THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-Reportable

Case no: 262/2018

In the matter between:

M VISAGIE & ASSOCIATES CC **FIRST APPELLANT**

MULLARD HAMLET VISAGIE **SECOND APPELLANT**

and

SMALL ENTERPRISE FINANCE AGENCY LTD **RESPONDENT**

Neutral citation: *Visagie & Associates CC & another v Small Enterprise Finance Agency Ltd* (262/2018) [2019] ZASCA 32 (28 March 2019)

Bench: Majiedt, Swain, Zondi and Mocumie JJA and Rogers AJA

Heard: 04 March 2019

Delivered: 28 March 2019

Summary: Law of Contract – whether terms of lease tacitly relocated into settlement agreement.

ORDER

On appeal from: Western Cape Division, Cape Town (Ndita and Boqwana JJ sitting as court of appeal):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

'The appeal is upheld with costs. The order of the Magistrate's Court, Kuilsrivier, is set aside and substituted with the following:

"The application is dismissed with costs"'.

JUDGMENT

Mocumie JA (Majiedt, Swain and Zondi JJA and Rogers AJA concurring):

[1] This appeal concerns the alleged breach of the terms of a settlement agreement. Related thereto, is the question whether the terms of an earlier lease agreement had been tacitly relocated into the settlement agreement. The appeal, which is before us with the special leave of this court, is directed against the judgment and order of the Full Bench of the Western Cape High Court, Cape Town (Ndita and Boqwana JJ) (the high court). The high court dismissed an appeal against an order of the Magistrate's Court, Kuilsrivier, upholding a claim by the respondent, Small Enterprise Finance Agency Ltd. The respondent sought judgment in terms of Magistrate's Court Rule 27(9) in respect of the alleged non-fulfilment of the terms of a settlement agreement against the appellants, M Visagie & Associates CC and Mr Mullard Hamlet Visagie.

[2] The first appellant, the first defendant in the magistrate's court, had leased premises from Business Partners Ltd, which sold the premises to Khula Enterprise

Finance Ltd, which later changed its name to Small Enterprise Finance Agency Ltd, the present respondent. The second appellant – the sole member of the first appellant – had bound himself as surety and co-principal debtor for the due and proper fulfilment of the obligations of the first appellant. The lease agreement was concluded on 16 July 2001 and endured from 1 July 2001 until 30 June 2004 when it expired by the effluxion of time. In terms thereof, monthly rental of R503.36 for the first year, R553.70 for the second year and R609.07 for the third year was payable. The rentals were payable monthly in advance by the first working day of each calendar month.

[3] It is common cause that after the expiry of the initial lease period, the first appellant remained in occupation and the lease agreement continued on a month to month basis. The first appellant fell into arrears with the payment of the rental which led the respondent to cancel the agreement in an email dated 30 September 2013 which reads:

'[Y]our client did in fact have a lease agreement with the landlord, which had expired and he was unwilling to renew…

We therefore reject his offer and have no alternative but to give your client 30 days' notice to vacate on 31 October 2013.'

[4] On 28 January 2014 the respondent instituted legal action against the appellants in which it claimed, amongst others, confirmation of the cancellation of the lease agreement and payment of the amount of arrear rental. In their plea, the appellants admitted that they were bound by the terms of the lease agreement. However, they denied that they had breached any of its terms. The appellants filed a counterclaim in which they sought payment of the sum of R80 000 for unjust enrichment arising from improvements which they alleged they had effected to the leased premises.

[5] On the date of trial, 18 July 2016, the parties settled the matter on certain terms which they embodied in a settlement agreement. The settlement agreement was made an order of court. Its salient terms were as follows. The respondent withdrew its claim and in turn the appellants withdrew their counterclaim based on unjust enrichment. The appellants agreed to pay the respondent's legal costs as from December 2013 up to 18

July 2016 and to vacate the premises by 30 September 2016. The scale on which the costs were to be paid, was not specified.

