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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

WOLFGANG KARL RUDOLF DELFSAPPELLANT

and

KUEHNE & NAGEL (PROP) LTD RESPONDENT

CORAM: BOTHA, VIVIER, KUMLEBEN, EKSTEEN
 et F H GROSSKOPF JJA

HEARD: 16 NOVEMBER 1989

DELIVERED: 28 NOVEMBER 1989

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA

The trial action, giving rise to the present appeal, was instituted in the Supreme Court of South West Africa. Initially it involved a claim and a counterclaim. Both were based on an oral agreement between the plaintiff, now the respondent, and the defendant, the present appellant. For ease of reference, as extracts from the pleadings are to be quoted, I shall continue to refer to the parties as plaintiff and defendant. In terms of their agreement the plaintiff, a shipping and forwarding agent, undertook to act as the defendant's agent for the shipment of certain game to Saudi Arabia, viz. 50 Oryx gazelle, 100 impala and 2 cheetah.

The plaintiff claimed a nett amount

of R84 446,37 for fees and disbursements together with interest and costs, alleging fulfilment of its side of the bargain. The defendant resisted this claim on a number of grounds. They failed, judgment being granted in favour of the plaintiff as prayed. This order was not challenged on appeal and no more need therefore be said about the main action.

The defendant in turn claimed, as damages, payment of R180 627,45 with interest and costs. In his counterclaim, after alleging the express term of the agreement substantially as stated above, an implied term was pleaded. In its ultimate form, after certain amendments, it read as follows:

"It was an express, alternatively implied term of the said agreement that Plaintiff would see to it that all requirements relating to the necessary documentation were complied with to ensure that all conditions contained in a Letter of Credit

issued by Barclays Bank were met so that on due presentation of the required documents the said Bank would honour the said letter, provided Plaintiff is not required to produce documents which it knew to be false."

(Though pleaded, the defendant did not attempt to prove an express term to this effect.) The counterclaim went on to aver that, in breach of its obligations under the implied term, the plaintiff failed to ensure that there was compliance with all the requirements specified in the Letter of Credit with the result that it was dishonoured and the defendant was unable to recover the amount of \$93 250,00 (R180 627,45) due to him under the Letter of Credit. Accordingly, so it was alleged, the defendant suffered damages in this amount, for the payment of which the plaintiff was liable. The defendant in his plea to the counterclaim denied that any such implied term was incorporated in their agreement and, in the alternative, pleaded that, should

such a term be proved:

"It was an implied term that, if the Defendant failed to put the Plaintiff in a position to arrange for the transportation of and to ship animals in accordance with the terms of the letter of credit and/or to generally comply with the terms of the letter of credit, then the term alleged by the plaintiff would not apply."

Thus, on this disputed issue of the presence and nature of unexpressed terms in their agreement, the defendant was required to prove the implied term pleaded, in which event, by way of confession and avoidance, the plaintiff relied on a further implied term rendering the former inapplicable in the stated circumstances.

The plea to the counterclaim raised a number of other defences. It is unnecessary to refer to them since at the stage when the matter was argued before us the only issues contested, and calling for

decision, were:

- (i) Whether the implied term pleaded by the defendant had been proved.
- (ii) If so, whether the plaintiff was in breach of his obligations under the said term.
- (iii) And if so, whether such breach was proved to have been the cause of the damage suffered by the defendant.

The trial court found for the defendant. It held that the implied term pleaded had been proved; that the defendant had proved his case in all other respects; and that in the result the defendant was entitled to judgment on the counterclaim as prayed. The matter went on appeal to the Full Court where the decision of the court a quo was reversed. The court of appeal shared the view that the implied term relied upon by the defendant was established but decided - as the plaintiff contended - that as a result of

supervening events it no longer applied. The reasoning in both judgments will be examined in due course. With leave of this court, the matter is now before us on appeal.

At the trial two witnesses were called: Mr Liebich, the manager of the Windhoek branch of plaintiff's firm, and the defendant himself. It was common cause that the former acted throughout on behalf of the plaintiff and was duly authorised. For convenience I shall simply refer to him as "the plaintiff". A great deal of the evidence of both these witnesses canvassed issues which have fallen away. I shall therefore restrict a recital of the common cause facts to those which place the dispute in its setting and which bear upon the abovementioned remaining issues.

