IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

SCZ/08/038/2018
APPEAL NO. 04/2018

(CIVIL JURISDICTION)

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
06 AUG 2020
SUPREME COURT REGISTRY 2
P.O. BOX 50067, LUSAKA

BETWEEN:

BIDVEST FOOD ZAMBIA LIMITED	**1ST APPELLANT**
CHIPKINS BAKERY SUPPLIES (PTY) LIMITED	**2ND APPELLANT**
CROWN NATIONAL (PTY) LIMITED	**3RD APPELLANT**
BIDFOOD INGRIDIENTS (PTY) LIMITED	**4TH APPELLANT**
BIDVEST GROUP LIMITED	**5TH APPELLANT**

AND

CAA IMPORT & EXPORT LIMITED	**RESPONDENT**

Coram: **Musonda, DCJ, Malila and Kaoma, JJS**
on 15th July, 2020 and 6th August, 2020

For the appellants: Mr. Sidney Chisenga of Messrs Corpus Legal Practitioners

For the respondent: Mr. Rodwyn Dean-Jay Peterson of Messrs Chibesakunda & Co.

JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Bidvest Food Zambia Limited, Chipkins Bakery Supplies (Pty) Limited, Crown National (Pty) Limited, Bidfood Ingredients (Pty) Limited, Bidvest Group Limited v. CAA Import and Export Limited, Appeal No. 56 of 2017.*
2. *IRC v. Muller and Co.'s Margarine (1901) AC 217.*

3. *Star Industrial Company Limited v. Yap Kwee Kor (1976) RPC.*
4. *W. T. Lamb and Sons v. Goring Brick Company Limited (1932) 1RB 1.*
5. *Lonsdale v. Howard & Hallam (2007) UK KL 32 HL.*
6. *Baird Textiles v. Marks & Spenser (2001) EWCA Civ 274*
7. *Federal Commissioner of Taxation v. Murray (1997) 193 CLR 605.*

Legislation referred to:

1. *Court of Appeal Act No. 7 of 2016.*
2. *Supreme Court Rules, chapter 25 of the Laws of Zambia.*
3. *High Court Act Chapter 27 of the Laws of Zambia.*

Other works referred to:

1. *Halsbury's Laws of England 5th ed.*
2. *UK Commercial Agents (Council Directive) Regulations No. 3053, 1993.*
3. *UK Supreme Court.*
4. *International Agency and Distribution Law (2009, Yorkhill Law Publishing) D. Campbell (ed).*
5. *Unfair Contract Terms Act 1977 (UK).*
6. *The Sale of Goods Act, 1979 (UK).*

1.0 INTRODUCTION

1.1 This appeal involves a claim by a commercial merchant for goodwill compensation. It is sequel to the termination of contractual arrangements which the merchant had entered into with suppliers of products whose marketing in Zambia the merchant had undertaken to do on an exclusive basis.

1.2 The merchant claims that through its spadework it had, during the period it exclusively marketed the suppliers' products on the Zambia market, grown a brand loyal customer base and thereby improved the brand's goodwill –

that intangible value - that will continue to inure to the suppliers' business.

1.3 The suppliers, as trademark owners of the marketed products, deny that the merchant has any colour of right to claim goodwill compensation.

2.0 BACKGROUND FACTS

2.1 All the parties to the present appeal are bodies corporate, legally recognized as such under the laws of the respective jurisdictions in which they were incorporated.

2.2 For completeness, the respondent and the first appellant are private companies limited by shares and registered under the Companies Act, chapter 388 of the Laws of Zambia, but have continued to exist as such under the successor legislation to this statute, while the second, third and fourth appellants are private limited companies incorporated under the relevant laws of the Republic of South Africa. The fifth appellant, on the other hand, is a public limited company registered as such under the laws of the Republic of South Africa and is listed on the Johannesburg Stock Exchange.

2.3 The second, third and fourth appellants enjoy a symbiotic relationship with one another – each one of them being a subsidiary company of the fifth appellant.

2.4 The present dispute arose from what, on all accounts, started off as a fairly cordial business relationship between the respondent and the second appellant. The respondent's narrative of the background facts was that on its behalf and that of the second appellant, an oral agreement was entered into by their representatives sometime in 1997 under which the second appellant was to exclusively supply the respondent with baking products (to wit, Chipkins bakery products) for sale on the Zambian market.

2.5 Other terms of that oral contract, according to the respondent, were that the respondent was to have a 75 days statement credit facility within which to settle the account in respect of the products supplied by the second appellant; the second appellant was to give to the respondent a rebate of 2.5% of the total invoice amount upon proof of export of the products from South Africa; the respondent was to arrange collection of the bakery products from the second appellant's premises and was, to this end, to meet the costs of transportation, insurance and taxes for the products. The respondent would then put a mark-up on the sale price of the products and distribute the same on the Zambian local market.

2.6 It was the respondent's position that the second appellant and the respondent had originally agreed that their oral contract would be automatically renewed yearly on the first of January. However, on the 12th July 1999, a new development occurred in that contractual arrangement: the oral contract was confirmed by way of a letter from the second appellant to the respondent.

2.7 A couple of years later, in 2004 to be precise, the respondent concluded a similar but separate oral agreement with the third appellant. Under that agreement, the respondent agreed to assume the role of exclusive distributor of the third appellant's products (to wit, the Crown natural products) throughout Zambia. The terms of that engagement were identical to those applying to the contractual relationship assumed between the respondent and the second appellant particularized at paragraph 2.5.

2.8 It would appear that the business relationship between the respondent and the second appellant, on the one hand, and the respondent and the third appellant on the other, flourished without incident until August, 2013.

