IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT. PRETORIA)

CASE NO: 28244/08
DATE: 2009-05-26

In the matter between:

INDEPENDENT PETROLEUM GROUP **Applicant**
and

ENERGY FOR AFRICA **Respondent**

JUDGMENT

HARTZENBERG J: This is an application for the liquidation of the respondent company. The main issue between the parties revolves around an agreement in terms of which an oil tanker containing gas arrived in the Durban harbour and the respondent company was required to provide a letter of credit and to accept 30 000 tons of liquid gas.

There were a number of e-mails sent to the respondent company insisting upon the production of the letter of credit and insisting upon the respondent company taking possession of the substance. Eventually the liquid

gas was sold by the applicant company, and it is alleged that the applicant suffered damages in that it had to sell at a lesser price, that there was demurrage and that there was extra transport costs involved.

The respondent disputes the validity of the claim, and which is common cause, refers to the fact that the agreement upon which the applicant relies, specifically provides that the agreement will be governed by the laws of England.

Then the defence is that there was a condition precedent to the agreement and that it was well known between the parties that the respondent company could not take possession of more than 8 500 tons of this substance. The allegation is that some of the major companies like Caltex or Shell or so, had to come into the picture.

Mr Leibowitz, who it is clear does not believe a word that Mr Eymond says, argues that the respondent company has not disclosed in the papers a *bone fide* defence, and he argues it on basically two bases. The first is he says that the correspondence through e-mails and later letters do not from the outset indicate that there was this pre-condition and that the pre-condition on which the respondent company relies is an afterthought. Then he says that the probabilities are so strong against the acceptance of such a pre-condition, that the court can safely reject it on that basis. He argues that if, and I will deal with the pre-conditions just now, that if the respondent company could only take 8 500 tons, then why at least did it not buy 8 500 tons at the time when the oil tanker appeared in the Durban harbour?

On the other hand it is clear that at an early stage it was stated on behalf of the respondent company that in trying to raise a letter of credit or get a letter of credit, there were compiications with the bank and that a situation could arise where the respondent could only get a letter of credit for 8 500 metric tons. That fits in with what was later on explained by the respondent, and that communication dates back to 15 February, which is the very beginning of the communications on which Mr Leibowitz relies.

The pre-condition relied upon is that the majors had to get onto the picture and that there had to be some sort of a consortium buying. The respondent company refers to the very same agreement upon which the applicant relies, but added to it are the words: “plus consortium (third parties), which Mr Eymond on behalf of the respondent company explains as follows, he says that he received the agreement, he added those words, signed the agreement and sent it back to the applicant, but that it was clear between the applicant and the respondent that that was the agreement.

I find it impossible on the papers to come to the conclusion that the defence raised by the respondent company is not a *bone fide* defence. In the circumstances the application for liquidation cannot succeed. Mr Leibowitz on behalf of the applicant argues that the matter in those circumstances has to be referred to evidence so that the evidence of the two main parties can be tested and the court can come to a conclusion.

I would have acceded to that request but for one circumstance, and that is the fact that the agreement upon which the applicant relies and which is the only source for a claim against the respondent company provides that the parties are bound by the laws of England. The situation may therefor arise that eventually the court decides in favour of the applicant and that the respondent company is liquidated and liquidators are appointed. But even then it is still possible that it will be necessary to revert to the English courts for clarity about the amounts involved. In those circumstances I do not think that it would be prudent of this court to refer the matter to evidence where it was evident to the applicant that the claim was disputed. In all the circumstances the application is dismissed with costs.

DATE OF JUDGMENT:	26 MAY 2009
ON BEHALF OF APPLICANT:	D G LEIBOWITZ
ON BEHALF OF RESPONDENT:	FJ ERASMUS