of witnesses is inextricably bound up with the probabilities. If one version is clearly more probable than the other then that is the version that must be accepted. It is only if the probabilities are equally balanced that a court has to fall back on credibility and reliability as decided factors.

[57] From the evaluation of all the evidential material placed before Court, it is clear that all the objective evidence is in fact in favour of the plaintiff's version of events.

[58] The evidence consists of contemporaneous business records, statements made to the plaintiff's auditors by Ann-Marie Viljoen at a time

[2] 1984 (4) SA 437 E at 440 to H

when repayment was not being actively enforced and the acknowledgements of debt signed by Mr Swart on behalf of the first defendant.

[59] I have already indicated earlier on in this judgment that in the letter dated 19 March 2008, signed by Blackie Swart on behalf of the defendant, he not only acknowledges the indebtedness of the defendant to the plaintiff in the amount of R630 222 59,00 in paragraph 1 of the said letter, he also states the cause for the debt, and in paragraph 2, he confirms the correctness of the method used in the determination of the aforesaid amount and in the last paragraph, he undertakes that the amount will be paid to the plaintiff within the next financial year or twelve consecutive months subsequent to a year-end or settled in exchange for product.

[60] The plaintiff submitted that the transaction contended for makes sense in the context of the parties' business relationship. The plaintiff assisted the defendant's cash flow by advancing it funds. The plaintiff did not require immediate repayment. It also did not charge interest, and perhaps that can be attributed to the friendship between Messrs Lanzendorf and Swart. But the advance was not a gift, and the defendant was required to repay, and undertook to do so.

[61] The plaintiff assisted its neighbour, but it also protected its own interests by assisting its sole supplier to continue in business.

[62] The probabilities also favour the plaintiff's version in this matter.

[63] Against this, the defendant has no objective evidence in its favour. It relies on the say-so of Mr Swart and his daughter, Anna-Marie Viljoen. There is no external corroboration of their evidence.

[64] Their version is inherently improbable.

[65] It is improbable that any businessman, even if friendly with a business associate, would unconditionally acknowledge a debt purely because his friend asked him to do so.

[66] It is improbable Mr Lanzendorff would have perpetrated the fraud alleged because:

a. fraud is not inferred lightly;

b. the alleged fraud would not have achieved its alleged purpose;

c. the fraud would have been discovered easily and immediately by a purchaser of the plaintiff's business, and would have led to serious negative consequences for the plaintiff.

[67] On their own version, the evidence of the two witnesses called by the defendant cannot be taken at face value and believed unless it can be corroborated externally, or constitutes a statement against interest.

[68] If what they said in the witness box is true, then they previously made false statements deliberately in order to perpetrate a fraud. They should both be found to be unreliable and to lack credibility.

[69] The plaintiff's version is supported by the probabilities, by objective evidence and by Mr Swart's acknowledgement of liability contrary to his interests.

[70] It is entirely incorrect as the defendant submitted that the probability favour Mrs Viljoen's evidence in Court.

[71] I have already indicated earlier on in this judgment that this was a perpetration of fraud which could be easily detected by the new purchaser of the business.

[72] Mr Swart testified that there were never any overpayments. That the prices which the plaintiff was charged were in fact lower than the general market price at the time. He pointed out that during that relevant period the defendant sold oil to the plaintiff at R6 500,00 per unit which was lower than the price the plaintiff was paying for palm kennel oil which was purchased for R8 280,00 per unit.

[73] This submission loses sight of the fact that there is a difference between neutral coconut oil and palm kennel oil which is more expensive than the neutral coconut oil.

[74] The defendant submitted that even if it is however seemed that there was a genuine overpayment by the plaintiff to the defendant, there was no

evidence whatsoever that Mr Lanzendorff and Mr Swart had agreed that this overpayment would constitute a loan or that this debt would be repaid.

[75] This submission flies in the face of the content of the letter dated 19 March 2008, which has already been referred to earlier on in this judgment, acknowledging the debt, the cause and thereof and that the debt would be repaid within the next financial year or twelve consecutive months subsequent to year end or settled in exchange for product. This submission therefore, cannot be true.

