THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 238/04
Reportable

In the matter between

TRANSNET LIMITED **Appellant**

and

LEON RUBENSTEIN **Respondent**

Coram: **MPATI, ZULMAN, MTHIYANE, CLOETE, LEWIS JJA**

Heard: **13 May 2005**

Delivered: **1 Junie 2005**

Summary: Where parties to a contract agree that it is terminable on the happening of a specified future event, a tacit term that it is terminable on reasonable notice cannot, in the absence of evidence as to the parties' intention, and the precise formulation of the term, be read into the contract.

JUDGMENT

LEWIS JA

[1] The principal issue in this appeal, and indeed the only one argued before this court, is whether a tacit term should be read into a contract allowing either of the parties to terminate it by giving reasonable notice. The contract itself is not silent on the question of its duration. It states that it will come to an end on the happening of a future event – privatisation of the 'Blue Train', one of the businesses of the appellant, Transnet Limited.

[2] The respondent, Mr Leon Rubenstein, brought an urgent application in the Johannesburg High Court for various orders relating to a contract between him and Transnet, entitling him to the exclusive right to operate a jewellery boutique on two trains, known as the Blue Train, operated by Transnet. The relief sought was a declaratory order that the contract was still in existence and that Rubenstein was entitled to operate the boutique until privatisation of the Blue Train; and that Transnet be interdicted

from purporting to cancel the contract and from denying him access to the boutique. Alternatively, if the court were to find that the contract was terminable on reasonable notice, Rubenstein asked for an order that such notice be not less than six months.

[3] The court of first instance decided that the contract was terminable on the giving of six months' notice, but ordered Transnet to pay only 50 per cent of Rubenstein's costs. An appeal to the full court (the High Court, Johannesburg), against both the order that the contract was terminable on notice, and against the costs order, succeeded. It is against the decision of the full court that this appeal lies with special leave of this court.

[4] It is common cause that the express terms of the contract are set out in a letter written to Rubenstein on 14 July 1999 by the operations manager of the Blue Train, and which is annexed to the founding affidavit. The letter deals inter alia with stock control,

receipt of payments for items sold, accommodation on the Trains for Rubenstein and his staff, shop facilities and the determination of a management fee. The clause in issue, paragraph (j) of the letter, states that the management fee will 'form the basis for the contract; *the duration of which is to extend to the final date of privatization*'. (My emphasis.)

[5] It is also not disputed that Rubenstein ran the jewellery business on the Blue Train successfully, making a profit not only for himself but also for Transnet. He discovered, however, in April 2001 that Transnet had published invitations to tender for the operation of the jewellery boutique. He demanded that the invitations be withdrawn. His demand was ignored and he accordingly launched an urgent application for an interdict prohibiting Transnet from proceeding with any tender process. A

rule nisi was granted calling on Transnet to show cause why the interdict should not be made final.

[6] Before any final interdict could be granted the parties embarked on negotiations to settle the litigation, and there was talk about entering into a new agreement. The rule was discharged, and Transnet was ordered to pay the costs. Rubenstein continued to run the boutique, and the parties continued to talk about a more comprehensive contract. A draft produced by Transnet in October 2001 was considered unacceptable by Rubenstein. Transnet threatened Rubenstein that if no new contract were concluded by 31 January 2002, it would give two months' notice of termination. It gave such notice on 14 February 2002, advising that Rubenstein's 'services' would be terminated with effect from 15 April 2002. That prompted the urgent application currently under consideration.

[7] Transnet, as I have said, does not deny the existence or the terms of the contract alleged by Rubenstein. But in an affidavit filed in support of the answering affidavit, a Ms Borotho, the executive manager of the division (Luxrail) which runs the Blue Train, it was alleged that the parties had 'accepted' that privatization was due to take place by the end of 1999. When it became clear that that would not happen 'the parties agreed to regulate the appointment and services provided by [Rubenstein] in terms of extensions'. In fact there were several internal memoranda of Transnet, annexed to Borotho's affidavit, that indicated that as far as Transnet was concerned the contract required extension. But this was never communicated to Rubenstein and before this court it was not contended that the contract had come to an end, nor that Rubenstein's business or services continued by virtue of any extension.

