THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No: 238/2001

In the matter between:

CASH CONVERTERS SOUTHERN AFRICA (PTY) LTD — **APPELLANT**

and

ROSEBUD WESTERN PROVINCE FRANCHISE (PTY) LTD — **RESPONDENT**

Coram: ***Howie, Schutz, Navsa, Brand JJA and Lewis AJA***

Date of hearing: **23 May 2002**

Date of delivery: **31 May 2002**

Summary: **Interpretation of two linked agreements to determine whether cancellation of one results in the termination of the other.**

JUDGMENT

NAVSA JA:

[1] This is an appeal, with leave of this Court, against a judgment of the Full Bench of the Cape of Good Hope Provincial Division of the High Court (Comrie and Selikowitz JJ with Josman J dissenting), upholding a judgment of Foxcroft J, in terms of which the learned judge ordered the appellant to repay the respondent an amount of R715 701-62, representing part-payment of the purchase price for a franchise business.

[2] The issue in this appeal is whether the cancellation of one of two linked agreements resulted in the termination of the other with attendant consequences. The answer lies in the interpretation of the agreements in question. The background facts are as follows.

[3] The appellant is a South African company that sells franchise rights to persons enabling them to trade in second hand goods under the name and style of ***Cash Converters***, using a system and method developed by an Australian company from which it acquired the right to act as the South African franchisor. It also sells to others (as in the present case), the right to act as Cash Converter sub-franchisors.

[4] On 15 August 1997 the parties concluded the two written agreements that are the subject of the present appeal. In terms of one of the agreements ('the sale agreement') the appellant, Cash Converters Southern Africa (Pty) Ltd (Cash Converters) sold to the respondent, Rosebud Western Province Franchise (Pty) Ltd (Rosebud), as a going concern, its business in the Western Cape, the operation of which was concerned with the selling of franchise rights to persons to carry on business in the Western Cape

under the Cash Converters banner as dealers in second hand goods. The purchase price was an amount of R800 000-00 to be paid by way of a deposit of R250 000 00 and the balance (plus interest) in 36 equal monthly instalments.

[5] The second agreement concluded by the parties ('the franchise agreement') is entitled ***Sub-Master Franchisor Agreement***. In consideration for purchasing the business the franchise agreement granted Rosebud franchise rights and the use of intellectual property in order to enable it to conduct the business. The franchise agreement regulated the manner in which the business acquired in terms of the sale agreement was to be conducted. The franchise agreement deals with matters such as the logos to be used, the slogans to be employed in promoting the business, marketing and operations manuals, *etc*. It bound Rosebud to observe strict secrecy in relation to information or data incidental to the Cash Converter business methods and systems and to intellectual property connected therewith. It also prescribed how fees received from sub-franchisees were to be divided between Cash Converters (the master franchisor) and Rosebud.

[6] Clause 3.1.4 of the franchise agreement provided that Rosebud:

> '…shall cause to be opened at least five (5) Cash Converter stores per year for the first two (2) years of this Agreement, and at least thirty (30) such stores open and trading (including existing stores) at the conclusion of the Initial Term…'

The 'initial term' is defined in the franchise agreement as a period of ten years from

1 August 1997. It is common cause that Rosebud failed to solicit sufficient new business timeously to enable it to open five new Cash Converter stores and that it was in breach of its obligations in terms of the franchise agreement. In April 1999 Cash Converters, acting in terms of clause 11.2 of the franchise agreement, gave Rosebud three months written notice of termination. Subsequently, Cash Converters applied to the Cape of Good Hope Provincial Division of the High Court for an order declaring the franchise agreement to have been validly cancelled and for related relief, including an order prohibiting Rosebud from using any of the methods, systems and intellectual property of the Cash Converter franchise and from associating itself in any way with the franchise. Rosebud initially opposed the application and in a counter-application sought repayment of the amount of R715 710-62 being the amount already paid in terms of the sale agreement. It is common cause that at the time that notice of termination was given Rosebud was not in arrears in paying the purchase price in terms of the sale agreement.

[7] The matter came before Foxcroft J and it was agreed between the parties that the only matter to be adjudicated was the counterclaim, Rosebud conceding that the franchise agreement was validly cancelled. It was contended on behalf of Rosebud that without the rights granted to it in terms of the franchise agreement it would be unable to conduct the business. It was further contended that a necessary consequence of the cancellation of the franchise agreement was the termination of the inextricably linked

sale agreement, with the result that Cash Converters was obliged to repay the purchase price against restoration of the business. Foxcroft J accepted the correctness of these contentions and granted Rosebud the relief sought in the counterclaim.

