

Case No 250/92

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

JOKARI SA (PTY) LTD

Appellant

and

REEBOK INTERNATIONAL LTD

Respondent

CORAM: JOUBERT, EM GROSSKOPF, SMALBERGER, VIVIER

et NIENABER JJA

Heard: 15 and 16 August 1994

Delivered: 29 September 1994

JUDGMENT

JOUBERT, JA:

This is an appeal against a judgment by Joffe J in the Transvaal
Provincial Division dismissing an action instituted by the appellant ("Jokari")

against the respondent ("Reebok") for the payment of R7 410 161-00 damages allegedly suffered by Jokari as the result of a material breach of agreement by Reebok, alternatively the repudiation thereof by Reebok.

The material facts which form the background to the action are reasonably straightforward and may be outlined as follows:

The Foster family were shoemakers in England. They manufactured athletic shoes which were sold locally. Joe Foster and his brother commenced a manufacturing business known as Mercury Sports Footwear which was incorporated as Reebok Sports Ltd in 1960. The latter manufactured at Bolton in England the Reebok shoe and other Reebok products. The trade marks in respect of the Reebok shoes and merchandise were registered in the name of Reebok Sports Ltd. On 27 November 1979 the trade marks were transferred to Reebok as the marketing company of the Reebok products while Reebok Sports Ltd continued as the manufacturing company thereof. Mr Foster was the managing director of Reebok until 1989.

Towards the latter part of 1982 and early 1983 Reebok moved its

manufacturing to the Far East because Reebok Sports Ltd was unable to produce the quantities of footwear that could be produced in the Far East. Moreover an independent corporation known as Reebok International USA ("Reebok USA") became the distributor of Reebok products in the United States. It was also granted the right to manufacture Reebok products, or cause them to be manufactured, subject to Reebok's stringent quality control. For the manufacture of Reebok products it utilised the services of Asco Merchandise International Ltd. ("Asco") in Hong Kong. Reebok USA expanded so rapidly that it acquired control of Reebok in March 1984.

Jokari is a South African company trading in Johannesburg since 1980 as an importer and wholesale distributor of sporting goods. It does not directly retail any of its products. It sells its imported products through more than 1 300 retailers in South Africa. Its managing director has at all material times been Mr. Stone.

In 1981 Mr Foster met Mr Stone. The upshot of their cordial relationship was that on 6 August 1982 Reebok as proprietor of the Reebok

trade mark in respect of footwear entered into a Distribution Agreement as well as a Trade Mark Agreement with Jokari. Both agreements were to endure from 1 August 1982 until 31 December 1995. It is necessary to refer to some of their provisions which are relevant for purposes of this appeal.

The Distribution Agreement is in essence a sole distribution agreement since Reebok in terms of clause 1.1 thereof appointed Jokari "as its exclusive distributor of the Goods for promoting and extending the sale or disposal of the Goods supplied under the Trade Mark of 'Reebok' in the Territory during the term of this Agreement subject to and upon the conditions contained in this Agreement and in the Trade Mark Agreement." According to the Preface the expression "Goods" refers to the "special footwear for the use of athletes and others in running and ancillary sports and activities under the Trade Mark 'Reebok'." The term "the Territory" designates South Africa.

Clause 2.1 of the Distribution Agreement provides as follows:

"The Company has made arrangements for Reebok goods to be manufactured for sale to the Distributors and the prices applicable thereto shall be prices as may be agreed by the Distributors and such manufacturer or manufacturers. All such agreements with such manufacturers shall provide for manufacture of the

goods to be subject to the Company's stringent quality control procedures, provided always that any charge or levy imposed by the Company on such manufacturers, or any manufacturing royalty imposed by the Company shall not exceed 5% of the price at which the goods are purchased by the Distributors from such manufacturer."

The Preface explains that the terms "Company " and "the Distributors" refer to Reebok and Jokari respectively.

Clause 7.1 of the Distribution Agreement records the following:

"This Agreement shall be deemed to have been made in England and the construction validity and performance of this Agreement shall be governed in all respects by English Law."

On turning to the Trade Mark Agreement it is apparent from its Preface that Reebok and Jokari are referred to as the "Proprietor" and "the Users" respectively while "the Trade Mark" is the trade mark Reebok. The expressions "the Goods" and "the Territory" have the same meaning as defined in the Distribution Agreement.

According to clause 1(a) of the Trade Mark Agreement Reebok grants Jokari "the right during the continuance of this Agreement and subject to the terms and conditions hereinafter contained to use display or exploit or otherwise

deal with the Trade Mark in or upon or in connection with the Goods sold by or on behalf of the User in the Territory (as defined in the Distribution Agreement)" Clause 10 provides as follows:

"In consideration of the rights granted pursuant to this Agreement the User agrees to pay the Proprietor (as provided by Clause 14 and 15 hereof) a sum equivalent to 7½ percent of the total amount of the Net Sales Value of all Goods sold by the User under or in pursuance of the terms of this Agreement and the Distribution Agreement."

