Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**
Circulate to Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION KIMBERLEY)

Case Number: 375/2018

In the matter between:

NTEENE ENTERPRISE (PTY) LTD Plaintiff

and

THE TRUSTEES FOR THE TIME BEING OF THE GERBRAND VAN DER WALT TRUST First Defendant

GERBRAND VAN DER WALT N.O. Second Defendant

Neutral citation: *Nteene Enterprise (Pty) Ltd v The Trustees for the time being of the Gerbrand Van Der Walt Trust and Another* (Case Number: 375/2018).

Coram: Ramaepadi AJ

Heard: 08 October 2024

Delivered: 08 August 2025

JUDGMENT

RAMAEPADI AJ

[1] This case concerns the proper interpretation of a commercial contract concluded between the plaintiff ("Nteene Enterprise (Pty) Ltd") on the one hand, and the first and second defendants on the other hand ("The Trustees for the time being of the Gerbrand Van der Walt Trust ["the Trust"] and Gerbrand Van der Walt N.O., as first and second defendants, respectively).

[2] The terms of the contract are recorded in two e-mails dated 24 October 2016. The first is the e-mail by Serekeu Charles Nteene ("Nteene junior") on behalf of the plaintiff and was transmitted to the defendants on 24 October 2016 at 12:55 pm for the attention of Pierre Haggard. This e-mail was attached to the plaintiff's particulars of claim as annexure "D". The second is the e-mail by Pierre Haggard on behalf of the defendants and was transmitted to the plaintiff on 24 October 2016 for the attention of Nteene junior. This e-mail was attached to the plaintiff's particulars of claim as annexure "C". It was common cause at the hearing of this matter that annexure "D" was sent at around 14:00 pm on 24 October 2016.

[3] According to the particulars of claim, the terms of the contract were reduced to writing and recorded in the two e-mails (annexures "C" and "D").

[4] In annexure "D", Nteene junior wrote to Haggard:

> "Good day. In respect to a final agreement, I would like to follow up on the meeting that took place at Ladybrand on the 24th October 2016. This is between DG Logistics and Nteene Enterprise.
>
> Per terms, DG Logistics will sub-contract Nteene Enterprise. Nteene Enterprise would supply a total of three (3) Volvo FH440 6*4 T/T trucks to be operated under DG Logistics. As the contractor DG Logistics would provide loads and the daily running of the trucks. Diesel will be supplied by the contractor (DG Logistics).

Nteene Enterprise will be responsible for all issues pertaining to the drivers. It would also be responsible for the service and any maintenance needed on the vehicles." (My underlining)

[5] In annexure "C", Haggard wrote to the plaintiff:

"Hi Charles/ Moroke
Owner is Gerbrand van der Walt and is our Head Office in Kimberley.

1. DG Carriers have its own fleet with 14 trucks and 6 sub-contractors, conducting Business for more than 5 years.

2. We do loads across SA and Lesotho. As mentioned this morning we will utilize you (sic) trucks on the Cape route as it is most profitable and conducive op drop sides trailers.

3. Nteene Enterprises to appoint suitable drivers as it is of cardinal importance to the success of the Business. We will work directly with the drivers on a daily basis and any problems will be referred to you.

4. DG Carriers will supply all loads at a profit margin of R10. Per ton.

5. We will supply diesel and tyres.

6. Invoices to be done by Nteene Enterprises. All supporting documents, Pod's weighbridge slips and loadcons must accompany invoices. We will assist in this regard. For every load a loadcon will be mailed directly to you.

7. Cut-off date for invoices is the 25 of each month with payment not later than the 7th of the month following thereafter. For example: Cut-off date 25 November 2016 and payment then at 7 January 2017.

8. Working capital to cover for expenses until first payment are received. All expenses be covered by Nteene Enterprices (sic) except for diesel and tyres.

9. Goods in Transit insurance for R500 000 be provided before work commence.

10. Monthly reconciliation will be provided ….

We trust that you find above in order and please let us know if there are any questions or proposals . . .".

[6] The contract and the terms thereof as contained in annexures "C" and "D" are not seriously disputed by the parties. What is in dispute between the parties is the meaning of the contract with particular reference to the party responsible for the expenses for diesel and tyres.

[6.1] The plaintiff contends that in terms of the contract, the Trust is responsible for the expenses related to the supply of diesel and tyres.

[6.2] The defendants contend differently. They contend that in terms of the contract, the plaintiff was responsible for the expenses related to the supply of diesel and tyres.

COMMON CAUSE FACTS

[7] At the commencement of the trial, the parties reached agreement on the following matters, which by agreement, were reduced to writing and tendered into evidence as Exhibit "B":

[7.1] The plaintiff has rendered invoices in the total amount of R916, 359.90 and which invoices are not in dispute;

[7.2] The first defendant owes to the plaintiff the further amount of R40, 284.00 in respect of "profit share" overcharged by the first defendant;

[7.3] The total amount of the first defendant's liability to the plaintiff, subject to the court's finding in respect of the contractual terms and before any payment has been discounted, amounts to the sum of R956, 643.90;

[7.4] Invoices with numbers 29, 45, 47, 83, 84, 88 and 90 remain disputed.

[8] During evidence, the following matters also became common cause between the parties:

[8.1] The first defendant paid an amount of R38, 818.82 to the plaintiff, which amount should be accounted for in any calculation of what, if any, is due to the plaintiff;

[8.2] The correctness of the amounts "debited" against the plaintiff's account in respect of diesel, tyres and sundry expenses and charges;

[8.3] The total amount of expenses incurred for and on behalf of the plaintiff, as well as charges in respect of services rendered in connection with the transportation conducted by the plaintiff, amounts to a total of R895, 231.69.

THE ISSUES IN THE CASE

[9] There are two main issues for determination in this case. The first is the interpretative one. The second is the decision on a series of disputed invoices.

[10] The interpretative issue presented in this case turns on a fine, narrow point. It turns on the proper interpretation of the contract and, in particular, clauses 5 and 8 of exhibit "C30" which has also been attached to the plaintiff's particulars of claim as annexure "C", and the relevant provisions of annexure "D".

[11] The proper approach to the interpretation of written instruments was explained by the Supreme Court of Appeal in *Endumeni*,[1] as follows:

> ". . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as

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[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA).

reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The '*inevitable point of departure is the language of the provision itself*', *read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*"[2]

[12] One of the lessons that comes out of the Supreme Court of Appeal in *Endumeni* is that, from the outset, one must consider the context and the language together, with neither predominating over the other.[3] This is what was described by the Constitutional Court in *Chisuse*[4] as the 'unitary exercise', meaning that interpretation is to be approached holistically, simultaneously considering the text, context and purpose.

[13] The implication of *Endumeni* is that in an interpretative dispute, evidence as to the context and purpose of the relevant contractual provisions will almost always be admissible. As explained by the Constitutional Court in *University of Johannesburg*, that evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded.[5] That is consistent with what the Supreme Court of Appeal had earlier said in *Novartis*.[6] In that case , the SCA said:

> ". . . This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it . . . A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."[7]

[14] Whilst evidence of context and purpose is generally admissible to shed light on the intention of the parties, where the contract has been reduced to writing, evidence which attempts to amend, add to or vary the terms of the written contract is excluded by the

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[2] *Ibid* para 18.
[3] *Endumeni* para 19; see also *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 65. *("University of Johannesburg")*.
[4] *Chisuse and Others v Director-General, Department of Home Affairs and Another* (CCT 155/19) [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 52.
[5] *University of Johannesburg,* above fn 3, para 67.
[6] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA).
[7] *Ibid* paras 27 – 28.

parol evidence rule. That is because where the contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction. In that event, extrinsic evidence of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the terms of the written contract is excluded by the parol evidence rule.

