



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 7992/2012

In the matter between:

VARICOR NINETEEN (PTY) LTD t/a BP ATLANTIC

Plaintiff

And

HENDRIK CHRISTOFFEL MARAIS N.O.

First Defendant

CHRISTINA SUSANNA MULLER N.O.

Second Defendant

CHRISTINA SUSANNA MULLER

Third Defendant

JUDGMENT DELIVERED ON 22 MAY 2015

GAMBLE, J:

INTRODUCTION

[1] The Southern Cape town of Albertinia (which lies about 60 kilometres to the west of Mossel Bay) is well known for the cultivation of aloes and the manufacture of aloe-related products. In addition, it is one of the few places in the Republic where the building trade is able to source good quality thatch for roofing. The abundance of

restio grasses (locally called “*dekriet*”) in the area has seen trade in thatch grow significantly over the years.

[2] The third defendant, Ms Susanna Muller (“*Muller*”) is evidently well-known in the town. Until 1994 she was the Station Commander at the local police station and after she resigned from the SA Police Service began trading in thatch, initially as a sole proprietor. The first defendant Mr Hendrik Marais (“*Marais*”) and Muller cohabited from about 1994 before marrying in 2006.

[3] Because thatch was sourced far and wide in the district transportation was an issue. Both Muller and Marais owned a number of large trucks with which the harvested thatch was collected and transported to its ultimate destination. Often this involved conveyance up to Gauteng and in such cases the otherwise empty trucks were utilised to transport loads of coal back down to the coast.

[4] Muller and Marais decided to pool their resources in 1997 and formed a trust known as the Albertinia Dekriet Trust (“*the Trust*”) for purposes of conducting their joint endeavour. Muller testified that they each effectively held a 50% interest in the Trust, of which they were both trustees and, in respect whereof there was joint decision-making and management of the business. The decision to form a trust was evidently made on the basis of legal advice from attorneys in Mossel Bay and was designed to provide tax efficiency. The Trust was also intended ultimately to be for the benefit of Marais and Muller’s respective children from previous marriages.

[5] The use of a fleet of trucks to transport thatch of course necessitates the consumption of large quantities of diesel. Prior to the formation of the Trust Muller

made use, firstly, of a “*fleet card*” for refuelling her fleet of trucks. This enabled the vehicles to fill up anywhere in the Republic with any brand of fuel.

[6] The plaintiff company trades as BP Atlantic (“*BPA*”) from premises, *inter alia*, in the industrial area at George. BPA has its head office in Somerset West and was set up by Messrs Esbach senior and junior to distribute petroleum products (mainly diesel) on behalf of BP, a large multi-national petroleum company which operates throughout South Africa. BPA has seven depots in the Western Cape from which bulk diesel is sold. It appears that a bulk user can purchase diesel at such a depot where vehicles’ tanks are filled. In addition BPA will deliver bulk diesel to a user’s premises e.g. to a farmer who has installed a storage tank from which vehicles and farm implements may be filled. For the sake of clarity, I should add that BPA is in no way related to BP South Africa, but functions as an accredited distributor of BP products.

[7] Mr Cornelius Otto (“*Otto*”) who testified on behalf of BPA told the court that he worked as a sales representative for the plaintiff. Having been born in Albertinia he knew Muller well – for more than 40 years – and had served under her as a police reservist for a number of years. At one stage they were also house friends.

[8] In the process of looking for new customers Otto approached Muller shortly after he joined BPA in August 2001. At that stage there was no diesel storage tank on the commercial premises at 14 Nywerheidslaan in Albertinia – the premises at which Muller had for years conducted her sole proprietorship and from which the Trust also later traded in thatch. Otto was looking to expand the business of BPA and

suggested to Muller that she purchase diesel in bulk from BPA so that she could refuel her vehicles on the premises. Muller was taken by the idea and Otto agreed to arrange for the delivery of a supply tank.

[9] The evidence reveals that initially Muller was supplied with a 9 000 litre diesel supply tank so as to refuel her vehicles. It transpired that at a later stage BPA wanted to open a fuel depot which would be open to the public for general refuelling, for Muller's own vehicles and to other local commercial clients. Such a commercial operation necessitated a much larger storage facility and two tanks holding 23 000 litres each were referred to in evidence by Otto. A tank of that volume would ordinarily be installed with an electric pump similar to those found at ordinary service stations, from which the metering of the fuel could be verified.

[10] Otto said that on 3 September 2001 he and Muller concluded the deal for the supply of bulk diesel to the Trust. It is that agreement, and its subsequent implementation, which forms the basis of this litigation and to which I shall return later.

COMMENCEMENT OF LITIGATION

[11] From late 2001 onwards BPA delivered petroleum products to the premises occupied by the Trust and BPA's account was paid by way of direct payments from a bank account controlled by Muller on behalf of the Trust. For reasons which were not fully explained, the Trust's account with BPA later fell into arrears with the outstanding balance increasing progressively.

[12] During the period July to October 2008, BPA sold and delivered to the premises petroleum products, the balance whereof after payments totalled more than

R7 million. After its demand for payment in early March 2011 was ignored, BPA issued summons on 13 April 2011 against the Trust for payment of the sum of R7 million together with agreed interest at the rate of 2.5% per month and costs on the scale as between attorney and own client.

[13] Similar claims were advanced against Muller jointly and severally with the Trust, on the strength of a suretyship which she had executed in favour of BPA on behalf of the Trust on 3 September 2001.

[14] The Trust's initial response to the summons was relatively uncomplicated. It contended, firstly, that any and all amounts due by the Trust to BPA had been settled "*long ago*"¹. Secondly, it alleged that in terms of an oral agreement concluded in 2002 between BPA and Muller, all diesel delivered to the premises between 2002 and 2008 was delivered to Muller personally.