[8] Foxcroft J granted leave to appeal to the Full Bench. The majority, *per* Comrie J, agreed with Foxcroft J's reasoning and conclusion. Dealing with the argument on behalf of Cash Converters that during the currency of the franchise agreement Rosebud received franchise fees and ought first to tender the return of such fees before being able to claim repayment of the purchase price, Comrie J stated that this was fallacious as the fees were earned by Rosebud and ought not to be considered to be part of what had to be restored.

[9] In his dissenting judgment, Josman J agreed that the two agreements were inextricably linked, but reasoned that even though the full purchase price had not yet been paid the sale agreement should be seen as having run its course and should be considered to have been fully executed with no question of breach by either party. The learned judge was of the view that it could never have been in the contemplation of the parties that a breach of the franchise agreement constituted by Rosebud's failure to establish the requisite number of outlets would terminate the sale of the business. Josman J considered that the rights of the parties following on the termination of the franchise agreement had to be determined solely by reference to the provisions of that agreement and stated that Rosebud had only itself to blame for the failure of the

franchise agreement and the consequent forfeiture of the purchase price. The judgment of the Full Bench is reported as ***Cash Converters SA v Rosebud Western Province Franchise*** **2002 (1) SA 708 (C)**.

[10] As the appeal turns on an interpretation of the two agreements it is necessary to examine each agreement in some detail. The relevant provisions of the sale agreement are set out in this and the following six paragraphs. Clause 2, under the heading ***Narrative***, reads as follows:

> '2.1 The Seller carries on the business and wishes to sell the business on condition that the Purchaser thereof will conduct the business in terms of a Sub-Master Franchise Agreement with the Franchisor;
>
> 2.2 The Purchaser wishes to purchase the business;
>
> 2.3 The Franchisor has indicated its willingness to enter into a Sub-Master Franchise Agreement with the Purchaser on the Franchisor's standard terms and conditions;
>
> 2.4 The Purchaser has agreed to enter into a Sub-Master Franchise Agreement on the terms required by the Franchisor.'

[11] Clause 3 deals with the transfer of risk and provides:

> 'Subject to the reservation of ownership set out below, the Seller sells to the Purchaser who purchases the Business, as a going concern, with effect from the Effective Date, on which day all risk in and benefit attaching to the business shall pass to the Purchaser.'

'Business' is defined in the definition section as '…that part of the Seller's business as a going concern conducted by the Seller in the Western Cape Province, in terms whereof it promotes the

Franchised System by granting franchise rights to persons within the Western Cape Province to carry on business as secondhand dealers of various products and merchandise, under the name "Cash Converters", but excluding the name "CASH CONVERTERS", insignia and colour schemes and any rights thereto;'

[12] Clause 9 reads as follows:

> 'The Purchaser shall enter into a Sub-Master Franchise Agreement with the Franchisor and such other agreements as the Franchisor may require on the Franchisor's current terms and conditions."

[13] Clause 10.1, under the heading ***Reservation of Ownership***, provides that until the alienation date, which is defined as being the date on which the full consideration is paid, '[t]he assets, including the fixed assets and all movables (if any), sold by the Seller in terms of this Agreement shall not pass to or vest in the Purchaser, but shall remain the sole and absolute property of the Seller; …'

[14] Clause 13 deals with intellectual property and provides:

> 'The Purchaser acknowledges that the name "CASH CONVERTERS" and the trading style and trading methods used in the business including trade marks, trade names, logos and designs, whether registered or not, used in connection with the business and its merchandise are licenced exclusively to the Franchisor in terms of its Master Franchise Agreement with Cash Converters (Pty) Limited, an Australian corporation. ***The Purchaser acknowledges that by purchasing the business the Purchaser will not acquire any rights to any of the aforegoing.***'
> (emphasis added)

[15] Clauses 16.2 and 16.4 provide:

'16.2 This document constitutes the sole record of the agreement between the parties in respect of the subject matter hereof.

…

16.4 No addition to or variation or agreed cancellation of this agreement shall be of any force or effect unless in writing and signed by the parties or on their behalves by their respective duly authorised representatives.'

[16] Clause 17 spells out the seller's remedy upon a breach by the purchaser and reads as follows:

'If the Purchaser fails to make payment of any amount payable in terms of this agreement on due date thereof or breaches any other provision or term of this agreement and fails to make any such payment or remedy the breach in question within thirty (30) days of the date of receipt of written notice requiring the Purchaser to do so, the Seller shall without prejudice to his other legal remedies be entitled to cancel this agreement by written notice, repossess the business and retain any monies paid by the Purchaser or to claim immediate payment of the balance of purchase price and interest then outstanding.

