IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 1616/06

In the matter between:

SASOL OIL (PROPRIETARY) LIMITED **Plaintiff**

and

KZN OILS (PROPRIETARY) LIMITED **Defendant**

JUDGMENT

KOEN, J

INTRODUCTION

[1] This is an action in which the plaintiff claims from the defendant payment of the sum of R6 385 957.84, interest on the individual amounts making up that sum as set out on annexures 'A' and 'B' to the particulars of claim from the dates appearing alongside such amounts to date of payment, and costs of suit. The defendant counterclaims for an alleged overpayment in the sum of R61 076.00 together with interest thereon at the rate of 15,5% per annum from 16 August 2004 to date of repayment, and the costs of the counter-claim.

[2] The amounts in annexure 'A' to the particulars of claim total R611 172,13 and represent the unpaid purchase price of petroleum products ('product') alleged to have been sold and delivered to the defendant from time to time. It is common cause that this claim arises[1] from the fraudulent conduct of Baher Ezzad Marcous Armanyous ('Marcous'), the former sales manager of the defendant. Marcous was

[1] Five transactions on annexure 'A' were admitted by the defendant and do not arise from the fraudulent activities of Marcous.

responsible for the purchase of fuel for export from the plaintiff. It is not in dispute that he abused that position by placing orders with the plaintiff in the name of the defendant and in collusion with others, including probably employees of the plaintiff and a customer or customers of the defendant, achieved deliveries of fuel for nefarious gains for himself and others, without the plaintiff or defendant receiving any payment in respect of such deliveries. When he realized that this scheme was about to be revealed, he absconded, apparently never to be seen again. That has left the plaintiff and the defendant having to resolve between themselves on whom the loss for the outstanding purchase price of the product ordered by him should fall. Resolving that question is primarily what this case is about. An amount of R500 000 falls to be deducted from the total on annexure 'A' in respect of the proceeds of two guarantees which were held by the plaintiff and cashed by it.[2]

[3] The amounts in annexure 'B' total R274 229.71 and relate to alleged short payments in respect of admitted purchases of fuel supplied, due to exchange rate fluctuations affecting the purchase price in rand terms.

[4] Ultimately, the correctness or otherwise of the parties' claims must be sought in the terms of the agreement between. This judgment will therefore first examine the respective contentions of the parties as averred in the pleadings and thereafter the evidence adduced in support thereof, to determine the terms of the parties' agreement.

THE PLEADINGS

[5] The plaintiff avers that it sold and delivered product to the defendant at the latter's special instance and request from 23 April 2004 until 22 July 2004. The purchase price for the petroleum products was Dollar based and had to be converted to South African Rand. Annexure 'A' sets out the details of alleged sales for which payment was not received, with reference to the invoices numbers,[3] the date of each invoice, the Dollar value, the equivalent Rand value, product delivered and quantity delivered. Annexure 'B' reflects invoices that were short paid.

[2] This was conceded by the plaintiff's counsel during argument.
[3] In some instances the tax invoice and in others the pro forma invoice numbers are provided.

[6] The plaintiff contends that each sale and delivery of product was a separate transaction pursuant, in each instance, to a separate and distinct agreement. The defendant responds that every sale and delivery was pursuant to the terms of a prior agreement governing all future sales and supplies of product.

[7] The following emerges from the defendant's plea[4] and the plaintiff's Replication thereto:

(a) The defendant pleads that during or about July 2003 it, represented by its managing director Mr Rajendran Reddy ('Mr Reddy'), and Exel Petroleum (Pty) Limited ('Excel') represented by a trader Mr Goosen,[5] concluded an agreement that was oral, alternatively partly oral and partly in writing, the written portion of the agreement comprising:

(i) a letter from Exel to the defendant dated 7 July 2003;[6]

(ii) an application dated 23 July 2003 seeking a new trading account with Exel;[7]

(iii) a fax dated 3 September 2003 from Exel to the defendant;[8] and

(iv) Exel's general trading terms and conditions.[9]

The Replication admits that these annexures (attached as 'C' to 'F') are what they purport to be, but denies that the attachments constitute the written portion of an agreement allegedly concluded in July 2003, pleading, consistent with the plaintiff's contention, that each agreement concluded between Exel and the defendant depended on the terms of the particular agreement, some of which were oral and some of which were reflected in the invoices, delivery notes and documents reflecting the accompanying payment.

(b) The defendant pleads that in terms of Exel's general terms and conditions any order by the defendant was only to be processed once Exel

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[4] The defendant's initial plea to the particulars of claim was a bare denial denying that it placed any orders and received the products. It subsequently amended its plea.
[5] In paragraph 1.6 of the replication the plaintiff denies that Mr Goosen had authority to conclude the agreement as alleged.
[6] Annexures 'C1' and 'C2'.
[7] Annexures 'D1' to 'D4' to the plea
[8] Annexure 'E'
[9] Annexure 'F'

received confirmation of payment from its bankers, Absa.[10] It pleads further that it was pursuant to this agreement that the defendant from time to time placed orders with Exel and effected payment to it.

(c) The defendant pleads that the aforesaid agreement was subsequently varied to the extent that the plaintiff stepped into Exel's shoes from January 2004. The terms that regulated the agreements for the supply of petroleum products thereafter continued to apply *mutatis mutandis*. This is partly confirmed in the Replication where it is replied that from 1 January 2004 Exel's rights and obligations were ceded and assigned to the plaintiff.

(d) The defendant pleads that subsequently, on 2 April 2004, the plaintiff required a fresh application for a new cash account and/or credit facilities and/or change/update of customer data[11] to be completed. The plaintiff approved the application, annexures 'G1' to 'G5', on 13 April 2004 in terms of a memorandum, annexures 'H1' and 'H2', signed by P Lai, the acting financial manager of the plaintiff.

(e) Upon the request of the plaintiff, the defendant also completed an application for export trading, annexures 'I1' to 'I6'. In this application the defendant *inter alia* warranted its acceptance of the terms and conditions stipulated by the plaintiff which were to regulate the supply to the defendant of petroleum products for export trading. I shall return to these below when dealing with the evidence.

(f) The defendant pleads that the conclusion that annexures 'G', 'H' and 'I' constitute an agreement that the terms that were to regulate export trading was strictly cash before delivery unless otherwise agreed to in writing, that no amendment to the plaintiff's credit terms will be valid and/or enforceable unless reduced to writing and signed by the plaintiff, and that over-deliveries would not be allowed. The plaintiff in its Replication admits that annexures

[10] The further terms of the agreement were as pleaded in paragraph 9 of the Plea. They are not relevant to this judgment.
[11] Annexures 'G1' to 'G5', page 28 read with pages 52 to 56.

'G' to 'I' are what they purport to be, but denies that they constitute an agreement as alleged.[12]

(g) The defendant maintains that it was pursuant to that agreement that it placed orders with the plaintiff for the products, effected payment to the plaintiff of the value of the products reflected in the plaintiff's pro forma invoices and took delivery of diesel and petrol, including five transactions reflected on annexure 'A' which are admitted by the defendant.