[6] Clause 10 of the settlement agreement provides:

'As the rental claim until May 2016 is hereby settled (the claim currently before the court), the [appellants] will pay all rental due and payable as from June 2016, until they vacate the leased premises'

Clause 12 states:

'Should the [appellants] fail to make payment herein or fail to make payment *timeously* and in accordance with the terms set out in clauses 1 to [11] … then and in such event:

12.1 The full balance of the debt will immediately become due and payable;

12.2 The [appellants] agree that the [respondent] shall immediately become entitled to obtain judgment against the [appellants] for the full balance of the debt, which will be calculated as follows' (Emphasis added.)

Clause 17 provides as follows:

'Notwithstanding anything contained herein, the [appellants] hereby agree and acknowledge that this Settlement Agreement shall not constitute a novation of the [respondent's] claim against the [appellants] and is merely the confirmation of an existing debt.'

[7] The respondent, asserting that the appellants were in breach of the settlement agreement, invoked the provisions of clause 12 and applied for judgment to be entered against the appellants in terms of rule 27(9).[1] It was common cause that, subsequent to the conclusion of the settlement agreement, rentals were paid as follows:

(a) the July rental was paid on 4 July 2016;

(b) the August rental was paid on 11 August 2016; and

(c) the September rental was paid on 2 September 2016.

These payments were accepted by respondent without demur.

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[1] Rule 27(9) of the Magistrates Court Act stipulates:

'(a) When the terms of a settlement agreement which was recorded in terms of sub-rule (6) provide for the future fulfilment by any party of stated conditions and such conditions have not been complied with by the party concerned, the other party may at any time on notice to all interested parties apply for the entry of judgment in terms of the settlement.

(b) An application referred to in this sub-rule shall be on notice to the party alleged to be in default, setting forth particulars of the breach by the respondent of the terms of settlement.'

[8] The appellants opposed the application. They contended that all rental payments were made, the last one on 2 September, prior to the date on which they were to vacate the leased premises. The appellants further contended that payments were tendered every month. They were not in arrears. They contended also that since the settlement agreement did not specify by when monthly payments had to be made, nor the scale of the costs, the payments they made were timeous. The appellants refused to pay costs on the attorney and client scale. Costs thus had to be paid on the party and party scale and not the attorney and client scale as the respondent demanded.

[9] The magistrate's court found that the failure of the appellants to pay the rental amounts monthly in advance on or before the first working day of each calendar month constituted a breach of the settlement agreement. This conclusion was based on its finding that the terms of the lease agreement, more particularly in respect of the date when rentals had to be paid, had been tacitly relocated into the settlement agreement.

[10] It held further that, as a consequence of the breach, the provisions of clause 12 applied and granted judgment against the respondents with costs on an attorney and client scale. The appellants appealed against the judgment of the magistrates' court to the high court. The high court dismissed the appeal. In dismissing the appeal, the high court found that:

'The only inference that can be drawn from the settlement agreement and the surrounding facts is that at the time the settlement agreement was concluded, the parties were of the same mind that the appellants occupied the leased premises on the terms contained in the written lease agreement. It is not unreasonable to conclude that the settlement agreement was agreed upon on that basis. The appellants and the respondent's imputed intention was that the terms of the written lease agreement would apply to regulate the former's obligation to pay rent for the period they would continue to lease the leased premises from the respondent under the terms of the settlement agreement.'

In conclusion it held 'the parties intended to relocate the terms of the lease agreement. It follows that the appellants were in arrears as payment was not tendered timeously and in accordance with the terms of the lease agreement.' It awarded costs on an attorney and client scale on the basis of the provisions of clause 12.2.3 and 13 of the settlement agreement.

