



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

OF INTEREST

Case No.: 2906/2020

In the matter between:

RCOG PROPCO 1 LIMITED
(Registration Number: RC122476)

Plaintiff

and

WELFIT ODDY (PTY) LIMITED
(Registration Number: 1936/008806/07)

Defendant

JUDGMENT

EKSTEEN J:

[1] This matter arises from a contractual dispute concerning the validity of various agreements, and if binding agreements have been established, each party claims to have cancelled the agreements as a result of the other party's repudiation thereof. The plaintiff, RCOG Propco 1 Limited (Propco)¹, a company situated in Jersey, in the Channel Islands, issued summons in which it claimed US\$2 617 520,00 pursuant to the alleged breach of contract. The defendant, Welfit Oddy (Pty) Ltd (Welfit Oddy), a company registered in South Africa, entered a claim in reconvention in which it claimed payment of US\$2 389 750,00.

¹ At the time of the issue of summons plaintiff was known as GEM Propco 1 Limited and has subsequently changed its name.

[2] Welfit Oddy is a manufacturer of stainless-steel ISO tank containers and conducts business in Gqeberha, in the Eastern Cape. Prior to 2018, it had had a relationship with GEM Containers Limited (GEM), a company registered in the United Kingdom, with its offices in London. Welfit Oddy had from time-to-time manufactured tank containers for GEM and had, for that purpose, entered into a master container purchase agreement with GEM in 2013. The master container purchase agreement had envisaged future purchases from time-to-time. It provided for individual agreements to be concluded from time-to-time in respect of each additional order for containers. In the course of their relationship Welfit Oddy had dealt extensively with Ms Heidi Sommerville, the chief executive officer of GEM.

[3] GEM operated throughout as a container leasing company and had owned its own fleet of containers, which it had leased out to various customers. The ISO tank containers were designed for conveying liquids by sea, road or rail. On 24 January 2018 Ms Sommerville wrote to Welfit Oddy to advise of the restructuring of GEM's business. She said that GEM would remain the manager and lessor of the containers, but in the future, Propco would be the owner of the containers. She described the relationship with Propco as follows:

'With regard to the tank container data plate - it is important that Gem Containers Limited is shown as the only party to be contacted in case of an emergency or for any equipment, operational or legal queries in the field. Typically we do not include the owner details on the data plate to avoid operators or authorities contacting Gem Propco 1 Limited or any of our other asset owners directly.

On this basis, I have shown the same information for the Owner section and the Operator section in the table below.

The purchaser is **GEM Propco 1 Limited**.

This may require amendment to the original Master Container Purchase Agreement signed in 2013 which defines the purchaser as Gem Containers Limited.

Also, I have included Bev in to this communication. Bev Mason is GEM's operations manager and will be responsible for all operational requirements relating to the order from confirmation, through production, acceptance and delivery.

Bev will provide the GEM frame paint RAL reference and GEM decal format.'²

[4] The email received from Ms Sommerville proceeded to direct that the invoices for purchases of stainless-steel tank containers should henceforth be made out to Propco at their address in St Helier, Jersey, but were to be forwarded by email to Mr Pat Rocholl, the chief financial officer of GEM, and Beverly Mason for onward transmission to Propco. All communication was to be with GEM.

[5] As a result of this email there was no direct contact or communication between Welfit Oddy and Propco. All negotiation was conducted through GEM, who Welfit Oddy perceived to be Propco's agent. Welfit Oddy relied throughout on this email from Ms Sommerville dated 24 January 2018.

[6] Pursuant to the alleged restructuring of GEM's business, a new master container purchase agreement (the MPA) was negotiated with Ms Sommerville and forwarded to her. She presented the document to the directors of Propco and obtained their signatures to the MPA. The MPA is not in dispute, but, as I shall explain later, I am called upon to consider the interpretation of various clauses in the MPA.³ The contentious provisions are reflected hereafter.

[7] The introductory portion of the MPA recorded:

² The relationship described between GEM and Propco appears to foreshadow the conduct of the container leasing business as an anonymous partnership.

³ The MPA was signed by Welfit Oddy on 11 October 2018 and the signatures by the directors of Propco reflect no date. However, on the introductory page of the agreement it records: 'A master agreement made this 21st day of June 2018'. On the pleadings and in the conduct of the trial the parties were agreed that the MPA was concluded on 21 June 2018.

‘The VENDOR and the PURCHASER will in future enter into agreements (hereinafter described as “Each Individual Agreement”) for the sale and purchase of various UN Portable or IMO 4 or SWAP Tank Containers (herein described as “the Containers”).

The price, delivery and specification of these Containers are agreed in writing between the VENDOR and the PURCHASER at the time Each Individual Agreement is made.’

The master container purchase agreement that had been concluded with GEM in 2013 had contained an identical provision.

[8] The MPA stipulated that it would govern all the other terms and conditions of each individual agreement including, but not limited to, acceptance and inspection procedures, transfer of risk and warranties.

[9] Paragraph 2 of the MPA provided for the quantity and the price of the purchases. It recorded that:

‘The VENDOR shall sell and make available for delivery the containers at prices in accordance with the particulars and details as set out in Each Individual Agreement.’

[10] The acceptance and inspection procedures referred to earlier were set out in paragraph 3 of the MPA and it includes the following provision:

‘3.4 The Purchaser or his Agent may inspect units at the VENDOR’S plant after it receives notice from the Vendor that such units are available for inspection. If a unit is rejected by the PURCHASER or his Agent, the PURCHASER shall not be deemed to have accepted such unit and shall be under no obligation to issue clean receipt until such unit is accepted by the PURCHASER or his Agent, after further inspection. The price for each unit stated in 2 above includes the cost of making units available for inspection by the Purchaser including such lifting, handling, etc as may be necessary.’

[11] In terms of clause 4 of the MPA delivery of the containers had to be effected in accordance with the particulars and details set out in each individual agreement. It stipulated:

‘4.1 The Containers shall be delivered by the VENDOR in accordance with particulars and details set out in Each Individual Agreement.

...

4.4 Notwithstanding the above nor any of the terms recorded in Each Individual Agreement attached hereto, the PURCHASER accepts that the Containers remain the property of the VENDOR until payment has been made in full.

4.5 Although ownership of each Container will only pass to the PURCHASER against payment of the full purchase price, risk will pass to the PURCHASER against delivery.’

[12] Finally, the MPA provided for payment of each tank container to be made, again, ‘in accordance with the particulars and details set out in Each Individual Agreement’. It provided:

‘5.2 Payment is to be made for the full number of tanks produced and invoiced each month, irrespective of the number of tanks contractually promised and planned for the month. If however, the number of tanks built, is in excess of the contractual amount for the month, then the tanks in excess will be excluded from the monthly invoice, unless otherwise requested by or agreed with the PURCHASER.

5.3 Notwithstanding the above nor any terms recorded in Each Individual Agreement, the PURCHASER accepts that Containers may not be released to the PURCHASER until any overdue invoices had been paid in full.’⁴

⁴ The terms of the MPA are materially similar to those contained in the earlier master container purchase agreement concluded with GEM’s.

[13] Pursuant to the communication on 24 January 2018,⁵ as foreshadowed in the MPA, various agreements were negotiated and concluded between Welfit Oddy and GEM, generally under the guidance of Ms Sommerville. The agreements were concluded by an exchange of emails, and no written contracts signed by the parties were entered into at the time. Welfit Oddy proceeded to manufacture containers according to the terms agreed upon. Invoices were made out to Propco and directed to it through Mr Rocholl and Ms Mason. Eight of these individual agreements gave rise to the disputes in this matter. I revert to these agreements.

[14] Initially, all went well and payments were received from Propco pursuant to the agreements concluded through GEM, until approximately October 2018, when the first signs of financial distress at Propco became apparent. On 26 October 2018 Welfit Oddy addressed an email to Ms Mason in which it recorded:

‘... Up to this stage we have released 29 Tanks without invoicing.

Our Standard finance procedure for tanks sold EXWORKS entitles that we invoice on collection of tanks.

Moving forward I regret to advise that Finance has instructed that we are unable to release any further tanks until an agreement has been made between Welfit Oddy and Gem regarding the payment terms.’

[15] Much correspondence followed, extending over the next year, wherein Ms Sommerville repeatedly requested extended payment terms and reported regularly on attempts to obtain fresh banking facilities for Propco. Acting on the assurances given in respect of future payments, Welfit Oddy permitted the release of further containers from time-to-time, but the repeated undertakings in respect of payments were not honoured.

⁵ Para 3 above.

[16] During the same period the financial position at Welfit Oddy deteriorated significantly, largely due to unfavourable global trading conditions in the stainless-steel tank container industry and compounded by the substantial debt owed to it by Propco. Thus, Welfit Oddy sought legal advice, and, on 9 October 2019, Attorney Nurse addressed a letter to GEM demanding payment of overdue invoices in the amount of US\$4 856 480,00. This was followed two days later by a letter from Mr Allen, the managing director of Welfit Oddy, to Ms Sommerville in which he, too, affirmed that no further containers would be released until the overdue payments had been received.

[17] As I have said, throughout this period there had been no contact or communication between Propco and Welfit Oddy. All correspondence and business had been conducted through GEM, whom Welfit Oddy perceived to be the representatives of Propco. However, on 18 October 2019, Mr Ken Richie, a director and head of fund administration of Propco, responded to Mr Allen. He recorded:

‘Further to your email to Heidi Sommerville on 17 October 2019, please accept this email as acknowledgement of our receipt. The board will be meeting next week to discuss the matter.

In the interim, we are processing a payment of US\$316,800,00 to Welfit Oddy today for the release of tank containers.’

[18] Upon receipt of the payment a special arrangement was indeed made for the release of ten further containers.

[19] Matters came to a head on 29 October 2019 when Mr James Bryant, also a director of Propco, responded to the demand made by Mr Nurse. He recorded:

‘Patrick Rocholl has forwarded your recent correspondence to me as a director of GEM PropCo1 Limited. Please note, and kindly also remind your client, that none of the persons you have addressed your letter to are employed by or authorised to represent GEM PropCo1 Limited.

