



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

Case No: 2009/59675

6/12/2012

In the matter between:

GILROY CLEMENTS MCAPLINE

First Plaintiff

KEVIN ANTHONY HIRST

Second Plaintiff

ARNOLD PISTORIUS

Third Plaintiff

AND

THE MASHISHIMANE COMMUNAL PROPERTY

ASSOCIATION

The First Defendant

THE MINISTER OF LAND AFFAIRS

Second Defendants

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO.

(3) REVISED. ☒ ✓

6/12/2012

SIGNATURE *[Signature]*

JUDGMENT

RANCHOD J

[1] The three plaintiffs in this matter are cessionaries of a claim by Gamevest (Pty) Ltd (Gamevest) against the First Defendant (the CPA) for the sale of certain game and movable property to the CPA. The plaintiffs say in their particulars of claim that no relief is sought against the second defendant who is joined only to ensure that she has knowledge of this action and in so far as she may have an interest in the matter.

[2] It is common cause that during September 2006 Gamevest and the second defendant entered into an agreement of sale in respect of certain immovable property constituting a nature reserve called "Croc Ranch". The agreement of sale was entered into pursuant to a land claim in respect of the property in accordance with the Restitution of Land Rights Act 24 of 1994, as amended. The offer to purchase the property was made by the second defendant. The second defendant nominated the CPA as her nominee in whose name the property would be registered. The property was duly transferred into the name of the CPA.

[3] The CPA is an association registered in accordance with the provisions of the Communal Property Association Act 28 of 1996.

[4] On 22 April 2007 an agreement was entered into between Gamevest represented by Attorney Jurgen Bekker (Bekker) and the Regional Land Claims Commissioner representing the second defendant. The regional land claims commissioner was represented by Commissioner Mashile Mokono and Mr Shilote. The CPA was represented by its duly authorised representatives. The agreement was reduced to writing in a letter dated 25 April 2007 by Bekker and signed on behalf of the CPA by its duly authorised representatives. As this agreement is central to the dispute between the parties it is necessary to quote it at length. The letter (which became the agreement when it was signed by the relevant parties) is dated 25 April 2007 and marked for the attention of Mr Shilote. Of importance is the fact that this letter was not addressed to the CPA but rather to the regional land claims Commissioner. The letter provides as follows:

"Dear Sir

RE: LAND CLAIM ON CROC RANCH

We thank you for the meeting arranged for this past Sunday 22 April 2007 at 10h00 on Croc Ranch between members of the Mashishimale Community Property Association ("the CPA") and Directors of Gamevest (Pty) Ltd ("Gamevest").

We particularly thank Commissioner Mashile Mokono and Mr. Riranzo Shilote of your offices for their efforts in facilitating the meeting and conducting the meeting and for the guidance provided to both parties.

We record that the following agreement was reached subject to your written confirmation:

1. That the handover date from Gamevest to the CPA has been extended by mutual consent to 30 May 2007;
2. That a price has been agreed for the remaining game on Croc Ranch as well as the moveable property and equipment in amount of R2 500 000.00 (Two million five hundred thousand Rand) which shall exclude the following items :
 - 2.1. The tractor and 4x4 vehicle of Mr. McAlpine;
 - 2.2. The game privately owned by Mr. Kevin Hirst;
 - 2.3. The guns owned by Mr. McAlpine;
 - 2.4. The personal belongs of Directors, employees and contractors of Gamevest;
 - 2.5. Buffalo which are still on the farm but have been sold;

And that Gamevest and/or Mr. McDonald will supply a full list of the game and moveables purchased within three days from date hereof.

3. That the rental, which is owed by Gamevest to the CPA is an amount of R1 080 000.00 (One million and eighty thousand Rand) being the rental of R216 000.00 per month for five months being December 2006, January 2007 to April 2007 and that Gamevest is relieved from paying any further rental for May 2007 or any further period to which the handover date may be extended.
4. That R980 000.00 (Nine hundred and eighty thousand Rand) is to be set off by agreement from the price of the moveables leaving an outstanding amount of R1 520 000.00 (One million five hundred and twenty thousand Rand).
5. That the CPA will liaise with professional hunter Sandy McDonald in the next thirty days to finalise a business plan and a proposal to the board of Gamevest on how the outstanding balance of R1 520 000.00 will be paid within a reasonable period.
6. That of the remaining R100 000.00 (Hundred thousand Rand) owed by Gamevest to the CPA, which has not been set off against the payment for the game and moveables, Gamevest undertakes to pay the reasonable running expenses involved in operating the reserve for the month of May 2007 which shall include but not be limited to salaries, fuel, maintenance, insurance and other necessary expenses up to R100 000.00 and shall account to the CPA fully on these expenses and the balance of funds not expended so shall also be set off against the balance of the amount owed on the game and moveables.
7. That the retention monies currently held in an interest bearing investment trust account by the transferring attorneys, Ramatwala Lenyai Attorneys, shall be paid over immediately to Gamevest and/or their attorney.

