IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION : DURBAN

CASE NO: 13794/2011

In the matter between:

ASTRAL OPERATIONS LTD t/a EARLY BIRD FARM **PLAINTIFF**

and

MICHAEL HENRY O'FARRELL N.O. **FIRST DEFENDANT**

DAVID VIVIAN HOTZ N.O. **SECOND DEFENDANT**

BRIAN GEORGE GARDINER N.O. **THIRD DEFENDANT**

MICHAEL HENRY O'FARRELL **FOURTH DEFENDANT**

ORDER

A. Under case number 13794/2011 the following order is made.

1. **Judgment is granted in favour of the plaintiff against the first defendant (representing the Nambitha Trust) and the fourth defendant, jointly and severally, the one paying the other to be absolved, for:**

   (a) payment of the sum of R8 116 236.77;

   (b) interest thereon at the rate of 15.5% per annum calculated as follows:

      (i) on the sum of R1 412 395.56 from 1 November 2011 to date of payment;

      (ii) on the sum of R6 366 913.13 from 1 December 2011 to date of payment; and

      (iii) on the sum of R336 928.08 from 1 January 2012 to date of payment;

   (c) costs of suit on the scale as between attorney and client, including any which have been reserved.

2. **The claim in reconvention of the first defendant (representing the Nambitha Trust) is dismissed with costs.**

B. Under case number 689/2013 the following order is made:

1. **Judgment is granted in favour of the plaintiff against the defendant for:**

   (a) payment of the sum of R759 194.24;

   (b) interest thereon at the rate of 15.5% per annum from 1 December 2011 to date of payment;

(c) costs of suit on the scale as between attorney and client.

2. The defendant's claim-in-reconvention is dismissed with costs.

JUDGMENT

Delivered on: 20 November 2020

OLSEN J

[1] In 2011 the plaintiff (which I shall call "Astral") instituted the present action against the trustees of the Nambitha Trust (which I shall call "Nambitha") seeking judgment for payment of a little over R8 million as the outstanding balance of the price of chicken pieces sold to Nambitha. Mr Michael Henry O'Farrell, who turned out to be the sole trustee of Nambitha, was also cited as Nambitha's surety, a status which was not disputed in the action.

[2] Subsequently, in 2013, Astral instituted another action, on this occasion against Nambitha Distributors (Pty) Limited, for payment of a sum of a little over R750 000, also said to be the unpaid price of chicken pieces sold and delivered. Mr O'Farrell was the guiding hand of Nambitha Distributors (Pty) Limited. The issues arising in that second action are to all intents and purposes the same as those which arise in the present action. The parties agreed at the outset that whatever order is made in the present action should also be made in the second action. The evidence led before me related only to the present action, that is the one against Nambitha Trust.

[3] At the outset of the trial an order was made in terms of Rule 33(4) separating out certain issues for decision before all else. A little background and a brief consideration of the pleadings are necessary in order to identify the issues to be decided at this stage.

[4] Astral has a division known as Early Bird Farms. It produces chicken in large quantities (more or less five million per week) for ultimate sale into the consumer market. Much of the production is sold directly to the major supermarket chains. Smaller outlets are generally serviced by wholesalers who buy from Astral. Nambitha was one of these wholesalers. Another was a family enterprise which has been referred to throughout as "Dawoods".

[5] Astral's product which features at the centre of the present case is an apparently upmarket version of frozen chicken pieces called "Goldi". There are cheaper versions of frozen chicken pieces, cheaper apparently mainly because the meat is injected with brine to a greater extent than is the case with a more upmarket product. Astral had to compete with other producers of chicken, such as Rainbow Chickens, which was a prominent player at the material time.

[6] The events which gave rise to this litigation took place in 2011. By that time Nambitha was a firmly established customer of Astral (in its Early Bird Farms division). They had been doing business since the early 1990s. Nambitha had an established customer base, almost exclusively in KwaZulu-Natal. Dawoods was also a well-established customer of Astral. Until 2011 its area of operation was almost exclusively in Gauteng. This geographic separation of the activities of Nambitha and Dawoods existed at the turn of the century but was upset in about 2002 when Dawoods decided to penetrate the KwaZulu-Natal market. This had a detrimental effect on Nambitha's business, and it reacted by exploring, apparently quite successfully, the Gauteng market. This competition between the two wholesalers generated something of a price war, and matters were resolved by an agreement which reinstated a geographic separation of Dawoods and Nambitha, the latter to service predominantly the KwaZulu-Natal market and the former predominantly the Gauteng market. At some stage during 2010 Dawoods decided that it was no longer satisfied with the geographic limitations placed on it, and that it would re-enter the KwaZulu-Natal market. This it did around the beginning of 2011. The competition put pressure on Nambitha. On this occasion it

chose not to alleviate its pain by expanding its market beyond KwaZulu-Natal. It was out-traded by Dawoods and, near the end of 2011, its business of selling Astral products collapsed, leaving an unpaid balance owing to Astral.

[7] It was not disputed by Nambitha that during the period September 2011 to November 2011 it bought the product from Astral the supply of which, according to Astral, generates the debt which is the subject of its claim. Neither is it disputed (in the light of a concession made in the order for separation of issues, and indeed in the light of the evidence) that the sum of the prices at which the orders for that product were made generates the amount claimed by Astral. It is Nambitha's contention that it was entitled to lower prices for the product in question, as a result of which a debatement of Astral's account of its claim against Nambitha will reveal at least a lesser debt. Furthermore, in a claim-in-reconvention Nambitha contends that throughout 2011 it was entitled to lower prices than those which were actually charged, and that it should be compensated not only for loss of profits, but also for the collapse of its business as, according to Nambitha, it was out-traded by Dawoods because Astral afforded Dawoods the better prices to which Nambitha claims it was also entitled. The amounts claimed by Nambitha amount to some R16.4 million.

[8] I will confine my account of the pleadings to those aspects which are material to the decisions which have to be made in terms of the order for separation of issues.

[9] Astral has pleaded that its business with Nambitha was conducted in terms of a written contract which is annexed to the particulars of claim. The written contract allowed Nambitha to buy goods on credit. Clause 12.1 provided that Astral would have the right "to withdraw any credit facilities at any time without prior notice and the nature and the extent of such facilities shall at all times be at [Astral's] sole discretion".

[10] Clause 10.1 of the contract dealt with price. It reads as follows.

'The price of the goods shall be the usual price applicable at the time of the despatch of the goods.'

In the light of the evidence led at trial, it is safe to say that clause 11.3 of the contract supplemented clause 10.1. It reads as follows.

'[Nambitha] shall not claim the right to rebates and/or discounts on any basis of whatsoever nature unless a manager or director of [Astral] shall have agreed to such rebates and/or discounts in writing, and further provided always that such amount shall not be allowed on any goods despatched if payment for any goods whatsoever involved prior thereto is overdue'.

[11] The written contract was concluded in 2007. Its conclusion is admitted. (Nambitha pleads that there were earlier ones, basically to the same effect as the one in force at the material time.) Clause 20.1 is to the effect that the contract represents the entire agreement between Astral and Nambitha. Clauses 20.1, 20.2 and 20.3 proceed as follows.

'20.1 This contract represents the entire agreement between [Astral] and [Nambitha] and shall govern all future contractual relationships between [Astral] and [Nambitha] and shall also be applicable to all debts which [Nambitha] owes to [Astral] prior to [Nambitha's] signature hereto.

20.2 No amendment and/or alteration and/or variation and/or deletion and/or addition and/or cancellation of these terms and conditions, whether consensual or unilateral or bilateral shall be of any force and effect unless presented in writing and signed by a director or the duly authorised representatives of [Astral] and [Nambitha]. No agreement, whether consensual or unilateral or bilateral, purporting to obligate [Astral] to sign a written agreement to amend, alter, vary, delete, add or cancel these terms and conditions shall be of any force and effect unless presented in writing and signed by an authorised manager or director of [Astral].

20.3 No relaxation or indulgence which [Astral] may give at any time in regard to the carrying out of [Nambitha's] obligations in terms of any contract shall prejudice or be deemed to be a waiver of any of [Astral's] rights in terms of any contract'.

[12] Nambitha has accepted from the outset that it could not contend for a variation of any of the terms of the written contract between the parties because there never was a written variation. It accordingly chose to construct its main defence (and main counterclaim) around the propositions pleaded in paragraphs 4.4 and 4.5 of its plea.

