

SOUTH AFRICA / JUDGMENT

Kempster Sedwick (Pty) Limited v Monument Car Wash & Valet CC (A5076/2015) [2021] ZAGPJHC 397 (15 September 2021) [2021] ZAGPJHC 397

COURT

South Gauteng High Court, Johannesburg

BEFORE

Matojane, Adams, Nichols

CASE / FILE NUMBER

A5076/2015

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

Date:

15th

September 2021

CASE

NO: A5076/2015

In

the matter between:

KEMPSTER
SEDWICK (PTY) LIMITED
Appellant
and
MONUMENT
CAR WASH & VALET CC
Respondent
Coram: Matojane,
Adams JJ et
Nichols AJ
Heard: 16
August 2021 – The ‘virtual hearing’ of the Full
Court Appeal was conducted as a videoconference on the Microsoft
Teams digital platform.
Delivered: 15
September 2021 – This judgment was handed down electronically
by circulation to the parties' representatives via
email, by being uploaded to the CaseLines
system of the GLD and by release to SAFLII. The date and time for
hand-down is deemed to be 11H00 on 15 September 2021.
Summary: Contract
– for the rendering of services – contractual
interpretation – admissibility of contextual evidence –
parol evidence rule – agreement of indefinite duration –
pactum de contrahendo – contractual damages arising from
breach of contract – in assessing the sufficiency of the
evidence in support of the quantum
of the damages, a ‘fairly
robust approach’ may be adopted – appeal dismissed
ORDER
On
appeal from: The Gauteng Local
Division of the High Court, Johannesburg (Mokgoathleng J sitting as

Court of first instance):

(1)
The appellant’s appeal against the order of the court a quo
is dismissed with costs, including those costs previously reserved.
(2)
The order of the court a quo is confirmed.

JUDGMENT

Adams J (Matojane J et Nichols AJ concurring):

- [1] During November 2004, the appellant[1], Kempster Sedgwick (Pty) Limited ('Kempster'), and the respondent[2], Monument Carwash and Valet CC ('Monument'), entered into an agreement ('the agreement') in terms of which Kempster outsourced to Monument the carwash and related services at its Dealership in Roodepoort. In terms of the agreement, Monument alone was to attend to the interior and exterior cleaning requirements of all vehicles sold and serviced by Kempster at the Dealership.
- [2] The issue in this appeal is simply whether the agreement was a contract of indefinite duration. The parties did not reduce to writing all of the material terms and conditions of the agreement between them. Importantly, they omitted to agree expressly and in no uncertain terms on the period during which the agreement would endure. And, because of that, this dispute arose between the parties, which relates to whether or not the contract between them was to endure for a period of one year or indefinitely.
- [3] Kempster is a motorcar Dealership, which does business as a retailer of new and used motor vehicles. It also services and does repairs of motor vehicles. Monument, as its name suggests, is in the carwash business, which includes valets and other related services. As indicated, during November 2004, Kempster, under the leadership of its then Dealer Principal, a Mr Petzer ('Petzer'),

decided to outsource the carwash, car cleaning and valet services required at its Dealership in Roodepoort. Monument, who was known to Petzer, who had dealings with Monument whilst at other motorcar dealerships, was then required to make to Kempster a business

proposal in relation to the provision of such services, which they did.

- [4] Pursuant to a presentation made by Monument to Kempster and following discussions between their representatives, an agreement was concluded between the parties in terms of which Monument was to render to Kempster specified carwash, valet and related services at an agreed price. The agreement between the parties was partly in writing and partly oral, and in terms of the agreement, Monument would render to Kempster the following services: cleaning of the interior and exterior of cars – full car washes; steam cleaning of car engines and chasses; valets; removal of oxidation and body polish; paint protection and auto care; upholstery protection and leather treatment.
- [5] As already indicated, the parties agreed on the fees to be charged by Monument in respect of the services to be rendered to Kempster. This part of the agreement was contained in the written portion, which was constituted by a one-page document, signed on behalf of Monument by a Ms E C Van Heerden ('Van Heerden') and by Petzer on behalf of Kempster. The document, which strangely

enough was not dated, was authored by Monument and commenced with the following sentence:

'We thank you for the opportunity and are pleased to quote as follows:'

- [6] The concluding paragraph reads as follows:

‘This contract will be in place from the 1st of December 2004 and will be revised on a yearly basis thereafter.’