Notwithstanding that the Seller may claim payment of the balance of purchase price ownership in the business shall not pass until the full purchase price has been paid.'

[17] The relevant provisions of the franchise agreement are referred to in this and the following three paragraphs. It is recorded in the franchise agreement that Cash Converters has already licensed franchisees in the Western Cape who established Cash Converter stores. Clause 2.1 records the following:

'In consideration of the Sub-Master Franchisor having purchased from the Franchisor the business described in the preamble to this agreement, and the performance and

> observance of the conditions and obligations in this Agreement on the part of the Sub-Master Franchisor to be performed and observed, the Franchisor hereby grants to the Sub-Master Franchisor the right and authority for the Term and within the Territory to market, promote, and distribute by way of franchise, the Franchised System and the right to use and/or apply the Industrial Property in connection with Franchised Businesses…'

Clause 2.3 grants the respondent a percentage of the gross receipts of all individual franchisees in the Western Cape.

[18] Clause 11.2 deals with the consequences of Rosebud's failure to meet its obligation to establish the requisite number of Cash Converter outlets within the stipulated time:

> 'Notwithstanding any other term covenant or condition contained herein, the Franchisor may at any time during the term or any extension thereof, terminate this Agreement upon giving to the Sub-Master Franchisor three (3) months notice in writing if the Sub-Master Franchisor fails to achieve its obligations in terms of clause 3.1.4 and thereupon all the rights and entitlements, burdens and obligations under this Agreement shall immediately cease ***without either party having any rights to claim for compensation or damages whatsoever in respect of such termination*** provided that the Sub-Master Franchisor shall in any event fully and unconditionally perform and observe each of the obligations set out in clauses 11.3, 12 and 14 hereof.'
> (emphasis added)

[19] Clause 11.1 provides that upon the expiration of the initial term either party is entitled to terminate the agreement by giving not less than three calendar months

notice. Clause 12 provides that upon termination of the franchise agreement for any reason whatsoever all rights of the sub-master franchisor 'shall terminate' and Rosebud will not be entitled to receive any rebate or refund of any amounts paid in terms thereof.

[20] Importantly, clauses 17.6 and 17.8 provide:

> '17.6 Notwithstanding anything said or written prior to the execution hereof, this Agreement embodies the entire understanding of the parties and constitutes the entire terms agreed upon between them and supersedes and replaces entirely any prior written or verbal agreement between the parties.
>
> …
>
> 17.8 This Agreement may only be varied by written agreement signed by the parties.'

[21] Counsel for Rosebud submitted that the two agreements were parts of one ***indivisible*** transaction. The doctrine of divisibility or severability is usually invoked when the question of the enforceability or legality of a part or parts of an agreement is in dispute. See R.H. Christie ***The Law of Contract*** (4th ed) at **423**. In my view the categorisation employed by counsel is unhelpful as is the reliance by Comrie J at **713 I – 714 B** on ***Chitty on Contracts*** where in vol 1 at para 824 the learned author states:

> 'Several instruments may be construed as one instrument, and be read together but so that each shall have its distinct effect in carrying out the main design…'

This statement begs the question. The appeal turns on the true meaning and purpose of

the two documents in question. This entails an exercise in interpretation.

[22] In interpreting the two agreements it is necessary at the outset to consider what exactly was 'sold' to Rosebud. Apart from some movable assets and goodwill what Rosebud purchased was the opportunity to exploit the Cash Converter franchise in the Western Cape for a defined time. In consideration for concluding the sale agreement Cash Converters transferred in the franchise agreement the franchisor rights and the right to the use of intellectual property to enable the business opportunity to be exploited. It should be borne in mind that in terms of clause 12 of the franchise agreement termination for any reason whatsoever would result in those rights reverting to Cash Converters without compensation to Rosebud.

[23] I accept, as did Foxcroft J and all the members of the Court below, that the two agreements are linked. They were both concluded on the same day and the sale agreement clearly served as the basis for the conclusion of the franchise agreement and vice versa. However, the fact is that there are two agreements, related but distinct, each serving a specific purpose. The purchase price for the business as set out in the sale agreement was intended to ensure that Cash Converters received value for the transfer of the franchisor rights which would be given effect to with the conclusion of the franchise agreement. The sale agreement thus served as a springboard for the franchise agreement. Once the franchise agreement was concluded the sale agreement had served its purpose. Save for regulating the payment of the balance of the purchase

price the sale agreement had no further part to play. The franchise agreement regulated the future relationship between the parties and determined the manner in which the franchise business was to be conducted.

