IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 08/28635

In the matter between:

CTP LIMITED
Trading as CTP WEB PRINTERS JOHANNESBURG — Applicant

and

THE CAR TRADER (PTY) LIMITED — Respondent

JUDGMENT

FRANKLIN AJ:

Introduction

[1] The applicant conducts business as a printer of commercial leaflets, catalogues and magazines. The respondent is the publisher of various publications which advertise motor vehicles for sale to the general public.

For the last ten years the applicant has printed the publications known as "Auto Trader", "Commercial Trader", "Auto Freeway Gauteng", "Auto Freeway KwaZulu-Natal" and (until 13 June 2008) "Auto Freeway Cape", on behalf of the respondent. On 25 July 2008 the respondent informed the applicant that it had decided to terminate the applicant's services. This verbal notification was followed by a letter dated 31 July 2008 giving formal notice of termination with effect from 31 August 2008. After attempts to resolve a dispute precipitated by the notice of termination had failed, the applicant launched urgent proceedings in this court on 28 August. The matter was set down for 1 September. On that day the respondent filed an answering affidavit and the matter stood down until the following day, 2 September, to enable the applicant to file a reply, which it did. On 2 September the parties were told that, given its expected duration, the matter could not be accommodated on the urgent roll for that week. It was suggested by the court that the parties agree to postpone the application to the opposed roll of 9 September 2008. The parties did so.

[2] The matter duly came before me on 10 September. The application consists of two parts. In Part A the applicant prays for interim relief pending the final determination of the relief claimed in Part B. Part B is for final relief in substantially the same terms. Counsel for the applicant informed me that the applicant moved for relief under Part A only. Part B,

he said, was to be heard in due course since the time periods contemplated for the filing of affidavits in that section of the notice of motion had not yet expired and the applicant wished in due course to supplement its affidavits. Counsel for the respondent on the other hand argued that because a period of more than a week had elapsed since the matter was originally set down, and since full affidavits had been filed, the matter should be treated as an application for final relief under Part B. He argued further that were the court to determine the matter as one for interim relief under Part A, then the question of urgency remained in issue and since (so it was alleged) the applicant had made out no proper case in that regard, the application should be struck from the roll with costs.

[3] I do not agree that what falls to be determined at this stage is the relief claimed under Part B of the notice of motion. The applicant seeks, in the first instance, interim relief as a matter of urgency. It has given notice in the usual way of its intention to seek final relief in due course. Different consideration will apply at that time and both parties may wish to supplement their papers to deal more fully with the issues in dispute. The application could not be accommodated in the urgent court during the week of 1 September through no fault of the applicant's and the parties were urged to agree to the matter being postponed to the opposed roll. The respondent apparently went along with this suggestion and did not (so far as

I am aware or have been told) insist that the issue of urgency be determined then and there. Accordingly, the applicant is entitled to have its application for urgent interim relief under Part A of the notice of motion determined at this stage of the proceedings.

[4] Under Part A the applicant seeks an order, pending the final determination of the application, directing that the respondent continue to engage it for the purposes of printing and binding the respondent's publications and interdicting and restraining the respondent from acting in a manner inconsistent with an obligation to entrust to the applicant the printing and binding of the respondent's publications.

The Applicant's Case

[5] The applicant alleges that there exists an agreement between the parties in terms of which the applicant will attend to the printing of the respondent's publications until 30 April 2009 at agreed prices. The agreement is said to have been concluded orally and tacitly. In addition, the applicant contends that it will suffer irreparable harm if the relief is not granted, that the balance of convenience favours it, and that it has no satisfactory remedy other than interdictory relief for specific performance. The facts upon which the applicant bases its claim are summarized below.

[6] For approximately the last ten years the applicant has printed the publications listed in paragraph 1 above on behalf of the respondent. With the exclusion of Auto Freeway Cape, these are hereinafter referred to as the respondent's publications. Some of them are printed weekly. The applicant receives data from the respondent, prints such data and then binds the respondent's publications. Each year for the last ten years, the parties have agreed upon the price that will prevail between them for the following twelve months, subject to minor variations in respect of imported paper because of exchange rate fluctuations. The applicant's pricing structure is based on forward commitments which the applicant places with paper mills for the paper required to publish the respondent's publications for a twelve month period. Similarly, the applicant commits annually in advance to suppliers of ink, printing plates and various other consumables, based upon a twelve month contract with the respondent.

