REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32665/12

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 01 August 2022 WJ du Plessis

In the matter between:

KRANSBERG PETROLEUM (PTY) LTD Plaintiff

and

BOSKOR BELEGGINGS (PTY) LTD **FIRST** Defendant

JUDGMENT

DU PLESSIS AJ

[1] This is an action for the payment of outstanding monies stemming from an oral agreement for the sale and delivery of fuel products[1] concluded between the plaintiff and the defendant. The plaintiff is a wholesale supplier of fuel products, and the defendant is a fuel retailer operating a filling station.

[1] Namely petrol, diesel and paraffin.

[2] The parties

[3] At the time of instituting the proceedings in 2012, the plaintiff was a close corporation registered in terms of the Close Corporation Act.[2] It initially consisted of Mr Garhardus Jacobus du Plessis ("Mr du Plessis") and his father. When his father resigned, Ms Magdalena Sophia du Plessis ("Ms du Plessis") became a member. Mr du Plessis resigned on 27 September 2006 when new regulations prohibited a fuel retailer from being a wholesaler as well. During the time in dispute and the launching of these legal proceedings, Ms du Plessis was the only member of the plaintiff.

[4] At the time of instituting the proceedings, the defendant was also a close corporation,[3] registered in 1987 with member Mr Dawid Matthys de Beer ("Mr de Beer"). He was later joined by Mr du Plessis and Mr Clemens Frederick Pretorius ("Mr Pretorius"). The three started planning the filling station. Mr de Beer eventually emigrated to Australia and sold his membership interests. After Mr du Plessis and Ms du Plessis approached Mr Daniel Petrus Smit ("Mr Smit"), he joined as a member together with Mr Jordaan in 2008.

[5] Between 30 June 2004 and 27 September 2006, Mr du Plessis was a member of the plaintiff and the defendant. When Mr du Plessis was a member of the defendant close corporation,[4] the members often referred to themselves and one another as "directors". The fact that Mr du Plessis was deemed the "chief executive officer" of the close corporation will become important later in the judgment.

[6] Mr du Plessis also has another business called "Klein Kransberg", operating a filling station in Thabazimbi. This entity will be referred to as "Klein Kransberg" where necessary.

[7] Most of the people mentioned above had been friends before the litigation ensued. For some, the litigation meant the end of family friendships that spanned

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[2] 68 of 1984. It converted into a private company in 2015.

[3] It converted into a private company in 2019.

[4] He was removed in 2016.

generations. The deeply personal nature of the dispute was evident throughout the trial. Their living in a small town makes the losing stakes more than just the money.

[8] This is perhaps why the defendant's bundle consists of more than 4551 pages, with the plaintiff matching. I am grateful to counsel for, in the end, limiting the pages to a manageable volume of papers and providing the court with a bundle with only the relevant information on the issues still in dispute. I am also grateful for counsel conceding arguments during the trial when it became clear that certain arguments were no longer legally tenable. What is left in this judgment is thus a discussion of only the facts and law necessary to resolve the remaining dispute.

[9] The claim, the counterclaim, and the issues in dispute

[10] The plaintiff claims the payment of R741 657.68, interest and costs from the defendant, being the outstanding balance on an open account commencing on 1 July 2008 and closing on 9 January 2012. The defendant has a counterclaim based on the difference in price per litre (as explained below) sold and delivered by the plaintiff to the amount of R 7 464 610, plus interest and costs.

[11] Each party led much evidence to answer the following questions concerning the terms of the oral contract concluded between the parties regarding the sale and delivery of fuel products.

i. Who represented the parties when this contract was concluded on 27 June 2008?

ii. Who had the authority to bind the parties?

iii. What was the term of the agreement relating to price?

a. The plaintiff avers that it will be at their normal delivery price, the price listed for zone 12C.

b. The defendant avers it is the price at which the plaintiff buys the petrol from the suppliers plus a 3c – 7c handling fee.

[12] Suppose the court finds that the defendant's version prevails on the last point. In that case, the counterclaim kicks in (the difference in the price the plaintiff charged and what the defendant regarded the terms of agreement regarding the price to be).