[7] This document provided, for example, that Monument would charge Kempster an amount of R55 (including value added tax) for the PDI (pre-delivery inspection) removal of plastic stickers from a vehicle and R250 for a full valet of a used car. Another example is that an amount of R513 would be charged for the valet of a used car, including the application of auto care paint protection, as well as upholstery protection. Certain charges were set at a monthly rate. So, for example, the washing of all of Kempster’s demo vehicles was charged for at a set tariff of R1368 per month.

[8] It is common cause that the agreement was concluded during November 2004 and came into operation with effect from the 1st of December 2004. What is however not so clear is what the parties had agreed upon regarding the duration of the contract. In that

regard, nothing was expressly stated or discussed between the parties in either the written or oral portions of the agreement. And that is the dispute which needs to be adjudicated in this appeal.

[9] Monument’s case in this Full Court appeal and in the trial court was that the agreement between the parties was that the services would be rendered indefinitely and that the contract would endure for as long as its (Monument’s) standard of service delivery remained of a generally acceptable standard to Kempster. Monument pleaded its cause in the trial court as follows:

‘[The parties], when concluding the agreement, intended to be bound in perpetuity for as long as [Monument’s] standard of service

delivery remained of a generally acceptable standard to [Kempster].’

[10] Kempster, on the other hand, was and is of the view that the agreement was only to be for a one-year period. In support of their stance, Kempster relies heavily on the written part of the agreement which indicates that the contract was to be revised on a yearly basis. This Kempster interprets to mean that the contract was for a one-year period from the 1st of December 2004 to the 30th of November 2005. Monument disagrees. Having regard to the context and the way in which the parties conducted themselves, so Monument

contends, the agreement was that the contract would be for an indefinite period, terminable only in the event of Monument’s

standard of service delivery not being of a generally acceptable standard to Kempster. It is also not without significance that during the trial in the court a quo, Monument’s case was ostensibly supported by the evidence of Mr Petzer, who, it will be recalled, represented Kempster when the agreement was concluded during November 2004.

[11] The evidence on behalf of Monument was that that the implementation of the agreement worked well for the period from December 2004 to the end of October 2005, when Kempster unceremoniously evicted Monument from the premises ostensibly on the basis that the contract had run its course and Monument was to be replaced by another carwash and cleaning Contractor with effect from the 1st of November 2005. This, according to Monument, amounted to an unlawful repudiation by Kempster of the contract, which entitled them (Monument) to contractual damages for breach of contract. Incidentally, at the hearing of this appeal, it was conceded by

Kempster that, in evicting Monument from their premises at the end of October 2005, they (Kempster) breached the agreement, which, on their version was only due to come to an end at the end of November 2005. In other words, Kempster accepted that their summary cancellation of the agreement at the end of October 2004 amounted to an unlawful repudiation of the agreement, entitling Monument, at least in theory, to damages for breach of contract.

[12] I interpose here to note that during the trial in the court a quo Kempster presented evidence by Mr Beeckman, its Dealer Principal during November 2004, and a Mr Kruger, its Sales Manager at the time (November 2004), which suggested that the agreement was cancelled because Monument's standard of service delivery was no longer at a level acceptable to Kempster. This, so the evidence went, entitled Kempster to cancel the agreement with effect from the 1st of November 2004. This was denied in the strongest possible terms by Monument and Ms Van Heerden during her evidence, as was the

claim by Kempster that at the end of October 2004 Monument, through its member, Ms Van Heerden, accepted and agreed to the cancellation

of the agreement with effect from 1 November 2004.

[13] The trial Court appears to have rejected, in my view, rightly so, Kempster's version and accepted Monument's on these aspects. The detailed version of Ms Van Heerden on these aspects was corroborated by a contemporaneous email sent to Kempster on the 6th of November 2004, in which she placed on record her version of events relating to the unlawful repudiation of the agreement by Mr Beeckman and the other representatives of Kempster. The trial court's factual finding in that regard can therefore not be faulted.

