

SOUTH AFRICA / JUDGMENT

Putco Ltd. v TV & Radio Guarantee Company (Pty) Ltd.; TV & Radio Guarantee Company (Pty) Ltd. v Putco Ltd.; Putco Ltd. v TV & Radio Guarantee Company (Pty) Ltd.; TV & Radio Guarantee Company (Pty) Ltd. v Putco Ltd. and Others (1) (18404/1981, 18488/1981, 9937/1981, 5165/1982) [1985] ZASCA 72; [1985] 2 All SA 533 (A) (10 September 1985)
[1985] ZASCA 72

COURT

Supreme Court of Appeal

BEFORE

KOTZé, JOUBERT, TRENGOVE, VILJOEN,
SMALBERGER

CASE / FILE NUMBER

18404/1981, 18488/1981, 9937/1981, 5165/1982

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467/82

N v H

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE

DIVISION)In, the
consolidated matters
between:

CASE NO 18404/1981
PUTCO LIMITED Appellant
and
TV & RADIO GUARANTEE
COMPANY(PROPRIETARY)LIMITED Respondent
CASE NO 18488/1981
TV & RADIO GUARANTEE COMPANY
(PROPRIETARY) LIMITED Cross AppellantandPUTCO
LIMITED Cross Respondent
CASE NO 9937/1981
(PROPRIETARY) LIMITED Respondent
CASE /
CASE NO 5165/1982
(PROPRIETARY) LIMITED AppellantandPUTCO LIMITED First
RespondentALBINO CARLEO Second RespondentBUSADVERT
(PROPRIETARY) LIMITED Third RespondentJ J MULDER Fourth
Respondent
CASE NO 5585/1982
TV & RADIO GUARANTEE COMPANY'

(PROPRIETARY) LIMITED Appellantand
PUTCO LIMITED Respondent
CORAM: KOTZÉ, JOUBERT, TRENGOVE, VILJOEN, JJA,
et SMALBERGER, AJA.
HEARD: 12 MARCH 1985
DELIVERED: 10 September 1985

JUDGMENT

SMALBERGER, AJA :-

The present appeals and cross-appeal

lie against two judgments of NICHOLAS, J, in the Witwaters-

rand / 2 rand Local Division. They centre around an agreement entered into in August 1976 between Putco Limited (Putco), the owner of a large fleet of buses, and TV & Radio Guarantee Company (Proprietary) Limited (TV), an advertising company, and the subsequent attempts by Putco to terminate the agreement. The first of the judgments of NICHOLAS, J, that relating to the merits of the dispute between Putco and TV, is reported at 1984(1) SA 443 (W). The second, which relates to costs, is unreported. The events leading up to, and giving rise to, the dispute between Putco and TV, are dealt with in the reported judgment at pages 445 to 451 and need not be detailed herein. For the sake of convenience, however, and to facilitate understanding of the issues arising on

appeal / 3 appeal, a resume of certain relevant facts is necessary. It is common cause that an agreement was entered into between Putco and TV entitling the latter to the sole advertising rights in respect of Putco's buses. This agreement was embodied in a letter dated 9 August 1976 drafted by TV's attorney and signed on behalf of Putco. This agreement was referred to during the trial and in the judgment of NICHOLAS, J, as annexure "C", but for the purposes of this judgment it will be referred to simply as "the agreement". The agreement (in which the references to "we" and "you" are to Putco and TV respectively) reads as follows:

"Dear /

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"Dear Sirs,

Re: Exclusive Advertising Rights - Putco Buses

This letter serves to confirm that we have granted to your company (or its nominee) the sole and exclusive rights with regard to all buses operated by our company. The rights granted to you relate to the rental of the advertising space constituted by the interior and exterior of the buses and it will be your sole and absolute responsibility to provide staff, running and management systems as well as supervision, signwriting and other activities relating to the exploitation of such advertising space.

The remuneration which will be payable to us by yourselves flowing from your exercise of the rights granted to you is set out in annexure 'A' hereto and we confirm that we will not conduct any advertising or marketing activities using the interior or exterior of the buses other than through yourselves.

We undertake to allow you all reasonable access to the buses from time to time to ensure that the relevant advertising copy can be applied to the buses but it must be clearly understood that we will not in any way allow this to prejudice our normal operations and there can be no question of withdrawing a vehicle from scheduled trips in order to effect the provisions of what is contained in this letter.

This /

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This letter, although binding upon both of us, is intended to be a temporary interim arrangement, and we confirm that, in due course, a detailed agreement will be concluded between us as a result of the negotiations which we have been conducting.

The purpose of this letter is to enable you to satisfy outside parties that you have been granted these exclusive rights and that there is a current binding arrangement between us, but we reserve to ourselves the right to withdraw from this arrangement should damage result to our image flowing from your activities, or should our earnings at any time be insufficient from this scheme, or should the arrangement become administratively impracticable in regard to your ability to signwrite and maintain the advertising copy.

Yours faithfully,

Putco Ltd, H M Kolbe

Deputy Managing Director."

