IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A160/2016

RCC/CT Case No: 1793/2012

786/2013

In the matter between:

KUMKANI CRANES CC t/a

KUMKANI HEAVY HAULAGE Appellant

and

CLOSETRADE 200074 CC

t/a ILCOR ENGINEERING SERVICES CC Respondent

Coram: Saldanha et Boqwana JJ

Delivered: 10 May 2017

JUDGMENT

BOQWANA, J

Introduction

[1] This is an appeal against a judgment granted against the appellant in favour of the respondent in the Cape Town Regional Court for payment of the sum of R538 301.07, interest and costs. The judgment was the outcome of an action

which had been instituted by the respondent against the appellant. In what follows I shall refer to the appellant and respondent as 'the defendant' and 'the plaintiff' respectively.

Facts

[2] On or about 30 September 2008, the parties entered into an oral agreement in terms of which the defendant commissioned the plaintiff to design and manufacture a six- axle fixed- neck steerable low bed trailer for abnormal loads ('six axle trailer'/'low bed trailer'/'trailer'). The plaintiff was represented by one of its directors Trevor Flynn ('Flynn') and the defendant by Ryan Wall ('R Wall") and/or Michael Wall ('M Wall').

[3] It is common ground that the plaintiff was to design and manufacture the low bed trailer according to the specifications of the defendant to meet the defendant's peculiar requirements in respect of the low bed trailer.

[4] According to the plaintiff, the defendant bore all the risks and obligations in relation to the registration of the low bed trailer. This is disputed by the defendant which contends that the plaintiff was to be responsible for compliance of the low bed trailer with all statutory and regulatory requirements, including the licensing thereof, specifically that it would comply with abnormal vehicle registration requirements for an 84-ton payload. There was an issue of whether the payload required was 82 or 84. Flynn testified that it was 82 whilst M Wall said it was 84. Nothing much turns on that, as it shall become clear in the judgment.

[5] The plaintiff contends that it complied with its obligations in terms of the agreement and completed the design and manufacture of the low bed trailer according to the defendant's specific instructions on or about 5 February 2009. It then tendered delivery of the low bed trailer to the defendant against payment of the manufacturing costs totalling R 2 135 220.00, inclusive of VAT. A number of developments which are discussed below took place resulting in the reduction of the claim to R538 301.07.

[6] The plaintiff contends further that the defendant repudiated the agreement by refusing to take delivery of the low bed trailer. It rejected such repudiation and tendered delivery of the low bed trailer to the defendant against the payment of the design and manufacturing costs.

[7] The defendant, on the other hand, contends that the plaintiff failed to deliver the low bed trailer in the terms of the agreed terms, in that the low bed trailer was not manufactured in accordance with the required specifications. Due to that the low bed trailer was accordingly not fit for the purpose for which it was commissioned and/or purchased. It also claimed that the plaintiff charged the defendant in excess of the agreed price. This issue as I understand it, is no longer in contention. The defendant denies that it repudiated the agreement and asserts that due to the breach by the plaintiff of its obligations, the defendant was entitled to refuse to take delivery of the trailer.

[8] At the trial, Flynn and Carl de Villiers (‘de Villiers’) testified for the plaintiff and M Wall and two other witnesses testified on behalf of the defendant. The magistrate found that the plaintiff had proved its claim on the merits and granted judgment in its favour. He was very critical of M Wall whom he found not to be a credible witness.

The issue

[9] As appears from the heads of argument of counsel for both parties, the issue before this Court can be defined as whether a term existed as part of the oral agreement between the parties that the plaintiff *‘would be responsible for compliance of the six-bed trailer with all statutory and regulatory requirements, including the licencing thereof, specifically that it would comply with the abnormal vehicle registration requirements for an 84-ton payload.’*

[10] The plaintiff’s case is that the requirement was never expressly discussed between the parties at the time of contracting. The defendant’s case is that it was tacitly agreed.

Plaintiff's case

[11] Flynn testified that he was one of the directors of the plaintiff and has been employed there since 2000. He is a metallurgist by profession and has worked in the mining industry with mechanical equipment. He had been building low bed trailers for 14 years. He ran the operations in the factory for the plaintiff and was responsible for making sure that the trailers were built in accordance with the general arrangement drawings and requirements of clients. He also conducted the weighing of the trailers for clients when they prepared such for inspections done by the engineers from the Department of Transport ('the department').

[12] The plaintiff was a designer, manufacturer and repairer of abnormal trailers. As regards its relationship with the defendant, the plaintiff was contracted to manufacture low bed trailers for the defendant for a number of years prior to the last it built in 2008. Flynn testified that he dealt with M Wall in his dealings with the defendant.

[13] In terms of the process that would normally be followed for the manufacturing of a trailer, the client would notify the plaintiff of the trailer that it required and the load it would like to carry. The plaintiff would then prepare a general arrangement ('GA') drawing based on the information furnished by the client. The client would normally tell them what payload it would like to carry. It sometimes would indicate the size. The GA document is then submitted to the client together with a letter drawn up explaining what the GA values entail. These documents are generally sent by the client to its consultant. The consultant in turn applies for a principle approval with the department. The consultant is a middleman between the client and the department. To Flynn's knowledge, the consultant is supposed to advise the client on the day to day running and operations as regards the department.