2.9 On the 8th August 2013, a development occurred which no doubt was unsettling for what had hitherto been tranquil commercial arrangements between the respondent and the second and third appellants: the Managing Director of the fourth appellant (Bidvest Ingredients (Pty) Limited) penned a letter to the respondent, notifying the latter that the fifth appellant had resolved to terminate the contractual relationship between the respondent and the second appellant, and that existing between the respondent and the third appellant.

2.10 The respondent viewed the decision by the fifth appellant to terminate the respondent's contractual arrangements with the second and third appellants as illegitimate, granted that the respondent had no contractual relationship with either the fourth or the fifth appellant.

2.11 Arising from the termination of the respondent's business relationships with the second and the third appellants, the latter discontinued the supply of their products to the respondent after 1st October 2013, thus making it impossible for the respondent to continue to service its customers competitively.

2.12 The respondent claimed that as the sole distributor in Zambia of Chipkins branded products for sixteen years and sole distributor in the same market of Crown branded products for nine years, it had, through its aggressive marketing of those products, developed a brand-loyal customer base to which it distributed approximately 200,000 tonnes of Chipkins Bakery products and 10,000 tonnes of Crown natural products annually.

2.13 The respondent grumbled that through its distributorship and marketing efforts during the subsistence of the contractual arrangements, a considerable level of goodwill value in the second and third appellants' products had been generated from which the second, third and indirectly, the fifth appellants had benefitted considerably. The goodwill value involved would survive the termination of the respondent's contractual relationship with the second and third appellants as the marketing of the products would henceforth be carried out through the first appellant, which was specifically incorporated in Zambia to replace the distributorship role of the respondent in respect of the second and third appellant's products.

2.14 Without offering any compensation to the respondent for the goodwill value in question, the fourth appellant demanded a transfer of the respondent's customer list, which customers were in any case bound to migrate to the first appellant, granted the refusal by the second and third appellants to continue supplying the respondent with its products.

2.15 The respondent further complained that in the period immediately preceding the termination of the contractual arrangements with the second and third appellants, the respondent experienced delays in receiving deliveries of products from the two contract appellants which the respondent believed was intentionally designed to occasion reputational damage to the respondent among its customers.

2.16 Much irritated by these developments, the respondent sought the intervention of the High Court to provide relief.

3.0 CLAIM IN THE HIGH COURT AND DECISION OF THAT COURT

3.1 In the High Court, the respondent claimed, in its amended writ of summons, the following relief:

> **(i) A declaration that the termination [of the contracts] by the fourth and/or fifth appellants was unlawful.**
>
> **(ii) Against the second and third appellants:**
>
> > **(a) Specific performance of the distribution contracts.**
> >
> > **(b) Alterative to(a)**
> >
> > > **i) damages for breach of contract;**
> > > **ii) damages for loss of earnings**
> >
> > **(c) Damages for injury to commercial reputation.**
>
> **(iii) Against the fourth and fifth appellants**
>
> > **(a) Damages for unlawful interference; and**
> >
> > **(b) Damages for procuring a breach of contract.**
>
> **(iv) Against the respondents jointly and severally, compensation for the transfer of the benefits of the goodwill from the respondent to the first appellant.**
>
> **(v) Interest on the sums payable at the current Bank of Zambia lending rate**

(vi) **Interim injunction restraining the first appellant from distributing, selling or otherwise dealing with any products manufactured or distributed by the second and third appellants and restraining the second and third appellants from distributing their products in Zambia.**

(vii) **Any other order the court may deem fit; and**

(viii) **Costs of an incidental to the action.**

3.2 In their defence in the trial court, the appellants were in substantial agreement with the facts as narrated by the respondent in their amended statement of claim. They, however, disagreed in minor respects as specified below.

3.3 The appellants averred that the second appellant and the third appellant had since changed names to Bidvest Bakery (Pty) Limited and Bidvest Food Southern Africa (Pty) Limited; that the credit period under the contracts with the respondent was not 75 days as alleged, but rather 60 days; and that there was no agreement for yearly renewal of the agreements.

3.4 The appellants also claimed that the fourth and fifth appellants were aware of the agreements entered into between the respondent and the second and third appellants and that subsequently, the respondent started to deal with Bidvest Food Export (Pty) Limited, a division of the fourth appellant; and that the fourth appellant had authority to notify the respondent of the termination of the agreements – that termination was thus lawfully made.

3.5 The appellants asserted that the respondent was neither the manufacturer of the products it marketed nor the owner of the trade mark in them and that the customer base developed by the respondent is as a result of the customers trusting the second and third appellants' products. Goodwill, according to the appellants, is in relation to the products manufactured by the appellants and not in the respondent, as the latter was merely a buyer and reseller.

3.6 Furthermore, the second and third appellants have registered trademarks in Zambia which trademarks have never been assigned to the respondent for the latter to claim any goodwill in the products in question.

3.7 The appellants further asserted that the incorporation of the first appellant was a result of a business decision taken to improve distribution of the appellants' products in Zambia. It was, according to the appellants, the respondent that had benefited from the reputation and goodwill of the second and third appellants' products.

3.8 The appellants thus emphatically denied the respondent's claim in the High Court.

3.9 The matter was set down for hearing before Nyambe J. She considered the documents filed before her and heard the respective witnesses of the parties. She held that, on the evidence before her, a breach of the contracts by the second and third appellants had occurred when the fourth appellant, whilst acting as agent for the second and third appellants, informed the respondent that the latter would no longer be able to place orders with the second and third appellants. The resultant refusal by the second and third appellants to supply the respondent with their products as per contractual stipulation, was a breach of contract.

