

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban
(Exercising its admiralty jurisdiction)

Case No: A32/2014:

In the matter between:

Columbus Stainless (Pty) Ltd

Applicant

and

Kuehne & Nagel (Pty) Ltd

First Respondent

Transnet (SOC) Ltd t/a National Ports Authority
of South Africa
Respondent

Second

Case No: A33/2014

In the matter between:

Transnet (SOC) Ltd t/a National Ports Authority
of South Africa

Applicant

and

Kuehne & Nagel (Pty) Ltd

First Respondent

Columbus Stainless (Pty) Ltd

Second Respondent

Judgment

Lopes J

[1] There are two applications before me. The applicant in the first matter, Columbus Stainless (Pty) Ltd ('Columbus') carries on business in Gauteng as a

manufacturer and exporter of stainless-steel. In order to export the stainless-steel:

- (a) it had to pay the second respondent, Transnet (SOC) Ltd t/a National Ports Authority of South Africa (TNPA) tariffs for exporting stainless-steel;
- (b) to that end, it concluded agreements directly with TNPA for the earning of tariff rebates which would accrue to Columbus for exporting agreed minimum quantities of stainless-steel;
- (c) with regard to stainless-steel exported through Maputo, it paid the tariffs through its forwarding agent, the first respondent, Kuehne & Nagel (Pty) Ltd (K&N);
- (d) K&N paid the tariffs to TNPA, and then invoiced Columbus. When it did so, it paid TNPA the tariff for ordinary steel, and rendered to Columbus the original tariff documentation which it received from TNPA. However, when doing so, one or more of its employees used correcting fluid to 'white-out' the original tariff charges (for ordinary steel) and put in higher charges (for stainless-steel);
- (e) this only came to the attention of Columbus when it conducted reconciliations in order to claim tariff rebates from TNPA; and
- (f) Columbus considered that it had been defrauded by its agent, K&N.

[2] Columbus instituted action against K&N and TNPA out of the South Gauteng High Court for recovery of what it considered to be overpaid tariffs in the sum of R10 340 897.96, together with certain declaratory relief. TNPA

instituted action against K&N and Columbus out of the same court on the 29th November 2011 for repayment of what it considered to be underpaid tariffs, which, together with penalties, totalled R40 976 124.64.

[3] After both actions were transferred to this court, on the 23rd May 2014, Ploos van Amstel J granted an order that they proceed as admiralty actions-in-personam. His judgment was appealed against, and on the 15th December 2014 the Supreme Court of Appeal dismissed the appeal. The two actions were then to proceed in this court. The Registrar of this court allocated the actions case numbers A32/2014 and A33/2014 respectively.

[4] The defence of K&N included that it was entitled to behave as it had done by virtue of its contractual arrangements with Columbus and TNPA. The two actions have continued side-by-side. The litigation has been characterised by numerous interlocutory applications. There are presently ten interlocutory applications pending between the parties. The parties approached the Judge President with a request that all ten be heard simultaneously. The Judge President ruled that only two could be heard together. They are:

- (a) under Case No A32/2014, that the late filing of the replication delivered by Columbus on the 21st October 2019, be condoned; and
- (b) under Case No A33/2014 that TNPA be permitted to amend its replication.

The parties agreed that the matters be argued together, and that I deliver one judgment dealing with both applications. This was because the basis of the opposition to the grant of each application is the same.

- [5] In Case No A32/2014, an abbreviated time-line of the pleadings is:
- (a) summons was issued by Columbus on the 23rd June 2011;
 - (b) the plea of K&N was delivered on the 12th June 2015;
 - (c) a third-party notice was issued by Columbus it was pleaded to during July 2016;
 - (e) K&N had, on the 2nd May 2012, brought a challenge before the Ports Regulator, against the lawfulness of the tariffs levied by TNPA during the 2004-2009 period. The Ports Regulator dismissed the challenge on the 30th May 2014. A review by K&N of that decision was heard by me on the 2nd and 3rd May 2017. I dismissed the review on the 23rd June 2017. Leave to appeal was refused by me on the 5th August 2017, which was followed by a further refusal of leave to appeal by the Supreme Court of Appeal on the 6th November 2017.
 - (f) the replication of Columbus was delivered on the 21st October 2019;
 - (g) the application for condonation of the late filing thereof was delivered on the 26th March 2020.

