

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No.2022/17936

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: No
	
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R SHEPSTONE	
13 June 2023	

In the matter between:

JUJDEESHIN JUNKOON NO

(in his capacity as trustee of the
DIPULA PROPERTY INVESTMENT TRUST)

First Plaintiff/Applicant

RIDWAAN ASMAL NO

(in his capacity as trustee of the
DIPULA PROPERTY INVESTMENT TRUST)

Second Plaintiff/Applicant

ISAK SMOLLY PETERSEN NO

(in his capacity as trustee of the
DIPULA PROPERTY INVESTMENT TRUST)

Third Plaintiff/Applicant

BRIAN HILTON AZIZOLLAHOFF NO

(in his capacity as trustee of the
DIPULA PROPERTY INVESTMENT TRUST)

Fourth Plaintiff/Applicant

and

SPAR GROUP LIMITED

RESPONDENT/DEFENDANT

JUDGMENT

Introduction

- [1] The task before this Court is akin to walking through the remnants of the fire-ravaged premises, sifting through the debris to uncover the allegations of fact relevant on the pleadings, and unearthing principles of law to determine whether the landlord is entitled to amend its particulars of claim by the introduction of a tacit term.

Background

- [2] The Plaintiffs are cited in their capacities as Trustees of the Dipula Property Investment Trust (**"the Trust"**). The Trust instituted action against the Defendant claiming that, on account of the Defendant's breach of a written lease agreement, the Trust has suffered damages for which the Defendant is liable.
- [3] The Trust as landlord concluded a lease agreement with the Defendant in respect of premises situated at Bram Fisherville, Soweto. The lease

agreement stipulated that the leased premises would be used to operate a supermarket and a liquor store.

- [4] The lease commenced on 1 May 2018 and would have endured for a period of 10 years if it were not for a fire which damaged the premises to such an extent that the Defendant was unable to utilise the leased premises for the purposes for which it was let.
- [5] The lease agreement expressly stipulated that in the event of the destruction of or damage to the leased premises during the first 10 years of the lease agreement, then the tenant would not be liable for rental in respect of the period calculated from the date of such destruction or material damage until the leased premises had been reconstructed and occupation thereof given to the tenant ("**the damage or destruction clause**").
- [6] In addition, the damage or destruction clause placed an obligation on the landlord to proceed as expeditiously as reasonably possible with the reconstruction and restoration of the premises.
- [7] The Defendant approached the Trust after the fire damaged the leased premises, and requested alterations to be done in accordance with its own specifications and requirements. It is during the process of reconstructing and reinstating the leased premises that the dispute arose.

The proposed amendment

- [8] The Trust's instituted this action against the Defendant in May 2022. The Defendant considered that the particulars of claim were vague and embarrassing and / or lacked the necessary averments to sustain a cause of action against it and accordingly served a notice in terms of Rule 23(1) of the Rules of Court on the Trust.
- [9] The Trust thereafter elected to deliver a notice of its intention to amend its particulars of claim in various respects, to which the Defendant objected.
- [10] The principal basis of the Defendant's objection is that: -
- 10.1. the amendment renders the particulars of claim excipiable because the Trust sought to introduce a tacit term to the lease agreement which was in conflict with the written terms thereof; and
 - 10.2. the Trust by the amendment intended to introduce a verbal agreement into the lease agreement that *sans* the tacit term would invoke the 'non variation' clause.
- [11] During argument the question to be decided by this Court crystallised into whether the tacit term proposed by the Trust could on the papers before me, without resort to evidence of the surrounding circumstances present when the lease agreement was concluded, be imported to the lease agreement. Mr. Dobie for the Trust and Mr. van Niekerk for the Defendant agreed that this issue was dispositive of the application and that costs should follow the event.

The tacit term

[12] The Plaintiff in its notice of intention to amend sought to introduce the following tacit term to the agreement: -

"8. It was a tacit term of the lease agreement that:

8.1 the Defendant would do all things necessary to assist the Plaintiffs to finalise the reconstruction and restoration.

8.2 in the event of the Defendant being required to take any steps to ensure that the Plaintiff was able to finalise the reconstruction and restoration, the Defendant would do so within a reasonable time."

[13] The Defendant argues that the tacit term contradicts the express terms of the lease agreement. I have already referred to the express term above but it would be prudent to repeat it here in its exact terms: -

"22 DAMAGE OR DESTRUCTION OF PREMISES

221. In the event of the destruction of or damage to the PREMISES during the first 10 (TEN) years of this lease reckoned from the COMMENCEMENT DATE thereof to such an extent that the TENANT is unable to use the PREMISES for the purposes for which it is let:

22.1.1 the TENANT shall not be liable for rental in respect of the period calculated from the date of such destruction or

material damage until the PREMISES has been reconstructed and occupation given to the TENANT;

22.1.2 *the LANDLORD shall proceed as expeditiously as reasonably possible with the reconstruction and restoration of the PREMISES.”*

The pleadings

[14] The Trust in its particulars of claim pleads the terms of the lease agreement relevant to the action, including the damage and destruction clause word for word, and adds the following subparagraphs:

“7.12 *In the event of destruction of or damage to*

7.12.3 *notwithstanding the provisions of the lease, the shopping centre and the premises would be rebuilt substantially to the same design and standard as the original structures and the Defendant would be given reasonable notice to commence trading in the rebuilt premises;*

7.12.4 *if the Defendant fails to pay any amount due to the Trust in respect of rental within 14 days after date of delivery to the Defendant of a written notice from the Trust calling upon it to do so or if either the Trust or the Defendant commits a material breach of any other of their respective obligations in terms of the agreement and fails to remedy such breach*

within 30 days after delivery of written notices from the aggrieved party to the defaulting party calling upon it to do so, the aggrieved party giving such notice shall be entitled to cancel the lease.”