[7] In accordance with their practice in previous years, the parties agreed upon the ruling prices for the twelve months ending on 30 April 2009. Pricing was discussed at a meeting held on 10 April 2008 between the parties' representatives. On 24 April the applicant sent to the respondent its pricing proposal for the year 1 May 2008 to 30 April 2009. At a meeting held on 9 May 2008 the respondent accepted the pricing structure which the parties

had discussed at the 10 April meeting and which had been conveyed in writing on 24 April.

[8] At the 9 May meeting the applicant also sought an assurance from the respondent that the respondent's business would remain with it. This issue arose because at the meeting held on 9 May the respondent informed the applicant that it would henceforth have the publication known as Freeway Cape printed at a printer known as "Paarl Web" in the Cape. In addition, at an earlier meeting held on 18 February the respondent had referred to rumours in the market place that the respondent intended to terminate its relationship with the applicant and to place its printing needs with one of the applicant's competitors. The respondent had said that these rumours were untrue although all options were being pursued. At the 9 May meeting, the respondent assured the applicant that it would continue to be engaged for the printing of the respondent's publications. The applicant left the meeting of 9 May satisfied that it had the respondent's assurance that it would retain its business for the next twelve month period. As indicated, the rationale for requiring the respondent to accept new prices annually is that the applicant bases its planning and production for the satisfaction of the respondent's needs on an annual basis and to that end commits itself to various supplier all on the strength of a twelve month contract with the respondent.

[9] It is the applicant's case that by reaching agreement with the respondent on prices for the year ending April 2009, it secured a binding commitment from the respondent that for the forthcoming twelve months the applicant would attend to the provision of those publishing services which it had provided for the preceding ten years, in accordance with past practice. The agreement upon which the applicant relies was said in argument to be oral insofar as price is concerned and tacit as regards its remaining terms.

The Respondent's Opposition

[10] The respondent for its part admits that for the past ten years the applicant has published its various publications and it admits that it agreed to a new pricing structure for the year ending 30 April 2009. However it denies that there is (or ever has been) any binding contract between the parties for the provision of printing services. It contends that the *"relationship between the applicant and the respondent was simply an arrangement in terms whereof the respondent utilized the applicant's printing services to print and bind the respondent's various publications."* Business that was conducted between them was done *ad hoc* and not in terms of an ongoing agreement. While it is so that pricing was agreed annually this did not mean that a contract came into being or that the respondent was obliged to use the applicant's services. It simply meant that in the event that the respondent placed orders with the applicant during the forthcoming year,

the agreed prices would govern. The respondent also points to the fact that during 2007 and 2008 the parties were engaged in an attempt to negotiate a comprehensive written agreement which would govern their relationship, but failed. It says this is further evidence of the lack of any agreement between the parties.

[11] The respondent submits that the applicant has failed even to establish a *prima facie* right based upon an agreement, saying that there is no evidence of the terms of such agreement or when and by whom it was concluded.

***Prima facie* Right**

[12] There are currently two apparently conflicting tests for inferring the existence of a tacit contract, both based upon decisions given by the Appellate Division. The first test was stated thus in *Standard Bank of SA Limited v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 292:

> *"In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem."*

The second test – formulated in the case of *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Limited* 1984 (3) SA 155 (A) at 165B – is in these terms:

> *"In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence."*

[13] *Christie (RH Christie : The Law of Contract in South Africa* 5th Ed) suggests a synthesis embracing both tests. It reads as follows:

> *"In order to establish a tacit contract it is necessary to prove, by the preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on the preponderance of probabilities that the parties reached agreement in that manner it may find the tacit contract established."* (at page 85)