The plaintiff, as I have said, is a shipping and forwarding agent. The defendant is an exporter of inter alia game and regularly used the services of the plaintiff for this purpose. In this case the 50 Oryx gazelle, 100 impala and 2 cheetah were to be delivered to a buyer in Saudi Arabia. The sale was in the first instance between the defendant and a London firm called Salefour, which in turn had sold to a person in Saudi Arabia.

Payment on behalf of the buyer was to have been by means of an irrevocable Letter of Credit drawn on Barclays Bank PLC, London in favour of the defendant and issued to the Dresdner Bank, Frankfurt, West Germany. On 7 May 1985 the latter bank notified the defendant by telex message that the Letter of Credit had been established in his favour. This notification

recommended to the defendant that he examine the Letter of Credit carefully and stated that:

"As even an insignificant discrepancy may cause difficulties when negotiating the documents, you are kindly requested to pay particular attention to the terms of the L/C; especially, the description of the goods in your commercial invoice must correspond with the description in the L/C."

In due course it arrived. It stipulated, as a prerequisite to its being honoured, inter alia that the signed invoice, the air waybill and the packing list should correspond with the description of the goods in the Letter of Credit, which set out the numbers of the three species of game in accordance with the agreement of sale. In addition the Letter of Credit required veterinary certificates in respect of the animals consigned.

Pursuant to their agreement, the plaintiff set about arranging for the carrier and preparing the necessary documents for the shipment of the animals sold. A carrier, Tradewinds Airways, was commissioned to transport them by air. At Windhoek the plaintiff completed the necessary documentation, as far as he was able to, in anticipation of the actual shipping. He partially completed the packing list, omitting details of the number of crates and animals in each crate since this information could only be obtained when the animals arrived and were ready to be loaded on the aircraft. He was able to complete the air waybill and the invoice, with the necessary copies, at Windhoek. The details of the animals on these documents - as one would have expected - corresponded with what was sold and stated in the Letter of Credit. The necessary

veterinary certificates had been obtained. They referred, in the case of one certificate, to "50 only Oryx gazelles" and "2 only Cheetahs" and, in the case of the other certificate - somewhat strangely - to 110 impala.

It had been arranged that the animals were to be shipped from the airport at Mmabatho. The plaintiff, the defendant and a Mr McCullum, a representative of Salefour, proceeded there by car from Windhoek. They arrived during the late afternoon of 29 May 1985. That evening the Oryx gazelle and the two cheetah arrived from Windhoek. Some of the former had died in transit. When it was time to load them the next morning there were 47 alive and available for dispatch. During the night 104 impala arrived in a number of crates from Hoopstad in the Orange Free State. The

shortfall and surplus presented a problem. The aircraft, a Boeing 707, was on the runway ready to be loaded. The fee for the air carrier's services, an amount of some 35 000 UK pounds, had been paid by the plaintiff on behalf of the defendant. The carrier was not prepared or obliged to delay unduly the time for take off. It was impracticable to attempt to remove four impala from one or more of the crates since any attempt to do so could result in their being injured. It was impossible to make up the shortfall of Oryx gazelle before the aircraft was due to leave: in fact, as the defendant ultimately conceded, this could not have been done within a fortnight.

After some discussion, in which all three men took part, it was decided that the animals on hand were to be shipped, notwithstanding the discrepancy in

numbers. Once this decision was taken it became necessary to complete and amend the shipping documents to reflect the true position as regards the animals to be dispatched. The packing list was completed by recording the number and description of the animals in each of the 14 numbered crates and the correct totals were then reflected on it. The air waybill, which serves to confirm that a consignment as described in it was received for carriage, was amended to reflect the true position. It was required to be signed by the carrier or his agent and was in fact signed by someone on behalf of Tradewinds Airways. The invoice was similarly altered to reflect the actual consignment. It was manifest, and was appreciated by all concerned, that these documents no longer corresponded to the description of the goods in the Letter of Credit. This the defendant acknowledged. In regard to the Oryx

gazelle, when asked "Did you expect that there then could ever be documents reflecting, complying with the letter of credit for 50?" he replied "I did not expect it."

