THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

CASE NO: 539/2002

In the matter between :

AMALGAMATED BEVERAGE INDUSTRIES LIMITED Appellant

and

ROND VISTA WHOLESALERS Respondent

Before: **HARMS, STREICHER, BRAND JJA, SOUTHWOOD & VAN HEERDEN AJJA**
Heard: **12 SEPTEMBER 2003**
Delivered: **26 SEPTEMBER 2003**

Summary: **Contract of indefinite duration – whether terminable on reasonable notice a matter of construction – time of determining whether period of notice of termination reasonable a matter of construction – notice period of six months reasonable in the circumstances.**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] In an action instituted by the respondent against the appellant in the Durban and Coast Local Division the court granted judgment for the respondent in terms of which it (a) declared that a notice of termination of a contract by the appellant to the respondent did not terminate the contract and (b) interdicted the appellant from conducting itself towards the respondent as if the contract had been validly cancelled. With the leave of the court *a quo* the appellant appeals against its judgment. Before us the main issue between the parties was whether reasonable notice of termination of the contract had been given.

[2] The appellant manufactures and distributes carbonated soft drinks of the Coca Cola Company in terms of a franchise agreement with that company. By the end of 1989 the appellant was experiencing various problems in so far as the distribution of its products was concerned. There were labour problems; some customers needed deliveries over weekends while the appellant only operated five days a week; the appellant's trucks were huge and were finding it difficult to get into some of the small streets in the centre of Durban and to find parking; it was uneconomical to deliver to customers who only took a few cases at a time; and some of the customers had their premises high up in multi-storey buildings in the city centre.

[3] As a result of the aforementioned considerations the appellant, on or about 12 February 1990, concluded a written contract with the respondent, a partnership, in terms of which it appointed the respondent as a sole distributor in Durban for its products. In terms of the contract the respondent undertook to service all outlets for the appellant's products including trade discount outlets and to attend to customer needs; to purchase a forklift, two trucks and a Hi-Ace van; and to achieve a

distribution target of 16 000 cases per month. The distribution was to be done on the basis of the respondent buying the product from the appellant and on-selling it to the relevant outlet. The appellant undertook to pay a discount at a fixed rate of 10% on the purchases by the respondent, at the end of each month. Clause 19 of the agreement provided that the appointment of the respondent would be terminated by the appellant if the respondent became insolvent or was sequestrated whether provisionally or finally or if it made an assignment for the benefit of its creditors. It did not in express terms provide for the termination of the contract in other circumstances.

[4] The respondent leased warehouse space for its operations and started with some 13 to 15 employees and a sales representative. The sales representative was employed by the appellant and made available to the respondent. As was required by the contract the respondent acquired two trucks, a forklift and a Hi-Ace van. The trucks were painted in signage which described the respondent as an official distributor of appellant's products. The appellant gave the respondent a list of customers it required the respondent to service but continued to distribute its products to trade discount outlets itself.

[5] The respondent rendered a very good service. It could make deliveries on short notice and over weekends. As a result some of the trade discount customers, at times, preferred to buy from it instead of from the appellant. Because of the increase in the warehouse space requirements of the respondent it, in 1997, 'acquired' the property from which it was, at that time, conducting its business, by taking over the trust which owned the property. The purchase consideration was R2 300 000, R1 725 000 of which was financed by way of a mortgage bond over the property payable over a period of 20 years. Improvements to the value of approximately R100 000 were subsequently effected on the property.

[6] Until a Mr Gould came onto the scene as general manager of the appellant's Durban operation in 1998 the appellant had no complaints about the service rendered by the respondent. At first Gould was also satisfied with the service rendered by the respondent. He channelled more work towards the respondent and encouraged the respondent to buy another four trucks in order to service additional outlets. The respondent complied with the request. In 1998 it purchased two new trucks. The purchases were financed by the appellant by way of allowing the respondent to repay a debt of R300 000 in 18 monthly instalments with effect from the end of

September 1998. In addition the respondent purchased two second-hand trucks from the appellant for a purchase price of R28 000. The purchase price was payable in twelve monthly instalments as from 31 December 1998. As a result of Gould's encouragement the respondent's turnover doubled.

[7] However, Gould did not remain satisfied. He wanted the respondent to agree to a reduction of the agreed 10% discount. He threatened to 'pull the plug out beneath' the respondent when the respondent refused to agree to a reduction. He contended that the respondent was not entitled to deliver to trade discount outlets without the appellant's consent and complained that such deliveries resulted in the appellant having to grant a double discount. He also threatened to remove the respondent's existing computer link to the appellant's main computer system. On 8 January 1999 the respondent was informed, in writing, that the discount would be changed unilaterally.

[8] The respondent's attorneys, thereupon, advised the appellant that its demand that the respondent should cease deliveries to clients who received a trade discount, its unilateral reduction of 'commission' payable and its decision to terminate the respondent's computer link constituted breaches of contract. The appellant then, on 23 February 1999, gave the respondent notice of termination of the contract with effect from 31 August 1999.