3.10 On the question whether Bidvest Ingredients (Pty) Limited and Bidvest Group Limited had unlawfully interfered in the agreement between the respondent and the third appellant, the learned High Court judge held that the fifth appellant did induce a breach of contract by the second and third appellant and by so doing had committed the tort of unlawful interference with the contracts in question.

3.11 On the issue of goodwill, the court held that the elements of goodwill of the respondent's business extended beyond the goodwill of the products it distributed. She further held that in the case of branded consumer goods, as the case was with the goods subject of the dispute, the goodwill generated by the distributor remains with the manufacturer or supplier. The respondent, however, contributed immensely to the extension of the appellants' customer portfolio and generated a great deal of goodwill.

3.12 In the court's holding, goodwill was transferred from the respondent to the appellants. The respondent was thus entitled to the relief as endorsed on the writ of summons. She accordingly entered judgment for the respondent with costs.

4.0 THE APPELLANT APPEALS TO THE COURT OF APPEAL

4.1 The appellants were peeved by the judgment of the High Court. They thus launched an appeal to the Court of Appeal on eight grounds.

4.2 It is important that we set out those eight grounds of appeal so as to facilitate a proper appreciation of the judgment of the Court of Appeal, the subject of the appeal in this court.

4.3 The grounds upon which the appeal was argued in the Court of Appeal were as follows:

> **(a) That the learned trial judge erred in law and in fact when she entered judgment on admission in respect of an admission in the Amended Defence that the Respondent had an exclusive distribution agreement with the 2nd and 3rd appellants in circumstances where no relief was sought in the Statement of Claim that the aforesaid parties had an exclusive Distributors Agreement.**
>
> **(b) That the learned trial judge erred in law and in fact when she held that there was transfer of goodwill from the Respondent to the Appellants in circumstances where it had been established that the Appellants were the registered trademark owners of the goods that were distributed by the respondent and where the Respondent did not lead any evidence to illustrate the creation of goodwill in the products of the 2nd and 3rd Appellants**
>
> **(c) That the learned trial judge erred in law when she awarded the Respondent all the reliefs as endorsed on the writ of summons when the said reliefs included an injunction restraining the Appellants from distributing their products in Zambia except through the Respondent when injunction application was dismissed by the same court on 18 March, 2014.**

(d) That the learned trial judge erred in law when she failed and/or neglected to consider and make reference to the Appellants' evidence both in the Defendant's Witness Statement and in cross examination as well as the Defendant's own written submission in her judgment.

(e) That the court below erred in law and fact when it held that the letter dated 12 July 1999 does not constitute an enforceable variation of the agreement between the Respondent and the 2nd Appellant when what was pleaded is that the said letter constituted confirmation or evidence of the oral agreement and not a variation of the agreement.

(f) That the learned trial judge erred in fact and in law when she held that the Appellant's refusal to supply the Respondent was a clear and plain breach of contract when the said contract had been effectively terminated by notice and the evidence on record clearly shows that the Appellant did not refuse to supply the Respondent with products to distribute in Zambia.

(g) That the learned trial judge erred in law and in fact when she held that the reasonable notice period for the termination of the Distribution Agreement between the 2nd and 3rd Appellants and the Respondent is 12 months when the evidence or record shows that the agreement had a duration of 12 months.

(h) That the learned judge erred in law and in fact when she held that the 4th and 5th Appellants interfered and induced the breach of contract by the 2nd and 3rd Appellants when there was no breach of contract by the 2nd and 3rd Appellants and the evidence on record shows that in the

course of dealing the Respondent had been dealing with Bidfood Exports (Pty) Limited.

5.0 THE COURT OF APPEAL DECIDES

5.1 The Court of Appeal (comprising Makungu, Chashi and Kondolo, JJA) heard the arguments for and against the appeal and delivered its judgment on the 27th November 2017 which is by the present appeal, being assailed.

5.2 In its judgment, the Court of Appeal upheld ground one of the appeal, holding that the High Court should never have entered judgment on admission in respect of the non-contentious position that there were exclusive dealership agreements between the contesting parties. What the High Court should have done, according to the Court of Appeal, was to make a finding of fact, rather than enter judgment.

5.3 As regards the second ground dealing with goodwill, the Court of Appeal agreed with the High Court that the respondent, as the exclusive distributor of the appellants' products in Zambia, had generated goodwill which, in the view of the court, is not restricted to products. That ground of appeal failed accordingly.

5.4 With respect to the third ground of appeal impeaching a global award of all the relief sought in the originating process, including an injunction, specific performance, damages and exemplary damages, the Court of Appeal held that the ground of appeal should succeed because the High Court should not have granted all the relief prayed for in a manner reminiscent of lack of the necessary deliberative judicial discernment on the part of the court.

5.5 Ground four of the appeal was dismissed on the basis that although the High Court judge did not make any specific reference to the evidence of the appellants' witness and to the submissions of counsel, the contractual relationship between the respondent and the second and third appellants was admitted and raised no issue. Failure to consider the submission did not thus prejudice the appellant.

5.6 The Court of Appeal also dismissed ground five of the appeal, holding that the finding by the lower court judge that the letter of 12th July 1999 was a confirmation and not a variation of the earlier oral agreement, was correct. Likewise the court dismissed ground six of the appeal, holding that the letter of

26th August 2013, though sent by parties who were not privy to the agreement, had the approval of the second and third appellants, and did in effect terminate the agreements. That termination constituted a breach of the agreements granted that no proper notice was given.

