IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 5537/2013

In the matter between:

NORTHERN OCEAN MARINE (PTY) LTD Applicant

and

FFS REFINERS (PTY) LTD Respondent

JUDGMENT

Delivered on 11 June 2013

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[1] The applicant seeks urgent interim relief the effect of which is to enforce certain contractual arrangements between it and the respondent, such relief to remain effective and in force pending the resolution of an alleged dispute over price adjustments either by arbitration or adjudication.

[2] The application was commenced as a matter of urgency on 22 May 2013 and served before me in the Motion Court on 24 May 2013. After hearing preliminary submissions I adjourned the application and fixed dates for the expeditious exchange of further answering and replying affidavits and it was subsequently enrolled for argument before me on 30 May 2013.

[3] At the opposed hearing Mr *Camp*, who appeared for the applicant, and Mr *Voormolen*, who appeared for the respondent, were in agreement that although the relief was couched in the Notice of Motion in the form of a *Rule Nisi*, I was at liberty to finally determine the matter. In order words, I was to grant relief pending the final determination of the intended arbitration or litigation if I was with the applicant, or refuse the application if I was with the respondent. That approach was a sensible one.

[4] Ships operating in and frequenting the Port of Durban need to dispose of a waste product known to the industry as *Slops*. *Slops* are hydrocarbon liquids (fuel oil) contaminated with water and other impurities originating from ships' engine rooms, machinery spaces and centrifuges. The applicant carries on business as a supplier of services to the shipping industry for the removal of *Slops* from vessels. The respondent is in the business of refining *Slops* by means of a treatment process to separate the hydrocarbons from the water and other impurities.

[5] On 28 April 2010 the applicant and the respondent concluded a written agreement regulating the sale and delivery of *Slops* by the applicant to the respondent. The material portions of the agreement provide:

'**3 PERIOD**

This Agreement shall be deemed to have commenced on date of final signature hereof and shall continue to be in force and effect until:

3.1 terminated by either party to this Agreement by providing three (3) calendar month's notice, in writing of such termination. However, such notice of termination may not be given prior to fifty seven full calendar months having elapsed from date of final signature.

3.2 terminated as a result of a breach by either party to the terms and conditions of this Agreement, subject to clause 16.

…

6 COLLECTION AND DELIVERY

NOM shall deliver the slops to the nominated FFS branch and/or depot, or arrange with FFS to assist in the collection thereof.

Having regard to the above, in the event that NOM is unable to provide a crew and the resources, including but not limited to hoses, fittings etc, required to unload slops from a ship, FFS shall be upon reasonable notice provide such service.

Should FFS be required to assist in the collection of slops, such a request will be raised at least 18 hours before the vessel is expected, in order to allow FFS to arrange the necessary transport and drivers. Continuous communication regarding the status of the vessels approach is required to prevent premature deployment of trucks, which could result in unnecessary standing times and associated costs. Trucks will only be deployed once FFS has received notice that the harbour pilot is on board the vessel and about to enter the harbour. FFS reserves the right to charge NOM at a rate of R500 per hour or part thereof, in excess of 2 hours, caused by delays in utilising the FFS trucks being deployed, but such right will not be exercised without consultation with NOM. The slops discharge rate into FFS' trucks is expected to be at a minimum rate of 5 ton per hour. Should a slower pump rate be expected, this must be made known to FFS when the trucks are booked. FFS reserves the right to withdraw its trucks if undue delays are being experienced in receiving the slops. Should communications prove to be unsatisfactory, the ship's agent must be made known to FFS on request, in order to allow FFS to gather information regarding the vessel's movements and optimise transport.

FFS reserves the right to accept or reject any tank washings offered.

…

8 PRICE

8.1 FFS shall pay NOM for the "dry oil" received as per the attached pricing table, annexed hereto as Annexure A and Annexure B.

8.2 the water content will be deducted from the total received mass and payment will be calculated on the remaining dry oil mass. The price of the dry oil will be determined on an individual load basis.

8.3 after the initial twelve month period, the price will be reviewed an annual basis.

…

10 SUPPLY

NOM agrees to exclusively supply to FFS all the slops collected by them. FFS is not actively competing with its slops collectors, but will respond to direct requests from the shipping industry to collect slops and to agents specifically wanting to deal with FFS directly.