[14] In any event, on the basis of the principles enunciated in *R v Dhlumayo & Another*[3], I cannot and should not interfere with the factual findings of the trial Court. In that matter, Davis AJA at pg 706 held as follows:

'[8]. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.'

- [15] I am not convinced that the trial Court was wrong in its findings relating to these facts – far from it. I have little doubt that there has been no misdirection on the part of the trial Judge in that regard. And this is probably why this contention – that the agreement was lawfully cancelled in terms of the cancellation clause – was not pursued with any vigour on appeal.
- [16] During August 2007, Monument instituted action in the High Court against Kempster for damages for breach of contract. Kempster disputed liability to Monument and defended the action on the basis that it was fully within its rights to evict Monument from their premises as the contract expired at the end of November 2005 after a period of one year. They therefore denied that they were in breach of the Agreement and that they were liable for damages.
- [17] The trial court (Mokgoathleng J), after considering the evidence, concluded that the contract was for a period in excess of one year. He accepted the version of Monument that the agreement was to endure indefinitely. He accordingly made the following order:
- ‘1. The defendant is ordered to pay the plaintiff damages in the amount of R420 000 in respect of future loss of profits.
2. The defendant is ordered to pay the plaintiff the amount of R97 817.95 in respect of loss of wages, meaning that the defendant is ordered to pay in aggregate the plaintiff the amount of R517 817.95, plus cost of suit, including all the reserved costs in the prosecution of this matter.’
- [18] The appeal lies against this order with leave of the Supreme Court of Appeal. The question for determination on appeal is whether the trial court’s legal conclusion and its interpretation of the agreement were correct. The questions to be answered are: (1). What was the agreement between the parties as regards the duration of the contract? (2). Did the parties agree on a one-year contract or did they agree that the contract would endure in perpetuity?
- [19] In its particulars of claim, Monument pleaded that the agreement was to endure for as long as Monument’s standard of service delivery remained of a generally acceptable standard to Kempster. I understand this to mean that, according to Monument, the agreement was to endure indefinitely and in perpetuity and that neither of the parties could under any circumstances cancel the agreement for as long as the services rendered by Monument pursuant to the agreement were of a standard generally acceptable to Kempster.
- [20] Monument’s cause of action, based on a contract of indefinite duration, is sound and legally sustainable. In that regard, *Unterhalter J in Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd*[4], held as follows:
- ‘[8] It is common ground between the parties that an agreement of unspecified duration is a valid agreement. Such an agreement cannot be terminated unless it contains a clause to that effect, express or tacit.

... ..

- [10] The exception proceeds from an incorrect premise. As the Pillman case makes plain, absent a term of the agreement permitting of termination (which is a question of construction), there is no presumption that a contract of unspecified duration is terminable on reasonable notice. If the agreement is one in perpetuity, then the parties will be held to that bargain.
- [11] Pilot pleads that the agreement was continuous and indefinite. The agreement is thus not of unspecified duration in the sense that it is silent on the matter of duration, rather it is specified to be indefinite. Once that averment is made, the agreement must be understood to endure in perpetuity, and there is no requirement to plead that the agreement is not terminable. There is no presumption that an agreement expressed to be of indefinite duration must be taken to be tacitly subject to termination on reasonable notice. On the contrary, once the agreement is expressed to endure in perpetuity, it is for the party relying on reasonable notice to make the case for such a construction. No such burden rests upon Pilot.
- [12] This conclusion is not at odds with the holding in Putco. In Putco the express language of the agreement stipulated that it was a temporary interim arrangement and hence the intention of the parties could not have been that the agreement continues indefinitely. As the court in Putco made plain: where the agreement is silent as to duration, it is terminable on reasonable notice, in the absence of a conclusion that it was intended to continue indefinitely.’
- [21] This postulation by Monument relative to the agreement was denied by Kempster in its plea. It pleaded that the contract would be in place from the 1st of December 2004 and was to be revised on a yearly basis thereafter. Kempster furthermore pleaded that, in the event that the contract was not revised as aforesaid, it would terminate after a year from its inception, that being the 30th of November 2005.
- [22] From the evidence led during the trial, I think that it can safely be accepted that there was no express agreement relative to the period of the contract. So, for example, the evidence-in-chief of Petzer on that point went as follows:

‘Monument’s Counsel: U het reeds vir die agbare hof gesê u was namens die verweerder en Mnr Fenner en Mev Van Heerden namens die eiser. Nou benewens hierdie prysstrukture wat daar onderhandel was, was daar verdere onderhandelinge oor die [onhoorbaar] van die eiser gewees en die manier waarop hulle die diens sou verskaf?

