THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1249/18

In the matter between:

WILMA PETRU KOOIJ

and

MAGDALENA MARIA KRUGER

and

JACOBUS CHRISTOFFEL KRUGER **APPELLANT**

(In their capacities as Trustees of Daleen Kruger Trust

(IT: 1972/96)

and

MIDDLEGROUND TRADING 251 CC **FIRST RESPONDENT**

DIRK JAKOBUS FOURIE **SECOND RESPONDENT**

Neutral citation: *Wilma Petru Kooij v Middleground Trading 251 CC and Another* (1249/18) [2020] ZASCA 45 (23 April 2020)

Coram: MBHA, ZONDI and MOLEMELA JJA and LEDWABA and KOEN AJJA

Heard: 20 February 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 23 April 2020.

Summary: Contract – interpretation of – dominant right granted not lease - importation of tacit term – permanent supervening impossibility of performance.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Moultrie AJ, Van Niewenhuizen J concurring, sitting as a court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Molemela JA (Mbha and Zondi, JJA, and Ledwaba and Koen AJJA concurring)

Introduction

[1] Central to this appeal is a determination of the nature and consequences of the agreement entered into by the appellant, the Daleen Kruger Trust (the Trust) and the first respondent, Middleground Trading 251 CC (Middleground).

Background facts

[2] On 30 September 2005, the Trust, duly represented by its trustee, Mr Kruger, entered into an agreement with Middleground, duly represented by its director, Mr Fourie. The agreement was, in its heading, described as 'Rent and rental Agreement'. It recorded that the Trust was the owner of a farm on which Middleground would be allowed to prospect, mine or harvest peat[1] from a specified portion thereof, which mainly constituted a wetlands area, in consideration for a minimum amount of R15 000.00 per month (minimum amount payable). The agreement commenced on 30 September 2005 and was initially for a fixed period of three years. Middleground was entitled to exercise the option to extend the agreement for a further period of three years. It did so twice, thereby extending the life of the contract to 30 September 2014. The salient provisions of the agreement, loosely translated, are as follows:[2]

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[1] Peat is plant material mostly found in wetlands. It is generally considered to be a fossil fuel. Due to its water retention and filtration capabilities, it is also used as a soil mixture or compost.

[2] The agreement concluded between the parties was recorded in Afrikaans. The relevant terms thereof were couched as follows:

'**1. DIE PARTYE EN DIE EIENDOM**

1.3 Die eiendom waaroor die regte verleen word is die uitgewysde vleiland en gedeeltes waarop veen voorkom op die plaas ... soos per kaart hierby aangeheg ... Die veen gedeelte word aangedui in rooi op die kaart plus die uitgewysde gedeelte van ongeveer 5 hektaar waarop die gepaardgaande besigheidsaktiwiteite op uitgeoefen kan word, en die uitgewysde paaie.

‘1. **THE PARTIES AND THE PROPERTY**

1.3 The property in respect of which the rights are granted is the designated marshland and sections where peat is located on the farm . . . as indicated in the attached diagram . . . .The peat section is depicted in red on the diagram plus the designated section of approximately five hectares on which associated business activities may be undertaken, and the designated roads.

2. **GENERAL**

2.2 Subject to the conditions set out in this agreement and for the duration of the contract period [the Trust] hereby leases the property to [Middleground] for purposes of giving it the exclusive right to solely prospect, extract or mine for peat and / or to harvest peat on the property.

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2. ALGEMEEN

2.2 Onderworpe aan die voorwaardes van hierdie ooreenkoms en vir die duur van die kontraktermyn verhuur die [Trust] hiermee aan [Middleground] die eiendom om die alleen reg te verkry om alleenlik vir veen te prospekteer, om veen te ontgin, om vir veen te myn en om veen op die eiendom te oes.

3. KONTRAKTERMYN

3.4 [Middleground] mag die ooreenkoms slegs kanselleer as:

3.4.1 [Middleground] deur nuwe wetgewing verbied word om die Veen te oes; of

3.4.2 die veenland uitgeoes is en veen nie meer daarop geoes kan word nie.

3.5 Ingeval van ‘n dispuut of die veen land uitgeoes is, sal die dispuut vir arbitrasie verwys word. Die arbiter sal deur die Departement van Landbou aangewys word. [Middleground] sal steeds voortgaan met die maandelikse huurbetalings totdat die arbiter sy besluit maak, of totdat die dispuut geskik is. Indien bevind word dat die veenland uitgeoes is, sal [Middleground] geregtig wees op terugbetaling van die huurgeld, betaal vir die maande terwyl die veenland uitgeoes is.