(h) Save for five transactions on annexure 'A' admitted by the defendant after it had conducted its investigations, the defendant denies that it placed any orders with the plaintiff for any of the products referred to in Annexure 'A', that it received delivery of such petroleum products, that it is liable to pay Exel or the plaintiff for such petroleum products, and the correctness of annexure 'A'. Pleading over, it denies liability for the payment on the basis that the orders were fraudulently placed by Marcous acting in collusion with a Mr Julian Stone and/or other employees of the plaintiff without payment first having been received from its customers and paid or notified to the plaintiff. It pleads that on 16th August 2004 it authorised the plaintiff to cash two guarantees in the value of R100 000,00 (hundred thousand rand) and R400 000,00 (four hundred thousand rand) respectively and to use the proceeds thereof to discharge the defendant's liability for the payment of the five transactions admitted, in the amount of R438 923,04, thus resulting in an overpayment of R61 076,97,[13] being the subject of its counterclaim.

(i) In its Replication the plaintiff pleads that Mr Reddy and the defendant's credit manager Mrs Naidoo at all relevant times knew that the plaintiff invoiced and delivered products without payment for those products having been effected prior to delivery and on the strength of assurances given by the defendant that payment would be made. The defendant

[12] In its Replication the plaintiff pleads that the defendant placed orders with it long before the agreement pleaded in paragraphs 13 to 15 of the defendant's plea and attaches annexures 'R1' to 'R4' indicating when the defendant paid certain invoices together with the proof of payment attached to the spreadsheet, marked 'A1' to 'A13'.

[13] The difference between R500 000,00 and R438 923,04. In reply the plaintiff denies that it owes any money to the defendant.

however maintains that neither it nor the plaintiff had agreed, either orally or in writing, to any variation of the terms of the agreement requiring payment upfront or in cash before delivery. In the alternative the defendant denies any waiver of strict compliance with the terms requiring payment upfront prior to the delivery of products being effected. It maintains that such terms could not be waived as it served the benefit and interest of both parties, but in any event, as a matter of fact, that it had not waived such terms.

(j) To conclude, the defendant pleads that the plaintiff cannot enforce a claim against the defendant contrary to, alternatively in breach of the terms of the agreement, in particular the term that payment had to be effected upfront and/or in cash prior to the delivery of the products.[14]

(k) The plaintiff seeks to place some reliance on an alleged extra curial admission that the defendant admitted owing the plaintiff money for the products sold and delivered as reflected on annexure 'A' to the particulars of claim, in an affidavit submitted by the defendant to the South African Police Services and a document prepared by the defendant identifying 72 allegedly fraudulent transactions. The evidence on this aspect was however at best equivocal and does not disturb the probabilities which arise from the facts in this matter.

(l) As far as annexure 'B' to the particulars of claim is concerned, the defendant admits that it placed orders for the supply of the petroleum products on the dates and for the amounts and the product as set out in annexure 'B'. It also admits that it paid the amounts as set out and that it received the products. It however denies liability for the difference in price, pleading that the defendant was not notified of the changes in the Rand/Dollar exchange rate and did not receive a settlement reconciliation reflecting such changes and did not furnish invoices or statements reflecting the charges as required, alternatively that the plaintiff was now estopped

[14] A further plea that the plaintiff did not have the *locus standi* to institute proceedings for recovery of any amounts that may be payable to Exel was abandoned at the commencement of the proceedings.
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from claiming such alleged shortfalls. Further it pleads that if it is liable to the plaintiff in respect of any short payments, that the amount of R61 067,97 resulting from the cashing of the guarantees should be set off against the total of annexure 'B'.

THE ISSUES

[8] The issues arising from the pleadings are in broad terms:

(a) What are the terms of the contract between the plaintiff and the defendant; specifically whether they prevent the plaintiff from claiming payment for products sold and delivered without payment being received by the plaintiff up front, or at the very least, the defendant having first furnished the plaintiff with proof that the deliveries had been paid for by its customers before the plaintiff delivered the product? This issue involves determining the true terms of the agreement, whether there were any variations thereto and any waiver of such terms?

(b) If the issues in subparagraph (a) above are answered in favour of the plaintiff, whether the defendant is liable for the fraudulent conduct of its export manager, Marcous?

(c) If answered in the affirmative, whether the plaintiff proved that the products were sold and delivered?

(d) Whether the plaintiff is entitled to recover the short payment of the products reflected on Schedule "B"?

THE ONUS

[9] The onus to prove the agreements and the transactions giving rise to the alleged indebtedness by the defendant to the plaintiff, is on the plaintiff. This will include, should they arise, any variation of terms to an agreement and any waiver of

terms thereof. The onus to prove the overpayment claimed in the counterclaim is on the defendant.

THE PLAINTIFF'S VERSION AND EVIDENCE

[10] The plaintiff adduced only the evidence of Mr Klopper, the Manager: Economic Crime Risk Management for the plaintiff, to prove the sales and deliveries. He has no personal knowledge of any of the transactions. He holds a B.Comm Honours degree and a Post Graduate Diploma in Forensic Accounting and Auditing and started working for the plaintiff in 1996 as an internal auditor doing basic internal audit work. He investigated the alleged 72 fraudulent transactions on annexure 'A' and compiled a spreadsheet based on information available within the plaintiff's systems, including the manual accounting records and the electronic accounting records available in the SAP system.[15] He analysed the process from the point that the plaintiff received alleged individual orders from the defendant until delivery, which it was common cause, occurred when the products were pumped into transporters' tanks at the plaintiff's Natref refinery. He illustrated the process of his investigation with reference to transaction 21 as an example, referring to the placement of the order, the pro forma invoice, the persons involved in the process, the upliftment of the product at the Natref refinery, the commercial and tax invoices generated and the Customs documentation.

[11] After Mr Klopper testified about all the documentation, he stated that there was nothing in the documentation indicating that the petroleum product was not sold by the plaintiff and collected for or on behalf of the defendant. After he had dealt with three of the disputed transactions, the defendant's counsel indicated that the defendant understood what the documents are and that Mr Klopper should only identify any issues that he wanted to identify above the face value of these documents. Mr Klopper then conceded that he was not able to find all the transactions with Exel where the invoice numbers start with a 'T'. He also identified the items that he had no documentation for, namely transactions 'A1' and 'A2'. He could not find Natref dispatch documentation for transactions 'B14' and 'B15'. He

[15] SAP stands for Systems Application Program.

was not able to look at the original DA 550 documentation for transactions 'A10' to 'A14'. He could also not obtain this documentation for the transactions identified as 'B1', 'B3' to 'B9', 'B13' to 'B15', 'B17' to 'B19', 'B21', 'B26' and 'B27', 'B31' to 'B36' and 'B12'.

[12] It also emerged from his evidence that:

(a) The plaintiff instituted disciplinary proceedings[16] against a Mr Stone and Ms Kotze, two of its employees, for

(i) gross negligence arising from their failure:

(aa) to ensure that payment had been received by the plaintiff prior to the release of orders amounting to R4 160 126.04 in the case of the defendant; and

(bb) to exercise due care in reviewing the age analysis of the defendant's account.