The animals were duly transported to Saudi Arabia and the Letter of Credit was presented for payment. The bank refused to honour it on various grounds. It is unnecessary to refer to each. It relied inter alia on the discrepancies between the specification of the goods in it and that appearing in the documents to which I have referred. It was common cause that the Bank was entitled to refuse to pay out in the circumstances; that it was the sole responsibility of the defendant to obtain the Letter of Credit in a form acceptable to him; and that the plaintiff was in no way responsible for ensuring that the correct number of animals were available for

shipment.

No payment was forthcoming from the buyer in Saudi Arabia. The defendant instructed solicitors in England to institute action against Salefour for payment of the purchase price. They informed him that this firm was in a parlous financial state and would not be able to satisfy any judgment obtained. Thus it came about that the defendant sought to recover from the plaintiff the equivalent of the purchase price as reflected in the Letter of Credit. (Being a claim for damages, one would have expected that the costs incurred by the defendant in implementing the sale would have been deducted from the purchase price, that is, that his claim would have been restricted to the nett profit to which he claimed to be entitled. But this is by the way.)

The legal nature of an implied term and the principles to be applied in deciding whether one has been satisfactorily proved in a particular case were thus enunciated by the present Chief Justice in Alfred McAlpine & Son (Pty.) Ltd. v. Transvaal Provincial Administration 1974(3) S.A. 506(A) 531 H - 533 B:

"In supplying ... an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention

The distinction between terms implied by law and implied terms based upon the actual or imputed intention of the parties to the contract was emphasized in Minister van Landbou-Tegniese Dienste v. Scholtz, 1971(3) S.A. 188 (A.D.) at p. 197, and reference was there made to Salmond and

Williams, Contracts, 2nd ed., pp. 24, 36 and 37, in which the expression 'implied term' is used to denote the former and the expression 'tacit term' to describe the latter It is not a matter of great moment what terminology is adopted but in the interests of continuity I shall use the expressions 'implied term' and 'tacit term', as defined by Salmond and Williams The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term The practical test to be applied - and one which has been consistently approved and adopted in this Court - is that formulated by SCRUTTON, L.J., in the well-known case of Reigate v Union Manufacturing Co., 118 L.T. 479 at p. 483:

'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, 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?' they would have both replied: 'Of course, so-and-so. We did not trouble to say that; it is too clear.'

This is often referred to as the 'bystander test'."

(In the light of what is said on the terminology, I shall henceforth refer to the "implied" term under discussion as a "tacit term".) A similar statement on the correct approach to the recognition of a tacit term is to be found in Techni-Pak Sales (Pty.) Ltd. v. Hall 1968(3) S.A. 231 (W) 236 - 237:

"The Court has no power to supplement the bargain between the parties by adding a term which they would have been wise to agree upon, although they did not. The fact that the suggested term would have been a reasonable one for them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties, is not enough. The suggested term must, in the first place, be one which was necessary as opposed to merely desirable, to give business efficacy to the contract; and, what is more, the Court must be satisfied that it is a term which the parties themselves intended to operate if the occasion for such operation arose, although they did not express it

That does not mean, in my view, that the parties

must consciously have visualised the situation in which the term would come into operation It does not matter ... if the negotiating parties fail to think of the situation in which the term would be required, provided that their common intention was such that a reference to such a possible situation would have evoked from them a prompt and unanimous assertion of the term which was to govern it."

To return to the tacit term pleaded in this case, up until the argument stage at the trial it read as follows:

"It was an ... implied term of the said agreement that Plaintiff would see to it that all requirements were complied with to ensure that all conditions contained in a Letter of Credit issued by Barclays Bank were met so that on due presentation of the required documents, the said Bank would honour the said Letter of Credit."

It, one notes, was unqualified: the implication being that in all circumstances the plaintiff would ensure that the documents accorded with the requirements of the Letter of Credit. It goes without saying that such a provision would not pass the tests for its inclusion

as a tacit term as laid down by the decisions to which I have referred. It would in effect make the plaintiff the insurer or guarantor that there would be compliance with all the terms of the Letter of Credit. Moreover, it is to be noted that certain of them have nothing to do with the plaintiff, for instance, the provision of a "Airline certificate stating that the carrying aircraft will not call at an Israeli airport en route to Saudi Arabia". On the wording of the tacit term the plaintiff was obliged to ensure that there was compliance with this condition as well. Had the notional bystander at the time of contracting asked the plaintiff whether he was undertaking to see to it that the conditions of the Letter of Credit would be in all circumstances fulfilled even if, for instance, the required number of animals were not available for shipment, his answer would have been: "The very idea!"

