



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

6/3/15

CASE NO: 71989/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

2015/03/15

DATE

[Signature]

SIGNATURE

IN THE MATTER BETWEEN

DISCOVERY LIFE LIMITED

Plaintiff/ Applicant

and

PERCY GEORGE EDWARD BARTHAM

Defendant/Respondent

JUDGMENT

LEGODI J

[1] This is an exception noted against the defendant's defence. Several grounds of the exception are raised. All revolve around averment made in paragraph 2.2 of the plea. It reads as follows:

"It was furthermore a tacit term of the agreement that should the plaintiff unlawfully terminate the agreement or breach, the terms thereof, defendant would remain entitled to all remuneration earned by him prior to such termination or earned during the period that the plaintiff prescribed with such breach".

[2] On behalf of the plaintiff, is alleged that the tacit term alleged in paragraph 2.2 of the defendant's defence is not one of the expressed terms of the written agreement and that it is therefore vague and embarrassing particularly taking into account the followings:

- 2.1 That the written agreement pleaded by the plaintiff is admitted by the defendant;
- 2.2 That the written agreement constitutes the entire agreement, a term which is also admitted by the defendant;
- 2.3 That the written agreement pleaded by the plaintiff contains a non-variation clause. That any amendment or variation is invalid unless such variation or amendment has been reduced to writing by the parties;
- 2.4 Further, is contended by the plaintiff that the defendant fails to set out in what manner, where, when and by whom the tacit term pleaded by the defendant in paragraph 2.2. of its plea was reached.

[3] Based on all of these, is then suggested that the defendant's defence or claim lacks material facts to sustain a defence or claim and that therefore, is vague and embarrassing.

[4] Counsel for the defendant starts by taking a swipe at the plaintiff's written heads of argument. It is contended that the plaintiff's heads of argument and the relief sought therein, is wider than the content of the exception. The contention is based on the followings: Firstly, that in paragraph 5.1 of the heads of argument is alleged that the plaintiff did not plead the tacit term and its particularity. That such allegation appears in the exception. Even if the allegation has merit, which it has not, it should have been relied upon in the exception, so it was argued on behalf of the defendant. Lastly, that in

paragraph 5.3 of the plaintiff's heads of argument, the plaintiff asks for striking out of the defendant's counterclaim. But the plaintiff did not seek such a relief in the exception, so is argued.

[5] True, as was argued by counsel on behalf of the defendant, the plaintiff is not entitled to widen the scope of its exception which is not covered in the exception itself.

[6] Coming to the exception, the suggestion is that the exception noted by the plaintiff is based on a misconception which resulted from failure on the part of the plaintiff to appreciate the nature of the pleaded tacit term. As correctly pointed out by counsel on behalf of the defendant, a tacit term is an outspoken provision of the contract. It is one to which the parties agree, though without saying so explicitly.

[7] The test for inferring a tacit term is whether the parties, if asked whether their agreement contains the term, would immediately say: "*Yes, of course that is what we agreed*"¹. Similarly, implied term is used to denote an unexpressed provision of the contract which derives from the common intention of the parties as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term, the court in truth, declares the whole contract entered into by the parties².

[8] A tacit term can be imported into a written contract where there are expressed terms. When that happens, the tacit term supplements the expressed terms in the contract and it thus forms much part of the contract as its express terms. Such a tacit term for it to be imported should not amend, contradict or vary the contract, instead it must form part of the contract with its expressed terms.

[9] The words "should plaintiff unlawfully terminate the agreement or breach the terms thereof the defendant would remain entitled to all remuneration earned by him prior to such termination or earned during the period that the plaintiff persisted with such breach", in paragraph 2.2 of the plea, is the basis for the exception.

¹ See *Food Allied Workers Union v Ngcobo NO & Another* 2014 (1) SA (CC) p43G.

² See *Alfred McApine and Son (PTY) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) p531-532A.

[13] In my view, paragraph 2.2 of the defendant's plea should be seen in context. The context is founded in clauses 17 and 18 of the contract. Clause 17 deals with the termination of employment and clause 18 with termination consequences.

[14] Clause 17 reads as follows:

"17.1 The agreement may be terminated in the following circumstances:

17.1.1 where the Consultant breaches any term of the agreement;

17.1.2 where the Consultant fails to or ceases to comply with Fit and Proper requirements as spelled out by the FAIS Act;

17.1.3 for any lawful or fair reason; or

17.1.4 where either party provides to the other party written notice of termination of employment in terms of the Basic Condition of Employment Act".

The relevant provisions in clause 18 reads as follows:

"18.1 The Consultant's membership of the pension and provident fund and medical scheme shall terminate on the last day of the month for which contribution have been paid in full.

18.2 The obligation of Discovery to remunerate the Consultant in terms of this agreement ceases upon termination of this agreement for any reason whatsoever.

18.3 Upon termination of this agreement, the Consultant shall lose any entitlement to shares allocated to them during their employment with Discovery (except in the event of the Consultant's retirement which shall be regulated in terms of clause 18.10 below).

18.4 Upon termination of this agreement, the Consultant shall immediately return all property and material, including client files (unless retention of same is permitted in terms of this agreement) of the Discovery Group.

This is to enable the Discovery Group to comply with its recordkeeping obligations in terms of the Applicable law.

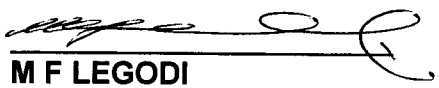
[15] 'For any lawful or fair reason' in clause 17.1.3 as quoted, in my view, is in harmony with "Should plaintiff unlawfully terminate the agreement or breach the terms thereof" set out in paragraph 2.2 of the defendant's plea. In other words, the plaintiff will be entitled to terminate the agreement for as long as the plaintiff acts lawfully and fairly towards the defendant in terminating the defendant's employment.

[16] By the way, Consultant in clauses 17 and 18 refers to the defendant. What is pleaded in paragraph 2.2 of the defendant's plea, in my view, does not offend the non-variation term in clause 34 of the agreement. It provides as follows:

"Save as provided for herein, no amendment, or variation to this agreement shall be of any force or effect unless agreed between the parties and reduced to writing".

17. The pleaded paragraph 2.2 of the defendant's plea is neither a variation nor amendment. It is supplementary to the expressed terms of the agreement and is clearly inferred or implied in the agreement.

[18] Consequently, the application for exception is hereby dismissed with costs.


M F LEGODI
JUDGE OF THE HIGH COURT

FOR THE APPLICANT/PLAINTIFF :

ADV. T COLYN

INSTRUCTED BY:

KEITH SUTCLIFFE & ASSOCIATES
 c/o ANREA RAE ATTORNEYS
 69 Douglas Street
 Colbyn, PRETORIA
 REF: K Sutcliffe/BB/D1356
 Mrs Rae/K188
 TEL: 012 430 7757

FOR THE DEFENDANT:

ADV PP DELPORT SC

INSTRUCTED BY:

PEET DELPORT ATTORNEYS
43B Marili Avenue
Val de Grace
PRETORIA
REF: PD 762
TEL: 012 753 7916

Matter heard on: 02 MARCH 2015

Judgment handed down on: 06 March 2015