REPORTABLE

Case No: 158/2000

In the matter between:

GOLDEN FRIED CHICKEN (PTY) LTD **Appellant**

and

SIRAD FAST FOODS CC and OTHERS **Respondents**

Coram: HARMS & MPATI JJA and FRONEMAN AJA
Heard: 12 NOVEMBER 2001
Delivered: 22 NOVEMBER 2001
Subject: Tacit relocation of franchise agreement

JUDGMENT

HARMS JA/

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[1] The appellant is the franchiser of a well-known fast-food outlet, *Chicken Licken*. The first respondent ('Sirad') is a close corporation and one of its many franchisees; the other two respondents are the members of Sirad. The issue in this case is whether there is an existing franchise agreement between the appellant and Sirad. If not, the appellant is entitled to the relief sought, namely an interdict preventing Sirad from using its trademarks. The court below (Claassen AJ) dismissed the appellant's application for an interdict with costs, and the appeal is with its leave.

[2] A franchise agreement was indeed concluded between the appellant and Sirad on 24 October 1988. It came into force on 1 November of the same year and was to endure for a period of ten years. Provision was made for the possibility of extending the term of the agreement for a further period of five years upon substantially the same terms and conditions. The franchisee's right to extend the term of the agreement was subject to a number of conditions, two of which are relevant at this stage: (a) Sirad had to serve a written notice on the appellant requiring the extension not later than six months before the expiry of the initial term and (b) a new agreement in the standard form then prevailing in the appellant's business had to be executed.

[3] Sirad failed to give the required notice and consequently no new agreement was executed. The initial agreement thus terminated on 31 October 1998. In spite of this it was business as usual and Sirad continued to trade under exactly the same conditions as had applied during the initial period: royalty payments were effected, weekly quality control tests were conducted by the appellant and Sirad received its supplies as before. There was telephonic contact between the appellant's managing director and Sirad concerning the payment of royalties and a promotional competition for *Chicken Licken* customers. About August 1999, Sirad even received a letter from the appellant, instructing it to effect renovations to its premises (something catered for in the franchise agreement) and Sirad complied. Then came the turnabout on 25 August when the appellant, relying on the expiry of the agreement on 31 October of the previous year, gave Sirad notice to cease trading as a *Chicken Licken* outlet by 1 October.

[4] After the termination of the initial agreement and prior to this letter the parties (in the light of the facts recited) conducted themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before. Taken together, those facts establish a tacit relocation of a franchise agreement (comparable to a tacit relocation of a lease) between the appellant and Sirad

(*Shell South Africa (Pty) Ltd v Bezuidenhout and Others* 1978 (3) SA 981 (N) 984B-E). A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement (*Fiat S A v Kolbe Motors* 1975 (2) SA 129 (O) 139D-E; *Shell* 985B-C). The fact that the appellant had forgotten that the agreement had lapsed is beside the point because in determining whether a tacit contract was concluded a court has regard to the external manifestations and not the subjective workings of minds (*Fiat S A* 138H -139D).

[5] My reference to the 'same terms' does not imply that each and every term of the initial agreement forms part of the tacit contract (cf. *Doll House Refreshments v O'Shea and Others* 1957 (1) SA 345 (T)). The right to use the trademarks and get-up of *Chicken Licken* and the duty to pay royalties no doubt form part of the new contract but apart from that it is not necessary for present purposes, and not possible in the light of the paucity of evidence, to make a finding relating to all the terms of the new agreement. An important exception pressed during argument relates to the term or period of the new agreement. Sirad was somewhat ambivalent. At one stage it stated that the new term is five years, something based upon the fact that the initial agreement provided for an extension for such a period. Elsewhere Sirad said that all the terms of the initial agreement applied, which would suggest a period of ten years. The appellant did not address the issue. This is not something that can

be decided on the papers and it is not necessary for us to express any views upon the matter. At best for the appellant the period is an undefined one (Kerr *The Law of Sale and Lease* 452), in which event a reasonable notice of cancellation has to be given (*ibid* 248). The letter of 25 August hardly qualifies as a reasonable notice, especially if regard is had to the fact that it does not purport to be a notice of cancellation and that Sirad had just given heed to the earlier letter requiring of it to effect substantial renovations to the premises. In any event, the appellant did not canvass this aspect of the case in its papers.

[6] In order to meet this conclusion the appellant relied upon two provisions of the initial agreement. The first provided that no amendment, cancellation or waiver of any term of the agreement would be effective unless in writing and signed by both parties, and the second that no relaxation or indulgence granted in respect to a party's obligations would constitute a waiver. Relying on the principle that non-variation and non-waiver clauses are binding (*S A Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A)), the submission was that the conditions for renewal of the initial contract were entrenched and that unless they were complied with the contract could not have been extended.

[7] In my judgment the argument misses the point. It is common cause that the initial contract was not extended and accordingly since 31 October 1998 at an end. Its non-variation and non-waiver provisions likewise lapsed, simply because there was nothing left to vary or waive. An entirely different point is whether a tacit contract was concluded afterwards, albeit on much the same terms. Counsel correctly accepted that the parties, in spite of the clauses relied upon, could have entered into a new written franchise agreement for whatever term and in whatever form without the preceding notice as required by the original agreement. Once that is conceded it has to follow that a tacit franchise agreement could likewise have been entered into. The initial contract did not preclude the conclusion of contracts, tacit or otherwise, at least not once it had expired. (I have already mentioned that a tacit relocation is a new agreement and not an extension of the old one.) The conditions for extending the initial agreement cannot govern the conclusion of a new and independent agreement. (Cf *Fiat SA* for a comparable conclusion under similar circumstances.)

[8] It follows that the appeal stands to be dismissed. The court below decided against the appellant on the grounds of estoppel and unconscionable conduct but for the reasons given it is unnecessary to say anything about those issues.

[9] The appeal is dismissed with costs.

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L T C HARMS
JUDGE OF APPEAL

AGREE:

MPATI JA
FRONEMAN AJA