OVERVIEW OF THE EVIDENCE

[15] By agreement between counsel, Mr Maree for BPA and Mr van Riet SC for only the Trust (not Muller), the quantum of BPA's claim was to stand over for later determination. The issue to be decided was with whom BPA contracted and what the terms of that contract in respect of the supply of diesel were. Otto testified for BPA, while Muller was the sole witness for the Trust. In addition, BPA called Ms Esther Oosthuizen its former head of administration and from December 2000 its area manager for George. It also called its financial manager, Mr Schalk van Heerden, and Ms Agnes Hocky, the Trust's erstwhile debtors' clerk. Finally it called two of the

¹ "Reeds lank gelede".

Trust's former employees – Ms Annatjie Conradie, an admin clerk employed by the Trust to attend to petroleum sales and Ms Drieka Harker, who worked as a general clerk and administrative manager on the thatch side.

[16] The evidence is a matter of record and I do not intend to recite or analyse the individual testimony. The gist of the relevant evidence will appear from the analysis and discussion of the case.

THE PLAINTIFF'S CAUSES OF ACTION

[17] The particulars of claim were prepared by BPA's attorneys in George and are, to say the least, very elementary. With the citation of Marais and Muller as the first and second defendants in their capacities as trustees, and Muller as the third defendant in her personal capacity, the following allegations are made by the plaintiff.

- "6. On or about 3 September 2001, the Defendant applied for credit facilities from the Plaintiff for the purpose of purchasing petroleum products from time to time on credit.*
- 7. The Plaintiff agreed to grant the Defendant credit facilities for petroleum products, which the Defendant intended to purchase from the Plaintiff in accordance with the Plaintiff's Terms and Conditions.*
- 8. A copy of the Credit Application Form incorporating the Plaintiff's Terms and Conditions is annexed hereto marked annexure "A".*

9. *In terms of the Plaintiff's Terms and Conditions –*

- 9.1 *the purchase price of all goods purchased are (sic) payable strictly 30 (thirty) days from the date of the said purchase;*
- 9.2 *all overdue amounts shall bear interest at 2.5% per month or part thereof;*
- 9.3 *all costs incurred in any action against the First Defendant shall be paid by the First Defendant on an attorney and own client scale and (sic) collection commission".*

It immediately strikes one that no specific allegation is made by BPA regarding the conclusion of an agreement for the sale and delivery of goods , whether oral or written, tacit or implied.

[18] The suretyship executed by Muller is introduced thus in the particulars of claim:

"10.1 On 3 September 2001 the Third Defendant bound herself jointly and severally as surety and co-principal debtor in solidum with the First and Second Defendant, unto and in favour of Plaintiff for the due and punctual payment and performance by the First and Second Defendant of all debts and obligations of whatever nature and howsoever

arising which First and Second Defendant may now or, in the future owe to the Plaintiff”.

[19] The supply and delivery of goods is alleged as follows:

“11. During the period of (sic) July 2008 to October 2008, the Plaintiff sold and delivered petroleum products to the Defendant at the latter’s special instance and request, the total outstanding balance of which amounted to R7 million”.

[20] The relief claimed is for judgment *“against the First, Second and Third Defendants, jointly and severally, the one paying the other to be absolved”.*

[21] The plea filed on behalf of the three defendants by their attorney in Mossel Bay is no beacon of clarity either.

21.1 In response to paragraph 6 of the particulars of claim the following is alleged:

“2.1 Die Verweerdere dra kennis van hierdie ooreenkoms.

2.2 Die Verweerdere voer aan dat hierdie ooreenkoms niks te doen het met hierdie eis van die Eiser nie, en stel die Eiser tot die bewys daarvan.

2.3 *Die Verweerders voer verder aan dat alle aankope van petroleumprodukte (diesel) gemaak deur die Albertinia Dekriet Trust in terme van die aansoek om kredietfasiliteite gemerk aanhangsel "A" reeds lank gelede deur die Albertinia Dekriet Trust ten volle vereffen is".*

21.2 There is no reply to the plaintiff's paragraph 7 which, in terms of rule 22(3) is deemed to be admitted by the Trust. In respect of paragraph 8 the defendants say the following:

"3. Die Verweerders neem kennis hiervan".

21.3 Regarding the plaintiff's paragraph 9, the defendant say:

"4. Insover dit betrekking het op aanhangsel "A" word dit erken".

21.4 As to the execution of the suretyship alleged by BPA in paragraph 10 of the particulars, the defendants allege:

"5. Insover dit betrekking het op aanhangsel "A", en die aankope deur die Albertinia Dekriet Trust gemaak in terme van die kredietfasiliteite deur die Eiser's (sic) verskaf, word dit erken".

[22] The defendants reply to the allegations made by BPA in paragraph 11 regarding supply and delivery is somewhat more involved:

“6.1 Dit word ontken, en word die Eiser tot die bewys daarvan gestel.

6.2 Die Verweerders voer aan dat die Eiser in terme van ‘n mondelinge ooreenkoms aangegaan tussen die Eiser en ene Christina Susanna Muller h/a Albertinia Diesel Depot gedurende 2002, diesel aan gemelde Christina Susanna Muller gedurende the tydperk 2002 tot Oktober 2008 verkoop en gelever het.

6.3 Die Verweerders voer aan dat bogemelde mondelinge ooreenkoms niks te doen het met die kredietaansoek gemerk aanhangsel “A” nie, en stel die Eiser tot die bewys daarvan.

7. In die alternatief, sou die Agbare Hof bevind dat daar wel ‘n ooreenkoms was tussen die Eiser en die Verweerders, soos beweer word, en wat nogsteeds ontken word, dan voer die Verweerders aan dat:

7.1 Dit ontken word dat die Eiser gedurende Julie tot Oktober 2008 diesel ten bedrae van R7 miljoen aan die Verweerders gelever het; en

7.2 *Alle rekeningstate wat deur die Eiser aan die Verweerders gelewer is alreeds vereffen is;*

en word die Eiser tot die bewys hiervan gestel. “

[23] It seems then that although the plaintiff did not state precisely which of the defendants had applied for a credit facility in December 2001, both the Trust and Muller understood the plaintiff to allege that it was in fact the Trust that was initially BPA's debtor.

