IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 3156/2024
Date Heard: 23 August 2024
Date Delivered: 10 October 2024

In the matter between:

TRIPLE S HOLDINGS PROPRIETARY LIMITED	FIRST APPLICANT
INVUCOM PROPRIETARY LIMITED	SECOND APPLICANT
and	
PIONEER FOODS PROPRIETARY LIMITED	RESPONDENT

REASONS

MULLINS AJ:

[1] On 23 August 2024 this matter, which came before me on an urgent basis, was argued. Although originally disputed, the Respondent did not persist with its challenge to urgency and, as both sides required a speedy resolution to the dispute, on 27 August 2024 I handed down an order, with reasons to follow.

[2] The order reads as follows:

1. The application is dismissed.

2. The Applicants are ordered to pay the costs of the application, the one paying, the other to be absolved, on scale C, as agreed by the parties.

3. The reasons for the above order will follow.

[3] The matter came before me in an unusual manner:

(a) On 25 July 2024 the Applicants issued the application papers, to be heard on Tuesday, 6 August 2024. As the 6th was a normal motion court day, although a certificate of urgency was required, it was not necessary to place it (the certificate) before the duty judge in order for the judge to consider whether, based solely on the certificate, *prima facie* the matter was urgent and, if so, to issue directions as to the further conduct of the matter, as required by the practise directive;[1]

(b) The Respondent filed answering affidavits and the matter was duly argued on the motion court day set out in the notice of motion. I am advised that only the question of urgency was dealt with and the application was struck off the roll by the learned judge due to the unreasonably short time periods imposed by the Applicants for the filing of papers. The Applicants were ordered to pay the Respondent's costs;

(c) Thereafter, on 16 August 2024, a "*Further Certificate Of Urgency*", alleging new grounds of urgency, was placed before me. Based on the further information I was satisfied that a *prima facie* case for urgency had been made out and directed that the matter be heard before me on Friday, 23 August 2024.

[4] The background facts may be summarised as follows:

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[1] Eastern Cape Joint Rules of Practise: Rule 12.
For a comprehensive explanation of the purpose of the certificate of urgency (in the Eastern Cape Division) see the judgment of Rossi AJ in **MV Tai Harmony: Sure Success Steamship SA v MV Tai Harmony and Others** 2024 (4) SA 640 (ECGq) at paras [30] – [41].

(a) The Respondent, which is a company based in Gqeberha, is a manufacturer and wholesaler of what is referred to as "*bread products*", which it markets throughout the Eastern Cape. The Respondent, which is part of the Pepsico Inc. group of companies, trades under the name Sasko Brito Bakery;

(b) The Respondent delivers bread products in bulk to independent contractors, who then distribute the said bread products to retail outlets within a specified area in accordance with what is referred to as an Independent Contractor Agreement;

(c) During January 2023 the First Applicant and the Respondent concluded a one year oral contract for the distribution by the First Applicant of bread products in the Port Alfred area (the "PA Agreement"). This contract was later reduced to writing, back-dated to 1 January 2024;

(d) During March 2023 the First Applicant and the Respondent concluded a similar oral contract for the distribution by the First Applicant of bread products in the East London area (the "EL Agreement"). This contract was also subsequently reduced to writing, back-dated to 1 May 2023;

(e) Save for the dates and the different locations the contracts are similar in all material respects (and will be referred to collectively as the "Distribution Agreements", unless it is necessary to distinguish them);

(f) In addition to the two Distribution Agreements the First Applicant and the Respondent concluded two written lease agreements in terms of which the First Applicant leased vehicles from the Respondent for the purposes of delivering the bread products in Port Alfred and East London;

(g) The Second Applicant also leased premises from the Respondent in East London. This was an oral contract and, according to the First Applicant, is "*linked*" to the Distribution Agreements;

(h) The delivery of the bread products is divided into two categories: the traditional trade (referred to in the papers as "TT") and the modern trade (referred to in the papers as "MT"). The important distinction between the two is that the bread products delivered to the traditional trade is cash on delivery, whereas the modern trade is on a credit basis;[2]

(i) The monies collected by the First Applicant in respect of the traditional trade is either deposited into a machine called a "*Deposito*" or directly into the Respondent's bank account;

(j) It is in respect of the monies collected from the traditional trade which is at the heart of this dispute;

(k) Every day the Respondent delivered a certain quantity of bread products to the First Applicant. The First Applicant in turn delivered the bread products to the retail outlets (both TT and MT), returning what was not sold to the Respondent. Where there is a discrepancy between what had been delivered to the First Applicant, what has been returned to the Respondent and the money deposited by the First Applicant it is known as "*driver shorts*";

