THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 843/16

In the matter between:

HENDRIK CHRISTOFFEL MARAIS NO	**FIRST APPELLANT**
CHRISTINA SUSANNA MÜLLER NO	**SECOND APPELLANT**
CHRISTINA SUSANNA MÜLLER	**THIRD APPELLANT**

and

VARICOR NINETEEN (PTY) LTD t/a BP ATLANTIC	**RESPONDENT**

Neutral Citation: *Marais & others v Varicor Nineteen (Pty) Ltd* (843/16) [2017] ZASCA 46 (30 March 2017)

Coram: Tshiqi, Theron, Mathopo and Van der Merwe JJA and Coppin AJA

Heard: 24 February 2017

Delivered: 30 March 2017

Summary: Contract: whether agreement to establish a diesel depot constituted extension of an existing supply agreement between the respondent and a trust or a new agreement with trustee of the trust in personal capacity : respondent satisfied onus to prove the former : appeal dismissed.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Gamble J) sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mathopo JA (Tshiqi, Theron and Van der Merwe JJA and Coppin AJA concurring):

[1] This is an appeal against a decision of the Western Cape High Court (Gamble J). The respondent, Varicor Nineteen (Pty) Ltd t/a BP Atlantic (BPA), sued the first and second respondents as trustees of the Albertinia Dekriet Trust (the Trust) for the outstanding balance in respect of the sale and delivery of bulk diesel. Ms Müller was also sued in her personal capacity as surety for the Trust.

[2] When the matter came before the court a quo a separation of issues was ordered in terms of Rule 33(4) of the Uniform rules of the court. The issues to be tried related to whether, as alleged by the BPA, the agreement concluded in 2003 (the depot agreement) for the opening of a new depot was an extension of the contract concluded between it and the Trust in 2001 and whether in 2003 it concluded a new agreement with Ms Muller in her personal capacity in which event the Trust would not be liable. The court a quo found that there was no consensus between the parties as to who the contracting parties were after 2003. It reasoned that there was an error in personam which vitiated the consensus. After applying the principle of quasi mutual assent the court a quo found that BPA had concluded an agreement with the Trust and that the parties' conduct was 'consonant with an understanding that

the Trust was the debtor' of BPA. With leave of the court a quo, the appellants now appeal to this court.

[3] The salient facts are as follows: BPA, with its head office in Somerset West, was established to distribute petroleum products on behalf of BP South Africa. BPA had seven depots in the Western Cape from which it sold diesel in bulk. In addition, it delivered bulk diesel to farmers who had installed storage tanks from which vehicles and farm implements would be filled. The Trust's business involved the transportation of thatch through the use of a fleet of trucks. This obviously necessitated a consumption of diesel on a large scale. Initially, the Trust made use of a fleet card for the refuelling of its trucks and this made it easier for the vehicles to fill up anywhere in the country with any brand of fuel.

[4] As BPA was looking to expand its business, in 2001 Mr Cornelius Otto, it's sales representative, approached Ms Müller, his friend of 40 years, and suggested that the Trust purchase diesel in bulk from BPA to refuel their vehicles at the premises from which the Trust's business was being conducted, namely, 14 Nywerheidslaan in Albertinia (the premises). At that stage there was only a small tank situated on the premises. Following this discussion, an agreement was reached between BPA and the Trust in terms of which the former supplied the latter with a 9 000 litre diesel tank to refuel the vehicles. A credit application form which included the suretyship was signed by Ms Müller on behalf of the Trust. The supply agreement was signed by Ms Rika Harper on behalf of the Trust. The credit limit granted to the Trust was R20 000 per month.

[5] BPA's business grew and in its quest for further expansion, in 2003 Mr Otto again approached Ms Müller at the premises and suggested the opening of a diesel depot on the premises, which would cater, not only for the refuelling of the Trust's vehicles, but also the general public. Pursuant to their discussion, the depot agreement was concluded in terms of which BPA delivered diesel to the premises. According to Mr Otto, this agreement was an extension of the existing agreement with the same customer (the Trust) in

terms of which diesel products were still to be delivered at the premises as before. Mr Otto understood the agreement to be involving Ms Müller in her capacity as trustee of the Trust.

[6] Prior to the depot agreement, the diesel was purchased by the Trust, for the use of the Trust's own trucks. With the opening of the depot at Albertinia there were purchases of diesel for the Trust's use as well as for on sale to members of the public, especially farmers. This venture necessitated the replacement of the existing 9 000 litre tank with a 23 000 litre tank.