[15] The parol evidence or integration rule, as it is generally referred to, was explained by the then Appellate Division more than four decades ago in *Johnston v Leal*,[8] as follows:

> "In many instances *recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by the so-called "parol evidence rule" or, more correctly, that branch of the "rule" which prescribes that, subject to certain qualifications . . . , when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering , adding to or varying the written contract.* The extrinsic evidence is excluded because it relates to matters which, by reason of the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant."[9]

[16] Whilst the parol evidence rule is still firmly part of our law, in *University of Johannesburg*,[10] the Constitutional Court preferred a rather expansive approach to the admissibility of extrinsic evidence of context and purpose. The Constitutional Court held the view that whether or not the words used in the contract are ambiguous, extrinsic evidence of context and purpose should be admissible in order to determine what the parties to the contract intended.[11] In that case – *University of Johannesburg*, the Constitutional Court made clear that the expansive approach to the admissibility of extrinsic evidence did not mean that extrinsic evidence should always be admissible because a court's recourse to extrinsic evidence is not limitless. The Constitutional Court remarked as follows:

> "Let me clarify that what I say here does not mean that extrinsic evidence is *always* admissible. It is true that a court's recourse to extrinsic evidence is not limitless because 'interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not

[8] 1980 (3) SA 927 (A).
[9] *Ibid* at 938C-F.
[10] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 68.
[11] *Ibid* paras 66-67.

for the witnesses'. It is also true that 'to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible. I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight". [12]

[17] It is important to highlight that even though in *University of Johannesburg,* the Constitutional Court leaned in favour of an expansive approach to the admissibility of extrinsic evidence of context and purpose, the court also made clear that the admissibility of such evidence is not limitless. It may be limited, for instance, by evidence which seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement. The latter is precisely the type of evidence that is precluded under the parol evidence rule.

[18] In an attempt to reconcile the generous admissibility of extrinsic evidence of context and purpose with the limitations imposed by the parol evidence rule, the Constitutional Court in *University of Johannesburg*, drew the distinction between extrinsic evidence that attempts to vary, contradict or add to the terms of the contract on the one hand, with extrinsic evidence of context on the other hand. The Court observed as follows:

"The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. *It does not prevent contextual evidence from being adduced.* The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the term of the agreement."[13]

[19] In *Capitec,*[14] the Supreme Court of Appeal made the following observations about the implications of the Constitutional Court judgment in *University of Johannesburg*:

[12] *Ibid* para 68.
[13] *Ibid* para 92.
[14] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) paras 47-49.

"First, it is inevitable that extrinsic evidence that one litigant contends to have the effect of contradicting, altering or adding to the written contract, the other litigant will characterise as extrinsic evidence relevant to the context or purpose of the written contract. Since the interpretative exercise affords the meaning yielded by text no priority and requires no ambiguity as to the meaning of the text to admit extrinsic evidence, the parol evidence rule is likely to become a residual rule that does little more than identify the written agreement, the meaning of which must be determined. That is so for an important reason. It is only possible to determine whether extrinsic evidence is contradicting, altering or adding to a written contract once the court has determined the meaning of that contract. Since meaning is ascertained by recourse to a wide-ranging engagement with the triad of text, context and purpose, extrinsic evidence may be admitted as relevant to context and purpose. It is this enquiry into relevance that will determine the admissibility of the evidence. Once this has taken place, the exclusionary force of the parol evidence rule is consigned to a rather residual role.

Second, *University of Johannesburg* recognises that there are limits to the evidence that may be admitted as relevant to context and purpose. While the factual background known to the parties before the contract was concluded may be of assistance in the interpretation of the meaning of a contract, the courts' aversion to receiving evidence of the parties' prior negotiations and what they intended (outside cases of rectification) or understood the contract to mean should remain an important limitation on what may be said to be relevant to the context or purpose of the contract. *Blair Atholl* rightly warned of the laxity with which some courts have permitted evidence that traverses what a witness considers a contract to mean. That is strictly a matter for the court. *Comwezi* is not to be understood as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement. The case made it plain such evidence must be relevant to an objective determination of the meaning of the words used in the contract.

Third, *Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither *Endumeni*, nor its reception in the Constitutional Court, most recently in *University of Johannesburg*, evince scepticism that the words and terms used in a contract have meaning."

[20] What remains, then, is to determine the meaning of the contract in the light of the principles set out above.

<u>THE PLAINTIFF'S CASE</u>

[21] The plaintiff's claim against the defendants is for payment of an amount of R1, 059, 874.10 (One million and Fifty-Nine Thousand Eight Hundred and Seventy-Four Rand and Ten Cents) plus interest thereon, arising out of a sub-contracting agreement in terms of which the plaintiff would transport loads of various commodities, at an agreed rate per ton, as and when required by the defendant.

[22] The plaintiff's case as pleaded in paragraphs 7 and 8 of its particulars of claim can be summarised as follows:

[22.1] The plaintiff will make its trucks available to the Trust on 31 October 2016;

[22.2] The plaintiff will collect loads assigned to it by the Trust and deliver them to the designated delivery point;

[22.3] The plaintiff will render invoices for work performed by it before the 25th day of each month, together with weighbridge slips and all the other supporting documentation;

[22.4] On each load conveyed by the plaintiff, the Trust will retain an amount of R10.00 per ton as its "profit";

[22.5] The Trust will supply diesel and tyres required for the plaintiff's trucks to perform the required transportation;

[22.6] *The Trust will pay to the plaintiff 'all expenses incurred by the plaintiff in the transportation of the load'* upon receipt of invoices, weighbridge slips and other supporting documentation;

[22.7] Payment in respect of invoices rendered before the 25th day of a month will be payable before the 7th day of the following month;

[22.8] The Trust will provide the plaintiff with monthly reconciliation statements.

[23] The plaintiff avers that it transported the loads and rendered invoices to the Trust for the transportation work done, but despite demand, the defendants have failed to pay to the plaintiff the amount claimed in the summons. A breakdown of the amount claimed is set out in annexure "F" to the plaintiff's claim. In summary, annexure "F" contains details of the dates, the driver, registration letters and numbers of the truck and trailer,

loadcon, commodity delivered, destination, rate per ton, the number of tonnes delivered, and the amount per load.

THE PLAINTIFF'S EVIDENCE

Nteene Senior:

[24] The first witness for the plaintiff was Mr Moroke Nteene ("Nteene senior"). His evidence, to the extent relevant to the case, can be summarised as follows:

[24.1] The plaintiff ("Nteene Enterprise (Pty) Ltd") is the business of his son (Charles Nteene), although the witness financed the trucks that were sub-contracted to the Trust.

[24.2] He was remotely involved in the administration of the plaintiff's business, and his involvement was limited to payment of the salaries of the drivers and maintenance of the trucks where needed.

[24.3] He attended a meeting in Ladybrand on 24 October 2016 where the contract was concluded. Also, in attendance at the said meeting were Mr Pierre Haggard ("Haggard") representing the Trust, and his son Charles Nteene ("Nteene Junior").

[24.4] At the meeting, it was discussed that the plaintiff would make its trucks available as sub-contractor to the defendants; the Trust would be in daily contact with the drivers of the trucks; the trucks would be allocated loads on the Cape Town-route, and the plaintiff would be obliged to hire disciplined drivers; the Trust would supply diesel and tyres to the plaintiff.

[24.5] All the terms of the agreement as discussed and agreed at the meeting in Ladybrand were reduced to writing and recorded in an e-mail by Nteene Junior addressed to Mr Haggard on 24 October 2016 at 12:55, and in an e-mail of 24 October 2016 at 14:00 by Mr Haggard, which confirmed some of the agreements reached orally and also corrected the understanding of Nteene Enterprise as opposed to what Nteene Junior had actually written in his e-mail.

[24.6] The agreement did not include any terms other than those contained in exhibit "C30" (which has also been attached to the plaintiff's particulars of claim as annexure "C").

[24.7] He confirmed that it was agreed that the Trust would be responsible for all expenses in respect of diesel and tyres.