(ii) bribery/corruption in that they received and/or attempted to receive bribes from customers of the plaintiff, including a payment of R15 000.00 from Marcous as inducement to perform corrupt and /or dishonest acts;

(b) the plaintiff instituted disciplinary proceedings against Stone for:

(aa) falsification in that he denied when questioned having received the payment of R15 000.00 from Marcous;

(bb) fraud in that he intentionally and unlawfully misrepresented to the plaintiff that it should release products to the defendant, a cash customer in circumstances where he knew that payment had not been received and thereby caused a loss to the plaintiff in an amount of R5 440 542.97;

(cc) fraud in similar circumstances to the latter charge in relation to another customer Musiwa Trading CC.

Mr Stone was found guilty as charged *in absentia*. The evidence pointed to Mr Stone having received a payment of R15 000.00 from Marcous.[17] Ms Kotze was convicted

[16] Exhibit D103 to 105.

of gross negligence in relation to the orders that were delivered and in failing to review the age analysis.

THE DEFENDANT'S VERSION AND EVIDENCE

[13] The defendant's evidence is that on or about 7 July 2003 Mr Goosen of Exel Petroleum (Proprietary) Limited furnished a quotation[18] to Mr Reddy of the defendant for the exportation of petrol and diesel to Harare, Zimbabwe. This quotation which set out the conditions upon which products would be supplied provided:

> '(a) Payment in US Dollars / SA Rands will be upfront, before loading of road tankers will be authorised, by means of cash in advance…..'
>
> (b) 'The Rand/Dollar exchange rate applicable will be the Reuters closing rate of the previous day, prior to the transfer of funds. The Reuters exchange rate on day of loading will be applied to calculate your final invoice Rand value. A settlement reconciliation between yourself and Exel will be made depending in the change in the Reuters exchange rate between the date of initial transfer and the date of loading'.
>
> (c) 'If our quotation is successful, Exel will require the following:
>
> ---completion of application to open an export account with Exel….'
>
> (my underlining).

[14] Mr Reddy testified that the defendant was cautioned by Mr Goosen about the risks of trading in Zimbabwe. Mr Goosen recommended and he, Mr Reddy, accepted that the defendant should also trade with its proposed customers in Zimbabwe on a cash before delivery basis, being the basis on which the plaintiff would also trade with the defendant, in order to avoid any risks associated with such trade. Mr Reddy confirmed with Mr Goosen that the defendant would engage in trade with Exel on such basis. The defendant completed an application[19] to open an export account

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[17] Exhibit A1602.
[18] Exhibit D5 and 6.
[19] Exhibit D8 to 11.

with Exel. The application recorded that the method of payment foreshadowed thereby was 'cash before delivery'.

[15] The General Terms and Conditions[20] which regulated trade by Exel with its customers was communicated to the defendant under cover of a letter[21] dated 3 September 2003 and provided as follows:

> '1. Payment by the buyer will be cash upfront ….
>
> 6. This pro forma is subject to the terms and conditions of Exel's official quotation submitted to the buyer. The above terms and conditions of the Pro forma Invoice are in addition to those of the Quotation…..
>
> The Rand/Dollar exchange rate applicable will be the previous day, prior to the transfer of funds, Reuter's closing rate. On loading of product the Reuter's exchange at date of loading will be applied to calculate your final invoice Rand value. A settlement reconciliation between yourself and Exel will be made depending in the change in the exchange rate between date of initial transfer and date of loading….
>
> A faxed copy of the payment made into Exel's banking account must be forwarded to Exel. The order will only be processed once confirmation from Exel's bank (ABSA) is received by Exel'.

(my underlining).

[16] In a fax[22] dated 8 January 2004 the defendant was notified of the merger between Exel and the plaintiff and was advised that all transactions and operational issues would thereafter be handled by the plaintiff. The plaintiff's General Trading Terms and Conditions[23] were communicated to and accepted by the defendant. They were substantially the same terms as the Exel Trading Terms and Conditions and provided inter alia as follows:

> '1. Payment – upfront by Telegraphic Transfer or irrevocable Letter of Credit confirmed by ABSA Bank, or irrevocable Payment Guarantee from a first class international bank…

[20] Exhibit D26.
[21] Exhibit D25.
[22] Exhibit D32.
[23] Exhibit D33.

4. Payment must be for the full invoiced amount...

7. …A faxed copy of the payment made into our banking account must be forwarded to Sasol. The order will only be processed once confirmation from the bank is received by Sasol.'

(my underlining).

[17] On 2 April 2004 the defendant was required to complete an application[24] to open an export trading account with the plaintiff. The application provided as follows:

'9.4 No amendment to Sasol's credit terms shall be valid unless it is in writing and signed by Sasol…

9.5 If at any time the purchaser is in default of payment, Sasol shall, without prejudice to any other legal remedy have the right to defer further deliveries until payment…

9.10 I/we hereby unconditionally accept and confirm that all transactions and purchases or petroleum products will be liable to the terms and conditions of sale of Sasol Oil, of which a copy is included herewith'.

[18] The memorandum[25] dated 13 April 2004 which set out the outcome of the above application records as follows:

'APPLICATION FOR CREDIT TERMS: CASH BEFORE DELIVERY…

- Product will be supplied on a Cash Before Delivery basis.
  Should the customer wish to pay by cheque, the cheque must be cleared before delivery (please communicate to the customer)…

OUTCOME:

Approved on the condition that:

[24] Exhibit D40 to 44.
[25] Exhibit D46 and 47.

- The account must be managed strictly on a cash before delivery basis.
  Should the customer wish to pay by cheque, the cheque must be cleared before delivery

- Over deliveries must not be allowed.

- Payment by means of electronic transfer will be recommended."

(my underlining).

This result of the application was communicated to and accepted by the defendant.

[19] On 14 June 2004 the defendant completed a further export trading application updating its data, recording:

'CREDIT TERMS: STRICTLY CBD UNLESS OTHERWISE AGREED IN WRITING'

[20] Clauses 9.4, 9.5 and 9.10 of the previous application were replicated as clauses 8.4, 8.5 and 8.10 in the new application.

[21] The defendant mirrored the plaintiff's trading terms and conditions in its dealings and interactions with its customers.[26] The documentation is consistent with the evidence of Mr Reddy.

[22] From 8 May 2004 the plaintiff released some deliveries of petroleum products prior to the receipt of payment in respect thereof. This was the case in respect of all the disputed transactions reflected on annexure 'A'. No written agreement was concluded between the parties varying the payment terms requiring payment to be effected in cash and upfront and before delivery.

[23] The aforesaid terms were also consistent with the plaintiff's internal credit control policy. This policy provided as follows:

[26] Exhibit D55.

(a) Sales of petroleum products would be handled on a cash before delivery basis;[27]

(b) Only after the approval of a credit facility would the Supply and Trading Department be authorised and allowed to deliver any produce on credit or cash.[28]

(c) Credit control would be required to verify the receipt of payments and thereafter capture the payment on the customer's account.[29]

(d) Only thereafter would credit control be authorised to:[30]

(i) release the sales order;
(ii) print the released order;
(iii) print the export documents;
(iv) forward the sales order to the customer;
(v) receive the relevant customs documents;
(vi) remove the interface block from the sales order;
(vii) manually check the interface block;
(viii) contact the transporter to pick up the documents and collect the product.

