THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 574/13
Reportable

In the matter between:

PLAASKEM (PTY) LTD **APPELLANT**

and

NIPPON AFRICA CHEMICALS (PTY) LTD **RESPONDENT**

Neutral citation:	*Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* (574/13) [2014] ZASCA 73 (29 May 2014)
Coram:	Mthiyane DP, Mhlantla, Shongwe and Willis JJA and Hancke AJA
Heard:	13 May 2014
Delivered:	29 May 2014

Summary: Law of contract ─ contract silent as to its duration ─ matter of construction whether terminable on reasonable notice, having regard to the express terms of the contract and the surrounding circumstances ─ if the contract requires the parties to work closely together and to have mutual trust and confidence in each other, it is reasonable to infer that they did not intend to bind themselves indefinitely, but rather contemplated termination by either party on reasonable notice.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoka J) sitting as court of first instance:

1 The appeal succeeds with costs.

2 The order of the high court is set aside and substituted with the following order:

'(a) It is declared that the written agreement between the parties concluded on 25 February 2005 does have a tacit term that it may be terminated by either party on reasonable written notice.

(b) The plaintiff is ordered to pay the costs incurred by the determination of this issue.'

JUDGMENT

Hancke AJA (Mthiyane DP, Mhlantla, Shongwe and Willis JJA concurring):

[1] The dispute between the parties has its origin in the written agreement concluded on 25 February 2005 titled 'Samewerkingsooreenkoms' (the contract). The contract involved the local distribution authority, in respect of imported agricultural chemical products. The respondent (the plaintiff in the high court) had a business relationship with Mitsui, a Japanese manufacturer of the products. It was the appellant's function to distribute the products and then pay the respondent the amount equal to 15 per cent, calculated on the gross profit earned in respect of the products sold as a result of the respondent's endeavours. Against this background, the respondent sought an order directing the appellant to account to it in respect of products sold from 25 February 2005 onwards.

[2] The issue here is whether the contract between the parties contained a tacit term to the effect that the contract was terminable by either party on reasonable notice.

[3] According to the 'MINUTE OF AGREEMENT' dated 26 October 2012 the issues to be decided by the high court were formulated as follows:

'The parties will request an order on the following aspects

6.1 Does the agreement have a tacit, alternatively implied term that the agreement was terminable (by either party thereto) on reasonable notice to that effect, alternatively the agreement, properly construed, was terminable (by either party) on reasonable notice to that effect.

6.2 Is the defendant obliged to account to plaintiff in respect of the sales as set out supra for the period after the defendant's purported cancellation with effect from 30 June 2010.'

[4] After hearing evidence the high court (Makgoka J) made the following order:

'1. The written agreement between the parties concluded on 25 February 2005 does not have a tacit, alternatively an implied, alternatively on a proper construction thereof, a term that the agreement is terminable on a reasonable notice;

2. The purported notice of cancellation of the agreement by the defendant on 18 May 2010 with effect from 30 June 2010, is invalid and of no effect;

3. The defendant is obliged to render a statement and debatement of account to the plaintiff in respect of all sales it made of the products, for the period commencing 1 September 2008, including for the sales made after 30 June 2010, and it is ordered to do so;

4. The defendant is ordered to pay the costs of the action.'

The appellant (defendant in the high court) appeals against the judgment and order mentioned above, with the leave of the high court.

[5] The appellant in the high court pleaded that the contract contained a tacit, alternatively implied term to the effect that the contract was terminable (by either party) on reasonable notice. It was further pleaded that in accordance with the tacit term referred to above, the contract was terminated on 30 June 2010 in terms of a notice to that effect dated 18 May 2010. Before the commencement of the trial the appellant tendered an account for the period ending at the date of termination ie 30 June 2010.

[6] It is common cause between the parties that (i) the contract was concluded; (ii) the document annexed to the particulars of claim is the contract; and (iii) the contract is silent as to its duration.

[7] To the extent that the case concerned the interpretation of a contract and the question whether the tacit term contended for by the appellant ought to be read into the contract, the evidence presented by the witnesses who testified at the trial was of limited importance. The witnesses could only provide evidence of background and surrounding circumstances as well as the purpose of the contract and what the parties had in mind at the time it was concluded.

[8] Mr Engelbrecht who testified on behalf of the respondent, did not take the matter further. He became a director in August 2012 after the passing of his father Dr Engelbrecht who was the founder, sole director and sole shareholder of the respondent. He testified that the respondent did market analysis to find a product in a field that was actually sustainable. According to him it took a two year period of research and trials to get this product ready and able for local distribution. However, he was not involved in the negotiations and discussions preceding the conclusion of the contract.

