IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: 816/2015
Date heard: 19 March 2015
Date delivered: 31 March 2015

In the matter between

SUTHERLAND TRANSPORT (PTY) LTD **Applicant**

And

WILLARD BATTERIES, a division of
POWERTECH (PTY) LTD **Respondent**

Urgent application for interim relief pending arbitration of contractual dispute – commercial interests justifying urgent relief – established principles applied – applicant seeking payment of amounts claimed pursuant to invoices submitted and withheld – clause in agreement precluding respondent from holding over payment in terms of counterclaim, set-off or deduction – interpretation of agreement – principles restated – held that prima facie right established even though open to doubt – other requisites for interim relief established – balance of convenience favouring grant of order – interim order granted.

JUDGMENT

GOOSEN, J.

[1] The applicant is a road transport company which transports batteries and related products manufactured and distributed by the respondent. The provision of transportation services by the applicant is regulated by a written agreement concluded between the parties in March 2011. In this application the applicant seeks an order directing the respondent to pay to it a total amount of R1 176 732.56 which was withheld by the respondent in respect of invoices issued by the applicant to the respondent in December 2014 and January 2015. The applicant

also seeks an order that the respondent be interdicted and restrained from withholding any further amounts which the respondent disputes is due to the applicant pursuant to invoices to be issued pursuant to the agreement. The relief sought by the applicant, as framed in an amended notice of motion[1], is sought pending the finalisation of arbitration proceedings which are pending between the parties.

[2] The application was launched on the basis of urgency and is opposed by the respondent on several grounds. The respondent's opposition is based on, *inter-alia*, the contention that the application is not urgent; that this court lacks jurisdiction to entertain the relief sought by virtue of the provisions of the Arbitration Act[2] inasmuch as the relief sought is final relief; and further that the applicant has failed to meet the requirements for an interdict as claimed.

[3] The applicant bases its claim in essence upon the provisions of clause 18.5 of the agreement which, it is submitted, on a proper interpretation prohibits the admitted conduct of the respondent, namely the refusal to pay a portion of the amounts claimed by the applicant on invoice by reason of a dispute relating to the rates to be charged in terms of the agreement. It is necessary, before dealing with the particular provisions of the relevant clause and its interpretation to briefly set out the facts, which are largely common cause, which have given rise to the present dispute.

[4] The applicant has been providing transport services to the respondent since 2004. Those services were provided, apparently, on the basis of *ad hoc* agreements. During 2009 the respondent called for tenders for the provision of transportation services to it. A number of transport companies submitted tenders, including the applicant. It is common cause that the respondent abandoned the tender process and that it entered into negotiations with the applicant for the

[1] The applicant sought an amendment to its Notice of Motion at the commencement of the hearing, to which the respondent consented.
[2] Act %%%

provision of those services in terms of a written agreement to be concluded. The negotiations continued through 2010. A written agreement was entered into in March 2011. It is that agreement which is the subject of the present matter and the dispute between the parties in the arbitration.

[5] It is common cause that during the course of March 2014 the respondent expressed concern to the applicant that the applicant was not charging it in accordance with the terms of the agreement. The respondent initiated various investigations, including an investigation by the auditing firm KPMG. Various exchanges took place between the parties relating to this matter and, it is common cause, a dispute was framed and referred to arbitration pursuant to a dispute resolution clause set out in the written agreement. The applicant has filed a statement of claim in the dispute in which it claims an amount in excess of R19 million for alleged underpayments for services rendered in respect of specific routes operated by the applicant. It also claims payment of the disputed amounts withheld in relation to its invoices issued in December 2014 and January 2015. The respondent, in turn, according to the papers, has framed a counterclaim against the applicant for alleged payments made to the applicant in excess of the rates provided in the written agreement in an amount of approximately R30 million.

[6] It is also common cause that during February 2015 the respondent indicated its intention to the applicant only to pay those amounts which are provided for in terms of the rates set out in schedule 1 of the agreement. It indicated that all amounts in excess of those rates, namely amounts it disputed, it would pay into the trust account of the respondent's attorneys pending the finalisation of the arbitration process. When the invoice for December 2014 fell due the respondent only paid a portion of the amount claimed by the applicant. It did the same in respect of the January 2015 invoice. It is these two amounts, which together total in excess of R1.1 million that the applicant seeks to be paid pending the resolution of the dispute.

