

REPUBLIC OF SOUTH AFRICA



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

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

29.04.2025 _____
DATE

SIGNATURE

Case No: A2024-054003

IN THE MATTER BETWEEN:

**RAM TRANSPORT
SOUTH AFRICA (PTY) LTD
t/a RAM HAND TO HAND COURIERS**

APPELLANT

AND

**DHL SUPPLY CHAIN
SOUTH AFRICA (PTY) LTD**

RESPONDENT

JUDGMENT

Siwendu J (Maier- Frawley J and Flatela J concurring):

Introduction

[1] The is appeal involves a contractual dispute between the appellant, RAM Transport (South Africa) Pty Ltd t/a RAM Hand-to-Hand Couriers, (RAM) and the respondent, DHL Supply Chain (South Africa) (Pty) Ltd (DHL).

[2] RAM and DHL are well known logistics and supply chain companies. DHL provides wholesale distribution services. DHL conducts the wholesale distribution of pharmaceutical products, which feature in this appeal, through its Life Sciences and Healthcare Distribution Supply Chain division (LSH). LSH's clients, referred to as "the principals," include companies like Bard Medical, BMX, Octopharma, Smith and Nephew, Mlungisi Healthcare and Omni. LSH wholesale distribution service has two components, a multiuser facility and one dedicated to Netcare (also referred to as Omni).

[3] RAM provides bulk collection and delivery services, warehousing management services, courier services and other logistics services. It has an established footprint and operates forty two hubs throughout the Southern African region. It also provides shipments and courier services containing medical and pharmaceutical products to its own clients like United Pharmaceutical Distributors, Dischem, Dischem Oncology, Transpharm, Equipharma.

[4] The wholesale distribution of pharmaceutical products is regulated by the Medicine Control Council (MCC). Other applicable regulatory standards include the Good Wholesaling Practice, Pharmaceutical Inspection Convention, Pharmaceutical Inspection Co-operation Scheme and South African National Accreditation System. Quality assurance and Health and Safety, and Standard Operating Procedure are a critical to the provision of the wholesale distribution service. DHL is licensed to conduct its wholesale distribution business in respect of pharmaceutical products in terms of these regulations. When it subcontracts its

deliveries services to third parties, such as RAM, it cascades the regulatory compliance to its subcontractors.

[5] The trial evidence showed that it requires infrastructure comprising warehousing (hubs and depots), temperature controlled vehicles. Coordination between the wholesaler, the distribution service provider and the end customer, through efficient IT systems, is an integral component of the distribution service. The maintenance of a cold supply chain at varying levels to safeguard integrity and quality of the pharmaceutical products is a critical requirement. The rates for transportation of the pharmaceutical products are linked to whether they are transported by road and or air freight and depend on customer delivery requirements. This has an implication on rates charged and the profit margin to be realised between the wholesaler and the distributor. These considerations featured prominently during the trial and subsequent disputes between the parties.

[6] The disagreement on appeal is about whether, when DHL nominated RAM in terms of a Letter of Intent (LOI) to distribute pharmaceutical products on its behalf, the parties concluded a binding unconditional contract. It is common cause that from 26 March 2018 to July 2018, RAM distributed pharmaceutical products on DHL's behalf. Whether by permitting RAM to provide the distribution services, DHL suspended or waived the need to conclude a contract is in issue. The terms upon which RAM provided the distribution services during that period are in dispute.

Background

[7] In August 2017, Mr Craven (Craven), DHL's Sourcing and Procurement Manager sent a Request for Quotation (RFQ) to RAM's Senior Sales Executive, Mr Walker (Walker), in what RAM alleged was a closed bid, requesting RAM to populate a Case Study and provide DHL with rates for distributing pharmaceutical products. Craven and Walker, both members of the respective

parties' sales teams, played a prominent role during the RFQ process. At the time, DHL had subcontracted the delivery services to Seabourne Couriers (Seabourne)

[8] RAM submitted its last proposal on 11 September 2017, after Craven consulted with Mr Graeme Lazarus (Lazarus), RAM's Managing Director, following a request by Craven for RAM to adjust its initial rates. The last proposal comprised of: (a) the populated case study, (b) the rate cards recording pricing and (c) the Statement of services.

