

SOUTH AFRICA / JUDGMENT

## Stargrow Fruit Marketing (Pty) Ltd v Gamtoosvalley Farming (Pty) Ltd t/a Entabeni (1486/2025; 1487/2025) [2025] ZAECQBHC 12 (2 May 2025) [2025] ZAECQBHC 12

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Potgieter

CASE / FILE NUMBER

1486/2025; 1487/2025

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### Source record

IN THE HIGH COURT OF  
SOUTH AFRICA  
(EASTERN CAPE  
DIVISION, GQEBERHA)  
CASE  
NO: 1486/2025  
In

the matter between:

STARGROW  
FRUIT MARKETING (PTY) LTD  
Applicant  
and  
GAMTOOSVALLEY  
FARMING (PTY) LTD t/a ENTABENI  
Respondent  
CASE  
NO: 1487/2025  
In

the matter between: STARGROW  
FRUIT MARKETING (PTY) LTD  
Applicant  
and  
NEW  
DAY PACKAGING (PTY) LTD  
Respondent  
Reportable: YES/NO  
OF INTEREST TO OTHER  
JUDGE: YES/NO  
REVISED.

## JUDGMENT

POTGIETER J

## INTRODUCTION

- [1] These two opposed matters have been brought over the past Easter long weekend on an urgent basis. They are interrelated and have accordingly been dealt with together at the hearing on the opposed Motion Roll on Thursday, 24 April 2025. Although I am not altogether persuaded that these matters are sufficiently urgent to warrant being afforded the priority they received on the court roll, I nonetheless decided that it was in the interests of justice to deal with them. Full sets of papers have been filed in both matters which I perforce had to read after I assumed doing duty for the week. The certificates of urgency were issued by the previous duty Judge on Good Friday, 18 April 2025 and the matters were enrolled on my already overburdened opposed motion roll. I considered that if I were to strike the matters off the roll for lack of urgency, the applicants would be at liberty to enroll the matters within a few days on the next Motion Court roll compelling the duty judge also to read the papers and basically cover the same ground as myself. This did not strike me as an efficient use of resources or being in the interests of justice. Both matters concern perishable export fruit either about to be harvested or in the process of being harvested and as such warrant being determined sooner rather than later. For these reasons I decided to deal with the matters.

## BACKGROUND

- [2] The background briefly is that the common applicant in both matters, Stargrow Fruit Marketing (Pty) Ltd ('SFM') is an authorised marketer of certain South African fruit in the export market. It is the sole licensee to market certain variety of fruit worldwide. Relevant for present purposes, it holds such exclusive licence in respect of the citrus variety, Clemenus. In pursuit of its business objectives, it concludes agreements with local fruit producers such as the two respondents in the present matters, for the supply to it of fruit that is suitable for export which it in turn markets to foreign purchasers. The respondents

operate farms producing citrus fruit in the Hankey and Patensie regions of the Eastern Cape Province. They have for a number of years supplied such fruit for marketing to the applicant.

- [3] Pursuant to disputes which had arisen with regard to the 2025 harvesting season, SFM launched the current applications against the respondents the details whereof would be dealt separately below. It is convenient to deal with case number 1487/2025 ('New Day Packing') first.

#### NEW DAY PACKING (Case No 1487/2025)

- [4] The applicant seeks the following relief in its notice of motion:

'1. That the forms and service provided for in the Rules of this Honourable Court be dispensed with, the Applicant's failure to comply with the Rules in respect of time periods and notice be condoned in as far as necessary and that the application be heard as one of urgency in terms of Rule 6(12);

2. That a rule nisi be issued calling upon the Respondent or any party with a legal interest to show cause why the order in paragraph 3 shall not be made final;

3. Pending the outcome of an arbitration (alternatively an action), to be commenced by the Applicant within 60 days of the above return day:

a. That the respondent be ordered to make available and deliver to the applicant all produce from the fruit orchards described in annexure B to the Memorandum of Understanding concluded between the parties and dated 28 July 2017, annexed to the founding affidavit as FA1, and the marketing agreement relating thereto ("the MOU"), during the 2025 harvest season for marketing and sale thereof in compliance with the provisions of the MOU;

b. That the respondent be ordered to make available and deliver to the applicant all produce from the fruit orchards described in annexure B to the MOU during each harvest season after the 2025 harvest season for marketing and sale thereof in compliance with the provisions of the MOU;

c. That the respondent is interdicted and restrained from delivering any of the fruit as contemplated above to any third party for marketing and sale in contravention of the provisions of the MOU;

d. That the respondent shall pay the costs of this application on Scale C;

e. Further and/or alternative relief.