[13] Petroleum industry

[14] To make sense of the facts, I deem it helpful to start by briefly describing how the fuel supply chain, from a depot to the pump, works. This was set out in the defendant's expert report[5] and was not in dispute.

[15] The Minister of Petroleum and Energy publishes prices for petroleum products monthly, indicating specific "zone prices" for retailers. This "zone price" calculation ensures that retailers pay more or less the same price for petrol after delivery. The list indicates, amongst other things, a price that retailers will pay for the product and an estimated pump price that they can sell for. Retailers are not bound by the diesel price, but they are bound by the petrol price set. Northam, the filling station in question, falls in zone 12C.

[16] Refineries such as Sasol or Total sell products to suppliers such as Kopano in this case. Kopano picks up the fuel in a specific zone and pays the zone price for the product (in this case, zone 9C). Kopano then delivers the products as ordered by the plaintiff directly to the client (the defendant). They then invoice at zone price (in this case 12C). In this case, based on a long business relationship, Kopano charged the plaintiff 35c less than the list price, which the plaintiff then sold at the list price.

[17] Facts of the case

[18] It is common cause that an oral contract was concluded in June 2008. In the particulars of claim, the plaintiff states that the agreement was for invoicing at the plaintiff's "normal price".

[19] The plaintiff avers that the parties who concluded the contract are Ms du Plessis (for the plaintiff) with Mr du Plessis (for the defendant). Both these parties have the authority to conclude contracts that binds their respective close corporations. The plaintiff states that the price charged throughout the period was the "list price", the wholesale price for "zone 12C", published monthly by the Minister of Energy.

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[5] Paragraph 4.5 of the report.

[20] The defendant says it was Mr du Plessis (on behalf of the plaintiff) who concluded the contract with Mr Pretorius (on behalf of the defendant). The defendant states that the agreed price is the price at which the plaintiff purchases the fuel, plus 3c – 7c.

[21] Alternatively, if the agreement was between Ms du Plessis and the defendant (represented by Mr du Plessis), which they deny, then the price is the plaintiff's purchase price plus 5c, as was the agreement between the plaintiff and Klein Kransberg.

[22] Evidence

[23] To prove its case, the plaintiff called the following witnesses: Ms du Plessis, Mr du Plessis and Mr de Beer. It also relied on the expert report prepared by Mr Justus van Wyk, although he was not called to testify.

[24] To prove its case, the defendant called Mr Pretorius and Mr Smit. It also relied on the expert report prepared by Mr Heinrich Regenass. He was also not called to testify. The experts compiled a joint note before the trial.

[25] The testimony of each witness will be summarised in short, along with a finding as to their credibility, before discussing the legal principles applicable.

(i) Ms du Plessis

[26] Ms du Plessis is a self-taught businesswoman who relies on the trust between friends when doing business, rather than concluding written agreements.

[27] Ms du Plessis joined her husband as a member of the plaintiff in 2004. She became the sole member of the plaintiff in 2006 when new regulations prohibited a fuel wholesaler from being a retailer. She and her husband, Mr du Plessis, decided that she would do wholesale, and he will do retail. This prompted Mr du Plessis to resign as a member of the plaintiff and to start his own business under the name of "Klein Kransberg" in Thabazimbi, operating a filling station.

[28] She testified that she and her husband concluded the agreement that the plaintiff would deliver fuel products to the defendant at "list price".

[29] According to her testimony, she called the defendant every morning (and spoke to either Annette, Sannette or Antoinette). They would then give her the "dip" measurements (in other words, how much was left in the tank) to determine how much fuel she must order. She would order directly from Kopano and have it delivered directly to the defendant.

[30] The delivery was then made to the defendant, who checked and signed the documentation. These documents were sent to the plaintiff, who compared them with the depot's invoice. The plaintiff then invoiced the defendant at the list price (for zone 12C). She would give a discount of between 5c – 10c per litre when finances were tight. However, she denies vehemently that the agreement was ever purchased price, plus 3c – 7c.

[31] Ms du Plessis, as paymaster, made the payments from the defendant's account to the plaintiff on the internet, recording it on both books with the accounting software Pastel. She testified that in 2012 Mr Smit started questioning the loan accounts after the accountants alerted them to a decline in the profit margin in 2011.