[7] The Trust's account in respect of diesel purchased from BPA was paid by way of a direct payment from a bank account controlled by Ms Müller on behalf of the Trust. The Trust fell into arrears with its payments with the result that for the period from July to October 2008 it owed BPA a sum of R7 million, (amount is disputed). Because no payment was forthcoming, BPA issued summons against the Trust, and Ms Müller was sued jointly and severally with the Trust on the basis of a deed of suretyship which she executed on 3 September 2001.

[8] In order to determine the issue in this matter, it is necessary to devote some attention to the pleadings. In its particulars of claim, which were not a model of clarity, BPA simply alleged that the appellants, without specifying which one, applied for a credit facility from it for the purposes of purchasing petroleum products from time to time. Such facilities, it was alleged, were granted in terms of BPA's standard terms and conditions which were incorporated in the credit application form and the supply agreement.

[9] In their plea, in addition to denying the existence of the agreement with BPA, the appellants averred that all purchases in 2001 were made by the Trust in terms of the credit facility agreement; that a new oral agreement was concluded in 2002 between Ms Muller trading personally as Albertinia Diesel Depot, and BPA; that the Trust never traded in petroleum products and that BPA sold and delivered diesel to Ms Müller from 2002 to October 2008. In the alternative the appellants denied being indebted to BPA in the amount alleged

and further averred that all the invoices were paid by them. As a result of this plea, BPA requested certain further particulars from the appellants for the purpose of trial, including: who acted on behalf of the parties, where it was alleged the oral agreement was entered into, and of significance when it is alleged that the respondent (plaintiff) ceased to make deliveries to the Trust, and why those deliveries were stopped, where, and on behalf of whom the oral agreement was concluded. In response, the appellants stated that it was Mr Otto who concluded the agreement at the premises, on behalf of BPA in 2005; that the Trust never conducted a business involving petroleum products; that Ms Müller had sold her business, the Albertinia Diesel Depot, during October 2008 to Van Rob CC, and that Mr Esbach, (a managing director of BPA) was aware of the sale as Ms Müller personally informed him of it.

[10] In response to the further particulars for trial, BPA filed a replication in terms of which it denied that any agreement was entered into with Mr Otto in terms whereof the diesel would be sold and supplied to Ms Müller personally. It further alleged that Mr Otto was not authorised by BPA to conclude such an agreement with Ms Müller. BPA introduced an amendment after the closing argument in order to rely on the doctrine of quasi mutual assent as an alternative.

[11] The court a quo held that Mr Otto's evidence in respect of the depot agreement was unconvincing, because he prevaricated and demonstrated a lack of certainty. It held that there could never have been consensus between the parties as to who the contracting parties were after 2003, and concluded that there appears to have been an *error in personam* which vitiated consensus. The court a quo proceeded to decide the case on the basis of the doctrine of quasi mutual assent.

[12] After analysing the evidence, the court a quo held that the Trust was bound to the existing terms of the contract concluded in September 2001. It found that the manner in which Ms Müller conducted the business of the depot, was consonant with the understanding that the Trust was the debtor. It

further held that if BPA wanted to contract with her personally, it would have taken appropriate steps to do so. These findings form the core of this appeal.

[13] I now proceed to deal with the evidence and the arguments of both parties. At the hearing of the appeal both counsel were in agreement that a finding that there was no new agreement as contended for by Ms Müller would be dispositive of this appeal and it would not be necessary for this court to deal with the court a quo's finding with regard to the doctrine of quasi mutual assent. The answer in this appeal lies in the proper analysis of the evidence of various witnesses together with supporting documentary evidence tendered at the trial.

[14] Ms Müller testified that the agreement embodied in the credit application of 2001 came to an end in 2003 after the bulk diesel contract was orally concluded with her as a sole proprietor at the premises. It was her evidence that the Trust was never mentioned in the discussion or agreement. She stated that in terms of the 2003 agreement, she agreed to buy diesel as a new client and which would not only be for her own use, but also for the purpose of on selling it to members of the public. In other words, this agreement ushered in a new era because a different entity was hence forth the debtor instead of the Trust. She testified that the credit terms in respect of the depot agreement were completely different to those in the credit application in that, in terms of the new agreement initially she had to pay for the diesel before it was delivered and that it was only later on, when the credit agreement were amended, that she was given 30 days' credit.