'4.4 On a proper interpretation of clause 10.1 of the contract and in accordance with the trade practice between the Plaintiff and the First Defendant developed and implemented over many years, the Plaintiff's usual prices applicable at the time of dispatch of goods as contemplated in clause 10.1 of the contract entailed that the Plaintiff would charge the First Defendant the Plaintiff's best wholesale prices and would not favour any other wholesale customer with prices or discounts or advertising allowances more advantageous than the prices charged to the First Defendant.

4.5 The meaning of the term "usual prices" as pleaded in paragraph 4.4 above was confirmed between the parties on a repeated basis over the years and particularly:

4.5.1 During meetings held in Johannesburg between the Plaintiff represented by Johan Grobler, he being duly authorized thereto, and the First Defendant in and during 2002;

4.5.2 During meetings in and during 2003 between the Plaintiff represented by duly authorised officials, and the First Defendant, and;

4.5.3 During a meeting held in Durban between the parties on 31 January 2011 between Philip Tozer representing the Plaintiff, he being duly authorised thereto, and the First Defendant.'

[13] The first issue I have to decide is the proper interpretation of the terms of the contract between the parties with specific reference to Astral's allegation that it charged its "usual prices" to Nambitha at the time of despatch of the goods and Nambitha's allegations in paragraphs 4.4 and 4.5 of its plea. In retrospect the relevant part of the order for separation (paragraph 2.1) is somewhat inelegant, but it conveys clearly enough that the court must decide what the term "usual price" meant where it features in clause 10.1 of the contract.

[14] The second issue is whether the prices charged by Astral for the goods which were sold were the usual prices in the sense contended for by Nambitha in paragraph 4.4 of its plea.

[15] The third issue flows from the first and the second issues. In paragraph 6.5.1 of its plea Nambitha contended that from December 2010 Astral supplied Dawoods and other wholesalers with the Goldi product at prices lower than were allowed to Nambitha, or with rebates or discounts or advertising allowances more favourable than those allowed to Nambitha, or at both such lower prices and at more favourable rebates, discounts or advertising allowances. The question is as to whether Astral breached the contract by doing that. It is also alleged in paragraph 6.5.2 that Astral breached the contract by refusing to supply Nambitha when the latter refused or failed to pay the outstanding debt which is the subject of the claim in convention. (This latter aspect of the third issue should probably not have featured as an issue to be decided first. If the first and second issues are decided in favour of Nambitha, it claims to be entitled to a debatement of account. The debatement would cover the whole of the period during which Dawoods were in competition in KwaZulu-Natal, and would determine whether there was indeed an overdue amount payable at the time when Astral refused to supply. If there was such an overdue amount then there was no breach in refusing supplies as Astral's right to do so under the written terms of the contract is clear. However the debatement of the account is not the subject of this first phase of the trial.)

[16] The fourth issue to be decided (which like the third issue has more than one part) arises out of paragraphs 6.6 and 6.7.1 of the plea. These paragraphs really belong in the counterclaim, where they are in any event incorporated. They read as follows.

'6.6 In the period from at least December 2010 to approximately October 2011, the Plaintiff, represented by Philip Tozer, and or Mauritz Strauss, and or Elsin De Brito, and or Johan Grobler, they being duly authorised thereto, intentionally, falsely and fraudulently represented to the First Defendant that it was supplying goods to the First Defendant:

6.6.1 at the Plaintiff's usual prices and in accordance with the meaning of the term set out in paragraph 4.4 above,

6.6.2 at prices that were the same as the prices of goods supplied to Dawoods and other wholesalers, when in fact it was not ("the Plaintiff's fraudulent misrepresentation").

6.7 As a direct result of the Plaintiff's breaches of contract, and the Plaintiff's fraudulent misrepresentation, the First Defendant:

6.7.1 was induced to purchase goods from the Plaintiff set out in annexure "B" to the particulars of claim which it otherwise would not have purchased'.
(Further consequences are pleaded, but they are not to be decided or dealt with at this stage of the proceedings.)

[17] There is a fifth issue identified in the order as one to be decided first. It concerns a provision in the contract which would not permit Nambitha to withhold payment of a debt owed to Astral upon the basis that the former had a counterclaim against the latter. Mr *King SC*, who appeared for Astral, pointed out that in fact the case is being run upon the basis that the claims in convention and reconvention are being dealt with at the same time, and that the clause is accordingly not an issue. As I understand it Mr *Van Huyssteen*, who appeared for Nambitha, accepted this and I need say no more about the fifth issue.

[18] To complete this account of the order for separation of issues, if the first and fourth issues are decided against Nambitha, judgment must be entered in favour of Astral on the claim in convention. (The parties have subsequently agreed that in those circumstances the counterclaim must also be dismissed.) If that does not happen, I am to record my findings on the separated issues and the trial is to be adjourned to a date to be arranged for the determination of the remaining issues in the action.

The First Issue

[19] The trial in this matter took up more or less four weeks over a period of a little less than five years. The interlude between October 2015 (when evidence was first heard) and the resumption of evidence in August 2019 was taken up with what might be called a joint audit of prices charged and special discounts (credits) allowed in the course of the trade between Astral and Nambitha, and Astral and Dawoods, during 2011. The interlude contributed nothing to the resolution of first issue, correctly defined by Mr *Van Huyssteen* as a determination of the meaning to be ascribed to the term "usual price" where it appears in the written credit agreement.

[20] Furthermore, much of the evidence led in this case contributed little if anything to the resolution of this central question.

[21] It will be necessary to refer to the evidence of a number of witnesses when dealing with the first issue. As the perspective which each of them had of matters is different, it is convenient to introduce them at this stage to establish reference points.

[22] Astral called three witnesses.

(a) Mr P C Tozer was Astral's chief witness. He was employed in Astral's poultry division from October 2008 to June 2015. He started out as sales and marketing executive for the Early Bird division, and about 18 months later took over the same role for the poultry division of the whole group. Astral had three factories in Gauteng, which comprised the Early Bird division. Mr Tozer was based there.

(b) Ms A D Asmal has worked for Astral's Early Bird division from June 1995 to date. She was initially sales secretary until she was promoted in about 2007/8. She has been stationed throughout at Astral's Early Bird Durban office. Until she was promoted she had frequent contact with Mr O'Farrell (representing Nambitha) in connection with sales to him. Her involvement with Mr O'Farrell was irregular or intermittent after her promotion.

(c) Astral's third witness was Mr M J Mynhardt, who was employed as credit manager between 2009 and 2016.

[23] Nambitha called seven witnesses.

(a) Nambitha's first and most important witness was Mr O'Farrell. He was the guiding hand of Nambitha throughout.

(b) Mr B Williams worked for Astral from September 2007 until September 2010. He started off as the national sales manager and was later promoted to sales marketing executive. He was based in Gauteng.

(c) Mr J Neilson worked for Astral from 1989 to 2005 with a small hiatus of about two years around the year 2000. He was originally area sales manager in Johannesburg but in 1995 he became national key accounts manager.

(d) Ms A De Brito worked for Astral from 2007 until 2012. She started off as regional sales manager based in Durban. She became coastal sales manageress responsible for the Eastern Cape, Western Cape and KwaZulu-Natal a little later. In October 2010 she was promoted to national sales manager which required her to relocate to Gauteng. She held that position until February 2011 when, due to family reasons, she returned to her post at Durban.

(e) Mr M Strauss commenced employment with Astral in March 2010 and stayed with the company for two years. He was the sales and marketing executive for the inland region, based in Gauteng, where he reported to Mr Tozer. Despite its coastal flavour, KwaZulu-Natal was regarded as part of the inland region for which Mr Strauss was responsible.

(f) Mr H Solwa ran a small supermarket chain which used to buy chicken pieces from Nambitha, but subsequently bought from Dawoods which offered a better price.

(g) Nambitha's final witness was Mr D McLean, a chartered accountant, registered tax practitioner and a designated large-scale business rescue practitioner. He was engaged by Nambitha to look into its position in August 2011, and accompanied Mr O'Farrell to two meetings with Astral in mid-October 2011.

[24] Astral's mode of doing business was described by a number of witnesses, and constitutes the most important element of the context within which the written credit agreement between Nambitha and Astral was designed to operate.

[25] By way of background, Mr Tozer explained that in around 2011 Astral was producing about four million chickens per week. The growth period for the birds from day old to slaughter is about 34 days. Given that lead time, adjustments to stock or stockholdings to coincide with fluctuating market conditions are difficult to achieve. An overstock position means that Astral's price must come down. Roughly 60% of Astral's output is sold as a commodity – for cooking at home. The major retail chains bought their stock directly from Astral. The smaller retail outlets bought their stock from wholesalers like Dawoods and Nambitha. The considerations which affected the pricing of sales to wholesalers were not exactly the same as those applying to the large retail chains.