4. The provisions of paragraphs 3(a), 3(b) and 3(c) above will serve as interim interdicts and be immediately effective and binding upon the Respondent who will give effect to those provisions forthwith, pending the return day;

5. Further and/or alternative relief.'

- [5] As appears from the above relief, SFM is effectively seeking an order for specific performance of the marketing agreement which it averred existed between the parties in respect of the 2025 harvest season and beyond. However, during argument the relief was limited to the 2025 harvest season only. It is common cause that the parties concluded a Memorandum of Understanding ('MOU') on 28 July 2017 in terms whereof SFM provided interest-free loan funding to the respondent ('New Day Packing') to establish and plant designated new orchards covering 52 hectares on its farm, Rooivlakte district Hankey with certain specified citrus tree varieties between 2017 – 2020 and for the commercial farming of the trees. The loan covered the acquisition of the fruit trees, the initial Orchard Establishment Royalty Fee payable to the Master Licensee in respect of the relevant citrus varieties, and the cost of the installation of the necessary irrigation system for the fruit trees.
- [6] The MOU provides for the amount due to SFM to be settled in equal payments over a period of 5 years commencing in 2018 'from the proceeds of all fruit sold and marketed by Stargrow on behalf of the Producer [New Day Packing] under the marketing agreements to be concluded in terms of clause 7.1.2 as contemplated in clause 5.3' (clause 5.1.2.1). It is common cause that the amount due to SFM has been settled in 2025 from the proceeds of the sale of the 2024 harvest.
- [7] Clause 5.3 of the MOU provides as follows in relevant part:
- 'Stargrow shall be entitled to deduct the relevant amounts as set out in clause 5.1 annually from the proceeds of any fruit sold and marketed by Stargrow on behalf of the Producer as part settlement of all the amounts as may be outstanding from time to time on the loan account owed by the Producer to Stargrow until such time as the loan is settled in full. The Producer hereby irrevocably authorizes Stargrow to annually deduct the relevant amounts from any or all payments which becomes due to the Producer by Stargrow, until the amounts have been deducted in full.'
- [8] Clause 7.1.2 stipulates the following suspensive condition, that:
- 'the Producer enters into separate marketing agreements with Stargrow or any affiliate company of Stargrow as appointed by Stargrow, in terms of which the Producer will appoint the relevant company to market fruit produced from the area marked "SB 03" in Annexure "B" as of 2017, and thereafter all fruit produced by the Producer for as long as the Producer enjoys the licensed production rights in respect of the Trees to be established on the Designated Production Areas and Stargrow is an authorised marketer of the Varietals.'
- [9] An unsigned version of a proposed marketing agreement (as envisaged in clause 7.1.2) is annexed to the MOU marked 'C'. It is common cause that there is no signed written marketing agreement between the parties. The case advanced by SFM in the founding

affidavit is that although annexure 'C' is unsigned, the parties have regulated their relationship substantially in accordance with the provisions thereof. As indicated, New Day Packing (and also the other respondent Entabeni as appears below) have supplied fruit for marketing to SFM for a number of years prior to the 2025 season. Both parties therefore appear to accept that there was at least some form of tacit marketing agreement between them. This is probably correct. There is, however, no need to finally decide this aspect since the case of SFM has somewhat shifted during argument. It is now seeking the implementation of a separate new agreement which it contends was concluded in respect of the 2025 harvest season after it accepted a 'tender' made by New Day Packing in a letter from its attorneys of record, Pagdens, dated 2 April 2025.

Alternatively, and in the event of it being found that the new agreement has not been concluded, SFM contends that New Day Packing was not entitled unilaterally to revoke its authority which was granted pursuant to a mandate with interest ie a mandatum in rem suam. The issue in the matter has thus distilled into the question whether the new agreement was concluded and can be enforced by SFM, alternatively whether New Day Packing has lawfully unilaterally revoked or terminated the authority of SFM on 2 April 2025 as its agent to market the relevant fruit. I, however, proceed to deal with the further exchange of correspondence before reverting to the current case being advanced by SFM.

[10] The said letter of 2 April 2025 was preceded by a protracted exchange of correspondence involving the parties and their attorneys

characterised by escalating adversity. It was apparent that the working relationship between SFM and New Day Packing was in jeopardy.

New Day Packing explained in its answering affidavit that it became increasingly dissatisfied over time with the quality of service it received from SFM referring to different examples apparently in support of its stance. All of this was vehemently disputed by SFM who indicated that its conduct was beyond reproach and there was no basis for complaint on the part of New Day Packing. There is no need to determine any of these issues. What is clear and relevant, however, is that the relationship between New Day Packing as principal and SFM as agent was rapidly disintegrating if not entirely broken down early in 2025.