[14] The principle approval issued by the department is a document that gives the plaintiff permission to proceed with the manufacturing of the required trailer. Once the principle approval had been granted, the plaintiff would proceed with the process starting with the design drawing where individual components are itemised

and designed. It would then order the materials and proceed to manufacture the trailer. Once the trailer is completed, it would prepare a set of documents including all the certification from various suppliers as required by the then South African Bureau of Standards ('SABS'). It prepared the documents for the homologation process. The plaintiff would then be given a National Traffic Information System ('Natis') number. The Natis number is used in the registration of the trailer which is commonly referred to as a birth certificate. The plaintiff would register the number on the system. It would then notify the client that it has completed building the trailer and that an engineer from the department may be summoned to measure it. The engineer goes to the plaintiff's premises normally to verify the dimensions that are on the plaintiff's GA drawing that had been given in the principle approval. The consultant for the client normally organises the inspector to come to the plaintiff's premises.

[15] The engineer from the department requires weighbridge certificates for his calculations and the plaintiff requires a tare weight for its application for homologation. Flynn would also weigh the trailers for clients as part of his duties. The tare weight is the weight of the trailer alone with no load on it. Once the inspection has taken place, the birth certificate together with a change of ownership is submitted to either the financing authority that is being used to finance the trailer or to the clients themselves to do the change of ownership from the plaintiff's name to the client's or the bank's, whichever might be the title holder. The trailer then leaves the plaintiff's yard. The next time they would see it would be when it is broken.

[16] The invoice would be submitted together with the change of ownership paperwork and the birth certificate to either the bank or the client for payment. Payment is in accordance with the terms of agreement and it is normally done on a Cash-on-Delivery ('COD') basis prior to the trailer leaving the plaintiff's premises.

[17] According to Flynn, the plaintiff's and defendant's business relationship started in 2006 when M Wall gave him a call requiring a trailer. He flew down to Cape Town and they discussed a 100-ton trailer. A price and GA were requested

from his Springs company which were sent to the office of Target Cranes, a company owned by M Wall together with the defendant. Flynn referred to an invoice dated 9 November 2006 relating to that transaction. At the bottom of the invoice the following words are contained: 'THE AV WILL LARGELY BE DETERMINED BY THE RATING OF THE HORSE OF CHOICE'. This means that the choice of truck tractor, as they call it, would largely affect the load that can be carried on the trailer by the position of the fifth wheel which links onto the kingpin and the ratings of the front and drive axles as allowed by the department. AV is the register of Abnormal Vehicles. When Flynn met M Wall, M Wall was the owner of a company that had a number of low beds that had been bought from another manufacturer.

[18] Between 2006 and 2008 the plaintiff built various and varied low beds for M Wall upon his requirements. Flynn got the impression that M Wall knew what he was doing. In 2008, Flynn and M Wall reached an agreement that Flynn would build a four-axle step deck trailer. It was also required of him to design and build on receipt of principle approval a six-axle trailer to carry a payload of 82 tons. M Wall gave him the dimensions of the loading surface for the unit to be manufactured and the plaintiff supplied a GA drawing in accordance with that. Flynn understood the 82-ton requirement to be the payload that his trailer could carry. The trailer of this nature was custom built for the requirements of the client. It was the first trailer of its kind in South Africa. Flynn referred to a document sent to M Wall dated 21 October 2008 relating to trailers that were still to be built. Both parties agreed that they would both benefit from the process.

[19] As regards the six-axle trailer that Flynn was asked to build, he asked his designer, Adrian Gray ('Gray') to do the calculations based on the information the plaintiff received from the axle manufacturer and from the kingpin manufacturers. The plaintiff produced the GA drawing that was used to obtain the principle approval. Flynn was referred to the relevant GA drawing by Mr Morrissey, who represented the plaintiff in the *court a quo* from which he confirmed that the GA drawing sent to the defendant referred to an 89 millimetre diameter kingpin. Below

that there was reference to GKM32, which stood for gross kingpin mass 32 000 kilograms. The kingpin was rated at 32 tons and could sustain a weight of 32 000 kilograms as limited by the manufacturer. The gross axle unit ('GAU') is a combination of all six axles, which were calculated at 13 tons per axle, equalling 78 000 kilograms' capacity.

[20] The GVM is the gross vehicle mass which is obtained by the addition of gross kingpin mass and gross axle unit which gives a total of 110 000 kilograms. That is a maximum according to the manufacturer a trailer may weigh including payload. Payload being the load imposed on top of the unit. The gross vehicle mass is a combination of payload and the tare weight of the trailer. As appearing in the GA drawing, the payload would be the gross vehicle mass of 110 000 kg less the tare weight of the trailer. The tare weight of the trailer when he took it over the weighbridge was 21 720 kilograms. The result of 110 000 kg minus 21 720 kg equals 88 280. That would be the payload that the plaintiff allows as manufacturer of the trailer in question. There is a note in the GA drawing which states that all tare masses are estimated and payloads guaranteed dimensions may vary on final design. This note is there because there are variations in weight or mass of a trailer that may occur. The number GF299C at the bottom of the document represents revision that may have been done on the axle loading based on information received from the axle manufacturers due to the fact that they were imported. This GA document was sent to the defendant. Pretoria Vervoer Konsultante were the defendant's consultants followed by Gaffley's Transport Services, as there was a fall out between the former and the defendant.