[9] By the time that the notice of termination was given the respondent's employees had increased from about 15 to 60; the number of sales representatives allocated by the appellant to it had increased from one to three; the number of vehicles used by it had increased to 11 trucks and three forklifts; the warehouse space occupied by it had increased from $300m^2$ to $1800m^2$; and its turnover had increased to between R40 million and R50 million a year or 1 178 000 cases.

[10] The respondent instituted action for the relief eventually granted by the court *a quo*. It alleged that the notice was invalid as the contract was for an indefinite period and could not be terminated at the election of the appellant. In the alternative the respondent alleged that the period of the notice terminating the contract had to be reasonable and that a notice period of six months was unreasonable.

[11] The court *a quo* held that the contract was terminable on reasonable notice. It held, furthermore, that notice of termination was not given for valid commercial reasons and that the respondent had not been given reasonable notice.

[12] Before us the appellant attacked the judgment of the court *a quo* on the basis that it erred in finding that reasonable notice had not been given and that valid commercial reasons were required for terminating the contract. The appellant did not persist in various other defences raised by it in the court *a quo*. The respondent, on the other hand, did not persist in its contention that the contract was not terminable on reasonable notice. It contended that one year was a reasonable notice period.

[13] In my view the court *a quo* correctly decided that the contract was terminable on reasonable notice. Whether it was is a matter of construction.[1] The question is whether a tacit term to that effect should by implication be read into the contract. That would be the case if the common intention of the parties at the time when they concluded the contract, having regard to the express terms of the contract and the surrounding circumstances, was such that, had they applied their minds to the question whether the contract could be so terminated, they would have agreed that it could.[2]

[14] The appellant's franchise agreement with Coca Cola was for a period of five years after which it had to be renegotiated. It would therefore have made no commercial sense for the appellant to enter into a contract of indefinite duration which could not be terminated on reasonable notice. The respondent on the other hand was embarking on a new venture. The cost of distributing the appellant's product could have escalated to such an extent that it could no longer be performed economically at a discount of 10%. For these reasons it is highly unlikely that either the appellant or the respondent would have intended the contract not to be terminable on reasonable notice.

[15] It is not clear why the court *a quo* considered it necessary to make a finding that the notice of termination was not given for valid commercial reasons. It may have had in mind the following statement by Smalberger AJA in *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases*:[3]

'Once a contract is terminable on reasonable notice either party is entitled to give such notice for any valid commercial reason . . .'

[1] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A) at 828A-B.

[2] *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236D-237A; and *Van den Berg v Tenner* 1975 (2) SA 268 (A) at 277D-F.

[3] 1985 (4) SA 809 (A) at 832H.

I do not think Smalberger AJA intended to say that a valid commercial reason is always required for terminating a contract terminable on reasonable notice. He was probably of the view that because of the special relationship between the parties it was implicit in the contract between them that notice could only have been given for valid commercial reasons. There is no rule of law to the effect that it is implicit in a contract which may be terminated by notice that it may only be so terminated for a valid commercial reason. Such a term may of course be implied on a proper construction of the agreement.

[16] In the present case it is not necessary to decide whether such a term is a tacit term of the contract. It can be assumed to be the case. That is so because it is clear that the appellant did have a valid commercial reason for terminating the contract. It wished to reduce the discount payable to the respondent and the respondent refused to agree to such a reduction.

[17] The only issue that remains to be decided is whether the notice period of six months was reasonable. The parties were agreed that the reasonableness of the period of notice has to be tested at the time when notice is given. As the term that the contract can be terminated on reasonable notice is a tacit term of the contract the time for testing the reasonableness of the period of the notice is likewise a matter of construction. Again the question is what the parties would have replied, at the time when they concluded the contract, to the question whether the reasonableness of the notice should be tested in the light of the circumstances pertaining at that time or in the light of the circumstances pertaining at the time notice is given.

[18] At least one object of requiring a reasonable notice is to give the receiving party sufficient time in which reasonably to regulate its own affairs.[4] It is, therefore, in the absence of any indication to the contrary,

[4] *Putco supra* at 831C.

probable that parties who agree that their contract may be terminated by reasonable notice would require the reasonableness of the notice period to be tested in the light of the circumstances pertaining at the time when the notice is given. In the present case where the parties, at the time when the contract was concluded, could not foresee to what extent the business would grow there can be little doubt that they would have required the reasonableness of the notice period to be tested in the light of the circumstances pertaining at the time when the notice was given. In *Putco*[5] it was considered that the minority judgment of Jansen JA in *Nel v Cloete*[6] was authority for the proposition that in determining what is a reasonable period of notice, regard must be had to the circumstances at the time of the contract. However, Jansen JA was not dealing with a notice of termination of a contract; he was dealing with a demand made by a contracting party on the other contracting party to perform an obligation in terms of their contract.