(e) The relevant accounting entries would be created automatically on the plaintiff's SAP accounting system.

(f) No deliveries or part deliveries would be allowed before payment has been received.[31]

(g) No second delivery may be made to a customer before the previous delivery has been paid in full.[32]

[27] Exhibit E17: Credit Terms: paragraph 4.1.
[28] Exhibit E20: Handling and Approving of Credit Facilities: paragraph 8.1.
[29] Exhibit E7: Process flow: paragraphs 11 and 12.
[30] Exhibit E7: Process flow: paragraphs 17 to 21; Exhibit E37: Releases of Orders: paragraph 18.4; Exhibit E45: SAP paragraphs 26 to 34.
[31] Exhibit E2: Payment terms: C001.

(h) All payment terms or changes in payment terms may only be allowed in writing.[33]

(i) Credit control must compile weekly and monthly reports on outstanding debtors and unpaid items. The reports must be completed every Tuesday by 10h00 and distributed to certain identified personnel. All relevant information should be reported to the Risk and Financial Manager.[34]

(j) Outstanding debtors on the system must be followed up by credit control, distribution and traders as one team and must be sorted out on a daily basis and should not be carried forward from week to week.[35]

(k) Monthly reports will be compiled with the total outstanding amounts on the debtor's age analysis as of the last day of each month. No adjustments will be made to the figures and every debit and credit from 30 to 180 days must be explained in full under the reasons for the outstanding debtors.[36]

(l) The credit controller should print the age analysis on a daily basis.[37]

(m) If a debtor does not comply with the approved credit terms or exceeds its credit limits the debtor must be contacted telephonically to regularise the situation, a meeting should be arranged to ensure payment and if non compliance continues a decision must be taken to terminate future deliveries.[38]

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[32] Exhibit E3: A: Payment terms.
[33] Exhibit E3: A: Payment terms.
[34] Exhibit E4: F: Reports; Exhibit E24: Weekly and monthly reports: paragraph 4.
[35] Exhibit E4: F: Reports.
[36] Exhibit E4: F: Reports (2); Exhibit E42: Age Analysis: paragraph 22.
[37] Exhibit E44: Printing of Age Analysis: paragraph 25.
[38] Exhibit E21: Noncompliance with requirements: paragraph 9.3.

(n) Cash before delivery will only be accepted on the basis of an electronic transfer of funds, bank drafts or bill of exchange. No cheques or 'physical' cash will be accepted.[39]

(o) Invoices should be presented and faxed or emailed to the customer on a weekly basis.[40]

(p) Statements should be sent out to the customer on the 6th of each month.[41]

(q) The credit controller should undertake all reconciliations highlighting short and overpayments per invoice and per payment.[42]

(r) If an account is defaulted and needs to be blocked it is the duty of the credit controller to block it after contacting the business trader and customer before loading the block.[43]

[24] The defendant dealt with all of its export customers on a cash before delivery basis. It did not open accounts for any such customers and did not extend to them any credit facilities.

[25] Mr Reddy was aware of the significant risks that were involved in engaging in trade on any terms other than cash before delivery with customers located outside the boundaries of South Africa, and was not willing to expose the defendant to any risks in relation thereto.

[26] Mr Reddy steadfastly maintained that he was not aware of and would in any event not have sanctioned or countenanced the release of deliveries by the plaintiff prior to the receipt by the defendant of payment and payment to the plaintiff in respect thereof.

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[39] Exhibit E22: Cash before delivery: paragraph 11.
[40] Exhibit E31: Statements and invoices: paragraph 14.4.1.
[41] Exhibit E31: Statements and invoices: paragraph 14.4.2.
[42] Exhibit E38: Reconciliations: paragraphs 18.4.
[43] Exhibit E47: Procedure for blocking of accounts.

DISCUSSION

[27] The discussion of the merits shall firstly consider the claim represented by annexure ‘A’ to the particulars and thereafter consider that represented by annexure ‘B’ to the particulars of claim.

THE ANNEXURE ‘A’ CLAIM

[28] The plaintiff did not adduce evidence from any representative who would have concluded the individual transactions with whoever, but probably Marcous, representing the defendant in respect of the disputed transactions. The whereabouts of Ms Kotze, Mr Stone and Mr Goosen, all of whom dealt with the defendant most, if not at all material times, were known to the plaintiff. Yet they were not called to explain the conclusion of the separate agreements allegedly giving rise to the individual transactions detailed in annexure ‘A’. An adverse inference must be drawn from the failure to call these individuals.

[29] The plaintiff however endeavoured to overcome its difficulties in this regard by relying on the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, contending that the hearsay evidence emerging from the documents and Mr Klopper’s evidence in relation to the individual transactions was admissible in the interest of justice, having regard to:

(a) the nature of the proceedings, being civil as opposed to criminal proceedings (where the approach to admitting such evidence would be more circumspect);

(b) the nature of the evidence, involving as it does reliance on contemporaneous documents created in the plaintiff’s SAP computer system and there being no suggestion of any tampering with such documents;

(c) the purpose for which the evidence is tendered, namely to show that product was delivered;

(d) the probative value of the evidence, which it was submitted was strong because the documentation applied where there were admitted transactions and there was no rational basis to contend that they would not similarly be the basis for the disputed transaction on annexure 'A';

(e) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; and

(f) the lack of prejudice which the admission of the evidence might entail, it being argued that Mr Reddy of the defendant said that these deliveries in respect of the disputed items were made to Bravo Trading.

The plaintiff argued that If each witness who had personal knowledge of the facts had to be called the trial would have been an enormous waste of court time and money; the documents are contemporaneous, they are consistent and there is no reason to doubt there veracity. Accordingly, the submission was that Mr Klopper's evidence, together with the documentary evidence contained in the five volumes of exhibit 'A', as summarised in exhibit 'C', proved the placement of the orders, the sale of the product and the delivery thereof as well as the purchase price of the product sold and delivered.

[30] The relevant documents extracted and referred to by Mr Klopper certainly suggests with some probative force that:

(a) in respect of the disputed transactions, product was ordered by the defendant and delivered by the plaintiff without payment ever being received; and

(b) in a number of admitted transactions, delivery of the product at Natreff had occurred prior to payment being received by the plaintiff, without any complaint by the defendant. It is however not surprising that no complaints were raised, as generally one would not necessarily expect complaints to be raised while no problems are experienced. But the irresistible inference which the plaintiff wants to draw from the fact that there were some admitted transactions where delivery was made before payment was received without

any protestation, is that the disputed transactions on annexure 'A' were, on probability each individually concluded on the contractual basis that delivery could be effected without prior payment, or that this had become the contractual basis upon which the parties dealt with each other.

