CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 114/21

In the matter between:

TRANSNET SOC LIMITED Applicant

and

TOTAL SOUTH AFRICA (PTY) LIMITED First Respondent

SASOL OIL (PTY) LIMITED Second Respondent

Neutral citation: *Transnet SOC Limited v Total South Africa (Pty) Limited and Another* [2022] ZACC 21

Coram: Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgment: Madlanga J (unanimous)

Heard on: 16 November 2021

Decided on: 21 June 2022

ORDER

On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg:

1. Leave to appeal is granted only in respect of the questions whether the variation agreement was terminable and, if it was, whether it was terminated validly.
2. The appeal is allowed and, as a consequence, it is declared that the variation agreement was terminable, was terminated validly and came to an end on 13 September 2020.
3. The order of the High Court of South Africa, Gauteng Local Division, Johannesburg, is set aside insofar as it relates to the questions referred to in paragraph 1 and to costs.
4. Each party must pay its own costs in this Court and in the High Court.

JUDGMENT

MADLANGA J (Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] An agreement concluded in 1967 for the transportation of crude oil from Durban, KwaZulu-Natal, to an inland refinery sited in Sasolburg, Free State, did not expressly provide for termination. This agreement entailed what was known as the neutrality principle. So called because – in order to attract the participation, in an inland refinery, of an established foreign oil company, Total South Africa (Pty) Ltd (Total) which is the first respondent – the South African government had to make a contractual undertaking that the inland refinery would not be disadvantaged by the cost of transporting crude oil from Durban to the inland refinery. Put differently, the cost had to be structured such that it was as if the inland refinery was sited at the coast.

[2] A variation of the 1967 agreement (variation agreement) was concluded some 24 years later, in 1991, to be exact. Albeit with a change in the formula, the variation

agreement maintained the neutrality principle on the cost of transporting crude oil from Durban to the inland refinery. The variation agreement also made provision – in vague terms – for any party to give at least three years' notice of its intention to "disregard the contents of [the variation agreement] subject to the arrangement that a full agreement of conveyance for crude oil is being prepared and that such agreement will embody the contents of this [agreement] and supersede this [agreement]". In September 2017 the applicant, Transnet SOC Ltd (Transnet), which had since stepped into the shoes of the government, one of the original parties to the 1967 agreement, gave a three-year notice terminating the variation agreement. In the main, what is now at issue before us is whether the variation agreement which, when looked at cumulatively with the 1967 agreement had been in existence for some 50 years, is terminable and – if it is – whether it has been lawfully terminated. Another issue is whether – absent cancellation of the contract – claims for contractual damages where a refund is sought in respect of amounts that were allegedly overcharged disclose a cause of action.

[3] The matter comes to this Court as an application for leave to appeal against a judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg.[1]

Background

[4] Largely, the facts are not contentious. At the end of World War II there was an increased demand for petroleum products. Total and other refineries obtained these products from refineries located at the coast, mostly Durban, although some supply also came from Cape Town. The coastal refineries did not have the capacity to meet the demand, the greatest of which was inland. The situation was made worse by the fact that – because of apartheid – South Africa was facing isolation. Its neighbour, the then Rhodesia (now Zimbabwe), was subject to an international oil embargo and depended on South Africa for its supply of petroleum products. Fearful of running out of its own supplies, the apartheid government decided to establish an inland refinery in Sasolburg.

[1] *Total South Africa (Pty) Ltd v Transnet SOC Ltd*, unreported judgment of the Gauteng High Court, Johannesburg, Case No 2013/38820 (9 October 2020) (High Court judgment).

It approached Total, a French controlled oil company, France being a country which – according to Transnet – had "a markedly pragmatic relationship with apartheid South Africa", to participate in this project. Total was reluctant to accept the proposal because its plan was to invest with Mobil, another oil company, in a coastal refinery.

[5] In the end, as a pre-condition for its participation in the government's proposal, Total required an undertaking that it would not be placed at a disadvantage compared to a coastal refinery. The 1967 agreement, whose main feature was the neutrality principle, was then concluded. The agreement recorded its purpose as being to ensure that "an inland refinery will not at any time be placed at a disadvantage as regards transportation costs in relation to a refinery sited at the coast". It was constituted by two letters. The first – dated 2 July 1967 – was from the Department of Trade and Industry to Total. The second letter – dated 3 July 1967 – was a response from Total accepting the terms of the first letter. A specific tariff was fixed in the first letter. Crude oil was to be transported at 40 cents per 100 lbs. The government and Total were satisfied that this tariff guaranteed neutrality.[2] The tariff was subject to revision at stipulated intervals.

[6] The entity that was to be contractually bound on behalf of the government was the "Administration". The Administration was created in terms of the Railways and Harbours Control and Management (Consolidation) Act[3] (Railways Act). The Administration was going to be responsible for the transportation by means of a pipeline of crude oil from Durban to the Sasolburg inland refinery.

[7] On 8 December 1967 the National Petroleum Refiners of South Africa (Pty) Ltd, commonly known as Natref, was incorporated to own the inland refinery at Sasolburg. Its shares were, and continue to be, held by Total (36.36%) and Sasol Oil (Pty) Ltd (Sasol), the second respondent (63.64%). At that time Sasol, which is now privately

[2] In this regard, the first letter said the tariff "appears to be suitable in placing the [inland] refinery in a balanced transport position vis-à-vis the coastal refineries on the situation as assessed".

[3] 70 of 1957.

owned, was a wholly-owned government company. Natref was to refine crude oil exclusively for its shareholders in proportion to their shareholding.

[8] The repeal of the Railways Act by the South African Transport Services Act[4] brought about the creation of a commercial government enterprise called the South African Transport Services (SATS). SATS replaced the Administration and continued to honour the neutrality principle. In terms of the Legal Succession to the South African Transport Services Act,[5] Transnet, a wholly-owned government company, succeeded SATS. Initially Transnet refused to recognise the neutrality principle. During the late 1980s it announced a 15% increase in the conveyance of crude oil that was to take effect on 1 January 1991. This had the effect of breaching the neutrality principle as there was no increase to tariffs for the conveyance of petrol, diesel and avtur (aviation fuel). Total and Sasol would have none of it. Sasol threatened to build its own pipeline for the transportation of crude oil from Durban to the Natref refinery in Sasolburg. It also indicated its preparedness to purchase Transnet's pipeline. The fruition of any of these options would have meant substantial loss of revenue by Transnet. This led to a forced change of heart. Negotiations between Petronet, a division of Transnet, on the one hand, and Total and Sasol, on the other, resulted in the conclusion of the variation agreement on 2 December 1991. This agreement constituted a variation of the 1967 agreement.