5.7 The seventh ground of appeal impeached the High Court's holding that reasonable notice for the termination of the subsisting distributorship agreement was twelve months when the duration of the agreements themselves was twelve months.

5.8 The Court of Appeal agreed with the appellant that twelve months' notice to terminate a twelve months' contract was rather excessive and thus unreasonable. The ground succeeded accordingly.

5.9 Ground eight of the appeal was also dismissed on the same basis that ground six was dismissed.

5.10 The upshot of the Court of Appeal's judgment was that grounds one, three and seven of the appeal were upheld while grounds two, four, five, six and eight were dismissed for lack of merit.

6.0 THE APPELLANTS APPEAL FURTHER

6.1 Equally unhappy with the judgment of the Court of Appeal, the appellants sought leave in terms of section 13 (1) of the Court of Appeal Act to appeal that judgment. That application was, however, refused by the Court of Appeal. The appellants renewed their application before a single judge of this court who granted it. The basis for granting leave to appeal was that the issue of a distributor's goodwill compensation in relation to goods whose trademark belongs to a manufacturer or supplier was a novel issue that presented a point of law of public importance fit for determination by the Supreme Court.

6.2 An order granting leave to appeal was then drawn up by counsel for the appellants, which order was signed by the learned single judge.

6.3 In its formulation, the order granting leave to appeal did not restrict itself to the basis upon which leave to appeal was granted, namely that the appeal raised a point of law of public importance within the meaning of section 13(3)(a) of the Court of Appeal Act.

6.4 Following the signing of the order by the single judge, the appellants filed their memorandum of appeal containing four grounds of appeal structured as follows:

GROUND ONE

That the court below erred in law and in fact when it awarded the Respondent compensation for goodwill on the basis that the Respondent exclusively marketed and sold the Appellants' products in Zambia notwithstanding that the Appellants were registered trademark owners of the goods distributed by the Respondent.

GROUND TWO

That the court below erred in law and in fact when it found that the Honorable Judge of the High Court had considered the evidence in totality in rendering her judgment when the record shows that the judgment of the High Court was an exact replica of the Respondent's submission and that the trial judge failed to consider the totality of the evidence.

GROUND THREE

That the court below erred in law and in fact when it held that the 4th Defendant induced a breach of contract when the record shows that the 4th Appellant was the authorized agent of the 2nd and 3rd Appellants who dealt with the respondent on behalf of the 2nd and 3rd Appellants. [sic]!

GROUND FOUR

That the Court below erred in law and in fact when it held that the 2nd and 3rd Appellants breached their contract with the Respondent when the said contract had been lawfully terminated.

6.5 The respective learned counsel for the parties filed heads of argument in support of the parties' positions in respect of each of the grounds of appeal.

7.0 THE RESPONDENT FILES A MOTION AGAINST THE DECISION OF THE SINGLE JUDGE ON LEAVE TO APPEAL

7.1 Notwithstanding the filing of responses to all the grounds of appeal as framed and filed, the respondent, through their learned counsel, took out a motion under rule 48(4) of the Supreme Court Rules, chapter 25 of the Laws of Zambia, which provides that any person dissatisfied with a decision of a single judge and desires to have such decision varied, discharged or reversed by the full court, is at liberty to apply to the court by motion.

7.2 In the motion before the full court, the respondent grumbled that although the basis upon which the single judge granted leave to appeal was that the appeal raised a point of law of public importance pursuant to section 13(3)(a) of the Court of Appeal Act, the single judge signed an order which opened the door for the appellants to appeal on matters that did not in their construction, raise any point of law of public importance.

7.3 It was the respondent's plea that the full court should vary the single judge's order so as to restrict the appeal to the one basis upon which leave to appeal was granted, namely that it raised a point of law of public importance – and therefore that the grounds of appeal that did not raise any such point of law should not be allowed to form part of the appeal before this court.

8.0 THE SUPREME COURT DECIDES ON THE MOTION

8.1 In our judgment on the motion in Appeal No. 56 of 2017 between the same parties, that is to say, **Bidvest Food Zambia Limited, Chipkins Bakery Supplies (Pty) Limited, Crown National (Pty) Limited, Bidvest Food Ingredients (Pty) Limited, Bidvest Group Limited v. CAA Import and Export Limited**[1], delivered on 11th June 2020, we upheld the respondent's motion.

8.2 We held in that case, *inter alia,* as follows:

> **... where leave to appeal is granted on the basis that the appeal raises a point of law of public importance under section 13(3)(a) only a ground of appeal raising such point will be covered by such leave. Any other proposed ground of appeal which does not satisfy that threshold will not be eligible for consideration in the appeal.**

8.3 Arising from that holding, we varied the learned single judge's order and directed that grounds two, three and four of the appeal, which do not raise any point of law of public importance, should be severed from the memorandum of appeal.

8.4 It is for the reason articulated in the foregoing paragraphs that the sole surviving ground of appeal before us is the first of the initial four grounds reproduced at paragraph 6.4.

9.0 THE APPELLANTS' CASE ON APPEAL

9.1 In the heads of argument filed on behalf of the appellants, the learned counsel submitted, in respect of the sole surviving ground of appeal, that given that the appellants are the registered trademark owners of the goods which the respondent distributed, the respondent cannot claim goodwill generated by the second and third appellants' products in Zambia. The court was, according to counsel, wrong to have held that goodwill transferred from the respondent to the first appellant when the distributorship agreements were terminated.

9.2 The point that counsel was pressing home was that the evidence available before the court shows that the respondent was in agreement that reputation and goodwill were acquired by the second and third appellants' products in Zambia during the subsistence of the distributorship agreement. There was no legal basis upon which the court could hold that, notwithstanding that the appellants are the registered trademark owners, goodwill in the goods was transferred from the respondent to the first appellant.

