

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: A135/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 23 January 2025

E van der Schyff

In the matter between:

Mineral-Loy (Pty) Ltd

Appellant

and

Highveld Steel & Vanadium Corporation Limited

First Respondent

Transalloys (Pty) Ltd

Second Respondent

JUDGMENT

Van der Schyff J (Baqwa J *et* Mbongwe J concurring)

Introduction

[1] The appellant, Mineral-Loy (Pty) Ltd ('Mineral-Loy'), the plaintiff before the court *a quo*, noted an appeal against the judgment and order handed down by Basson J on

27 January 2020 in respect of the court's findings and order relating to claim 1.1 and claim 2. Basson J dismissed claim 1.1 and granted absolution from the instance in respect to claim 2. The appeal is with the leave of the court *a quo*.

- [2] The second respondent, Transalloys (Pty) Ltd ('Transalloys'), the second defendant before the court *a quo*, noted a cross-appeal against the costs order handed down on 27 January 2020 and the finding in the application for reconsideration of the costs order in terms of Rule 34(12) handed down on 30 October 2020. The appeal is with the leave of the court *a quo*.
- [3] Mineral-Loy and Transalloys sought an order reinstating the appeal and cross-appeal, respectively. The appeal and cross-appeal were subsequently reinstated. In this judgment, I deal first with the appeal and then the cross-appeal.

Background

- [4] The litigation between the parties has a protracted history. Basson J, succinctly set out the context of the litigation, which is dealt with herein only in broad strokes, as Basson J's main findings are stated below. Mineral-Loy instituted action against Highveld Steel and Vanadium Corporation Limited ('Highveld Steel') and Transalloys for damages alleged to have been suffered as a result of a breach of the parties' distribution agreement. Transalloys did not yet exist as a separate legal entity at the conclusion of the distribution agreement but was a trading division of Highveld Steel.
- [5] The distribution agreement essentially provided for Mineral-Loy's appointment as the sole local¹ distributor of m/c ferro-manganese ("the product"), produced by Highveld Steel's Transalloys division, subject to Highveld Steels' right to exclude certain customers to which Highveld Steel would supply directly ("excluded customers"). Mineral-Loy was not entitled to sell the product to excluded customers, while Highveld Steel was only allowed to sell the product to excluded customers. Mineral-Loy would, however, provide technical assistance to all parties who bought

¹ In South-Africa.

the product, irrespective of whether they bought the product from Mineral-Loy or Highveld Steel. The agreement was subsequently amended to include the product silico-manganese. M/c ferro-manganese and silico-manganese are collectively referred to herein as 'the product'.

- [6] On sales to customers that were not excluded customers, Mineral-Loy would determine its own mark-up and profit margin. On sales of the m/c ferro-manganese directly by Highveld Steel to its excluded customers, Highveld Steel would pay Mineral-Loy a commission of 2% on the invoice price of sales. With respect to sales of silico-manganese, Highveld Steel would pay Mineral-Loy a commission of 2% of the invoice price of sales to Ozz Industries and a 3% commission of the invoice price of sales to all other customers.

- [7] In 2007, Transalloys, now a separate legal entity, bought the business of the Transalloys division from Highveld Steel, with effect from 1 July 2007. Bertelsmann J held, among others, that by virtue of the Transalloys sale agreement between Highveld Steel and Transalloys, the distribution agreement concluded with Mineral-Loy was assigned to Transalloys.

- [8] Mineral-Loy essentially claimed that Transalloys had breached a sole distributorship agreement by selling product that only Mineral-Loy was entitled to sell in terms of the sole distributorship agreement directly to customers. This breach caused Mineral-Loy a loss of profit on such sales. Transalloys further failed to disclose sales to customers on the excluded list, to which Mineral-Loy was not entitled to sell product but was entitled to commission on such sales.

- [9] Mineral-Loy initially instituted a claim against the two defendants for the payment of two invoices, respectively, issued in August 2008 (R168 712.56) and September 2008 (R114 316.69) for commission. This claim subsequently comprised Mineral-Loy's claim 3 in the proceedings before Basson J. Mineral-Loy further claimed damages in the sum of R 195 403.76 in respect of loss of profit for a 12-month period as a result of Highveld Steel's repudiation of the agreement and its alleged failure to give reasonable notice of termination – the damages claim.