[9] Like the 1967 agreement, the variation agreement comprised two letters, the first from Transnet proposing terms and the second from Total and Sasol accepting the terms. It maintained the neutrality principle, but on different terms. The percentage increase of the tariff for the transportation of crude oil was pegged to increases in the transportation by Transnet of *refined* petroleum products. In this regard, clause 1 provides that "the percentage increase in the crude oil tariff will not exceed the weighted average percentage increase of any adjustments of petrol, diesel and [a]vtur tariffs".

[4] 65 of 1981.

[5] 9 of 1989.

[10] Total and Sasol explain that the crude oil transported from Durban to the Natref refinery contains matter which – in the refining process – gets removed and is of no use to them. That matter is not an insignificant addition to the volumes of crude oil transported to the Natref refinery. Simply put, the volumes of refined products that Total and Sasol produce and sell are less than the volumes of crude oil transported from the coast to Natref. If there were to be a 100% charge on the transportation of these volumes (i.e. including the unusable matter), Total and Sasol would be disadvantaged. It is for this reason that the transportation of crude oil to Natref was pegged to the weighted average of refined products, namely petrol, diesel and avtur. In essence, the unusable matter is taken out of the equation in costing transportation.

[11] The variation agreement was largely complied with for some years. In 2005 Transnet took the view that the legal landscape had changed to such an extent that the variation agreement had been rendered inoperable. According to it, this was the result of the coming into force of two Acts, the National Energy Regulator Act[6] and the Petroleum Pipelines Act.[7] The National Energy Regulator Act establishes a regulator, the National Energy Regulator (Nersa) which, amongst others, has the mandate to undertake the powers of the Petroleum Pipelines Regulatory Authority set out in the Petroleum Pipelines Act. One of these functions is to set or approve tariffs and charges in respect of conveyance on pipelines.[8] The thrust of Transnet's contention was that, since the power to set and approve tariffs now vested in Nersa, it had become legally impermissible for it to comply with the variation agreement. Put differently, it no longer lay with Transnet to set tariffs.

[12] The first tariff in which Transnet departed from the neutrality principle was the tariff effective from 6 August 2008. This tariff predated the setting of tariffs by Nersa. In Transnet's 2008 determination, the crude oil tariff was increased by 10.25% whereas

[6] 40 of 2004.

[7] 60 of 2003.

[8] Section 4(f) of the Petroleum Pipelines Act.

the tariff for petrol, diesel and avtur was increased by less than 1%. The first tariff determination by Nersa was effective from April 2010. The 2010 tariff essentially observed the neutrality principle. Things changed in Nersa's 2011 tariff determination; the crude oil tariff was increased by about 107% whereas the tariff for petrol, diesel and avtur was increased by about 80%. Although subsequent tariff determinations have essentially observed the neutrality principle, the differential increases in 2008 and 2011 have obviously had, and still have, annual knock-on effects.

[13] Aggrieved by Transnet's resolve to subject it to the differential tariffs of 2008 and 2011, on 16 October 2013 Total brought suit in the High Court. Under one claim, it sought a declarator that the variation agreement is valid and binding and an order directing Transnet to comply with the variation agreement by ensuring that increases in tariffs do not exceed the stipulation in the agreement. Under another claim Total sought a refund as contractual damages in the sum of R838 million by which it alleged it was overcharged as a result of an alleged breach of the variation agreement. Transnet defended the action. As part of its defence it contended that – in the face of Nersa's statutory mandate to determine tariffs for the transportation of crude oil on petroleum pipelines – the variation agreement could no longer be valid and binding. This issue was separated in terms of rule 33(4) of the Uniform Rules of Court for determination before the other issues.

[14] On 4 June 2015 Coppin J decided the separated issue in Total's favour and held that the variation agreement continued to be valid and binding. With leave of the High Court, Transnet appealed to the Supreme Court of Appeal. On 14 September 2016 the Supreme Court of Appeal held that the variation agreement obliged Transnet to allow discounts, within the maximum tariffs set by Nersa, so as to give effect to the neutrality principle. It too held that the variation agreement was binding and the appeal failed. On 9 November 2016 the Constitutional Court dismissed an application for leave to appeal.

[15] On 27 July 2017 Sasol entered the fray, seeking relief against Transnet on substantially similar bases as Total. The refund claimed by Total and Sasol totalled just under R2 billion. According to Transnet, this accounts for almost half of its profit after tax.

[16] Plainly as a result of its failure on the separated issue, on 14 September 2017 Transnet wrote letters to Total and Sasol to the effect that it was giving a three-year notice of termination of the variation agreement. Total and Sasol amended their particulars of claim by seeking orders directing Transnet to perform in terms of the variation agreement. This, on the basis that the notice of termination amounted to a repudiation, which they did not accept.

[17] In addition to defences that traversed factual issues with regard to what was claimed, Transnet took defences that raised legal questions, including questions of interpretation of the variation agreement. First, it raised a special defence that the claims for a refund did not disclose a cause of action (cause of action defence). This defence was to the effect that – absent cancellation of the agreement – recognised remedies in law do not afford a right to recover allegedly overpaid amounts as damages. Instead of cancellation, continued the special defence, enforcement of the agreement was sought. Second, according to Transnet, to achieve neutrality, Total and Sasol were not entitled to derive a profit from the transportation costs they were being charged. This is a question of interpretation. Transnet alleged that Total and Sasol were, in fact, deriving a profit from transportation costs. Third, and as was to be expected, Transnet pleaded that its notice of termination complied with clause 5 of the variation agreement and was, therefore, valid. At this point let me quote clause 5 of the variation agreement. It says:

> "Each party shall give the other at least three years notice of any intention to disregard the contents of this [l]etter of [a]greement subject to the arrangement that a full agreement of conveyance for crude oil is being prepared and that such agreement will embody the contents of this letter and supersede this letter."

[18] The two actions by Total and Sasol were consolidated. Yet again, there was a separation of issues in terms of rule 33(4). The issues that were to be determined first were the three defences set out in the preceding paragraph that raised legal questions. The High Court held against Transnet on all the issues.[9] It refused leave to appeal, and so did the Supreme Court of Appeal.

The approach to this Court

[19] Transnet now seeks leave to appeal from this Court. The application concerns only two of the three issues that were determined by the High Court. The first is whether the variation agreement is terminable and, if it is, whether it has been lawfully terminated. What is key to the determination of this issue is an interpretation of the variation agreement. The second is whether Total and Sasol's claims for a refund do disclose a cause of action.