[21] Flynn referred to the application for principle approval dated 17 November 2008 which was addressed to the department. According to him, the said document is submitted to the department by the defendant's consultant based on the information supplied by the plaintiff. The content of the application letter is the same as contained in the GA document. Flynn also referred to a letter dated 12 November 2008 addressed by the defendant to the department and written by R

Wall, which accompanied a principle approval application on the 82 ton six-axle steerable trailer. The letter contained, *inter alia*, the following information:

> 'We require principle approval on the 82 ton 6-axle steerable trailer with a carrying capacity of 82 tons. (Drawings supplied)
>
> The broadening of our geographical area of transport has forced us to expand our fleet, specifically in this weight category. We have opened a Gauteng branch on request of our Gauteng based clients and due to the increased volume of loads to be transported out of the Gauteng area. We are also transporting loads onto Zimbabwe, Zambia and the Democratic Republic of the Congo (DRC), where restrictions of 8, 5-ton maximum load per axle are applicable (Zambia).'

[22] When asked whether he knew when preparing the GA Drawing that the trailer was going to be used to transport cranes, Flynn's response was that the plaintiff was told that the trailer was going to be used for transport of cranes.

[23] The principle approval was granted by the department and communicated by means of a letter dated 21 November 2008. The values (calculations) that were stated in the GA drawing appear in that letter. After receipt of the principle approval in principle, the plaintiff proceeded with the manufacture, registration of the birth certificate and completed paperwork for change of ownership to the defendant. The manufacturer's certificate for registration document dated February 2009 contains the Natis number and the tare weight of 21720. When the plaintiff's office contacted M Wall informing him that the trailer was ready, no truck tractor came with the engineer to measure the trailer.

[24] M Wall initially indicated that the defendant did not want the trailer because it was non-conformant and then further down the line the defendant required it again for a five-year contract at Medupi Power Station. Some months went by and the plaintiff was again informed by the defendant that the trailer was no longer required. Ultimately the plaintiff was left with the trailer. The plaintiff notified the defendant that it would take legal action against it, that it would attempt to sell the trailer or modify it for sale and would refund the defendant of (any) monies once all outstanding invoices had been settled. The plaintiff then took legal advice from

their attorneys of record. It marketed the trailer and modified it to make it extendable to sell it to Transvaal Heavy Transport in 2011. The trailer had to be modified because it was of no interest to anybody else as it was built specifically for the defendant.

[25] According to Flynn, the plaintiff built the trailer to the defendant's requirements and it was capable of carrying the 84-ton required load and the abnormal vehicle registration had nothing to do with that. That, according to him, had to be done by the defendant through the consultant with the department.

[26] The defendant paid the deposit of R300 000 to the plaintiff on 01 October 2009 for the four axle trailer. The defendant had been invoiced for this on 3 March 2009. The balance did not follow and the four axle trailer was sold to Basil Reid with the defendant's blessing. M Wall told him that the R300 000 would be payable back to the plaintiff after the sale to Basil Reid. Flynn did not know the defendant's financial status, but the plaintiff needed the money. After the defendant told the plaintiff that it would not be taking possession of the six axle trailer, the plaintiff took legal advice and decided to withhold the R300 000.00. (The amount that was finally claimed by the plaintiff took into account the manufacturing costs, modifications of the trailer, proceeds of the sale of the trailer to a third party and the R300 000 paid by the defendant).

[27] In cross examination, Flynn testified that he sent a letter dated 20 May 2009 to one Otto van Griethuizen ('van Griethuizen') because M Wall had told him that he did not want the trailer because it could not carry the load. He took the calculations that he had done plus the tare weight that had been weighed and the GA drawing to van Griethuizen's home. Van Griethuizen did the calculations for the plaintiff based on that. One set of calculations was with a bridge formula and one without. Flynn testified that the trailer could carry 85 tons. When asked whether he had achieved an 85-ton payload, he responded by stating that, it was never loaded and tested. When asked how it helped that 85 tons can be put on the trailer if it could not carry the 85 tons legally to another place, his response was that he read in the TRH11 (guideline document) that one could get an exemption

permit to move the load. He did not deal with the TRH11, but with manufacturer's rating. He testified that he did not know what the law and the department said as the plaintiff never gets feedback as to what the department says about what loads are allowable on the trailers. He confirmed that he saw the letter mentioning that the trailer was needed in order to load crane on a truck and travel as far as Zambia although it was not made clear to him. He confirmed that he saw the letter before the principle approval (was made) and knew what M Wall needed the trailer for. He conceded that the conditions of the agreement only encompassed South African law. He stated that the vehicles manufactured by the plaintiff went on public roads but they have to travel with permits because they are abnormal. He knew that the defendant's trailer was going to have to take its 82 tons on the public road, over bridges and over culverts. According to him, the plaintiff would have to conform with what the department said with regard to the manufacturer's ratings. The plaintiff could not just do what they liked.

[28] Upon being asked about the whereabouts of van Griethuizen's calculations confirming this, he testified that he did not tender the documents because he did not see the necessity as the documents were merely confirmation of his calculations. He stated further that no documentation existed regarding the state of the trailer prior to modification. He testified that he was not familiar with permits and was not in a position to comment on permits. He was referred to the plaintiff's notice in terms of Rule 24 (9) (b) [of the Magistrate Court Rules] wherein it was stated that Flynn would express an opinion on various matters which indicated that he had knowledge about abnormal vehicle permits and the TRH11, contrary to his statement in court. To this he retorted that he had received this information from someone else. In view of this, he could not confirm whether the bridge formula was applied or not. He confirmed that according to the summary of evidence of Karl Trouw de Villiers ('de Villiers') provided in the plaintiff's expert notice, in order for the vehicle to operate legally it must be registered on the abnormal load system. Abnormal load exemption permits will be used based on guidelines specified on the TRH11 guidelines for conveyance of abnormal vehicles and loads.