[11] In this court, it was common cause that the settlement agreement was a product of a negotiated settlement between the parties. It is clear from the language and text of the agreement that it was meant to be final and inclusive of all the issues that related to the *lis*. It was further common cause that:

(a) the settlement agreement contains no express terms as to when payments had to be made;

(b) all the rentals were paid but the payments were made after the first day of the month; and

(c) that at the time of the settlement of the matter, the appellants had paid up all the arrears that were not compromised by the agreement.

The issue and legal principles

[12] The central issue is whether the terms of the lease agreement had been tacitly relocated into the settlement agreement. If so, the rentals had to be paid monthly in advance by the first working day of each month. Failure to do so would trigger the provisions of clause 12, outlined above. It is well established that a tacit term is 'an unexpressed provision of the contract which derives from the intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances.[2] A court will be slow to import a tacit term into a written contract.[3]

[13] In *Wilkins* this court said:

'A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. *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. The practical test for determining what the parties would*

[2] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H.
[3] *Wilkins v Voges* 1994 (3) SA 130 (A) at 136–137.

necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume 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; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional. The above propositions, all in point, are established by or follow from numerous decisions of our courts.[4] (Emphasis added; authorities omitted.)

[14] As the appeal revolves around the interpretation of a court order - the settlement agreement and its relevant clauses – we must apply the approach to interpretation of contracts and legislation, outlined in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [5], and *Novartis v Maphil.*[6]

[15] As stated, in respect of the central issue, regard must be had to the express terms of the settlement agreement, the surrounding circumstances at the time of the conclusion of the settlement agreement and the conduct of the parties post the conclusion of the settlement agreement. The starting point is the express terms of the settlement agreement: one must determine whether, in view of its express terms, there is any room for importing the alleged tacit term.[7] The express terms of the settlement agreement are neutral with regard to the relocation of the original lease agreement. And it also contains no express term from which any inference can be drawn.

[16] The relevant surrounding circumstances are the following. At the time of the conclusion of the settlement agreement there was a history of repeated non-payment of rental by the appellants. The respondent refused to renew the lease agreement after the appellants had continued to occupy the leased premises without paying rental as proposed by the respondent after it acquired ownership from the previous owner. In fact, despite this failure by the appellants to pay rental timeously, the respondent accepted late

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[4] *Wilkins v Voges* 1994 (3) SA 130 (A) at 136 H– 37D. The judgment has been cited with approval by this court in subsequent cases. See *Jacobs NO v Braaff* [2006] ZASCA 115; [2007] 4 All SA 966 (SCA) para 20.
[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA).
[6].*Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518; [2015] 4 All SA 417 (SCA).
[7] *Pan American World Airways Inc v S A Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175C.

payments without raising the issue that it was entitled to cancel the lease agreement as provided for in the original lease agreement. Negotiations between the parties failed as the email dated 30 September 2013, referred to in para 3 above, shows. There was resultant acrimony between the parties. By the time the settlement agreement was concluded and made an order of court on 18 July 2016, the June and July rentals had been paid, but in neither case by the first day of the month in question (the June rent was paid on 8 June, the July rent on 4 July). Considering the acrimony between the parties whether or not rental was paid on the first day of each month was not important to the respondent. All the respondent wanted was to see the first appellant vacate the leased premises. A factor of some importance is that the respondent received payments after the first working day of the month, particularly in respect of August 2016, without protest (the August rent was paid on 11 August). The respondent took no action for about a month in respect of the 'late' August payment. A delay in asserting rights which allegedly emanate from a tacit term has a direct bearing on the probabilities. (see *Wilkins v Voges* above, at 143B-D). The parties' email exchanges show that the dispute arose not because of alleged late payments, but due to their different views on the scale on which the costs would be payable by the appellants.

[17] Viewed in its proper contextual setting and bearing in mind the surrounding circumstances, the settlement agreement plainly intended to achieve two important objects as far as the respondent was concerned:

(a) First, it enabled the forbearing respondent to get its rentals for the period June-September 2016 and to have the first appellant vacate the premises by the end of September 2016, clearly an important consideration for the respondent; and

(b) Secondly, the unjust enrichment claim by the appellants, which lingered in the background, would be withdrawn.