[15] She further explained that save for sharing premises with the Trust, there was no relationship between it and the depot: the entities had different secretaries, kept separate financial records, and their offices were administered by different people. Her husband (Mr Marais) was not involved in the depot business and was aware that the depot was her personal business, which was kept separate from the Trust, so as to not prejudice the interests of the Trust beneficiaries, in the event that the depot was not a financial success. When asked why all the invoices from 2003 to 2004

onwards were issued in the name of the Trust, she suggested that when the invoices changed from Albertinia Dekriet Trust to Albertinia Dekriet, she understood that to be a reference to her personally. When pressed further in cross examination she stated that she asked a BPA employee, whom she thought was named Linda, to rectify the error. When this was not done she did nothing thereafter.

[16] As regards the account reference number ie ALB009 appearing in the invoices and statements for payment of the diesel. Ms Müller could not give an acceptable explanation for it, which was always used in reference to the Albertina Dekriet Trust. According to her she never opened the post and as such did not see what appeared in the invoices. This evidence was contradicted by Ms Conradie, who testified that Ms Müller was hands-on and opened the post herself. Ms Müller was also unconvincing as to whether the Trust and depot shared the same VAT number. What made her explanation more startling is the fact that the Trust's VAT number was inserted on the invoice of the depot, despite the fact that neither she personally, nor the depot were registered for VAT. This state of affairs continued for a period of four years until 2008 when the depot was sold. In an attempt to extricate herself from this morass she testified that her employees were aware that the Trust and the depot were separate and distinct entities. Realising the apparent improbability in her evidence she absurdly suggested that South African Revenue Services (SARS) did not find the discrepancies to be unacceptable.

[17] Furthermore, she denied receiving a letter of demand from Mr Esbach (snr), the managing director of BPA who had been concerned about the account of the Trust which was substantially in arrears. This letter was addressed to the Trust and not Ms Müller personally because Mr Esbach regarded the Trust as the company debtor. This is supported by the fact that the credit facilities were granted to the Trust owing to its creditworthiness and not Ms Müller personally. I did not understand Ms Müller to have said that her personal creditworthiness was assessed by BPA before the alleged new contract was concluded. In an attempt to distance the Trust from the debt to

BPA, Ms Müller testified that the supply of the thatch was a business conducted by her as a sole proprietorship, and that the business of the Trust was that of transport.

[18] With regards to Mr Otto, it is common cause that he approached Ms Müller in 2001 with a business opportunity to purchase diesel from BPA to fuel the Trust's own trucks at Albertinia. To this end, a credit application form, which was annexed to the particulars of claim, was signed with a credit limit of R20 000. In addition Ms Müller signed as surety for the Trust. At that stage because the Trust did not require large quantities of fuel, a supply of a single 9 000 litre diesel storage tank was installed at her premises. This was in accordance with the supply and installation agreement signed by Ms Rika Harper on behalf of the Trust. According to Mr Otto's evidence, when BPA was looking to expand its business, a depot in Albertinia was identified as its first venture to supply diesel to commercial clients and members of the public.

[19] In 2003, Mr Otto approached Ms Müller at her offices in Albertinia and an agreement was concluded for the establishment of the depot. Mr Otto testified that the 2003 depot agreement was an extension of the existing agreement with the same customer (the Trust) in terms of which diesel products were to continue to be delivered at the same premises. He made it very clear in his testimony that any new agreement with a new client would have to be done with the consent of BPA and followed up by paperwork. As a sales representative he could not conclude an agreement, be it orally or in writing, with a new client without the authority of BPA. In answer to the allegation of an oral agreement he testified as follows:

'*As daar 'n mondelingse ooreenkoms was sou daar papierwerk ingevul gewees het* . . . . Daar is geen mondelingse ooreenkomste wat ek met hierdie kliënte aangegaan het nie . . . . So ons sou, kon daaroor gepraat het en ons kon daardeur besigheid doen . . . .' (My emphasis.)

[20] Again, when pressed for an answer to the question whether the name 'Albertinia Dekriet Trust' was ever mentioned in relation to the entity to be involved in the expansion of the existing facility. The evidence was as follows:

‘Is ek nou reg, ek het nou net vir u gevra is die naam Albertinia Dekriet Trust of enige komponent daarvan ooit gebruik in die gesprek en u antwoord was dit is 13 jaar gelede ek kan nie onthou nie. Is dit die regte antwoord? --- U Edele, as dit ‘n ander naam was die dag dan sou ek die dag gesê het maar daar moet die volgende papierwerk gedoen word. So ek het aanvaar dat dit Albertinia Dekriet Trust is.
Vir die oomblik, Mnr Otto, aanvaar ek dat u dit aanvaar het. My vraag is heeltemal ‘n ander een. My vraag is nie wat u gedink het in u kop nie. My vraag is u loop in en u sê hallo Sunet en u maak van haar ‘n voorstel, is die woorde Albertinia Dekriet Trust of enige komponent daarvan ooit gebruik in daardie gesprek? --- Dit kan wees, U Edele. Dit is 13 jaar terug.
Maar u kan nie onthou nie en u kan nie sê dat dit gebruik is nie/ - - - Nee, ek kan nie sê dit is gebruik nie.’

