**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 20232/2020**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

**…….** **…11/12/2023…**
**SIGNATURE** **DATE**

In the matter between:

**RAM TRANSPORT (SOUTH AFRICA) PROPRIETARY LIMITED t/a RAM HAND-TO-HAND COURIERS** **Plaintiff**

and

**DHL SUPPLY CHAIN (SOUTH AFRICA) PROPRIETARY LIMITED** **Defendant**

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**JUDGMENT**

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**MANOIM J:**

**Introduction**

[1] The plaintiff in this case, RAM sues the defendant, DHL, for R39 054 201 for damages for unlawfully terminating a contract. In brief RAM contends that it had a two year contract to distribute pharmaceutical products for DHL to various destinations. DHL, it alleges, terminated the contract after only six months and thus prematurely.[1]

[2] In an earlier decision I separated the hearing on the merits from the damages in terms of Uniform Court Rule 33(4).[2] This decision is confined then to the dispute on the merits. It is common cause that in order to succeed with its damages claim RAM needs to prove that the contract it alleges existed, contained the following three express or implied terms; (i) that it was for a minimum of two years;(ii) that it was exclusive; and (iii) that it could only be terminated for breach or cause. Absent success on these points its claim for damages is a non-starter.

**Prior litigation**

[3] RAM had initially sought to enforce specific performance against DHL in an urgent interdict in November 2018. That application heard by Modiba J, was unsuccessful. Modiba J held that RAM had failed to prove the existence of the contract it sought to enforce. RAM then instituted the present action for damages on 12 August 2020. DHL brought an exception application which was heard by

[1] The full name of the plaintiff is RAM Transport (South Africa) Pty Ltd t/a RAM Hand to Hand Couriers . The full name of the defendant is DHL Supply Chain (South Africa) Pty Ltd.
[2] This ruling was made on 14 October 2022. As it happened the hearing on the merits could not be completed in the first three weeks.

Twala J who dismissed it. The matter was then transferred to the Commercial Court after close of pleadings, and it is in that capacity that I have case managed and subsequently heard the trial in this matter.

**Litigation history**

[4] The trial commenced on 14 November 2022 and the plaintiff's case ran until 18 November 2022. RAM called four witnesses to testify and one under subpoena to produce documents. At the end of RAM's case DHL applied for absolution. I heard that application on 2 December and dismissed the application by order given on 8 December 2022. The case then resumed on 15 May 2023 for DHL's case and ran until 25 May. DHL called seven witnesses. Final argument was heard on 3 and 4 August 2023.

**Background**

[5] On 31 August 2018, DHL, wrote to RAM, to terminate its services. RAM had been providing these services for a period of six months. What is central to the dispute is what were the terms of the agreement that governed the provision of these services. The parties do not deny that they had some form of a contract. They cannot however agree what the terms of that contract were. Put differently the contract DHL sought to terminate was not the same one that RAM alleges was the one between them and on which it now sues on.

[6] Ironically, each party seeks to rely on contractual terms drafted by the other. At the end of a trial lasting nearly four weeks, the testimony of eleven witnesses and over 2000 pages of documentary evidence, the position is not much clearer. Each side has been able to produce some evidence in support of its choice of contract. But each side has had to explain away certain difficulties with its version and has had to invoke context to resolve this. This led to further dispute. Whilst the parties agreed that context is relevant, they disagree over which facts should be relied on to inform the context. Largely that factual dispute is premised on which period is relevant.

**The parties**

[7] RAM is a large courier company which distributes a wide variety of products including pharmaceuticals. It has a wide footprint over the country and hence its attractiveness to DHL. Like RAM, DHL is a courier company. DHL is also an international company, one of the largest of its kind in the world. But despite this scale, DHL does not do all types of distribution, and so it outsources some of its functions to firms in the same line of business that can offer a complementary service. This is what led to its engagement with RAM.

[8] DHL has entered into a number of contracts with health care companies to distribute products for them. It refers to these clients as its principals. The largest of these principals, in terms of the business they represent to DHL, is Netcare, a private hospital group which requires products to be distributed to its hospitals located all across the country. DHL's relationship with its other principals has not

featured in this litigation but the views and centrality of Netcare has loomed large. All the principals have contracts with DHL in terms of which DHL has certain service obligations, principally related to the turnaround times between the placing of an order and its delivery (varying between the next day delivery or the day thereafter) and because these are principally health care products, the integrity of the supply chain or put more simply, the need to avoid contamination or compromise of the product. Many of the products will be contaminated if they are not distributed in temperature controlled environments. This means that distribution vehicles have to be specially configured to meet these requirements.

[9] The principals imposed these integrity and timeous delivery obligations on to DHL through their respective contracts. The evidence is that with the consent of the respective principals, DHL could outsource some of its distribution responsibilities to third parties such as RAM.

[10] Since RAM did not have any contract with any of the principals the challenge for DHL was to ensure that it passed on its service obligations to RAM. But DHL also wanted to reduce the amount it paid for outsourcing the third party distribution. The more it paid out, the more it cut into its own margins. But if the third party had to meet the stringent distribution requirements passed on by DHL from the principals, its own costs would increase, and hence it would seek to recover these in terms of the rates it charged DHL. This conflict of interest explains some of the problems that emerged in the relationship.