[7] It is necessary at this juncture to detail the basic structure of the agreement regarding the rates charged for transport services rendered. As already indicated the applicant transports batteries and related products to various destinations around the country. In doing so it utilises trucks with varying capacities. The rate that the applicant charges the respondent comprises two essential components, namely a rate for certain fixed costs, namely the costs for maintenance, tyres, salaries and the like and a variable cost, namely the cost of fuel. The agreement provides that 67% of the rate charged is made up of the enumerated fixed costs and 37% of the rate comprises the cost of fuel. The agreement makes provision for an annual escalation of the rates in respect of the fixed costs and interim adjustments to take account of the statutory variation in the cost of fuel.

[8] The relevant clauses of the agreement in this respect are clause 19.1.1 and 19.1.2, which provide as follows:

> 19.1 The Rates are subject to the following adjustments: Also see schedule 1.
>
> **Annual adjustments**
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> 19.1.1 The Rates will annually be adjusted in accordance with the latest available SEIFSA Index (Table L 2), the first of which will be effected 1 February 2012, and thereafter annually on the same date of each and every successive year, provided that such annual adjustments shall exclude any Interim Fuel Adjustments to the Rates.
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> **Interim adjustments**
>
> **Fuel**
>
> 19.1.2. Apart from any annual adjustment of the Rates as provided for in clause 19.1.1 *supra*, the fuel component of the Rates, expressed as a percentage of the total Rate (37% – thirty seven percent), will be subject to interim upwards or downwards adjustments (the "INTERIM FUEL ADJUSTMENTS") by Sutherland upon any statutory increase/decrease ("VARIATION") in the price of fuel, from time to time, provided that such Interim Fuel Adjustments shall be implemented, in respect of each and every fuel price Variation and, notwithstanding the number of statutory Variations during any one Month, with immediate effect during the Month in which such Variation becomes effective.

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[9] The other portions of clause 19 not relevant for present purposes and need not be reproduced here It is important to note that clause 19.1.2 imposes an obligation upon the applicant to immediately effect a variation of the fuel component of the rate upon a statutory variation coming into effect. The obligation applies to both upward and downward variations.

[10] The essential dispute in the arbitration, as well as in this application, concerns the calculation of the interim adjustments to the rates as provided in schedule 1 to the agreement. The respondent alleges that the applicant is, and has been, applying a formula which is not provided for in the agreement and that it has accordingly overcharged the respondent from the inception of the agreement. The applicant in turn alleges that the formula applied by it is consistent with the formula applied by the parties from the inception of the business relationship between them in 2004. In the arbitration proceedings in regard to this aspect it allege that to the extent that the rate set out in schedule 1 is not clear, the formula as alleged by the applicant is to be incorporated as a tacit term of the agreement, alternatively, that the agreement is to be rectified to that extent.

[11] In this application the applicant alleges that it has applied the formula for the adjustment of the fuel levy as it always has done, and in accordance with the practice between the parties. It has submitted invoices in accordance with that calculation. It contends that the respondent is contractually bound by virtue of the terms of clause 18.5 of the agreement, to make payment of those invoices without delay and that the respondent's failure to do so constitutes a breach of clause 18.5. The applicant contends that it has a *prima facie* right to claim immediate payment of the amounts raised in the invoices. It contends that it is suffering and will continue to suffer irreparable harm in the event that the respondent fails to make payment in accordance with its obligations. It is on this basis that it seeks the interim relief framed in the notice of motion.

[12] The respondent opposes the application on the basis, as already mentioned, that the application is not urgent and that this court does not have jurisdiction by reason of the fact that the relief sought is final in nature. In respect of the merits of the application the respondent alleges that the applicant has failed to make out a *prima facie* right since the contract does not make provision for the use of the so-called 2004 formula for the adjustment of the fuel levy. It is submitted that the agreement stipulates that the respondent is obliged to make payment in accordance with the rates provided in schedule 1 to the agreement. The respondent further contends that the applicant is precluded from relying upon the evidence as to the circumstances in which the agreement was concluded and the nature of the negotiations entered into by the parties by reason of the parol evidence rule and, in particular, the content of clauses 32 and 33. Clause 32 provides that the agreement constitutes the whole of the agreement concluded between the parties. Clause 33 in turn makes provision for non-variation of the agreement, other than by way of written agreement concluded between the parties. In addition to this the respondent alleges that the applicant has failed to make out any case in respect of a reasonable apprehension of harm and that the balance of convenience favours the granting of the relief to the applicant.

