In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE: A33/2014

In the appeal between:

HOMSEK (PTY) LIMITED
t/a HOMSEK SUIWEL

APPELLANT
(Defendant in the Court *a quo*)

and

J.W. MULLER & SEUN

RESPONDENT
(Plaintiff in the Court *a quo*)

JUDGMENT DELIVERED ON 2 SEPTEMBER 2015

GOLIATH, J:

INTRODUCTION

[1] This is a case about a milk supply agreement that has gone sour. The product is the acclaimed Ayrshire milk and the exclusive purchaser was Woolworths. The Appellant contends that it was a tacit term of the agreement that a reduced milk price would be paid to suppliers, one of whom being the respondent, in the event of the milk being downgraded by Woolworths due to poor quality. The milk in question was rejected by Woolworths, consequently the Respondent was only entitled to the reduced price. The Respondent contends that it duly performed in terms of the agreement

between the parties, and was therefore entitled to payment in full and not a reduced amount as alleged by the appellant. The Court *a quo* ruled in favour of Respondent and Appellant now appeals this finding. The fate of this appeal hinges on proof of a tacit term in one or other forms pleaded by the appellant.

Factual Background

[2] The scheme to supply Ayrshire milk to Woolworths was the brainchild of the appellant. By virtue of existing business connections between appellant and Woolworths, the appellant negotiated a contract with Woolworths to facilitate a regular supply of milk to Woolworths. The agreement between appellant and Woolworths was not part of the record. It is common cause that Woolworths had specific stringent standards and requirements for the milk.

[3] Appellant approached various farmers to buy into the scheme, which included the Mosselbay Conglomerate, a group consisting of eleven farmers, the respondent being one such farmer. Meetings were held to discuss the terms of participation in the scheme. An agreement was concluded between appellant and individual farmers of the Mosselbay Conglomerate. Respondent did not sign the contract but participated in the scheme. All the farmers were aware that the client is Woolworths. They capitalized on the business opportunity and the milk was to be sold at R2,90 per litre instead of their usual tariff of R1,90 per litre. In terms of the agreement entered into between appellant and the individual farmers the Woolworths standards had to be complied with as stipulated in Clause 4 of the agreement which provides that:

3.1 Sour milk or milk of which the temperature is higher than 4 degrees Celsius will not be accepted or paid for by the purchaser.

3.2 The milk should be delivered free of BST.

3.3 Only A grade milk with a total bacteria count of 50 000 would be paid for at the full agreed amount.

3.4 No Ecoli or water may be present in the milk and colivormers are limited to a maximum of 5000.

3.5 The minimum bottervet is agreed to be 4%, protein 3,55% and the maximum somatic cell count 250 000.

3.6 No fodder may be used which negatively affects the taste or quality of the milk.

3.7 The purchaser or representative shall conduct a taste and smell test as prescribed by the University of Free State on collection of the milk.

3.8 The hygiene standards as prescribed by Woolworths must be maintained.

3.9 Tests are to be conducted at least 3 times per month by the purchaser or representative in order to subject the milk to certain tests.

3.10 Clause 4.2.9 provides that in the event of failure to comply with specified standards, the purchaser is entitled to return the milk, destroy it or discard it.

3.11 Clause 5 provides that the risk of the milk passes to the purchaser as soon as it is collected and pumped into the tank.

[4] The parties agree that the agreement between the parties was in part oral, and was supplemented by the terms of the supply agreement. Respondent, having been identified as the largest supplier, was to receive 5 cents more per litre than other suppliers. The milk delivered by respondent and other milk -producing farmers would be received by the appellant in a tanker wherein all the milk of the Mosselbay group would

be pooled and mixed.

[5] The milk had to comply with the standards as reflected in the agreement and was subject to tests before delivery thereof would be accepted. Respondent duly delivered milk in the manner provided in the contract. A problem arose with the milk supplied by the Mosselbay Conglomerate. Investigations concluded that the milk had a bad smell and taste after a few days, especially when heated up. The rancidity of the milk was only noticed five days after it was packed. Consequently the milk was rejected by Woolworths and returned to appellant. Appellant thereafter sold the milk to another client at a reduced rate of R2,30 per litre, and reduced each producer's rate accordingly. The farmers were informed of the problems and that investigations revealed that the poor quality of the milk was as result of the fodder that was used to feed the cattle. Appellant's entitlement to reduce the payment due to the producers is explained in its plea as follows:

5.1 The group of milk producers and the respondent would jointly assume the risk should the milk not comply with the Woolworths standards and requirements;

5.2 Should the milk be downgraded by Woolworths on account of poor quality, the unit price per litre would be reduced *pro tando*. Consequently, the respondent is only entitled to a reduced price of R2,30 per litre instead of R2,95 per litre.