(l) A dispute arose between the First Applicant and the Respondent as to the extent of the driver shorts. There are major disputes of fact as to how the system was supposed to operate and the extent of the driver shorts, which disputes I am unable to resolve on these papers nor, due to the nature of the relief being claimed at this stage, is it necessary to do so;

(m) In accordance with clause 4 of annexure B of the Distribution Agreements the parties had to do a daily reconciliation of the bread

[2] The traditional trade is made up of small retailers, such as cafes and spaza shops, whereas the modern trade consists of supermarkets.

delivered and the monies deposited. Where a discrepancy occurs which the parties are unable to resolve the issue would have to be referred to arbitration. Despite this clause the First Applicant alleges, and it is not denied, that the Respondent resorted to "*self-help*" and unilaterally deducted what it alleged was the extent of driver shorts. This has placed the First Applicant, and as an indirect consequence, the Second Applicant, under huge financial pressure;

(n) Coinciding with this dispute the parties were negotiating the conclusion of new distribution contracts, the PA Agreement having terminated on 31 December 2023 and the EL Agreement on 31 March 2024, both having been orally extended on a month-to-month basis thereafter;

(o) Eventually (in the circumstances described below) the Respondent terminated the Distribution Agreements and refused to continue to deliver bread products to the First Applicant, which refusal prompted this application.

[5] It would be more convenient to reproduce the relevant portions of the notice of motion rather than to paraphrase it:

"1. …

2. The Respondent is directed, with effect from the date of this Order, to:

2.1. continue to utilise the services of the First Applicant as its service provider for the delivery and sale of its bread products to existing and/or future customers within the delivery area of Port Alfred on the same terms and conditions as provided for in the written agreement between the First Applicant and the Respondent, a copy of which is annexed to the founding affidavit of Dylan Phillips ("the founding affidavit") marked FA1, save as to the term thereof and as is otherwise directed in terms hereof, at the rates for the provision of service and on the routes as were applicable between the First Applicant and the Respondent as at 1 May 2024;

2.2. continue to lease to the First Applicant the delivery vehicles as were utilised by First Applicant as at 1 May 2024 on the same terms and conditions as provided for in the vehicle lease agreement between the First Applicant and the Respondent.

3. The Respondent is further directed, with effect from the date of this Order, to:

3.1. continue to utilise the services of the Second Applicant as its service provider for the delivery and sale of its bread products to existing and/or future customers within the delivery area of East London on the same terms and conditions as provided for in the written agreement between the First Applicant and the Respondent, a copy of which is annexed to the founding affidavit marked FA2, save as to the terms thereof and as is otherwise directed in terms hereof, at the rates for the provision of services and on the routes as were applicable between the Second Applicant and the Respondent as at 1 May 2024;

3.2. lease to the Second Applicant the delivery vehicles as were utilised by First Applicant as at 1 May 2024 on the same terms and conditions as provided for in the vehicle lease agreement between the First Applicant and the Respondent, a copy of which is annexed to the founding affidavit marked FA4.

4. In implementing the Orders in paragraphs 2 and 3 above, the Respondent is directed to commence with a clean slate and is precluded from making any deductions from service fees or other amounts due to the Applicants without having complied strictly with the terms of the aforesaid agreements as to reconciliations and other procedures or as are provided in the agreements.

4a. The Respondent is interdicted from terminating the services of the First and/or Second Applicants provided in terms of paragraphs 2 and 3 above on the basis of the clause referred to in paragraph 5.3 below.

5. The Orders in paragraphs 2 to 4 above serve as interdicts binding on the Respondent pending the final outcome of an action; alternatively, arbitration proceedings to be instituted by the Applicants within 30 days of the date of this Order for substantiating the following relief:

5.1. It is declared that:

5.1.1. during or about February 2024 an oral agreement was concluded between the First Applicant and the Respondent in terms of which the First Applicant will provide to the Respondent delivery services of bread products within the Port Alfred delivery area for a period of 3 years with effect from 1 May 2024 and on the terms and conditions set forth in the agreement referred to in 2.1 above (annexure FA1) (subject to the further declaratory relief in 5.3 below);

5.1.2. during or about February 2024 an oral agreement was concluded between the Second Applicant and the Respondent in terms of which the Second Applicant will provide to the Respondent delivery services of bread products within the East London delivery area for a period of 3 years with effect from 1 May 2024 and on the terms and conditions as the agreement referred to in 2.2 above (annexure FA2) (subject to the further declaratory relief in 5.3 below);

5.2. The Respondent is directed to perform specifically its obligations in terms of the agreements referred to in paragraphs 5.1.1 and 5.1.2 above.

5.3. It is declared that to the extent that the Respondent seeks to rely on a provision in any of the agreements concluded between it and the First and Second Applicants to the following effect:

"Either party may terminate this agreement by giving the other no less than 1 months written notice of its intention to do so, which termination shall take effect after the expiry of the said 1 month notice period"

is contrary to public policy and is void and invalid accordingly.