8. That professional hunter, Sandy McDonald, of McDonald Hunting Safari's will liaise with the office of the Regional Land Claims Commissioner Limpopo in order to finalise a business plan for the smooth takeover of the reserve which shall also include a proposal to Gamevest on paying the balance of the amount outstanding in respect of game and moveables within a reasonable time.
9. That the office of the Land Claims Commissioner Limpopo will assist where and how it can Mr. McDonald in the obtaining the necessary permits to facilitate that hunting on Croc Ranch can commence as soon as possible on behalf of the CPA.
10. That Mr. McDonald be issued a key for the main gate of the Croc Ranch and that his employee living on the farm, the professional hunter, "Chris", also be issued a key for the main gate and take responsibility for security on the farm.
11. That two representatives of the CPA are also allowed to live on the farm in order to satisfy the CPA that the running of the farm is conducted in satisfactory manner.
12. That the Regional Land Claims Commissioner Limpopo has agreed to sign a short addendum to the agreement of sale for Croc Ranch, a copy of which is annexed hereto as annexure "A" and which has been signed.
13. That the CPA has discussed granting to Mr. McDonald a management contract in respect of the running of the reserve and the hunting concession for a period of one year subject to a written agreement being successfully concluded between the parties.
14. The current status of the exemption permit for hunting and capture will remain status quo as per instructions from the meeting however, the profits to be for the account of the claimants the CPA/Mashishimale tribe. The permit will then be transferred to a designated responsible person from the tribe. This is to be facilitated by the Department of Environmental Affairs and Tourism in Phalaborwa.

The above points record what the parties have agreed to.

Kindly provide your written confirmation that you are in agreement."

Subsequently, the parties appended their signatures on the letter to signify that it was the agreement.

[5] It is not in dispute that the game and movables referred to in the agreement were delivered by Gamevest to the CPA.

[6] It is apparent from the contents of the letter, which constitutes the agreement between Gamevest and the CPA, that the game and movables were purchased for a consideration of R2,500,000. After various set offs and other adjustments the balance to be paid by the CPA according to the agreement was an amount of R1,520,000 which was to be paid "within a reasonable period". The plaintiffs allege that a reasonable time for the payment of the amount due to Gamevest would be a period of six months calculated from 31 May 2007. Hence, the full amount outstanding became due, owing and payable by 30 November 2007.

[7] Mr Bekker was the only witness to testify on behalf of the plaintiffs while Mr Hendrik Malatji testified on behalf of the CPA.

[8] The CPA filed a plea in abatement and pleaded over. The plea in abatement was to the effect that the cedent (Gamevest) ought to have been joined as a party to the action. I dismissed the plea in abatement with costs on the grounds that Gamevest no longer has a claim against the CPA and therefore had no interest in the matter that would have entitled it to have been joined as a plaintiff and would have been, in fact, a mis-joinder. In any event, Gamevest had already been de-registered. In any event, it was open to the CPA to have joined Gamevest if it thought it was necessary to do so.

[9] The CPA admits that the agreement was signed by its duly authorised representatives. Apart from that it denies the plaintiffs' other allegations and pleads that the agreement does not correctly reflect the terms of the agreement insofar as it does not accord with what it sets out. The CPA has raised four main issues which are central to the dispute between the parties as to when payment for the balance of the purchase price of the movables was to be made. First, that the express, alternatively tacit, further or alternatively the implied terms of the agreement were that Gamevest would furnish the CPA with a complete list of the game and movables it purchased within three days from 22 April 2007 but failed to do so. Second that Gamevest failed to account to the CPA for the running expenses for May 2007. Third, that a business plan was to have been finalised by Mr Sandy

MacDonald in deliberation with the CPA and the Regional Land Claims Commissioner for Limpopo as to how the balance of the purchase price would be paid within the reasonable time stipulated in the agreement but the business plan never materialised. Fourth, that the outstanding balance would only have been payable by the CPA within a reasonable time after receipt of a state grant for this purpose. It further pleads that up to the date of filing its plea it had not received the state grant.