He conceded that according to the notice, TRH11 would apply. He testified that the plaintiff created vehicles that could travel legally on the roads and none of its vehicles have ever been returned. He maintained that the plaintiff did not get involved in the TRH 11 requirements as those are directed at the client and its consultant and not at the plaintiff. This is because the plaintiff does not operate the vehicle on the road, it merely builds it. According to him, TRH 11 is post manufacture. He conceded that the defendant's low bed trailer had to carry loads in public roads and would have to go over bridges. He did not know if the bridge formula applied in this instance and could not dispute it if someone were to contend that it did.

[29] De Villiers testified that the TRH11 is a policy document that provides guidelines for the transport of abnormal vehicles on public roads in South Africa. An abnormal vehicle is one of which the dimensions or masses exceed the limits laid down in the National Road Traffic Regulations ('the Regulations'). An abnormal load is when the mass exceed the limitations imposed by the Regulations. A permit for road usage to convey abnormal load is issued by authorities situate in the various provinces. Such authorities have a right to refuse a permit or modify the conditions. One would need a truck tractor or other type of prime mover for use of a trailer on a public road. The combination of the vehicles would be evaluated separately. In order to operate on the road the vehicle must be registered and a permit be obtained. The six axle trailer in question could carry a load of 88 280 kilograms within the manufacturer's limits. The carrying capacity of the tyres was 77 256 kilograms which was lower than the manufacturer's rating and that was a limiting factor. Hooked up to a FH6 Volvo FH60 truck, the net carrying capacity of the trailer was approximately 86 000 kilograms. According to him, the manufacturer's ratings are legally allowable.

[30] In cross examination de Villiers testified that the principle approval is strictly speaking not a compulsory document. The TRH11 states that it is recommended that the principle approval be obtained before the vehicle is built. He

would not express an opinion on whether if one would ever get a permit, if the maximum payload in terms of the AV registration number is exceeded.

Defendant's case

[31] The defendant's first witness was Jose Heredia, a chief engineer responsible for abnormal registration, loads and loaded vehicles and granting exemptions in the department. He testified that he was familiar with the principle approval letter dated 21 November 2008 relating to the trailer which is the subject of these proceedings. He specifically confirmed the portion of the letter that '*in order for the vehicle to operate legally, it must be registered on the Abnormal Vehicles/Load system. Abnormal Loads exemption permits will be issued based on the guidelines as specified on the TRH 11, Guidelines for the Conveyance of Abnormal Vehicles Loads'*. He testified further that the bridge formula would be applicable in this kind of case.

[32] A second witness Leon de Beer, a mechanical engineer who had worked with abnormal load vehicles for 41 years in various capacities, testified that he was familiar with the TRH11 document. According to him, the TRH11 guidelines and bridge formula were of prime importance in all the relevant work he did involving such (abnormal load vehicles). He was taken aback by the contention that the department required no strict compliance. He confirmed that Chapter 3 of the TRH11 document required seven factors to be taken into account when a permit is sought to operate an abnormal vehicle on the road. He confirmed the seven factors stated in de Villiers' summary of evidence to include: the capacity as rated by the manufacturer; the load which may be carried by the tyres; the damaging effect on pavements; the structural capacity on bridges and culverts; the power of the prime mover(s) and the load imposed by the steering axles. He agreed with de Villiers' conclusion that in the present matter, *'[a]pplying the bridge formula restricts, the semi-trailer axle unit to 59 113 kilograms, the total combination mass is reduced to 99 946 kilograms, resulting in an allowable payload of 67 606 kilograms.'*

[33] He further testified that the TRH11 limitations have always been applied by the department to abnormal load vehicles. The clause making reference to the TRH11 guidelines is contained in all principle approvals. Payload in his understanding was what the vehicle could carry on the public roads and that is applicable to abnormal load vehicles. The AV registration is what provides for the allowable payload.

[34] He disputed a notion that the trailer in this case could carry 82 tons on the public roads. According to him, whilst structurally the trailer could carry 85 or 82 tons because it is an abnormal vehicle and also being a trailer, it first has to be combined with a truck tractor to ultimately work out the payload, but one could get an indication of the actual allowable payload by also just considering the trailer. This would be done by taking the structural capacity of the trailer being a manufacturer's rating and then looking at the wheel configuration as to what will be an allowance in terms of the bridges and the equivalent single wheel massload ('ESWM'). ESWM is a method of calculating the damage to a pavement caused by a vehicle and is determined by its tyre pressure, the magnitude of the individual wheel loads and the spacing between the wheels. One could get an indication of what the payload on the trailer is but ultimately one has to combine it with a truck tractor to get the correct figure.

