

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: 1176/2021

In the matter between:-

BUNTIBIZ (PTY) LTD

PLAINTIFF

and

QUEST RETAIL COMPANY (PTY) LTD

DEFENDANT

JUDGMENT

NORMAN J:

[1] This is an action brought by Buntibiz (Pty) Ltd (Buntibiz) against Quest Retail Company (Pty) Ltd (Quest Retail). Both companies are duly registered in terms of the laws of this country. Buntibiz seeks against Quest Retail, a refund of the purchase price paid in respect of the business dealt with more fully below. It also seeks interest and costs of suit.

[2] It is common cause that on 5 June 2018, Buntibiz and Quest Retail concluded a sale agreement in respect of a business which was sold as a going concern. The business consisted of an automotive fuel filling service station, a

convenience shop, a food takeaway outlet and a car wash on the property situated at Erf 5404, Gelvandale, Gqeberha. The business is commonly referred to by the parties as Quest Gelvandale. The effective date was 1 July 2018. The business sold comprised of fixed assets, stocks and goodwill. The purchase price was the sum of R2,5 million (two million five hundred thousand rand) excluding VAT, plus an amount equal to the cost price of the stocks. Buntibiz was represented by Mr Gotz Edel Gunther Von Westernhagen (Gotz) and Quest Retail by Ms Liesel Bezuidenhout.

- [3] There were suspensive conditions that Buntibiz as a purchaser was to be approved by Quest Petroleum as a customer and it was to enter into two relevant agreements, namely, a lease agreement and a supply agreement (relevant agreements) with Quest Petroleum. The two relevant agreements were concluded on the same day as the sale agreement and Buntibiz was approved as a customer. It is common cause that those conditions were fulfilled.

Issues

- [4] The parties identified issues for determination as follows:
- (a) Whether the tacit term can competently be imported into the sale agreement between Buntibiz and Quest Retail (the tacit term issue);
 - (b) If so, whether the resolutive condition created by the tacit term should be deemed to have been fictionally fulfilled because Buntibiz deliberately and intentionally sabotaged their own retail licence application (the resolutive condition issue);

- (c) If the tacit term can competently be imported into the sale agreement and that Buntibiz is held not to have deliberately and intentionally sabotaged its own licence application, then whether Buntibiz adequately performed under the sale agreement to justify it being refunded the R2.5 million by Quest Retail in terms of the tacit term (the restitution issue).

Relevant pleadings

- [5] I deem it necessary to record the pleadings that are relevant to the issues. Buntibiz alleged in the particulars of claim that:

“5. There was a tacit term of the sale agreement:

- 5.1 That Plaintiff shall apply for a retail licence in terms of the Petroleum Products Act 120 of 1977, and, in the event of such licence not being granted, the sale agreement would become null and void and the purchase price would be repaid.”*

- [6] Clause 26 in the lease agreement reads as follows:

“26. LICENCING AND COMPLIANCE WITH THE LAW

- 26.1. The lessee shall, within 7 (seven) days of the signature date, apply for its retail licence, it being agreed that if it is not granted a retail licence by the Department of Energy, it will not be able to operate the business and will accordingly be refunded the amount it paid as a right to trade.*
- 26.2 The lessee shall ensure that at all times during subsistence of this agreement that the retail licence, as provided for in the Act, remains valid.*
- 26.3 The lessor shall provide all reasonable assistance to the lessee for the prosecution of the application as set out in 26.1 and the maintenance thereof in terms of the 26.2”*

- [7] Buntibiz alleged in paragraphs 11 to 17 as follows:

- “11. Plaintiff applied for a retail licence in terms of the Petroleum Products Act 120 of 1977.*
- 12. A temporary licence was issued, which allowed the Plaintiff to trade pending the determination of the application for the retail licence.*
- 13. Plaintiff’s application for the retail licence was refused on 13 December 2019.*
- 14. Plaintiff appealed the refusal of the retail licence in terms of section 12A(1) of the Act.*

15. *The Minister dismissed the appeal on 12 December 2020.*
16. *On the dismissal of the appeal the tacit term pleaded above resulted in the sale agreement became null and void of no force and effect and Defendant being required to refund the purchase price.*
17. *On 12 January 2021 plaintiff informed Quest Petroleum (Pty) Ltd of the dismissal of the appeal and made demand for the repayment of the purchase price, being R2 500 000.00 and tendered the return of the business.*
 - 17.1 *This letter was addressed to and received by attorneys acting for both defendant and Quest Petroleum (Pty) Ltd.*
 - 17.2 *Such letter accordingly served as notice to and demand on defendant."*

[8] Quest Retail pleaded to the above allegations as follows:

"6. AD PARAGRAPHS 11 TO 15 THEREOF

- 6.1 *The Defendant has been advised by the Plaintiff that it applied for a retail licence, that a temporary licence was issued allowing the Plaintiff to trade pending the determination of the application for a retail licence, that the application was refused, that the Plaintiff appealed the refusal of the licence, and that the Minister dismissed the appeal.*
- 6.2 *The defendant has not yet had sight of the application, the decision thereon, the appeal or the reasons given by the Minister for the dismissal of the appeal (or the decision), and thus makes no admissions concerning the foregoing, and the Plaintiff is put to the proof thereof.*