(Annexure /

6 (Annexure "A" provided for the payment by TV to Putco of an amount equal to 40% of the rental provided by each advertisement after deduction of certain commissions.) During the period 1976 to 1981 various attempts were made by Putco and TV to conclude the detailed agreement contemplated, including the preparation and exchange of several draft proposals for such an agreement, but to no avail. The result was that no detailed agreement was ever concluded. One such proposal was contained in a letter of 29 June 1979, referred to at the trial and henceforth as

annexure "K", which later gave rise to a contention by Putco that it constituted a binding agreement. This contention was abandoned by Putco at the commencement of the trial.

On /

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On 26 May 1981 Putco wrote a letter to TV which

purported to terminate the agreement. The relevant portion of this letter is the following:

"We have decided to channel all future advertising upon our buses through a subsidiary of this company. Please therefore take notice that with effect from 1 July 1981 our buses will not be made available to your company for advertising purposes in the placing of new advertisements. Obviously all existing advertising upon our buses will be permitted to see out their relevant contracted periods for advertisements, subject of course to your continuing to honour your applicable obligations. To enable us to properly govern these advertisements, will you please furnish us with a full schedule supported by copies of relative advertising contracts, setting out details of the remaining period that the same still have to run. We trust that you will take the necessary action to notify your abovementioned associated companies of this notice and that it will consequently not be necessary for us to do so. Will you please confirm this."

The /

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The letter was received by TV through the post on 2 June 1981, but it is common cause that Putco's intention to terminate the agreement was known to TV prior to the end of May 1981. (Although I have referred to the letter as being written to TV, it was actually directed to Media Promotions (Africa) (Pty) Ltd, which was known as Afmed, a company which had been formed by TV for the specific purpose of selling advertising on Putco's buses. For the purposes of this judgment Afmed may be equated to TV, and any communications between Putco and Afmed will be regarded as being between Putco and TV.) After receipt of the letter of 26 May 1981 TV sought certain undertakings from Putco. When these were not forthcoming TV, by notice of motion dated

20 June /

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20 June 1981 (case no 9937/81) launched an urgent application for a final, alternatively, a temporary

interdict against Putco aimed at safeguarding TV's rights under the agreement, and restraining Putco from breaching any of its terms (the first interdict application). The basis for this application was that the letter of

26 May 1981 did not suffice effectively to terminate the

agreement. On 29 June 1981 the parties agreed that, pending the hearing of the application, they would both be entitled to canvass for and sell new advertising upon Putco's buses, subject to certain terms and conditions. This agreement also regulated the respective rights of the parties depending on which party was successful in the application.

10The first interdict application was postponed from time to time, and lengthy affidavits were filed. It was finally heard over a period of five days in September 1981. On 6 October 1981 an interim interdict was granted pending the determination of an action for a final interdict to be instituted against Putco by TV. The costs of the first interdict application were reserved for decision by the trial Court. The agreement of 29 June 1981 was also made part of the Court's order. In the meantime, on 23 September 1981, Putco had written a further letter to TV in the following terms:

"Insofar /

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"Insofar as the letter dated 9 August 1976 directed by our Company to TV & Radio Guarantees (Pty) Ltd may in any respect still be considered to be operative in regard to your rights to procure advertising upon or in Putco buses (which we specifically deny to be the case as a consequence of and by virtue of our letter of termination dated 26 May 1981, copy of which is annexed), this letter serves to record:

1. That our earnings from the scheme have for some years been insufficient and inadequate and still remain insufficient both in respect of external and internal advertising in the buses as a direct consequence of your failure fully to exploit the potential field of advertising as well as your failure to follow up expired contracts and to remit

to us monies collected from advertising.

2. That the arrangement had become and still is administratively impracticable in regard to your ability to signwrite and maintain the advertising copy. 3. That consequently we hereby give you notice that we exercise our right to withdraw from the arrangement referred to in our letter of 9 August 1976 and that as from 1 April 1982

the /

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the arrangement between ourselves and TV Radio & Guarantee Co (Pty) Ltd and/or Media Promotions Africa (Pty) Ltd (Afmed) will be regarded as cancelled and of no further force or effect.

Since judgment has been reserved by the Supreme Court (Johannesburg Local Division) in case no 81/9937 on the question of the adequacy or otherwise of the notice given by us on 26 May 1981, this letter specifically serves as formal notice of cancellation of the arrangement between the parties concerned. Naturally, if the Judge should determine in our favour that the arrangement was lawfully terminated at an earlier date, such earlier date will be the applicable date of cancellation."

On 30 October 1981 Putco instituted action against

TV (case no 18404/81) for a declaratory order relative to whether the agreement or annexure "K" constituted the

effective contract between the parties, as well as for an

order declaring the applicable agreement to have been can=

celled by the letter of 26 May 1981, alternatively the

letter / 13 letter of 23 September 1981, further alternatively "an order declaring what would be reasonable notice in terms of the applicable agreement". (As previously mentioned, Putco subsequently abandoned its reliance on annexure "K" and, other than in relation to costs, it does not need to be considered further). In due course, apart from the defences raised by it to the merits of Putco's action TV also filed a notice of exception to, alternatively, a notice to strike out, the further alternative prayer to which reference has been made.