We have no records of the orders your client claims payment for. So to be able to investigate this matter we would be grateful if you could provide us in the first instance with the individual signed contracts supporting your client's claim.'

[20] This letter was followed by a further communication from Mr Bryant on 1 November 2019 where he recorded:

'We would like to take this opportunity to re-confirm that all purchases and orders made with you must be approved by GEMPropCo1 in writing before manufacturing commences. Only orders signed by at least one of the directors of GEM Propco1 are binding. ...

We further advise that going forward we have mandated Mr Patrick Rocholl to exclusively deal with all negotiations and the logistics of existing and future orders, however, any order will not be binding unless confirmed so by GEM Propco 1 in the manner set out above.'

[21] I shall revert to the issue of individual signed contracts and orders. Suffice it to say that Welfit Oddy insisted that it had concluded eight valid individual agreements and persisted in its claim for payment of all outstanding amounts. There were endeavours to reach a settlement of the disputes and Propco contended in its particulars of claim that a binding settlement had been concluded and sought to enforce it. The claim was not persisted with and it is not necessary to deal further with the settlement. Welfit Oddy, on the other hand, regarded the refusal to honour payment, coupled with the correspondence from Mr Bryant, as a repudiation of the MPA and the individual agreements. Accordingly, on 13 December 2019, Mr Nurse addressed a letter to Propco in which he recorded that Welfit Oddy had 'elected to enforce the purchase agreements concluded with GEM Propco, in terms of which Welfit Oddy has manufactured 816 tank containers for the

aggregate purchase price of US\$18 760 000,00'. Welfit Oddy expressly reserved its rights in terms of the purchase agreements.⁶

[22] Mr Nurse explained that Welfit Oddy had now sold and ceded all its rights in terms of the purchase agreements to its associated company, Buhold Intermodal BV of the Netherlands, with effect from 13 December 2019. Therefore, he advised that all amounts payable by GEM Propco to Welfit Oddy in terms of the purchase agreements would now be payable to Buhold Intermodal. However, Mr Nurse wrote that Welfit Oddy's obligations in terms of the purchase agreements had not been transferred to Buhold Intermodal and remained with Welfit Oddy. It therefore tendered performance of its obligations in terms of the purchase agreements 'against payment of all amounts owing by GEM Propco to Buhold Intermodal in terms of the purchase agreements'.

[23] The indisputable import of Mr Nurse's declaration was that Welfit Oddy did not accept the repudiation and had elected to hold Propco to its contract. However, what Mr Nurse neglected to explain was that Welfit Oddy had in fact also sold and delivered all the remaining containers to Buhold Intermodal and that they had no containers to tender against payment of the outstanding amounts to Buhold Intermodal. Welfit Oddy claimed that the sale was necessitated by its deteriorating financial position, which was, in part, attributed to Propco's failure to honour the agreements.

[24] At this stage, Welfit Oddy had manufactured 816 tank containers pursuant to the 8 contested individual agreements and 234 of these had already been delivered to Propco. Propco had made payment in respect of 344 containers, but Welfit Oddy refused to permit the delivery of any further containers. It contended that it was entitled to do so in terms of clause 5.3 of the MPA⁷.

⁶ Prior to this unequivocal election Mr Nurse had, on 19 November 2019, demanded that Propco perform its obligations under the agreements.

⁷ See para 12 above.

[25] On 30 July 2020, Jurgens Bekker Attorneys, of Johannesburg, addressed a letter to Mr Nurse, ironically, on behalf of GEM. He recorded that GEM had paid for 344 UN-Portable T11 tank containers and UN-T11 swap tank containers and that Welfit Oddy had delivered only 234. Jurgens Bekker enquired how many of the manufactured containers Welfit Oddy still had in their possession and demanded delivery of the remaining 110 containers for which it had paid, alternatively, a refund of its payment in the amount of US\$2 617 520,00.⁸

[26] On 14 August 2020, Mr Nurse reiterated that Welfit Oddy had in fact sold 816 tank containers of which it had delivered 234. He said that Welfit Oddy had retained the amount of US\$2 617 520,00 already paid by Propco in respect of the remaining containers on account of the outstanding balance of the purchase price due by Propco. He emphasised, again, that Welfit Oddy had elected to claim specific performance, however, in respect of the enquiry as to the number of containers still in possession of Welfit Oddy, he was silent.

[27] Accordingly, on 20 August 2020, Jurgens Bekker noted the election to claim specific performance and repeated their enquiry in respect of the number of containers that were still in Welfit Oddy's possession. Again, Mr Nurse responded, on 8 September 2020, reaffirming Welfit Oddy's insistence on specific performance and they again tendered to perform their obligation under the agreements. Still, Mr Nurse did not respond to the enquiry as to the number of containers in the possession of Welfit Oddy. Thus, Jurgens Bekker issued a demand that Welfit Oddy produce a notice for the inspection in terms of clause 3.4⁹ of the agreement for all the containers produced by Welfit Oddy in terms of the individual agreements, including the 110 containers already paid for. Mr Nurse rejected the demand and explained that Welfit Oddy had previously given notice in compliance with clause 3.4 and that the containers had in fact been inspected and approved by independent experts engaged by Propco. He again explained that Welfit

⁸ It is common cause that the value of the 110 containers for which Propco had paid, but not received, was US\$2 617 520,00.

⁹ See para 10 above.

Oddy had not cancelled the container purchase agreements pursuant to Propco's breach and insisted that they remained of full force and effect. This prompted Propco to issue summons on 25 November 2020.

The pleadings

Propco's Particulars of Claim

[28] As I have said the terms of the MPA are not in dispute. However, as adumbrated earlier, and explained in the letter from Mr James Bryant on 29 October 2019¹⁰, Propco adopted the stance that nobody at GEM, including Ms Sommerville, had authority to represent Propco. Propco accordingly denied that the individual agreements had been validly concluded.

[29] The crux of Propco's case is set out in their particulars of claim (as amended) as follows:

- '6. During the period 2018 to 2019, the Plaintiff paid for the total of 344 containers from the Defendant, amounting to US \$7 350 000.00. The containers were ordered by Heidi Somerville (without the authority of Gem Containers Limited and the Plaintiff) alternatively were ordered by Gem Containers Limited (without the authority of the Plaintiff) and the purchase of the aforesaid 344 containers was ratified by the Plaintiff by payment of the Defendant's invoices amounting to the aforesaid amount in respect of the said 344 containers. As a result of the aforesaid ratification, the terms of the Master Agreement became applicable to the purchase of the said 344 containers.¹¹

...

- 18. On 8 October 2020, the Plaintiff in writing demanded that the Defendant furnish to the Plaintiff a notice for inspection in terms of clause 3.4 of the Master Agreement for all the containers allegedly produced by the Defendant

¹⁰ See para 19 above.

¹¹ At the start of the trial on 14 November 2022 the plaintiff's pleaded case was that three of the agreements contended for in defendant's particulars of claim had been properly concluded in July 2023.

in terms of the Individual Agreements, inclusive of the outstanding containers, and further demanded that the Defendant deliver the outstanding containers¹², which the Defendant failed and/or refused and/or neglected to do.

19. The Defendant disputed that it was obliged to do so in terms of the Master Agreement, which conduct amounts to an unequivocal intention not to be bound by the provisions of the Master Agreement and a repudiation of the Master Agreement.
20. The Plaintiff has elected to accept the repudiation and cancelled the Master Agreement and the Individual Agreements, insofar as the Court finds that Heidi Somerville and/or Gem Containers Limited did enter into the Individual Agreements on behalf of the Plaintiff, which is still denied, alternatively, hereby accepts the repudiation and cancels the Master Agreement and the Individual Agreements ...'

[30] It accordingly claimed that it was entitled to the refund of the purchase price of the 110 outstanding containers.

The defendant's case

[31] As I have said, Welfit Oddy contended that it had manufactured 816 tank containers pursuant to 8 individual agreements concluded between the parties. It annexed to its particulars of claim 8 documents, each headed 'Individual Agreement'¹³ and contended that these documents constitute written agreements concluded between the parties at Port Elizabeth, alternatively London. Six of the agreements were signed by Mr Allen, for Welfit Oddy, on 17 April 2019 and the remaining two on 31 May 2019. None of the documents have been signed on behalf of Propco but, Welfit Oddy, nevertheless contended that Propco had been represented at the conclusion of the agreements by GEM, 'in the person of Ms Heidi Sommerville, both duly authorised.'

¹² The 110 containers for which Propco had paid but had not been received.

¹³ The documents are annexed to the particulars of claim as Annexures A1-A8 and were referred to during the trial by these numbers. Each 'Individual Agreement' was however allocated a separate contract number by Welfit Oddy to coincide with the number of each individual order allegedly placed. I shall refer to these documents as Annexures A1 to A8 and to the underlying agreements simply as A1 to A8.

[32] As adumbrated before, Propco persisted in its position that neither Ms Sommerville nor GEM had been authorised to act on its behalf. Thus, in its replication, Welfit Oddy contended that Propco was estopped from denying the authority of GEM, in the person of Ms Sommerville, to conclude the agreements. The material portions of the estoppel was pleaded as follows:

‘6.3.1 In the Master Container Purchase Agreement the parties expressly recorded in its preamble, and the Plaintiff thus represented to the Defendant, that the Plaintiff would in the future enter into Individual Agreements for the purchase of various tank containers from the Defendant.

6.3.2 Thereafter, and while negligently remaining silent throughout concerning the alleged lack of authority on the part of Gem Containers Limited to conclude Individual Agreements on behalf of the Plaintiff:

6.3.2.1 The Plaintiff on 27 July 2018 purchased 100 tank containers from the Defendant in terms of Individual Agreement number WO8808,¹⁴ an Individual Agreement negotiated by Gem Containers Limited, through Heidi Sommerville, on behalf of the Plaintiff. Individual Agreement number WO8808 is signed by the Plaintiff;

6.3.2.2 The Plaintiff subsequently paid to the Defendant the invoices addressed to the Plaintiff by the Defendant and presented to the Plaintiff by Gem Containers Limited in respect of Individual Agreement number W08808;

6.3.2.3 The Plaintiff concluded with the Defendant the three Individual Agreements relied upon by it in its Particulars of Claim, being annexures “A1”, “A4” and “A6” to the Defendant’s Plea, which

¹⁴ The individual agreement referred to does not form part of the 8 individual agreements relied upon for the relief sought.