[24] Each agreement records that the document embodying it is the entire agreement between the parties and may not be varied except in writing. Nowhere in the franchise or sale agreement is it recorded that in the event of the franchise agreement being cancelled because of a breach on the part of either party the sale agreement would terminate. Each agreement has its own breach provisions and there is no cross-referencing. The franchise agreement has been cancelled in terms of clause 11.2. There was no cancellation of the sale agreement either in terms of clause 17.8 thereof or at all and it is thus still extant. In principle, apart from the question of prescription, there appears to be no obstacle to Cash Converters claiming the balance of the purchase price. In these circumstances there can be no talk of restitution. I agree with Josman J that the ostensible purpose behind ***two*** agreements was to ensure that the failure of the franchise agreement did not impact on the sale agreement and that in the event of a failure of the franchise agreement the rights of the parties are to be determined solely by reference to that agreement.

[25] Following the reasoning of Foxcroft J and the majority of the Court below would have the absurd result that, having concluded the sale agreement, a sub-master franchisor could sit back for a year and do nothing to achieve the target set in clause

3.1.4 of the franchise agreement and on the basis of its own default claim the return of the purchase price. It would also mean, that if the target for the initial term (beyond the first two years) was not met, the franchisee, having had the use of the business for almost a decade and having earned fees from so many franchisees as it may have recruited and from those that might have existed at the time of the conclusion of the sale agreement, can now recover the purchase price from the master franchisor who will be left with underdeveloped and perhaps worthless franchisor rights in the Western Cape.

[26] Rosebud would have us accept that the two agreements are one and indivisible yet would restrict the operation of clause 11.2 to the franchise agreement. The provisions of clause 11.2 set out in paragraph [18] of this judgment preclude either party from claiming compensation or damages '***whatsoever***' in respect of a termination of the franchise agreement.

[27] With respect, Josman J recognised the absurdities referred to earlier and rightly came to the conclusion that to interpret the document as contended for by Rosebud makes no commercial sense.

[28] It was submitted on behalf of Rosebud that it could never have been intended that Cash Converters, which had been paid a large sum of money for the business and was entitled either to retain ownership because a final instalment had not been paid or to retake the business for failure of the franchise agreement, could keep both the

business and the money.

[29] In my view this is exactly what was intended in the event of Rosebud failing to meet its obligations in terms of clause 3.1.4. The two agreements were concluded on the same day. Any prospective sub-master franchisor would of necessity have had regard to both before signing either. It must have been clear to Rosebud that if any of the targets set by clause 3.1.4 were not met, the first agreement would be terminated and the business purchased in terms of the sale agreement would be rendered inoperative. Rosebud must have been aware of the provisions of clauses 11.2 and 12 of the franchise agreement. The conduct of the business was subject to the terms of the franchise agreement. It was a business risk Rosebud consciously undertook and it must bear the responsibility for the failure of the franchise agreement and the forfeiture of the amounts paid as part of the purchase price.

[30] I turn to deal with Rosebud's alternative argument. It was contended on behalf of Rosebud that subsequent to the termination of the franchise agreement Cash Converters, in allegedly attempting to physically take back the business, repudiated the sale agreement. This submission ignores the following. First, Rosebud in its answering affidavit did not rely on the behaviour of Cash Converters in attempting to reassert control over the business as a repudiation of the sale agreement but rather as a repudiation of the franchise agreement. Secondly, the consequence of the termination of the franchise agreement as spelt out in the agreement itself is that Rosebud would be

obliged to return to Cash Converters such materials as are related to the conduct of the business and would be prohibited from operating the Cash Converter franchise. Finally, the breach by Rosebud of its obligations in terms of clause 3.1.4 rendered the business then in its hands inoperative. In these circumstances it is not open to Rosebud to contend that Cash Converters repudiated the sale agreement.

[31] It remains to deal with a costs related issue. Cash Converter's counsel rightly conceded that the volumes of the appeal record referred to in the order that follows were unnecessary and that the related costs should be disallowed.

[32] In the light of the conclusions reached the following order is made:

1. The appeal is allowed with costs including the costs for special leave to appeal to this Court but excluding the costs related to volumes 3,4 and 7 of the appeal record;

2. The order of the Full Bench is set aside and for it is substituted the following:

'2.1 The appeal succeeds with costs, including the costs of the application for leave to appeal;

2.2 Paragraphs 4 and 5 of the order of the Court below is set aside and for it is substituted the following:

2.2.1 "The Counter-application is dismissed with costs".'