[9] It is common cause that before the nomination, between 12 September 2017 and 30 November 2017, RAM and DHL representatives held discussions to ascertain DHL's requirements. The companies conducted reciprocal site visits to inspect each other's infrastructure. Separate meetings were held between Ms Gail Mkele (Mkele) and Cindy Hayward (Hayward), RAM and DHL's responsible pharmacists, to understand the nature of RAM's service offering and what would be required to deliver the services stipulated by the RFQ.

[10] On 30 November Craven advised Walker that RAM's proposal was successful, and congratulated RAM on the "successful nomination", stating that "we wish to initiate the implementation planning going forward." A letter dated 27 November 2017 signed by Craven and Ms Margareutte van der Merwe (Van der Merwe), the designated General Manager LS & H (DSC), was attached to Craven's email. Craven reported to Van der Merwe. I return to the contents of the letter, which must be read with the RFQ in due course.

[11] On 30 November 2017, DHL terminated the distribution service contract with Seabourne with effect from 31 January 2018. In addition, Ms Lindie Smith (Smith), the Key Accounts manager for Netcare, advised Ms Anthea Richie, that RAM would be taking over the distribution services from Seabourne. Netcare is one of DHL's significant customers, constituting 60% of the pharmaceutical

products business. Walker testified that from December 2017 he and Craven worked on “implementation plans.”

[12] During December 2017, Mr Derrick Bode (Bode), entered the discussions as the newly appointed operations manager and became a key role player. His role was to ensure that RAM and DHL would be operationally ready to render the services from the “go live date” on 1 February 2018. Craven and Walker scheduled a site visit with Bode and others on 14th December 2017.

[13] A separate meeting between the principal pharmacists Hayward and Mkele took place in tandem, to exchange information on the pharmaceutical related parts of the service, in particular, the pre supplier Audit processes, Quality Management System, Health and Safety Policy audit. After this meeting, Mkele forwarded RAM’s Standard Operating Procedures (SOP) and existing Quality Assurance documents to Hayward.

[14] On 18 December 2017, Walker circulated the first project “medical implementation tracker report” to Bode, Padayachee, Craven (the DHL team) reflecting items discussed and milestones to be achieved on different components of the logistics and distribution chain. Bode’s evidence was that Change Management control from one service provider to another was an important component of the project plan and integral to the readiness to “go -live.” The induction or training of personnel, ensuring regulatory compliance and understanding of reciprocal infrastructure and systems of both RAM and DHL and the needs of the principal customers was integral to readiness before the “go-live” date. Bode was concerned that the Netcare business be retained. He testified on a need to “...have a project person on RAM’s side working hand in hand with DHL on the project (and not the sales guy as he will say yes to everything without thinking it through).”

[15] Bode assembled a project plan and motivated for the appointment of a project manager to oversee the milestones and implementation of the project. DHL appointed Daniel du Plessis (du Plessis) as the DHL Project Manager to manage the transition process. Bode was concerned about the readiness to “go live” on 1 February 2018. As result, DHL took a decision to postpone the “go-live” date following internal discussions. The consequence was that the termination of Seabournes’ contract had to be extended for a period while DHL and RAM worked on completing the milestones for the implementation of the project. The transition date was moved to 1 April 2018.

[16] On the 20th of December 2017, Van der Merwe wrote to several role players in DHL including Bode, Smith and Craven about the decision to “change vendors.” The email included Ravil Raman (Raman), Kevin Makkie (Makkie) whose role in the project was at that stage was not yet clear, and stated:

“Dear Business partner

DHL Supply Chain has taken the decision to move from its current 3rd party vendor to RAM. This change will be effective in Q2 2018. This change was not taken lightly and is as result of a rigorous RFQ process.

RAM has placed a very compelling service offering on the table and DHL is looking forward to working with them in the future.

There will be a dedicated project team compromising all the DHL stakeholders in place as of January 2018 and the timelines will be made available to all as soon as the project kicks off in January 2018.

DHL Regulatory has already been in contact with your responsible Pharmacists to align on the technical agreements and to obtain sign-off.

From a business perspective please advise by return email that you are comfortable with the move so I can note on our side.

Rest assured that all the regulatory and operational checks and balances will be in place and signed off with a SLA in place before go live.....”