[31] As regards viewing each disputed transaction as a separate and distinct transaction, there was of course no direct evidence of the underlying agreement giving rise to the individual deliveries. All the documentation established was the processing of the deliveries giving rise to the individual transactions. Proof of delivery at the Natreff refinery, does not establish liability. It is only delivery with proof of the underlying terms of the agreement giving rise to a legal liability, which could impose legal liability. The mere fact that some deliveries were effected before payment was received, but with payment nevertheless subsequently being made by the defendant, does not *per se* establish liability for all deliveries, if the terms of the agreement were that delivery was only to be effected after payment had been made.

[32] The evidence certainly proves at the level of probability that a fraud was perpetrated by Marcous. In order to be successful, the fraud also required collusion within the operations of the plaintiff, or, at the very best for the plaintiff, a gross dereliction of duty on the part of some of its employees. It is undisputed that in releasing the relevant deliveries the plaintiff's staff acted contrary to their instructions and in particular contrary to the plaintiff's credit control policy.[44] It is overwhelmingly probable that the release of deliveries by the plaintiff prior to the receipt by it of payment in respect thereof in respect of the disputed transactions occurred by reason also of a fraud perpetrated on the plaintiff by one or more of its employees acting in concert with Marcous[45] There was a total failure on the part of the

[44] Exhibit E.

[45] The evidence reveals that Marcous received into his personal banking account the following payments from one of the defendant's customers and in particular Bravo Trading on the following dates - 27 May 2004: R87 000.00; 4 June 2004: R61 500.00; 29 June 2004: R20 000.00; 9 July 2004: R103 572.00; 28 July 2004: R40 000.00, giving a total of R312 072.00.
His credit card statements reflected substantial credits - 18 June 2004: R7 000.00; 21 June 2004: R10 000.00; 5 July 2004: R10 000.00; 5 July 2000: R10 000.00; 6 July 2004: R7 000.00; 12 July 2004: R15 000.00; 12 July 2004: R15 000.00; 13 July 2004: R100 000.00; 14 July 2004: R15 000.00; 16 July 2004: R15 000.00; 19 July 2004: R10 000.00; 5 August 2004: R15 000.00; 6 August 2004: R15 000.00; 7 August 2004: R15 000.00; 10 August 2004: R15 000.00, giving a total of R274 000.00.
His banking account reflected the following additional credits - 1 July 2004: R15 000.00; 13 July 2004: R10 000.00; 13 July 2004: R10 000.00; 24 July 2004: R4 100.00; 27 July 2004: R15 000.00; 30 July

plaintiff's employees including Kotze, who was at the material time the credit controller responsible for the defendant's account, to adhere to the requirements of the plaintiff's credit control policy. If the policy was properly adhered to no delivery of any product should have been undertaken by the plaintiff. Certainly no second delivery or any further deliveries should have been undertaken by the plaintiff. The relevant age analysis would have reflected the irregular arrear position in relation to the account on a daily, if not a weekly, if not a monthly basis and, at the very least, further deliveries should have been stopped.

[33] Puzzling also is the fact that although Mr Goosen telephoned Mr Reddy on 16 July 2004 and advised him that the defendant was indebted to the plaintiff in an amount of approximately R1.2 million arising from deliveries which had been released without payment, the plaintiff released some twenty two further deliveries of product without prior receipt of payment in respect thereof during the period 16 July 2004 until 10 August 2004. If this was due to the terms of the agreement(s) pursuant to which deliveries were made no longer requiring payment before deliveries were made, then I would have expected Mr Goosen to testify to that effect and explain the patent conflict with the express terms contained in the documentation relied upon by the defendant requiring payment up front before deliveries should be made. There was no such evidence. Without it being explained that Mr Goosen was not available, an inference to the contrary, namely that payment up front was no longer required, cannot simply be assumed. Again, an adverse inference is clearly justified on the facts as against the plaintiff.[46] The justification for such adverse inference must weigh against the plaintiff because its employees would have exclusive knowledge

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2004: R15 000.00; 31 July 2004: R23 280.37; 3 August 2004: R20 000.00; 3 August 2004: R15 000.00; 4 August 2004: R15 000.00, giving a total of R142 380.37.
During that time Marcous' income from his employment with the defendant generated an income of approximately R10 000.00 per month only and he had no known legitimate source from which he could have generated the above credits and payments totaling at least R728 452.37 over a period of approximately two (2) months.
The fact that he absconded on 6 August 2004 at a time when he was called upon to answer allegations pertaining to his dealings with the plaintiff and the defendant's customers lends credence to the conclusion that he was perpetrating a fraud and in collusion with an employee or employees of the plaintiff, possibly Stone and Kotze and possibly other employees of the plaintiff in

[46] Zeffert and Paizes *The South African Law of Evidence* 2ed (2009) page 135 to 137 and the cases cited therein; *Galante v Dickinson* 1950 (2) SA 460A at 465.

as to what transpired within the operations of the plaintiff in releasing deliveries without payment and contrary to the terms of the agreement.

[34] Based on the aforesaid, it cannot be said that the delivery of product before payment was received in respect of some, or even many of the admitted transactions, carries as the only reasonable inference that this was the agreement in relation to all recorded purported sales by the plaintiff to the defendant. Most importantly also, such a conclusion ignores the defendant's direct evidence altogether.

[35] The defendant's version, as also borne out by the contents of the documents it relies on as expressing the terms of the agreement between them pursuant to which the individual transactions were concluded, clearly referred to it being on the basis of cash before delivery. This was not just a fanciful term but one based on the very reality of risk when dealing with export fuel sales which, on the unchallenged evidence of Mr Reddy, was discussed between the parties and which they endeavoured to countenance by the terms of their agreement.

[36] As much as there were separate transactions giving rise to the individual deliveries, the probabilities are that these specific sales and deliveries occurred against the background of the agreement between the parties contended for by the defendant.

[37] That it was a material term of the parties' agreement that the plaintiff had to be paid in cash before delivery occurred is in my view also supported by the successful disciplinary measures taken by the plaintiff against its employees. There would be no basis for taking disciplinary proceedings against Ms Kotze for failing to ensure that payments were received by the plaintiff prior to the release of orders unless her conduct was contrary to the terms of the parties' agreement.

[38] The uncontradicted evidence of Mr Reddy was that it was a material express term of the agreement that deliveries of petroleum products would only be

undertaken on a cash before delivery basis and all the relevant documents and the evidence points to this conclusion.[47]

[39] The only questions remaining are, accepting that it was a term of the parties' agreement that delivery was not to occur before payment was made to the plaintiff, whether that term was varied or waived?

WAS THERE A VARIATION OF THE TERM REQUIRING CASH PAYMENT BEFORE DELIVERY

[40] The plaintiff's credit application and the credit control policy expressly stipulated that:

> 'no amendment to Sasol's terms shall be valid unless it is in writing and signed by Sasol'

[41] It is common cause that the plaintiff did not in writing amend the credit terms extended to the defendant. That disposes of any notion that there could be a valid variation of that term.