- [10] On 14 March 2013, Fabricius J granted an order in terms of which 27 issues were to be determined separately ('Fabricius order'). The most important issues identified related to the existence of the distribution agreement, its precise terms and conditions and whether the agreement was repudiated.
- [11] The matter then came before Bertelsmann J who found in favour of Mineral-Loy in respect of most of the issues listed in the Fabricius order. Bertelsmann J, amongst others, held that Mineral-Loy was appointed as Highveld Steel's sole local distributor and that Transalloys repudiated the distribution agreement with effect 30 November 2008.
- [12] Subsequent to this judgment, Mineral-Loy amended its particulars of claim relying on new breaches of the distribution agreement and increased the quantum of its claims. The amendment was prompted by the fact that it became apparent to Mineral-Loy, during the Bertelsmann trial, that Transalloys had sold products to customers who Mineral-Loy contends were not excluded customers in terms of the distribution agreement. Mineral-Loy contends that only it was entitled to sell products to customers who were not on the excluded list.
- [13] Claim 1.1 now related to a sale by Transalloys of its entire stockpile to an entity referred to as AMT (the AMT claim). Mineral-Loy also became aware that Transalloys had concluded sales with customers appearing on the excluded list without disclosing the values of those sales and the amount of commission that would have been payable to Mineral-Loy during the period July 2007 to 30 September 2008, and these sales form the basis of claim 2 (the undisclosed sales claim).
- [14] Transalloys, in turn, amended its plea, among others, pleading that the distribution agreement was varied in terms of a memorandum dated 21 December 2006 (variation defence), alternatively that Mineral-Loy waived its rights under the distribution agreement (waiver defence).

The court *a quo*'s judgment and order

[15] Basson J, in a well-reasoned judgment, reached the following main conclusions in the matter:

- i. The distribution agreement concluded between the parties meant that Mineral-Loy was appointed as the sole distributor to sell and deliver m/c ferromanganese and silico-manganese produced by Transalloys to customers, to the exclusion of Transalloys except for those customers whose names appear on the so-called exclusion list to whom Transalloys would continue to deliver directly (but subject to certain terms regarding commission payments on these transactions).
- ii. Although it is accepted that an excluded list existed, it is not possible to determine which customers ultimately were on the list at the time of the dispute.
- iii. Claim 1.1 has prescribed. The special plea in respect of this claim is therefor upheld (claim 1.2 has fallen away.)
- iv. Claim 2 has not prescribed. The special plea of prescription in respect of claim 2 is therefore dismissed.
- v. The defence of waiver is dismissed.
- vi. The defence of estoppel is dismissed.
- vii. Absolution of the instance is given in respect of claim 2 as it is not possible to quantify the damages suffered by Mineral-Loy.
- viii. Claim 3 succeeds and Transalloys is ordered to make the relevant payment with interest.'

[16] It is relevant to note that Basson J held that Mineral-Loy, among others, bore the onus to prove that it suffered damages and, if so, the quantification thereof. Transalloys, on the other hand, among others, bore the onus to prove that claims 1 and 2 prescribed.

[17] Transalloys did not lead any evidence. Transalloys pleaded that the facts giving rise to the debt claimed in claims 1.1 and 2 occurred on dates prior to October 2008, which is the date of the repudiation. The claims were, however, only instituted by an amendment to Mineral-Loy's particulars of claim on 24 July 2014.

