

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 22702/2023

In the matter between:

MTECH SA (PTY) LTD

(Registration Number: 2015/318108/07)

Applicant

and

AFOODABLE (PTY) LTD

(Registration Number: 2003/009337/07)

First Respondent

JACK HENRY FRIEDMAN

(Identity Number: 7[...])

Second Respondent

MORNE GROVE

(Identity Number: 8[...])

Third Respondent

JEAN-PIERRE PHARO

(Identity Number: 8[...])

Fourth Respondent

WESLEY ARNO COWDEN

Fifth Respondent

(Identity Number: 7[...])

ADRIAAN JACOBUS DE WAAL

Sixth Respondent

(Identity Number: 5[...])

Coram: Wille, J

Heard: 28 August 2024

Delivered: 4 September 2024

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an application for summary judgment by the applicant against the respondents. The dispute is between the applicant and the first respondent as the remaining respondents are sureties. The first respondent conducts the business of manufacturing and packaging food products for distribution to customers that require that such products comply with certain specified health and safety requirements.¹

[2] The applicant conducts the business of manufacturing packaging material used in the packaging and distribution of food products and has special expertise and experience concerning the manufacture and distribution of packaging material used for the purposes required by the first respondent.²

¹ Following specifications from “The World Food Program” (this in terms of EU and FDA standards and protocols).

² These specific requirements were detailed in the defendants’ plea.

[3] It is not the subject of any dispute that the applicant was aware of the first respondent's obligation to comply with the strict protocols and requirements for the packaging of its products for onward distribution to its customers. The first respondent accordingly placed with the applicant a specified order (the first respondent's specified purchase order) with detailed specifications concerning the products ordered from and to be supplied by the applicant.³

OVERVIEW

[4] About two years ago, the first respondent submitted a specified and detailed purchase order to the applicant to manufacture and supply certain packaging materials. A dispute arose on the papers as to whether the packaging material provided in terms of this order was defective or not. This dispute (although still relevant) was overtaken by arrangements made between the applicant and the first respondent (in an attempt to settle the matter amicably).⁴

[5] These arrangements culminated in an agreement that the packaging material not used by the first respondent (alleged to be defective in that same did not meet the first respondent's buying specifications) would be returned to the applicant, who would send for the collection of this product from the first respondent's premises.⁵

[6] It was a matter of common cause that some of this packaging material would be returned by the first respondent to the applicant, and a credit note would be passed to the benefit of the first respondent for these returns. Also, it was agreed that the first respondent would receive a credit on account from the applicant, which would be calculated following the cost price of the material supplied to the first respondent.⁶

[7] Correspondence followed between the attorney representing the applicant and the first respondent representing the respondents. The respondents during this

³ This order contained specific references to certain paper "sachets" referred to in the first respondent's "buying specifications".

⁴ The respondents signed a settlement agreement that had been drafted by the applicant's attorney.

⁵ The applicant collected same from the first respondent's premises on the morning of 31 October 2023.

⁶ The methodology to be used of how the amount of the credit would be calculated was agreed.

exchange of correspondence and the settlement negotiations that followed were unrepresented. As a direct result of all these communications, a settlement agreement was signed by the respondents, which was sent to the applicant for signature.⁷

[8] Herein lies the crisp dispute for determination. The issue is that between the time the respondents signed the settlement agreement (and the applicant collected the alleged unsuitable packaging material), the respondents communicated with the applicant about specific features of the settlement agreement at a time when the applicant had not yet signed off on the agreement (alternatively it was signed by the applicant, but the acceptance thereof was not yet communicated to the respondents).⁸

CONTEXT

[9] The applicant's attorney and the fifth respondent exchanged correspondence concerning the conclusion of the settlement agreement during the subject month, and only at the end of that month did the applicant's attorney receive the signed settlement agreement from the respondents.⁹

[10] It is alleged by the respondents that the applicant collected the stock of packaging material not used by it on the day after they signed the agreement, and that happened at a time when the respondents had not been notified that it had been so signed and accepted by the applicant.¹⁰

[11] Thereafter the first respondent immediately communicated with the applicant's attorney after the collection of the returned packaging material and confirmed the following: (a) each pallet was being weighed so the parties could sign off on the volumes returned, (b) the first respondent would pay for the volumes used, (c) the stock returned would be deducted from the amount owed to the applicant, and (d)

⁷ This settlement agreement was to be signed by the respondents before the collection of the unused packaging material.

⁸ The respondents returned more "unused packaging material" than initially anticipated.

⁹ From 12 October 2023 to 30 October 2023 (the agreement was received at 16h04 on 30 October 2024).

