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

Reportable

CASE NO: 22002/2016

In the matter between:

STARWAYS TRADING 21 CC	Applicant
And	
PEARL ISLAND TRADING 714 (PTY) LTD	First Respondent
SHOPRITE CHECKERS (PTY) LTD	Second Respondent

JUDGMENT: 10 February 2017

DAVIS J

Introduction

[1] The relief as sought by applicant is aimed at enforcing what applicant considers to be a written contract concluded between it and first respondent on 14 July 2016 in terms of which first respondent purchased from applicant 25 000 metric tons (MT) of white refined sugar at R 10,350.00 per MT for the first 10 000 MT and R 10 650.00 for the remaining 15 000 MT to be delivered in consignments over a period from October 2016 to May 2017 ("the sugar contract").

[2] It appears that first respondent considers that it cancelled the sugar contract, pursuant to a repudiation thereof by applicant. Applicant denies a repudiation on its part and submits that there was no valid basis for a cancellation of the sugar contract. It also denies that there was, in fact, an act of cancellation.

[3] Applicant also seeks relief against second respondent for the enforcement of an express, verbal, alternatively tacit agreement between all three parties to the effect that second respondent, being the actual ultimate purchaser, of the consignment is responsible for the funding of the entire transaction and hence second respondent make payment to first respondent of the amounts due for delivery of consignments by applicant to first respondent, thereby placing first respondent in funds to make payments to applicant. Both first and second respondent deny the existence of this agreement.

The factual background

[4] Most of the relevant facts are undisputed or not seriously contested. Of further relevance is that there was an agreement between first and second respondent, namely a, "Supply Storage and Integrated Logistic Services Agreement" which was concluded on 20 March 2013. It appeared that between first and second respondents, second respondent signed "a letter of confirmation in order to confirm the terms of the on sale of the sugar by Pearl to Shoprite". In this connection, it should be noted that first respondent's business is solely the packaging of rice and sugar for second respondent.

[5] Applicant is an importer of sugar. Since 2014 a number of transactions were concluded and implemented which involved all three parties. In terms of these transactions, first respondent would purchase sugar from applicant at a price agreed to by applicant and second respondent. Upon delivery of the sugar to first respondent, applicant rendered an invoice and provided a copy thereof to second

respondent. According to Mr Mukadam of applicant, second respondent made payment of the invoice to first respondent which, in turn, made payment to applicant with the funds received from second respondent.

[6] Mr Rapsch of first respondent states in his affidavit that second respondent paid it pursuant to an invoice raised by it and not as a result of applicant's invoice. However, it can be taken that the sequence of payments as outlined by applicant does not seem to be in serious dispute.

[7] In his affidavit Mr Du Plessis of second respondent notes that there was not only one invoice involved. He explained that, upon delivery of each consignment to first respondent, applicant rendered an invoice to it and first respondent rendered a separate invoice to second respondent for a different amount. Furthermore, second respondent does not deny the sequence of events stating simply that "Pearl paid the Starways invoice amount to Starways and Shoprite the Pearl invoice amount to Pearl".

[8] According to Mr Rapsch "applicant was at all times aware of the fact that second respondent was the ultimate purchaser of the sugar as far as the transaction between the parties is concerned and that it is in that capacity and not in a representative capacity that applicant communicated with second respondent."

[9] On 28 June 2016 second respondent generated an email to applicant in which Mr Du Plessis stated "as per our discussion we are interested in sugar to the tune

25 tons over the next 12 months". Thereafter, following negotiations between Mr Mukadam of applicant and Mr Du Plessis of second respondent, with which correspondence Mr Rapsch of first respondent was copied, a signing of a sugar contract took place on 14 July 2016.

[10] On 04 August 2016 Mr Mukadam received a WhatsApp message from Mr Du Plessis in which the latter indicated that there was a problem, as second respondent could purchase sugar at R 9500.00 including duty which "is a big difference from R 10350.00". He further stated "please advise as this puts our deal at risk" and followed with a suggestion "let's talk in the morning" to which Mr Mukadam replied "no problem".

[11] According to Mr Mukadam he and Mr Du Plessis then telephonically discussed the issue in relation to the purchase price. He stated that he advised Du Plessis to purchase sugar at R 9500.00 and that, considering what second respondent was paying the first respondent to pay the applicant in terms of the 14 July 2016 contract the average price which would probably be in the region of R 9800.00 per MT.