[11] It was in this context that Pagdens addressed the letter of 2 April 2025 to their counterparts representing SFM, namely BBS Attorneys Inc ('BBS') stating:

'1. We refer to the correspondence exchanged between 4 October 2024 to 18 March 2025.

2. Our client's letter dated 18 March 2025 has not enjoyed the courtesy of acknowledgement or reply and the concerns raised by our client in the various exchanges have not been resolved.

3. In the circumstances, our client hereby notifies you of its election to terminate your client's mandate and/or to revoke your client's authority thereunder with immediate effect except:

3.1 to the extent that your client has already committed any specific fruit in respect of the 2025 harvest to the market;

3.2 in relation to the Clemenlus fruit relating to the 2025 harvest.

4. Kindly, by reply hereto, acknowledge receipt of this letter and confirm:

4.1 whether your client has already committed any specific fruit to the market and, if so, the further particulars thereof;

4.2 that your client shall execute its mandate in relation to the Clemenlus fruit for the 2025 season.

5. We await your client's reply.'

[12] SFM wrote to New Day Packing on 4 April 2025 indicating that it came to their attention that New Day Packing 'purportedly cancelled your marketing agreement with SFM' and confirming that SFM remained the authorised marketer of the Clemenlus variety and will not approve any other marketer for the export of New Day Packing's Clemenlus which cannot be delivered to any other marketer.

[13] Pagdens wrote to BBS on 8 April 2025 referring to the letter of SFM dated 4 April 2025 and, inter-alia, demanded an unequivocal response whether SFM has committed any specific fruit to the market. BBS responded on 11 April 2025 disputing New Day Packing's entitlement to terminate the mandate, accepting the 'tender' contained in paragraph 3.1 and 3.2 of Pagdens' letter of 2 April 2025 'to export, market and sell the fruit cultivated by your client', indicating that SFM has committed the 2025 harvest to various export programs and customers the 'final market and customers depending on the quality of your client's fruit, the time of delivery thereof by your client and status of the relevant market at the time', and that New Day Packing is now also obliged to deliver the fruit in terms of the 'further agreement'.

[14] Pagdens replied on 14 April 2025 indicating that:

'3. ... our client disputes the contention that:

3.1 your client(s) are mandated or authorised to export any of its fruit (except in respect of the Clemenlus fruit) for the 2025 season;

3.2 our client's so-called 'tender' constituted a distinct offer capable of acceptance for the purposes of the conclusion of a new agreement;

3.3 your client has irrevocably bound itself to a third party for the export of our client's fruit.'

[15] BBS responded on 15 April 2025 indicating that: 'Ad paragraph 3.3 – it is unclear what the relevance is of 'irrevocably bound' as now introduced by you for the first time.'

[16] In the circumstances the present application was launched on 18 April

2025. I proceed to deal with the circumstances of the second application ('Entabeni').

ENTABENI (Case No.1486/2025)

[17] The facts and circumstances of this matter are materially similar to those of the New Day Packing matter. I accordingly do not repeat all the common aspects but only deal with those aspects that are unique to the present matter.

[18] The respondent, Gamtoosvalley Farming (Pty) Ltd t/a Entabeni ('Entabeni') is a fruit producer on its farm Boplaas in Patensie, Eastern Cape Province. It has, inter-alia, entered into a written marketing agreement ('the agreement') on 6 November 2020 with SFM which agreement is annexed to the founding affidavit marked 'FA4' and will lapse on 31 December 2029.

[19] A dispute has arisen between the parties regarding the question whether Entabeni has cancelled the agreement. This has resulted in the present proceedings. SFM is seeking the following relief in the notice of motion:

'a) The application be heard as an urgent application in terms of Rule 6(12) and the Applicant's failure to comply with the Rules in respect of time periods and notice be condoned in as far as necessary;

b) A rule nisi be issued calling upon the Respondent or any party with a legal interest to show cause why the order in paragraph

(c) shall not be made final;

c) Pending the outcome of an arbitration (alternatively an action), to be commenced by the Applicant within 60 days of the above return day:

i. The Respondent shall deliver all the Tango fruit, as well as the agreed minimum of the other fruit (either 33% of such Fruit grown or as per the "wish list" annexed to the founding affidavit as "FA 13") as contemplated in clause 5.1 and 5.1.4 of the Marketing Agreement of 6 November 2020 (the "2020 Marketing Agreement")