[24.8] His understanding of paragraph 8 of exhibit "C30" was that it was agreed that the Trust would advance working capital to the plaintiff until the plaintiff receives its first payment for work performed.

[24.9] He testified that the business would not be profitable for the plaintiff if it had to pay for tyres and diesel, and if that was the proposal, the plaintiff would not have entered into the agreement.

[24.10] He confirmed that the Trust did send an invoice for tyres supplied to the plaintiff around the time when Mr Haggard, on 13 December 2016, addressed an e-mail to Nteene Junior regarding burst tyres. According to Nteene Senior, the reason for the invoice was to enable the plaintiff to take disciplinary action against one of the drivers ('Luvo'). He testified that the Trust never requested payment of any expenses for diesel and tyres.

[24.11] He confirmed that as diesel expenses made up 70% of the total earnings from transportation, the plaintiff would run at a loss if it had to carry all the expenses for diesel.

[25] The witness also testified about the disputed invoices. In this regard, the witness testified that:

[25.1] Invoice 84 was the invoice rendered in respect of the load conveyed in accordance with loadcon (LC43130).

[25.2] Invoice 47 was the invoice rendered in respect of the load conveyed in accordance with LC43131.

[25.3] Invoice 85 was the invoice rendered in respect of the load conveyed in accordance with LC23525.

[25.4] Invoice 45 was generated by the plaintiff pursuant to a discussion with the Trust, but that there is no supporting documentation in respect of that invoice with LC43327.

[25.5] Invoice 88 was generated by the plaintiff in respect of coal that was conveyed in accordance with LC43472.

[26] In cross-examination, he testified that:

[26.1] When he raised his dissatisfaction regarding the payment received, he was informed by Mr Haggard that nobody in the industry would give you diesel.

[26.2] He agreed that if his version of the agreement regarding diesel was correct, it would mean that the Trust would suffer a loss in respect of a one-way trip between Delmas and Gqeberha.

[26.3] He confirmed that the plaintiff continued rendering services even after becoming aware that it is the view of the Trust that the plaintiff was responsible for the costs of diesel.

[26.4] He was certain that invoice 84 was sent to the Trust and that there was proof to that effect, but was unsure whether such proof was before the Court. He was also unable to explain why invoice 84 had two loadcons.

[26.5] There was no supporting documentation in respect of invoice 83. He was also unable to explain why that invoice was only generated in August 2017.

[26.6] He was unable to refer the Court to supporting documentation in respect of invoices 45, 47, 85 and 88.

Nteene Junior:

[27] Next to testify on behalf of the plaintiff was Charles Nteene ("Nteene junior"). In summary, he testified as follows:

[27.1] He alone had a meeting with Mr Haggard around October 2016 in Ladybrand, where Haggard explained how the Trust operated. He testified about a second meeting with Mr Haggard, to which he was accompanied by his father (Nteene senior).

[27.2] At the second meeting, himself and Mr Haggard explained to Nteene Senior what was discussed at the first meeting and that Mr Haggard explained what the responsibilities of the respective parties would be if they were to enter into an agreement.

[27.3] He recounted the following as the terms of the agreement as agreed at the meeting: he would find his own drivers; the Trust would look for suitable loads; the Trust would take care of the plaintiff's fuel and tyres; and the plaintiff would take care of any other inconvenience.

[27.4] He sent the e-mail of 24 October 2016 to Mr Haggard to record the terms as agreed at the meeting.

[27.5] He explained his understanding of the e-mail sent by Mr Haggard on 24 October 2016.

[27.6] He testified that the purpose of the monthly reconciliations was for the Trust to show how much it [the Trust] spent and how much profit the plaintiff made.

[27.7] He denied that it was agreed that the plaintiff would be responsible for the costs of diesel and tyres. He was emphatic that the plaintiff was never required to pay any such expenses.

[27.8] He explained the process of generating invoices on a computer program called "*Invoicely*" and how the invoices, once generated, would be sent automatically by e-mail to the Trust.

[27.9] He testified that invoice 83 was generated only in August 2017, as it was a load which was still outstanding and, in respect of which, as there were no supporting documents, he invoiced according to a spreadsheet provided.

[27.10] He testified that invoices 45, 47, 84, 85 and 88 were generated on the same basis as invoice 83, *i.e,* based on a spreadsheet, as there was no supporting documentation.

[27.11]He testified about a meeting regarding the disputed reconciliation at which he heard for the first time that the cost of diesel is to be deducted from the amounts invoiced by the plaintiff.

[28] In cross-examination, Nteene junior testified as follows:

[28.1] Mr Haggard was the one who made the offer that the Trust would pay for diesel and tyres.

[28.2] He conceded that it was possibly so that he enquired whether the plaintiff could use the credit facility of the Trust for diesel and tyres, and as a result of which it was discussed that the Trust would provide the said commodities and the cost of which would be recovered from the amounts of invoices rendered by the plaintiff.

[28.3] He conceded that the question of a working capital was discussed at the meeting he held with Mr Haggard. He denied, however, that the plaintiff did not have sufficient working capital. According to this witness, the plaintiff had sufficient working capital to cover the expenses incurred in the running of the transportation business.

[28.4] He sometimes amended invoices after they were first generated, and, in that event, the number of the amended invoice would remain the same as the original invoice.

<u>THE DEFENDANTS' EVIDENCE</u>

Mr Pierre Haggard:

[29] Mr Haggard's evidence can be summarised as follows:

[29.1] He had a meeting with Mr Nteene junior in September or October 2016 at his office in Ladybrand. During the meeting, Mr Nteene junior indicated that he wanted to buy trucks and enquired about the possibility of the witness assisting them with loads for transportation.

[29.2] He informed Mr Nteene junior at the self-same meeting that the plaintiff would need working capital of R400, 000.00 for the first two months, as 50% of that would be required for diesel.

[29.3] He testified that when they were discussing the working capital, the issue of tyres was discussed. According to Mr Haggard, R200, 000.00 was for diesel and the other R200, 000.00 was for other expenses, which included truck maintenance, drivers' salaries, tyres and toll money.

[29.4] Mr Nteene junior indicated that he did not have that kind of capital available, and as a result, he informed Mr Nteene junior about the availability of their diesel facility, where the Trust would provide diesel, and the costs thereof would be recovered from the first payment. Mr Nteene junior indicated that he would like to make use of the diesel facility.

[29.5] His impression was that the Trust would also provide tyres, and the cost thereof would be deducted from the amounts invoiced by the plaintiff.

[29.6] After the first meeting with Mr Nteene junior, he consulted Van der Walt about the proposal to extend credit facilities to the plaintiff for diesel and tyres, and Van der Walt's response was that Mr Haggard should make every effort to help the plaintiff, if possible.

[29.7] The discussions at the second meeting held with the plaintiff were mostly a repetition of what was discussed at the first meeting.

[29.8] He denied that it was agreed that diesel and tyres would be supplied at the expense of the Trust. He was emphatic that if anybody had suggested that diesel and tyres would have to be supplied at the Trust's expense, that would have been the end of the negotiations.

[29.9] He testified that the agreement at the second meeting was that diesel and tyres would be supplied by the Trust and the cost thereof would be recovered from the amounts invoiced by the plaintiff for the transportation.

[29.10] At a subsequent meeting held in March 2017 to discuss, amongst others, payments due to the plaintiff, he explained to the plaintiff that diesel and tyre expenses were to be deducted from the amounts invoiced by the plaintiff.

[29.11] He testified that the plaintiff always understood that the cost of diesel and tyres would be recovered from their invoices.

[29.12] He confirmed that it was a very important agreement between the parties that the Trust would recover the costs of diesel and tyres from the plaintiff.

[29.13] He testified that his e-mail contained the terms on which the relationship between the plaintiff and the Trust would be managed.

[30] In cross-examination, Mr Haggard testified as follows:

[30.1] His e-mail containing the terms of the agreement (exhibit "C30") was sent after he received the e-mail from Nteene junior (annexure "D").