[76] Considering all the evidence in this matter, I am satisfied that the defendant's evidence given in Court is to be rejected as improbable and untrue and the plaintiff's version should be accepted as true.

[77] In my judgment, the plaintiff should succeed in the first claim and that judgment should be granted in its favour.

Claim 2 – Payment of the Purchase Price

[78] In Claim 2 the plaintiff pleaded that an agreement was entered into between the respective parties represented respectively by Mr Lanzendorff and Swart the relevant terms of which were that the plaintiff would furnish the defendant with 143,32 metric tons of coconut oil; that the defendant would replace the aforesaid quantity of oil upon demand from the plaintiff, failing which the defendant would pay for the coconut oil at a price of R11 250,00 per metric ton, (excluding VAT).

[79] It is common cause that the plaintiff delivered 143,32 metric tons of oil to the defendant, and that the defendant subsequently returned 85,48 metric tons of oil and still owes 57,84 metric tons of oil.

[80] Monique Snyders testified on behalf of the plaintiff, her evidence was that the oil either had to be replaced upon demand failing which the defendant was to pay for the oil at the going rate of R11 250,00 per metric ton. She has direct recollection of agreement being concluded in terms of which the defendant would either replace neutralised coconut oil or would pay for it.

[81] Mrs Snyder's evidence was contradicted by the evidence of both Mrs Viljoen and Mr Swart. Both these witnesses testified that it was always understood that only the oil had to be replaced. There was never an agreement that the oil would be paid for. Mrs Viljoen testified that paying for the oil made no sense simply because it would have meant that the defendant would pay the plaintiff money whereafter the plaintiff would immediately order oil with money. Her evidence was that the plaintiff required oil to sell to its customers and not money.

[82] The agreement described by Mrs Snyders did not have a specified date upon which replacement or payment would have to take place.

[83] Prior evidence was that the plaintiff required oil to sell to its customers and not the money.

[84] The defendant further submitted that Mrs Snyder's evidence was also contradicted by the only written document on record emanating from Mr Lanzendorff. On 15 June 2012, Mr Lanzendorff sent an email to Mr Swart in which he requested to return oil starting a week after 15 June 2012. The defendant submitted that it is significant that Mr Lanzendorff makes no reference whatsoever to the payment of the oil. He plainly understood the agreement exactly the same way as the defendant's witnesses testifying namely, that the oil simply had to be replaced. Although Blakkie Swart made an undertaking that they will start replacing one load per week from the following week, this never happened.

[85] There is another email from Monique Snyders on behalf of Como Oils, dated 25 July 2012, which refers to Blakkie's email dated 15 June 2012, which reads as follows:

> "The agreement was 143.32 metric tons neutralised CNO, that was bought from us by Laumo Oils and sold to Unilever would be replaced before Laurmo Oils enters into a new order with the Unilever. <u>Laurmo Oils has agreed to supply Uniliver with another 132 tons starting in July/August</u>.
> We are out of oil and we have not received any payment for the oil from Laurmo Oils, who owes Como Oils R1 838 79,00 (Invoices 18 May 2012 – 06 June 2012) …"

[86] It is entirely untrue that the email 5 June 2012 Lanzendorff sent to Mr Swart requesting the return of the oil is the only written document on record emanating from Mr Lanzendorff. There is this document referred to above dated 25 July 2012, wherein the plaintiff stated that they have never received

the oil nor payment. This document supports the evidence of Mrs Snyders that the terms of the agreement were that oil had to be returned failing which it had to be paid for.

[87] Ms Snyders's recollection of the meeting during which the agreement was concluded was precise and specific. By contrast, Mr Swart did not seem to have a clear and specific recollection of the meeting when the agreement was concluded.

[88] But the issue turns on the probabilities. Ms Snyders describes a businesslike transaction in terms of which the plaintiff was entitled to require the defendant to settle its debt on demand within a reasonable time, if not by replacement, then by payment of money. This is supported by contemporaneous invoices that fixed the price.

