IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/58009

(1)	REPORTABLE: ~~YES~~ / NO	
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO	
(3)	REVISED.	
30.12.2021		**Electronic**
DATE		SIGNATURE

In the matter between:

KELLOGG COMPANY OF SOUTH AFRICA (PTY) LTD Applicant

and

BARLOW WORLD LOGISTICS AFRICA (PTY) LTD Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] This application comes before me by way of urgency for final, alternatively interim, interdictory relief.

[2] The applicant is Kellogg Company of South Africa (Pty) Ltd, a major cereal manufacturer in South Africa. The respondent is Barloworld Logistics Africa (Pty) Ltd, a specialist service provider.

[3] Given that final interdictory relief is not appropriate in urgent proceedings, the applicant sought interim relief at the hearing before me, in the following terms:

3.1 Pending the final determination of the dispute regarding the respondent's right to terminate its services to the applicant on one month's notice (which challenge is to be launched by the applicant within ten days of this order):

3.1.1 The termination as set out in the respondent's termination letter is suspended; and

3.1.2 The respondent is interdicted and restrained from taking steps to implement the termination of its relationship with the applicant on one month's notice on the basis of the termination letter, including taking any steps:

3.1.2.1. to reduce the level of service offered by the respondent to the applicant immediately prior to the termination letter; or

3.1.2.2. that jeopardises the performance of the respondent's obligations towards the applicant;

3.2 The respondent is to continue to provide the services to the applicant that it provided immediately prior to the termination letter.

[4] The applicant does not proceed with its claim for costs.

[5] The respondent opposes the application.

[6] Briefly stated, the background to this matter is a fixed-term master services agreement (the 'MSA'), in operation between the parties from 2015 to 30 June 2018, in terms of which the respondent provided logistical services to the applicant. Two formal fixed-term extensions of the MSA followed from 1 July 2018 to 30 June 2020 and thereafter from 1 July 2020 to 31 December 2020.

[7] As from January 2021, the parties continued with a services arrangement on an unwritten basis whilst negotiating a further extension of the MSA or a replacement services agreement. On 31 November 2021, the respondent gave the applicant one month's notice of the termination of its services to the applicant, such services to cease on 31 December 2021.

[8] The issue before this Court is whether the respondent is entitled to give notice of one month as it contends or whether it is obliged to afford the applicant reasonable notice of the termination of its services, such period being anything between three to six months according to the applicant, although the applicant is careful not to commit itself to a definite duration.

[9] The applicant contends that the parties' agreement from 1 January 2021, is one of indefinite duration, thus requiring reasonable notice of termination. Furthermore, that notice of one month is wholly unreasonable, thus unlawful, given the nature and extent of the applicant's business operation together with the complexity of the services that he respondent provides to the applicant. The applicant argues that notice of one month will cause the collapse of the applicant's business.

[10] The respondent, however, contends that with effect from 1 January 2021, it provides services to the applicant on a month-to-month basis, that a month-to-month agreement exists between the parties and it is well within its rights to afford one month's notice of the termination of its services to the applicant.

[11] The applicant alleges that notice of one month will cause the collapse of the applicant's business. The respondent denies this allegation in that the respondent's systems and services will always be available for use by the applicant, albeit that the cost thereof may differ from that incurred presently.

[12] The applicant relies in addition, on the norm in the industry that allegedly does not support termination on one month's notice.

[13] In this regard, the applicant failed to specify the identities of the relevant independent service providers relied upon by the applicant in its founding affidavit. Nor did the applicant allege the information provided to the independent service providers, leaving the respondent in a position where it was unable to meaningfully engage with or respond to the averments. The fact that the applicant augmented its allegations in reply, did not assist the applicant.

[14] It is common cause that a tacit agreement exists between the parties as from January 2021. The dispute centres on whether the parties' agreement is one of indefinite duration, (in which case reasonable notice of termination is required), or, is a month-to-month agreement, (pursuant to which notice of one month is appropriate).

[15] My task is to determine the characterisation of the most probable agreement. The answer to the latter enquiry will determine the lawfulness or otherwise of the respondent's

notice of one month to the applicant. Given that the parties' agreement is tacit, the determination of the most probable agreement is a fact-based enquiry.

[16] As a result of the MSA and the two extensions thereof being fixed term agreements, they do not include notice periods for their termination. Thus, the material terms of the MSA and the extensions thereof that continue to apply to the prevailing agreement, do not include a notice period.

[17] The applicant referred to and relied upon *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd*[1] ('*Plaaskem')* where the Supreme Court of Appeal stated that:

'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.'