WAIVER

[42] In paragraph 9 of the plaintiff's particulars of claim the plaintiff pleaded as follows:[48]

> 'Payment of the purchase price of the petroleum product referred to in annexures "A" and "B" by the Defendant to the Plaintiff had to be effected in cash by no later than the date on which the invoice for the delivery of the petroleum product was issued. The Defendant failed to make the cash payment as aforesaid, although the Plaintiff delivered the petroleum product to the Defendant.'

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[47] Exhibit D5: The Exel Quotation.
Exhibit D10: The Exel Credit Application.
Exhibit D26: The Exel General Terms and Conditions.
Exhibit D33: The Sasol General Terms and Conditions.
Exhibit D43: The Sasol Credit Application .
Exhibit D46 to 47: The Sasol Appraisal of the Credit Application.
Exhibit D49: The Export Trading (Customer data) Application.
Exhibit: The Credit Control Policy.

[48] Pleadings: page 7: paragraph 9

[43] In a request for further particulars[49] the defendant requested the plaintiff to:

'(a) State whether such cash payments were in terms of the Plaintiff's trading terms and conditions. If so, a copy of such terms and conditions is requested.'

(b) 'State the basis underlying the plaintiff's alleged delivery of the petroleum products prior to receiving the cash payments'.

[44] The response[50] put up by the plaintiff is in the following terms:

'The Plaintiff and the Defendant deviated from the standard terms and conditions in that the Plaintiff did not receive payment for all the petroleum products before delivery. This term and condition was for the sole benefit of the Plaintiff. The Plaintiff, through its conduct, waived strict compliance therewith. The Defendant's managing director, Mr Reddy, knew from approximately May 2004 that the Plaintiff and Defendant deviated from this term and condition.'

[45] In argument Mr Pretorius SC for the plaintiff conceded that he would be hard pressed to argue that a term requiring payment before delivery was to be effected, if proved to have been a term of the agreement, did not endure for the benefit of both parties.[51] That concession was correctly made. The question remaining is whether there was a waiver of the benefits of such a term by the defendant.

[46] There was no evidence of an express waiver. At best for the plaintiff it would have to prove a waiver arising from the conduct of the parties.[52]

[47] Mr Reddy testified that when Mr Goosen indicated that Exel would supply petroleum products required by the defendant on a cash before delivery basis, Mr Goosen explained the reasons underlying such requirement. Apart from it apparently being a Reserve Bank requirement relating to cross border transactions, it was also a prudent business practice as there are plainly significant risks to trading with

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[49] Pleadings: page 130: Request for Further Particulars: paragraph 5.
[50] Pleadings: page 141: Further Particulars: paragraph 7.1.
[51] It was accordingly not open to the plaintiff to unilaterally waive compliance with the condition.
[52] *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E – 768E; *KPMG Chartered Accountants v Serurefin & Another* 2009 (4) SA 399 SCA at para 39; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at para 18.

customers in a foreign country. Mr Reddy appreciated the risks and agreed to the basis on which the plaintiff proposed that the parties would trade, as it would also suit the defendant's requirements. There would be no risks to both the plaintiff and the defendant if products were released by the plaintiff only after payments in respect thereof were received by the defendant and paid over to the plaintiff, or at the very least, the plaintiff being advised by the defendant that payment had been received. The term requiring payment in cash upfront prior to delivery served to benefit both the plaintiff and the defendant. It was the basis in terms whereof Exel initially and the plaintiff subsequently were willing to trade with the defendant. In the light of that background neither of the parties would at the level of probability readily waive the benefit of such a term.

[48] In its further particulars[53] the plaintiff contends:

> 'The Plaintiff requested payment in advance. The requests were addressed to Mr Marcous Baher. Mr Baher promised that payment would be made, and in certain instances payment was made. In addition the Plaintiff had surety for an amount of R500 000.00.'

[49] The security put up by the defendant, of course, did not relate to the petroleum export account at all but related to a separate lubricants account and a furnace oil account which was never activated. That part of the particulars furnished appear to be factually incorrect. There was no evidence of any agreement that the plaintiff would utilize and/or rely upon either of the two guarantees for the purposes of the export trading account. It was only *ex post facto* that they were applied to discharge the admitted indebtedness arising from five transaction on annexure 'A'. In any event, there was no evidence that the plaintiff relied upon the said guarantees in releasing any of the disputed deliveries. Nor was any evidence adduced by the plaintiff that Marcous made any promises to pay. In the absence of such evidence there was no basis for any alleged waiver of the term requiring payment before the release of the petroleum products.

[50] In the final analysis, at best for the plaintiff, its case for contending that there was a waiver is mainly or solely dependant on the evidence that in relation to some

[53] Pleadings: page 140: Further Particulars: paragraph 5.

deliveries for which liability was accepted, the defendant paid for the deliveries although, *ex facie* the applicable invoices, delivery had already occurred and thus preceded payment, that is without payment having been made up front in respect of such product before or at the time of delivery.

[51] Mr Reddy and Mrs Naidoo denied being aware that any product had been released prior to payment until after 16 July 2004 when Mr Goosen telephoned Mr Reddy about the account being in arrears. According to Mr Reddy and Mrs Naidoo, the defendant had entrusted the handling of the export account to Marcous. Marcous's authority was limited to transacting for the sale of products on a cash before delivery basis. Marcous was required to liaise with their customers regarding the defendant's requirements and payment. As and when the defendant required the delivery of petroleum products to its customers Mrs Naidoo was to ensure that payment had been received by the defendant from its customer, and if so, she and Marcous would approach Mr Reddy for authorisation to effect payment from the funds held to the plaintiff. The documents that were presented to Mr Reddy for such purpose would invariably include the relevant pro forma invoice which would set out the calculation undertaken by Marcous as to the profit which the defendant would realise from the transaction, checked by Mrs Naidoo, and her confirmation that the relevant funds had been received by the defendant. If these requirements were met, Mr Reddy would authorise the payments to the plaintiff.

[52] It was argued on behalf of the defendant that Mr Reddy did not and was not required to consider and/or study the documents underlying each transaction, that he accordingly did not become aware that certain of the deliveries in respect whereof payment was made had already been delivered, and that this only came to his attention and knowledge after Mr Goosen's telephone call of 16 July 2004.

[53] Only five of the twenty seven payments reflected on the PriceWaterhouseCoopers schedule[54] in respect of deliveries already made were effected subsequent to 8 May 2004 and prior to 16 July 2004. These payments were made on 25 May 2004, 30 June 2004 and 6 and 7 July 2004. At the level of

[54] Exhibit I.

probability, Mr Reddy in approving payments based on the underlying documents required to be placed before him, must have been aware from the contents of the tax invoices and sometimes other documents clearly indicating a delivery date which had already passed (one such invoice in fact being initialed by him), that these payments between May and 16 July 2004 were made subsequent to delivery and therefore contrary to the terms of the parties' agreement.

[54] But these few exceptions do not point to a consistent pattern of conduct, especially where such conduct would be in conflict with the express terms of the parties' agreement. Most importantly, these exceptions are not consistent only with an inference that there was now an implied variation by waiver of a term of the agreement which was to operate for the benefit of both parties.

[55] Payment having already been received by the defendant from its customers in respect of those transactions, it is unlikely that the fact that the deliveries were released by the plaintiff before payment was made to it would have been of any serious concern to Mr Reddy and the defendant.