[89] The defendant's version leaves the determination of the due date entirely in the hands of the debtor. This is inherently unlikely. It is inherently improbable that the plaintiff would have agreed with the defendant that the defendant could replace oil effectively whenever Mr Swart felt like it. Once one accepts that whether or not the defendant had a surplus was entirely up to Mr Swart, it becomes clear that it could never have been agreed that coconut oil would be replaced only when a surplus arose.

[90] That being so, Mr Swart's evidence on this point falls to be rejected as false, and Ms Snyders' evidence which is in accordance with the contemporaneous documents and the probabilities, should be accepted.

[91] It follows that by 6 March 2013 at the latest the defendant was in default of its obligation to replace on demand, and the plaintiff was entitled to insist on payment as agreed. The agreement described by Ms Snyders provided that if replacement did not occur then the plaintiff would be entitled to receive payment. Once this right to payment had crystallised then this was the only way for the defendant to discharge the debt, and it follows that the purported tender of replacement oil in August 2013 was an invalid tender that did not absolve the defendant from its obligation to pay.

[92] In my judgment, the plaintiff has succeeded in proving claim 2.

[93] Having considered all the above, I am satisfied that the plaintiff is entitled to judgment in its favour on claim 2.

Set-off

[94] The defendant pleaded a set-off as a defence to the plaintiff's first claim. This defence was pleaded in the alternative to the denial that a genuine loan was agreed upon.

Defendant's submissions

[95] In this regard, the defendant made the following submissions:

[95.1] The set-off defence is based solely on the undisputed fact that the defendant provided storage to the plaintiff for the plaintiff's coconut oil. The undisputed evidence of Mr Swart was that the defendant in fact built the oil tanks in question for the sole purpose of assisting the plaintiff with its storage requirements. That they had agreed that the value of the storage would be calculated and reconciled when the businesses of both the plaintiff and defendant were sold.

[95.2] There is support for Mr Swart's evidence in a letter of the plaintiff's auditor to Mr Swart, dated 5 November 2012, in which the auditor pointed out that once the plaintiff had been "wrapped up" then the various amounts due between the plaintiff and the defendant would be sorted out.

[95.3] The value of the storage for purposes of the set-off was testified to be the amount of R2 753 700,00. Mr Swart testified that this amount was based on documents received from the plaintiff reflecting the extent to which the tanks were used.

[95.4] It was submitted that since it cannot be disputed that:

1) the plaintiff utilised the defendant's tanks for storage;

2) the undisputed amount claimed by the defendant for such storage, the defence of set-off must be upheld.

[96] It was further submitted that trite law set-off comes into operation when two parties are mutually indebted to each other and both debts are liquidated and fully due.

[97] Although Mr Swart testified that the parties had agreed that the debts owed by the one entity to the other would be settled once both businesses were sold, the plaintiff's debt to the defendant became due when the plaintiff in fact sold its business and "wrapped up" its business as the auditor had pointed out.

[98] It was common cause that the plaintiff had sold its business during 2012 at which time the debt owing to the defendant became due, owing and payable. Set-off therefore operated automatically from at least 2012 to extinguish the alleged debt owed by the defendant to the plaintiff.

<u>Plaintiff's Submissions</u>

[99] The following submissions were made on behalf of the plaintiff:

[99.1] The defendant pleads a counterclaim, but only as a defence, based on the assertion that set-off applies.

[99.2] The applicable principle was stated in *Schierhout v Union Government*[3] where the following was said, "When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment has been made".

[99.3] The critical point for the present purposes is that for set-off to operate the two debts must both be liquidated.

[99.4] "Liquidated" in this context means capable of easy and speedy proof, calculable by way of an arithmetic calculation.

See: *Mahomed v Nagdee*[4], *See also:*

Treasurer – General v van Vuuren[5]

Fatti's Engineering Company (Pty) Ltd v Vendick Spares (Pty) Ltd[6]

[99.5] It has been held that an untaxed bill of costs is an example of an unliquidated debt.

See: *Blakes Maphanga Inc v Outsource Insurance Company Ltd*[7]

[99.6] A claim for payment of the price of goods and charges where those amounts are in dispute has been held not to be a liquidated claim.

See: *Faure Brothers v Clayton*[8]

[99.7] The defendant describes its claim for rental of storage tanks as a claim for the "value of the rental" (not for the payment of an agreed price).