Individual Agreements were negotiated by Gem Containers Limited, through Heidi Sommerville, on behalf of the Plaintiff;¹⁵

6.3.2.4 The Plaintiff subsequently paid to the Defendant, in part, the invoices addressed to the Plaintiff by the Defendant and presented to the Plaintiff by Gem Containers in respect of the Individual Agreements “A1”, “A4” and “A6”;

6.3.2.5 The Plaintiff concluded a further Individual Agreement with the Defendant, being Individual Agreement “A3” to the Defendant’s Plea, which was negotiated by Gem Containers Limited, through Heidi Sommerville, on behalf of the Plaintiff;

6.3.2.6 The Plaintiff subsequently paid to the Defendant in full the invoices addressed to the Plaintiff by the Defendant and presented to the Plaintiff by Gem Containers Limited in respect of Individual Agreement “A3”;

6.3.2.7 The Plaintiff accepted without demur the invoices addressed to the Plaintiff by the Defendant and presented to the Plaintiff by Gem Containers in respect of all eight Individual Agreements, as and when presented, all of which were negotiated by Gem Containers Limited, through Heidi Sommerville, on behalf of the Plaintiff;

...

6.4 By virtue of its conduct, the Plaintiff represented to the Defendant that Gem Containers Limited, through the person of Heidi Sommerville, was authorised to represent it in concluding the eight Individual Agreements.’

¹⁵ In its initial particulars of claim, which were amended during the course of the trial, the plaintiff had relied on the due conclusion of these Agreements. The amended particulars of claim deny the conclusion of these Agreements and contend for the ratification of a number of individual containers. See para 29 above.

[33] Welfit Oddy contended that it had been entitled to retain the 110 containers that Propco had already paid for until Propco had paid all overdue invoices in full. They pleaded thus:

‘5.8 Despite its obligation to do so:

5.8.1 the Plaintiff has refused to pay the sum of US\$11 366 000,00; and

5.8.2 against such payment, to take delivery of the remaining 582 tank containers purchased by it.

5.8A The invoices previously issued by the Defendant to the Plaintiff, in respect of the sum of US\$11 366 000,00, are accordingly overdue as contemplated by the Master Agreement. The Defendant was accordingly entitled to retain all tank containers manufactured by it until payment of the overdue invoices is made by the Plaintiff to it.’

[34] As I have explained, Welfit Oddy did not accept Propco’s alleged repudiation, and in its repeated demands Mr Nurse explicitly recorded that the defendant had made an election to keep the various individual agreements alive and hence demanded compliance. Welfit Oddy contended that Propco had invalidly purported to cancel the MPA and the individual agreements. It persisted, in its claim in reconvention, to compel the specific performance of the agreements. However, it later, during the course of the litigation, amended its plea to allege:

‘5.9.3 By resisting the Defendant’s claim for specific performance, the Plaintiff has not repented of its repudiation despite having had every opportunity to do so at all time subsequent to the formal demands for specific performance having been made ...

5.9.4 The Defendant is in law entitled to change its election and accordingly it has now accepted the Plaintiff’s repudiation and has on 26 March 2021 cancelled

the Master Agreement and the Individual Agreements, alternatively, it hereby cancels them.'

Welfit Oddy claimed that they had suffered financial loss as a direct result of Propco's repudiation which was the basis for its claim in reconvention.

[35] Finally, Welfit Oddy denied that it had repudiated the agreements. It contended:

'10.2 The Defendant was not obliged to comply with either demand because:

10.2.1 The Plaintiff had previously inspected and approved the tank containers manufactured by the Defendant in terms of the Individual Agreements; and

10.2.2 The Defendant is entitled to retain the 110 containers until payment of the full outstanding balance of US\$11 366 000,00 to the Defendant.

10.3 The Defendant denies that it has repudiated the Master Agreement and the Individual Agreements.

10.4 ... The Defendant has now cancelled those agreements'

The plaintiff's replication to the defendant's plea

[36] Propco denied that Annexures A1 – A8 to the particulars of the defendant's claim in reconvention constituted written agreements entered into by it and accordingly persisted in its denial of any binding agreement with Welfit Oddy.

[37] In respect of paragraph 5.8 and 5.8A, which I have quoted earlier,¹⁶ Propco pleaded:

¹⁶ Para 33 above.

- ‘4.2 When the Plaintiff demanded the release of the outstanding 110 outstanding containers on 8 October 2020, no invoices from the Defendant were overdue;
- 4.3 Upon the sale of the containers to Buhold on 11 December 2019, any invoices that were allegedly due to the Defendant, were no longer due by the Plaintiff as the Defendant was not in a position to tender delivery of the 582 containers to the Plaintiff, as alleged.
- 4.4 In amplification of the aforesaid, the Plaintiff specifically pleads clause 5.2 of the master agreement, which states as follows:
- 4.4.1 *“Payment is to be made for the full number of tanks produced and invoiced each month. Irrespective of the number of tanks contractually promised and planned for the month ...”*
- 4.5 Accordingly, payment by the Plaintiff was only due in terms of the master agreement up until latest 11 December 2019, the Defendant was not entitled to retain the 110 outstanding containers paid for by the Plaintiff and such conduct amounted to a repudiation of the master agreement and individual agreements, which repudiation was accepted by the Plaintiff and the master and the individual agreements were accordingly cancelled.’

Thus, Propco persisted that it had lawfully accepted Welfit Oddy’s repudiation of the agreement, all be it on a different ground to that relied upon at the time.

The issues

[38] The matter raises a number of complex issues of law and of fact. Broadly, they relate, firstly, to the question of whether any binding individual agreements were concluded and, secondly, if agreements were concluded, whether the conduct of either party, or both, constituted a repudiation of the MPA, or any of the individual agreements, and if so, what consequences flowed from that. Finally, in the event that Welfit Oddy is successful in its claim in reconvention, there remains the quantification of their claim.

During the pre-trial procedures it was agreed that Welfit Oddy would commence by presenting its evidence first, notwithstanding that it was the defendant in the main claim. After it had done so Propco closed its case without leading evidence.

[39] The contentions of the respective parties and the material terms of the MPA that require interpretation have been recorded earlier. A number of issues turn on the construction of the MPA and, accordingly, it is convenient to consider the construction of the MPA at the outset.

The construction of the MPA

[40] As I have said, the conclusion of the MPA and its terms are not in dispute, but the parties disagree on the proper interpretation thereof. Before I turn to the provisions of the MPA it is instructive to have regard to the legal principles applicable to the interpretation of contracts. In *Natal-Joint Municipal Pension Fund v Endumeni Municipality*¹⁷ the Supreme Court of Appeal considered the approach to be adopted in respect of the interpretation of documents. They concluded:

“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

¹⁷ 2012 (4) SA 593 (SCA) para 18; [2012] 2 All SA 262 (SCA); [2012] ZASCA 13.

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 and the background to the preparation and production of the document."

[41] It is appropriate to emphasise the precautionary guideline of the Supreme Court of Appeal in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*¹⁸ where they held:

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act¹⁹, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B - C).'

[42] Evidence of witnesses as to their perception of the meaning of the document and the obligations of the various parties arising from it is accordingly inadmissible and irrelevant. However, evidence that is directed at establishing the factual matrix or purpose, or for purposes of identification, is admissible but should be used sparingly.

¹⁸ 2009 (4) SA 399 (SCA) para 39; [2009] 2 All SA 523.

¹⁹ Clause 10 of the MPA provides: 'This agreement shall be the entire and sole agreement and understanding between the parties with respect to the sale and purchase of containers ...'.

[43] Mr Kairinos, on behalf of PROPCO, submitted that evidence of what passed between the parties during the precontractual negotiation is inadmissible. In support of this proposition he relied on *Tshwane, City of v Blair Atholl Homeowners Association*²⁰ and the authorities set out therein. However, in *University of Johannesburg v Auckland Park Theological Seminary and Another*²¹ the Constitutional Court endorsed the approach set out in *Endumeni* and they confirmed that it is one, unitary exercise of interpretation that requires a holistic approach, considering text, context, and purpose simultaneously.²² Against this background the Constitutional Court said:

'... (P)arties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. As the Supreme Court of Appeal held in *Novartis*:

"This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties — what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. . . . A court must examine all the facts — the context — in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."

[68] Let me clarify that what I say here does not mean that extrinsic evidence is *always* admissible. It is true that a court's recourse to extrinsic evidence is not limitless because "interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses". It is also true that 'to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible'. I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of

²⁰ 2019 (3) SA 398 (SCA); [2019] 1 All SA 291 (SCA); [2018] ZASCA 176 (SCA).

²¹ 2021 (6) SA 1 (CC); [2012] ZACC 13; 2021 (8) BCLR 807 (CC).

²² *University of Johannesburg* para 65.

context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.'

[44] Evidence of what passed between Ms Sommerville of GEM and Mr Allen of Welfit Oddy prior to the conclusion of the MPA is, in my view, admissible to establish the factual matrix or purpose of the MPA.

[45] I turn to the content of the MPA. The first enquiry is whether it required the individual agreements to be in writing and signed by the parties before they would have any binding contractual force. The MPA envisaged that the parties would enter into agreements from time to time for the sale and purchase of various types of containers stipulated in the agreement. As I have said, it provided that the 'price, delivery and specification of these containers are agreed in writing between the VENDOR and the PURCHASER at the time Each Individual Agreement is made'. Mr Bryant's initial position²³ was that a written document reflecting agreement on these issues and signed by the parties was required before a contractual obligation could arise. The position was persisted with during the trial.

[46] There are other indications in the MPA that it did envisage the preparation of a formal document.²⁴ However, whether a written deed of sale signed by the parties was a requisite for a binding agreement to arise by virtue of the provisions of the MPA is a matter dependent upon the proper construction of the agreement. Generally, where the

²³ Para 19.

