Case No 270/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

H MERKS & CO (PTY) LIMITED Appellant

and

THE B-M GROUP (PTY) LIMITED First Respondent

C P F DISTRIBUTORS CC Second Respondent

CORAM: CORBETT CJ, HEFER, NESTADT, F H GROSSKOPF et HOWIE JJA

Date heard: 3 March 1995

Date delivered: 10 May 1995

J U D G M E N T

NESTADT. JA:

The issue in this; appeal is whether the first respondent

("B-M") repudiated a written agreement entered into by it with the appellant ("Merks"). If it did, the appeal succeeds. If not, the appeal fails.

Part of the business of B-M was the manufacture and marketing of hair care products. It began this activity in March 1986. The products were known as the Clairol Professional Formula ("Clairol") range of products. As will be seen the range consisted of a number of items. Merks, suppliers of hairdressing requisites, was appointed one of B-M's distributors in the Transvaal. The products were purchased by hairdressing salons for use by their customers. By about October 1988 B-M had decided to discontinue the manufacture and sale of the Clairol products. The business was not profitable. Mr Lars Fischer, a consultant employed by Merks,

heard of B-Ms decision. He thought that if Merks was appointed sole distributor for the whole country, it could successfully market the products. With this in mind he met with B-M's managing director, a Mr Paul Woolfson (as also with the company's sales manager, a Mr Rodney Hesketh-Maré). They were amenable to his proposal. The result was the agreement to which I earlier referred. It will, in due course, be necessary to analyse the agreement in some detail and to quote certain clauses. For the moment, however, it suffices to merely outline its effect. The agreement was entered into and commenced on 15 November 1988. The parties to it were B-M and Merks. Merks was for a period of five years appointed "the exclusive sales agent, distributor and purchaser" of Clairol products for South Africa and certain of its

neighbouring states. However, in terms of clause 2 of the agreement, Merks was given the right to nominate a company or close corporation "who shall on its behalf handle all matter's regarding the [Clairol] range of products". Merks committed itself to purchasing a certain quantity of Clairol products each year. The parties would in this regard agree on a forecast which Merks was obliged to submit annually, in advance. To ensure that B-M had stocks available, Merks also undertook to furnish, by way of further (quarterly) forecasts, details of the purchases to be made. As will appear, the issue of forecasts is of importance. Even more so, is the question of the price of the products. It, too, is dealt with in the agreement. Those for 1989 would be B-M's prices as at October 1988. For the ensuing years, however, it is stipulated that they may,

subject to certain qualifications, be increased. Clause 22 provides for the agreement to be replaced by a more comprehensive contract prepared by B-M "within a reasonable period of time". (Such contract was never concluded.)

During the months that followed, the agreement was implemented. To begin with, and pursuant to clause 2, Merks caused the second respondent ("CPF") to be formed and nominated. Thereafter orders were placed by CPF with B-M who duly executed them. Such orders included products to the value of R62 816.07 sold and delivered during the period from September 1989 to November 1989. At about this time, however, problems arose between the parties. They culminated in B-M on 13 March 1990 stating in a letter addressed to Merks that the agreement was "henceforth

terminated".

Thus it was that the business relationship between the parties came to an end.

Litigation took its place. B-M issued summons in the Witwatersrand Local Division claiming payment from Merks of the R62 816.07 referred to earlier. Subsequently, by way of an amendment, CPF was cited as a second defendant. It was now alleged that CPF, alternatively Merks, had purchased the goods. Payment was accordingly claimed from CPF, alternatively Merks. In its plea CPF denied liability. Merks, on the other hand, admitted that it had purchased the goods and that it was liable to B-M for the amount claimed. Payment was sought to be excused on the basis of a counterclaim which Merks averred it had against B-M and which it pleaded should first be adjudicated on. The counterclaim was for

damages in the sum of a little over R8,2 m. Merks' cause of action was that B-M had repudiated the agreement and that Merks had accepted such repudiation. The damages claimed represented the loss of profit which it was alleged Merks had suffered over the remaining term of the agreement as a result of its premature termination. In its plea in reconvention B-M raised a number of defences in support of its denial that it had repudiated the agreement. The matter came to trial before Mynhardt, J. At the request of the parties, and in relation to the claim in reconvention, an order in terms of Rule 33(4) was made that certain agreed issues relevant to the question of whether B-M repudiated the agreement first be determined and that in the meantime proof of damages stand over. Somewhat surprisingly (seeing that the liability of CPF on the