[8] Ponnan J, in the court of first instance, came to the conclusion that the contract was terminable on notice, but that the period of notice given was inadequate. He made an order declaring that the notice of two months was 'unreasonably short' and that Transnet 'was obliged to give the applicant six months' notice of cancellation . . . such notice to operate with retrospective effect to 14 February 2002'. The contract would thus terminate with effect from 15 August 2002. He ordered Transnet to pay only 50 per cent of Rubenstein's costs, censuring the latter as being responsible for the urgency of the application.

[9] The learned judge of first instance reasoned as follows in regard to reading the contract subject to the right of the parties to terminate on reasonable notice:

'On a conspectus of the factual matrix before me, privatization of the Blue Train has become an uncertain future event. It is quite clear that the perception of the parties at the time that they contracted with each other was

that privatization would occur shortly thereafter. A period of almost three years has since elapsed. That the contract would endure for as long as it already has, could not have been the common intention of the parties. It is thus reasonable to infer that they did not intend to bind themselves indefinitely, but rather contemplated termination by either party on reasonable notice. To hold otherwise would be to permanently bind them to each other and the contract when all they contracted for was a temporary arrangement.'

[10] The appeal to the full court succeeded, as I have said. Gildenhuys J (Schwartzman and Willis JJ concurring) held that the implication of a term that the contract was terminable on reasonable notice was contrary to the express provision of the contract as to its duration. It was conceded by counsel for Transnet that the learned judge of first instance should not have substituted his view of what constituted reasonable notice for that of the parties, and thus no reliance was placed on the right to six months' notice.

[11] The court a quo, in concluding that the contract was not terminable on notice, distinguished the case from *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd*[1] and *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd.*[2] In both those cases it was held that where the circumstances of an agreement show that all that the parties intended was a temporary arrangement, but the contract was silent as to duration, it is reasonable to infer that they contemplated termination on reasonable notice.

[12] That was the approach too of this court in *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers,*[3] a decision reported after the judgment of the full court was handed down. In *Amalgamated Beverage* the court was asked to determine only whether reasonable notice had been given, the respondent having conceded that although the contract was silent as to duration, it

[1] 1984 (1) SA 433 (W).
[2] 1985 (4) SA 809 (A).
[3] 2004 (1) SA 538 (SCA).

could be terminated on reasonable notice. Streicher JA said[4] that whether a contract which is silent on its duration is terminable on reasonable notice is a matter of construction:

'The question is whether a tacit term to that effect should by implication be read into the contract. That would be the case if the common intention of the parties at the time when they concluded the contract, having regard to the express terms of the contract and the surrounding circumstances, was such that, had they applied their minds to the question whether the contract could be so terminated, they would have agreed that it could.'

[13] This case, on the other hand, is not silent on duration: the contract terminates on the happening of an uncertain future event. Moreover, the tacit term contended for in this appeal was never pleaded let alone formulated. There is no allegation of a tacit term in the answering affidavit, nor is there any evidence proffered by Transnet that would support the implication of one. But counsel for Transnet argued that it is necessary to read in a term that if

[4] Para 13.

privatization did not occur, the contract would be terminable on reasonable notice, because otherwise the parties would be locked in a contract indefinitely, which was patently never their intention, a point made by Ponnan J in the court of first instance.

[14] The court a quo, on the other hand, was of the view that there was no evidence that privatization had become impossible or impracticable or that it had been abandoned. That is indeed so. I accept, without deciding, however, that there should be some mechanism for bringing the contract to an end if it becomes evident that privatization is not going to occur. As counsel for Transnet argued, it is required, as an organ of state, when it contracts for goods or services, to 'do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.[5] That requires it to invite tenders for the operation of the Blue Train boutiques. While an exemption in respect of

[5] Section 217(1) of the Constitution.