Mr Petzer: Van my kant af, van die maatskappy se kant af, op daardie stadium was daar nie verdere vreeslike onderhandelinge nie. Dit was ’n proses waarin ek [onhoorbaar] gevra het, kom aan boord en doen die ding vir ons ordentlik. Wat toe tot gevolg gehad het dat met die huidige uitleg van waar die voertuile gewas was, was daar verskeie goed wat moes gebeur het. Ek herinner myself aan ’n drain wat gebou moes word en ek herinner myself aan afvoerwater wat gekanaliseer moes word [tussenbei]

Op die eerste perseel herinner ek my dat daar daadwerklike veranderings moes plaasgevind het om effektiewe dienste te kan lewer

en die detail daarvan moet ek bieg 'n paar, die drain kan ek onthou, die afloop-voere kan ek onthou. Dit was relatief gevaarlik waar die water heen gevloei het wat volgens reëls en regulasies moes nagekom word. Daardie spesifieke prosesse het ek aan die diensverskaffer

oorgelaat, en in 'n relatiewe kort tydjie was al daardie goed in plek en het die dienslewering dan relatief vlot verloop.'

[23] And then later on in his evidence-in-chief, Petzer had this to say:

'As ek die vraag kan antwoord soos wat ek die betrokke intensie van die onderhandelings kan herroep, is dit was daadwerklik onderhandel dat die kontrak sal begin. My, met my verstandhouding dat die kontrak sal beëindig wanneer die dienste nie korrek gelewer is nie. Nou my rekolleksie van die intensie van waarom hierdie ding begin is, was daadwerklik op 'n langer termyn as net 'n jaar gebaseer, as dit enige lig op enige aspek kan werp.

Monument's Counsel: Nou u sê dit was u begrip van die intensie, wie se intensie?

My intensie as handelaarshoof van die handelaarskap was definitief om dit 'n langer termyn as net 'n jaar te [onhoorbaar].

Monument's Counsel: Hoekom so, kan u vir die hof verduidelik hoekom u bedoeling so was?

Daar is geen miskonsepsie by my dat hierdie tipe dienslewering, soos baie ander tipe dienslewering in ons bedryf 'n mens nie lukraak veranderings aanbring nie. 'n Mens bou 'n verhouding op met 'n verskaffer en probeer dan daardie verhouding kweek tot tyd en wyl either een kan of die ander kant, in hierdie prosesse dan die verskaffer, die dienste nie meer na die, either na hulle vermoë

lewer nie, of na die verwagting van die handelaar. Dit is nie n prosesse wat weekliks in heroorweging geneem word nie.

... ..

Monument's Counsel: Met hierdie, of in hierdie onderhandelings prosesse wat u vir die hof sê uiteindelik die ooreenkoms tot gevolg gehad het, het u en die eisers, Mev Van Heerden en Mnr Fenner saamgestem oor die duur van die kontrak, of oor hoe lank dit sou moes wees?

Ek het, ek het geen illusies gehad oor die duur van die kontrak nie. Ek sou nie kan sê, ek sou nie direk kan sê wat Monument Car Wash se bedoeling was nie, ek kan net aannames maak daar.

Monument's Counsel: Is dit bespreek tussen u daar?

Het u aan die een kant, en Mev Van Heerden en mnr Fenner, onderhandel oor die duur van die kontrak op daardie dag toe u hierdie dokument bespreek het en die onderhandelings gevoer het?

Ek kan nie onthou of ons spesifiek oor die totale tydperk van die kontrak onderhandel het nie. Wat ek wel onthou is dat daar nooit 'n spesifieke beperking op die kontrak geplaas is nie. Ek sal nie die waarheid praat as ek sê ons het gesê dit gaan 'n twee-jaar termyn of 'n drie-jaar termyn of 'n vyf-jaar termyn wees nie. Wat ek wel weet is dat die tipe kontrakte word nie gewoonlik vir minder as drie jaar geskryf nie.'