In the recent case of *Sewpersadh v Dookie* 2008 (2) SA 526 (D) Swain J refers with approval to the test formulated by Christie. (at para 27). The learned judge also relied upon the dictum of Comrie J in *Muller v Pam*

Snyman Eiendoms Konsultante (Edms) Beperk [2000] 4 All SA 412 (C) at 419b – c, to the following effect:

> *"The idea of a compelling inference appeals to me; a compelling influence derived from proof on a balance of probabilities of unequivocal conduct usually in a business setting."*

In the *Sewpersadh case*, the court concluded that the facts before it *"prove[d] on a preponderance of probabilities unequivocal conduct on the part of the parties, from which a compelling inference may be drawn that they concluded a tacit contract ....Alternatively, the conduct of the applicants was such as to lead the respondent reasonably to believe that the applicants had so agreed."* (at para 29)

[14] Of particular importance in deciding whether a tacit contract has been concluded are the objective, common cause facts in any matter, rather than the conflicting assertions of the parties after the event. There are a number of probabilities which in my view point at least *prima facie* to the existence of the obligation underpinning the applicant's claim. The applicant stressed in argument that the contract upon which it relies is a simple one and I agree that it is sufficient for present purposes for the applicant to establish only that the respondent is obliged to permit the applicant to print its publications and that the prices for its services have been agreed upon.

[14.1] For ten continuous years the applicant has printed the respondent's publications. All that changes each year is that the parties agree on an updated pricing structure for the following year. It seems probably that the parties have agreed pricing each year, for a whole year, precisely because they expect to do business with each other until the termination of the next annual period. This is indicative of an ongoing contractual relationship rather than the placing of *ad hoc* orders.

[14.2] The applicant gears a substantial part of its business to the fulfillment of the respondent's requirements. It is highly improbable that it would commit itself to suppliers for a twelve month period if its only expectation was for periodic orders which may or may not eventuate.

[14.3] Some of the respondent's publications are printed weekly. On the respondent's version, it had no obligation to give these to the applicant for printing and correspondingly the applicant had no obligation to accept them. It is not credible from a business perspective that the parties intended to agree to so precarious a relationship. This finding is corroborated by what the respondent itself said in its e-mail, Annexure "WB5" to its affidavit, when motivating the inclusion of a twelve month notice period in the

written agreement under negotiation. It wrote that the *"problem is that technically no-one else can print Auto Trader in its current form. If CTP burnt down we would be forced to print the title at multiple locations, and would have to split the publication accordingly, to be pollybagged with all components in one bag. To do that and make our deadline would be next to impossible"*.

[14.4] In the face of rumours, the applicant sought an assurance from the respondent at the 9 May meeting that the respondent would continue to receive the applicant's business. The request for an assurance makes sense if (as the applicant contends) there was a continuing obligation upon the respondent to use the applicant as its printer. It makes less sense if the applicant had only an expectation of *ad hoc* work. Although there is a dispute about whether the respondent gave an assurance of continued business, even on its own version, the respondent's response (namely that it assured the applicant it would continue giving its business *"for now"*), is equivocal. If there never was any agreement one would have expected a response along those lines in answer to the applicant's enquiry.

[14.5] The tenor of the discussions between the parties when the respondent announced its decision to terminate are consistent with the existence rather than the absence of an agreement. In its letter

of termination the respondent gave formal notice advising the applicant *"that we hereby terminate your services"*. Although it is said that the notice was given merely as a matter of courtesy due to the length of the business relationship between the parties, it is more probable that the real reason is that the respondent felt it was under an obligation to give notice.

[15] The applicant relied on the case of *H Merks and Co (Pty) Ltd v The B-M Group (Pty) Limited and Another* 1996 (2) SA 255 (W) as being in point. In that case it was held that the agreement in question continued for so long as the parties agreed on updated prices at regular intervals but that once there was a failure to agree on prices, the agreement came to an end. So too in this case it is probable that the parties intended the agreement to endure from year to year as long as they continued to agree upon prices for the forthcoming twelve months, and only if the parties failed so to agree would the agreement come to an end.

