

SOUTH AFRICA / JUDGMENT

Huntleigh Hejsani Duncan Manufacturing (Pty) Ltd v Hejsani Wagner Investments CC (17588/04) [2005] ZAGPHC 25 (4 March 2005)

[2005] ZAGPHC 25

COURT

High Courts - Gauteng

BEFORE

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CASE / FILE NUMBER

17588/04

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IN THE HIGH COURT OF SOUTH AFRICA/ES(TRANSVAAL PROVINCIAL DIVISION)CASE NO:
17588/04DATE: 4/3/2005reportableIN THE MATTER BETWEEN:HUNTLEIGH HEJSANI
DUNCANMANUFACTURING (PTY) LTD

APPLICANTANDHEJSANI WAGNER INVESTMENTS CC

RESPONDENT010009000003bb00000006001c00000000000400000003010800050000000b02000000000
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0101001c000000fb02ceff0000000000009001000000000440001254696d6573204e657720526f6d616e0000
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306ffff0000ffff08000000fa0200000000000000000000040000002d01040007000000fc020000ffff0000000
40000002d010500040000002701ffff040000002d010000030000000000JUDGMENTRANCHOD, AJThis
is an application to compel the respondent to effect transfer of certain immovable property to the
applicant against payment by the applicant to the respondent of the purchase consideration of R4
million. Applicant seeks the following order:1. Ordering and directing the respondent to do all
such things and sign all necessary documents to effect transfer of certain immovable property,
being Portion 302 of the farm Witfontein No 301 Registration Division JR measuring 2,1821
hectares and situate at 120 Willem Kruiwagen Avenue, Klerksoord, Pretoria [held by the
respondent under deed of transfer no T21819/90 ("the property")] into the name of the applicant
against payment by the applicant to the respondent of the sum of R4 million.2. In the event of the
respondent failing to give effect to paragraph 1 above within fifteen days from the granting of
such order, authorising and directing the sheriff in the place and stead of the respondent to do all
such things that may be necessary to effect transfer of the aforesaid property from the
respondent to the applicant against payment of the sum of R4 million by the applicant to the

respondent.³ Costs of suit.⁴ Further and/or alternative relief.⁵ On 20 November 2002, the applicant and respondent concluded an agreement of lease in terms whereof the respondent leased to the applicant the premises situated on the property. In terms of paragraph 4 of the agreement of lease it is provided: "OPTION TO PURCHASE The lessee shall have an option to purchase the property for the sum of R4,000,000.00 (four million rand) to be exercised on/or before the 28th day of February 2004. Thereafter the purchase price shall be negotiated." On 12 December 2003, the applicant, in writing, claimed to have exercised its option to purchase the said property. The purported exercise of the option is in the form of a letter dated 12 December 2003 by the applicant and addressed to the directors of the respondent. The letter refers to the agreement of lease between the applicant and the respondent and in particular to clause 4 of the lease agreement and states that the applicant exercised the option in accordance with the terms set out in the agreement. On 16 February 2004 respondent's attorneys forwarded to applicant's attorneys a draft agreement of sale prepared by the attorneys in respect of the sale of the property to the applicant. The draft agreement records that the purchaser (applicant) has timeously exercised the option to purchase the property. The draft agreement, however, reflects the purchase price of the property as R4 million exclusive of value added tax ("VAT"). On 20 February 2004, applicant's attorneys addressed a letter to respondent's attorneys advising that the draft agreement was not necessary but that if certain specified amendments were made to the draft, inter alia, deletion of the words "exclusive of VAT" in paragraph 5.1, same would be submitted to the applicant for its comment. The respondent until then had not put the option or the exercise thereof in issue nor challenged its validity as it stood. Respondent contends that the purchase price of R4 million was "to have been a net selling price (obviously exclusive of VAT)" and that this was the intention of the contracting parties throughout. The respondent was ready to give transfer of the property except for the issue of whether VAT was included in the price or excluded. In other words the real bone of contention was the VAT issue. Respondent then contended that the option contained in clause 4 of the agreement of lease did not constitute a valid option and that there was thus no option to be exercised by the applicant. In its answering affidavit, the respondent raised the following defences to applicant's claim, all in the alternative: 1. lack of consensus in respect of the option on the basis that: 1.1 it was never agreed or intended that the option granted in the lease agreement could, by mere acceptance, be converted to a deed of sale; 1.2 alternatively that the option is void for vagueness and thus invalid and unenforceable for the reasons stated in the answering affidavit; 1.3 further alternatively, the respondent contended that applicant is liable for payment of VAT on the purchase price; 1.4 further alternatively, the respondent contended that it was an implied term of the option that should VAT be payable, the applicant would be liable for payment of the VAT; and 1.5 further alternatively, the respondent sought rectification of the agreement by the addition of the words "exclusive of VAT" after the purchase price. I turn then to each of the defences raised by the respondent. Counsel for the applicant submitted that it is common practice for a lessor to grant a lessee an option to purchase the property let and for the option to be made a term of the lease. I was referred to *Swart v Vosloo* 1965 1 SA 100 (AD) at 108 and *Mittermeier v Skema Engineering* 1984 1 SA 121 (AD) at 125B as examples. I agree. It was further submitted that all that is required of a lessee option holder who seeks to exercise an option to purchase is to communicate his

