

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2022/007321

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

In the matter between:

TRANSNET

Plaintiff/Respondent

SOC

LTD

and

TOTALENERGIES MARKETING SOUTH AFRICA (PTY) LTD

First Defendant

SASOL OIL (PTY) LTD

Defendant/Applicant

Second

**NATIONAL PETROLEUM REFINERS
OF SOUTH AFRICA (PTY) LTD**

Third Defendant

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA

Fourth Defendant

Coram: Ingrid Opperman J

Heard: 16 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 23 August 2023

Summary: Application to compel – Targeted discovery to Rule 26 of the Commercial Court Rules – Relevance under Commercial Court Rules considered

ORDER

The application for targeted document disclosure dated 24 July 2023 is dismissed with costs, such costs to include the costs of two counsel where so employed.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application, brought by Sasol against Transnet, to compel the production of documents under Rule 26 of the Commercial Court Rules.

[2] The background to the main action is, briefly, that Transnet charges Total and Sasol amounts for use of its Crude Oil Pipeline (*COP*). Transnet concluded an agreement during December 1991 which stipulated a formula for increases in the crude oil tariff (*the variation agreement*). On 21 June 2022, the Constitutional Court found that the variation agreement was validly terminated with effect from September 2020. There is at present no contractual arrangement between the parties.

[3] Transnet claims amounts from Sasol and Total for invoices issued for services rendered for the period after the termination of the variation agreement and relies on

tariffs set by the National Energy Regulator of South Africa (*NERSA*). The services relate to the use of Transnet's COP for the conveyance of crude oil from Durban to the NATREF refinery in Sasolburg. Total and Sasol have not paid what they were charged by Transnet. Instead, they have paid less than what was claimed by Transnet, contending that Transnet is under a legal obligation to discount the tariff charged to Total and Sasol. Transnet has instituted this action for the difference between what was charged and what Sasol and Total have paid (*the short payment*).

[4] The essence of the dispute before this Court in the main action is whether Transnet is under a legal obligation to discount the tariff charged to Total and Sasol.

[5] Transnet holds a licence to operate a petroleum pipeline system (*the Licence*). In terms of clause 16.1 of the Licence, Transnet is required to charge users of COP tariffs that are consistent with sections 28(2)(a) to (d) of the Petroleum Pipelines Act 60 of 2003, as amended (*PPA*). In terms of clause 16.2 of the Licence, Transnet must comply with section 28(6) of the PPA. Section 28(6) provides that: "A licensee [*Transnet*] may not charge a tariff for the licensed activity in question other than that set or approved by the Authority [*NERSA*]"

[6] *NERSA*'s decision-making process is governed by statute. Neither Total nor Sasol have challenged *NERSA*'s decision-making process in the main action. Accordingly, the way in which *NERSA* went about making its decision is irrelevant to these proceedings.

Sasol's position

[7] Sasol contends that the tariff set by *NERSA* is a maximum tariff and that Transnet (not *NERSA*) is obliged to charge tariffs that are consistent with section 28(2)(a) to (d) of the PPA. In breach of its legal obligations, Transnet charged a tariff

by merely applying the 'maximum' tariff without taking a decision, as it was required to do, to charge a discounted rate. In the alternative, Sasol contends that if Transnet did make a decision, such decision was invalid on certain review grounds set out in Promotion of Administrative Justice Act 3 of 2000 (*PAJA*). Sasol also pleads that the tariff was not fair and was discriminatory and that Transnet was exercising coercive power over Sasol when it applied the tariff.

[8] Sasol does not seek, in this action, any relief under *PAJA* or the principle of legality to review and set aside the tariff. Instead, it contends that Transnet is not entitled to charge, and Sasol is not obliged to pay, the allegedly invalid tariff, also referred to as the impugned tariff.

The request

[9] On 24 July 2023, Sasol filed a six page request for documents which forms the basis of this application to compel. The request, brought under Rule 26 of the Commercial Court Rules, seeks two broad streams of information.

[10] The first relates to a category of documents which focuses on whether Transnet ever made a decision in respect of the tariff to be charged to Sasol. A review of these documents, so it is contended, will permit the Court (and Sasol) to see if Transnet properly applied its mind to whether to discount the tariff charged for the conveyance of crude in the COP. It includes documents '*demonstrating steps taken by Transnet when deciding to charge the impugned tariff*'.

[11] The second category, outlined in paragraph 2 of the request, encompasses a demand by Sasol that Transnet '*produce documents reflecting information*' on about 50 wide-ranging topics about the commercial value, operating costs, efficiency, and

productivity of Transnet's pipeline system. Sasol indicates that it wants this information in order to enable it to file an expert report.