7. AD PARAGRAPH 16 THEREOF

- 7.1 *These averments are denied.*
- 7.2 *In the event that it is held that the Plaintiff proceeded as alleged in the paragraphs 11 to 15 of the particulars of claim, and that the Minister dismissed the appeal, and further that the tacit term pleaded by the Plaintiff applied to the sale agreement (or a tacit term having the effect pleaded), all of which is denied, then the Defendant pleads that such a tacit term would amount to a resolute condition, and that the Plaintiff deliberately and intentionally frustrated the fulfilment of the condition, in one or more of the following respects:*
 - 7.2.1 *The Plaintiff failed to present an application for a retail licence that met the requirements for the issue of such a licence; and/or*
 - 7.2.2 *The Plaintiff failed to submit and pursue an appeal which the Minister could and/or should have upheld; and/or*
 - 7.2.3 *The Plaintiff failed to pursue a review of the decision of the licencing authority, alternatively the Minister on appeal, alternatively both, in respect of their failure to issue the licence and/or uphold the appeal (whichever the case may be), and to pursue such review for purposes of securing a licence; and/or*

7.2.4 *The Plaintiff failed to amend its application and/or the terms thereof, and/or to institute a fresh application for retail licence, once any concerns of the licencing authority and/or the Minister on appeal, were known to it and to thereby ensure that a retail licence was granted; and/or*

7.2.5 *The Plaintiff failed to pursue its application and/or appeal with diligence and care, such as would have enabled it to succeed in its application for the issue of a retail licence.*

7.3 *In the event that it is held that the Plaintiff deliberately and intentionally prevented the fulfilment of the said condition in one or more of the respects set out above, the Defendant pleads that the condition shall be deemed to have been fulfilled as against the Plaintiff and the sale agreement will in such circumstances not be null and void or of no force and effect."*

Buntibiz evidence

Mr Kevin Niel McLoughlin

McLoughlin testified on behalf of the plaintiff as follows:

[9] Buntibiz is 60% controlled by Gotz and 40% by himself. During 2018 they were looking for investments when they were introduced to Quest Gelvandale. During the negotiations for the acquisition of the business McLoughlin was dealing with Mr Adriaan Jacobus Le Roux (Le Roux) from Quest, who was negotiating on behalf of Quest Retail.

[10] Before Buntibiz paid the purchase price McLoughlin received a call from one Mr Norman LeGrange, the previous owner of Quest Gelvandale who informed him that he was the rightful owner of the business and any application for a licence would be objected to. He was concerned because that meant that they would not get the fuel licence. He reported this threat to Le Roux.

[11] Le Roux indicated that there was no risk in them not getting the licence. McLoughlin requested Le Roux to reduce that into writing. Le Roux wrote a letter dated 17 July 2018 to the effect that if there was a problem their money

would be refunded. Le Roux mentioned that this was common law. Le Roux also told him that he was an attorney.

[12] He confirmed that the business consisted of a filling station, a convenient store and a car wash. When asked by his Counsel *“Is there a clause that regulates what would happen if you do not get the licence?”* His answer was *“not that I could recall.”*

[13] He testified in relation to the lease agreement between Buntibiz and Quest Petroleum. He is the one who negotiated the lease on behalf of Buntibiz and Le Roux was negotiating on behalf of Quest Petroleum. He was referred to clause 26.1 of the lease agreement. His understanding of that clause was that if Buntibiz did not get the retail licence it would be refunded R2.5 million. He stated that there were numerous talks about this issue with Le Roux. There was no distinction drawn between the companies, namely, Quest Retail and Quest Petroleum.

[14] In his mind he had no doubt that they would get the licence. As far as he was concerned there was only one company Quest and Le Roux himself never made the distinction between the companies. He understood that he would get three separate contracts. His understanding of the supply agreement was that he could only buy fuel from Quest unless Quest did not have it. All these contracts were signed on the same day on 5 June 2018.

[15] In so far as the application for a retail licence is concerned he testified that one Mr Earle Cloete (Cloete) worked with his office in compiling the applications. He was not directly involved. A temporary licence was granted on 12 September 2018. Buntibiz took control of the assets and the business

from September 2018. After three months of trading they realized that trading was difficult. They conveyed this to Quest, they agreed that they had to revamp the business. Quest revamped the pumps and canopy and Buntibiz refurbished the convenient store, tiled, painted and bought refrigeration. In this regard Buntibiz incurred costs that were in excess of R1 million.

[16] During renovations the filling station was shut for about three months. After the renovations they reopened the filling station and business improved slightly but still they were not able to reach their targets. They were informed in December 2018 that the application for a permanent licence had been refused. They were advised by Cloete that the HDSA requirement was not necessary. They had no inclination that the 25% rule was applicable and that it was a requirement.

[17] It was suggested that they should put in their wives as shareholders to meet the 25% rule. He, together with Gotz, were not willing to do so because their wives are not involved in their businesses. They were not prepared to dilute the shareholding. Buntibiz lodged an appeal against the decision refusing licence. The appeal was unsuccessful. In the motivation for the appeal, Cloete put in that Buntibiz would restructure its shareholding. That was not an instruction from Buntibiz and as a result McLoughlin demanded that Cloete withdraw that statement, which he did. The appeal was then submitted to the Minister. They received the Minister's decision on 6 January 2021. The Minister refused the appeal by Buntibiz on 12 December 2020.

[18] It is common cause that the reason for the refusal of the appeal was based on the 25% rule. Whilst awaiting the outcome of the licence Buntibiz continued to

trade. It was able to meet its commitments for rentals, fuel supply even though it did from time to time fall into arrears.

