THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 624/10

In the matter between:

ASHCOR SECUNDA (PTY) LTD **Appellant**

and

SASOL SYNTHETIC FUELS (PTY) LTD **Respondent**

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

Bench: **BRAND, PONNAN, CACHALIA, SHONGWE JJA and PLASKET AJA**

Heard: **1 SEPTEMBER 2011**

Delivered: **28 SEPTEMBER 2011**

Corrected:

Summary: **Contract – interpretation of - one party's repudiation may entitle the other party to withhold performance - distinction between implied and tacit terms – no room for importing implied or tacit terms in conflict with terms that the parties have expressly agreed upon.**

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Claasen J sitting as court of first instance).

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

PONNAN JA (BRAND, CACHALIA, SHONGWE JJA and PLASKET AJA concurring):

[1] Fly-ash is a pozzolan that reacts with water and lime to form a cementitious material. It enhances the properties of mortars and concretes resulting in significant improvements to the mix, strength and durability of the end product. The respondent, Sasol Synthetic Fuels (Pty) Ltd (Sasol), manufactures synthetic fuel from coal. As part of its synthetic fuel production process Sasol operates a series of coal-fired boilers in Secunda to generate its own electricity. A by-product of that coal burning process is fly-ash. To prevent its emission into the atmosphere, Sasol initially caused the fly-ash to pass over a series of electro-magnetically charged plates. Those plates were vibrated periodically causing the fly-ash to fall into fields of hoppers — massive bins. Those bins converged into four-sided funnels, where the ash accumulated. From there it was extracted by a system known as the hydro-vac system - water was used to create a vacuum to suction the ash out of the hoppers. The ash, once extracted, was carried mixed with the water to waste sites. But that proved to be an expensive and environmentally hazardous process. And so Sasol chose in addition to implement an

alternative fly-ash extraction system known as the Fly-Ash Plant (FAP). It consisted of a blower system and two nitrogen systems connected in the fields for three of the boilers. That system enabled the fly-ash to be extracted and stored in silos for commercial exploitation.

[2] The appellant, Ashcor Secunda (Pty) Ltd (Ashcor) sought to commercially exploit the fly-ash extracted via the FAP. To that end it concluded a written agreement with Sasol, which, to the extent here relevant, provided:

'1. LEASE PERIOD

This lease shall take effect 30 days after the Fly Ash Recover Plant is repaired and made operational. The lease period shall continue for a period of 4 (four) years and 11 (eleven) months.

. . .

2. RENTAL

2.1 ASHCOR shall pay SASOL rental in the amount of R20 000 (VAT excluded) per month. VAT is to be paid by ASHCOR. Rental shall be inclusive of water, electricity and nitrogen. SASOL reserves the right to review the supply of said commodities in the event of extension of ASHCOR's activities on the premises. SASOL furthermore reserves the right to review the monthly rental amount in the event that it costs SASOL in excess of R150 000 to make the Fly Ash Plant operational.

. . .

3. USE OF PREMISES

3.1 ASHCOR shall use the premises only for the operation of a Fly Ash Plant and for the purpose for which it was designed and for no other purpose, without the written consent of SASOL. Operation of the PREMISES shall be conducted in strict accordance with SASOL's requirements. The Fly Ash Plant is coupled to Boilers 7, 8 and 9 and fly ash shall only b[e] drawn from these three boilers.

. . .

5. GUARANTEES

5.1 SASOL does not guarantee that the PREMISES are suitable for the use indicated in clause 3.1 and shall not be responsible to ensure that said PREMISES become suitable for the use indicated in said clause.

5.2 SASOL does not guarantee either the quantity or quality of ash produced by the Fly Ash Plant and shall not be liable in the event of said plant not rendering either the quantity or quality of ash expected by ASHCOR.

. . .

5.5 SASOL shall grant ASHCOR the period from the commencement date of this AGREEMENT until 28/02/1998 to establish the economic viability of the Fly Ash Plant, with regards to the quantity and quality of fly ash delivered by it. Economical viability is dependent on the recovery of a month average of 8 500 tons of fly ash which conforms to the EN450 and ASTM standards.

5.6 ASHCOR shall on 28/02/1998 inform SASOL, in writing, whether it intends to proceed with; or cancel the AGREEMENT, in which event a 3 (three) month's written notice must be given to SASOL.'

[3] Ashcor caused summons to be issued against Sasol for damages in the sum of R303 903 000 (alternatively R179 957 000) together with interest and costs. In it Ashcor contended that Sasol had breached the agreement in that it had failed to repair and make the FAP operational. In the alternative Ashcor alleged that as a result of an error common to the parties, both parties had signed the written agreement in the bona fide but mistaken belief that it recorded the true terms of the agreement between them. Ashcor accordingly sought an order rectifying the agreement.