[30.2] He testified that the e-mail (exhibit "C30") contained the terms on which the relationship between the plaintiff and the Trust would be managed, and that is why the e-mail is headed 'formal logistic agreement'.

[30.3] He testified that a working capital of R200, 000.00 would be needed for diesel, and the other R200, 000.00 would be for other operating costs, including tyres.

[30.4] He testified that Nteene junior indicated that he had R200, 000.00 available as working capital.

[30.5] He confirmed that Mr Nteene junior requested that the Trust should supply both diesel and tyres.

[30.6] He confirmed that the Trust was never asked in writing to supply the tyres.

[30.7] He testified that the plaintiff always understood that the cost of diesel and tyres would be recovered from its invoices.

[30.8] He testified that it is common knowledge in the industry that no one can conduct a transportation business without paying for diesel and tyres.

[30.9] He could not answer why he included diesel and tyres in his e-mail to Mr Nteene junior, if that formed part of the second R200, 000.00 working capital that Mr Nteene junior had in his possession.

[30.10] When asked why the agreement to recover the costs of diesel and tyres from the plaintiff was not contained in exhibit "C30", he responded that it is common knowledge that that is the basis on which diesel and tyres are supplied.

[30.11]He confirmed that he did not send any quotations for tyres to Mr Nteene junior.

[30.12]He confirmed that the R10.00 per ton profit referred to in clause 4 of Exhibit "C30" was an admin fee, which the Trust charged for assisting with invoices and getting the documentation and invoices to the customer and that it was all an admin fee charged per load.

Gerbrandt Van der Walt:

[31] Mr Van der Walt testified as follows:

[31.1] He is the director of DG Carriers and a trustee of the Gerbrandt van der Walt Trust ("the Trust"). When he started out with the business of transport, it was conducted under the trading name of DG Carriers and the business was conducted by the Trust. The Trust also conducted the business of farming, and at the end of February 2017, the transport business was moved over to DG Carriers (Pty) Ltd.

[31.2] He received a call from Mr Haggard informing him that he was approached by Mr Nteene junior, who wanted to explore the possibility of a sub-contracting arrangement with the Trust.

[31.3] He instructed Mr Haggard to ask exactly what the plaintiff wanted DG Carriers to do and asked him to schedule a meeting with the plaintiff.

[31.4] As far as he knows, a meeting was arranged with Mr Nteene junior, and after the meeting, Mr Haggard informed him that the plaintiff was going to purchase three (3) trucks. According to this witness, Mr Haggard asked Mr Nteene junior about working capital that would include the costs for diesel and tyres.

[31.5] Mr Haggard informed him further that the plaintiff did not have sufficient funds for working capital in respect of diesel and tyres. He informed Mr Haggard that DG Carriers could, just as in the case of the other sub-contractors, provide diesel and tyres and recover the costs thereof from the first loads that they transport.

[31.6] He discussed with Mr Haggard that the Trust has other sub-contractors that they provide diesel to, and at the end of the month, they recover the money from the first load that they transported.

[31.7] Mr Haggard phoned him and informed him that a subsequent meeting was held with Mr Nteene junior, and Mr Haggard informed him about the terms of the diesel and tyres facilities. He then requested Mr Haggard to put in an e-mail and send it to him, or copy him in the e-mail and send it to Mr Nteene senior and copy Mr Nteene junior.

[31.8] Since its inception, the business has had about thirty (30) to forty (40) sub-contractors performing work for it, but no agreement was ever made with any of them to the effect that they would be supplied with diesel and tyres at the expense of the Trust.

[31.9] The reason for this was that such an arrangement would result in severe losses for the Trust.

[31.10] No one ever conveyed to him that an arrangement was concluded to the effect that the plaintiff would be sponsored with diesel and tyres by the Trust. He testified that if anything of that nature was conveyed, he would have ended the relationship there and then.

[31.11] He testified that the R10.00 per ton was a profit margin. He confirmed that, contrary to the terms of the contract, the Trust took more than R10.00 per ton. He also conceded that the Trust benefited from the agreement that they performed work in respect of diesel and tyres.

[32] In cross-examination, Mr Van der Walt testified as follows:

[32.1] The Trust has its own fleet of trucks, a diesel depot, and it sells tyres.

[32.2] He confirmed that the Trust supplies tyres and diesel to sub-contractors. It then adds a margin on the prices. No proof of invoice was attached to any of the fees charged to the plaintiff to indicate what the actual cost was for replacing the tyres and for diesel supplied.

[32.3] The technicians that would charge a callout fee were salaried employees of DG Carriers. DG Carriers also performed maintenance on trucks.

[32.4] The plaintiff would be called to obtain permission before any maintenance work was performed.

[32.5] He conceded that all monies paid in respect of the transportation business were retained in the account of the Trust, save for R38, 000.00 which was paid to the plaintiff. He confirmed that a bulk of the money went into the account of the Trust.

[32.6] He testified that after the first payment, the plaintiff should have been in a position to cover the working capital.

[32.7] When asked about clause 8 of exhibit "C30" which provided that 'all expenses be covered by the plaintiff except for diesel and tyres', he stated that they meant that the Trust would supply diesel and tyres until the first payment and that the amounts thereof would be deducted from the payment due to the plaintiff.

[32.8] He testified that it was Mr Haggard who suggested that the plaintiff be put on the same arrangement that the Trust had with its other sub-contractors to be supplied with diesel and tyres.

ANALYSIS

[33] It is important at the outset to point out that during the course of the trial, both parties led evidence on the witnesses' understanding of the contract and, in particular, clauses 5 and 8. That evidence is of no moment when it comes to the interpretation of the contract. This is because interpretation is for the court and not the witnesses. This is a well-known legal proposition for which no authority is needed. For this reason, the witnesses' evidence of their understanding of particular clauses of the contract is irrelevant for purposes of determining the meaning of the contract.

[34] The plaintiff's case, based on the contract, as I understand it, is that the reference to 'all expenses incurred by the plaintiff in the transportation of the loads' in the particulars of claim includes the expenses for diesel and tyres. In this regard, the averment in paragraph 8.1.4 of the plaintiff's particulars of claim is that "(T)he First Defendant will pay and compensate the Plaintiff all expenses incurred by the Plaintiff in the transportation of the load upon receipt of invoices, weighbridge slips and other supporting documentations which should be submitted to the First Defendant on or before the 25th of each month."

[35] Paragraph 8.1.4 of the particulars of claim has not been pleaded as an implied or tacit term of the contract. Though not expressly stated, paragraph 8.1.4 of the particulars of claim has been pleaded as an express term of the contract. I say so because if the plaintiff had intended to plead paragraph 8.1.4 as an implied or tacit term of the contract, it certainly could have said so. Once it is so, then it must follow that paragraph 8.1.4 of the particulars of claim was pleaded as an express term of the contract.

[36] However, no support for the pleaded term that the Trust will pay to the plaintiff 'all expenses incurred by the plaintiff in the transportation of the loads' can be found in the contract. There is simply no textual basis for that assertion. Contrary to the plaintiff's assertion, the contract places no obligation on the Trust to 'pay for any expenses' related to the running of the transportation business. In terms of the contract, that responsibility has been allocated to the plaintiff. That can be inferred from paragraph 8 of exhibit "C30", which provides:

> "*Working capital to cover for expenses until first payment are received. All expenses be covered by Nteene Enterprices (sic) except for diesel and tyres*". (Emphasis added).

[37] During the trial, there was a debate between the parties about the meaning of clause 8 of the contract. Mr Nteene senior testified that clause 8 meant that the Trust would advance a loan to the plaintiff for working capital, whilst Mr Nteene junior testified that clause 8 meant that the plaintiff would provide working capital to cover the expenses incurred, except for diesel and tyres, until the plaintiff received the first payment.