Urgency

[13] Both parties accept that, in appropriate circumstances, commercial considerations may properly found an approach to the court on the basis of urgency as provided by Rule 6(12) (cf. *Bandle Investments (Pty) Ltd v Registrar of Deeds* 2002 (2) SA 203 (SECLD)). The respondent however contends that the applicant is obliged to set out in proof of the urgency of the matter appropriate allegations of fact as opposed to mere assertions. Reference was made in this regard to *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA) and *Swissborough Diamond Mines (Pty) Ltd and others the Government of the Republic of Africa and others* 1999 (2) SA 279 (T).

[14] It was submitted on behalf of the respondent that the applicant has merely asserted that the conduct of the respondent in withholding payments will "decidedly bring the applicant to its knees, financially speaking" and that this assertion is not supported by any evidentiary material. A similar criticism is directed at the averments made by the applicant that in consequence of the respondent withholding amounts due to it, it is making a nett loss on each load that it carries on behalf of the respondent and that it operates on a "very tight profit margin is quite and that its cash flow is dependent upon receipt of full and timeous payment of its invoices. These averments the respondent characterised as mere assertions, being, so it was submitted, inferences drawn from primary facts. It was argued therefore that no factual basis for urgency was alleged at all.

[15] I am unable to agree. The deponent to the applicant's founding affidavit is the managing director of the applicant who, it must be accepted, is intimately involved with the conduct of the applicant's business and is well versed in the financial affairs of the applicant. He alleges, as a matter of fact, that the applicant is, and will continue, to make a loss on each load that it carries for the applicant in the light of the respondent's refusal to pay the disputed amounts to the applicant. He alleges, as a fact, that the withholding of the disputed amounts has, and undoubtedly will, given the attitude of the respondent, have a negative effect on the applicant's cash flow. In my view this is not a mere assertion or an inference to be drawn from primary facts. In my judgment, the respondent's objection on the basis amounts to no more than an objection to the fact that the applicant has not tendered supporting and corroborating evidence in relation to its *factual* claims as to the effect that the respondent's conduct will have on the applicant's business. I'm not aware that it is a requirement for establishing grounds for urgency that an applicant is required to put up a substantial body of evidence to substantiate and its allegations of fact in relation to those grounds of urgency. A claim for urgent consideration of a matter is, after all, no more than an appeal to the court based on substantial and reasonable grounds to condone the applicant's non-compliance with the ordinary rules of procedure and to permit the

presentation of the applicant's case, other than in the ordinary course. An applicant is required to set out the basis of its claim for urgency with sufficient detail to enable the court to assess whether the inherent prejudice to a party who is brought to court on truncated or reduced time periods is justified, having regard to the general exigencies of the matter. In my view the applicant has indeed set out factual basis upon which it alleges that there is cause for an appropriate reduction of the time periods provided for in the rules.

[16] The second string to the respondent's bow, on urgency, is that the applicant unduly truncated the time periods provided for in the rules by affording the respondent only five days within which to prepare its answering affidavits. In support of this the respondent pointed to the fact that the applicant was made aware on 28 January 2015 that it was the respondent's intention to withhold payment of the disputed amounts presented in the applicant's invoices and that it would pay such disputed amounts into the trust account of its attorneys. The respondent argued that despite this knowledge, the applicant waited until 3 March 2015 before launching this application and then only afforded the respondent five days within which to finalise its answer. The respondent pointed to the factual complexity of the founding papers and in particular the fact that the founding papers canvas factual material over a ten-year period necessitating investigation by the respondent and consultations with a large number of witnesses. It was accordingly argued that the applicant's reduction of the time periods was unduly short.