3.6 Enige vorm van *vis major* sal ‘n geldige rede vir [Middleground] daar stel om nie sy werksaamhede in terme van hierdie ooreenkoms uit te oefen nie, indien dit permanente onmoontlikheid tot gevolg het.

4. VERGOEDING

4.1 Vir die huur van die eindom sal [Middleground] die [Trust] die minimum huur bedrag van R15 000-00 (Vyftien duisend rand), plus BTW per maand betaal en ‘n verdere bedrag van R25-00 per kubieke meter per maand betaal vir die Veen wat verwyder is van meer as 600m^3 veen per maand. Die bedrag van R15 000-00 sal jaarliks met die persentasie van 10% eskaleer.

4.2. Die betaling van die bedrag van R15 000-00 per maand, vir die huur van die eiendom en vir die verlening van die regte in terme van die ooreenkoms is ‘n vooruitbetaling van die bedrag van die betaling van R25-00 / m^3 (R25 per kubieke meter) (plus BTW indien van toepassing), vir die Veen wat per maand deur [Middleground] verwyder is.

4.3 Die bedrag van R15 000-00 per maand sal verreken word teen die bedrag wat aan die [Trust] verskuldig is, vir die veen wat ingevolge die bepalings van die ooreenkoms verwyder is en waarvoor [Middleground] die [Trust] vergoed. Die verrekening sal maandeliks gedoen word en sal daar maandeliks ‘n rekonsiliasie van gedoen word. Betaling sal geskied 30 dae na maand-einde.

4.4 Die bedrag vir betalings van die Veen van R25-00 per m^3 Veen verwyder sal jaarliks met 10% eskaleer.

. . . . ’

3. **CONTRACT PERIOD**

3.4 [Middleground] may only cancel the agreement if:

3.4.1 [Middleground] is prohibited from harvesting peat in terms of new legislation; or

3.4.2 the peatland is depleted and peat can no longer be harvested on it.

3.5 In the event of a dispute as to whether the peat resources is depleted, the dispute will be referred for arbitration. The arbitrator shall be appointed by the Department of Agriculture. [Middleground] will continue paying its monthly rentals until the arbitrator makes their decision, or until the dispute is settled. If it is found that the peat resources is depleted, [Middleground] will be entitled to a refund of the rent paid during the period when there was no peat to mine.

3.6 Any form of *vis major* will be a valid reason for [Middleground] not to perform its operations in terms of this agreement, if it results in a permanent impossibility.

4. **PAYMENT**

4.1 [Middleground] will pay [the Trust] the minimum rental amount of R15 000.00 per month, plus VAT, for the lease of the property and in addition an amount of R25.00 per cubic meter will become payable any additional volume of peat that is extracted in excess of $600m^3$ per month. The amount of R15 000.00 shall escalate at the rate of 10 per cent per annum.

4.2 The payment of the sum of R15 000.00 per month, for the lease of the property and the granting of the rights in terms of the agreement is a prepayment of the amount of R25.00/m^3 (R25 per cubic metre) (plus VAT if it is applicable), for the peat extracted by [Middleground] monthly.

4.3 The amount of R15 000.00 per month will be taken into account against the amount that is due to [the Trust] for the peat that is extracted in terms of the agreement and for which [Middleground] compensates [the Trust]. The calculation will be done monthly and the reconciliation thereof will be done monthly. Payment will be made 30 days after month-end.

4.4 The amounts payable for the peat extracted will be R25.00 per cubic metre and will escalate at the rate of 10 per cent per annum.'

[3] It is common cause that for some time prior to the conclusion of the aforesaid agreement, peat had been extracted from the Trust's property by an entity known as Stander Veen CC (Stander Veen) under a licence issued by the Department of Environmental Affairs (the Department). At the time of the conclusion of the agreement between the Trust and Middleground, Stander Veen was still the authorised licence

holder even though it was no longer extracting peat from that property. It appears that Middleground and Stander Veen had a separate arrangement regarding Middleground harvesting the peat under Stander Veen's licence. This separate arrangement deserves no further mention in this appeal, as nothing turns on it.

[4] Following the conclusion of the contract, Middleground took possession of the Trust's property. However, for the first ten months of the contract, no peat was extracted from the property as Middleground was still setting up its business operations. Despite this, Middleground paid the agreed minimum amount of R15 000.00 per month and submitted monthly reconciliation statements that reflected the amounts paid to the Trust as credits.