The law

[15] A tacit term is derived from the mutual intention of the parties involved.¹ This can be inferred from the contract's explicit terms, the circumstances surrounding the conclusion of the contract, and how the parties behaved afterwards.

[16] The passage in *Alfred McAlpine & Son* in which Justice Corbett explains the difference between tacit and implied terms was footnoted in the minority judgment of Justice Froneman in the seminal decision of the Constitutional Court in *Beadica 231 CC and other v Trustees, Oregon Trust and others*² where the learned judge speaks of the concept of ‘hypothetical consent’ in relation to tacit terms, as follows: -

“[135] This process of locating contractual liability outside the subjective consent of the contracting parties is continued when the content of contractual obligations is determined. The prime examples are terms implied by law. But even so-called ‘tacit terms’ (unspoken terms that the parties would presumably have agreed to, if asked) are not actual; they, too, may be

¹ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* [1974] SA 506 (A).

² 2020 (5) SA 247 (CC) at [135] and footnote [259].

'imputed'. This kind of hypothetical consent is justified by a finding by a judge that the parties would have agreed to that term if they had been made aware of its possible inclusion at the time of concluding the contract. But they did not. The practical upshot is that the judge makes that part of their contract for the parties."

- [17] A tacit term operates under the same principles as an express term and carries the same legal weight. It can be actual or imputed. In *Wilkins NO v Voges*³ Justice of Appeal Nienaber said:-

"A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented E about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are equally plausible, none of them can be said to be axiomatic. The inference can be drawn from F the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have

agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term G will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional."

[18] The "bystander" test is a practical way to determine what the parties would have agreed on. It asks: what would the parties have said if a bystander had asked them what would happen in a certain case during the contract negotiations?⁴ If both parties would have said, "Of course, so-and-so; we didn't bother to say that, it's too obvious", then that outcome is considered to have been intended by the parties and a term to that effect is implied in the contract. In other words, the parties' common intention must have been such that a reference to the hypothetical situation would have prompted them to quickly and unanimously assert the tacit term to govern it.

[19] If the suggested term is necessary for the contract to work effectively, it's likely that the parties had the term in mind or would have agreed to it if the bystander had asked the hypothetical question.⁵ On the other hand, if the term isn't necessary for the contract to function fully - if it would have just been

⁴ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* 2005 (6) SA 1 (SCA) at [50] – [51], and *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO* 2006 (3) SA 488 (SCA) at [19] – [21].

⁵ *Wilkins NO v Voges* 1994 (3) SA 130(A) at 137.

reasonable, sensible, or convenient for the parties to have adopted it - it doesn't necessarily mean that the parties had it in mind or would have agreed on it if the situation that makes it desirable had been brought to their attention. It's obvious that a term can only be implied if it can be formulated in substantially one way only. If there's difficulty in formulating the term or doubt about its scope, the Courts won't imply it.

Application of the law

- [20] The parties to the lease agreement considered the damage or destruction of the leased premises, and the consequences thereof. Hence the inclusion of the damage or destruction clause into the written lease agreement.

- [21] This is not a case where the Trust and the Defendant considered the relevant matter but didn't express their agreement. Both parties thought about a matter which is pertinent and declared their assent.

- [22] The parties actually considered the relevant matter and foresaw the situation where, due to damage or destruction whether by fire or otherwise, the Defendant would not be able to occupy the leased premises. The parties, after considering the relevant matter, included an express term into their written agreement – the damage or destruction clause. This clause signifies the common intention of the parties and it is thus not necessary to determine their hypothetical consent.

- [23] The parties agreed that the sole obligation to restore and reconstruct the leased premises would fall on the Trust, and thus there is no room to import a

tacit term into the lease agreement imposing an obligation on the Defendant to assist the Trust in the reconstruction and restoration of the leased premises.

[24] The Trust was obliged to proceed as expeditiously as reasonably possible with the reconstruction and restoration of the leased premises without the assistance of the Defendant.

[25] A Court doesn't easily import a tacit term. It can't make contracts for people or add to the parties' agreement just because it seems reasonable. The Court must be convinced that the parties intended to contract on the basis of the suggested term.

[26] Mr. Dobie forcefully submitted that it was the common (but unexpressed) intention of the parties to impose an obligation on the Defendant to expeditiously take occupation of the leased premise (and therefore to cooperate with the Trust in the reconstruction of the leased premises) in order to comply with an express term of the lease to keep the premises open for business during the hours stipulated in the agreement. I disagree. The parties considered the situation which eventuated here and expressly agreed to clothe the Trust with the sole responsibility to reconstruct the premises '*...as expeditiously as reasonably possible*'.

[27] In any event a term requiring the Defendant to assist the Trust with the reconstruction of the damaged premises is neither necessary nor does it give business efficacy to the agreement.

[28] I therefore find that the parties actually considered the relevant matter and foresaw the situation where the Trust could not give the Defendant beneficial occupation of the leased premises as it was damaged or destroyed. The parties thought about this scenario and declared their assent in the express wording of the damage or destruction clause.

Conclusion

[29] In the circumstances, the Court concludes that the tacit term cannot be imported into the lease agreement.

[30] Accordingly, I refuse the amendment.

Order

In consequence, the Court makes the following order:-

1. The application is dismissed with costs.

R S Vunstone

R. SHEPSTONE
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 06 June 2023

Judgment: 13 June 2023

Appearances

For Applicant: Adv J G Dobie
Instructed by: Reaan Swanepoel Attorneys

For Respondent: Adv D Van Niekerk
Instructed by: Hammand Pole Attorneys