IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 22002/2016

DATE: 26 JULY 2017

In the matter between:

STARWAYS TRADING 21 CC Applicant

and

PEARL ISLAND 714 (PTY) LIMITED Respondent

J U D G M E N T

(Application for leave to appeal)

DAVIS, J:

[1] The applicant has applied for leave to appeal against the order of this Court of 10 February 2017. The appeal is against the dismissal of an application, the basis of which is set out comprehensively in the principal judgment. It is not my intention to traverse again the entire nature of the dispute.

[2] In essence, summarising the case, the relief sought by the applicant is aimed at enforcing what the applicant considered 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 of white refined sugar at R10 350,00 per metric ton for the first 10 000 metric tons and R10 650,00 for the remaining 15 000 metric tons to be delivered in consignments over a period from October 2016 to May 2017.

[3] The case turned on the action of first respondent, which considered that it had cancelled the sugar contract pursuant to a repudiation thereof by applicant. Applicant denied the repudiation, submitted that there was no basis for the cancellation of the contract, and further denied that there was any act of cancellation on its part.

[4] The applicant also sought 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 ultimate purchaser of the consignment, was responsible for the funding of the entire transaction. Hence it sought that second respondent make payment to first respondent for the amounts due for the delivery consignments by applicant to the first respondent, thus placing the first respondent in funds to make the payments to applicant.

[5] The existence of this agreement was denied by the respondents. It was the totality of relief sought which was dismissed by the Court and which has triggered the application for leave to appeal.

[6] It is trite that there are now three requirements for the granting of leave to appeal pursuant to section 17(1) of the Superior Courts Act 10 of 2013, namely that there is a reasonable prospect of success, that the amount is not trifling and is a matter of substantial importance to one or both the parties concerned and further that a practical effect or result can be achieved by the appeal. I shall return presently to the application of these grounds.

[7] This application for leave to appeal is unusual for reasons that will become apparent. It has necessitated a fairly lengthy judgment in dealing with the questions raised by applicant. Less than 16 hours before the hearing for the application for leave to appeal was to take place, in terms of an arrangement between this Court and legal representatives on both sides, applicant, now represented by a new senior counsel, Mr Dickerson, who appears together with Mr Heunis, e-mailed this Court 31 pages of argument, based, as set out in the introduction to the written document, on the work of Professor Gerhard Lubbe, in my view the leading academic in

the area contract law. A range of fresh (and in some instances nuanced) arguments were raised. As respondents had also received these written arguments of the same time, a postponement of the appeal was necessary. Given the complexity of the arguments, the oral arguments continued for a number of hours, when the court reconvened.

[8] The crisp point to be derived from this observation, is that an appeal, notwithstanding these fresh arguments, has to be evaluated in terms of the facts of the case, as opposed to novel legal arguments, which may well not be coupled to the specific case, pleadings nor the evidence on the record. A further implication which follows from this observation, is that until one reaches page 24 of these written arguments, there is not one single reference to the facts of this case, nor to the record, whereafter there are but a couple of references to the record (apart from that is from some references to the judgment).

[9] I make these points to emphasise that an application for leave to appeal must be evaluated in terms of the context of the case. A court cannot be intimidated by a range of arguments better suited to an academic journal than to the confines of the court papers. That having been said, there are a number of issues that require earnest consideration in

evaluating whether, the applicant in this case (and the applicant in the principal case) is entitled to succeed in this application, based on the grounds for leave to appeal that I have set them out.

[10] One further point requires comment. Section 17(1)(a) of the Superior Court Act, appears to have raised the bar insofar as the test to determine whether leave to appeal should be granted. See in this connection Notshokovu v The State [2016] ZASCA 112 (7 September 2016) at para 2. Furthermore, the determination of a reasonable prospect of success relates to the substantive order of a court, as opposed to the reasons given for it in the judgment. See, for example, Tecmed Africa (Pty) Ltd v Minister of Health & Another [2012] 4 All SA 149 (SCA) at para 17.