[32] Under cross-examination, *Mr van Ryneveld* who appeared for the defendant, put it to Ms du Plessis that Mr du Plessis only resigned on paper from the plaintiff, but he was, in fact, still involved in the plaintiff's business. She denied this, stated unequivocally that she was in charge, made the decisions, and was the plaintiff's main financer.

[33] When counsel later asked her about an invitation to quote for the delivery of petrol to the defendant in 2011, addressed to her and Mr du Plessis, whether this does not create the impression that Mr du Plessis acted and had the authority to act on behalf of the plaintiff, she disagreed.

[34] When confronted with other quotations submitted to the defendant during this time, where most suppliers quoted zone price minus a few cents, she explained that before 2010, the plaintiff did not have competition in the area, and wholesalers respected each other's territory. All this changed after 2010 when competition forced wholesalers to offer fuel at a discounted price.

[35] Counsel also confronted her about why there was such a big difference in price invoiced for the defendant and Klein Kransberg. She explained that Klein Kransberg gets a better price because they pay ahead and because the various businesses of the spouses support and finance one another.

[36] Ms du Plessis did not come across as an untruthful witness, and she could explain to the court with clarity how the process of buying and delivering fuel works. Her sometimes creative accounting skills were always rectified to make the book balance with the accounted Oom Rinus, and the books were duly audited. She did not hide anything and showed good faith and cooperation throughout.

(ii) Mr du Plessis

[37] Mr du Plessis was more nervous than his wife on the stand. He describes himself as a farmer and businessperson, including his filling station business, Klein Kransberg. He told the court how the defendant came about and how it functioned. He testified about regular meetings of the members that he minuted.

[38] Neither the minutes of 23 June nor 24 June 2008, or any minutes after for that matter, recorded the agreement that the defendant concluded with the plaintiff regarding the price of fuel products.

[39] Mr du Plessis stated that "zone price" or "list price" was the norm. He, however, did not recall expressly agreeing to this with Ms du Plessis, although he did not contradict what she testified. When asked what he pays for petroleum products at Klein Kransberg, he said he has no idea.

[40] In 2008 Mr de Beer left the country, and Mr Smit and Mr Jordaan became members. Mr du Plessis was then appointed as "CEO", Mr Jordaan was in charge of the banking, and Mr Pretorius was the filling station manager.

[41] The court was referred to minutes of meetings where income and expenditure statements as prepared by Oom Rinus and Ms du Plessis were accepted. It noted that the current profit for fuel is: Petrol R0,60, Diesel R0,25 and Paraffin R0,45. This income and expenditure statement gave the members an indication of the profit. The profit was then multiplied by the litres sold to show the overall profit. Profit was

determined by subtracting the price they pay for the products from the price they sell it for. This statement was compiled monthly.

[42] From around 2011, the minutes started to convey the conflict between the members of the defendant. In August 2011, Ms du Plessis was requested to join a meeting. Fourteen months later, in an email from Mr Pretorius to Mr Smit, Mr Pretorius states, from what he remembers, the agreement as purchase price plus 3c – 7c. Mr du Plessis denies this.

[43] Only one document indicated an agreement between the plaintiff and defendant, stating the buying of fuel products at the list price. The plaintiff does not rely on this. The date indicated 23 June 2008, but it was only signed in 2011. Mr du Plessis signed for the plaintiff, the defendant and Mr de Beer. Despite signing for the plaintiff, Mr du Plessis denies that he was involved with the plaintiff and knows what kind of profit it made.

[44] During cross-examination, Mr du Plessis was asked about the payments he received from the plaintiff. He stated that this was for small jobs, such as changing tyres. He was also asked about the plaintiff paying for his mortgage bond and a car – all indicating that he gets a benefit from the plaintiff.

[45] When pressured to admit that the agreement was always purchased price plus 3c – 5c, as the profit should lie in the defendant to share, and not with the plaintiff, Mr du Plessis denied it.

[46] Mr du Plessis had difficulty explaining his interconnectedness with, and interest in, the plaintiff. For a couple married out of community of property, their business dealings were closely entwined.