[10] It should be noted that there was an initial agreement between the parties which provided for Gamevest to sell its game (to third parties). This agreement was concluded in September or October 2006 and shortly thereafter the game count was effected. However, this changed when the agreement in April 2007 was concluded as the CPA then decided to purchase the game itself.

[11] The essential contention on behalf of the plaintiff is that there is no reference in the agreement that payment for the game and other movables was to be made only after the conclusion of a business plan and receipt of a state grant by the CPA. Mr De Villiers, who appeared for the plaintiffs submitted that this issue had not been raised in the pleadings and nor has it been stated in the written agreement of 25 April 2007. However, the CPA's plea at paragraph 11 records that the CPA pleads that the express, alternatively tacit further alternatively implied terms of the agreement were that:

"v) the outstanding balance of the purchase price would be payable by the CPA within a reasonable time after receipt of a state grant payable to the CPA as part of the CPA's successful land claims transaction;

vi) a business plan would be finalised by Mr Sandy McDonald in deliberation with the CPA and the regional land claims commissioner, Limpopo as to how the balance of the purchase price will be paid within the reasonable time stipulated in paragraph 11.1.4 (v) above."

This defence has therefore in fact been raised in the pleadings. It is therefore not understood why plaintiffs contend that the defendant did not plead these two defences.

[12] These two defences were also raised by the CPA in the affidavit resisting the summary judgement application by the plaintiffs. The affidavit resisting summary judgement was deposed to by the witness Mr. Malatji, who testified in the trial before me. He was, at the time the Deputy Chairperson of the CPA. Three paragraphs in the agreement are relevant. They are:

“And that Gamevest and/or Mr McDonald will supply a full list of the game and movables purchased within three days from date hereof.”

“That the CPA will liaise with professional hunter Sandy McDonald in the next thirty days to finalise a business plan and a proposal to the board of Gamevest on how the outstanding balance of R1 520 000.00 will be paid within a reasonable period.”

“That professional hunter, Sandy McDonald, of McDonald Hunting Safaris will liaise with the office of the regional land claims commissioner, Limpopo in order to finalise a business plan for the smooth takeover of the reserve which shall also include a proposal to Gamevest on paying the balance of the amount outstanding in respect of game and movables within a reasonable time.”

[13] Insofar as the provision of a list of the game on the farm within three days is concerned, the plaintiff has failed to provide any evidence that Gamevest has in fact done so.

[14] Mr McDonald is a professional hunter who carries out hunting operations on the farm. Mr Bekker testified that since Gamevest no longer had anyone on the farm it was for Mr McDonald to produce that list. The agreement is however clear. It was either Gamevest or Mr McDonald or both of them who were to have provided the list. It seems that while the primary obligation to provide the list rested on Gamevest, if it was unable to do so because it was no longer represented on the farm, then Mr McDonald would do so on its behalf as he had continued conducting hunting operations there.

[15] The submission by plaintiff that the agreement contains no condition for the payment being subject to a grant and a business plan cannot be sustained. The quoted paragraphs from the agreement show that a business plan was to be prepared by Mr

McDonald and that was to include a proposal to Gamevest on paying the balance of the outstanding amount in respect of game and movables within a reasonable time.

[16] As I said, one of the defences of the CPA is that it was the express, alternatively tacit, further alternatively implied term of the purported agreement concluded between Gamevest and the community that the outstanding balance of the purchase price would be payable within a reasonable time after receipt of a state grant. Mr Uys, who appeared for the CPA, submitted that the crux of this sentence is the word “after”. It was submitted that “after” can be interpreted in two ways, either as a suspensive condition or on the other hand that it was merely a term of the agreement delaying payment. For the reasons that follow, I am of the view that it was merely a term of the agreement, delaying payment.

[17] Mr. Malatji testified that it was an express term that payment to Gamevest would be subject to receipt of a state grant. However, even if he may have understood it (as a layman) to be an express term, the agreement does not state it expressly.

[18] Implied terms are terms implied by law (*ex-lege* terms) or implied from the facts (tacit terms). A tacit term derives from the common intention of the parties, as inferred from the express terms of the contract, the circumstances surrounding the conclusion of the contract and the subsequent conduct of the parties.

[19] A tacit term or term to be implied from the facts was defined in *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A)* as follows at 531 to 532:

“An unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express term 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 parties.”

