REPUBLIC OF SOUTH AFRICA

CASE NO: 392/96

In the matter between:

MAYIBUYE CENTRE - CD-ROM PUBLICATIONS APPELLANT

and

WORKGROUP HOLDINGS (PTY) LIMITED RESPONDENT

CORAM: SMALBERGER, HARMS, MARAIS, SCHUTZ and ZULMAN, JJA

HEARD: 29 AUGUST 1997

DELIVERED: 8 SEPTEMBER 1997

J U D G M E N T

HARMS JA/

HARMS JA:

The appellant, the plaintiff in the court of first instance, produced a publication entitled "Apartheid and the History of the Struggle for Freedom in South Africa - Part 1" in CD-ROM format. Anticipating a lucrative market for the product in the United States of America, the plaintiff entered into a so-called Distributor Agreement with the respondent ("the defendant") on 15 May 1994. The agreement falls into three discernible parts: the defendant obtained a limited copyright licence for the United States, the defendant was granted the exclusive right to distribute and sell the publication in the United States and, thirdly, the defendant committed itself to purchase a minimum quantity of CD-ROM's at US $67,50 each. The commitment was expressed as follows:

> "Yearly commitment: 2500 units of the product taken in quarterly lots of not less than 600 units.
> Minimum draw: 200 units."

At the end of the third quarter of the first year, the defendant had acquired only 600 units although a further 125 units had been delivered to it without any formal order for them. In consequence of its failure to have fulfilled its accrued commitment — 1800 units should have been taken — the plaintiff issued summons against the defendant in the Witwatersrand Local Division claiming

(a) US $9 618,75 in respect of the 125 units delivered but not paid for, and

(b) US $82 721,25 against a tender of delivery of 1075 units not taken.

The notice of intention to defend was followed by an application for summary judgment. The application was mislaid in the defendant's attorney's office with the result that summary judgment was granted by default. This led to an application for the rescission of the summary judgment which was dismissed by Streicher J on the ground that the defendant had no defence to the plaintiff's claim. On appeal, the Full

Court (per Flemming DJP, Eloff JP and MacArthur J concurring) set aside the summary judgment because the "defence was at least sufficiently arguable to have required a court to give leave to defend". Special leave to appeal to this Court was granted and it is common cause that the only question in contention is whether the defence raised by the defendant is a bona fide defence which, prima facie, carries some prospect of success (Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) 765C).

Since the defence raised is dependent upon the interpretation of the written agreement and because – save in one regard to which I shall return – there is no serious suggestion that background or surrounding circumstances could affect the interpretation of the provisions germane to the defence, this Court is at this stage as well equipped to consider the validity of the defence as a trial court would be.

The defence is premised upon the provisions of

clause 5 of the agreement:

> "5. MINIMUM PAYMENTS
>
> Distributor agrees to acquire Products in accordance with the Benchmarks timetable listed on Schedule 2 of this Agreement. Should Distributor fail to acquire Products to meet the minimum purchase requirements within the quarterly schedule defined in the Benchmarks in Schedule 2, Distributor agrees to forfeit exclusive rights to the distribution of the product as described in Schedule 1."

The schedules referred to define the product, state its unit price, provide the starting date of the agreement (May 1994), determine the payment provisions and set out the yearly and quarterly commitment and minimum draw (quoted at the outset of this judgment).

Accepting that the agreement incorporates the essentials of a sale, the defendant's case is that the "remedy" provided in terms of the second sentence of clause 5 - the loss of exclusivity - is the sole remedy available to

the plaintiff in the event of the defendant failing to honour the undertaking concerning the yearly or quarterly commitment.

It is apparent from the terms of the agreement that the parties's assessment of the prospects of a marketing success in the United States was optimistic. Performance discounts calculated on purchases of 10 000 units or more per year were agreed upon. A change of the distribution rights in the United States would entitle the one or other contracting party to a payment of not less than R250 000 - and that for an agreement with an initial term of 12 months only. It therefore stands to reason that the plaintiff negotiated for "minimum payments" (see the heading of clause 5) and that the defendant bound itself to minimum purchase commitments. That the plaintiff would have parted with the perceived valuable exclusive rights to the United States market without the certainty of a counter-performance, is so unlikely that it can be discounted. I therefore disagree

with the view of the Full Court that there is a commercial improbability that the parties would have contracted on the basis that the defendant's breach could lead to an obligation nevertheless to perform in spite of the loss of exclusivity. Applying the ordinary rules relating to purchase and sale, the plaintiff as seller would have been entitled to sue for the purchase price of goods sold and delivered, and for goods sold but not delivered against tender of delivery. Does clause 5 in any way detract from this basic right? Clear language to that effect would have been required, something I do not find in clause 5. It does create a remedy for breach of contract. That remedy was conceived for the sole advantage of the plaintiff. No rights were created for the defendant. What the provision does is to grant to the plaintiff the option to determine the defendant's sole distribution right should the defendant fail to meet the minimum purchase requirements. That does not mean that the plaintiff has to exercise the option or, once the option is

