REPORTABLE (57) Judgment No, -S.C. 122/83

Civil Appeal No. 199/83

MACEYS STORES LIMITED v TANGANDA TEA COMPANY LIMITED

SUPREME COURT OP ZIMBABWE,
GEORGES, CJ, BECK, JA & GUBBAY, JA,
HARARE, OCTOBER 6 & NOVEMBER 14, 1983

J.C. Kriegler S.C., with him
F.C. Blackie S.C., for the appellant.
I. A. Donovan, for the respondent

BECK JA: By way of Notice of Motion in the High Court the appellant unsuccessfully sought an order that

> "1. The Respondent shall accept and shall supply promptly all orders placed with the Respondent by the Applicant in respect of all tea and coffee products and 'Cerebos' products offered by the Respondent either directly, or indirectly through its subsidiaries, to the public.
>
> 2. The Respondent shall, in respect of such orders, grant the discounts set out in the letter dated the 18th May 1972 from Tanrose (Pvt) Ltd to the Applicant."

The appellant owns a chain of supermarkets and the respondent is a wholesale supplier of tea and other commodities. Prior to May 1972 the appellant purchased tea at a discount from Tanrose (Pvt) Ltd, a wholly owned subsidiary of the respondent, but a dispute arose over the discounts and the appellant stopped buying the respondent's products.

Wishing to win back the appellant's custom, the then General Manager of Tanrose, a Mr Lotz, together with a Director of Tanrose, a Mr Gawith, called on Mr Levy, the Chairman of the appellant's Board, and made certain proposals to him concerning discounts. Pursuant to their discussion the following letter was sent to the appellant by Tanrose on 18 May 1972. The contents of this letter lie at the heart of the present dispute. It reads as follows:-

"QUANTITY DISCOUNTS

Further to our letter dated 1st May, 1972 and our subsequent discussions, we wish now to confirm that the maximum quantity discount being granted by this Company on all of its products will at all times apply to all purchases of these products made by your Organisation. This maximum discount will apply irrespective of the quantity purchased by your Group at any one time.

There are two further points which should be clarified. Firstly, since the above arrangement is effective from 1st May, 1972, which is the date of introduction of our new discount structure, we must confirm that your Organisation also qualified for all maximum discounts, irrespective of quantity, on all purchases made prior to. that date. This point is made in view of various invoicing anomalies that have arisen recently.

Secondly, it is confirmed that your Group will continue to qualify for all over-riders and other special rebates which have applied to date. According to our records, the 'special allowances' in operation at present are as follows:

(a) 2c per pound rebate on purchases in excess of basic target of all 'Tanganda' products;

(b) 2,5% over-rider on net value of all 'Five Roses' tea and coffee products:

(c) 2,5% over--rider on net value of all 'Cerebos' products.

"Net value in (b) and (c) above means value after deduction of

maximum quantity discounts.

The above summarises the situation as it exists now.

To streamline the position and to provide an added incentive for the distribution of our products, we would like to replace the present system with an 'across the board' over-riding discount of 3,5% on the net value of all purchases made by your Group.

Like the maximum quantity discount referred to previously, this confidential rebate will apply at all times to all purchases made by your Organisation. It is also suggested that this over rider be paid to your Company on a quarterly basis and be retrospective to 1st May, 1972. We trust you will find this proposal acceptable and look forward to receiving your agreement so that the arrangement may be instituted without delay.

Finally, we would like to thank you for the opportunity of discussing the overall situation with you and have pleasure in enclosing a copy of our current price list which also shows the discounts in force at present."

It is common cause that, by conduct, the appellant accepted all the terms of this letter without alteration, and from that time on until October 1982 the appellant was given all the discounts that are stated in the letter in respect of every purchase that it made from the respondent. For the sake of clarification I should say that throughout these proceedings the respondent has accepted that it is not merely Tanrose (Pvt) Ltd, from - whom the letter emanated, that was bound by its terms, but the respondent as well; Tanrose was merely the marketing company for the respondent's products.

Although the submission was not really necessary for the structure of his argument on the appellant's behalf, Mr Kriegler, Mr Holmes suggested that the learned judge a quo (McNaLLY in approaching the matter on the basis that the contract was a

written one embodied in the above-mentioned letter so that the so-called "parol evidence rule" and the rules

of construction of written contracts applied to it.

Mr Kriegler contended that a proper categorisation of the contract is that it was concluded orally as to part of it at the meeting between Gawith, Lotz and Levy; and by conduct as to the remaining part of it which was not mooted at that meeting, but which was first proposed in the letter and tacitly accepted thereafter.