9.3 Counsel contended that the goodwill in the respondent as a business could not have been transferred to the first appellant company at its incorporation, as alleged by the respondent, since the respondent remained a going concern. The only thing that changed in the distributorship arrangement was that the respondent was no longer the sole distributor of the appellants' products in Zambia.

9.4 According to counsel, the only goodwill that could have been transferred to the first appellant was the goodwill in the second and third appellants' products which the first appellant was incorporated to distribute in Zambia.

9.5 The learned counsel contended that if the definition of goodwill as given by Lord Macnaughten in **IRC v. Muller and Co.'s Margarine**[2]**,** namely that it is an attractive force which emerges from a particular source, is anything to go by, the source of the goodwill which the first appellant would have benefited from upon incorporation is the second and third appellants' products which had hitherto been distributed exclusively by the respondent in Zambia.

9.6 It was further submitted that the goodwill in the respondent's business could not have been transferred to the first appellant because if the respondent had desired to continue exploiting the goodwill in its distributorship business, it could have minded to take up the appellants' offer as set out in the email of 12 August, 2013 to purchase the second and third appellants' products at a preferential price.

9.7 The short point made by the appellants' learned counsel is that goodwill in the appellants' products never resided in the respondent but remained throughout the distributorship arrangement in the appellants as trademark owners. This remained the case notwithstanding the respondent's business decision to advertise the products in order to increase its sales and profit.

9.8 The final argument made by counsel in his heads of argument was in regard to the question who owned the greater goodwill between the appellants and the respondent. He submitted that the question is more easily answered by considering who can maintain an action in passing off.

9.9 Counsel submitted that the respondent would have no cause of action against the first appellant but against the second and third appellant for breach of the exclusive distributorship agreements as the respondent had no property in the second and third appellants' products or indeed the goodwill generated by the products. Counsel quoted a passage from the judgment of Lord Diplock in the case of **Star Industrial Company Limited v. Yap Kwee Kor**[3] in explaining the purpose of a passing off action.

9.10 The learned counsel for the appellants ended by fervidly praying that the appeal be upheld.

9.11 At the hearing of the appeal, Mr. Chisenga, learned counsel for the appellants, was allowed to make a minor correction to his heads of argument which he relied upon exclusively. He made no oral augmentation.

10.0 THE RESPONDENT'S CASE ON APPEAL

10.1 In response, counsel for the respondent began by quoting what they identified as the passage in the Court of Appeal judgment touching on the issue of goodwill compensation and submitted that the Court of Appeal did not award the respondent any compensation for goodwill on the basis that the respondent exclusively marketed, distributed and sold the appellants' products in Zambia notwithstanding that the appellants were registered trademark owners of the goods in question.

10.2 The argument made by counsel was that the Court of Appeal, like the High Court, identified that there are two types of goodwill at play, and although these were interrelated, they were distinct from each other.

10.3 Counsel noted that the Court of Appeal agreed with the High Court that goodwill existed in the products and that in a typical case of branded consumer goods, there is an expectation to buy the supplier's branded goods rather than follow the distributor on termination of the distribution contract. Yet, both courts also acknowledged that the respondent's goodwill as an entity was separate from that of the products it distributed.

10.4 After making reference to various definitions of goodwill including that given by Lord Macnaughten in **IRC v. Muller & Co. Margarine Limited**[2] and in **Halsbury's Laws of England** (5th ed. Vol. 80 at para. 807), counsel submitted that the goodwill of the respondent's business extended beyond the goodwill of the products it distributed.

10.5 The learned counsel referred to the factual basis upon which the courts below made their decisions, namely that the respondent 'became closely integrated in the [appellants'] sales and distribution network' and 'invested considerable time and money in countrywide advertising campaigns of the [appellants'] products, periodically reported on its sales and over the years provided information about access to customers'. Counsel additionally posited that it was the lower court's unassailable finding that:

> **the plaintiff [respondent] contributed immensely to the extension of the defendants [appellants'] customer portfolios and generated a great deal of good will. As a result the plaintiff [respondent] improved the 2nd and 3rd defendants' [appellants'] economic status. No doubt, to date the defendants [appellants] continue to maintain the commercial relations with the customers generated by the plaintiff after the termination of the distribution agreement and will continue to benefit financially from these customers.**

10.6 It was also submitted that as the evidence on record shows, the respondent introduced the appellants to its customers; the latter having requested that the customers be transferred to the first appellant. The compensation for goodwill thus embodies the advantages which the appellants still enjoy following the respondent's effort. The first appellant simply stepped into the respondent's shoes, thus entitling the respondent to receive payment of an amount that was fair and reasonable, having regard to the circumstances.

10.7 Counsel argued that compensating the respondent would take care of two important equitable and contractual considerations; to prevent the appellants from being unjustly enriched at the expense of the respondent by retaining all the benefits of goodwill to which the respondent's efforts contributed; and to recompense the respondent for the loss of beneficial contracts.

10.8 The argument by the appellants that the respondent would not have *locus standi* to maintain an action for passing off the products together with the *dicta* in the case of **Star Industrial Company Limited v. Yap Kwee Kor**[3] relied upon by the appellants, were both discounted as being misplaced.

10.9 Counsel for the respondent finally invoked the spirit of equity. Having quoted from section 13 of the High Court Act, chapter 27 of the Laws of Zambia, which directs that law and equity shall be administered concurrently, he submitted that in accordance with principles of equity, a reasonable amount of customer portfolio compensation is due to the respondent in an amount roughly corresponding to the economic contribution made by the respondent to the appellants' business during the term of their relationship.