M S NAVSA
JUDGE OF APPEAL

CONCUR:

HOWIE JA

JUDGMENT

SCHUTZ JA

[1] I agree with the judgments of Navsa and Brand JJA and disagree with that of Lewis AJA. Additionally to what Brand JA has said I would add this.

[2] Reliance is placed on those cases which, in order to avoid unjust enrichment, allow an innocent party who is no longer able to return exactly what he has received to make restitution in some alternative form to a greater or lesser extent. But this allowance, I must stress, is made to the innocent party.

[3] I can see no reason for making a similar allowance in a case such as is before us. Rosebud has breached its duties in a serious respect. To allow it to demand restitution of the price would mean that by its own breach of the second agreement it could cast off the obligation placed upon it by the sale agreement – to pay the price. If that were allowed it could achieve the same result by repudiating the second agreement in refusing to perform its obligations under it. In other words the contract-breaker would be able to relieve himself of the obligation to pay the price by his own breach. That cannot be correct. Nor do I see any injustice in Cash Converters receiving back what it has duly delivered in terms of its obligation, but which has, in effect, been cast aside by

Rosebud.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR

HOWIE JA
NAVSA JA
BRAND JA

BRAND JA

[1] I have had the benefit of reading the judgments of both Navsa JA and Lewis AJA. I concur in the judgment of Navsa JA and share the views reflected therein. I find myself in respectful disagreement with Lewis AJA. Broadly stated the reason why I cannot agree with her conclusion is that it is wholly dependent on the acceptance of a tacit of the sale agreement ('the sale') that, in my view, does not exist.

[2] I agree with both Navsa JA and Lewis AJA that the two contracts cannot be regarded as one indivisible transaction, as was contended for by Rosebud. There are two separate contracts and, although interlinked, they represented two separate transactions. Once this is accepted, the notion that termination of the franchise agreement ('the franchise') automatically leads to the termination of the sale, can only be founded, as is accepted by Lewis AJA, on a tacit or implied term. This must be so.

In the absence of an express term to that effect in either contract I can see no other way. My difficulty lies with Lewis AJA's conclusion that 'there must surely be a tacit term that if the business sold is taken back by Cash Converters there would be a rescission and restitution' of the purchase price. With regard to this conclusion the complications are threefold. First, no such tacit term is referred to in the papers and in argument before this Court Rosebud's counsel expressly disavowed any reliance on any such tacit term. Secondly, the hypothesis of the tacit term relied upon by Lewis AJA for conclusion militates against the express provision in clause 16.4 of the sale that 'no agreed cancellation of this agreement shall be of any force and effect unless in writing and signed by the parties ...'. Thirdly, I am satisfied that the tacit term contended for will not meet the requirements of the so-called bystander test regularly applied by this Court. According to this test the inference of such a term would only be justified if, at the time when the contracts were entered int o, the bystander's question as to what

would happen to the purchase price upon termination of the franchise, would have elicited the prompt and unanimous response from both parties that, in that event, the whole of the purchase price will be repaid. I have no doubt that, whatever Rosebud's response might have been, that would not have been the response of Cash Converters.

FDJ BRAND
JUDGE OF APPEAL

CONCUR:

HOWIE JA
NAVSA JA

J U D G M E N T

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[1] **I have read the judgment of Navsa JA and respectfully disagree with the conclusion reached by him that the appeal should be allowed.**

[2] **For the sake of convenience I shall in this judgment refer to the parties in the same way as Navsa JA has done.**

[3] I agree that the two contracts are divisible. They were entered into separately, deal with different aspects of the parties' relationship, and have different provisions governing breach of any term of each contract. No doubt there were good reasons for deciding to regulate the different aspects of the transaction through the use of separate contracts. The sale agreement, although executory in the sense that the purchase price was to be paid in instalments over a period, is essentially one of limited duration. Once the price was paid in full, the obligations of the parties would have been performed. This does not mean, of course, that the contract could not be rescinded, and restitution effected, even after performance had been completed, if it were found, for example, that the sale had been induced by misrepresentation, or was the result of a material and actionable mistake. The franchise agreement, on the other hand, would have continued to operate for the initial term, and possibly for longer if extended.

The franchise agreement was probably modeled on the contract between Cash Converters and the Australian company that had licensed it to grant franchises. No doubt certain terms were required to be included by the latter, and were non-negotiable. The agreement would have been in virtually standard terms, leaving little opportunity for either Cash Converters or Rosebud to negotiate any changes. It would thus probably have been both convenient and cost-effective to embody the terms governing one aspect of the legal relationship between the parties in one contract, and the sale of the rights and other assets to Rosebud in another.