It is factually correct that the letter contains matter that was agreed upon at two different stages and in two different ways, but it is not suggested that the parties expressly agreed in addition upon any matter that is not contained in the letter. In so far as the letter contained proposals that had not already been agreed upon, but which were tacitly accepted after the letter was received, those proposals are subject to the parol evidence rule.

In Harlin Properties Ltd and Anor v Los Angeles Hotel Ltd 1962 (3) SA 143 (AD) the court accepted, at 149H, the statement in Wessels' Law of Contract 2nd Ed vol 1 para 1797 that:-

> "If there is a proposal in writing and it is accepted simpliciter, the entire agreement is considered to be in writing, and no evidence is admissible to add to, diminish or vary the written proposal...".

And in so far as the letter contained written confirmation of matter that had earlier been verbally agreed upon, the situation is no different from that which arose in Cohn v Rand Rietfontein Estates, Ltd 1937 TPD 334 and with regard to which TINDALL J (as he then was) said at 336:-

"It will be observed that in the particulars these words occur: 'The agreement was verbal.

Such agreement was confirmed by the defendant under letter of the 20th June, 1933, copy whereof is annexed hereto.' It seems to me that we cannot construe these words to mean that all that was confirmed was the fact that an agreement was entered into.

It seems to me that the plain meaning of the words is that the terms of agreement were confirmed by the defendant under letter of 20th June, 1933, of which a copy is attached. The meaning of the word 'confirm' is clear: it means to make certain: and it seems to me that the only interpretation to put on these words is that the terms of the agreement were made certain in the letter in question.

There is nothing on the pleadings to show that the terms contain in the letter were repudiated or that they were objected to. On the other hand, the paragraph which I have quoted from the particulars leads to the inference that those terms were agreed upon. If that is so, the principles referred to in the case of Union Government v Chatv in (1931 TPD 317) apply. Although the letter is a unilateral document, prima facie on the pleadings it was accepted by the plaintiff as containing the terms of the contract, and that being so it sets out in writing the terms of the contract and it constitutes a contract in writing, and cannot be varied by oral testimony."

Everything that the letter contains is there for subject to the parol evidence rule. Indeed, the effect of the letter has been to integrate both parts of the agreement that the parties concluded. In National Board (Pretoria) (Pty) ltd and Anor v Estate Swanepoel 1975 (3) SA 16 (AD) at 260 the following statement from Wigmore on Evidence 3rd Ed Vol 9 para 2425 was approved

"This process of embodying the terms of a jural act in a single memorial may be termed the Integration of the act, i.e., information from scattered parts into an integral documentary unity.

The practical consequence of this is that its scattered parts, in their former and inchoate
shape, do not have any jural effect; they are replaced by a single embodiment of the act.

"In other words: When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are *legally* immaterial for the purpose of determining what are the terms of their act."

Having rejected Mr Kriegler's submission that the learned judge in the Court below erred in his approach to the categorisation of the contract embodied in the letter,
I must now further recount the history of the dispute that gave rise to these proceedings.

In October 1982 a representative of the respondent company verbally informed Mr Levy that the respondent intended to withdraw the over-riding discount that it

had allowed the appellant over the previous ten years.

Mr Levy challenged the respondent's right to withdraw this discount, but the respondent persisted in its attitude and addressed a letter to the appellant on 10 November 1982 advising that:-

> "As you know, we at Tangada now seek to vary the oasis on which Tanganda would De agreeable to continuing our supplier/customer relationship with and we, therefore, give notice that the overriding special rebate of *3,5%* on sales and any other special discounts which Maceys have hitherto enjoyed will be withdrawn with effect from 31 December 1982.
>
> Cur terms of supply to Maceys with effect from 01 January 1983 will be in precise accordance with our published price list and trade discount structure applicable to the retail trade and no special rebates of whatsoever nature will be paid
>
> Orders received from Maceys on and after 01 January 1983 will only be executed on this basis, prior to which we require to receive your written acceptance of the terms of supply as set out in the preceding paragraph."

The appellant still persisted in its contention that the respondent was not free to withdraw any of the discounts that it had allowed the appellant since 1972.

This attitude was met by a letter dated 9 December 1982,

written by the respondent's legal practitioners, which said:-

> "The letter of 18 May 1972 is not a contract to supply and sell, but is simply an agreement to give certain quantity discounts to your Client in respect of orders for purchases made by it if our Client does supply and sell to your Client. This is the whole tenor of the letter and the heading to the letter states this.