[24] BPA sought trial particulars in relation to the allegations made in the defendants' plea by requesting *inter alia* the following:

24.1 Where, and by whom on behalf of BPA, the oral agreement of 2002 pleaded in paragraph 6 of the plea was concluded. The defendants replied that the date originally pleaded was incorrect and said that the agreement was in fact concluded by Otto on behalf of BPA in 2005. The defendant thought (“*vermoed*”) that the agreement was concluded at the Albertinia premises of the Trust;

24.2 When the defendants alleged that BPA ceased to deliver petroleum products to the Trust and why? The defendants' case was that the Trust never traded in petroleum products but that deliveries were made to a business called “ the Albertinia Diesel Depot” (hereinafter “the Depot”) which was operated by Muller (presumably it intended to allege as a sole proprietor);

24.3 Whether the Trust disposed of the business and, if so, to whom?

The defendants said that in October 2008 Muller sold the Depot to a close corporation called Vanrob and that she personally informed Esbach snr thereof;

24.4 Whether the defendants admitted that in March 2002 the Trust concluded a written supply agreement (a copy whereof was attached) with BPA? This allegation was expressly denied by the Trust;

24.5 In the event that the supply agreement was not admitted, who purported to sign same on behalf of the Trust, cited in the agreement as “*the User*”? The defendants said that they did not know;

24.6 In respect of the allegation made in paragraph 7 of the plea regarding payment, when and by whom same was made? The defendants said that this probably (“*waarskynlik*”) was made by the Trust in 2005 but went on to allege that it could not vouch for the accuracy of the allegation.²

[25] BPA then responded to the defendants’ allegations by way of a replication in which it said the following:

25.1 it denied that any agreement was entered into with Otto in terms whereof diesel would be sold and supplied to Muller;

² “ ‘n presise antwoord is nie moontlik nie.”

25.2 in the alternative, that Otto was not authorised by BPA to conclude such an agreement with Muller.

[26] BPA went on in its replication to plead an estoppel as follows. To the extent that it may be found, as alleged by Muller, that from 2005 (or whichever date she alleged) she intended to purchase product from BPA, not on behalf of the Trust but on behalf of the Albertinia Diesel Depot of which she was the sole proprietor, she was estopped from relying on such an allegation for the following reasons:

- 26.1 at all material times Muller misrepresented to BPA that all of her purchases were made on behalf of the Trust and not the Depot;
- 26.2 the misrepresentation occurred when Muller failed to inform BPA that she was no longer purchasing product from it on behalf of the Trust but on behalf of her sole proprietorship, the Depot;
- 26.3 Muller acted negligently in not disclosing to BPA, as she was reasonably required to do, the alleged change in the identity of the purchaser;
- 26.4 BPA acted to its detriment by continuing to supply product, whereas had it known it was no longer supplying to the Trust, it would have ceased supplying in light of the fact that Muller was not as creditworthy as the Trust, which operated a successful business.

[27] There appeared to BPA to be some ambiguity in the defendants' earlier trial particulars and in November 2013 it sought further and better trial particulars. These elicited the following points of clarification from the defendants:

- 27.1 Muller purchased product from BPA from the inception of the Depot by personally (or through her staff) placing telephonic orders with the plaintiff;
- 27.2 the Diesel Depot was established as a separate business to make profit;
- 27.3 the Trust only ran a transport business;
- 27.4 the Trust did not sell its business but in 2008 Muller disposed of the Depot;
- 27.5 Muller informed Esbach snr and Otto of the fact that the Depot was a sole proprietorship;
- 27.6 payment to BPA was made by, and in the name of, Albertinia Diesel Depot;
- 27.7 Muller also traded in that;
- 27.8 the Trust was registered for VAT and, allegedly on the advice of the SA Revenue Service, its VAT number was used for transactions by both the Trust and the Depot, the latter on the

basis that diesel is zero rated for VAT, and further because sale of the Depot business was considered imminent.

[28] After the furnishing of these further trial particulars the defendants delivered an amendment to their plea, which sought to introduce a first alternative to the allegations made in response to paragraph 11 of the particulars of claim. The Trust alleged that as the sole trustees of the Trust, Marais and Muller were required to consider and reach consensus on the agreement to purchase petroleum products from BPA. To the extent that Marais allegedly never knew of the agreement and was not consulted in relation thereto, the Trust alleged that the agreement was invalid and unenforceable against it.

[29] In April 2014 BPA duly amended its replication in response to the amended plea by denying that Marais did not consent as alleged and in reply to the Trust's allegation that the transactions were not consented to by Marais, BPA pleaded a further estoppel, claiming that at all material times (as far as it was concerned) the business of the Trust was effectively conducted by Muller. It was said that Marais permitted Muller to so conduct the business of the Trust with BPA and, accordingly, Muller and/or Marais negligently represented to the plaintiff that she alone was authorised to act on behalf of the Trust. In light of the fact that it believed that this representation reflected the true position, BPA said that it acted to its detriment in dealing only with Muller when entering into sales of petroleum products, and accordingly pleaded that Muller was estopped from relying on any lack of authority.

[30] But the pre-trial jousting was not over yet. At the commencement of the trial on 6 October 2014, BPA sought to bolster its replication by referring to clause

3.1.5 of the Credit Application Form referred to in paragraph 8 of the particulars of claim (and attached thereto as annexure “A”) which is to the effect that the person signing the document on behalf of the debtor warranted that he/she was duly authorised to act on behalf of the debtor and, in the event that such authority was subsequently challenged, the signatory accepted personal liability in terms of the agreement.

[31] BPA therefore sought that Muller (*qua* trustee) be held personally liable for the Trust’s debts to it, such liability to be in addition to her personal liability in terms of the suretyship she put up on behalf of the Trust.

[32] Evidence was heard from 6 to 8 October 2014 and, at the request of the parties, postponed to 14 November 2014 for argument. At the conclusion of argument, Mr Maree indicated that a further amendment to the replication would be forthcoming and on 25 November 2014 a further allegation was made by BPA in which it sought, in addition, to rely on the principle of *quasi-mutual assent*. It is preferable to deal with these allegations in the replication after I have considered the evidence, since there is extensive reference therein to the facts arising from the evidence.