[17] Although Netcare, as the principal was informed of the nomination of RAM by Smith on 30 November 2017, the change in vendor received the

attention of Ms Anita Hamilton (Hamilton), who wrote to Van der Merwe as follows:

“Dear Margareutte

One of the challenges we have experienced with Seabourne was their cold chain management — despite the SLA in place. I trust that RAM offers an accredited and approved cold chain management well reviewed for competence. Your 3rd Party provider to outlying areas has often been responsible for KPI's not reached and therefore your SLA should be watertight with measurement tools and recourse for failure.

Please confirm same, and please share that with ourselves.”

[18] DHL together with representatives from RAM went on a roadshow to Cape Town where they met with Netcare’s key representatives. Bode conceded that, in a presentation to Netcare, he had referred to several reasons why DHL chose RAM. DHL’s principals had to approve of any change in service provider. Such approval was not yet in place on 30 November 2017.

[19] Mkele’s evidence confirmed the need to customize RAM and DHL Standard Operating Procedures (SOP), and to reach agreement and document these procedures. On the other hand, Hayward’s evidence emphasised the integrity of the storage, handling and conveyance of the pharmaceutical product prior to utilization of a supplier, which was subject to an audit review. Part of this included the winter and summer Qualification of RAM’s vehicles. Although RAM was nominated and several meetings held between the parties, a Pre-Approval Supplier Audit Review Report was outstanding. Hayward was responsible for completing the Audit Review. She emailed the “Pre-Approval Supplier Audit Report Version 2”, dated 5 March 2018, to Mkele on 6 March 2018. It conveyed “two critical findings” requiring attention. Although RAM distributed pharmaceutical products, DHL’s principals (in particular Netcare) appeared to have had additional requirements which differed from RAM’s service offering.

[20] For example, Mkele agreed with the finding that the line haul was not temperature monitored and had not been mapped. A solution was required before products at ambient temperatures were to be transported by line haul. It was not disputed that not all of RAM's vehicles were temperature controlled to ensure the integrity of the product, but there was disagreement on whether this was a critical finding. Its common cause that RAM later purchased a fleet of 52 vehicles for approximately R18m.

[21] Mkele and Hayward agreed that a Technical or Quality agreement was necessary and had to be signed off by the responsible pharmacist prior to "go live" date. Mkele's evidence was that since there was no such agreement, same had to be constructed, and the parties had been working through the technical and quality requirements from January 2018.

[22] Between January and March 2018, the parties monitored the completion of the project milestones using an "implementation tracker report" which was updated by different work streams as the project developed. The conclusion of a Master Logistics Agreement (MLA) and Service Level Agreement (SLA) with Draft agreements targeted for completion early February 2018 was amongst the outstanding items. As of 1 March 2018, the SLA and related agreement agreements had not been finalised.

[23] On 6 March 2018, RAM's Group General Counsel, Mr Alan Da Costa (Da Costa) entered the project implementation discussions. He circulated the draft Interpretation Schedule Master Logistics Agreement (MLA), the Service Level Agreement (SLA) on 8 March 2018 to DHL's legal counsel, Ms Lisa Cronwright (Cronwright) and copied Hayward, Van Der Merwe, Lazarus, Kassim, and Mkele amongst others.

[24] On 13 March 2018, Da Costa raised several points of contention under various heads of discussion, about (a) Timing and Rollout, (b) Rates, (c)

Technical, (d) Full Liability / Insurance, (e) integration and IT, (f) Linehaul, (g) Local Fleet and (h), Pallets.

[25] Despite the above outstanding issues, the “go-live” scheduled for 1 April 2018 was brought forward because Seabourne refused further extensions and gave a notice terminating its services with DHL earlier than expected. Svoboda testified that DHL called on RAM to commence the services from 26th March 2018, earlier than the scheduled “go-live” date. Svoboda testified that DHL had anticipated that the necessary agreements would be reached before “go- live” date.

[26] On 13 March 2018, simultaneously with draft agreements sent to DHL, Da Costa advised DHL that:

“Should the agreements not be signed before start date, the fall back would be that we would carry the goods on our standard terms and conditions which are available on our website.”

[27] On 16 March 2018, he wrote to DHL stating:

“We understand that you may have to bring us on board sooner rather than later as we are advised that you service provider is already moving out.

.....

We understand the materiality of the Contract with a number of large principals and in order to ensure that we do not drop the ball, we urgently need to conclude all the legal and other documentation and SOP's and are working closely with your team to ensure timeous rollout.”