[6] K&N opposes condonation of the late filing of the replication delivered by Columbus. In its founding affidavit to lead the application for condonation the deponent for Columbus, in dealing with the delay in bringing the replication, stated that:

- (a) during the review of the Ports Regulator’s decision, ‘the energy and efforts of Columbus and its legal team were understandably fully focused on opposing the review proceedings. . .’;
- (b) ‘It was therefore only from March 2018 onwards (taking into account the end of year recess and holiday season) that Columbus and its legal team were in a position to turn their attention to both the Columbus Action and the NPA Action (sic)’;
- (c) ‘During the course of 2018 and early 2019, the parties engaged in certain “without prejudice” communications. As a result of these communications, whilst the Columbus legal team had commenced the preparation of a Replication, it was not finalised during this period.’; and
- (d) Letters were exchanged between the legal representatives of Columbus and K&N, with the object of avoiding Columbus having to bring an application for condonation. K&N insisted on such an application, and indicated that it intended to deliver a rejoinder.

[7] Under Case No A33/2014:

- (a) K&N pleaded to the particulars of claim of TNPA on the 8th June 2015. Two special pleas were taken:
 - (i) *locus standi*; and
 - (ii) prescription.
- (b) TNPA replicated to the plea of K&N on the 16th May 2015. It now seeks to amend its replication in accordance with a Notice of

Intention to Amend dated the 15th April 2020. K&N opposes the application.

- (c) The amendment in respect of which TNPA seeks leave is as follows:
- (i) by renumbering the existing paragraph 80 of the replication to read “80(a)”; and
 - (ii) by adding the following subparagraph after the renumbered subparagraph 80(a) as subparagraph (b):
“(b) On 23 June 2017 the review application was dismissed with costs, and the Port Regulator’s decision referred to in paragraph 76 hereof is binding on the first defendant hence it cannot validly in law seek to reventilate its challenges to the validity of the tariffs in this action.”

[8] The purpose of the amendment was to update the replication. Pursuant to the replication, K&N delivered a rejoinder on the 30th July 2015, to which TNPA delivered a surrejoinder on the 18th August 2015. The issue in dispute before me is whether the original amendment sought by TNPA should be permitted.

[9] Mr *GD Harpur SC*, who appeared for K&N together with Ms *CV du Toit*, submitted that K&N opposed each of the applications for the same reasons:

- (a) in neither application was any acceptable explanation given for the inordinate delays; and

- (b) the applications were not brought on a *bona fide* basis.

He submitted that in those circumstances, I should not grant either of the applications.

[10] With regard to the lack of good faith, Mr *Harpur* submitted that:

- (a) in the arguments before me during the review application, both counsel for Columbus and TNPA submitted that they were not asking me to decide the merits of the tariff dispute, because that issue would be dealt with at the trial;
- (b) in my judgment that is exactly what I did, or, at least, I created the impression that the issue of the lawfulness of the tariffs levied between 2004-2009 would still be dealt with at the trial;
- (c) both Columbus and TNPA now wish to rely on a suggestion that, in my judgment, I had effectively disposed of the issue of the lawfulness of the 2004-2009 tariffs;
- (d) he had predicted this in his submissions in the review, submitting then that if I did not decide the issue, he would be trapped in a ‘catch 22’ situation, where Columbus and TNPA would argue at the trial that I had in fact disposed of the issue, and K&N may be precluded by the judge hearing the main trial from relying on the defence that the 2004-2009 tariffs levied by TNPA were unlawful, and, accordingly, unenforceable against K&N; and
- (e) in now changing tack, as it were, Columbus and TNPA were acting in bad faith to suggest that the issue was *res judicata* or that issue estoppel prevented K&N from relying on that defence.