[38] It is significant that Mr Nteene junior's evidence about the meaning of clause 8 is consistent with the evidence of both Mr Haggard and Mr Van der Walt. Both of them testified that clause 8 of the contract meant that the plaintiff would provide working

capital to cover the expenses incurred in the running of the transportation business. This is not to say that the meaning attributed to the clause by the witnesses is of any significance to the interpretation or process of ascertaining the meaning of the contract. It is well-established that interpretation is a matter of law and not of fact, and, accordingly, interpretation is a matter for the court and not for witnesses. This was aptly explained by the Supreme Court of Appeal in *KPMG.*[15]

[39] Of significance, though, is the evidence of Mr Nteene junior and Mr Haggard pertaining to the negotiation of the contract because that evidence is relevant as to the context and purpose of clause 8 of the contract. It is therefore extrinsic evidence which is admissible for purposes of interpreting the contract.[16]

[40] On the evidence of both Mr Haggard and Mr Nteene junior, it was at a meeting attended by both of them at Ladybrand where the issue of working capital was discussed. Most significantly, though, Mr Nteene junior, who was in attendance at that meeting, does not dispute that it was agreed in that meeting that the plaintiff would provide working capital to cover the expenses until receipt of the first payment. There is a dispute on the evidence as to whether the working capital required had to cover all the expenses incurred in the transportation business, or whether that working capital had to cover the other expenses only, excluding diesel and tyres.

[41] In my view, it makes no difference. Even if the working capital required did not have to cover diesel and tyres (as contended for by Mr Nteene junior), the mere fact that the plaintiff was required to have working capital to pay the 'expenses incurred in the transportation business', even if diesel and tyres were excluded, contradicts the averment in paragraph 8.1.4 of the particulars of claim that [in terms of the contract], the parties agreed that '[T]he First Defendant will pay and compensate the Plaintiff all expenses incurred by the Plaintiff in the transportation of the loads'.

[42] In terms of the evidence, the other expenses, with the exception of diesel and tyres, included toll fees, truck washes, food and accommodation. Yet, these expenses have never been included in the plaintiff's invoices to the Trust. In fact, in all those invoices,

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[15] *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) para 39.

[16] See *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others,* above fn 14, paras 48-50.

the only item in the plaintiff's invoices is for the actual load per ton. This aptly demonstrates the fallacy in paragraph 8.1.4 of the particulars of claim.

[43] Further, it was not the plaintiff's evidence that, in terms of the contract, the Trust would pay to the plaintiff all the expenses incurred by the plaintiff in the transportation business. Instead, their evidence was to the contrary. Their evidence was that, in terms of the contract, the plaintiff was responsible for all the expenses except for diesel and tyres.

[44] In any event, the evidence of Mr Nteene junior and Mr Haggard concerning the working capital and the purpose thereof, completely destroys the foundation of the case pleaded in paragraph 8.1.4 of the particulars of claim. If the working capital was to cover expenses for the period until the plaintiff received the first payment, then it must follow that the plaintiff was responsible for those expenses. Therefore, the purpose of clause 8 was to ensure that the plaintiff had sufficient working capital to cover the expenses for the day-to-day running of the transportation business (except for diesel and tyres), *albeit* in the period until the plaintiff received the first payments.

[45] If that is so, then clause 8 of Exhibit "C30" seriously undermines the plaintiff's assertion that it was a term of the contract that the Trust would pay the plaintiff for all the expenses incurred by the plaintiff in the running of the transportation business. In fact, clause 8 of Exhibit "C30" is destructive of the existence of such a term because:

[45.1] If the Trust was obliged to pay the plaintiff for all the expenses incurred by the plaintiff in the running of the transportation business, then there would not have been a need for the plaintiff to raise 'working capital' until it received the first payment. It is baffling why the plaintiff would have had to raise 'working capital' to cover the expenses related to the day-to-day running of the transportation business if those expenses rested on the Trust.

[45.2] Surely the fact that the plaintiff had to raise 'working capital' to cover the expenses incurred by the plaintiff in the transportation business *albeit* until it received the first payment can only mean one thing and that is – the 'working capital' was required as a stop-gap-measure until the plaintiff received the first payment because thereafter, the plaintiff would be able to pay those expenses from the payments received from the transportation business.

[46] Hypothetically, even if clause 8 was capable of supporting the meaning contended for by the plaintiff (which is not the case), then clause 8 would have been capable of two possible meanings – either the Trust would be responsible for the expenses for diesel and tyres or, the plaintiff would be responsible for all the expenses incurred in the running of the transportation business, including diesel and tyres.

[47] I am not persuaded that clause 8 means that the Trust would be responsible for the expenses for diesel and tyres. There are at least two reasons why clause 8 cannot support that meaning.

[47.1] First, the text of clause 8 makes plain that the provisions of the clause were intended to regulate the situation only until the plaintiff received the first payment. That was both in respect of the provision of working capital to cover the expenses and the exclusion of diesel and tyres from those expenses.

[47.2] Second, there is nothing in the text of clause 8 to support the meaning that, in terms of the contract, the Trust was to be responsible for the expenses for diesel and tyres.

[48] In any event, it is trite that where a provision of a contract is capable of two possible meanings, each possibility must be weighed in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

[49] The material known to those responsible for the production of this contract includes the pre-contractual negotiations between Mr Haggard and Mr Nteene junior, both of whom are *ad idem* that it is the plaintiff that had to raise working capital to cover the expenses. That evidence is also consistent with the entire text of clause 8 of the contract.

[50] Anyway, it does not make commercial sense to contend as the plaintiff does, that the Trust would pay the plaintiff for all the expenses incurred in the running of the transportation business, including diesel and tyres. The upshot of this contention is that the plaintiff will not incur any expenses in the running of the transportation business. That is not how business works. In the words of the Supreme Court of Appeal in *Endumeni,* that is unbusinesslike.

[51] The plaintiff's proposition becomes even more illogical when regard is had to the fact that in terms of the contract, the Trust retains only R10.00 per ton 'as profit', out of which it has to pay all the expenses incurred by the plaintiff in the running of the transportation business, including diesel and tyres. That is plainly unbusinesslike because the implication of the plaintiff's contention is that for every load, the Trust would receive R340.00 out of which it would have to pay for diesel and tyres.

[52] Adv. Nortje, who appeared on behalf of the plaintiff, did not dispute that if the Trust were to pay for diesel only, it would suffer a huge loss for every load transported. Adv. Van Niekerk SC equated the situation to the Trust literally donating diesel to the plaintiff. I agree. There is probably no better way to put it than to say that the Trust would be donating diesel to the plaintiff. It is not in dispute that diesel and tyres are the biggest costs in the transportation business. This renders the plaintiff's proposition that, in terms of the contract, the Trust was to be responsible for all the expenses incurred in the running of the transportation business, diesel and tyres included, unbusinesslike and in the circumstances absurd.

[53] It is indeed so that if the plaintiff were to pay for all the expenses, including diesel and tyres, the plaintiff would also run at a loss, but certainly not at the rate at which the Trust would suffer loss. When these anomalies were pointed out to the plaintiff, Adv. Nortje argued that the question whether the transaction makes business sense is of no moment because this court is tasked to do one thing and one thing only, and that is to determine the intention of the parties to be gathered from the terms of the contract. In support thereof, Adv. Nortje relied on paragraph [68] of the Supreme Court of Appeal judgment in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA), which reads as follows:

> "...The judge's views on business ethics cannot signify to impute a duty that Capitec Holdings grant consent to a sale that the court considers a desirable outcome. Capitec Holdings enjoyed a contractual right to retain Coral as an empowerment shareholder. That was the bargain that Coral and Ash Brook had struck. That the world might be a better place if Coral were permitted to sell the sale shares without a repurchase obligation, and thereby reimburse the Fund, is a judgment of no relevance to the contractual rights and duties of the parties."

[54] Adv. Nortje further referred to paragraph [30] in the unreported judgment of the Gauteng High Court in *Municipal Employees Pension Fund v Aspara Tech and Projects*

(Pty) Ltd t/a Gadget Solutions and Another,[17] in support of the proposition that the court's view about whether the transaction makes commercial sense is irrelevant for purposes of determining the meaning of the contract. I disagree.