[28] He reaffirmed earlier emails that should RAM commence work before the signing of the MSA and the SLA, then “all shipments will be collected and delivered in accordance with RAM's standard terms and conditions, a copy of which is available on RAM's website.” Da Costa was aware that the “test/overlap week” would need to be accelerated to the week of 19 March 2018. I understand this allows for a period of a hand over from Seabourne to RAM. On 20 March 2018, Da Costa informed DHL that RAM would not commence with the

distribution services until “the legals are sorted.” He repeated this stance on 22 March 2018.

[29] Svoboda’s evidence was that DHL reluctantly signed RAM’s credit application with the standard terms and conditions, even though the nature of the service was not a standard courier service, until the proper contract was agreed. The rates for the service were not the standard RAM rates that would be available in the market. They were the rates as per what was tendered in October [sic] September 2017. He had assumed that the rates tendered for would be applied. Walker had testified that the rates were not discussed again after the last proposal. It was a compromise, as RAM would not be taking any liability under those terms.

[30] According to Hayward DHL had no contractual basis to compel RAM to comply with the quality and the material regulatory requirements of DHL's clients. When questioned about allowing RAM to commence distributing the products under those circumstances, Hayward testified that:

“We had SOB, standard operating procedures in place. There was excessive training. We did a change control which is a GWP document on our side at DHL to ensure that we look at all the different aspects and do a risk assessment and address the risks, but always understanding and even on that change control document, that a quality agreement needed to be agreed upon between the two entities. What we were doing, we were operating on risk and we were mitigating it.”

[31] After RAM commenced the services, several iterations of the draft MLA, an SLA, an Interpretation Schedule, and a Quality Agreement were exchanged between March 2018 to July 2018. It is common cause that as late as June 2018, several contentious issues which had arisen had not been resolved. It is not necessary to chronicle all of them. Indicative areas will suffice. One related to the liability insurance for Goods in Transit (GIT) reflected in the statement as part of the tender. However, this issue was resolved in an interim arrangement during contract negotiations.

[32] Svoboda's evidence was that after an analysis, DHL found there was a "mismatch between how the service types were being applied by RAM versus what they tendered," prompting discussions which were escalated to Lazarus. RAM could not effect Next Business Day Deliveries (NBD) to distant centres by road but could only do so by air. RAM had tendered to deliver by road. This affected pricing. RAM indicated that it would not assume liability or warrant that RAM would comply with DHL's MMC obligations, which remained a point of some contention between the parties.

[33] Da Costa revised the initial period of the draft Service Level Agreement to be for 30 months as opposed to 3 years. However, he stated to DHL that RAM could not agree to termination on a month's notice by a party without cause. This also featured in the revised draft Master Logistics Agreement, where Da Costa also appeared to delete DHL's comment in respect of the termination clause.

[34] Zanoedene Kassim (Kassim) who was employed as Legal Counsel for Sub-Saharan Africa DHL Supply Chain (South Africa) (Pty) reported to Cronwright and was involved in what she referred to as protracted negotiations of the contract. There were at least seven iterations of draft agreements circulated between the parties between March 2018 to July 2018, all of which were not brought to finality.

[35] DHL sought to bring an end to the negotiations with RAM and to stop using RAM for the rendering of the services. On 29 August 2018, DHL sent a letter of a "Notice of Termination of Services" to RAM. Da Costa's stance in reply to the notice of termination was that, since the receipt of the LOI, RAM and DHL had agreed all material terms of the contract and had concluded a partly written, and partly oral agreement. RAM would therefore not accept the Termination Notice.

Before the Trial Court

[36] The action came before Manoim J, sitting as the Commercial Court (trial court) who determined the dispute concerning the existence of the contract on the terms alleged separately from quantum.

