REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A5037/2022

[1] REPORTABLE: NO

[2] OF INTEREST TO OTHER JUDGES: NO

[3] REVISED: NO

DATE: 06/6/2023

SIGNATURE:

In the matter between:

ESPORTIF INTERNATIONAL SA (PTY) LTD Appellant

and

PORTER, JAKOBUS ADRIAAN First Respondent

VAN DYK, REGHARD WILHELM Second Respondent

ORDER

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[4] The appeal is dismissed with costs.

Neutral Citation: *Esportif International SA (Pty) Ltd v Porter, Jakobus Adriaan* (Case NO: A5037/2022 [2023] ZAGP JHC 642 (06 June 2023)

JUDGMENT

Fisher J (Francis and Twala JJ concurring)

Introduction

[1] This is an appeal, with leave of the Supreme Court of Appeal, in terms of which the appellant appeals the dismissal, with costs, of declaratory relief by Swanepoel AJ (as he then was).

[2] The appellant concedes that it was not entitled to the original declaratory relief claimed but it argues that a case for amended relief was made out, that such amended relief was sought informally in argument and that this informal application for amended relief should have been dealt with by the court and granted.

[3] The appellant thus seeks that the notice of motion be amended as sought and that an order be granted by this court in terms of such amended order.

[4] There are a number of respondents and extensive relief was claimed against some of them in relation to allegations of unfair competition and money judgements. However, as the proceedings evolved, most of the claims fell away and are not relevant for the purposes of this appeal.

[5] The only claims pressed on appeal is the aforesaid amended declaratory relief against the first and second respondents.

[6] To properly deal with the issues in the appeal, it is necessary to examine the case in contract as initially framed in the founding affidavit and its evolution into the declaratory relief now sought. I move to deal with the material undisputed facts.

Material facts

[7] The appellant is involved in the business of sports management. The respondents are in the business of acting as agents for professional rugby players. As such they negotiate, on behalf of professional rugby players, the conclusion of contracts with various rugby unions locally and internationally and thereafter manage this contractual relationship and other aspects of the player's sports career such a sponsorships and the like. The amounts derived

by the players from contracts negotiated by the agents can be substantial. This is especially true in respect of international contracts which pay in currencies which are strong against the Rand.

[8] The manner in which this agency arrangement works in the industry is regulated by the South African Rugby Union (SARU).

[9] In terms of these regulations an agent must be a natural person who is accredited under the regulations and registered with SARU.

[10] Pursuant to these regulations the agent and the player, when they transact in this area are required to conclude a fairly standard written agreement known as a player/agent agreement. The terms of such agreements must conform to the regulations.

[11] The regulations provided that the player/agent agreement cannot extend beyond two years and is terminable by either party on four months' notice. During a notice period the player may not be represented by any other agent.

[12] The player pays the agent a commission for his services which appears generally to be based on a percentage of salary and other amounts earned by the player in terms of the negotiated contract. This commission is generally payable over the period of the agreement. Thus, on payment to the player under the negotiated agreement, a percentage becomes due and payable by the player to the agent.

[13] Regulation 13 of the SARU regulations is important in the context of the rights of third parties such as the appellant this player/agent space.

[14] In terms of regulation 13 (and subject to provisos which are not of direct relevance in this case) only a SARU accredited agent is entitled to perform the function of an agent. The rugby bodies in South Africa, which are all subject to the regulations, are prohibited from contracting with a player other than through

this method. Any foreign agent who wishes to enter into negotiations in South Africa for a player can only do so through an agent accredited by SARU.

[15] Simply put, only licenced agents can represent players and they have to be natural persons.

[16] It appears to be accepted that an agent is not entitled to dispose of his rights under the player/agent agreement to a third party or assign his responsibilities thereunder.

[17] It seems however that there are attempts by corporate entities to participate commercially in this industry on the basis that they derive payment of the amounts due under the player/agent agreement. The employment contracts in issue are an example of such attempts.

[18] The respondents wished to secure regular monthly employment with the appellant on the basis that the appellant received the fees from player/agent agreements concluded between players and the respondents and the respondents were paid a salary.

[19] On the basis that the respondents could not lawfully cede their rights to the appellant, contractual terms were formulated which sought to fashion a legal basis for the receipt by the appellant of the payments owing to the respondents. This led to the inclusion of clause 8.2 in the employment contracts. The clause reads as follows:

> "8.2 <u>Collection of commission on agency contracts</u>
>
> 8.2.1 The Employee hereby appoints the Company to collect on its behalf, any commission which may be payable to the Employee in terms of any contract of agency concluded with a player.
>
> 8.2.2 The Employee hereby waives any right to claim the payment of any such commission from the Company."

The relief as it evolved

[20] The notice of motion is framed on the basis that declarations are sought that the appellant is entitled to payment of all monies under the player/agent agreements and that the respondents have the obligation to pay these amounts to the appellant.

[21] The dispute is framed as follows in the founding affidavit:

> "As I will expand on below, there is currently a dispute between the appellant and the agent respondents concerning the appellant's entitlement to continued receipt from the respondents of agreed commission payments. That dispute is one as contemplated in section 21(1)(c) of the Superior Courts Act, No 10 of 2013 which, I respectfully state, entitles the appellant to the declaratory relief sought in the notice of motion to which this affidavit is annexed.
>
> The appellant has already accrued an entitlement to payment from the agent respondents of certain vested commissions. That entitlement sustains appellant's claims for money judgements.''