[12] At this stage, suffice to say, Du Plessis has a somewhat different account as is evidenced in his answering affidavit.

> 'Later that day, at approximately 17h30, I telephoned Mr Mukadam to confirm with him that the purchase price in terms of the sugar contract would be reduced in

accordance with the decrease in the duty. Mr Mukadam, however, was clearly unwilling to reduce the purchase price.

At approximately 18h00 I telephoned Mr Rapsch and established from him that merely the reduction of the import duty would enable Pearl to import sugar (from Brazil) at R 9500.00 per ton, including import duty. I advised Mr Mukadam accordingly in my WhatsApp message ("MM21") at 18h19 (or 19h19 according to my mobile for).

By 5 August 2016 Messrs Rapsch, Stoffberg and I had decided to pursue the import of the cheaper sugar from Brazil. I agreed to convey to Mr Mukadam that Pearl was, in the circumstances cancelling the sugar contract.

On 5 August 2016, during a telephone conversation, I informed Mr Mukadam of our decision and expressly cancelled the sugar contract on behalf of Pearl. I later confirmed to Mr Rapsch that I had done so.

On 17 August 2016 the consequential cancellation of the onsale agreement was confirmed when I endorsed the letter of confirmation accordingly, in the presence of Mr Stoffberg.' (page 19)

[13] The next relevant piece of relevant documentation was generated on 30 September 2016 when Mr Mukadam sent a letter to first respondent advising that applicant would shortly be in a position to execute upon its contractual obligations to supply 8000 MT during October 2016 in terms of subparagraph 7(a) of the sugar contract. In this correspondence first respondent was reminded to insure the product upon delivery and "furthermore the payment in full of delivery of invoice and copy of bill of lading; is expected such payment amounting to R 82 800 000.00 together with VAT. This letter was sent to Mr Rapsch by Ms Mills of applicant under the cover of an email letter of 30 September 2016 in which it was confirmed that the containers would be delivered directly to first respondent and that the first vessel

was to arrive in Cape Town on 12 October. The plan was to deliver approximately 15 containers each day starting on 14 October 2016. In response Mr Du Plessis sent an email to Ms Mills stating: "I have had separate discussion with Mac regarding the sugar. We will not be taking it due to the current pricing on your stock" and "I have also kept Mac in the loop as we have taken significant positions of our own w.r.t sugar". Following further correspondence, Mr Du Plessis generated a further email on 04 October 2016 in which he said "Mac has been informed timeously of what changes have occurred and the contract is null and void ... as the relationship financially is funded by Shoprite anyway".

[14] On the basis of this background applicant's case against first respondent is for an order of specific performance of the sugar contract against second respondent. As stated, applicant's case is based on an express, alternatively tacit agreement between all three parties, that second respondent would finance the entire sugar contract by paying the contract price to first respondent upon delivery of sugar in order to enable first respondent to pay second respondent.

The case against first respondent

[15] Mr Joubert, who appeared together with Mr Heunis on behalf of the applicant, submitted that, based upon the papers before this Court, there was no basis to find that there had been a repudiation of the sugar contact as alleged by respondents. Repudiation, in his view, is based on a doctrine set eloquently by Nienaber JA in *Datacolor International Pty Ltd v Intamarket Pty Ltd* 2001 (2) SA 285 SCA (para 73):

'[17] As such a repudiator breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non-or malperformance.

[18] The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is 'a serious matter' (*cf Ross T Smyth & Co Ltd v T D J Bailey, Son E Co* [1940] 3 All ER 60 (HL) at 72 B; *Metamil (Pty) Ltd v AECI Explosives and A Chemicals Ltd* (*supra* at 685 B-C), requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments- not lightly to be presumed.'

[16] According to Mr Joubert, the content of the WhatsApp message of 04 August 2016 between Du Plessis and Mukadam was incompatible with Du Plessis' evidence to the effect that Mukadam had repudiated the contract during the telephone conversation on the previous day. In his view, what emerged from this message was an agreement to discuss the issue the next day. However, before the discussion took place, Du Plessis Rapsch and Stoffberg had decided to cancel the contract on the basis of an alleged repudiation.