(collectively referred to as "the Fruit") grown on the farm Boplaas situated on Willowmore Road, Patensie, Eastern Cape ("the Farm") during the 2025 harvest season to the Applicant for marketing and sale thereof in compliance with the provisions of the 2020 Marketing Agreement;

ii. The Respondent shall deliver all Fruit grown on the Farm during each harvest season after the 2025 harvest season to the Applicant for marketing and sale thereof in compliance with the provisions of the 2020 Marketing Agreement;

iii. The Respondent is interdicted and restrained from delivering any of the Fruit as contemplated above, to any third party for marketing and sale in contravention of the provisions of the 2020 Marketing Agreement;

iv. The Respondent shall pay the costs of this application on an attorney and client scale; and

v. Further/alternative relief.'

[20] The agreement provides that Entabeni had to deliver certain identified fruit grown on its farm to SFM, as its agent, for marketing, export and sale thereof. The position of Entabeni is that it lawfully cancelled the agreement and is not obliged to deliver any

further fruit to SFM. This prompted SFM's present application in which it effectively seeks implementation or specific performance

of Entabeni's obligations under the agreement.

[21] As a prelude to the present dispute, representatives of Entabeni started raising complaints during 2022 concerning the quality of SFM's services. In February 2024 Entabeni's attorneys notified SFM that Entabeni wished to terminate the agreement. SFM's attorneys indicated in response that it was not agreeable to the cancellation of the agreement. This eventually led to SFM bringing an urgent interdict application in April 2024 in this court. The application was settled on terms which were recorded in a court order. This included Entabeni's undertaking to deliver its fruit for the 2024 season to SFM and that the parties would endeavour to resolve their disputes. No agreement was reached between the parties in respect of the disputes.

[22] Against the above backdrop, Entabeni's attorneys, Pagdens, wrote to SFM's attorneys, BBS, on 3 February 2025 indicating

that SFM was in default of the agreement for various listed reasons which has endured for many years causing Entabeni to suffer financial harm. The latter requested an unequivocal written statement, inter-alia, that SFM has committed (or not) the fruit of Entabeni to a buyer in relation to the 2025 harvest. It further indicated that the defaults in question constituted a material breach and repudiation of the agreement and gave SFM 30 days within which to remedy the breaches, while reserving its right to make an election regarding the repudiation. The letter stated that:

'7. SFM is hereby notified that, until SFM has remedied its breach(es) aforesaid in the performance of obligations under the agreement, its authority to market any of our client's further fruit for export or sale is withheld and thus revoked.'

[23] The letter of 3 February 2025 was followed by a letter from Pagdens dated 18 March 2025 addressed to BBS and copied to SFM, giving notice that Entabeni has elected to cancel the agreement with effect from 18 March 2025. BBS responded on 23 March 2025 indicating that while the letter of 3 February 2025 was delivered to the email address of Mr Bronn, the attorney who was dealing with the matter, it only came to his attention on 19 March 2025 after he was alerted thereto by an enquiry from representatives of SFM. He then discovered the email in his inbox. Due to Mr Bronn's 'oversight of the letter' it was not acknowledge or replied to. The averments in the letter of 3 February 2025 were denied and so was the entitlement of Entabeni

to demand certain actions from SFM or to cancel or terminate the agreement. The letter further demanded delivery of the fruit for the 2025 season. Pagdens wrote to BBS on 2 April 2025 reiterating, inter-alia, that if the agreement is extant than SFM remained in default thereof and was required to remedy its default. The letter furthermore indicated that:

‘5. In the interim (and as stated in correspondence dated 3 February 2025), your client’s authority to export our client’s fruit is revoked except to the extent that your client has committed such fruit to the market in terms of, and during the currency of, the agreement.’

[24] BBS responded to the said letter of 2 April 2025 on 14 April 2025 indicating, inter-alia, that SFM has accepted the ‘tender’ contained in the above quoted paragraph 5 as well as the appointment and authority to market Entabeni’s fruit for the 2025 harvest season. The letter further confirmed that the fruit had been ‘committed ... to export programs set for the EU, UK, the Middle East and Russia final market and customer depending on the quality of your client’s fruit, the time of delivery thereof by your client and the status of the relevant market at the time.’ Pagdens responded on 15 April 2025 indicating that the conclusion that Entabeni authorised SFM to commit its fruit to the market is factually incorrect and legally untenable. This set the scene for the present application. I proceed to deal with the merits

of both applications.