[19] Thereafter this witness was taken through a number of emails and letters on the basis that they were relevant to the issues at hand. Quest objected to that on the basis that those documents were not relevant to the issues before court. The court ruled that they would be provisionally admitted. It was only at the end of the matter during argument that Mr Hopkins SC conceded that, bar one letter ("Exhibit A"), all the other documents were irrelevant. I shall revert to this issue later.

[20] It is worth-mentioning that most of those letters related to settlement negotiations between Quest Petroleum who is not a party in these proceedings, and Buntibiz. It is also common cause that Quest Petroleum sold the business to Maguta Properties (Pty) Ltd. In his evidence -in -chief McLoughlin testified that the same business was sold to Maguta for R2.5 million. Later in his evidence -in -chief when asked by counsel in reference to a letter dated 6 May 2020, "Exhibit K":

Q: *What were your instructions to your attorney?*

A: *In the lease agreement we said if we don't get the licence we will get our money back".*

[21] When asked about the employees he stated that they had to retrench them but they are all still working for the business at the Gelvandale site. Under cross-examination when asked who Buntibiz was McLoughlin responded that it was Gotz and himself. He could not recall why clause 26.1 was in the lease agreement. He said he could not recall that he had asked for it to be put in the lease agreement. It was put to him that Le Roux would say when he testified that he, McLoughlin, had requested it to be put in the lease agreement. He

confirmed that the agreements were sent to him by email and he and Gotz would suggest changes in manuscript. He accepted that Buntibiz did not plead that Quest Retail and Quest Petroleum were the same company. He read the sale agreement. He and Gotz, who resided in East London, would meet at least once a week to discuss the agreements. When he read the agreements he understood that there were two companies involved.

[22] He stated that *“they put the part of the refund in another agreement into a company that was not the seller of the business.”* He assumed that everything was interlinked.

[23] He conceded that a reasonable reader would see the seller and the lessor as two different companies. He also understood that reference to ‘relevant agreements’ in the sale agreement does not mean the same agreement. He conceded that a licence was not part of the business. He also understood that ownership and risk would pass to Buntibiz on 1 July 2018 being the date of takeover of the business. He also conceded that Quest Retail fell out of the picture after Buntibiz took over the business.

[24] Contrary to what he had stated in his evidence in chief, under cross-examination, he agreed with Quest’s version that after he and Le Roux had a discussion, Le Roux sent the amended drafts on 28 May 2018 and he inserted clause 26 as he had requested. He later changed and said that it was put into the wrong agreement. He also conceded that when Buntibiz bought the business it was operating and when it left the business, the business was closed and not operating. He testified that the R2,5 million was for the goodwill and assets. He conceded that he understood that once they paid the

business will be that of Buntibiz. He also conceded that the sale agreement was not amended. He accepted that he was confused about the dates when Le Grange called him. It was not before they paid the purchase price but it was at a stage when Buntibiz was already trading.

[25] He contradicted himself when referred to Exhibit "A", a letter dated 17 July 2018. In his evidence in chief he stated that in that exhibit there was an undertaking to refund Buntibiz if it did not get a licence. He conceded that was not what was recorded in the letter. As aforementioned this is the only letter that was relevant to the issues as it made reference to Quest Retail as well. I shall record its contents below:

"17 July 2018

Buntibiz (Pty) Ltd

Port Elizabeth

Per email: kf...l@wgproperties.co.za

Dear Kevin,

RE: NORMAN LE GRANGE (THE 5404 STANDFORD ROAD TRUST)

- 1. I refer to our discussion yesterday. I write to you on behalf of Quest, Quest Retail Company and PropT Solutions.*
- 2. You reported receiving a telephone call from Norman Le Grange alleging that he had an option over the business. I set out herein after some context.*
- 3. The 5404 Stanford Road Trust ("the Trust"), represented by Le Grange, is the erstwhile owner of Erf 5404, Gelvandale ("the property") and the business operated therefrom at that time.*
- 4. Propt Solutions (Pty) Ltd (formerly known as Quest Petroleum Free State (Pty) Ltd purchased the property from the Trust. The deed of sale had included in it an option to repurchase the property (not the business), only if the Trust was not indebted to the purchaser nor in default of its lease agreement with the purchaser.*
- 5. The Trust breached the lease agreement which was subsequently cancelled and accordingly the Trust is in perpetual breach of the lease agreement. It therefore can never exercise the option to repurchase the property.*
- 6. I reiterate that the Trust had no option in relation to the business, and in fact the Trust vacated the property willingly.*
- 7. If for any reasons the Trust succeeds in its attempt to activate its option (which it has not done in any shape or form) then you will be refunded the full purchase price as well as your expenditure on site.*
- 8. I trust that this is in order.*

Yours faithfully,

Adriaan Le Roux

Quest Petroleum (Pty) Ltd"

[26] He testified that he and Gotz were not told upfront about the 25% rule, and they were not willing to do it for that reason. They did not want outside people to be involved in their business, he said. He struggled to deal with the questions relating to the 25% rule. First, he stated that he was advised about it but was told it was not enforced. Later that changed to Le Roux told them that they did not need HDSA ownership. Later that changed to *“they said it will not be an issue we will get our licence”*. He later conceded that nothing prevented Buntibiz from changing its shareholding but it was not prepared to do so.