[11] Mr *Harpur* also submitted that the Ports Regulator had, in a ruling requested by Columbus, and made prior to the ruling which was unsuccessfully sought to be reviewed, decided that the tariff was unlawful. The Ports Regulator had then ruled that he would only apply the corrected tariff after the 2004-2009 period. K&N was entitled to bring a collateral action against the lawfulness of the application of the 2004-2009 tariff and had done so. My judgment in the review application was both sought and granted on the basis that I was not to, and did not, decide the collateral challenge. What Columbus and TNPA did, was to initially request me not to decide the collateral challenge, but now they say that I did so. They had argued that the Ports Regulator had not decided the issue of the collateral challenge, and that I should not do so.

[12] In support of this view, K&N annexed to its affidavits, extracts from the arguments advanced before me at the review hearing. Mr *Harpur* indicated a number of passages which he submitted supported his submissions of bad faith. In addition, he referred to extracts from my judgment which he submitted demonstrated that the tone of my judgment suggests that the collateral challenge would be decided later – ie. at the trial.

[13] Ms *A Annandale SC*, who appeared for Columbus together with Mr *M du Plessis SC*, submitted that the issue of the unlawfulness of the tariffs for the 2004-2009 period was determined by the Ports Regulator, and confirmed by me. It was possible for me to have written my review judgment so that the issue at the heart of the collateral challenge was not determined, but ultimately, I chose not to do that, and I dealt with it. The upshot of my decision was that K&N had to pay the 2004-2009 tariffs.

[14] Ms *Annandale* submitted that there are other issues raised in the replication than just the question of *res judicata* of the tariff issue – ie. the special plea of prescription, the allegations that Columbus had suffered no loss, had no indemnity claim against K&N, had not suffered any loss of rebate claims, and certain responses to the plea-over of K&N.

[15] Mr *N Singh SC*, who appeared for TNPA together with Ms *MA Ngqanda*, submitted that in the annexures recording the review application submissions, it does not appear anywhere that he had submitted that my decision on the review should involve the issue of the lawfulness of the tariff. He submitted that it was, in fact, Mr *Harpur* who submitted that I should decide the tariff issue on the papers, and that the Ports Regulator was wrong – this would bring an end to the issue. Mr *Harpur* had also submitted that the review issue should stand over for decision by the trial court. He submitted that the risk which K&N had faced in the review was that if I did not accept the stance of TNPA, that I would decide the issue against K&N.

[16] Mr *Singh* submitted that the matters complained of by K&N were already in the pleadings, and if K&N thought that they should not be there, K&N should have excepted. It did not do so. In the original replication, the review application was pleaded – the amendment is simply to record an update of the result of the review, and its legal effect on the case. There was accordingly no question of bad faith on the part of TNPA as *res judicata* had already been pleaded.

[17] Mr *Singh* referred me to *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and others* 2019 (2) SA 606 (ECG) which dealt with the position where an administrative decision was challenged, the challenge failed and the matter was then taken on review. The reviewing party made it clear that the decision which it sought to review was the original decision – the decision at first instance – and not the appellate decision of the MEC. The court held that the setting-aside of the decision at first instance would be academic and of no practical effect, and refused the application on that basis alone. Mr *Singh* submitted that on the basis of this decision, and my dismissal of the review, any challenge to the legality of the tariff is moot. For the reasons set out below, it is unnecessary for me to deal with this submission.

[18] Mr *Singh* submitted that, whether on the basis of *res judicata*, issue estoppel or the ‘once and for all’ rule, the issue of the legality of the 2004-2009 tariff charges was decided in my review judgment, and the replication simply seeks to update the pleadings in that regard.

[19] In dealing with delay in its founding affidavit to lead the application for an amendment, the deponent for TNPA, states:

‘Due to the many challenges that were brought by K&N which required a lot of time and energy from the NPA, attention was unfortunately not given to the pleadings especially after the dismissal of K&N’s application by the SCA. Further to the NPA defending the various legal applications by K&N, the NPA also had to deal with the change of attorneys and procuring the services of new attorneys at an advanced stage.’