#### MERITS

[25] As alluded to earlier, the issue for determination in both matters has distilled into the question whether a further agreement has been concluded between the respective parties pursuant to the acceptance by SFM of the ‘tender’ contained in the correspondence from Pagdens dated 2 April 2025 and 3 April 2025 respectively. If not, the further question is whether Entabeni’s unilateral revocation of the authority of SFM as its marketing agent was unlawful. I will deal with these two issues in turn.

#### The new agreement

[26] To recap, New Day Packing revoked the authority of SFM in Pagdens’ letter of 2 April 2025 except ‘to the extent that your client has already committed any specific fruit in respect of the 2025 harvest to the market’. BBS responded on 11 April 2025 indicating that SFM has ‘committed’ New Day Packing’s 2025 fruit to various export programs and customers and that SFM has accepted the ‘tender’ to export, market and sell the fruit which gave rise to a ‘further agreement’. Pagdens wrote on 14 April 2025 indicating that New Day Packing disputed that SFM has ‘irrevocably bound itself to a third party for the export of our client’s fruit’. It is thus apparent that the dispute between the parties related to the extent of the revocation ie whether it is a complete revocation

in respect of all fruit or a partial revocation excluding only the 2025 fruit. The latter situation would apply where the terms of the exception or exclusion have been satisfied ie where specific 2025 fruit had already been committed to the market. The dispute is confined to the latter question. In this regard, SFM contends that fruit had already been committed which is being denied by New Day Packing. The issue boils down to the proper interpretation of the terms of the exclusion.

[27] It is disputed in Pagdens' letter of 14 April 2025 that SFM 'has irrevocably bound itself to a third party' which is indicative of the position of New Day Packing with regard to the meaning of the exclusion. This is further elucidated in the answering affidavit as follows:

'52. The first exception was included to mitigate any potential loss of the Applicant in circumstances where it may have become unequivocally and irrevocably bound under a contract with a third party, and liable to damages for breach of that contract, in respect of the sale of the Respondent's fruit.'

[28] It is not really in contention that SFM has not 'committed' any of the 2025 fruit in the above sense. This is evidenced by the averments in the founding affidavit that the aim of the present urgent proceedings is to mitigate its potential loss 'i.e. loss of commissions and potential market share by not being able to commit to marketing and sales programs with its foreigner customers ...'[1]. It is furthermore indicated that SFM 'is unable to adequately plan its marketing strategy for the various fruit varieties and enter into firm commitments with foreign buyers in respect of fruit marketing and sales programs which are imminent.'[2] It is finally stated that SFM 'must shortly commit to sales and marketing programs with foreigner clients.'[3] (Emphasis added)

[29] SFM, however, contends that the interpretation of the exclusion advanced by New Day Packing is untenable and does not accord with the 'grammatical context', makes no commercial sense, and renders the "tender" ineffective. Its own contention that 'the tender should be interpreted as a wide one namely that, to the extent that the produce from New Day's 2025 harvest has already been earmarked and committed to international clients, same would be honoured'[4] and that it is not a 'specific' but a 'general'[5] tender is therefore 'the only reasonable interpretation'.[6] SFM further pointed out that in fact 'by 2 April 2025 no specific fruit of the 2025 harvest could have been committed to the market in the sense now claimed by him. This is so because the fruit would only be harvested later that month until approximately end of August 2025'[7] and 'because Stargrow Marketing [SFM] has an obligation to produce sufficient tonnage for relevant international consumers the full produce of New Day which qualifies for export has already been committed for that purpose'[8]. Furthermore, that New Day Packing's interpretation 'would be entirely impractical. Simply put, no "specific fruit" could have been committed to the market by 2 April 2025 because same has not yet been harvested'[9].

[30] Insofar as the Entabeni matter is concerned, the revocation of SFM's authority is dealt with as follows in Pagdens' letter of 3 February 2025:

‘7. SFM is hereby notified that, until SFM has remedied its breach(es) aforesaid in performance of obligations under the agreement, its authority to market any of our client’s further fruit for export or sale is withheld and thus revoked.’

[31] The issue was followed up in the letter of 2 April 2025 which stated:

[32] BBS confirmed that SFM has ‘committed’ Entabeni’s fruit to export programs in its letter of 14 April 2025 referred to above. A similar dispute raising the same issues referred to above with regard to New Day Packing exists between the parties. Accordingly, in both matters the issue turns on the proper interpretation of the exclusion which I now turn to.