10.10 The learned counsel for the respondent beseeched us to dismiss the appeal.

10.11 In his oral supplementation of the heads of argument, Mr. Peterson rehashed the arguments and stressed that although the respondent was a distributor, both the High Court and the Court of Appeal acknowledged the extraordinary contribution it had made to the business of the appellants for which compensation is payable.

11.0 THE ISSUES FOR DETERMINATION

11.1 Having critically considered the arguments debated before us, we perceive the key issue for determination in this appeal as being whether compensation is payable to the respondent on any basis for goodwill attaching or accruing to either the appellants or to the appellants' goods arising from the efforts of the respondent.

11.2 In effect we have to determine whether the lower court was right to hold that the respondent was entitled to compensation.

11.3 A subsidiary question we must ask, perhaps induced by the non-circumspect use of terminology, is whether compensation for goodwill is the same as goodwill compensation. And as we explain later in this judgment, we did indeed put this question to Mr. Petersen at the hearing of the appeal.

12.0 OUR ANALYSIS

12.1 Our view is that whether or not the respondent was legally entitled to compensation and the nature of any such compensation will, as we shall demonstrate, depend on the kind of relationship that subsisted between the respondent and the second appellant and the respondent and the third appellant.

12.2 Although it is beyond argument that there was, between the parties, a relationship which entailed commercial representation of some sort, it is important to bear in mind the distinction between a commercial agent or sales representative and a distributor, and to properly locate the position of the respondent in that relationship. This is significant for at least two reasons. First, the rights of these parties at termination of the relationship will depend on the precise nature of the relationship and the terms of the agreement. Second, we sense that in the arguments by counsel for the parties, the rights attaching to an agent and those attaching to a distributor may have been transposed or at best conflated.

12.3 We must state that in our understanding, although the terms 'agent' and 'distributor' are often used interchangeably in the commercial world, there is a fundamental difference between the two. At a very elementary level, an agent is understood to be someone who acts on behalf of another in bringing about, or performing a contractual obligation on that other's behalf. Thus, in contracts for the sale of products, such as the one implicated in this appeal, the agent would have authority to enter into contracts of sale of the products on behalf of the supplier. In other words, the contract of sale will be between the supplier and the customer with the agent merely acting as an intermediary and receiving remuneration by way of a commission, typically a percentage of the price, for his or her labours.

12.4 We understand a distributor, on the other hand, as being essentially an independent merchant. He or she buys products or services in larger quantities from a supplier and then markets them on his or her own account to retailers or wholesalers. The distributor's profit is represented by a commercial margin he or she makes. The fact that the distributor's gain may be described as a commission will not alter his or her status as a distributor.

12.5 Put differently, whilst the function of an agent is to provide a service to the supplier by either introducing customers to the supplier, or concluding contracts on the supplier's behalf, depending on the circumstances, a distributor purchases goods from the supplier and resells them on his own behalf and thus has no authority to bind the supplier. In point of fact, in regard to the same goods, there are two distinct contracts of sale involved – one between the supplier and the distributor and the other between the distributor and the customer.

12.6 The parties' description of the contract may be at variance with the actual legal form of the existing relationship. For example in **W. T. Lamb and Sons v. Goring Brick Company Limited**[4], the English Court of Appeal noted that the 'sole selling agent' in that case was in fact a purchaser with exclusive rights to re-sell.

12.7 Turning to the relationship between the parties in the present dispute, it is self evident that what subsisted between the respondent and the second and third appellants were distributorship arrangements rather than commercial agency relationships. Counsel for the parties have, in their heads of argument before us, referred to the relationships as such. We have, for our part, identified the terms of those agreements at paragraphs 2.4 to 2.7 of this judgment. To recap, the respondent was to purchase the second and third appellants' products which it would then resell at a commercial margin. As Mr. Peterson in answer to our question emphasised, the relationship between the parties was thus one of distributorship and not one of agency, and this, as we have intimated already, should reflect in the rights of the parties at termination of the relationship.

12.8 The claim by the respondent in the lower court was for various relief, arising from the termination of the distributorship arrangements. We have at paragraph 3.1 set out those claims verbatim. Of particular moment to the sole surviving ground of appeal is the claim for compensation in respect of goodwill. In paraphrase, we are being asked to determine whether or not the respondent was entitled to be compensated for goodwill on the basis that it exclusively marketed and sold the appellants' products and grew a customer base in Zambia notwithstanding that the appellants were the registered trademark owners of the marketed products.

12.9 As structured, the ground of appeal appears confined to compensation for goodwill. Mr. Peterson indicated to the court at the hearing that he perceived no distinction between compensation for goodwill and goodwill compensation. Our understanding is, however, that there is a nuanced distinction between the two forms of compensation.

12.10 It is axiomatic that goodwill is an intangible asset. It is personal property, the exclusive right to which the owner can vindicate by process of law as in a passing off action. And this is the point that Mr. Chisenga, learned counsel for the appellants, has alluded to in the peroration to his heads of argument. Needless to state that items included in goodwill are proprietary or intellectual property and brand recognition which are not easily quantifiable. A company's brand name, a solid customer base, good customer relations, good employee relations and proprietary technology all represent some basis of goodwill.