[11] Turning to the merits of application for leave to appeal, it would appear that the following issues are critical:

1. Whether another Court would find that the reference in the sugar contract, particularly the phrase "ex-warehouse", constitutes an agreement to the contrary as contemplated in Section 59(2) of the Customs & Excise Act 91 of 1964 ("the Act")?

2. If there was no "agreement to the contrary", whether another court would find that, by its conduct, the

applicant repudiated the contract, leading to its cancellation. Whereas the first ground places an onus on the applicant, the second ground places the onus on the respondents.

3. Whether another court would find that applicant established an alleged tripartite agreement, an issue which only affects second respondent and on which the onus is upon the applicant?

[12] Mr Dickerson, in dealing with the first question, submitted that the inclusion of the phrase "ex-warehouse" in clause 8 of the sugar contract, was evidence of an agreement "to the contrary", as described in the Act. He accepted that the "ex-warehouse" term has not been the subject of thorough academic analysis in South Africa. The academic authors that do address it, appear to merely summarise the Incoterms version of this phrase. (that is the periodic codification drawn up by the International Chamber of Commerce). To this extent, the Incoterms support the view that risk passes to the purchaser, upon the purchaser taking delivery of the goods at the seller's premises.

[13] Mr Dickerson went on to submit that a consideration of the case law has not yielded any pronouncement regarding the effect of the terms regarding the incidence of the risk. See in

this regard Coetzee, 2002, Stellenbosch Law Review 115 at 119-120; Coetzee Stellenbosch Law Review 564 at 576; Van Niekerk & Schulz South African Law International Trade: Selected Topics at 49.

[14] Mr Dickerson submitted further that the reception of the English approach regarding trade terms which emphases the point of delivery as a decisive point for the transfer of risk should (and which may reasonably be accepted by another court) extend to the ex-warehouse term. The reaction against the attempt in Birkbeck & Rose-Innes & Hill 1915 CPD 678 to assimilate the treatment of the conditional trade terms to the Roman Dutch approach to risk and the ease with which the courts have followed the English precedent provides a basis for this approach.

[15] The terms of the agreements before the courts in some of the decisions in which "ex-warehouse" contracts were considered, provide some evidence that the international understanding of this terms, accords with the expectations of the South African business community. This could serve to show acceptance that the ex-works price is a full and final price and not subject to fluctuations in view of changes in costs, transport charges, customs duty and currency rates, unless provision is made therefor.

[16] The authority cited in support of this submission, namely African Solar (Pty) Ltd v Divwatt (Pty) Ltd 2002 (4) SA 681 (SCA) is hardly clear on this precise point. Unsurprisingly, no page reference from the judgment is provided in support thereof.

[16] Under an ex-works term, the materialisation of a risk such as the imposition of a customs levy in the period before delivery, which under the common law risk rule and the statutory manifestation thereof embodied in s 59 of the Act would be for the account of the buyer after the contract became perfecta, will remain with the seller. Similarly, however, a benefit attaching to the *merx*, such as a reduction of duty on that class of goods which materialises before delivery, accrues to the seller under the regime imposed by an 'ex works' term. In this respect, Mr Dickerson submitted that it was apparent that the incorporation of this phrase, subjects the relationship of the parties to a risk and benefit regime that is diametrically opposed to that under the common law doctrine.

[17] The allocation of risks turns on the moment of delivery. Events prior thereto are for the account of the seller and everything thereafter this point are for the buyer. Mr Dickerson accordingly contended that another court was likely

to interpret the phrase "ex-warehouse" and "ex-works" in the ordinary sense of the word, as employed in clause 8 of the contract, to be "an agreement to the contrary within the meaning of section 59(1)and (2) of the Act. The price is determined as a global amount so that akin to the position of a building owner under a lump sum arrangement in the building context. The price in an "ex warehouse" contract remains unaffected by events bearing on the cost of performance.

[18] He further noted that the "ex-warehouse" formulation in this case, is equivalent to a provision that "prices shall be free from all fluctuations, which was held to exclude the operation of the statutory rule in Fraser & Chalmers SA (Pty) Ltd v Cape Town Municipality 1964 (3) SA 303 (C).