[26] Every Thursday morning there was what Mr Tozer called a "stocks and sales meeting" at which, *inter alia*, the price for wholesalers was determined. This price was regarded as the "mandate" price, and I will refer to it as such. The Thursday meetings would review Astral's stock position and market conditions in order to determine the mandate price.

[27] Customers other than the major retail chains were divided into A, B and C grades. Each of these grades had a different discount structure, the best one being allocated to the 'A' grade customers. According to Mr Tozer the grading was based on size and loyalty. 'A' grade customers benefited from a system called the 8:5:1 discount structure.

These customers got eight percent off the mandate price, and a further five percent and then a further one percent for payment within 30 days. (The lesser discount structures applicable to the two lower grades of customers are not material.)

[28] The price determined at the Thursday meetings was conveyed to customers on Friday and was applicable from the following Monday, usually for one week only. It would be relayed by each sales manager to his or her customers and sent to the administrative department to be loaded for invoicing purposes. In the ordinary course customers would place their orders with knowledge of the mandate price.

[29] The sales people were entitled to do deals with their customers at the mandate price. However, certainly according to Mr Tozer, there was scope for what he called "some other specific agreement" with an individual customer for a discount other than the one attached to the customer's grading. This was sometimes called a "tally". Mr Tozer said that this was not a preferred method of doing business. The sales personnel dealing with customers had no authority to grant it. It had to be authorised higher up. Whether a customer asking for such a benefit would be granted it turned largely on Astral's stock position. An excess stock position would justify authorising such a special discount or tally. According to Mr Tozer customers had what he called "ingenious ways of concocting these things". There might be a summer promotion, a winter promotion, a launch into spring, a birthday promotion and so on. It might be justified as a contribution to advertising. These special discounts or tallies linked to a time period or quantity to be taken would not be reflected on the invoice. They would be credited to the customers' statement after the fact. There is some evidence that a discount below the mandate price negotiated between Astral and its customers may have been reflected on some invoices, after agreement thereto was recorded as or on a "P" note - or "promotion note".

[30] Mr Tozer's evidence also extended to the effect of competition from other producers. He said that it was not uncommon to have daily or even hourly requests to match competitive pricing from other producers. From his point of view (as a senior in the Astral structure) he regarded these as no reason to panic. He described the

business as a “continual badgering type”. He stressed that Astral’s approach was really governed by its position as to stock. I think it fair to say that his view was that badgering from his customers about their inability to cope with prices at which his competitors’ products were being sold would be dealt with as follows. If Astral was carrying too much stock a request for assistance from customers would generate a favourable response. Otherwise requests for discounts on the mandate price would be refused as politely as possible.

[31] Mr Mynhardt confirmed that there were special deals from time to time but that it would be unusual for them to occur daily. From his perspective excess stock on Astral’s part was the only reason why Astral would have to negotiate better prices to get rid of the chicken. Presumably confining his observation to situations of excess stock on Astral’s part, he understood the principle to be that the more you buy the cheaper you get the product.

[32] Mr O’Farrell also spoke about deviations from the mandate price. He agreed to the proposition put to him by Mr *Van Huyssteen* that Astral itself might approach customers such as Nambitha in an over-stock situation offering a better price than what was mandated in order to move more stock.

[33] I found the evidence of Mr Williams to be somewhat confusing on the subject of whether there were additional discounts or tallies allowed at times. He said that in his time he cannot recall “doing a tally”. The reason he gave was that in the chicken business everything should be done on invoice – “the cleanest correct way to do things in that type of business”. More than one other witness agreed or would have agreed with Mr Williams on that score. However Mr Williams knew what a tally was; or what one type of tally entailed. A customer would be allowed, for instance, a ten cents tally for a given period. He would not know how much to credit the customer until the end of the period.

[34] Mr Williams was asked to comment on a special deal allowed to Dawoods on the occasion of the opening of their Durban distribution centre. It involved 20 truck loads of

two kilogram Goldi packs to be taken up during the first two weeks of March at a fixed (presumably advantageous) price and a promotional spend of R140 000. The nett effect of the offer was obviously a sale below the anticipated mandate price. His evidence was that when he was there the "same opportunity at a volume as well" would have been allowed to Nambitha. He explained that not to give it to Nambitha would be "against the ethos of the agreement which is each customer, or all 'A' grade customers, need to get the same price." He was not asked how this might have worked, given that Dawoods bought four to five times the quantity of Goldi products which Nambitha bought from Astral's. (Dawoods was by far the largest wholesale buyer of chicken products from Astral.)

[35] Under cross-examination Mr Williams eventually conceded that he was speaking to his "personal opinion" and his personal approach to running a business like that of Astral.

[36] Mr Neilson, who left Astral in 2005, confirmed the arrangement of the Thursday meetings which fixed a mandate price. He said that there were discounts or rebates given to the wholesale sector but most of these would be confined to small amounts as contributions towards the costs of advertising.

[37] Ms De Brito was a witness whose bias in favour of Nambitha and firm friendship with Mr O'Farrell was not hidden at all. She had worked for many years with Mr O'Farrell. It became clear, especially through the course of the evidence of Mr O'Farrell himself, that he was a person who cultivated genuine personal relationships with people with whom he did business. Almost all Astral's customers took delivery of the chicken they bought from a logistics business known as Hestony which was contracted to Astral to make such deliveries at fixed rates. The position was different with Nambitha. Mr O'Farrell had his own logistics company. It would collect Nambitha's purchases and make the deliveries, and Astral would pay for that at the Hestony rates. This made for a profitable and secure logistics enterprise. Whilst there is no gainsaying the commercial significance and advantage of this mode of business, my clear impression, gleaned from

all of the evidence, is that Mr O'Farrell's people skills served Nambitha's business interests well.

[38] Like the other witnesses, Ms De Brito confirmed that mandate prices were established at Thursday meetings and that they normally held for a week. She confirmed that a customer like Nambitha could ask for a contribution towards a promotion or an advertising pamphlet.

[39] It is not disputed that the mandate price determined at the Thursday meetings was the same throughout the country. When Ms De Brito got to Johannesburg in October 2010 (that is to say the year before Dawoods joined the market in KwaZulu-Natal) she found large quantities of credit notes, evidence of rebates granted in particular to Dawoods and the BJ Group. Her evidence seems to be clear enough that credits were being granted in terms of agreements for rebates which had the effect of reducing the cost to the beneficiaries of the credit notes of their Goldi product purchases below the invoiced figures which accorded with the mandate prices. In the case of Dawoods her evidence seems to be that this was historically well entrenched to the point where she called this an "additional clause in [Dawoods] rebate structure".

[40] Her evidence was that there were two other "anomalies" (to use her term) in Durban, one in favour of Chester Meats, and one in favour of Nambitha, which was entitled to buy two trucks per month at what she called "a special price" (which I think, on her evidence, also involved a ten cents per kilogram discount, rebate or tally).

[41] Like Mr Mynhardt and other witnesses, Ms De Brito took the view that a system should be devised where rebates or discounts or tallies after the fact are not allowed, and any discounts allowed are reflected on the invoices for goods in respect of which these benefits are allowed. As to the extent of administrative complications brought about by the rebates or special discounts on transactions invoiced at the mandate price, she spoke of finding credit notes in Johannesburg when she arrived there in October

2010 piled up to perhaps a metre high. Coming from the Durban office this was something of a revelation to Ms De Brito.

[42] Mr Strauss, also called by Nambitha, confirmed the arrangement of credit notes being used in effect to allow a discount or rebate in respect of product invoiced at the mandate price. One of his tasks was to authorise these credit deals which would presumably have been negotiated between the buyer and the relevant sales personnel. Initially he had to sign all of the variances. Later on he only had to deal with those above a certain limit. He was unsure about the limit, and mentioned both R20 000 and R50 000 as the limit. His evidence was that there were more credit notes in favour of Dawoods as a norm when compared to the rest of Astral's customer base.

[43] To the extent that the evidence of Messrs Williams and Neilson especially on the issues of rebates or tallies or discounts may contradict at different levels the conclusion I have reached as to the mode of business of Astral, I favour the versions of the other witnesses, and in particular that of Mr Tozer. As Mr Tozer pointed out, in his business 'there has to be some form of commercial discussion and calculation that takes place, but you do it certainly with large customers because the rest of the industry is also doing it. So if I don't do it someone else might do it, and then I don't get an advert and then I don't move my product, so it becomes a – it's not a good practice but its part of the marketing mix'.