²⁴ Clause 2 of the written agreement provides that the vendor shall sell the containers 'at prices in accordance with the particulars and details as set out in each individual agreement'; clause 4.4 provides that, 'notwithstanding the above nor any of the terms recorded in each individual agreement, the purchaser accepts that the containers remain the property of the vendor until payment has been made in full; clause 5.3 provides that 'notwithstanding ... any terms recorded in each individual agreement, the purchaser accepts that the containers may not be released to the purchaser until any overdue invoices have been paid in full'.

parties decide for themselves that their contract should be reduced to writing, as in this case, it is merely to serve as proof of the terms of their agreement, and not to give contractual force to it, unless there is clear evidence to the contrary.²⁵

[47] In *Goldblatt v Fremantle*²⁶ Innes CJ said:

‘Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (*Grotius* 3.14.26 etc.). At the same time it is always open to the parties to agree that their contract shall be a written one (see *Voet* 5.1.73. *V. Leeuwen* 4.2., sec. 2, *Decker’s note*); and in that case there would be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction.’

[48] In *Pillay and Another v Shaik and Others*²⁷ the Supreme Court of Appeal referred with approval to *Goldblatt*. Farlam JA noted²⁸ *C W Decker’s annotation of Van Leeuwen’s Commentaries on Roman Dutch Law* where he had referred to an observation by Samuel Strykuis (*Modern Pandect* 2.14.7) as follows:

‘(W)e must regard the *written* contracts as distinct, insofar as we should bear in mind that although the writing does not constitute the essentiality of the contract, which is contained in the mutual consent of the parties, they may nevertheless agree that their verbal agreement shall be of no effect until reduced to writing, in which case the agreement cannot before signature have any binding force, although there exists mutual consent; and it cannot be said that the writing served not in perfecting the transaction, but only as proof thereof, since here it is agreed that the consent should not operate without the writing, which must be observed as a legitimate condition.’

²⁵ *Grotius* 3.14.26 and *Christie’s Law of Contract in South Africa* (8th ed) p. 136.

²⁶ *Goldblatt v Fremantle* 1920 AD 123 at 128-129.

²⁷ *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA); [2009] 2 All SA 435 (SCA); [2008] ZASCA 159.

²⁸ Para 50.

[49] Accordingly, in *Woods v Walters*²⁹ it was held that:

‘It follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of the written document, lies upon the party who alleges it.’

[50] The MPA contains no express provision that an individual agreement would have no force or effect until reduced to writing and signed. The question that arises is whether, on a proper construction of the agreement, it can be inferred. PROPCO is hamstrung in its attempt to discharge the onus which rested on it by its decision to call no evidence at all.

[51] In support of the argument that the MPA envisaged duly signed written agreements as a prerequisite for the validity of the agreements, Mr Kairinos referred to various correspondence between the parties after the conclusion of the MPA seeking signed documents. The first series of emails stretching from 18 January 2018 to 18 October 2018 relates to the signature of the master purchase agreement and the individual agreement WO8808.³⁰ The latter related to the purchase of 100 26 CBM T11 Odessey designed containers purchased by GEM on behalf of Propco. A GEM document marked ‘Purchase Order’ was delivered for the purchase of these containers on 24 January 2018 signed by Ms Sommerville and Mr Rocholl, both employees of GEM. The purchase order reflected the quantity, the description and the price of the containers to be purchased under the agreement. It made no mention of the terms of payment or of the delivery of the containers and it recorded that they were to be ‘manufactured to approved specification’. No further particulars are contained in the order. However, in the initial email relied upon, dated 18 January 2018, Ms Sommerville indicated that GEM anticipated delivery during April and May 2018. Pursuant to this order, Welfit Oddy

²⁹ 1921 AD 34 at 305.

³⁰ The individual agreement WO8808 was relied on by Welfit Oddy in its replication (para 32 above) and is not one of the contested agreements.

proceeded to manufacture the said containers and delivery commenced during May 2018 and extended to 29 June 2018. In a weekly progress report, submitted to GEM, Welfit Oddy recorded on 12 July 2018 that contract WO8808 had been completed and all containers had been shipped. On 18 July 2018 Ms Sommerville addressed an email to Mr Gardner of Welfit Oddy in which she requested the outstanding documentation, duly signed. She recorded that payment had been delayed on account of her not having submitted the requisition in time, and she undertook to attend thereto. The individual agreement in respect of WO8808 was signed by Propco on 27 July 2018, simultaneously with the MPA, and by Welfit Oddy on 11 October 2018, long after the contract had acquired contractual force, and in this instance after it had been fully executed. Whilst it is true that the correspondence does demonstrate that the parties did require a signed agreement it is equally apparent that the parties did not envisage that the written document would give contractual force to their agreement. The conduct of the parties in respect of this agreement reflects a practice known to the parties at the conclusion of the MPA.

[52] The second series of emails seeking signed documentation upon which reliance is placed relates to agreements WO8830 (A1), 8842 (A3), 8872 (A5), 8872b (A6) and 8872B (A7)³¹. The correspondence commenced with an email from Mr Gardner to GEM on 10 April 2019 to which he had attached the draft individual agreements. It is of significance that, as of 10 April 2019, delivery of completed containers in respect of contract WO8830 and WO8842 had already commenced and the manufacturing process in respect of WO8872 was well underway. Payments had already been received from Propco in respect of the delivery of containers under WO8842. Again, the practice adopted was similar to that which they had applied in respect of agreement WO8808, to reduce their agreement to writing, long after it had acquired contractual force and when all the ancillary detail had been agreed.

³¹ The alleged terms of these agreements are reflected in Welfit Oddy's claim in reconvention as annexures A1, A3, A5, A6 and A7.

[53] Finally, I was referred to a series of correspondence relating to agreements WO8830b (A2) and 8881 (A8)³². This correspondence commences with an email from Mr Gardner to GEM on 15 August 2019, in which he had forwarded signed copies of WO8830b and 8881 to GEM to request that they obtain the signature of Propco. Once again, in respect of WO8830b the manufacture of the containers had already commenced. The conduct of the parties in respect of these individual agreements reflect their own understanding of the provision in the MPA.³³

[54] On a proper consideration of the conduct of the parties, both before³⁴ and after the conclusion of the MPA, it exhibits a practice of preparing a document reflecting the terms of their individual agreements long after a binding contract between the parties had come into force, and sometimes after the execution thereof. I do not lose sight of the fact that Propco denied that the agreements had been concluded on their behalf. I shall revert to that issue. However, on its own admission, at best for Propco, they had ratified the purchase of 344 containers for which they had paid. It is common cause that these containers for which Propco had paid relate to agreements A1 (WO8830), A3 (WO8842), A4 (WO8842B) and A6 (WO8872b). Welfit Oddy had released 134 of these containers to them on receipt of payment but, as I have said, retained 110 containers in respect of these contracts for which Propco had already paid. In respect of WO8842 Propco had paid in full and accepted delivery of all the containers under the agreement, without demur.

[55] In respect of agreement A1, Propco contended that it had ratified the purchase of 24 of the 100 containers contracted for. Mr Kairinos was constrained to acknowledge during his argument, correctly, that it is not open to a party to ratify a portion of an agreement.³⁵ Ratification occurs when a purported agent, without express or implied authority, enters into a transaction on behalf of a principal. If, after a full disclosure of all

³² Annexures A2 and A8 to Welfit Oddy's particulars of its counterclaim.

³³ *University of Johannesburg* para 43.

³⁴ As evidenced by agreement WO8808.

³⁵ See *Theron v Leon* 1928 TPD 719.

the facts, the principal wishes to adopt the contract, he may ratify the transaction.³⁶ The effect of a valid ratification is to cloak the agent's unauthorised acts with authority, retrospectively establishing the relationship of principal and agent after the fact, with the usual consequences of agency. Accordingly, the effect of Propco's admitted ratification is that it had, with full knowledge of all the interaction between Welfit Oddy and GEM, clothed the said agreements with validity. This, as I have said, can occur only after a full disclosure, and it must be accepted that by ratifying the agreements Propco was aware that GEM had concluded various agreements on its behalf that had not been reduced to writing and had not been signed by it. They proceeded to pay the agreed purchase price and to take delivery of the containers, purchased in this manner, without demur. Mr Allen said that no-one had advised Welfit Oddy of any ratification and they laboured under the continued impression that GEM and Ms Sommerville had been duly authorised.

[56] That brings me back to the provisions contained in the MPA relating to the agreement in writing. As I have said, the MPA did envisage the preparation of a written memorandum of agreement for each individual agreement. In *Meter Motors (Pty) Limited v Cohen*³⁷ Snyman J interpreted *Goldblatt* as contemplating three types of writing:

- (a) a memorandum which facilitates proof of an oral agreement;
- (b) a writing which embodies an agreement of the parties, although not signed; and
- (c) a written document which is to be the agreement, and must be signed.³⁸

An analysis of the correspondence relating to the signature of documents, to which I have referred earlier, militates strongly in favour of (a). In particular, the signature of WO8808, which occurred on the same day as the signature of the MPA, lends strong support to the conclusion that the MPA envisaged the preparation of the written memorandum for purposes of facilitating proof of an earlier binding agreement.

³⁶ *Legg and Co. v Premier Tobacco Co.* 1926 AD 132.

³⁷ 1966 (2) SA 735 (T) 736-7, [1966] 2 All SA 406 (T).

³⁸ It is doubtful whether *Goldblatt* envisaged the possibility set out in (b). See *Christie's Law of Contract in South Africa* (8th ed) p. 138.

[57] The interpretation accords, in my view, with the facts known to the parties at the time of the conclusion of the MPA³⁹ and the particular context in which the agreement was concluded. Mr Allen explained that the vast majority of the sales of stainless-steel containers manufactured by Welfit Oddy are sold on the international market in Europe or the United States of America. They are manufactured from stainless-steel which has an extremely volatile price, fixed on a daily basis. Mr Allen explained that the price quoted for the purchase of stainless-steel in the market remains valid for only seven days. Once he had obtained a price for the stainless-steel required, Welfit Oddy had to quote a purchase price for the containers which are sold in US dollars. The exchange rate of the rand to the US dollar is equally volatile. Thus, he said that he could only fix the dollar price on the day that he placed his order. When the order had been placed, Welfit Oddy would immediately hedge the currency and purchase the stainless-steel. The currency was hedged by a forward exchange contract entered into with their bankers, which ensured that they would, when the containers are eventually delivered, receive the exchange rate that had applied on the day that order was placed. Signature, as demonstrated by the exchange of emails to which I have referred earlier, may often take weeks or even months to finalise. An agreement that required signature before it could require contractual force would, in the context of this industry, give rise to an unworkable result. As adumbrated earlier, what the MPA envisaged was the preparation of a memorandum in writing that would, when made, facilitate proof of earlier agreements, which may be oral or in writing.