[19] An examination of Fraser's case, is particularly significant to the evaluation of this part of the argument in favour of leave to appeal. Fraser's case thus needs to be examined in some detail. The facts can be summarised thus: In a tender for the supply of water meters submitted by the plaintiff to the defendant, the general conclusion of purchase and conditions of tender, provided that the tenders "may submit firm prices, which price shall be free from all fluctuations". Certain of the meters for which the plaintiff had successfully tendered, had been imported free of duty, but the

balance which was imported after the acceptance of the tender, was subject to a duty in terms of an amendment to the Customs Act 55 of 1955. The plaintiff paid its duty and claimed payment thereof from the defendant.

[20] The relevant clauses of the contract which were the subject of examination in the stated case before Van Winsen, J, were firstly clause 14, which provided:

> "Tenderers may submit firm prices, which prices shall be free from all fluctuations. All prices shall be quoted in South African currency and any discount or brokerage allowed to the Council, must be stated in the form or the tender."

[21] Clause 15 which applied if the tender was subject to price adjustment, provided that the tender price, stated in the tenderer form, shall be raised on the cost to the tender, rates and charges and import duties, ruling at the date of the compilation of the tender. "Rates and charges" were defined in the clause, as including the published official and statutory rates for ocean freight, marine insurance, marine was insurance, wharfage, dock dues, landing and delivery charges, customs and import duty and railage rates. In the event of the goods sold having to be imported, the rates of exchange upon which the tender was based, must be stated in the tender.

Sub-clause (b)(i) of clause 15 provided that the contract price shall be increased or reduced by the amount of the variation between the cost to the tenderer, upon which the tender was based on the actual cost of the tender, while clause (b)(iii) provided that any difference between the rate as specified in the form of tender in respect of rates and charges and the rates actually paid, were for the account of the Council.

[22] It appears that clause 15, which I have set out, was not incorporated into the contract between the parties. However, Van Winsen, J said:

> "[I]t is nevertheless legitimate for the court to have regard to the this clause as an aid to interpretation. The clause is part of the surrounding circumstances which appertained at the time of the conclusion of the contract. It would appear that the Council invited tenders for the supply and delivery of the goods referred to in the contract, upon the basis of the general conditions of the purchase and conditions of tender. These conditions envisage that the tenderer will quote "at a price at which he is prepared to supply the goods. In the absence of any further provision in the conditions of the tender", a tenderer having offered to supply goods at quoted prices and the tender having been accepted, would be obliged

to supply the goods at those prices and no other. The conditions of tender, however, make provision for a price adjustment in the manner and to the extent set out in clause 15." 306F-G.

[23] Van Winsen, J then went on to say the following insofar as the provisions of clause 15 were concerned:

"[t]hey are intended to convey that if the tenderer does not choose to enter into a contract embodied in clause 15, then he can enjoy none of the benefits of adjustment of prices which would have followed, had that clause been embodied in the contract." 307C.

[24] The learned judge concluded:

"In my view, however, the better approach is to afford significance to all words used by the parties to a contract, unless this should be manifestly impossible. Accordingly, if a meaning must be given to these words, then, in my view, the parties, by their use intended to provide that in the event of the tenderer not choosing to contract on the basis of clause 15, he must bear any increased burden which might result from increases in relation to those factors mentioned in clause 15, and which had that clause applied, would have been for the account of the Council." 307F-G.

[25] In summary, the judgment in Fraser shows that it was not merely the provisions of clause 14 that "prices should be free from all fluctuations", which was regarded as an agreement to the contrary. The court interpreted the provision in the context of the deleted clause 15, which expressly provided for an alternative basis of prices, subject to an adjustment as a result of custom's duty. In short, the court held that the provisions of clause 15 intended to convey the consequence that, if the seller did not choose to enter into a contract which contained clause 15, then he could enjoy none of the benefits of an adjustment of price flowing from a change in custom's duty.

[26] It follows that this case provides very little basis for supporting the argument advanced by Mr Dickerson in an unqualified fashion. It is clear that what was intended in Fraser's case, was for a court to look at the intention of the parties and read the two clauses together, the included clause and the deleted clause, in order to come to a clear understanding of what was intended by the use of the relevant phrase.