[17] The question of truncated time periods and the obligation of an applicant who relies on such truncated time periods have been dealt with in a number of judgments, both in this division and elsewhere. In the oft quoted *Caledon Street Restaurant CC v D'Aviera* [1988] JOL 1832 (SE) Kroon J said the following in this regard:

> In the assessment of the validity of a respondent's objection to the procedure adopted by the applicant. The following principles are applicable. It is incumbent

> on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification there of, by the applicant is permissible only in the respects and to the extent that it is necessary in the circumstances. The applicant will have to demonstrate sufficient real loss or damage were he to be compelled to rely solely or substantially on the normal procedure. The court is enjoined by Rule 6(12) to dispose of an urgent matter by procedures "which shall as far as practicable be in terms of these rules". The obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case.

[18] The principles enunciated by Kroon J have been followed consistently in this division. As is apparent from the quoted passage, when dealing with a matter brought upon reduced or truncated time periods a court must have regard to the circumstances and exigencies of the matter as demonstrated by the applicant. In this instance, the applicant has indeed pointed to real loss or damage were it to pursue relief in the ordinary course.

[19] In determining urgency, it must be accepted that the applicant has properly made out a case for the relief which it seeks. That being so, and having regard to the fact that the respondent has not pointed to any substantive prejudice in relation to the urgent conduct of these proceedings, apart from the general allegation that it has had to operate under some pressure in answering the applicant's case, it is my view that the applicant is entitled to the condonation it seeks for non-compliance with the Rules.

Jurisdiction

[20] The challenge to this court's jurisdiction is premised upon a finding that the relief which the applicant seeks is final in nature. It is apparent from the amended notice of motion that the relief is sought pending the final determination of the issues at arbitration. It is common cause that the basis of the applicant's charges for services rendered, namely its application of a formula for the adjustment of the fuel component of the rate, is a central issue in the arbitration. That dispute is

to be finally determined at the pending arbitration. It is so that this court's order will not be subject to reconsideration at the arbitration. That however does not render the relief final in effect.

[21] In my view the relief sought is interim in nature. The applicant seeks payment in accordance with what it alleges is the basis for calculation of the adjusted rates as provided in the schedule to the agreement. It claims such payment on the basis of a contractual right to payment in terms of clause 18.5.

[22] In the light of this, this court has jurisdiction to adjudicate the matter in terms of section 21 (1) of the Arbitration Act, which provides *inter alia* that a court may adjudicate claims for interim relief.

[23] I turn now to deal with the merits of the applicant's claim for an interim interdict. It is trite that the applicant for an interim interdict is required to establish a *prima facie* right, even though it is open to doubt; a well-grounded apprehension of irreparable injury or harm; the absence of an alternative remedy; and that the balance of convenience favours the granting of the relief sought.

Interpretation of Clause 18.5 of the agreement

[24] The right upon which the applicant relies is that is set out in clause 18.5 of the agreement between the parties. Clause 18 provides as follows:

> 18.1 Willard shall make payment to Sutherland of the Rates, as reflected in Schedule 1.
> 18.2 For purposes of this clause and notwithstanding provisions to the contrary, a Month shall mean the period commencing on the 1st day of the Calendar Month and ending on the last Day of such Calendar Month. Accordingly, "MONTH END – END OF THE MONTH" shall mean the last day of the particular Calendar Month during which Sutherland has rendered the Services to Willard.
> 18.3 Within 7 (seven) Business Days from the Month-End, Sutherland shall furnish Willard with a proper detailed tax invoice/s (which will comply with

> the Vat Act) in respect of the Services rendered during that Month, accompanied by each and every POD relating to each and every transaction reflected in such tax invoice.
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> 18.4 All tax invoices and statements will be nett of VAT and accordingly VAT will be added to the Rates, as detailed in Schedule 1.
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> 18.5 Provided each invoice is accompanied by the relevant POD'S in accordance with clause 18.3 above, Willard shall make payment to Sutherland of the aggregate of such VAT invoices by no later than the End of the Month following the Month during which the Services were rendered. All payments made by Willard shall subject to the provisions of clause is 18.6 and 20 *infra*, be made without delay, counterclaim, holding-over, set-off or deduction and shall, unless otherwise agreed, be made by way of Electronic Funds Transfer ("EFT") into the bank account designated in writing from time to time by Sutherland for this purpose. All EFT'S shall be made at such time as to reflect such payment in good and cleared funds in the designated bank account by no later than the due date.
>
> 18.6 A 7% (seven percent), discount on the nett value of each invoice shall be applied should Willard make payment in respect of such invoice within the prescribed time period. Willard shall be entitled to deduct the amount of such discount from the payment in respect of the relevant invoice.
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> (Underlining added)