[37] RAM alleged that it had:

- i. an exclusive contract to render the distribution services for the duration of 24 months, which contract could only be terminated for material breach (for cause), which contract came into force on 30 November 2017, commencing on 1 February 2016 which date was subsequently amended to 26 March 2018.
- ii. The express, or implied or tacit terms of the contract were embodied in the (a) Statement, (b) Case Study and (c) Rates Card submitted as its last offer to DHL in response to the RFQ and subsequent conduct of the parties evidenced that there was a binding enforceable contract.
- iii. From 26 March 2018 RAM rendered the distribution services for the pharmaceutical products until DHL gave it a notice of an intention to terminate the distribution service on 31 August 2018 with effect from 30 September 2018.
- iv. DHL repudiated the contract and as a result, RAM suffered a loss of profit in the sum of R36 003 703.00.
- v. It also pleaded in the alternative that the reference to the “initial period of 24 months”, “final award” and the conclusion of a contract in the letter of nomination did not constitute a suspensive condition and if the court found it was, then the parties tacitly alternatively, by their conduct amended the condition by deleting the suspensive condition, alternatively waived it, alternatively waived its fulfilment.
- vi. As a further alternative, it alleged a representation by the defendants’ representatives who led RAM it to believe DHL believed the terms of the agreement and this bound the defendants through the doctrine of quasi- mutual assent.

[38] After a trial of long duration in which thirteen witnesses were called, the trial court dismissed RAM’s action with costs. It considered the RFQ, RAM’s last offer, the LOI and the language employed in the documents. It found that textually, the LOI expressed itself in aspirational terms rather than those consonant with a binding contract. The Statement forming part of RAM’s last offer was not drafted in imperative contractual terms but comprised criteria for

the qualification of RAM as tenderer. Nevertheless, it concluded that the LOI was “sufficiently ambiguous for the context to tilt interpretation.”

[39] The trial court found that the evidence of the context, the subsequent events and the conduct of the parties for the earlier period (in this I read conduct leading to the nomination), the rendering of the distribution services from 26 March 2018 and the failure by DHL to call key witnesses suggested the context supported RAM’s interpretation, noting that:

“RAM, as I noted at the outset, needed to get around the 'final sentence problem'. It relied on the context to do so. On 30 November 2017 that contextual history must be construed in its favour-that RAM had been appointed on two-year contract and whatever final contract was concluded was a matter of finer detail.”

[40] However the latter period, (in this I read to mean conduct post the nomination and after March), the conduct and context was “messy” and not “static.” It tilted the scales against RAM’s interpretation because RAM’s conduct suggested that the parties had decided their future relationship depended on a final agreement. Mr da Costa’s conduct and evidence appears central to this finding.

[41] It dismissed the alternative claims based on quasi mutual assent and or waiver, because “the factual matrix for their support was based on the same principal argument on which RAM relied. First, there is no direct evidence of this apparent mutual decision. Second, the notion of a suggestion cannot be elevated to one of probability. The fact that RAM initiated the process of the final contract is irrelevant.” Having dismissed that argument, RAM’s alternative claims followed a similar fate. Aggrieved by the dismissal, RAM appealed to this Court and the appeal is with the leave of the trial court.

On Appeal

[42] RAM’s case is premised on the trial court’s failure to apply the principles *CGEE Alsthom Equipments et Enterprise Electriques, South African Division v*

*GKN Sankey (Pty) Ltd*¹ (*Alsthom*) in evaluating the facts and the conduct of the parties. In *Alsthom* the court held that:

“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.”

[43] It contends, based on *Alsthom*, that the determinative events were those leading up to the 30 November 2017, being the date when the LOI was issued and a binding contract concluded with DHL. The covering email to the Statement, the Statement, the Populated Case Study read together with the LOI constitute a binding contract. The essence of this submission is that as of 30 November 2017, the essentialia of the contract were agreed. The services to be rendered, the rates, the initial period and the commencement date were known. The fact that there were outstanding issues to be resolved was immaterial and not determinative of whether an unconditional contract came into force. Witnesses who had knowledge of the facts leading up to the issuance of the LOI were Van de Merwe and, later Smith. An adverse inference should have been drawn for DHL’s failure to call them.

[44] RAM also relies on events after the LOI and contends that from December 2017, steps were taken to implement the contract, and this included the termination of the services of the existing distributor, Seabourne. It claims that such termination was designed to coincide with the “go-live” date of 1 February 2018, as contemplated in the LOI. It further contends that from 26 March 2018, RAM rendered services for the distribution of pharmaceutical products on behalf of DHL, which is consistent with an unconditional agreement having come into force. The parties’ mutual conduct pointed to unambiguous steps taken to implement the contract.

¹ 1987(1) SA 81 at 92 A-E

[45] Part of the complaint is that the trial court over emphasized, in its the interpretative exercise, the wording in the RFQ and the LOI and placed insufficient weight on steps taken to implement the contract when determining the intention of the parties.