claim was in issue), Merks and CPF tendered evidence first. They relied on the testimony of Fischer. Evidence on behalf of B-M was given by Woolfson and Hesketh-Maré. It was held that B-M had not proved that CPF was liable for payment of the purchase price of the products. Accordingly, B-M's claim against CPF failed. As regards the counterclaim, the court found that in law there had been no repudiation of the agreement. Consequently, the counterclaim was dismissed. It followed that judgment of the claim (in the sum of R62 816.07) was granted against Merks. With the leave of the trial judge Merks appeals against the dismissal of the counterclaim. With the leave of this Court B-M cross-appeals against the dismissal of its claim against CPF (as well as the refusal of an amendment to the plea to the counterclaim which B-M had sought during the trial).

Both cross-appeals are conditional on the appeal succeeding.

It is necessary at this stage to examine the course of events which gave rise to the dispute between the parties and B-M's notification in March 1990 that it had terminated the agreement. They concern the forecasts which Merks was obliged to submit and the prices at which the products were to be sold by B-M. These issues must be considered with clauses 3, 4 and 5 of the agreement in mind. They provide:

> "3. This agreement shall have a tenure of 5 years. Merks will be committed to achieving certain forecasts, such forecasts being mutually agreed upon yearly in advance. It is agreed that the forecast for 1989 will be R286 000,00. Such forecast is at the transfer price existing in October 1988. The transfer price is the price paid by Merks for the goods received.
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> 4. The transfer price may be increased by mutual agreement from time to time. Such increases will only be effected at reasonable intervals taking cognisance of

the effect they may have on the prevailing market conditions. The transfer price for the stocks on hand at B-M's warehouse (see attached stock list) will not be increased until such stocks are depleted. 5. To ensure that stocks are always available for sale to Merks, it is a requirement that a phased quarterly forecast be completed for the year and updated for the 12 months on a rolling basis. Stocks forecast and not taken off by the year end must be taken by Merks in the first quarter of the following year."

I have already stated that (save for the non-payment referred to) there was no problem in the first year of the agreement's operation (ending 15 November 1989 but which I refer to as 1989). The quantity and type of products which Merks forecast it would (and did) purchase and the price of the goods were agreed to (largely, as will have been seen, in clause 3 of the agreement itself). When, however, it comes to 1990, a different picture emerges. The following are its components (as they appear, for the most part, from

an exchange of letters between the parties):

(i) It was common cause that at an early stage B-M agreed to Merks' forecast of R620 000 for 1990,

(ii) Thereafter, on 11 September 1989, in a letter to B-M, Merks submitted what is termed a "suggested" or "preliminary" forecast or projection (which Merks said it "would like……to firm up……closer towards the end of the year"). In the letter eighteen products (being the Clairol range) are listed and in each case the number of units which it was envisaged would be purchased. But there is no reference to individual prices or the total price. (iii) On 30 October 1989 B-M (as it was entitled to do,

seeing that the stocks on hand and referred to in clause 4 had been exhausted) informed Merks what its 1990 prices would be. Such prices were between 36% and 150% higher than B-M's 1989 prices. This was because, so B-M stated, "some of these products have not been produced and costed for over two years" and "it was necessary to update all costs and sources of materials".

(iv) Fischer objected to the increased prices. At his request, Woolfson undertook to reconsider the amount of the increase.

(v) Woolfson did this. He was prepared to reduce the increase. On 6 December 1989 he advised Fischer what

B-M's adjusted 1990 prices would be. At the same time it was pointed out that on the basis of Merks' provisional forecast (see (ii) above) and at B-M's increased prices, products totalling only R464 753 were to be purchased. This did not meet the forecast of R620 000 (see (i) above). Merks was also requested to supply B-M with "quarterly forecasts as soon as possible to enable us to plan our batch production on this basis". Such forecasts would have to be adjusted "for the additional units to make up the R620 000 (we presume this would be the last quarter)". (vi) Fischer remained dissatisfied with B-M's proposed prices. In a letter to B-M dated 13 December 1989

(emanating from CPF but obviously written on behalf of Merks) he said that the average price increase was still just under 50%. He asked that the intended increase be reconsidered; that it be "more in line with the ruling inflation rate"; failing this "we would find it extremely difficult, if not impossible, to achieve the intended objectives".