(iii) Mr de Beer

[47] Mr de Beer had some experience in the fuel industry, and testified that the agreement was to buy at the zone price, which is what they paid. Under cross-examination, he was asked if they ever considered investigating getting petrol for less. He says no, it was important that Mr du Plessis delivers since he is in charge of the plaintiff. Even if he was not the cheapest, Mr de Beer testified that he raised Mr du Plessis, that they were like family, and that he wanted to help him.

[48] Mr de Beer came across as a loyal friend, willing to support the plaintiff's version, although exactly *who* the plaintiff was remained unclear. He did not strike the court as a dishonest person, although his loyalty to his friends might make him somewhat biased. However, he no longer has a financial interest in these proceedings, and his testimony must be evaluated in this light.

(iv) Mr Pretorius

[49] Mr Pretorius was a mathematics and science teacher who resigned from his teaching position when he got the opportunity to acquire the filling station with Mr du Plessis. He testified that the agreement was purchase price plus 3c – 5c. It is unclear exactly when he became aware of this agreement or what it is based on.

[50] Mr Pretorius also confirmed a letter (21 August 2008) regarding the ordering of fuel, addressed to the then members of the defendant, and signed by Mr du Plessis. The letterhead was a "Kransberg" letterhead. The registration number in small print at the bottom indicates the registration number of "Klein Kransberg".

[51] Under cross-examination, when asked about the early days of the business and why so little about what was decided was reduced to a contract, Mr Pretorius indicated that he trusted Mr du Plessis and Mr de Beer, as he had known them for long. In fact, he was Mr du Plessis's teacher, and they were family friends.

[52] Mr Pretorius further testified that he was interested in the profits of a filling station. He testified that Mr du Plessis was the wholesaler. He also testified that he did not pay attention to the income and expenditure statements and did not really go into the details. He operated on trust. As for the document he signed (that plaintiff is not relying on) that the petrol would be bought at list price, he replied that he did not see that it was at list price.

[53] While Mr Pretorius did not strike the court as being wilfully dishonest, he created the impression that he did not pay attention to the running of the business. As the socialite and handyman, his interests lay elsewhere. He was satisfied as long as he derived an income to replace his teacher's salary. His email in the latter parts of 2012, suddenly remembering the price agreement, does not carry much weight.

(v) Mr Smit

[54] Mr Smit is a qualified engineer. He was approached by his friends Ms du Plessis and Mr du Plessis on his farm in September 2008 to ask if he wanted to become involved in Boskor, as they did not have enough money to buy Mr de Beer out. He was promised that as a member of Boskor, he would make a lot of money. He testified that in gathering information about the business, he was under the impression that Mr du Plessis was the one involved from the plaintiff's side for delivering petrol. Mr du Plessis assured him that the price they pay for petrol is the purchase price plus 3c – 7c, he says. However, in cross-examination, he was no longer so sure that they did talk about the price on the farm that day. With some pressure, he eventually conceded that they did not talk about the price, just the fact that the plaintiff would deliver to the defendant.

[55] He was referred to the various minutes that indicated that they take note of the income and expenditure statements provided by Ms du Plessis every month. He stated that he compiled the excel spreadsheet when he became involved in the business but did not fill it in every month – Ms du Plessis did.

[56] He avoided answering the statement that nowhere in the minutes is the price noted, stating that he was not there when the agreement was concluded. He admitted that this is essential because of the small profit margin. He admitted to this with his eyes close.

[57] When he was referred to the income and expenditure statement that he compiled in excel and Ms du Plessis filled in, he was asked to explain how the profit indicated on the document was calculated. He stated it was the difference between the invoice and the price at the pump. However, he could not indicate what they were invoiced for, other than repeating that the agreement was purchase price plus 3c – 7c.

[58] At times Mr Smit created the impression that he was unwilling to change his mind as different facts came to light. Instead, he decided on a narrative and tried to make the facts fit. He could not adequately explain why the defendant kept

approving income and expenditure statements based on a price they apparently did not agree upon.