[44] Mr Tozer also pointed out that things like advertising costs were not ordinarily audited. An astute customer would negotiate so-called advertising spend at a level which would allow some of it to be put into what Mr Tozer called "margin". The example he chose to illustrate the point is of a customer who may have been given an advertising credit of R100 000, but only spent R10 000 on an advertisement in the Mercury (a well-known KwaZulu-Natal newspaper).

[45] I find that as a matter of probability Astral's mode of doing business before and in the crucial year (2011) was as follows.

(a) Nearly every Thursday a meeting would be held where market conditions (i.e. market conditions from Astral's perspective – how it had to compete in the market) and the state of Astral's stock would determine a mandate price for, *inter alia*, the Goldi product which is at the centre of this litigation.

(b) The mandate price applied across the country. Astral's wholesale customers were graded. The discount structure for 'A' grade customers (amongst whom were Nambitha and Dawoods) was a fixed one, and better than those of 'B' and 'C' grade customers. The 8:5:1 regime applicable to 'A' grade customers meant that the invoice price would be the mandate price less eight percent. (As it turns out, whether in some cases the mandate price would be further discounted on the invoice itself is not material.)

(c) There was a system of extra discounts, tallies and rebates (there is no clearly discernible reason for this different terminology) which would allow a customer to receive credits to its account with Astral. Some of these would arise from a claim for assistance with advertising spend and others more generally under the pretext of a promotion. The issue as to whether a request from a customer for such a benefit would be accepted, and equally as to whether Astral would approach a customer with an offer of such a benefit in exchange for a higher uptake of Astral's product, turned largely on the state of Astral's stock. However, as between customers, size mattered.

[46] With that somewhat lengthy introduction it is possible to focus on the question which needs to be answered, namely whether "the usual price" referred to in the contract between Astral and Nambitha meant the best wholesale price not undermined by the grant to any other wholesale customer of rebates or discounts or advertising allowances more advantageous than those afforded to Nambitha.

[47] The first thing to notice is that in his evidence Mr O'Farrell did not support the ambit of the privilege pleaded. The following passages from his evidence illustrate his

contention as to the regime which prevailed before Dawoods entered the KwaZulu-Natal market at the beginning of 2011.

(a) "They were my longstanding customers. And basically the arrangement was that I was – always had the best price available to go to those customers with. And that effectively Early Bird was not supporting and would not support any competition to myself. In my market."

(b) "And that Early Bird – there was a policy in place, okay, that I obtain the best price for my market".

(c) "And that Early Bird, under no circumstances, would ever support competition against myself in the market that I served".

(d) On the subject of the market he served: "My independent market – its retailers, wholesalers – was the market channel that I was responsible for. Okay?"

(e) "So when I talk about "price entitlement", I am talking about the market that I served and Early Bird understood me to be serving. I have got no claim or ever made a claim to having the best price in the country". "It's the best price available from Early Bird for the market that I serve."

[48] In my view the difficulties with what Mr O'Farrell was contending for are obvious, even in advance of Dawoods arrival. It is not contested that the market in KwaZulu-Natal was effectively carved up. Another major wholesaler ("Pongola") operated in areas of the province where Nambitha did not, and did not attempt to cultivate Nambitha's customers. There were other 'A' grade customers in KwaZulu-Natal, although the evidence is not clear as to how many others there were (one or two, or as many as twelve). Whatever the position, and perhaps because of established relationships to Nambitha's advantage derived from its associated logistics business, save for one exception of a peculiar type,

Nambitha's customer base, certainly with its major customers, seems to have become impregnable.

[49] The difficulty with this situation, from Nambitha's perspective, is that Mr O'Farrell did not know whether the stability in Nambitha's market was a product of the other wholesaler and operators in this province not ever being given rebates, tallies or promotional discounts, advertising spend, more advantageous at any particular time than such as might have been offered to Nambitha. Mr O'Farrell had to have known that others, like him, would ask for promotional benefits from time to time, and I am satisfied that he would no more have expected those benefits to be given to him without asking, than he would have expected the others to receive the benefits he asked for. That is clearly not how the market worked.

[50] Furthermore, it is not disputed that Astral unsurprisingly implemented a rule of client confidentiality. An employee of Astral privy to the terms of the business between Astral and a customer was not entitled to disclose or discuss those terms with any other customer. Mr O'Farrell himself recalls an incident in 2006 or 2007 when it came to his knowledge that a Mr Mathew, a regional manager, discussed Nambitha's business with a then competitor of Nambitha named Chickery. He took it up with the managing director of Astral and Mr Mathew was disciplined, and some manner of compensation was given to Nambitha.

[51] Mr Tozer pointed out it would be unethical for Astral to go "running around the market place" to customers disclosing what Astral had agreed with another customer, and what that customer was going to do in the press, and so on. It was unacceptable to discuss with one customer the trading terms, promotions or prices which had been agreed with another customer. There was no dispute about this proposition raised by other witnesses.

[52] On the other hand there was also no dispute about the fact that there was a well-established grapevine in the industry – so-called "market intelligence". It seems that the

customers of Astral sometimes got to know of information which would not ordinarily have been disclosed, and ought not to have been disclosed (if it was) by Astral employees. There is no clear evidence as to how this sort of information was generated. Given human experience the probabilities are that sometimes there were leaks; and at other times a belief in a certain state of affairs might have been generated by what appeared to be reasonable deductions from known factors such as the performance of a particular party in the market. To the extent that Mr O'Farrell's contention that no one in his "market" ever got more favourable overall terms than Nambitha was based on deduction of this kind, it can hardly be regarded as reliable. What he could say is undisputed – namely that as an 'A' grade customer nobody in his area (or for that matter in the country) got better prices than he did. In saying that I used the word "price" to denote the mandate price.

[53] Nevertheless it is common cause that Nambitha was the biggest wholesale player in this province when it came to the purchase and distribution of Astral's Goldi product. Mr O'Farrell acknowledged that when it came to getting rid of excess stock, the size of Astral's customer mattered, in the sense that those who took more would get a better promotional discount. But he attempted to qualify that by saying that size was not the final determinant. Nevertheless, applying the rule that size matters (to which Mr Tozer testified in clear terms) in KwaZulu-Natal, Nambitha would presumably have tended to obtain the best promotional discounts when Astral needed to diminish its stockholdings. That would support the argument that normally in the period prior to the arrival of Dawoods in this province, no one ordinarily trading in this province would be advantaged over Nambitha when it came to trading position, taking into account both the mandate price and any tallies, rebates, additional discounts or advertising allowances, except in special circumstances personal to such other customer of Astral.

[54] But that set of circumstances does not on its own give rise to a contractual right always to receive an as good if not better price than anyone else in the province (or as Mr O'Farrell would have it, in his "market") at all times; or indeed at all. I will revert to this later.

[55] Mr O'Farrell's evidence, shifting his claim to the best trading position available to wholesalers from a national one (as pleaded) to his own market, introduces an added complication to his claim to a contractual benefit in that regard, and the existence of what his plea calls a "trade practice".

[56] The implication of the so-called "trade practice" pleaded by Nambitha is that historically, prior to the arrival of Dawoods in this province at the beginning of 2011, notwithstanding the size of Dawoods, it always paid what Nambitha paid for the Goldi product, and got the same discounts, rebates or tallies, and so on, as Nambitha did. The term "trade practice" was in my view introduced into the pleadings for the simple reason that there is no evidence of this "implied term" being expressed in words. If it existed, as a contractual term, one would have expected it to be reflected in the written credit agreement which governed the provision of credit to Nambitha for its purchases from Astral. What is contended for is a "practice" – something that actually happened, and was so entrenched that it must be taken to not only affect but also determine the meaning of the term "usual price" where it appears in the written contract.

[57] There is no evidence of this equality between Dawoods and Nambitha in the period up to the beginning of 2011. Indeed, what evidence there is (for instance of the historical ten cents per kilogram tally with which Dawoods was favoured) suggests that no such practice existed at all. No witness spoke of it. On the contrary, Ms de Brito's evidence was that the number of credit notes in favour of Dawoods which she found in Johannesburg in 2010 was not replicated at all in KwaZulu-Natal.

[58] The change of tactic by Mr O'Farrell, confining his alleged right derived from practice to the best price and the best tallies and promotional benefits, and so on, to his own market is in my view an exercise in restating the question to generate the desired answer. This tactic is often employed in order to advance an argument when the only way of doing so successfully is to extinguish the relevance of factors inconsistent with the argument.