The First Category

[12] It is clear, from Transnet's replication to Sasol's plea, that Transnet pleads that it did not take a decision to charge Sasol a discounted rate. Although the reason for doing so is irrelevant for purposes of deciding whether targeted disclosure of the documents sought are to be allowed, the reason advanced is that it can only do so if NERSA approves a discount for which none was applied. Thus, should this Court find that there was a legal obligation on Transnet to consider a discounted tariff, it failed to do so and that's the end of that. Transnet considered itself bound to apply the NERSA approved tariff, and that is what it did. A choice of whether to charge a discounted tariff or not to charge a discounted tariff was not, as Transnet pleads it, open to Transnet. It simply charged the NERSA approved tariff. Transnet pleads that it did not have to apply its mind regarding a lower tariff and no decision had to be made or was made regarding a lower tariff. A such none of the documents in this category have to be provided.

The Second Category

[13] Mr Turner SC, representing Sasol, argued that relevance is determined with reference to the issues crystallised in the pleadings. This of course, as a general proposition and within the Uniform Rules of Court, is correct.¹ But Ms Pillay SC, acting for Transnet, correctly emphasized the fact that, this matter being one in the Commercial Court, one should look not only to the Uniform Rules of Court but also to the Commercial Court Rules. She argued that the concept of relevance has been

¹ Indeed, a Court's jurisdiction is determined with reference to the pleadings see *Gcaba v Minister of Safety and Security and Others* 2010 (1) SA 238 (CC) at paras [74] to [75]

somewhat widened if regard is had to Rule 26 of the Commercial Court Rules which provides:

‘[T]he Judge may allow for the **targeted disclosure** of documents. If permitted, a request for disclosure must be made concerning specific documents or classes of documents that are relevant to the dispute **as defined in the statement of case or responsive statement of the case.**’ (emphasis added)

[14] The ‘statement of case’, in this case, includes Transnet’s amended particulars of claim, its amended replication, the summary of the claim contained in the statement of case, the essential documents listed therein as well as the summary of the evidence. Similarly, the ‘responsive statement’ includes Sasol’s amended plea, the essential documents listed therein and the summary of the evidence.

[15] In my view, the enquiry into relevance in this case should be commenced with an enquiry into what relief the parties are seeking: Transnet seeks:

‘(a) An order declaring that the plaintiff [Transnet] is obliged to charge, and the first and second defendants [Total and Sasol] are obliged to pay, the tariff set by NERSA for the conveyance of crude oil from Durban to NATREF.

(b) The first defendant [Total] is ordered to pay ZAR461,946,277.55 to the plaintiff

(c) The second defendant [Sasol] is ordered to pay ZAR815,590,950.53 to the plaintiff’.

[16] Both Sasol and Total seek the dismissal of Transnet’s claim. Both Sasol and Total have referred to PAJA in their respective pleas but have sought no review relief against Transnet; they have not pleaded nor claimed what a tariff, compliant with their legal arguments, would have been. The tariff as charged is impugned. What tariff should have been charged is not stated.

[17] As mentioned previously, the essence of the dispute before this Court is whether Transnet is under a legal obligation to discount the tariff charged to Total and Sasol. Transnet does not dispute that it is **entitled** to discount the tariff charged if NERSA approves such discounted tariff but disputes that it is **obliged** to discount the tariff where NERSA has not approved a discounted tariff.

[18] The difficulty with Sasol's case, as currently framed, is what this Court is to do if, at the end of the day, it should make a finding in Sasol's favour that Transnet was **obliged in law** to discount the tariff. Neither Transnet nor Sasol have pleaded nor claimed that payment should be made of a lesser sum based on such a finding. Thus, a legal finding in Sasol's favour, on the existing relief claimed, would be one in which Transnet's claim is dismissed. There is no relief sought based on Sasol's legal construction other than the dismissal of Transnet's claim. If an entire trial were to be run on, not only what facts should have been considered by Transnet but which facts were considered, one knows that one will probably arrive at a lesser tariff because one knows, from what Sasol has pleaded, that Transnet charged the 'maximum' tariff (on Transnet's version, the only tariff it was authorised by NERSA to charge). But it matters not at which tariff one arrives, because if the law is against Transnet, Transnet's claim for payment at the NERSA approved tariff would be dismissed and Sasol would win. Sasol has not asked for a declarator that what it paid is legally compliant with the notional lesser tariff that Transnet should allegedly have charged. All this Court knows is that Sasol unilaterally paid a lesser amount. The Court does not have the benefit of knowing how that lesser amount was arrived at. The question which falls for determination is why this Court is to direct discovery to be made of documents which will explore what the lesser tariff should have been when Transnet's case does not depend on it nor does Sasol's case depend on a finding as

to what the lesser 'correct' tariff should have been. All that matters is whether the tariff charged was legally the correct one to charge or not. To explore the foundations for a lesser tariff is to invite a descent into an irrelevant factual morass **in this** action.

