



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 28 September 2011  
**STATUS** Immediate

*Please note that the media summary is for the benefit of the media and does not form part of the judgment.*

***Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd  
(624/10) [2011] ZASCA 158 (28 September 2011)***

#### **Media Statement**

Today the Supreme Court of Appeal (SCA) dismissed an appeal by Ashcor Secunda (Pty) Ltd (Ashcor) against an order by the South Gauteng High Court absolving Sasol Synthetic Fuels (Pty) Ltd (Sasol) from the instance at the close of Ashcor's case.

Fly-ash is a pozzolan that enhances the strength and durability of mortars and cement when mixed with it. It is a by-product of the coal burning process used by Sasol as part of its synthetic fuel production process. To prevent its emission into the atmosphere Sasol had developed a fly-ash extraction system known as the Fly-Ash Plant (FAP). Ashcor wished to commercially exploit the fly-ash. To that end Ashcor concluded a written agreement with Sasol.

Ashcor caused summons to be issued against Sasol for damages. Ashcor contended that Sasol had breached the agreement in that it had failed to repair and make the FAP operational. In the alternative Ashcor alleged that as a result of an error common to both the parties, they had signed the written agreement in the mistaken belief that it recorded the true terms of the agreement. Ashcor accordingly sought rectification of the agreement.

The SCA held that it was trite that where the language of a contract is clear and unambiguous the court must give effect to the intention of the parties as expressed in the contract. Clause 1 of the agreement states that the lease would take effect 30 days after the FAP was repaired and made operational. It was Ashcor's case that that had never happened. On the plain language of the clause that ought to have been the end of the matter. Ashcor however

contended that Sasol had an obligation in terms of the agreement to repair and render the FAP operational. The SCA found that the court below had correctly held that even if it were accepted that Sasol was burdened with a contractual obligation to render the FAP operational such a duty was circumscribed by an outlay of R150 000 in terms of clause 2.1 of the agreement. It was common cause that Sasol had indeed expended in the region of R 1 million.

Ashcor relied further on various tacit alternatively implied terms in addition to the express terms of the agreement. The court made it clear that it was important to distinguish between implied and tacit terms and that this distinction was not merely academic. Implied terms are imported into contracts by law, a standardised term amounting to a rule of law which the court will apply unless expressly excluded. A tacit term on the other hand is a provision which must be found in the unexpressed intention of the parties. The SCA held that given the express terms of the agreement there could be no room for importing the alleged tacit terms asserted by Ashcor.

The SCA found that the obligation upon which Ashcor's case rested did not exist and the order absolving Sasol from the instance with costs could not be faulted.

The appeal was accordingly dismissed with costs.

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