Also on 30 October 1981, TV instituted action against Putco for a final interdict in terms similar to those in which the interim interdict had been granted (case no 18488/81). On 20 March 1982 an order for the

consolidation /

14consolidation of the two trial actions was granted, and I shall henceforth refer to them as the consolidated action

On 11 March 1982 TV launched a contempt of

court application against Putco and three other respondents

(case no 5165/82) arising from their alleged wilful failure

and refusal to comply with the order of Court of 6 October

1981, which incorporated the agreement between Putco and TV

of 29 June 1981. Finally, on 17 March 1982 Putco launched

a further application for a final, alternatively, an interdict (case no 5585/82 - the second interdict application) in which it sought relief, relative to the letter of 23 September 1981, similar to that sought in the first interdict application. On 26 March 1982 the contempt and second interdict applications were postponed sine die, and / 15 and the costs of both applications were reserved for decision at the hearing of the consolidated action. After a hearing which commenced on 24 August 1982 the trial Judge gave judgment on 20 October 1982 on all the issues raised in the consolidated action. He heard argument on the costs of the consolidated action and all the other proceedings between the parties on 21 January 1983, and delivered judgment thereon on 1 February 1983. It will be convenient at this stage to outline briefly the findings of the trial Judge in respect of the merits and costs of the consolidated action and proceedings referred to, and the extent to which his findings are the subject of appeal. In the consolidated action, in case no 18404/81 (the action for a declaratory order) he held that / 16 that the agreement was terminable on reasonable notice; that the notice contained in the letter of 26 May 1981 was equivocal and therefore not a valid notice; and that the period of notice in the letter of 23 September 1981 was not a reasonable period. Putco appeals against these findings. Although Putco accepts that the agreement was terminable on reasonable notice, it does not accept that as being the only basis for termination. TV's exception and application to strike out were dismissed, and it has cross-appealed against such dismissals. In case no 18488/81 the trial Judge refused the grant of a final interdict and made no order. TV cross-appeals against his decision in that regard on the basis that the agreement was to continue indefinitely. Putco was ordered to pay 60% of / 17 of TV's costs in the consolidated action. Putco has appealed, and TV has cross-appealed, against this order. Putco was further ordered to pay the costs of the first interdict application (case no 9937/81), and TV was ordered to pay the costs of the contempt application (case no 5165/82) and the costs of the second interdict application (case no 5585/82). In each case the unsuccessful party has appealed against the order of costs. I shall deal with the issues on appeal under the head of each action and application. THE CONSOLIDATED ACTION

The first issue which needs to be addressed is whether the agreement was terminable on reasonable notice. In holding this to be the case, the trial Judge rejected

TV's / 18 TV's contention that the agreement was to continue in perpetuity unless it was terminated on one of the specific grounds set out therein. The trial Judge also rejected Putco's contention that the agreement was cancellable summarily, or summarily upon the failure of negotiations to conclude a detailed agreement. In endeavouring to arrive at a proper construction of the agreement the trial Judge held that it was capable of interpretation by linguistic treatment only. There may, however, be certain surrounding circumstances that are admissible.

In dealing with TV's contention to which I have referred the trial Judge said:

"While /

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the "While it is correct that agreement was to

continue for an indefinite period, the sub= mission advanced in argument cannot be sus= tained. It is in conflict with the language of annexure 'C, which refers to 'a temporary interim agreement' and 'a current binding agreement' (that is an agreement currently,

presently binding). In the light of those words

the parties could not have contemplated that failing a detailed agreement the interim agrees= ment should be binding upon them in perpetuity." I agree that the language used in the agreement

is entirely inconsistent with an intention that the agree=ment should continue indefinitely if a detailed agreement was not reached. The parties clearly never contemplated

that the agreement would be anything other than a temporary

one, and their rights and obligations under the agreement must be determined on that basis. They can not be held

permanently bound when all they contracted for was a

temporary / 20 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 contem= plated 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 con= elusion that it was intended to continue indefinitely. The inclusion in the agreement of three specific grounds for termination does not exclude termination by reasonable notice. The logical consequence of an argument that only three specific grounds for cancellation of the agree=

ment / 21 ment exist would be that, provided those grounds for cancellation do not arise, the agreement would continue indefinitely. This would not be a proper construction to place on the agreement as it ignores the intention of the parties when entering into the agreement, and such

intention is paramount (cf. Trident Sales (Pty) Ltd v A H Pillman & Son (Pty) Ltd 1984(1) SA 433 (W) .) Faced with these weighty considerations Mr Morris, who appeared for TV virtually conceded that the agreement was not one of indefinite duration but was terminable on reasonable notice.