- [18] Basson J explained that as far as claim 1.1 is concerned, Mineral-Loy claims that Transalloys breached the distribution agreement by making sales directly to AMT without Mineral-Loy (the sole distributor's) intervention. Evidence was led on behalf of Mineral-Loy, that it only became aware of the sale of the stockpile to AMT when the relevant sale agreement was provided to it pursuant to the delivery of Transalloys' discovery affidavit dated 16 March 2012. Transalloys disputed this and insisted that Mineral-Loy's attention was pertinently drawn to AMT's involvement in a letter dated 18 June 2008, in terms of which AMT advised that as of 1 July 2008, it would be solely responsible for the marketing of all Transalloys' products and that orders for the sale of Transalloys' products had to be placed with AMT.
- [19] Basson J considered the evidence presented by Mineral-Loy and was persuaded on a balance of probabilities that Mineral-Loy obtained constructive knowledge on 18 June 2008 that as of 1 July 2008, AMT would be responsible for the marketing and sale of all Transalloys' products. She also held that based on the letter received from AMT, there could be no doubt on the part of Mineral-Loy that another entity had been appointed to act as Transalloys' marketing arm to market 'all products produced at Transalloys.' Basson J concluded that Mineral-Loy should have been more diligent and should have exercised reasonable care in determining the relationship between Transalloys and AMT and how it affected its appointment as the sole distributor of Transalloys' product, particularly as it had been appointed sole distributor for many years. Basson J did not accept that it was reasonable for Mineral-Loy to assume that the AMT letter was merely relevant with respect to export transactions. She highlighted that Mineral-Loy's witness, Mr. Duff, conceded that, although he did not appreciate the meaning of this communication at the time, 'in hindsight, it may appear naïve, we trusted the process.'
- [20] Basson J found that Transalloys had made out a *prima facie* case of constructive knowledge on Mineral-Loy's part of the fact that AMT was appointed as Transalloys' marketing arm. Although the AMT letter did not explicitly refer to the sale of the stockpile to AMT, Basson J found that Mineral-Loy had the minimum facts available to institute action – It was aware that another entity was appointed to distribute *all* Transalloys' products in circumstances where they had been appointed to do so,

and had been appointed as such for many years. If there was some doubt, by acting reasonable and with diligence, Mineral-Loy could have picked up the phone or sent an e-mail to either Transalloys or AMT to establish the relationship between AMT and Transalloys. By the exercise of reasonable care, Mineral-Loy could have established that Transalloys had sold its stockpile to AMT. Instead of doing so, Mineral-Loy continued to buy product previously bought from Transalloys from AMT, and to pay invoices using AMT's banking account. As a result, Basson J was persuaded that Transalloys had discharged its onus in respect of the plea of prescription regarding claim 1.1 and dismissed the claim.

- [21] As far as claim 2, based on undisclosed sales is concerned, Basson J held that Transalloys failed to discharge its onus of proving that the claim had prescribed. In dealing with the merits of the claim, Basson J explained that Mineral-Loy's claim relates to sales to both customers – (i) on the excluded list but which were not disclosed in order for Mineral-Loy to prepare an invoice for commission on those sales; and in respect of customers (ii) not on the excluded list which meant that Transalloys were precluded from making direct sales to them under the terms of the distribution agreement.
- [22] The court *a quo* was unable to make a definitive finding on which customers' names appeared on the excluded list and that the calculation of any possible commission on sales to them, therefore, had to be done in light of this finding. Mineral-Loy submitted to the court *a quo*, as it did to this court, that if the court is unable to make a finding on which customers were on the excluded list, the court is entitled to award Mineral-Loy an amount of 2% commission on all sales made by Transalloys to all customers (except in respect of sales of silico-manganese to Arcelor-Mittal and Scaw on which, on either party's version, there was no commission payable). This, Mineral-Loy submitted, is on the basis that it was entitled to earn either a commission of 2% if customers were on the excluded list or gross profit of at least 2% if customers were not on the excluded list, and the sales to them should have been made by Mineral-Loy, less all commissions in fact paid to Mineral-Loy during the material period.

- [23] Basson J stated that the onus was on Mineral-Loy to persuade the court of the profit margin at the relevant time. This information falls exclusively within Mineral-Loy's knowledge. Mineral-Loy could not discover any invoices sent out to its customers from June 2008 to November 2008. These invoices, the court *a quo* held, would have gone a long way in proving Mineral-Loy's margin of sales. Basson J was acutely aware of the fact that the lack of documentary evidence proving Mineral-Loy's profit margin at the time, was not the end of the matter. She explained that 'the question must still be considered whether there is sufficient evidence before the court to make a determination as to the profit margin that could be applied to sales made by Mineral-Loy or, at least to make an educated guess.'
- [24] The court *a quo* identified several obstacles faced by Mineral-Loy in respect of proving its damage. The first was that Mineral-Loy's case in the pleadings hinged on the allegation that it was entitled to a certain percentage commission in respect of customers on the excluded list. Mineral-Loy, however, failed to prove who was on the excluded list and attempted to sidestep the problem by contending that it would, in any event, have been entitled to at least 2% commission irrespective of whether the customer is on the excluded list or not. Basson J held that Mineral-Loy's failure to prove an entitlement to commission in respect of customers on the excluded list did not, without more, entitle Mineral-Loy to compensation for lost profit. This was not the pleaded case and not the agreement between the parties.
- [25] The second obstacle faced by Mineral-Loy, Basson J held, was its inability to prove what the profit margin on sales was. Mineral-Loy was able to establish the price at which it purchased the product from Transalloys, but unable to present any evidence showing at which price it sold, or would have sold to its customers. Basson J held that she was not able, on the evidence as it stood, to 'resort to the rough and ready method of the proverbial educated guess (the fourth method) and to the best it can on such material as is placed before it', as set out in *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd and Others*.²