[20] In order to determine whether a tacit term is to be imported regard will first be had to the express terms of a contract. See: *Pan American World Airways Inc SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A)* at 175C. Fabricius J explains in *Firststrand Bank Ltd. V Mzimkhulu Property Investments CC & Another A159/11 (NGP)* (unreported):

"It follows that a tacit term cannot be imported on the question to which the parties have applied their minds, or for which they have made express provision in the contract. A tacit term can obviously not be imported where it will contradict an existing express term. It can also not be imported because it is reasonable or convenient for the parties to have included it in their agreement. It must be necessary. It is also not to be imported on the basis that only an unreasonable person would not have agreed to the term. The question is rather, whether the Court is satisfied that both parties did, in fact, agree. In the proper context, namely, whether a tacit term exists or not, the so-called "bystander" test will be applied. The tacit term must be capable of the exact (although not concise) formulation. If there "is difficulty and doubt as to what a term should be or how far it should be taken, it is obviously difficult to say whether the parties clearly intended anything at all to be implied. See *Desai and others versus Greyreach Investments (Pty) Ltd 1974 (1) SA 509 (A)* at 522 to 523A."

[21] In *Wilkins NO v Voges 1994 (3) SA 130 (AD)* the following was said by Nienaber JA at 136H to 137C:

"A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if parties thought about the matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they would have 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 all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from 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 will readily be imported into the 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 express, when such term is not necessary to render the contract fully functional."

[22] In the present instance, it is in my view, obvious that the tacit term is not "actual" but one that must be "imputed". The tacit term contended for by the CPA can be inferred

from the agreement and the surrounding circumstances as they become apparent from the correspondence addressed by Bekker to the Land Claims Commissioner rather than to the CPA.

[23] The first thing to note is that the negotiations between Gamevest and the CPA were facilitated by the Land Claims Commissioner. It is also common cause that it was the Land Claims Commission operating under the auspices of the Minister of Land Affairs, who was to finance, and in fact did finance, the purchase of the immovable property on which the game and movables are situated. Almost all the correspondence and discussions that took place relating to the purchase by the CPA of the game and movables were directed to the Land Claims Commission. Gamevest (through its attorney) must have clearly been aware that the financing of the game and movables would also come from the Commission just as it did for the land. No doubt, it is for this reason that the correspondence was addressed to the Commissioner and the discussions took place with his representatives. Furthermore, in paragraph 8 of the agreement it is stated that Sandy MacDonald will liaise with the office of the Commissioner to finalise the business plan and, of importance, "which shall also include a proposal to Gamevest on paying the balance of the amount outstanding in respect of game and movables within a reasonable time". If a bystander were to be asked who would be paying for the game and movables no doubt, the answer would be of course it is the Land Claims Commission.

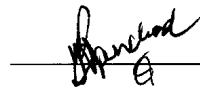
[24] The demands for payment for the game and movables were also addressed to the Commission, not to the CPA. It is therefore clear, in my view that Gamevest was expecting payment from the Land Claims Commission. Also, in the particulars of claim it is stated that the agreement was concluded between the plaintiffs duly represented by Bekker, the CPA represented by duly authorised representatives and the second defendant represented by the Land Claims Commissioner. What this indicates is that the second defendant, through the Land Claims Commissioner was a party to the agreement. Again, applying the bystander test as to how would the purchase price be paid the bystander would say: well obviously that is why the second defendant participated in these negotiations. The CPA comprises of a rural community and for all intents and purposes had no funds to purchase the game and movables. The second defendant paid Gamevest for the immovable property. It therefore

makes sense why all the demands for payment were sent to the second defendant. In this context it also makes sense why there is the reference to the business proposal in the agreement as it is this business proposal that would enable the CPA to get the state grant. In my view, it was just a condition delaying payment. I am of the view that it was a tacit term to be inferred from the agreement that the payment for the game and movables was subject to a business plan being prepared and further subject to the obtaining of a state grant by the CPA.

[25] I stated earlier that Gamevest had also failed to comply with the agreement as far as providing a list of the game on the farm within three days is concerned.

[26] I turn then to the question of accounting for the running expenses for the month of May 2007 by Gamevest. The plaintiffs have provided the necessary proof about the running expenses that Gamevest incurred during that month and the balance that is to be set off against the purchase price. Nothing further needs to be said about it.

[27] In all the circumstances, there shall be absolution from the instance with costs.



N RANCHOD

JUDGE OF THE HIGH COURT

Appearances:

Counsel for 1st, 2nd and 3rd Plaintiffs:
Instructed by:

Adv. D. P. de Villiers
EY Stuart Inc Attorneys

Counsel for 1st Defendant:
Instructed by:

Adv. Uys
Hartzenberg Inc

No Appearance for the 2nd Defendant.

Judgement Handed Down:

06/12/2012