[59] It has not been established, and is in my view altogether improbable, that no other wholesale customer of Astral operating in the geographic area in which Nambitha operated, ever got terms as to price and tallies and the like which were better at any one point in time than was offered to Nambitha. Nambitha's success in its "market" does not prove otherwise. The point is that, given the commercial advantage which Nambitha enjoyed because of the logistics arrangement referred to earlier (and, I must add, Mr O'Farrell's people skills), it is probable that as a general rule none of its competitors in the geographic area in question would have bothered in the ordinary course to steal away Nambitha's customers, and especially its major customers. There is no evidence to support the proposition that there was, prior to 2011, a competitor strong enough to out-trade Nambitha, even with the benefit of better terms from Astral from time to time.

[60] The arrival of Dawoods in 2011 created a quite different matrix of circumstances. Because of its size (four to five times the buying power of Nambitha for Goldi products alone), and the fact that it did not confine its business either to chicken pieces or to Astral, Dawoods was in a position to challenge Nambitha in its own market. On Nambitha's case the arrival of Dawoods brought about a regime which had not prevailed before. Either:

(a) henceforth Nambitha would enjoy not only the same mandate price as Dawoods, but all of the promotional benefits, extra discounts or tallies and the like which were available to a wholesaler four to five times its size, something Nambitha had never had before; or

(b) Dawoods had to accede to Astral depriving it of all the trade advantages it enjoyed by reason of its size in order to allow Astral to avoid a breach of its alleged contractual obligation owed to Nambitha not to allow any wholesaler better deals in Nambitha's market that were available to Nambitha. (The implications of this latter scenario would affect Dawoods nationally, as the evidence is that Astral could not control, or be expected to control, where its Goldi chicken was sold by Dawoods.)

[61] Neither of the scenarios painted above, or anything in between, would reflect trading circumstances established by the trade practice contended for by Nambitha. One of the features of the argument which Mr O'Farrell and Nambitha overlook altogether is that, as much as they would like it to be otherwise, this case is not about the perpetuation of benefits historically enjoyed by Nambitha. Nor is it about the (allegedly just) protection of the advantage enjoyed by Nambitha which generated its beneficial trading position in its market. The case is about the contract between Astral and Nambitha. Whether one founds the enquiry in the trade practice pleaded by Nambitha, or simply looks at the facts in order to derive an implied or tacit term, the enquiry must be directed at the question as to whether Astral in fact bound itself, or regarded itself as being bound, to either reducing the beneficial status of Dawoods' trading terms, or increasing the benefits of Nambitha's trading terms in the event of Dawoods deciding to re-enter the KwaZulu-Natal market. In my view the answer given by Mr Tozer to a question put to him in evidence supports a conclusion that this was improbable. When asked if, at the meeting of 31 January 2011 referred to in the pleadings, he was asked to and did confirm an arrangement that Nambitha would get the best price always, and so on, he said "if I had agreed to same prices at all times to any customer versus anyone else I think I would have been fired".

[62] Notwithstanding some of the observations already made above, I must deal with the evidence which may have a bearing on Nambitha's contention that it had a contractual right to require of Astral not to afford a better price, or better discounts and tallies, to anyone else, or anyone else who might compete in Nambitha's market.

[63] The first thing to note is that none of the witnesses, and especially none of the witnesses called by Nambitha save for Mr O'Farrell, claimed to have knowledge of the existence of the contractual right contended for by Mr O'Farrell. The closest one gets to anything which might support Mr O'Farrell's contention is the evidence of Mr Williams. As far as any special discount or dispensation was concerned, he confined his observation to what would apply within a region, as opposed to nationally, despite the

fact that prices are fixed nationally. He said that if any such special dispensation were to be allowed to one 'A' grade customer then it should be allowed to the other 'A' grade customers, because not to do so would be "against the ethos of the agreement". Of course that is not quite the same thing as saying that to give it to one and not the others would constitute a breach of contract with the others. Furthermore, when his views were tested in evidence it became clear that he was talking about a personal view of matters. His perception concerning the "ethos" of the agreement as a matter of probability lies in his statement that he "would never have done something like this and not offered it to the same person because this would have been a debate for at least six months and it would be brought up again a year later on how you favoured Mr Nambitha and not me, and it would ruin your relationship".

[64] I add the observation that on all the evidence before me it does seem correct that a consistent and unmanageable advantage allowed to one customer over another was not in Astral's interests, as it would disturb and confuse its efforts to penetrate and maintain penetration of the market into which Astral and its competing producers sold their product. But of course that is one factor amongst the many others which determined the terms upon which Astral would do business with its customers.

[65] According to paragraph 4.5 of Nambitha's plea the meaning it ascribes to the term "usual prices" was confirmed between the parties on a repeated basis over the years. That general statement is particularised in the plea. The first reference is to meetings held in Johannesburg between Johan Grobler (of Astral) and Nambitha in and during 2002. A few lines of Mr O'Farrell's evidence covers this topic. He said that when he decided to compete in Gauteng Mr Grobler committed "that I would certainly have equal prices" – equal to Dawoods – because Mr O'Farrell was concerned that there might be a disparity. He said he never had to go back to Mr Grobler to complain about prices but acknowledges that Mr Grobler might have had a motive of his own at that time, bearing in mind the then close relationship between Nambitha and Mr Grobler, and that Mr Grobler might have been trying to teach Dawoods a lesson. This evidence is of little value for more than one reason. Firstly, it could not be tested because Mr Grobler is

deceased. Secondly, it suggests that at the time Mr O'Farrell had little confidence in the so-called trade practice that he was entitled at all times not to be disadvantaged whether by way of price, discounts, or tallies. Thirdly, given the mode of business of Astral which I have already described, Mr Grobler's undertaking would have had to have been expressed in more precise terms if it was sought to be held up as evidence of the contractual right pleaded in paragraph 4.4 of the plea. It is improbable that in 2015 Mr O'Farrell would have a clear and reliable recall of what exactly passed between him and Mr Grobler in 2002.

[66] The second instance pleaded is that during meetings in 2003 between Astral represented by duly authorised officials and Nambitha, the special meaning of the term "usual prices" was confirmed. No evidence was led in support of this contention.

[67] The third and final example of the confirmation pleaded by Nambitha is said to have occurred at a meeting in Durban on 31 January 2011 between Mr Tozer and Mr O'Farrell. This meeting was dealt with in evidence.

[68] As the first witness, Mr Tozer dealt with the subject before Mr O'Farrell. He was confronted with Nambitha's contention in his evidence in chief when, unsurprisingly, counsel for Astral had to put the propositions to him as they were pleaded. The first question was whether, at the time the meeting was held, Mr Tozer believed that Nambitha got "the best price automatically every day, every week, including best rebates and everything else", to which the witness replied in the negative.

[69] He was then asked whether at the meeting he confirmed an arrangement such as that contended for by Nambitha. This ensued:

'I am not sure. I am not sure, but I can say that my understanding was that Mr O'Farrell asked that I treat him equally.
Sorry, equally with whom? – equally in terms of Dawoods. If I had agreed to same price at all times to any customer versus anyone else I think I would have been fired.'

[70] Mr Tozer then said that his recollection was that Dawoods and Nambitha would be treated equally.

'I was comfortable with the principle of equal treatment. For example the trading terms were the same, the principle of Mr O'Farrell asking for promotional prices, Dawoods having promotional prices, and I would be fair in that they would both have promotional prices at times. I was comfortable with equal treatment'.

A little later he explained as follows.
'M'Lord, I agreed to equal – I agreed to equal – treat equally. Equal for me in respect of – and there are a number of criteria that comes into play on equal'.

[71] Counsel for Astral then tried to achieve more clarity. Mr Tozer's evidence was that he thought Mr O'Farrell was asking for, or that it was implied in what he was asking for, that, for instance, if Dawoods got a promotion, then Nambitha would get the same one in terms of rands and cents and every other discount or benefit exactly the same on all occasions. Mr Tozer says that that was how he interpreted what Mr O'Farrell was asking for but it was not what he agreed to.

[72] Mr Tozer's evidence on the subject of the meeting was barely canvassed in cross-examination. The particularity which characterised Mr O'Farrell's evidence on the subject was not put to Mr Tozer. He was questioned about the use of the terms "equal", "same pricing", and "identical" that emanated from his evidence with respect to the meeting and it was proposed to him that they were in effect no differences between the meanings of those words. Mr Tozer disagreed. He was asked to confirm that Mr O'Farrell had the impression that "equal meant equal". His response was as follows.

'And, as I explained yesterday, equally in terms of trading terms, the trading terms were equal apart from the early settlement. Equal, equal handling of the business when it came to promotions, etcetera. That's how I understood it, but at no time, as I explained yesterday, could I have agreed to identical, the same, etcetera and I say that because in so many of the papers there are ongoing requests for promotions from both parties. So if I – what I did for one, one

would have to do for the other, and it was not a practical thing to have implemented or agreed to'.