² 1997 (4) SA 399 (SCA) at 412F-H.

The main questions in the appeal

- [26] Having regard to Mineral-Loy's grounds of appeal, two primary questions need to be determined. The first is whether the court *a quo* was correct in finding that claim 1.1 prescribed. The second is whether the court *a quo* was correct in finding that Mineral-Loy failed in quantifying claim 2, and that the order to grant absolution was justified and correct.

Did claim 1.1 prescribe?

The parties' contentions

- [27] Mineral-Loy submits that the court *a quo*'s finding that claim 1.1 prescribed is incorrect on two scores. Mineral-Loy contends Transalloys did not allege and prove that Mineral-Loy was aware of the identity of the debtor (Transalloys), or when Mineral-Loy could and should have been aware of the identity of the debtor as required in section 12(3) of the Prescription Act 68 of 1969. This contention was not argued before the court *a quo*.
- [28] Mineral-Loy submits that the court *a quo* failed to consider that Transalloys had not pleaded nor proved that, at the material time, Mineral-Loy was aware of the identity of its debtor. The argument is that until the Bertelsmann judgment was delivered, Mineral-Loy could not have definitive knowledge of whether the true defendant was Highveld Steel or Transalloys since it had no knowledge of whether Transalloys had taken over Highveld Steel's obligations in terms of the distributorship agreement.
- [29] Mineral-Loy contends that the court *a quo*'s finding that the letter dated 18 June 2008 from AMT should have alerted it to ascertain the facts and to realise that Transalloys was breaching the agreement is incorrect. This finding, Mineral-Loy submits, is premised on an incorrect conclusion that the distribution agreement meant that Mineral-Loy was appointed as the exclusive marketing agent of the product. The correct finding would be that Mineral-Loy was only entitled to market and promote the products of Transalloys, as opposed to the products of other manufacturers. Mineral-Loy elaborated on this aspect, and for clarity's sake, it is

necessary to quote verbatim the submission as contained in the heads of argument

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'It is submitted that the correct interpretation of the distribution agreement was that the Plaintiff was not the exclusive marketing agent or promoter of the Second Defendant's product but rather that the Plaintiff would only market and promote the Second Defendant's products to the exclusion of products produced by any other producer of such products. In other words, there was no contractual prohibition on any other party from marketing or promoting Second Defendant's products. However, only the Plaintiff was entitled to sell and distribute those products and the Plaintiff was obliged to market and sell those products and not the products of any other manufacturer thereof.'

- [30] As a result, Mineral-Loy contends, the correct conclusion is that the AMT letter would not necessarily have alerted it since Transalloys was entitled to appoint other marketers or promoters of its goods as long as Mineral-Loy was still recognised as the sole distributor of the products to customers not on the excluded list.
- [31] Transalloys, in turn, submits that claim 1.1 is a new claim introduced when Mineral-Loy amended its pleading. Transalloys rely, among others, on the finding of the Supreme Court of Appeal in the appeal against the order and judgment handed down by Janse van Nieuwenhuizen J, in submitting that claim 1.1, the so-called AMT claim, is a 'fresh claim' that featured for the first time when Mineral-Loy amended its particulars of claim. I pause to note that I did not understand Mineral-Loy's argument before this court to be that claim 1.1 has its roots in the original particulars of claim and that the summons interrupted prescription.
- [32] As for Mineral-Loy's submission that Transalloys did not discharge the onus on it as far as prescription is concerned, Transalloys submits that Mineral-Loy was not precluded from suing because the debtor was unknown to it. When the action was instituted in 2010, Mineral-Loy sued two defendants, in the alternative, based on potentially different factual findings. Transalloys points out that Mineral-Loy did not raise the argument it raised on appeal before the court *a quo*, and it did not lead any

evidence to suggest that while it knew it had a claim, it elected not to sue because it was uncertain as to whom the true debtor was.