(vi) Experts

[59] When the defendant realised that the profit was dwindling, it sent already audited accounts to a new accountant, a firm of auditors and a forensic expert. The plaintiff's experts also fine-combed the statements. All this eventually led to a joint minute by the experts, where the experts agreed on everything except the price agreed upon in the contract, on which they cannot testify.

[60] The law

(i) Close Corporation Act

[61] Unlike a company, a close corporation does not separate ownership from control of the legal entity. A close corporation further has the capacity and powers of a natural person of full capacity and is practically unlimited.[6] The only limitation is the authority of the person who has acted for the close corporation in a particular transaction.[7] This means that, in principle, the members have equal rights regarding the power to represent the close corporation[8] unless an association agreement determines otherwise.[9]

[62] Section 54 sets out the power of a member to bind the close corporation. It determines that any member will be, in relation to outsiders dealing with the close corporation, an agent of the close corporation. Such a member will bind the close corporation. Even if a member's power to represent the close corporation is restricted, they will still bind the close corporation when contracting with a bona fide third party unless the outsider "has, or ought reasonably to have, knowledge of the fact that the member has no such power" to act.[10]

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[6] Section 2(4).

[7] Sections 42 – 52.

[8] Section 46(b).

[9] Section 44.

[10] Section 54(2).

[63] "Member" in section 54 refers only to a registered member. The section does not apply where someone actually or ostensibly acts on behalf of the close corporation when they are not a member.[11] The law of agency governs the situation where a person who is not a member purports to act on behalf of the close corporation, i.e. whether such a person was authorised and which actions fall within the scope of the person's authority.[12]

[64] Section 54(2) relates to the doctrine of ostensible authority.[13] The law on ostensible authority was considerably widened in the Constitutional Court case of *Makate v Vodacom (Pty) Ltd*[14] where the court held that[15]

> The presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required.

[65] The next other critical legal principles relate to unexpressed terms of a contract.

(ii) Terms of the contract

[66] Terms of a contract are the stipulations that parties include in their contract. Express terms as specifically agreed upon between the parties, either articulated orally or in writing. There can also be unexpressed terms to a contract, namely tacit and implied terms. South African law relating to unexpressed terms is based on

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[11] *J & K Timbers (Pty) Ltd t/a Tegs Timbers v GL & S Furniture Enterprises CC* 2005 SA 223 (N).

[12] *J & K Timbers (Pty) Ltd t/a Tegs Timbers v GL & S Furniture Enterprises CC* 2005 SA 223 (N).

[13] *J & K Timbers (Pty) Ltd t/a Tegs Timbers v GL & S Furniture Enterprises* CC 2005 SA 223 (N) par 10.

[14] [2016] ZACC 13.

[15] Par 47.

English law.[16] It often sits uncomfortably with the Roman-Dutch law's reliance on *consensus ad idem*, requiring a focus on the parties' actual intention.[17]

[67] The law of unexpressed terms, as set out in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*,[18] supposes two kinds of unexpressed terms: one derived from the consensus of the parties (assumed or actual) and the other independent from the intention of the parties imposed by law.[19]

[68] An implied term refers to a term not explicitly agreed upon by parties but which nevertheless forms part of the contract.[20] This can be implied by law (*ex lege*), custom or trade usages, or the facts surrounding the parties' agreement (*ex consensu*). The latter is also referred to as tacit terms.[21]

[69] Such a tacit term is one the parties did not expressly agree upon, but the parties expected to form part of their agreement. A tacit term is implied by the facts. It can be established by considering the express terms and the circumstances surrounding the formation of the contract[22] and, in some instances, the parties' subsequent conduct.[23] Based on this, the court will infer the intention of the parties.[24]

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[16] *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (A); *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A).

[17] Cornelius S "The unexpressed terms of a contract" 2006 (17) *Stellenbosch Law Review* 497.

[18] 1974 3 SA 506 (A).

[19] Cornelius S "The unexpressed terms of a contract" 2006 (17) *Stellenbosch Law Review* 496.

[20] Wille G, Du Bois F and Bradfield G *Wille's principles of South African law* (2007) 799, Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C, Naudé T, Stadler Ed, Hutchison D and Pretorius C *The Law of Contract in SA 3e* (2017) 242.