In both the above passages quoted from the two decisions there is a reference to "imputed knowledge". (See too Van den Berg v. Tenner 1975(2) S.A. 268(A) 277). In the present case I am not at all certain that the possibility of the incorrect number of animals arriving for loading was not a foreseeable and contemplated eventuality present to the minds of the parties at the time of contracting, in which event any need to impute such knowledge does not arise. But if such prescience is to be attributed to them, the plaintiff's reply to the officious bystander would have been exactly the same.

The fact of the matter is that the proviso or qualification, omitted from the term as pleaded, should have been that the obligations stated in it would only arise if, or persist for as long as, the defendant

intended to ship the animals as specified in the Letter of Credit.

At the argument stage counsel for the defendant appreciated the need for qualification of the term pleaded. The reason for the obvious and appropriate one not being appended was no doubt the fact that the undisputed evidence on record disclosed that the correct number of animals had not been produced by the defendant for shipment. Be that as it may, the proviso counsel elected to introduce reads as follows: "provided Plaintiff is not required to produce documents which it knew to be false." This amendment did not, and could not, overcome the defendant's difficulty, for two reasons. First, as a probability a tacit term in this form would not have been agreed upon in preference to the more appropriate one, to which I have referred. Second, if one assumes such a tacit

term with this proviso to have been proved, the facts of this case establish that it applied - that the proviso became operative. As the common cause facts amply demonstrate, at Mmabatho airport the plaintiff was required by force of circumstances to produce documents which were false in a sense that they were incorrect. (Cf. Breedt v. Elsie Motors (Edms.) Bpk 1963(3) S.A. 525 (A) 529.) It follows that in terms of the proviso the plaintiff was relieved of the obligations contained in the tacit term. Thus, even on an acceptance of it in its final form, a cause of action based on it cannot be sustained.

At the hearing in this court Mr Gauntlett appeared on behalf of the plaintiff, replacing Mr Farlam, who was not available to argue the appeal. Mr Gauntlett's heads of argument differed substantially

from those first lodged on behalf of the defendant.

His argument ran along these lines. He submitted - to quote from his heads of argument - that:

"It is submitted that the Respondent was bound - as both the Trial Court and the Full Bench found - by a tacit term to see to it that all requirements relating to the necessary documentation were complied with, to ensure that all conditions contained in the letter of credit were met."

In other words, the submission was that the stated obligations were unqualified or at least not qualified in any relevant respect. The finding of the Full Court that this tacit term had subsequently been "qualified" because it became impossible for the plaintiff to comply with its terms was, so counsel submitted, incorrect: the true position being that the alleged obstacle to defendant's claim, which was upheld by that court, was supervening impossibility of performance.

For present purposes it is unnecessary to decide whether the court a quo based its conclusion on an implied qualification (which was pleaded by the plaintiff) or on supervening impossibility of performance (which was not directly or explicitly pleaded by the plaintiff). The factual issue is the same one, namely, whether it became impossible for the plaintiff to comply with its terms. The court a quo found this to be the case. Mr Gauntlett disputed this finding. Counsel submitted that, notwithstanding the change in the numbers of the animals to be shipped, it remained possible for the plaintiff (legitimately) to draw up or complete the necessary documents in such a way that they complied with the Letter of Credit.

In support of this submission counsel submitted: (i) that the shortfall in the number of Oryx

gazelle was to be left out of account in deciding what the plaintiff could or could not have done to remedy the situation and comply with the Letter of Credit since the discrepancy in the documentation arising from the short delivery of Oryx gazelle was not a ground relied upon by the bank for refusing to honour the Letter of Credit; (ii) that, since the impala sent outnumbered those specified in the Letter of Credit, 100 impala could, and should, have been recorded on the various documents; and (iii) that the fact that the veterinary certificates referred to quantities differing from those actually sent was of no real consequence.

In the light of the conclusion that the tacit term pleaded (on which counsel conceded he was obliged to rely), was not proved and, in any event, that there was no breach thereof by virtue of the proviso, it is

strictly unnecessary to state the reasons for rejecting counsel's submissions on "possibility of performance". However, let me just say that, in my view, the shortfall in the number of Oryx gazelle was a discrepancy raised as an objection by the bank; that the plaintiff could not have drawn up the documents, particularly the packing list, (and have certain of them signed by the carrier or his agent) in such a way that they would reflect the true position and still comply with the requirements of the Letter of Credit; and finally that there were good reasons why the veterinary certificates reflecting different numbers, were unacceptable, it being quite beyond the power of the plaintiff to have these altered timeously, even assuming that it was his duty to have seen to this.