[35] In cross examination, he testified that in his experience, if he went to a manufacturer and asked for an 85-ton trailer, the manufacturer would prepare a document in terms of the TRH11 for him. The manufacturer's rating is one of the elements [considered]. The ultimate product is to be used on public roads and it has to comply with that. In his experience when he went to the manufacturer for specified vehicles, the manufacturer actually requested the TRH11 and designed the vehicles around that. He gave examples of manufacturers who designed the trailer around the payloads that could be carried on the public roads. He conceded that the truck tractor involved may vary and if one did not know what the truck tractor was, they would not necessarily know what the payload is. In his

interactions with the department he was not made aware of any relaxation of the requirements in the TRH11.

[36] M Wall testified that Flynn knew that the defendant was transporting in Africa and the whole of South Africa and therefore the trailer had to comply with the TRH11. He ordered a four-axle trailer with a payload of 55 tons and that was built 100% to his specifications. The defendant did not take delivery of that trailer because Flynn was approached by Basil Reed who showed interest in it. The work on the defendant's side had slowed down and so they agreed to the selling of the trailer to Basil Reed. The defendant had paid a deposit of R300 000 to the plaintiff and once the trailer was sold; the money was to be returned back to the defendant. There was never an agreement that the deposit could be retained for whatever reason.

[37] As regards the six-axle trailer, the parties agreed that Flynn would build a trailer that would carry 84 tons specifically. His 400-ton crane had to be carried on this trailer. It would be carried into African countries such as Zambia and the Congo. The defendant wanted Flynn to build a trailer that could carry the tons mentioned. No specifics were mentioned as to the size of the amount of axles or lengths or widths because that is Flynn's job. Flynn designs and builds trailers. The other part of the agreement was that the trailer to be built would be with a new design. Flynn had copied it from the trailers the defendant had brought into the country from Europe and therefore he would charge the cost plus 10% for building the trailer.

[38] The plaintiff did not deliver what the defendant commissioned it to do. M Wall testified that he held discussions with Flynn a number of times concerning the six-axle trailer. He asked Flynn when would the plaintiff get the AV correct and up to the 84-ton mark because the plaintiff was struggling. Flynn kept promising that he would get to the 84-ton payload and that he was in discussion with Heredia and van Griethuizen. According to M Wall, the plaintiff could never achieve the payload required because from his recollection, Flynn told him that 72 tons was the maximum they could get on the trailer. According to him, the responsibility of the

trailer to get the 84-ton payload lied with Flynn or the plaintiff. The plaintiff or Flynn took the responsibility to deal with the consultants in getting the principle approvals and ultimately achieving the 84-ton payload. What every trailer was going to be used for was discussed with Flynn. He did not deal with the paperwork, that was all Flynn's work. He would not have known at the time that it was impossible for the trailer to in fact achieve an 84-ton payload as he did not design and build trailers.

[39] The defendant bought and ordered trailers from the plaintiff because they were their sole providers in South Africa and they had never let them down in the past. Flynn assured him that he would build a trailer that could carry 84-ton mobile crane. These steerable trailers were the first to be built in South Africa. M Wall testified that he did not know the rules and laws surrounding steerable trailers. He told Flynn every time he went to Johannesburg that he wanted an 84-ton trailer so that the trailer would not be obsolete. He disputed that the plaintiff built a trailer that could take an 84-ton payload. According to him, the plaintiff built a trailer that could carry 84 tons; he did not build a trailer that could carry an 84 payload on a public road under a permit or special condition permit. It therefore did not fulfil its obligation. In his view, payload is the load that would be imposed on the trailer and transported from one point to the other across public roads, bridges, culverts in the Republic and across the border of Africa. He testified that Flynn had built numerous trailers for the defendant in the past worth tens of millions of rands and each time the payloads were achieved. In the case of the six-axle trailer the payload was never achieved. Whenever the defendant purchased a trailer or any piece of equipment, it has special requirements otherwise it would not be purchasing the equipment from the supplier. The defendant needed the equipment to achieve payloads or lift capacities. The agreement was cancelled, *inter alia*, because the payload was not achieved. He testified that the trailer had never belonged to the defendant and it never took possession of it.

[40] In cross examination, with reference to the letter dated 20 April 2009, he could not say whether the trailer was complete or not complete. He testified that he

did not order a trailer to carry a load on manufacturer's ratings. He seemed to be conceding that it was the duty of the defendant to arrange for inspection of the trailer when completed but yet suggesting that, that would not be the case in respect of the six-axle trailer. According to him, the agreement was that all paper work pertaining to the six-axle trailer would be done by Flynn. He met with Flynn every second week in Johannesburg. Flynn was not achieving the 84-ton payload but told M Wall that he would get there.

Analysis

[41] The defendant contends that it was a tacit term of agreement between the parties that the trailer would be able to convey the load on South African public roads legally. Its case is that although the plaintiff did not concede an express term, the facts which are common cause between the parties indicate that the existence of the term contended for by the defendant would be necessary to establish the business efficacy of the agreement in the sense postured in *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] (1) KB 592 at 605.