[24] The evidence of one of the members of Monument, a Mr Fenner, who also represented Monument when the contract was concluded, went as follows on this point relating to the duration of the agreement:

'Monument's Counsel: Met ander woorde vir hoe lank moes u hierdie dienste verskaf het?

Mr Fenner: Daar was werklikwaar, ons kan sê die tendens daar buite soos wat ek ook met al my ander Dealerships het, is werklikwaar dit is 'n oop kontrak. Solank as wat ek die diens lewer en waarde vir die dealership gee is hulle, sal hulle ... hou hierdie kontrak net aan, behalwe vir op 'n jaarlikse basis wat ons net dan die pryse hersien. Ons moet eskalasie in ag neem ook aan die dealership se kant.

Monument's Counsel: Die verweerder se saak is dat die ooreenkoms gesluit was net vir 'n jaar. Wat is u kommentaar daarop?

Mr Fenner: U Edele, nee, absoluut nie. Eerstens om 'n span van, ek dink dit was omtrent 7 mense oor te vat vanaf niks, 'n wash bay en alles op te sit vir 'n jaar, dis – geen persoon sal ooit so 'n besluit [onhoorbaar] dit is [onhoorbaar], niemand sal dit so, so n ooreenkoms [onhoorbaar] nie. Dit is, hierdie was 'n verhouding wat oor jare gebou word. So [onhoorbaar] huidiglik 15 jaar by hierdie [onhoorbaar], dit kom oor jare. Dit is nie 'n, dit is glad nie dat dit 'n jaar sou gewees het nie. Ek sou glad nie eers

in so iets ingegaan het as dit moes vir n jaar gewees het nie, en dit kan u sien aan my kostes wat ek aangegaan het. Daar is geen manier wat 'n mens daardie kostes sal [onhoorbaar] in 'n jaar se tyd om te [onhoorbaar].'

[25] Under cross-examination, the evidence of Mr Fenner on this point continued as follows:

‘Kempster’s Counsel: Nee, maar wat ek eintlik in belangstel is, wat ek wil weet is, wat is, of enigsins iets gesê is in verband met die duur van die kontrak. Kan u spesifiek onthou dat julle daaroor gepraat het? ---

Mr Fenner: Daar was glad nie, ons het glad nie daaroor gepraat in daardie sin nie. Dit was [onhoorbaar] van al twee partye dat hierdie is 'n aaneenlopende [onhoorbaar], daar is nie 'n einde op dit nie. Soos ek voorheen getuig het, ek sal nooit in so iets ingegaan het as daar 'n tyd periode op so iets was.’

[26] The point about these extracts from the evidence led during the trial is simply that there was no express agreement between the parties as regards the duration of the agreement. The question, therefore, is whether the parties tacitly agreed on the duration of the contract.

[27] Kempster’s case, as I have already indicated, was that the agreement was to come to an end on the 30th of November 2005 and in support of that viewpoint, reliance was placed on the wording of the written portion of the agreement, which was to the effect that the contract would be in place from the 1st of December 2004 and would be revised on a yearly basis thereafter. This, so Kempster contends, should be the end of the matter – the wording of the agreement, which is clear and unequivocal and requires no interpretation, provides that the contract would come to an end after one year as it would have been revised at that point. In the absence of such revision, so the contention on behalf Kempster goes, there would have been no contract in place.

[28] Moreover, so it was submitted by Mr Smit, who appeared on behalf of Kempster, in subsequent correspondence from and on behalf of Monument, this view is in fact supported by Monument. So, for example, on the 7th of November 2005 – about seven days after Monument was evicted from their premises by Kempster – Ms Van Heerden, the other member of Monument, addressed an email to Kempster in which she confirmed that the parties had entered into ‘a contractual

agreement for a provisional period of one year’.

[29] Also, on 2 February 2006, Monument’s attorneys addressed a letter to Kempster in which it was stated that:

‘The services provided by [Monument] would, in terms of the agreement, be for a period of one year, whereafter it would be renewed again for another year’.