(vii) B-M's response on 15 December 1989 was that because the 1989 prices were already two years old and that since then costs had risen, it could not reduce the increase in prices.

(viii) Fischer was not persuaded. In a letter dated 15 December 1989 he warned B-M that "it is impossible to

pass this 50% cost increase on to the consumers". In his evidence Fischer confirmed that such consumers could not afford to pay the increased price at which the products would have to be sold to them if Merks were to pay the increased prices proposed by B-M. (ix) B-M replied (on 20 December 1989) that the prices referred to in its letter of 6 December 1989 ((v) above) were "final". Merks was told that we "await your acceptance and quarterly forecast as soon as possible". (x) Merks never supplied the quarterly forecast either as adjusted or at all. Nor did it agree to B-M's price demands. On the contrary, and as the trial judge found, it had by this time become clear that there was a

stalemate between the parties and that Merks would not place any orders with B-M for 1990. Indeed, it did not.

It was in these circumstances that B-M on 13 March 1990 purported to terminate the agreement. The reason given was that "you have not acceded to our price structure for 1990".

I think I can best sum up the parties' respective contentions, as they emerge from the pleadings in reconvention read with the Rule 33(4) order, in the following way. The pith of Merks' allegations was that B-M was not unilaterally entitled to increase prices and that its attempt to do so and its purported termination of the agreement on 13 March 1990 was a repudiation of the agreement. The plea in reconvention denies this. The effect of what is pleaded in amplification is that the parties failed to agree on (i) the forecasts

for 1990 or (ii) the prices of the products for that year (as contemplated in clauses 3 and 4 respectively) and that the agreement had accordingly terminated or was unenforceable. The court a quo upheld this defence. It was found that the agreement was not enforceable (after its first year).

Plainly, if this conclusion was correct, there can be no question of any repudiation of the agreement by B-M. There would have been no obligation by B-M to supply Merks with any Clairol products. Whether there was such an obligation, depends on a proper interpretation of the agreement. It is of a kind which is not uncommon (see, eg, the one which featured in Decro-Wall International SA vs Practitioners in Marketing Ltd [1971] 2 All ER 216 (CA)). One could call it a distribution or concessionaire

agreement. I do not believe that Mynhardt J intended to find that it did not give rise to a vinculum juris between the parties. It did. A reciprocal contractual relationship was created. As such it was capable of affording Merks a remedy if for example B-M, during the currency of the agreement, had appointed someone else to market its products or had sold its products directly to customers (see the Decro-Wall case). But this is not the position here. The gravamen of the counterclaim is that B-M, in breach of its obligations, refused to supply Merks with Clairol products during 1990 and the three subsequent years at the 1989 prices. And the loss of profits claimed by Merks is calculated on this basis. So it does not suffice for Merks to prove merely that the agreement was enforceable in general terms. What Merks had to establish was that, the parties

having failed to agree on the price of the products for 1990, the 1989 prices were to apply; and, of course, either that it duly submitted the forecasts required for 1990 or, if it failed to, that this did not avail B-M.

Let me immediately deal with the issue of the forecasts. A great deal of the argument was devoted to it. As already indicated there were two kinds of forecast that were required from Merks. One (in terms of clause 3) had to be mutually agreed upon in advance. Its purpose was to define, in monetary terms, what amount of Clairol products Merks was to purchase during the ensuing year. The other (in terms of clause 5) was a more detailed forecast identifying the products required and the quantities thereof. It will be recalled that B-M's complaint, as pleaded, related to the clause 3

forecast. As I understand the judgment a quo it was that the forecast of R620,000 was not a proper one (because it did not specify the number of units of each product required during 1990); and that B-M was accordingly not obliged to supply Merks with any products for that year. I am not sure that this is a sound conclusion. It may be that Mynhardt J has imported into clause 3 what clause 5 provides for. It is, however, unnecessary to decide this or the other arguments advanced by Mr Horwitz on behalf of Merks in support of the submission that the forecast of R620,000 was a proper one. I shall assume that it was. Even so, and for the reasons which follow, I do not think the appeal can succeed.

