REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

**CASE NO:** A5004 / 2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

14/5/14.

In the matter between:

**DANONE SOUTHERN AFRICA (PTY) LTD** Applicant

and

**CLOVER SA (PTY) LTD** Respondent

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**JUDGMENT**

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**WEINER J:**

[1] On 19 March 2014, this matter came before me in the court dealing with urgent applications. I struck the matter off the roll for lack of urgency and indicated that I would give reasons for same and deal with the costs. I do so herein.

[2] The Applicant sought an order on an urgent basis to compel the Respondent to continue performing in terms two agreements dated 8 December 2009 concluded between the parties. The first is a Secondary Distribution and Warehousing Agreement ("the distribution agreement"). The second is a Manufacture and/or Packing Agreement ("the manufacturing agreement") ("the agreements").

[3] On 26 February 2014, the Respondent cancelled the agreements as a result of the Applicant's alleged repudiation thereof. The Applicant challenges the repudiation and cancellation. This issue has been referred to arbitration.

[4] The Applicant now seeks an order for specific performance on an urgent basis.

[5] The Respondent opposes this application on the following grounds –

5.1. the relief sought is not urgent as the Respondent made a proposal in terms of which it has tendered to continue rendering the services to applicant on the same terms as embodied in the agreements for a period of six months calculated from the date of cancellation thereof (the proposal); and

5.2. the Applicant cannot be granted the relief sought herein as it amounts to an order for specific performance (which is a final order) in circumstances where the respondent cancelled the agreements due to the Applicant's repudiation thereof.

**Urgency**

[6] According to the Applicant, it "*reasonably apprehends*" that the Respondent could suspend rendering the services contemplated in the agreements at any time. This, the Applicant submits, will result in it sustaining irreparable harm.

[7] It is common cause that the Respondent has not ceased rendering the services in question and the respondent has not threatened to summarily discontinue rendering them.

[8] The Respondent submits that it made the proposal, referred to in 5.1. above, in its letter of cancellation, in order to mitigate damages it might sustain if the agreements came to an abrupt end. Therefore, the Applicant could not have reasonably concluded that there was an imminent threat of irreparable harm, which necessitated this application.

[9] According to the Respondent, there is no justification for the Applicant not to accept the proposal, as it does not prejudice its position in any way. The Applicant can pursue arbitration proceedings during the six-month period afforded to it in terms of the proposal. If the arbitration is not concluded before such time, the Applicant could bring the present application in the ordinary course.

[10] The Applicant, however, asserts that it "*will not and cannot accept the proposal*" as it contends that "*the purported cancellation of the agreements is itself a*

*repudiation thereof that* [the Applicant] *has not accepted and has elected to abide thereby*".

[11] In the answering affidavit, the Respondent refers to a letter dated 3 March 2014 ("the letter") addressed to the Applicant's attorneys:-

> "...*Our client's cancellation of the Agreements does not, with respect, justify approaching the Court for relief on an urgent basis or at all. Your client can simply accept the proposal on the basis that such acceptance is without prejudice to its contentions and that it is subject to a strict reservation of its rights to reclaim any overpayments made to our client in terms thereof or in terms of the Agreements, as the case may be...*"

[12] It is evident from the above that the Applicant was not required to accept the proposal as being a determination of the parties' rights and obligations. The Applicant can still challenge the cancellation of the agreements and claim damages from the respondent in due course.

[13] The Respondent submits that the Applicant's refusal to accept the proposal is "self-serving".

[14] The Applicant submitted that it does not have alternative remedies available to it. This submission was based upon grounds that the Respondent will abruptly terminate the services to the Applicant without affording the applicant an adequate opportunity to make alternative arrangements, so that it can mitigate any damages that it may sustain, if it is found that the Respondent's cancellation of the agreements was unlawful. The Respondent will only be terminating its services five and a half

months from the date of cancellation, which affords the Applicant sufficient time to make alternative arrangements or to have the arbitration proceedings determined.

[15] The Applicant tendered to continue paying amounts to the Respondent, in accordance with the Applicant's interpretation of the distribution agreement. The Applicant required the Respondent to continue performing in terms of the manufacturing agreement whilst refusing to pay what the Respondent states is due in terms thereof.

[16] The Applicant clearly had another remedy as opposed to launching this application. That was to pay what the Respondent claimed in terms of the agreement, without prejudice to its rights, pending the determination of the arbitration. The Applicant is a large, commercial and financially successful entity that would not have suffered substantial prejudice through such payment. In the result, I am of the view that the matter is not urgent.

**Costs**

[17] The Applicant submitted that it was only in the Respondent's heads of argument that the Respondent explained the "proposal", that is that the Respondent would continue to supply even if the Applicant did not accept the proposal. The proposal was set out clearly in the letter of cancellation. It was open to the Applicant to accept the same by paying, under protest, and reserving its rights. It was financially able to do so. This application would thus have been avoided.

In the result, the following order is made:-

a. The application is struck off the roll.

b. The Applicant is to pay the Respondent's costs, including the costs consequent upon the employment of two counsel.

**WEINER J**

*Counsel for the Applicant:* MILTZ SC & BITTER
*Applicant's Attorneys:*
*Counsel for the Respondent:* SIBEL SC & RUDOLPH
*Respondent's Attorneys:*
*Date of Hearing:* 19 MARCH 2014
*Date of Judgment:* 15 MAY 2014