With that explanation Mr Tozer confirmed that he did not agree to identical pricing.

[73] Mr Tozer was cross-examined over a number of days. At the end the question of the January 2011 meeting was raised again by the court. Mr Tozer again tried to give an account of what he could remember of the meeting. He confessed that it was difficult to answer the questions and to remember what exactly transpired. He said there was no dispute between Mr O'Farrell and him at the meeting. There was a good business relationship. He said Mr O'Farrell was concerned. He was worried about what was going to happen to his business in this province. That concern was justified. Dawoods was a family business that had generated enormous wealth over a period of 30 odd years. Mr Tozer continued:

'Mr O'Farrell clearly was concerned. The discussions were around as long as you – and I am not sure these were the – these couldn't have been the exact words, but they were something like, "as long as you are fair to me. Treat me fairly, treat me equally", something like that. There was no discussion around "you will give me the best all the time".'

[74] Mr O'Farrell's evidence painted a somewhat different picture of the meeting.

'I wanted to, you know, protect my history and status, position in the market. I had no problem with equal prices; I would have a problem with better prices for Dawoods. I was very emphatic that I meant equal prices, equal tallies, equal discounts, equal rebates. And that the trading terms would be equal and effectively, as a result of having equal prices, equal tallies, we would be on a level playing field.'

[75] Mr O'Farrell had a habit in his evidence of referring back to evidence already given by other witnesses (and, for that matter evidence which might yet be given following his). When asked about his statement of what he wanted, he said that

'basically Mr Tozer agreed with my requests – okay. There was no resistance. … so – as Mr Tozer in evidence has stated, he clearly understood what I wanted but wants to hedge to what he agreed'.

Besides the fact that I do not agree with Mr O'Farrell's implied criticism of Mr Tozer's evidence, it must be observed that whereas Mr O'Farrell was in his evidence speaking about a discussion between the two men in which equal tallies, rebates and discounts were specifically raised, Mr Tozer was not.

[76] The conflicting versions between the two as to what exactly was discussed are quite apparent from Mr O'Farrell's answer to the question as to whether he heard the phrase "equal treatment" being used at the meeting. His answer went as follows.

'At the meeting, the phrase "equal treatment" wasn't used. It was a phrase that I know I subsequently used in some correspondence, but at the meeting, the terms I used was "equal pricing, equal tallies, equal trading terms". We didn't discuss advertising, however, at the meeting and we didn't discuss transport costs, because I didn't believe - certainly with regards to transport costs – that there could be any differential. The transport costs, advertising wasn't discussed at the meeting, but prices, tallies, rebates, payment terms were discussed at the meeting.'

[77] Mr O'Farrell was cross-examined at some length on the proposition that the cause of absolute equality between the treatment of Dawoods and Nambitha for which he contended could not actually be served by the application of a regime of the kind he said was established or confirmed at the meeting of 31 January 2011. I do not propose to go through all the examples put to him. They were of the type of the following. If Dawoods negotiated a special price for 50 trucks to be taken over a week, and Nambitha were to be afforded an equal benefit, how could that be achieved? Nambitha only takes ten trucks in a week. Was Nambitha's benefit to be confined to 10 trucks? That would not be equal. Would Nambitha be entitled to take 50 trucks at the special price over five weeks? That would not be equal either. Mr O'Farrell's response to such questions went along the following lines. First of all, he claimed that the subject of special promotions did not come up at the meeting of 31 January. That is not correct. His earlier evidence

was that advertising did not come up at the meeting. On the evidence before me tallies, discounts and rebates and the like had everything to do with promotions, as opposed to sales at the usual price. He continued:

'…but I would have expected as the outcome of our agreement that if such a situation was going to arise that there would need to be transparency with me in saying this is the situation and our intention is to do this but we will give you the *quid pro quo* at such a date or you will advise us when you request the *quid pro quo*. Mr Tozer's evidence, even if he wants to hedge from what an equal price was, was that certainly there was to be equal treatment, okay'.

[78] Amongst others, two observations can be made regarding this passage of evidence.

(a) Mr O'Farrell's reference to the "outcome of our agreement" may or may not have been the product of a slip of the tongue. However in my view it is closer to the truth of what the meeting of 31 January 2011 was all about, than the assertion that it involved mere confirmation of an existing trade practice. It was not put squarely to Mr Tozer that whatever transpired between the two men at that meeting amounted to confirmation of an existing trade practice. (But judging from his answer during his evidence in chief as to whether he knew when he went to the meeting, that there was such a trade practice, I have no doubt that he would have denied it had he been cross-examined on the issue).

(b) Secondly, what comes through, and what is supported by a consideration of all of Mr O'Farrell's evidence, is the fact that Mr O'Farrell could not state the terms he contended for with such precision as would justify their acceptance as enforceable contractual provisions within the context of the mode of business between Astral and its customers, and especially its wholesaler customers.

[79] Mr Tozer impressed me as a witness who was concerned to ensure that his evidence was true and accurate to the extent that it was possible for him to present it as such. His evidence on the subject of the meeting of 31 January 2011 serves as an example of the care he took not to present as certain any proposition about which he

was uncertain. He was an honest witness and I regard him as a reliable one. On the subject of the meeting of 31 January I reject Mr O'Farrell's evidence where he contradicts that of Mr Tozer. The probabilities favour Mr Tozer's version. Mr Tozer was an astute businessman, well versed in the industry in which he was employed by Astral. On all the evidence I find the terms of business (or the terms of the contract) pleaded in paragraph 4.4 of the plea to have been incapable of implementation in the manner the words employed to describe the term convey. As a matter of probability Mr Tozer would not have agreed to those terms.

[80] The bundles of documents are littered with emails from Mr O'Farrell to Astral complaining, bitterly at times, about the fact that Nambitha was being out-traded by Dawoods in Nambitha's own market through 2011. There are requests for better pricing. They amount to requests for assistance. All but one of the emails are devoid of any claim that Dawoods' advantage in the market was a product of a breach by Astral of its contract with Nambitha. When cross-examined on this Mr O'Farrell's response was that these emails were followed up with personal oral exchanges with Astral employees where his case was stated more forcefully. There was no corroboration of this from any of Astral's former employees who were called as witnesses by Nambitha. The most that can be said, in my view, is that they were aware that all 'A' grade customers were offered the same mandate price, a subject about which there is no dispute between the parties.

[81] The email which is different is dated 12 October 2011. It was addressed by Mr O'Farrell to Mr Tozer (and copied, *inter alia*, to Mr McLean). There we see this.

'Phil, please I have the highest respect for you and don't doubt your integrity or commitments given to me that Nambitha would be treated equally as Dawoods. (Same pricing. Rebates ..)'

Of course by then Mr O'Farrell had already consulted with Mr McLean, whose evidence was to the effect that he had assisted Mr O'Farrell in composing the email.

[82] There are other factors which illustrate the improbability of the terms of business pleaded in paragraph 4.4 of the plea (whether one regards it as a national or regional phenomenon). I do not intend to go into them all. One deserves mention, because it was highlighted in the cross-examination of Mr O'Farrell. The simple way in which the term of the alleged trade practice was pleaded, and the way in which Mr O'Farrell sought to present it, means that whatever Dawoods negotiated would be given to Nambitha, and whatever Nambitha negotiated would be given to Dawoods. The term or the practice affects Dawoods as much as it affects Nambitha. Mr O'Farrell could not answer the question as to why, if that was the case, Dawoods would not be told of it; and as to why in those circumstances Nambitha and Dawoods did not join together in their negotiations with Astral over price, promotions, rebates, discounts and so on. His evidence was that he would negotiate for Nambitha and Dawoods would negotiate for themselves. He claimed to have expected that Mr Tozer would, after the meeting of 31 January 2011, disclose to Dawoods what had transpired so that Dawoods would know that whatever they negotiated would be given to Nambitha as well, and vice versa. Nevertheless he claimed that he refrained from combining with Dawoods to negotiate prices because that would amount to "collusion". My own view is that this aspect of Mr O'Farrell's evidence makes no sense, fundamentally because the existence of the terms contended for in paragraph 4.4 of the plea, which give rise to such questions, are themselves insensible and unbusinesslike.

[83] The essence of Nambitha's case on this first issue is that a trade practice or trade usage gave rise to the term "usual price", where used in the written agreement, having a peculiar or special meaning. A contract is subject to a trade usage:

'provided that it is shown to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, and does not conflict with positive law (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract.'