[58] I turn to consider clause 3.4 and 5.3 of the MPA.⁴⁰ There is no major dispute between the parties in respect of the interpretation of clause 3.4. The dispute lies in the application. The general scheme of the MPA is as follows: Once the parties had reached agreement in respect of the price, the nature and the quantity of the containers to be purchased, Welfit Oddy was required to manufacture them to the required specification. When manufacture had been completed, Propco, or its agent, was entitled to inspect the manufactured containers and, if acceptable upon inspection, Welfit Oddy was entitled to

³⁹ In particular the practice exhibited by agreement WO8808.

⁴⁰ Quoted para 10 and 12 above.

issue an invoice. Propco was required to pay the invoice within the time period agreed upon and was entitled to take delivery of the containers in accordance with the delivery schedule which had been agreed to in each individual agreement. In the event that delivery occurs prior to the payment date the container would remain the property of Welfit Oddy until payment is received.⁴¹

[59] Two significant features emerge from the formulation of clause 3.4 which find application to the disputes relating to the alleged repudiation. First, Welfit Oddy could only issue invoices once the specified containers had been fully manufactured and inspected. This flows from clause 5.2 of the MPA which provides for payment to be made for the full number of tanks produced and invoiced each month. Thus, payment could never be due before the container in issue was ready for delivery. Secondly, the costs occasioned by the inspection by Propco are included in the purchase price of the containers. It follows from this provision that the costs occasioned by such an inspection are for the account of Welfit Oddy. This leads ineluctably to the conclusion that, save where a particular container has been rejected upon the first inspection, the MPA does not provide for multiple inspections at the expense of Welfit Oddy, all to be recouped from the purchase price.

[60] Clause 5.3 of the MPA must be considered in the context of the overall scheme of the agreement.⁴² The clause entitled Welfit Oddy to withhold delivery of completed containers until all overdue invoices have been paid in full. As I have explained, Welfit Oddy withheld delivery of 110 containers already paid for by Propco in respect of agreements 8830 (A1), 8842B (A4) and 8872b (A6). It contended that it was entitled to do so in terms of clause 5.3 of the MPA.

[61] Propco, on the other hand, argued that on a proper construction of clause 5.3 Welfit Oddy was entitled to retain only the specific containers which have not been paid for. I am not persuaded that either interpretation correctly reflects the import of the clause.

⁴¹ Clause 4 of the MPA, quoted in para 11 hereof.

⁴² Quoted in para 12 above.

[62] The MPA envisaged that numerous separate, distinct, agreements for the sale and purchase of containers would be concluded. Each would have its own terms in respect of price, delivery and specification and would further be governed by the terms of the MPA. Each individual agreement provided for its own delivery schedule and terms of payment and, as I have said, the scheme of the agreement provided for an invoice to be issued after the inspection of the individual containers and the acceptance thereof. The MPA postulated that such an inspection would occur before the date of delivery agreed upon. Depending upon the date of delivery and the period provided for payment in the particular individual agreement, delivery could occur prior to payment being made. If delivery occurred before payment, the containers remained the property of Welfit Oddy, in terms of clause 4.4 and 4.5 of the MPA, until payment has been made. However, notwithstanding the security provided by clause 4.4 and 4.5, or anything contained in the individual agreement concerned, if Welfit Oddy had delivered containers under a particular individual agreement before payment had been made, it would not be obliged to deliver further containers in terms of that individual agreement until all the overdue payments under that agreement have been made. There is, however, nothing in the MPA to suggest that containers that have been fully paid for under one individual agreement may be retained as security for overdue payments under a different agreement. The issues in dispute between the parties should be considered in the context of this construction of the MPA.

Was GEM or Ms Sommerville duly authorised to conclude the agreements on behalf of Propco?

[63] As adumbrated earlier, Welfit Oddy's pleaded case relied primarily on actual authority conferred upon GEM, in the person of Ms Sommerville, to conclude the agreements. Mr Rorke, on behalf of Welfit Oddy, acknowledged at the conclusion of the trial that Welfit Oddy had failed to establish actual authority and he abandoned any reliance thereon. However, he argued that Propco was estopped from denying the authority of GEM, in the person of Ms Sommerville, to conclude any agreement pursuant

to the MPA on its behalf.⁴³ An estoppel arises when a person (the representor) has by words or conduct made a representation to another person (the representee) and the latter, believing the representation to be true, acted thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him. Where this occurs, the representor may be precluded (or estopped) from denying the truth of the representation.⁴⁴ The party raising an estoppel bears the onus of proving the essentials thereof.⁴⁵

[64] The essentials to establish an estoppel are:

- (a) A representation by words or conduct of a certain factual position⁴⁶;
- (b) that the representee relied and acted on the correctness of the facts as represented⁴⁷;
- (c) that the representee acted, or failed to act, to his or her detriment;⁴⁸
- (d) that representation was made negligently;⁴⁹ and
- (e) the representor could bind the defendant by means of the representation.⁵⁰

[65] As I have said, there was no communication between Propco and Welfit Oddy before October 2019, when Mr Bryant denied knowledge of the existence of the disputed individual agreements.⁵¹ There was accordingly no suggestion of any express

⁴³ The estoppel is set out in para 32 above.

⁴⁴ *Aris Enterprises (Finance)(Pty) Limited v Protea Assurance Co. Limited* [1981] 4 All SA 238 (A); 1981 (3) SA 274 (A) 291D-E; *Sodo v Chairman, African National Congress, Umtata Region* [1998] 1 All SA 45 (Tk) at 51.

⁴⁵ *Blackie Swart Argitekte v Van Heerden* [1986] 1 All SA 373 (A), 1986 (1) SA 249 (A) at 260; and *Absa Bank Limited v I W Blumberg and Wilkinson* [1997] 2 All SA 307 (A), 1997 (3) SA 669 (SCA).

⁴⁶ *Universal Stores Limited v OK Bazaars (1929) Limited* [1973] 4 All SA 611 (A), 1973 (4) SA 747 (A) at 761; *Road Accident Fund v Mothupi* [2000] 3 All SA 181 (A), 2000 (4) SA 38 (SCA); and *Northern Metropolitan Local Council v The Company Unique Finance (Pty) Limited and Others* [2012] 3 All SA 498 (SCA), 2012 (5) SA 323 (SCA).

⁴⁷ *Standard Bank of SA Limited v Stama (Pty) Ltd* [1975] 2 All SA 206 (A), 1975 (1) SA 730 (A) at 743; *Stellenbosch Farmers Winery Limited v Vlachos t/a Liquor Den* [2001] 3 All SA 577 (A), 2001 (3) SA 597 (SCA).

⁴⁸ *Peri-Urban Areas Health Board v Breedts NO* [1955] 2 All SA 186 (T), 1958 (3) SA 783 (T) at 790; *Absa Bank Limited v De Klerk* [1998] 4 All SA 674 (W), 1999 (1) SA 861 (W).

⁴⁹ *Info Plus v Scheelke* [1998] 2 All SA 509 (A), 1998 (3) SA 184 (SCA); *Caldeira v Ruthenberg* [1999] 1 All SA 519 (A), 1999 (4) SA 37 (SCA).

⁵⁰ *NBS Bank Limited v Cape Produce Co. (Pty) Ltd* [2002] 2 All SA 262 (SCA), 2002 (1) SA 396 (SCA); *Glofinco v Absa Bank Limited t/a United Bank* 2002 (6) SA 470 (SCA).

⁵¹ Para 19 above.

representation made in words by Propco or anyone who could bind Propco. However, representation may be made in any manner by which one person conveys thoughts to, or creates an impression or image in the mind of another, either in words, whether oral or in writing, or by acts of conduct, including silence or inaction.⁵² The impression created by the conduct of one party on the mind of the other is, in the context of estoppel, the test for a representation, and the conduct must create a reasonable impression.⁵³ Thus, a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and, in addition, the representee acted reasonably in construing their representation in the sense in which the representee did.⁵⁴

[66] As alluded to earlier, Welfit Oddy had had a relationship with GEM before the conclusion of the MPA. Propco and GEM were associated companies, with GEM leasing out containers that belonged to Propco. The MPA recorded that it had been ‘made the 21st day of June, 2018’. Although it did not specifically provide for retrospective operation, clause 10 of the MPA recorded that the agreement ‘shall be the entire and sole agreement and understanding between the parties with respect to the sale and purchase of containers and shall supercede any express or implied agreement between the parties subsisting at the date hereof’. The parties accordingly agreed that the provisions of the MPA would apply in respect of any pre-existing contracts which may have been in the process of execution at the time. The MPA was signed by Mr Richie and Mr Bryant, both directors of Propco, on 27 July 2018 and by Mr Allen, on behalf of Welfit Oddy, in October 2018. As I have explained earlier, contract WO8808 had been forwarded to Propco by Ms Sommerville together with the MPA. It is not in dispute that contract WO8808 had been negotiated by GEMS on behalf of Propco, through the medium of Ms Sommerville, without reference to Propco. The written individual agreement recorded that it had been

⁵² *Service Motor Supplies (1956) (Pty) Limited v Hyper Investments (Pty) Limited* [1961] 4 All SA 464 (A), 1961 (4) SA 842 (A); *Resisto Dairy (Pty) Limited v Auto Protection Insurance Co. Limited* [1963] 2 All SA 45 (A), 1963 (1) SA 632 (A) 642; *Universal Stores Limited v Ok Bazaars (1929) (Pty) Limited* [1973] 4 All SA 611 (A); 1973 (4) SA 747 (A) 761B-C.

⁵³ *Road Accident Fund v Mothupi* para 29.