This brings me to a consideration of the effect of the parties having failed to agree on prices for 1990. Undoubtedly, the

agreement contains a flavour of sale. Rather I should say that it provides the framework for the conclusion of a series of purchases which Merks would, from time to time, make from B-M in order to give effect to its right to market the Clairol range of products. In other words, there would (to quote Sachs LJ in the Decro-Wall case at 226 d) be "a continuing number of individual transactions for the sale and delivery of goods" (by B-M to Merks). These would be grouped together on an annual calendar year basis, commencing in 1989. The one reason for this was that the forecasts which Merks was obliged to furnish in terms of clauses 3 and 5 were on a yearly basis. The other was, as appears from clause 4, that it was envisaged that there would be periodic increases of prices. These were to be "from time to time" and "at reasonable intervals". But it was not in

dispute that here too this would be on an annual basis. Of course, there would have to be "mutual agreement" on such increases.

This being so, and as Mynhardt J held, the agreement was a species of pactum de contrahendo, ie an agreement to make a contract in the future. Such a contract may be enforceable (Christie: The Law of Contract in South Africa, 2nd ed, 40). In casu whether it is depends on the price of the products having (post 1989) been fixed or at least being ascertainable. The principle to be applied was stated by the present Chief Justice in Westinghouse Brake and Equipment (Pty) Ltd vs Bilger Engineering (Pty) Ltd 1986(2) SA 555(A) at 574 B-C as follows:

> "It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree

> upon some external standard by the application whereof it will be possible to determine the price without further reference to them. There can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them ..... This is part of the wider general principle that contractual obligations must be defined or ascertainable, not vague and uncertain."

Equally so, an agreement to later negotiate and agree on a price is not acceptable (Hattingh vs van Rensburg 1964(1) SA 578(T) at 582 C; Letaba Sawmills (Edms) Bpk vs Majovi (Edms) Bpk 1993(1) SA 768(A) at 773 I). If then this is the effect of clause 4, Merks must fail. Its case was, however, that this is not what the provision means. The argument was that it was only the increase that had to be mutually agreed to and not the price; in the absence of the parties agreeing on an increase the previous, ie original, price remained; accordingly, the parties having failed to agree on the increase for

1990, the 1989 prices applied and the agreement was valid.

A similar argument was rejected by the trial judge and in my view rightly so. The language of clause 4 does not warrant the meaning contended for. Merks never disputed that a reasonable interval (see the second sentence of clause 4) had elapsed. So B-M was entitled to require Merks to pay an increased price. This is what it did. When this happened and notwithstanding the enjoinder in the clause that increases had to take "cognisance of the effect they may have on the prevailing market conditions" (i) the old prices fell away and (ii) in their stead the parties had "by mutual agreement" (see the first sentence of clause 4) to fix new (increased) prices. The position would, of course, have been different had the clause stipulated that failing an agreed increase, the price referred to in

clause 3 would continue to apply after 1989. But (as in Wasmuth vs Jacobs 1987(3) SA 629 (SWA) at 633 B-C)it does not. And to read clause 4 as doing so would be to make a contract for the parties. It would be a singular contract. It would make clause 4 futile. If in default of agreement the old prices were to continue there would be no incentive for Merks to agree to an increase (cf Beer vs Bowden [1981] 1 All ER 1070 (CA) at 1073 d). In the result what we are concerned with is a lack of agreement on prices, not merely a failure to agree on an amendment or review of the original prices (so that the latter continue to apply).

So much for what may be regarded as a linguistic interpretation. A contextual approach (including a reference to permissible background evidence) confirms it. The parties never

contemplated that the initial price would continue to apply subsequent to 1989. On the contrary, the parties anticipated that prices would increase. The correspondence referred to bears this out. And so does the evidence. I content myself with the following extract from that of Fischer, namely:

> "I thought that that price list [for 1989] would rule for the first year. Prices in my experience with this product range normally went up once a year ..... As I said yesterday I experienced previously with the B-M group that the prices were increased once a year and the price increases were reasonable increases in line with inflation.....My Lord I am a business man. I understand that prices go up".

In these circumstances Merks' construction is not a tenable one. It would mean that failing an agreed increase, the initial price would continue to apply throughout the five year duration of the agreement.