**The history**

[11] The events in this case span from mid-2017 to 30 September 2018. Prior to this, RAM and DHL had an existing distribution arrangement for other products. This arrangement still persists notwithstanding this litigation.

[12] The history starts with an interaction between John Craven, DHL's sourcing manager, and JP Walker, RAM's sales representative in 2017. Craven had asked Walker if RAM was interested in doing DHL's pharmaceutical distribution. Not much came of this conversation at the time, but later, on 10 August 2017, Craven sent Walker a request for quotation ("RFQ"), to perform the pharmaceutical distribution services for DHL.

[13] The text of the RFQ states:

> *"Moreover, while it is the intention of DP DHL GROUP to enter contract negotiations with the selected Supplier, the fact that DP DHL GROUP has given acceptance to a Supplier does not bind it or any official of it to purchase any product or service from such a Supplier."*[3]

[14] DHL rely on this text to suggest that the RFQ constitutes DHL inviting RAM to make an offer to it. Moreover, it argues, all it signifies, is that the selected supplier (i.e., eventually to be RAM) would be selected to be its negotiating partner. What it does not do, is signify that RAM's "acceptance" meant it had been appointed the supplier.

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[3] 100-10

[15] The RFQ was accompanied by two documents. The first was a case study in which the deliveries of the existing service provider, a firm called Seabourne, over the period June 2016 to April 2017, were set out. The other document was entitled *"DHL's ...distribution Services Requirement Statement"* ("the Statement"). This is a generic document, eleven pages long, dealing with what DHL's service requirements are. It traverses a number of topics but is not addressed to RAM specifically nor does it deal with issues that have become the ones of contention in this litigation namely duration and exclusivity.

[16] RAM was asked to complete a spreadsheet setting out its rates for the month to various destinations and within various time periods based on the Seabourne case study. The purpose of the exercise was to enable DHL to compare RAM's proposed rates and services, with those that Seabourne was currently providing. Although the service was about moving a box from point A to point B it is more complicated than that. It is also about how much the parcel weighs as this influences the price, as well as the anticipated time of delivery and by what mode (by road or by air). Precisely what this time and mode factor meant, became the subject of later dispute. RAM populated the spreadsheet with its rates. This spreadsheet became RAM's offer on the pricing. Craven was not impressed with RAM's first spreadsheet. According to Walker he was told that RAM needed to "*sharpen its pencil*". This Walker understood to mean that RAM must make a new offer where its pricing was lower. Apart from populating the case study RAM also had to send separately its rate cards for distribution from Johannesburg and Cape Town. At the time DHL had distribution warehouses in both Cape Town and

Johannesburg but later it closed its Cape Town warehouse and it no longer has significance in this case.

[17] RAM revised its pricing on the spread sheet to result in net lower pricing than on the first offer. This documentation was finally submitted on 11 September 2017 and according to RAM constituted its “last proposal”. On 30 November DHL sent a letter addressed to Graeme Lazarus, the Chief Executive Officer of RAM. Accompanying the letter was an email from Craven in which he congratulates RAM on being nominated as DHL’s preferred service provider.

[18] The contents of the email and the letter are important for evaluating the dispute. The letter is dated 27 November but was only received by RAM on 30 November – it arrived with Craven’s accompanying email. It is signed by Craven and Margareutte Van Der Merwe who at that time was the general manager of DHL Supply Chain in South Africa. The letter is titled *“Letter of intent for provisioning of Life Science and Healthcare products to DHL Supply Chain SA”.* In this case both parties refer to this as the Letter of intent and I will follow that convention from now.

[19] Within minutes of receiving the email from Craven, Lazarus emailed Craven to thank him for the award and indicating the urgent need to form teams to begin executing the task.

[20] On RAM’s construction of the events the preceding documents constituted the offer made by DHL, and Lazarus’ email, the acceptance. RAM has pleaded that

on 30 November then, the parties had reached an agreement. That agreement according to RAM comprised the following:

[21] An express component made up of the following documents:

a. The Statement;

b. The award, by which is meant the Letter of intent and Craven's covering email of 30 November; and

c. Ram's populated case study and its rate cards.

[22] I commence with the terms of Craven's email that accompanied the letter of intent. that states:

*"Dear RAM Team*

*We hereby confirm that your LSH distribution proposal for DHL Supply Chain has been successful and as a result we wish to initiate the implementation planning going forward. Please see attached letter and confirm that you accept the nomination. We would also like to extend our congratulations on your successful*

*nomination and we certainly look forward to a mutually prosperous relationship going forward."*

[23] I then quote in full the accompanying letter of intent:

***"LETTER OF INTENT FOR PROVISIONING OF LIFE SCIENCES AND HEALTHCARE PRODUCT DISTRIBUTION SERVICES TO DHL SUPPLY***

***CHAIN S.A.***

*Dear Graeme*

*It is our pleasure to inform you that DHL Supply Chain S.A. has nominated RAM Hand To Hand Couriers to be its preferred service provider and with whom DHL Supply Chain S.A. intends to partner with for the provisioning of their required Life Science and Healthcare Product Distribution Services. This nomination is based on the requirements as stipulated in the RFQ and as per RAM's last proposal. It is to this end that DHL Supply Chain S.A. would like to contract with RAM Hand To Hand Couriers for an initial period of 24 months effective 012 (sic) February 2018. DHL Supply Chain S.A. would like this letter of intent to serve as a means to an end for the preparations necessary for the implementation of these services with the targeted effective date being no later than 26 January 2018. The final award shall be subject to the successful conclusion of the contract accordingly."* (Emphasis added. The underlined words were the source of alternative readings.)