[30] As indicated above, Monument contends that the agreement was to endure in perpetuity. This contention is based on the circumstances surrounding the conclusion of the contract. Monument also disputes the claim by Kempster that the agreement is clear, unequivocal and not open to an interpretation other than one to the effect that the agreement was to commence on 1 December 2004 and end on 30 November 2005. The evidence on behalf of Monument was that the reference in the written part of the agreement to ‘the contract’ being revised on a yearly basis after its commencement on the 1st of December 2004, was intended to refer to the pricing structure, which would be revised annually. I will

revert to this aspect of the matter later on in the judgment. For the moment, it suffices to say that at first blush, there is merit in Monument's contention that the wording of the particular clause is certainly open to an interpretation that supports its version. One needs look no further than the way in which the relevant clause is structured – it is not inconceivable that, according to this clause, the contract was to commence on 1 December 2004 and that the written portion, which dealt almost exclusively with the pricing, would be reviewed annually. My view, therefore, is that the parol evidence rule was not offended by the testimony for Monument that what the parties intended was not to agree that the agreement itself would be revised but only the pricing structure.

[31] I find support for this view in what was recently said by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*[5]. At para 69 Khampepe J held as follows:

'[69] What the preceding discussion clearly shows is that, to the extent that the Supreme Court of Appeal in the current matter purported to revert to a position where contextual evidence may only be adduced when a contract or its terms are ambiguous, it erred. Context must be considered when interpreting any contractual provision and it must be considered from the outset as part of the unitary exercise of interpretation.' (My emphasis).

[32] The pertinent question is whether the parties tacitly agreed that the agreement would be of indefinite duration. In seeking to answer this question the approach to be adopted should be as per *Trident Sales (Pty) Ltd v A H Pillman & Son (Pty) Ltd*[6], which held that (1) It is a question of construction of the agreement according to the ordinary principles of construction; (2) Since, however, such agreements, *ex hypothesi*, contain no express provisions 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 either way; (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.

[33] Once a Court is persuaded that, on a proper construction of their agreement, the parties intended to be bound in perpetuity, there is no reason why such a bargain, like any other, should not be enforced.

[34] I agree. This is the approach to be adopted in this matter when interpreting the agreement between the parties. Importantly, the context in which the agreement was concluded was testified about by the witnesses on behalf of the plaintiff, notably by Mr Petzer, whose evidence was to the effect that it was envisaged by the parties that the agreement would endure for a considerable period of time. This agreement, in particular, required of Monument to invest in the infrastructure and setting up of the car wash premises at Kempster to support the carwash.

[35] Kempster specifically required Monument to set up a Valet Centre at the premises of Kempster. This was unusual as all cars for other Dealerships were normally valeted at Monument's premises. Therefore, this was an additional expense that Monument had to incur for the specialised valet equipment, such as high pressure-washing machines, dryers and bigger vacuum cleaners. Additionally, specialised valet staff members were required to be seconded to Kempster. The start-up costs, which was for the account of Monument, amounted in total to approximately R170 000. These costs included the costs of moving the Car Wash, the Valet Centre and all the equipment and machinery to new premises after Kempster moved their Dealership early in 2005. The evidence of Mr Fenner in relation

to these expenses was to the effect that Monument believed that these costs would in the course of the duration of the agreement be recouped by them.

[36] Kempster also required of Monument to take over all of the Kempster staff – about seven in total – who were involved at that stage in the car wash and cleaning side of the business. This investment, in the normal course of events, would only start showing a dividend after a few years of being operational.

[37] The first issue which needs to be addressed is whether the agreement was for an indefinite period of time. In that regard, the witnesses of Monument were cross-examined at length on the agreement which would have prevailed in the event of the parties being unable, when the pricing was being revised, to reach agreement. Most of the witnesses were not able to give a definitive answer, as they were confident that that scenario was unlikely to eventuate. This then gives rise to a further question, that being whether the

agreement was not a species of pactum de contrahendo, i.e. an agreement to make a contract in the future. If so, it might not be enforceable.