acceptance to the seller of the offer to sell. It was common cause that the applicant, in terms of its letter timeously conveyed its acceptance of the offer to the respondent. The exercising of an option by acceptance constitutes the ensuing agreement of sale and provided the agreement complies with the formalities required for the sale of land, it is a valid contract and no further agreement is required. I was referred in this regard to *Hirshowitz v Moolman & Others* 1985 3 SA 739(AD) at 767F and *Dold v Bester* 1984 1 SA 365(D) at 370C371A. Paragraph 3 of the agreement of purchase and sale of immovable property prepared by the respondent's attorney in response to the applicant's letter wherein the applicant exercised its option states the following and I quote: "RECORDAL 3.1 On the 23rd of September 2002 and at Pretoria the seller and the purchaser entered into a written agreement of lease ('the lease agreement') in terms whereof the seller let to the purchaser the property for a period of 9 (nine) years and 7 (seven) months commencing on the 1st day of July 2002 and terminating on the 31st of January 2012. 3.2 In terms of the lease agreement the seller gave the purchaser an option to purchase the property for the sum of R4 000 000.00 which option was to be exercised on or before the 28th of February 2004. 3.3 The purchaser has timeously exercised the said option to purchase the property and the parties are now desirous of recording the terms of their agreement of purchase and sale of the property as set out herein." In my view, there was consensus between the parties in so far as the exercising of the option was concerned. The second ground of attack by the respondent was that the option was void for vagueness. Respondent's counsel submitted that in addition to essential terms the material terms had to be included in the agreement. Section 2 of the Alienation of Land Act, 68 of 1981, states: "2. Formalities in respect of alienation of land. – (1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority." It was submitted that the essentials of a contract must be more than is set out in the Alienation of Land Act. As authority for this proposition I was referred to *Estate Du Toit, Appellant v Coronation Syndicate, Ltd and Others, Respondent* 1929 AD 219 at 224. That case concerned a situation where the property leased under a notarial mineral lease could not be identified by the description given without recourse to a pointing out which had taken place prior to the execution of the lease. It was held in that case that the lease was of no force and effect and that the subsequent framing of a diagram in the registration of the lease did not cure the otherwise defective instrument. However, in the case before me the validity of the lease has not been challenged. Furthermore the option refers to the property and not the premises that the lessee was renting. Both parties were clear in their minds as to which property it was as the lessee was in fact occupying premises on the property. The case of *King v Potgieter* 1950 3 SA 7 was referred to as authority for the proposition that the date of possession of the property was an essential term of the contract. However, that case can be distinguished in that the purchase price was payable in instalments whereas in the case before me that is not the case. Indeed it is trite that where the date of possession is not mentioned then possession will take place on the date of registration of transfer. Counsel for the applicant submitted, in my view correctly, that the exercise of the option by the applicant and the resultant contract of sale complies with all the formalities required by law in terms of the provisions of the Alienation of Land Act 68 of 1981. The agreement contains all the essential terms of a sale namely, a proper