### Meaning of the exclusion

[33] The proper approach to interpreting written instrument or documents was authoritatively set out by the Supreme Court of Appeal in the oft quoted decision in *Endumeni*[10] which was confirmed in a number of subsequent decisions which do not warrant specific mention. In summary, the legal position is that interpretation is an objective process entailing a unitary exercise in which due regard is had to the text, context and purpose of the disputed wording as well as the material known to the drafter. Every possible meaning must be weighed in the light of all these factors. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The court must guard against substituting its own views of what is sensible or businesslike rather than giving effect to the words actually used. The ‘inevitable point of departure’ is the language used read in context and having regard to its purpose and the background to the preparation and production of the document.

[34] Applying this approach to the present issue and bearing in mind that the matter does not relate to a consensual provision in a contract but to a unilateral act on the part of the respondents revoking the authority of SFM and formulating an exception thereto. The real question is what did they intend to convey to SFM, not what SFM understood them to say. It is readily apparent from the

correspondence and the answering papers that the respondents had set out to revoke the authority of SFM. The exclusion is said to be intended to mitigate the situation where the revocation might adversely affect the accrued rights and interests of third parties in instances where binding agreements had been concluded with them with regard to the sale of specific fruit of the 2025 harvest season. It makes eminent general and business sense to avoid a situation where litigation might ensue in this regard which would inevitably also involve the respondents. It would make no business sense to want to resell the 2025 fruit that had already been sold by SFM to purchasers presumably at the going market price at pains of being embroiled in unnecessary litigation. It clearly was this specific situation that the respondents wanted to cater for. It makes no sense for the respondents to revoke the authority but at the same time allow SFM to continue as normal with marketing the 2025 fruit in circumstances where there was dissatisfaction with the services provided by SFM. The exclusion quite clearly provides for specific authority to cater for the situation explained above and not a general authorisation in

respect of the 2025 fruit as contended for by SFM. This interpretation is consistent with the ordinary grammatical and syntactical meaning of the wording of the exclusion, the context as well as the purpose thereof. The fact that SFM did not or could not 'commit' the 2025 fruit in the above sense does not in my view detract from the interpretation set out above. The exclusion was clearly intended to apply where SFM in fact already committed fruit. If this had not yet happened, the exclusion is not rendered ineffective but simply does not apply. In the latter event, the revocation is effective in respect of all fruit. In the circumstances the exceptions do not apply and the revocation applies to all the fruit.

[35] I accordingly conclude that no 'further agreement' had been concluded between the respondents and SFM pursuant to a 'tender' made by them which can be enforced by SFM through a claim for specific performance.

#### Revocation of authority

[36] The remaining issue is whether the respondents were entitled unilaterally to lawfully revoke the authority of SFM. Revocation can occur at any stage. Accordingly, the issue in the Entabeni matter concerning receipt of the earlier email notices by BBS is therefore not pertinent in this regard given that it is not in contention that the revocation that was repeated in Pagdens' letter of 2 April 2025 actually came to the attention of SFM.

[37] It is settled law that a principal can in general unilaterally revoke the authority of an agent without incurring any liability.[11] For a clearer understanding of this position it is necessary to distinguish between a mandate (the contract between principal and

agent) and the agent's authority (the power to bind the principal in dealings with third parties). This was lucidly explained

as follows in Keyhealth:[12]

'The trial court referred to Firs Investment, which pointed to the controversy that surrounds the question of whether an authority to conclude juristic acts on behalf of a principal can be granted irrevocably. According to Lawsa, the uncertainty that exists stems partly from the fact that the distinction is sometimes not made between revocation of authority and termination arising out of contracts of mandate. These are two distinct terms with different rules. The appreciation that a contract of mandate cannot be terminated at will by one of the parties, does not mean that a mandatary's authority to conclude juristic acts on behalf of [a] principal can be irrevocable. Even if the representative's authority is linked with a contract of mandate which cannot be terminated unilaterally by the mandator, the authority is revocable. The mandator is liable in damages for breach of the contract of mandate, but the mandatary can no longer conclude juristic acts on behalf of the mandator.'

[38] The common-law position is that a principal is entitled to terminate an agent's authority at will even where the contract describes the mandate as irrevocable. In Stupel & Berman[13] the seller of immovable property revoked instructions to the attorneys to pay a third-party finance company. The court held that: 'once it is accepted that [the attorneys] gave the

undertakings in the capacity of an agent ... those instructions could be terminated.’ Hence, the attorneys could no longer act on the revoked mandate. The court in *Firs Investment*, however, held that revocation in breach of a fixed term contract entitled the agent to damages.[14] Similarly, the court held in *Eileen Louvet*[15] that an exclusive agency agreement for a fixed period could not unilaterally be terminated prematurely without incurring liability. This would amount to a breach of contract and the principal would be liable for damages. This position was reaffirmed by the Supreme Court of Appeal in *Liberty Group*[16] as follows where the principal terminated the mandate without notice:

‘It must be emphasised that in the present case we are not dealing with a term of a contract which is alleged to be contrary to good faith, fairness and equity. We are dealing with a rule of the common law, namely, that a principal is entitled to revoke a mandate of agency. It would be against public policy to coerce a principal into retaining an individual as his agent, when he no longer wishes to retain him as such. If the termination of the mandate has prejudiced the agent his remedy lies in a claim for damages and not in an order compelling the principal to retain him as his agent in the future.’

