THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 728/2015

In the matter between:

TRANSNET SOC LIMITED **APPELLANT**

and

TOTAL SOUTH AFRICA (PTY) LTD **FIRST RESPONDENT**

SASOL OIL (PTY) LIMITED **SECOND RESPONDENT**

Neutral Citation: *Transnet v Total* (728/2015) [2016] ZASCA 116 (14 September 2016)

Coram: Lewis, Theron and Zondi JJA and Schoeman and Makgoka AJJA

Heard: 2 September 2016

Delivered: 14 September 2016

Summary: A contract pertaining to tariffs payable for the transportation of crude oil remains enforceable despite a change in legislative regime that governs the conveyance of petroleum products in South Africa: nothing in the contract incompatible with the relevant legislation.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Coppin J sitting as court of first instance)

The appeal is dismissed with the costs of two counsel.

JUDGMENT

Lewis JA (Theron and Zondi JJA and Schoeman and Makgoka AJJA concurring)

[1] The question for decision in this appeal is whether a contract between the former Government of South Africa, and the first respondent, Total South Africa (Pty) Ltd (Total), continues to bind the appellant, Transnet Soc Ltd (Transnet), a wholly-owned government company, despite the change in legislative regime that governs the transport and conveyance of fuel in South Africa. Coppin J in the Gauteng Local Division of the High Court (to which I shall refer for convenience as 'the high court') was asked and agreed to determine a number of issues arising from pleadings in an action between the parties separately from others in terms of rule 33(4) of the Uniform Rules of Court.

[2] Before setting out the issues that the high court was asked to determine, it is useful to discuss briefly the background to the conclusion of the contract and to the litigation between the parties. For the purpose of determining whether the contract survived the change in regime regulating conveyance of fuels and the charges for it, the parties assumed certain facts alleged in the particulars of claim to be correct. And the evidence confirming these facts by a witness for Total, Mr R Duchateau, was not contested by Transnet.

[3] After World War II there was an increase in demand for petroleum products. Total and other petroleum suppliers obtained these from refineries on the coast, mostly in Durban but also in Cape Town. The coastal refineries did not have sufficient capacity to meet the increased need for petroleum products. In 1966 the Government decided to establish an inland refinery to cater for increasing demand. It acted in terms of the Railways and Harbours Control and Management (Consolidation) Act 70 of 1957, which created an 'Administration' for the control and management of railways, ports, harbours and petroleum pipelines. The Administration was empowered to determine rates for the conveyance of petroleum pipelines managed by it.

[4] The 1957 Act was repealed by the South African Transport Services Act 65 of 1981. The Administration was renamed the South African Transport Services (SATS). SATS was established as a commercial enterprise of the Government. Transnet succeeded SATS in terms of the Legal Succession to the South African Transport Services Act 9 of 1989, s 3(2) of which provided that Transnet, as a wholly-owned Government company, acquired most of the property of SATS including petroleum pipelines.

[5] In 1966 the Administration approached Total and requested it to participate in the proposed inland refinery. Total was reluctant to do so because it proposed to invest with Mobil in a coastal refinery, which made more commercial sense for it. Coastal refineries have access to both international and domestic markets, whereas an inland refinery would have access only to inland markets. Moreover, when using an inland refinery, crude oil would have to be brought to it from the coast, thus incurring pipeline costs that would not arise if the oil were processed at the coast.

[6] Accordingly, as a precondition to participating in the establishment of an inland refinery, Total required an undertaking from the Administration that it would not be placed in a position worse than at a coastal refinery. In a letter from the Department of Commerce and Industries to Total, the general manager assured Total that, in determining the tariff for the conveyance of crude petroleum by pipeline from Durban to Sasolburg, where the inland refinery was to be established, in

principle, Total would be treated as if at the coast in determining the tariff for transporting crude oil.

[7] In response, and after a meeting with the Administration in January 1967, Total recorded that the Government had undertaken 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'. The principle so agreed was referred to as 'the neutrality principle' (it being neutral whether a refinery was at the coast or inland) and was honoured for many years, first by the Administration and then by SATS.