Putco's contention that the agreement was terminable summarily and without notice is based on the

submission that the agreement was one of agency or mandate

and /

22and that Putco (as principal) was at liberty to revoke the mandate of TV (as agent) at any time. There is no substance in this submission. Whatever the true legal character of the agreement may be, a matter to which I shall revert later in this judgment, it is clearly not one of agency. In terms of the agreement TV was granted "the sole and exclusive advertising rights" with regard to all Putco's buses. The agreement envisages TV letting or selling advertising space to advertisers. All advertising rental was payable to TV, which in turn accepted responsibility for the provision and cost of all the necessary management, staff, signwriting, maintenance and other related services required for advertising purposes. A percentage of the rental was payable by TV

to /

23to Putco as remuneration for the rights granted to it by Putco. The agreement creates no relationship of principal and agent between Putco and TV. In terms thereof TV is not authorised to represent Putco. or act on its behalf. Nor does the agreement envisage that TV will conclude any'

contracts with advertisers on Putco's behalf and bring

about any binding relations between Putco and such advertisers. On the contrary, the agreement makes it clear that in contracting with advertisers TV would do so as principal on its own behalf. The requisites of agency are therefore not present in the agreement. Mr Schutz, for Putco, was invited to point out any words or phrases in the agreement consistent with agency, but was unable to do so. It is also not without significance that the question

of /

24of agency was not specifically raised on the pleadings, nor does it appear to have been canvassed at the trial. Any agreement based on agency must accordingly fail. The further contention advanced on behalf of Putco was that the agreement was terminable without notice if negotiations for a detailed agreement failed, and that such negotiations having failed, the agreement had come to an end. No provision was made in the agreement for what was to happen if the parties were unable to negotiate the detailed agreement which they contemplated. It is common cause that their negotiations for such an agreement failed, and that neither party could legally compel the other to continue to negotiate until a binding agreement was reached (cf. Scheepers v Vermeulen 1948(4) SA 884 (0))

at /

25at 892). It does not, however, follow that the agreement

ipso facto terminated on the failure of negotiations.

It is a question of what the parties must impliedly have

intended should happen in the event of their negotiations not reaching fruition.. The trial Judge in my view convincingly dealt with Putco's contention in this regard

in holding as follows:

"It was contemplated in annexure 'C' that TV & Radio would immediately begin canvassing for advertisements for Putco buses, would enter into binding contracts with advertisers, and would incur expenditure of time, money and labour in connection therewith; and that Putco would receive income from advertisements. In the light of this, the parties could not have contemplated that the agreement would terminate ipso facto upon the failure of the negotiations for a detailed agreement or that Putco would be entitled (at any rate for a reason other than those set out in the last paragraph of annexure 'C') to

terminate /

26 terminate the agreement summarily and without notice. It was implicit in annexure 'C' that, if Putco wished to terminate the agreement

on grounds other than those specified, it could do so only upon reasonable notice. This accords with what is stated in Corbin on Contracts vol 1A at 413 s 91:

'Contracts between a producer and his distributing agent often contemplate long continued performance without specifying any time for termination. They may give to one or both of the parties a power of termination by notice for a stated period. In the absence of such a provision the contract may be held to be terminable at will; but, if the establishment and conduct of the agency require an investment of money or labour and the agency has been in operation for some time, the court may justly hold that the producer has power to terminate only by giving notice for a reasonable time and that termination without such notice is a breach of contract.

In the alternative it was contended on Putco's

behalf that the agreement had been entered into on the

assumption /

27assumption that a detailed agreement would be concluded later, and as no such agreement was entered into the assumption had failed and the agreement was accordingly at 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 a detailed agreement would not be concluded later. The agreement envisaged that the parties would negotiate and conclude a detailed agreement in future. Had such a later contract

eventuated / 28 the agreement would have terminated. But there is no indication to be found in the agreement that it would terminate on the failure to conclude the envisaged detailed agreement. Putco's alternative contention, therefore, can not succeed.

It was accepted on behalf of Putco that if its contentions in respect of summary termination failed, the agreement was terminable on reasonable notice. All that therefore remains to be considered is whether a valid and reasonable notice of termination was given. In order to answer this question it is necessary to first consider the nature and effect of the agreement. The agreement does not fall into one of the recognized categories of contract

such /

29such as sale or lease. No point would be served in trying to define its precise legal character. Broadly speaking it can be classified as an innominate contract which confers a licence or privilege. The contractual relationship between Putco and TV arising from the agreement is, however, clear. In terms of the agreement TV acquired the sole advertising rights on Putco's buses. It is implicit in the agreement that TV would be entitled to sell or let advertising space to advertisers, and that it would enter into contractual obligations with advertisers in this regard. At the same time Putco undertook the obligation to make its buses available for the application (and by implication, the maintenance) of advertising copy on the buses. By implication Putco's obligation in this

respect / 30 respect would extend, in relation to each contract entered into during the currency of the agreement between TV and advertisers, for the duration of the period of such contract (subject perhaps only to the duration thereof being for a commercially acceptable period and not one beyond the reasonable contemplation of the parties, in other words, one in keeping with the notion of a temporary interim agreement). The implications to which I have alluded are ones necessary to give business efficacy to the agreement (*Mullin (Pty) Ltd v Benade Ltd* 1952(1) SA 211 (A) at 215; *Van den Berg v Tenner* 1975(2) SA 268 (A) at p 277 A). This twofold nature of the agreement, i.e. the right acquired by TV to enter into contracts with advertisers, and the obligation of Putco to suffer contracts