[27] In the present case, when the facts are examined, there are a number of considerations which militate against another court finding that the applicant has discharged the onus, which

rests upon it, of showing that it and first respondent concluded "an agreement to the contrary" by the use of the words "ex-warehouse" in clause 8 of the contract. By using the same methodology employed in Fraser's case, the words employed by the parties will dictate that this court must divine the clear intention of the parties.

[28] Mr Dickerson would be correct if it could be said that there is a reasonable prospect that another court would accept that both parties consciously agreed to afford the applicant an immediate windfall of more than R18.5 million, and a more than likely further windfall of R52 million over the six month period of contract, when they signed the sugar contract on 14 July 2016; that is over and above the profit margin which was built into the contract price. If so, Mr Dickerson's submission must then succeed. However it is clear that at the time that both parties concluded the contract, they well knew that the customs duty had dropped to R1 462,99 three days earlier, and was indeed to drop to R300,00 by 12 August 2016.

[29] It is, I think, correct, as Mr Muller, who appeared together with Mr Du Toit on behalf of second respondent, submitted, that this case is not about injecting a concept of fairness into the interpretive exercise (which is not an issue which can completely be ignored in our jurisprudence, although

it is irrelevant to the determination of this application). Rather it is a question of trying to provide a sensible meaning to be given to the words of the contract; namely clause 8.

[30] It is accepted that the phrase "ex-warehouse", is capable of meaning no more than "in front or out of the warehouse" in terms of its ordinary dictionary meaning. This was clearly the meaning which was given to the contract in clause 7 of the contract.

[31] In other words, clause 7 of the contract, to which I shall return presently, refers to a delivery period "between 1 October 2016 and 31 May 2017 as follows:

> "October 2016, 8 000 MT delivered directly from port to the buyer. November 2016, 2 000 MT "ex-warehouse". December 2016, 2 500 MT "ex-warehouse". January 2017, 2 500 MT "ex-warehouse". February 2017, 4 000 MT "ex-warehouse". March 2017, 2 500 "ex-warehouse". April 2017, 2 500 MT "ex-warehouse". May 2017, 1 000 MT "ex-warehouse"."

[32] There can be little doubt that when the clause is employed in this context, it means no more than that from or out of the warehouse and thus holds a meaning, which is very

different to the one contended for by applicant insofar as clause 8 is concerned.

[33] In summary, the sugar contract was finalised and signed on 14 July 2016 after exchanges between applicant and first respondent during the course of negotiations. The "ex-warehouse" clause in clause 7, as I have set it out, was intended, to mean no more than 'from the applicant's warehouse. This is evident from Mr Rapsch's e-mail which preceded the final draft of the agreement and which was ultimately signed. In it, Mr Rapsch requested clause 7 to be amended to indicate that the monthly consignments between November 2016 and May 2017 should be collected from applicant's premises.

[34] This request was then translated by applicant's Mr Mukadam, by the use of the synonym "ex-warehouse" in the final draft of the contract. Hence it is clear that Mr Mukhadam considered "ex-warehouse" in clause 7 to be a synonym for collection from applicant's premises. There is no specific mention, even in the comprehensive replying affidavit by Mr Mukadam, to support the view that applicant's interpretation of "ex-warehouse", of clause 7 is the same as that contended for in respect of clause 8. On the present argument of applicant, the phrase would have to mean two different things;

that is Mr Mukadam would have intended clause 8 to employ the word "ex-warehouse" in the technical sense contended for by Mr Dickerson, and clause 7's employment of "ex-warehouse" would be that which I have described earlier. This appears to me to be an extremely contrived argument and it is difficult to see how another court would come to a different conclusion to this court, namely that Mr Mukhadam had two meanings in mind for the same phrase.

[35] Unsurprisingly there has been considerable debate about the appropriate manner in which to interpret a contract in the context of this case. In this connection, Mr Dickerson relied on the interpretation of a contract as set out in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), at para 24 namely that in respect of interpretation, the court's interpretive task involves:

> "discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say...the proper approach... is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances."