[8] A refinery at Sasolburg was accordingly established and was run by the National Petroleum Refiners of South Africa (Pty) Ltd (Natref). Total held 36.36% of the shares in Natref and Sasol held the balance. Sasol was cited as the second defendant by Total, but has played no role in these proceedings.

[9] When Transnet succeeded SATS it first refused to recognize the neutrality principle. But in 1991, after meetings between Total, Sasol and Transnet, a variation agreement was concluded between the parties. Transnet undertook that the percentage increase in the crude oil tariff that would be levied to Sasol and Total (the Natref shareholders) would not exceed the weighted average percentage increase of any adjustments of petrol, diesel and avtur (the so-called white fuels) tariffs. The variation agreement, which also embodied the neutrality principle, was largely complied with until March 2005.

[10] However, Transnet refused to recognize the neutrality principle once the regulatory regime governing the supply of petroleum products was changed. The National Energy Regulator Act 40 of 2004 (NERSA Act) came into force in September 2005 and the Petroleum Pipelines Act 60 of 2003 (PPA) came into force in November 2005. The NERSA Act establishes a single regulator to regulate the electricity, piped-gas and petroleum pipeline industries. The regulator is a juristic person that, amongst other things, undertakes the functions of the Petroleum Pipelines Regulatory Authority referred to in the PPA. The regulator is referred to in

the PPA as the 'Authority' and in the NERSA Act, in terms of which it is established, as the 'Energy Regulator'. I shall refer to it as the NERSA.

[11] The objects of the PPA include the promotion of an efficient, effective, sustainable and orderly development, operation and use of petroleum pipelines, loading and storage facilities. The Authority is given the power to issue licences for the construction and conversion of pipelines, loading and storage facilities, and for the operation of these (s 4*(a)*). It is also, importantly, given the power to set or approve tariffs and charges in the manner prescribed by regulation. At present, Transnet is the only licensee.

[12] The first tariff determination by the NERSA that is in issue was made for the 2010/2011 years, effective from 1 April 2010. Transnet maintains that the neutrality principle cannot prevail over that decision, and that the variation agreement has effectively been terminated by the regulatory regime introduced by the NERSA Act and the PPA. Accordingly, Total instituted action claiming a declaration that the variation agreement remains binding, and directing Transnet to implement its terms by ensuring that the percentage increase in the crude oil tariff does not exceed the weighted average percentage of petrol, diesel and avtur tariffs. It also claimed payment of the shortfall that it allegedly suffered as a result of Transnet's failure to apply the neutrality principle.

[13] At the start of the trial, as I have said, the high court ordered that only certain issues be determined. These were the defences raised to the first claim by Total (paragraphs 14 to 19 of Transnet's plea) and the responses to them in its replication by Total. Coppin J found that these defences had to fail. The appeal to this court is with his leave.

[14] The essence of Transnet's defences is that the variation agreement, and with it the neutrality principle, was 'abolished' by the PPA; the Authority established by the NERSA Act was the only body that could set tariffs that licensees are obliged to charge; the NERSA was not directed by the PPA to give effect to the neutrality principle; the PPA did not authorize discrimination between customers; the PPA prohibits any agreement contrary to its provisions, and thus the variation agreement

became void; and that Total had made representations to the NERSA about applying the neutrality principle, which had been rejected. If Total had any remedy, it was to review the NERSA's decision.

[15] On appeal, Transnet argues that the neutrality principle is not consonant with the provisions of the PPA and that the basis of determining the tariff before its enactment cannot exist together with that determined by the NERSA in terms of s 28 of the PPA. It should be made clear that the former basis for determining the tariff paid by petroleum products suppliers was aligned with that payable for rail transportation. The new method of tariff determination now established by the NERSA is, in terms of the PPA, completely different, and must comply with the provisions of the PPA. Total does not argue otherwise.

[16] Section 28 of the PPA provides:

'(1) The Authority must set as a condition of a licence the tariffs to be charged by a licensee in the operation of a petroleum pipeline and approve the tariffs for storage and loading facilities.

(2) A tariff charged in terms of subsection (1)—

(a) must be—

(i) based on a systematic methodology applicable on a consistent and comparable basis;

(ii) fair;

(iii) non-discriminatory;

(iv) simple and transparent;

(v) predictable and stable;

(vi) such as to promote access to affordable petroleum products;

(b) becomes effective from the date set out in the licence;

(c) must be reviewed by the Authority within the period set out in the licence; and

(d) may be adjusted by the Authority on review.