⁵⁴ *Concor Holdings (Pty) Limited t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) at 495A-C; and *Leeuw v First National Bank* 2010 (3) SA 140 (SCA).

confirmed in writing per email on 22 January 2018. As adumbrated earlier, a purchase order generated by GEM and signed by Ms Sommerville and Mr Rocholl had been completed on 24 January 2018 and no written contract had been prepared at the time. Both the MPA and the written individual agreement in respect of contract WO8808 were negotiated and prepared, in consultation with Ms Sommerville, forwarded by Mr Allen to Ms Sommerville, and presented to the directors of Propco by Ms Sommerville. Thus, the unsigned written individual agreement was prepared in respect of a fully executed contract, negotiated and administered by Ms Sommerville, on behalf of Propco, months earlier, and Mr Richie and Mr Bryant signed both documents, simultaneously, without demur.

[67] The introductory portion of the MPA records an intention by the parties to enter into future agreements for the purchase and sale of containers. This, of course, is not a representation of fact but merely a statement of future intention.⁵⁵ However, it cannot be gainsaid that, at the time of the signature of the MPA and the written individual agreement WO8808, both Mr Richie and Mr Bryant had every reason to believe that further agreements would be concluded. By the signature of the written agreement WO8808 they had created the impression that GEM had had the authority to bind them in the conclusion of the agreement and the administration thereof, and that the written memorandum of agreement was not intended to give contractual force to the agreement with Welfit Oddy.

[68] At the time of the signature of these documents, and reliant, no doubt, on the existing business practice, Welfit Oddy had already committed to the individual agreement WO8830 (A1). On 3 May 2018, Ms Sommerville had confirmed in writing the placement of the order in respect of this individual agreement. In accordance with Mr Allen's evidence in respect of the volatility of the price of stainless-steel and the rand exchange rate, the necessary material had been purchased and insurance had been acquired to hedge the exchange rate of the rand. On 12 June 2018, Ms Sommerville had

⁵⁵ See *Simpson v Selfmed Medical Scheme and Another* [1992] 3 All SA 504 (C); 1992 (1) SA 855 (C) at 866D and *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 57A-B.

presented a formal purchase order, generated by GEM and signed by herself and Mr Rocholl. Negotiations in respect of individual agreements WO8842 (A3) and 8842B (A4) were underway at the time of the signature of the MPA as evidenced by email exchanges with Ms Sommerville on 11 June 2018.

[69] The signature of the written individual agreement WO8808, which had been negotiated, concluded and administrated by GEM, without demur from Propco, constituted a representation which would reasonably have created the impression that GEM had been duly authorised to do so on behalf of Propco. Mr Rorke contended that the silence of Propco in these circumstances was negligent and that Welfit Oddy acted reasonably in construing their representation, as it did, to confirm the authority of GEM to conclude a contract.

[70] Silence might constitute a representation where there is a legal duty to speak or to act.⁵⁶ Generally, the duty to speak or to act arises if it is considered reasonable in the circumstances that the person concerned should speak or act in order to avoid the other person acting to his detriment.⁵⁷ The test as to when the duty arises corresponds with the test applied in the case of a delictual omission.⁵⁸

[71] The evidence of Mr Allen demonstrates that Welfit Oddy accepted the authority of Ms Sommerville as a result of the negotiation, through her, of the MPA and of the individual agreement WO8808, in the face of the silence by Propco and its directors. As I have said, these were signed without demur and Welfit Oddy proceeded to contract through GEM in respect of WO8830b (A2), 8842 (A3), 8842B (A4), 8872 (A5), 8872b (A6), 8872B (A7) and 8881 (A8) and performed these contracts reliant on the impression negligently created by Mr Richie and Mr Bryant through the silence. As directors they were in the position to bind Propco. I consider that if Ms Sommerville, or GEM were not authorised to represent Propco there had been a duty on the directors to say so. Ms

⁵⁶ *Martin v De Kock* [1948] 2 All SA 545 (A); 1948 (2) SA 719 (A) 735.

⁵⁷ *Universal Stores Limited v OK Bazaars* at 761G-H.

⁵⁸ *Saridakis t/a Auto Nest v Lamont* [1993] 1 All SA 431 (C); 1993 (2) SA 164 (C) at 172I-173B.

Sommerville continued to contract on their behalf and, although they ratified four of these agreements, there was still no word to Welfit Oddy. For these reasons I think that the estoppel must be upheld.

Were valid individual agreements concluded?

[72] As I have said, Welfit Oddy contended that eight individual agreements had been concluded in writing and annexed copies of the alleged agreements to the particulars of its claim in reconvention. Welfit Oddy contended that these agreements had been concluded on 17 April 2019 and 31 May 2019⁵⁹ at Port Elizabeth, alternatively London. It asserted that Propco had been represented at the time by GEM, in the person of Ms Heidi Sommerville, both duly authorised. However, although Mr Allen had signed these agreements on behalf of Welfit Oddy none of the documents had been signed on behalf of Propco.

[73] The suggestion that these documents constitute written agreements needs only be stated to be rejected. A written contract comes into existence when it is signed by all the parties thereto.⁶⁰ Where a party seeks to rely on a written agreement, he must not only prove that the defendant signed the document, but also that he signed the document in its completed form.⁶¹ In this case, the documents bear no signature at all on behalf of Propco and it has not been alleged that the acceptance of the contract was contained in a different document. Nor that it has been tacitly accepted.⁶² However, Welfit Oddy's case was conducted through the introduction of volumes of email and WhatsApp correspondence and letters that had passed between the parties and which Mr Allen and Mr Gardner contended constituted agreements. Mr Kairinos did not object to the introduction of this evidence and conducted a thorough cross-examination of both Mr Allen and of Mr Gardner in respect of all the correspondence.

⁵⁹ Para 31 above.

⁶⁰ *Christie's Law of Contract in South Africa* (8th ed) p. 138.

⁶¹ *Da Silva v Janowski* 1982 (3) SA 205 (A); [1982] 1 All SA 43 (A).

⁶² See *Clegg v Groenewald* 1970 (3) SA 90 (C).

[74] As I have said, the case pleaded relied on written agreements, and the position ought to have been regularised by an amendment to Welfit Oddy's pleadings. However, all the evidence that is relevant to determining whether or not the individual agreements were concluded has been placed before the court and thoroughly tested, without demur. In this regard, in *Shill v Milner*,⁶³ De Villiers JA said:

'The importance of pleadings should not be unduly magnified. "The object of pleading is to define the issue; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party had had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been." *Robinson v Randfontein Estates G.M. Co. Ltd.* (1925, A.D.198).'

[75] In similar vein, in *Collen v Rietfontein Engineering Works*⁶⁴ Centlivres JA found a contract which had not been relied upon in the pleadings to have been established. He said:

'But in this case, where the contractual relationship between the parties arose partly through the interchange of letters and partly through their conduct, all the material letters (excepting one in respect of which secondary evidence, which was rightly accepted by the magistrate, was led) were produced in evidence and the conduct of the parties was examined in *viva voce* evidence. This Court, therefore, has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial.'⁶⁵

⁶³ 1937 AD 101 at 105.

⁶⁴ 1948 (1) SA 413 (A).

⁶⁵ *Collen* at 433.

[76] This is such a case and Mr Kairinos, fairly in my view, acknowledged that the manner in which the trial had been conducted had the effect of expanding the enquiry to determine the real dispute between the parties, being whether the individual agreements contended for have been proved through the evidence and the correspondence. In embarking on this enquiry I am mindful of the caution expressed by Lord Cairns LC in *Brogden v Metropolitan Railway Co.*⁶⁶ that ‘... there are no cases whereupon difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has been constituted between the partners’.

[77] In the present case the position is compounded by the somewhat awkward pleadings to which I have referred.

[78] I have earlier concluded that on a proper construction of the MPA, an informal agreement of purchase and sale concluded between the parties would suffice to bind the parties and that the reduction to writing was intended merely to facilitate proof of the terms of a preceding agreement. Nevertheless, Welfit Oddy bore the onus to establish such an agreement in each case.

[79] It is convenient to consider first agreements WO8830, 8842, 8842B and 8872b. As adumbrated earlier, it is Propco’s case that it had ratified the purchase of 344 containers that it had paid for.⁶⁷ It had paid for all the containers in respect of WO8842, WO8842B and WO8872b and for 24 of the 100 containers ordered under WO8830. They had taken delivery of all the containers ordered under WO8842, 4 containers under WO8842B and 10 under WO8872b. Welfit Oddy had retained the 24 containers paid for under WO8830, 76 of those paid for under WO8842B and 10 under WO8872B.

⁶⁶ (1877) 2 App Cas 666 at 672, quoted in *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA) at 954B; 2001 (3) SA 952 (SCA); [2001] 3 All SA 133 (SCA).

⁶⁷ Para 29 above.

[80] Propco tendered no evidence in support of the alleged ratification, and it cannot be determined from the evidence when, how or by whom these contracts were ratified. However, at best for Propco, its pleadings constitute an admission that it chose to be bound by these agreements after a full disclosure of the conclusion of the agreements and their terms. Accordingly, it is not necessary to consider these agreements further. Suffice it to record that the nature and quantity of tanks purchased and the price agreed to under these agreements are not in dispute.

[81] In respect of WO8830b (A2) Mr Allen testified to an email sent to him on 24 April 2019 by one Havenga, in the employ of Welfit Oddy. Mr Havenga recorded:

‘Heidi phoned you on the 5th of March to confirm the order for 60 tanks (terms agreed between the 2 of you) for US\$ 35 365.00 per tank, delivered Rotterdam. ...

I phoned on 18th/19th March with our offer for 100 tanks averaged at US\$ 34 500.00. I followed up with her on the 20th of March.

On the 20th of March Heidi confirmed additional 40 tanks with an average price (100 tanks) of US\$ 34 500.00 per tank, delivered Rotterdam. ...’

[82] Included in the email were copies of correspondence between Mr Havenga and Ms Sommerville. The first was an email from Mr Havenga to Ms Sommerville in which he recorded, *inter alia*:

‘We would still need to secure the currency in order to achieve the reduced price of US\$ 34 500.00 per tank, averaged for the total of 100 units. I am sure that it will be fine if you cannot commit to them as an actual order confirmation, however would need to have verbal approval at least to secure the currency.’