[20] On the first issue, Transnet argues that the High Court's holding on whether the variation agreement is terminable has the effect of locking Transnet into an evergreen contract; evergreen in the sense of existing in perpetuity. It bases this contention on the High Court's view that "[a]bsent the 'full agreement' of conveyance of crude oil, any attempt to cancel the [variation] agreement is ineffectual and of no consequence".[10] It develops the argument by saying for as long as the parties do not reach agreement on the terms of the full agreement, it may not cancel the variation agreement. According to Transnet, this "perpetuity" is contrary to public policy which is informed by sections 195(1) and 217 of the Constitution.[11] Transnet contends that what it calls the

[9] High Court judgment above n 1 at para 55.

[10] Id at para 66. The judgment goes on to say:

> "That Transnet's purported three years' notice given to both Total and Sasol was unaccompanied by such 'full agreement' is undisputed. That being the case, the purported termination was invalid. It is ineffectual and of no moment."

[11] Section 195(1) of the Constitution provides:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.

perpetuity of the variation agreement is at odds with the basic values and principles governing public administration set out in section 195 of the Constitution. On this, Transnet lays particular emphasis on the section 195 principles of accountability, transparency and fairness.

[21] It also submits that the variation agreement, which – according to the High Court's interpretation – is effectively not terminable, contravenes the provisions of section 217 of the Constitution. This section decrees that "[w]hen an organ of state . . . contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective". Transnet submits that Total and Sasol derive a favourable transportation benefit provided by means of a finite public resource, a benefit not enjoyed by other oil companies like "BP, Shell and Caltex", and that this is at variance with the provisions of section 217 of the

---

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

And section 217 provides:

"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

Constitution. The outcome of the High Court's interpretation of the variation agreement is, first, unfair because Total and Sasol's competitors are not treated equally. Second, the whole arrangement is inequitable because the preferred, privileged and protected position of Total and Sasol frustrates any possibility of the empowerment of new entrants. Third, the agreement – "which perpetuates an apartheid pact with a foreign entity" – lacks transparency. Fourth, it is not competitive because it does not allow the participation of other oil producers at the same or better rates. Fifth, it is not cost-effective because it results in the subsidisation of "profiteering Total and monopolist Sasol". The contention continues that on the High Court's interpretation, this must carry on in perpetuity, and that is not tenable.

[22] Transnet concludes that the High Court's interpretation gives rise to an agreement that is unenforceable for being contrary to public policy. It submits that there is a constitutionally compliant construction. It accepts that – insofar as it is founded on sections 195 and 217 – the public policy argument was "not fully expounded" in the High Court. It makes the point that – because it did plead that the evergreen nature of the variation agreement is contrary to public policy – it impliedly pleaded constitutional values, as public policy is now informed by such values. It matters not, therefore, that specific reference was not made to the two sections, so contends Transnet.

[23] On the actual interpretation of clause 5 of the variation agreement, Transnet submits that the words – in clause 5 – "subject to the arrangement that a full agreement of conveyance for crude oil is being prepared" do not make the right to give notice subject to the conclusion of a full agreement. The effect of such an interpretation, which is the interpretation the High Court adopted, is that the parties have the right to terminate the agreement but, as they do so, they must simultaneously conclude a full agreement on the same terms as the one they are terminating. That, according to Transnet, cannot possibly be what clause 5 contemplates. Such an interpretation is not only contradictory, but it leads to an absurdity. In context, what the quoted words mean instead is that clause 5 contemplated that the full agreement was *in the process of being prepared* at the time of conclusion of the variation agreement.

[24] On the cause of action defence, Transnet argues before this Court a point it did not argue before. That point is not even pleaded as part of this defence. It makes the proposition that an overcharge cannot be recovered by means of a damages claim at all. A fitting cause of action, so says Transnet, should rather have been one of unjustified enrichment; the *condictio indebiti*, to be exact. Incidentally, Sasol has pleaded the *condictio indebiti* as an alternative to the contractual claim. For its proposition, Transnet relies on *Affirmative Portfolios*,[12] a case in which it seems – but for failure to show that an overpayment was excusable – the Supreme of Court of Appeal would have upheld a claim for a refund founded on the *condictio indebiti*. Transnet submits that *Affirmative Portfolios* instances the employment of the *condictio indebiti* in seeking refunds for overpayments. Therefore, this is the route Total and Sasol ought to have followed. It then makes the point that the public in general will benefit from a final word from this Court as to the correctness of its proposition.

[25] Transnet persists in its other contention, which is that Total and Sasol could sue for a refund only if they had first cancelled the agreement. Otherwise, as they presently stand, the claims for a refund do not disclose a cause of action. Transnet argues that *Victoria Falls*[13] and *Mainline Carriers*,[14] on which the High Court relied in dismissing the cause of action defence, are distinguishable.

[26] Lastly, Transnet argues that – based on the arguments set out above – the question whether the notice of termination was issued validly engages both our constitutional and general jurisdiction. On the other hand, it submits that the point about lack of a cause of action engages our general jurisdiction.

[27] Total argues that this matter does not engage this Court's jurisdiction. In support, it makes the following arguments. There is no constitutional issue, since sections 195

[12] *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* [2008] ZASCA 127; 2009 (1) SA 196 (SCA).

[13] *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1.

[14] *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C).

and 217 of the Constitution have been raised for the first time before this Court. In any event, these sections do not assist Transnet. Section 195 informs the interpretation of substantive provisions of the Constitution. It does not create independent rights or obligations, and Transnet has not shown how the cancellation clause violates section 195. Section 217 does not apply because what it prescribes is applicable where an organ of state *procures* goods or services. Here Transnet is *providing* the service.

[28] On the merits, Total argues that in the appeal against Coppin J's judgment[15] the Supreme Court of Appeal put paid to Transnet's arguments about the impermissibility of the tariff charged in accordance with the neutrality principle. Also, there is no evidence on the question whether the High Court's interpretation of the cancellation clause hinders Transnet from promoting efficient, economic and effective use of its resources, as contemplated by section 195. Nor is there evidence of the extent of such hindrance, if there be any hindrance. And a violation of section 217 of the Constitution would, at best, permit a review and setting aside of the variation agreement, which Transnet has never sought.

[29] Total accepts that the cause of action defence and the point on termination are points of law. However, it takes the view that both lack reasonable prospects of success and are, therefore, not arguable. Also, there is nothing about them that makes them of general public importance. The matter concerns the application of uncontroversial legal tests, and does not transcend the narrow interests of the parties involved. Additionally, Total argues that it is not in the interests of justice to grant leave to appeal. This matter has been ongoing for eight years, offending the principle of finality in litigation and tying the respondents in unending litigation.