It is clear from the contents of the aforementioned two agreements, which must be read in conjunction with each other, that Jokari was appointed both a licensee or user and a distributor. It was a licensee or user of the trade mark Reebok in relation to the Reebok footwear imported and sold by it in South Africa. It was also an exclusive distributor of the said Reebok footwear. The two agreements accordingly complement each other.

I now turn to examine the method evolved by Reebok for the ordering of its products by its distributors. Towards the end of 1982 and the beginning of 1983 Reebok invited its distributors from time to time to attend product meetings at which they could assess the products on display and decide whether

they were interested in them or not. The next step would be for Reebok to submit the range of products to Asco for costing at factories in the Far East. Asco would then negotiate with the manufacturers the design and price of the products. The information obtained would be forwarded to Reebok in order to prepare a price list which would be circulated among the distributors. The latter could place their orders with Reebok before a stipulated deadline date. After scrutinising and collating the orders received Reebok would forward them to Asco. As Reebok USA expanded its business immensely a slight change was introduced approximately in 1985. After receipt and processing of the orders Reebok would send them to Reebok USA instead of sending them direct to Asco. Reebok USA would after co-ordinating all the orders, including its own, send them to Asco.

Asco would on receipt of the orders place them with the various manufacturers. It would consolidate the delivery dates in order to give the distributor one date for the shipment of the footwear. A sales confirmation note and a pro forma invoice containing particulars of the shipment date, the

ordered footwear, the prices per pair and the total price in American dollars would be forwarded to the distributor. The following legend appeared on the sale confirmation notes: "We have this day sold the undermentioned goods to . . ." the particular distributor. The total price included Asco's buying commission of 6% for its buying and sourcing services as well as the royalty due to Reebok by the distributor which had by now increased to 20%. Asco would pay this royalty to Reebok. Receipt by Asco of the distributor's letter of credit was a condition precedent to the shipment of the ordered footwear. Upon receipt of the distributor's letter of credit Asco would give its own letter of credit to the manufacturer who would then proceed with the production and delivery of the footwear. It was incumbent on Jokari to obtain an import permit in respect of each shipment until this requirement was done away with as from 1 January 1988.

From 1985 onwards strong repugnance was mounting in the United States against South Africa's racial policies to such an extent as to cause resistance by black people to the marketing of Reebok products by reason of

the sales of such products in South Africa. Reebok USA accordingly exerted pressure on Reebok to terminate its distribution connections with Jokari.

Reebok yielded to this pressure by forwarding on 22 June 1987 in the form of a letter to Jokari a proposed new agreement to apply as from 1 July 1987. The introduction to and the relevant provisions thereof read as follows:

"By this letter we confirm the arrangements by which we have agreed to continue to supply you with Reebok products and permit you to distribute these products in South Africa:-

- 1) The arrangements set out in this letter will apply from 1st July 1987 and the terms set out in this letter will replace and supersede any previous arrangements which are hereby cancelled.
- 2) We reserve the right to terminate the distribution by yourself in South Africa at any time, on giving you three months notice in writing.
- 3) The arrangements for purchase of Reebok products will be the same as apply to other Reebok distributors.
- 4) - - - -
- 5) Your appointment will be exclusive and we will not appoint or supply Reebok permits to any other person in South Africa.
- 6) - - - -
- 7) - - - - -."

(My underlining)

Reluctantly Jokari signed the New Agreement but amended the period of 3 months stipulated in clause 2 to 6 months. Reebok accepted the amendment.

Three months later on 29 September 1987 Reebok invoked the 6 months' notice to cancel its Distribution Agreement with Jokari. The notice period was to run from 1 October 1987 until 31 March 1988 when the Distribution Agreement was to terminate. Although Jokari did not place orders for Reebok products after October 1987 there were still ordered goods in the pipeline for delivery before 31 March 1988. It is common cause that shipments were delivered by Asco to Jokari from 24 July 1987 to November 1987. After that period Jokari received no shipments save for two shipments in July 1988. On 14 May 1988 Asco faxed Jokari that there were six order numbers of 3744 pairs of shoes available for shipment provided a letter of credit was promptly put up. The letter of credit was obtained on 26 May 1988.

An examination of the pleadings reveals that according to Jokari's amended intendit its action for damages against Reebok was based on the agreement of 24 July 1987 ("the New Agreement") in terms of which Jokari was permitted as exclusive distributor to distribute Reebok products in South Africa subject to Reebok's right of termination at any time upon 6 months'

notice in writing. Reebok agreed to continue to supply Jokari with its products in accordance with the arrangements regarding the practice or procedure introduced in 1985 for the placing of orders for the said products. The arrangements for the purchase of Reebok products would be the same as those applicable to other Reebok distributors. In para 9 of its intendit Jokari purported to outline the practice or procedure that was introduced in 1985. In para 9.5 of its intendit Jokari pleaded that in terms of the said practice "... the defendant became obliged to supply the plaintiff with the goods thus ordered." It was alleged that from 5 February 1987 until 23 October 1987 Jokari placed 8 orders for a total pairage of 255 746 shoes which Reebok was obliged to supply. In para 12 of its intendit Jokari alleged that "... in breach of the second agreement the defendant failed to deliver any of the aforesaid shoes." As a result of Reebok's alleged breach of contract Jokari claimed that it suffered a loss of profits amounting to R7 410 161-00.