Appellant's contentions

[6] Appellant contends that it was common cause that the standards specified by Woolworths applied and that the Woolworths standards could only be tested after

delivery. The milk had a bad taste and smell a few days after delivery and the problem was also exposed when the milk was heated up. The agreement provided stringent requirements with regard to the quality of the fodder used. Producers were not allowed to make use of fodder that could have an influence on the taste and quality of the milk. Clause 4.2.9 explicitly authorizes the buyer, where milk does not comply with the standards of Woolworths, to return, destroy or get rid of it in any manner.

[7] Appellant does not dispute that respondent's milk passed the tests before delivery. However, the appellant maintains that on a proper interpretation of Clause 5 it becomes clear that the risk provision had not been intended to cover any risks directly related to the standards of Woolworths not being achieved, which standards were not tested prior to delivery. Appellant argues that two rules of interpretation give rise to such finding:

7.1 When words or stipulations used in a contract are capable of different meanings, a purposive construction may be applied. In this instance the purpose of the contract was that milk was to be delivered that could be sold by Woolworths as drinking milk. If that purpose could not be achieved for the reason that the agreed standards are not met, the milk must be dealt with in terms of clause 4.2.9 (See: **Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another** 1996 (3) SA 966(A) 973 D; Christie, **The Law of Contract in South Africa** 6th Edition, p 221 - 222).

7.2 With reference to Christie quoting ***Pothier and Van Linden's*** second rule of interpretation at p228, appellant stated that, "*When a stipulation is capable of two meanings, it should rather be construed in that sense in which it can have some operation than in that which it cannot have any*".

[8] It was therefore contended that clause 4.2.9 will only have meaning when it is interpreted to override clause 5, in circumstances in which milk is found to contravene Woolworths standards, subsequent to delivery. Consequently the conclusion is inevitable that clause 5 does not protect the producers where the standards of Woolworths have not been complied with.

[9] On a proper construction of clause 4.2.9 the producers pooled their milk and were meant to be treated as one. Clause 4.2.9 does not require the appellant to only penalise the particular guilty producer, but in fact by implication authorises it to treat them the same. The producers were therefore jointly liable for the quality of the milk. Consequently appellant was entitled to deal with the milk in question in terms of clause 4.2.9 and therefore no claim lies against it for doing so. Alternatively, the appellant contends that the provisions of clause 5 do not absolve the respondent and other producers from supplying milk which complies with the Woolworths standards. The clause 5 risk provision does not exclude liability arising from a latent defect in the milk. Appellant referred to **Dutch Reformed Church Council v Crocker** 1953 (4) SA 53 (C) at 60D where the following was stated:

> **"Such risk is, however, one of the damage to, and destruction of, the property after its sale and does not apply to an inherent or latent defect in the property in existence as at the date of its sale, even though discovered at a later stage".**

Respondent's contentions

[10] Respondent contends that he had practised the same farming methods

consistently and has never produced milk suffering from the alleged defects in question. The agreement expressly recognises the “pooling” nature of the scheme, and provides for tests and standards to be passed and met by the milk producer prior to or as at delivery. The tests applied at delivery are akin to a suspensive condition that delivery will only be accepted, the sale become perfecta, and the risk pass to the purchaser, if the milk passes the tests. The respondent’s milk passed all the tests and the poor taste and smell only developed after delivery. The protection measures for the purchaser built into the contract recognised that once delivery and pooling of the milk had been effected, quality checks would be too late since clause 5 then passed the risk to the purchaser.

[11] It was therefore argued that the appellant incorrectly shifts the risk to the respondent and other farmers contrary to the provisions in the contract. The nature of appellant’s risk is clearly defined in the contract which included the risk associated with the pooling of the milk, as well as the risk of the milk developing a poor taste or smell after delivery. Respondent avers that appellant is driven to plead that it was a tacit term of the agreement that the group producers would assume the risk. Appellant’s case is inconsistent with the express terms of the milk supply contract in that the issue of risk is expressly provided for in the contract. Respondent contends that the express terms and provisions of the milk supply agreement exclude the terms pleaded and relied upon by the appellant.

