



CONSTITUTIONAL COURT OF SOUTH AFRICA

Transnet SOC Limited v Total South Africa (Pty) Limited and Sasol Oil (Pty) Limited

CCT 114/21

Date of hearing: 16 November 2021

Date of judgment: 21 June 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday 21 June 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). In that Court, Total South Africa (Pty) Limited and Sasol (Pty) Limited (the respondents) sought damages from Transnet SOC Limited (the applicant) for an alleged breach of its obligations in terms of a variation agreement to set tariffs for conveyance of crude oil from Durban to Sasolburg.

In 1967 the apartheid government concluded an agreement with Total to establish an inland oil refinery, subject to the condition that costs of transporting crude oil from the coast to the inland refinery would not place Total at a disadvantage compared to coastal refineries. This was referred to as the neutrality principle. Natref, an inland refinery sited in Sasolburg, was then established, its shareholders being Total and Sasol, which was then a wholly owned government entity. In terms of the agreement, tariffs for the conveyance of crude oil from the coast to Natref were structured such that the principle of neutrality was maintained.

Over the years Transnet became the successor in title to the government and, therefore, a party to the agreement. A variation agreement concluded in 1991 by Transnet, on the one hand, and Total and Sasol, on the other, altered the terms of the original agreement, but also embodied the neutrality principle, albeit on the basis of a different formula. It provided that Transnet would increase the tariffs for conveyance of crude oil by no more than a weighted average cost for the conveyance of refined petroleum products from the coast to inland markets.

In 2008 and 2011 Transnet set tariffs that were above this weighted average cost. Total and Sasol instituted proceedings in the High Court alleging that this constituted a breach of the variation agreement. They claimed contractual damages in the form of a refund of amounts paid as a result of the overcharge. Transnet gave three years' notice to terminate the variation agreement. Total and Sasol then added to the relief sought an order declaring that the variation agreement remained binding on Transnet.

Transnet raised a defence that in law Total and Sasol cannot claim a refund for monies allegedly overcharged by it unless the variation agreement is first cancelled. It also contended that it had validly terminated the variation agreement in accordance with clause 5 by giving the three-years notice. In terms of clause 5 of the variation agreement each party must give at least a three-year 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]”.

The High Court held that Total and Sasol did not have to cancel the variation agreement before claiming payment for monies overcharged as a result of Transnet's breach. The High Court also found that the variation agreement remained binding on Transnet as, properly interpreted, the agreement makes cancellation contingent on the conclusion of a new agreement embodying the neutrality principle. Both the High Court and Supreme Court of Appeal dismissed Transnet's applications for leave to appeal.

Transnet then approached the Constitutional Court to appeal the judgment of the High Court. It argued that Total and Sasol's claim for damages is bad in law and should have been brought as a claim for unjustified enrichment rather than damages for breach of contract. Transnet also asked the Constitutional Court to reject the High Court's interpretation of the cancellation clause (clause 5), as it would be contrary to public policy to lock Transnet into a prejudicial agreement in perpetuity. Total and Sasol argued that they were correct to claim contractual damages from Transnet since their claim arises from Transnet's breach of its tariff-setting obligations. Further, a proper interpretation of the variation agreement, considering the text, context and purpose, should lead the Court to the conclusion that Transnet repudiated rather than validly terminated the variation agreement. Total and Sasol disputed Transnet's assertion that the variation agreement is contrary to public policy.

In a unanimous judgment penned by Madlanga J, the Constitutional Court held that there was no substance in Transnet's contention that Total and Sasol could not claim contractual damages without first having cancelled the variation agreement. On termination of the variation agreement, the Court held that a viable interpretation of clause 5 is one that factors into the contextual setting the history of the neutrality principle. It held that on a contextual reading of clause 5, 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. There was no reason to assume that the words “subject to” were used in a technical legal sense that introduced a suspensive

condition. The upshot of this was that the variation agreement was terminable on three years' notice.

As a result, the Court held that Transnet's notice of termination was issued validly and the variation agreement had, therefore, been terminated validly. However, that did not in itself mean that Transnet no longer had an obligation to convey crude oil to Natref. All that the judgment meant was that conveyance was no longer to be regulated by the variation agreement. This was because there was nothing in the papers to suggest that Transnet wished to terminate the use of the pipeline by Total and Sasol. The main point of contention between the parties had been whether the tariff for use of the pipeline should continue to be based on the neutrality principle. In this regard, the Court reasoned that while Transnet's licence to operate the pipeline was not before it, section 20(1)(f) of the Petroleum Pipelines Act 60 of 2003 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 concern". The Court went further and held that public law remedies may well be available to Total and Sasol if Transnet, when making decisions regarding access to, and the terms for use of, the pipeline, failed to observe the legal constraints on the exercise of its powers.

Finally, the appeal succeeded only to the extent of the questions whether the variation agreement was terminable and, if it was, whether it was terminated validly.