[5] On 19 August 2011 the Department of Environmental Affairs (the Department) issued a notice (pre-notice) indicating its intention to issue a Compliance Notice and/or Directive (Compliance Notice) in terms of ss 28(4) and/or 31L of the National Environmental Management Act, 107 of 1998 and/or a directive in terms of s 31A of the Environment Conservation Act, 73 of 1989, because of what it contended was 'environmental degradation and serious harm caused by the unlawful activities conducted' on the property. The pre-notice was addressed to the Trust, Middleground and Stander Veen. On 30 August 2011, the three entities jointly submitted representations to the Department in an effort to fend off the allegations made therein. Notwithstanding those representations, on 17 November 2011, the Department proceeded to issue a Compliance Notice against the Trust, Middleground and Stander Veen. It was served on the three entities on 28 November 2011. The Compliance Notice directed that the extraction of peat be stopped forthwith, that all the machinery and implements used for the mining thereof be removed from the property within 5 days of the issuance of that order, and that all access points to the designated property be barricaded.

[6] Middleground, the Trust and Stander Veen jointly tried to negotiate with the Department for the withdrawal of the Compliance Notice. When that failed, they launched an urgent application against the Department in the Gauteng Division of the High Court, Pretoria (High Court) in December 2011. Based on the legal advice they subsequently obtained, they withdrew that application and lodged an appeal to the

Minister of Environmental Affairs (the Minister). Although an undertaking was made promising to secure the Minister's response by 31 January 2012, the decision refusing that appeal was only made on 26 June 2013. Middleground subsequently decided to institute an application reviewing the Department's decision to issue the Compliance Notice and setting it aside. The Trust was cited as one of the respondents in that application as a party having an interest in the matter.

[7] In the intervening period, Middleground had, in accordance with the Compliance Notice issued by the Department, stopped harvesting peat and had removed its equipment from the Trust's property. The last recorded payment made by Middleground to the Trust was for the month of February 2012. Considering Middleground to be in default of its payment obligations, the Trust sent a letter in May 2012, demanding payment of, what it termed, 'arrear rental'. Further correspondence was exchanged between the parties but the issue could not be resolved amicably. The Trust then sent a letter purporting to cancel the agreement and demanded payment of an amount of R1 051 796.99 in respect of 'rental due and payable' for the period 1 March 2012 to 30 September 2014'.

Litigation History

[8] In an action instituted in the Magistrate's Court, the Trust, citing Middleground as a first respondent by virtue of being a 'lessee' of the peatland and Fourie as the second respondent on account of the suretyship that he signed in respect of Middleground's indebtedness, claimed payment of the amount of R1 051 796.00. The case pleaded by the Trust was that the parties had entered into a lease agreement, the consequence whereof was that Middleground would remain bound by its terms until the agreement was terminated by effluxion of time.

[9] The first argument advanced by Middleground was that the agreement concluded by the parties was not one that could be characterised as a common law lease of immovable property, but was one in terms of which the Trust granted Middleground the right to prospect for and harvest peat on the property and activities related thereto, for an agreed consideration. Following from that, the primary defence raised was that, on a proper interpretation of the agreement, the amounts payable by Middleground in terms of the agreement were only payable for so long as

Middleground was able to legitimately exercise its right to prospect for, and to mine and/or harvest peat. This defence also sought to invoke a tacit term to the effect that the amounts payable by Middleground were payable only for so long as Middleground was able to legitimately exercise its rights to prospect for and to mine and/or harvest peat.

[10] Middleground further pleaded that the issuance of the Compliance Notice resulted in it no longer being able to continue with peat extraction operations on the property, as a result of which performance in terms of the agreement became impossible. Lastly, Middleground asserted that the issuance of the Compliance Notice constituted *vis major* of a permanent nature as contemplated in clause 3.6 of the agreement, which entitled it to terminate the agreement. The Magistrate dismissed the action on the basis that there was a supervening impossibility that prevented Middleground from exercising its rights in terms of the agreement. The Trust subsequently appealed against that judgment to the Gauteng Division of the High Court (High Court).

[11] In upholding the magistrate's dismissal of the Trust's claim, the High Court held that, on a proper construction of the contract, the minimum monthly payment constituted a prepayment in respect of peat to be mined, which was subject to a set- off based on the reconciliations done on a monthly basis. It held that even though the payment was categorised as 'rent' it was not an amount that the Trust was entitled to retain irrespective of the volume of peat Middleground had extracted. It held further that the tacit term contended for by Middleground was reasonable and necessary in view of the fact that the minimum monthly payment constituted a prepayment.