In his opening address in the Court a quo Mr Horwitz, Jokari's counsel, stated unequivocally: "This is an action for damages. It arises out of a

distribution agreement between the plaintiff and the defendant." The distribution agreement he had in mind was the New Agreement of 24 July 1987. (No cause of action other than a contractual one was pleaded).

Reebok in paras. 2.3 to 2.3.4 of its plea outlined the procedure followed by distributors in placing their orders with Reebok for its footwear, the consolidation of the orders and passing them on to Asco who negotiated with manufacturers in the Far East for their manufacture and who would thereafter offer to each distributor in a sales confirmation note and a pro forma invoice at a particular price the goods ordered for which the necessary letter of credit had to be furnished by the distributor upon acceptance of the offer. Reebok's defence to Jokari's cause of action was formulated as follows:

Para 2.3.5: "No agreement of purchase and sale would come into being until ASCO had offered the product ordered at a particular price or prices and until such offer had been accepted by the said distributor by means of the requisite letter of credit being supplied to ASCO."

Para 2.3.6: "All agreements of purchase and sale in respect of goods ordered were entered into between ASCO and the distributors and no agreements in this respect were entered into between the distributors and the Defendant".

At the trial both Stone and Foster testified on behalf of Jokari. Joffe J

found that "Stone's factual evidence does not differ from Foster's to any great degree." After a careful consideration of their evidence as supported by documentation he came to the conclusion that "there was no obligation on the defendant to supply the goods ordered by plaintiff as alleged in paragraph 9.5 of the plaintiff's amended Intendit." He accordingly dismissed Jokari's claim with costs, including the costs of two counsel and the qualifying fees of two expert witnesses.

The crucial question is whether or not Reebok was contractually obliged to supply Jokari with the goods ordered. That is to say, did they enter into agreements of purchase and sale in respect of the goods ordered?

Clause 5 of the New Agreement re-affirmed the appointment of Jokari as the sole distributor of Reebok products in South Africa. An important characteristic of a sole distribution agreement is concisely described as follows in Schmitthoff's Export Trade. The Law and Practice of International Trade by Clive M. Schmitthoff, 9th ed at p 261:

"The sole distribution agreement is not a contract of sale of specific goods. It merely lays down the general terms on which later individual contracts of sale

will be concluded."

The New Agreement does not refer to contracts of sale of specific goods by Reebok to Jokari. In the introduction to the said Agreement Reebok confirmed "the arrangements by which we have agreed to supply you with Reebok products." The word "supply" is not elucidated in the said Agreement. Nor is it equated with words such as "sell" or "deliver." This introduction must be read in conjunction with clause 3 which provides: "The arrangements for purchase of Reebok products will be the same as apply to other Reebok distributors." The arrangements for the manufacture of Reebok goods for sale to its distributors were mentioned in clause 2.1 of the Distribution Agreement (quoted supra) which envisaged agreements between the distributors and the manufacturers. Reebok never manufactured Reebok goods and it never supplied Reebok goods to its distributors. It never received payment for Reebok goods from its distributors. Reebok was not a manufacturing company of Reebok goods.

Reebok was described by Foster in his evidence as a marketing

company. It was concerned with the quality control of goods marketed as Reebok goods. It was the proprietor of the Reebok trade mark which was extremely valuable. Its only income was royalties which it obtained from users of the trade mark. The royalties were sales-based.

I have already explained supra the arrangements made by Reebok for setting up a buying system for its distributors by utilising the services of Asco. That also happened between Asco and Jokari as appears from the evidence of Foster as supported by the discovered documentation. It is clear therefrom that no agreement of sale of Reebok goods was concluded until Asco had sent Jokari a sales confirmation note and pro forma invoice and Jokari had accepted the goods and prices offered by Asco in the said sales confirmation note and pro forma invoice by supplying the necessary letter of credit in favour of Asco. The buying commission of Asco and the royalties of Reebok were included in the prices of the goods. This buying system enabled Reebok as trade mark proprietor to exercise stringent quality control over the manufacture of Reebok products and to assess how much royalty it was earning from the purchases by

its distributors.

It was argued on behalf of Jokari that Asco was Reebok's agent. That was never pleaded. Moreover, the facts do not support the submission.

It follows in my view that the Court a quo correctly concluded that Jokari contracted with Asco to purchase from it the Reebok footwear which it had initially ordered. There was accordingly no obligation on Reebok to supply the goods ordered by Jokari as alleged in para 9.5 of its amended intendment. That is the answer to the crucial question I have formulated supra. In view of that conclusion it is not necessary to consider other issues in dispute between the parties.

In the result the appeal is dismissed with costs of two counsel.

C.P. JOUBERT JA

EM GROSSKOPF JA
SMALBERGER JA CONCUR
VIVIER JA
NIENABER JA