[46] RAM argued that, if the court finds that its nomination was conditional upon the conclusion of a contract, DHL had waived the condition, alternatively, that the parties proceeded by quasi- mutual consent. Although that view was dismissed by the trial court, it remained alive for determination on appeal.

Discussion

[47] As the court in *Command Protection Services (Gauteng) t/a Maxi Security v SA Post Office Ltd*² (*Command Protection Services*) observed, “disputes of this nature are not novel in complex transactions where parties reach agreement by tender (offer) and acceptance while there are clearly some outstanding issues that require further negotiation and agreement.” The court points to two possibilities, one being that the acceptance of the offer does not create an *animus contrahendi* if it is conditional on further negotiations of outstanding issues. The other possibility is the principle in *Alsthom*, that parties intended the offer and acceptance to give rise to a binding contract and for the outstanding issues to be left for later negotiation. RAM’s case is based on the latter proposition in *Alsthom*.

[48] Although the word “nominates” is capable of a variety of meanings depending upon the context in which it is used,³ both parties accepted that “nominate” meant “appoint.” DHL’s case in opposition is that RAM’s nomination as a preferred service provider was no more than an agreement or an invitation to negotiate a contract.

² 2013(2) SA 133 SCA at para 12

³ *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W) at 634J to 635B

[49] RAM submits that the court must determine whether there was *animus contrahendi*. If the principle in *Alsthom* is applied in conjunction with the approach by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another (Auckland Park)*⁴, the only relevant considerations are those leading up to the LOI, hence the complaint about the failure to call Van der Merwe and Smith. In its heads of argument it contends that “the most satisfactory analysis in disputed cases of this nature is to isolate the offer and ascertain whether the evidence shows that the offeree knew, or ought to have known, that it was intended to be accepted on a provisional basis only, and that the conclusion of a binding contract was to be dependent on agreement on further points.”⁵ It found support in the decision in *Pitout v North Cape Livestock Co-op Ltd*⁶ (*Pitout*)- also referred to in *Alsthom Equipments*. In *Pitout* the court held:

“The question which arises, accordingly, is whether the undertaking, given as it was during the course of uncompleted negotiations, had, or has been shown to have had, contractual force. Was the undertaking an offer made, *animo contrahendi*, which upon acceptance would give rise to an enforceable contract, or was it merely a proposal made by the appellant while the parties were in the process of negotiating and were feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case”

[50] Although the trial court found that DHL expressed its acceptance of RAM’s last proposal in aspirational terms using phrases like it “intends to partner”, it “would like to contract,” however, what distinguishes an offer to contract from any other proposal or statement is the express, or tacit intention to be legally bound by the offeree's acceptance.⁷ As DHL contends, the LOI appointing RAM as a preferred supplier was “conditional” upon the conclusion of the RFQ

⁴ 2021 (6) SA 1 (CC)

⁵ Although not cited, in RAM’s heads, the approach is to be found in Christie *Law of Contract* 4th Edition page 39.

⁶ 1977 (4) SA 842 (A)

⁷ R H Christie, *Law of Contract* 4th Ed, page 33

contract, evident from its terms. The conclusion of a final binding contract was not a suspensive condition susceptible to waiver. There was thus no binding agreement with RAM on the terms alleged.

[51] The RFQ states in relevant part that:

“This RFQ does not commit DP DHL GROUP or any official of it to any specific course of action. The issuance of this RFQ does not bind DP DHL GROUP or any official of it to accept any proposal, in whole or in part, whether it includes the lowest bid, nor does it bind any official of DP DHL GROUP to provide any explanation or reason for its decision to accept or reject any proposal. Moreover, while it is the intention of DP DHL GROUP to enter contract negotiations with the selected Supplier, the fact that DP DHL GROUP has given acceptance to a Supplier does not bind it or any official of it to purchase any product or service from such a Supplier.”

[52] The letter of intent states:

*LETTER OF INTENT FOR PROVISIONING OF LIFE SCIENCES AND HEALTHCARE
PRODUCT DISTRIBUTION SERVICES TO DHL SUPPLY CHAIN S.A.*

Dear Graeme

It is our pleasure to inform you that DHL Supply Chain S.A. has nominated RAM Hand To Hand Couriers to be its preferred service provider and with whom DHL Supply Chain S.A. intends to partner with for the provisioning of their required Life Science and Healthcare Product Distribution Services.