Rubenstein's business had apparently been obtained, this situation could not continue indefinitely.

[15] The question is, however, what was intended by the parties should privatization not occur within a particular, though unspecified, period? Rubenstein's uncontradicted evidence was that he had not intended that the contract endure only until the end of 1999: he had invested in training staff, and in stock, and would not have contracted on that basis. Borotho, for Transnet, said only that she was advised that there was a common supposition that if privatization had not occurred by the end of 1999, the contract with Rubenstein would have to be extended from time to time. As I have indicated, Rubenstein was never made aware of these 'extensions' which were internal Transnet arrangements. And the fact that Transnet representatives thought it necessary to authorise 'extensions' from time to time shows clearly that Transnet did not

intend that the contract was terminable on reasonable notice. There was thus no common underlying supposition or assumption as to the termination of the contract should privatization not occur.

[16] And even if a tacit or implied term as to termination should privatization not occur were to be inserted in the contract, given the express condition as to termination on privatization, how would one formulate the term? Of course such a term can be formulated in the abstract. To give business efficacy to the contract one could suggest that there must be inserted into the contract a term that either party has the right to terminate the contract on giving reasonable notice if privatization has not occurred by the end of 1999, although that would be contrary to the intention of the parties as described in their affidavits. Or one could assume that either party would be entitled to terminate if privatization did not occur within a reasonable time after the conclusion of the contract. But

as I have said, no such term was pleaded or formulated by Transnet, and there is no evidence to suggest that such an arrangement was ever contemplated by the parties.

[17] Transnet sought to rely on *Wilkins NO v Voges*[6] in arguing that the term should be imputed by having regard to what reasonable people would say was needed to give effect to the contract. This is in essence the expression of tests that have been used for many decades in relation to the implication of a tacit term: would the 'officious bystander', when asked whether the term is necessary, and not merely desirable, say 'Of course it is'; or is the term necessary to give business efficacy to the contract?[7] But while one may assume that the parties are reasonable people, one

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[6] 1994 (3) SA 130 (A).

[7] *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105; *West End Diamonds Ltd v Johannesburg Stock Exchange* 1946 AD 910; *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A); See also *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532 in fin-533B, where Corbett AJA relied on a statement of Scrutton LJ in *Reigate v Union Manufacturing Co* [1918] 1 KB 592 (CA) at 605; 118 LT 479 (CA) at 483. See also *Botha v Coopers & Lybrand* 2002 (S) SA 347 (SCA) para 23 and *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* [2004] 1 All SA 1 (SCA) paras 50 and 51.

must be astute not to ignore their expressed intention. Thus Nienaber JA states in *Wilkins*:[8]

'One is certainly entitled to assume, in the absence of indications to the contrary, that the parties to the agreement are typical men of affairs, contracting on an equal and honest footing, without hidden motives and reservations. But when the facts show that the one or the other had special knowledge, which would probably have had a bearing on his state of mind, that fact simply cannot be ignored. For otherwise the enquiry as to the existence of the tacit term becomes a matter of invention, not intention.'[9]

[18] The difficulty of formulating the kind of term contended for by Transnet (quite apart from its failure to do so, or even to plead its existence) is that it could be in conflict with the express term as to duration. In *Kelvinator Group Services of SA (Pty) Ltd v*

[8] At 141C-E.
[9] See also *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25 at 31-32 where Stratford JA too had regard to what an independent person would say about the necessity of incorporating the term in question, but also stated that the 'true view' is that 'you have to get at the intention of the parties in regard to a matter which they must have had in mind, but which they have not expressed'. He considered therefore that one had to have regard not only to objective tests but also to what the parties claimed to have intended.