[22] The appellant goes further and contends that the respondents are obliged to pay, alternatively ensure payment of the commissions which "vested" in the respondents whilst they were employed by the appellant.

[23] The appellant however purported to rely for this relief on the express terms of clause 8.2. In terms thereof the appellant can collect the payments due to the respondents and the respondent has no claim to get these payments back.

[24] It is important that the express terms of the clause place no obligation on the respondents in relation to payment of the amounts which flow from the player/agent agreements. The limitations of the clause have been wrought by the constraints of the SAFU regulations.

[25] In argument it was conceded on behalf of the appellant that clause 8.2 did not allow for the relief claimed in the notice of motion. This led to the resort to the amended relief which is now formally sought on appeal. It was not formulated in the court *a quo*.

The issues on appeal

[26] The appellant now seeks a declarator to the following effect –

> "Declaring that the first and second respondents are obliged to pay to the appellant all monies, qua commissions, due, owing and received by those respondents from rugby players in consequence of any player/agent agreement:
>
> (i) to which those respondents were parties on the date of their employment with the appellant;
>
> (ii) to which those respondents became parties during the currency of that employment."

[27] There was a central dispute which arose in the application in relation to whether the appellant would, under the employment agreement, be entitled to collect payments under player/agent agreements concluded before the date of employment (pre-employment payments) as opposed to only amounts under the contracts concluded with the players during the course of employment. This dispute is not relevant to this appeal because of the conclusion reached.

[28] The two issues which arise in this appeal are as follows:

a) Was the application to amend moved in front of the court?

b) Was a case made out for the amended relief?

I move to deal with each in turn.

Was there an amendment?

[29] When it became clear in argument in the court a quo that the relief as framed in the notice of motion was not competent because it sought to make the respondents liable for monies not received by them from the players, counsel for the appellant sensibly conceded in argument that the appellant "may have to propose a rephrasing to your Lordship". He went on to explain that "the general idea is to obtain from you're your Lordship a declaratory order … based on the underlying legal premise that we have argued to your Lordship, that there remains an enduring obligation on the part of those respondents to pay to the appellant any amounts that they receive as commission payments from those players". (Emphasis added.)

[30] Thus, the indication was that the appellant would be satisfied with the amended relief as an alternative to the relief set out in the notice of motion. There was however no formal amendment which the trial court was bound to consider one way or another. Thus, Swanepoel AJ cannot be criticised for not dealing with what was nothing more than an informal suggestion of alternative relief.

[31] It may well be that the court would have been more inclined to give the suggested alternative relief if a case had been made out for it. This leads me to the second issue.

Was a case made out for the alternative relief?

[32] The declaration sought must find its basis in the contract. The contract provides for the appellant to collect payments owing to the respondents and that the respondents have no claim for such monies thus collected.

[33] The appellant says that this creates a tacit term that if monies are paid by the players to the respondents they have to be paid to the appellants. But this tacit term is not made out in the founding affidavit. As is clear from what is set out above, the founding affidavit relies on the *express* terms of clause 8.2.

[34] A tacit term is an unexpressed provision of the contract, derived from the common intention of the parties. This intention is inferred from the express terms of the contract and from the surrounding circumstances.[1]

[35] A tacit term may be actual or imputed. It is an actual term if both parties thought about a pertinent matter but did not bother to express their agreement on the point. The term is imputed if the parties would have agreed on such a matter if they had thought about it "which they did not do because they overlooked a present fact or failed to anticipate a future one".[2]

[36] The simple and determinative fact in this matter is that the appellant failed to plead tacit term which it now seeks to rely on for its amended relief. This failure is significant in the context of the limitations prescribed by the SARU regulations. It seems that the tacit term now proposed does not chime with these regulations which seem not to allow the agents and players to transact with the rights under the player/agent agreements. However, it is not necessary to decide this, as the court *a quo* correctly pointed out.

[37] For the appellant successfully to establish a term at odds with the express term relied on, it would have to have set out the circumstances relied on for this construction.[3] To the extent that this tacit term had been raised this may have involved proving that the express terms were not at odds with the proposed tacit term.[4] This is all academic however in that a tacit term was not pleaded.

Conclusion

[38] The appellant made out no case for either the original relief or the alternative relief. The proposed amendment could not have and cannot rescue the application.

[39] The appeal must thus fail.

Order

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[1] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).
[2] *Wilkins NO v Voges* [1994] ZASCA 53; 1994 (3) SA 130 (AD) at 136I-136J.
[3] *Societe Commerciale de Moteurs v Ackermann* 1981(3) SA 422 (A).
[4] *Nel v Nelspruit Motors (Edms) Bpk* 1961 (1) SA 582 (A).

I thus make an order as follows:

[40] The appeal is dismissed with costs.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBUR

I agree,

EJ FRANCIS
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree,

ML TWALA
JUDGE OF THE HIGH COURT
JOHANNESBURG

Heard:	10 May 2023
Delivered:	06 June 2023
APPEARANCES:	
For the appellant:	A R G Mundell SC
Instructed by:	Ellis Coll Attorneys
For the first and second respondents:	Wilhelm P Bekker
	M Van der Westhuizen
Instructed by:	Gildenhuys Malatji Inc.