THE ONUS

[33] After various attempts at refinement of the issues through the pleadings, the fundamental question is whether diesel was delivered at the Albertinia premises during the period July to October 2008 in terms of an agreement with the Trust, concluded between Otto on behalf of BPA and Muller on behalf of the Trust on 3

September 2001. The material terms of that alleged agreement are to be found in annexure “A” to the particulars of claim.

[34] Mr Maree accepted that BPA bore the onus to establish that agreement. In the event that the Trust contended for terms different from those alleged by BPA in terms of that agreement, the onus was on BPA to establish that the agreement did not include those terms as alleged by the Trust.³

[35] However, Mr Maree argued that the situation under consideration did not fall into the Topaz Kitchens’ category. Rather, he observed, the Trust contended that the agreement reflected in annexure “A” had served its purpose, i.e. the supply of diesel to the business conducted by the Trust at the Albertinia premises. To the extent that Muller claims that diesel was supplied to a different entity (her sole proprietorship called the Albertinia Diesel Depot) on different terms and conditions, it was argued that she bears the onus of proof of establishing that contract. To the extent that Muller contends for an agreement between other parties (a different debtor), she has set up a special defence as contemplated in Pillay⁴, and has attracted the onus of proof in respect of that agreement.

THE EVIDENCE

[36] Otto’s evidence established that shortly after he started working for BPA (in September 2001), he was looking for new business for his employer. He approached his life-long friend (and former police chief) to establish whether she was interested in buying quantities of bulk diesel with which to fuel her trucks at Albertinia.

³ Topaz Kitchens Pty Ltd v Naboom Spa (Edms) Bpk 1976 (3) SA 470 (A).

⁴ Pillay v Krishna & Another 1946 AD 946 at 952-3.

Muller expressed an interest and she was asked to fill in a Credit Application Form, annexure “A” to the particulars of claim.

[37] The fact that Muller applied in that document for credit in the amount of R20 000.00 in September 2001, said Otto, demonstrated that she contemplated needing relatively limited quantities of fuel. In addition, he confirmed that supply of a single 9000 litre storage tank to the Albertinia premises in November 2001 (under the supply agreement) strongly supported the fact that at that stage the parties were *ad idem* as to the precise nature of their agreement – the supply of diesel with which to fuel the fleet of trucks transporting thatch.

[38] Otto was clear in his evidence that a depot supplying diesel to both the fleet of the Trust’s trucks, other customers and the public in general would have required significantly larger storage facilities than a 9 000 litre tank – of the order of 40000 litres or more.

[39] Otto said that at a later stage BPA was looking to expand its sales capability and that a depot in Albertinia was its first venture into the establishment of a number of privately owned diesel depots which would supply its product to both existing commercial clients and to members of the public who wished to fill up there. The witness was unable to fix a date for this expansion of the Albertinia operation with any accuracy.

[40] One fact is without doubt however – the parties were *ad idem* that in September 2001 BPA concluded a supply agreement with the Trust. Otto testified

that he thereafter believed, at all material times, that he (on behalf of BPA) was dealing only with the Trust.

“HOF: ... Die vraag was, soos ek dit verstaan, het julle ooit bulk diesel aan Mevrouw Muller in haar persoonlike hoedanigheid verkoop of was dit die heelyd aan die Trust? Wat is u antwoord?”

- - - U Agbare, dit was heelyd aan Dekriet Trust”.

[41] When the Albertinia depot was expanded to accommodate the later sale of what I shall conveniently refer to as “*bulk diesel*”, Muller said the parties concluded a new agreement. In his evidence in chief Otto was asked by counsel for the plaintiff what his comment was in regard to Muller’s claims of an oral agreement concluded with her personally. He answered frankly but inconclusively:

“MNR MAREE: ... die bewering oor ‘n mondelingse ooreenkoms waar u sou optree namens eiser vir die verkoop van bulk diesel aan Muller wat is u reaksie daarop? Was daar so ‘n mondelingse ooreenkoms?”

- - - Nie sover ek weet nie. Ek is ontseker, dit is baie jare terug”.

[42] Otto thereafter speculated as he attempted to rationalise what had actually happened by referring to certain probabilities:

- *“As daar ‘n mondelingse ooreenkoms was sou daar papierwerk ingevul gewees het ...”;*
- *“Daar is geen mondelingse ooreenkomste wat ek met hierdie kliënte aangegaan het nie ...”;*
- *“So ons sou, kon daaroor gepraat het en ons kon daardeur besigheid doen ...”.*

[43] Under cross-examination Otto’s recollection regarding the conclusion of the bulk diesel agreement appears to have improved somewhat as he steadfastly clung to the claim that there was one agreement with the Trust which lasted forever and a day.

“MNR VAN RIET: ... nou dit in aggenome verstaan ek u getuienis reg dat u net een kontrak vir die lewering van diesel aan Mevrouw Muller en/of haar trust gesluit het en dit was die aanvanklike November 2001 ooreenkoms met die Albertinia Dekriet Trust soos deur haar verteenwoordig?- -

Ja, u Edele.

En daardie kontrak se terme het in plek gebly vir altyd daarna? - - -

Ja u Edele.

En die lewerings ten opsigte waarvan die eiser nou eis gedurende Julie tot Oktober 2008 het ingevolge daardie kontrak met daardie selfde terme geskied?- - -

Ja, u Edele”.

[44] And when given a reasonable opportunity by counsel for the Trust to reflect on the correct position, Otto waived, then recanted, and eventually demonstrated a complete lack of certainty.

“Nou gaan ek vir u die kans gee om ‘n erkenning te maak. Die erkenning is die volgende: Dat soos u daar staan weet u dat uself persoonlik later ‘n ander kontrak met haar aangegaan het met heeltemal ander terme vir die lewering van bulk diesel. U weet dit soos u daar staan. Wat wil u daaromtrent sê? - - - Nee U Edele ek weet dit nie. So ek ... (tussenbeide).