[12] The problems encountered with the milk after delivery could not be disputed by respondent. However, as a result of the pooling of the milk it is impossible to determine the source of the poor quality milk. It cannot be said that it was respondent’s milk that

contributed to the problem. The onus to prove that a latent defect existed rests on the appellant as purchaser. (See: **Seboko v Soll** 1949 (3) SA 337 (T) at 350). No latent defect in respondent's milk could be found and appellant is unable to discharge the onus of proving that the respondent's milk contained any such defect. Appellant's special defence raised in the plea is accordingly excluded by the terms of the written portion of the agreement between the parties. Consequently the respondent has met all the requirements and tests as determined in the agreement and cannot be held responsible for problems of taste and smell which developed subsequent to delivery.

Legal Principles

[13] The court *a quo* applied the bystander test and found that the tacit term pleaded by the appellant cannot be sustained. The court concluded that the importation of such term would essentially be for the benefit of appellant and impose an unreasonable burden on respondent. The court found that due to the nature of the term pleaded it is not appropriate in the circumstances that same be imported by mere application of the bystander tests.

[14] It is common cause that no evidence was led in respect of the alleged terms as pleaded by the appellant. On appeal, the main issues to be determined revolved around the existence of the tacit terms pleaded and the interpretation of clauses 4.2.9 and 5. In terms of clause 5 the risk of the milk passes to the purchaser as soon as it is collected and pumped into the tank. However, the appellant pleaded the existence of a tacit term to the effect that the group of milk producers would jointly assume the risk should the milk not comply with the Woolworths standards and requirements.

Furthermore, should the milk be downgraded by Woolworths on account of poor quality, the unit price would be reduced to R2,30 per litre.

[15] As explained by Corbett, AJA in **Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration** 1974 (3) SA 506 (A) at 531H - 532A, a tacit term is an unexpressed provision of a contract, inferred by the court from the express terms of the contract and the surrounding circumstances. In our law the test for establishing the existence of a tacit term is the so-called "bystander" or "officious bystander" test. (See: **Botha v Coopers and Lybrand** 2002 (5) SA 347 (SCA) para 22-25; **Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another** 2005 (6) SA 1 (SCA) para 50-51).

[16] The bystander test was described as follows in the frequently quoted case of **Reigate v Union Manufacturing Co** 1918 (1) KB 592 at 605:

> **"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; i.e. if it is such a term that it can confidently be said that if at the time the contract was negotiated someone had said to the parties: "*What will happen in such a case?*" they would both have replied: '*Of course so and so will happen; we did not trouble to say that; it is too clear'".***

[17] The court *a quo* referred to **Rapp and Maister v Aronovksy** 1943 WLD 68 at 74 to 75 where Millin J stated the following:

> **"It has often been pointed out that it is not sufficient to show that the term would be highly reasonable or convenient to one or other or even both of the parties. The cases show that the court has to be continually on its guard against being persuaded to introduce a term which, on analysis of**

> **the argument, appears to be no more than a term which would make the carrying out of the contract more convenient to one of the parties or to both of the parties and might have been included if the parties had thought of it and if they had both been reasonable. You are not to imply the term merely because if one of the parties or a bystander had suggested it, you think only an unreasonable person would have disagreed. You have to be satisfied that both parties did agree. It is quite a different proposition, if in the hypothetical case Scrutton Lord Justice puts in, you feel the parties might say: *"You have called our minds to something we have not thought of and what you say is not unreasonable, let us discuss it."* If that is all that the Court feels might have happened, then the Court is not entitled to imply the term."**

[18] In order to decide whether the importation of a tacit term would be appropriate Nienaber, JA in **Wilkins NO v Voges** 1994 (3) SA 130 (A) at 137A-C stated that "*a term will readily be imported into a contract if it is necessary to ensure its business efficacy*." In **City of Cape Town (CMC Administration) v Bourbon – Leftley and Another NNO** 2006 (3) SA 488 (SCA) Brand, JA succinctly set out the legal principles governing tacit terms at para 19:

> **"... [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 postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so (see e.g. Alfred McAlpine and 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 e.g. Alfred McAlpine (supra) at 532H- 533B and Consol Ltd t/a Consol Glass (supra) at 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".

[19] The Court is slow to import a tacit term into the written contract. One reason, no doubt, is that parties would choose to commit themselves to paper can be expected to cover all aspects that matters. In **Union Government Minister of Railways and Harbours v Faux Ltd** 1916 AD 105 at 112 the court stated it as follows:

"Now it is needless to say that a Court should be very slow to imply a term in a contract which is not found to be there, more particularly in a case like the present, where in the printed conditions the whole subject is dealt with in the greatest detail; and where the condition which we are asked to imply is one of the very greatest importance on a matter which could not possibly have been absent from the minds of the parties at the time when the agreement was made".