McCullogh[10] Nugent J pointed out that a term, to be imputed, must not merely be reasonable or desirable, but necessary, and that 'there can be no room for such a term if it would be in conflict with the express provisions of the agreement'. The learned judge relied in this regard on *South African Mutual Aid Society v Cape Town Chamber of Commerce*[11] where Van Winsen JA said:

'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.'

[19] In my view, therefore, especially given the absence of evidence as to what the parties intended, it is not possible to

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[10] 1999 (4) SA 840 (W) at 844A-C.
[11] 1962 (1) SA 598 (A) at 615D-E. See *Aymard v* Webster 1910 TPD 123; *Mullin (Pty) Ltd v Benade Ltd* above at 215I-H; and *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175C; *Alfred McAlpine & Son (Pty) Ltd* above at 531E-F and *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 567A-F.

impute into the contract between the parties a term that is in conflict with their express agreement as to its duration. This is all the more so since the evidence that we do have conflicts with the proposition argued for by Transnet that the contract was terminable on reasonable notice.

[20] Lastly, the question of costs. Ponnan J considered that Rubenstein was responsible for creating the urgency that led to the application being made on an urgent basis. He censured Rubenstein by awarding only half his costs. The court below disagreed with the decision and reversed the order, allowing Rubenstein full costs.

[21] Transnet argues that the question of costs is a discretionary matter, and that the appeal court ought not to have interfered with the order. It is clear, however, that that court, although it does not say so expressly, considered that Ponnan J had misdirected

himself. The judgment deals with the fact that Rubenstein, in his replying affidavit, explained the reasons for delay, which related largely to attempts to settle the matter and to enter into a new contract. It was not essential for Rubenstein to deal fully with the question of delay in the founding affidavit given that much of it was attributable to ongoing discussions with Transnet about the conclusion of a new contract. Transnet was not deprived of the opportunity properly to prepare and file its answering affidavit. The costs order, intended to censure Rubenstein, was based on the assumption that the application was brought on an urgent basis only because of delay on the part of Rubenstein. This was not the case, as was fully explained in the replying affidavit. Thus there was, with respect, a misdirection on the part of the learned judge of first instance, and the court on appeal was entitled to interfere with the costs order as it did.

[22] Accordingly the appeal is dismissed with costs.

C H Lewis
Judge of Appeal

Concur:

Mpati DP
Zulman JA
Mthiyane JA

CLOETE JA:

[23] I have had the advantage of reading the judgment by my colleague, Lewis JA. I concur in the conclusion she has reached but I approach the matter with a different emphasis. I also find it unnecessary to consider whether a tacit term can be imputed to the parties in view of the express term of the contract relating to its duration; and if the appeal is disposed of for the reasons set out in this judgment, whatever is said on that question would be obiter. Because the facts are set out fully in the judgment of my learned colleague, a brief summary will suffice for purposes of this judgment.

[24] The respondent in this appeal is Mr Rubenstein, a jeweller. He brought motion proceedings as a matter of urgency in the High Court, Johannesburg, against the appellant, Transnet. Transnet owns the Blue Train. Part of the relief claimed by Rubenstein in the notice of motion was the following:

'2. Declaring that a contract exists between the applicant [Rubenstein] and the respondent [Transnet], which entitles the applicant to the sole and exclusive right to operate a jewellery boutique and to sell jewellery and other gift items on respondent's train known as the "Blue Train".

3. Declaring that the respondent bound itself to permit the applicant to operate the aforesaid boutique until such time as the business of operating

the Blue Train is privatised i.e. vests in a private organisation not under the control of the State.'

[25] It has at all times been common cause that a contract was concluded between Rubenstein and Transnet in terms of which Rubenstein was granted the right to operate a jewellery boutique on the Blue Train. The prayers quoted above were refused by Ponnan J at first instance, although alternative relief was granted to Rubenstein. On appeal, the full court (Gildenhuys J, Schwartzman and Willis JJ concurring) set aside the order made but issued a declaratory order that the purported cancellation of the contract between Rubenstein and Transnet was invalid. That order presumably satisfied Rubenstein as he has not sought to challenge it. Transnet has, however, appealed further with the special leave of this court.

