



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
DATE 14 September 2016
STATUS Immediate

Transnet v Total (728/2015) [2016] ZASCA 116 (14 September 2016)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

In 1967 the former Administration of the Railways and Harbours, a predecessor first to the South African Transport Services (SATS) and then to Transnet, decided that because of the increased demand for petroleum products in South Africa, it should establish an inland refinery at Sasolburg. At the time all refineries were at the coast, principally in Durban. The Administration approached Total, a supplier of petroleum products, to participate in the inland refinery. It was initially reluctant to do so as the cost of transporting crude oil from the coast inland via pipeline would be additional to the cost of refined fuels such as petrol, diesel and avtur. After meetings with the Administration and Sasol, a state-controlled supplier, Total sought an undertaking that if it participated in the inland refinery, it would not be worse off than it would be had it transported refined fuels from the coast.

The Administration made the undertaking, embodied in what came to be referred to as the 'neutrality principle', and Total became a shareholder in Natref, the company that ran the inland refinery. It held some 33% of the shareholding and Sasol held the balance. The principle was applied consistently until Transnet became the owner of the pipeline in 1991. Transnet refused initially to apply the neutrality principle, until it and Total varied the original agreement, after which it continued to apply the principle, charging a lesser amount for transporting crude oil than for refined products. The tariffs had always been set by the Administration, then by SATS, and subsequently by Transnet, based on the cost of conveying petroleum products by rail.

In March 2005 Transnet refused to recognize the neutrality principle. Shortly after that, the National Energy Regulator Act 40 of 2004 (NERSA Act) came into force in September 2005 and the Petroleum Pipelines Act 60 of 2003 (PPA) came into force in November 2005. The NERSA Act establishes a single regulator, the NERSA, to regulate the electricity, piped-gas and petroleum pipeline industries.

It is now the NERSA that determines the tariff, not Transnet. While Total accepted that the tariff was set under a new regulatory regime, it contended that the neutrality principle continued to apply – that it was entitled to a discount when it conveyed crude oil from the coast. Total instituted action against Transnet, claiming various forms of relief. The parties agreed, and the Gauteng Local Division ordered, that the question whether the neutrality principle continued to apply despite the change in the legislative regime, would be determined separately.

The court a quo found that the neutrality principle was not inconsistent with the new legislation. The SCA today dismissed an appeal against the judgment of that court and confirmed that the principle continued to apply: the legislation prohibited discrimination amongst customers and Total would be disadvantaged unless it applied. The NERSA had set a maximum tariff and specifically stated in its first tariff determination that a discount could be given.

Thus Transnet was bound to comply with the undertaking given in 1967, as varied in 1991.