[20] The respondent participated in the scheme based on the oral agreement in conjunction with the contract which passes the risk of the milk to the appellant on delivery. The contract made provision for certain tests to be conducted before the milk

is accepted for delivery. The milk of the producers is tested individually, but pooled together in one tank. At the time of the delivery of the milk, respondent's milk passed all the tests as prescribed in respect of quality, and was accepted by appellant's representative as such. However, the critical point where Woolworths' standards are determined is some time after the actual delivery of the milk. The contract is silent on any obligation on the producers with regard to the pooled milk.

[21] The respondent was the largest supplier of milk and was thus the producer who stood to lose most should producers bear the risk associated with pooling. He also has his own insurance should the milk be defective. On the wording of the tacit term pleaded the respondent was obliged to ensure that there was compliance with the Woolworths standards in respect of the pooled milk. The question as to who bore the risks of the pooling of the milk would introduce various important considerations for the largest supplier. Had the notional bystander at the time of contracting asked the respondent whether he was undertaking to ensure that the quality of the pooled milk would comply with Woolworths' standards, in my view, at best the respondent would have wanted to consider and discuss it further. Nothing in the evidence warrants the conclusion that the respondent's answer would have been in the affirmative.

[22] The tacit term pleaded purports to saddle the respondent with the risks associated with the pooling of the milk. There was no compelling reason for respondent to agree to such obligation bearing in mind that he is the largest supplier. Why should respondent have been prepared to guarantee the overall quality of the milk over which he had no control and which could conceivably cause it substantial loss. At the time the

contract was entered into the respondent was not aware of potential problems which could arise after delivery of the milk and could not have foreseen such problems.

[23] The tacit term pleaded would in effect make the producers guarantors that there would be compliance by all the producers with Woolworths' standards during and after delivery of the milk. Considering the surrounding circumstances relating to the nature of the contract between the parties and the pooling of the milk the respondent could not have contemplated the eventuality of the pooled milk not complying with Woolworths standards. Consequently the respondent could not have intended to be held liable or be penalized for problems with the milk after delivery. The risks associated with the non-compliance with Woolworths' standards after delivery were not present in the mind of respondent and can therefore not be imputed to the respondent in terms of the contract. (See**: Delfs v Kuehne and Nagel (Pty) Ltd** 1990 (1) SA 822(A) at 828E). Such a provision would clearly not pass the test for its inclusion as a tacit term. Against this background it is inconceivable, on the probabilities, that the respondent would have agreed to assume the risks associated with the pooling of the milk as pleaded by appellant.

[24] A tacit term is derived from an inference as to what both parties must have intended if they had applied their minds to the issue, and the inference will be drawn only if the court is satisfied that it is a necessary one. Any difficulty and doubt as to how the term should be formulated will negate the inference that the parties clearly intended the proposed term to be part of their agreement. (See: **South African Mutual Aid Society v Cape Town Chamber of Commerce** 1962 (1) SA 598 (A) at 606B; **Desai**

and Others v Greyridge Investments (Pty) Ltd 1974 (1) SA 509 (A) at 522H - 523A). How would a tacit term be formulated which provides for the joint responsibility of all producers in the event of non-compliance with Woolworths' standards after delivery of the milk? It would be difficult to formulate such a term since it is wholly irreconcilable with clause 5 of the agreement.

<u>CONCLUSION</u>

[25] It follows that a tacit term cannot be imported into a contract on any matter to which the parties have applied their minds and for which they have made expressed provision for in the contract. (See: **Robin v Guarantee Life Assurance Co Ltd** 1984 (4) SA 558 (A) at 567C-D). A tacit term can also not be imported where it will contradict an existing expressed term, such being well-established in law. As stated by Van Winsen JA in **SA Mutual Medical Aid Society v Cape Town Chamber of Commerce** 1962 (1) SA 598 (A) at 615D:

> **"A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms, no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only."**

[26] Appellant bore the onus of proving the existence of the tacit term for which it contended. Clause 5 of the agreement provides that the risk of the milk passes to the purchaser on delivery of the milk. The scope and reach of the agreement between the parties transfers the risk from producers to purchasers once the milk had been tested

and pumped into the tank. Considering the express terms of the agreement and the surrounding circumstances it was entered into, I am of the view that the tacit term pleaded by the appellant cannot be sustained.

[27] In the circumstances the following order is made:

The appeal is dismissed with costs.

GOLIATH, J
Judge of the High Court

I agree.

SCHIPPERS, J
Judge of the High Court