Discussion *re* prescription

[33] In considering this ground of appeal, it is necessary to have regard to the special plea filed by Transalloys and Mineral-Loy's subsequent replication. This plea was filed in the context of Mineral-Loy averring, among others, in its amended particulars of claim that Transalloys assumed Highveld Steel's rights and obligations in terms of the distribution agreement with effect from 1 July 2007, alternatively 1 April 2008, and repudiated the agreement in October 2008.

[34] Transalloys special plea reads as follows:

- '1. In paragraphs 22B.1 to 22B.15 of the particulars of claim, as amended, the plaintiff claims payments of amounts alleged to represent damages, suffered by the plaintiff on account of the defendant's breach of the distribution agreement.
2. The breaches are alleged to have occurred before the repudiation of the distribution agreement.
3. The repudiation of the distribution agreement is alleged to have occurred at the end of October 2008. The breaches, in the circumstances, occurred before October 2010.
4. The claims for damages (resulting from the alleged breaches of the distribution agreement) were first instituted:
 - 4.1 by the amendment of the plaintiff's particulars of claim;
 - 4.2 on or about 24 July 2014.
5. 24 July 2014 is more than three years after the date(s):
 - 5.1 on which the alleged breaches have occurred; and
 - 5.2 on which the plaintiff;
 - 5.2.1 had become aware of the alleged breaches; and

5.2.2 by exercising reasonable care, could and would have become aware of the alleged breaches of the distribution agreement.

6. In the circumstances, the plaintiff's claims for payment of R15 071.04 and R5 093 663.00 have prescribed.'

- [35] Mineral-Loy did not address the issue of prescription in its replication to Transalloys' final amended plea. Since the final amendment of the plea effectively amended the plea and not the special plea, I had regard to Mineral-Loy's replication to the special plea dated 31 March 2015. Mineral-Loy, in replication, took issue with Transalloys' averment that it could and would have become aware of alleged breaches of the distribution agreement by exercising reasonable care. Mineral-Loy did not claim that it was unaware of the identity of the debtor at the time. Mineral-Loy averred that it was not by the exercise of reasonable care able to establish the facts from which the debt arose in respect of the claims that Transalloys pleaded to have prescribed.
- [36] Section 12(3) of the 1969 Prescription Act provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if it could have been acquired by the exercise of reasonable care. Section 12(3) is aimed at preventing prescription from running against a creditor who, by reason of the lack of knowledge and the inability to acquire it by the exercise of reasonable care, is unable to institute action.³
- [37] It is trite that the onus rests on a defendant raising prescription as a special plea to establish the defence. Such a defendant will not succeed with its special plea unless it can prove the date of the inception and the date of the completion of the period of prescription. If regard is had to the special plea, the date of inception of prescription was before October 2008, when the repudiation of the agreement occurred. In the event that the plaintiff disputed the inception date as the end of October 2008, as specifically pleaded, it should have made the necessary averment in replication. This

³ M. Loubser *Extinctive Prescription*, 2nd ed, JUTA 191.

would, however, not have resulted in a shift of the onus of proving the defence of prescription. The onus remained on Transalloys at all time.

- [38] Knowledge of the debtor's identity for practical purposes means sufficient information for a process-server to identify the debtor by name and address.⁴ Mineral-Loy was not ignorant of the identity of the debtor. It had the required knowledge, as is evinced by the fact that it instituted action against Transalloys in June 2010, well in advance of the probable prescription date of any claim that could have arisen against Transalloys since 1 July 2007. According to the averments contained already in the original particulars of the claim, Mineral-Loy held the view that Transalloys assumed the rights and obligations of Highveld Steel from 1 July 2007, alternatively 1 April 2008, and that it was Transalloys that repudiated the distribution agreement. Mineral-Loy accepted Transalloys' repudiation of the distribution agreement and cancelled the agreement. On the averments in the particulars of claim and the evidence it is evident that knowledge of Transalloys' identity as a debtor was never an issue for Mineral-Loy.
- [39] The complaint that no witnesses were called to testify before the court *a quo* on Transalloys' behalf, is neither here nor there. A party can discharge its burden of proof by relying on the evidence presented by the other party's witnesses and evidence elicited under cross-examination, as a court considered the full matrix of the evidence before it.
- [40] In the factual context of this matter, the special plea contained the requisite averments to establish the defence that claim 1.1 has prescribed. Considering the plaintiff's witnesses' evidence presented in chief and elicited under cross-examination, Transalloys discharged itself of its burden of proof in relation to the special plea of prescription raised in defence to claim 1.1. Despite this point not being raised or argued before the court *a quo*, this court does not find any merit therein.

