FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A110/13

In matter between:

ENGEN PETROLEUM LIMITED	Appellant
and	
ROBERT HOWARD VAN LOGGERENBER N.O	1st Respondent
PETRONELLA FRANCINA VAN LOGGERENBERG N.O	2ND Respondent

Coram: **Van Der Merwe, et C. J. Musi, et Lekale JJJ**

HEARD ON: 9 JUNE 2014

JUDGMENT BY: **C.J. MUSI, J**

DELIVERED ON: 14 AUGUST 2014

---

[1] This is an unopposed appeal against the judgment of a single judge of this division. The court *a quo* discharged a provisional order of sequestration with costs. The appellant, being dissatisfied with the order, applied unsuccessfully for leave to appeal in the court *a quo*. It subsequently applied, successfully, for leave to appeal at the Supreme Court of Appeal. The Supreme Court of Appeal granted it leave to appeal to a full bench of this court. This appeal is therefore with the leave of the Supreme Court of Appeal.

[2] The first and second respondents are trustees of the HJP Trust (IT1876/1996) (the Trust). The Trust conducted a road transportation business. During June 2004 the respondents *qua* trustees of the Trust entered into a written agreement, styled an EDC membership agreement (EDC), with the appellant.[1]

[3] In terms of the EDC the appellant, through an approved Bank, made available a form of credit facility to the Trust for the purpose of funding *inter alia* the Trust's "away from home" diesel purchases at the appellant's national dealer network.

[4] EDC cards were issued to the Trust by the approved Bank on behalf of the appellant. The scheme worked as follows. The Trust would utilise the EDC cards to purchase the appellant's brand diesel and other products at various independent retailers that form part of the appellant's national dealer network. The approved Bank would pay the retailers. The appellant would in turn settle the approved Bank or become liable to the approved Bank for settling the retailer and the Trust became liable to the appellant for having settled or having become liable to the approved Bank. The respondents, in their personal capacities, also bound themselves as sureties to the appellant for the debt of the Trust.

[1] EDC is an acronym for Engen Diesel Club

[5] Pursuant to the conclusion of the EDC the Trust commenced purchasing the appellant's brand of diesel and lubrication products. The EDC was valid for a period of 36 months only and expired at the end of May 2007.

[6] During 2007 the road transportation business of the Trust was acquired by the HJP Vervoer CC (the CC). It is not clear how this happened because the respondents refused to give any information relating to the take-over. The respondents, in their personal capacities, are the only members of the CC.

[7] The CC purchased diesel and lubricants from retailers using the EDC cards issued to the Trust in terms of the EDC.

[8] The CC accepted liability for the purchases it made with the EDC cards issued to the Trust. Resultantly, on 3 February 2011, it signed an Acknowledgement of Debt wherein it acknowledged that it owed the appellant the aggregate liquidated amount of R1 453 690.40. It was unable to make payments in terms of the acknowledgement of debt and the appellant successfully applied for its compulsory Winding-up.[2]

[9] Above and beyond the R1 453 690.40 admitted by the CC, the appellant alleged that the Trust owed it R2 731 175.55 because it purchased diesel and lubricants in terms of the EDC.

[2] A final order of liquidation was issued against the CC under case number 4901/2011.

[10] On 4 May 2011 the appellant's attorneys and Mr Johan Oosthuizen, an attorney who represented the respondents in their various capacities as trustees of the Trust, sureties of the Trust and members of the CC met to discuss how the debt would be settled.

[11] On 5 May 2011 the appellant's attorney recorded what transpired at the meeting in a letter which was sent to Oosthuizen as follows:-

"Dear Johann(sic)

Re: ENGEN PETROLEUM LIMITED/ H J P VERVOER

1. Thank you for having travelled to Durban yesterday together with your clients' representatives to meet with me and mine in order to explore settlement of this matter.
2. In order to avoid misunderstandings, so that we can move forward in a towards settlement constructive manner (sic), it is necessary for me to record the salient aspects of our discussions as follows:

    2.1 my client made it perfectly clear that there is no truth whatsoever in the rumours doing their (sic) rounds that it was advising your clients' creditors that it was in the process of issuing a Winding-Up Application;

    2.2 my client underlined the fact that it had not ruled out the possibility that it may have to bring such proceedings, dependent on the outcome of our meeting, but it had most certainly not reached such a conclusion prior to our meeting and more to the point, it certainly has not held discussions with any other creditors of your clients;