[16] It is common cause that the parties attempted but failed to conclude a comprehensive written agreement by the time the respondent gave notice. The respondent points to this as evidence of the absence of any agreement. Whilst it is correct that no written agreement was concluded between the parties, this is not to say that no agreement of any sort existed between them. It is trite that when parties attempt to negotiate a comprehensive

agreement regulating all aspects of their relationship, certain terms may nonetheless be binding upon them before the finalization of that process. (See *Christie (supra)* at page 35). The failed negotiations are not therefore conclusive either way.

[17] The applicant applies for interim relief and therefore it is sufficient for it to show a *prima facie* right, though open to some doubt. The proper approach as set out in *Webster v Mitchell* 1948 (1) SA 1186 (W) is well know. In my view the applicant has satisfied the threshold by setting up sufficient objective facts from which to conclude on a *prima facie* basis that there is an ongoing obligation upon the respondent to place its publications with the applicant at the agreed prices until April 2009.

[18] In its founding papers the applicant said that its agreement was subject to a twelve month notice period. That contention was not pursued in argument before me. The applicant submitted that the duration of any notice period was an issue for decision under Part B of the application and need not be considered now. This is because the respondent's version is that there was no agreement, not that it gave reasonable notice in terms of an admitted agreement. I accept the submission. Accordingly it is not necessary to consider what would be a reasonable notice period in the present context and the cases relied on in argument (especially *Putco Ltd v T V & Radio Guarantee Co. (Pty) Limited* 1958 (4) SA 773 (AD) and *Transnet Ltd v*

Rubenstein 2006 (1) SA 591 (CA) need not be considered for this leg of the application.

[19] In the light of the above I find that the applicant has succeeded in showing *prima facie* the existence of an obligation upon the respondent to utilize the applicant's services for printing its publications for the twelve month period ending 30 April 2009, at the agreed prices for that period.

Irreparable Harm and Balance of Convenience

[20] The applicant complains of the irreparable harm it will suffer if the relief is not granted. This assertion is based upon the commitments it has made to suppliers and staff members on the strength of a twelve month contract with the respondent. As mentioned, the applicant says it has committed to suppliers of ink, printing plates and various other consumables for the twelve months ending on 30 April 2009. The applicant presently holds stock and will receive further stock of paper, ink and other consumables. If the respondent is permitted to unlawfully terminate the contract the applicant will nonetheless be obliged to perform in terms of its commitments to the various suppliers.

[21] The respondent denies these allegations but its denials are bald and not particularized. It is also no answer to say, as the respondent does, that the applicant's stock of goods could be used elsewhere in the Caxton Group.

The applicant points out in reply that it prints only one in-house Caxton publication and the rest are printed by other Caxton companies which already have sufficient stocks on hand to fulfill those printing requirements.

[22] In addition, the applicant says it has purchased a back up Perfect binder at a cost of approximately R5 000 000, which it would not have bought had it been aware that the respondent intended to unlawfully terminate its contract. This is a further relevant consideration along with the first.

[23] The respondent for its part says the balance of convenience is in its favour for three main reasons:

[23.1] The first is that it would be saddled with an under-performing counterparty were the court to grant the order sought. This is based upon the allegations of poor performance set out in the answering affidavit and in particular the incident which occurred at the end of August 2007. The applicant's Perfect binding machine broke down, as a result of which the Auto Trader issue 772 had to be reduced by 104 pages and the publication was saddle-stitched instead of perfect bound. The applicant acknowledges the respondent has made complaints of poor performance but answers this point in a number of ways. Firstly, it says it has bought a new press which will enable it to improve the turnaround time in the printing of the respondent's

publications as well as a second back-up Perfect binder specifically for binding the respondent's publications. Secondly, it points out that the complaints of poor performance are in the main of recent vintage and (so it says) contrived. Thirdly, it points out that these complaints were evidently not serious enough to prevent the parties from continuing negotiations for a written fixed term contract. It says it is also significant that despite performance being an ongoing issue from March 2008, the respondent still agreed to a new pricing structure for the year ending April 2008. Finally, the applicant emphasized that the respondent retains all its common law remedies in the event of the applicant's mal-performance of its printing obligations. I agree on the strength of these answers that complaints of poor performance are no bar to the relief sought.