[4] The suggested reasons for creating separate contracts do not, however, throw any light on their interpretation, especially given that they are speculative. However, even if it be accepted that the contracts are divisible, this does not mean that they are not inter-dependent, and that the termination of the one does not lead automatically to the termination of the other.

[5] An examination of their respective terms demonstrates, in my view, that they are interrelated in such a way that if either agreement is cancelled or terminated, the other is affected. I do not propose to traverse all the relevant terms since Navsa JA has done so. However, the following terms seem to me to be particularly significant.

1 Clause 1 of the sale agreement, the definition section, describes the object of the sale as that part of Cash Converters' business (rights acquired by Cash Converters from the Australian corporation to promote the franchised system by granting franchise rights) '*as a going concern'* my emphasis), but excluding certain proprietary rights of Cash Converters such as names, colour schemes and insignia. It follows from this that if Rosebud is deprived of the right to promote franchises then it is deprived of the *merx* itself.

2 Clause 2, the 'Narrative', makes the sale conditional on entering into the franchise agreement, and clause 9 imposes an obligation on Rosebud to enter into the franchise agreement on Cash Converters' terms.

3 Clause 2.1 of the franchise agreement provides that '*in consideration of*' the sub-master franchisor (Rosebud) under the sale agreement having purchased the business, and the performance and observation of the terms of the franchise agreement, Cash Converters grants Rosebud the right, for the term of the contract, 'to market, promote, and distribute by way of franchise, the Franchised System and the right to use and/or apply the Industrial Property in connection with Franchised Businesses'. Industrial property includes marketing and operations manuals, the name, logos, trademarks and other intellectual property rights.

[6] The sale agreement is thus of no import without the franchise agreement and vice versa. Each gives substance to the other. Without the franchise agreement, the business sold is an empty shell. Without the sale, there can be no franchise agreement. Thus, while I agree that each contract is a separate legal transaction, it is my view that if the one fails the other must too.

[7] It is my respectful view that there are a number of faulty premises underlying the conclusion of Navsa JA. The first is that if one accepts that the contracts are inter-dependent, breach of one amounts to a breach of the other. That is clearly not so. Each contract sets out forms of breach and the steps and remedies that may follow. But termination is different from breach: it may be the result of it, or occur for some other reason. Certain forms of breach may result in cancellation. And some other vitiating factor might result in rescission and restitution. In my view, where cancellation is the remedy for the victim of the breach, this must, because of the nature of the contracts and their inter-dependence, result in the termination of the other. If the sale were breached and cancelled then surely the franchise agreement would necessarily fall away. Its entire reason for being would cease. What would the franchise agreement regulate? Is there any purpose in its continued existence? The answer must surely be No. If, on the other hand, the franchise agreement is terminated then the sale, whether

fully executed or not, must also terminate because Rosebud is left with no *merx*. I cannot therefore agree with the conclusion of Navsa JA that the sale agreement was no more than a springboard for the franchise agreement.

[8] The second fallacy in the reasoning of Navsa JA, I suggest with respect, is that what Rosebud purchased was an *opportunity* to run a business. That does not appear to accord with the wording of the agreements nor with the parties' intentions flowing from them. Rosebud purchased rights as part of a business that was defined as a going concern. It did not purchase a *spes*: the rights existed and were to be exercised in the manner contemplated in the franchise agreement. Of course the acquisition of the rights might have given rise to opportunities that Rosebud may or may not have exploited. But the rights to franchise others to run businesses were more than opportunities. One would be hard-pressed to argue that such rights were unenforceable. But how does one enforce an opportunity?

[9] Thirdly, Navsa JA has proceeded on the assumption that if the franchise agreement were cancelled, the sale agreement would terminate only if it were expressly cancelled too. This is not necessarily so. The sale would, in my view, have terminated because its entire reason for existence would have ceased to exist. There must surely be

a tacit term that if the business sold were taken back by Cash Converters, there would be a rescission of the sale and restitution to the status *quo ante*.

[10] I consider that on any of the tests used by our courts over the years to establish whether a tacit term can be found in a contract, an unexpressed term that both of the contracts would terminate if one were cancelled or rescinded would be implied into both contracts. (See R H Christie *The Law of Contract* 4 ed pages 190ff; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A); and, for a comprehensive, more recent exposition of the general principles, *Wilken v Voges* 1994 (3) SA 130 (A).)