5.4. The Respondent is directed:

5.4.1. within 30 days of the date of this order to deliver to the First Applicant an account (including daily reconciliations) in respect of the written and oral agreements concluded between the Respondent and the First Applicant for the provision of bread product delivery services in the Port Alfred area, for the period from 1 January 2023 to the date of delivery of the account;

5.4.2. within 15 days of the date of delivery of the account as aforesaid, to debate the account with the First Applicant;

5.4.3. within 15 days of the completion of the debatement as aforesaid, to pay to the First Applicant such amount as is due to it pursuant to the debatement;

5.5. The Respondent is directed:

5.5.1. within 30 days of the date of this order to deliver to the Second Applicant[3] an account (including daily reconciliations) in respect of the written and oral agreements concluded between the Respondent and the Second Applicant for the provision of bread product delivery services in the East London area, for the period from 1 May 2023 to the date of delivery of the account;

5.5.2. within 15 days of the date of delivery of the account as aforesaid, to debate the account with the Second Applicant;

5.5.3. within 15 days of the completion of the debatement as aforesaid, to pay to the Second Applicant such amount as is due to it pursuant to the debatement.

5.6. Pursuant to the orders in 5.3 and 5.4 above,[4] the First and Second Applicants (or either of them) shall be entitled to approach this Court to seek such further or amended relief as may be necessary to ensure compliance therewith and for such purposes to amend their pleadings as may be necessary.

5.7. The Respondent is to pay the costs of the Applicants, including the costs of counsel on scale C as contemplated in Rule 69(7) of the Rules.

6. The Respondent is to pay the costs of the Applicants in this application, including the costs of counsel on scale C as contemplated in Rule 69(7) of the Rules."

[6] Paragraph 4a was introduced by way of an amendment, which amendment was not opposed by the Respondent.

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3 This must surely have been intended to read <u>First</u> Applicant.
4 This must surely have been intended to read 5.4 and 5.5.

[7] The relevance of the Second Applicant requires some explanation. While both the PA and EL Agreements were concluded with the First Applicant (as were the lease agreements for the vehicles and the lease of premises in East London), when the parties commenced negotiating the renewal thereof it was agreed that the EL Agreement would be concluded with another entity, referred to as a "*shelf company*" to be identified in due course, the company so identified being the Second Applicant.

[8] Notwithstanding the dispute over the extent of the driver shorts the parties entered into negotiations for the renewal of the Distribution Agreements. It is the Applicants' contention that those negotiations culminated in the conclusion of binding agreements, hence the extensive relief sought in the notice of motion. It is the Respondent's contention that the negotiations were no more than that and no new agreements were in fact concluded.

[9] That the parties were engaging with each other is common cause, not only in respect of the renewal of the Distribution Agreements, but also as to how to resolve the driver shorts dispute. The two issues were intertwined. In this regard Mr Dayalan Phillips ("Phillips"), on behalf of the Applicants, states in the founding affidavit:

> "31. During or about February 2024 the issue of the renewal of the Agreements came up for discussion. I met with Mr Brugh on 2 February 2024. The meeting dealt with two discrete matters, namely the renewal of the Agreements (and in particular, their duration) and the issue of "driver shorts"."

[10] I interpose to comment that the two issues were certainly not discrete, particularly insofar as the Respondent was concerned, as is evidenced below.

[11] Pursuant to these discussions, on 14 February 2024 Brugh, on behalf of the Respondent, sent Phillips the following email:

"I trust this letter finds you well. I am writing to remind you of our previous communication regarding the submission of essential company documents.[5] I am writing to follow up on our recent meeting held on February 2, 2024,[6] where we discussed the crucial matter of submitting essential company documents for the completion of the **3 years contracts** that will be used for your loan application.

It has been **7 working days** since our meeting, and unfortunately, we have not received any correspondence or the required documentation. I must stress the urgency of this matter, as the delay is now impacting the processing of the contract renewal and your loan application and jeopardizing the timely execution of the associated contracts, which are vital for your business. Additionally, I want to reiterate our serious concern regarding the outstanding debt of **R2,186,915.00**. Considering the lack of progress in both matters, we find it imperative to inform you that the company as discussed requires full payment of the outstanding debt **30 April 2024**. Regrettably due to the prolonged delay, we are at great risk that this date will not be met and I remind you the Bakery is unable to consider any payment terms or instalment plans.

We remind you again of the discussion:

- The company will not enter into a term payment for the outstanding amount.

- The company will offer a 3-year contract that can be used to raise the funds inform of a loan to settle the outstanding debt.

- The debts need to be settled on 30 April 2024.