[20] The 'Rules regulating the conduct of the admiralty proceedings of the several provincial and local divisions of the supreme court of South Africa' ('the Admiralty rules') as they are referred to, provide the following:

- (a) in rule 1, that '*pleading*' includes any pleading consequent upon '*particulars of claim, plea, claim in reconvention, third party notice and . . .*';
- (b) In rule 9(1)(c), that:

'Any party may, consequent upon a pleading delivered by another party to the action, deliver any further pleading within 10 days after the delivery of the preceding pleading: Provided that no replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary.'
- (c) in rule 9(3)(c), that '*It shall not be an objection to any further pleading after a plea. . .that it raises new matters or, in the case of any further pleading after a plea, that it constitutes a departure from a previous allegation made by the same party and any such departure shall be deemed to be in the alternative to any such previous allegation.*'; and
- (d) in rule 22(10)(d) that '*A pleading . . . delivered out of time shall not merely on that account be refused by the registrar or any other party unless the party seeking to deliver the pleading has been barred or the court orders it to be struck out.*'

[21] The definition of “pleading” in rule 1 of the Admiralty rules includes a replication, and Columbus had not been barred from delivering one. There is no application before me to strike out the replication which was delivered by it.

[22] It is notorious, however, that pleadings in admiralty are not treated in the same manner as they are in the parochial courts. This is dealt with by DJ Shaw QC in his work *Admiralty Jurisdiction and Practice in South Africa* (Juta & Co 1987) at 115ff. Dealing with the previous rule 7 (now revised in rule 9), the learned author stated:

‘There are certain aspects of rule 7 of the Admiralty Proceedings Rules which should tend to make it easier for pleadings to carry out their function of defining the issues between the parties and to prevent what appears to have developed into a purely obstructive approach to pleadings by what has been referred to as the mere erection of legal barbed wire entanglements in the path of the opposite party.’

[23] In dealing with the original rule 7(3)(c) (now rule 9(3)(c), Shaw QC stated:

‘This provision will be of practical importance in many cases of claims arising out of contracts of carriage in which the original claim does not allege lack of seaworthiness, but it transpires from subsequent investigations, or from the allegations made by the defendant, that a claim based on a lack of seaworthiness ought to be advanced. There would appear to be no objection whatever to this procedure. The basis of the rules with regard to pleading in the Admiralty Proceedings Rules is that the pleadings continue until they are closed in terms of rule 10.’

Rule 10 (now rule 12) provides that:

‘Pleadings shall be closed when the time has expired for the delivery of any further pleading and no such pleading has been delivered, or when a pleading has been filed joining issue without the addition of any further pleading.’

[24] In deciding the issue of condonation, ‘sufficient cause’ is a requirement. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F, Holmes JA stated:

‘In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an *objective* conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases.’

[25] The nub of allowing a replication to be delivered out of time is to ensure that the court hearing the action is properly appraised of the issues between the parties. Any effort to stifle that object should not easily be entertained, particularly where there is no evidence of prejudice to the other party.

[26] With regard to the explanations of delay, they are inadequate. Legal practitioners are paid to ensure that they do their work efficiently and promptly.

A heavy work-load is no excuse for poor performance – if one is unable to do the work, one should not accept the task! Every legal practitioner knows that ongoing negotiations are not an excuse for delay. It would serve no purpose for me to cite authorities on the inadequacy of the excuses provided.

[27] Although the explanations for delay are inadequate, as pointed out by Holmes JA, that is not the end of the enquiry as to how I should exercise my discretion. I have referred above to the less stringent attitude adopted in admiralty with regard to pleadings. I do not, however, wish to be misunderstood as suggesting that the rules are not to be complied with, or that an entirely *laissez-faire* attitude should be acceptable. The ‘collegial’ attitude adopted by legal practitioners in admiralty is strictly limited to what they decide, but the rules remain, and those wishing to apply them strictly are perfectly entitled to attempt to do so. Indeed, the duty of all legal practitioners to their clients dictates that they do not take their eye off the ball when it comes to the delivery of pleadings!

[28] And so, to the question of the lack of *bona fides* in the approaches of Columbus and TNPA. Some time was spent in argument dealing with what Mr *Harpur* referred to as the contradictory attitude of the parties in urging me to act in one direction, and then changing tack when they believed that I had not done so. Part of this debate was the correct interpretation of my judgment. I considered then, as I do now, that it is not desirable, and perhaps not even proper, that I should become embroiled in the interpretation debate, and unwittingly become a witness in the cases. Indeed, Mr *Harpur* faintly submitted that I should perhaps recuse myself, and that the two applications be heard by another judge. I did not believe that such a course was appropriate. The point

was never raised previously in the heads of argument, and would have involved a great deal of unnecessarily wasted costs.