description of the parties, the property sold and the price. The general approach of our courts to contentions that contracts are void for vagueness is to seek reasons to uphold the contract rather than to nullify it. See: *Gandi v SMP Properties (Pty) Ltd* 1983 1 SA 1154 (Dat 1156 CE) and *Christie* The Law of Contract 5th ed p108. As stated earlier the name and identities of the parties appear clearly on the face of the agreement of lease as well as from the written exercise of the option. The property is clearly identified in paragraph 1 of the agreement of lease. The address and description of the property in the agreement is clear and certain. In *Clements v Simpson* 1971 3 SA 1 (AD) at 7 FH it is stated: "4. The test for compliance with the statute, in regard to the *res vendita*, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus. 5. In the foregoing regard there are, broadly, two categories of contract. The first is whether the document itself sufficiently describes the property to enable identification on the ground. There is no fixed rule about this. For example, a house may be identifiable if the contract gives its address, such as its number, street and city; or a farm may be identifiable if the document mentions its name. The second category is where it appears from the contract that the parties intended that someone, whether buyer, seller or third party, should select the *res vendita* from a genus or class." See also *Mittermeier v Skema Engineering (Pty) Ltd*, supra, at 124 H 125 A; *Van Wyk v Rotchers Sawmills (Pty) Ltd* 1948 1 SA 983 (AD) 989 990. There can be no doubt that the parties were agreed with regard to the description and identity of the property sold. The option was included in a lease between the parties. The applicant was a tenant on premises in the property. Both the physical address and title deed address are specified in the applicant's acceptance of the option and the property is similarly described in the draft agreement prepared by respondent's attorneys. Respondent's counsel then sought to attack the validity of the option by submitting that liability for VAT rested upon the applicant. In terms of the provisions of section 7(2) of the Value Added Tax Act 89 of 1991 ("the VAT Act"), the obligation to pay VAT on a transaction in respect of which VAT is payable rests on the seller and not on the purchaser. See *Strydom v Duvenhage NO & Another* 1998 4 SA 1037 at 1043 HI, a Supreme Court of Appeal decision where FARLAM, AJA stated: "Dit is duidelik vanuit die bepalings van artikel 7(2) van die BTW Wet dat die verpligting om BTW te betaal ten opsigte van 'n transaksie waar BTW betaalbaar is op die ondernemer (verkoper) rus en nie op die ontvanger (koper) nie." Furthermore, in terms of the provisions of section 64(1) of the VAT Act, the price charged by a vendor is deemed to include the VAT payable in terms of section 7(1)(a). The deeming provision means that where the VAT amount is not expressly stated separately from the purchase price then VAT is included in the price. These sections of the VAT Act, in my view, present an insurmountable obstacle to the respondent's contention that the applicant is liable for VAT over and above the purchase price of R4 million. It is also noteworthy that in other sections of the lease where for example the rental and other charges are mentioned VAT is provided for specifically as being payable over and above the charges; likewise in the separate agreements relating to the sale of the business between the lessee as purchaser and another party as seller. In the agreement of sale of the business it was a condition of the sale that the purchaser (the lessee in the instant case) would obtain a lease of the premises from which the business was conducted. See also *Annual Survey of South African Law* 1996 at 864 866 and the unreported judgment in the case of *B P Marais NO and Three others v J*