5 This is a reference to the Second Applicant's company details.
6 Referred to in paragraph [9] above.

- Spilt[7] of the two debts between two individual companies and contracts will be adjusted in accordance.

Time is of the essence, and we kindly request your immediate attention to this matter. Please ensure the prompt submission of the required documents and the initiation of the settlement process for the outstanding debt.

Should you have any questions or need further clarification, do not hesitate to contact me directly. We appreciate your urgent cooperation in resolving these matters and expect a prompt response." (The highlighted portions are as per the original).

[12] The reference to an "*outstanding debt*" is to what the Respondent alleged was the amount owed in respect of the driver shorts.

[13] On 4 March 2024 the Second Applicant's details were forwarded to the Respondent, although the Respondent was apparently not satisfied with the information provided.

[14] Parallel with the discussions referred to above there was a continuous, and somewhat acrimonious, exchange of emails between one Mr Kristen Ravichandran Naidoo ("Naidoo") of the Respondent and Phillips, dating from mid-May 2024 to the end of June 2024, dealing with the driver shorts. It is clear that the parties could not see eye-to-eye on this issue and it was never resolved. On 19 May 2024 Naidoo sent the Phillips an email which reads as follows:

"As discussed with Dayalan,[8] 10 days' notice to remedy the breach of contract and comply with the required conditions set out below has been confirmed and will end as at **17:00 on Friday, 24th May 2024**.

This notice is based on the following conditions:

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[7] It should read "Split".
[8] Phillips

1. **ALL** cash due to Sasko needs to be banked in the relevant Depositas (in East London) and Sasko's bank account (for Port Alfred) from today onwards **WITHOUT EXCEPTION**. Failure to adhere to this condition will result in Sasko immediately taking over the operations of the East London Depot. The Port Alfred routes will be serviced from Sasko Brito's Bakery in Port Elizabeth.

2. **No allowances will be made for any cash due to Sasko to be used for filling diesel or any other business expenses from TODAY onwards**.

3. A workable (and suitable) commitment on how the outstanding money will be paid back to Sasko Bristo's and how you will ensure that your drivers' account balances will not increase during this payment period to be submitted by no later than **17:00 on Friday, 24th May 2024**. Acceptance of the debt payment commitment is subject to the approval of Sasko Head Office.

Failure to timeously comply with the required conditions stipulated above will result in stop supply to Triple S Holdings. Sasko will take over the operations of the East London Depot and the Port Alfred routes will be serviced from Sasko Brito's Bakery in Port Elizabeth.

@Dayalan Phillips @Shereen Phillips please confirm receipt of this email and the conditions set out in this email by **no later than 06:00 on Monday, 20th May 2024**." (The highlighted portions are as per the original).

[15] There were a number of further emails in similar vein. On 31 May 2024 Phillips sent Naidoo a lengthy email disputing much of what he (Naidoo) had alleged and raising a number of other issues.

[16] The response to Brugh's email (referred to in paragraph [11] above) is set out by Phillips in the Applicants' founding affidavit:

"39. As regards the email of 14 February 2024 (annexure FA6), the First Applicant has never accepted that the "driver shorts" amounted to R2,186,915.00. In this regard:

39.1. At least 60% of the above amount is made up of rental for the trucks and rental for the East London premises as well as diesel supplied by the Respondent. Initially, the Respondent failed to invoice the First Applicant of these rentals with the results that when it eventually did so only during or about September 2024 the First Applicant was facing significant (but once-off) arrears;

39.2. Having regard to what I say above and, in any event, according to the Respondent the extent of the Applicants indebtedness has risen to R6,156,841.00 but once the case deposits amounting to R8,516,859.65 have been cleared by the Respondent, it will be indebted to the Applicants for at least R2,360,018.65."

[17] The Respondent certainly did not see it that way because on 1 July 2024 it sent the Applicants an email, the covering page of which reads as follows:

> "Please see attached formal notice indicating that the IDC agreements for the Sasko Port Alfred and Sasko East London Bread Depots will not be renewed with Triple S Holdings.
>
> Please note that the Triple S Holdings' final delivery into the respective Sasko Port Alfred and Sasko East London Depots' delivery areas will be on Wednesday, 31st July 2024.
>
> Also take note of the condition listed below and which appears in the formal notice as well."

[18] The attached formal notice, which is dated 29 June 2024, reads in part as follows:

”As you are aware, the Independent Contractor Agreements (IDC Agreements) for the Sasko Port Alfred and Sasko East London Bread Depots have expired as of 30th April 2024, respectively, resulting in these contracts being managed on a month-to-month basis.

We, hereby, wish to place on record that Pioneer Foods will not renew the IDC Agreements for both abovementioned Sasko Bread Depots with Triple S Holdings. Therefore, this letter serves as the formal 30-day notice that your last delivery date into the Port Alfred and East London delivery areas will be on the 31 July 2024.