[38] The trial Judge accepted Monument's contention that the agreement was to continue in perpetuity unless it was terminated on the specific ground set out therein. The trial Judge also rejected Kempster's contention that the agreement came to an end on the 30th of November 2005. In arriving at a proper construction of the agreement the trial Judge, on the basis of the context in which the

agreement was concluded, held that it was to be interpreted as enduring in perpetuity. The trial Judge said:

'Consequently, despite the fact that Ms van Heerden in an email which she had addressed to [Kempster] had stated that the contract was provisionally for a year, there is a reasonable explanation which is bona fide that when she wrote that letter she was upset and she was not in her normal state of mind. Also, that the attorneys who previously represented [Monument] had written a letter to [Kempster's] attorneys wherein they stated that the contract concluded between the parties was concluded to endure for a year.'

Mr Fenner and Ms van Heerden vehemently denied that such instructions were given to the attorneys, because they at all reasonable times understood that the contract would have to endure for a period in perpetuity. For this contention, this court finds comfort in that it is confirmed by Mr Petzer, who said unequivocally that the contract was not intended to endure for a year, it was intended to endure in perpetuity or at least for a minimum of three to five years. Consequently, the court finds that that was the intention of the parties.'

- [39] I agree. Applying the principles in *Trident Steel* and having regard to the evidence led during the trial and the context in which the agreement was entered into, the contract was to continue for an indefinite period. As indicated above, I do not believe that the language and the wording of the written portion of the agreement is in conflict with this interpretation. On the contrary, I am of the view that, on a proper interpretation, the relevant clause simply provides that the pricing shall be revisited on a yearly basis. In the light of the words of the clause, the parties probably contemplated that, failing agreement on a new pricing structure when same fell due to be revised within a year from 1 December 2004, the agreement, as it stood, would have been binding upon them in perpetuity.
- [40] I do not agree with Kempster's contention that the language used in the agreement is inconsistent with an intention that the agreement should continue indefinitely if agreement on a revised pricing structure was not reached. The parties clearly contemplated that the agreement would endure for a period well in excess of one year, and their rights and obligations under the agreement must be determined on that basis. Furthermore, the parties bound themselves to an agreement which required them to work closely together and to have mutual trust and confidence in each other. This is evidenced by the fact that Kempster required Monument to take over some of their staff together with any and all of the concomitant obligations which go with that. The individuals representing the parties during the conclusion of the contract also had a history together. It is reasonable to infer that they intended, as stated by the witnesses, to bind themselves indefinitely.
- [41] It is so that, where an agreement is silent as to its duration, it is terminable on reasonable notice. However, in *casu*, the conclusion is ineluctable that the agreement by implication was intended to continue indefinitely. In that regard, I disagree with Kempster's contention that, in the event of a new pricing structure not being agreed upon after the expiration of one year, the agreement would come to an end. This contention is without substance. It has not been established in the present matter that the parties would have refrained from entering into the agreement had they known that revised prices would not be agreed upon when the time came for revision thereof. The agreement envisaged that the parties would negotiate and conclude new agreements in relation to the quoted prices.
- [42] Had the new pricing structure eventuated, the agreement would have continued on the basis of the new prices. However, there is no indication to be found in the agreement and in the evidence relating thereto that it would have terminated on the failure to reach an agreement on a revised pricing structure. This contention by Kempster, therefore, cannot succeed.