Since insistence that rental payments be made by the first day of each month (something which had not historically occurred) may have jeopardized the achievement of these objects, one cannot find on a balance of probability that the respondent would have held out for this strict term. That is why it was evidently content to receive payments later in the month without objection. As stated, its subsequent discontent originated from the dispute about the scale of the costs to be paid.

[18] Having regard to the surrounding circumstances and the conduct of the parties at the time of the conclusion of the settlement agreement and subsequently, I am not satisfied that the respondent discharged the burden of proving a tacit term that 'timeous' payment referred to in clause 12 means the first working day of the month. This is so taking into consideration that even when the parties concluded the settlement agreement, the respondent did so when the appellants had already been 'late' in paying the rentals for June and July and in a sense waived those arrears. It also accepted late payment despite the clear language of the forfeiture clause under clause 12. Put differently, if the officious bystander had asked the parties, when they concluded their settlement, by what date the rent would have to be paid, it is not more probable than not that they would both have promptly answered, 'By the first day of each month'. There may have been some discussion, with the respondent being willing to receive the rent at any time before the appellants vacated on 30 September 2016.

[19] Since the respondent failed to prove a tacit term, one must consider what term the law would imply in the absence of consensus. In *Kerr's Law of Sale and Lease*,[8] Professor Glove adopts the view, correctly so, that absent an express provision as to when rental should be paid i.e. in advance or in arrears, the common law applies, namely that rental is payable in arrears after the lessor has fulfilled its obligation, i.e. after the lease had come to an end or after the end of each period in the case of a periodical lease.[9] In this case the lease was a monthly one and the rental was therefore payable on the last day of the month, alternatively at the end of the lease period, namely the date on which the appellants had undertaken to vacate the leased premises, 30 September 2016. From the respondent's conduct it has to be inferred that the fact that rental was paid late for the outstanding months is of no significance in the scheme of things – as long as all arrears would have been paid up by the time the appellants vacated the leased premises on the date agreed upon.

[20] As stated, the respondent made an about turn after the conclusion of the settlement agreement. When the settlement agreement was concluded the appellants

[8] G Glove *Kerr's Law of Sale and Lease* (4 ed) (2014) at 427-428 and cases cited therein.
[9] Ibid.

were not required to pay the full outstanding balance of the rental. They agreed to pay the rental for June-September 2016 and to vacate the premises by 30 September 2016. They paid such rental. They undertook to pay the respondent's costs of the action which had been settled. The scale of the costs was not stipulated in the settlement agreement, which meant that the ordinary party and party scale applied. The costs which the respondent demanded from the appellants subsequently amounted to R134 217.82 which were owed in respect of a trial which never ran and which was clearly calculated on the attorney and client scale. This demand precipitated the present dispute. As stated, the respondent's delayed invocation of the clause 12 forfeiture provisions, in respect of the 'late' payments, is telling as far as the probabilities are concerned.

[21] In sum, the respondent failed in my view to discharge the onus of proving that the terms of the original lease agreement as to when rental payments had to be made, were tacitly relocated into the settlement agreement. The surrounding circumstances and the parties' subsequent conduct are at best for the respondent equivocal. The respondent was not entitled to invoke the forfeiture provisions in clause 12, since there had been no breach by the appellant. For these reasons the appeal must succeed.

[22] In the result the following order is granted:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

'The appeal is upheld with costs. The order of the Magistrate's Court, Kuilsrivier, is set aside and substituted with the following:

"The application is dismissed with costs"'.

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B C Mocumie

Judge of Appeal

APPEARANCES

For Appellant:	P J Tredoux
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For Respondent:	J B Engelbrecht
	Instructed by: Gideon Pretorius Inc., Bellville Symington & de Kok, Bloemfontein