Earlier in his judgment Wallis JA warns:

"Judges must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible and 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." paras 18.

[36] In paragraph 25, Wallis, JA said further that sometimes the language of the word read in context is clear and that is the appropriate meaning to give to the language so used. But if the meaning which follows the plain language leads to absurdity, another meaning needs to be given. This is then:

"either a restriction or extension of the language used by the adoption of a narrow and broad meaning of the words, the selection of a lesser apparent meaning or sometimes a correction of an apparent error in the language in order to avoid the identified absurdity."

[37] Although not mentioned in applicant's comprehensive written heads, the Endumeni approach has been subject to subsequent qualification. Thus in Novartis SA (Pty) Ltd v Maphill Trading (Pty) Ltd 2016 (1) SA 518 (SCA), Lewis, JA

said at paras 28 to 29:

> "The passage cited from the judgment... in Endumeni summarises the state of law as it was in 2012. This court did not change the law and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper. This much is made even clearer in a judgment of Wallis, JA in Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) ...:
> 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."

[38] It appears from her judgment in Novartis, that Lewis, JA considered that the approach adopted earlier in Coopers & Lybrand & Others v Bryant 1995 (3) SA 761 (A) at 768, was not in any way significantly altered by the Endumeni judgment.

[39] Given the debate between counsel it is important, to say a little bit more about this issue. I refer to the approach adopted to interpretation by Wallis, JA, particularly the consideration of "relevant circumstances", which is taken to

include factual context, and the purpose of the underlying document which might lead to either a restriction or extension of the language used by adoption of the narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language, in order to avoid the identified absurdity.

[40] In short, a departure from the plain meaning is appropriate, when the former leads to "impractical, unbusinesslike or oppressive consequences, or a conclusion that will stultify the broader operation of the legislation or contract under consideration. It is also impermissible to substitute what judges might regard as reasonable, sensible or businesslike for the words actually used.

[41] By reference to a leading work in linguistic philosophy by Paul Grice, Studies in the Way of Words (1989), it appears that it is possible to understand best what was being suggested in this approach; namely interpretation requires that we elicit a speaker meaning and then only a sentence meaning of the relevant text. In short, a court should not be limited to an assessment of what the sentences used in a contract mean (the literal meaning) but may assess what the use of those sentences meant.

[42] An example of sentence and speaker meaning coming apart: John says: "everybody is going to the party". The sentence meaning: "everyone simpliciter", that is everyone in the world is going to the party. The speaker meaning, means all of John's friends, or all of John and his interlocutory friends, all the people, in John and his interlocutors social circle are going to the party. Speaker meaning is far less fine grained than the imputed speaker's conceptions. For example, consider the phrase red and round fruit. The sentence meaning is in indeterminate in that it could mean tomatoes or apples or some other fruit. The speaker meaning might be tomatoes, but the speaker's conception could be the tastiest of the fruit; "the fruit that I thought was a vegetable" and so on. So speaker conception are those subjective attitudes that a speaker has about some item and sameness of speaker (and listener) are not required for communication. By contrast, sameness of (or at apprehension of the same) speaker meaning, is required for communication.

[43] This application to the dicta in Endumeni, then clarifies of this approach, namely that neither the relevant circumstances nor the text predominate over each other. The text does not predominate, because we are concerned with the meaning of the use of the imputed sentences rather than the sentence in itself. The relevant circumstances cannot

predominate, because without consideration of the text, we cannot begin to elicit the meaning that is intended through the use of the text.

[44] The problem with the dicta in Endumeni, is that they leave unspecified the kinds of absurdity that might justify a departure from plain meaning and what might constitute relevant circumstances.

[45] In the present case, the question is whether (a) the speaker meaning of "ex-warehouse" is identical to the sentence meaning of that phrase, and thus the sentence meaning constitutes a contrary agreement in terms of Section 59 of the Act, and (b) the speaker meaning of "ex-warehouse" is not identical to the sentence meaning, and the sentence meaning does not constitute contrary agreement in terms of Section 59 of the Act, but the speaker might.

