SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 07/25471

In the matter between:

VIP INDUSTRIAL CLEANING CC Plaintiff

and

FURNITURE CITY Defendant

MEYER, J.

[1] The plaintiff claims damages from the defendant resulting from an alleged breach of a written agreement that was concluded between the parties on 10 September 1996 and in terms whereof the plaintiff was engaged to supply cleaning services at the defendant's various Furniture City stores ('the agreement'). The defendant notified the plaintiff of the termination of the agreement with effect from 10 September 2006. The plaintiff considers the notification to be premature in respect of certain stores and accordingly, insofar as those stores are concerned, a breach of the agreement. The defendant

considers that its termination accords with the provisions of the written agreement.

[2] The agreement that the parties concluded on 10 September 1996 is not in issue. It reads as follows:

'MEMORANDUM OF AGREEMENT
ENTERED BY AND BETWEEN'
the plaintiff (the supplier) and the defendant (the client)

'For the cleaning services on a five yearly contractual basis on the premises at Furniture City Stores as laid down in Annexure A to C which forms an integral part of this Agreement.

It is therefore agreed as follows: The supplier undertakes to supply the cleaning services as laid down in Annexure A to C, in all the stores existing and future.
The contract will remain in force for five Years and will renew itself for a further five years if it is not cancelled in writing three months in advance. The contract will escalate with not less than inflation Yearly. The Client hereby accepts the mentioned services and costs laid down in Annexure C.'

Annexure A stipulates the nature of the cleaning services to be provided and the working hours. Annexure B stipulates the cleaning materials and labour to be provided and the consumables and areas that are excluded. Annexure C stipulates the contract price, which is R1 500.00 per cleaner per month.

[3] Sub-paragraph 5.2 of the plaintiff's particulars of claim, which is denied in paragraph 6 of the defendant's plea, reads:

'5. The relevant material express, alternatively, tacit, further alternatively, implied terms of the agreement were:

5.2 the agreement would endure, *in respect of each individual store from the date of opening thereof*, for an initial period of 5 years and would automatically be renewed for a further 5 years in the event of the agreement not being cancelled in writing three months prior to the expiration of the first 5 year period;' (*emphasis added)*

[4] Adv. EJ Ferreira, who appeared for the plaintiff, submitted in the first instance that the ordinary meaning of the contractual term relating to the duration of the agreement is the one ascribed to it in paragraph 5.2 of the plaintiff's particulars of claim. I refer to the term in issue as 'the duration term'. The plaintiff's alternative contention is that the language of the document is on the face of it ambiguous and the contractual term in issue should be interpreted in accordance with the plaintiff's contention with reference to the content of the document and to the extrinsic evidence of the plaintiff's sole member, Mr. Human. The plaintiff's further alternative contention is that the term contended for by it should be implied as a tacit term.

[5] Adv. JJC Swanepoel, who appeared for the defendant, took issue with each one of the plaintiff's contentions. It is common cause that a Mr. Smith represented the defendant in the conclusion of the agreement and that he now resides overseas. The defendant closed its case without calling any witness.

[6] The parol evidence rule applies in this instance. The plaintiff does not seek rectification of the written agreement. It is trite that 'interpretation is a

matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses'. Per: Harms DP in *KPMG v Securefin Ltd* 2009 (4) SA 399 (SCA), at p 409G - H. The evidence of the plaintiff's sole member, Mr. Human, on what the agreement and particularly the relevant term means are irrelevant. The approach to interpretation was summarised by Joubert JA in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at pp 767E – 768E.

[7] The ordinary grammatical meaning of the words used – '[t]he contract will remain in force for five years and will renew itself for a further five years if it is not cancelled in writing three months in advance' - is that the agreement remains 'operative, binding, valid' (See: *The New Shorter Oxford English Dictionary* 1993, Vol. 1, at p.998 on the meaning of ''in force') for a period of five years, and, if it is not cancelled in writing three months before the expiration of this period, for a further period of five years. The ordinary grammatical meaning of the words used is as simple as that.

[8] The agreement contains a pre-amble. The operative terms follow. The annexures to the agreement are incorporated into the operative terms. The first sentence of the operative terms imposes obligations on the plaintiff. It is obliged to supply the cleaning services and cleaning materials as described in the annexures to the agreement at all the defendant's stores that existed at the time of the conclusion of the agreement as well as at those that open after the date of the agreement. The second sentence of the operative terms, which is the

duration term, deals with the duration of the agreement or period in which it will be operative, binding, and valid. The last two sentences of the operative terms impose an obligation on the defendant to remunerate the plaintiff for its cleaning services.

[9] 'The contract' referred to in the duration term is the written agreement that was concluded between the parties on 10 September 1996. 'The contract' obliges the plaintiff to render cleaning services in respect of all the defendant's stores – the existing ones and the future ones; it obliges the defendant to remunerate the plaintiff for such cleaning services; and the contract provides that it remains valid for a fixed term of five or of ten years. The duration of the agreement is expressed without distinguishing between existing and future stores or the dates of opening of individual stores. The annual escalation of the contract price is also not linked to individual stores.

[10] I am also unable to agree with the submission on behalf of the defendant that the words used in the operative part of the agreement and those used in the pre-amble – '[f]or the cleaning services on a five yearly contractual basis on the premises at Furniture City Stores' - are in conflict. The services to be rendered and the contractual period are fixed. The only variable is the stores at which the services are to be rendered. The preamble does not detract from the ordinary grammatical meaning of the words used in the operative part of the agreement. It should also be mentioned that a preamble is 'generally regarded as

subordinate to the operative portion of a contract which, if clear, carries more weight than anything in the preamble.' See: *Bekker NO v Total South Africa (Pty) Ltd* 1990 (3) SA 159 (TPD), at p 171 H – I. The grammatical and ordinary meaning of the words used in the duration term is, in my view, consistent with the rest of the written agreement.

[11] There is also nothing strange or unusual about the terms when one considers the agreement in its context. Its purpose is evident. The defendant required cleaning services for its various stores and the plaintiff agreed to provide them at an amount that was determined with reference to the number of cleaners used per store and the number of cleaners, in turn, was determined by the size of each store. The contract was a sizeable one for the plaintiff. It eventually applied to about forty stores of the defendant. To some stores the contract applied from the outset and to others from dates after its conclusion.

[12] There is, in my view, accordingly no scope for the interpretation contended for by the plaintiff on the ordinary grammatical meaning of the words used in their extended context. The language of the agreement is not on the face of it ambiguous and it is accordingly unnecessary for me to further deal with the evidence of Mr. Human relating to the negotiations between the parties, their conduct subsequent to the conclusion of the written agreement, the exchange of correspondence between them, or other extrinsic evidence relating to the surrounding circumstances.

[13] The plaintiff in the alternative seeks the words that I have italicised in paragraph 3 *supra* to be imported into the agreement as a tacit term. Regard being had to the express words of the agreement, there is, in my view, no room for importing such a tacit term. The question is dealt with unambiguously in the agreement. Such a tacit term would be in conflict with the express duration term. '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.' See: *Robin v Guarantee Life Assurance Co Ltd 1984 (4) SA 558 (A)*, at p 567A - F.

[14] In view of the conclusions at which I have arrived in regard to the construction of the agreement and in regard to the importing of a tacit term into the agreement, it is not necessary to deal with the issue of damages.

[15] In the result the plaintiff's claim is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

9 November 2009