See *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 (2) SA 642 (C) at 645 G-H; and *Frank v Ohlsson's Cape Breweries Ltd* 1924 AD 289 at 296-297.

[84] It does not strike me that there is any difference that matters in the present context between these requirements for an enforceable trade usage or trade practice, and those for the importation of a tacit term into an otherwise express agreement. Adopting either approach, the difficulties with the case for Nambitha (besides the absence of proof) are that what is contended for is far from clear and certain (a subject on which I need say no more than has already been said); and what is contended for contradicts the express terms of the contract.

[85] As to the conflict with the written contract, the following may be said.

(a) Clause 10.1 provides for a right of the part of Nambitha to purchase goods on credit for so long as Astral allows the credit agreement to continue to exist, but at "the usual price". In the context of purchase and sale, a "usual price" would normally be regarded as one applicable to the product rather than to a particular customer. Clause 11.3 has the effect that no right to any rebate or discount can be enforced unless a manager or director of Astral has agreed to afford it in writing. The contract therefore draws a clear distinction between that which may be claimed as of right without any further ado (ie the "usual price"), and that which can be claimed (ie enforced if necessary) only if it has been agreed to in writing, that is to say rebates or discounts.

(b) The context within which to construe this contract is clear on the evidence. As a matter of fact each graded customer is entitled to buy a product from Astral at the mandate price determined each Thursday, and with the benefit of the standard discount for the grading which, it is common cause, was recorded in writing, certainly in the case of Dawoods and Nambitha. It is overwhelmingly probable that the mandate price thus derived on a weekly basis is the usual price to which clause 10.1 of the agreement speaks.

(c) Clause 11.3 clearly speaks to other and additional discounts or rebates (or tallies, and so on) which Astral may agree to afford a customer.

(d) All the evidence before me (and indeed the years of analysis of the transactions between Astral and Nambitha and Astral and Dawoods which took place mid-trial) goes to show that the differences between what one might call the overall net consideration ultimately paid by Dawoods for product, and that ultimately paid by Nambitha for product, arose because of different discounts, rebates (or tallies and the like) afforded to the two parties. On the evidence there was no difference between the mandate prices offered to the two customers.

(e) Where paragraph 4.4 of the plea speaks to a right on the part of Nambitha to receive discounts or advertising allowances as good as those which might be allowed to any other wholesale customer, it is speaking to the very discounts, rebates (or tallies, and so on) which are the subject of clause 11.3 of the contract. What is asserted is a right to receive such despite the fact that Astral's agreement thereto was not reduced to writing as required by clause 11.3 of the contract.

(f) In the circumstances what is contended for conflicts with the express written provisions of the credit agreement.

[86] My finding on the first issue is according that the term "usual price" where it appears in the written credit agreement does not have the meaning attributed to it by Nambitha in paragraph 4.4 of its plea.

Second Issue: Were the prices charged to Nambitha in accordance with the meaning it attributes to the terms "usual price" in paragraph 4.4 of the plea?

[87] In the light of the conclusion I have reached on the first issue, the second issue becomes irrelevant. Nevertheless the finding on this issue should be stated if for no

other reason than because it is not in dispute. Indeed the finding was conceded by Astral from the outset of the trial.

[88] It is a matter of undisputed fact that the net prices (ie including discounts or tallies, and so on) charged by Astral to Nambitha during the period that it was in competition with Dawoods during 2011 were not the same as those charged to Dawoods. The exercise which took all the time mid-trial ought to have generated an agreement between the parties as to the extent of the divergence between the nett cost to Dawoods and Nambitha, respectively (ie including discounts, tallies and so on), during the period in question. A combination of a dispute over the question as to whether the exercise or audit was to be confined to two kilogram packs, and Mr O'Farrell's obdurate belief in the proposition that Astral was hiding things throughout (ie dishonesty withholding accounting information) meant that what was agreed at the end of the exercise was agreed subject to his qualifications. The agreement relates only to 2 kilogram packs, although those comprise the overwhelming majority of sales. I agree with Mr *Van Huyssteen* that the comparison to which one should have regard is the one which ignores the credits passed in favour of Nambitha at a stage when it was too late for it to take advantage of them. That comparison reveals that in February, March and August 2011 Nambitha enjoyed a pricing advantage over Dawoods of between two cents and 13 cents per kilogram. Over the remaining months from January to October 2011 Dawoods enjoyed an advantage over Nambitha of between 8 cents and 49 cents per kilogram. The advantage in most of those months was higher than the mean of those figures.

The Third Issue: Did Astral breach the agreement by allowing Dawoods more favourable nett prices (after discounts, etc) or by ceasing to supply Nambitha with effect from 31 October 2011?

[89] The answer to the first part of this question is self-evident. The allegation that the pricing allowed to Dawoods from time to time was in breach of the contract depends on a finding in favour of Nambitha on the first issue. There was no breach of contract.

[90] As to the second part, I think that I have dealt with it sufficiently in the introductory part of this judgment. I did not understand Mr *Van Huyssteen* to argue that in terms of the credit agreement Astral was obliged to continue to supply Nambitha notwithstanding the latter's failure to pay for goods already purchased.

The Fourth Issue: Did Astral make false representations to Nambitha which induced Nambitha to purchase the goods for which it has failed to pay, which goods it would not otherwise have purchased?

[91] In dealing with this issue it is necessary to remind oneself of the particulars of the allegations set out in paragraph 6.6 of the plea.

(a) It is alleged that intentional, false and fraudulent representations were made to Nambitha.

(b) It is alleged that these representations were made by Mr Tozer, and/or Mr Strauss, and/or Ms de Brito, and/or the late Mr Grobler.

(c) In each case the representation was that goods were being supplied to Nambitha at a price in accordance with the meaning of the term "usual price" set out in paragraph 4.4 of the plea, and that the prices were the same as those being supplied to Dawoods and other wholesalers.

[92] Mr Strauss and Ms de Brito were called as witnesses by Nambitha. It was not put to either of them that they knew that the contents of paragraph 4.4 of the plea reflected a contractual term enforceable by Nambitha against Astral. Neither of them confessed, nor were asked to confess to the proposition that they intentionally and with fraudulent intent misrepresented the position to Mr O'Farrell in the manner alleged in the plea.

[93] There was no evidence at all that Mr Grobler made any false representation to Nambitha or Mr O'Farrell. Mr Grobler was based in Johannesburg. There is the

evidence of the fact that he attended a luncheon meeting with, *inter alia*, Mr O'Farrell, but that was when he made the comment "may the best man win" when the subject of Dawoods' trade successes in KwaZulu-Natal was touched on, a comment which apparently enraged Mr O'Farrell and which Mr Tozer felt was not in order.

[94] The evidence that there is about exchanges on the question of price must be seen against the backdrop of the rule imposed by Astral that information concerning one customer's business and prices was not to be shared or discussed with another customer. It is common cause that the rule prevailed. I have discussed it already earlier in this judgment. I do not intend to traverse the ground fully again.

[95] Mr O'Farrell knew of this rule of non-disclosure. By way of illustration, this passage from the evidence of Ms Asmal went unchallenged.

'…Did he ever ask you this specific question, "look, tell me what the other wholesalers are getting price wise because I am entitled to the best price with them"? Did he ever ask you that specific question? --- No.

About customers generally asking about prices and asking about other people's prices – did that happen? --- Yes, but it eventually became a standing joke between, you know, Mike and myself. It was, okay Mike I'll phone the other customer, I'll tell the customer what's your price and then I'll phone and tell you what's his price'.

Of course, Ms Asmal's invitation was not accepted.

[96] It does appear that Mr O'Farrell looked to Ms de Brito for whatever inside line he could get, bearing in mind their close friendly relationship. On the subject of his exchanges with each of Messrs Tozer, Strauss and de Brito, he said that on a number of occasions he was told that he was not being disadvantaged as against Dawoods with regard to price. He continued as follows.

'In those specific conversations I spoke about price being price, okay, I didn't actually mention or discuss tallies or whatever, those assurances were given to me that the prices were – I was receiving equal prices. I didn't interrogate whether the tallies at that time were equal or the rebates or whatever but the tallies would go into price. It would all ultimately go into price.'

Ms de Brito's evidence was that when she checked for price, she was looking at the invoice price or the mandate price. Ms Asmal's evidence was that she was asked by Ms de Brito to come in one evening to check prices, as she was able to access the Johannesburg computers in order to see Dawoods' prices. She found that Dawoods were being charged at the mandate price, as was Nambitha. There was no difference in "price".