[26] It is common cause that the letter written on behalf of Transnet dated 14 July 1999 and which embodied the express terms of the contract between the parties provided that 'the duration' of the contract 'is to extend to the final date of privatisation'. The Blue Train has not been privatised yet and it is at present uncertain when this will occur.

[27] Counsel representing Transnet submitted that Transnet was entitled to cancel the contract on notice to Rubenstein because of a tacit term permitting it to do so. In the absence of such a tacit term Transnet's appeal cannot succeed.

[28] The fundamental problems facing Transnet are twofold. In motion proceedings the affidavits constitute not only the evidence, but also the pleadings.[12] Transnet's answering affidavit is deficient in both respects.

[29] There is no allegation in the answering affidavit that the contract contained the tacit term for which Transnet's counsel contended ─ much less a formulation of such a term. The high-water mark of Transnet's case is the following statement in the affidavit of Ms Borotho, who is now (but was not at the time when the contract with Rubenstein was concluded) the Executive Manager of Luxrail (which is part of Transnet and operates the Blue Train on its behalf):

'I have been advised and respectfully submit that the appointment of the applicant to manage the boutiques was made on a supposition common to both parties that the business of The Blue Train would be privatised by the end of 1999. That supposition was mistaken and The Blue Train was not privatised as was assumed.'

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[12] See eg *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) 269G-H and *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) 149C.

A supposition, to have legal effect, must translate into a mistake, a misrepresentation, a term or a condition (and the term or condition may be express or tacit). This court said in *Van Reenen Steel (Pty) Limited v Smith NO*[13]:

'[8] Assumptions or suppositions can have many forms and have different effects depending upon the circumstances. An assumption relating to a future state of affairs

"relates to an agreement which is in operation and its recognition would have a direct bearing upon one of the terms of the agreement. Such a supposition is indistinguishable from a condition,"

usually a resolutive condition, perhaps also a condition precedent or an ordinary term of the contract. The use of the word "supposition" or "assumption" instead of "condition" in this context is not conducive to clear thinking.

[9] Assumptions may also relate to present or past facts. If unilateral, one is back to the effect of a unilateral mistake on a contract. If common, unless elevated to terms of the agreement, they invariably amount to no more than the reasons for contracting (on those terms) or, expressing the same idea, common mistakes relating to a motive in entering into the agreement ("dwaling in beweegrede"). Whether or not a motive leading up to an agreement is based upon an assumption of fact, it remains a motive. A party cannot vitiate a contract based upon a mistaken motive relating to an existing fact, even if the motive is common, unless the contract is made dependent upon the motive, or if the requirements for a misrepresentation are present.

[13] 2002 (4) SA 264 (SCA) (footnotes omitted).

The principle is as stated in *African Realty Trust Ltd v Holmes* 1922 AD 389 at 403:

"But as a Court, we are after all not concerned with the motives which actuated the parties in entering into the contract, except insofar as they were expressly made part and parcel of the contract or are part of the contract by clear implication." '

The allegations made by Borotho accordingly do not go far enough. In the absence of an allegation by Transnet that the agreement between the parties contained a tacit term entitling Transnet to cancel it, a defence based on such tacit term cannot succeed. Nor is it for this court to formulate such a tacit term when Transnet has failed to do so.