¹⁰ On the morning of 31 October 2024.

hopefully the volumes would align with the calculations mentioned in the settlement agreement.¹¹

[12] On the same day, the applicant's attorney responded in writing and stated that the settlement agreement had been signed, that the figures had been agreed upon and that any unilateral amendments by the first respondent would be considered a breach of the contract. Most importantly, it was stated that the applicant would not credit any stock over and above what had been agreed upon.¹²

[13] On the same day, the fifth respondent (on behalf of the first respondent) communicated that he would revert once the numbers had been agreed and that the parties should wait for the final numbers to be calculated. The applicant's attorney responded by stating that the respondents were bound by the terms of the settlement agreement and attached a counter-signed version to their communication to the respondents.¹³

[14] More letters followed on the day of the collection of the returned packaging. The respondents calculated the amount due to the applicant following the collection and return of the packaging material. They requested the applicant to align this calculation with what the applicant had received in return from the first respondent.¹⁴

[15] The applicant finally responded via its attorney of record to the respondents to the effect that they had signed a settlement agreement and that they were accordingly obliged to pay into the applicant's bank account the exact amount stipulated in the settlement agreement.¹⁵

CONSIDERATION

THE SHIELDS RAISED BY THE RESPONDENTS

¹¹ The respondents knew that the applicant had collected more stock than anticipated.

¹² The applicant stated that it would revert once it had examined the stock that had been collected by it.

¹³ According to the first respondent it had by then withdrawn the offer to settle on the prior agreed figures.

¹⁴ The respondents alleged they were indebted to the applicant only to the sum of R371,808.88.

¹⁵ The amount of returned stock stipulated in the settlement agreement was the sum of R623,542.01.

[16] The respondents contend that the offer in the settlement agreement signed by them and sent to the applicant's attorney was validly withdrawn by them before it was accepted by the applicant. Alternatively, the settlement agreement did not fully and correctly set out the terms of the agreement because of a *bona fide* and common mistake and ought to be rectified as set out in the respondents' conditional counterclaim¹⁶.

THE FIRST SHIELD

[17] The respondents contend for the overarching theme and agreement in principle of the parties, which was that the respondents would only pay for the volumes of packaging material used by the first respondent. To fortify this shield, they advance that by their conduct, they unequivocally communicated a withdrawal of their offer in the settlement agreement.¹⁷

[18] They say this because once it is clear that parties intend to agree to employ a written contract, the contract will only come into existence when all parties have signed and accepted the contract. They contend that this is one of those contracts that only finds application when it has been accepted by all the parties to the contract.¹⁸

[19] By elaboration, it is argued that in this *species* of contract, the first signatory thereto creates an offer which the intermediary signatories accept, which in turn creates an offer that the final signatory accepts.¹⁹

[20] The respondents aver that upon a proper reading of the applicant's papers, it cannot be contended by the applicant that the applicant had countersigned the settlement agreement before the respondents had communicated their withdrawal

¹⁶ The respondents pleaded this in terms and also filed a conditional counter-claim.

¹⁷ They say they acted immediately when a larger quantity of goods was collected by the applicant.

¹⁸ *Goldblatt v Fremantle* 1920 AD 123 at 129.

¹⁹ G B Bradfield *Christie's Law of Contract in South Africa*, 8th Ed, at 138.

from the settlement because of what had been revealed when the returned packaging material had been reconciled.²⁰

[21] Thus, the respondents advance that this is a triable issue, which will determine whether the offer in the settlement agreement signed by the respondents had been withdrawn and whether the contract was signed on behalf of the applicant before such withdrawal occurred.²¹

[22] Further, the respondents contend for the position that the overarching intention of the parties bears scrutiny. They say this because the settlement agreement itself provides for a process of verification, which would involve thorough weighing, inspection and stock-taking of the packaging to be returned to the applicant.²²

[23] It is advanced that the figure agreed upon should be considered concerning the preamble to the settlement agreement that records an amount due in respect of the stock at a time before any of the stock was returned.²³

[24] The core argument is that the overarching intention was that the first respondent would return whatever unused stock of packaging material it had and that after that, a verification process would take place, at which point further adjustments to the amount owing by the first respondent to the applicant would be made.²⁴

[25] In summary, the respondents say that to interpret the settlement agreement in these circumstances in any other way would be both absurd and unbusinesslike²⁵.

²⁰ The respondents say that the applicant's papers are unclear and that they do not engage with this issue sufficiently.

²¹ The respondents aver that this was always the common intention of the parties regarding the return of the packaging material.

²² This would result in a written confirmation detailing the exact quantity of goods returned to the applicant.

²³ The then stipulated amount of R623,542.01 was agreed upon before any stock was weighed and returned.

²⁴ The respondents say they reacted immediately upon the realization that more stock had been collected by the applicant.

²⁵ Metcash Trading Ltd v Credit Guarantee Insurance Cooperation of Africa Ltd 2004 (5) SA 520 (SCA) at 526 B–F.