- [39] It is thus clear that where the unilateral termination of the mandate has caused prejudice to the agent, the latter is not entitled to an order for specific performance. The remedy lies in a claim for damages.
- [40] There is an exception to the principal’s right to revoke the authority of an agent where the authority is coupled with an interest ie a *mandatum in rem suam*[17]. In such cases the authority has been conferred on the agent in order that he may act for his own benefit. It gives the agent an interest not merely in the exercise of his authority but in the very thing vested in, or entrusted to, him by the principal. This kind of authority cannot be revoked at will. In *Sybrand Smit*[18] the court held that: ‘a power of attorney given as security for a debt owed is irrevocable for as long as the debt remains unpaid’.
- [41] In argument, counsel for SFM submitted that in any event the authority of SFM is coupled with a ‘business interest’ and as such the respondents were not entitled unilaterally to revoke its authority. According to counsel SFM’s interest is to enjoy access to fruit of a certain quality and the exclusive right to market the fruit for a specified period thereby meeting its overseas obligations and advancing its principal business of exporting high quality fruit. This elevates the interest of SFM to more than mere commission. Counsel for the respondents pointed out that this case being contended for in argument was nowhere advanced in the papers which only deal with SFM’s interest in commission. This also coincides with the provisions of the 2020 Marketing Agreement in the case of *Entabeni* and even the unsigned annexure ‘C’ in the case of *New Day Packing* which both also only deal with commission and no other interest. In any event a ‘business interest’ does not qualify as a protectable interest rendering the authority irrevocable. The position is that the authority must be granted to the agent as security such as a power of attorney to register a mortgage bond or lien to secure a debt. In that event, the authority

only becomes revocable after the obligation being secured had been satisfied. Counsel submitted that the court found in *Stupel & Berman*[19] that the interest of an agent in earning commission does not constitute a protected interest. SFM has thus failed to establish a protectable interest which renders the authority irrevocable.

[42] It is readily apparent that unless SFM enjoys authority coupled with a recognised interest, its authority had been lawfully revoked and there is no basis for granting any relief against the respondents.

[43] Counsel for SFM did not refer to any authority in support of the contention that the 'business interest' as explained by him in argument qualifies as a protectable interest for present purposes. Counsel for the respondents indicated that she has been unable to find such authority. The decisions are clear that in order to be irrevocable, the object of the authority must be to secure an obligation or debt. The agent must be authorised to act for his own benefit. The 'business interest' of SFM to establish and maintain an overseas supply chain does not entail securing such an obligation or a debt. In my view, it is not a protectable interest that renders SFM's authority irrevocable.

[44] It follows that the respondents lawfully revoked the authority of SFM. It remains for me to deal with a further issue that was raised for the first time by SFM in its replying affidavit in the *New Day Packing* matter.

The status of Mr Bezuidenhout snr

[45] The issue raised by SFM is that Mr Bezuidenhout snr had ceased to be a director of *New Day Packing* by the time he deposed to the answering affidavit pursuant to his resignation with effect from 10 April 2025. His averment that he was a director was thus incorrect. The significance of this fact according to SFM is that he had no authority to instruct *Pagdens* to terminate its mandate or authority. He did not have authority to represent *New Day Packing* in its dealings with *Pagdens*. As a consequence, the termination and revocation were ineffective.

[46] Leave was sought without opposition and was granted to *New Day Packing* to file supplementary affidavits by its attorney, Mr Eksteen, Mr Bezuidenhout snr and the current directors Mr Eben Louw Bezuidenhout and Mr Evert Bezuidenhout.

[47] The effect of the averments in the affidavit of Mr Eksteen, which are confirmed in the other three affidavits, is that the speculation in the replying affidavit is incorrect that Mr Bezuidenhout snr instructed him to deliver the letter of 2 April 2025 (erroneously referred to as the letter of 3 April) or that Mr Bezuidenhout snr is not authorised to act on behalf of *New Day Packing*. He also adequately explained how the error occurred in the answering affidavit which referred to Mr Bezuidenhout snr as a director of *New Day Packing*. To the extent that there is a dispute of fact this issue must be decided on the version of the respondent, in view of the *Plascon Evans* rule and given that a final interdict is being sought.