⁴ See *Gericke, supra*, 830A-B.

- [41] As indicated above, Mineral-Loy additionally took issue with the court *a quo*'s finding that the receipt of the letter from AMT dated 18 June 2008 (the AMT letter) should have altered it to ascertain the facts and realise that Transalloys was breaching the agreement. The submission raised in this regard that the court *a quo* should have differentiated between the 'marketing and promotion' and 'selling and distributing' of the products concerned is, in the factual matrix of this matter, superficial. In the factual context of the relationship between Mineral-Loy and Highveld Steel and Transalloys respectively, it would have been prudent and amounted to the exercise of reasonable care for Mineral-Loy to have investigated when it received the AMT letter. The evidence on record indicates that Mineral-Loy purchased products from AMT on 9 July 2008, 4 August 2008, 11 September 2008, 9 October 2008, and 21 February 2013.⁵ The evidence does not substantiate the submission that Mineral-Loy was under the impression that AMT would only market and promote Transalloys' product and that Mineral-Loy would remain the sole distributor and seller of the product. I cannot fault the court *a quo*'s findings in this regard. The appeal against the court *a quo*'s judgment and order in relation to claim 1.1 stands to be dismissed.

Was the court *a quo* correct in finding that Mineral-Loy had not proved its damages in claim 2 and therefore granted absolution from the instance regarding claim 2?

The parties' contentions

- [42] Mineral-Loy submits that the court *a quo* erred in not taking into account that it was claiming damages and not enforcing specific performance of the agreement, since the latter would lead to a different measure and quantification of damages. It is again necessary to repeat Mineral-Loy's submission verbatim:

'As such, the Plaintiff, by seeking in the alternative, 2% across the board, was not seeking an award of loss of profit of 2% *per se* across the board, but was seeking damages calculated on the basis of at least 2% across the board, irrespective of whether such was loss of commission or loss of profit. This is so since there was clear

⁵ Appeal Record, Volume 17, 000-1784 – 000-1791.

undisputed evidence that the least commission that the Plaintiff would earn on the undisclosed sales, would have been 2% irrespective of the type of product.'

- [43] Mineral-Loy, among others, submits that the court *a quo* erred in not placing sufficient weight on the fact that Mr. Duff testified that all records of sales and mark-up were lost due to a crash of Mineral-Loy's IT systems. It was impossible for Mineral-Loy to present relevant documentary evidence. The submission was also made that the court *a quo* erred in accepting Mr. Greyling's version as opposed to Mr. Marais' version in relation to the reasonable profit margin or mark-up on the price of the product. Mineral-Loy called both witnesses, Mr. Greyling as the expert in relation to the computation of damages and Mr. Marais as the expert in relation to the industry and what a reasonable profit margin or mark-up would have been in the industry at that time on that product.
- [44] Mineral-Loy's submission, in summary, is that it is clear from the undisputed evidence that Mineral-Loy would charge a profit margin of at least 2% or that it would earn commission of at least 2% on sales of either m/c ferro-manganese or silico-manganese by Transalloys, excluding sales to Arcelor-Mittal and SCAW for which no commission was payable. In addition, the court *a quo* should have postponed the finding on the exact amount, made findings on the various variables, and requested the parties' respective expert witnesses to agree to the exact quantification based on the findings of the variables.
- [45] Transalloys, in short, submits that Mineral-Loy's approach of a claim based on 2% mark-up across the board, is impermissible, having regard to its pleaded case.

Discussion *re* quantification

- [46] It is trite that a plaintiff should be able to quantify its damages when instituting a damages claim. The onus is on the plaintiff to lead evidence of the loss suffered by it. *In casu*, the court *a quo* accepted that Mineral-Loy suffered damages, but was unable to quantify the damages.