[29] It is not necessary for me to deal with the question of the correct interpretation of my judgment. What Columbus and TNPA wish to do is regularise and update the pleadings. That will have the benefit of ensuring that the court hearing the main trial will be fully apprised of the issues to be dealt with at that stage. If Columbus and TNPA wish to plead that K&N cannot deal at the trial with the lawfulness of the tariffs levied between 2004-2009, because the issue is *res judicata*, or that issue estoppel operates, or the ‘once and for all’ rule is applicable, they are entitled to do so. All that Columbus and TNPA wish to do is to regularise the pleadings.

[30] I do not accept that, in seeking to regularise the pleadings, either Columbus or TNPA have acted in any manner which may be viewed as lacking in *bona fides*. When faced with changing circumstances (such as the effect of my review judgment) they have the right to change direction in the legal arguments they advance. Whether they pressed me in argument to decide the review in one way or another does not matter. I have decided the review, and the interpretation of my judgment is for others to decide – as would be done on appeal, or if the judgment were cited as authority for some proposition.

[31] In all the circumstances, and applying the approach of Holmes JA as best I am able to do, I believe that it would be fair to all concerned for me to grant the applications in both cases, in terms of the order below. This is despite my criticisms of the explanations for delay. The inordinate delays are balanced by

the lack of any prejudice to K&N, and the interests of informing the trial court of all issues to be decided. This matter should be disposed of as expeditiously as possible, because it has already been allowed to drag on for far too long.

[32] During the hearing Ms *Annandale* drew my attention to the fact that Columbus also sought to deliver a replication in Case No A33/2014. This application was on precisely the same basis that the other applications were made, and is referred to in paragraph 25 of the founding affidavit of Columbus in Case No A32/2014. The problem was that the parties had been granted leave to have only two applications heard before me. In addition, Mr *Harpur* submitted, as he was entitled to do, that he had not had an opportunity properly to consider the third application. I accordingly do not rule on it, but I express the hope that common sense will prevail in due course, guided by my thoughts as set out above.

[33] With regard to costs, Mr *Harpur* submitted that they should be reserved for the decision of the trial court. Alternatively, should I find against K&N, they should not be mulcted in costs because their opposition to the applications was reasonable. In my view, K&N's opposition on the basis of a lack of *bona fides* was unreasonable, because it was dilatory. It would have been sensible and reasonable for K&N to have allowed the application by TNPA for leave to amend its pleadings. There is no prejudice to K&N if both the condonation and amendment are granted.

[34] However, the opposition by K&N on the basis of the lack of a suitable explanation for the dilatory conduct of the applicants in both applications, may,

in other circumstances, have carried the day. In all the circumstances it would be just and equitable were I to order that each party should pay their own costs of these unnecessary proceedings.

[34] I make the following orders:

In case no: A32/2014:

- (a) condonation is hereby granted for the late filing of the replication delivered by the applicant (Columbus Stainless (Pty) Ltd) on the 21st October 2019; and
- (b) each party is to pay its own costs of the application.

In case no A33/2014:

- (a) the applicant, Transnet (SOC) t/a National Ports Authority of South Africa is granted leave to amend its replication dated the 16th May 2015 in accordance with its notice of intention to amend dated the 15th April 2020; and
- (b) each party is to pay its own costs of the application.

Lopes J

Date of hearing: 2nd December 2021.

Date of judgment: 17th January 2021.

For Columbus Stainless

(Pty) Ltd: Ms A Annandale SC, with Mr M du Plessis SC
(instructed by Cox Yeats).

For Kuehne & Nagel

(Pty) Ltd: Mr GD Harpur SC, with Ms CV du Toit
(instructed by Prinsloo Inc).

For Transnet (SOC) Ltd t/a

National Ports Authority of

South Africa: Mr N Singh SC, with Ms MA Ngqanda
(instructed by Livingston Leandy Inc).