2.3 according to your clients:-

i) the Close Corporation is indebted to SARS in the sum of R5m for unpaid VAT;

ii) the Trust is indebted to SARS in the sum of R700k for unpaid VAT;

iii) your clients' accountant is responsible for the aforesaid liabilities as he failed to pay VAT Output to SARS for the last 12 months;

iv) consequently the Close Corporation ceded its book debt to SARS to settle the aforesaid claims against it and the Trust;

v) the original transport business of the Trust ceased some time ago and its sole business became the rental of motor trucks to the Close Corporation;

vi) the Close Corporation's business became that of a transporter;

vii) the Trust and Close Corporation both stopped trading on 15 March 2011;

viii) the Trust bought diesel every month from Engen for use by the trucks of the Close Corporation and the Close Corporation paid for the diesel;

ix) although the Trust (sic) used and paid for the diesel, it ought not have been invoiced by my client as the Trust was responsible for payment;

x) the Close Corporation is only indebted to Engen in terms of an AOD and the Trust is indebted to Engen for the balance of its claim; and

xi) your clients' Mr Van Loggerenberg intends to take up employment in his father's newly established business, which is also a trucking business in order to sustain himself.

3. I do not intend to engage in argument with you about whether or not your clients' submissions are sound or even true. *Prima facie* I must state that I find them to be incredible. Be that as it may, I intend only to pursue settlement and in this regard call on you to let me have your clients' offer by 15H00 on Monday next week, as was undertaken by you.
4. Kindly be adviced that should I not receive same, I shall reach the conclusion that this matter is outside of the realms of settlement in which event my client shall take whatever steps it deems necessary to protect its interests."

[12] On 11 May 2011 Oosthuizen sent an email to the appellant's attorney that in part reads as follows:-

> "Manogh, hope you are doing well. I had a discussion with SARS this morning again and it seems that we will be able to give Engen an amount of round about R900 000 of the debtors of the CC for payment of the amount owed by the CC and Mr and Me. Van Loggerenberg to Engen…."

[13] On 24 May 2011 Oosthuizen wrote another letter to the appellant wherein he indicated that the respondents are willing to cede the net profit from the sale of their personal

immovable properties to the appellant. He further stated, in the letter, that "According to our calculations your client will, in terms of the above transactions, receive an amount of approximately R1 600 000**…. Please take note that this settlement offer is made in full and final settlement of the debt for which Mr and Ms Van Loggerenberg signed as sureties for the debt of the HJP Trust. You will therefore notice that the above properties are registered in their personal names and not in the name of HJP Trust.** This step is taken in good faith as neither our client not (sic) Mr or Ms Van Loggerenberg had or have any intention to cause your client to suffer damage…" (My emphasis.)

[14] In their answering affidavits however, the respondents denied that the Trust, at any stage, negotiated with the appellant to pay any debt. It was also denied that the Trust bought any petroleum products from the appellant or its retail network after the EDC expired. It was further denied that Oosthuizen intimated or offered that the Trust would pay its indebtedness to the appellant. According to the respondents they, i.e. the Trust and the respondents in their personal capacities endeavoured to settle the debt of the CC and not any debt of the Trust. The admissibility of the letters was, correctly, not challenged by the respondents. See **LYNN & MAIN INC v NAIDOO AND ANOTHER** 2006 (1) SA 59 (NPD) at para 22 to 30.

[15] It was the Trust's case that after the expiration of the EDC in 2007, the CC purchased the appellant's products and not it. It attached invoices wherein the appellant invoiced the CC for petroleum products supplied to it by the appellant. The Trust also disputed that its indebtedness can result from the expired EDC.

[16] The court *a quo* found that the EDC expired after 36 months and that the CC and not the Trust did business with the appellant thereafter. According to the court *a quo* it is logical that the Trust could not have been indebted to the appellant post 2007.

[17] The court *a quo* also found that it is unclear, from the correspondence between the attorneys, whether Oosthuizen was acting on behalf of the CC or the Trust.

[18] The court *a quo* further found that because the approved bank issued the EDC cards; issued statements to the Trust and Trust had to make payments to the approved bank, the Trust was therefore not indebted to the appellant.

[19] Mr Harcourt on behalf of the appellant challenged all the above mentioned findings of the court *a quo*. He submitted that the court *a quo* erred in its findings because the correspondence between the parties clearly shows that the Trust was indeed a debtor of the appellant. He further argued that the court *a quo* should have found that the approved bank was an agent of the appellant.

[20] The facts of this matter present a few material factual disputes. The most significant being whether the trust was a debtor of the appellant after the expiration of the EDC.

[21] This being an application for final relief the factual disputes must be resolved by having regard to infamous and well-known dictum in **<u>Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 635 C</u>**. The factual issues must therefore be decided based on the respondents' version unless their version is untenable or far-fetched.

[22] It is common cause that subsequent to the expiration of the EDC, no express written or oral agreement was entered into by the parties. It is also common cause that subsequent to the expiration of the EDC, the cards issued to the Trust were used to purchase diesel and lubricants from the appellants' retail network. The same EDC cards were used prior and subsequent to the expiration of the EDC agreement. The first question that arises is what is the status of the expired EDC? Secondly, given the facts of this matter, where there was performance after the expiration of the EDC, purportedly in terms thereof, whether the Trust can be held liable where there was no express agreement.