[46] This then is the challenge before this Court. I should add that none of this was canvassed, in the heads, but it is relevant if a court is to understand the process of legal interpretation. En passant, lawyers in South Africa regrettably have little, if any understanding of Grice or, of the philosophical basis of interpretation, which is critical to unlocking the problem posed in this case. A ritual incantation

of Endumeni, hardly suffices.

[47] If sentence and speaker meaning must be evaluated, then this has to be with reference to the record, which, as I indicated, was ignored almost completely in appellant's heads. The initial draft of the contract, as I indicated, provided in clause 7 and 8 as follows:

> "Delivery period between 1 October 2016 and 31 March 2017.
>
> Price, for 10 000 MT is ZAR10 350,00 per MT "ex-warehouse", Cape Town.
>
> For 15 000 MT is ZAR10 650,00 for MT "Ex-warehouse", Cape Town."

[48] This text, followed upon a battery of e-mails generated on 4 July 2016 between first and second respondents' representatives and Mr Mukadam of the applicant. Clause 7 is then drafted to reflect the version reproduced earlier in this judgment. Clause 8 refers to "ex-warehouse" as indicated earlier. In short, if a court examines these e-mails, the idea that "ex-warehouse", through the prism of sentence and speaker meaning, would result in different content for clause 7 to clause 8 is problematic. This simply makes no interpretative sense within the context of this case; the

speaker meaning is unresolved by applicant's arguments.

[49] In short, did the parties contract on the basis of clause 8, and its use of "ex-warehouse" to mean something different then the phrase as employed in clause 7? Significantly, in his very comprehensive replying affidavit, Mr Mukadam says:

> "I deny that the words 'collected from Starways' explains fully what is meant by "ex-warehouse" and refer to the explanation of the latter term that I provided elsewhere in these papers. (Note: this court accepts that in the founding affidavit, the technical meaning of "ex-warehouse" is set out). It has always been the applicant's case that "ex-warehouse" means that the agreed price is not affected by fluctuations and, *inter alia*, import duty. This position was clear from all the correspondence and discussions that took place prior to the launching of the application." (my emphasis)

[50] This is an exquisitely and carefully crafted phrase; namely no mention is made about "all correspondence and discussions prior to the conclusion of a contract". It is prior to the conclusion of the contract that is the critical time for the determination of speaker and sentence meaning. In short, there is absolutely no basis, in my view, that another court, in

reading the record as opposed to providing an academic analysis of the phrase, would come to a conclusion different to this Court on this point: trying to apply speaker and sentence meanings cannot lead, in these facts, to a conclusion that different meanings were employed for the very same words in Clause 7 and Clause 8.

REPUDIATION

[51] I must now deal with the repudiation issue. On the basis that the price adjustment mechanism for section 59 was material in terms of the agreement, the court *a quo* held that the applicant's insistence on being paid a price took no account of an act which constituted a serious repudiation of the contract between the applicant and the first respondent.

[52] Mr Dickerson submitted that this was an incorrect application of the principle. He referred to the case of Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at para 17, that namely a repudiation is constituted by:

> "an intimation by or on behalf of the repudiating party by word or conduct and without lawful excuse, that all the some of the obligations arising from the agreement, will not be performed according to their true tenor."

[53] This means that the test is an objective one and does not require an intention not to perform. What is required is that a reasonable person in the position of the innocent party, would have concluded that the performance under the agreement would not be forthcoming. The conduct in question should be clear-cut and unequivocal and should engender a reasonable certainty of an eventual malperformance by the party in question of the obligations under the agreement.

[54] In Mr Dickerson's view not at any point was the evidence of the applicant to the effect that it was not willing and able to deliver the sugar and that it, therefore, "by word or conduct and without lawful excuse, would not perform in terms of the contract. Mr Dickerson submitted that another court may well conclude that the court *a quo* did not afford any, or sufficient, weight to the applicant's letter of 30 September 2016, in which it stated that it would be in a position to execute on its contractual obligations, and the first respondent was reminded of the obligations in respect of the payment.