[42] A *tacit* term was described by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* [1974] 3 All SA 497, 1974 (3) SA 506 (A) 531-2 as *'an unexpressed provision 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.'*

[43] According to Corbett AJA, it was important to distinguish between those unexpressed terms implied by law and tacit terms which must be found, if at all, in the unexpressed intention of the parties. Importantly, he went on to state that:

> '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.' (See *Alfred McAlpine* supra at 532 G – 583) (Own emphasis)

[44] Referring to the bystander test, the Court in *Alfred McAlpine* supra at 533B echoed with approval the famous quote derived from the decision of *Reigate v Union Manufacturing Co*. *supra* at 483, where Scrutton, LJ said:

> 'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident 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 both replied: 'Of course, so-and-so. We did not trouble to say that; it is too clear.' (Own emphasis)

[45] The test of business efficacy has been applied in many cases by the courts but its meaning has not necessarily been defined. In *Rapp and Maister v Aronovsky* 1943 WLD 68 at 74-75 the court observed that:

> 'It has often been pointed out that it is not sufficient to show that the term would be highly reasonable or convenient to one or other or even both of the parties. The cases show that the Court has to be continually on its guard against being persuaded to introduce a term which, on analysis of the argument, appears to be no more than a term which would make the carrying out of the contract more convenient to one of the parties or both of the parties and might have been included if the parties had thought of it and if they had both been reasonable. You are not to imply the term merely because if one of the parties or a bystander has suggested it, you think only an unreasonable person would have disagreed. You have to be satisfied that both parties did agree. It is quite a different proposition, if in the hypothetical case Scrutton LJ puts in, you feel the parties might say: 'You have called our minds to something we have not thought of and what you say is not unreasonable, let us discuss it.' If that is all that the Court feels might have happened then the Court is not entitled to imply the term.' (Own emphasis)

[46] In importing a tacit term the Court is giving effect to the common, although unexpressed, intention of the parties. The term to be imported must be necessary to give effect to the contract. If the contract would be effective without the term, it

makes no sense to import it. In *Wilkins No v Voges* 1994 (3) SA 130 (A) at 137B-D, Nienaber JA said:

> '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.' ('Own emphasis')

[47] The defendant must satisfy the Court on a preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties to the agreement must have been satisfied that they are in agreement on the tacit term. In its importation of a tacit term the Court draws an inference as to what both parties must or would have necessarily agreed to but for some reason left the term unexpressed. (See *City of Cape Town (CMC Administration) v Bourbon-Leftley And Another* 2006 (3) SA 488 (SCA) at para [19]. It has been held that not only the surrounding circumstances but the subsequent conduct of the parties may be an indication of whether the contract contained the tacit term. (See *Richard Ellis South Africa (Pty) Ltd v Miller* 1990 (1) SA 453 (T) at 460 D-E cited in *Christie's The law of contract in South Africa*, RH Christie & GB Bradfield, 6th Edition, LexisNexis at page 178)

[48] With these principles in mind, I now turn to the present agreement. It is common cause that the defendant required the plaintiff to build a trailer that would carry 82 or 84-ton payload. Flynn conceded that the trailer had to carry loads in public roads and that it would have to go over the bridges and culverts. It is also common cause that the plaintiff would design and manufacture a trailer which met the defendant's particular requirements. The parties differ as to what those requirements were with the plaintiff limiting those to only designing and manufacturing a six-axle trailer that could carry 84 tons. Flynn was adamant that the trailer was capable of carrying 84 tons. The defendant on the other hand is of the view that in fulfilling the defendant's requirements, the plaintiff had to ensure

that the trailer complied with the law by making it capable of legally conveying an 82 or 84 ton over the South African public roads.

[49] Flynn states that it was not the plaintiff's responsibility to arrange for the AV registration, that is done by a client. According to him, the plaintiff was only required to build on its manufacturer's rating. Flynn's assertion is flawed in a number of respects, in my view. Firstly, his version on whether the payload was a term of agreement vacillated at different times of his evidence. At first, he testified in chief that *'[it] was also required of me to design and build on the seat of principle approval we build a six-axle trailer to carry a payload of 82 tons*.' He was then asked by Mr Morrissey: '*What did you understand the 82-ton requirement to be*?' His answer was: '*To be the payload that my trailer could carry Your Worship*'. He later stated in his evidence '*I know of 82 ton payload that was required to be carried*.' However when asked by Mr Morrissey towards the end of his evidence '*As far as payloads were concerned what was the term of the agreement?*' his answer was '*The term was to carry 82 tons Your Worship*'. I highlight this issue because when asked whether he had achieved an 85-ton payload, he kept stating that the trailer could carry 85 tons. The distinction between a 'load' and 'a payload' is important because as stated by all the witnesses, including Flynn, payload is when the trailer can travel with the load on public roads.

[50] It is clear from the evidence that the required 82 or 84 payload was not achieved. That much is evident not only from the defendant's witnesses but from Flynn's evidence as well. In order to achieve the payload one had to comply with the TRH11 guidelines. Flynn avoided this issue by stating that, that was not his responsibility and that he was not an expert in TRH11. It seems contradictory, in my view, for Flynn to accept on the one hand that he was required to build a trailer to carry a payload of 82 tons but yet state that he was only required to focus only on the manufacturer's ratings of 82 tons. Flynn disavowed the notice made by the plaintiff suggesting that he was an expert on TRH11 by stating that he got the information from someone else and was in fact not an expert on this issue.

[51] It seems to me, the legal requirement that the trailer must be capable of operating on South African public roads as an abnormal vehicle cannot be divorced from or was intertwined with the achievement of the payload required to be achieved. That much is clear from the principle approval granted by the department. The principle approval states unequivocally that: '*In order for the vehicle to operate legally, it must be registered on the Abnormal Vehicles/Loads system. Abnormal Loads exemption permits will be issued based on the guidelines as specified on the TRH11, Guidelines for the Conveyance of Abnormal Vehicle Loads*.'