[97] The evidence of Mr Strauss was that whilst he knew that the discounts or tallies and so on that advantaged Dawoods over and above the invoiced mandate price were better than what Nambitha was getting, that was to his knowledge not disclosed to Nambitha for the simple reason that no Astral employee was entitled to convey such information concerning one customer to another. Strangely enough this issue was not explored by Mr *Van Huyssteen* on Nambitha's behalf, along the lines that if Mr Strauss knew that Nambitha and Dawoods had what might be termed reciprocal rights to receive the best of the benefits by way of discounts and tallies allowed to the one or the other, the rule against non-disclosure could not apply. The answer may lie in the fact that it was not Mr Strauss's evidence that he knew of such a contractual provision; ie the one described in paragraph 4.4 of the plea.

[98] To the extent that Mr O'Farrell's evidence extends at times into the realms contemplated by paragraph 6.6 of the plea, and he asserts that he was misled by false statements from many of the named representatives of Astral into believing that Nambitha and Dawoods got exactly the same discounts, tallies and so on, I do not regard that evidence as credible, and reject it as false.

[99] The effect of Mr Tozer's evidence is that Nambitha would be treated fairly. It would have its day in the sun. That evidence was supported by Nambitha's own witness, Mr Strauss. His evidence was that during 2011 Astral went on a drive to increase turnover. The benefits of that drive started with a wholesaler known as the BJ Group and thereafter it went to Dawoods. But that caused huge complications in the market place, according to Mr Strauss. He continued:

'Remember I said earlier on that the strategic plan of these promotions was to roll them out one at a time by distributor and that the unfortunate thing here was that by the time we tried to salvage the situation Mike who was next in the queue wasn't able to take up the offer.'

[100] It was Mr Strauss who ventured the evidence that Mr O'Farrell knew that the net overall price (ie including discounts, tallies and the like) to Dawoods had to be better than was being offered to Nambitha, because he could see it in the market and the prices at which Nambitha's customers could buy the goods from Dawoods. In my view the various emails of complaint written by Mr O'Farrell during the relevant period suggest that he had to have believed that, certainly at various times through the year, Dawoods were getting better deals than those given to Nambitha. I do not think that someone as infatuated as Mr O'Farrell claimed to be with a belief that he had "most favoured customer status" would have asked in the terms he did for assistance with price in order to allow him to conquer a competitor in the market who was buying from Astral at the same price as was Nambitha. That is improbable, just as is the proposition that the persons named in paragraph 6.6 of the plea would discuss the discounts, promotions and so on allowed to Dawoods with Mr O'Farrell, let alone lie about it.

[101] Mr *Van Huyssteen* has sought to argue that the principle enunciated in paragraph 5 of the judgment in *ABSA Bank Ltd vs Fouche* 2003 (1) SA 176 (SCA) can get Nambitha home.

'…A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and

the information, moreover, is such that the right to have it communicated to him "would be mutually recognised by honest men in the circumstances".'

Misrepresentation by silence or omission, and the facts and circumstances necessary to be proved in order to rely on that principle, were not pleaded. Nevertheless the answer to the argument lies in the evidence of all the witnesses who acknowledged that, far from there being a duty to speak, the price of a healthy competitive relationship between those who purchased goods from Astral was recognition of the fact that Astral would not share one customer's plans, promotions, discounts and so on with another. I find that Mr O'Farrell was aware of that principle at all times. It is why he would

(a) not press the Astral employees to make disclosures to him which they were not permitted to do; and
(b) not be misled in any way by their silence on the subject of whatever advantages Dawoods, or any other wholesaler for that matter, received from Astral from time to time, over and above the common right to buy at the mandate price.

[102] I conclude that there were no misrepresentations such as are relied upon in paragraph 6.6 of Nambitha's plea.

[103] I find myself compelled to make one further observation. Ms de Brito and Mr Strauss came before this court at the request of Nambitha, and observing what went on in court I have no reason to doubt that they were under the impression that they remained on friendly terms with Mr O'Farrell. Whilst it is true that Mr O'Farrell did not say in evidence that either of these witnesses (or for that matter Mr Tozer) had intentionally lied to him in order fraudulently to induce him to buy goods from Astral, he displayed no regret or reservation about what had been pleaded on his behalf concerning the conduct of these persons. His conduct in this regard lent no weight to any argument on his behalf that he should be regarded as a credible and reliable witness, or that the integrity which, according to his plea, he found lacking in those witnesses was indeed to be found in him.

[104] It goes without saying that the conclusion must be that there was no inducement to buy the product which generates Astral's claim for the price of it.

Conclusion

[105] Mr *Van Huyssteen* sought to argue that despite the fact that all the evidence in this case was either directed at the issues I have already dealt with above, or thought (erroneously in some cases) to go to the issues I have already dealt with above, Astral's claim-in-convention for the price of the goods it sold had to fail because it had led no evidence to prove its allegation that the prices it charged were its usual prices. As I understand the argument it rests on a somewhat narrow interpretation placed on paragraph 2.1 of the order for separation of issues which reads as follows.

'2. The court shall first decide, under case number 13794/2011 the issues:

2.1. arising from the proper interpretation of the terms of the contract between the parties with specific reference to what is alleged by the plaintiff in paragraph 12 of the particulars of claim and by the defendants in paragraphs 4.4 and 4.5 of the plea.'

[106] What is alleged in paragraph 12 of the particulars of claim is that the prices making up the amount claimed were Astral's usual prices charged to Nambitha at the time of despatch of the goods. I understood from the outset, and I understood Mr *Van Huyssteen* to understand this from the outset, that the reference to paragraph 12 of the particulars of claim was no more than a pointer to the proposition that the prices were supposed to be the usual prices, the issue being whether what was "usual" involved the principles set out in paragraph 4.4 of the plea.

[107] If there were any doubt about this (and I do not believe there ever was any doubt about it until this argument was raised), it is answered by paragraph 3 of the order for separation of issues which in its material part reads as follows.

‘If it is decided that the contract is not to be construed as the first defendant alleges in paragraph 4.4 of the plea and if the allegations in paragraph 6.6 and 6.7.1 are not proved, the plaintiff shall be entitled to judgment against the first and fourth defendants as claimed in the prayers …’

It is quite clear that the parties agreed that there was no need for Astral to prove that the figures in the annexure which tabulates the claim is the product of the application of the usual price for which the plaintiff contended; that is to say the one not qualified in the manner suggested by paragraph 4.4 of the plea.

[108] I add that there is no evidence at all, directly from Mr O’Farrell or from the correspondence put before the court, that the debits to Nambitha’s account were not the product of the application of the agreed discount regime to the mandate price in place at the time of the sales reflected in the invoices.

[109] It became necessary after final oral argument for some aspects of the case to be dealt with by supplementary written heads of argument. One of the issues was the question of interest, as the prayer at amended page 8 of the particulars of claim appeared to be incorrect. This was corrected in supplementary written argument delivered on behalf of Astral, and not contradicted or questioned by Nambitha when its subsequent further written argument was delivered. I shall accordingly follow the amended prayer for interest.

[110] The contracts provide for Astral to be awarded attorney and client costs.

A. Under case number 13794/2011 the following order is made.

1. Judgment is granted in favour of the plaintiff against the first defendant

(representing the Nambitha Trust) and the fourth defendant, jointly and severally, the one paying the other to be absolved, for:

(a) payment of the sum of R8 116 236.77;

(b) interest thereon at the rate of 15.5% per annum calculated as follows:

(i) on the sum of R1 412 395.56 from 1 November 2011 to date of payment;

(ii) on the sum of R6 366 913.13 from 1 December 2011 to date of payment; and

(iii) on the sum of R336 928.08 from 1 January 2012 to date of payment;

(c) costs of suit on the scale as between attorney and client, including any which have been reserved.

2. The claim in reconvention of the first defendant (representing the Nambitha Trust) is dismissed with costs.

B. Under case number 689/2013 the following order is made:

1. Judgment is granted in favour of the plaintiff against the defendant for:

(a) payment of the sum of R759 194.24;

(b) interest thereon at the rate of 15.5% per annum from 1 December 2011 to date of payment;

(c) costs of suit on the scale as between attorney and client.

2. The defendant's claim-in-reconvention is dismissed with costs.

OLSEN J

Date of Hearing:	05 to 09 October 2015 (5days) 16 February 2017 26 to 30 August 2019 (5days) 02 to 06 September 2019 (5days) 17 to 20 February 2020 (4days) 26 February 2020 18 & 19 March 2020 (2days) Final written argument: 21 August 2020.
Date of Judgment :	20 November 2020
Plaintiff's Counsel:	Mr JC King SC
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