[27] He conceded that Cloete told him that if Buntibiz complied with the transformation requirement it would get the licence. He was also told that if it did not do so, it will not get the licence. He conceded that he had an option to comply with the 25% rule. He also conceded that the closure of the filling station and the financial distress of the business were not related to the application for a retail licence. He did not dispute the fact that a temporal licence was for six months and that Buntibiz continued to trade pending the permanent licence and also continued to trade pending the appeal. He testified that Buntibiz traded the filling station until March 2021. He agreed that Quest Petroleum in its correspondence with him was attempting to resolve the problem. At that point Buntibiz did not demand a refund because of the licence issue.

[28] The attorneys of record of Buntibiz at some point communicated that they were going to apply for rectification of the agreement but that did not occur. In his evidence -in- chief he created an impression that Quest Petroleum wanted to sell the business in order for it to refund Buntibiz. However, when

confronted with correspondence dated 7 May 2020, Exhibit “Z”, wherein Buntibiz indicated that it wanted a purchase price of R3 million for the business, his evidence changed. It became clear that it was Buntibiz that would be the seller and not Quest Petroleum. It was Buntibiz that wanted R3 million in order for it to recoup some of the expenses incurred towards renovations of the business.

[29] Later when being questioned on the issue of the refund, he changed his evidence and stated that he effectively wanted a refund. He conceded that in the correspondence (‘Exhibit Z’) there was no mention of a refund at all. He conceded that the issue about the refund by Quest Petroleum was based on certain conditions which were not met. He agreed that there was a dispute between Quest Petroleum and Buntibiz.

[30] It transpired in evidence that all the attempts and proposals to resolve the dispute between Quest Petroleum and Buntibiz failed. He did not recall that he asked Le Roux to put the clause in the lease agreement but he said it was highly likely. The following question was put to him:

“Q - *His evidence would be that there was no need to put clause in the sale agreement because you had a right against Petroleum.*

A - *He is right.”*

[31] He conceded that clause 26 in its present form could not be contained in the sale agreement because there would be a contradiction in the agreements. He also conceded that Buntibiz removed some of the expensive equipment from the premises. He further agreed that the correspondence between the parties did not indicate that the three agreements were to be treated as one. He testified that the people that they engaged in relation to the license did not

raise the fact that they had to 'dilute' Buntibiz. He conceded that in the particulars of claim there were no allegations of misrepresentation.

Mr Earle Cloete

[32] The next witness for Buntibiz was Mr Earle Cloete. He is a petroleum consultant. His expertise in this regard was not challenged. He had worked previously for the Department of Minerals and Energy. He left the department in 2017 to start his own business. He knew Quest and was dealing with Le Roux. He confirmed that he had put in applications for both the temporal and permanent licences for Buntibiz. He confirmed that the temporal was granted and the permanent licence was refused because Buntibiz did not comply with the 25% rule. This rule comes from the Petroleum Charter which has been in existence since 2000 but was not implemented. It was only implemented at the end of the year 2018.

[33] He also confirmed that he also prepared and lodged an appeal after the application for a licence was refused. In the provisional appeal that he prepared he put in a statement that Buntibiz would restructure its shareholding because that was the only way it would be able to succeed in the appeal. He conceded that he did not have a mandate from Buntibiz to put in that statement. McLoughlin was not satisfied with that statement and instructed him to withdraw it and he obliged. He believed that application would succeed but because of the change in the implementation of the law, some applicants including Buntibiz, suffered the same fate.

[34] Under cross-examination he stated that if Buntibiz had restructured its shareholding it would not have had a problem. He conceded Buntibiz was unwilling to restructure. Plaintiff closed its case.

[35] Defendant applied for the absolution from the instance which was refused for the reasons set out in that judgment.

Quest Retail evidence

Mr Adriaan Jacobus Le Roux

[36] Le Roux testified for the defendant. He stated that in 2018 he was the retail sales manager of Quest Petroleum now known as Petrofuel. He is not employed by Quest Retail. He represented both Quest Retail and Quest Petroleum in the transactions. He drafted the agreements. He then sent them to McLoughlin by email. There were proposed amendments by Buntibiz. There was a discussion around the licensing issue and what would occur if the licence was not obtained. It was agreed that Quest Petroleum would come to the assistance of Buntibiz. Before inserting the clause he would have gone to the board of Quest Petroleum and obtained an instruction to do so. Mr Jurgen Smith was the founder and a director of Quest Petroleum. He also signed the agreements.

[37] The director of Quest Retail was Ms Liesel Bezuidenhout. He testified that Quest Retail was an enabling company which only sold the business and then

walked away. The party that attended to the lease and supply of fuel was Quest Petroleum. After the takeover date of the business by Buntibiz, Quest Retail was never involved in the business again. He testified that the R2.5 million was for fixed assets, stock and goodwill.

[38] If he had been requested to put in clause 26 in the sale agreement he would have had to approach Quest Retail for consent. He was confident that Quest Retail would have told him to look for another buyer. The reason for that was because Quest Retail was an enabling entity. Quest Retail would have told Buntibiz that it bought a functioning business as a going concern and after the sale it had moved away from it.

[39] He testified that anything that needed to be paid would be paid by Quest Petroleum. He confirmed that Quest Petroleum tried to get a buyer for the business for continuity sake. They found a buyer who offered R2.5 million but Buntibiz wanted R3 million. He stated that the attitude of Quest Petroleum was that Buntibiz was unwilling to comply with the law and therefore they could not come to its assistance. The 25% was a requirement in terms of the law. He denied that Quest Retail intended to refund the R2.5 million to Buntibiz if they did not get the licence. He stated that the agreements were three distinct agreements and it was never their intention that they should be seen as one.