[30] Total argues that this Court should dismiss Transnet's cause of action defence, since there is no requirement in our law that a party suing for damages for breach of

[15] *Total South Africa (Pty) Ltd v Transnet SOC Ltd*, unreported judgment of the Gauteng High Court, Johannesburg, Case No 38820/2013 (4 June 2015).

contract must first cancel the contract.[16] Total asks this Court to reject Transnet's contention that its claim for a refund ought to have been brought under the *condictio indebiti*. There is no authority for the proposition that a claimant suing for the return of overpayment must sue in enrichment. In fact, a claim under an enrichment action is a claim of last resort, where there are no other remedies available to a claimant under the law of obligations.

[31] Total contends that Transnet's argument that the variation agreement permits cancellation on three years' notice must be rejected. Transnet's argument, in essence, asks this Court to ignore the agreement's requirement that the right of cancellation is "subject to the arrangement that a full agreement of conveyance for crude oil is being prepared and that such agreement will embody the contents of this letter and supersede this letter". Ignoring that phrase contravenes the presumption against superfluity when interpreting contracts, continues the argument. Total submits that a proper interpretation of the variation agreement's cancellation clause, considering the text, context and purpose, should lead this Court to the conclusion that Transnet repudiated the variation agreement by attempting to terminate it without any agreement for the conveyance of crude oil being prepared.

[32] Additionally, Total argues that Transnet mischaracterises the condition in the variation agreement when it argues that the High Court's interpretation of the cancellation clause is absurd as it makes terminating a contract subject to another agreement being concluded on identical terms to the one being terminated. What must be borne in mind, Total submits, is that the parties agreed to the neutrality principle being maintained throughout. As such, so long as it continues to embody the neutrality principle, an agreement that would supersede the variation agreement could conceivably change the manner in which the neutrality principle is maintained.

[16] See for example *Victoria Falls* above n 13 at 22; *Trotman v Edwick* 1951 (1) SA 443 (AD) at 449B-C; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687B-C; and *Mainline Carriers* above n 14 at paras 14, 16, 18, 20-4, 35-8 and 55-60.

[33] Sasol's arguments on jurisdiction are substantially similar to Total's.

[34] On the termination defence, Sasol, like Total, argues that an interpretation that requires that conveyance in accordance with the neutrality principle must always be in place is informed by the text, context and purpose of the variation agreement. Sasol illustrates this with the following. Transnet operates the only pipeline connecting Natref to Durban. When concluding the variation agreement, the parties understood that the continuation of pipeline services to Natref would always be essential to the operation of Natref for as long as no alternative existed. The parties, therefore, understood that this was no ordinary commercial agreement, which could be cancelled with the parties going their separate ways. Sasol submits that a key purpose of the variation agreement that Transnet ignores is that it regulates a relationship in terms of which the Natref shareholders are dependent on Transnet's pipeline and which is characterised by long-term reciprocal obligations that the parties undertook to one another. Transnet also has no right to cancel on reasonable notice since the agreement expressly provides a period of notice. And Sasol submits that public policy considerations do not bypass the accepted approach to contractual interpretation. There is, in any event, nothing about the cancellation clause that is contrary to public policy.

[35] On the cause of action defence, Sasol contends that the well-established position in our law is that an enrichment claim is not sustainable where there is a contractual basis for the claim. And the respondents' claims have a clear contractual origin. The variation agreement imposes an obligation on Transnet, when it increases the crude oil tariff, not to exceed a prescribed ratio. Transnet breached this obligation by publishing a higher tariff and Sasol (under protest) paid this amount. Sasol's main claim then, is not that it made payments because of an error or a mistaken belief that the payments were owing. Instead, it made payments in accordance with Transnet's official published tariffs, and its damages therefore arise because Transnet set those official tariffs in breach of its obligations under the variation agreement. Sasol submits that it plainly has a valid contractual claim. That claim arises from Transnet's positive malperformance of its tariff setting obligations under the variation agreement, an

agreement which, according to the Supreme Court of Appeal, remains valid and binding.

Jurisdiction and leave to appeal

[36] Does this Court have jurisdiction? That question must be answered in relation to each of the two issues before us. I start with the cause of action defence. As stated a few times before, Transnet pleaded that a contract must be cancelled in order for a party to claim a refund for a breach of that contract. It persists in that argument. Transnet did not suggest that this issue engages our constitutional jurisdiction. I need say no more about that. Transnet invoked our general jurisdiction. In terms of section 167(3)(b)(ii) of the Constitution the general jurisdiction of the Constitutional Court is engaged if a "matter raises an arguable point of law of general public importance which ought to be considered by that Court". In *Paulsen* this Court held that "[t]he notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of plausibility."[17]

[37] Total and Sasol allege that Transnet charged them a rate that was more than the weighted average of increase on the conveyance of petrol, diesel and avtur. This was in breach of the variation agreement, they aver. I will return to the question whether the overcharge constituted a breach. Total and Sasol seek repayment of the amounts overcharged as contractual damages. They seek to be placed in the position they would have been in but for the breach.[18] On first principles, there is nothing the matter with their claims. Well over a century ago Innes CJ said as much in *Victoria Falls*.[19] The context in which this was said may be different, but I do not see why the principle must not find application. All that Total and Sasol are asking for now is to "be placed in the

[17] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 21.

[18] I deal with the question whether this is a breach shortly. It is not necessary to do so under the question whether cancellation of the contract is a prerequisite for seeking a refund.

[19] *Victoria Falls and Transvaal Power* above n 13 at para 22.

position [they] would have occupied had the contract been performed, so far as [could] be done by the payment of money, and without undue hardship to [Transnet]".[20]

[38] There is no reason whatsoever for the contract first to be cancelled for Total and Sasol to be able to claim damages. Authority for the general principle that a party can claim specific performance together with damages for defective or late performance is to be found in cases like *Silverton Estates*,[21] *Sunjeevi*,[22] *Allers*[23] and *Dominion Earthworks (Pty) Ltd*.[24] It is worth noting that the judgment in *Silverton Estates* was penned by Innes CJ. So, his later judgment in *Victoria Falls* is unlikely to have been intended to conflict with this general principle.[25] I might add that opting to stand by the contract and claiming specific performance together with damages are not inconsistent remedies which – in accordance with the principle set out in *Gouws* – are impermissible. Beyers JA held in *Gouws*:

> "I am not aware of any general proposition that a plaintiff who has two or more remedies at [her or] his disposal must elect at a given point of time which of them [she or] he intends to pursue, and that, having elected one, [she or] he is taken to have abandoned all others. Such a situation might well arise where the choice lies between two inconsistent remedies and the plaintiff commits [her- or] himself unequivocally to the one or other of them."[26]

[20] Id. See also *MTN Service Provider (Pty) Ltd v Belet Industries CC t/a Belet Cellular* [2021] ZASCA 7; 2021 JOL 49370 (SCA) at para 46.