U weet dit nie ? - - - Ek weet dit nie. So as dit gebeur het dan is dit, dan is dit baie jare terug. Ek weet dit nie. Ek het nie volgens my kennis het ek dit nie gedoen nie. Dit kan dalk wees, ek weet nie. Dit is baie jare terug.

U sê dit kan dalk wees. U het dit twee maal gesê in u getuienis in-hoof. Dit kan dalk wees. Sê (u) dat dit kan wees en u kan dit net nie onthou nie of sê u dit het nie gebeur nie? ... Ek het dit nie gesê nie, u Edele. Ek het

gesê dit kan dalk wees. Dit is baie jare terug. Ek kan nie alles onthou wat ek elke dag in my lewe gedoen het nie. Ek doen R400 miljoen se besigheid in 'n jaar en ek kan nie elke oomblik elke sent onthou nie".

[45] Mr van Riet SC debated with Otto the discussions which led up to the decision to supply the Albertinia premises with bulk diesel. The witness explained the position as follows:

"... U Edele, hierdie konsep van privaat depots was Mevrouw Muller die eerste persoon wat dit gedoen het vir ons maatskappy. Niemand anders het dit gedoen nie. En dit het gegaan oor Tuinroete Agri wat nie dit, met ons die pad wou loop nie. Toe het ons teen Tuinroete Agri gegaan op daardie stadium en dit is die eerste persoon met wie BP Atlantic dit gedoen het".

[46] When asked whether the name "*Albertinia Dekriet Trust*" was ever mentioned in relation to the entity to be involved in the expansion of the existing facility, the witness was, once again, less than convincing.

"MNR VAN RIET: Is ek nou reg, ek het nou net vir u gevra, is die naam Albertinia Dekriet Trust of enige komponent daarvan ooit gebruik in die gesprek en u antwoord was dit is 13 jaar gelede ek kan nie onthou nie. Is dit die regte antwoord?- - U Edele, as dit 'n ander naam was die dag

dan sou ek die dag gesê het maar daar moet die volgende papierwerk gedoen word. So het ek aanvaar dat dit Albertinia Dekriet Trust is.

Vir die oomblik, Mnr Otto, aanvaar ek dat u dit aanvaar het. My vraag is heeltemal 'n ander een. My vraag is nie wat u gedink het in u kop nie. My vraag is u loop in en u se hallo Sunet en u maak van haar 'n voorstel, is die woorde Albertinia Dekriet Trust of enige komponent daarvan ooit gebruik in daardie gesprek? - - - Dit kan wees, U Edele. Dit is 13 jaar terug.

Maar u kan nie onthou nie en u kan nie sê dat dit gebruik is nie/ - - - Nee, ek kan nie sê dit is gebruik nie”.

[47] In fairness to Otto, Mr van Riet SC put it to the witness that Muller herself could not recall whether she had expressly said to Otto at any time that the bulk diesel contract was to be concluded with herself (as sole proprietor) rather than the Trust.

[48] This concession by counsel on behalf of Muller *qua* trustee, was directly at odds with the allegations made in paragraph 2.3(a) and (b) of the Trust's further trial particulars (see paragraph 27.5 above). Whether Muller is, in view of this apparent change in her version to be regarded as dishonest is one thing. But, it certainly is demonstrative of another concern. In light of the fact that the witnesses were being asked to recall events going back 10 years or more, their reliability was

certainly a cause for concern. The evidence on contentious issues must therefore be approached with the necessary caution.

[49] In my view the evidence unequivocally establishes the following:

- 49.1 From September/October 2001 until October 2008 BPA continuously delivered petroleum products (diesel and lubricants) to the Albertinia premises;
- 49.2 The parties were *ad idem* that such diesel, as was initially delivered by BPA at the premises with effect from late 2001, was to be stored in a 9 000 litre supply tank;
- 49.3 The diesel so delivered was for the account of the Trust which was recorded as BPA's debtor;
- 49.4 Some three or more years later BPA began to deliver increased quantities of diesel to the premises. This required the installation of two larger storage tanks (23 000 litres each) equipped with electric petrol pumps with metering devices;
- 49.5 The installation of the 23 000 litre tanks could only take place after approval by the Western Cape Provincial Environmental Affairs Department had been obtained. A letter placed before the court suggests that this process commenced around January 2004;

- 49.6 BPA dealt throughout with Muller and her staff members while Marais' involvement in the business at the premises was minimal;
- 49.7 BPA's invoices and month-end statements throughout the seven year period that products were delivered in Albertinia reflect the debtor as "*Albertinia Dekriet Trust*", or its shortened form "*Albertinia Dekriet*";
- 49.8 The only other documentation (aside from the invoices and accounts) placed before the court relevant to the parties' contractual arrangements (the application for credit, the suretyship and the installation agreement), all reflect the Trust as the debtor of BPA;
- 49.9 When BPA started delivering bulk diesel in Albertinia the monthly liability of the debtor increased significantly due to the larger quantities of fuel then being despatched - from the R20 000 limit applied for by the Trust and granted by BPA in 2001, to amounts in excess of R3 million in 2006 and R6 million in 2007;
- 49.10 The purchase and/or terms relevant to the increase in liability on the part of the debtor in respect of bulk diesel delivery was not recorded in writing at any time and it is therefore impossible to establish exactly when the increase in supply commenced. Nevertheless, the documentation relevant to delivery, billing and payment suggest that this was some time in the first half of 2005;

49.11 All payments to BPA in respect of diesel delivered in Albertinia from 2001 to 2007 were made from two bank accounts (one with ABSA in Albertinia and another with Standard Bank in Mossel Bay) both of which were operated by the Trust;

49.12 From time to time during the period 2005 to 2007 faxes were sent to BPA in which the allocation of payments made to it in respect of the delivery of bulk diesel at Albertinia was explained. The vast majority of these faxes were printed on the letterhead of “*Albertinia Diesel Depot*”, whose telephone and fax number were recorded as 082 735 1543. On one occasion such an allocation was made on the letterhead of the Trust whose telephone number was said to be 028 735 1951 and the fax number recorded as 028 735 1543. It is fair, therefore, to conclude that there were two telephone lines and one fax machine on the premises. Further it is to be noted that on both letterheads the street address and post office box number are identical.

