

REPORTABLE (86)

Judgment No. SC 97/05

Civil Appeal No. 294/02

DAIRIBORD ZIMBABWE (PRIVATE) LIMITED

v

LIGHTON TRADING (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, MAY 23, 2005

J C Andersen SC, for the appellant

No appearance for the respondent

MALABA JA: At the conclusion of submissions made on behalf of the appellant, we allowed the appeal with costs, set aside the order of the court *a quo* and substituted it with the following order –

- "1. That the franchise agreement entered into between the appellant and the respondent in or around December 1999 be and is hereby declared lawfully cancelled.
2. That the respondent and all those claiming through it be and are hereby ordered to vacate forthwith –
 - (a) The depot premises at number 9 Wilcania Street, Kwekwe;
 - (b) The depot premises at number 11 Wilcania Street, Kwekwe; and
 - (c) The house at number 9 Norfolk Drive, Fitchlea, Kwekwe.
3. In the event of the respondent failing to comply with paragraph 2 above, it is ordered that the Deputy Sheriff be and is hereby authorised to evict the respondent from the said premises mentioned in paragraph 2 above.
4. The respondent pays the costs of suit."

We indicated that our reasons for our decision would follow in due course. These are they.

The appellant and the respondent entered into a franchise agreement on 1 December 1999, in terms of which the latter was appointed the sole franchisee of the appellant to sell and distribute its milk and other dairy products in the district of Kwekwe from the date of signature of the agreement to 30 November 2004.

To facilitate the operation of the franchise the respondent was allowed to occupy the appellant's business premises at numbers 9 and 11 Wilcania Street, Kwekwe. It was also allowed to lease the house at number 9 Norfolk Drive, Fitchlea, Kwekwe at a fixed monthly rental. The franchise was one of a fixed duration.

In terms of clause 1 of the franchise agreement the parties agreed that the duration of the franchise was to run from December 1999 to 30 November 2004. In clause 8(3) the parties agreed that:

"Either party may terminate the agreement at any time after the expiration of one year from the date of this agreement by giving to the other party two months' notice in writing sent by registered post to the address of the other party as given in this agreement."

The effect of the termination of the franchise agreement was to be what was agreed upon by the parties in clause 9. It was stated that:

"Upon termination of this agreement for any cause the franchisee shall forthwith deliver up the premises from which it operates the franchise and all equipment of Dairibord contained therein, described in the schedule. If for any reason the franchisee contests the termination of this agreement, the franchisee shall still forthwith deliver up the premises which it operates from and all the equipment of Dairibord contained therein pending the outcome of their contention."

On 26 February 2002 the appellant, through its legal practitioners, gave the respondent notice in terms of clause 8(3) of the franchise agreement of its intention to terminate the franchise at the expiration of two months, on 30 April 2002. At the expiration of the notice period, the respondent did not deliver up the business premises and the house, arguing that the termination was unlawful.

A court application for an order confirming the lawfulness of the termination of the franchise agreement and directing the respondent to vacate the two properties was made by the appellant to the High Court. The respondent opposed the application, contending that clause 8(3) of the franchise agreement was an unlawful term, because it could not exist in the same contract with clause 1 fixing the duration of the franchise at five years. The respondent also argued that it had purchased the cold-rooms which were fixed to the building and as such it had become the co-owner of the buildings from which the appellant claimed its eviction. It also said it had bought the house from the appellant.

The appellant pointed out that the respondent had purchased equipment and not the cold-rooms. It said that although the respondent had been offered the house at a purchase price of \$180 000 in 1996 and had in October 1997 indicated that it accepted the offer, no agreement of sale had been reached, as the respondent had not paid the purchase price. The respondent had instead made a counter-offer to pay the purchase price in instalments. The counter-offer had not been accepted. Hence the respondent was still paying monthly rentals for its occupancy of the house in December 1999. The appellant contended that the respondent was obliged under clause 9 of the franchise agreement to vacate the premises, notwithstanding the fact that it was contesting the termination.

The court *a quo* held that the termination of the franchise agreement by the appellant was null and void. It reasoned that clause 8(3) was unlawful and unenforceable because the agreement was for a fixed period of five years. The learned Judge said:

“In my view, clause 8(3) of the agreement runs against the grain of the relationship between the parties. The gist of the agreement is that the parties intended a five year agreement, renewable if both parties agree. Premature termination of the agreement is contemplated in the main under well defined and momentous circumstances such as breach, insolvency, liquidation, prejudicial conduct and prevention of performance of duties. Clause 8(3) seeks to empower either party to cancel the agreement at any time after its first anniversary for no reason. I agree with the respondent in the argument that the effect of clause 8(3) is to provide for wrongful breach of the contract. To the extent that clause 8(3) provides for unlawful termination of the agreement the applicant should not expect this court to hold that provision binding on the parties. Accordingly, the applicant has not, in my view, established the grounds upon which the agreement may be cancelled.”

The learned Judge proceeded on an assumption of the existence of a law prohibiting parties to a franchise agreement providing in its terms for its termination at the expiration of a fixed period of time and also giving either party the right to terminate upon giving notice of a specified time to the other party without giving reasons for the termination. I agree with Mr *Andersen* that the learned Judge misdirected himself in proceeding on the basis that there was such a law and therefore that what the parties did in enacting clauses 1 and 8(3) in the franchise agreement was unlawful.

A franchise agreement is, of course, one of the types of contracts for which a fixed duration of operation is usually a material term. The law recognises the freedom in parties to an agreement to determine the substance of the terms of

their contract, as long as they do not contravene any common law or statutory law or public policy.

There is no law to the effect that once parties have entered into a franchise agreement and fixed the period of its termination they cannot provide in the same contract for its termination by either of them on notice to the other. In the absence of such a law it would not be unlawful for the parties to have as a term of the franchise agreement the stipulation that it may be terminated by either party on notice at any time before the expiration of the fixed period.

In *Halsbury's Laws of England* Vol 9 (4 ed) para 529 it is stated as follows:

"Contracts for Fixed Term

Where the parties to a contract stipulate that the contract is to continue for a definite period, the contract cannot be terminated before the expiration of that period, unless the parties are empowered to do so by the terms of the contract." (the underlining is mine for emphasis)

The termination of the franchise agreement by the appellant was clearly in terms of the contract. It was lawful.

In any case, the respondent bound itself under clause 9 of the franchise agreement to deliver up to the appellant the business premises and equipment therein, even if it was contesting the termination.

It is also clear from the facts that the respondent could not sustain the contention that it had purchased the house. It produced no evidence of payment of the purchase price, particularly in light of the allegation by the appellant that it made

a counter-offer to pay the purchase price in instalments, which was not accepted. It was common cause that the respondent was paying monthly rentals for the occupancy of the house at the time it claimed it had purchased it.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Webb, Low & Barry, appellant's legal practitioners