T Benade NO & Another 1996 TPD, a judgment of VAN DIJKHORST, J is referred to in *Strydom v Duvenhage*, supra, at 1043G. The next ground of attack was that it was an implied term that applicant is liable for VAT and consequently the contract had to be rectified. From the papers it is clear that the applicant had at no stage agreed to pay any amount for VAT. There has, furthermore, clearly been no express undertaking or common intention in this regard. An implied term was described by CORBETT, AJA (as he then was) in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (AD) at 531532: "an unexpressed condition of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the court, in truth, declares the whole contract entered into by the parties." A court does not readily import an implied or tacit term into a contract. It cannot make contracts for the parties nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before a court can imply a tacit term, it 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. See in this regard *Alfred McAlpine & Son*, supra, at 532H533B; *Mullin (Pty) Ltd v Benade Ltd* 1952 1 SA 211 (AD) at 214215. In my view the dictum in *Reigate v Union Manufacturing Co (Randsbottom)* 1918 (1) KB 592 at 605 referred to as the "bystander test" is apposite: "a term can only be implied if it is necessary in the business sense to give efficacy to the contract; ie if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'what will happen in such a case?' They would have replied: 'of course so and so will happen; we did not trouble to say that; it is too clear'." This dictum has been approved in many cases in our courts subsequently. Applying the dictum quoted to this case would have yielded different answers from the parties. See also *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25 at 31; *Alfred McAlpine & Son*, supra, at 533. The bystander test was applied in *Strydom v Duvenhage NO*, supra, at 1045CE. The court concluded that the seller was in terms of section 7(2) read with section 7(1)(a) of the VAT Act liable to pay VAT on the purchase price. Respondent's counsel submitted that one should have regard to the Transfer Duty Act where the obligation to pay transfer duty on the sale of immovable property rests upon the transferee. It was argued that it can accordingly be inferred that the obligation to pay VAT rested upon the purchaser in the instant case. To my mind that submission cannot be sustained. Furthermore, in my view I am bound by the decision in *Strydom v Duvenhage NO*, supra. The facts of that case briefly are that there was a sale of land and there was a provision in the contract that the purchaser would pay transfer duty. The seller was registered as a vendor in terms of the VAT Act and consequently VAT and not transfer duty was payable on the sale. The duty to pay VAT rested on the seller and not the purchaser. However, both parties were under the impression that transfer duty was payable. The question then arose whether a term that VAT was payable by the purchaser was to be imported into the contract. There was no question of a common intention in this regard and the bystander test was applied. It was said that although the seller would at time of negotiation of the agreement probably have said that the purchaser should pay VAT if VAT and not transfer duty was payable the purchaser would probably have disagreed. It was also further stated that an intended implied term in any

event was not required to give business efficacy to the contract. It was held in that case that no basis for incorporation of an implied term was made out and the seller was accordingly obliged to pay VAT. I accordingly grant an order in terms of prayers 1, 2 and 3 (supra) of the notice of motion. N RANCHOD ACTING JUDGE OF THE HIGH COURT 17588-04 HEARD ON: 23/2/2005 FOR THE APPLICANT: ADV I J ZIDEL SC INSTRUCTED BY: MESSRS FLUXMANS INC, JHB, c/o GROSS PAPADOPULO & ASS, PRETORIA FOR THE RESPONDENT: ADV D ROSSOUW SC INSTRUCTED BY: MORRIS POKROY ATTORNEYS, PRETORIA

IN THE HIGH COURT OF SOUTH AFRICA

/ES

(TRANSVAAL PROVINCIAL DIVISION)

TRANSVAAL PROVINCIAL DIVISION

IN THE MATTER BETWEEN

JUDGMENT

RANCHOD, AJ

This is an application to compel the respondent to effect transfer of certain immovable property to the applicant against payment by the applicant to the respondent of the purchase consideration of R4 million. Applicant seeks the following order:

1. Ordering and directing the respondent to do all such things and sign all necessary documents to effect transfer of certain immovable property, being Portion 302 of the farm Witfontein No 301 Registration Division JR measuring 2,1821 hectares and situate at 120 Willem Kruiwagen Avenue, Klerksoord, Pretoria [held by the respondent under deed of transfer no T21819/90 ("the property")] into the name of the applicant against payment by the applicant to the respondent of the sum of R4 million.
2. In the event of the respondent failing to give effect to paragraph 1 above within fifteen days from the granting of such order, authorising and directing the sheriff in the place and stead of the respondent to do all such things that may be necessary to effect transfer of the aforesaid property from the respondent to the applicant against payment of the sum of R4 million by the applicant to the respondent.
3. Costs of suit.
4. Further and/or alternative relief.

On 20 November 2002, the applicant and respondent concluded an agreement of lease in terms whereof the respondent leased to the applicant the premises situated on the property. In terms of paragraph 4 of the agreement of lease it is provided: "OPTION TO PURCHASE

OPTION TO PURCHASE

The lessee shall have an option to purchase the property for the sum of R4,000,000.00 (four million rand) to be exercised on/or before the 28th day of February 2004. Thereafter the purchase price shall be negotiated."

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On 12 December 2003, the applicant, in writing, claimed to have exercised its option to purchase the said property. The purported exercise of the option is in the form of a letter dated 12 December 2003 by the applicant and addressed to the directors of the respondent. The letter refers to the agreement of lease between the applicant and the respondent and in particular to clause 4 of the lease agreement and states that the applicant exercised the option in accordance with the terms set out in the agreement. On 16 February 2004 respondent's attorneys forwarded to applicant's attorneys a draft agreement of sale prepared by the attorneys in respect of the sale of the property to the applicant. The draft agreement records that the purchaser (applicant) has timeously exercised the option to purchase the property. The draft agreement, however, reflects the purchase price of the property as R4 million exclusive of value added tax ("VAT"). On 20 February 2004, applicant's attorneys addressed a letter to respondent's attorneys advising that the draft agreement was not necessary but that if certain specified amendments were made to the draft, inter alia, deletion of the words "exclusive of VAT" in paragraph 5.1, same would be submitted to the applicant for its comment. The respondent until then had not put the option or the exercise thereof in issue nor challenged its validity as it stood. Respondent contends that the purchase price of R4 million was "to have been a net selling price (obviously exclusive of VAT)" and that this was the intention of the contracting parties throughout. The respondent was ready to give transfer of the property except for the issue of whether VAT was included in the price or excluded. In other words the real bone of contention was the VAT issue. Respondent then contended that the option contained in clause 4 of the agreement of lease did not constitute a valid option and that there was thus no option to be exercised by the applicant. In its answering affidavit, the respondent raised the following defences to applicant's claim, all in the alternative: 1. lack of consensus in respect of the option on the basis that:

inter alia

1.1 it was never agreed or intended that the option granted in the lease agreement could, by mere acceptance, be converted to a deed of sale; 1.2 alternatively that the option is void for vagueness and thus invalid and unenforceable for the reasons stated in the answering affidavit; 1.3 further alternatively, the respondent contended that applicant is liable for payment of VAT on the purchase price;

1.4 further alternatively, the respondent contended that it was an implied term of the option that should VAT be payable, the applicant would be liable for payment of the VAT; and 1.5 further alternatively, the respondent sought rectification of the agreement by the addition of the words "exclusive of VAT" after the purchase price.