[17] Mr Joubert also referred to Du Plessis evidence in which he did not deny Mr Mukadam's version of events:

'I advised Mr Du Plessis to purchase the sugar at R 9 500.00 and that considering what the second respondent is paying the First Respondent to pay the Applicant in terms of the 14 July 2016 sugar contract, the average price would probably be in the region of R 9 800.00 per metric ton.'

[18] Mr Joubert also referred to the subsequent communication between Mukadam and Du Plessis; that is the WhatsApp communication of 23 August 2016 and email correspondence between Ms Mills and Rapsch on 22 and 23 August 2016 which dispelled any notion that the sugar contract had been cancelled.

[19] Mr Joubert then dealt with the further difficulty which he contended confronted respondents in terms of s 59 (2) of the Customs and Excise Act 91 of 1964 ("the Act") on which respondents had relied for their contention that applicant had repudiated the contract. In its answering affidavit, first respondent's version was that it was an implied or tacit term of the sugar contract that, should there be a fall in the duties payable on the sugar purchased, the purchase price would also be reduced. As applicant had refused to reduce the price, first respondent adopted the view that this constituted a refusal which amounted to a repudiation of the contract which first respondent had accepted and accordingly it had then cancelled the contract.

[20] To the extent relevant, s 59 (2) of the Act reads as follows:

'(2) Whenever any duty is withdrawn or decreased, directly or indirectly, by amendment in any manner of Schedule to this Act, on any goods, and such goods in pursuance to a contract made before the withdrawal or decrease became effective are thereafter delivered to the purchaser, the purchaser of the goods may, in the absence of agreement to the contrary, if the seller has in respect of those

goods had the benefit of the withdrawal or decrease, deduct from the contract price a sum equal to the said duty or decrease.'

[21] Mr Joubert submitted that s 59 (2) of the Act provides a specific mechanism for a procedure by which a deduction from the contract can be made in the event of a decrease in the import duty, namely that the price may be reduced after delivery of the goods. It was applicant's case that, even if Mukadam, had during a telephone conversation on 4 August 2016, indicated that applicant did not accept that the contract price ought to be decreased (which Mr Joubert contended had never been so conceded), there was no evidence that applicant intended to refuse to deliver the sugar in accordance with the terms of the sugar contract. Furthermore, clause 13 of the sugar contract prescribed a speedy dispute resolution process, in the event that a proposed deduction was disputed between the parties. Thus, even if Mukadam had indicated that he disputed Du Plessis' contention that the contract price be reduced, this did not amount to a repudiation in terms of the law as set out in *Datacolor, supra*.

[22] Mr Joubert also submitted that it would offend the principles of good faith and reasonableness to consider that a repudiation took place based upon a mere indication by Mukadam that the contract price was unaffected by decreases of import duty in circumstances where the right to deduct the decrease from the contract price would only occur after delivery in terms of s 59 (2) of the Act. This could not constitute a repudiation which entitled respondents to cancel the sugar contract without more.

[23] Mr Joubert also submitted that, as the agreement indicated that the price was "ex warehouse", this constituted an agreement "to the contrary" as

contemplated in s 59(2) and hence the contract price was not affected by fluctuations in currency, duty or taxes; that is the provisions of s 59 (2) were ousted by an agreement to the contrary.

The case against second respondent

[24] In support of the argument that an express, alternatively a tacit agreement existed between all three parties, reference was made by Mr Joubert to the correspondence preceding the signing of the sugar contract between applicant and second respondent in which Du Plessis had made it clear that second respondent was the purchaser and had negotiated the price on this basis. In support of this submission Mr Joubert referred to a series of emails generated on 01 July 2016 and 04 July 2016 to that effect. In particular in an email on 04 October 2016 Du Plessis said; "I have also been honest with him (Mac) and told him everything as to what Shoprite has done. The contract is null and void seen as the relationship financially is funded by Shoprite anyway". This email represented a response to an earlier email by Ms Mills to Du Plessis on the same day:

> 'I have spoken to Mac and should Pearl Island/Shoprite be interested in washing out your contractual obligations with Starways then we could in principal discuss this. It would require you to compensate any losses incurred in trying to find an alternative buyer(s) for the sugar. Mac is still travelling as the moment and will be back in the office on Monday 10 October. In the meantime please advise how do we take this situation forward?'