[55] In short, the applicant contended that the repudiation on its part, would only have been constituted by its refusal to deliver the sugar. However in Datacolor, it was also made clear that repudiation is not only triggered by an intimation

regarding future non-performance of the core obligation arising from the agreement, but "all or some of the obligations arising from the agreement". An obligation, as Mr Muller submitted, is a legal bond between two legal subjects, in terms of which the one, the creditor, has a right to a particular performance against the other, the debtor, whilst the debtor has a corresponding duty to render the performance. See Hohfeld, Fundamental Legal Conceptions (1933). Performance, which forms the content of an obligation, must always consist in the debtor doing something or refraining from doing something. The debtor has a duty to act in a particular manner and the creditor has a right to demand such conduct by the debtor.

[56] Section 59(2) of the Act, imported an implied term into the sugar contract. Therefore, there was a duty on the applicant to reduce or permit a reduction of the contract price. Performance of this duty entailed reducing or permitting a reduction of the contract price. To the contrary, the applicant unequivocally indicated that although it was willing to perform its obligation to deliver, it would upon such delivery not perform its duty to reduce or permit the reduction of the contract price.

[57] A repudiation is not avoided when a party refuses to perform one duty, but is prepared to perform the remaining

duties in terms of the contract. See, for example, Walker's Fruit Farms Ltd v Sumner 1930 TPD 394, where applicant agreed to pay the respondent sales commission and 'to guarantee you a sum of 275 per month ... on account of your travelling expenses and commission relative to this agency'. The applicant incorrectly interpreted the provision as an obligation to advance the sum to be repaid by the respondent as opposed to a minimum payment. The stance of applicant was regarded as a repudiation.

[58] In short, repudiation is conduct from which a reasonable person can conclude that the alleged repudiator, without having a lawful ground, will not comply with all or some of its contractual obligations. As is made clear in Metamil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A) case at 684, 685:

> "It is probably correct to say the respondent was *bona fide* in its interpretation of the agreement and that subjectively it intended to be bound by the agreement, not repudiate it. The fact does not, however, preclude the conclusion that its conduct constituted 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 he was obliged to do on an objective interpretation of the

agreement. In effect, he is insisting on a different contract, however, *bona fide* it might have been in its belief that it was not."

TRIPARTITE AGREEMENT

[59] Turning to the final point, namely the tripartite agreement, and the submission that another court might reasonably find that an applicant discharged the onus in establishing a tacit tripartite agreement between itself and the first and second respondent, applicant made two points. The first is that another court might distinguish the case of Hentiq 1320 (Pty) Ltd v Mediterranean Shipping Company 2012 (6) SA 88 (SCA) and De Villiers v McKay 2008 (4) SA 161 (SCA) as not being in point. The second was that another court may reasonably conclude that the doctrine of the undisclosed principal applies to the relationship between the parties and that the applicant was at liberty to choose against whom it wished to proceed.

[60] Hentiq and De Villiers, *supra* are examples of the approach to agreements which are commercially, but not legally linked. The courts consistently give legal effect to the formal structure chosen by the parties. These judgments were referred to by the second respondent, in order to support the conclusion that the commercial realities, or the parties

recognition thereof, do not support a tacit tripartite agreement superimposed on to two written agreements.

[61] A central requirement, on which the onus rested upon applicant, concerned the existence of a consensus between the parties. In Gordon Lloyd Page & Associates v Rivera 2001 (1) SA 88 (SCA), para 11, Harms, JA said:

> "It was, at that stage, at least necessary for the appellant to have produced evidence of conduct of the parties, which justified a reasonable inference that the parties intended to, and did, contract on the terms alleged, in other words that there was, in fact, a *consensus ad idem*."

An imputed consensus, which may be sufficient in respect of the establishment of a tacit term or of quasi mutual assent, does not suffice for the purpose of establishing a tacit contract.