[83] Mr Havenga wrote that Ms Sommerville had responded by WhatsApp sent on 20 March 2019 at 6:14pm in which she recorded as follows:

'Please accept this as confirmation to proceed with the additional 40 swapbody units in accordance with the terms noted – I will be in contact to finalise.'

[84] Mr Allen confirmed that he had discussed an order for 60 tanks with Ms Sommerville and that the additional 40 tanks added thereto account for the total of 100 tanks reflected under WO8830b. The correspondence, together with the evidence of Mr Allen, reflects an express agreement to purchase 100 tanks at the price quoted, namely US\$34 500,00, and to be bound by the agreement.

[85] Neither Mr Havenga nor Ms Sommerville testified. However, there was no objection to the evidence, either at the time when it was tendered or in argument.⁶⁸ The authenticity of the WhatsApp was not challenged and the parties had agreed at the pre-trial proceedings that the documents had been sent and received according to their tenor. Whereas Propco presented no evidence, there is no contrary version and it must be viewed in conjunction with the evidence of Mr Allen that weekly progress reports were sent to GEM throughout the period of construction reflecting the number and description of tanks together with the production progress thereof. No objection was raised by GEM throughout the production period either to the existence of the agreement or the number of tanks being produced.

[86] The evidence in respect of order WO8872 (A5) consists of an email chain on 13 and 14 September 2018 in which one Nocwaka, of GEM, enquired whether Welfit Oddy would be able to add an additional 100 tanks to the previous purchase made. The previous purchase was not identified. Mr Havenga responded on 14 September in which he recorded:

⁶⁸ Compare s 3 of the *Law of Evidence Amendment Act, 45 of 1988*.

'We were able to get extension on last week's S/S (stainless-steel) price which is lower than today's new steel price.

We would need to inform Columbus by 3pm today should you be in a position to place an order for the 100 standard tanks.'

[87] Thereafter an email from Ms Sommerville was directed to Mr Havenga at 10:59am on 14 September in which she recorded as follows:

'I write to confirm that I will be placing the order for the additional 100 x 26 cbm T11 tank containers with full walkway and hand rail at USD 16,000 per unit. ...

For now, I want to confirm the order so that we can secure the pricing.

Formalities to follow. ...'

Again, the email from Ms Sommerville reflects an unequivocal acceptance of Welfit Oddy's offer and a contractual commitment to purchase 100 containers at a price of US\$16 000,00.

[88] It is convenient to consider the correspondence in respect of order WO8872b, 8872B and 8881 together. As I have said, WO8872b (A6) has been ratified, but its negotiation was closely aligned to WO8872B (A7) which is in dispute. On 10 December 2018, Mr Havenga forwarded an email to Ms Sommerville, copied to Mr Allen under the subject line 'offer for 200x26 000L standard tanks (as per job 8872)'. He recorded:

'We are pleased to be able to offer a quotation for the supply of 200 off new 26 000L standard tank containers to the same specification as your current new order, to be built under our reference, 8872.

For this new enquiry, we are able to calculate using stock steel which is priced lower than today's new price. Of the 200 tanks, 180 tanks worth of material are calculated

at 0.4mm corrosion allowance and the remaining 20 tanks with 0.2mm corrosion allowance. ...

Based on the above, we are pleased to offer a price of US\$ 16 000.00 per tank, ex works Welfit Oddy.'

[89] Hence, Mr Allen and Mr Gardner explained that there was a slight specification change from the original order, WO8872, which required a split between the 20 and the 180 tanks referred to in the email by Mr Havenga. The 20 tanks with 0.2mm corrosion allowance constituted order 8872b (A6) (which was ratified) while the remaining 180 tanks constituted 8872B (A7).

[90] On 17 December 2018, Mr Havenga addressed a further email to Ms Sommerville (copied to Mr Allen) containing a further offer in respect of WO8881 (A8). He recorded:

'As per our discussion last week, we are pleased to offer 16 off new 24,000L electrical heated tanks.

The specification is attached to this email ...

Price – US\$ 37 000.00 each net, ex works Welfit Oddy.

Ex works delivery for these units can start in October through to December 2019.'

[91] Ms Sommerville did not respond to Mr Havenga, in respect of these quotations, but responded to Mr Allen on 18 December 2018, after attending a visit to Welfit Oddy's factory in Gqeberha. She recorded her gratitude to Mr Allen for his hospitality during her visit and then she said:

‘On that note, I am delighted to have committed to the additional 200 units (thank you for your offer) and will end with confirmation that we would also like to purchase the 16 electrically heated units too ... formalities to follow.’

[92] Notwithstanding Ms Sommerville’s commitment, in writing, to these purchases, Mr Havenga, on 6 February 2019, again addressed Ms Sommerville in which he recorded that he had not received confirmation in writing in respect of the orders for the 200 additional 26 000L standard tanks or for the 16 electrically heated tanks. He wrote:

‘(P)lease can you acknowledge that the below is correct?

Order received from Gem on the 11th of December 2018 for 200 additional 26 000L standard tanks – WO ref 8872/B.

Price US\$ 15 840.00 per tank ex works Welfit Oddy.

Order confirmed from Gem on the 18th December 2018 for 16 x 24 000L electrical tanks - WO ref 8881.

Price: US\$ 37 000.00 per tank, ex works Welfit Oddy.

I did receive a Whatsapp message from you for the electrical tanks, but no confirmation on email.’

There is no evidence as to any response to this email but, it is apparent from this email that Ms Sommerville’s acceptance of the offer in respect of the 200 containers was at a reduced price of US\$15 840,00 per tank. As I have said, production commenced in respect of each order and detailed weekly progress reports were forwarded to GEM and met with no objection.

[93] The alleged agreements that emerge from this correspondence constitute contracts of purchase and sale. The essential elements for a valid agreement of purchase and sale⁶⁹ are that there must be:

- (a) A buyer and a seller – parties capable of entering into an agreement of sale;
- (b) a Merx, being the thing or the things, which form the subject matter of the agreement of sale⁷⁰;
- (c) a fixed price, in money, or which is readily ascertainable in terms of money⁷¹; and
- (d) consensus of the contracting parties to these issues.

[94] Generally, whether the parties intended to prepare an agreement in writing, or otherwise, an agreement of sale becomes binding on the parties when they are agreed, not only on the elements of the contract, but on all outstanding subsidiary modalities in the absence of which they would not have bound themselves.⁷² But this is not always so. The position was authoritatively explained in *CGEE Alsthom Equipments*⁷³ where Corbett JA said:

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. A good example of this kind of situation is provided by the case of *OK Bazaars v Bloch* 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

⁶⁹ See *Johnston v Leal* 1980 (3) SA 927 (A) 937H; [1980] 2 All SA 366 (A); *Norman's Law of Purchase and Sale in South Africa* (6th ed) p. 2.

⁷⁰ See for example *Kriel and Another v Le Roux* [2000] 2 All SA 65 (SCA).

⁷¹ See *Lubbe 2000 Annual Survey of South African Law* pp 213-221.

⁷² *Norman's Law of Purchase and Sale* at 3.

⁷³ *CGEE Alsthom Equipments Et Enterprises (Electriques, South African Division) v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-F; [1987] 3 All SA 619 (AD).

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 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.'

[95] I have dealt earlier with the interpretation of the MPA. Mr Kairinos has placed considerable reliance on Mr Allen's evidence that he understood the MPA to require there to be an agreement in writing in respect of price and terms of payment, delivery schedules and specification of containers. But, as I have explained, the understanding of a particular witness of the interpretation of the contract is immaterial. It is a matter of law. What does emerge unequivocally from the evidence of Mr Allen and from numerous correspondence from Ms Sommerville is the urgent need to commit firmly upfront in order to secure a quoted purchase price for stainless-steel and to arrange hedging against the volatility of the rand exchange rate. It was urgent because Welfit Oddy had to purchase stainless-steel immediately in order to secure the price. The evidence shows that considerable correspondence occurred after the conclusion of a binding agreement in respect of the specifications of containers, which was varied from time to time. Mr Kairinos emphasised the correspondence from Ms Sommerville in which she had repeatedly concluded with the words 'Formalities to follow'. I do not consider that these detract from the clear intention of the parties to be bound by the agreement once the order is confirmed in response to a quoted price. Accordingly, I am satisfied that Welfit Oddy has established the binding individual agreements.

Repudiation

[96] I turn to the alleged repudiation and cancellation of the agreements. Repudiation, or anticipatory breach, as it is sometimes called, occurs when one contracting party, through its conduct exhibits, objectively, a deliberate and unequivocal intention not to be bound by the contract. It is an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their tenor.⁷⁴ It is not a matter of intention, and often a repudiating party may have the *bona fide* belief that their interpretation of the contract is correct and may, subjectively, intend to be bound by it. However, the test that must be applied is whether they acted in such a way as to lead a reasonable person to the conclusion that they did not intend to fulfill their part of the contract.⁷⁵

[97] Propco's alleged repudiation must be considered on the strength of these principles. As adumbrated earlier, in the face of mounting pressure on Propco to make payment of outstanding invoices, on 29 October 2019, Mr Bryant denied any knowledge of the conclusion of the individual agreements and demanded signed individual contracts from Welfit Oddy. As I have explained, the conduct of the parties before this, as demonstrated by order WO8808, had been to draw up a document long after a binding contract had been concluded. The document did not create the contract between the parties and only came into existence after they had already performed, or started performing their obligations under the contract. On 1 November 2019, he followed up by alleging that only the orders signed by a director of Propco would be binding. Mr Allen said that he understood this to be a clear communication that Propco did not intend to honour its obligations under the MPA or the individual agreements.

[98] Propco's case, as pleaded, is that it had already ratified the agreements A1, A3, A4 and A6, at that stage by making payment in respect of containers purchased under

⁷⁴ *Street v Dublin* 1961 (2) SA 4 (W) 10; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A-B; *Culverwell and Another v Brown* 1988 (2) SA 468 (C) at 475C; *Christie* at 646 and *Van der Merwe, Van Huyssteen, Reinecke and Lubbe: Contract, General Principles* (4th ed) at 311.