[19] Transnet's replication alleges **NERSA's** tariff is compliant with the PPA. It is not **Transnet's** tariff. Transnet's stance is that they were applying the tariff considered by NERSA. If that tariff i.e., NERSA's, is not legally compliant, Transnet contends that that fight is one to be had between NERSA and Sasol, and is not to be traversed in this action.

[20] Transnet further submitted in the heads of argument filed, that even if it were to be found that it made a decision, Sasol's application is fundamentally flawed because it overlooked the first principle of *Oudekraal*,² which holds that an administrative action, once taken, exists in fact and has legal consequences that cannot simply be overlooked but must be treated as fact until set aside by a Court . Transnet contended that the effect of this principle is that, even if Transnet's tariff were unfair or discriminatory, Sasol "*is compelled to pay that tariff until and unless it has been set aside on review*". Sasol on the other hand contended that Transnet failed to appreciate the distinction that the cases have drawn between 'classical' collateral challenges on the one hand and 'reactive' challenges by organs of state on the other. Both Transnet and Sasol cautioned that I should not rule on this feature as Total's rights, (and Total is not party to the current application), will be affected by such a ruling.

[21] Mr Turner SC, representing Sasol, argued that Transnet raised what is essentially a legal objection to Sasol's plea and that if Sasol's defence were indeed objectionable on this basis, then Transnet ought to have raised its objection by way

² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*, 2004 (6) SA 222 (SCA)

of an exception. It has not done so, so the argument continues, and it cannot now raise such an objection in order to deny Sasol the documents it requires to establish its defence. Indeed, in raising this objection at this stage, the criticism continues, Transnet conflates the merits of Sasol's defence, with Sasol's entitlement to obtain disclosure of documents required to establish its defence. I was urged to conclude that the trial Court will, in due course, determine whether Sasol's defence is sustainable in law but that that was not the question for present purposes.

[22] I disagree that Transnet is asking this Court at this stage to determine the validity of Sasol's defence. In my view, the position at present can be summarised as follows: Transnet has pleaded that it charged the tariff set by NERSA. It has pleaded that it is obliged to do so. It has also pleaded that it is entitled to charge Sasol a discounted rate provided NERSA approves such discounted rate which did not occur. It took no decisions in relation to Sasol which involved the exercise of discretions or the weighing up of interests. It pleaded essentially that it applied the NERSA set tariff in a robotic or mechanistic manner as it submits it was obliged to do, to charge the tariff set by the body which sets tariffs. Thus: if the Court finds that a) Transnet was obliged in law to charge NERSA's **set** tariff; b) Transnet was entitled in law to charge a discounted NERSA tariff provided the discount was approved by NERSA (which would then amount to the set tariff contemplated in a)); and c) that NERSA in fact had not approved a discounted rate (i.e. it had not set the discounted tariff), it would follow, that Transnet would be entitled to its declaratory relief. On this scenario, the PAJA challenges all come into play in Sasol's relationship with NERSA (not Transnet) and are irrelevant to the issues which fall for determination by this Court on the current pleadings.

[23] Sasol placed much reliance on paragraph 5 of Transnet's replication: Transnet "*pleads specifically that it appropriately applied the extant tariff set by NERSA, which tariff is: 5.1 lawful under section 28(1) of the Act; 5.2 warranted under section 28(2) of the Act; and 5.3 properly to be applied under section 28(3) of the Act.*" These allegations so the argument goes, show that Transnet does not accept that its application of the tariff was flawed and that it intends to rely on attributes of the tariff. This in turn shows that the information informing the make-up of the tariff, to justify charging the tariff, is relevant as it will be relied upon. The replication thus requires factual allegations on whether the tariff set was based on the factors set out in section 28 of the PPA and evidence on Transnet's evaluation of the NERSA tariff from which it satisfied itself that the NERSA tariff took into account the factors set out in section 28(2)(a) of the PPA.

[24] Transnet is not contending that it did have regard to such factual allegations. If it is found that it ought to have considered any such factual allegations, it should fail in its claim.

[25] Sasol also pins its argument on the following paragraph in Transnet's amended replication to Sasol's plea:

'11.2 In the event that it be concluded (contrary to Transnet's stance) that a discretionary power existed to impose a tariff other than the one imposed by NERSA, and that Transnet's conduct is irregular in any material respect, then Transnet pleads that the tariffs imposed by NERSA constitute an appropriate *quantum meruit* to which it is entitled as just and equitable relief, whether under section 172 of the Constitution, section 8 of PAJA or otherwise.