[24] From these documents RAM relies on, as an express term, that the agreement was for 24 months. (It was originally meant to commence on 1 February 2018, but later postponed and meant to run for two years from 1 April 2018). But crucial as well to RAM's case for damages, are two other terms it says were tacit. These are that the agreement was exclusive to RAM for the period, and that it could only be terminated for material breach. If the latter, the defaulting party was entitled to 30 days' notice to remedy the breach.

[25] Crucial to the current dispute is the interpretation of the Letter of intent. Was it an offer open to acceptance by RAM and even if it was, was it conditional because of one of its terms. The Letter of intent has as its final sentence: *"The final award shall be subject to the successful conclusion of the contract accordingly*".

[26] DHL's pleaded case was that the award of the distribution was conditional on the conclusion of a contract which never took place. At the end of the trial its position became more nuanced. It argued that no contract had indeed come into place and hence it was not an issue of whether a suspensive condition was in place which may have been waived. Properly interpreted the letter served as an invitation to negotiate the terms of contract. Absent such a contemplated contract no agreement on the terms RAM alleges could be concluded.

[27] In RAM's pleaded case the final sentence of the Letter of intent is acknowledged, as a hurdle it has to cross. But it sought to meet the problem in three possible ways: it was referring to a period subsequent to the first 24 months, it was deleted, or it was waived, or its fulfilment was waived.

[28] On RAM's reconstruction of the history, 30 November 2017 was a red letter day because three crucial steps were taken by DHL on that day. First, as I have mentioned it was the day on which it had received the letter of intent from Craven with his covering email. Second, it emerged that on that day Seabourne was advised by DHL, that the contract between them would terminate on 31 January 2018. The evidence is that Seabourne had been asked by Craven on the 16th November 2017 to also submit a quote for the service pursuant to the same

RFQ. (RAM speculate that this opportunity afforded to Seabourne was all form and of no substance - a pretext to terminate the contract, something DHL denies). This would then align the termination of Seabourne with the start of the RAM contract as specified in the Letter of intent as 1 February. (The Seabourne contract did not have a specified duration. It could be terminated at the instance of either party on 60 days' notice to the other, which is what DHL had done). The third step taken that day, was that Lindi Smith, a staff member of DHL responsible for handling the Netcare account, wrote to the latter to inform it that "… *just a heads up on DHL's decision to replace Seabourne with RAM."* She goes to state that DHL has "*kicked off the formal process around this and a formal notification together with all the elements of the change control process, will be implemented, communicated and shared accordingly.*

[29] She concludes saying: *"I believe this decision is the right one …"*

[30] RAM's argument on the events thus far is that the award was not conditional, because if it was, why would DHL terminate its existing supplier and notify, without any qualification, its largest customer. Such behaviour would be commercially reckless unless DHL considered it had a contract with RAM in place.

[31] Ever since the seminal case of *Endumeni* in the Supreme Court of Appeal (SCA) *and* the successive decision of the Constitutional Court in *University of Johannesburg v Auckland Park Seminary,* most agree that the text of the

contract has been knocked off its elevated perch and is now relegated to co-equal interpretative status with context and intent.[4]

[32] At this stage of the history, on RAM's narrative, an agreement is in place. On DHL's narrative, no more than an agreement to negotiate with RAM as the chosen supplier elect is in place. But RAM at this point has the stronger argument. The three steps taken on the 30th November show decisiveness on DHL's part. If DHL was still in a process of consideration, why terminate Seabourne, which was the only alternative for it, if later contract discussions with RAM failed. After all Seabourne was the incumbent ensconced on its premises and could be booted off without cause on 60 days' notice. Then why inform, Netcare, the largest customer prematurely. If RAM had not worked out and DHL been forced to retain Seabourne or find someone else, it would have suffered serious reputational damage.

[33] Also, DHL had prior to 30 November taken various steps to assess the suitability of RAM, with visits to its premises conducted by its staff in the course of November and, given the other distribution contract it had with RAM, was already familiar with the company and its systems. Moreover, from the testimony of Craven two facts emerged. He had by late October 2017 concluded that RAM should be appointed. He had also sent a draft of the proposed contract on 1 November 2017 to Van der Merwe for consideration.

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at paras 66 and 67 and *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 SCA at para 25.

[34] Netcare's witnesses could have offered an explanation to rebut the inferences sought to be drawn by RAM. But two crucial witnesses from DHL, Van der Merwe and Lindi Smith were not called. There is no indication that they were not available to testify. RAM argued that the failure to call a relevant witness who is available may lead to an adverse inference. [5]

[35] The inference sought to be drawn here is that both knew at the time that the agreement was unconditional given their respective correspondence on 30 November. If it was not, they could have come to testify to the contrary. The one witness relevant to this period who did testify for DHL was Craven. However, Craven was junior to Van der Merwe in the hierarchy. He could not account for why all three events took place on the same day. Moreover, as a witness giving a subsequent account of the contemporaneous documentation, he proved unreliable.

