

TERMINATION OF CONTRACTS WITH AN INDEFINITE TERM: SOUTH AFRICAN COURTS' APPROACH

14 August 2018 | South Africa
Legal Briefings - By **Michelle Mudzviti, Trainee**

The duration of a contract is often specified by an express provision, or it may be determined from the nature and purpose of the contract. However, there are cases when the duration is neither determined nor determinable. An indefinite term contract is a contract that does not set a time period for the life of the contract, nor a procedure for termination of the contract. It usually covers agreements that involve the regular, cyclical sale or transfer of goods and services. Indefinite term contracts are typically used when the life of the contract cannot be readily estimated, but each party is willing to work with the other over a long period of time.

The clause determining the duration or termination of a contract is one that can be easily forgotten in the rush of concluding a deal; or parties may omit it in anticipation of a permanently harmonious business relationship. Should one of the contracting parties wish to terminate the agreement this can cause numerous problems such as what is considered a reasonable notice period for termination or whether a contract has existed for a 'reasonable period' to warrant termination. Due care should always be taken to remove any ambiguity surrounding the term of a contract and the termination procedure required to terminate the contract, to avoid the possibility of a dispute as to whether and how the contract can be terminated.

Where the duration or termination of an agreement is regulated by legislation, those provisions regarding duration and termination must be applied to the contract. For example, the Consumer Protection Act 68 of 2008 (CPA) allows certain fixed term consumer contracts to be terminated on 20 days' notice, thus removing the uncertainty regarding termination periods. The CPA also specifies a maximum period of two years for such fixed term consumer contracts. Any agreement, which purports to be longer than this would need the supplier to prove a demonstrable benefit in favour of the consumer.

Under common law, the duration and termination procedure will have to be determined contractually by establishing whether there are any specific termination grounds, including voluntary termination on which the parties can rely. If no such specific termination grounds are included in the contract, the courts have provided direction in this respect. In 2014, the Supreme Court of Appeal (SCA) dealt in detail with the position where a contract is silent as to its duration and termination procedure. In *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA) the issue was whether the written contract could be construed as containing a tacit or implied term to the effect that the contract was terminable by either party on reasonable written notice.

The dispute between the parties had its origin in a contract concluded in 2005, which Plaaskem sought to terminate by way of written notice in 2010. Plaaskem's purported termination of the contract by written notice was rejected by Nippon Africa as being of no force and effect, because according to Nippon Africa, the contract did not contain a tacit term that it could be terminated on reasonable notice. Plaaskem pleaded that the contract contained a tacit, alternatively implied, term to the effect that the contract was terminable on reasonable notice.

The court *a quo* held that the contract did not contain such a term and as a result, the notice of cancellation of the contract by Plaaskem was invalid and of no effect. In overturning the court *a quo*'s decision, the SCA held that certain factors had to be taken into account to determine the existence of such a tacit term. Firstly, the SCA analysed the language used by the parties in the contract and held that from such language, there was no indication that they intended to be bound in perpetuity. Secondly, the court considered the intention of the parties, having regard to the nature of the relationship between the parties, as well as the surrounding circumstances. The SCA noted that the contract was of such a nature that it required the parties to form and maintain a close working relationship and have regular contact and interaction with each other. Other aspects such as the contract covering a wide spectrum of products and that the nature of the relationship would change over time were strong suggestions that the parties did not intend to remain bound in perpetuity.

Regarding the third consideration, being the nature of the relationship between the parties, the SCA held that the court *a quo* erred in finding that the working relationship between the parties was open to serious doubt. The relationship appeared to be one of good faith and trust from the contract. Fourthly, the surrounding circumstances of the agreement were considered. The unpredictable and variable nature of factors such as production costs, transportation costs, landing costs and the applicable exchange rates would lead one to conclude that the parties had no intention to be bound in perpetuity.

The SCA upheld Plaaskem's appeal and held that it was necessary and commercially efficacious for a tacit term to be imputed, which in this case meant the contract could be terminated by either party on reasonable written notice.

This was also the approach of the courts in *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA); *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 (1) SA 433 (W); and *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A). In these cases it was held that where the circumstances of an agreement show that all that the parties intended was a temporary arrangement, but the contract was silent as to duration, it is reasonable to infer that they contemplated termination on reasonable notice.

PERPETUAL CONTRACTS

In some jurisdictions, like most American states, parties may not enter into perpetual contracts, because they violate public policy and thus will not be enforced. In South Africa, however, parties may enter into a perpetual contract as long as they make it clear that they intend to be bound in perpetuity. Where the contract does not specify the duration or expiry date of the contract, or the termination process, but the parties intended the contract to run indefinitely, the court will generally not impute a tacit term that the contract is terminable on reasonable notice. In *Golden Lions Rugby Union and Another v First National Bank of SA Ltd* 1999 (3) SA 576 (SCA) the court held that the appellant was bound to a written agreement in perpetuity as the agreement contained a clause, which expressly stated that the obligation would endure in perpetuity, or until terminated by the respondent.

In *Kelvinator Group Services of SA (Pty) Ltd v McCulloch* 1999 (4) SA 840 the court held that a term, to be imputed, must not merely be reasonable or desirable, but necessary, and that such a tacit term will not be imputed into an agreement if it is in conflict with its express provisions.

CONCLUSION

Termination of a contract should be contemplated by the parties at the time of drafting. In order to avoid lengthy and costly court procedures, the drafter should ensure that the intention of the parties regarding the duration and termination of the contract is clear and unambiguous from the wording of the contract. The contract should contain clear and unambiguous language with regard to how it can be terminated, whether that is a certain date, specific notice provisions, a specified event, or some other occurrence that makes it clear to both parties that their business relationship has ended. If the parties intend to be bound in perpetuity the wording of the contract should also make this clear. Where an agreement is silent as to its duration or termination procedure, it is terminable on reasonable notice in the absence of an intention that it was intended to continue indefinitely.

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This article was first published in *De Rebus* in 2018 (Aug) DR 18.

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