[25] The applicant contends that the clear wording of clause 18.5 precludes the respondent from withholding any amount which is properly incorporated in an invoice presented to the respondent for transport services rendered pursuant to the agreement. It submits that the admitted conduct of the respondent, in withholding certain amounts is in breach of the clause 18.5. The respondent on the other hand submits that clause 18.5 it must be read in the context of clause 18 as a whole and that the clause does not permit the applicant to charge anything other than that which is provided for in the rates as set out in schedule 1 to the agreement. An invoice which is based on the rates defined in schedule 1 is a "proper" invoice as provided by clause 18.3 and, so the argument goes, the respondent's obligation is only to make payment of proper invoices as presented to it in accordance with clause 18.5.

[26] In *Natal Joint Municipal Pension Fund v Endumeni Municipalit*y 2012 (4) SA 593 (SCA) at paragraph18 the approach to the interpretation of a written instrument was summarised as follows:

> The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax;; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context, it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context, and having regard to the purpose of the provision in the background to the preparation and production of the document.

[27] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), Wallis JA further said the following at paragraph 12:

> Whilst the starting point remains the words of the document, which are the only relevant medium to which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived delictual meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages, but is "essentially one unitary exercise".

[28] In this instance the applicant bases its claim for an interdict upon the terms of clause 18.5 which, it is submitted, means simply that the respondent is obliged to make payment of the full amount of an invoice which complies with the requirements of clause 18. A dispute as to liability for payment is a matter that is to be resolved by means of arbitration between the parties. As such the respondent cannot withhold payment, as it has done, of any portion of the invoices properly submitted to the respondent for payment. It is the applicant's case that the invoices submitted in December 2014 and January 2015 invoices comply with the agreed rates, as adjusted in accordance with clause 19.1.2 of

the agreement and that therefore it has complied with the provisions of clause 18.

[29] The language used in clause 18.5 is, in my view, clear and unequivocal. The only qualification in clause 18.5 is that each invoice submitted for payment must be accompanied by the relevant POD's in accordance with the requirements of clause 18.3. Clause 18.3 contains an independent requirement that the invoice must be a proper and detailed invoice and comply with the provisions of the VAT Act. There is no suggestion on the papers that the invoices were not "proper" in this respect. The respondent's argument, however, was that in context, the respondent is only obliged to effect payment of the amounts claimed in an invoice as comply with the rates as reflected in schedule 1 of the agreement. That schedule does not make provision for the basis upon which the applicant seeks to calculate the amounts due by the respondent and accordingly to the extent that there is a difference, the respondent is entitled to withhold payment of those disputed amounts pending the resolution of the issue at the arbitration. The difficulty with the respondent's position in this regard is the plain language of clause 18.5 which does not permit such conduct.

[30] There is, in my view, a further difficulty. Schedule 1 to the agreement. It consists of two pages. The first deals with the "annual rate review model. There is a table detailing the cost breakdown of certain elements relevant to that portion of the rates charged by the applicant, which are subject to annual escalation in terms of clause 19.1.1 of the agreement. These items include tyres, depreciation, interest, insurance, maintenance, salaries and wages and a provision for other expenses. The total contribution of these items to the rates charged by the applicant is set at 63%. The schedule then provides a formula to be applied in the event of there being any interim adjustment required to be made in respect of any particular element of the items identified in the schedule, as is provided for in clause 19.1.4 of the agreement. This portion of schedule 1 is not relevant for present purposes. What appears to be relevant is the second page of the schedule headed,

"*Starting rates as per column "A" below.*" This consists of a schedule of different rates for specified routes for the carriage of goods as required in terms of the agreement. In the first column the routes are identified. The second column is headed "*Agreed rate 01 August 2007*", a date which precedes the conclusion on of the written agreement. The third column refers to a "*Base rate per trip or as indicated effective rate 01 Sep 08"*. It is not immediate apparent from the schedule what the relationship is between these two columns or how they relate to the final column. The next column is headed "*Fuel adj*[ustment] *3 Mar 2010*" in an amount of 25.5% and the fifth column, "A" is headed "*Rate per trip or as indicated proposal 7% increase"*.