- [47] It is equally well established that in some types of cases, damages are difficult to estimate, and the fact that they cannot be assessed with precision or certainty will not relieve the wrongdoer of the necessity of paying damages.⁶ In *Hershman v Shapiro & Co*⁷ the court explained:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.'

- [48] Mineral-Loy submits that it provided the best evidence that is available and that the court a quo erred in finding that it did not provide sufficient evidence to quantify the damages it suffered.
- [49] The issue of the quantification of damages in this matter, cannot be considered in a vacuum. It must be considered alongside the averments made by Mineral-Loy in its particulars of claim. This is so, because in the South African legal system, the purpose of the pleadings is to:

'[B]ring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.'⁸

⁶ *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T); *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) 969H-970H.

⁷ 1926 TPD 367 at 379.

⁸ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) 107C-H.

- [50] In claim 2, Mineral-Loy averred in its amended particulars of claim that Transalloys breached the distribution agreement between itself and Mineral-Loy, by selling and distributing m/c ferro-manganese and/or silico-manganese to customers without disclosing such sales to Mineral-Loy. Mineral-Loy was thus unable to either earn a profit of 5% on such sales or commission, depending on whether the customers were on the excluded list or not. On the evidence, Mineral-Loy was not able to prove definitively which customer's names appeared on the excluded list. As a result, it is not possible to determine whether Mineral-Loy was entitled to commission (2% or 3%) or to 5% loss of profit in respect of the respective customers.
- [51] Mineral-Loy submitted to Basson J, as it did to this court, that it was entitled to earn either a commission of at least 2% (if the customers were on the excluded list) or gross profit of at least 2% (if customers were not on the excluded list and sales should have been made by Mineral-Loy), less all the commission paid to Mineral-Loy during the material period.
- [52] Mineral-Loy was, however, unable to persuade the court what the relevant profit margin was at the relevant time. Mineral-Loy was unable to provide any invoices sent out to its customers. Mineral-Loy explained that it lost all documentary proof. However, Mineral-Loy was not precluded from leading the evidence of its alleged customers. Basson J highlighted the obstacles faced by Mineral-Loy in quantifying its damages, and this court cannot disagree with the learned judge. Different factors come into play when profit, or loss of profit, is determined than when commission is calculated. Mineral-Loy failed in proving its profit margin, because it did not lead any evidence showing at which prices it sold or would have sold the products to its customers. The court cannot discount or ignore Mr. Greyling's evidence under cross-examination that the annual financial statements 'actually tells us nothing' and:

'M Lady, I think the point Mr. Daniels is making and Mr. Kairinos put to me on Monday, is that the problem with Mineral-Loy financials is that they have a globular turnover for the year from all their products.
Ja.

And the gross profit that is effected in the annual financial statements similarly is as conglomeration of the gross profit margin on all their products. So what Mr Daniels is saying I cannot say, **and he is absolutely right**, whether the marginal Mineral-Loy was 0.26 or 20.6. I think that point is, **I concede that.** ...' [My emphasis]

Mr. Greyling also conceded that the evidence presented by Mineral-Loy's other witness, Mr. Marais, 'is probably also something of a meaningless bit of information for purposes of looking at the margin.' He stated later-

'I do not know about a guestimate. The point is we are not basing the opinion on margin **on anything resembling fact**. I accept that. That is a fair comment.' [My emphasis].

- [53] In failing to provide any factual evidence relating to what the actual mark-up or profit was on the product sold, in conjunction with its failure to prove which customers were on the excluded list, Mineral-Loy failed to provide a justifiable base for the quantification of its damage. Mineral Loy's appeal against the judgment and order relating to claim 2 stands to be dismissed.

The cross-appeal relating to the costs order and the order granted on the reconsideration of the costs

- [54] On 27 January 2020, Basson J ordered Transalloys to pay Mineral-Loy's costs, such costs to include the costs of two counsel. Transalloys applied for a reconsideration of the costs order as provided in rule 34(12) of the Uniform Rules of Court. Transalloys was granted leave to appeal the costs order in the main judgment and the order for reconsideration.
- [55] In this cross-appeal, there two primary questions that need to be considered. The first is whether Basson J's view that Mineral-Loy was 'substantially successful' in the litigation and is thus entitled to costs should be overturned, and the second is whether the notices of tenders complied with the prescripts of rule 34.