[12] The High Court thus upheld Middleground's reliance on a tacit term excusing it from the obligation to pay the minimum monthly payment for the period when peat could not be extracted between February 2012 and September 2014. It held that given that finding, it was not necessary to decide the question whether the Compliance Notice constituted a permanent impediment excusing Middleground from the obligation to pay the minimum monthly amount on the basis of the defence of supervening impossibility of performance. The High Court held that what the Department sought to prohibit by virtue of the Compliance Notice was peat extraction

per se. It found that it could therefore not be said that the issuance of the Compliance Notice and Middleground's consequent inability to legitimately carry out its peat extraction activities were as a result of its failure to comply with the required authorisations or legislation. The High Court dismissed the appeal. Aggrieved by the decision of the High Court, the Trust applied for and was granted leave to appeal to this Court against the judgment of the High Court.

The submissions of the parties

[13] Before us it was contended on behalf of the Trust that the agreement in question was *sui generis*, but that the lease element thereof formed an integral part of the agreement. It was further contended that even in the event that the agreement is considered not to be a nominate agreement of lease, the terms thereof clearly provide for a continuous obligation to make payment by Middleground irrespective of whether peat was extracted or not. Middleground, on the other hand, persisted with the defences it had raised. It contended that the agreement was not a lease but a right granted to it for the mining of peat; that the minimum monthly payment constituted a prepayment for the peat to be extracted and, properly construed, not rental. Lastly, it contended that the prohibition on the extraction of peat by virtue of the Compliance Notice amounted to a permanent supervening impossibility of performance envisaged in the parties' agreement.

The issues for determination

[14] The issues for determination in this Court are threefold. First, whether the written agreement entered into by the parties was an agreement with significant features of a lease of immovable property, with the monthly payments constituting rental as alleged by the appellant, or whether, as Middleground contends, it was merely an agreement granting it the right to extract peat from the Trust's property, with the prepayments being consideration paid in advance for the right to prospect for, mine and harvest peat. Second, whether a tacit term should be imported into the agreement, the effect thereof being that the amounts payable by Middleground would be payable to the Trust only for so long as Middleground was able to legitimately carry out its rights to prospect for, and to mine and/or harvest peat. Third, whether the

Department's issuance of the Compliance Notice during November 2011 constituted *vis major* of a permanent nature as contemplated in the parties' agreement.

Discussion

The nature of the contract

[15] At the crux of this matter is the interpretation that has to be given to the agreement concluded by the parties. The principle enunciated decades ago by Wigmore in relation to the construction of contracts still applies: once a contract is concluded by the parties, it becomes the only memorial of their jural act 'and all other utterances of the parties on that topic are legally immaterial for the purpose of determining. . . the terms of their act'.[3] Since then, the general principles applicable to the interpretative process have been restated in a plethora of cases. Although the objective meaning of a provision is determined both with reference to its language and in the light of its factual context, the 'inevitable point of departure' is the language of the provision.[4] In *Natal Joint Municipality Pension Fund v Endumeni Municipality*,[5] this Court stated that regard must be had to the language used, viewed in context. In *Novartis v Maphil*,[6] the position was restated as follows:

'. . . This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.'[7]

[16] With those principles in mind, I turn now to consider the relevant provisions of the agreement in the light of the agreement as a whole and in the light of all relevant

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[3] J H Wigmore, *Evidence* 3 ed (1940) at 2425; *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) 26A-C. Also *see Venter v Birchhotlz* 1972 (1) SA 276 (A) at 282.

[4] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC) para 128.

[5] *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593.

[6] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27.

[7] Ibid para 27.

circumstances.[8] Counsel for the Trust submitted that the manner in which the parties conducted themselves after the conclusion of the contract should be accepted as part of the surrounding circumstances from which the true intention of the parties can be established. It is true that a Court can, when interpreting a contract, have regard to the parties' subsequent conduct in order to determine what they intended.[9] This Court has, however, made it clear that the use of such evidence is circumscribed. It laid down that such evidence may be accepted subject to three provisos. First, the evidence must be indicative of a common understanding of the terms and meaning of the contract. Second, the evidence may be used as an aid to interpretation and not to alter the words used by the parties. Third, that evidence must be used as conservatively as possible.[10]

[17] The evidence we were urged to take into account as evidence of subsequent conduct related to the reconciliation statements submitted monthly to the Trust in accordance with clause 4.2 of the agreement. The Trust made much of the fact that in the statements in question, the amounts paid by Middleground were referred to as 'rental'. On the other hand, Middleground contended that the fact that the amounts paid to the Trust had always been reflected as credits in the reconciliation statements was an indication that the amounts in question constituted prepayments for the peat and not rental. Middleground urged us to take special note of the fact that during the initial ten months when prior to it starting with its business activities for the extraction of peat, the reconciliation statements it had submitted showed that the amounts that were paid for those months had increased cumulatively culminating in a credit of R150 000.00, as opposed to being appropriated monthly, without being carried forward as a cumulative total as one would expect with rentals paid for the use of leased property in a conventional lease of immovable property.