[52] It was manifest in the evidence, particularly that of the experts, that the TRH11 and bridge formula are of prime importance in the operation of abnormal vehicles. Whether the responsibility to apply for the permit lay with the defendant was in my view, not the core issue because that would be a step taken after the manufacturing has been completed. In other words, in building the trailer it seems logical to me that the manufacturer has to build the object with the view to achieving the factors and formula in the TRH11. De Beers testified that, this is the approach followed by the manufacturers he has dealt with. They manufactured the trailer around the TRH11. The purpose of the inspection by the engineer from the department post manufacture is to check whether there is compliance with TRH11, amongst others. M Wall's contention that it would be illogical for the defendant to order a trailer simply for it to carry tons and remain in the yard, makes sense to me. The whole purpose of purchasing the trailer was to carry the load in South African public roads. It is therefore unhelpful for Flynn to suggest that obtaining the exemption permit was not his function. That is not the point; the point is that when the application for the permit is sought, the trailer must be found to be legally compliant. In simple terms, it must be found to be capable of conveying an 82 (84) payload on South African public roads. The GA drawing done in order to get the principle approval is not the end of the process. The payload needed to be achieved and therefore the bridge formula, *inter alia*, had to be applied in order for the defendant to get the payload and eventually permission to do what the trailer was

required for, which was to carry payloads on South African roads, through bridges and culverts, amongst others. The plaintiff knew that that was the purpose. It is instructive that the TRH11 as stated by de Villiers recommends that a principle approval be obtained prior to building the vehicle. The principle approval itself as a standard specifically refers to compliance with the TRH11 guidelines.

[53] The argument advanced by Mr van Eeden appearing with Mr Myburgh for the defendant that in order to give business efficacy to the agreement the trailer had to comply with all the requirements which would make it capable of legally conveying an 82 or 84-ton payload over the South African public roads is sensible.

[54] If at the time of entering into the agreement parties were asked whether the trailer should be designed and built to legally convey an 82 or 84-ton payload over the South African public roads, they would have agreed. They would also have agreed that if it was not built in that way, it was not compliant and therefore could not achieve the purpose for which it was built. Dealing with the question of whether or not an implied condition existed that the goods sold were reasonably fit for the purpose for which they had been sold, the Court in *Kroomer v Hess & Co* 1919 AD 204 at p 206 held the following:

> 'Even, therefore, if we assume that the words "in good sound order and condition" do not form part of the contract, the plaintiffs were entitled to reject nuts which did not satisfy the implied condition that they should be reasonably fit for the purpose for which they had been sold, viz., for human consumption. That would have been so, even if there had been no stipulation that they should be of "fair average quality of the season's crop." But the addition of these words strengthen the plaintiff's case, for it is difficult to conceive that nuts which are sold for human consumption and which are unfit for that purpose can be said to be a fair average quality of this or any other season's crop. It follows, therefore, that even if we assume that the words "in good sound order and condition" do not form part of the contract between the parties, the defendant had failed to carry out his contract, and was therefore liable in damages for its breach. The application must, therefore, be refused, with costs.'

[55] So too, in the case of *Minister van Landbou Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 200G to 201H the Court found that the fact that the bull in that

case was bought for breeding purposes (which was common cause), and the non-attainment of that purpose by the delivery a bull that was infertile amounted to a breach of the contract.

[56] Therefore, even if legal compliance was not expressed, the purpose for which the trailer was required was known and common cause between the parties in this present matter. It was necessary for the business of the defendant for the trailer to be legally compliant for it to carry loads on South African business roads.

[57] It is noteworthy that the plaintiff was a designer, manufacturer and repairer of abnormal trailers, whilst for the purposes of manufacturing of trailers the defendant appears to be lay. It has not been proven that the consultant was employed to advise the defendant on the TRH11 or to pick up that the payload had not been achieved. Even if the consultant had that expertise the responsibility to ensure that it was achieved was that of the plaintiff, in my view. Flynn further knew that the defendant is a company that transported goods by road for business. The plaintiff had built various trailers for the defendant before worth tens of millions of rands according to M Wall between 2006 and 2008. All these were designed and manufactured with no difficulty. Furthermore it was alleged that in 2008 the plaintiff built a four-axle trailer to the requirements of the defendant. It bears mentioning that compliance with the manufacturer's specifications contained in the GA cannot be said to constitute the 'defendant's particular requirements'. Flynn's insistence that the manufacturer's ratings was the only requirement the plaintiff had to consider appears to be contrary to the averment by the plaintiff in its particulars of claim that it had to comply with the defendant's requirements.

[58] The magistrate found M Wall not to be a credible witness. Whilst M Wall's evidence was not entirely satisfactory, his evidence was not altogether wanting on the core issue of whether it was a term of agreement for the trailer to be legally compliant as outlined above. Even if he were shaky on other aspects of his evidence, particularly on the defendant's conduct after the plaintiff invited it to take delivery of the trailer, his evidence on the defendant's specific requirements carried through.