…

15 LOYALTY/HARDSHIP

In signing this Agreement, the parties agree on the principle that the further performance of this Agreement should meet their mutual requirements in an economical and reasonable manner. If this contractual objective can, in the future, no longer be reached because of changes and developments which could not reasonably have been foreseen at the time that Agreement was concluded, the so-affected party shall have the right to request an adaptation of the relevant articles of this Agreement to the changed conditions. These adaptations are to restore the original contract equilibrium in a fair and reasonable manner.

…

17 DISPUTES

Any dispute that arises out of or in connection with this Agreement, its termination or cancellation, including claims in delict or rectification of the agreement, should be resolved within 14 days of that dispute arising by the parties respective representatives identified by the signatories to this Agreement. Any unresolved dispute must be referred to the parties' senior management or their respective nominees to try and resolve the dispute. If they fail to resolve the dispute or to agree on an alternative dispute resolution process (including mediation or arbitration) within

30 days of the date of the referral or such extended date as agreed between them, either party may approach any court having jurisdiction for appropriate relief."

[6] Annexure A to the agreement is a detailed table grid headed "Slops Received Price Calculation Table". It provides firstly for different pricings for Slops received in Durban and in Cape Town. It then provides for different calculations to be applied in situations, for Durban, where the water content is less than 80% and where it is higher than 80% and for Cape Town where it is less than 85% and where it is higher than 85%. Thereafter factors are applied in different transportation scenarios for a treatment and disposal charge as well as transport costs, with the final result being shown in a Rand Price per Ton for the dry oil result. Annexure B sets out, for Slops collected in Richards Bay, the details of the different operating hours and, in US dollar prices, provides the rates for standing charge, pumping rate, slow pumping rate and overtime rates to be applied with regard to road tankers. In addition it provides for the charges applicable to a disposal fee. It also sets out how the exchange rate is to be determined and applied.

[7] It appears not to be in dispute that until about August 2012 the parties enjoyed a reasonably good business relationship. Until that time, so the applicant alleges, its trucks were attended to at the respondent's depot with a discharging turn-around time of approximately 3 hours. A quick and efficient turn-around time in this regard was important to the efficient running of the applicant's business. The longer it took for a truck to discharge its contents the higher the costs associated with that particular delivery of Slops.

[8] The applicant alleges that from about August 2012 the turn-around time grew substantially without any apparent cogent reason therefor. It goes on to allege that that appeared to coincide with the respondent acquiring an interest in the Western Cape in an entity that competed directly with the applicant. The delay in turn-around time increased so that by February 2013, so says the applicant, delays could be anything up to 72 hours of standing time with a turn-around time of approximately 6 hours. The applicant concluded that it was the target of an orchestrated campaign.

[9] On 13 February 2013 the respondent give notice to the applicant of the immediate termination of the agreement. It was alleged that the applicant had breached the exclusive supply arrangement, that that breach was not capable of being remedied, and that it then called for the immediate termination of the agreement. Subsequent interactions between the parties resulted in that notice of termination being withdrawn by the respondent.

[10] Following up on that the applicant alleges that it experienced a significant improvement in the turn-around time for the discharge of Slops at the respondent's premises. It alleges that the agreement continued to be honoured thereafter.

[11] On 25 April 2013 the respondent issued a notice to the applicant advising of the respondent's annual pricing adjustment effective from 28 April 2013. That pricing adjustment, so says the applicant, was in effect a unilateral 58% reduction in the price paid per ton of oil. It was also, according to the

applicant, a unilateral reduction in the allowable percentage of water in the collected and supplied Slops, and a substantial increase in the treatment and disposal charges.

[12] The applicant challenged the imposition of that price increase and suggested that if the respondent persisted therein then the matter ought to be regarded as a dispute requiring the invocation of the arbitration procedure provided for in clause 17 of the agreement. Two meetings were held between the parties thereafter, both involving the parties' legal representatives but the matter could not be resolved.

[13] Subsequent to 28 April 2013 the respondent has been paying the new price determined by it and this is unacceptable to the applicant. According to the applicant it wants to resolve the dispute as to price in accordance with the provisions set out in clause 17 of the agreement.