- [48] It is trite that it is not only directors who may be authorised to act on behalf of a corporation. In light of the available evidence in particular appearing from the affidavit of Mr Eksteen, the fact that Mr Bezuidenhout snr ceased to be a director on 10 April 2025 is accordingly of no moment and does not per se render the termination or revocation ineffective.

#### REQUIREMENTS FOR AN INTERDICT

- [49] Counsel for SFM indicated that it is currently seeking a final interdict notwithstanding the fact that interim relief was sought in the notice of motion. The parties are agreed that this is sensible in the circumstances. The applications are thus adjudicated on that basis.
- [50] The requirements for a final interdict are trite and can be briefly stated as a clear right, irreparable harm, and the absence of an adequate alternative remedy. I will deal with these requirements in turn.

##### Clear right

- [51] As indicated both applications turn firstly on the question whether the revocation of SFM's authority excludes the 2025 harvest (the 'tender') and secondly, if not, whether the revocation was lawful. These issues have been dealt with fully. For the reasons set out above, the 2025 harvest has not been excluded from the revocation which was lawful. It follows that SFM is not entitled to delivery of the 2025 harvest or to an order for specific performance of such an obligation on the part of the respondents. It is trite that where the right which is asserted by the applicant is held not to exist, the application cannot succeed.
- [52] It follows that SFM has failed to establish a clear right and is not entitled to a final interdict. That is really the end of the matter. However, for the sake of completeness I proceed to consider the remaining requirements.

##### Irreparable harm

- [53] It is self-evident that because SFM is not entitled to delivery of the 2025 harvest, it cannot suffer any harm, irreparable or otherwise, also given that it has an adequate alternative remedy as indicated below.

##### Adequate alternative remedy

- [54] As appears from what is set out above, where the revocation of its authority was unlawful or prejudicial, SFM can recover any damages it may suffer (although it would not be entitled to an order for specific performance). There is accordingly an adequate alternative remedy at its disposal.

#### CONCLUSION

- [55] SFM has failed to make out a case for the relief it is seeking and both applications accordingly fall to be dismissed.

## ORDER

[56] In the result I make the following order:

- (a) In case number 1486/2025 –
  - (i) The application is dismissed;
  - (ii) The applicant is directed to pay the costs;
  - (iii) The fees of counsel to be determined on Scale B.
- (b) In case number 1487/2025 –

D.O. POTGIETER

## JUDGE OF THE HIGH COURT

APPEARANCE Counsel for the applicant: Adv P Botha, instructed by BBS Attorneys c/o Minde Shapiro Smith, Conyningham Road, Greenacres, Gqeberha For the respondents: Adv KL Watt, instructed by Pagdens Attorneys, 18 Castle Hill, Central, Gqeberha Date of hearing: 24 & 25 April 2025 Date of delivery of judgment: 2 May 2025

- [1] Record p25 para 75.
- [2] Record p26 para 81.
- [3] Record p27 para 84.
- [4] Record p203 para 21.
- [5] Record p202 para 19.
- [6] Record p204 para 27.
- [7] Record p203-4 para 23.
- [8] Record p204 para 25.
- [9] Record p204 para 26.
- [10] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) paragraph 18.
- [11] The Firs Investment Ltd v Levy Brothers Estates (Pty) Ltd 1984(2) SA 881 (A) at 886F: ‘Generally speaking, a principal has the right and power to revoke his agent’s authority without incurring any liability for damages to the agent ...’ (‘Firs Investment’)
- [12] Keyhealth Medical Scheme v Glopini (Pty) Ltd 2023(1) SA 388 (SCA) para 18.
- [13] Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd 2015
- (3) SA 36 (SCA) para 17.

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- [14] Note 11 at 334B-F.
- [15] Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd 1989(3) SA 26 (A).
- [16] Liberty Group Ltd v Mall Space Management CC t/a Mall Space Management 2020(1) SA 30 (SCA) para 36. ('Liberty Group')
- [17] Koutsopoulos v Bilardi 1970(2) SA 391 (C) at 399B-400A; Lee & Honore The South African Law of Obligations (2ed) p162 para 450 and the authorities collected there.
- [18] Sybrand Smit v Origize 166 Strand Real Estate (Pty) Ltd (Case No 710/19) [2020] ZASCA 132 (19 October 2020) paras 19, 28-29.
- [19] Note 13 para 17: 'The interest to be protected ... must be of the agent as opposed to that of a third party.'
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