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[3] 1926 AD 286 at 289 to 290
[4] 1952 (2) SA 410 A at 416 H
[5] 1905 TS 582
[6] 1961 (1) SA 736 (T) 738 F to G.
[7] 2010(3) SA 383 (SCA) para 17.
[8] 1906 TS 205

[99.8] This evokes a type of enrichment claim which by its nature is not a liquidated claim because it requires an estimation of value, not mere arithmetic calculation.

[99.9] Mr Swart's evidence did not establish any binding agreement for the payment of any amount of storage. At best his evidence was that he and Mr Lanzendorff had agreed that this would all have to be sorted out at some point in the future. Even if this evidence could be accepted and taken at face value, it fails to establish an enforceable agreement, much less a liquidated claim.

[99.10] Evidence should be approached with caution for the reasons already stated. Mr Swart conceded that the defendant benefited by allowing the plaintiff to see its storage tanks because this enabled the defendant to deliver oil to the plaintiff and to invoice and receive payment that would otherwise have been deferred.

[99.11] In keeping with his approach to evidence throughout the matter, the defendant caused a whole series of back dated invoices to be generated purely in preparation for the trial, in order to attempt to demonstrate the claim for storage costs.

[99.12] These are patently fictitious and fake invoice. Ms Snyders evidence is that they were not sent to the plaintiff. The plaintiff has no record of any ongoing liability for tank storage. They were generated purely for use at trial. They exist solely in the defendant's accounting system. They refer to all the defendant's storage tanks, whereas the plaintiff did not use all of them.

[99.13] The amounts claimed are massively exaggerated and are not based on any agreement as to price or any market valuation. Ms Snyders evidence was that her new employer, Vida Oils (Pty) Ltd, pays an amount of approximately R15 000, 00 a month for tank storage. The back dated invoices formulated by the defendant are for an amount of R114 000,00 per month.

[100] I am in agreement with the submissions made on behalf of the plaintiff in refuting the allegations of an alleged set-off.

[101] The defendant's claim for rental of storage is indeed not a liquidated claim.

[102] The invoices in support of the set-off claim are backdated invoices generated purely in preparation for the trial. These were never sent to the plaintiff. The amounts claimed are exaggerated. The plaintiff has no record of any on-going liability for tank storage.

[103] The defendant's evidence, even taken at face value, fails to establish any enforceable contractual claim for payment of these amounts. There is no evidence that it was agreed that a reasonable amount would be paid, and no evidence that the amount claimed is a reasonable amount in any event. In the circumstances, the defendant's attempt to rely on set-off is clearly misconceived and invalid.

[104] In the evaluation of the two versions, based on the evidence tendered, in my view, the version of the plaintiff is more probable than the version of the defendant on this issue. The defendant has failed to establish the existence of the se-off to extinguish its debt to the plaintiff. The defendant's claim in this regard should fail.

[105] Considering the totality of the evidence tendered, the submissions and the authorities made on behalf of both parties, it is my judgment that the plaintiff has succeeded in proving both claims on the balance of probabilities and that judgment should be granted in favour of the plaintiff in respect of both claims.

[106] On the issue of costs, the plaintiff has argued that the defendant should be ordered to pay the costs of suit. The defendant on the other hand has argued that the plaintiff's claim should be dismissed with costs.

[107] In my view, there is no reason why the costs in this matter should not follow the result.

<u>The order</u>

[108] In the result, the following order is made;

[108.1] Judgment is granted against the defendant for payment to the plaintiff of R595 967,59, together with interest thereon at 15,5% from 6 March 2013 to 31 July 2014 at 15,5% per annum, and thereafter at 9% per annum until date of payment;

[108.2] Judgment is granted against the defendant for payment to the plaintiff of R741 798.00 together with interest thereof at 15,5%

from 6 March 2013 to 31 July 2014 at 15,5% per annum, and thereafter at 9% per annum until final date of payment.

[108.3] The defendant is ordered to pay the plaintiff's costs of suit.

SISHI J

APPEARANCES

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Date of Judgment	:	17 March 2015
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