[26] It is this *quantum meruit* position (the reasonable value of services) which Sasol contends throws open the net for Sasol to explore the reasonableness of the

tariff. The documents sought are, under these circumstances, self-evidently relevant as all that ought to have been considered should then be unpacked.

[27] Transnet's pleaded position though is that it took no decision in relation to the tariff charged. It's pleaded position is that it slavishly applied a tariff dictated to it by NERSA which tariff is informed by the PPA and other applicable legislation including the PFMA. It followed NERSA which applied a methodology which was decided upon after input from all stakeholders and this approach, it contends is appropriate and reasonable and constitutes an appropriate quantum meruit. Transnet's position as I understand it is that the actual considerations in respect of NERSA's methodology, are not relevant to the tariff Transnet charged as it was NERSA who set the tariff, not Transnet. The considerations in setting such a tariff pertain to factors considered by NERSA, not Transnet. The only "factor" Transnet would have considered is whether or not to apply the NERSA tariff. The documents requested pertain to factors informing the setting of the tariff (which lies with NERSA) and not factors informing Transnet's "decision" to impose NERSA's tariffs. Essentially, the documents requested would not inform the basis for the set tariff – NERSA is the entity that would be in possession of the documents underlying the setting of the tariff.

[28] If I am wrong on my construction of the documents which informs relevance in these proceedings, I would nonetheless find that all the PAJA considerations can be raised in principle, but it is unnecessary to give factual content thereto because Sasol is not seeking any tariff-compliant relief. I thus do not agree with Sasol's contentions that evidence will need to be led to show what facts ought to have been considered by Transnet when setting the tariff. Transnet has pleaded clearly: it took no decision.

[29] The Commercial Court rules make no provision for the taking of an exception to a pleading, for a request for further particulars or for general discovery. Paragraph 1 of Chapter 1 of the Commercial Court Rules provides that the '*Commercial Court aims to promote efficient conduct of litigation in the High Court and resolve disputes quickly, cheaply, fairly and with legal acuity.*' Aligned with that are the provisions of paragraph 18 which reads: '*Matters heard in the Commercial Court will be dealt with in line with the broad principles of fairness, efficiency and cost-effectiveness*'.

[30] As highlighted earlier, Rule 26 of the Commercial Court Rules casts the net for relevance somewhat wider. I conclude that at this stage of the proceedings, the documents sought are not relevant. This is an interlocutory ruling and as matters unfold and pleadings are amended, this might change, and this ruling can be revisited.

[31] I was specifically asked not to rule on Transnet's assertion that Sasol's application is fundamentally flawed because it has overlooked the first principle of *Oudekraal*³, which holds that an administrative action, once taken, exists in fact and has legal consequences that cannot simply be overlooked but must be treated as fact until set aside by a Court .

[32] I want to make it plain that my ruling in respect of relevance has assumed that Sasol's challenge is one falling within the 'classical' collateral challenge category and that Sasol is not required to institute review proceedings and Sasol is entitled to challenge the validity of the 'administrative act' (if it is found to be one) as of right. These are all assumptions made in Sasol's favour but nonetheless do not disturb my finding on relevance.

³ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*, 2004 (6) SA 222 (SCA)

[33] I thus rule that it may well constitute a legal defence but there are no facts which need to be explored and which require the production of documents by Transnet.

Confidentiality and extent of the request

[34] In my view, the concern can be dealt with by imposing confidentiality restrictions on disclosure and Ms Pillay suggested as much during argument. This is not the real issue at present though.

[35] A further criticism raised was that the Rule 26 request is overly broad, vague and lacks particularity. In my view, if the documents are relevant, it is perfectly permissible to describe them in categories as Sasol did. It is difficult to ask for that which one doesn't have and to describe where to find that which one does not even know whether it exists. In my view, however, this application stands or falls on relevance, and I need not concern myself with the nature of the request and accordingly decline to do so.

Costs

[36] No reason has been advanced as to why the costs should not follow the result. Even though I have ruled that a request of this nature could conceivably be entertained again, this application is self-contained, and the costs should be dealt with herein.

Order

[37] I accordingly make the following order:

The application for targeted document disclosure dated 24 July 2023 is dismissed with costs, such costs to include the costs of two counsel where so employed.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant (Sasol): Adv D Turner SC, Adv M Mbikiwa and Adv A Ngidi

Instructed by: Mchunu Attorneys

Counsel for the Respondent (Transnet): Adv K Pillay SC, Adv R Tulk, Adv YS Ntloko, Adv N Nyembe and Adv M Dafel

Instructed by: Webber Wentzel

Date of hearing: 17 August 2023

Date of Judgment: 23 August 2023