[40] Under cross-examination he testified that although the sale agreement makes reference to relevant agreements they should not be seen as linked. He testified that Maguta Properties (Pty) Ltd did not purchase the same business as the one sold to Buntibiz because there were no fuel pumps functioning.

Maguta did not receive what Buntibiz bought. Quest Petroleum tried to get a third party to buy the business from Buntibiz. He testified that because Quest Petroleum was the operator it made sense that if Buntibiz had done everything in its power to obtain the licence, but did not succeed, that it should be refunded. Quest Petroleum had to ensure that the operator was able to operate. He testified that Liesel Bezuidenhout has since left Quest Retail and is now a director in Simply Nest. He did not expect McLoughlin to know the internal workings of Quest Retail and Quest Petroleum. He believed that Buntibiz would get a licence. He did not believe that Quest Petroleum is liable to pay Buntibiz. The option that related to Mr De Lange related to the property and not the business and it had nothing to do with the retail licence. He confirmed that he was asked to put clause 26 into the lease agreement by McLoughlin for recordal purposes.

- [41] It was suggested to him that one would get a refund from the person he paid the money to. He disputed this on the basis that it would depend on the context. He testified that the right to trade was not defined as an amount. He disputed that Buntibiz paid R2,5 million for a right to trade. He stated that that amount was for a going concern. He disputed that the right to trade was reference to the goodwill which Buntibiz acquired in terms of the sale agreement. He testified that McLoughlin had approached them and stated that he wanted to get out of the business. His attitude was that he could stay in the business, or sell or close it. If Buntibiz had done everything that the department told it to do in order for it to get the licence, but was still refused, then he could invoke clause 26. He described the right to trade amount as

“the key money, the right to do business and the right for you to operate”.

Quest Retail closed its case.

Legal submission by the parties

[42] Mr Hopkins submitted that this court should make use of the innocent bystander test adopted from English law. He relied on, *inter alia*, ***Reigate v Union Manufacturing Company (Ramsbottoms)***¹ for the contention that the court must imply a term if it is necessary in the business sense to give efficacy to the contract. If it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties? What will happen in such a case? and they would have both replied *“of course so and so but we did not trouble to say it because it is clear”*.

[43] He submitted that the court may import the tacit term if it is satisfied that the facts and the circumstances give rise to a reasonable inference that Quest Retail and Buntibiz intended for the tacit term to apply and that the tacit term makes good business sense. He submitted that because Ms Liesel Bezuidenhout, the only director of Quest Retail did not give evidence at the trial, this court does not have direct evidence from her to suggest that she would have answered the innocent bystander on behalf of Quest Retail negatively. He submitted that Le Roux did not ask Liesel Bezuidenhout whether she would have agreed to put the refund clause into the sale agreement. He submitted that the court should reject the evidence of Le Roux that McLoughlin specifically asked him not to put the refund clause in the sale agreement.

¹ 118 LT 479 at 483.

[44] He submitted that this court viewing the suite of the three contracts as a single transaction concluded with a single Quest entity, the version of McLoughlin is more probable. He also relied on Le Roux's concession that he never told McLoughlin that there were two separate Quest entities and therefore McLoughlin would have had no reason to select a specific agreement within which to put the refund clause. Once Le Roux's evidence is rejected, he argued, the court will be left with circumstantial evidence. Relying on the undertaking by Quest Retail and Quest Petroleum in response to the Norman Le Grange threat of his intended objection to the licence application, this court must infer that that undertaking by the exercise of inferential reasoning, would lead to the conclusion that Quest Retail would have consented to the tacit term.

[45] He submitted that the court in giving true meaning to paragraph 7 of Exhibit "A" dated 17 July 2018 must adopt the broader context in its approach as was adopted in the ***Natal Joint Municipal Pension Fund v Endumeni Municipality***². He submitted that Le Roux was not a good witness. He was evasive and obfuscatory because he could not even explain to the court what right to trade meant although he had used the term in the contract which he drafted. He submitted that the tacit term made absolute business sense. He submitted that Buntibiz would have answered the innocent bystander question positively. He also submitted that the tacit term should be imported and incorporated into the sale agreement.

[46] Dealing with the resolute condition he submitted that the Liquid Fuel Charter did not have the force of law. He submitted that the 25% was applied in

² 2012 (4) SA 593 (SCA) PARA 16.

December 2019. The resolute condition does not postpone the operation of the obligation meaning that the contract comes into effect immediately but will terminate if some future uncertain event transpired. Relying on ***Van der Merwe et al***³ he submitted that the adoption of fictional fulfilment does not mean that the contracting parties need to go out of their way to interfere with the normal course of events. He accepted that if Western Gruppe who held 100% of shares in Buntibiz had sold 25% of those shares to an HDSA, Buntibiz would have received its retail licence. He submitted that an active restructuring of the holding company would amount to an interference in the normal flow of events. In this regard, the restructuring of the company takes the company out of the realm of fictional fulfilment. He further argued that the adoption of fictional fulfilment cannot be used to keep a contract in place in order to countenance an unlawful agreement. In this regard, he relied on ***Premier of the Free State v Firechem Free State (Pty) Ltd***⁴.