[9] Mr Cross testified on behalf of the appellant and stated that he had no mandate or instruction to conclude a contract in perpetuity; it was never in his mind to conclude such an agreement and it would have been poor business practice to do so. Mr Cross also referred to an e-mail sent to the respondent dated 22 January 2010 which was a purported termination of the agreement. Thereafter they consulted with their legal representatives, hence the termination during June 2010. He also referred to the technical agreement between the respondent and Mitsui and stated that after Mitsui was no longer in the picture, they approached the appellant and at present the appellant is distributing Mitsui's products. As far as groundwork is concerned Mr Cross testified that there was only one training session attended by Dr Engelbrecht, and he also referred to the lack of contribution on the part of Dr Engelbrecht. The letter dated 18 May 2010 was sent by the appellant's attorneys to the respondent terminating the contract with effect from 30 June 2010. This was the written termination the appellant relied upon, which was rejected by the respondent as being of no force and effect because, according to the respondent, the contract did not contain a tacit term that it could be terminated on reasonable written notice.

[10] After a comprehensive exposition of the facts and the law, the high court stated the following:

'[36] In the circumstances, I take a view that the term alleged by the defendant, tacit or implied, is not borne out by either the terms of the agreement or the evidence. Furthermore, I find nothing in the proper construction of the agreement that it was terminable by notice. I therefore conclude that the defendant has not discharged the onus it bore in this regard. The defendant's purported notice of termination of the agreement dated 18 May 2010 is therefore void and of no effect. The agreement between the parties remains valid and enforceable. It follows that the defendant is liable to account to the plaintiff for the sales of the products made after the date of the purported termination, i.e. 30 June 2010.'

[11] As far as the law regarding a contract of unspecified duration is concerned, the following was said by Coetzee J in *Trident Sales (Pty) Ltd v A H Pillman & Son (Pty) Ltd* 1984 (1) SA 433 (W) at 441D-E:

'(1) It is a question of construction of the agreement according to the ordinary principles of construction.

(2) Since, however, such agreement, *ex hypothesi*, contains no express provision dealing with determination by the party who asserts that it should be inferred, it is a question of construction in the wider sense of ascertaining what the intention of the parties was when they entered into the agreement.

(3) This intention is determined in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in their agreement.

(4) There is no presumption one way or the other.

(5) The *onus* is on the party who asserts that the parties intended something which they omitted to state expressly to demonstrate that this was so.'[1]

[12] Despite the decision in the *Trident* case that there is 'no presumption one way or the other', concern has been raised regarding the fact that parties could be bound in perpetuity. In A R Carnegie's article titled 'Terminability of Contracts of Unspecified Duration' (1969) *85 Law Quarterly Review* 392 the following is stated at 411-412:

'By holding the parties bound forever in such circumstances, the rule would impose on the party to whom the contract becomes disadvantageous an excessively severe penalty for the

[1] See also *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at 596H-I, 598D-599C.

misdemeanour of careless craftsmanship. Moreover, considerations of commercial convenience have been predominant among the principles informing the development of the law of contract; and as McNair J has in effect argued, commercial prudence is much more likely to indicate that a contract should be determinable than that it should endure perpetually.'[2]

[13] In *Llanelly Railway and Dock Company v London and North-Western Railway Company*[3] the following was stated:

'No doubt there are a great many contracts of that kind [subject to a presumption in favour of determination]: a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes ─ all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties.'

[14] As to the considerations to be taken into account, the following is stated by Smalberger AJA in *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 827G-J:

'I agree that the language used in the agreement is entirely inconsistent with an intention that the agreement should continue indefinitely if a detailed agreement was not reached. . . . They cannot be held permanently bound when all they contracted for was a temporary arrangement. Furthermore, when parties bind themselves to an agreement which *requires them to work closely together and to have mutual trust and confidence in each other*, of which the agreement under consideration is an example, it is reasonable to infer that they did not intend to bind themselves indefinitely, but rather contemplated termination by either party on reasonable notice. Where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely.' (My emphasis.)

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[2] *Martin-Baker Aircraft Co Ld v Marison* [1955] 2 QB 556; *Martin-Baker Aircraft Co Ld v Canadian Flight Equipment Ld, Martin-Baker Aircraft Co Ld v Murison*.

[3] *Llanelly Railway and Dock Company v London and North-Western Railway Company* (1873) LR 8 Ch App 942 (CA) at 950. Other examples in English law where it was found that an agreement was terminable by reasonable notice, see *Crediton Gas Co v Crediton UDC* (1928) Ch 174 (CA); *Re Spenborough Union District Council's Agreement* [1967] 1 All ER 959; *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 3 All ER 769; *Alpha Lettings Ltd v Neptune Research & Development Inc* [2003] EWCA Civ 704 para 36.