[55] The two cases relied upon by Adv. Nortje do not support the proposition sought to be advanced by the plaintiff that in an interpretative dispute, the court need not concern itself with whether the transaction was commercially sound or not. The simple point made in both cases is that a court should not attribute meaning which is not sourced from the text of the contract. They certainly do not support the proposition that a court should not consider whether the transaction, or to be more precise, whether the meaning sought to be attributed to a provision of the contract is commercially sound.

[56] In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*,[18] the Supreme Court of Appeal made clear that a contract must be interpreted so as to give it a commercially sensible meaning.[19] *Endumeni* makes clear, however, that whilst 'a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'[20]

[57] This court is acutely alert to the caution sounded by the Supreme Court of Appeal in *Endumeni*. However, this court is not seeking to substitute the text of the contract with a meaning which it considers to be businesslike or commercially sensible. What this court is saying in this case is that the case pleaded by the plaintiff, that the Trust will pay to the plaintiff all the expenses, including diesel and tyres, incurred by the plaintiff in the running of the transportation business, is not supported by the text of clause 8 of Exhibit "C30". The plain text of clause 8 makes clear that the intention of the parties was that the plaintiff would be responsible for the expenses incurred in the running of the business.

[58] This court's view that the plaintiff's assertion that in terms of the contract the Trust would be responsible for all the expenses incurred by the plaintiff in the running of the

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[17] (2023/009050) [2024] ZAGPJHC 530 (31 May 2024); [2024] JOL 65034 (GJ); 2024 JDR 2299 (GJ).
[18] ZASCA 76; 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA).
[19] *Ibid* para 25.
[20] *Endumeni,* above fn 1, para 18.

transportation business is not commercially sound, is based on the text of clause 8 of Exhibit "C30" read in the context of the contract as a whole and the purpose thereof. It is not a view that is divorced from the text of clause 8 of the contract.

[59] In any event, that view is consonant with the nature of the transportation business – that the transport operator should ordinarily bear the day-to-day expenses for the running of the transportation business unless a contrary intention is apparent from the contract. No such contrary intention is apparent from the wording of the contract. In my view, the contention advanced by the plaintiff is inimical to the nature of the transportation business in general, and particularly the one involved here, where the only payment in the real sense, which the Trust received from the transaction, was the R10.00 per ton for every load transported by the plaintiff.

[60] Mr Haggard has explained that the R10.00 per ton was an administrative fee which the Trust charged the plaintiff for the transaction. This was not disputed by the plaintiff. The plaintiff's contention in this regard was that it is not correct that the Trust received only R10.00 per ton because, in addition thereto, the Trust received money for diesel and tyres, all of which went into the Trust's bank account. The plaintiff's contention in this regard is misplaced because the amounts for diesel and tyres are for actual commodities supplied by the Trust. They are distinct and separate from the R10.00 per ton administrative fee payable to the Trust.

[61] Clause 5 of annexure "C" also does not support the plaintiff's pleaded case that, in terms of the contract, the Trust would pay the plaintiff for all the expenses incurred by the plaintiff in the running of the transportation business, including diesel and tyres.

[61.1] Clause 5 does not refer to 'all expenses'. It is only limited to diesel and tyres. In any event, it was the plaintiff's evidence that in terms of the contract, the plaintiff was to be responsible for 'all other expenses' incurred in the running of the transportation business, except for diesel and tyres.

[61.2] Textually, clause 5 cannot even support the contention that, in terms of the contract, the Trust was to be responsible for the costs of diesel and tyres because clause 5 only refers to the 'supply' of diesel and tyres. There is nothing in the text of clause 5 that indicates or from which it can be inferred that diesel and tyres would be supplied at the Trust's expense.

[62] A plain reading of clause 5 makes clear that the clause is only concerned with the element of 'supply'. It has absolutely nothing to do with the terms of supply and which party would be responsible for the cost of supply.

[63] The ordinary grammatical meaning of the word 'supply' does not include payment. The Oxford English Dictionary defines the word "supply" as the total amount of goods and services *available for consumption*. As a verb, the word "supply" means *to make available to someone; provide*.

[64] Thus, unless the word 'supply' in clause 5 is used in a special way, the ordinary grammatical meaning of clause 5 would mean no more than that the Trust would 'supply' the diesel and tyres. That meaning is consistent with the nature and purpose of the contract. As I have already indicated above, the transport operator would ordinarily be responsible for the costs of diesel and tyres, especially because on the common cause facts, diesel and tyres are the biggest cost drivers in a transportation business.

[65] Mr Haggard has explained the terms on which the Trust supplies diesel and tyres to some of the Trust's sub-contractors, including the plaintiff. What emerged from his testimony is that the diesel and tyres facilities, though under the ownership of the Trust, are separate business units of the Trust.

[66] It simply does not make sense that the Trust would buy both diesel and tyres and give them to the plaintiff for R10.00 per ton. That proposition is self-evidently unsound. Based on the reconciliation statements, the amounts debited by the Trust for diesel and tyres by far exceeded the R10.00 per ton which the Trust was entitled to for every load transported by the plaintiff.

[67] It is possible that maybe the Trust was overcharging the plaintiff for the supply of diesel and tyres. I say 'maybe' because that was not established in evidence, and I make no definitive finding on this aspect. But even if that were to be so, that would not assist the plaintiff. It is not the plaintiff's case that the Trust overcharged the plaintiff for diesel and tyres so that the Trust could recover its costs from the amounts overcharged.

[68] I reiterate that the plaintiff's pleaded case is one founded on the assertion that, in terms of the contract, the Trust would pay the plaintiff all the expenses incurred by the plaintiff in the running of the transportation business.

[69] I have already found that the plaintiff's pleaded term cannot be supported by the text of the contract.

[70] It is not the plaintiff's case that the term pleaded is either a tacit or implied term of the contract. The term that the Trust would pay the plaintiff all the expenses incurred by the plaintiff in the running of the transportation business has therefore been pleaded as an express term of the contract, yet such term is not supported by the text of the contract. Once it is so, then it follows that it was not an express term of the contract that the Trust will pay to the plaintiff 'all expenses incurred by the plaintiff in the transportation of the load'. Nor is it an express term of the contract that the 'all expenses' included diesel and tyres.

[71] That leaves, as the foundation for the pleaded case, two possibilities. First, the possibility of an implied term properly so called or, as a tacit term of the contract. The difference between implied and tacit terms was explained by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*.[21] In terms of that explanation, the difference between the two terms can be summarised as follows: An implied term properly so-called is a term that is introduced into the contract as a matter of course by operation of law, either the common law, trade usage or custom, or statute, as an invariable feature of such a contract, subject only to the parties' entitlement in certain, but not all, instances to vary it by agreement. Where reliance is placed on such a term the intention of the parties will not come into the picture and the issue is the purely legal one of whether in those circumstances in relation to a contract of that particular type the law imposes such a term on the parties as part of their contract. A tacit term is a term that arises from the actual or imputed intention of the parties as representing what they intended should be the contractual position in a particular situation or, where they did not address their minds to that situation, what it is inferred they would have intended had they applied their minds to the question.[22]

[72] That is not the case pleaded by the plaintiff in this matter. The plaintiff's case is not based on an implied term. It is based on the intention of the parties manifested in the contract which they concluded.

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[21] 1974 (3) SA 506 (A) at 531D-532G.

[22] *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; (2010) 31 ILJ 529 (SCA); [2010] 5 BLLR 488 (SCA); 2010 (3) SA 601 (SCA) para 11.