[50] In light of the foregoing it is safe to conclude that from 2001 to 2004 diesel was delivered by BPA for consumption by the Trust’s trucks in the course of the conveyance of thatch and coal. There is no issue that the Trust was liable to BPA for these deliveries. This accords with the case as pleaded by both BPA and the Trust.

[51] As already demonstrated, Otto’s recollection about the change-over from the sale of diesel for the Trust’s fleet of trucks to the supply of bulk diesel is vague and unreliable. What is however apparent therefrom, is that around 2004/5 the

Trusts account with BPA was significantly beyond the R20 000 limit agreed to in 2001. At that stage (2004/5) Otto says he handed the Trust's account over to Esbach snr. It appears that thereafter Otto had nothing more to do with the management of the account, which was entirely in the hands of Esbach snr until May 2012 when he suddenly succumbed to a fatal heart attack.

[52] Muller testified that she recalled that the 23 000 litre tanks were installed towards the end of 2003 and testified regarding the necessity of having to obtain municipal approval as her point of reference. Her recollection was assisted by her referral to the aforementioned documentation, relevant to the procurement of environmental approvals dated January 2004. Muller went on to say that Ms Annatjie Conradie, who testified on behalf of BPA, was employed in February 2004 to assist with the administration of the bulk diesel Depot, and that a new bank account with Standard Bank in Mossel Bay, which was to be used exclusively for the bulk diesel sales, was opened.

[53] Muller also testified that the sale of bulk diesel was conducted in the name of "*Albertinia Diesel Depot*". This fact is corroborated by the documents bearing that description referred to above in relation to payment allocations. Muller also produced financial statements prepared by a certain Johan Barnard, a tax consultant and bookkeeper from Mossel Bay. In respect of the tax year 1 March 2002 – 28 February 2003, the financial statements in the name of the Albertinia Dekriet Trust appear to record the Trust's activities as the sale of thatch and the conducting of a transport business, the total turnover whereof amounted to R5.9 million.

[54] Barnard also prepared financial statements for the tax year 1 June 2004 to 31 May 2005 in the name of “*Albertinia Diesel Depot*”. Those statements clearly demonstrate the business of the Depot as the purchasing and supply of bulk diesel by an entity with a turnover in excess of R10.7 million.

[55] All things considered then, there can be little doubt that after the installation of the 23 000 litre tanks at the Albertinia premises in 2004, a business known as Albertinia Diesel Depot was conducted on the Albertinia premises. For the purposes of BPA’s claim the question that logically arises is whether the Depot was conducted by Muller as a sole proprietorship, or whether it was a distinct trading entity conducted by the Trust alongside the established thatch and transport business?

[56] In her evidence Muller testified that the installation of the two larger tanks followed on discussions between herself and Otto. Her recollection was that this was towards the end of 2003 or the beginning of 2004. As to ownership of the Depot business, Muller said the following in her evidence in chief:

“MNR VAN RIET: ... Was daar enige iets gesê spesifiek uitdruklik oor wie die Depot sou bedryf? - - U Edele,... dit was absoluut Sunet Muller wat die Depot sou bedryf. Albertinia Dekriet Trust se naam was nie genoem nie en was nooit te sprake gewees nie.

Maar, en ek verstaan wat u sê, maar my verdere vraag is of iemand ooit gesê het onthou nou X is die koper en Y nie? Is dit ooit so gestel of nie? - - As u bedoel of dit gestel is dat Albertinia Dekriet Trust die koper is, dit is nooit so gestel nie ...

HOF: *Nee, maar die vraag is anders. Het u spesifiek gesê onthou Meneer Otto dit is nie meer ADT nie, dit is nou ADD? Dit is nou nie meer die Trust nie dit is ek in my persoonlikehoedanigheid wat die depot gaan run? U Edele, Albertinia Dekriet, omdat Albertinia Dekriet Trust nooit te sprake was nie en ek ook besigheid op my eie naam noem het ek aangeneem dit is ek wat die depot, omdat net met my gepraat is en nooit die Dekriet Trust se naam genome is nie”.*

[57] It is noteworthy that Muller initially used the verb “aangeneem” (“assumed”) in relation to her alleged proprietorship of the Depot, whereas later in her evidence she stated in fairly unequivocal terms that the Depot was indeed run for her own account. Muller said that initially she used an ABSA Bank account in Albertinia in the name of the Trust to conduct the business of the Depot: at that stage there was no Standard Bank branch in Albertinia. Later, she said, there were two accounts: one at ABSA Bank in Albertinia in the name of the Albertinia Dekriet Trust and another at Standard Bank in Mossel Bay in the name of Albertinia Diesel Depot. Copies of bank statements of the latter reflect that they were addressed to the “partners”⁵ of the business.

[58] The witness demonstrated how payments were made from the Trust’s ABSA account to the Standard Bank account in settlement of diesel supplied by the Depot to the Trust for use in its vehicles. She was taken through Barnard’s financial statements and asked to explain certain types of expenses normally associated with a trucking business. She also referred to certain correspondence on the Trust’s letterhead which authorized certain of BPA’s other depots in the Western Cape to supply fuel to a limited number of the Trust’s trucks.

⁵ “Die Vennote”.

[59] Muller pointed out that the Depot was sold in late 2008 to a company known as “*Vanrob (Pty) Limited*”. The statutory notices relevant to this transaction were duly published and reflected Muller as the owner of the business. She also referred to a number of documents relating to statutory approvals e.g. by the Controller of Petroleum Products, all of which reflected her as the owner of the Depot.