[25] For further support Mr Joubert referred to the affidavit of Mr Rapsch in which the latter said the following:

'Applicant was at all relevant times aware of the fact that Second Respondent was the ultimate purchaser of the sugar as far as the transaction between the parties is concerned and it is in that capacity, and not in any representative capacity, that Applicant communicated with Second Respondent.'

[26] Based on this evidence, applicant's case is that it was more probable than not that the parties were in agreement and that the contract between them came into being in consequence of this agreement. In this reliance was placed upon a *dictum* in *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 34:

'As in all such cases, the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issues that in the crux of the agreement and, per contram, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequences of their agreement.'

Evaluation

[27] Mr Olivier, on behalf of the first respondent, referred to an email of 11 July 2016 sent by Mr Chris Engelbrecht of Agritrade to applicant and first respondent to the effect; "we already triggered the next base set price and duty should come down to around R 300 per ton on 12 August or later". In short, three days before the sugar contract was entered into it was clear that the duty was to be reduced. According to Mr Olivier, applicant's argument was to the effect that it had been agreed that applicant would 'pocket' the difference between the initial price and the reduced price pursuant to the lower duty and hence obtain a windfall of R 51.9

million. In short, Mr Olivier submitted that the relevant duty had been decreased. The sugar contract had been entered into before the decrease in the amount of duty to be paid. Applicant had only paid the decreased duty and not the duty as it was at the time of the conclusion of the sugar contract. It therefore enjoyed a significant benefit from the decrease in duty.

[28] Mr Olivier contended that it fell to be determined whether the sugar contract contained an implied term that, should duties payable in respect of the sugar be reduced, applicant would derive the benefit from this reduction or, alternatively, was the purchase price to be commensurably reduced. According to Mr Olivier applicant's attitude was clear; it benefitted from the decrease in duty. This approach was evident from the following passage in the founding affidavit of Mr Mukadam:

> 'If the import duty was an issue why not insist that reference is made thereto in the final sugar contract?
>
> The answer is clear, namely it was never a term of the agreement. If it was Du Plessis and Rapsch would have insisted that it be inserted in the contract, as they are both experienced sugar buyers both locally and internationally.'

[29] Mr Olivier submitted to the contrary that applicant's approach to the effect that there was no reduction in import duty was in direct conflict with the contention that "ex warehouse" is an express term, namely that duties, being one of the variables in the process of acquisition of the sugar consignment, would play no part in the price that first respondent was required to pay. Given that applicant contended that the price of the sugar was the price in terms of the sugar contract being "ex-warehouse" it meant that, however the price of sugar was made up, this

would have no bearing on the price to be paid by the purchaser, being first respondent.

[30] This dispute therefore necessitates an examination of the terms "ex-warehouse". Blacks Law Dictionary (8th ed) defines ex-works price as "the price of goods as they leave the factory". SARS defines ex-works as the price which the buyer will pay for a product if delivery thereof is taken outside the factory gate that is the full price of the product. See the Agreement on Trade, Development and Cooperation between the European Economic Community and its Members States and the Republic of South Africa concluded in 1999. In terms of protocol 1, an ex-works price is defined to mean the price paid for the product of ex-works to the manufacturer in the community or South Africa in whose undertaking the last working or processing is carried out provided that the price includes the value of all the materials used minus any internal taxes which are or may be repaid when the product obtained is exported.

[31] Mr Olivier correctly noted that there was no evidence to suggest that the words "ex-warehouse" was employed in a sense outside and beyond its ordinary meaning. There was no indication that applicant had informed first respondent that the words were to be used in any special sense. In the founding affidavit, applicant had not put up any case to the effect that s 59 (2) of the Act was not applicable. Indeed no reference to its provisions were found in this affidavit.

[32] On a plain reading of s 59 (2) of the Act it is clear that what the provision envisages is the existence of an agreement that a decrease would not be deductible; that is absent the existence of a specific agreement which would render the balance of the section inapplicable to the dispute in question, the default

position as set out in the section would apply. Interpreting the phrase ex-warehouse as it is employed in s 59 (2) of the Act by way of the approach of meaning textualism, the conclusion must be reached that, without a separate agreement, the purchaser is entitled to pay the reduced price. By meaning textualism, it is suggested that we take words to be employed within a set of established and available meanings of the words so employed and include the further step of examining the consequences of these words as they are employed in particular phrases. The alternative approach of conception textualism in which the engagement with the words are designed to seek to divine a purpose that the enactors of the legislation may (or may not) have had, often proves to be an impossible task, given a plurality of conceptions of meaning that particular legislators may have had beyond an agreement about the choice of words employed. See for example John Perry "*Textualism and the Discovery of Rights*" in A Marmor and S Soames (eds) Philosophical Foundations of language in the Law (2011); Chapter 6.