I turn then to each of the defences raised by the respondent. Counsel for the applicant submitted that it is common practice for a lessor to grant a lessee an option to purchase the property let and for the option to be made a term of the lease. I was referred to *Swart v Vosloo* 1965 1 SA 100 (AD) at 108 and *Mittermeier v Skema Engineering* 1984 1 SA 121 (AD) at 125B as examples. I agree. It was further submitted that all that is required of a lessee option holder who seeks to exercise an

option to purchase is to communicate his acceptance to the seller of the offer to sell. It was common cause that the applicant, in terms of its letter timeously conveyed its acceptance of the offer to the respondent. The exercising of an option by acceptance constitutes the ensuing agreement of sale and provided the agreement complies with the formalities required for the sale of land, it is a valid contract and no further agreement is required. I was referred in this regard to *Hirshowitz v Moolman & Others* 1985 3 SA 739(AD) at 767F and *Dold v Bester* 1984 1 SA 365(D) at 370C371A. Paragraph 3 of the agreement of purchase and sale of immovable property prepared by the respondent's attorney in response to the applicant's letter wherein the applicant exercised its option states the following and I quote: "RECORDAL

Swart v Vosloo

1965 1 SA 100

Mittermeier v Skema Engineering

1984 1 SA 121

Hirshowitz v Moolman & Others

1985 3 SA 739

Dold v Bester

1984 1 SA 365

RECORDAL

3.1 On the 23rd of September 2002 and at Pretoria the seller and the purchaser entered into a written agreement of lease ('the lease agreement') in terms whereof the seller let to the purchaser the property for a period of 9 (nine) years and 7 (seven) months commencing on the 1st day of July 2002 and terminating on the 31st of January 2012. 3.2 In terms of the lease agreement the seller gave the purchaser an option to purchase the property for the sum of R4 000 000.00 which option was to be exercised on or before the 28th of February 2004. 3.3 The purchaser has timeously exercised the said option to purchase the property and the parties are now desirous of recording the terms of their agreement of purchase and sale of the property as set out herein."

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In my view, there was consensus between the parties in so far as the exercising of the option was concerned. The second ground of attack by the respondent was that the option was void for vagueness. Respondent's counsel submitted that in addition to essential terms the material terms had to be included in the agreement. Section 2 of the Alienation of Land Act, 68 of 1981, states:

Section 2

Alienation of Land Act, 68 of 1981

"2. Formalities in respect of alienation of land. – (1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

section 28

It was submitted that the essentials of a contract must be more than is set out in the Alienation of Land Act. As authority for this proposition I was referred to *Estate Du Toit, Appellant v Coronation Syndicate, Ltd and Others, Respondent* 1929 AD 219 at 224. That case concerned a situation where the property leased under a notarial mineral lease could not be identified by the description given without recourse to a pointing out which had taken place prior to the execution of the lease. It was held in that case that the lease was of no force and effect and that the subsequent framing of a diagram in the registration of the lease did not cure the otherwise defective instrument. However, in the case before me the validity of the lease has not been challenged. Furthermore the option refers to the property and not the premises that the lessee was renting. Both parties were clear in their minds as to which property it was as the lessee was in fact occupying premises on the property. The case of *King v Potgieter* 1950 3 SA 7 was referred to as authority for the proposition that the date of possession of the property was an essential term of the contract. However, that case can be distinguished in that the purchase price was payable in instalments whereas in the case before me that is not the case. Indeed it is trite that where the date of possession is not mentioned then possession will take place on the date of registration of transfer. Counsel for the applicant submitted, in my view correctly, that the exercise of the option by the applicant and the resultant contract of sale complies with all the formalities required by law in terms of the provisions of the Alienation of Land Act 68 of 1981. The agreement contains all the essential terms of a sale namely, a proper description of the parties, the property sold and the price. The general approach of our courts to contentions that contracts are void for vagueness is to seek reasons to uphold the contract rather than to nullify it. See: *Gandi v SMP Properties (Pty) Ltd* 1983 1 SA 1154 (D) at 1156 (C) and *Christie* The Law of Contract 5th ed p108. As stated earlier the name and identities of the parties appear clearly in the agreement of lease as well as from the written exercise of the option. The property is clearly identified in paragraph 1 of the agreement of lease. The address and description of the property in the agreement is clear and certain. In *Clements v Simpson* 1971 3 SA 1 (AD) at 7 (FH) it is stated:

Alienation of Land Act. As

Estate Du Toit, Appellant v Coronation Syndicate, Ltd and Others, Respondent

1929 AD 219

King v Potgieter

1950 3 SA 7

Alienation of Land Act 68 of 1981

Gandi v SMP Properties (Pty) Ltd

1983 1 SA 1154D

The Law of Contract

ex facie

Clements v Simpson

1971 3 SA 1

"4. The test for compliance with the statute, in regard to theres vendita, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus.5. In the foregoing regard there are, broadly, two categories of contract. The first is whether the document itself sufficiently describes the property to enable identification on the ground. There is no fixed rule about this. For example, a house may be identifiable if the contract gives its address, such as its number, street and city; or a farm may be identifiable if the document mentions its name. The second category is where it appears from the contract that the parties intended that someone, whether buyer, seller or third party, should select theres vendita from a genus or class."

res vendita

See also Mittermeier v Skema Engineering (Pty) Ltd, supra, at 124H125A; Van Wyk v Rotchers Sawmills (Pty) Ltd 1948 1 SA 983(AD) 989990. There can be no doubt that the parties were read idem with regard to the description and identity of the property sold. The option was included in a lease between the parties. The applicant was a tenant on premises in the property. Both the physical address and title deed address are specified in the applicant's acceptance of the option and the property is similarly described in the draft agreement prepared by respondent's attorneys. Respondent's counsel then sought to attack the validity of the option by submitting that liability for VAT rested upon the applicant. In terms of the provisions of section 7(2) of the Value Added Tax Act 89 of 1991 ("the VAT Act"), the obligation to pay VAT on a transaction in respect of which VAT is payable rests on the seller and not on the purchaser. See Strydom v Duvenhage NO & Another 1998 4 SA 1037 at 1043HI, a Supreme Court of Appeal decision where FARLAM, AJA stated:

Mittermeier v Skema Engineering (Pty) Ltd, supra

Van Wyk v

Rotchers Sawmills (Pty) Ltd

1948 1 SA 983

ad idem

Strydom v Duvenhage NO & Another

1998 4 SA 1037

"Dit is duidelik vanuit die bepalings van artikel 7(2) van die BTW Wet dat die verpligting om BTW te betaal ten opsigte van 'n transaksie waar BTW betaalbaar is op die ondernemer (verkoper) rus en nie op die ontvanger (koper) nie."

Furthermore, in terms of the provisions of section 64(1) of the VAT Act, the price charged by a vendor is deemed to include the VAT payable in terms of section 7(1)(a). The deeming provision means that where the VAT amount is not expressly stated separately from the purchase price then VAT is included in the price. These sections of the VAT Act, in my view, present an insurmountable obstacle to the respondent's contention that the applicant is liable for VAT over and above the purchase price of R4 million. It is also noteworthy that in other sections of the lease where for example the rental and other charges are mentioned VAT is provided for specifically as being payable over and above the charges; likewise in the separate agreements relating to the sale of the business between the lessee as purchaser and another party as seller. In the agreement of sale of the business it was a condition of the sale that the purchaser (the lessee in the instant case) would obtain a lease of the premises from which the business was conducted. See also Annual Survey of South African Law 1996 at 864866 and the unreported judgment in the case of *B P Marais NO and Three others v J T Benade NO & Another* 1996 TPD, a judgment of VAN DIJKHORST, J is referred to in *Strydom v Duvenhage*, supra, at 1043G. The next ground of attack was that it was an implied term that applicant is liable for VAT and consequently the contract had to be rectified. From the papers it is clear that the applicant had at no stage agreed to pay any amount for VAT. There has, furthermore, clearly been no express undertaking or common intention in this regard. An implied term was described by CORBETT, AJA (as he then was) in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506(AD) at 531532:

Annual Survey of South African Law

B P Marais NO and Three others v J T Benade NO & Another

Strydom v Duvenhage, supra

Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration

1974 3 SA 506

"an unexpressed condition of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the court, in truth, declares the whole contract entered into by the parties."