Pioneer Foods confirms that during the 30-day notice period, Triple S Holdings shall ensure that all deliveries are made in full and on time to the customers being serviced by the Sasko Port Alfred and Sasko East London Depots, as well as the daily banking of ALL cash owed to Sasko. Failure to abide by either and/or both conditions will result in the immediate termination of your services without any further engagement.”

[19] The balance of the letter deals with the driver shorts issue and the amounts in respect of which the Respondent is alleged was due to it by the First Applicant.

[20] The First Applicant failed to abide by the conditions imposed (according to the Respondent) and on 12 July 2024 the Respondent cancelled the contracts “*with immediate effect*”.

[21] This prompted a response from the First Applicant’s attorney, *inter alia*, stating (and I paraphrase):

(a) The Respondent had been “*persistently and consistently*” in breach in respect of the driver shorts issue;

(b) There is a dispute in respect of the amount owed, or not owed, with regard to driver shorts and the Respondent had unilaterally deducted monies owed to the First Applicant in breach of clause 4 of annexure "B" of the Distribution Agreements (the arbitration clause);

(c) During or about February 2024 the parties had concluded new contracts for three years effective from 1 May 2024, subject to the driver shorts issue being resolved which, due to the Respondent's refusal to co-operate, had not occurred;

(d) In the circumstances the First Applicant denied that the parties were on a month-to-month basis, the termination letter in any event being a nullity because it was sent (and received) on 1 July 2024;

(e) The Respondent was given until 15 July 2024 to honour the contracts (referred to in (c) above) and to immediately cease unilaterally and unlawfully deducting driver shorts, failing which the First Applicant would approach the High Court for urgent relief.

[22] Not surprisingly, the Respondent did not comply, as a result of which the Applicants launched this application on an urgent basis.

[23] The Respondent's case can be summarised by quoting the following paragraphs from the answering affidavit:

"32. The first and second applicants were required to fulfil the conditions set out in paragraphs 17 and 18 above before the conclusion of the proposed new three-year agreements between the applicants and the respondent.

33. The applicants failed to fulfil the conditions set out in paragraphs 17 and 18 above on or before the deadline of 30 April 2024 and the parties continued to fulfil their obligations under the month-to-month EL and PA Agreements.

34. Accordingly, the applicants and the respondent never concluded the proposed new three-year agreements in respect of the distribution of bakery goods in the Port Alfred and East London regions.

35. As a result, the first applicant and the respondent continued to contract on the same terms and conditions reflected in the PA Agreement and the EL Agreement on a month-to-month basis until the respondent terminated both Agreements, in terms of the Termination Clause on 1 July 2024."

[24] The reference to paragraphs 17 and 18 (in the quoted paragraphs 32 and 33 above) are to (a) the alleged failure to provide the Second Applicant's company documentation / details to the Respondent's satisfaction and (b) the alleged failure by the First Applicant to settle its indebtedness to the Applicant based on the driver shorts.

[25] The Respondent also takes issue with the Applicants' compliance with the requirements for an interim interdict and contends that:

(a) As no Distribution Agreements had been concluded and the month-to-month extension of the existing contracts had been terminated the First Applicant had not established a *prima facie* right, let alone one open to some doubt;

(b) The fact that the Respondents were suffering financial hardship will only in exceptional circumstances be a well-grounded apprehension of irreparable harm;

(c) As the conduct of the First Applicant had been unlawful and dishonest the balance of convenience was not in its favour, particularly as it (the Respondent) is out of pocket to the tune of millions of rands;[9]

[9] Which, to be fair, is in dispute.

(d) The Applicants have another satisfactory remedy, namely to seek new business.

[26] The Applicants filed a very brief replying affidavit which amounted to no more than a denial of the Respondent’s allegations. However, a supplementary affidavit, which dealt with events subsequent to the matter being struck off the roll on 6 August 2024 was filed by the Applicants. It is based on the supplementary affidavit that the Further Certificate of Urgency was placed before me.

[27] The Respondent did not object to the supplementary affidavit and filed a response thereto.

[28] What the First Applicant alleges in the supplementary affidavit is that, whereas it was in financial distress when the application was originally launched, as a result of the Respondent making no further deliveries of bread products to it and the withholding of payment of monies alleged to be owed to it the following is stated:

> “With no income or any prospects of new business, the Applicants have closed their doors and ceased trading.”

[29] In addition to dealing with the allegations in the supplementary affidavit, the Respondent used the opportunity to bolster its case. It stated that the relief being sought by the Applicants would result in:

(a) The court interfering with the Respondent’s right to freedom to contract;

(b) The court amending a contract between two commercial entities;

(c) The Respondent being held hostage in circumstances where the trust relationship had broken down.