[21] *Silverton Estates Co v Bellevue Syndicate* 1904 TS 462 at 470.

[22] *Sunjeevi v Wood* 1909 NLR 76 at 78.

[23] *Allers v Rautenbach* 1949 (4) SA 226 (O) at 232.

[24] *Dominion Earthworks (Pty) Ltd v M J Greef Electrical Contractors (Pty) Ltd* 1970 (1) SA 228 (A) at 234E-235C.

[25] See also De Wet and Van Wyk *Kontraktereg en Handelsreg* 5 ed (LexisNexis, Durban 1992) vol 1 at 167-8; Kerr *The Principles of the Law of Contract* 6 ed (LexisNexis, Durban 2004) at 697; and Christie *The Law of Contract in South Africa* 7 ed (LexisNexis, Durban 2011) at 626-7.

[26] *Montesse Township and Investment Corporation (Pty) Ltd v Gouws N.O.* 1965 (4) SA 373 (A) at 380H.

[39] Also worth noting is the fact that cancellation cannot be had merely out of a wish to have it. A party may cancel on the basis of a breach, if the breach is material or, as Kerr says, major. Kerr says:

> "Parties to a contract are bound together in a legal relationship. Termination of the legal relationship is clearly an important step. Because it is so important it may not be taken if the breach is a minor one only. . . . [E]very major breach entitles the aggrieved party to terminate the relationship by cancelling the contract."[27]

Quoting *Swartz and Son (Pty) Ltd* he continues:[28]

> "A breach is a major one if it 'goes to the root of the contract', or affects a 'vital part' of the obligations or means that there is no 'substantial performance'. It amounts to saying that the breach must be so serious that it cannot reasonably be expected of the other party that [she or] he should continue with the contract and content [herself or] himself with an eventual claim for damages."[29]

Where, on this basis, the aggrieved party is not entitled to cancel the contract, the law not only permits but confines the aggrieved party to a claim for damages to compensate it for the delinquent party's malperformance.

[40] Thus, it is mistaken of Transnet to suggest that cancellation of the variation agreement would have been available at will to Total and Sasol in order for them to then claim the refund.

[41] In sum, the point is not arguable.

---

[27] Kerr above n 25 at 602. Also see Christie above n 25 at 608 where the following appears:

> "[I]t has been universally accepted that a sufficiently serious breach of a sufficiently important term will justify cancellation without the necessity of proving an intention to repudiate . . . ."

[28] Kerr id at 602-3.

[29] *Swartz and Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 (T) at 4F-G.

[42] What of Transnet's new argument raised for the first time before us that amounts overcharged cannot be recovered by a claim for damages at all? May we entertain it?

[43] The only authority that Transnet relied on in support of this argument is *Affirmative Portfolios*. Its argument amounted to no more than that in that case the *condictio indebiti* was employed. As Total argued, it does not follow that no other cause of action is competent. There may be more than one possible cause of action in respect of the same set of facts. That much is trite. Thus, there is a missing link in Transnet's reasoning. In oral argument, Sasol was engaged in a debate that raised the following issues, perhaps not in as much detail as I set them out here; but the substance is the same. An argument may be made that in order to claim contractual damages, an aggrieved party must establish that the other has been guilty of a breach of the contract. It may then be argued that the fact that a contract provides that the price for an ongoing supply of goods or services will be X amount does not mean that the creditor commits a breach of contract if it sends invoices to the debtor for an amount in excess of X amount. Conceivably an insistence by a creditor in charging more than the agreed price, coupled with a refusal to supply except at the higher price, could be a repudiation justifying cancellation of the contract.[30] But unless the repudiation is accepted (leading to cancellation of the contract), repudiation is, as has been said in the cases, a "thing writ in water".[31] The other party can ignore it and insist on compliance with the contract.

[44] In countering this, Sasol put up a plausible argument, and I put it no higher. It submitted that this is not merely about an overcharge. It is not just a case of wrong invoicing. The overcharge arises from an antecedent breach; the determination of a new tariff. The "wrong" invoicing is pursuant to that determination. That determination is a breach, as it is at variance with the agreement on how tariffs would be increased.

[30] See *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-E.

[31] See *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 (CA) at 421. See also *Culverwell v Brown* 1990 (1) SA 7 (A) at 28D-E; *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ) at para 52; and *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2014] ZASCA 22; [2016] JOL 35526 (SCA) at para 1.

Setting tariffs in a particular manner was a contractual obligation that rested on Transnet. I cannot make light of this argument. Transnet's performance was not only about the conveyance of crude oil from Durban to Natref. It was also about periodically increasing tariffs in the manner stipulated in the variation agreement. It may well be mistaken, therefore, to view this as a case of a mere overcharge.

[45] Indeed, as one observes from the pleadings, the basis for the claims for a refund is this. First, for 2008 Transnet breached the variation agreement by increasing the tariff for the conveyance of crude oil by 10.25%, whilst the increase in respect of petrol, diesel and avtur was less than 1%. Second, for 2011 the respective increases were about 107% and 80%. According to Total and Sasol, that breach continues because even on those occasions when increases were based on the stipulated weighted average, the 2008 and 2011 breaches increased the base levels on which the succeeding years' "neutral" increases were calculated. It seems to me, therefore, that authorities, if any, on the mere invoicing of a wrong price may well not be on point.

[46] An argument may be made that any loss which Total and Sasol suffered by paying the increased amounts was caused not by the fact that the increased amounts were wrongly charged, but by their decision to pay the increased amounts. A possible counter is that they did not have much choice. As they say, they paid the extra amounts under protest. That is understandable. It does not seem that they had the luxury of an option to litigate and seek specific performance in accordance with the variation agreement. Had they not paid, they faced the prospect of Transnet halting the conveyance of crude oil with disastrous consequences for refining operations at Natref. It is so that there are judgments that have held that the making of payment under protest can be a precursor to a *condictio indebiti*.[32] But if – as Sasol argued – there was, in fact, a breach, would this inexorably wipe out any possibility of a claim for contractual damages?

[32] *Commissioner for Inland Revenue v First National Industrial Bank* 1990 (3) SA 641 (A) at 656C and *Kernsig v Absa* [2015] ZAWCHC 122 at paras 51-2.