[18] The issue in *Plaaskem* however was whether the agreement was one in perpetuity or whether it was terminable, somewhat different to the issue before me.

[19] In the event that the parties' agreement is not a month-to-month agreement then the question of the reasonableness or otherwise of the notice period arises. The applicant relies on *Amalgamated Beverage Industries Limited v Rond Vista Wholesalers* in support of its contention that the reasonableness of the notice period is tested at the date that the notice was given[2] and must be determined in the light of all the relevant circumstances.[3]

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1 *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA) paras 11 – 16 ('*Plaaskem*').

2 *Amalgamated Beverage Industries Limited v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA) paras 17 – 18 ('*Amalgamated*'),

3 Id paras 19 and 23.

[20] All relevant circumstances include those relevant to both the applicant and the respondent, the parties' conduct and the applicant having sufficient notice to regulate its affairs.[4]

[21] The applicant relies upon the Constitutional Court's formulation for importing tacit terms:

'The test for inferring a tacit term is whether the parties, if asked whether their agreement contained the term, will immediately say "yes, of course that's what we agreed".'[5]

[22] As stated by Brand JA in the *City of Cape Town (CMC Administration) v Bourbon-Leftley*:[6]

'A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time.'

[23] In order for me to find on the facts that the term upon which the applicant relies is a tacit term, "the common intention of the parties in such a case is inferred by a court from the express terms of the contract and the surrounding circumstances, including the subsequent conduct of the parties".[7]

[24] It must be apparent on the relevant facts that the parties intended the inclusion of the term and that they would not have contracted other than by including such a term.[8]

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4 Id paras 19 and 23.

5 *Food and Allied Workers Union v Ngcobo N.O. & Another* 2014 (1) SA 32 (CC) para [37] ('Ngcobo N.O.').

6 *City of Cape Town (CMC Administration) v Bourbon-Leftley* [2006] 1 All SA 561; 2006 (3) SA 488 (SCA) [19].

7 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531-2; *Botha v Coopers & Lybrand* 2002 (5) SA 349 (SCA) at 359.

8 Wille's Principles of South African Law 9th Edition p799.

[25] A term will be imported tacitly only if it is necessary 'in the business sense to give efficacy to the contract'.[9] The implication must be one of necessity and not merely reasonable.

[26] Thus, the applicant must demonstrate consensus between the parties as to an agreement of indefinite duration and a termination clause providing for reasonable notice of the agreement.

[27] The relevant circumstances according to the applicant comprise the apparently complex handing over of the services provided by the respondent to a replacement service provider.

[28] The respondent manages a number of warehouses, stocked with a vast amount of the applicant's product and there are various complexities involved in conveying that product to the applicant's customers.

[29] The terms that operated until 31 December 2020 imposed upon the respondent the risk of providing services at a standard that both parties concede the respondent is currently unable to meet.

[30] It is common cause between the parties that the respondent struggled to meet the increase in its obligations imposed on it pursuant to the expansion or explosion of the applicant's business since the parties commenced business during 2015.

[31] Notwithstanding, the parties attempted to negotiate a formal services agreement during the course of 2021 but to no avail.

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9 *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* (1918) 1 K B 592 (15 January 1918).

[32] The applicant contends that the respondent's conduct during the course of 2021 is consistent only with an intention to continue its relationship with the applicant. The applicant fails to consider however that whilst the respondent made at least two written proposals during the course of the parties' negotiations, the underlying premise of the proposals was that new commercial terms be agreed between the parties.

[33] The applicant's answer is that the fact that the respondent is struggling to deal with the workload does not afford it any 'special termination rights' as contracts ought to be upheld notwithstanding that doing so may visit harsh consequences upon one of the parties.[10]

[34] In effect, the applicant contends that it is entitled to hold the respondent to terms that the respondent considers commercially onerous and unviable, indefinitely and pending reasonable notice taking effect. The respondent, contrarily, contends that given the absence of an agreed arrangement after almost one year of negotiations, and regard being had to the unviable terms of the contract that terminated as at December 2020, the respondent is entitled to exit the prevailing arrangement.

[35] In correspondence dated 17 September 2021,[11] the respondent advised the applicant that the existing arrangement was no longer acceptable to the respondent as it placed the respondent in 'a commercially precarious position'.

[36] Subsequently, on 28 September 2020, the respondent proposed revised terms to the applicant requiring that the parties reach agreement by 31 October 2021'.

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10 *Beadica 231 CC & Others v Trustees of the time being of the Oregon Trust & Others* 2020 (5) SA 247 (CC) para 79 – 83 ('*Beadica*').