[30] With regard to the changed circumstances the Respondent stated that the Applicants had placed no proof before the court of its financial woes which had

resulted in the First Applicant having to close its doors, but that, in any event, it was "*a natural consequence of the termination of any commercial agreement.*"

[31] What emerges from the papers is that the parties cannot even agree that there are contracts in place, let alone the terms thereof. Based on the exchange of correspondence I cannot conclude that the meeting of 2 February 2024 resulted in the conclusion of contracts, let alone the terms thereof. At best there was a commitment, provided certain conditions had been complied with, to conclude contracts at a future date. Those conditions, according to the Respondent, were never complied with. According to the Applicants they were still trying to resolve them. Either way the parties were never *ad idem* as to the terms of contracts that they were busy negotiating.

[32] The high watermark of the Applicants case is that the meeting of the 2 February 2024 was concluded based on a "*handshake*" and that the contracts would be concluded once certain outstanding issues had been resolved. In this regard, on behalf of the Applicants, Naidoo states in the founding affidavit:

> "41. Notwithstanding that Mr Brugh (who subsequently resigned to take up a position with another company) in February 2024 had stressed the urgency of the matter, the Respondent has not produced draft agreements for the Applicants to sign. Nevertheless, each of the Applicants has concluded oral "handshake" agreements (as were the case in the beginning of 2023) with the Respondent for Port Alfred and East London respectively which remain in place until the Respondent presents the formal written contracts to the Applicants for signature ("the New Agreements").
>
> 42. As of 1 May 2024, being the first day of the terms of the New Agreements, the services have been provided on the common understanding of the parties that the written contracts will be substantially similar to the old Agreements but the "*ball is in the Respondent's court"* to produce the written instruments. However, having regard to the subsequent actions of the Respondent, this seems

most unlikely. That notwithstanding, until the written contracts are produced by the Respondents, the Applicants tender to provide their services on the basis of the New Agreements agreed upon in February 2024 (save for what I say below regarding the "*termination of convenience"* clause."

[33] Apart from the improbability of this assertion it suffers from difficulties both of which are, in my view, fatal to the relief the Applicants seek.

[34] Firstly, it is inherently contradictory. One cannot, on the one hand, allege a binding contract and at the same time, on the other hand, allege that it was subject to the resolution of certain outstanding issues. There was either an agreement, or there wasn't. Period.

[35] Secondly, the law with regard to an oral contract which parties intend to reduce to writing in due course is a murky area and appears to have been dealt with by the courts on a case by case basis, depending on the facts peculiar thereto. Kerr[10] says the following (footnotes omitted):

> "… if parties are negotiating a contract and either or both mention(s) a written document, one must ask what the speaker meant (or, if an apparent contract is in question, what a reasonable man would have understood the speaker to have meant). He may, broadly speaking, have meant any one of the following three things: (1) "I am not committing myself at the present stage. I will only do so when the provisions we have discussed are reduced to writing (whether in a single document or in an exchange of documents) and signed." (2) "I am not committing myself until I see in writing all the provisions we have discussed. I may then commit myself even though I do not sign the document." (3) "I am prepared to commit myself orally but I would like (or, I require) all or part of the provisions which we agree upon to be set down afterwards in a memorandum."

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[10] Kerr: The Principles of the Law of Contract; 6th Ed; pp. 140 – 141
See also Christie: The Law of Contract in South Africa; 5th Ed; pp. 105 – 109

[36] In the present matter, as I understand the position, while the Applicants allege that an oral contract was concluded, which merely had to be reduced to writing, the Respondent's case is that there were a number of outstanding issues and pre-conditions that had to be complied with before contracts could be concluded, which outstanding issues were never resolved, nor were the conditions complied with.

[37] The requirements for an interim interdict are trite and were formulated as far back as the landmark decision of **Setlogelo v Setlogelo**,[11] and approved (albeit slightly refined) over the years, most recently by the Constitutional Court.[12]

[38] In **Eskom Holdings SOC Ltd v Vaal River Development Association**[13] the following was stated (footnotes omitted):

> "[65] What the standard requires has given rise to no small measure of difference. According to *Webster v Mitchell*, as qualified in *Gool*, the test is whether the applicant has furnished proof which, if uncontradicted at trial (here in the review), would entitle the applicant to final relief. The Court will then consider the case of the respondent to decide whether it casts serious doubt on the case of the applicant. If it does, the standard is not met. In *Ferreira*, a majority of a Full Court considered this test to be too exacting. It held that the prospects of success of the claim for the principal relief, albeit weak, may nevertheless suffice. This is so because other requirements for the grant of an interim interdict may be strongly grounded and hence compensate for the weakness as to prospects. This, it was thought, better chimed with the holding in *Eriksen Motors*. More recently, this Court, in *Economic Freedom Fighters* held that—
>
> > "*before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review*. The claim for review must be based on *strong grounds* which are likely to succeed. This requires the court adjudicating the interdict

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[11] 1914 AD 221 at 227

[12] See **Economic Freedom Fighters v Gordhan and Others** 2020 (6) SA 325 (CC) at para [21]

[13] 2023 (2) SA 325 (CC)

application to *peek into the grounds of review raised in the main review application and assess their strength*. It is *only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict*." (Emphasis added.)