[36] On 20 December 2017 the record contains an email written by Van der Merwe addressed to "*Dear Business partner*" The email records that DHL had *"…taken a decision to move its current third party vendor to RAM. This change was not taken lightly and is as a result of a vigorous RFQ process"* Then there is a request from Van der Merwe, for the 'business partners' to advise if *"… they are comfortable with the move so I can note it on our side."*

[37] The email's salutation makes it appear that it is addressed to the principals but the addressees in the recipients' line, are not the principals, but internal staff from

[5] See *Elgin Fireclays Ltd v Webb* 1947(4) A at 750.

DHL. Nevertheless, there is an email from Anita Hamilton of Netcare to Van der Merwe, which appears to be a response to it. It was sent an hour later. What is not in the record is the actual email from Van der Merwe to the principals but now both parties accept that this email must have been re-addressed and sent to them. Despite this Craven attempted to suggest that the '*business partners'* salutation was probably a reference to the addressees' i.e. the internal DHL people, and not the principals. There is no evidence in the numerous emails we have in the record, that Van der Merwe or anyone else referred to internal colleagues as business partners. Nor does the text of the email suggest it was for anyone else but the principals as the intended recipients. Craven's evidence on this point has dented his credibility as an interpreter of these earlier events.

[38] It is worth noting that in this "*business partners"* email Van der Merwe does still caution that: *"Rest assured that all the regulatory and operational checks and balances will be in place and signed off with a SLA in place before go live."*

[39] Like the Letter of intent this is language capable of supporting either party's narrative, i.e. no contract without an SLA or a contract with an SLA as nuts and bolts.

[40] But even if the contextual evidence strongly favours RAM, what then of the text specifically the final sentence of the Letter of intent. Here RAM argues relying on the decision of Corbett JA in *Alsthom*, that the final agreement was about "nuts

and bolts". [6] These could have been more detailed instructions developed from the framework of the statement. *Alsthom* is cited as authority for the proposition that:

> "*There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force…. Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that consensus on the outstanding matters would have to be reached before a binding contract could come into existence… The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand. … Whether in a particular case the initial agreement*

[6] *Cgee Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A).

> *acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances."* (Emphasis added)

[41] DHL's argument at this stage is two-fold. An attempt to suggest that there had been no offer and acceptance, which I found unconvincing – who had offered who at this stage and who had accepted, the matter had reached some finality. A better argument was made on the text. The use of the term 'nominate' rather than 'appoint'. The emphasis on aspirational terms, "*would like to*" as a "*means to an end",* are all reflective of a statement of engagement rather than marriage. Put differently if agreement could not be reached on the final contract, then neither party was bound. DHL argued that not only the text of Letter of intent but also that of the Statement favoured this interpretation. The terms of the Statement are not drafted in the normal imperative terms of a contract. Rather they suggest what criteria would be taken into account for a tenderer interested in qualifying. Thus, for example the term "*should be"* appears several times. If it was a meant as contract, the more muscular term '*must'* would have been preferred by the drafter.

[42] RAM made a valiant effort to argue that some of the ambiguous terms in the Letter of intent, such as '*nominate*' was also linguistically compatible with the notion of '*appoint',* but overall, considered purely textually, I consider DHL had the better of the argument. Nevertheless, as held in *Endumeni* the text is not necessarily conclusive of the interpretation. There is no doubt that the text is

sufficiently ambiguous, for context to tilt interpretation. At this stage of the history the context favours RAM's interpretation. This context is informed by the decisive steps DHL took on the same day, coupled with the failure of the relevant DHL witnesses to testify, or in the case of Craven to do so credibly. With context brought in as an aid, it suggests at this stage of the history that when the Letter of Intent referred to '*nomination*' this meant '*appointment*' and that even absent the contract contemplated in the final sentence being realised, that as the court concluded in *Alsthom,* a contact on the 30 November terms would still subsist.

**Subsequent events post 30 November**

[43] There followed a frenetic period between December 2017 and January 2018, in which steps to ready the parties for implementation began. RAM established a team from its side which met regularly with a team from the DHL side to plan. It was a 'nuts and bolts' endeavour in which the various different people brought their skill sets to tackling the logistics the service entailed ranging from, reciprocal site visits, to detailing warehouse functions as well as ensuring that products met the standards required by the Medicine Control Council ("MCC") regulations. The working group prepared an agenda and kept rough minutes. RAM relies on this to suggest that both sides knew what the contract was and were implementing the minutiae, not the high level terms as these had been established in the 30 November contract documents. For DHL the continued reference for the need for a contract pointed to its interpretation that there was no contract yet in existence merely an expectation that it would be. However, the reference to a contract in

these documents and subsequent follow up emails is inconsistent. Sometimes it is mentioned and other times it is not. Thus, no inference either way can be drawn from this.

[44] However, what also emerged during evidence is that during this period Craven had followed up on the status of the draft contract and which he sent to Van der Merwe on 1 November. It is unclear whether Van der Merwe did anything further about this and he was not aware if she did. Craven was a key player in the relationship between the two parties at this stage particularly given his good relationship with Walker of Ram. However, Craven became seriously ill during this period and was away for several months only returning to the office in late March. Without his foot on the pedal no-one else from DHL appeared to be driving the contract process.