already / 31 already entered into between TV and advertisers, assumes importance on the termination of the agreement. Upon termination a distinction would have to be drawn between the executory part of the agreement and the executed part. The executory part (TV's right to enter into further contracts with advertisers) would fall away, upon termination, but the executed part (that relating to contracts already concluded between TV and advertisers) would stand, and Putco's obligations in relation thereto arising from the agreement would continue until each and

every contract had run its course (this presupposes no breach by TV in relation to the executed part of the agreement which would free Putco from its obligation to make buses available for the maintenance of advertising

copy.

I turn / 32 I turn now to consider whether the letter of 26 May 1981 constituted a valid notice of termination. The trial Judge correctly held that in order to be effective a notice of termination must be clear and unequivocal (*Ntsobi v Berlin Mission Society* 1924 TPD 378; *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973(1) SA 372 (A) at 385 G). He concluded, however, that the notice contained in the letter of 26 May 1981 was equivocal, and therefore not a valid notice, the reason being that "in one breath it gave notice of termination

of the contract with effect from 1 July 1981; in the next it stated that the contractual relationship would be continued after that date". This was a reference to that portion of the letter which reads as follows: "Please

therefore / 33 therefore take notice that with effect from 1 July 1981 our buses will not be made available to your company for advertising purposes in the placing of new advertisements. Obviously all existing advertising upon our buses will be permitted to see out their relevant contracted period of advertisements, subject of course to your continuing to honour your applicable obligations". In so writing Putco was in essence doing no more than recognizing and giving effect to the legal consequences that would flow from the termination of the agreement. The notice given was therefore not equivocal, and should not have been held to be such. What remains to be considered is whether it was a reasonable notice, in the sense of whether a

28 day period of notice before termination constituted a

reasonable period of notice.

"Reasonable" / 34 "Reasonable" is a relative term, and what is reasonable depends upon the circumstances of each case (cf. *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 326; *Microutsicos and Another v Swart* 1949(3) SA 715 (A) at 730). In order to determine what is reasonable within a given factual context one must have regard to the full spectrum of relevant facts and circumstances that bear on the matter in issue. As Corbin (op cit) Vol 1 at 414 s 96 states, "there is a large element of uncertainty in the determination of the length of a 'reasonable time' in any particular case. Furthermore, there is a difference

between what may be reasonable in the light of the circumstances existing at the time the contract is made and what is reasonable in the light of the circumstances as they

occur /

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occur during the course of performance". It is not necessary for the purposes of the present enquiry to decide whether, in determining what is a reasonable period of notice, regard must be had to the actual circumstances existing at the time of notice (as held by the trial Judge with reference to the decision in *Decro-Wall International SA v Practitioners in Marketing Ltd* (1971) 2 ALL ER 216 (CA) at 229 h) or those at the time of the contract (as suggested in the minority judgment of JANSSEN, JA, in *Nel v Cloete* 1972(2) SA 150 (A) at 177 E - G). Whichever

position pertains, a reasonable notice must allow the person to whom such notice is given sufficient time in which reasonably to regulate his own affairs. The agreement envisaged that TV would be responsible for the

promotional /

36 promotional, sales, management and maintenance side of advertising on Putco's buses. People would of necessity have to be employed by TV to carry out the required functions in this regard. A substantial undertaking was not only contemplated, but in fact eventuated. The termination of the agreement would have brought to an end the promotional and sales side of advertising, and perhaps even have reduced management and maintenance needs. TV would have had to take stock of its situation. It would either have to find new avenues in which to employ those persons whose duties would be affected by the termination of the agreement, or dispense with their services. The people concerned, or at least some of them, would have been employed on a monthly basis, and the period

of / 37 of notice given would have been inadequate to enable TV to dispense with their services (if it was necessary to do so) before or at the same time that the agreement would have terminated. Having regard to those circumstances alone, which were present or must have been contemplated both at the time of the contract and at the time of notice, it seems to me that 28 days was not a sufficient period of notice. Accordingly, the notice of 26 May 1981, while otherwise valid, was not reasonable, and did not terminate the agreement.

In view of the conclusion reached that the notice of 26 May 1981 did not constitute reasonable notice

it is necessary to consider whether that of 23 September

1981 did. The trial Judge held not, implying in his

judgment / 38 judgment (without making a definite finding in that regard) that at least 12 months notice was necessary, and not only 6 months as was given. The trial Judge approached the matter on the basis that as on the expiration of the period of notice all obligations between Putco and TV would cease, the period of notice had to be long enough to enable TV to perform, within the actual period of notice, its obligations towards all the advertisers with which it had contracted, otherwise it would be disabled from doing so. This approach does not make allowance for the difference between the executory and executed portions of the agreement, and the effect of termination on each.