12.11 The learned counsel for the appellant referred us to the definition of goodwill as given by Lord Macnaughten in **IRC v. Muller and Co's Margarine**[2] as an attractive force which emerges from a particular source. We agree, and would add to that observation, the definition assigned to goodwill by the learned authors of **Halsbury's Laws of England** vol. 35 (4th ed.) para. 1206 as follows:

> **... The whole advantage of the reputation and connection formed with customers together with the circumstances, whether of habit or otherwise, which tend to make that connection permanent. It represents in connection with any business or business products the value of the attraction to customers which the name and reputation possesses.**

12.12 In **Federal Commissioner of Taxation v. Murray**[7], the Federal Court of Australia defined goodwill as:

> **The legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom[ers] to it. It is a right or privilege that is inseparable from the conduct of the business.**

12.13 The Federal Court, in the case we have referred to in the preceding paragraph, observed that as goodwill is a derivative product of a recognised trademark, a particular location, or the reputation of the business, it was not advisable to define goodwill in terms of its elements. The court preferred instead to describe sources that contribute to goodwill. These sources can be manufacturing or distribution technologies, efficient use of assets, good relations with employees, lower prices that attract customers, convenience of location, etc.

12.14 Perhaps of significance to the present dispute, the court in that case concluded that selling assets does not include the sale of goodwill unless the sale includes the right to conduct the business in substantially the same manner and by substantially the same means as has attracted customers to the business in the past. This is a point we shall revert to momentarily.

12.15 We would thus view compensation for goodwill as a payment given as reparation for loss, injury, etc, or a payment made by someone buying a business for things that cannot be directly measured in the genre of proprietary interest we have identified in paragraphs 12.9 and 12.12 of this judgment.

12.16 On the other hand, goodwill compensation, as we perceive it, is generally speaking a payment that a manufacturer or supplier makes to a merchant by whatever name called, following the termination of a commercial arrangement. The payment is premised on the fact that the manufacturer or supplier has gained certain profits from the customer portfolios provided by the merchant. And this is where the distinction in the right to compensation between an agent and a distributor lies.

12.17 Earlier in this judgment at paragraph 12.2 we expressed our fears that the rights akin to those of agents under the law may have wrongly been attributed to a distributor.

12.18 It is of course beyond question that English common law relating to contracts generally applies in Zambia to the extent that such law has not been modified by statutory provisions which have no application in Zambia. And so it is that English common law principles regulating agency and distributorships apply without the fetters of English statutory modifications.

12.19 Under the UK Commercial Agents (Council Directive) Regulations 1993, No. 3053, as amended, a producer of goods who has used a commercial agent must pay the agent goodwill compensation on termination of the agency contract. This is in addition to any claim the agent may have for damages for breach of contract or commission. This is a significant departure with agency law based solely on the common law as it applies in Zambia.

12.20 The entitlement to goodwill payment by the agent on termination of the commercial agency agreement will be either an 'indemnity' or 'compensation' as defined in the Regulations. Payment will only be claimed where the agency contract so stipulates and it will depend on the agent having brought to the manufacturer or supplier new customers, or significantly increased the volume of business with existing customers from whom the manufacturer or supplier will continue to derive substantial benefits after termination.

12.21 As the UK Supreme Court decided in the case of **Lonsdale v. Howard & Hallam**[5], a case referred to by Mr. Petersen in his oral supplementation of the written arguments the agent is entitled to the full value of the agency business upon termination – the amount a hypothetical purchaser would have paid him for the right to take over the agency and receive the income streams the agent would have had, but for the termination.

12.22 We must hasten to state that the Commercial Agents (Council Directives) Regulations do not apply to distributorship arrangements in the UK. The common law, unadulterated by statutory inroads, save as explained below, thus applies. The position of distributors in the UK is thus similar to that of their counterparts in Zambia.

12.23 At the end of the day the important question we ask is whether distributors in Zambia are entitled to goodwill compensation in the same way as agents are entitled to under the Commercial Agents (Directives) Regulations in the United Kingdom (which apply post Brixit).

12.24 We have intimated already that in relation to distributors, a different legal regime exists. There are no specific statutory laws in the UK relating to distributorship that govern the relationship between a supplier and its distributor. None exist in Zambia either. Common law principles of contract thus apply, as will certain general statutory provisions in regulated sectors.

12.25 Even if we were to agree with Mr. Peterson that there is no distinction between goodwill compensation and compensation for goodwill, it still appears to us that the common law as it presently applies to distributors does not give any joy to a distributor at termination of the contract in the absence of a contractual stipulation as to compensation.

12.26 John Pratt of the International Bar Association Legal Practice Division, International Sales in **24 International Sales Committee Newsletter** (September 2007) at p. 28 writes quite informatively that:

> **There is no legal basis on which distributors can claim goodwill compensation under either UK Common law or UK legislation.**

12.27 Although what is captured in the preceding paragraph cannot, of course, be taken as representing an authoritative statement of the law, it is in our view a fairly accurate projection of the state of the law not only in the UK but in Zambia too.

12.28 The learned author Dennis Campbell (ed) in **International Agency and Distribution Law** (2009) at p. 111 writes as follows:

> **Distributors do not have an express right to be compensated for lost profit. On the one hand, they are, on the basis of current case law, not entitled to a termination indemnity. Furthermore distributors, unless otherwise provided, do not have a claim for goodwill upon termination. On the other hand they are entitled to compensatory damages as per the applicable statutory provisions if suppliers breach the contract.**

The statutory provisions being referred to in this case are those like the **Unfair Contract Terms Act 1977 (UK)** and the **Sale of Goods Act, 1979 (UK).** These statutes, needless to say, do not apply in Zambia.