[45] During this period Derick Bode emerged as the major figure for RAM. Not previously involved in the RFQ, Letter of intent process, he became involved in mid-December, effectively becoming DHL's operational manager for the project. He was not convinced the parties were ready yet to commence distribution on 1 February 2018. On 15 December 2017 he wrote to Paul Stone, then the most senior person in DHL South Africa with responsibly for the project, to suggest that the inception date or what they all referred to as the '*go live'* date be postponed by two months until 1 April 2018. He gave several reasons for this but notably does not mention the absence of an agreement as one of them. The two-month

postponement was accepted by all, and Seabourne was requested to stay on the job until the end of March 2018.

[46] Many more implementation meetings took place and emails were exchanged between what may be termed the operational people. One of the key players was Cindy Hayward, the chief pharmacist for DHL, and she interacted with several people at RAM, amongst them her counterpart, Gail Mkele. Hayward's anxiety, given her responsibility for health safety, was whether RAM would be compliant with the MCC regulations. DHL had a licence to conduct a warehouse in terms of these regulations. Were it to be found in contravention it would face the threat of losing its licence and as a consequence its business with the principals.

[47] Hayward, and DHL, laboured under the mistaken impression that RAM was subject to the same regularly regime as DHL was. As it turns out and this is now common cause, because RAM was conducting only the distribution of pharmaceuticals, and not warehousing them, the latter activity was subject to less stringent regulation. RAM claimed that insofar as the MCC regulations might apply to it *qua* distributor (i.e., having temperature-controlled vehicles) that it did comply. These requirements were set out in the Statement and RAM contends it met with them.

[48] During this period RAM invested several million rand in purchasing temperature controlled vehicles. It alleges that DHL was aware that it was doing so. RAM relies on this fact as additional to its arsenal of facts, suggesting a contract was in existence to the knowledge of both parties. Why else would RAM have spent

such an amount unless it reasonably believed it had a long-term contract. DHL in response contended that if RAM wanted to go on risk to make these purchases that was its decision. DHL did not oblige it to do so.

[49] RAM had made much of the fact during this period of planning for the ‘go live’ date both parties had expended major resources in management time and effort to ensure readiness. Why else do so RAM, argued unless both knew that RAM had been appointed in terms of the 30 November contract. DHL sought to deflect this by arguing that this was done in a spirit of optimism rather than contractual compliance. All believed at that stage, wrongly it turned out in hindsight, that a contract would be concluded, hence the effort.

[50] In mid-March of 2018, a dispute began between RAM and DHL regarding what they termed the liability issue. Who was responsible for the insurance of the packages whilst they were being transported from DHL’s warehouse to the principal. As far as DHL was concerned this was governed by the Statement. This required the distributor i.e., RAM, to have what it termed goods in transit insurance or GIT. RAM considered that the liability issue was governed not by the Statement but RAM’s terms for insurance as set out in its rate card. Since the rate card had been submitted as part of the RFQ process, RAM considered its terms as part of the 30 November agreement with DHL. Both parties had good point here. Both documents purported to regulate the liability issue but did so on different terms.

[51] On 26 March there was another D-day. At this stage RAM was meant to go on site as it was the Easter Weekend and although RAM was only meant to start or go live on the 1 April, Seabourne's staff had upped and left early. The unresolved liability issue, festering for some days before this, now broke open. On the 26 March, Craven, who had been off sick for some weeks due to illness, had returned. He wrote an email to RAM in which he stated that DHL required GIT insurance of R1.5 million per load which he states was part of the' RFQ requirements (clause 11.10). In fact, this was a reference to the Statement where it is correct this requirement is stipulated. Lazarus emailed back immediately and said RAM could not accept this requirement. He relied on his rate card. He pointed out that the rate card that RAM had submitted consequent to the RFQ, was not in RAM's conception, confined to freight rates, but also provided for liability. And then Lazurus held what he described as a gun to the head of DHL. He said in the email *"… we are onsite and will stop immediately until this is resolved."*

[52] DHL blinked. It agreed to continue the provision of the service on RAM's terms for the time being. Eventually the thorny issue of insurance was resolved. But it took till June 2018 till this happened, as a result of a meeting of minds between Nick Murray, the new chief executive officer of DHL, and David Lazarus, the chairperson of the RAM board. The settlement followed neither parties' original terms, but it is common cause that by June 2018 this issue which had divided them, was now settled.

[53] This dissonance on insurance although subsequently resolved does not favour RAM's version. Insurance was not a nut and bolts issue. It was material. If the two documents RAM relied on to infer the contract on 30 November contained different terms on insurance, it favours DHL's contention that this could not have been an agreement, but rather an invitation to negotiate, and that a final contract was still needed where such an issue would have been clarified.

[54] But at the same time this was going on, Alan Da Costa the inhouse legal counsel, and a director of RAM, as well as one of its shareholders, started playing a role. Da Costa had not been involved in the earlier part of the engagement with DHL around the RFQ and the Letter of intent. This meant he was not able to comment on what the understanding was prior to his involvement.

[55] On 1 March 2018 Da Costa wrote to DHL (this is shortly before the 'go live' date then anticipated to be 1 April) and undertook to draft a Master Logistic Agreement ("MLA") a Service Level Agreement ("SLA") and a Quality Level Agreement. One would have expected this initiative to have come from DHL, as the party who had, in the Letter of intent, signalled the need for this. As noted earlier, Craven claimed to have drafted something in November 2017, even prior to the 30 November, and then followed this up several times with Van der Merwe without a response. Given that Van der Merwe did not testify I do not know why. DHL had no person who was continuously involved in the relationship from the commencement until the end, unlike RAM where Lazarus and Walker were

throughout. Da Costa is an exception as he gets involved late. But his intervention in taking up the pen to prepare the agreements is crucial.