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The letter of 23 September 1981 gave an effective 6 months notice stating that as from 1 April 1982 the agreement "will be regarded as cancelled and of no further force and effect". Unlike the previous letter there was no intimation by Putco that "all existing advertising upon our buses will be permitted to see out their relevant contracted periods of advertisements". But whether Putco stated so or not, the legal implications flowing from the agreement would have obliged them to allow that to happen. ' The notice was clearly unequivocal in its intimation to TV that the agreement was to be terminated after 6 months. Whatever remaining rights and obligations the parties might have in respect of each other would be determined by the terms of the agreement, not those of the letter. The

terms /

40terms of the letter could not detract from TV's enforce= able rights under the agreement. The letter cites two of the grounds mentioned in the agreement on which Putco could rely to withdraw from it, as the apparent reason for terminating the agreement. Had Putco been entitled to withdraw on the grounds mentioned it would not have affected the rights of the parties flowing from the execute part of the agreement. As it happened, Putco later abandoned any reliance on these grounds. Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given (cf. Matador Buildings (Pty) Ltd v Harman 1971(2

SA /

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SA 21 (C) at 28 A); Stewart Wrightson (Pty) Ltd vThorpe 1977(2) SA 943 (A) at 953 G.) Applying thisprinciple to the facts of the present matter it meansthat if Putco was entitled to terminate the agreement byreasonable notice, and 6 months constitutes a reasonableperiod of notice, then the letter of 13 September 1981amounted to an effective notice of termination of theagreement for, irrespective of the reasons it relied on for

termination, and the somewhat inept way the letter was phrased, it was a clear intimation of Putco's intention to terminate the agreement in 6 months time.

It remains to be considered whether 6 monthswas a reasonable period of notice having regard to the

principles previously mentioned. Mr Morris conceded that it would be if termination of the agreement did not

preclude / 42 preclude TV from fulfilling its obligations towards advertisers it had contracted with before termination, which I have held to be the case. In this respect, too, it is therefore unnecessary to consider whether a reasonable period of notice must be determined with reference to the facts existing at the time of the contract or at the time of notice. It follows from the foregoing that the letter of 23 September 1981 was a valid and reasonable notice of termination, and that it effectively terminated the agreement as from 1 April 1982. There is no substance in TV's contention that the giving of such notice was not bona fide. Once a contract is terminable on reasonable notice either party is entitled to give such notice for any

valid / 43 valid commercial reason and there is nothing to suggest that no such reason existed in the present instance. Putco's appeal therefore succeeds on this ground. Although TV cross-appealed against the trial Judge's dismissal of its exception and application to strike out in case no 18404/81 no argument was addressed to us on this point. The trial Judge gave short but compelling reasons for arriving at his decision, and there is no justification for interfering with his findings. TV further appealed against the trial Judge's refusal to grant a final interdict in case no 81/18480. Such refusal follows naturally on the finding that the agreement was not to continue in perpetuity, as TV could not prevent Putco from doing the acts it sought to interdict

Putco /

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Putco from doing after the agreement had been duly terminated. TV's cross-appeal on these aspects there=

fore falls to be dismissed.

The effect of this judgment is that Putco

will have achieved substantial success at the trial in the consolidated action and therefore be entitled to its

costs, although not necessarily all its costs. Putco

either abandoned, withdrew or failed in certain conten=

tions raised by it which would have resulted in wasted

costs both in relation to the preparation for trial,

and the conduct of the trial. These were:-

- (a) The withdrawal of Putco's counterclaim in case no 18480/81 by notice dated 14 June 1982. This is referred to in the trial Judge's judgment on costs but does not appear from the appeal record, as the counterclaim and notice of withdrawal were

omitted /

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omitted by consent. It is not apparent from the appeal record whether such withdrawal was accompanied by a tender to pay wasted costs, although there is an indication to this effect in the heads of argument;

- (b) The withdrawal by Putco at the pre-trial conference of its allegations in its letter of 23 September 1981 that it was entitled to cancel the agreement on the two specific grounds mentioned therein, namely, that TV's earnings were insufficient and that the arrangements between the parties had become administratively impracticable in regard to TV's ability to signwrite and maintain the advertising copy. Putco tendered the wasted costs occasioned by such withdrawal;
- (c) The abandonment by Putco at the commencement of the trial of its contention that annexure "K" constituted a binding agreement between the parties;
- (d) The failure to establish that the letter of 26 May 1981 amounted to reasonable notice of termination.

Having /

46 Having regard to the above considerations TV should not be ordered to pay all Putco's costs. The vexed question is what percentage of Putco's costs it should be ordered to pay. Precise formulation is not feasible - as the trial Judge stated it is "largely a matter of impression, having regard to the documents contained in the agreed bundle and the conduct of the trial." All the documents concerned are not before us, and we are therefore less able to form a reliable impression. Counsel requested that they be given a further opportunity to debate the trial costs after judgment is given on the merits of the appeal. It would seem that the best course to adopt would be to make an interim order as to the costs of the consolidated action leaving it to the parties, if

they / ...⁴⁷ they so wish, to file further argument in relation to such costs within a specified period, failing which the interim order will become final. An appropriate order would be one ordering TV to pay 90% of Putco's costs. Putco will further be entitled to the costs of the appeal, and TV's cross-appeal must be dismissed, with costs. Costs will include the costs of two counsel, there being no justification for the employment of more than two counsel. Counsel were agreed that the costs of the hearing on 21 January 1983 (the day on which the question of costs was argued) should follow the result in the consolidated action. There is no reference in either the notice of appeal or the notice of cross-appeal to the order of costs made in respect of the first interdict application (case

no / .

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no 9937/81), although the matter was raised in argument. The trial Judge awarded TV the costs of that application because he was satisfied that the requisites for an interim interdict had been established. The underlying basis for such a finding was presumably the fact that the letter of 26

May 1981 was not a valid notice of termination and TV was entitled to protect its rights under the agreement which were being threatened. That basis has essentially remained unchanged, except that in terms of this judgment the letter of 26 May 1981 did not effectively terminate the agreement because it failed to allow a reasonable period of notice. Despite the arguments advanced on behalf of Putco I am unpersuaded that the trial Judge erred in making the order he did, and interference

therewith /49 therewith is accordingly not warranted. THE SECOND INTERDICT APPLICATION (Case No 5585/82) The trial Judge awarded the costs of this application to Putco. The application was launched consequent upon the notice given by Putco to TV in the letter of 23 September 1981 to terminate the agreement. The interdict claimed was in terms substantially identical to the interim interdict granted on 6 October 1981 (the first interdict) which was to operate pending the decision in an action for a final interdict. The first interdict precluded Putco from doing all the things the second interdict application sought to prevent it from doing. The only difference was that the first interdict related to the notice of 26 May 1981. On the date that the second

interdict / 50 interdict application was launched TV's action for a final interdict had already been instituted. I agree with the trial Judge that in the circumstances TV "could not reasonably have apprehended any prejudice to it" and that the second interdict application was accordingly unnecessary. A further consideration arising from this judgment is that the notice of 23 September 1981 was a valid and effective notice of termination, and TV was accordingly not entitled to the relief it sought in the second interdict application. It follows that TV was correctly ordered to pay the costs of the application and its appeal against such order must fail.

THE / 51 THE CONTEMPT OF COURT APPLICATION (Case No 5165/82)

In his judgment on the costs of the contempt

of court application the trial Judge intimated that TV's complaints had been restricted to two despite various alleged breaches of the order of Court of 6 October 1981. These were the alleged canvassing or selling of advertise=

ments to Kentucky Fried Chicken (South Africa) (Pty) Limited (Kentucky), and the failure to furnish certain

information. The trial Judge held that the former did not amount to a breach of the Court's order, and that the

failure to furnish the information requested had not been

shown by TV to constitute a wilful disobedience of the Court's order by any party on whom it was binding. In

consequence TV was ordered to pay the costs of the contempt

Although /

52 Although the heads of argument traversed a wider field of alleged acts of contempt than those dealt with in the judgment of the Court a quo, it ultimately transpired during argument that the cardinal issues were those referred to in the judgment, and the actual arguments did not extend much beyond them.

As previously mentioned the Court order of 6 October 1981 incorporated the terms of an agreement between the parties on 29 June 1981. Paragraph 2 of that agreement provided that "pending the hearing of this application, both parties shall be entitled to canvass for and sell new advertising upon respondent's (Putco's) buses". In the context of that agreement the "hearing of this application" would have extended to the time

judgment /

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judgment was given on the application for an interim interdict in case no 9937/81 i.e. 6 October 1981. Paragraphs 6 to 8.1 of the agreement referred to read as follows:

"The applicant (TV) shall, on or before 3rd of July, 1981, deliver a schedule to the respondent (Putco) setting out the following details:

6.1 The names and addresses of all advertisers whose advertisements appear on buses of the respondent for unexpired periods. 6.2 The date of commencement of all such contracts. 6.3 The names and addresses of advertisers who shall have been successfully canvassed, up to the date hereof, and as do not appear in 6.1. hereof. 6.4 All contracts itemised in 6.1 hereof shall be made available to the respondent, or its duly authorised representatives for purposes of their inspection, during reasonable office hours.

7. The respondent undertakes and agrees not to canvass or sell directly or indirectly, nor

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to permit any third party, other than the appellant, to sell or canvass for advertising upon its buses to those advertisers detailed in 6.1, 6.3 or 6.4 hereof.

8. At the conclusion of the hearing of this application, should this Honourable Court grant an order -

8.1 In favour of the applicant, then the

respondent shall continue to retain all contracts which it may have written in terms of 4 hereof, and shall further make full disclosure of such contracts."