[15] In *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA) para 13 Streicher JA said the following:

'In my view, the Court *a quo* correctly decided that the contract was terminable on reasonable notice.[4] Whether it was is a matter of construction. 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.' (My emphasis.)

[16] As to the effect of commercial considerations, the learned judge continued (at 544) as follows:

'[15] . . .

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 first question is one of construction. It is therefore necessary to have regard to the language used by the parties in the contract. It reads as follows:

'STRENG VERTROULIK

[4] One object of requiring a reasonable notice is to give the receiving party sufficient time to regulate its own affairs (at 545B). In *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd*, *supra*, mention is made of the fact that the notice was received by TV through the post on 2 June 1981, but it was common cause that Putco's intention to terminate the agreement was known to TV prior to the end of May 1981 (at 825B). See also R H Christie *The law of contract in South Africa* 6 ed (2011) at p 452-453.

SAMEWERKINGSOOREENKOMS TUSSEN PLAASKEM (PTY) LTD EN NIPPON AFRICA CHEMICALS (PTY) LTD. FEB 2005

NIPPON AFRICA CHEMICALS (PTY) LTD onderneem om voortaan nuwe gepatenteerde produkte van oa Japanese maatskappye to kanaliseer na PLAASKEM (PTY) LTD ten einde direkte toegang tot sodanige middels te verkry vir bemarking in Suid(er) Afrika.

NIPPON AFRICA CHEMICALS (PTY) LTD onderneem verder om gefokus saam te werk aan die verkryging en ontwikkeling van produkte (patente en ook generiese produkte) in konsultasie met PLAASKEM. Met die verkryging van die verspreidingsregte van ‘n nuwe middel is die reël dat ‘n verspreidingskontrak tussen die verspreider (hopelik dan PLAASKEM) en die vervaardiger in plek kom.

Daar is gewoonlik so ‘n kontrak per nuwe belangrike produk. Dit is ook die gewoonte dat Japanese vervaardigers gebruik maak van ‘n Japanese handelhuis wat kantore wêreldwyd het. Hierdie handelshuis is dan gewoonlik die registrasiehouer met die aangewese verspreider wat plaaslik ‘n alleen of ‘n gedeelde verspreiding het. Die omvang van verspreiding word gemotiveer deur effektiewe verteenwoordiging en markaandeel.

Nuwe produkte is nie die gevolg van ‘n bestelling nie maar eerder toevallige en gerigte ontdekking.

Dit moet aanvaar word dat dit moeilik sal wees om die verspreidingsroete van die huidige produkte te verander agv kontrakte wat reeds in plek is. Waar dit gemotiveer kan word sal die verspreidingsroete miskien verander kan word.

NIPPON AFRICA CHEMICALS sal ook aktief saamwerk om generiese produkte, nuwe formulasies en innoverende plantbeskermingmiddels in konsultasie met PLAASKEM vir verspreiding deur PLAASKEM, die lig te laat sien. Dit sluit produkte van ander verskaffers/vervaardigers in. Dit mag ook produkte insluit wat plaaslik gesintetiseer kan word.

PLAASKEM (PTY) LTD onderneem om as verspreider te presteer en 15% van PLAASKEM se bruto wins op produkte aan NIPPON AFRICA CHEMICALS te betaal wat deur NIPPON AFRICA CHEMICALS se toedoen deur PLAASKEM EN MAATSKAPPYE bemark word. Dit geld vir beide patente en ander produkte wat volgens die ooreenkoms deur PLAASKEM versprei word.

Om die verhouding tussen MITSUI SOUTHERN AFRICA/JAPANESE VERVAARDIGER EN PLAASKEM positief te hou en te bou, onderneem PLAASKEM OM voortdurend in konsultasie met NIPPON AFRICA CHEMICALS en die plaaslike Japanese handelshuis, MITSUI SOUTHERN AFRICA (PTY) LTD market te vind of skep vir die hele reeks produkte wat beskikbaar ag wees op ‘n stadium. Dit mag selfs gebeur dat die plaaslike handelshuis MITSUI SOUTHERN AFRICA versoek word deur ons (PLAASKEM en NIPPON AFRICA)

om in Japan te beding vir nuwe middels by vervaardigers wat hulle nie gewoonweg verteenwoordig nie.
Die eerste stap in die verkryging van 'n nuwe middel is behoorlike markontleding en plasing van die middel in die mark waar hy moet kompeteer en dan die aanbieding van so 'n opname.
PLAASKEM (PTY) LTD onderneem verder om te poog om ook van NIPPON AFRICA CHEMICALS (PTY) LTD gebruik te maak as verskaffer/organiseerder van hulle generiese produkte.
Hierdie ooreenkoms is hoogs vertroulik en nie vir 'n derde party bedoel nie.
Geteken te Boksburg op die 25 dag van Februarie 2005.'