[11] Two of the commonly used tests, both of which are discussed by Colman J in *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) in a passage quoted below, are whether the term sought to be implied is necessary to give business efficacy to the contract; and whether the parties, if asked about the inclusion of the term, would have agreed immediately that it was intended to be a part of their agreement, but they had not thought to include it because it was so obvious (the 'officious bystander' test).

[12] It is my view that the parties in this case would undoubtedly have agreed that if

the one contract failed for any reason, the other would too. So too, the absence of the term renders the contracts ineffective: as discussed earlier, what purpose is served, if the sale is cancelled, in the continuation of the franchise agreement? And equally, if the franchise agreement is terminated, what content does the sale agreement have? The answer in both cases must be 'None'.

[13] However, clause 16.2 of the sale agreement reads: 'This document constitutes the sole record of the agreement between the parties in respect of the subject matter hereof'. And clause 17.6 of the franchise agreement provides that 'this Agreement embodies the entire understanding of the parties and constitutes the entire terms agreed upon between them and supersedes and replaces entirely any prior written or verbal agreement between the parties'.

[14] Do these express terms of the respective agreements preclude the implication of the tacit term suggested into the contracts? The general principle is that a tacit term will not be imported if it is in conflict with an express provision of the contract: *Robin v Guarantee Life Assurance Co Ltd*
1984 (4) SA 558 (A) at 567C—F) and *First National Bank of SA Ltd v Transvaal Rugby Union & another* 1997 (3) SA 851 (W) at 864E—865D.

These and other cases deal, however, with terms sought to be implied which are in conflict or inconsistent with terms of substance in the written contract. Can it be said that the term relating to termination in the contracts under consideration is in conflict with the express term in each contract that states that the written document embodying the agreement is the sole record of the parties' agreement?

[15] In my view they do not. Both express terms make it clear that no other written or verbal agreement will have any effect: such agreements are replaced by the express terms of the contracts. But what of terms to which the parties did not apply their minds? In *Techni-Pak Sales (Pty) Ltd v Hall* (above) Colman J, dealing also with the general tests for the implication of tacit terms, said (at 236F—237A):

> 'The suggested term must, in the first place, be one which was necessary as opposed to merely desirable, to give business efficacy to the contract: and, what is more, the Court must be satisfied that it is a term which the parties themselves intended to operate if the occasion for such operation arose, although they did not express it. As Scrutton LJ put it in *Reigate v Union Manufacturing Co* [1918] 1 KB 592 at p 605, it must be
> "such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'what will happen in such a case', they would both have replied, 'of course, so and so will happen; we did not trouble to say that; it is too clear'".
> That does not mean, in my view, that the parties must consciously have visualized the situation in which the term would come into operation. . . . It does not matter, therefore, if the negotiating parties fail to think of the situation in which the term would be required, provided that their common intention was such that a reference to such a possible situation would have evoked from them a prompt and unanimous assertion of the term which was to govern it.'

In *Wilken v Voges* (above) at 136H—137D, Nienaber JA referred to such terms as ‘imputed terms’. A term is imputed if the parties would have agreed if only they had thought about the matter.

[16] I consider that the term suggested is one that falls into the category discussed in *Techni-Pak Sales* and *Wilken*. It is an imputed term. The parties may not actually have discussed and agreed what the consequences of termination of contract would be for the other agreement. But if they had applied their minds to the situation they would, on a balance of probabilities, have said that the other must inevitably terminate. This would be an unexpressed term, or an imputed term, the implication of which would not be precluded by either of the clauses in the contracts that exclude reliance on other agreements.

[17] That the ownership of the business had not passed to Rosebud because the full purchase price had not yet been paid is of no consequence. The position should be the same whether ownership had passed or not.

[18] As counsel for Rosebud argued, it would have been possible for the parties

expressly to exclude the possibility that the sale would terminate if the franchise agreement were cancelled. If they had done so then clearly Rosebud would have been taking the risk that it might pay for a business whether or not it were able to retain it.

[19] The fourth proposition with which I do not agree is this: if Rosebud were able to claim that the sale was terminated, and it were entitled to restitution of the purchase price at any stage after the contracts had been concluded, it could simply fail to carry out any of its obligations, effectively destroy the business and yet obtain restitution. However, restitution is reciprocal. The parties are required to restore each other to the position they were in prior to the conclusion of the contract. If complete restoration cannot be made where the *merx* has deteriorated in the hands of the buyer, then it is possible for an adjustment to be made to the amount repaid by the seller.