[23] With regard to the first question, the EDC agreement was a periodic contract, i.e. it was only binding during the period of its subsistence. It expired and was no more at the end of

May 2007. It was therefore terminated by the effluxion of time.

[24] After its termination the appellant did not cancel the EDC cards issued to the Trust. The Trust continued to use the EDC cards. The parties continued to conduct themselves as if the EDC was still in place, although the CC, seemingly unbeknown to the appellant, at some stage after the expiration of the EDC, used the cards for its own purposes.

[25] Mr Harcourt argued that the EDC has relocated after its expiration and that we should find that it relocated on a month-to-month basis.

[26] Service contracts like leases can relocate into new contracts after the expiration of the initial contract. The relocation can be express or tacit. Whether a tacit contract came into being and what the terms thereof are is a factual question dependent on the surrounding circumstances. **<u>See Fiat SA v Kolbe Motors 1975 (2) SA 129 (O) at 138</u>**; **<u>Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods (CC) and Others 2002 (1) SA 822 (SCA)</u>**.

[27] The surrounding circumstances will assist the court in making the necessary inferences. What the parties thought is of no moment. It is their conduct and the outward manifestation of their thoughts that is important. We do not have to attempt to delve into the windowless inner chambers of their minds to see what they intended. See **Fiat SA v**

Kolbe Motors supra. It had been said that “the law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds… if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract” **South African Railways and Harbours v National Bank of South Africa Ltd 1924 A.D. 704 at 715**. There is no allegation of fraud in this matter.

[28] An inference may be drawn from the surrounding circumstances or the proved facts in a civil case if it seems to be the more credible, likely or acceptable one from amongst several conceivable ones, unlike in a criminal matter where it must be the only reasonable inference. See **Ocean Accident and Guarantee Corporation Ltd v Kock 1963 (4) SA 147 (AD) at 159D; South Africa Railways and Harbours v Dhlamini 1967 (2) SA 203 (D) at 207G-H; Marine and Trade Insurance Co. Ltd v Van der Schyff 1972 (1) SA 26 (AD) at 32D; Govan v Skidmore 1952 (1) SA 732 (N) at 734C**.

[29] In this matter there was no express agreement. The appellant and the Trust conducted themselves as if the EDC was still extant, although it was terminated by effluxion of time. Their conduct evinces a desire to revive their former

contractual relationship on materially the same terms as existed before that termination. There is no evidence that the appellant ever entered into any agreement with the CC. Likewise there is no evidence that the CC used the Trust's EDC cards with the permission of the appellant.

[30] In my view, the inference to be drawn from the facts of this matter is that there was a tacit relocation of the material terms of the EDC. The tacit agreement is a new agreement and not a continuation of the old one. See **Golden Fried Chicken supra at 825 D**.

[31] Having found that there was a relocation, the next question to consider is whether it was for a fixed term or on a month-to-month basis as Mr Harcourt argued. In **Doll House Refreshments (Pty) Ltd v O'Shea and Others 1957 (1) SA 345 (T) at 348 F-H** it was said:

> "It is, I think, clear that a relocation after a lease has expired is a new contract which may be express or tacit. If the reletting is express the question which of the terms of the expired lease form part of the new contract is a question of interpretation as is explained in **Webb v Hipkin 1944 A.D 95**. Where the relocation is tacit, there is a presumption that the property is relet at the same rent and that those provisions that are 'incident to the relation of landlord and tenant' are renewed. But provisions that are collateral, independent of and not incident to that relation are not presumed to be incorporated in the new letting."

[32] What the law in effect desires to achieve by the implication of the contract is to give such business efficacy to the

transaction as must have been intended by both parties who are after all business people. See The Moorcock (1889), L.R. 14 P.D 64 at 68. The implied terms are therefore designed to the needs of the actual transaction of the parties rather than a notional reasonable contract. The acts and conduct of the parties will form the basis of the implied terms.

[33] There is no evidence or suggestion, on the facts of this matter, that the parties intended the relocation to be on a month-to-month basis. There is also no evidence that they wanted the agreement to relocate for three (3) years as the initial one. On the contrary the new contract by all accounts went beyond the three year period of the initial one. In my view, it is not necessary for us to come to a definitive finding as to the intended period of the tacit contract. The period of the contract is not 'incident to the relation' between the parties. It is collateral and independent of that relation. It can therefore be for an indefinite period too.

[34] The court *a quo* should have found that a new contract came into being between the appellant and the Trust after the expiration of the initial one. In fact the Trust categorically admitted that it received services from retailers in terms of the EDC after its expiration.

[35] The finding of the court *a quo* that it is not clear on whose behalf Oosthuizen was acting, is, with respect, clearly wrong.