[56] It was only after 16 July 2013 that it transpired that the plaintiff was seeking payment in respect of deliveries which were already made and in respect whereof the defendant had not received payment. It was these transactions which raised the concerns of the defendant and the plaintiff. That concern notwithstanding, the plaintiff permitted further deliveries without payment first having been received to still be made thereafter. This could only have been achieved by the fraudulent or negligent conduct of the plaintiff's employees in allowing deliveries to be effected without payment up front (for which the employees were held to account successfully) or allowed to happen if there had indeed been a waiver by the defendant of the term that payment was to be made to the plaintiff up front before any deliveries were made.

[57] There was no evidence from any witness on behalf of the plaintiff that the deliveries were released before payment because the plaintiff indeed viewed the term as varied or waived.

[58] But the aforesaid facts must also be measured against the relevant legal principles to establish whether, even in the absence of such evidence, there was indeed a waiver which would preclude the defendant from relying on the term of the agreement that deliveries were only to occur if payment had been made.

[59] The learned author Christie[55] has stated:

> 'Having gone to all the trouble to acquire contractual rights people are, in general, unlikely to give them up. There is therefore a presumption, even in some cases a strong one, against waiver. That means not only that the onus is upon the party asserting waiver to prove it, but that although, as in all civil cases, the onus may be discharged on a balance of probability, it is not easily discharged.'

[60] In *Hepner v Roodepoort-Maraisberg Town Council*[56] Steyn C J said:

> 'There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (*Smith v Momberg* (1895) 12 SC 295 at p 304; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at p 62) but in *Martin v de Kock* 1948 (2) SA 719 (AD) at p 733 this Court indicated that that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in *Laws v Rutherfurd* 1924 AD 261 at p 263, where Innes CJ says: "The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."
>
> This accords with the test applied in [*City of Cape Town v Kenny* 1934 AD 543] and was followed in *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (AD) at p 436 and *Linton v Corser* 1952 (3) SA 685 (AD) at p 695. (Cf. *Ellis and others v Laubscher* 1956 (4) SA 692 (AD) at p 702). In my opinion the test is more correctly stated in these cases.'

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[55] RH Christie & GB Bradfield *The Law of Contract in South Africa* 6ed (2011) at 457. See also *Road Accident Fund v Mothupi* 2000 (4) SA 38 SA at para 16 to 19.
[56] 1962 (4) SA 772 (A) at 778.

[61] Clear proof is required, especially of a tacit as opposed to an express waiver. As Corbett AJA remarked in *Borstlap v Spangenberg*:[57]

> 'Dit is herhaaldelik deur ons Howe beklemtoon dat duidelike bewys van 'n beweerde afstanddoening van regte geverg word, veral waar op 'n stilswyende afstanddoening staat gemaak word. Dit moet duidelik blyk dat die betrokke persoon opgetree het met behoorlike kennis van sy regte en dat sy optrede teenstrydig is met die voortbestaan van sodanige regte of met die bedoeling om hulle af te dwing.'

[62] In *Ex Parte Sussens*[58] it was held that:

> 'The necessity for a full knowledge of the law in the case of waiver follows from the principle that waiver is a form of contract, in which one party is taken deliberately to have surrendered his rights: there must therefore be proof of an intention so to surrender, which can only exist where there is knowledge both of the facts and the legal consequences thereof.'

[63] Christie notes that the necessity to prove knowledge of the rights allegedly waived before it can be said that the conduct in question amounts to waiver, applies equally to a case where the act of alleged waiver has been performed not by the party to the contract himself but by his agent. In *Pretorius v Greyling*[59] Price J said:

> 'It seems to me, however, that in a matter of waiver it cannot be said that the knowledge of the principal is that of the agent or that knowledge of the agent is that of the principal, because before there is a waiver there must be an unequivocal act done with full knowledge of all the relevant facts as well as of the rights which it is argued have been waived. This knowledge, to be effective in the case of waiver, must be the knowledge of a single person, not partly of one and partly of another, because no intention to waive can be inferred unless the particular person himself who commits the act which is said to constitute waiver knew of the relevant facts and intended to waive the rights of which he was fully aware.
>
> If in this case it is the agent who waived the rights then it must be proved that he himself knew all the relevant facts as well as the principal's legal rights and intended to waive those rights, and it must also be proved that he was authorised to waive his principal's right'.

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[57] 1974 (3) SA 695A at 704.
[58] 1941 TPD 15 at 20.
[59] 1947 (1) SA 171 (W) at 177.

[64] It was improbable that any person authorised to make a decision on behalf of the plaintiff in relation to the agreement would have authorised or sanctioned the delivery of petroleum products without payment being received by the plaintiff in respect thereof in cash, upfront and prior to delivery. This fact is also consistent with the disciplinary proceedings the plaintiff instituted against Ms Kotze

[65] When Mr Goosen initially contacted and subsequently wrote to the defendant, he recorded that exports were on strictly cash before delivery basis.[60] This was accepted by the defendant. Mr Goosen would not have scribed otherwise unless that was a term of the agreement.

[66] The management of the plaintiff did not proceed on the basis of any alleged waiver. In fact, they were totally unaware, at least for some time until probably even after Mr Goosen contacted Mr Reddy, that due to the conduct of some of its employees, the disputed deliveries were being released without payment first having been received. Were it not for such conduct and fraud, the disputed deliveries would not have been released.

[67] It was certainly not open to the plaintiff, even if the knowledge of its employees can be attributed to the plaintiff, to unilaterally waive a material term of the agreement fundamental thereto, which produced consequences which both parties were at pains to avoid.[61]

[68] The non-variation clause in the agreement further also precludes reliance on an alleged waiver. The credit application form signed by the defendant contained a non variation clause. In *Witon Chemical (Proprietary) Limited v Rebuff (Proprietary) Limited*[62] the court observed as follows:

> 'One must immediately distinguish between a waiver of accrued rights and a waiver to rely on certain contractual provisions. The defendant here relies on a waiver to

[60] Exhibit D57.
[61] *Hilsage investments (Pty) Ltd v National Exposition (Pty) Ltd and Others* 1974 (3) SA 346 (W) at 354F-G.
[62] [2002] (4) All SA 232 (T) at 239 – 240.

rely on certain contractual provisions. This amounts to a variation of the agreement which flies in the face of the non-variation clause.'

[69] In *Academy of Learning (Pty) Ltd v Hancock and Others*[63] Brand J (as he then was) stated as follows:

> 'In my view the subsequent oral agreements relied upon by respondents would constitute amendments or 'changes' to clause 5.4 of the agreement. (See, for example*, Van Tonder en 'n Ander v Van der Merwe en Andere* 1993 (2) SA 552 (W). In terms of clause 19 such oral amendments or changes are not binding on parties. It is a trite principle that a 'non-variation clause' such as clause 19 is in itself binding and enforceable. (See, for example, *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 766.) Consequently, the oral amendments contended for by respondents must be regarded as of no force and effect. However, even if the subsequent agreements must be regarded as constituting a waiver or an indulgence by applicant - as opposed to an amendment - clause 19 is wide enough to exclude oral waivers or indulgences as well. (*Compare Hillsage Investments (Pty) Ltd v E National Exposition (Pty) Ltd and Others* 1974 (3) SA 346 (W) at 354; *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 178.) Even in this event such oral waiver or indulgence would thus be equally unenforceable against applicant.'