[47] I raise all these arguments tentatively and not to decide them one way or the other. I do so to demonstrate that there are, at this stage, imponderables on an issue that was raised for the first time in this Court. We did not get much on it by way of authorities from the parties. And had the matter been raised before the High Court, we would have benefitted from a judgment of that Court. We should be wary not readily to entertain issues that are raised for the first time before this Court. And this is especially so in the case of matters which, as this one does, concern the common law. Cameron J had this to say in *Tiekiedraai*:

> "A considerable road hump in Tiekiedraai's way is that this Court is wary of deciding issues as a court of first and last instance. This is especially so in questions of common law doctrine, where this Court often solicits the views and expertise of the Supreme Court of Appeal. . . . Related is the respect this Court pays to the views of the High Court and of the Supreme Court of Appeal. Our precedents say that this Court functions better when it is assisted by a well-reasoned judgment (or judgments) on the point in issue."[33]

[48] For these reasons, I conclude that – although the issue is arguable – it is not one "which ought to be considered by [this] Court".[34] It is simply not in the interests of justice for us to consider the issue. In *Paulsen* we held that the words "which ought to be considered by that Court" are about the interests of justice factor.[35] We said, "If – for whatever reason – it is not in the interests of justice for this Court to entertain what is otherwise an arguable point of law of general public importance, then that point is not one that 'ought to be considered by [this] Court'."[36]

[49] So, I leave the question open.

---

[33] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) (CC); 2019 (7) BCLR 850 (CC) at paras 19-20.

[34] Section 167(3)(b)(ii) of the Constitution.

[35] *Paulsen* above n 17 at para 30.

[36] Id.

[50] I next consider whether the question of the validity of the notice of termination does engage our jurisdiction. To recapitulate, Total and Sasol argue that clause 5 of the variation agreement, which allows parties to "disregard" (for which, plainly, we must read "terminate") the agreement, is subject to a condition that the parties are preparing a "full agreement" embodying the contents of the variation agreement; there cannot be cancellation without preparation of a full agreement. Transnet, on the other hand, argues that the clause requires that a three-year notice of termination be given, but that the variation agreement and, therefore, this termination clause were meant to be superseded by a "full agreement" concluded by the parties. In terms of the variation agreement this full agreement had to embody the contents of the variation agreement. Of course, the full agreement was never concluded. Thus, argues Transnet, as the provision to terminate on three-years' notice is extant, it is entitled to terminate on such notice and has validly terminated the agreement.

[51] Without doubt, the interpretation of the termination clause is a point of law and, as I will show later, Transnet's argument on it is plausible. Put differently, the argument has reasonable prospects of success. That makes it arguable.[37] The next question is whether the point is of general public importance.

[52] This Court in *Paulsen* held that for a point to be of general public importance it need not implicate the interests of society as a whole but "it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public".[38] Does the question at hand meet that test? I think the answer lies in the consideration of a number of factors. These are they. Transnet is a public entity administering an economically strategic and crucial piece of public infrastructure. As Transnet avers, the infrastructure is finite. If the correct interpretation of clause 5 is that the variation agreement cannot be terminated, that means this infrastructure will be locked into this perpetual contract on terms which, according to Transnet, are

[37] *Paulsen* above n 17 at paras 25-6.

[38] Id at para 26.

unfavourable. And this is in circumstances where one of the objects of the Petroleum Pipelines Act is the promotion of equitable access to pipelines.[39] I must not be understood to be pronouncing on whether the terms are, indeed, unfavourable to Transnet. It is well established that jurisdiction is determined not on the substantive merits but on the pleadings.[40] Crucially and as shown presently, on Total's interpretation of clause 5, the variation agreement is evergreen. Total argued that for as long as the circumstances that informed the inclusion of the neutrality principle in the 1967 and variation agreements exist, the present agreement cannot be cancelled. The main circumstance worth mentioning is the fact that Natref is sited inland and it sources its crude oil from the coast (Durban, to be exact), whereas its competitors are located at the coast. It was that locational difference that informed the introduction of the neutrality principle. That will never change. Therefore, on Total's interpretation of clause 5, the variation agreement is, indeed, evergreen. And that this is Total's position was put beyond question during a fairly lengthy debate in oral argument.

[53] So, on this argument, an economically strategic, crucial and finite piece of public infrastructure is locked into a contractual arrangement that may well be perpetual. A combination of this and the couple of other factors referred to in the preceding paragraph certainly does make this a matter of general public importance. The public interest is implicated. Thus, the matter evidently transcends the narrow interests of the litigants. And that calls for an interpretation of clause 5.

[54] Due to the particular public interest that the matter implicates and the fact that Transnet's interpretation bears reasonable prospects of success, the matter ought to be considered by this Court. Thus, leave to appeal is granted for this Court to determine only the question whether the notice to terminate the variation agreement was issued validly. This question requires us to interpret clause 5 of the variation agreement.

---

[39] Section 2(d).

[40] *Gcaba v Minister of Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75; *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at paras 155 and 169; and *Fraser v ABSA National Bank Limited (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 40.

Termination

[55] Disagreement between the parties arises from the phrase in clause 5 "*subject to* the arrangement that a full agreement of conveyance for crude oil *is being prepared* and that such agreement will embody the contents of this letter and supersede this letter". (Emphasis added.) Total and Sasol are not in agreement on this. Sasol argued that the term "subject to" reflects a condition applicable to any party intending to terminate the variation agreement. Largely,[41] Sasol's interpretation coincides with that of the High Court. Sasol does not contend that there is a perpetual obligation on Transnet to provide crude oil conveyance in accordance with the variation agreement. On perpetuity, the High Court held as much. It also held that all that is required of a party wishing to terminate the agreement is to show that a new, "full" agreement is being prepared. The High Court put it thus:

> "That the variation agreement is not in perpetuity appears from the terms of the agreement that specifically spell out on what basis the terms of the variation agreement may be disregarded. So long as a full agreement of conveyance for crude oil *is being prepared* and such agreement will embody how the tariff is set out, either party is entitled to give the other party three years' notice of its intention to disregard the terms of the variation agreement."[42] (Emphasis added.)

[56] From this, it is clear that there need not be a finalised draft "full" agreement. It is enough if it is being prepared.

[57] The High Court continues and says something which, as Transnet correctly observed, contradicts this. It says "[a]bsent the 'full agreement' of conveyance of crude

[41] I say "largely" because the High Court's interpretation goes further, and I do not understand Sasol to share everything that the High Court held.

[42] High Court judgment above n 1 at para 66.

oil, any attempt to cancel the [variation] agreement is ineffectual and of no consequence".[43] It continues:

> "That Transnet's purported three-year notice given to both Total and Sasol was unaccompanied by such 'full agreement' is undisputed. That being the case, the purported termination was invalid. It is ineffectual and of no moment."[44]

[58] Now the judgment seems to require more than that a full agreement should be in the course of preparation. The notice of termination must be accompanied by a "full" agreement.