[33] To summarise: the meaning of s 59 (2) of the Act that where import duty is decreased and goods affected by the duty are delivered the day after the decrease takes effect, then pursuant to the contract entered into before that date, the purchaser of the goods, in the absence of an agreement to the contrary, may if the seller of the goods would otherwise enjoy the benefit of the decreased duty, deduct the amount of the decrease of the duty from the contract price in question when the purchaser pays the seller.

[34] This brings me back to the question of repudiation. Repudiation can constitute conduct from which a reasonable person in the position of the wronged

contractual party would conclude that the alleged repudiator, without a legal basis, refused to comply with his or her contractual obligations or some of them. Significantly in *Metamil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 685 the following was said in support of this proposition.

> 'It is probably correct to say that respondent was *bona fide* in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct constituted a repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however *bona fide* it might have been in its belief that it was not.'

[35] As I have found that the implied price adjustment was a material term of the sugar contract, then its application to the first consignment alone would reduce the purchase price, according to Mr Rapsch's evidence by more than R 80 million. It follows from the analysis developed in respect of s 59 (2) of the Act that the approach taken by the applicant was based on an incorrect interpretation of the contract and its insistence on being paid a price which took no account of the reduced duty constituted a serious repudiation of the contract between the applicant and first respondent.

The case against second respondent: evaluation

[36] Mr Muller, who appeared together with Mr Du Toit on behalf of second respondent, submitted that it was significant that the founding affidavit did not

contain a single allegation by Mr Mukadam to the effect that, while he was negotiating the terms of the sugar contract, he was even under the impression that he was simultaneously negotiating an agreement on the basis of a tripartite agreement.

[37] In this connection, a letter generated by applicant's attorneys to first respondent on 13 October 2016 is instructive; in particular the following:

> 'On 4 October 2016 Starways offered to relieve Shoprite and PI if their contractual obligations if they would make good any losses suffered by Starways as a result of such cancellation. Shoprite responded by alleging that Sugar Contract No. 2016.07/PI 001 was null and void as they provide the funds for the transactions in question. This led Starways to conclude that Shoprite [and not PI] is the vicarious Buyer of the sugar. Starways concluded further from Shoprite's *communiqués* that the *de facto* cause for resiling from Sugar Contract No. 2016.07/PI 001, is Shoprite's refusal to provide the agreed funding.' (my emphasis)

[38] Further significance can be drawn from an email sent by applicant's attorney on 10 November 2016 in which the following passage appears:

> 'Upon careful consideration of all the documents in relation to this matter and after lengthy consultations with our client, it became clear that there is an agent-principal relationship between your client and Pearl Island Trading. This fact substantiated by the offer received via De Klerk & Van Gend Attorneys. Your client is in fact the eventual buyer, so were concede the use of the word "vicarious" in previous correspondence may have been incorrect.'

[39] The first time that applicant made out a case that a tripartite agreement existed was in a supplementary affidavit by Mr Mukadam in which he states; "it is submitted that the discussions and correspondence referred in my founding affidavit in fact

amount to express agreement between all three parties in this regard, but alternatively at least tacit agreement."

[40] Significantly Mr Mukadam failed to deal with the Supply Storage and Integrated Logistics Service Agreement which was entered into separately between first and second respondent and in which, inter alia, the following appears:

'2.1 Shoprite (second respondent):

2.1.1 is a retailer engaged in the business of selling Products from supermarkets in the RSA to its customers;

2.1.2 wishes to place orders for the supply by the Supplier of Product from time to time;

2.1.3 requires Products to be warehoused, packaged and distributed from the Supplier's Warehouse to the Distribution Centre.