This nomination is based on the requirements as stipulated in the RFQ and as per RAM's last proposal.

It is to this end that DHL Supply Chain S.A. would like to contract with RAM Hand To Hand Couriers for an initial period of 24 months effective 012 (sic) February 2018.

DHL Supply Chain S.A. would like this letter of intent to serve as a means to an end for the preparations necessary for the implementation of these services with the targeted effective date being no later than 26 January 2018.

The final award shall be subject to the successful conclusion of the contract accordingly.”

[53] Lazarus who confirmed the acceptance of the award the same day, wrote:

“Hi John

Many thanks for the award and please be rest assured that we ensure our partnership and execution of this contract makes DHL stronger within the healthcare field.

We need to urgently please sure that we have the correct working teams to execute this integration to ensure we are ready to start date.”

[54] RAM’s construction of DHL’s LOI is that of a “firm offer” to RAM. It says the enforceable unconditional contract came about, upon Lazarus’s email, accepting the ‘award.’ The first difficulty is that this construction subverts the RFQ process followed, conflates the issues and is applied in a manner that is inconsistent with the common cause facts, the evidence and the pleadings.

[55] The correct position is that the RFQ, issued by DHL was an invitation to RAM to make “a proposal” for the distribution services. In procurement parlance, DHL invited RAM to tender (make an offer) for the distribution services. RAM accepted at the trial that it made a “final bid” by submitting its “Last Proposal” on 11 September 2017 in response to the RFQ, an invitation to make an offer for the services. RAM’s last proposal was the “firm offer” to DHL open to rejection or acceptance according to the RFQ terms and conditions. RAM was the “offeror” and DHL “offeree” and not the other way round.

[56] The second difficulty is that RAM seeks to overcome what was referred to by the trial court as “the last sentence problem” in the LOI. It asks of the Court to isolate the offer and to instead look to events leading to its nomination as a preferred supplier on the strength of the Constitutional Court’s decision in *Auckland Park*,⁸

[57] If adopted, RAM’s approach would avoid the debate about two important rules; namely (a) the parole evidence rule, and (b) the express language of the

⁸ 2021 (6) 1 (CC) para 66

RFQ and the LOI stipulating the terms on which RAM participated and accepted the nomination by DHL. In the face of the express language of the RFQ and the LOI, evidence of events leading to the LOI would be inadmissible evidence and would be hit by the parole evidence rule. It would avoid the evidence from RAM's witness, Walker, who testified that he understood that the covering email to the Statement, the Statement, the last proposal, the LOI and the "acceptance" of the nomination on which RAM relies did not give rise to an agreement as contended for. Walker was best placed to give the evidence as he was directly involved in the process with Craven.

[58] Considering the express language of the RFQ and the LOI, the LOI is explicit and clear that: "The final award shall be subject to the successful conclusion of the contract accordingly." RAM's acceptance of the terms of the RFQ, its firm offer in its last proposal, read with the LOI does not admit any doubt that, a final award would come into effect on conclusion of a contract. In these circumstances, *Pitout* and *Auckland Park* do not aid RAM's case. As the court in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194(Pty) Ltd and Others*⁹ clarified, *Auckland Park* did not jettison the need to have regard to the express language used by the parties above context. The facts in *Pitout* are distinguishable from the current facts because there, the court was seized with an undertaking that was not memorialised in writing.

[59] The language employed in the RFQ inviting RAM to quote on the distribution services, and the language employed in the LOI, accepting the proposal to render the distribution services, remain the point of departure that the court must consider to discern the intention of the parties. The LOI served to elect RAM as a party with whom DHL wished to negotiate and conclude a

⁹ 2022 (1) SA 100 (SCA), at para [51] states that: "Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

binding service contract. Viewed in this light, the pre-nomination meetings and site visit held from 12 September and 30 November 2017 were no more than part of an initial investigation to determine whether RAM was suitable for appointment and as a party with whom to negotiate a future contract. As the trial evidence shows, the intention to conclude the contract (referred to in the LOI), formed part of the project milestones, monitored through the project implementation trackers circulated in December, January and February and March.