Mr Gauntlett adopted the heads of argument

originally lodged on behalf of the defendant but elected not to elaborate on them. These heads, having submitted that the tacit term was proved, in order to prove a breach of its terms, rely on evidence of what took place at Mmabatho when the problem arose. Thus it is said that the defendant "was never expressly warned that to send the animals at hand would jeopardise the negotiability of the Letter of Credit"; that "in view of Liebich's obligations it was natural and probable that the Appellant would rely on him and his advice relating to documentation"; that "Appellant would have stopped the shipment had he known the Letter of Credit might not be met"; that "Appellant was guided by Liebich on what course to take when the numbers of animals available for shipment did not comply with the number mentioned in the Letter of Credit"; and, finally, that "Liebich never informed Appellant that

he (Liebich) could not fulfil his obligations vis-a-vis Appellant relating to the documentation."

Whether these allegations, which were no doubt the source of the defendant's sense of grievance, were proved in evidence is an open question. This, however, is by the way, since any obligations imposed on the plaintiff - directly or by implication - by these facts are not contained in the tacit term: if they give rise to a cause of action, it has simply not been pleaded.

It remains to refer briefly to the judgment of the trial court. It relied on certain "surrounding circumstances" to conclude that the tacit term in its amended form was proved. These circumstances were, as enumerated in the judgment:

- "(i) The documents in this instance were prepared by Liebich with the exception of one or two which were not;
- (ii) in this instance Liebich accompanied the Defendant to Mmabatho, partly to see to it that all the documentation was in order;
- (iii) Liebich knew that the Defendant was very concerned about transactions involving Letters of Credit because he knew that if all the requirements were not complied with then the Bank wouldn't honour such a Letter of Credit. This was told to him by Defendant.
- (iv) In this case Liebich knew about an unfortunate experience that the Defendant had before with another firm of forwarding agents.
- (v) Liebich also knew that the Defendant was concerned because the transaction, in this case, involved Saudi Arabia, and he furthermore knew of the Defendant's attempts to be present in Saudi Arabia when the consignment of animals was off-loaded. He also knew that these attempts were unsuccessful.
- (vi) Liebich had seen a letter written by the Dresdner Bank to the Defendant wherein attention was drawn to the fact that even an insignificant discrepancy between the Letter

of Credit and the documents required by it may have an effect on the negotiability of the Letter of Credit. It is probable that the Plaintiff made a copy of this letter before going to Mmabatho.

Against this background it is also necessary to look at the evidence of Liebich. Liebich stated unequivocally that he was far more knowledgeable about the preparation of the documents in respect of Letters of Credit than was the case with the Defendant. He also knew how very important it was that the documents should be correctly completed and, so he stated, he knew that the Defendant was relying on him to ensure that that was done. This assurance was given by Liebich on many occasions. Later on in cross-examination the evidence of Liebich was that he accepted that the Defendant looked towards him to make sure that the documents were in compliance with the Letter of Credit so that the Defendant would be paid the money secured by such Letter. That this was the position was also confirmed by Liebich on more than one occasion during his evidence in cross-examination. Liebich further stated that when problems in connection with a Letter of Credit arose, the Defendant came to him to attend to the matter because that was the Plaintiff's department. He also accepted that the Plaintiff was responsible for looking after the documents and making sure that they would comply with the Letter of Credit."

Assuming all these facts to have been common cause or

proved, the flaw in this reasoning, with due respect, is that they are consistent with the plaintiff having undertaken to see to it that the documentation complies with the Letter of Credit "provided that the correct number of animals are produced for shipment". But these circumstances do not warrant the inference that a tacit term having the effect of making the plaintiff a guarantor for the payment in terms of the Letter of Credit was ever agreed upon.

In the light of the above conclusions it is unnecessary to consider whether the causative element in plaintiff's cause of action was proved.

The appeal is dismissed with costs.

M E Kumleben
M E KUMLEBEN
JUDGE OF APPEAL

BOTHA)
 VIVIER)
 EKSTEEN) - Agree
 F H GROSSKOPF)