2.2 The Supplier: (first respondent)

2.2.1 is the lawful occupier of the Supplier's Warehouse;

2.2.2 the Supplier conducts the business of supplying and/or manufacturing and/or processing and/or Packaging and/or transporting the Products in the RSA;

2.2.3 is willing to supply Products to Shoprite and to provide the Services in terms of the provisions of this Agreement.'

[41] Finally in the replying affidavit, Mr Mukadam deals with this contract as follows:

'The fact that the agreement between the first and second respondents was effectively an "on-sell" transaction must also be viewed in light thereof that Mr Du Plessis from the outset, as appears from annexure "MM2", made it clear that the

second respondent was the real purchaser, a point which is confirmed by Mr Rapsch in paragraph 73.5 of his answering affidavit.'

[42] These factual disputes concerning a tripartite agreement can be analysed through the prism of the decision in *Hentiq 1320 (Pty) Ltd v Mediterranean Shipping Company* 2012 (6) SA 88 (SCA). In this case plaintiff wished to purchase imported rice from a company which supplied the requisite rice. In order for plaintiff to obtain financial assistance to discharge, its obligations, another company bought the rice from the supplier and then on sold it to plaintiff. Plaintiff sued the shipping company for damages arising from the delivery of defective rice.

[43] The Supreme Court of Appeal, per Farlam JA, upheld the approach of the court *a quo* citing with it with approval as follows:

'It is here that there is an insuperable obstacle in the path of the plaintiff. It arises from the fact that the structure of the transactions involved back-to-back sales from Whitefields to Kingsburg and from Kingsburg to the plaintiff. Because of that structure the plaintiff had no contractual link with Whitefield and the party to which it was entitled to look for performance of the contract was Kingsburg... [The] problem remains that as a matter of law the contract remains one of purchase and sale between Kingsburg and the plaintiff. It is not a loan by Kingsburg to the plaintiff any more than there was a contract of sale in respect of the rice between Whitefields and the plaintiff. ... Whilst I accept that the transactions between the plaintiff, Kingsburg and Whitefields were structured in the particular form that I have described in order to meet the dictates of the Islamic faith, that does not mean that the Court can treat them as if they had a different form or give them an effect other than that which they have in law.' (para 19)

[44] It may well be that the parties were only willing to enter into a written contract once an undertaking was given by a third party, such as second respondent in this case. However, this is irrelevant to the question of enforcing the terms of the contract. See *De Villiers v McKay NO* 2008 (4) SA 161 SCA at para 4.

[45] Aware of the problem posed to his case by the *Hentiq* decision, *supra,* Mr Joubert submitted that the present case was distinguishable, because in *Hentiq,* there was no evidence that the eventual purchaser had assumed a responsibility for the funding of the transaction as was the situation in present dispute.

[46] The problem with this argument is, on the present papers, there does not appear to be any evidence that second respondent assumed the obligation to pay the applicant nor was there any allegation in the founding papers which would have made out such a case; hence the reasoning in *Hentiq* is equally applicable to this case, namely that the structure of the transaction does not on the probabilities, support the claim of a tripartite agreement.

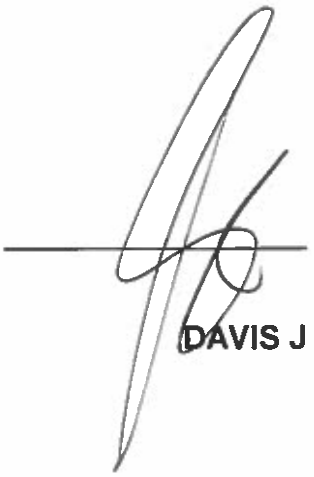
Conclusion

[47] In summary, the refusal by applicant to take into account the possible deduction in the price to be paid by first respondent caused by the lower duty constituted an act which justified the cancellation of the sugar contract.

[48] I accept that applicant did not accept second respondent's repudiation and sought rather to uphold the contract. However, on 13 October 2016, once applicant's attorneys demanded payment of the agreed sugar contract price without a reduction caused by the duty it committed a clear act of repudiation. This act of repudiation was accepted on 02 November 2016 by second respondent. It is also

worth noting that on 10 November 2016 applicant committed a second act of repudiation when it launched its application and in its founding affidavit expressly denied the existence of the price adjustment term.

[49] For all of these reasons, the application is dismissed with costs, including the costs of two counsel, where two counsel have been employed.



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