[56] For the most part Da Costa negotiated with the head of legal Cindy Cronwright and Zanoodene Kassim, her subordinate in the legal department, whose role was limited to commenting on Da Costa's various drafts rather than drafting their own. Ultimately, despite the exchange of several versions of the agreements none reached finality, and none were ever signed. It might be argued that even if the parties had attempted to re-negotiate and failed to do so then as a default, the 30 November agreement, then stood. This is the one possibility contemplated in *Alsthom*. But as Corbett JA cautiously noted this would depend on the facts.

[57] It is apparent from the facts that the putative agreements, the SLA and MLA, went further than nuts and bolts. For Da Costa used them to deal with three issues that remain in issue in this case. Duration, exclusivity and termination for convenience or cause. Zanoodene Kassim, his *bête noire* from DHL, was resistant to most of these suggestions.

[58] Thus, typifying this interaction is the following marginal comment from Da Costa to Kassim.

***"Commented [ADC2]:*** *Whilst we understand that DHL may not be agreeable to appointing RAM as the sole and exclusive supplier of the Services to DHL for this project, should information and the volume of the parcels materially decline from the information and volume provided to RAM at the commencement date, then*

*RAM reserves the right to re-negotiate the Service Costs and failing agreement, terminate on at least 60 day's notice. Accordingly, should DHL wish to delete sole and exclusive, then we would request that RAM inserts the clause 22 - VOLUME DISTRIBUTION PARAMETERS / INFORMATION below."*

[59] If Da Costa understood RAM to have a two-year exclusive contract terminated only for cause it is unclear why he would not insist on this term in the contract as RAM asserts was achieved already on 30 November. From the correspondence between him and DHL there is no indication that he relied on the 30 November agreement as binding on the parties in respect of these issues. While Kassim knew nothing of the history of the contract and could not take issues much further in this case, the same cannot be said for Da Costa, who as a director, and close confidant of Lazarus, must have been briefed on this.

[60] In some drafts Da Costa seemed prepared to give up on duration and even termination for cause, in order to gain other commercial advantages. If this was the in-house legal counsel's view of the matter, and Da Costa is clearly a sophisticated man, why would he do so, unless he and his firm, at that time, did not consider they had a firm contract yet, and hence his task was to urgently get the agreements done.

[61] It is likely that RAM believed, given DHL's March insurance capitulation, that it was in a strong bargaining position to get the contracts concluded on its own terms. The problem is that nowhere in the correspondence is there a suggestion that the fall-back position, if an MLA and SLA could not be concluded, was the 30

November agreement. Indeed, the fall-back position in some correspondence, particularly before the insurance issue was resolved, was that the services RAM was rendering would be in terms of its standard term contracts that it had for all customers Thus in a letter to DHL on 26 March 2018 Lazarus states:

> *"In light of the fact that the MLA has not yet been signed and having regard to the fact that DHL wishes to start trading today, our relationship will be based on RAM's standard Terms and Conditions of service a copy of which is available on RAM'swebsite@htpps: //www. ram. co.za/ Legal."*

[62] Here there is further cause for confusion. In order to get its account set up on the RAM system, DHL had to sign a credit statement known as the Master Services Application or MSA.[7] The MSA required the customer to fill in standard credit information RAM required. On the final page of the MSA are contractual terms. These constitute RAMs' standard terms of delivery for all its customers. These standard terms do not provide for duration, exclusivity, or cancellation for cause. But this credit agreement with contractual terms on its reverse side is not the same as the standard terms and conditions on the website. Nevertheless, this is the one agreement signed by both parties although at a low level in their respective hierarchies – the respective chief financial staffers not the chief executives.

[7] Not to be confused with the other contemplated agreement with Master Level Agreement or MLA.

[63] DHL has pleaded that this was the agreement that bound the parties, alternatively, RAM's standard terms and conditions as it appears on its website. The last claim seems the least credible as there is no evidence that anyone from DHL had read these terms. DHL otherwise contends that there was an ad hoc agreement between the parties open to cancellation by convenience.

[64] During July 2018 another dispute emerged between the parties over rates and the mode of delivery. This dispute continued during the course of the trial where it occupied much of the cross-examination time of the RAM witnesses but in final argument it received less attention. The dispute was due to a confusion over codes used by DHL and RAM which meant different things to the staff of the respective organisations. Pared down to its essentials, DHL required certain packages to be delivered no later than 17h00 on the day following collection from its warehouse in Johannesburg. This created problems for coastal deliveries particularly Cape Town as RAM's view was that next day delivery to meet this requirement meant the packages had to be flown making the rate more expensive. DHL understood that RAM could have made the delivery the following day by road. This misunderstanding is best set out in an email that Graeme Lazarus sent to Vojta Svobodo on 5 July 2018 in response to an email of complaint about rates from the latter.