[21] See the classic cases *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (A); *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A).

[22] *City of Cape Town (CMC Administration) v Bourbon-Leftley* 2006 (3) SA 488 (SCA) at par 20.

[23] *Wilkins v Voges* 1994 (3) SA 130 (a) at 143C -E.

[24] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 339E; *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* [2015] ZAGPJHC 154 paras 25 – 33.

[70] When considering the existence of a tacit term, the court often employs the "innocent bystander test". This test, adopted from the English law, was set out in *Reigate v Union Manufacturing Co*[25] as follows:

> You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?" they would have both replied: "Of course, so-and-so. We did not trouble to say that; it is too clear."

[71] For a court to import such a term, two things are necessary. Firstly, the implied term cannot conflict with an express term.[26] It only supplements the contract. Dodson AJ in *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books*[27] listed elements to consider when doing so (footnotes omitted):

i. the term should be necessary in a business sense to give efficacy to the contract;

ii. however, that does not mean that the contract as it stands must, of necessity, be ineffective without the proposed tacit term;

iii. necessity does not equate with a standard of proof beyond reasonable doubt – a balance of probabilities still applies;

iv. as pointed out above in the extract from the judgment of Nienaber JA in *Wilkins v Voges*, it is not necessary to prove that the parties applied their minds when concluding the contract to the issue to which the tacit term pertains. In this sense, the test is objective, not subjective.

[72] Secondly, the term must be capable of clear and exact formulation.

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[25] 118 LT 479 483.

[26] *De Lange v Absa Makelaars (Edms) Bpk* [2010] 3 All SA 403 (SCA) at para 22; *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 (3) SA 544 (SCA) at para 12.

[27] [2015] ZAGPJHC 154; 2016 (1) SA 473 (GJ); [2015] 3 All SA 561 (GJ) par 32.

[73] While the test for importing a term is an objective test, the Supreme Court of Appeal in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC*[28] suggested that subjective intentions at the time of contracting can play a role. Here the court can also look at trade usage, where parties engaged in a specific trade are taken to have tacitly incorporated trade usages into the contract.

[74] Application of the law to the facts

[75] The plaintiff bears the onus to prove the terms of the contract. It pleaded that an express oral agreement was concluded around 27 June 2008 between Ms du Plessis and Mr du Plessis.[29] As for the term on the price (which is in dispute), the plaintiff pleaded that the agreement was to sell and deliver at the plaintiff's "normal price" and was an express, alternatively tacit, alternatively implied term. The onus is on the plaintiff to prove this.

[76] The defendant entered a counterclaim claiming (it says) an additional term, namely that the price was the plaintiff's purchase price, plus 3c – 7c. In such a case, the onus, they say, is on the plaintiff to prove the terms of the contract plus that the defendant's term was not part of the contract.

[77] While the standard rule is that the person who asserts must prove the facts on which the claim is based, Christie states that if the defendant, instead of denying the plaintiff's version of a contract, pleads an additional term as a defence, the onus remains on the plaintiff to prove its version of the contract to succeed in its claim. This may require proving a negative, namely, that the term alleged by the defendant was not in the contract.[30] The defendant thus argued that the onus is on the plaintiff to prove that the agreement was not purchase price plus 3c-7c.

[78] In this case, the term relating to the price is in dispute. I find it hard to understand how the term proposed by the defendant is an *additional* term, as opposed to different content of the same term: the price to be paid for the delivery of the fuel products. If its version is accepted, it gives rise to a counterclaim. If the court

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[28] 2005 (5) SA 186 (SCA).

[29] Alternatively Mr Pretorius, alternatively Mr de Beer.

[30] Christie RHBG *Christie's the law of contract in South Africa* (2022) 194.

accepts the plaintiff's version, there is no counterclaim. The onus is thus on the defendant to prove its counterclaim.

[79] The onus is thus on the plaintiff to prove its claim on a balance of probabilities.