A court does not readily import an implied or tacit term into a contract. It cannot make contracts for the parties nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before a court can imply a tacit term, it 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. See in this regard *Alfred McAlpine*

& Son, supra, at 532H533B;Mullin (Pty) Ltd v Benade Ltd1952 1 SA 211(AD) at 214215. In my view thedictuminReigatev Union Manufacturing Co (Randsbottom)1918(1) KB 592 at 605 referred to as the "bystander test" is apposite:

Alfred McAlpine & Son, supra

Mullin (Pty) Ltd v Benade Ltd

1952 1 SA 211

dictum

Reigate

v Union Manufacturing Co (Randsbottom)

"a term can only be implied if it is necessary in the business sense to give efficacy to the contract; ie if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'what will happen in such a case'? They would have replied: 'of course so and so will happen; we did not trouble to say that; it is too clear'."

Thisdictumhas been approved in many cases in our courts subsequently. Applying thedictumquoted to this case would have yielded different answers from the parties. See alsoBarnabas Plein & Co v Sol Jacobson & Son1928 AD 25at 31;Alfred McAlpine & Son, supra, at 533. The bystander test was applied inStrydom v Duvenhage NO, supra, at 1045CE. The court concluded that the seller was in terms of section 7(2) read with section 7(1)(a) of the VAT Act liable to pay VAT on the purchase price. Respondent's counsel submitted that one should have regard to the Transfer Duty Act where the obligation to pay transfer duty on the sale of immovable property rests upon the transferee. It was argued that it can accordingly be inferred that the obligation to pay VAT rested upon the purchaser in the instant case. To my mind that submission cannot be sustained. Furthermore, in my view I am bound by the decision inStrydom v Duvenhage NO, supra. The facts of that case briefly are that there was a sale of land and there was a provision in the contract that the purchaser would pay transfer duty. The seller was registered as a vendor in terms of the VAT Act and consequently VAT and not transfer duty was payable on the sale. The duty to pay VAT rested on the seller and not the purchaser. However, both parties were under the impression that transfer duty was payable. The question then arose whether a term that VAT was payable by the purchaser was to be imported into the contract. There was no question of a common intention in this regard and the bystander test was applied. It was said that although the seller would at time of negotiation of the agreement probably have said that the purchaser should pay VAT if VAT and not transfer duty was payable the purchaser would probably have disagreed. It was also further stated that an intended implied term in any event was not required to give business efficacy to the contract. It was held in that case that no basis for incorporation of an implied term was made out and the seller was accordingly obliged to pay VAT.

Barnabas Plein & Co v Sol Jacobson & Son

1928 AD 25

Strydom v Duvenhage NO, supra

Strydom v Duvenhage NO, supra

I accordingly grant an order in terms of prayers 1, 2 and 3 (supra) of the notice of motion.

supra

N RANCHODACTING JUDGE OF THE HIGH COURT

ACTING JUDGE OF THE HIGH COURT

17588-04HEARD ON:23/2/2005FOR THE APPLICANT: ADV I J ZIDEL SCINSTRUCTED BY: MESSRS
FLUXMANS INC, JHB, c/o GROSS PAPADOPULO & ASS,PRETORIAFOR THE RESPONDENT: ADV D
ROSSOUW SCINSTRUCTED BY: MORRIS POKROY ATTORNEYS,PRETORIA

17588-04

HEARD ON:

23/2/2005

FOR THE APPLICANT: ADV I J ZIDEL SCINSTRUCTED BY: MESSRS FLUXMANS INC, JHB, c/o
GROSS PAPADOPULO & ASS,

PRETORIA

FOR THE RESPONDENT: ADV D ROSSOUW SCINSTRUCTED BY: MORRIS POKROY ATTORNEYS,

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Prepared on 11 October 2026 · Esheria