[60] Dealing with a tender, the Court in *Premier of the Free State Provincial Government and others v Firechem Free State (Pty) Ltd*¹⁰ citing Christie¹¹ held that:

“An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree”

The finding that there was no enforceable agreement should be dispositive of RAM’s case, but for the contention that the conclusion of a contract was a suspensive condition which DHL waived. The averment about the existence of a condition presupposes that upon DHL’s acceptance of RAM’s last proposal (the true offer), a binding contract operational *ab initio* came into effect. As I have already found, the LOI merely appointed RAM as a party with whom it sought to negotiate a contract.

[61] Similarly, the argument that the Court should import an implied or tacit terms on the strength of the decision in *Desai v Greyridge Investments (Pty) Ltd*

¹⁰ [2000] JOL 6603 (A) para 35

¹¹ “*The Law of Contract in SA* 3ed 152 states that it is somewhat of a solecism to describe as a conditional contract one in which the condition is purely potestative (the *si volam* of Roman law), as such a provision is destructive of any enforceable agreement. Nor does it matter if the provision is cast as a term: Christie (op cit) 109. The result is the same. Accordingly, if the provision is potestative it does not matter for present purposes whether it is classified as a condition or a term. In either case enforcement is dependent upon the will of both parties, in this case particularly the will of the province.”

(*Desai*¹²) is equally misplaced. An existence of a contract is a prerequisite for determining whether there is room to import an implied or tacit term.¹³

[62] If anything, the trial evidence concerning disputes about (a) the applicable rates (b) the routes and mode of delivery (c) the duration, (d) termination and (e) the exclusivity serves to confirm that the documents on which RAM relies did not constitute a binding and enforceable contract and lacked the material terms which enabled the parties to know their rights or performance obligations.

[63] To the extent that there were other agreements which had not been concluded, the decision by the court in *Kenilworth Palace Investments (Pty) Ltd v Ingala*¹⁴(*Kenilworth*) has some relevance and supports the conclusion that documents relied on by RAM could not have acquired contractual force. The evidence demonstrates that the conclusion of the Technical or Quality Agreements incorporating compliance requirements and Key Performance Indicators (KPI's) which would apply to multiple principals, were central to the Master Logistics Agreement (the MLA) and a Service Level Agreement (SLA) and the nature of the services required. DHL and RAM spent several months negotiating the terms, resulting in at least six iterations of the MLA and SLA agreements and failed to agree or display common intention about the terms.¹⁵

[64] RAM's reliance on the doctrine of *quasi-mutual* assent was correctly dismissed by the trial court. RAM would have been required to show that there was a misrepresentation, identify the person who made it, in addition to showing that it was reasonably misled and that a reasonable person who have been so

¹² *Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522-3; See *Consol Ltd v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1

¹³ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A)

¹⁴ 1984(2) SA (C) 1, at para H page 12

¹⁵ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A)

misled.¹⁶ The reliance on *quasi mutual* assent disregards the evidence of Walker (the sale executive) and Da Costa (the General Legal Counsel). The inescapable evidence is that RAM was aware that the documents relied on lacked contractual force and when it commenced the distribution services on 26 March 2018, Da Costa made it clear that it would do so under RAM's standard terms until a binding contract is concluded.

Conclusion

[65] For the reasons stated above, RAM's claim must fail, and the appeal dismissed.

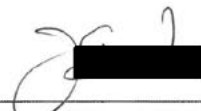
[66] What remains is the question of costs. On 11 February 2025, I directed the parties to prepare a Core Bundle to assist the Appeal Court, given the voluminous trial record running to forty two volumes. The Appeal record was already uploaded and available on Case Lines. Instead, the full record was delivered despite the limited request. At the hearing the parties were requested to make written submissions on who should bear the costs of the unnecessary additional record. I have considered and accepted the representations by RAM's attorneys.

[67] The costs of the appeal which include the costs of the preparation of the record must follow the result.

Accordingly, I make the following order:

- a. The appeal is dismissed with costs.
- b. The costs shall include those consequent upon the employment of two counsel.

¹⁶ *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239J–240A.



 NTY SIWENDU J

I agree



 A MAIER-FRAWLEY J pp

I agree



 L FLATELA J pp

This Judgment is handed down electronically by circulation to the Appellant's Legal Representatives and the Respondent by email, publication on Case Lines. The date for the handing down is deemed 29 April 2025

Date of appearance: 12 March 2025

Date Judgment delivered: 29 April 2025

Appearances:

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