It is apparently common cause that in compliance with paragraph 6 TV informed Putco that a certain firm of advertising agents S.S.C. & B Lintas (Lintas) was its client. It is also common cause that Putco sold advertising on its buses through Busadvert (Pty) Limited (the third respondent) to Kentucky at a time when Lintas was Kentucky's advertising agency. Carleo (the second respondent) and Mulder (the

fourth / 55fourth respondent) acted on behalf of Putco and Busadvert respectively in this regard. Lintas had not previously been successful in obtaining an advertising contract from Kentucky for TV. When Putco and Busadvert obtained its advertising contract from Kentucky the latter was neither an advertiser whose advertisement appeared on any of Putco's buses, nor one who had been successfully canvassed by TV prior to 29 June 1981. The fact that Lintas was Kentucky's advertising agent and also a client of TV does not make Kentucky an advertiser as envisaged in paragraph 6 in the absence of a specific contract

between TV and Kentucky. There was therefore no breach by Carleo or Mulder, and through them, Putco and Busadvert, of the terms of the Courts order.

The / .56 The second ground of contempt is based on Putco's failure to make full disclosure to TV of all contracts entered into by it during the moratorium period (paragraph 8.1). The Court's order did not impose any obligation on Putco to disclose details of contracts canvassed over that period, as alleged in TV's founding affidavit. Nor does the Court's order say when full disclosure of the contracts entered into must be made. Presumably this would have to be done within a reasonable time. TV requested disclosure of all such contracts, but by the time the application was launched (11 March 1982) no such disclosure had been made. It appears from the papers that Busadvert's attorney made the information in question available to Putco's attorney on 27 October 1981.

The / .

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The latter apparently failed to transmit these details to TV's attorney, and the information was ultimately only furnished to TV by Busadvert's attorney on 5 April

1982. Putco's attorney, one Botha, has endeavoured to explain the reason for his failure to transmit the requested information to TV on the basis of his deep involvement in a number of pressing issues relating to the dispute between Putco and TV. Assuming Putco to be

responsible for Botha's conduct (which is open to doubt)

it failed to comply with paragraph 8.1 of the order of Court because details of the contracts entered into between Putco and advertisers during the moratorium period were not furnished to TV within a reasonable time of the

date of that order. It was conceded on behalf of Putco

that in holding that it had not been established that

Botha's /

58 Botha's conduct was wilful the trial Judge misplaced the onus. Once a failure to comply with an order of Court has been established wilfulness will normally be inferred, and the onus will rest upon the person who failed to comply with such order to rebut the inference of wilfulness on a balance of probabilities (cf. *Du Plessis v Du Plessis* 1972(4) SA 216 (0) at 220 A - D). This can be done by such person establishing that he did not intentionally disobey the Court's order. Even though Botha's explanation for his failure to transmit the necessary information to TV is not entirely excusable, I am satisfied that his conduct was due to inadvertence and that he did not wilfully disobey the Court's order. This is what Botha has said on oath, there is nothing to rebut what he has said

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said and the probabilities are in his favour. Despite having misdirected himself on the question of onus the trial Judge's conclusion that Putco was not guilty of contempt in this respect was correct. On a consideration of the affidavits in the contempt application I am satisfied that no proper case was made out by TV against any of the respondents for the relief it sought. It follows that TV's appeal against the order of costs in case no 5165/82 must fail.

The following order is made:

1. In the consolidated action (cases nos 18404/81 and 18488/81):

(a) The appeal of Putco Limited is allowed, with costs.

(b) The /

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(b) The order of the Court a quo in case 18404/81 is set aside and there is substituted in its stead the following:

(i) It is declared that the only

agreement between the parties is that recorded in the letter of 9 August 1976 (Annexure "C"). (ii)

It is further declared that such agreement was validly terminated as from 1 April 1982 consequent upon the notice of termination dated 23 September 1981 (Annexure "BB").

(c) The cross-appeal by TV & Radio Guarantee Company (Pty) Limited against the dismissal of its exception and application to strike out in case no 18404/81, and the refusal by the Court a quo to grant a final interdict in case no 18488/81 is dismissed, with costs.

(d) Subject to paragraph 6 below the order of the Court a quo in relation to the costs of the consolidated action is altered to read : TV & Radio Guarantee Company (Pty) Limited is ordered to pay

90% /

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90% of the costs of Putco Limited in the consolidated action, such costs to include the costs of the hearing on 21 January 1983, and the costs of two counsel.

2. In case no 9937/81:

The appeal of Putco Limited is dismissed, with costs.

3. In case no 5165/82:

The appeal of TV & Radio Guarantee Company Limited is dismissed, with costs.

4. in case no 5585/82:

The appeal of TV & Radio Guarantee Company (Pty) Limited is dismissed, with costs.

5. All awards of costs on appeal will include the costs of two counsel.

6. In relation to the award of costs in the consolidated action the parties may, if they so wish, within 1 month of the date of this judgment file further heads of argument with the registrar of this Court in relation to the percentage of costs awarded, failing

which /

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which the order as to costs in paragraph (d) above will become final.

J W SMALBERGER

ACTING JUDGE OF APPEAL

KOTZÉ, JA)) CONCUR JOUBERT, JA)

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