⁷⁵ *Van Rooyen* at 845H-846A; and *Metalmil (Pty) Limited v AECI Explosives and Chemicals Limited* 1994 (3) SA 673 (A) at 685E-G.

these agreements. In respect of A3, the contract had been fully executed, all invoices had been paid and the containers had been delivered. Propco had met all its obligations under the individual agreements A4 and A6, made payment in full in respect of all the containers that were subject to these agreements, and was endeavouring to take delivery of the containers manufactured under these individual agreements. It was Welfit Oddy who refused to deliver. Mr Bryant's communication could not reasonably have been perceived to be a repudiation of these agreements. Propco had made payment in respect of 24 of the 100 containers under agreement A1 and, for the reasons set out earlier, the effect of their admitted ratification is that they were bound by the entire individual agreement and, on their own version, were required to make payment for the remaining 76 containers and to take delivery thereof. Because there were invoices overdue in respect of containers under this agreement, Welfit Oddy was entitled to withhold delivery until the overdue invoices had been paid.

[99] Thus, the position adopted by Mr Bryant conveyed unequivocally a deliberate intention not to be bound by the individual agreements A1, A2, A5, A7 and A8. The repudiation arises from the claim that Ms Sommerville, or GEM, had not been authorised to conclude individual agreements binding Propco. I do not think that it necessarily constituted a repudiation of the MPA, which had been signed by the directors of Propco itself, but nothing turns on that.

[100] The effect of the repudiation by Mr Bryant was to place Welfit Oddy before an election to decide whether to reject the repudiation, and thereby hold Propco to the individual agreements concluded, or to accept the repudiation, cancel the agreements and claim damages.⁷⁶ They were not obliged to make their election immediately and were entitled to a reasonable time to assess their position before making their election. When an innocent party has elected to reject the repudiation and to hold the repudiating party to the contract they may nevertheless, at a later stage, change their election and cancel the contract in the event that the repudiating party persists in its stance.⁷⁷

⁷⁶ *De Wet and Van Wyk: Kontraktereg en Handelsreg* (5th ed) vol. 1 at 170.

⁷⁷ *Sandown Travel (Pty) Limited v Cricket South Africa* 2013 (2) SA 502 (GSJ) para 39; *Primat Constructin CC v Nelson Mandela Bay Metropolitan Municipality* 2017 (5) SA 420 (SCA).

However, where they have made an election to hold the repudiating party to the contract, the contract remains in existence, unscathed, and the relationship between the parties remains as it was prior to the repudiation,⁷⁸ save that the obligations of the innocent party are suspended for as long as the repudiating party persists in its repudiation.⁷⁹ Their obligations are not extinguished, but merely temporarily suspended, and they must be in a position to perform their part of the contract in the event that the repudiating party does reconsider its position. So, by electing to keep the contract alive they keep it alive for the benefit of both parties. In the event that the repudiating party does repent and tender performance of its obligations, the innocent party, too, must be ready to perform its obligations. It would not be open to it then to say: 'But you repudiated'. Thus, while the repudiation endures, it relieves the innocent party from the obligation to perform or to tender performance, provided that it remains, to the knowledge of the party repudiating, willing and able to perform.⁸⁰

[101] As I have said, Welfit Oddy elected to reject the repudiation and to hold Propco to the individual agreements. It persisted in its stance until after the issue of summons, before, in 2021, it purported to change its election, alleging that Propco had persisted in its breach by resisting its claim for specific performance and thereby conveying an unequivocal intention not to remedy the breach. Hence its current claim for damages.

[102] However, in the interim, Propco contended that Welfit Oddy had itself repudiated the agreement.⁸¹ As I have explained, on a proper interpretation of the MPA, Welfit Oddy was obliged to provide one inspection of the completed containers and the costs of the inspection were included in the purchase price of the containers. Mr Allen's evidence, which was uncontradicted, established that Welfit Oddy had complied with its obligation in this respect and that the containers had in fact been inspected and approved by Propco's agent appointed by GEM. Nevertheless, for the reasons set out earlier, Welfit

⁷⁸ De Wet and Van Wyk at 170.

⁷⁹ *Erasmus v Pienaar* 1984 (4) SA 9 (T) at 27B-C.

⁸⁰ *Moodley v Moodley* [1990] 3 All SA 1099, 1990 (1) SA 427 (D); *GNH Office Automation CC v The Provincial Tender Board, Eastern Cape* 1998 (3) SA 45 (A) at 51F.

⁸¹ Para 29 and 37 above.

Oddy was not entitled to withhold containers under the individual agreements A4 or A6, in respect of which Propco had complied with all its contractual obligations, save to take delivery of the containers, which Welfit Oddy resisted. Welfit Oddy was entitled to withhold delivery of the 24 containers that had been fully paid under agreement A1 until the overdue invoices in respect of this individual agreement had been paid. It follows that Welfit Oddy's refusal to deliver the containers purchased under agreements A4 and A6, in circumstances where Propco had complied fully with its obligations did constitute a repudiation of the agreements in issue, which Propco accepted in its particulars of claim. In respect of A1 Welfit Oddy was obliged to hold the containers ready for delivery against payment of the overdue invoices under that agreement, as Mr Nurse had tendered to do on 13 December 2019.

[103] So, to summarise, Propco's conduct constituted a repudiation of all the individual agreements save for A3, A4 and A6. A3 has been fully executed by both parties and is not material to the outcome of the current dispute. Welfit Oddy's refusal to deliver the containers fully paid for under A4 and A6 amounted to a repudiation of these individual agreements which Propco was entitled to accept, as it did.

[104] The enquiry does not, however, end there. Although Propco relied only on the repudiation to which I have referred, in its particulars of claim, it did, in its replication, raise a further ground for its alleged cancellation of all the individual agreements.⁸² As I have explained, it was argued that once Welfit Oddy had sold the containers to Buhold they were no longer in a position to tender delivery of the 582 containers to the plaintiff, against payment. This, Mr Kairinos argued, constituted a repudiation of its own, which Propco was entitled to accept. Whilst this ground was not raised in the particulars of claim it is open to a party who has advanced unsustainable grounds for a cancellation of an agreement to rely, later, on any other valid grounds for cancellation, provided that it existed at the time of the cancellation.⁸³ As adumbrated earlier, in electing to hold Propco to its contract, Mr Nurse astutely avoided disclosing that Welfit Oddy no longer had any

⁸² Para 37 above.

⁸³ See *Contract General Principles* 346.

containers that it could deliver against payment of the purchase price. It was common cause that when the containers had been sold to Buhold, they had onsold the containers in the open market and it was accordingly not possible to retrieve the containers for delivery to Propco upon payment being made. Mr Rorke argued, and Mr Allen testified, that Welfit Oddy would have been required to manufacture new containers of the same quality and the same specification if Propco had reconsidered its position. Thus, it was contended that Welfit Oddy was able to perform, albeit not *in forma specifica*.

[105] I dealt earlier with the construction of the MPA and the scheme thereof. The purchase price of every individual container is determined by the prevailing cost of stainless-steel and the rand/dollar exchange rate at the time that the order was placed. Thereafter, the history of the relationship revealed that the manufacture of the containers in issue required a lead time of three to nine months. In terms of the MPA, payment of the purchase price was due after the completion of the manufacture and the inspection of the specific containers earmarked for delivery. It did not envisage payment upfront before the commencement of the manufacture or the lengthy delay thereafter before delivery.

[106] I shall accept, for purposes of this judgment, the *bona fides* of Welfit Oddy. However, the reasoning in *Metalmil*⁸⁴ is apposite in this instance where the SCA explained:

'It is probably correct to say that respondent was *bona fide* in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however *bona fide* it might have been in its belief that it was not.'

⁸⁴ 684J-685A.

[107] The argument advanced by Mr Rorke essentially sought to set up a different contract. That he cannot do. Once Welfit had sold the containers, they had disabled themselves from carrying out their part of the contract because they could not deliver in compliance with the contract, and they could therefore not sue for damages.⁸⁵ Thus, in *Geldenhuys and Neethling v Beuthin*⁸⁶ Solomon JA said:

'No doubt, had the plaintiff been willing to accept the repudiation, he would have been entitled forthwith and before he had performed his own obligation under the deed of sale to sue the defendants for damages for breach of contract. But as he refused to accept the repudiation and insisted upon the contract being kept alive, he remains subject to all his obligations and liabilities under it, and is bound to perform his part before he can claim that the defendants should perform theirs.'⁸⁷

[108] In the circumstances, although Propco had repudiated the individual agreements A1, A2, A5, A7 and A8, once Welfit Oddy sold the containers, while still insisting to hold Propco to the contracts, it could no longer claim damages and its own conduct was an unequivocal intimation that it did not intend to honour its obligations under any of the individual agreements. When, in 2021, Welfit Oddy purported to alter its election, which it is ordinarily entitled to do in law, its own repudiation of the agreement had already been accepted and the individual agreements cancelled. Accordingly, the plaintiff has established that it is entitled to repayment of the amount of US\$2 617 520,00 together with interest *a tempore morae* thereon.

⁸⁵ *Berman and Berzack v Finlay Holt & Co. Limited* 1932 TPD 142 at 145.

⁸⁶ 1918 AD 426 at 444.

⁸⁷ In *Erasmus* Ackerman J accepted the correctness of this decision on the facts, but held that it was not authority for the proposition that the obligations of the innocent party were not suspended for the duration of the repudiation.

[109] In the result, the following order is made:

1. The defendant is ordered to pay to the plaintiff the amount of US\$2 617 520,00 together with interest on the aforestated amount calculated *a tempore morae* at the prescribed rate of interest from the date of summons.
2. The defendant is ordered to pay the plaintiff's costs of the main action.
3. The defendant's claim in reconvention is dismissed with costs.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv G Kairinos SC instructed by Jurgens Bekker Attorneys,
Johannesburg c/o BLC Attorneys, Gqeberha

For Defendant: Adv S C Rorke SC instructed by Mike Nurse Attorneys, Gqeberha

Date Heard: 24 August 2023

Date Delivered: 30 January 2024