> *"If DHL required a Next day services to CPT, PLZ, GRG and ELS and DHL wants RAM to commit to this — we need to fly cargo and cannot truck to ensure (sic) in time The other aspect is that now DHI as requested a service change, our business does not*

*guarantee these on a next day service which is a huge issue in that they is what the service you require."*

[65] The relevance of this dispute featured in the pleadings because DHL filed an amended plea in November 2022 where it relied in the alternative that if the November agreement was established that RAM was nevertheless in material breach of its obligations arising from its failure to charge and carry the packages in accordance with what it had contracted to. However, I need not consider this issue any further as in final argument counsel for DHL indicated that he would no longer press this point.

[66] But this dispute continued to fester. As I noted in the beginning one of the commercial challenges facing DHL was that any increase in what it paid for distribution to RAM cut into the margin it earned from the principals. The expectation of what it might pay on a monthly basis based on the rates expressed in the RFQ was not realised although I make no finding as to who was at fault in this respect. I do not know if this would have been prevented, if there had been an SLA or MLA, as the price was unlikely to feature in these documents since the parties were in agreement that the RFQ represented the price, albeit that the difference in interpretation was not foreseen at that time. This leaves as the only relevance of this dispute for what it foreshadowed as the next stage in the chronology.

[67] What then occurred, dramatically from RAM's point of view, was that Murray on 29th August gave RAM notice that the service arrangement between them had

terminated.[8] Murray heads the letter, "*Notice of termination"* and refers to the fact that the parties had over the past few months been trying to agree terms but had failed to: *"(…) reach consensus as to final and agreed terms and conditions that would govern the provision of the Services. DHL are incurring damages and sustaining losses, as well as, losing the respect and credibility of its clients as a direct result of the conduct and services of RAM.*

[68] He goes on to state:

> *"In light of the aforementioned and* ***due to this failure of a meeting of the minds regarding the Services and an agreement governing such Services*** *and without prejudice to any other rights or remedies available to DHL, DHL has been left with no alternative but to hereby give notice of its intention to terminate RAM's Services, with the last day of RAM's Services being 30 September 2018"*

[69] Murray does not purport to rely on any agreement that might exist between RAM and DHL. He does not say whether it was the online RAM terms and conditions or the MSA. Rather he relies on two disparate issues. A breach of service by RAM, which is not explained, and a repeated mantra of a failure of meeting of the minds.

[8] The letter came as a complete shock to RAM. Da Costa wrote an internal email to Lazarus saying exactly this.

[70] RAM followed up with a letter from Da Costa dated 17 September 2018. The principal purpose was to hold DHL to the contract and to continue to tender services. But what was the contract Da Cost had in mind? He starts off with a quotation from the Letter of intent referring to the two-year period and that the final award shall be subject to a contract. The letter goes on to state:

> *"Since receipt of said Award Letter, RAM and DHL have agreed all material terms of the contract and have concluded a partly written, partly oral agreement (" Agreement"), including…"*

[71] A list of agreements then follows. They include the MLA, SLA, a quality agreement, and a supplier code of conduct. Da Costa goes on to state that the salient terms of the SLA are a Courier "Holiday period" of six months which was to end on 28 September 2018, and an initial period of 30 months for the agreement terminating on 31 March 2021. (The reference to 30 months was an error and presumably he meant 36 months, which would be consistent with the termination date on 31 March 2021 if the start date was 26 March 2018.)

[72] What Da Costa appears to be doing in this letter is to align the Letter of intent with the later drafts. Thus, alive to the difficulty with the reference to the *successful conclusion of a contract* he has relied on the incomplete documents as by implication to suggest their successful conclusion. But this is not RAM's pleaded case. There is no longer any reliance on these listed documents nor on the 30 or 36 month period in the incomplete SLA, but on the 24 months envisaged in the letter of intent.

[73] When DHL did not relent, RAM unsuccessfully brought an urgent application in September to enforce specific performance. Admittedly some of the contentions made there about the contract are not consistent with the case being made out now. That may well be a reasonable error, given the urgency of the case and the need for the legal team to get acquainted with the complex history which involved numerous individuals who interacted with one another over the relevant period and the fact that the documentary evidence had not yet been fully discovered. I therefore do not consider that an adverse inference can be fairly drawn from that fact alone.

**DHL candidate contracts.**

[74] DHL, as mentioned earlier, relied on the MSA and alternatively RAM's online standard conditions of sale, for its contention of the existence of an ad hoc contract. What DHL sought to do was to allege a contract which was non-exclusive and had no period of duration and was terminable for convenience. Its witnesses all ran into difficulties in cross-examination when it was put to them that neither of their candidates for the agreement, contained two issues of prime importance for DHL; the rates - the rate card submitted responsive to the RFQ was not RAM's standard rate but a lower rate that DHL held RAM to and which the latter duly charged; secondly, the MSA does not contain any need to comply with the MCC regulations. As counsel for RAM put it to the DHL witnesses if their candidate contracts were the ones between the parties, RAM would not have

been under any MCC compliance and could have distributed the parcels on the back of a bakkie.

[75] Thus, DHL to some extent has to rely on parts of the November agreements to claw back these material terms. But this is not fatal to its defence. As counsel for DHL argued is not for DHL to prove what its agreement was to succeed. It only has to show that RAM has not proven the terms of the agreement it seeks to rely on. On this modest approach of the burden it faced, it must succeed.

[76] What then of the fact that the services had been carried out for a period of six months. This is one quarter of the period of the contract that RAM contends for. Some agreement must have existed for the parties to have continued operations for this to have happened.