[18] Another argument relied upon by the Middleground was that Mr Kruger had confirmed that in the months where less than 600 cubic metres of peat was removed, a credit for the difference was given to Middleground. These arguments were borne out by the reconciliation statements that Middleground prepared and submitted to the

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[8] *Natal Joint Municipality Pension Fund v Endumeni Municipality*, note 5 above, para 24.
[9] *Urban Hip Hotels (Pty) Ltd v K Carrim Commercial Properties (Pty) Ltd* [2016] ZASCA 173 para 21.
[10] Ibid.

Trust, which the Trust never queried. The Trust contended that Mr Kruger had in his evidence, pointed out that he questioned Mr Fourie about the credits reflected in the reconciliation statements, as it was not reflective of the true intention of the parties. According to him, Mr Fourie had explained that the payments were reflected as a credit purely for purposes of deriving a book-keeping advantage for Middleground. He had accommodated Middleground in that arrangement purely for the sake of maintaining good relations. It appears that the parties did not have a clear common understanding on this aspect and therefore did not satisfy the first proviso set out in the *Urban Hip Hotels* judgment.

[19] The Trust also sought to place reliance on the correspondence it had sent to Middleground, claiming arrear rental. In its response, Middleground had not disputed the existence of the lease but made certain proposals for the Trust's consideration. The Trust contended that the correspondence exchanged between the parties was indicative of both parties' understanding that the agreement they had concluded was a lease. It is clear from the record that the correspondence in question was sent in the midst of legal steps the parties were taking to challenge the Compliance Notice. According to Mr Fourie, the correspondence was exchanged with a view to a settlement of all disputes between the parties. Notably, Middleground had also sent a letter to the Trust pointing out that it was far ahead with its payments. Clearly, the evidence pertaining to the amounts reflected as a credit and the correspondence exchanged between the parties by no means established that the conduct of Middleground was consistent only with the nature of the agreement being a lease. The threshold laid down in *Urban Hip Hotels* for the acceptance of evidence of subsequent conduct as part of the surrounding circumstances was therefore not met.

[20] It was contended on behalf of the Trust that the very fact that Middleground had not filed a counterclaim reclaiming the amount that it regarded as the remaining prepayment was a clear indication that the agreement the parties had in mind was an ordinary lease agreement, with the amounts paid constituting rental due. It is not for this court to descend into the realm of speculation regarding the reasons behind Middleground not filing a counterclaim against the Trust in respect of the amounts it considered to have been pre-paid for the period during which peat was not extracted. There could be a variety of reasons why it chose not to do so, other than that sought

to be inferred. What is clear from Middleground's amended plea is that not only did it deny indebtedness to the Trust in the amount claimed, but it also pleaded its entitlement to a credit in the amount of R228 918.38 in relation to amounts paid in advance. The non-filing of a counterclaim is therefore of no moment.

[21] It is now convenient to consider the true nature of the agreement concluded by the parties, on the basis of the principles mentioned earlier in the judgment. Much was made of the fact that the agreement was expressly described as one of 'letting and hiring' ('huur en verhuur') and that the minimum monthly payment payable by Middleground to the Trust was referred to as 'rental' ('huur') in the agreement and in the reconciliation statements that were prepared by Middleground. According to the Trust, the amount of R15 000.00 payable per month constituted a rental obligation. It was contended on behalf of the Trust that Middleground had to occupy the property in order to extract the peat and that without the use and enjoyment of the property, it would not have been able to do so. The agreement could therefore not exist without the lease element, so the argument went.

[22] It is well-established that the label attached to an agreement is not, of itself, determinative of its character. It is the nature of the performance agreed upon by the parties that determines its true nature.[11] I agree with the Trust's contention that the agreement had a lease element because Middleground had to have access to the property in order to extract the peat. However, that is not, by and of itself, a conclusive indicator that the parties entered into a lease agreement. Access to the property was simply an incident of its right to prospect and mine for and harvest peat. It is trite that a Court tasked with interpreting an agreement must consider the interrelation between the provisions that are in issue and the rest of the document.[12]

[23] As correctly pointed out in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*,[13] every contract must be given a commercially sensible

[11] F du Bois *Wille's Principles of South African Law* 9 ed (2007) at 740; *Ferndale Crossroads Share Block (Pty) Ltd and Others v City of Johannesburg Metropolitan Municipality and Others* [2010] ZASCA 126; 2011 (1) SA 24 (SCA) para 14.
[12] *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13.
[13] Ibid.