[62] If the evidence is examined, particularly Mr Mukadam's affidavits, certain issues become clear. It is significant that the founding affidavit does not contain a single allegation by Mr Mukadam to the effect that whilst he was negotiating the terms of the sugar contract, he was even under the impression that he was simultaneously reach an agreement on the terms

of the tripartite agreement. Neither is such an allegation contained in the two letters addressed by applicant's attorneys prior to the launch of the court application. In the first letter, second respondent is described as "a vicarious buyer of the sugar", and in the second letter, the second respondent is said to be an agent said to be of first respondent. Neither of the two alleged capacities entails the creation of an obligation which applicant in reply seeks to place on second respondent, terms of the alleged tripartite agreement.

[63] It is also significant that Mr Mukadam insisted that, the contract be reduced to writing, but included no reference to second respondent, particularly not first respondent's alleged financial dependence on receiving payment from second respondent.

[64] Insofar as the doctrine of the undisclosed principal is concerned, in order to determine whether this finds application, the second respondent must be regarded as notionally the undisclosed principal, the first respondent an intermediary and the applicant the third party. If the doctrine applies, the contract concluded by the intermediary, that is the first respondent, through the third party, applicant, is the sugar contract.

[65] It does not appear to have been applicant's case when it

proceeded to court that the doctrine applied. The applicant did not seek payment from the second respondent pursuant to the sugar contract. Indeed in paragraph 2.3 of the notice of motion, applicant sought an order directing the second respondent to make payment to first respondent. The applicant alleged that it is entitled to such an order which arose from the tripartite agreement between the three parties. In reply it acknowledged that second respondent's obligation to pay first respondent arose, in the first instance, from a separate on-sale agreement between the two parties.

[66] In terms of the principles with regard to the undisclosed principal, that is in order for the third party to sue the undisclosed principal, it must allege and prove that the intermediary is authorised or mandated by the principal to act as agent to conclude the contract. However the applicant never alleged that second respondent appointed first respondent as its agent, with authority or that it mandated it to conclude the contract. On the contrary, the applicant alleged the converse, namely that the first respondent was the principal and that the second respondent acted as its agent.

[67] Finally, as Mr Muller, noted, this argument now raised does not appear in the grounds of the written application for leave to appeal.

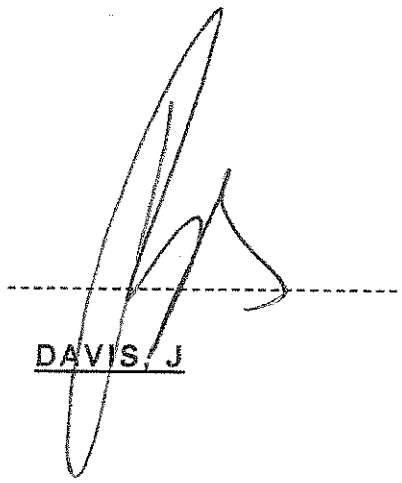
CONCLUSION:

[68] A number of novel and interesting arguments have been raised in extremely learned heads presented by Mr Dickerson and Mr Heunis, with the assistance of Professor Lubbe. It is always tempting to grant leave to appeal in such circumstances, because there are a range of academic issues which doubtless need determination by another court. But the problem in this case is, as I have been at pains to set out in the introduction: none of these academic issues are supported by the facts of the case as they were presented by the evidence, and contained in the papers, nor the law which must apply to the facts as I set them out. They must await determination in a case where the factual matrix requires that they be decided.

[69] Accordingly, the application for leave to appeal does not meet any of the tests that I set out earlier and, therefore, is **DISMISSED WITH COSTS**, including the cost of two counsel.

[70] Furthermore, it is clear that the hearing of the application for leave to appeal, which was postponed on 26 May 2017, was occasioned, by the very comprehensive heads of argument which were delivered but a few hours, in effect, before the matter was to be heard. Mr Dickerson contends that the

written heads were prepared as a courtesy. But even if these written heads had not been filed and the novel arguments had been raised, the matter would have been postponed, unless all parties were aware that these issues were to be raised prior thereto, in order for the respondents to do what they finally did do: present the Court with a comprehensive answer to the averments so made. Accordingly, the **COSTS** of the postponed hearing on 25 May 2017 are **TO BE PAID BY THE APPLICANT**, which costs shall include the costs of two counsel.



DAVIS, J