[19] Whether the notice period of six months was reasonable must of course be determined in the light of all the relevant circumstances. The court *a quo* held that the notice of termination left the respondent with insufficient time to regulate its affairs. However, it does not appear from the judgment why it was of that view or what it considered to be a reasonable time for the respondent to regulate its affairs.

[20] Asked in the court *a quo* what a reasonable notice period would have been Mr A Saeed, one of the partners of the respondent, said 20 years. Before us counsel for the respondent submitted that one year would have been a reasonable notice period. He could, however, not suggest why one year would be reasonable but six months not.

[21] Mr M Saeed, another partner of the respondent, who effectively runs the business of the respondent, testified that the main reasons why the respondent could not regulate its affairs within six months were the overheads and the commitments the respondent had in respect of the mortgage bond and the four additional trucks purchased by it. At the date of termination approximately R1,6 million was still outstanding in terms of the mortgage bond, R116 662 (or seven instalments) in respect of the acquisition of the two new trucks and three instalments in respect of the purchase price of the two second-hand trucks.

[22] However, M Saeed testified that he thought that the property was

[5] At 831B-C.

[6] 1972 (2) SA 150 (A) at 177E-G.

worth about R4,5 million and that one ought to be able to find a tenant therefor. In respect of the vehicles he testified that he thought that the respondent would be able to sell them for their market value. In the circumstances the capital expenditure of the respondent and the monthly payments which the respondent still had to make on the effective date of the notice of termination would, in my view, not have prevented the respondent from properly regulating its affairs in a period of six months.

[23] I should not be understood to say that the ability to regulate one's own affairs is the only factor to be taken into account in determining what a reasonable notice period would be. Capital expenditure which is not recoverable otherwise than through a continuation of the contract may for example, in appropriate circumstances, be a factor to be taken into account. Reasonableness may require that time be allowed to reap the benefits of such capital expenditure. This is not such a case.

[24] On behalf of the respondent it was contended that the fact that the distribution of the appellant's product was the sole business of the respondent and that the contract between the parties had endured for nine years justified a longer notice period. There is in my view no logic in this generalisation. In each case one has to have regard to all the relevant circumstances. Had the distribution of the appellant's product been intertwined with other businesses the respondent may conceivably have required a longer period to regulate its affairs. Similarly, it is not difficult to conceive of circumstances where, in the case of a contract of short duration, reasonableness would require a longer notice period than in the case of a contract of longer duration. In any event the submission that, because of a certain consideration, a longer period should have been allowed is unhelpful if no reason is given why a six month notice period is unreasonable.

[25] In *Decro-Wall International SA v Practioners in Marketing Ltd*[7] Sachs LJ considered a less than 12 month notice period unreasonable as neither of the contracting parties would have entered into the agreement at the time that the notice was given on the basis that it could be terminated on less than 12 months' notice. Counsel for the respondent submitted that the parties in the present case would likewise not have been willing, on the date when notice of termination was given, to conclude the initial agreement on the basis of a six month notice period. I do not think that there is, on the evidence, any basis for the submission. If in all the

[7] [1971] 2 All ER 216 (CA) at 230d-e.

circumstances six months' notice of termination is reasonable there is no reason to think that the respondent would not have entered into the agreement on the basis that it could be terminated on six months notice. Even if it is accepted that the respondent would not have entered into an agreement for a six month period only, it does not follow that it, in the hope that the contract would last much longer, would not have entered into an agreement which could be terminated on six months' notice.

[26] It was submitted that, by encouraging the respondent to expand its business and by financing the acquisition of additional vehicles, the appellant represented that the contract would not be terminated before expiry of the time allowed by the appellant for the repayment of the amounts advanced by the appellant to the respondent, in respect of the acquisition of the four trucks. However, such a representation or any reliance thereon was never pleaded by the respondent. Moreover, the respondent never testified that it understood the appellant to have made such a representation or that it relied on such a representation. As stated above the respondent's case was that the contract could not be terminated at the election of the appellant, alternatively that it could only be terminated on reasonable notice. The fact that the respondent expanded its operations can of course not be ignored and is not ignored when the reasonableness of the notice period is adjudged in the light of the circumstances pertaining at the time when the notice of termination was given.

[27] In my view six months is *prima facie* a reasonable notice period. I do not think that a longer period than six months would have placed the respondent in a more favourable position as regards the realisation of its assets, finding a tenant for its warehouse or diverting its business in another direction. It would still have had to comply with its obligations in terms of the contract and would only have been able to realise its assets, let its warehouse or divert its business in another direction towards the end of the notice period. The respondent has not tendered any evidence to the contrary. For these reasons the appeal should be upheld.

[28] The following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order by the court *a quo* is set aside and replaced with the

following order:

'The plaintiff's action is dismissed with costs including the costs of two counsel and the costs of the application under case no. 9065/99.'

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STREICHER JA

Harms JA)
Brand JA)
Southwood AJA) CONCUR
Van Heerden AJA)