[18] It is clear from the contract that there is no express term dealing with its duration. Having regard to the wording of the contract it is also clear that there is no indication that the parties intended to be bound in perpetuity.

[19] The next investigation concerns the intention of the parties, having regard to the nature of the relationship between the parties, as well as the surrounding circumstances.

[20] A tacit term cannot be imported where it will be contradicted by an express term.[5] In this regard counsel for the respondent submitted that it was unlikely that the appellant had the *actual intention* for the agreement to be terminable on reasonable notice, in view of the evidence of Mr Cross that the contract would lapse the moment Mitsui withdraws from the contract. He therefore submitted that the proposed tacit term would be in conflict with the evidence of Mr Cross. I disagree with this submission.

[21] It is clear that the contract required the parties to form and maintain a close working relationship with regular contact and interaction between them. It also covers a wide spectrum of products in respect of both existing and new products. It is reasonable to assume that the nature of the relationship may change over time. It is this commercial reality that strongly suggests an intention by the parties not to be and remain bound in perpetuity. It is apparent that the respondent was to a certain

[5] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 SCA at 596H-I; 598D-599C.

degree the alter ego of Dr Engelbrecht. In view of the fact that he was no longer involved with the respondent, the dynamic, and the relationship between the parties obviously changed. It is doubtful that without the involvement of Dr Engelbrecht the respondent and the appellant would collaborate, consult and work together.[6]

[22] It is important to note that the respondent, in its particulars of claim alleged the existence of a fiduciary relationship, which suggests a duty of good faith, mutual trust and confidence.

[23] In this regard the high court erred in stating that the working relationship between the parties was open to serious doubt. There is no basis to doubt the intended working relationship as it appears from the contract as being one of good faith and trust.

[24] Regarding the surrounding circumstances it appears that the contract involved the local distribution authority to import chemical products. A number of factors would undoubtedly have impacted upon the profitability and the financial viability of the contract. It is unlikely, given the unpredictable and variable nature of the factors such as production costs, transportation costs, landing costs and the applicable exchange rates, that the parties would or could have intended being and remaining bound in perpetuity.

[25] Another uncertainty is the respondent's foreign partner Mitsui with whom it had a contract of a limited duration and who eventually chose to do business with the appellant. The evidence of Mr Engelbrecht on behalf of the respondent is in this regard important. He acknowledged that, when the contract was concluded it could, for whatever reason, have died a 'slow death'. He acknowledged that the contract could have transpired not to live up to their expectations.

[26] Taking the surrounding circumstances into account and in view of the fact that the contract is silent as to its duration, it is necessary that a tacit term be imported. Apart from the surrounding circumstances already mentioned, there is no doubt that

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[6] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd*, *supra*, at 827H-I; *Amalgamated Beverage Industries Ltd v Rondvista Wholesalers*, *supra*, at 543-4 para 15.

it is necessary and commercially efficacious that the tacit term should be to the effect that the contract would be terminable on reasonable notice. In fact, in the absence of an express provision to that effect, it is difficult to imagine circumstances indicating that the parties intended to be bound in perpetuity.

[27] Regarding the formulation of the tacit term it is important that it must be capable of clear formulation, although the formulation need not be concise.[7] In this case the term can be clearly and concisely formulated as follows:

'The contract may be terminated by either party on reasonable written notice.'

[28] It follows from the aforegoing that the legal point in para 6.1 of the MINUTE OF AGREEMENT must be decided in favour of the appellant. Being the successful party there is no reason not to award the appellant costs of appeal as well as costs in the high court.[8]

[29] It is important to note that this decision does not have any effect regarding other disputes between the parties which may still be pending between them.

[30] Accordingly the following orders are issued:

1 The appeal succeeds with costs.

2 The order of the high court is set aside and substituted with the following order:

'(a) It is declared that the written agreement between the parties concluded on 25 February 2005 does have a tacit term that it may be terminated by either party on reasonable written notice.

(b) The plaintiff is ordered to pay the costs incurred by the determination of this issue.'

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S P B HANCKE
ACTING JUDGE OF APPEAL

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[7] *OK Bazaars v Bloch* 1929 WLD 37 at 44; *Smith NO v Van Reenen Steel (Pty) Ltd* [2001] 2 All SA 604 (D) at 614.

[8] *Fulane v Road Accident Fund* 2003 (3) SA 461 (W) at 463H-J; *Baptista v Stadsraad van Welkom* 1996 (3) SA 517 (O) at 521A-B; 522E.

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