- [56] It is trite that a court has a wide and unfettered discretion in awarding costs. Having considered the ambit of issues the court *a quo* was called on to adjudicate and the respective orders granted, the court *a quo* cannot be faulted for its view that Mineral-Loy was substantially successful and is entitled to its costs. Mineral-Loy was successful in claim three, whilst the defendant's waiver- and estoppel defences were dismissed.
- [57] The provisions of subrule (5) are peremptory – 'Notice of any offer or tender in terms of this rule **shall** be given to all parties to the action and **shall** state...' [My emphasis]. A litigant who wants to benefit from the provisions of the rule must follow the prescripts of the rule.
- [58] It is clear from a reading of the relevant notices that neither complies with the prescripts of rule 34(5). Basson J pointed out in the judgment dealing with the application for reconsideration of costs that the notices do not comply with the provisions of rule 34(5) in that they do not state-
- i. Whether the tenders were accompanied by an offer to pay all or only part of the plaintiff's costs;
 - ii. Whether the tenders were made by way of settlement of both claim and costs or of the claim only;
 - iii. Whether Transalloys disclaimed liability for payment of costs or for part thereof, and if so, what were the reasons for such disclaimer?
- [59] The rule 34 notice filed by Transalloys dated 10 January 2019 states that 'no tender is made to costs'. This notice does not fall in the same category as notices referred to in rule 34(9). Rule 34(9) provides for the scenario where the offer or tender does not state that it is in satisfaction of a plaintiff's claim and costs. In such a case the rule provides that the party to whom the offer or tender is made may apply to the court, after notice, for an order for costs. Where the tender disclaims liability for the payment of costs, as was clearly the intention with the notice dated 10 January 2019, rule 34(5) requires that the reasons for such disclaimer shall be given and 'the action may then be set down on the question of costs alone.'

[60] Where a defendant fails to provide its reasons for disclaiming liability for costs by excluding costs from the tendered amount and specifically states that no tender is made to costs, a plaintiff who is of the view that it is entitled to its costs but is not privy to the defendant's reason for not accepting liability for the costs, is basically forced to proceed with the action for the court to make an order regarding costs.⁹

[61] I agree with Basson J's finding that because the rule 34(5) notice did not meet the prescripts of the rule, Mineral-Loy cannot be prejudiced for not acting on the tender, and Transalloys cannot rely on the benefits provided by rule 34. In the result, the cross-appeal stands to be dismissed.

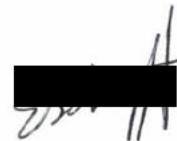
Costs

[62] In both the appeal and cross-appeal, the unsuccessful party stands to carry the costs on scale C. The issues raised in the appeal and cross-appeal were important and justified the appointment of senior counsel.

ORDER

In the result, the following order is granted:

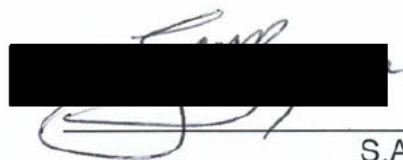
1. The appeal and cross-appeal are dismissed.
2. The appellant is ordered to pay the costs relating to the appeal, which costs include the costs of two counsel on scale C;
3. The second respondent is ordered to pay the costs relating to the cross-appeal, which costs include the costs of two counsel on scale C.



E. van der Schyff
Judge of the High Court

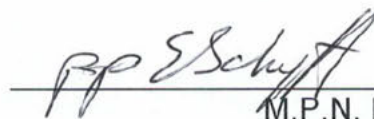
⁹ See *Erasmus v Viljoen* 1992 (1) SA 893 (W) at 895J-896A.

I agree and it is so ordered.



S.A.M. Baqwa
Judge of the High Court

I agree



M.P.N. Mbongwe
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the appellant:

Adv. G. Kairinos SC

With:

Adv. R. Pottas

Instructed by:

Duff & Associates Attorneys & Notaries

For the second respondent:

Adv. A.J. Daniels SC

With:

Adv. C.T. Vetter

Instructed by:

Tabacks Inc.

Date of the hearing:

23 October 2024

Date of judgment:

23 January 2025