[30] Furthermore Transnet delivered no affidavit deposed to by the employee(s) who had negotiated with Rubenstein and who had knowledge of what the agreement was, to the extent to which (if at all) it was not embodied in the letter of 14 July 1999. The existence of a tacit term is primarily a question of fact (as opposed to a term which is implied by operation of law); and the decision in *Wilkins NO v Voges*,[14] which was much relied upon by Transnet's counsel, makes it clear at 136I-137A and 141C-E that this is so even where the court is dealing with a tacit term which is imputed to the parties. The advice given to Borotho, whatever it source, was

[14] 1994 (3) SA 130 (A) 136H-I.

therefore hearsay and inadmissible and her submission is nothing more than argument without a factual foundation. The argument advanced by Transnet's counsel suffers from the same defect. In response to the passage in Borotho's affidavit quoted above Rubenstein said in his replying affidavit:

'I emphatically deny that there was a common supposition that privatisation would take place by the end of 1999. Nor was it ever suggested that my rights to operate the boutique were in any way affected because privatisation had not occurred by the end of 1999. I state that the year 1999 was never mentioned as a material time with respect to my contract.'

There is no admissible evidence ─ indeed, no evidence at all ─ to contradict this assertion; and it is not so improbable that it falls to be rejected even although uncontradicted.[15] What Rubenstein might have said if faced with an allegation that the contract between the parties contained a tacit term entitling Transnet to terminate it on notice, and evidence in support of such an allegation, is a matter of pure conjecture.

[31] Borotho did say in her affidavit:

'Transnet has been forced to deal with this matter on the basis of unreasonable time frames fixed by the applicant, without due regard to Transnet's procedure or rights and interests as to the time period for the filing of its notice of intention to oppose and answering affidavit. It has been

[15] Some of the decisions of this court on the point are collected in *Kentz (Pty) Ltd v Power* [2002] 1 All SA 605 (W) paras [16] to [20].

deprived of an adequate opportunity to obtain confirmatory affidavits from persons who have knowledge of certain crucial aspects of this case.'

But Transnet did take a week longer than the time period fixed by Rubenstein for the filing of its answering affidavit; and no attempt was made by Transnet to have the matter postponed so that further affidavits could be delivered. Nor did Transnet aver that the person(s) who negotiated and concluded the contract with Rubenstein were no longer available to it, and seek to have the matter referred to oral evidence in terms of Uniform Rule of Court 6(5)(g) so that Rubenstein could be cross-examined. On the contrary, Transnet was content to argue the application, and both appeals, on the papers as they stood.

[32] In short, Transnet's defence has no basis in fact or in law. The

appeal against the order made by the full court on the merits accordingly falls to be dismissed.

[33] Transnet's appeal against the costs order made by the full court must suffer the same fate. Rubenstein was deprived of half of his costs by Ponnan J, who held the view that Rubenstein had abused the process of the court by the delay in bringing the application. The full court set this order aside and awarded Rubenstein all of his costs in the court of first instance. The

submission on behalf of Transnet to this court was that there was no basis upon which the full court could legitimately have interfered with the discretion exercised by the court of first instance. But there was. As the full court pointed out, Ponnan J disregarded the explanation for the delay given by the respondent in his replying affidavit, in reply to the complaint raised by Transnet in this regard in its answering affidavit. Rubenstein's explanation, which there is no reason to doubt, is that he, on several occasions personally and in a letter written by his attorney, requested a meeting to discuss the matter; and although Borotho indicated her willingness to do so, she never fixed a date for such a meeting despite an undertaking that she would. Ultimately, Rubenstein's attorney wrote a letter requesting Transnet to withdraw its purported notice of termination and that letter was simply ignored by Transnet. The application was then urgent because the date for cancellation specified by Transnet was looming. Rubenstein cannot legitimately be criticised for attempting to settle the matter before resorting to litigation. Counsel representing Transnet submitted that the explanation given by Rubenstein should have been in the founding affidavit. I disagree. It formed no part of his cause of action on the merits. It was also not incumbent upon him, when dealing with the question of urgency in terms of Uniform

Rule of Court 6(12), to anticipate the complainant made by Transnet.

[34] It is for these reasons I conclude that the appeal should be dismissed.

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T D CLOETE
JUDGE OF APPEAL

Concur: Zulman JA