[73] A tacit term, on the other hand, can either be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter, if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic.[23]

[74] The established test for the existence of a tacit term is that of the interfering bystander who asks what is to happen in the particular situation and receives the answer: 'Of course X will be the position. It is too obvious for us to say so.'[24] That test was explained by Brand JA in *City of Cape Town (CMC Administration) v Bourbon–Leftley and Another NNO*[25] as follows:

> ". . . (A) tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so.
>
> It follows that a term cannot be inferred because it would, on the application of the well-known 'officious bystander' test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. *A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time.* If the inference is that the response by one of the parties to the bystander's

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[23] *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H-J.
[24] *South African Maritime Safety Authority v McKenzie*, *ibid* fn 22, para 12; see also *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration,* Above fn 21 at 532G-533C; *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A) at 827B-828B; *Wilkins NO v Voges*, Above fn 23 at 136H-137D.
[25] 2006 (3) SA 488 (SCA); [2006] 1 All SA 561 (SCA).

question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified."[26]

[75] I am not satisfied that had the term pleaded by the plaintiff (that the Trust would pay the plaintiff for all the costs incurred by the plaintiff in the running of the transportation business) been suggested, the Trust would have agreed to the incorporation of such term. The application of that test in relation to the term pleaded on behalf of the plaintiff is destructive of the contention that the contract is subject to that term. I have little doubt that the bystander's query as to which party would be responsible for the costs of diesel and tyres used by the trucks in the running of the transportation business, would have attracted the response: 'Diesel and tyres are part and parcel of the transportation business. We don't need to provide for them', rather than the unequivocal and mutual agreement which is the necessary cornerstone of a case founded on a tacit term. In any event, no such tacit term has been pleaded by the plaintiff.

[76] Both Mr Haggard and Mr Van der Walt were unequivocal in their testimony that the Trust would never have agreed to a proposal that the Trust should be responsible for the expenses of diesel and tyres. According to Mr Haggard, he raised the question of the expenses involved in the running of the transportation business and in particular, the expenses for diesel and tyres. He further testified that it was when he realised that the plaintiff did not have sufficient 'working capital' to cover all the expenses, that he offered the diesel and tyre facilities to the plaintiff, subject to Mr Van der Walt's approval.

[77] There is disagreement between the parties about the precise terms of the offer made by Mr Haggard. What is significant though, is that Nteene junior admits that the issue was discussed with Mr Haggard. It is also significant that Mr Van der Walt confirmed that he was approached by Mr Haggard with the proposal to extend the diesel and tyre facility to the plaintiff, but when it was suggested to him that the Trust agreed to supply diesel and tyres for free, he totally disagreed. This evidence shows why it is dangerous and impermissible in the circumstances to import a tacit term into the contract in the terms pleaded by the plaintiff.

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[26] *Ibid*, para 19.

[78] Most significantly though, the above evidence gives context to the contract and, in particular, clause 5 thereof. The evidence of Mr Haggard and Van der Walt to the effect that the Trust offered the diesel and tyre facilities to the plaintiff on the terms testified to by both Haggard and Van der Walt does not attempt to amend or vary the terms of the contract. Rather, it explains, for instance, what the parties intended by clause 5 of the contract when the Trust agreed to supply diesel and tyres. That evidence is therefore admissible as evidence of context and purpose and serves to give meaning to the text of clause 5 of the contract in order to determine the intention of the parties from the words used to express themselves in clause 5 of the contract.

[79] It is trite that a litigant intending to rely on a tacit term is required to plead the tacit term relied upon and, must also prove the facts from which the contended tacit term could be inferred. The correct position regarding the test for importing a tacit term into a contract appears from the judgment of the Supreme Court of Appeal in *Transman (Pty) Ltd v Dick and Another*[27], as follows:

> "In the present case *the duty was on the employee not only to plead a contractual claim but also to prove facts from which the contended tacit term could be inferred.* This the employee has failed to do and as a result there is no factual basis for importing into the employment agreement the term that he was entitled to a hearing before the board terminated his employment. In fact he has failed to plead the terms of the employment agreement between himself and the employer. Therefore he has not satisfied the requirements of the test for importing terms into a contract. Accordingly the court below erred in assuming that his employment contract was 'subject to an implied term that he would be afforded a fair hearing before he was dismissed'."[28]

[80] As indicated above, the plaintiff did not plead any tacit term or the facts from which such term may be inferred. In the result, the plaintiff has not satisfied the requirements of the test for importing a tacit term into the contract.

[81] In the result, there is no basis in law to find for the interpretation contended for by the plaintiff that, in terms of the contract, the Trust was responsible for the expenses for the supply of diesel and tyres.

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[27] 2009 (4) SA 22 (SCA).

[28] *Ibid*, para 30.

THE DISPUTED INVOICES

[82] The following invoices are disputed by the defendants: Invoice 29 for the transportation of 33.22 tonnes of Koring at a rate of R300.00 per ton in the amount of R9, 966.00; Invoice 45 for the transportation of 32 tonnes of Steenkool at a rate of R570.00 per ton in the amount of R18, 240.00; Invoice 47 for the transportation of 35 tonnes of Koring at a rate of R520.00 per ton in the amount of R18, 200.60; Invoice 83 for the transportation of 33.64 tonnes of Koring at a rate of R520.00 per ton amounting to R17, 492.80; Invoice 84 for the transportation of 33.22 tonnes of Coal at a rate of R580.00 per ton amounting to R19, 267.60; Invoice 85 for the transportation of 33.4 tonnes of Coal at a rate of R570.00 per ton amounting to R19, 038.00; Invoice 88 for the transportation of 34 tonnes of Peas at a rate of R570.00 per ton amounting to R19, 380.00 and Invoice 90 for the transportation of 34 tonnes of Duff at a rate of R560.00 per ton amounting to R19, 040.00.

[83] The disputed invoices amount to R140, 624.40. These invoices were disputed by the defendants on the bases *inter alia* that, the said invoices were not backed by supporting documentation, had errors in relation to the quantities of the loads transported as well as the rates used in calculating the amounts due to the plaintiff, and that the invoices were never sent to the Trust.

[84] During the trial, Mr Nteene junior was extensively cross-examined on the process of generating and transmitting invoices to the Trust. In certain respects, Mr Nteene junior's explanation about how and whether the invoices were indeed transmitted to the Trust, and the errors in relation to the quantities, the loadcon numbers and the rates per ton charged, were mostly unsatisfactory.

[85] Overall, I find the plaintiff's evidence relating to the disputed invoices to be unreliable to make a finding on whether the amount of the disputed invoices is indeed due and owing by the defendants to the plaintiff.

[86] I agree with Adv. Van Niekerk SC that the plaintiff has failed to prove the disputed invoices and that they are due and payable by the defendants to the plaintiff.

[87] In oral argument, Adv. Nortje correctly conceded that the plaintiff has not proved its claim in respect of the disputed invoices. She made it plain that the plaintiff is not

claiming anything in respect of the disputed invoices. She confined her argument, instead, to the contention that the court must find that the defendants are liable to the plaintiff in the amount of R916, 359.90 (the undisputed amount), plus the profit share incorrectly charged in the amount of R40, 282.00 and costs.

[88] I agree that the plaintiff has failed to prove its claim in respect of the disputed invoices.

THE RESULT

[89] For the reasons set out above, I find that the plaintiff has failed to prove on a balance of probabilities that it was a term of the contract that the Trust would be responsible for the expenses related to the supply of diesel and tyres. On the evidence before the court, I find that it was a term of the contract that the Trust would supply diesel and tyres to the plaintiff, but the expenses thereof would be recovered from the plaintiff. I find the evidence of Mr Haggard and Mr Van der Walt in this regard, that the terms on which the Trust offered to supply the plaintiff with diesel and tyres were explained to Mr Nteene junior and he agreed thereto, to be more probable. Moreover, I find the evidence of Mr Haggard and Mr Van der Walt relating to the terms for the supply of diesel and tyres to be consonant with sound commercial practices in enterprises of that nature.

[90] The contrary view, advanced by Mr Nteene senior and Mr Nteene junior on behalf of the plaintiff is, with respect, unsound. It is improbable that the Trust would have agreed to carry the cost of diesel and tyres for a meagre R10.00 per ton. In any event, if that was indeed so, there was absolutely no explanation why that was not pleaded in the plaintiff's particulars of claim.