[4] The matter proceeded to trial before C J Claasen J in the South Gauteng High Court. At the commencement of the trial a separation order in terms of Uniform Rule 33(4) issued by agreement between the parties. It required the resolution of all issues relating to the contractual terms and the liability and rights flowing therefrom — whatever that might mean. All other issues, including the question of damages, were postponed *sine die*. That notwithstanding, the trial, which commenced during April 2005, ran for no less than 18 court days. On 22 January 2010 and at the close of Ashcor's case the learned Judge absolved Sasol from the instance with costs.

[5] The matter is one of interpretation. A useful starting point is the following trite proposition: where the language of a contract is clear and unambiguous the court must give effect to the intention of the parties as expressed in the contract however harsh or unreasonable that may appear to be (see *Scottish Union & National Insurance Company Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465). According to the golden rule of interpretation the language in a document is to be given its

grammatical and ordinary meaning unless this would result in some absurdity or repugnancy or inconsistency with the rest of the instrument (See *Coopers and Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 767). According to Greenberg JA in *Worman v Hughes & others* 1948 (3) SA 495 (A) at 505

'It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e what their intention was as expressed in the contract. As was said by Solomon J in *van Pletsen v Henning* (1913, A.D., p 82 at p. 89): "The intention of the parties must be gathered from their language, not from what either of them may have had in mind.". . . '

[6] It follows that to the extent that evidence was adduced on that aspect of the case, it was plainly inadmissible. And to the extent that the court below relied on that evidence for its interpretation of the agreement, it erred. For, as Harms DP pointed out in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39:

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . . . Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses . . . . Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent . . . . Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" . . . . The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice.'

[7] Reverting then to the agreement. Clause 1 states: 'This lease shall take effect 30 days after the [FAP] is repaired and made operational'. It is Ashcor's case that the FAP had never been rendered operational by Sasol. That, one would have thought, on the plain language of the clause, would have been the end of the matter. But, says Ashcor, Sasol had an obligation in terms of the agreement to repair and render the FAP operational. That obligation, so the contention went, came into effect upon the signature

of the agreement and Sasol's failure to do so constituted a breach of the agreement. In my view any such obligation, if there be one, extended unconditionally to Sasol expending no more than R150 000 (clause 2.1). As Claasen J correctly observed:

'Alternatively, even if it were accepted that Sasol was burdened with the contractual obligation to render the plant operational, such duty was circumscribed by an outlay of R150 000 . . . in such circumstances Sasol complied with its contractual obligation to spend the R150 000 for rendering the plant operational. In the refusal on the part of Sasol to expend any further monies on the repair, alteration or modification of the plant would not have established a breach of contract on its part.'

[8] It was Ashcor's case that Sasol's obligation in terms of the agreement was not limited to R150 000. Even were that to be so, any such obligation as Sasol may have had to perform beyond the R150 000 threshold, was conditional upon its exercise of a right to review the monthly rental. It was common cause that Sasol had spent closer to R 1 million on the plant. Clause 2.1 therefore entitled Sasol to review the monthly rental. The undisputed evidence however was that Ashcor, whilst contending that Sasol had to spend an indeterminate amount in making the FAP operational, flatly refused to pay an increased rental. In those circumstances, given Ashcor's refusal to perform, Sasol would have been entitled to withhold its performance. For, as Nienaber J stated in *Moodley & another v Moodley & another* 1990 (1) SA 427 (D) at 431C-H:

'In *Erasmus v Pienaar* (*supra* at 29 *et seq*) Ackermann J, while expressing reservations about the given reason (that an unaccepted repudiation operates as a waiver of sorts), fully endorsed the notion that the repudiation may release the aggrieved party all the same from taking measures which, in terms of the agreement, he would otherwise have been obliged to take. The Court (at 29A read with 22J) accepted the proposition (if I may be permitted to paraphrase) that the one party's repudiation, though not treated by the other as a cause for cancellation, may nevertheless (i) excuse the latter from formal acts preparatory to performance; and (ii) entitle him, in appropriate circumstances, to suspend his own performance until the guilty party has reaffirmed his willingness and ability to fulfil his side of the bargain, provided that the aggrieved party, to the knowledge of the repudiating one, remained ready, willing and able to perform his part. The appropriate circumstances would be that the aggrieved party cannot proceed without co-operation from the other or that the principle of mutuality of performance would entitle him, eventually, to withhold his own performance.

The rationale for the rule was said to be (if I may again paraphrase) that a party to a contract ought not to be allowed, by his own wrongful conduct, to advantage himself or to disadvantage his counterpart. To permit the repudiating party to take advantage of the other side's failure to do something, when that

failure is attributable to his own repudiation, is to reward him for his repudiation; conversely, it would disadvantage the other party to be obliged to make the effort and incur the expense of tendering a guarantee or of performing some other act when such a step, because of the repudiation, has become nothing but an idle gesture.'