meaning. Where more than one meaning is possible, a sensible meaning should be preferred to one that leads to 'insensible or unbusinesslike results, or one that undermines the apparent purpose'.[14] Considering the terms of the agreement as a whole, it is evident that various provisions thereof tend to show that the lease element was of less significance. The property in respect of which the rights had been granted was described as marshland, with the remaining area being for activities ancillary to peat extraction.[15] Furthermore, the agreement expressly provided that the property in question made available to Middleground *solely* for prospecting, mining and harvesting of peat.[16]

[24] While clause 4.1 characterised the minimum monthly payment of the sum of R15 000.00 as rental, clause 4.2 categorically stated that the same amount was in respect of both the rental *and* the granting of the right to extract peat from the property.[17] In the same clause, the same amount was described as a 'prepayment' for the peat to be extracted, calculable at R25.00 per cubic metre.[18] Whereas it was contended on behalf of the Trust that the minimum monthly payment of R15 000.00 pertained to the lease component of the agreement, it is clear from the computation stipulated in clause 4.1 and 4.2, that the entire sum of R15 000.00 payable monthly was linked to the actual quantity or volume of peat to be extracted. Thus, the prepayment mentioned in clause 4.2 was not a prepayment of rental within the contemplation of a common law lease, but constituted a prepayment of the consideration payable for peat.

[25] In addition to the above, clause 4.3 recorded that Middleground would compensate ('vergoed') the Trust for the peat extracted, that the amount of R15 000 would be set off against the amount due to the Trust in respect of the peat actually extracted, and that Middleground would be responsible for reconciling the accounts every month. Interpreted in the context of the whole agreement, it is clear that

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[14] *Endumeni Municipality*, note 5 above para 18.
[15] Clause 1.3 of the agreement.
[16] Clause 2.2 of the agreement.
[17] In clause 4.2, even though the minimum monthly amount is identified as being *'vir die huur van die eiendom',* it is specifically stipulated that it 'is 'n vooruitbetaling van die bedrag van die betaling van R25-00 / m3 (R25 per kubieke meter) (plus BTW indien van toepassing), vir die Veen wat per maand deur [Middleground] verwyder is.'
[18] Clause 4.2 of the agreement.

clause 4.3 provides for the payment of a monthly amount of R15 000.00 as a prepayment for peat to be extracted on the property on the express understanding that the prepayment of the R15 000.00 for the peat would be taken into account against the amount owing to the Trust for peat extracted in terms of the agreement. Similarly, where less peat than the specified volume of 600 cubic metres was extracted, this was factored in as a credit when reconciling the accounts. The payments would later be reconciled with the value of the peat actually extracted. I agree with the contention made on behalf of Middleground, that this is an aspect that is irreconcilable with a common law lease. It seems to me that the lease element was merely aimed at entitling Middleground to access the property to do whatever was reasonably necessary to mine for peat. Granting a party access to property in order to enable it to access property for purposes of attaining its ultimate goal of mining is not a characteristic that is found exclusively in lease agreements and cannot, without more, justify the characterisation of the agreement as a lease.[19]

[26] Another relevant provision is clause 3.4.2, which entitles Middleground to cancel the agreement if the peat resources were depleted and peat could no longer be harvested. This is another feature that is irreconcilable with a lease agreement, as a lessee ordinarily has no right to take any of the substance of the leased property[20] or dispose of the property (*ius abutendi*) but only has the right to enjoy it (*ius fruendi*) and the right to use it (*ius utendi*).[21] The *ius abutendi* has been considered to be a principal feature of the right to mine.[22] The fact that Middleground was granted the right to cancel the agreement when the peat was depleted is, in my view, the clearest indication that the parties regarded the extraction of peat as the substratum of the agreement. I am persuaded that a businesslike consideration of all the provisions of the agreement and the surrounding circumstances reveals that the dominant right conferred in the parties' agreement is not a lease, but the *ius abutendi*.[23] Thus, on a proper construction of the parties' agreement, the inescapable inference is that the minimum monthly payment was not rental but constituted a prepayment in respect of

[19] Clause 1.3 of the agreement. Also see note 6 above.
[20] F du Bois *Wille's Principles of South African Law* 9 ed (2007) at 907.
[21] See *Neebe v Registrar of Mining Rights* 1902 TS 65; Ex Parte *Lanham's Executors* 1908 TS 330.
[22] See *Drymiotis v Du Toit* 1969 (1) SA 631 (T); [1969] 2 All SA 158 (T) at 633A-B. *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at 363H-I.
[23]Compare *Bozzone and Others v Secretary for Inland Revenue* 1975 (4) SA 579 (A) at 586.

peat, which would be taken into account and reflected in the reconciliation statements on a monthly basis.