No wonder that Merks never at any time advanced it in the pre-

litigation correspondence and discussions between the parties. Mr Horwitz submitted, however, that it was unthinkable that Merks would set up a selling organisation with no security of tenure beyond the first year of the agreement. This is a consideration but not a very strong one. Fischer himself, as his evidence makes clear, "expected [the parties] to reach agreement on the price increases". In any event, the agreement was intended to be an interim one; as clause 22 shows, it was to be replaced by a more comprehensive agreement.

On behalf of Merks an alternative argument (not foreshadowed in the pleadings and not raised in the court below) was relied on. It was that, either on a proper interpretation of the agreement or on the basis of an implied term, the increase had to be

a reasonable one; there was accordingly an objective yardstick by which it could be measured; in this way the price for the years following 1989 was ascertainable and the agreement was enforceable. Even assuming that a sale at a reasonable price is valid (as to which see Genac Properties Jhb (Pty) Ltd vs NBC Administrators CC (previously NBC Administrators (Pty) Ltd) 1992(1) SA 566(A) at 577 G - 578 D), I am unable to agree with the argument. The express terms of clause 4 negate it. That clause defines the method by which price adjustments are to be determined, namely, by the parties agreeing thereto. Where in a given case that fails, a court will not usually substitute its own machinery in the form of a reasonable price. This is what was said in Sudbrook Trading Estate Ltd vs Eggleton and others [1981] 3 All ER 105 (CA) especially at

114 f - 116 d). According to Templeman LJ, the principle stems from "one central proposition, that where the agreement on the face of it is incomplete until something else has been done……by further agreement between the parties……the court is powerless, because there is no complete agreement to enforce." In our case the determination of a reasonable increase (a difficult task I would have thought) is an alternative which, on the wording of the agreement is not available, either by way of an interpretation or an implication. To sum up. In terms of clause 4, price increases had to be agreed. In the absence of such agreement in respect of 1990, the obligation on B-M to continue to supply Clairol products to Merks became unenforceable. B-M's letter of 13 March 1990 did not therefore constitute a repudiation. The counterclaim was correctly

dismissed by the court a quo. The appeal must fail.

This brings me to the cross-appeals. As was stated earlier, they are both conditional on the appeal succeeding. This being so, Mr Schwartzman. on behalf of B-M, fairly conceded that in the event of the appeal failing, the cross-appeals should be dismissed with costs including those of two counsel. The order for costs is also to include those which this Court reserved when granting B-M leave to appeal. They are the costs of the counter-application to the court a quo for leave to cross-appeal and the costs of the petition to this Court to cross-appeal. In this latter regard, however, I feel impelled to add a rider. It arises from the fact that a full set of the pleadings, including the summons and the affidavit opposing an application of the summary judgment, were annexed to the

petition. These documents comprise 189 pages. It was unnecessary to have done this. The pleadings are summarised in the judgment a, quo (which, of course, was annexed to the petition). AD Rule 3(5) requires that every application for leave to appeal furnish succinctly all information necessary to enable the court to decide whether leave ought to be granted. Succinctly means concisely or briefly expressed. In the light of what I have said, the Rule was not complied with. The unfortunate result is that unnecessary costs have been incurred. B-M's Johannesburg attorneys must be held responsible for this. I therefore propose to direct that they pay such costs de bonis propriis. This Court has previously warned practitioners that their breach of duty in this regard may result in an order of this kind being made (see Government of the Republic of South Africa vs Maskam

Boukontrakteurs (Edms) Bpk 1984(1) SA 680(A) at 692 G - 693 A). Indeed, such orders have been made. With this in mind, the matter was raised with counsel during argument before us. The attorneys have therefore had an opportunity of being heard.

The following order is made:

(A) As to the appeal:

(1) The appeal is dismissed with costs.

(2) Such costs are to include the costs occasioned by the employment of two counsel.

(B) As to the cross-appeals:

(3) The cross-appeals are dismissed with costs.

(4) Such costs are to include the costs occasioned by the employment of two counsel.

(3) Such costs are also to include:

(i) the costs of the application to the court a quo for leave to appeal and (ii) the costs of the petition to this Court for leave to appeal, save that the costs arising from the pleadings having been annexed to the petition are to be paid by the cross-appellant's Johannesburg attorneys de bonis propriis.

H H Nestadt
Judge of Appeal

Corbett, CJ)
Hefer, JA) Concur
F H Grosskopf, JA)
Howie, JA)