Our Client has now decided that it will not accept orders for purchases from and will not supply and sell to your Client from the 1st January 1983."

Mr Kriegler accepted that the discount agreement did not bind the respondent forever and a day but could be unilaterally terminated by the respondent upon reasonable notice. He submitted, however, that in order to give business efficacy to that agreement it is necessary to imply a term that, while the agreement remained in force, the respondent could not refuse to accept orders from the appellant; and that the Court can be satisfied that the parties themselves would both have replied without hesitation that the respondent could not so refuse

had this question been specifically asked of them when concluded the agreement, Mr Kriegler urged that without such an implied terra it was open to the respondent to have rendered the agreement nugatory from its very inception.

The submission has its appeal, and Mr Donovan was somewhat hesitant in countering the contention that the agreement was ineffective in a business sense if the respondent was free to reject any orders given to it by the appellant the very next day after the parties had agreed on the discounts that the appellant would enjoy. Nevertheless, I consider that MCNALLY J was correct in refusing to read such an implied term into the contract. It may be accepted that both parties would naturally have assumed that at the outset at least, the respondent was hardly likely to reject offers that it received from the appellant for its products. Indeed, the very purpose of the agreement was to woo back for the respondent the custom that the appellant had withdrawn.

The learned judge a quo pointed out, however, that "there is a world of difference between assuming a continuing state of affairs and guaranteeing or warranting its continuation".

In the context of the facts of this case I think that this is an accurate observation. The agreement was expressly directed only to the terms that would govern such

transactions as might take place between the parties, and was not directed to the entirely separate question concerning the respondent's obligation to accept whatever orders the appellant might place. Mr Donovan appears to me to be correct when he contends that one cannot be satisfied that the respondent would unhesitatingly have said, had the question been asked, that it was willing to bind itself to meet every order that the appellant would submit. Considerations such as, for example, the quantity and timing of any such orders; the requirements of other la customers and the respondent's capacity to meet all such requirements without undue difficulty; any temporary changes in the trading climate with regard to the respondent's products or to the appellant's popularity in the retail market, would seem to militate against a willingness on the respondent's part to be bound to accept from the appellant every order it might make. I do not think that this difficulty can be avoided by saying that it was always open to the respondent to terminate the whole agreement upon reasonable notice.

This conclusion is fatal to the relief that was asked for by the appellant which specifically sought to compel the respondent to accept and meet all orders placed by the appellant and to grant, in respect of all such orders, the discounts agreed upon in the letter of 18 May 1972.

It is therefore strictly not necessary to debate Mr Kriegler's further submission that, although the respondent has the right to terminate unilaterally the agreement (with the implied term contended for) upon giving reasonable notice of termination, the letter dated 9 December 1982 could not reasonably serve to terminate as soon as 31 December 1982

an agreement of this nature which had endured for more than ten years. Mr Kriegler went on to submit that there is insufficient evidence on the papers to discharge the respondent's onus of establishing what a reasonable period of notice would be under the circumstances, and he asked that the appeal should therefore be allowed and the orders asked for in the Notice of Motion granted, leaving it to the respondent to give afresh a notice of termination - should it so wish - that would be reasonable; alternatively, he suggested that, although the appeal must succeed, the matter continued be remitted for the Court a quo to determine, on such further"

evidence as the parties might wish to place before it, whether reasonable notice of termination was in fact given.

The letter of 9 December 1982 was not merely a refutation of the respondent's supposed obligation under the agreement to accept any and every order placed by the appellant. It went further and stated a settled intention to cease permanently to trade at all with the appellant after the end of December, thereby necessarily affirming that the 1972 agreement would terminate on that date.

That was not, however, the first notice of termination that the appellant was given. The **earlier** letter of 10 November 1982, which has already been referred to, gave formal notice of termination of the 1972 Agreement on 31 December, In the absence of any evidence to suggest otherwise it would seem to me that a notice of termination that was substantially longer than a calendar month is, prima facie, a reasonable notice having regard to the nature and the terms of the agreement in question, but, as I have said, it is not necessary to decide this aspect of the matter.

For the reasons that i have stated I would accordingly dismiss the appeal with costs.

GEORGES CJ: I agree.

GUBBAY JA: I agree.

Atherstone & Cook, appellant's legal representatives

Scanlen & Holderness, respondent's legal representative's