11 FA6 002-90.

[37] The applicant failed to engage meaningfully with the respondent's correspondence aforementioned, resulting in the respondent on 15 November 2021, advancing proposals to govern the parties' relationship for a six-month interim period to address *inter alia* the 'precarious position both parties found themselves in since the expiry of the agreement governing the relationship on 31 December 2020', and that the parties finalise 'the terms of agreement between them, … by 30 November 2021'.

[38] Thus, the respondent contends that the applicant well-knew that the respondent required an agreement to be concluded between the parties by 30 November 2021 or it would exit the negotiations and its relationship with the applicant.

[39] The respondent contends that the applicant understood the respondent's position given the applicant's correspondence of 24 November 2021 in which the applicant stated *inter alia* that the parties were party to a 'contractual relationship … (and) any termination would have to be preceded by a reasonable notice period which in the current circumstances will be a period of at least six calendar months. … (The applicant) intends to enforce the terms of the current contractual relationship …'.

[40] In correspondence dated 6 December 2021, the applicant informed the respondent that the termination notice did not accord with the contractual relationship between the parties and did not 'provide reasonable notice' to the applicant of the termination of the contract. The applicant averred that a termination date of 31 March 2020 was 'agreed' between the parties notwithstanding that there is no documentary support of the contention.

[41] In short, the applicant declined to negotiate an extension of the MSA or a new agreement with the respondent, rejecting the respondent's proposals and failing to make any counter-proposals.

[42] In so far as the applicant criticises the respondent for driving a ‘hard bargain’, the applicant did the same in failing to engage meaningfully in the negotiations with the respondent.

[43] The applicant knew on 17 September 2021 that the respondent could not, and was not prepared to, continue the agreement on the terms that the applicant sought to enforce. The respondent repeated its position in its letter of 28 September 2021 in which it proposed in addition that terms be agreed by 31 October 2021. Thus, the applicant knew that if terms were not agreed by the latter date, the respondent would terminate the contract. This much is clear from the applicant’s letter of 24 November 2021.

[44] Notwithstanding, the applicant failed to source a replacement service provider and declined to offer counter-proposals to the respondent.

[45] The applicant does not point to any fact or surrounding circumstances that signifies that the respondent assented to an indefinite agreement or termination on reasonable notice. Moreover, there is nothing to be gleaned from the surrounding circumstances that support the applicant’s contention.

[46] Moreover, the applicant’s reliance on an indefinite agreement stands contrary to the parties’ history of fixed term agreements. Furthermore, the respondent denies that the parties concluded an indefinite agreement.

[47] The onus lies with the applicant to demonstrate *prima facie* although open to some doubt, the prevailing tacit indefinite agreement including the terms of that agreement, upon which the applicant place reliance.

[48] Regard being had to the facts set out above, particularly the allegedly onerous and unviable terms of the agreement that existed until 31 December 2021, would the respondent have 'necessarily agreed upon such a term if it had been suggested to (the parties) at the time.' The answer must be in the negative.

[49] It is wholly improbable that the respondent in the circumstances described by me, if asked by an objective bystander whether it would not have contracted otherwise than on the basis of an agreement of indefinite duration terminable on reasonable notice, would have replied in the affirmative.

[50] Whilst the applicant, if asked if it would not have contracted otherwise than on the basis of a tacit month-to-month agreement terminable on one month's notice would, in all probability, have replied in the negative, it is the applicant who must demonstrate *prima facie* although open to some doubt, the contract and the terms that it relies upon.

[51] The result is that the applicant's claim to an indefinite agreement terminable on reasonable notice between the parties, must fail. I make no finding that the agreement is a month-to-month agreement as I need only determine whether the applicant meets the required threshold, which it does not do.

[52] Thus, there is no basis for me to find that the applicant holds a right *prima facie* established although open to some doubt,[12] to the interim interdictory relief claimed by it.

[53] In the light of my conclusion in this matter, it is appropriate that the costs of the application follow the merits and an order in such terms will follow below.

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12 *Webster v Mitchell* 1948 (1) SA 1186 (W).

[54] By reason of the aforementioned, I grant the following order:

1. The application is dismissed with costs including the costs of two counsel where two counsel were used.

A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 30 December 2021.

COUNSEL FOR THE APPLICANT:	Mr J V T McNally SC
ATTORNEYS FOR THE APPLICANT:	Webber Wentzel Attorneys
COUNSEL FOR RESPONDENT:	Mr J Campbell SC & Mr A Laher
INSTRUCTED BY:	Bowman Gilfillan Attorneys
DATE OF THE HEARING:	21 December 2021
DATE OF JUDGMENT:	30 December 2021

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A A CRUTCHFIELD SC

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

Electronically submitted therefore unsigned