[60] When questioned as to the rationale for conducting the business of the Depot as a sole proprietorship rather than through the Trust, Muller intimated that this was intended to be conducted as her own business so as not to prejudice the interests of the beneficiaries of the Trust in the event that the Depot was not a financial success. And, when asked why she did not raise with BPA the fact that all of its invoices after 2004 were incorrectly directed for the attention of the Trust, rather than the Depot (as a sole proprietor), Muller claimed that she had on one occasion, fairly early on in the Depot’s life, phoned an employee of BPA and informed her that the invoices and month-end statements incorrectly reflected the Trust as its debtor whereas it should have been for her account. When things were not corrected Muller said that she decided to leave it at that.

[61] Turning to the identity of the representatives of BPA with whom she dealt, Muller maintained that Otto was the person that she dealt with throughout – from 2001 through to 2004. In particular, she said it was he who had initiated discussions around the expansion of the business to include a depot of general sales of diesel. Muller acknowledged that the opening of such a depot necessitated new terms of supply and an extension of credit limits and facilities, but she steadfastly maintained that she believed that Otto had the requisite authority to negotiate these.

[62] Muller said that in about 2006 the Depot's account with BPA was significantly in the red. She was under pressure to reduce it and was being let down by the clients of the Depot who were paying late. There was clearly a severe cash-flow crisis. At that stage Muller said that she engaged directly with Esbach snr for the first time, in an endeavour to resolve the problem which would have otherwise led to a shortage of supply from BPA. Muller said that during those discussions she pertinently informed Esbach snr of the fact that she was conducting the Depot business as a sole proprietor but, it seems, Esbach snr did not accept that to be the legal position.

[63] However, the correspondence shows that as early as 9 June 2005 Esbach snr wrote to "*Albertinia Dekriet Trust*" regarding its overdue account. In a letter addressed to Muller informally⁶, Esbach snr put her to terms to clear all outstanding amounts at the end of each successive month. The letter recorded that he had built up trust in Muller as a client to such an extent that he expected her to confirm acceptance of the proposal by signing the letter.⁷

[64] This correspondence suggests that Esbach snr regarded the Trust (and not Muller) as his company's debtor. Even though he addressed Muller in terms suggestive of sole proprietorship ("*jou as kliënt*"), I am of the view that this must refer to the leading role she played on behalf of the Trust which was the entity which had been supplied by BPA up to then, and which had established its creditworthiness over the years. It most certainly does not sustain Muller's allegation under cross-

⁶ "*Beste Sunet*".

⁷ "*Ek het genoeg respek vir jou as kliënt om te verwag dat jy by hierdie onderneming sal bly deur dit met jou handtekening onderaan hierdie brief te bevestig*".

examination that BPA knew through her earlier discussion with Otto that it was doing business with a sole proprietor.

[65] At a fairly advanced stage of her evidence Muller sought to suggest that the supply of thatch was a business always conducted by her as a sole proprietor and that the business of the Trust was that of transport. On the strength of this, she said, BPA should have realized that when Otto approached her in regard to the setting up of the depot she was negotiating, not as a representative of the Trust, but on her own behalf. This evidence flies in the face of Barnard's financial statements which reflect that the Trust was responsible for the purchase and sale of large amounts of thatch.

[66] What is clear however from her evidence is that Muller never pertinently said to either Otto or Esbach snr that the Depot was to be conducted as a sole proprietorship – it was only at a later stage when the account with BPA moved into the red and when BPA became concerned about payment thereof, that Muller says she spoke of the fact that she ran the Depot as a sole proprietorship. Her evidence is replete with passages in which she suggests why they (Otto and Esbach snr) should (or could) have realized from the start of the supply of bulk diesel that they were no longer dealing with the Trust, but she is unable to make any positive assertions which establish that they in fact knew.

[67] This evidence creates a problem for Muller. Assuming for the purposes of argument that the Depot was indeed conducted as a business entity distinct from the Trust, as Muller claims, her version lays the very basis for an absence of *consensus* at the time that negotiations regarding the establishment of the depot were taking place. Muller does not claim that, as a fact, BPA knew that it was negotiating

with her as a sole proprietor, but suggests that they ought to have realised this. Otto (and later Esbach snr) on the other hand thought that there was one contract concluded in 2001 in terms whereof business with the Trust would last indefinitely. In such circumstances there could never have been consensus between the parties as to who was contracting with whom after 2004 : rather there appears to have been an *error in personam* which vitiated consensus.⁸

[68] To the extent that Muller was saddled with the onus of establishing that she was BPA's debtor, I am of the view that she has failed to establish that the parties reached consensus in that regard.

[69] That finding leaves one with BPA's argument that it concluded a contract, partly written and partly oral, with the Trust in 2001 for the supply of petroleum products and that that agreement endured until 2008. While it was not expressly pleaded as such, Mr Maree argued that this was what the evidence ultimately established. I did not understand Mr van Riet SC to object to this ultimate formulation of the Plaintiff's claim which, in broad terms, accorded with the evidence before the court.

[70] The Trust accepted that the delivery of diesel initially was in terms of this agreement, and in particular, with incorporation of the conditions contained in annexure "A". The reason that the arrangement came to an end, said Muller, was because the bulk diesel contract was concluded with her as a sole proprietor. I did not understand Muller to contend that delivery of the bulk fuel to the Depot was

⁸ Van der Merwe et al Contract – General Principles 4th Ed at 25; Venter & Others v Credit Guarantee Insurance Corporation of Africa Ltd 1996 (3) SA 966 (A) at 974-6; Lake & Others NNO v Caithness 1997 (1) SA 667 (E) at 672B.

effected on any terms other than those which had been in place for the previous two-three years, save that the debtor was a different party. The fact that BPA was prepared to deliver significantly larger volumes of fuel to the Albertinia premises without reviewing the existing credit facilities does not mean that it no longer intended to deliver fuel to the Trust. On the contrary, as the letter of Esbach snr to Muller on 9 June 2005 suggests, BPA was satisfied with the creditworthiness of the Trust up to that stage, and in particular with Muller's management thereof. That would provide a logical basis for continued business with the Trust.