(i) Close Corporation Act

[80] As set out in the facts, both parties were close corporations at the time of concluding the contract. On 27 June 2008, Ms du Plessis was the only member of the plaintiff, and she, and only she, had the authority to bind the plaintiff. The members of the defendant at the time of the conclusion of the contract were Mr du Plessis, Mr de Beer and Mr Pretorius. They were all legally entitled to bind the defendant.

[81] The defendant did not have an association agreement when concluding the contract. There was, therefore, no formal division of powers between the members or exclusion of any member from actively participating in the business. There was an informal arrangement in the defendant as to who oversees what, with Mr du Plessis in charge of management and finances.

[82] The defendant pleaded that Mr du Plessis represented the plaintiff in making the contract. They further plea that Mr du Plessis "owned" the plaintiff, with Ms du Plessis, the "nominated director". Though not clear, the defendant seems to hint at ostensible authority in its heads of argument – speaking of "involvement" in the plaintiff, having "authority to represent the plaintiff", being the "kingpin" in the plaintiff and representing the plaintiff. The plaintiff rightfully notes that the defendant did not plead nor prove the only legal defence as set out in section 54(2) of the Close Corporations Act.

[83] While the test for ostensible authority is relatively wide, this does not help the defendant as the defendant did not plead that Mr du Plessis acted on ostensible authority of the plaintiff. This is an issue that only came up during trial and argument.

[84] There is no evidence that Mr du Plessis was prohibited from concluding binding contracts for the defendant. In fact, most of the evidence showed that Mr du

Plessis was regarded as the person designated to conclude the contracts during that time. Mr du Plessis accordingly had the authority to represent the defendant.

[85] Likewise, Mr du Plessis was not a "nominated director" for the plaintiff. There is no such thing. Even if he did present the plaintiff, the Supreme Court of Appeal case of *Vaal Reefs Exploration and Mining Company v Burger*[31] provides some authority that a person can act in two capacities.

[86] I, therefore, find that Mr du Plessis had the authority to bind the defendant in concluding a contract in June 2008. I am also satisfied that at the time, the other two members of the defendant were aware that the defendant contracted with the plaintiff to supply fuel. I am also satisfied that Ms du Plessis acted for the plaintiff in concluding the contract.

[87] The question that the court now has to answer is on what terms the contract was concluded, with specific reference to the price.

(ii) Contract law

[88] The contract terms on price were never expressly agreed upon or recorded. I must thus determine, based on the evidence before me, what the tacit, or implied, contract term was on price.

[89] I must do so with due regard to the contractual relations between the parties that was based on trust and cooperation when the contract was concluded. The parties agreed to work together for a long time, profiting from the agreement. Mr de Beer's testimony supports this idea. The fact that Ms du Plessis was intricately involved and trusted to do various financial and administrative tasks for the defendant speaks of this underlying relationship in which the contract was cemented. This trust relationship overrode the urge to put the contract on paper and state explicitly that the defendant would buy petroleum products from the plaintiff at the plaintiff's normal price.

[90] What I sit with are two versions. In *National Employers General Insurance Co Ltd v Jagers*[32] the court stated that the credibility of witnesses becomes important

[31] [1999] ZASCA 67; [1999] 4 All SA 253 (A).

[32] 1984 (4) SA 437 (E)

when determining, on a preponderance of probabilities, whether the plaintiff's version is true and accurate and the defendant's false or mistaken. Both parties quoted *Stellenbosch Farmer's Winery v Martell et Cie*[33] in this regard, focussing on the credibility of the various factual witnesses, their reliability, and the probabilities.[34]

[91] As mentioned earlier, from the evidence led, also on the now abandoned points, a picture emerged of a self-educated Ms du Plessis who, in her personal capacity, but also as a member of the plaintiff, showed good faith and cooperation throughout. She testified that the price was "list price", as agreed with her husband, Mr du Plessis. Mr du Plessis could not recall this conversation, but he did not deny it. Mr Pretorius did not seem interested in the facts and figures – he just wanted to ensure that his investment provided him with a form of income. Mr de Beer, likewise, gave the impression that he wanted a return on his money and, in the process, ensure that his friends made money with the supply of fuel. Even when the new members joined, there was not much interest in clarifying the terms of the contract with the plaintiff. No questions were asked about the price at which the fuel was purchased at the meeting between Ms du Plessis, Mr du Plessis and Mr Smit in September 2008. Money was made, and the trust relationship kept the unexpressed terms of the contract intact. There was contractual certainty with every invoice paid, every auditor's report accepted, and every income and expenditure statement approved.