[47] In addressing the restitution issue, he submitted that, Quest Retail's submission that if the tacit term is established and the resolute condition is met Quest Retail has no obligation to make restitution until Buntibiz also makes restitution. He submitted that Quest Retail has not communicated to Buntibiz why it alleged non-performance. In this regard, he relied on ***Telcordia Technologies Inc. v Telkom SA Ltd***⁵. On these bases, he submitted that the court should find for Buntibizz with costs including reserved costs relating to the absolution from the instance application.

³ At page 267 and 268.

⁴ 2000 (4) SA 413 (SCA) at 431 – 432.

⁵ 2007 (3) SA 266 (SCA) at para 163.

[48] Mr Niekerk, on the other hand, submitted that a tacit term cannot be imported into any contract where the parties applied their minds to that contract. In this regard, he referred the court to ***Robin v Guarantee Life Assurance Company Ltd***⁶. He further submitted that there was deliberate intent on the part of Buntibiz not to fulfil the condition of the retail licence. He relied, in this regard, on ***Lekup Prop Company v Wright***⁷. He contended that on the evidence it is clear that McLoughlin understood that the proposal to pay the R2.5 million was from Quest Petroleum and not from Quest Retail as expressly agreed between the parties. He submitted that, on that basis alone, there would be no basis for this court to import a similar term already agreed to in the lease agreement into the sale agreement.

[49] Mr Niekerk referred to ***City of Tshwane Metro v Brooklyn Edge***⁸ for the submission that the court must first look at the terms of the contract, the surrounding circumstances and the facts of the case. He argued that the court must find that clause 26 was put in the lease agreement only. He further contended that the sale agreement itself had a non-variation clause. If clause 26 were to be imported into the sale agreement, as suggested by Buntibiz that would vary the sale agreement which has a non- variation clause. He further submitted that because McLoughlin had conceded in evidence that the term was not necessary for it to be put in the sale agreement because there was the protection in clause 26 of the lease agreement, therefore the cause of action of Buntibiz is against Quest Petroleum.

⁶ [1984] 2 ALLSA 422 (A) at 567.

⁷ (2012) ALLSA 136 (SCA).

⁸ *City of Tshwane v Brooklyn Edge* 2022 (2) ALLSA 334 (SCA) 16.

[50] He submitted that on the objective bystander test there are no prospects that the tacit term existed and if the tacit term did exist Buntibiz failed to establish that term. He submitted that the mere fact that the clause was put in the lease agreement mitigates against the suggestion that it should have been in the sale agreement. He submitted that the court cannot infer that it should have been part of the sale agreement because to do so would amount to the court contracting for the parties, contrary to the caution made in the *City of Tshwane* matter. He further submitted that should it be necessary for Buntibiz to prove the resolute condition, it should prove that it was unable to obtain the licence not that it was unwilling to change ownership. He submitted that on this ground too, Buntibiz must fail because its evidence is that of unwillingness to embrace the transformation imperatives of the Charter.

[51] He submitted that the court must find that McLoughlin's evidence was not reliable as he vacillated in his evidence. He submitted that the concessions he made under cross-examination demonstrated that he knew that he was dealing with different companies and not with one company as he wanted the court to believe when he gave his evidence in chief. He submitted that the court should accept the evidence of Le Roux that Buntibiz was not willing to comply with the law and on that basis alone he deliberately sabotaged the licensing approval. He further submitted that after the sale was concluded, Quest Retail went away, as testified by Le Roux and had no further dealings with Buntibiz in its operations of the business and therefore it would make no business sense to include the proposed term in the sale agreement. He relied heavily in his submissions on ***Cash Converters Southern Africa (Pty) Ltd v***

Rosebud Western Province Franchise (Pty) Ltd⁹ for his submission that once the sale agreement was concluded it had served its purpose and there can be no question of a refund of the purchase price.

[52] He further submitted that on the bystander principle Le Roux had testified that Quest Retail would have simply told him to look for another buyer if he had conveyed to it that the refund of the purchase price should be paid to Buntibiz should it not obtain a trading licence. That, he submitted, is sufficient to refuse the importation of the tacit term proposed by Buntibiz.

[53] On the issue of restitution, he submitted that Buntibiz was sold a business as a going concern. When it was handed over to it on the effective date it was functional, the filling station was pumping fuel and the business was operative. However, when he handed the business back, the business was not operational and the pumps were not pumping any fuel. He submitted that any order directing payment of the purchase price in those circumstances would be prejudicial to Quest Retail who honoured the terms of the sale agreement between the parties in full.

Evaluation of evidence

[54] I have already made certain observations in relation to the evidence of Mr McLoughlin. He testified that it is highly likely that he requested that clause 26 be put in the lease agreement. In this regard he corroborated the evidence of Le Roux. This court must accordingly accept Le Roux's evidence.

[55] He also testified that he was aware that there were three agreements and there were two companies involved. This goes against his evidence in chief

⁹ (238/2001) [2002] ZASCA 66 (2002) 3 ALLSA 435 (A) 31 May 2002 at para 23.

that there was one commercial transaction and his assumption that he was dealing with one company. Again, Le Roux's evidence in this regard that these agreements are distinct and so are the companies involved must be accepted.

[56] There is a fundamental difficulty with Mc Loughlin's evidence where it seeks to rely on both clause 26 and on the tacit term in paragraph 5.1 of the particulars of claim. In his evidence -in - chief he testified that clause 26 should have been placed in the sale agreement. That evidence does not support the tacit term contended for. This means that his evidence does not support the pleaded case in paragraph 5.1 of the particulars of claim.