[91] For the reasons advanced above, I further find that the plaintiff has failed to prove that the amount of the disputed invoices is due and owing in terms of the contract. That much has been conceded by the plaintiff.

[92] Based on the agreement between the parties recorded in Exhibit "B", the plaintiff is therefore entitled to payment in the amount of R22, 593.69 calculated as follows:

(1).	Undisputed invoices:	R 916, 359.90
(2).	Add profit share incorrectly charged:	R 40, 284.00
	Total:	R 956, 643.90

[93] The following amounts must then be deducted from the above amount:

(1).	Total expenses and charges incurred by the defendants:	R 895, 231.39
(2).	Payment made to the plaintiff:	R 38, 818.82
	Total:	R 22,593.69

[94] The result of the above calculation is that the net amount payable to the plaintiff is the sum of R22, 593,69 (Twenty-two thousand five hundred and ninety-three rand and sixty-nine cents).

COSTS

[95] Adv. Nortje contends that since the plaintiff has been substantially successful in its claim, it is entitled to the costs of the action on scale C of the Magistrate's Court scale. She contends that the postponement that was requested by the defendants for purposes of bringing an application for absolution, which was not proceeded with, means that the request for the postponement was not *bona fide*, which justifies costs to be awarded against the defendants on scale C.

[96] Adv. Van Niekerk SC contends differently. He contends that since the amount which has been established to be due and payable to the plaintiff represents 2.13% of the plaintiff's claim, the plaintiff's success cannot be substantial. He contends that, on the contrary, the defendants were able through their defence to resist 98% of the plaintiff's claim.

[97] Adv. Van Niekerk SC contends that in view of the above, as well as the totally fallacious basis of the plaintiff's claim, it would be just and equitable if the plaintiff is ordered to pay the costs of the action, alternatively that the plaintiff should bear its own costs. In support of this argument, reference was made to paragraphs [14] and [15] of the judgment of the Free State High Court in *Sutherland Transport (Pty) Ltd v Dirk Lotter Vervoer (Pty) Ltd.*[29] In the said paragraphs, the Court observed as follows:

[29] (922/2022) [2023] ZAFSHC 6 (19 January 2023) ; [2023] JOL 57384 (FB); 2023 JDR 0122 (FB).

> "With regard to costs, it is trite that the award of costs is in the discretion of the court. In exercising its discretion, it takes into account all relevant factors and makes an award based on fairness and equity. As a matter of general practice the rule is that a party who is successful or substantially successful will be entitled to his costs. Substantial success does not mean he has to win the whole case but obtains materially what he seeks. . . .
>
> In considering whether the applicant was substantially successful in the application, this court takes cognizance of the well-established guidelines set out in our case law. In summary, a court must consider whether it was necessary for the applicant to resort to litigation in order to obtain relief, and the measure of the applicant's success and failure. . . . In my view, the payment of 83.5% of the applicant's claim, while the disputed amount represents 16.5%, indicates that the applicant was substantially successful in the matter. . . . "

[98] In this case, it certainly cannot be said that the plaintiff was 'substantially' successful in its claim. As demonstrated by Adv. Van Nierkerk SC, the plaintiff's success in this case is very negligible. It cannot be disputed, however, that the plaintiff was forced to resort to litigation to vindicate its claim, *albeit* that the plaintiff's success was less than substantial.

[99] The defendants were equally forced to defend a claim which turned out to be less than meritorious. Unlike the plaintiff, the defendants had no choice of forum. They were dragged to the High Court, probably at a huge cost to defend a case which should have been instituted in the Magistrate's Court. The plaintiff would, therefore, have been entitled to recover the costs incurred up to the first day of trial on Magistrate's Court scale, while the defendants, on the other hand, would have been entitled to recover the costs incurred from the second day of the trial on High Court scale.

[100] The situation would result in a serious anomaly and would, in my view, not be just and equitable. A just and equitable order in the circumstances would be to order each party to pay their own costs.

[101] Had the parties seriously applied themselves to the issues during the pre-trial procedures, this matter could have been resolved before trial or, at the very least, referred to the Magistrate's Court, with a resultant significant cost saving.

[102] This case underscores the need for litigants to seriously engage with the issues in the pre-trial procedures. In this case, they failed to do so, hence a part of the claim was only settled at court. This is a serious indictment on legal practitioners to thoroughly analyse their prospects before proceeding to trial.

[103] In any event, I am not persuaded. The plaintiff has not established any special considerations that would justify an award of costs on scale C. Costs are normally awarded at scale A. It is only in rare cases where special considerations exist that costs may be awarded on scale C.

[104] The position in the High Court is clearer. In terms of the amended Uniform Rule 69(7), counsel's costs are generally recoverable on scale A, unless a contrary indication exists. In terms of the new Uniform Rule 67A, the considerations that justify an award on a higher scale include the complexity of the matter, the value of the claim, and the importance of the matter. There is no reason why similar considerations should not apply to a determination of costs in the Magistrate's Court.

[105] In this case, the amount which the plaintiff has been able to prove is negligible. The value of the claim can therefore not be used to justify costs on scale C. Equally so, the matter is not complex enough to justify costs on scale C. As indicated elsewhere above, the matter turns on the interpretation of the contract. This is an area of law which has been extensively traversed by the courts. The case does not involve novel issues. It can also not be contended that the case is important enough to justify costs on scale C.

[106] In any event, it is not the plaintiff's contention that any of the considerations mentioned in the new Uniform Rule 67A are applicable here. The only reason which the plaintiff has put forward to justify costs on scale C is that the matter was previously postponed at the request of the defendants, who intimated an intention to apply for absolution but did not proceed with the application after the matter was postponed. Adv. Nortje contended that this is the type of conduct that justifies an award of costs on scale C. I disagree.

[107] I am not persuaded that the circumstances of this case justify a cost order on scale C. In my view, there is no reason why costs in this matter, if they were to be awarded, should not be awarded on scale A. The judgment of Wilson J in *Mashavha v Enaex*

Africa (Pty) Ltd and Others [30] is instructive in this regard. In that case, the Court found that in the absence of any contrary indication, scale A is the appropriate scale of counsel's costs. The Court observed thus:

> "Likewise, the default position set under the rule is that, in the absence of contrary indication, counsel's costs will be recovered on scale A. Scale A, it seems to me, is the appropriate scale on which to make an award unless the application of a higher scale has been justified by careful reference to clearly identified features of the case that mark it out as unusually complex, important or valuable. Run-of-the-mill cases, which must be the vast majority of cases in the High Court, should not attract an order on the B or C scales.
>
> In the case presently before me, the issues were uncomplicated. The entire case was determined on the bases of jurisdiction and standing. The merits never became relevant. The hearing lasted well under an hour. The case was competently and ethically pursued by all concerned. The A scale is plainly applicable."[31]

[108] I align myself with paragraphs [16] and [17] of the judgment of Wilson J referred to above, on the scale of costs. No special considerations have been presented to this court that would justify an award of costs on a higher scale.

[109] As already indicated above, I do not deem it appropriate in the circumstances of this case to award costs against any of the parties. In my view, it is just and equitable that each party pay their own costs.

[110] In the result I make the following order:

1. Judgment for the plaintiff in the amount of R22, 593, 69;
2. Interest on the aforesaid amount *tempore morae*;
3. Each party shall pay their own costs.

[redacted]

RAMAEPADI AJ
NORTHERN CAPE DIVISION

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[30] [2024] ZAGPJHC 387; 2025 (1) SA 466 (GJ).
[31] *Ibid* paras 16-17.

Appearances

For the plaintiff:	Adv. N Nortje
Instructed by:	Sekgala and Njau Attorneys C/O Haarhoff's Incorporated (Kimberley)
For the defendants:	Adv. J G Van Niekerk SC
Instructed by:	Van de Waal Incorporated (Kimberley)