[92] It was only when the profits dwindled that questions were being asked, the trust relationship came under pressure, and the terms of the unexpressed contract became no longer so clear. Then, a different understanding of what was agreed on, pertaining to price, arose. In a sense, it seems as if the parties no longer had the consensus that was initially there. Hence the request for new quotations to supply the defendant with fuel, and hence this court case.

[93] Ms du Plessis testified that at the time of the conclusion of the contract, the norm was to charge the list price. She also admitted that from about 2011, discounts had become the norm. Therefore they quoted the list price minus 25c when asked to

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[33] 2003 (1) SA 11 (SCA).

[34] The oft quoted passage can be found in paragraph 14 and 15 of the judgment.

quote. Therefore, in 2008 at the time of the conclusion of the contract, the normal price was list price. It might well be that in 2011, this changed, which is then also reflected in the quotations that the defendant obtained.

[94] An officious bystander asking the three parties: Mr du Plessis, Mr Pretorius, and Mr de Beer, what the price at which the fuel will be sold is, will, in all probability, get the answer: we trust Ms du Plessis to invoice us at the plaintiff's normal price, which was list price at the time, as long as we all to make some profit.

[95] The agreement between the plaintiff and Klein Kransberg cannot be taken as a blueprint for an agreement between the plaintiff and the defendant. The evidence before the court was that Ms du Plessis and Mr du Plessis's businesses were intertwined. The businesses finance their household and each other's businesses. Whether the profit lies in the plaintiff or Klein Kransberg probably makes little difference for them. The defendant, on the other hand, had four members, of which Mr du Plessis was just one. It would make business sense for the plaintiff to make money from this business transaction, charging what was then the normal price (i.e. list price).

[96] These facts are further supported by the fact that Ms du Plessis consistently invoiced at list price, except when she gave a bit of a discount to the defendant when times were tough. Everything was recorded and confirmed by the auditor's facts and figures. She did not try and hide it. When asked to do so, she filled in an excel spreadsheet and submitted it to the defendant to approve at meetings.

[97] The prices at which the fuel was sold were only questioned three years after opening. If the defendant was unhappy with this, it was free to renegotiate the price, get a different supplier (as it eventually did), or order directly from Kopano. It cannot blame the plaintiff for its wanting business decisions. If it avers that the contract was concluded fraudulently and under unfavourable terms, it has remedies in terms of the Close Corporations Act against the person who concluded the contract: Mr du Plessis.

[98] The term "purchase price plus 3c – 5c" also does not seem precise. How would it be determined when it is plus 3c and when plus 5c? This does not seem

probable. A list price as published every month can be ascertained with greater certainty. The fact that the quotations obtained in 2011 refer to "list price minus x cents" lends more credibility to the plaintiff's version than the defendant's.

[99] The fact that the consensus dwindled as the trust between the parties dwindled does not distract from the fact that the initial agreement was delivery of fuel at normal price, with normal price denoting list price.

[100] The plaintiff, therefore, succeeded in proving its claim on a balance of probabilities.

[101] Order

[102] As a result, the following order is made:

1. Judgment is granted in favour of the plaintiff against the defendant for the payment of R741 657,68;
2. Interest on the amount at the rate of 15,5% per annum from 6 July 2012 to the date of payment subject to the *in duplum* rule;
3. Defendant's counterclaim is dismissed;
4. The defendant shall pay the costs of the action, such costs to include:
    i. The costs consequent upon the employment of senior counsel; and
    ii. The qualifying fees of the witness, Mr Justus van Wyk.

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WJ du Plessis

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff:	Adv P Ellis SC
Instructed by:	EJ Burger of ED Ras Burger and Partner
For the for defendant:	Advs PM van Ryneveld and JHF le Roux
Instructed by:	LA Meyer of DBM Attorneys
Date of the hearing:	23 May 2022
Date of judgment:	29 July 2022