[36] In the founding affidavit it is clearly stated that on 4 May 2011 the meeting between representatives of the appellant and Oosthuizen who represented the respondents in their several capacities of sureties of the Trust, trustees of the Trust and members of the CC was held at the appellant's attorney's offices. This fact was admitted by the respondents in their answering affidavits.

[37] When Oosthuizen made the offers to liquidate the debts of the respondents in their personal capacities, he could only have meant the debts owed to the appellant pursuant to them being sureties for the Trust's debts. They are, on the papers before us, in no other way indebted to the appellant.

[38] When Oosthuizen intimated that the respondents would sell their personal properties and cede the profits therefrom to the appellant "in full and final settlement of the debt for which Mr and Me Van Loggerenberg signed as sureties for the debt of the HJP trust" he could only do so on behalf of the respondents in their personal capacities. They cannot be held liable as sureties if the principal debtor is not liable at all.

[39] Those admissions also make plain that the HJP Trust admitted liability to the appellant. There is no way in which Oosthuizen, an attorney, would offer to settle the debt of the Van Loggerenbergs in their personal capacities, if he was of the view that the Trust did not owe the appellant any money.

This also goes to show that the Trust's version is not only contrived but also far-fetched and untenable.

[40] In the letter dated 5 May 2011, written to Oosthuizen, it is clearly stated that Oosthuizen admitted that the Trust is indebted to the appellant because it and not the CC bought the diesel. Oosthuizen did not respond to this letter setting out the discussions held at the 4 May 2011 meeting. No reply having been vouchsafed to this letter what then is the status of its contents? In **Benefit Cycle Works v Atmore** 1927 T.P.D 524 at 530 the question was correctly, in my view, answered as followed:-

> "…Where as in this case, negotiations had taken place immediately preceding the writing of the letter, and the writer then places on records his version of what had taken place during the negotiations, and there is no reply by the other side, then the court is bound to attach the greatest importance to that fact."

[41] Oosthuizen by not responding to the letter must be held to have admitted its contents. In fact his actions and communications subsequent to receipt of the said letter also show that he agreed with its contents. It is clear that the court a *quo* should have found that Oosthuizen was acting on behalf of the Trust too when he communicated, in some instances, and failed to communicate, in the other instance, with the appellant.

[42] I am also of the view that the court *a quo* erred in finding that the Trust was not indebted to the appellant because the

approved bank issued the EDC cards and statements and that the Trust had to pay the money to the approved bank.

[43] The appellant's case is clear. The bank issued the cards on its behalf. The cards could only be used at identified independent retailers that formed part of the appellant's national dealer network. Whenever an independent retailer extended credit to the EDC cardholder the bank paid the retailer. The appellant then became liable to pay the bank the money that it paid the retailer. The cardholder would then become liable to pay the appellant because the appellant had either paid or is liable to pay the bank. The arrangement is an atypical one, but its strangeness does not mean that the cardholder cannot be liable to the appellant. It is clear that the approved bank acted as the appellant's agent in respect of the Trust, on the one hand, and in respect of the retailers on the other. The respondent was therefore indebted to the appellant.

[44] The other issue that must be considered is the fact that an invoice was issued in the name of the CC. It is in my view of no moment in whose name the invoice/s were issued because there is a clear and unambiguous admission and correction to the effect that the petroleum products were supplied to the Trust and more importantly that the invoice/s were erroneously issued in the name of the CC.

[45] The Trust, the CC and the respondents in their personal capacities tendered R1 600 000.00 in full and final settlement

of their indebtedness to the appellant. This constituted an act of insolvency by *inter alia* the Trust, in terms of section 8(e) of the Insolvency Act 24 of 1936, because it was an offer from the Trust to enter into an arrangement with the appellant in order to be released wholly or partially from its debts. It is also clear that the Trust is unable to pay its debts in the ordinary course. The appellant's claim is a liquidated claim that exceeds fifty pounds. According to the respondents the Trust's operations were taken over by the CC. The Trust therefore does not have any assets. The Trust not only committed an act of insolvency, it is also factually insolvent. In my view the court *a quo* should have found that a proper case for the confirmation of the *rule nisi* had been made out. It should therefore have granted the relief sought.

[46] I accordingly make the following order:-

a) The appeal is upheld.
b) The order of the court *a quo* is set aside and replaced with the following:
   i. The provisional order of sequestration is confirmed.
   ii. Costs to be costs in the sequestration.
c) The costs of the appeal shall be costs in the sequestration.

C.J. MUSI, J

I agree.

Van der Merwe, J

I agree.

Lekale,J

On behalf of the Appellant:	Adv. Harcourt SC
Instructed by:	Maharaj Attorneys DURBAN
Correspondent:	Claude Reide Inc Bloemfontein
On behalf of the Respondents:	No appearance

/ar