[66] What all of these cases make clear is that to secure interim relief, an applicant must establish their prospects of success of obtaining final relief to the required standard. Without that showing, there is no basis upon which a respondent can be required to endure the strictures of an interim order, pending the final determination of the case for final relief. And even if the standard is satisfied and the applicant is granted an interim order, the order is generally subject to the following condition. If the applicant ultimately fails in the main action, they will be liable for the damages that the respondent may have suffered as a result of the imposition of the interim order. This is a further demonstration of the manifest connection between the grant of interim relief and the likely outcome of the proceedings that will finally determine the matter." (Underlined for emphasis).

[39] Given the exchange of correspondence referred to above how can I conclude that the parties were *ad idem?* In his 2 February 2024 email Brugh refers to the "*discussions*", not an "*agreement*". This is the same email that Naidoo relies upon for the formation of binding contracts. Even the Applicant's attorney is equivocal in this regard. In his letter of demand he refers to the conclusion of new contracts, subject to the driver shorts issue being resolved, which he concedes never was.

[40] On the papers before me, at best for the Applicants, there are irreconcilable disputes of fact which cannot be resolved on the papers, alternatively, at worst no new Distribution Agreements were ever concluded.

[41] The First Applicant makes much of the fact that the month-to-month contracts, which required one months' written notice of the termination thereof, were not validly terminated. In this regard the First Applicant relies on the fact that the notice was received only on the 1st of July and thereafter, a few days later, the month-to-month contracts were summarily terminated with immediate effect.

[42] The Interpretation Act, 33 of 1957 defines a "month" as a calendar month. Thus, notice of termination would have had to reach the Applicants before the commencement of the month of July. It didn't. Similarly, there is no provision in the contracts for "*immediate termination*".

[43] The Applicants are actually correct in this regard. But where does that take the matter? In the first place, more than a month had elapsed by the time the application was launched, so the issue had become academic. In the second place, the Respondent could simply issue a fresh cancellation notice, which would have extended the contracts for another month, but not resolve the underlying irreconcilable issues.

[44] Furthermore, the fact that the Respondent did not comply with a term of the contracts and is in breach thereof does not necessarily mean that the Applicants are entitled to an interim interdict. Breaches of contract are an everyday reality, usually giving rise to an action for damages, although not exclusively so.

[45] Which brings me to another argument raised by the Respondent, namely that the trust relationship between the parties has broken down.

[46] Where a breach of contract is alleged one of the remedies available to the aggrieved party is a claim for specific performance. Dealing with an employment contract Innes CJ stated the following in **Schierhout v Minister of Justice**[14] (at p. 107):

> "Now, it is a well established rule of English law that the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages. The Courts will not decree specific performance against the employee, nor will they order the payment of the servant's wages for the remainder of his term. Macdonell (*Master and Servant*, 2nd ed., p. 162) however, points out that Equity Courts did at one time

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[14] 1926 AD 99

> issue decrees for specific performance. But the practice has long been abandoned, and for two reasons; the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently. The same practice has been adopted by South African Courts, and probably or the same reason." (Underlined for emphasis).

[47] That, however, is no longer the legal position. In **Haynes v King Williams's Town Municipality**[15] De Villiers AJA stated (at p. 378F-H):

> "It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse a decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.
>
> As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature."

[48] Notwithstanding the shift away from the inflexible rule espoused in **Schierhout** the starting point, as it were, appears still to be that the courts are loathe to order specific performance where contracts of employment / service are concerned. See: **Santos Professional Football Club (Pty) Ltd v Igesund and**

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15 1951 (2) SA 371 (AD)

Another[16] (at p. 701B – E) and **Nationwide Airlines (Pty) Ltd v Roediger and Another**[17] where Horn J stated (at paras 17 *et al)*:

> "[17] Where it concerns a contract of employment it has been held that a court will in the exercise of its discretion not normally grant specific performance. However, the tendency to regard this rule as one cast in stone, that is, that specific performance of an employment contract would never be granted, was shown not to be a hard-and-fast rule.
>
> [18] …
>
> [19] From this it is apparent that it is a misconception to say without qualification that specific performance of an employment agreement will never be permitted. There are numerous situations where specific performance may be ordered where various factors may play a determining role in coming to such a decision.
>
> [20] Such factors may, for example, be:
>
> 1. The particular relationship between the employer and the employee.
>
> 2. The nature of the employment contract.
>
> 3. The nature of the service or work which is to be performed in terms of the contract.
>
> 4. The prejudice or hardship to be suffered by the innocent party should specific performance not be ordered, compared to the prejudice that will be suffered by the employee, should it be granted.

