

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

..... 17/04/2024...
SIGNATURE **DATE**

In the matter between:

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

Applicant

and

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

Respondent

LEAVE TO APPEAL - JUDGMENT

MANOIM J:

[1] This is an application for leave to appeal. The applicant is the plaintiff in this matter. It seeks leave to appeal my decision to dismiss its matter. The matter

concerns a breach of contract and a claim for damages consequent on the alleged breach.

[2] I had separated the issue of damages from the merits. The appeal concerns my finding on the merits. There is no dispute that some form of contract existed between the plaintiff and the defendant (“the respondent in the application for leave to appeal”). To succeed with a claim for damages the plaintiff had to prove that the terms of the contract it contended for, contained the following three terms:

- a. The contract’s duration was for a minimum of two years (“the contract period”);
- b. The contract was exclusive; and
- c. That the contract was only terminable for cause during the contract period.

[3] The plaintiff alleged that the contract was to endure for a minimum period of two years. It is common cause that the parties had implemented some form of contract for a period of six months, before the defendant terminated it on one month’s notice. As a finding of fact, I did not find that it was terminated for cause.

[4] The defendant denies that the contract had a two-year duration but was an *ad hoc* contract which could be cancelled in the manner that it did without cause. (An alternative plea that it had been terminated for cause was not persisted with.)

[5] The basis for the plaintiff's claim of a two-year contract was a letter of intent ("LOI") that the defendant wrote to it on 30 November 2017. In that letter the defendant stated its intention to enter into a contract with the plaintiff. It mentions that this would be for an "... *initial period of 24 months...*". This sentence is what the plaintiff relies on to prove the alleged duration. (The two other provisions, exclusivity and cancellation for cause are pleaded as tacit terms.)

[6] But the LOI also stated in a concluding sentence that:

"The final award will be subject to the successful conclusion of the contract accordingly."

[7] The case largely turns on what that sentence meant. It is common cause that no further contract was entered into. That might suggest that this was a condition that had to be fulfilled prior to the contract being entered into. But the parties, notwithstanding this, proceeded to take a number of steps which the plaintiff alleges meant that the contract had been entered into. *Inter alia*, the plaintiff relied on the fact that the defendant had taken steps to terminate its existing service provider, verified that the plaintiff was compliant with its service standards, and advised its clients (amongst whom was major hospital group) that the plaintiff was now its service provider.

[8] It is also common cause that the plaintiff commenced providing the services contemplated in the contract on an exclusive basis from 26 March 2018 to 30 September 2018. The duration of the service provision was six months.

[9] What then does the plaintiff make of the condition? The plaintiff suggests various possibilities. The first was that the condition contemplated no more than a nuts-and-bolts agreement that detailed the minutiae but had no effect on the major terms including price and duration which the LOI had regulated. In the alternative this condition was waived or by virtue of quasi mutual assent the clause was no longer operative.

[10] The plaintiff, I found, had difficulties getting around the plain language of the agreement. But the plaintiff sought to rely on context to establish its primary argument that the condition was of the nuts-and-bolts variety. What the plaintiff was seeking to rely on as a matter of law was a decision by Corbett JA in *Alsthom*¹ where he held that the existence of outstanding matters may not deprive an agreement of contractual force. The matter concerned like this one with an acceptance of a contract, but which was subject to further negotiations which were never completed.

[11] Corbett JA held that the parties might well have agreed expressly or by implication, to have left the outstanding matters to later negotiation. Where these outstanding matters do not get resolved then the original contract might nevertheless still stand. When might this apply? Corbett JA held that this would depend on "*...their conduct, the terms of the agreement, and the surrounding circumstances.*"² On the facts of the case Corbett JA held that there had been a binding contract.

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

² *Supra*, 92 E-F.

[12] But at the other end of the spectrum was the case also from the SCA which the defendant relied on, *Command Protection Services*.³ That case like this one dealt with a tender that had been awarded subject to a condition. In that case as well the contract had been implemented before the defendant had terminated it. *Command Protection Services* was decided after *Alsthom* and the court refers to it. Brand JA explains that disputes of this kind are not novel. He goes on to say that the case law recognises two possibilities. The first is that the parties lacked *animus contrahendi* because there was no consensus on the outstanding issue. In that case there is no contract to be recognised. The second is that of the *Alsthom* situation. Even if they fail to agree on the outstanding issues the original contract prevails.⁴

[13] Both parties regard these two cases as authoritative. The issue was whether on the spectrum of possibilities between them, the case more closely resembled the one, not the other. The plaintiff in its leave to appeal has devoted an entire table to setting out the differences in fact between the facts in the present case and that in *Command Services*. I make no comment on whether all the differences are as significant as the plaintiff suggests.