[57] The tacit term pleaded is different from clause 26 in material respects. First, there is a time frame in clause 26.1 set for the application for a licence, namely, within 7 days of the date of signature. In the pleadings the consequence of the non- approval of the licence would render the sale agreement null and void. That is what is envisaged in paragraph 5.1 of the claim.

[58] Second, in clause 26, Quest Petroleum acknowledged that once the retail licence is not approved Buntibiz will not be able to operate the business. There is no acknowledgement relating to the operation of the business in the sale agreement.

[59] Third, paragraph 5.1 of the claim provides that the purchase price would be repaid. On the other hand, clause 26 provides for a refund of the amount that Buntibiz paid as a right to trade.

[60] Fourth, there is no amount, either in the lease or the sale agreement that was agreed on in relation to the right to trade.

[61] Fifth, in paragraph 5.1 the proposed tacit term makes reference to a refund of the purchase price. The sale agreement makes reference to the purchase price of R2,5 million. However, that purchase price is apportioned as follows:

“7.2.1 Fixed Assets	<i>fair market value;</i>
7.2.2 Stocks	<i>cost price or the net realizable value;</i>
7.2.3 Goodwill	<i>the balance.”</i>

[62] All of these items do not stipulate in monetary terms what the fair market value is for fixed assets, cost price for stocks or their realizable value and what the balance for goodwill would be. Buntibiz operated the business from the effective date 1 July 2018 until March 2021. In order for it to succeed there must be evidence that having operated the business for that period of time, it would make business sense to refund it the R2,5 million despite lack of the market value; cost price of stocks and with no knowledge whatsoever of the balance for goodwill. The purchase price provided for the R2,5 million plus an amount equal to the cost price of the stocks calculated in terms of clause 8. Interestingly, clause 8 sets out, *inter alia*, the method of evaluating stocks, and the dispute mechanisms relating to stocks. After the payment of the R2,5 million Buntibiz became the owner of the business¹⁰. There is no evidence whatsoever tendered by Buntibiz to support the tacit term and the refund of R2,5 million in the light of the apportionment of the purchase price.

¹⁰ See: Clause 16 of the sale agreement. “*The Business is sold subject to the condition that it shall remain the absolute property of the Seller until such time as the full purchase price has been paid to the Seller.*”

[63] McLoughlin continuously made reference to the R2,5 million being a refund for the right to trade. The reference to the “right to trade” is contained in clause 26 of the lease agreement and not in the proposed tacit term contended for in paragraph 5.1 of the particulars of claim. He also relied on the proposed tacit term by making reference to ‘the purchase price’. I have already highlighted the material differences between the proposed tacit term and the expressed term in clause 26 of the lease agreement. McLoughlin relied on both in evidence which made his evidence contradictory and thus unreliable.

[64] The sale agreement is the only agreement that was signed by Buntibiz and Quest Retail. If one has regard to that agreement, it only makes reference to the thing that was sold and the purchase price which are matters relevant to this action. It makes no reference to the retail licence needed to operate the business. First, were this court to import the tacit term it would be introducing a new aspect, not contemplated by the parties to the sale agreement, namely, a retail licence.

[65] Second, contrary to the express terms in the sale agreement, it would be introducing a new term that the sale would be null and void in the event of the retail licence not being granted. In this regard, by so doing, this court would be creating a contract that would be at variance with what the parties agreed to in clauses 23 and 24 of the sale agreement, that:

“23. ENTIRE AGREEMENT

This agreement, together with all annexures annexed thereto represents the entire agreement between the parties and supersedes all other agreements or understandings, written or verbal, that the parties may have had with respect to the subject matter of this agreement.

25. VARIATION

No addition to, variation or consensual cancellation of any provision in this agreement including this provision, shall be of any force or effect unless reduced to writing and signed by or on behalf of both parties.”

[66] It is common cause that these terms were never varied by the parties. The fact that, it was agreed in the sale agreement that the conclusion of the lease and the supply agreements constituted suspensive conditions to the sale agreement, does not make all three agreements interlinked. Performance in relation to each agreement is distinct. It is common cause that these suspensive conditions were fulfilled and to that extent the sale agreement came into effect and became binding on the parties.

[67] When McLoughlin dealt with the shareholding of Buntibiz, he was adamant that he controlled 40% whilst Gotz controlled 60% of Buntibiz. Contrary to the submissions made by counsel he did not refer to the restructuring of Western Gruppe instead he limited the views on that issue to Gotz and himself. Therefore, the restructuring of Buntibiz in order to meet the 25% rule should be viewed in the context of his evidence and not on speculation as to what Western Gruppe was expected to do.

[68] He had testified and this was confirmed by Cloete that Cloete had indicated that the company would restructure and that company was Buntibiz and upon him having become aware of that he instructed Cloete to withdraw that statement because the company was not willing to do so.

[69] On the facts, McLoughlin conceded that the closure of the filling station and the financial distress of the business were unrelated to the application for the retail licence. He also conceded that the closure of the fuel pumps was also

unrelated to the retail licence. Although the licence application and the appeal was dismissed by December 2020 Buntibiz continued to trade until March 2021. He also conceded that as at 7 April 2020 when a letter from Le Roux was written where Quest Petroleum was attempting to resolve the problem between itself and Buntibiz at that point there was never a mention by Buntibiz of the fact that if it could not get a licence it wanted a refund.