- [43] Therefore, I conclude that the learned trial Judge was correct in finding that the agreement between the parties was to endure for an indefinite period in perpetuity.
- [44] That brings me to the issue of the quantum of Monument's contractual damages as a result of Kempster's breach of the agreement. The trial court assessed such damages at R517 817.95, which sum was constituted as follows: R420 000, representing R20 000 estimated profit per month from the business times 24 months (two years); plus R97 817.95 in respect of salaries and wages, which, according to Monument, it had to incur unnecessarily as a result of the unlawful termination of the contract.
- [45] The R97 817.95 was roughly calculated on the basis of approximately six months' salaries for all of the workers, who had been employed by Monument at the premises of Kempster. They had to be redeployed and accommodated somewhere else and at other branches by Monument, who continued to pay their wages and salaries, when in truth and in fact they were superfluous. Their salaries and wages for a period of six months would therefore have been damages flowing naturally from Kempster's breach, and the trial court was therefore correct in awarding this amount to Monument as damages.
- [46] As regards the amount of R480 000, the trial Court reasoned that Monument's damages should be calculated on the basis that the agreement would at least have endured for five years. The evidence indicated, so the trial Court found, that the business from the agreement would have started turning a profit of about R20 000 per month from about the third year onwards. This, in turn, means that Monument would have earned a profit at least for a period of twenty-four months, being the remaining two years of the five-year period of the contract.
- [47] The approach of the trial Court cannot be faulted. There can be little doubt that Monument would have suffered damages as a result of Kempster's breach of the agreement. The simple fact of the matter is that up to the point when Kempster summarily and unlawfully cancelled the agreement with effect from the 27th of October 2004, Monument had been earning gross monthly income of approximately R20 000. That income stream was closed when the agreement was cancelled and it, therefore, stands to reason that, however one views this matter, Monument's income was reduced by R20 000 per month – this is the very definition of a loss or damages.
- [48] That having been established, the trial Court opted to adopt, correctly so, in my view, a robust approach in the quantification of the damages. In that regard, the trial Court was guided by cases such as *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd*[7], in which the SCA at para 14 held as follows:
- '[14] Due recognition must be given to the fact that it is extremely difficult to prove damages such as these and that in assessing the sufficiency of the evidence "a fairly robust approach" may be adopted (*Thompson v Scholtz* [1998] ZASCA 87; 1999 (1) SA 232 (SCA) at 249B).'

- [49] I believe that the evidence on behalf of Monument sufficed to establish as a probability that it would have suffered the future loss of profit as formulated by the trial judge.
- [50] I do not accept Kempster's submission that Monument did not prove that it suffered damages, because, on Monument's version, that part of the business, which operated from the premises of Kempster, made a loss on a monthly basis for the period from December 2004 to October 2005. That then means, so the argument on behalf of Kempster goes, that Kempster in fact did Monument a favour by cancelling the agreement, thus saving them from the further losses suffered by them on a monthly basis. This contention misses the point, that being Monument lost the income generated from that operation, which reduced the net income of Monument.
- [51] Even if I am wrong in calculating Monument's damages on the aforesaid basis, I nevertheless believe that the said amount of damages should be awarded to Monument. I say so for the following reasons.
- [52] There is an alternative approach which would also justify the award of damages under the head of loss of future profits. That would be on the basis that during the period from December 2004 to October 2005, Monument earned additional income from the contract with Kempster. Assuming conservatively that the agreement would have endured for another two years after 30 November 2005, Monument would have earned that R20 000 per month for those two years. In view of the unlawful cancellation of the contract, that R20 000 X 24 was wiped off Monument's Income Statement for those two years. That, in my view, equates at the very least to a loss by Monument irrespective of whether the contract on its own was a loss-making enterprise.
- [53] For these reasons, I am of the view that the award of damages by the trial Court cannot be faulted.
- [54] The appeal must therefore fail.

Costs of Appeal

- [55] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See *Myers v Abramson*[8].
- [56] I can think of no reason to deviate from the general rule. Kempster should therefore pay Monument's costs of the appeal.

Order

- [57] In the result, the following order is made: -
- (1) The appellant's appeal against the order of the Court a quo is dismissed with costs, including those costs previously reserved.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 16th August 2021 – in a ‘virtual hearing’ during a videoconference on the Microsoft Teams digital platform.

JUDGMENT

DATE: 15th September 2021 – judgment handed down electronically

FOR THE APPELLANT:

Advocate Mark Smit

INSTRUCTED BY:

Pearce, Du Toit & Moodie Attorneys, Sandton

FOR THE RESPONDENT:

Advocate G V F Fouché

INSTRUCTED BY:

Suené Meyburg Incorporated, Roodepoort

[1] The defendant in the trial court.

[2] The plaintiff in the trial court.

[3] R v Dhlumayo & Another 1948 (2) SA 677 (A)

[4] Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd 2019 (3) SA 580 (GJ)

[5] University of Johannesburg v Auckland Park Theological Seminary and Another (CCT 70/20)
[2021] ZACC 13; 2021 (8) BCLR 807 (CC)

[6]

[7] AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd 2000 (1) SA 639 (SCA)

[8] Myers v Abramson, 1951(3) SA 438 (C) at 455

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