[20] In *Feinstein v Niggli & another* 1981 (2) SA 684 (A) at 700E-701D Trollip JA discussed the general principles relating to restitution where a contract is set aside on the ground of fraudulent misrepresentation. The principles would, however, be the same where the contract is set aside or rescinded on another basis: see *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) at 832H-833A. In *Hall-Thermotank* Henning J said (at 832E—F):

> 'The basis of *restitutio in integrum* is the equitable doctrine that no one is permitted to enrich himself unjustly at the expense of another. A party who has benefited by a contract must, therefore, tender to return what he has gained, if he seeks to rescind the contract upon a ground recognized by law. Similarly he is required to tender return of what he has received into his possession.'

In *Feinstein's* case, Trollip JA reaffirmed the principle that restitution is based upon equity, and stated (at 701A-C) that where the subject-matter of the contract cannot be restored in full because of deterioration in its value, whether due to the buyer's fault or for some other reason, restitution is not precluded. The learned judge said also, albeit obiter (he found that the business bought in that case had not deteriorated through any fault of the buyer) that 'Even where the deterioration or depreciation is due to the representee's [the buyer's] fault, *restitutio* is not necessarily precluded for the Court may allow him to adjust the deficiency by a monetary compensation' (at 701B-C).

[21] There seems to me to be no reason to distinguish between the position of the victim of a breach, or a misrepresentee, on the one hand, and the perpetrator of the breach on the other (see *Feinstein v Niggli* above). If the business purchased deteriorates as a result of the failure of the buyer to run it properly, or to perform his obligations under a franchise agreement, and the buyer nonetheless claims restitution of the purchase price, it seems obvious that he cannot claim the full price. The amount to which the buyer is entitled must be determined having regard to the value of the

business when restitution is made. See also *Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31H-32E. The Court there relied on the decision in *Harper v Webster* 1956 (2) SA 495 (FC), where Clayden J said (at 502D--H):

> 'The South African Courts, where justice requires it, have excused the purchaser from the need to make restitution, either wholly or partially, in a number of varying circumstances. With an underlying principle that it is unjust for a man to retain a benefit he has obtained by his misrepresentation, . . . there seems to be good reason, provided that justice is done also to him, to apply the principle in a broad way. The general rule that the person seeking restitution must himself make restitution always governs, but relief should not be denied when substantially that restitution can be made and, in so far as it falls short of complete restitution, compensation in money can make good the deficiency. That was the manner in which justice was done in the *action redhibitoria* -- see the authorities earlier referred to, especially *Voet* 21.1.4
>
> > "Finally the purchaser is bound to make good the full extent of any deterioration of the subject occasioned by him" (Berwick's translation), and *Pothier* sec 221
> >
> > "For the same reason when the thing has deteriorated due to his fault he is not thereby denied relief, but is only obliged to make good to the seller to whom he restores it that depreciation which has come about by his fault."
>
> And there seems to be no reason, in applying an equitable principle to a case where the seller has actually made representations, not to allow the same latitude to a purchaser. And in the English and Scots system of law, in which the matter is dealt with under the same equitable principle, relief is given to the purchaser to this extent.'

[22] The possibility of adjustment of the amount to be repaid by Cash Converters, following a cancellation because of Rosebud's breach, seems to me to be the answer to the problem posed by Navsa JA (and in the dissenting judgment in the court *a quo* of

Josman J) that a buyer could, in a case like this, if he were entitled to claim restitution of the purchase price under the sale agreement, for the duration of the initial period of the contract, fail to comply with his obligations under the franchise agreement, and yet be repaid in full. If Rosebud were to have followed such a course, it would hardly be entitled, on the equitable principles discussed, to restitution of the full price.

The absurdity adverted to by Navsa JA (and Josman J), that Rosebud could return worthless franchise rights at the end of the franchise agreement (or indeed at any time after the conclusion of the sale), yet still be entitled to recover the purchase price, is therefore not one that arises. Equally, the absurdity and injustice that would follow if Cash Converters were entitled to take back the franchise rights, yet keep the money, is avoided by allowing restitution subject to appropriate compensation or adjustment.

[23] It follows that I also do not agree with the proposition that Rosebud took the risk that if it did not comply with the franchise obligations, it would have to forfeit the price it had paid for the franchise rights. The sale agreement nowhere suggests, on any reading, that Rosebud was willing to pay for a business that might at any time after the conclusion of the sale become worthless, whether through its fault or otherwise.

[24] For these reasons I would dismiss the appeal with costs.

CAROLE LEWIS

ACTING JUDGE OF APPEAL