[14] The problem faced both parties, in a case where the conduct of the parties was a central issue, was the number of *dramatis personae* who had been players in the dispute. Each placed more reliance on the testimony or absence thereof of the other side's witnesses.

³ *Command Services (Gauteng) v SA Post Office Ltd* 2013(2) SA 133.

⁴ *Supra*, at paragraph 12.

- [15] The plaintiff seeks to rely on the fact that the defendant had failed to call two available witnesses. One was Margareutte Van Der Merwe, who at the relevant time was the general manager of DHL Supply Chain in South Africa. She was the author of the LOI and the person who had authorised the termination of the other service provider and gave an instruction that the change in service provider be communicated to the hospital group client. A lesser player who was also not called although available was Lindi Smith. She was the client liaison person who had authored the email to the hospital group on the instruction of Van der Merwe.
- [16] The plaintiff urged me to draw an adverse inference from the failure to call these witnesses when they were known to be available to testify. Although I did so in my decision, it would appear that the plaintiff considers that this inference should have gone further. In the view of plaintiff's counsel during argument "... *had they been called they would have sunk the defendant's case*".
- [17] I noted in my decision that up until this point in the narration the context favoured the plaintiff's version. What changed was when during the implementation stage, the plaintiff's in-house legal counsel, Alan Da Costa, who was also one of its directors, sought to taken up the pen and draft a contract between the parties. He is the plaintiff's witness whose conduct the defendant seeks to rely on to make its case.
- [18] Da Costa's attempt to conclude a contract went through several iterations but ultimately was never finalised. During the drafting process Da Costa had not

confined himself to 'nuts and bolts' but had dealt with the three key issues the plaintiff now seeks to rely on: duration, exclusivity, and termination for cause. What was perplexing was that in various drafts he never sought to rely on the LOI, but even proposed terms at variance with it. Also, during this period, a collateral dispute over insurance of goods in transit had led the plaintiff's managing director to assert that until this was resolved the plaintiff would operate in terms of its standard terms and conditions. This did not include any of the terms that the plaintiff now relies on.

[19] It was based on Da Costa's conduct that I considered that the context had changed and that it now favoured the version of the defendant. While I agreed at least with the plaintiff, that the defendant had not succeeded in proving its version of an alternative contract, I nevertheless agreed with defendant's counsel's proposition, that it was not for the defendant to prove its candidate for the contract. It only had to establish that the plaintiff had not established its candidate.

[20] What the plaintiff seeks to argue in the leave to appeal turns on two aspects that another court might consider differently. First, is the adverse inference to be drawn from the failure to testify being more consequential than I had regarded it. The second is that the evidence of Da Costa should have not been considered in the treatment of subsequent context. The argument here was that he was not involved in the initial contract negotiations leading to the LOI and had arrived late when the contract implementation had already taken place. The plaintiff argues that his views of the contract were subjective not objective, and I erred in having regard to them. Whilst I do not agree with this

view, I accept that these two issues are of sufficient probative value, that another court might consider the issues differently. Thus, if another court made more of the adverse inference in respect of the defendant's witnesses who did not testify, and made nothing of the conduct of Da Costa, because it would be considered no more than manifestations of his subjective intent, the outcome of the case would have been different, and the plaintiff would have prevailed.

[21] I therefore consider the plaintiff should be given leave to appeal. I do not consider the case should be appealed to the Supreme Court of Appeal as the plaintiff sought in its notice of appeal. There is, as I earlier noted, no legal dispute on the principles to be applied. Rather what the case turns on is their application. For this reason, an appeal to a full bench of this division would suffice.

[22] The plaintiff sought to rely on several other issues for the appeal. I did not, it argued, consider its alternatives, namely waiver and quasi mutual assent. It is correct that I did not. But as the factual underpinning for these cases is the same as the plaintiff's principal argument based on *Alsthom*, I did not consider they took the case any further. I do not consider they had any merit and I have therefore not needed to consider them given my conclusion on the two main issues.

ORDER:-

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

1. Leave to appeal to a full bench of this division is granted.

2. Costs to be costs in the appeal.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 08 March 2024

Date of Judgment: 17 April 2024

Appearances:

Counsel for the Applicant:

Adv MM Antonie SC

Adv AB Berkowitz

Instructed by.

Werksman Attorneys

Counsel for the Respondent:

Adv JPV Mc Nally SC

Adv JM Heher

Instructed by:

Eversheds Sutherland