[27] In the light of my aforesaid conclusion, it is not strictly necessary to consider whether Middleground was justified in asking this Court to import its suggested tacit term into the agreement. I, however, deal briefly with the argument simply in the interest of completeness. 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.[24] It is trite that 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.[25] Before a court can infer a tacit term, it must be satisfied, on a reasonable and businesslike consideration 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.[26] In *Wilkins NO v Voges*,[27] this Court pointed out that, since it can be assumed that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy.

[28] The tacit term proposed by Middleground is that the minimum monthly payments were payable only for so long as Middleground was able legitimately to carry out the peat extraction activities. This proposed tacit term is fully compatible with the express terms of the agreement and the surrounding circumstances. It is a term that will render the parties' agreement fully functional.[28] It is plain that it could never have been envisaged that Middleground would be expected to pay for the peat that it did not extract. Middleground has thus established a basis for the importation of the tacit term it proposed. For that reason too the appeal must fail.

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[24] *City Of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO* 2006 (3) SA 488 (SCA).
[25] *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H – 137B.
[26] *Alfred Mcalpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A); [1974] 3 All SA 497 (A) at 532-533.
[27] *Wilkins NO v Voges* 1994 (3) SA 130 (A); [1994] 2 All SA 349 (A) at 136H – 137B.
[28] Ibid.

[29] The Trust asserted that even if that tacit term could be imported, it would not apply where Middleground's inability to legitimately carry out its peat extraction activities 'was brought about by [Middleground's] failure to comply with the then existing permit and/or authorisations and/or legislation' in the course of its business activities. In the succeeding paragraphs, I show that this assertion is devoid of any merit.

[30] It is common cause that the cessation of the extraction of peat was on account of a Compliance Notice issued by the Department not only against Middleground but also against the Trust and Stander Veen. One of the reasons proffered by the Department for the issuance of the Compliance Notice was that Middleground was not entitled to extract peat under the authorisation granted by it to Stander Veen. It was also of the view that the problem with the extraction of peat was 'peat extraction as a whole'. It is of significance that the Trust had expressly exonerated Middleground from any culpability, both in relation to compliance with the applicable authorisations and the method of extracting peat. This is apparent from the representations jointly made by Middleground, the Trust and Stander Veen in response to the pre-notice issued against the three entities, which are recorded in the Compliance Notice. The three entities had taken the same stance when they, in a joint objection lodged against the issuance of the Compliance Notice, collectively refuted all the allegations of fault.

[31] As stated before, during 2013, Middleground filed an application for review against the Department and several other respondents. The Trust was cited as one of those respondents. In its founding affidavit, Middleground made several exculpatory averments in response to the allegations made in the Compliance Notice. Insofar as the Trust did not file an affidavit denying the correctness of Middleground's assertions, it has made common cause with its denials. Against these exculpatory statements jointly made by the Trust, Stander Veen and Middleground, the submissions attributing fault to Middleground amounts to a vacillation on the part of the Trust on this important issue.

[32] In any event, regardless of any non-compliance that may have been attributable to Middleground in relation to authorisation, it is clear from the following provisions of

the Compliance Notice that the Department, having received complaints about the impact of peat harvesting on water quality, was opposed to peat extraction per se:

'12.2. You claim that an official from the DAFF "created a legitimate expectation. . . that . . . the flotation method was sanctioned by the State and would hold no adverse consequences for our clients . . . ". The [Department] will hasten to remind you that the problem with the extraction is not with the flotation method as such, but peat extraction as a whole (particularly where this is unlawful), whether by flotation or any other method;

. . .

12.5.4 "Alterations to wetlands such as the removal of peat may not only cause changes in the structural, biological and physico-chemical properties of the system, but may also affect the functionality of the system. . ."

. . .

16.7.1 The excavation of the peat and the manner in which it has taken place has exceeded the capacity of the peatland to recover and has therefore resulted in degradation to the degree that the peatland has been destroyed . . . ."
16.7.3 "Research has indicated that recovery of a peatland impacted to this degree is, for all practical purposes, impossible . . . ."