(3) The tariffs set or approved by the Authority must enable the licensee to—

(a) recover the investment;

(b) operate and maintain the system; and

(c) make a profit commensurate with the risk.

(4) The Authority must monitor the application of tariffs and take appropriate action when necessary to ensure that they are applied in a non-discriminatory manner and licensees must provide the information required by the Authority in this regard.

. . .

(6) A licensee may not charge a tariff for the licensed activity in question other than that set or approved by the Authority.'

[17] The nub of Transnet's argument on appeal is that the neutrality principle cannot co-exist with s 28(6). Only the NERSA may set a tariff and the provisions of s 28 do not permit of any deviation. Total, on the other hand, argues that the neutrality principle is entirely consistent with s 28(6): the NERSA must set a tariff and the neutrality principle then requires that a lesser amount be charged in respect of crude petroleum conveyance. Total does not in any way contend that the old method of setting the tariff be applied.

[18] Indeed, Total's argument is that if the neutrality principle is not invoked, there will be a contravention of s 28(2)*(a)*(iii) which requires that the tariff must be non-discriminatory. If the tariff for crude petroleum is not reduced then suppliers at the inland refinery will be discriminated against. Discrimination is also precluded by s 21 of the PPA which provides:

'Licensees may not discriminate between customers or classes of customers regarding access, tariffs, conditions or service except for objectively justifiable and identifiable grounds approved by the Authority.'

[19] While Transnet contends that this provision is meant to ensure that new licensees who wish to compete with Transnet should not be disadvantaged, in my view there is no warrant for giving the provision such a limited meaning. The PPA as a whole is intended, inter alia, to achieve competition in the construction and operation of petroleum pipelines and associated facilities; to achieve environmentally responsible transport, loading and transport of petroleum products; to facilitate investment in the industry and to promote companies owned or controlled by historically disadvantaged South Africans (s 2). There is no reason why it would be intended to discriminate against long-established suppliers.

[20] That view is reinforced by s 20 of the PPA which sets out the conditions on which a licence may be granted by the NERSA, in particular s 20*(f)*, which states:

'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 operates as a going concern;'.

[21] Differentiation based on sound reason does not amount to discrimination (see the dicta in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) paras 23 to 25.) In this matter if the neutrality principle were not applied, there would be no differentiation despite different circumstances. Total and Sasol, as the shareholders in Natref which runs the refinery at Sasolburg, would be treated unfairly if they were not able to recover the cost of piping crude oil: that would mean that they were discriminated against vis-a-vis coastal refineries. If the Natref refinery were situated at the coast its shareholders would not have incurred the costs of transporting crude oil. That was what the neutrality principle was designed to avoid and the position is no different now that the tariff is set not by Transnet but by the NERSA.

[22] This construction appears to be shared by the NERSA. In its decision in respect of Transnet's application for a licence for the 2010/2011 years, it expressly stated that 'the *maximum* tariff' (my emphasis) set out in a table would be applied from 1 April 2010. And in its reasons for the decision, the NERSA stated: 'The tariffs set in this decision are maximum tariffs thus permitting the licensee to discount'. Subsequent decisions of the NERSA have again referred to maximum tariffs.

[23] Nothing could be clearer. Transnet is entitled to discount, and the neutrality principle embodied in the variation agreement obliges it to allow a discount for the conveyance of crude oil to the Natref refinery. The evidence for Transnet, given by Mr L Moodley, was that at present coastal customers are treated in the same way as the Natref refinery. That is unfair discrimination which puts the Natref shareholder at a disadvantage. That is clearly what the NERSA decision aims to avoid, and why it allows for a maximum tariff and a discounting of it.

[24] In the circumstances it is clear that Transnet is bound by the variation agreement of 1991. That is in keeping with the general principle that new legislation

is presumed not to interfere with vested rights: see *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; 2002 (2) All SA 295 (SCA) para 16. Transnet's defences to the action raised in its plea must fail, as the high court found.

[25] The appeal is dismissed with the costs of two counsel.

C H Lewis
Judge of Appeal

APPEARANCES

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