[59] Sasol embraces that part of the judgment that insists on a full agreement. It says its idea of a full agreement that "*is being prepared*" is a draft agreement prepared by Transnet "embod[ying] the contents of [the variation agreement]", and which Transnet must then hand over to Total and Sasol before giving notice to terminate the agreement. According to Sasol, if this condition is satisfied, it is only then that any party to the agreement may give the three-year notice of termination. It matters not that the other parties will not have made an input to the preparation of the agreement, let alone agreed to it. As soon as the unilaterally prepared document is in existence and has been given to Total and Sasol, the entitlement to terminate is triggered.

[60] Although writing in the context of statutory interpretation, Majiedt AJ said, in *Cool Ideas*, "[a] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity"[45] but that there are three important interrelated riders. These include that "statutory provisions should always be interpreted purposively".[46] Likewise, in *Endumeni* Wallis JA said:

---

[43] Id.

[44] Id.

[45] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[46] Id.

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."[47]

[61] Here is the outcome that Sasol's interpretation leads to. If desirous to terminate the agreement, all that Transnet need do is to prepare a "full" agreement and hand it over to Total and Sasol. It is only if the two entities have this draft agreement that a notice of termination may be issued. The two documents (the draft agreement and the notice of termination) may even be handed over simultaneously. At a purposive level, it is difficult to understand this submission. Its effect is this. Before delivery by Transnet of a new full draft agreement to Total and Sasol, the parties cannot give the three-year notice to cancel. But as soon as Transnet delivers this new draft agreement and without more, the right to terminate is triggered. One may ask rhetorically: in practical terms, what is the difference between these two scenarios, regard being had to the fact that in both there is not a concluded agreement? The "full" agreement may or may not be acceptable to Total and Sasol. If not acceptable, it will never become an agreement. Mere "preparation" and delivery of a full draft agreement to the other parties does the trick.

[62] Sasol submitted that the notice clause gave the parties three years to try to come to terms on the full draft agreement. If they did not come to terms, the notice of termination would take effect at the end of the three-year period. If they did come to terms, the notice of termination would fall away, because the variation agreement would be superseded by the full agreement. Sasol accepted that Transnet could permissibly include, in the full draft agreement, the three-year notice provision contained in the variation agreement. This would mean that, upon conclusion of the full agreement,

[47] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

Transnet could again give a three-year notice of termination, this time in terms of the full agreement rather than the variation agreement.

[63] Transnet submitted, correctly, that this interpretation is not only contradictory, it leads to an absurdity; a glaring one at that, I might add. *Endumeni* held:

> "[W]here the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a 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."[48]

[64] Total argues that, properly construed, the variation agreement provides that so long as the circumstances that necessitated the introduction of the neutrality principle continue to exist, the variation agreement cannot be terminated. What this means is that as long as Natref is located inland and sources crude oil from the coast, the variation agreement cannot be terminated. In essence then, Total contends for a situation where Transnet is locked into this contractual relationship in perpetuity or, at the very least, beyond the foreseeable future.

[65] This interpretation is not viable. It strikes a line right across the provision for a three-year notice period to terminate. If what is of paramount importance is a change in the circumstances that necessitated the introduction of the neutrality principle, it passes more than strange that the agreement is not direct on this. It would have been a matter of relative ease for the parties to stipulate that, unless there is a change in the circumstances that gave rise to the need for the neutrality principle, notice of termination cannot not be given. What the agreement does instead is clearly to make

[48] Id at para 25. See also *Cool Ideas* above n 46 at para 28.

provision for the parties to terminate on three years' notice. But Total relegates that into nothingness.

[66] In an attempt to avoid this, Total submitted that the three-year notice period allows the parties to "iron out" the terms of the agreement, but that if after three years they cannot agree on the terms, nothing happens. Furthermore, Total – unlike Sasol – did not accept that the full agreement, if concluded, could itself contain a clause permitting termination on three years' notice.

[67] The upshot of Total's argument is that the parties cannot terminate the variation agreement notwithstanding the three-year notice. If there is no full agreement to supersede the variation agreement, the three-year notice period will have served no purpose, except as some sort of obligatory negotiation period. If the variation agreement is superseded by a concluded full agreement, the latter agreement itself cannot permissibly be one capable of termination on three years' notice. Not only is this interpretation glaringly absurd, it renders the dominant part of clause 5 unnecessary and irrelevant. The Appellate Division in *Golden Dumps*, albeit in the context of interpreting legislation, affirmed the general rule of construction that, as far as possible, meaning is to be given to every word and that no word, phrase or sentence should easily be found to be superfluous.[49] As I say, Total's interpretation is as good as not giving meaning to the words that provide for a three-year notice.

[68] A viable interpretation is one that factors into the contextual setting the history of the neutrality principle. The original agreement was concluded in 1967. That agreement was silent both on its duration and on the giving of a notice of termination. If it was not intended to be a contract that would exist in perpetuity, it would be terminable on reasonable notice. In *Putco* Smalberger AJA said "[w]here an agreement

[49] *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 116F-117A.

is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely".[50]

[69] In *Amalgamated Beverage Industries* Streicher JA held that "[i]n my view, the Court *a quo* correctly decided that the contract was terminable on reasonable notice. Whether it was is a matter of construction".[51] Likewise, in *Plaaskem*[52] Hancke AJA – relying on *Putco,*[53] *Amalgamated Beverage Industries*[54] and *Trident Sales*[55] – came to the same conclusion.[56] *Trident Sales* says this is a question of interpretation; there is no presumption one way or the other. *Plaaskem* does point to some academic discontent with the lack of a bias in favour of the right to terminate on reasonable notice.[57] It says "concern has been raised regarding the fact that parties could be bound in perpetuity".[58] I need not get into that apparent legal controversy. Nor need I engage in an exercise of construction as envisaged in *Putco, Amalgamated Beverage Industries, Plaaskem* and *Trio Engineered Products*[59] on whether the 1967 agreement was to exist in perpetuity or was terminable on reasonable notice. Not when that agreement was varied by the 1991 variation agreement, the latter being what is litigated before us.

---

[50] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 827I.

[51] *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA); [2003] 4 All SA 95 (SCA) at 543H.

[52] *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA).

[53] *Putco* above n 50

[54] *Amalgamated Beverage Industries* above n 51.

[55] *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 (1) SA 433 (W).

[56] *Plaaskem* above n 52 at paras 11-5.