[59] I accept that the plaintiff advised the defendant that the trailer was complete and ready for inspection on 26 February 2009. On 31 March 2009, the defendant addressed correspondence to the plaintiff that the trailer was '*pending payout*' and could only be released once work had been completed on other trailers of the defendant purchased from the plaintiff. Another letter was sent on 20 April 2009 that due to unresolved matters, the defendant was cancelling all orders not yet taken into delivery and this would include the six axle and the four axle not yet completed. It is not clear why the four axle was included in that letter as M Wall stated it had been completed to the defendant's requirements. R Wall unfortunately did not testify to clear this up and M Wall was not a good witness in clarifying this issue. As to the correspondence of 31 March 2009, Mr Morrissey placed emphasis on the latter part of the letter and the lack of clarity as to what '*pending payout*' meant. The magistrate also took issue with the fact that the correspondence from the defendant made no mention of the alleged non-compliance with statutory requirements.

[60] M Wall testified that he had been having ongoing discussions with Flynn about achieving the 84-ton payload and Flynn confirmed that he will get there. Flynn's allegations that he did not know that M Wall refused to take delivery of the trailer because of the alleged non-compliance with the legal requirements does not conform to his evidence that whilst initially nothing was forthcoming, at some point the defendant indicated that it did not want the trailer because it was non-conformant.

[61] Flynn once again repeated in cross examination that M Wall told him that he did not want the trailer because it could not achieve the payload. Based on this he took the calculations done by the plaintiff plus tare weight and the GA drawing to van Griethuizen and asked him to do calculations for him, with and without the bridge formula. This does not sound like a person who did not know that there was a dispute.

[62] Assuming in the plaintiff's favour that there was some murkiness regarding the communication on the non-achievement of the payload from the defendant, in

so far as the documentation is concerned, one can however not ignore Flynn's evidence regarding a call he made to van Griethuizen and the letter he addressed to him dated 20 May 2009 where he advised van Griethuizen that the plaintiff would like to achieve '*the design payload of 85 000kg'* and furnishing van Griethuizen with information about the trailer in order to make calculations. Calculations from van Griethuizen indicated that the trailer could achieve a payload of 67.3 tons with the application of the bridge formula and without the bridge formula 87.5 tons. Flynn confirmed the documents discovered by the defendant containing the calculations as being the documents containing calculations he received from van Griethuizen.

[63] In a letter dated 25 May 2008 (sic) the plaintiff stated that the trailer awaited final certification from the department which appears to be an AV registration. This is so, even though the plaintiff had earlier stated that the trailer was complete. This places doubt on the assertion that the plaintiff had no duty to ensure that the trailer was legally compliant. It is rather curious that van Griethuizen's calculations were not passed onto the defendant so as to prove or disprove the plaintiff's contention that the tons or payload required were achieved.

[64] Whilst M Wall's answers were not satisfactory in some respects the magistrate erred in not analysing the common cause issues and in not finding that Flynn's evidence was also wanting on several aspects including his explanation on the filing of a notice on behalf of the plaintiff where it was indicated that he was an expert on TRH11 guidelines. That notice did not appear to have been withdrawn by the plaintiff's attorneys. It only turned out in cross examination that in fact Flynn was not an expert and he denied any first-hand knowledge of TRH11 guidelines. The expert summary described at length how the TRH11 guidelines were applied by the department during the period 2008 and 2009. This, the trial court should have given it a more careful look.

[65] It seems that the magistrate dismissed the defendant's version mainly based on M Wall's credibility and did not place much weight on the evidence of the

expert witnesses, which evidence was, in my view, crucial to the key issue before the court.

[66] It seems to me Flynn decided to maintain a line that he was only required to consider the manufacturer's ratings to the exclusion of other requirements which he said were not his responsibility. This, together with his failure to report to the defendant what van Griethuizen found, gives an impression that he was avoiding at all costs, to admit that the requirement of 82 or 84 payload was not achieved. For those reasons, it is unavoidable to find that the design and manufacture of the trailer was not done in accordance with the requirements agreed to between the parties. The defendant was accordingly entitled not to take delivery. This I say being aware of the seeming ambivalence and mixed messages sent by the defendant as to whether it would take delivery of the trailer between 2009 and 2010. The core issue, however, in my opinion, was whether the trailer complied with the requirements as per the agreement between the parties. Whether the defendant kept changing its mind regarding the delivery or not of the trailer after the manufacturing, is not as germane to the main question.

[67] My view, therefore, is that the defendant has been able to show that it was a *tacit* term of the agreement that the trailer be manufactured to carry an 82 or 84-ton payload, i.e. the trailer designed and manufactured had to be able to legally convey load on the public roads of the Republic of South Africa. Whilst the decision to grant a permit lies with the department, in its design and manufacturing of the trailer, the plaintiff had to ensure that the payload as provided in the TRH11 guidelines was achieved. The appeal should therefore succeed.

[68] As to costs, the defendant's counsel contended that whilst the issue to be determined by the Court seemed narrow, it was not uncomplicated; it therefore warranted employment of two counsel in the matter. The plaintiff's counsel did not seem to have any quarrel with that submission.

[69] In the result, I would make the following order:

1. The appeal succeeds with costs including costs of two counsel.

2. The order of the court *a quo* is set aside and replaced with the following order:
    1. The action is dismissed with costs.

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N P BOQWANA

Judge of the High Court

I agree and it is so ordered.

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V C SALDANHA

Judge of the High Court

APPEARANCES

For the Appellant: Adv. P A Van Eeden (SC) with Adv. P A Myburgh

Instructed by: Tinkler Incorporated, Claremont

For the Respondent: Adv. A Morrissey

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