[26] As I understand it, the respondents' case is not that the settlement agreement was varied, cancelled, novated or otherwise terminated or that any waiver of any existing rights took place, but rather that no valid and enforceable settlement agreement came about in the first place. They say this because it is trite that an offer may be withdrawn at any time before a contract is accepted by all the parties to it.²⁶

[27] The affidavit resisting summary judgment seems to suggest that the fifth respondent's understanding of what should take place concerning the return of the stock of packaging material (which was not used by the first respondent) differed materially from what was provided for in the settlement agreement. This was when the applicant had not yet signed and accepted the settlement agreement, and thus, the proposal contained in the settlement agreement was withdrawn and fell away.²⁷

[28] As far as the first shield is concerned, the respondents contend for the position that a triable issue exists in that the first respondent conveyed a clear intention that the respondents did not intend to perform in terms of the settlement agreement as recorded and that this constituted an unequivocal withdrawal of the offer contained in the settlement agreement before communication of acceptance by the applicant.²⁸

[29] Thus, without a contextual approach to the interpretation of the settlement agreement, it could mean that if the respondents were to sign the agreement first, they would be bound by the terms of the agreement even where the agreement was signed many years later, by or on behalf of the applicant. It is submitted that such an interpretation would not be businesslike and purposeful.²⁹

THE SECOND SHIELD

²⁶ Robarts v Antoni N.O. 2014 JDR 1004 (SCA) para [21] at pages 13 and 14.

²⁷ The respondents aver that they were accordingly entitled to withdraw their offer of settlement and they did so timeously.

²⁸ The complaint by the respondents is that the applicant needs to engage with this issue in its papers.

²⁹ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (A) para [18] at 603 E–604 D.

[30] Regarding the alternative second shield, which is based on rectification of the settlement agreement, it is submitted that there is no basis on which it may be found that this shield is not *bona fide* as the applicant has not alleged that the conditional counterclaim by the first respondent is subject to exception.³⁰

[31] The first respondent contends that it was always its understanding that it would not be obliged to pay for any stock of packaging material it received from the applicant that it did not use, that such stock would be returned to the applicant and that an aliquot credit would be granted to the first respondent.³¹

[32] The issue is whether or not, in these circumstances, considering the evidence and the pleaded case before the court, a finding can be made that this shield raised by the first respondent, read with the conditional counter-claim, can be legally labelled as a sham.³²

[33] The respondents submit that this court is not in a position to do so as there are strong indications that : (a) the parties were in agreement that the first respondent would return unused packaging material which the first respondent purchased from the applicant, and (b) the applicant and the first respondent intended to contract on the basis that the first respondent would be able to return all unused stock of packaging material to the applicant and it would receive a credit therefor.³³

[34] The first respondent avers that such an intention is further supported by the settlement agreement itself which provides for a verification process with regard to the stock returned to the applicant.³⁴

[35] The approach by the respondents is that the applicant pressed for the conclusion of the settlement agreement, on the basis of an acknowledgment by the

³⁰ The applicant did not file an exception to the respondents' conditional counter claim.

³¹ The respondents say this is precisely why they elected to settle their disputes with the applicant.

³² The respondents submitted that this shield was not untenable as no exception was filed against the counterclaim.

³³ The respondents took the position that the general theme of the agreement was that all the unused stock would be returned.

³⁴ *Dole South Africa (Pty) Ltd v Pieter Beukes (Pty) Ltd* 2007 (4) SA 577 (C).

first respondent of a liability in a fixed amount and that this was motivated by a strategy of snatching at a bargain and unfairly pressurizing the first respondent.³⁵

RULE 32 OF THE UNIFORM RULES

[36] The respondents may (to resist summary judgment) in terms of rules:

‘...satisfy the court by affidavit ... [t]hat the defendant has a bona fide defence to the action; such affidavit ...[s]hall disclose fully the nature and grounds of the defence and the material facts relied upon therefor...’

[37] It cannot be held that the applicant has demonstrated that the shields raised by the respondents do not raise any issues for trial. The shields relied upon do indeed raise factual matters which are only capable of determination by way of the trial process. Self-evidently, the respondents’ claim to rectify the settlement agreement will undoubtedly raise trial issues. If the court has some doubt, then the court should not grant summary judgment.³⁶

[38] The next issue for consideration is whether the two shields raised by the respondents are *bona fide* or a sham. This latter determination is difficult to make when the respondents allege that the applicant deceitfully supplied packaging material to the first respondent which did not meet the specified specifications.³⁷

[39] In these circumstances, the respondents are not required to demonstrate that the shields they raised to the summary judgment application will likely prevail. All they have to demonstrate is that, on the face of it, the defences they have raised are genuine and *bona fide*. This, they have done.³⁸

CONCLUSION AND ORDER

[40] The following order is granted:

³⁵ Rule 32(2)(b) of the Uniform Rule Court.

³⁶ First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (C) para [9].

³⁷ This is undoubtedly a triable issue.

³⁸ Tumileng Trading CC v National Security and Fire (Pty) Ltd. 2020 (6) SA 624 (WCC).

1. The application for summary judgment is refused.
2. The respondents (the defendants in the action proceedings) are given leave to defend the action.
3. The costs of the application are reserved for decision by the trial court.

E.D WILLE
Cape Town