[31] As indicated, the interrelationship between the columns is not apparent from a perusal of the schedule. At the foot of the page the following is recorded: "All rates exclude VAT" and "Fuel adjustment percentage change to be applied to the above rates, as per fuel price". Opposite this and, at the foot of the third column the figure 25.5% appears. It is not immediately apparent what it was intended to convey with this latter note at the foot of the page. What is clear however is that the rates set out as the starting rates, as per column A, are subject to interim fuel adjustments as provided for by clause 19.1.2 of the agreement. Clause 19.1.2 does not provide for a formula to be applied to that portion of the rates subject to interim adjustment.

[32] It was the applicant's case that the formula it applied was that which the parties had agreed upon as early as 2004 when they first commenced a business relationship. As I understood it, it was the applicant's case that the schedule was only explicable when regard is had to the formula as which it contended ad been agreed from the commencement of the business relationship. In support of this contention it provided supporting evidence in the form of an affidavit by a for employee who was part to the negotiation process and adduced evidence in its reply affidavit detailing the manner in which the figures in the schedule were derived by application of the adjustment formula. The respondent's case in

answer to this was that the applicant was precluded from relying upon this evidence and the alleged adjustment formula by reason of clauses 32 and 33 of the agreement. On this basis it was argued that the applicant had failed to establish that it had a right to charge anything other than the rates stipulated in schedule 1 to the agreement and on its own version it had applied a formula for which provision was not made in the agreement.

[33] The argument, in my view, loses much of its force when regard is had to the fact that the agreed rates set out the schedule were subject to interim adjustment as and when the statutory price of fuel was varied. Indeed the applicant is obliged to adjust the rates as and when the statutory fuel price is varied. It was not the respondent's case that there had been no such statutory fuel price adjustments since the inception of the agreement. The contrary appears to be accepted by the respondent. The respondent's papers are silent as to what formula was to be applied to determine an appropriate rate adjustment as is provided by clause 19.1.2 of the agreement. Instead the respondent appears to have contented itself with the averment that the applicant was applying the incorrect base rate.

[34] What is apparent from the above is that the interpretation of schedule 1 and the application of clause 19.1.2 in the context of the schedule 1 - which is at the heart of the dispute pending before the arbitrator - involves a dispute in which both parties intend to rely on evidence as to the circumstances in which the agreement was concluded. The applicant also relies on the conduct of the parties in implementing the agreement since its inception.

[35] In *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust L*td (759/11) [2012]'s ZASCA 126 (21 September 2012), Wallis JA said the following at paragraph 15:

> Now that regard is had to all relevant context irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business

> people situated as they were, and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties. This does not mean that, if the parties have implemented the agreement in a manner that is inconsistent with any possible meaning of the language used, the court can use their conduct to give that language an otherwise impermissible meaning. In that situation their conduct may be relevant to a claim for rectification of the agreement or may found an estoppel, but it does not affect the proper construction of the provision under consideration.

[36] These remarks are apposite in the present application. The applicant bases its claim upon an interpretation of the schedule 1 to the agreement which is founded upon the application of a formula for adjusting the rates in respect of the interim fuel adjustments. Its case is that that the formula has been consistently applied by the parties in the determination of the rates applicable for the services rendered. In my view, in the light of the general approach to the interpretation of an agreement, it cannot be said that the evidence adduced by the applicant regarding the implementation of the agreement will be held to be inadmissible. Indeed it seems clear to me that in order to assign meaning to and to apply clause 19.1.2, some evidence of the sort adduced in this application may be required. I need say no more than this. I am concerned at this stage only with determining whether the applicant has established a *prima facie* right even though open to doubt, to payment of the disputed amounts pending final determination of the issues at arbitration. When regard is had to the allegations made by the applicant and those made by the respondent which the applicant cannot dispute, it seems to me that the applicant has indeed made out a *prima facie* case for the basis upon which it has calculated the amounts due by the respondent. In addition, when regard is had t the clear and unequivocal language used in clause 18.5 I am satisfied that the applicant's *prima facie* right t payment of the disputed amounts is established.