[77] In *Command Protection Services* the issue before the court was similar.[9] The Post Office had announced that a security company was appointed to render security services. But the appointment letter also said this was subject to the finalisation and signing of a formal contract. The issue was whether this initial letter of appointment had acquired contractual force in circumstances where as *in casu* no final agreement had been reached. Nevertheless, again as in this case, the security company had rendered services to the Post Office for several months. The question was what one could infer from this as to the existence of an agreement. The initial one alleged by the security company as per the tender

[9] *Command Services (Gauteng) v SA Post Office Ltd* 2013(2) SA 133.

letter or another one. Here the answer from *Command Services* is of assistance. As Brand JA put it:

> *"In that light the most likely inference is that the appellant rendered the guarding services from 1 September 2003 pursuant to a collateral agreement and not in terms of an agreement reflected in PC2 and PC3. Whether this collateral agreement was impliedly on a month-to-month basis as suggested by the respondent, or on some other basis, is therefore of no consequence."*[10]

[72] The issue then is not what the terms of this arrangement were for the period of the six months that it subsisted. Rather it is whether RAM has proved the essential terms existed that it needs for its damages claim. The existence of a contract for six months does not help answer this. Put differently, the fact that some agreement existed through the six months does not lead to the inference that it is the one that contained the terms that RAM seeks to rely on.

**Conclusion**

[73] RAM, as I noted at the outset, needed to get around the 'final sentence problem'. It relied on the context to do so. On 30 November 2017, that contextual history could be construed in its favour – that RAM had been appointed on a two-year contract and whatever final contract was concluded was a matter of finer detail. But subsequent events changed the context. These events suggested that the parties had decided that their future relationship was dependent on a final

[10] *Command Services* paragraph 24.

agreement. It was RAM that initiated the process of the final contract but failed to reach consensus with DHL on its terms. RAM clearly indicated in this period that it was necessary. The various disputes that arose over liability, what next day delivery meant in terms of mode of delivery and the concerns of Hayward about the integrity of the cold chain, all suggest that agreement on these terms was necessary and material.[11] They were not mere 'nuts and bolts' or mere detail in the *Alsthom* sense. RAM appreciated this as much as DHL did, hence its driving of the drafting process.

[74] Although the final period (at least from March 2018) as evidence of context is messy, overall, the facts favour the interpretation, that the parties had no agreement until they concluded a final agreement. In this respect the case is similar to *Command Protection Services* where the successful tenderer was told by its customer that its *"… appointment was subject to … the finalisation and signing of a formal contract"* This language is similar to the final sentence in the Letter of intent which stated: "The *final award shall be subject to the successful conclusion of the contract*"

[75] In *Command Services* Brand JA explained that this sentence could never have been intended as a suspensive condition in the true sense. Rather he explained:

> *"If a formal contract were to be finalised and signed, this would not result in the agreement constituted by the respondent's acceptance*

[11] That Hayward linked the problems of the integrity of the cold chain to the absence of an agreement is evident from the following email she wrote on 20 June 2018 to her colleagues at DHL to state that she was: "…*not getting joy from RAM wrt Quality agreement"* She went on say: *"I would like to request to do inspections on 5 RAM Hubs to properly investigate how they handle our consignments, but I am afraid that I might not be able to do this without the paper in place."*

> *of PC2 becoming operative. What would happen in that event is that a new agreement, being the one constituted by the 'formal contract', would come into operation."* [12]

[76] As Unterhalter AJA noted in *Capitec Bank Holdings*, a decision made after those in *Endumen*i and *University of Johannesburg:*

> *"Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."*[13]

[77] RAM thus fails to prove that the duration of the contract was for 24 months. Ultimately the "gravitational pull" of the final sentence in the text has worked against its reliance on context because the context itself was not static during this period – it continued to evolve, sometimes favouring RAM's interpretation but more latterly in the relevant period, was inconsistent with its interpretation. Nor has it established whether the contract was only terminable for breach subject to 30 days' notice of termination. Recall this was alleged to be an implied or tacit term. Once this is the case, it is not necessary for me to find that the contract

[12] *Command Services* paragraph 11.
[13] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022(1) SA 100 SCA at para 51.

was subject to a tacit or implied term that it was exclusive. Without proof of the other two terms, the exclusivity issue is not relevant.

[78] I have also not considered that this is an appropriate case as RAM argued, albeit without much persistence, for invoking the doctrine of *quasi mutual consent*. This theory, also known as the reliance theory, holds that contractual liability may nevertheless arise where one party, the contract denier led the other party, the contract asserter, to believe that the contract was in place.[14] This theory may have possibly been invoked at sometime early in the chronology but is undermined by the evidence, as I discussed earlier, that the contract asserter, in this case RAM, was the one that also considered there needed to be contract.

**Costs**

[79] DHL is entitled to its costs. Both parties made use of senior and junior counsel so I will allow for costs for both.

**ORDER:-**

[80] In the result the following order is made:

The plaintiff's claim is dismissed with costs, including the costs of two counsel.

[14] See Hutchison et al *"Law of Contract in South Africa",* Third edition , Oxford, pages 520-521

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**N. MANOIM**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION**

**JOHNANNESBURG**

Date of hearing: 14 November 2022 – 28 November 2022

02 December 2022

15 May 2023 – 25 May 2023

03 August 2023 – 04 August 2023

Date of Judgment: 11 December 2023

Appearances:

| | |
|---|---|
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