[71] Furthermore, there are no objectively ascertainable facts which suggest that BPA was looking to supply diesel to a different entity: it had an established *modus operandi* in place which was commercially acceptable to it, and when the time came to increase the volume of diesel to be delivered, it was fully entitled to assume that it was doing so in terms of its existing contractual arrangement, i.e. the oral agreement as amplified by annexure "A". Moreover, the fact that Muller says that she only mentioned the alleged change in party sometime after the new supply arrangements were in place, strongly suggests that up until then BPA was entitled to assume that it was "*business as usual*".

[72] The evidence of Ms Annatjie Conradie on behalf of BPA is important corroboration for BPA's understanding of the position. She said that she was employed in February 2004 to assist on the Depot side of the business. She explained that the building on the premises from which she worked had been adapted to make provision for two offices – one for the supply of thatch and the other for diesel. Above the respective doors the names "*Albertinia Dekriet Trust*" and

“*Albertinia Diesel Depot*” were painted in large letters. Conradie said that she worked in the latter office.

[73] Conradie testified that she performed an administrative function, mainly the preparation of invoices for the Depot’s clients. She was shown the various faxes sent to BPA in which the allocation of payments made to it were set out. When shown one such document which was prepared on the letterhead of the Trust (as opposed to the majority of the documents that were on the letterhead of the Depot) Conradie replied that she saw the Trust and the Depot as one business run by Muller. She said that Muller had authorised the use of the Trust’s template on her computer for that particular fax and described Muller as a strict employer who ran an efficient office , the suggestion being that there was no mistake on the part of Muller in relation to that instruction.

[74] The significance of Conradie’s evidence is that if she , as an employee intimately familiar with the administration of the Depot’s business , believed that it and the Trust were one and the same trading entity, the belief by parties more distant to the business that they were still dealing with the Trust becomes all the more understandable and credible.

[75] In the circumstances I am satisfied, on a balance of probabilities, that BPA supplied bulk diesel to the Depot on the basis, and in the firm belief, that it was still dealing with the Trust and that it would be paid by the Trust , as indeed it was , first from the ABSA account , and later from the Standard Bank account. In the absence of actual *consensus* as to the underlying legal basis for the supply by BPA of

diesel, the question is whether there is a basis other than a contractual arrangement under which BPA may recover the debt from the Trust?

QUASI-MUTUAL ASSENT

[76] In the amendment introduced after conclusion of argument, Mr Maree sought to rely on the doctrine of quasi-mutual assent. This is an English law concept which was received into our law more than a century ago⁹ when the Appellate Division effectively accepted the import of the rule as expressed in Smith v Hughes¹⁰:

“If whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, and thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

[77] As Prof. Christie¹¹ observes the doctrine (or rule) has been adopted in numerous subsequent cases in our courts and

“(w)ithout it our law would be in a sorry state, as it would be obliged to hold that whenever there was no true subjective agreement there was no contract, even if the one party had given the other reasonably to understand that they were in

⁹ Pieters & Co v Salomon 1911 AD 121

¹⁰ (1871) LR 6 QB 597 at 607

¹¹ Christie and Bradfield Christie’s Law of Contract in South Africa (6th Ed) at 11

agreement. The conduct of business, if this were the law, would be so hazardous that the law would be brought into disrepute.”

[78] Applying that approach to the present case, Muller will be held to the existing terms of the contract between the parties (i.e. the agreement of September 2001) by virtue of assumed consent because of the way in which she conducted herself when the decision was made to establish the Depot , and subsequent thereto. There can be little doubt that had BPA wanted to contract with Muller in person (as opposed to the Trust) it would have taken appropriate steps to do so. These may have included new arrangements for securing payment as against delivery of increased quantities of diesel. Moreover, Muller’s conduct personally, and the manner in which she conducted the business of the Depot, were consonant with an understanding on the part of Otto and Esbach snr that the Trust was the debtor.

[79] In the amended replication BPA lists five grounds which it says support the claim that its belief was reasonable that Muller was consenting on behalf of the Trust to be bound by BPA’s terms. They are as follows:

“(i) Until then, the visits by Plaintiff (Otto) to the premises, and to “Mrs Muller”, involved “official” or “business” visits to Mrs Muller in her capacity as trustee of the said trust.

(ii) Until then, there was only one “office” and one entrance at the relevant premises in Albertinia.

(iii) *there was no indication in any manner that the discussions that day with Mrs Muller were with her in any other capacity than that of trustee of the trust (i.e. any other capacity than the one that was involved in/with all visits and/or discussions with her until then).*

(iv) *All supplies of diesel to the premises would thereafter continue as before.*

(v) *No written contract or even paperwork of any sorts were involved in relation to such discussion.”*

[80] When these circumstances are considered against the background of the facts set out in paragraph 49 above, I believe that the conclusion sought to be drawn by BPA through the application of the doctrine of quasi-mutual assent is sustainable. Accordingly, I am satisfied that the plaintiff has established that the Trust is liable to it for payment in respect of the diesel delivered to the Depot during the period July to October 2008, and that the third defendant is jointly and severally liable to the plaintiff with the Trust under the suretyship executed by her on behalf of the Trust on 3 September 2001. In light of this finding it is not necessary to deal with the plaintiff's further replication of estoppel.

ORDER OF COURT:

IN THE CIRCUMSTANCES THE FOLLOWING ORDER IS MADE:

- A. The First and Second Defendants , in their respective capacities as trustees of the Albertinia Dekriet Trust , are liable to the Plaintiff for such amount as the Plaintiff may prove is due to it in respect of petroleum products delivered by it to the Albertinia Diesel Depot during the period July 2008 to October 2008.
- B. The First and Second Defendants , in their representative capacities as aforesaid , are liable to the Plaintiff for the payment of interest on the aforesaid amount found to be due to it at the rate of 2,5% per month from 31 October 2008 to date of final payment.
- C. The First and Second Defendants, in their representative capacities as aforesaid, shall pay the Plaintiff's costs of suit on the scale as between attorney and own client.
- D. The Third Defendant is jointly and severally liable with the First and Second Defendants as aforesaid (the one paying the other to be absolved) for the payment to the Plaintiff of the capital, interest and costs due to it by the First and Defendants in their representative capacity as aforesaid.

GAMBLE, J