[37] That brings me to consideration of the other requirements for the granting of interim relief in the circumstances. In respect of the apprehension of irreparable harm the applicant averred that by reason of the respondent's refusal to pay the

full amounts claimed it would suffer severe financial prejudice. The applicant stated that it operates its business on “tight profit margins” and that the full payment of the rates at which it charges for its services was necessary to avoid serious financial losses to it. It also averred that unless it received full payment of the amounts claimed on invoice its cash flow would be seriously and negatively affected. This potential financial prejudice would result in having to consider liquidating certain assets in order to meet its obligations and that the liquidation of assets would place it in jeopardy in relation to its contractual obligations to the respondent.

[38] The respondent’s answer to this was to the effect that the averments lack substance and that the applicant had failed to adduce evidence of the alleged irreparable harm which it would be likely to suffer. I have already dealt with the argument regarding factual averments as opposed to mere assertions hereinabove in a different context. The same applies in this instance. The allegations made by the applicant in respect of the irreparable harm to be suffered are allegations of fact and not mere assertions. I am satisfied that the applicant has, on the evidence presented, established a reasonable apprehension of irreparable harm in the event that the relief sought is not granted.

[39] The respondent contended is, in its heads of argument, that the applicant was vested with an alternative remedy in the form of the pending arbitration proceedings between the parties. The argument was not pursued at the hearing of the matter. The suitable and effective remedy must be one which addresses the harm to be suffered by the applicant. In this instance the resolution of the dispute at arbitration, albeit in favour of the applicant, will not, in my view, address the harm suffered by the applicant.

[40] The question of balance of convenience can be disposed of briefly. The respondent, it was common cause, has made payment of the disputed amounts

into the trust account of its attorneys and has undertaken to continue to make payment of any further disputed amounts into the attorney's trust account. It is therefore effectively divests itself of control of those funds pending the finalisation of the arbitration. At the hearing of the matter the respondent consented to the striking out of a hearsay allegation to the effect that the applicant was operating its business in a manner that imposed some risk to the respondent insofar as being able to obtain satisfaction for an award in its favour in due course. That contention was rightly abandoned. It was also, quite properly, not pursued in argument that the respondent would notionally suffer prejudice in the event that the disputed amounts was paid to the applicant and utilised in the conduct of its business. In the light of this the respondent could not point to any prejudice which it would suffer should the relief sought by the applicant be granted.

[41] In determining the balance of convenience a court is required to weigh the prejudice that the applicant might suffer in the event that the relief is not granted against the prejudice that the respondent would suffer in the event that the relief is granted. I have already pointed to the prejudice that the applicant might suffer and, in the light of the fact that the respondent could not point to any prejudice that it would suffer, it must follow that the balance of convenience overwhelmingly favours the applicant.

[42] It follows that the applicant must succeed. It is appropriate to decide the question of costs at this stage. The costs should, in accordance with the general rule, follow the result. Both parties justifiably employed senior and junior counsel.

[43] In the result I make the following order:

1. The respondent is directed to pay to the applicant, pending the finalisation of the arbitration proceedings between the parties, the shortfall outstanding in respect of the applicant's December 2014 and January 2015 invoices, presented to the respondent in terms of the Road Transportation Services Agreement entered into between the parties on 24 March 2011 at port

Elizabeth (“the agreement”) and withheld by the respondent in the total sum of R1,176,732.56;

2. Pending the resolution of the arbitration proceedings between the parties the respondent is interdicted from withholding payment of any portion of the amount due to the applicant in terms of invoices issued by the applicant to the respondent in respect of services rendered by the applicant in terms of the agreement;
3. The respondent is ordered to pay the costs of the application, such costs to include the costs of two counsel.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant
Advs. E.A.S Ford SC and M. L. Beard
Instructed by Rushmere Noach Inc.

For the Respondent
Advs. S. C. Rorke SC and B. Maselle
Instructed by Pagdens Attorneys