[70] By parity of reasoning, the waiver contended for by the plaintiff would be unenforceable as against the defendant. It is highly improbable that the defendant would knowingly have countenanced the release of products by the plaintiff in circumstances where the defendant had not received payment in respect thereof from its customers, particularly having regard to the enormous risks of releasing products to foreign customers and/or consignees in respect of customers who did not have any accounts or credit facilities with the defendant.

[71] The evidence overwhelmingly points to the conclusion that a fraud was perpetrated within the operations of both the plaintiff and the defendant and it was for this reason only that the disputed deliveries were released. The plaintiff has failed to discharge the onus which rests upon it in relation to the waiver relied upon.

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[63] 2001 (1) SA 941 (C) at para 36.

[72] In the light of my aforesaid conclusions it becomes unnecessary to consider the further issues identified in paragraph [8](b) and (c) above and I refrain from doing so.

[73] The supplies of petroleum products for which the plaintiff seeks to hold the defendant liable were undertaken in breach of the term of the agreement requiring cash payment to precede delivery. In *Academy of Learning (Pty) Ltd v Hancock & Others*[64] Brand J (as he was then) stated as follows:

> 'As I see the legal position - and I do not understand the learned author Christie to differ fundamentally - a debtor can rely on the creditor's wrongful conduct as an excuse for his/her failure to perform if the facts of the case fall within the ambit of one or more of the following three broad categories:
>
> …
>
> (c) Where the creditor's conduct complained of by the debtor in itself constituted a breach of an express or an implied term of the agreement. This is the type of situation where the creditor expressly or impliedly bound him/herself 'to carry out the necessary preliminaries which rest upon him' (Christie (op cit at 550); see also, for example, *Design and Planning Services* (*supra* at 695C - E)) or to 'do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative'. (Christie (op cit at 550).) The latter example given by the learned author Christie must, however, be understood in the context of the quotation where it comes from, namely from the dictum by Cockburn CJ in the case of William Stirling the *Younger v Boyd & Maitland 5 Best & Smith* 840, which was referred to with approval by Searle JP in the case relied upon by Christie, namely *Truter v Hancke* 1923 CPD 43 at 50. This dictum by Cockburn CJ reads as follows:
>
> "If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he should do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative.'"

Christie[65] states as follows in this regard:

> 'A plaintiff who sues for payment must allege and prove that he has performed his obligations entitling him to payment, and no matter how positively the defendant

[64] 2001 (1) SA 941 (C) at [33].
[65] RH Christie & GB Bradfield *The Law of Contract in South Africa* 6ed (2011) at 516.

alleges that the plaintiff has not performed but is in breach, the onus remains on the plaintiff to prove he has performed'.

[74] Accordingly, the plaintiff has failed to prove that it has any enforceable contractual right for recovery of the purchase price of the disputed petroleum products reflected on annexure 'A'.

THE ANNEXURE 'B' CLAIM

[75] This claim is founded upon differences in the exchange rate between the date of payment by the defendant and the date of delivery of petroleum products admitted to be sold and delivered by the plaintiff to the defendant.

[76] The documents showed (and Mr Klopper accepted) that it was a material term of the agreement between the parties[66] that in the event of there being any change in the Reuters exchange rate between the date of payment and the date of loading, the plaintiff would furnish the defendant with a reconciliation reflecting the particulars of such difference and the additional amount if any payable in respect of each transaction for payment by the defendant.[67]

[77] Mr Reddy testified that the appropriate time for the defendant to be furnished with such reconciliation was prior to or immediately after the time of loading. This was the only viable means whereby the defendant would be in a position to recover from its customers the amount thereof. As far as Mr Reddy was aware credits or debits arising from each transaction were addressed in subsequent transactions concluded between the plaintiff and defendant. Clearly, such a reconciliation had by necessary implication to be furnished as soon as possible after the individual transactions were completed, or at least within a reasonable time of them being completed so as to enable the defendant in turn to recover any difference from its customers.

[66] Initially Exel and later the plaintiff.
[67] The transcript page 361 line 5 – 363 line 20.

[78] No such reconciliation as foreshadowed by the agreement was provided to the defendant. The first time the defendant became aware of the plaintiff's claim in this regard was when the action was instituted. That was not within a reasonable time.

[79] By that stage it was too late for the defendant to recover from its customers the amount that was payable by each of them.

[80] Due to the breach by the plaintiff of its obligations, it is not entitled to recover from the defendant the amount foreshadowed by annexure 'B'.[68]

[81] The plaintiff's claim founded upon annexure "B" accordingly also falls to be dismissed.

THE DEFENDANT'S COUNTERCLAIM

[82] It follows from the dismissal of the plaintiff's main claims that the defendant would be entitled to judgment against the plaintiff for payment of the amount of R61 076.00 plus interest thereon at the rate of 15,5% per annum with effect from 16 August 2004 to date of payment.

COSTS

[83] The defendant has been successful and there is no reason why it should not be entitled to its costs both in defending the plaintiff's claims against it and in pursuing its counterclaim. The costs of two counsel have been sought. Such costs

[68] In the alternative, the plaintiff submitted that by virtue of the relationship between the plaintiff and the defendant, the nature of the agreement that was being implemented and the risks associated with recovering from foreign and other customers any additional amounts payable by them, the plaintiff was obliged to communicate to the defendant particulars of any additional amounts payable by the defendant prior to loading or immediately thereafter. Accordingly it was submitted that having failed to do so, the plaintiff is estopped from pursuing any claim against the defendant for the amount claimed by the plaintiff. Although it is not strictly necessary to decide this issue, there is merit in the submissions that by failing to provide the defendant with reconciliations, the plaintiff effectively represented to the defendant that no amounts were payable by it owing to any fluctuations in the exchange rate, the defendant accordingly accepted that no such amounts were payable by it, the defendant accordingly did not seek to recover from its customers the amount of any shortfalls that were allegedly payable, and in doing so it accordingly acted to its prejudice, which would afford grounds for an estoppel.

are in my view justified in defending the plaintiff's claim. The counterclaim was integral to that defence. The amount of the counter claim is however only R61 076.00. In the exercise of my discretion I am disposed to allowing the costs in respect thereof on the high court scale in view of it being tied so closely to the plaintiff's claim, but to allow only the costs of one counsel.

ORDER

(a) The plaintiff's claims are dismissed with costs, such costs to include the costs of two counsel where two were employed, and all reserved costs; and

(b) Judgment is granted against the plaintiff in favour of the defendant for:

(i) Payment of the sum of R61 076.00;

(ii) Interest on the sum of R61 076.00 at the rate of 15,5% per annum from 16 August 2004 to date of payment;

(iii) Costs of suit, such costs limited to the costs of employing one counsel.

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