[23.2] The respondent's second point is that it may face a damages claim from Paarl Web, which it says has already been engaged to take over the printing and binding of its publications from 1 September 2008. The difficulty with this contention is that the respondent has set out very little concerning its relationship with Paarl Web. Although details of its dealings with Paarl Web (a competitor of the applicant's) are confidential), it was incumbent upon the respondent to at least set out facts which show that an interim order in the terms

prayed for would inevitably cause the respondent to act in breach of a contract it has concluded with Paarl Web. The respondent has set out no such facts.

[23.3] Finally, the respondent argues under this head that if the order is granted it will be compelled to utilize the services of the applicant without the terms of any contract being agreed upon between the parties. This allegation is not valid. The grant of an order will not place the respondent in any different position from that which it has been in for the past ten years regarding its relationship with the applicant. In any event, the order is interim only.

[24] Consequently, I cannot find that the balance of convenience favours the respondent. Instead, I find that the balance favours the applicant.

No Alternative Remedy

[25] A remedy open to the applicant is to claim damages for unlawful termination of the agreement. However the applicant points out with reference to the case of *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Limited and Others* 2006 (1) SA 252 (SCA) at 258C that it is not a proper consideration in assessing a claim for specific performance sought to be enforced by way of interdict, that a party is entitled to sue for damages or cancel the agreement. The applicant

is such a case is entitled to enforce its bargain and the only ordinary remedy which provides it with necessary protection is an interdict. Since I have found that the applicant has established a *prima facie* right, specific performance of the agreement should follow unless in the exercise of my discretion I find there is good reason not to make such order. (*Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A)). There are no facts preventing an interim order of specific performance, especially given the long standing relationship between the parties.

Urgency

[26] The respondent argued that the application is not urgent. The first (oral) notice of termination was given on 25 July, followed by written notice on 31 July. According to the respondent, the applicant delayed inexplicably before serving the application on 28 August and then asking for immediate relief so as to prevent the publication of any of the respondent's publications by Paarl Web on 1 September. The respondent argues that since 1 September has come and gone and Paarl Web have commenced publishing, the harm which the applicant sought to prevent has already occurred. Furthermore, any urgency which might have existed was self-created.

[27] It is correct that there is an appreciable delay between the date of termination by the respondent and the launching of the application. At least part of that delay (between 31 July and 11 August) is not explained on the papers. However for the rest, the applicant explains that it attempted to resolve the dispute with the respondent before launching court proceedings. According to the *Transnet case* (*Transnet v Rubenstein* 2006 (1) SA 591 SCA at page 603), an applicant cannot legitimately be criticized for attempting to settle a matter before resorting to litigation. In addition urgency is ongoing since each week there is a new publication and with each publication carried out by Paarl Web, the more remote become the prospects of reversing the respondent's decision.

[28] I am satisfied on balance that the matter is urgent despite the delays which have occurred.

Relief

[29] In the result, I make an order in the following terms:

[29.1] Pending the final determination of the relief claimed in paragraph B of the notice of motion:

(a) the respondent is directed to continue to engage the applicant for the purposes of printing and binding the following publications:

[29.1.1] Auto Trader;

[29.1.2] Commercial Trader;

[29.1.3] Auto Freeway KwaZulu-Natal; and

[29.1.4] Auto Freeway Gauteng.

(b) the respondent is interdicted and restrained from acting in a manner inconsistent with an obligation to entrust to the applicant the printing and binding of the following publications:

[29.1.5] Auto Trader;

[29.1.6] Commercial Trader;

[29.1.7] Auto Freeway KwaZulu-Natal; and

[29.1.8] Auto Freeway Gauteng.

[29.2] The costs of this application (including those incurred on 1 and 2 September 2008) are reserved for determination with the relief set out in paragraph B of the notice of motion

FRANKLIN AJ

16 SEPTEMBER 2008