[33] It is the afore-mentioned attitude expressed by the Department that forms the basis of Middleground's plea that it was not liable to continue with the prepayments for peat on account of *vis major* of a permanent nature. It is trite that where performance of an obligation by a party to an agreement becomes impossible after the conclusion of the agreement, that party is discharged from liability if it was prevented from performing its obligation by *vis major,*[29] but not if the impossibility was due to its own fault.[30] In this matter, the parties expressly stipulated that Middleground would be discharged from its obligations if the *vis major* was of a permanent nature.[31] It was contended on behalf of the Trust that Middleground could, in any event, not avail itself of that defence, as the prohibition against the extraction of peat was a consequence of Middleground's fault due to its non-compliance with applicable authorisations and prescribed methods of extracting peat.

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[29] W E Cooper *Landlord and Tenant* 2 ed (1994) at 201 defines *vis major* as a superior power or force which cannot be resisted or controlled.
[30] F du Bois *Wille's Principles of South African Law* 9 ed (2007) at 849.
[31] Clause 3.6 of the agreement.

[34] It was contended on behalf of the Trust that the mere issuance of the Compliance Notice did not constitute a permanent impossibility of performance contemplated in the parties' agreement as the leased property remained suitable for the purpose it was leased. It was further contended that the fact that Middleground was not allowed to harvest and remove peat pending the setting aside of the Compliance Notice had no impact on the suitability of the property for the purpose it was leased. In my view, this contention holds no water, as it fails to take into account that the property was intended solely for the extraction of peat.

[35] It is clear from various clauses of the Compliance Notice, mentioned earlier in the judgment, that the Department seemed implacably opposed to peat mining at the peatland situated on the Trust's property. Not only were the parties ordered to stop with the extraction of peat forthwith, but they were also ordered to remove all the machinery and implements used for the extraction of peat from the premises. They were also ordered to barricade the premises to prevent access thereto. As the Compliance Notice was a directive that was issued in terms of various statutory provisions, it constituted administrative action and would therefore remain in force until set aside.[32] These were objective facts that showed that the performance of Middleground's obligations was impossible.

[36] It was further contended that an expeditious recourse to the courts to set aside the Compliance Notice would probably have resulted in the resumption of the extraction of peat. I am unable to attribute any tardiness to Middleground in the processes it followed. Clearly, the matter was entirely out of Middleground's hands until at least July 2013, when the Minister declined the internal appeal. Middleground could not have approached the Court again without the final outcome of the appeal. Sight must not be lost of the fact that the Trust was, all along, one of the parties against whom the Compliance Notice was issued. It was part and parcel of the appeal that was lodged. If there was any way of expediting the outcome, then that avenue was equally available to the Trust. Subsequent to July 2013, the only option open to

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[32] See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA) at 242A-C.

Middleground was to seek to review and set aside the Compliance Notice and the Minister's appeal decision.

[37] The Trust considered the application for review to be a ruse as Middleground had indicated that it no longer intended harvesting peat on the property. In his evidence, Fourie indicated that Middleground was still pursuing the application in respect of the findings imputing fault to it and the order prescribing remedial steps that it must take. In Middleground's founding affidavit in support of the application for review, Fourie as the deponent, explained that Middleground's decision not to continue extracting peat was 'a practical and commercial decision', bearing in mind that Middleground had 'immobilised its operations fully' and that the contract would terminate by effluxion of time in September 2014. All things considered, the explanation proffered by Middleground is reasonable.

[38] The Trust contended that Middleground had been tardy in launching the application for review, as it was only launched 9 months after the dismissal of the internal appeal. In the founding affidavit supporting the application for review, Fourie pointed out that the delay in launching that application was partially caused by the fact that Middleground received the outcome of the appeal belatedly. It thereafter had to have various consultations with counsel in order to chart the way forward. When Middleground launched the application for review, it simultaneously asked for an order condoning the late filing of its application. Notably, the Trust did not oppose that application. Its criticism pertaining to tardiness is therefore misplaced. In any event, I am inclined to agree with the High Court's finding that the stance taken by the Department with regards to peat extraction as a whole made it highly unlikely that litigation in the courts would have been finalised before the contract expired at the end of September 2014.

[39] Considering all the circumstances set out in the foregoing paragraphs, I am persuaded that Middleground has discharged the onus of showing that the supervening impossibility was of a permanent nature and that it was in no way attributable to its fault. The High Court cannot be faulted for any of its findings. It follows that the appeal must fail.

[40] The appeal is dismissed with costs.

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MOLEMELA JA

JUDGE OF APPEAL

Appearances

For appellant:	L W De Koning SC
Instructed by:	Robert Schoeman Attorney
	c/o Van Schalkwyk Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For respondents:	B H Swart SC
Instructed by:	Japie van Zyl Attorneys
	c/o Couzyn, Hertzog & Horak, Pretoria
	Symington De Kok Attorneys, Bloemfontein