exercised, loses his ordinary contractual remedies. As far as the latter point is concerned, it should be emphasised that any election in terms of clause 5 does not put an end to any provision of the agreement other than the one relating to exclusivity – in other words, particularly the commitment relating to quantities remains unaltered. That commitment can only come to an end as the result of a cancellation by the plaintiff in terms of clause 1(c) or a termination by notice in terms of clause 2(a). (The first gives a right of termination in the case of breach and the second permits termination upon notice.) An intention to limit the defendant's liability, one would have expected, would have been explicitly stated, as is the case of the limitations upon the plaintiff's liability in clauses 3 and 4.

There is no allegation that the plaintiff has exercised its option in terms of clause 5. All the evidence shows is that the plaintiff was made aware of its right to elect. The defendant cannot by its breach of contract force

an election upon the innocent plaintiff to invoke any particular contractual remedy or limit its contractual remedies.

Some reference was made during argument to clause 3: it provides for purchase orders. From this it was submitted that any sale was subject to a purchase order and absent the latter absent the former. I disagree. The clause deals with administrative matters and is based upon an expectation that there would be orders in excess of the agreed minima, which would have been placed before the expiry of the periods stated in the second schedule. Argument was also addressed on the effect of clause 2(b) – it deals with the change of distribution rights against payment -upon the interpretation of clause 5. The courts below had opposing views. In my judgment clause 2(b) has no direct bearing on the issue and I refrain from attempting to interpret it.

That leaves the admissibility and relevance of pars 16 and 18 of the founding affidavit of Mr Lello. He alleges

that prior to December 1994 he advised the plaintiff of his inability to sell the product. He also advised the plaintiff that the defendant could not continue with the agreement and was quite happy to lose its exclusivity. Then follows the pregnant statement that Mr Goldstein (on behalf of the plaintiff) "did not dispute my interpretation of the agreement and did not suggest that the [defendant] was obliged to order the goods in accordance with the 'commitment'. Indeed the status of the agreement was left on the basis that [defendant] would not order any further products, and therefore lose the exclusivity." This evidence, it was submitted on behalf of the defendant, was admissible to solve any ambiguity in the agreement. Having found that the agreement is not ambiguous, this evidence — at best ambivalent — is not admissible and the defendant is not entitled to the benefit of a trial to attempt to present inadmissible evidence.

It follows that Streicher J was, in my judgment,

correct and that the Full Court erred in upsetting his order. In the result the present appeal is upheld with costs and the order of the Full Court replaced with an order dismissing the appeal with costs.

L T C HARMS JUDGE OF APPEAL

SMALBERGER JA)
CONCUR
SCHUTZ JA)

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J U D G M E N T

MARAIS JA/

MARAIS JA:

I have had the benefit of reading the judgment of my brother Harms. I agree that the order which he proposes should be made. I agree too with his conclusions as to the admissibility and import of the allegations made in paragraphs 16 and 18 of Mr Lello's founding affidavit. However, I do not find it necessary to decide finally whether or not plaintiff would have been entitled to exact payment from defendant for the agreed minimum quantities of product even if plaintiff had in fact forfeited the exclusive right to distribute conferred by this agreement. It is far from clear to me that an affirmative answer to that question is the right one once the commercial implications for both parties of that interpretation are closely examined. Its potentiality for allowing plaintiff what could amount to something akin to a double recovery in certain circumstances is another factor which troubles me. In my view, there is a good deal to be said for the proposition that defendant's obligation to take up the

minimum quantities was to be conterminous with its exclusive right to distribute in the United States of America. This was not simply a contract of purchase and sale. It conferred upon defendant a right of sole distribution. I am not persuaded that it is right to approach the matter as if it involves a contract of purchase and sale sale and then to deduce consequences from that premise as an aid to interpretation.

What is quite clear to me is that defendant is wrong in contending that forfeiture is the only remedy available to plaintiff if defendant should fail to purchase the minimum quantity. Clause 5 is plainly not in favour of defendant. It is not intended to operate automatically. It is for plaintiff to decide whether to invoke it or not. If plaintiff does not do so, and tenders delivery of the minimum quantity, defendant is obliged to pay for the minimum quantity. That is what happened here. There is nothing in the papers to suggest that plaintiff did invoke the forfeiture provision and it cannot be assumed that

it did. On the contrary, the particulars of claim recited that plaintiff granted defendant an exclusive right of distribution and nowhere in it was there any allegation that it was forfeited by defendant. Nor did defendant allege anywhere that plaintiff invoked the forfeiture provision. That being the case, defendant did not raise any potentially valid defence to the claim and the application for rescission of the summary judgment was rightly dismissed by Streicher J.

R M
MARAIS JUDGE
OF APPEAL

Zulman JA) Concurs