[57] Id at para 12. In the same paragraph it quotes AR Carnegie in "Terminability of Contracts of Unspecified Duration" (1969) 85 LQR 392 at 411–2 who says:

> "By holding the parties bound forever in such circumstances, the rule would impose on the party to whom the contract becomes disadvantageous an excessively severe penalty for the misdemeanour of careless craftsmanship. Moreover, considerations of commercial convenience have been predominant among the principles informing the development of the law of contract; and as McNair J has in effect argued, commercial prudence is much more likely to indicate that a contract should be determinable than that it should endure perpetually."

[58] *Plaaskem* id.

[59] *Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd* [2018] ZAGPJHC 447; 2019 (3) SA 580 (GJ).

[70] Suffice it to say, if the 1967 agreement was terminable on reasonable notice, in the beginning the notice period would probably have been quite lengthy; probably much longer than the contentious three years stipulated in clause 5 of the variation agreement. I will not venture a view on how much longer, as that is a question that turns on the circumstances of each case, and one determinable upon an interpretation of the contract concerned.[60] But the notice period would have been considerably longer because if the Natref shareholders were not going to have access to the then Administration's pipeline, they might have needed to construct one of their own, and there might have been questions of recouping the cost of their investment, and so forth. Indeed, *Amalgamated Beverage Industries* says at least one of the purposes of giving a notice of termination is to afford the other party "sufficient time in which reasonably to manage its own affairs".[61]

[71] In 1991 – when the variation agreement was concluded – the context was different. The 1967 agreement had been in place for 24 years. Circumstances could not possibly have been the same as those that prevailed in 1967 relative to the nature of the necessary notice before termination; that is, if the 1967 agreement was terminable on notice. Possibly – if not probably – as at 1991, Total and Sasol had not only recouped their cost of investment, but had even realised a return on their investment. To the extent that I may be criticised on the basis that this is speculative, the reality is that in 1991 circumstances simply could not have been the same as in 1967. That is the context in which we must construe clause 5 of the variation agreement. That is the context in which we must assess Total's argument, the effect of which is to render the variation agreement not terminable. In that context, it does make sense that – after 24 years of its existence – the parties decided that the neutrality principle should be terminable on three years' notice. This must have been on the basis that they considered the three-year notice period to be reasonable. And the right expressed in clause 5 to give a three-year notice to disregard the agreement means a three-year notice of termination.

[60] See *Amalgamated Beverage Industries* above n 51 at para 17.

[61] Id at para 18.

[72] I have already demonstrated that the conditionalities suggested by Total and Sasol are untenable. So, what qualification there may be, if any, to the entitlement to give notice of termination must flow from the words in clause 5: "subject to the arrangement that a full agreement of conveyance for crude oil is being prepared and that such agreement will embody the contents of this letter and supersede this letter". What does this mean?

[73] It seems to me that the contracting parties were not adding a suspensive condition to the cancellation clause. They were merely *recording* that at the time of concluding the variation agreement a full agreement was being prepared and that – upon conclusion – it would automatically replace the variation agreement. The words "subject to" appeared in a two-page letter from a business executive, not in a detailed contract drafted by lawyers. There is no reason to assume that the "subject to" formulation was used in a technical legal sense as introducing a suspensive condition.

[74] This is buttressed by the second of the two components of the variation agreement, the second letter penned by Total and Sasol. In response to the first letter penned by Mr Crowley of Petronet,[62] which contained the actual neutrality principle, Total and Sasol wrote that "[their] understanding is that these conditions [for which we must obviously read "terms"] will now be incorporated in an encompassing agreement between [them]selves and Petronet". This is consistent with the phrase "a full agreement *is* being prepared", used in the phrase that opens with "subject to". Of course, a full agreement was never concluded. The contractual relationship between the parties continues to be governed by the variation agreement. That means the provision in clause 5 that entitles the parties to terminate on three-years' notice remains operative. Therefore, Transnet was perfectly entitled to invoke it and give the requisite three-year notice of termination.

[62] As I said, Petronet was a division of Transnet.

[75] This interpretation avoids much of the difficulties the interpretations proffered by Total and Sasol encounter.

[76] *Endumeni* held:

> "Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."[63]

[77] The factors referred to are those set out in the earlier quotation from this judgment, namely the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The interpretations advocated by Total and Sasol are impractical, insensible and unbusinesslike. They simply do not make the cut.

[78] That leads to the conclusion that the notice of termination was issued validly. Since it was issued in September 2017, the variation agreement came to an end in September 2020. That, however, does not in itself mean that Transnet no longer has an obligation to convey crude oil to Natref, only that the conveyance is no longer regulated by contract. There is nothing in the papers to suggest that Transnet wishes to terminate the use of the pipeline by Total and Sasol. The main point of contention between the parties has been whether the tariff for use of the pipeline should continue to be based on the neutrality principle. Transnet's licence to operate the pipeline is not before us, but section 20(1)(f) of the Petroleum Pipelines Act provides that a petroleum pipeline may be licensed for either crude oil or petroleum products, or both, "as long as sufficient pipeline capacity is available for crude oil to enable the uninterrupted operation of the crude oil refinery located at Sasolburg, to operate at its normal operating capacity at the commencement of this Act and for so long as that refinery continues as a going

[63] *Endumeni* above n 47 at para 18.

concern". Public law remedies may well be available to Total and Sasol if Transnet or Nersa, when making decisions regarding access to, and the terms for use of, the pipeline, fail to observe the legal constraints on the exercise of their powers.

Costs

[79] The appeal succeeds only to the extent of the questions whether the variation agreement was terminable and, if it was, whether it was terminated validly. While Transnet enjoys this success, Total and Sasol have succeeded on the cause of action defence. It seems fair that in this Court each party must pay its costs. That must be the case in the High Court as well. That means the High Court's costs order must be set aside.

Order

[80] The following order is made:

1. Leave to appeal is granted only in respect of the questions whether the variation agreement was terminable and, if it was, whether it was terminated validly.
2. The appeal is allowed and, as a consequence, it is declared that the variation agreement was terminable, was terminated validly and came to an end on 13 September 2020.
3. The order of the High Court of South Africa, Gauteng Local Division, Johannesburg, is set aside insofar as it relates to the questions referred to in paragraph 1 and to costs.
4. Each party must pay its own costs in this Court and in the High Court.

For the Applicant:	J J Gauntlett SC QC, K Pillay SC, F B Pelser, Y S Ntloko and N Nyembe instructed by Webber Wentzel
For the First Respondent:	A E Bham SC, J Babamia SC and K Hofmeyr SC instructed by Norton Rose Fulbright South Africa Incorporated
For the Second Respondent:	T Ngcukaitobi SC, D Turner and M Mbikiwa instructed by Mchunu Attorneys