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16 2002 (5) SA 697 (CPD)

17 2008 (1) SA 293 (W)

> [21] The general rule should still be that where a party wrongfully breaches a contract it should entitle the innocent party to enforce the contract, and that should no less be so even in employment contracts." (Underlined for emphasis).

[49] Although these cases refer to employment contracts, the situation in the present matter is akin thereto. The Applicants were employed, albeit as independent contractors, to render a service to the Respondent.

[50] The cases quoted above dealt with a situation where the contract in question was common cause. In the present matter whether or not there are contracts in place is hotly contested by the Respondent. In the circumstances it would be unwise to order specific performance, even on an interim basis. In the exercise of my discretion I decline to do so.

[51] In a bizarre twist the Applicants also seek an order, to operate with immediate effect, that the clause providing that either party may terminate the contracts in writing on 30 days calendar notice be declared contrary to public policy.

[52] I have already referred to this clause above. The motive behind this relief is obvious. If I grant the relief the Applicants seek and order the continuance of the relationship, it would still be open to the Respondent to terminate on 30 days' calendar notice. This would defeat the very purpose of the application.

[53] Thus, not only do the Applicants seek the implementation of the alleged contracts in order to prove the conclusion thereof in due course, the very conclusion of which is in dispute, they expect the court to amend the terms thereof by declaring a particular clause *contra bonis mores*.

[54] It is trite that the court will not make a contract for the parties. In **Sasfin (Pty) Ltd v Beukes**[18] the court refused to do so in that:

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18 1989 (1) SA 1 (A) at 16H - I

"It is in my view that not open to parties to a contract to say to a court

> 'Take our agreement, such as it is, excise from it all that is bad, and retain what is good, and provide us with a contract which is legal and enforceable, even though it may not be what we originally had in mind'"

[55] Even if it were competent for a court to make such an order at this stage, other than based on the vaguest of allegations, the Applicants make out no case as to why a contractual term that either party may terminate the contracts on 30 days' notice is against public policy. The fact that the one party (the Respondent) may be in a much stronger bargaining position than the other party (the Applicants) is not a ground for declaring the term to be against public policy. This will be the case in the vast majority of cases. In any event, the Applicants were not forced into contracting with the Respondent. If they did not like this term they should not have concluded the contract. In addition, both parties are afforded the same right of termination so they are on a level playing field, as it were. It is not as if the term operates in favour of the Respondent only.

[56] In addition, although the notice of motion refers to the Distribution Agreements concluded between the Applicants and the Respondent, granting an order declaring the relevant clause contrary to public policy will create a precedent. One can just imagine the consternation it will cause. It will throw hundreds, if not thousands, of contracts into doubt. Thus, even if I was inclined to grant the rest of the relief, I would decline to declare the relevant clause contrary to public policy and therefore void and invalid.

[57] The final nail in the Applicants' coffin emerges from the supplementary affidavit which was the basis for the renewed case for urgency. In paragraph 10 thereof Phillips states that as a result of the Respondent's refusal to deliver bread products to the Applicants they have had no income and:

> "With no income or any prospects of new business, the Applicants have closed their doors and ceased trading."

[58] It is trite that an interdict is not a remedy for a past invasion of rights, but is concerned with present or future infringements. On its own version the harm that the Applicants sought to avoid has already occurred. There is thus no longer any point in granting the relief sought in the notice of motion.

[59] From the aforegoing it is evident that the Applicants failed to make out a case for the relief sought and it is for this reason that I handed down the order referred to in paragraph [2] above.

NJ MULLINS

(ACTING JUDGE OF THE HIGH COURT)

<u>REPRESENTATION</u>:

Obo the Applicants:	**Adv. G. Gajjar**
Instructed by:	**RUSHMERE NOACH INC.** **5 Ascot Office Park** **Conyngham Road** **Greenacres** **GQEBERHA** **c/o NETTELTONS ATTORNEYS** **118A High Street** **MAKHANDA**
Obo Respondent:	**Adv. D. De la Harpe SC**
Instructed by:	**NORTON ROSE FULBRIGHT SA INC.** **34 Fredman Drive** **Sandton** **JOHANNESBURG** **c/o WHEELDON RUSHMERE AND COLE INC.** **119 High Street**

MAKHANDA