That exchange, apparently, influenced the trial judge to conclude that there was dissensus between Mr Otto and Ms Müller. I will expand on this later in the judgment.

[21] With reference to the new depot arrangement, Mr Otto was steadfast in his evidence and responded as follows:
‘Dit is 13 jaar terug, u Edele, ek kan nie onthou of dit 13 jaar terug is nie. Ons het ‘n, ons het ‘n krediet applikasie met haar gehad en dit was baie makliker gewees anders moes hulle weer aansoek doen daarvoor. En as ek dit reg onthou was daar gesê ons gaan aan op Albertinia Dekriet Trust se besigheid.’

[22] The sum total of his evidence demonstrates that Mr Otto regarded the Trust as the company debtor and not Ms Müller personally. When confronted about the two separate names later written or displayed on the building, he answered: ‘Ek kan nie vir u ja sê nie, ek weet nie. Ek het nie notisie daarvan geneem nie. Ek het [sic] Nywerheidslaan 14 was Albertinia Dekriet Trust met wie ek handel gedryf het’. He went on to say: ‘Ek het haar gesien as die trust. So ek het haar gesien as die Albertinia Dekriet Trust.’ This piece of evidence demonstrates that he was unconcerned about what was written or displayed on the buildings because he regarded the Trust as the company debtor.

[23] In this court counsel for the appellants supported the findings of the court a quo that there was lack of consensus which vitiated the agreement. He contended that because Mr Otto, in evidence, wavered and demonstrated a lack of certainty regarding the identity of the parties involved in the agreement, BPA had failed to prove the contract sued upon. Mr Otto was subjected to a searching cross examination intended to establish that a new agreement came into being. This was clearly designed to extricate the Trust from its debts by contending for a new contract. Although Mr Otto had several problems explaining the identity of the parties to the depot agreement, the common thread in his evidence was that no new entity was involved. He and BPA always regarded the Trust as the debtor. It is clear from the record that he was consistent in that regard.

[24] Notwithstanding the minor discrepancies in his evidence Mr Otto came across as a honest and candid witness. He freely made concessions where necessary. He readily conceded that given the considerable passage of time he could not remember all the details leading to the conclusion of the agreement. What emerged clearly in his evidence is his consistency that the agreement was with the Trust. When his evidence is assessed objectively it is corroborated by Ms Conradie and Ms Viljoen in all material respects. Both these witnesses gave a clear and coherent account of the events in so far as it related to their duties with Ms Müller or the Trust.

[25] Ms Müller' evidence on the other hand was unsatisfactory and she got herself into a knot. She sought refuge in the financial statements prepared by the tax consultant, Mr Barnard. The financial statements do not support her evidence at all. During cross examination she was evasive and unconvincing with her responses. She came across as being unnecessarily argumentative. She offered no plausible responses to the damaging evidence against her by failing to explain the vital discrepancies in the documents.

[26] I agree with counsel for BPA that the criticism of Mr Otto by the trial court is without foundation. It is correct that during cross examination Mr Otto was hesitant and admitted that due to the passage of time he could not

remember everything but he was adamant that there was only one contract concluded with the Trust. In my view counsel's persistent cross examination did not go any distance in discrediting him. Mr Otto went further and stated that if there was a new client this would have been followed up by paperwork as it is standard procedure with BPA. This evidence was not seriously disputed.

[27] Again there was positive evidence by Mr Otto that there was no new client. In my opinion there is no basis upon which that evidence could be rejected. The evidence should not be judged in isolation but the mosaic of evidence should be judged as a whole. In fairness to Mr Otto one must bear in mind that he was testifying about events which occurred more than 13 years ago and given the fact that he dealt with many transactions, expecting him to remember all the details is impossible. It bears mentioning that not only Mr Otto but also Ms Müller struggled to remember certain events leading to the conclusion of the agreement. Mr Otto's evidence fully justifies the manner in which BPA's claim was formulated. It was not even suggested that the instructions he gave to his legal advisors was inconsistent with the evidence he gave as a witness. In the absence of such cross examination and such foundation, it is clear from the authorities that it was incorrect to make an adverse finding against him. Mr Otto's evidence was corroborated by supporting documents, ie invoices and statements, which indicate that the petroleum products were delivered in Albertinia and that the debtor was reflected as Albertinia Dekriet Trust. Furthermore the credit application, supply and installation agreements support his evidence that the Trust was BPA's debtor.