[14] Given the history of the interactions between the parties the applicant contends that the respondent's unilateral price variation is nothing more than a *mala fide* attempt to force a termination of the contractual relationship between the parties. It says so because the "new" pricing structure is unsustainable for the applicant.

[15] I pause to mention that arising out of the meetings referred to, and prior to the launch of the present urgent application, the respondent suggested that if the applicant was to persist in its contention that the dispute

concerning the price adjustment was capable of resolution by arbitration or litigation, and that if the applicant persisted with such arbitration or litigation, it (i.e. the respondent) would continue to pay the applicant the new stipulated price with the difference being retained in the respondent's attorney's trust account and offered that the amount so retained be paid over to the applicant if matters were eventually resolved in the applicant's favour. That offer was made to the applicant in the form of a firm undertaking pending the resolution of the alleged dispute.

[16] Notwithstanding that offer the applicant persisted with the relief sought in the urgent application.

[17] Against that backdrop the respondent contends that the relief being sought at this stage is in effect final in nature. That must be so, argues the respondent, because the applicant has not offered any security for the repayment of the price difference should the "dispute" ultimately be resolved in the respondent's favour. It says that there is no guarantee that the respondent will recover the money paid to the applicant if the applicant is ultimately unsuccessful.

[18] If the effect of the relief sought is indeed final in nature, and given the factual disputes that emerge from the papers, then it is clear that the applicant must present and meet the test for final relief. Firstly, it must demonstrate that it enjoys a clear right, and secondly, in accordance with the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA

623 (A), the matter must be decided on the undisputed facts and the facts as stated by the respondent. I agree with those submissions.

[19] It seems to me that the agreement between the parties, reduced to its essential basics, is nothing more than an agreement of sale between them. That being the case, price, being one of the essentials of an agreement of sale, must be fixed or, at the very least, must be easily determinable.

[20] Upon a proper construction being placed upon the agreement, and reading it so as to give it business efficacy, the following must emerge:

a. the agreement was intended to endure for an indefinite period. However, and putting aside for the moment any question of a consensual cancellation or of a cancellation for breach, it could be cancelled by either party, without that party having to furnish any reason for such cancellation, upon the giving of three calendar months' notice to the other, such notice however only being capable of being given after the agreement had endured for a period of 57 calendar months;

b. a fixed method was agreed upon for the determination of price during the initial twelve months;

c. it was agreed that the price would be reviewed on an annual basis. In this regard it is worth mentioning that that is something quite

> different from the price being *reviewable* on an annual basis. The fact that the price might not have been changed on certain anniversaries in the past does not mean that it did not undergo a review process. All that points to is this: the parties either actually or tacitly agreed not to change it on a particular anniversary. That process still constituted a review.

[21] It is trite that in the absence of an agreement as to price no agreement of sale can exist. In other words parties must either agree upon a price or must agree upon a mechanism by which price can objectively be determined.

[22] The applicant contends of the agreement provides such a mechanism, and because it does contents further that the ruling price must obtain until the new one has been properly determined.

[23] Upon clause 17 of the agreement being examined in context it is abundantly clear that it was not designed to resolve disputes as to price and nor can it be interpreted or implemented so as to resolve disputes as to price. It is clear that in implementing the provisions of clause 17 the parties cannot be compelled to arbitration. Therefore, the only ultimate resort is to litigation to achieve the applicant's desired result.

[24] In theory all of that is possible but the ground rules have to be provided in order for that determination to take place. This is where clause 17

fails. If an agreement it is to provide for the determination of price by a third party, and here the applicant contends that that third party is either the arbitrator or the court, it must provide for a mechanism by which that determination can be made. See in this regard *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA (SCA). The agreement in question in this case leaves the method by which price can be determined by either the arbitrator or the court wholly unstated and in those circumstances for the court to entertain such dispute it would be tantamount to making a contract for the parties. That is impermissible.

[25] As matters stand at present there is no agreement as to price in place, and consequently there is no agreement between the parties. In the result the so-called dispute resolution clause is of no assistance to the applicant.

[26] The application is dismissed with costs, such costs to include those reserved on previous occasions.

Vahed J

CASE INFORMATION

Date of Hearing: 30 May 2013

Date of Judgment: 11 June 2013

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