[70] In weighing up the evidence in its totality, the importation of the tacit term is not supported by the evidence, including the plaintiff's evidence. It would vary the sale agreement in a manner that would be inconsistent with its agreed material terms and its purpose and would thus lead to unbusinesslike consequences. It follows that the evidence of Le Roux must be preferred as reliable over that of McLoughlin. The evidence of Cloete confirmed that the only reason for the refusal of the licence was as a result of the unwillingness of Buntibiz, against his advice, to restructure in order to comply with the transformation imperatives as prescribed by law. I also accept the evidence of Le Roux as a representative of Quest Retail in the sale agreement that it would have told him to get another buyer if he sought its consent on the tacit term, because his authority in this regard was not impugned.

The Law

[71] Buntibiz bore the onus to prove its case. In the *City of Tshwane* matter with specific reference to paragraph 16 the Supreme Court of Appeal stated:

"A tacit term is an unexpressed provision of a contract. It is inferred primarily from the express terms and the admissible context of the contract. A court will not readily infer a tacit term, because it may not make a contract for the parties. The inference must be a necessary one, namely that the parties necessarily must have or would have agreed to the suggested term. A relevant fact in this regard is whether the contract is efficacious and complete or whether, on the other hand, the proposed tacit term is essential to lend business efficacy to the contract. The celebrated bystander test constitutes a practical tool for the determination of a tacit term. To satisfy the test the inference must be that each of the parties would inevitably have provided the same unequivocal answer to the bystander's hypothetical question. Even if the inference is

that one of the parties might have required time to consider the matter, the tacit term would not be established” (footnotes omitted).

[72] Brand JA in **City of Cape Town (CMC Administration) v Bourbon-Leftley**

NNO¹¹ reiterated the principle that a tacit term is not easily inferred by the Court, and stated:

[19] *As stated in these cases, a tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulation that the courts can neither make contracts for people, nor supplement their agreements merely because it appears reasonable or convenient to do so (see eg Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 532H). It follows that a term cannot be inferred because it would, on the application of the well-known 'officious bystander' test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time (see eg Alfred McAlpine supra at 532H-533B and Consol Ltd t/a Consol Glass supra para 50). If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified." (my underlining).*

[73] I have had regard to the authorities relied upon by the parties. In the *Firechem* matter, the Supreme Court of Appeal stated at paragraph 29:

[29] *But I do not think that the case is to be decided upon the basis of Mr Pillay's views. To do so would be to ignore the parol evidence rule in a fundamental way. It is not for him to tell us what the Board intended, when the Board has expressed its intentions in words that are capable of ready interpretation. One must ask oneself what was expressed to be intended when the acceptance referred to 'a contract.... signed by the province and Firechem.' This expression must be read together with the statement that: 'This letter of acceptance constitutes a binding contract...' If the contract brought into being by this acceptance was to bind, then the further contract envisaged could not be one which contradicted it. ..."*

[74] I have already indicated that the tacit term proposed will be contrary to what the parties expressed in the sale agreement and thus fall foul of the caution expressed in the *Firechem* case. In any event, the parties applied their minds

¹¹ 2006 (3) SA 488 (SCA) at para 19, 494 H – 495 A.

to the sale agreement and had made provision in the contract in relation to the terms that would result in a valid agreement. Any tacit term that is in contradiction of those express terms, cannot be imported.¹²

[75] The fact that there is clause 26 in the lease agreement does not lead to a justifiable inference that a similar term was in the contemplation of the parties when they concluded the sale agreement. I find that on the facts before this court there is no room for the importation of the tacit term for which the plaintiff contends. I do not deem it necessary to traverse the two other issues, namely, the resolute condition and the restitution issue as they both flow from the tacit term issue. It follows therefore that the plaintiff's claim must fail.

Costs

[76] The general rule on costs is that costs follow the result. I have no reason to depart from that rule. Something must be said about the leading of evidence and production of documents that were, as conceded by counsel for Buntibiz in the end, that except for one letter: "Exhibit A", all the other documents were privileged and or not relevant to the issues at hand. This was a call that Buntibiz ought to have made earlier. By so doing it would have avoided the unnecessary leading of irrelevant evidence in relation to those documents. This court spent hours going through the documents and provisionally admitting them on the basis that they were relevant, as contended on behalf of Buntibiz, despite numerous objections from Quest Retail. Those costs

¹² Absa Bank Ltd v SA Commercial Catering & Allied Workers Union National Provident Fund (under curatorship) 2012 (3) SA 585 (SCA) at para 33; See also Union Government (Minister of Railways & Harbours) v Faux Ltd 1916 AD 105 at 112.

cannot fall within the ordinary party and party cost order. As a mark of this court's disapproval of the conduct of Buntibiz in this regard, it must pay costs relating to all the privileged and/or irrelevant documents handed in and provisionally admitted as exhibits, at its request, on an attorney and client scale.

ORDER

[77] In the circumstances I make the following Order:

1. The plaintiff's claim is dismissed with costs.
2. Plaintiff is directed to pay costs associated with the evidence in relation to the privileged and/or irrelevant documents, handed in as exhibits at the trial, on an attorney and client scale.

T.V. NORMAN

JUDGE OF THE HIGH COURT

**Matter heard on : 31 July 2023, 01 August 2023, 02 August 2023,
03 August 2023 & 04 August 2023**

Judgment Delivered on : 31 August 2023

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