[28] What is clear from the evidence is that prior to 2003 the diesel was purchased by the Trust for its own trucks. When the depot was opened the contractual relationship between the Trust and BPA remained the same. Diesel was still delivered at the same premises to the same people. There was, in my view, no change or alteration of the parties' contractual obligations. As aptly put by counsel for BPA it was 'business as usual'. I agree with counsel for BPA that what occurred in 2003, when the agreement was

extended, is decisive in this matter. In my view what transpired years after for instance when the depot had separate names being written against buildings and separate accounts being opened is irrelevant. To my mind the conduct of the parties during the depot discussion is critical. Ms Müller's professed understanding that she became a new customer under a new agreement is untenable.

[29] There was, in my view, one continuous agreement which, given the business of selling diesel, allowed for some price fluctuations. The changes that occurred in volume and structurally in her premises resulted from expansion if the business. This, however, does not mean that the foundational agreements ie the credit and supply and installation agreements were changed.

[30] It appears from Ms Müller's evidence that she did not expressly inform Messrs Otto or Esbach that the depot was to be conducted as a sole proprietorship. It would seem to me that if this had been suggested to them that BPA was now dealing with a different entity, Mr Esbach, as the managing director of the company would have taken steps to assess Ms Müller's personal creditworthiness. At that stage BPA was satisfied with the creditworthiness of the Trust. The fact that it was not done supports Mr Otto's evidence and is further corroborated through Mr Esbach's letter which confirmed that the Trust and not Ms Müller personally, had purchased diesel from BPA. The objective facts demonstrate that Ms Müller only raised the issue of sole proprietorship when the company was already in the red. Another reason which militates against the acceptance of Ms Müller's evidence is that after the letter of demand was sent to her in 2007 she proceeded with the application for a licence for the depot. This, in my view, was another attempt to distance the Trust from the agreement. It is common cause that there was an existing contract between BPA and the Trust. The Trust was never substituted as a party in the depot agreement. Having regard to the probabilities, the version of Ms Müller was rightly rejected by the court a quo.

[31] I have no doubt that the opening of the depot had no impact on the contractual relationship between BPA and the Trust. It consequently did not usher in a new era. The business of supplying and delivering diesel to the same premises and to the same people remained the same. I am fortified by Mr Otto's evidence that he saw the Trust as Albertinia Dekriet Trust. Ms Müller's evidence that a new contract was concluded is not supported by any objective evidence. On the contrary, the documentary evidence tendered by BPA points to a different conclusion. Numerous documents contradicted Ms Müller's evidence and established that there was no new agreement, for example, the depot's VAT number was that of the Trust; and its invoices and bank statements reflected BPA's details.

[32] To sum up, I conclude that the appellants failed to adduce evidence that after 2003 BPA supplied diesel to Ms Müller personally. I find Mr Otto's evidence, as fully corroborated by other witnesses and documents tendered at the trial, to be consistent with an extension of the 2001 agreement. Consequently I find Ms Müller's evidence to be improbable and false. It follows that the appeal must be dismissed.

[33] There is another matter that needs to be addressed. This relates to the issue of onus. Counsel for the appellants criticised the court a quo for placing the onus on Ms Müller to establish that she was the debtor of BPA. In its findings the court reasoned 'that to the extent that Ms Müller contends for an agreement between the parties she has set up a special defence which attracted the onus of proof in respect of the agreement'. With respect to the learned judge this finding is incorrect. The general rule is that a plaintiff who sues on a contract must prove his contract even though this may involve proving a negative and that the additional term alleged by the defendant was not agreed to by the parties.[1] It was incumbent upon BPA to prove that it contracted with the Trust represented by one of its trustees, Ms Müller. In

[1] See *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A).

doing so it had to prove the contract sued upon. Burdening Ms Müller with the onus was impermissible and against the weight of authority on that point.[2]

[34] The appeal is dismissed with costs.

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R S Mathopo
Judge of Appeal

[2] See *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A) at 826-8; *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 472-4); *Da Silva v Janowski* 1982 (3) SA 205 at 220 (A).

APPEARANCES:

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