[9] There was a further string to Ashcor's bow. In addition to the aforementioned express terms of the agreement Ashcor relied also on what it alleged were various tacit alternatively implied terms. The only one relevant for present purposes being:

'that repairing and making of the fly-ash recovery plant (meaning the fly-ash plant coupled to boilers 7, 8 and 9) operational, meant rendering it capable of recovering all the fly-ash that was produced by boilers 7, 8 and 9 and accumulated in the precipitator hoppers to which the fly-ash plant was coupled . . .'

[10] It is to that that I now turn. Terminology in this context is important. For, as Prof Kerr observes, the employment of incorrect terminology leads to conceptual confusion (A J Kerr 'Implied Provisions in Contracts: Is there to be a new role for the hypothetical bystander? Conflicting Supreme Court of Appeal decisions' 2006 *SALJ* 195). In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532G-533A Corbett JA pointed out that the significance of the distinction between implied and tacit terms is not merely academic. Corbett JA expatiated:

'The implied term . . . is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. . . The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner 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.'

[11] That we could only be dealing with a tacit term in this case is evident from the following dictum of Brand JA in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 28:

'Unlike tacit terms, which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of development of our contract law, there is no *numerus clausus* of implied terms and the courts have the inherent power to develop new implied terms. Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith . . . Once an implied term has been recognised, however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties . . . It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development.'

[12] Clause 5.1 of the agreement expressly and unambiguously disavowed an obligation on Sasol to render the FAP fit for purpose. But even were it to be accepted that 'operational' meant 'fit for design purpose', that could hardly mean able to extract all the ash, as such a construction would mean that Sasol was obliged to ensure that the FAP was capable of rendering a certain quantity of fly-ash. That though would fly in the face of the express disavowal in the agreement by Sasol of any guarantee relating to the quantity or quality of the fly-ash to be produced or rendered by the FAP (clause 5.2). Furthermore, such a construction would be irreconcilable with the 'walk away regime' created by clauses 5.5 and 5.6 of the agreement, which gave to Ashcor an exit right in the event that the FAP was assessed by it to be incapable of delivering a certain quality and monthly quantity of fly-ash.

[13] Given the express terms of the agreement there plainly can be no room for importing the alleged tacit term asserted by Ashcor. For, as Trengrove JA put it in *Robin v Guarantee Life Assurance Ltd* 1984 (4) SA 558 (A) at 567C-D:

‘A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract. As was said by Van Winsen JA in *SA Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D:

"A term is sought to be implied [a tacit term in the terminology of *Alfred McAlpine*] 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."

(See also *Pan American Airways Incorporated v SA Fire and Accident Insurance Company Ltd* 1965 (3) SA 150 (A) at 175C.)

[14] The court below accordingly correctly found that the obligation upon which Ashcor's case rested did not exist and its order absolving Sasol from the instance can therefore not be faulted.

[15] As to costs, Ashcor submits that Sasol should have excepted to its summons as failing to disclose a cause of action. Accordingly, so the submission went, Sasol should only have been entitled to costs as on exception. In *Algoa Milling Company v Arkell and Douglas* 1918 AD 145 at 159 Innes CJ stated:

'The declaration as drafted disclosed no cause of action, and should therefore have been excepted to. Had that been done, there would have been a speedy end of the litigation and the heavy costs subsequently incurred would have been unnecessary. The defendants, therefore, will be entitled to such costs in the court below as would have been incurred had they excepted to the declaration.'

But, as Greenberg JA made plain in *Cohen v Hayward* 1948 (3) SA 365 (A) at 374:

'I do not think, however, that it was the intention of the Court in the cases quoted to lay down an inflexible rule which would deprive the Court of its discretion in regard to costs and disentitle it, in a proper case, from departing from the Rule.'

[16] It bears noting here that all of the evidence that was unnecessarily led was led by Ashcor as the plaintiff. Moreover, Ashcor sought an order of rectification the effect of which would have been to radically alter the import of clause 5.2 of the agreement. As to the rectification Claasen J recorded:

'It is necessary to state that counsel for the plaintiff . . . abandoned any reliance on the pleaded rectification. He did so during argument after the close of the plaintiff's case.'

In its heads of argument filed with this court Ashcor sought to resuscitate it. But from the bar in this court, when pressed, counsel was once again constrained to abandon any reliance on rectification.

Claasen J held:

'The plaintiff's final contention that costs as on exception should be awarded to the defendant if its contentions are upheld is untenable. The defendant was unable to take exception in the face of allegations entitling the plaintiff to rectification of the contract. The abandonment of the rectification claim only occurred during final argument after the plaintiff had closed its case. The defendant cannot therefore be faulted for having failed to take exception to the causes of action as pleaded by the plaintiff.'

I can find no fault with the approach of the learned judge. Moreover, given the manner in which the case was pleaded, it would have taken a very bold judge to decide the matter on exception.

[17] It follows that the appeal must fail and it is accordingly dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M Baslion SC R S Willis Instructed by: Webber Wentzel Attorneys Johannesburg Naudes Bloemfontein
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