Elsewhere at [p. 170] the author writes:

> **Court decisions hold that distributors are not entitled to a termination indemnity. The same applies to a possible compensation for goodwill. A distributor is well advised to provide contractually for the compensation of goodwill. This is of particular importance if the distributor has retained agents who sell products on his behalf. In fact the situation may arise where the distributor has no claim for compensation for goodwill but in turn must compensate his agent.**

12.29 In our understanding, it is regrettably the legal position arising from the nature of a distributorship contract that although a distributor must spend a great deal of time and money in order to ensure successful marketing of the product under contract, he or she will not be entitled to compensation unless this is specifically agreed in the contract. This is particularly unfortunate as, often times, the brand product which the distributor sells is the element that attracts customers, much more than the distributor's skill and reputation, a point alluded to, although not in these exact words, by Mr. Chisenga in his submissions. This invariably puts the distributor at the mercy of the supplier.

12.30 Assuming that the respondent was right to state, as Mr. Peterson sought to convince us at the hearing, that there was goodwill transferred from itself to the first appellant in respect of the appellants' products marketed by it, there are still monumental blocks standing in the way of the respondent's claim to compensation.

12.31 Resolving who owns the goodwill after termination of a distributorship agreement presents a dilemma. On one hand, the supplier has provided the trademarks that the Zambian customers recognize. On the other hand, the distributor's efforts have undoubtedly improved the goodwill of the supplier's brand product and may even have developed goodwill that is unique to the specific location, in this case, Zambia.

12.32 There seems to us, however, to be a distinction between business goodwill which the respondent as distributor claims it lost when the appellant suppliers terminated the distributorships, and trademark goodwill which is associated with the supplier's brands. This distinction implies that the business goodwill is owned by the distributor while the trademark goodwill is owned by the supplier.

12.33 At the hearing of the appeal, the learned counsel for the respondent submitted in his oral arguments, that the goodwill that was transferred by the respondent to the appellants lies in the customer list that it was requested by the appellants to pass on to them upon termination. We asked Mr. Peterson whether once the distributorship contracts had been terminated the respondent still risked losing any goodwill, given that its customers were in any case bound to migrate to the new distributor as in the first appellant. Counsel's response was that to the extent that the respondent was still allowed to purchase products from the second and third appellants after the termination of the distributorship, it stood in a bad place in as far as its reputation as marketer of the products is concerned.

12.34 We must state that we have serious difficulties in appreciating the argument of counsel here. If, as we believe was the case, the first appellant, which was newly incorporated to market the second and third appellants' products on the Zambian market, was to undertake its marketing activities in competition with the respondent, it would be the respondent, as an established distributor, which would have the edge in that marketing competition.

12.35 We thus agree with Mr. Chisenga's submission that the goodwill in the respondent as a business could not have been transferred by a mere change in the distributorship agreement when the respondent remained a going concern and operating, as Mr. Peterson reminded us, in the same business of distribution of the appellant's products. Our view which is in consonance with that of the Federal Court of

Australia as captured at paragraph 12.14, is that a distributor retains goodwill in his or her own business but not in the supplier's goods or business and therefore has no entitlement to compensation related to the latter's goods.

12.36 We reiterate the established common law position that at termination of a distributorship agreement, no mandatory compensation or indemnity is payable unless such compensation or indemnity is provided for in the agreement. If the agreement is terminated in breach of its express or implied terms or, in the absence of proper notice, the distributor may be entitled to damages for breach of contract as we shall shortly explain.

12.37 In **Baird Textiles v. Marks & Spenser**[6], Baird had supplied garments to Marks and Spencer (M & S) for thirty years. Without any warning M & S terminated the supply arrangement in October 1999. Baird claimed that the termination of business had caused it loss amounting to £50 million. Baird's claim for loss of business and that for loss of future sales were unsuccessful. The English Court of Appeal decided that there was not a supply agreement but a series of individual sales contracts akin to a distributorship.

12.38 We are alive to the fact that the terms of the distributorship agreements in the instant appeal may well result in hardship on the respondent distributor, but these terms constituted valid agreements entered into by the parties. Much as we appreciate the disastrous effects on the respondent's business of what could well have been unjustified, almost abrupt termination of exclusive terms distributorship contracts, that cannot be remedied by applying or extending what are otherwise statutory remedies outside the common law such as those available under the Commercial Agents (Council Directives) applicable to commercial agents in the United Kingdom.

12.39 Where a provision for termination exists in the distributorship contract, the courts will uphold freedom of contract. Where, as in the present case, no termination clause existed, the contracts were determinable by reasonable notice. What constitutes reasonable notice is determined bearing in mind various factors such as the length of the parties' relationship, the percentage turnover which the contract represents, the investment by the distributor, the profit realized by the distributor at the time of the termination, the magnitude of the conceded market, the difficulties for the distributor to find a suitable replacement for the terminated agreement, the repercussion of the termination on the distributor's total activity, etc.

12.40 In the absence of a reasonable notice period, the terminated party is allowed to claim an equitable indemnity whose purpose is to compensate the terminated party for the losses suffered because it did not receive a notice period.

12.41 In the present appeal, however, the issue of damages or compensation in lieu of notice is not in issue, that question having been dealt with by the Court of Appeal and it not being part of the appeal points.

13.0 CONCLUSION

13.1 It follows from our exposition of the attitude of the law that the appeal on the sole ground must succeed. The respondent was not contractually entitled to goodwill compensation and none is thus payable under any common law or equitable principle.

13.2 The contract having been terminated without proper notice, however, the position of the Court of Appeal on liability arising from such termination remains undisturbed.

13.3 Granted that there were findings in the Court of Appeal favourable to the respondent which have not been disturbed by this court, given our narrow focus, we believe this is an appropriate case in which each party should bear its own costs, and we so order.

M. C. MUSONDA
DEPUTY CHIEF JUSTICE

M. MALILA
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE