THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 10317/2019

In the matter between:

ORIGIN GLOBAL HOLDINGS LTD **Plaintiff**

and

ACORN AGRI (PTY) LTD **1st Defendant**
AFRIFRESH GROUP (PTY) LTD **2nd Defendant**

Coram: **Bozalek J**

Heard: **3 June 2021**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12h00 on 30 July 2021.

JUDGMENT

BOZALEK J

[1] The first defendant raises an exception to the plaintiff's particulars of claim on the basis that it fails to disclose a cause of action against the first defendant, alternatively, that the particulars of claim are vague and the first defendant is embarrassed in pleading thereto.

[2] The plaintiff ('Origin Global'), a Mauritian company, instituted action against the first and second defendants ('Acorn' and 'Afrifresh') claiming against them jointly,

alternatively, jointly and severally, payment of US$796 617.72 by reason of the defendants' alleged breach of their obligations in terms of a share purchase agreement (hereinafter 'the SPA').

[3] The plaintiff amended its Particulars of claim ('the Particulars') on two occasions and on 17 March 2020 the first defendant delivered the notice of exception which is the subject of the present proceedings.

[4] The SPA was concluded in writing on 3 September 2016, the parties thereto being Standard Chartered Private Equity (Mauritius) III Limited ('SCPE') the first and second defendants, Afrifresh Holdings (Pty) Ltd, represented by Mr Chris Conradie, and Mr Conradie himself.

[5] Very simply, in terms of the agreement SCPE sold 93% of the shares in the second defendant (Afrifresh) to the first defendant (Acorn). The key clause in the SPA for the purposes of the exception is clause 9. In reading this clause it must be borne in mind that *'the Purchaser'* is Acorn (first defendant), '*the Company'* is Afrifresh (second defendant,) *'Origin Holdings'* is the plaintiff and *'Holdings'* is Afrifresh Holdings (Proprietary) Limited. Clause 9 reads follows:

> *'9. SUPPLY AGREEMENT*
>
> *9.1 The Purchaser undertakes in favour of Conradie that it will procure that the Company enters into negotiations with Conradie as soon as reasonably possible after the Effective Date, with a view to concluding an agreement between the Company and Conradie or his nominee in terms of which the Company agrees to supply produce to Conradie or his nominee (the Supply Agreement).* (For purposes of this clause 9, Conradie hereby irrevocably nominates OFD and ODA as his nominees.)
>
> *9.2 Pending the outcome of the negotiations referred to in clause 9.1,* (but

subject to clause 9.4) *the Purchaser and the Company may not cede, alienate or encumber the loan claim of USD1 950 000 which the Purchaser will hold against Origin Holdings pursuant to the terms of this Agreement.*

9.3 The Company and Conradie undertake to negotiate in good faith with each other with a view to concluding a Supply Agreement.

9.4 If a Supply Agreement, on terms and conditions acceptable to the Company and Conradie, is not concluded within 6 months after the Effective Date:

9.4.1 the Purchaser undertakes in favour of Origin Holdings and Holdings that the loan of USD1 950 000 which the Purchaser will hold against Origin Holdings pursuant to the terms of this Agreement will not be enforced by the Purchaser and/or the Company and the rights of the Purchaser and/or the Company in respect thereof will be ceded outright and irrevocably to Origin Holdings (provided that Conradie has complied with his obligations in terms of clause 9.3); and

9.4.2. the company will supply a minimum of 500 000 units of fruit per year for 2 years from the Signature Date (for the benefit of) ~~*to*~~ *Origin Holdings* (to OFD and ODA collectively) *on market related terms and conditions. For the avoidance of doubt, the terms and conditions of the supply of fruit by the Company to* ~~*Origin Holdings*~~ (OFD and ODA) *will be consistent with past practice and at market related prices and on market related service provisions that do not materially differ from industry norms.*

9.5 The Parties agree that this clause 9 constitutes a stipulatio alteri *for the benefit of Origin Holdings and shall be open for acceptance by Origin Holdings which shall be capable of acceptance at any time by Origin Holdings by delivering written notice to that effect to the Parties. Prior acceptance, the benefit of this* stipulatio alteri *may not be withdrawn by the Parties without the prior written consent of Origin Holdings'.*

[6] The bracketed words in subclauses 9.1 and 9.4.2 reflect insertions/amendments to the SPA subsequent to the original date of signature on 3 September 2016, whilst the

words with a line through them reflect words deleted pursuant to such amendments. Three addendums to the SPA were executed: on 9 September 2016, 15 November 2016 and again on 15 November 2016. The amendments to clause 9 were effected by the second addendum.

[7] The focus of the exception is clause 9.4 of the SPA in which the defendants give various undertakings in favour of Mr Conradie, the plaintiff and Holdings. In clause 9.1 the first defendant undertook to procure that the second defendant entered into negotiations with Conradie with a view to concluding an agreement between them (the Supply Agreement) in terms of which the second defendant would supply fruit to Conradie or his nominees, namely, OFD and ODA. This was to take place within a period of six months after signature of the SPA.

[8] In its Particulars the plaintiff pleads further that a Supply Agreement could not be concluded within the six-month period as result of which clause 9.4 became operative, and in particular clause 9.4.2, in terms of which, it alleged, the first and second defendants were obliged to supply a minimum of 500 000 units of fruit per year for two years for the benefit of the plaintiff at market related prices. The allegation that the first defendant too was subject to this obligation forms the core of its exception.

[9] The first defendant's exception highlights paragraph 9 of the Particulars, the introduction to which reads as follows:

> *'9. The following were the material express, alternatively implied, alternatively tacit terms of the SPA as amended, alternatively such terms arise upon a proper interpretation of the SPA as amended.*'

[10] Also material is paragraph 9.7 which reads as follows:

> *'9.7 In terms of clause 9.4, it was agreed that if a Supply Agreement, on terms and conditionals* (sic) *acceptable to the Second Defendant and to Conradie, was not concluded within 6 months after the Effective Date:*
>
> *9.7.1 The First Defendant undertook in favour of the Plaintiff and Afrifresh Holdings Proprietary Limited that the loan claim of US$1,950,000.00 would not be enforced by the First Defendant and/or the Second Defendant and the rights of the First Defendant and/or the Second Defendant in respect thereof would be ceded outright and irrevocably to the Plaintiff (provided that Conradie complied with his obligations in terms of clause 9.3); and*
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> *9.7.2 The Second Defendant undertook to supply a minimum of 500 000 units of fruit per year for 2 years from the Signature Date for the benefit of the Plaintiff to OFD and ODA collectively on market related terms. For the avoidance of doubt, the terms and conditions of the supply of fruit by the Second Defendant to OFD and ODA would be consistent with past practice and at market related prices and on market related service provisions that do not materially differ from industry norms;*
>
> *9.7.3 The First Defendant undertook that the Second Defendant comply with its obligations pleaded above.'*

[11] The following paragraphs in the Particulars are also relevant:

> *'10. It was within the contemplation of the parties at the time of the conclusion of the SPA, and the addenda thereto, and the SPA and the addenda thereto were concluded on the basis that:*
>
> *10.1 The first defendant would become the de facto corporate controller of the second defendant, upon implementation of the terms of the SPA;*
>
> *10.2 The plaintiff or Conradie had made commitments, or was in the process of making commitments, to a purchaser or intended*

purchaser of OFD and ODA, being Mahindra Agri Solutions Limited ('Mahindra') in terms whereof, inter alia

10.2.1 OFD and ODA would be able to secure the supply of 500 000 units of fruit per year for 2 years on market related terms and conditions;

102.2 The plaintiff would earn commission on the supply of fruit, via OFD and ODA;

10.2.3 Clause 9, and specifically 9.1, and 9.4.2, were intended to enable OFD and ODA to continue to reserve fruit for their European clients.

10A It was within the contemplation of the parties at the time of the conclusion of second and third addenda to the SPA and such addenda were concluded on the basis that the Plaintiff or Conradie was or would be exposed to Mahindra or to OFD, in the sum of US$1 000 000.00, as a forfeiture or a penalty, were they not to secure supply in accordance with the commitments in paragraph 10.2. above.'

[12] The Particulars allege further that, despite demand, and although they made part performance of their obligations, the first and second defendants failed to effect, supply or procure the full supply of fruit and failed to tender to perform their obligations under clause 9.4.2 of the SPA and thereby breached the SPA, as amended. As a consequence of the aforesaid breach, the plaintiff suffered loss in the form of the penalty or forfeiture pleaded in paragraph 10A, being an amount of US$1mil, alternatively suffered a loss of commission in the sum of US$796 617.71.

[13] The first defendant's exception is directed at paragraph 9.7.3 of the Particulars in which the plaintiff alleges that the first defendant *'undertook to procure that the second defendant comply with its obligations'* (to supply a minimum of 1mil units of fruit over a two-year period). That allegation was in turn based upon clause 9.4.2 of the SPA.

[14] The basis of the first defendant's exception is captured in paragraphs 4 and 5 of its notice of exception as follows:

> *'4. Clause 9.4.2 imposes no obligation on the first defendant to supply or procure the supply of fruit by the second defendant.*
>
> *5. In the premises:*
>
> *5.1 the allegation that first defendant was in breach of any obligations in terms of clause 9.4.2 of the Master SPA, as is alleged by the plaintiff in paragraphs 17, 19, 20 and 21 of the POC, is not supported by the provision of the Master SPA on which the plaintiff relies; and*
>
> *5.2 the POC fails to disclose any cause of action against the first defendant jointly with the second defendant or jointly and severally with the second defendant, for payment of the sum of US$796 617,72'.*

[15] In advancing its exception the first defendant eventually ultimately relied only on the ground that the Particulars did not disclose a cause of action. In argument it noted that the plaintiff pleaded that the obligation was imposed on the first defendant on four separate bases, namely: expressly, tacitly, impliedly or on a proper interpretation of the SPA. It dealt with each of these bases and submitted that the allegation was not supported by the provisions of the SPA on any basis and that the Particulars accordingly failed to disclose any cause of action against the first defendant.

[16] In argument the plaintiff relied only on the term having arisen tacitly or, alternatively, on a proper interpretation of the agreement. It contended that since a tacit term is one that arises from the facts and is thus *'fact sensitive'*, its existence could not be determined on exception. For much the same reason, it contended, the SPA could not be properly interpreted at the exception stage since the exercise could only be done in the

context of all the facts which were as yet not before the Court. In regard to both bases the plaintiff relied *inter alia* on Rule 18(7) which provides that there is no obligation to plead the facts that are relied on for the imputation of an implied term. Finally, the plaintiff contended that there was sufficient contextual material pleaded in the particulars of claim to demonstrate that the term upon which the plaintiff relied could be relatively easily imputed or so interpreted.

The principles to be applied in deciding an exception

[17] It is trite that in deciding an exception the Court must take the facts alleged in the pleadings as correct. A further uncontentious principle is that an excipient has the duty to persuade the Court that upon every interpretation which the facts alleged in the particulars of claim can reasonably bear, no cause of action is disclosed. In *Francis v Sharp and Others*[1] it was held that an excipient should make out a very clear, strong case before he should be allowed to succeed. It reaffirmed that the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract.

[18] The principle that Courts are reluctant to decide issues concerning the interpretation of contracts upon exception is however, not an all-encompassing principle. As was stated by Nestadt JA in *Sun Packaging (Pty) Ltd Vreulink*,[2] this approach does not apply where the meaning of the contract is certain.

> *'Difficulty in interpreting a document does not necessarily imply that it is ambiguous … Contracts are not rendered uncertain because parties disagree as to their meaning … Counsel was probably right in saying that the letter is not a lawyer's contract. But this is no reason for interpreting it differently. For the reasons given, I do not find the meaning of clause 3 doubtful. Properly*

[1] 2004 (3) SA 230 (C).
[2] 1996 (4) SA 176 (A).

interpreted, it has only one meaning.'.

[19] I turn now to the various bases upon which it is contended by the plaintiff that the SPA, and more particularly, clause 9.4, can be interpreted as imposing an obligation on the first defendant to procure that the second defendant supply a minimum of 500 000 units of fruit per year for two years for the benefit of the plaintiff, to OFD and ODA collectively on market related terms and conditions.

Express term

[20] The first such basis was that this was what the clause expressly provided. As was pointed out by the first defendant, it is clear that the SPA does not contain any such express provision and nor did the plaintiff contend otherwise in argument.

Implied term

[21] The second basis upon which the obligation was said to arise was as an implied term. In *South African Forestry Co Ltd v York Timbers Ltd*,[3] Brand JA dealt at some length with the concept of an implied term explaining that, unlike tacit terms, which are based on the inferred intention of the party, implied terms are *'imported into contracts by law from without'*. He pointed out that the Courts have the inherent power to develop new implied terms stating as follows:

> *'Once an implied term has been recognised, however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties … It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can*

[3] 2005 (3) SA 323 (SCA).

serve only as catalysts in the process of legal development.'

[22] From this extract it is clear that the interpretation contended for by the plaintiff could hardly arise from an implied term. Again the plaintiff did not pursue this line in argument, restricting itself to reliance on a tacit term or on the alternative basis of the term arising on a proper interpretation of the agreement.

Tacit Term

[23] I turn then to the argument that the term contended for arose tacitly between the parties. In *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*,[4] Corbett AJA (as he then was), in the minority judgment, discussed at some length the concept of an *'implied term'* pointing out that in legal parlance the expression *'implied term'* is an ambiguous one in that it can be used to denote two or three distinct concepts. For present purposes I need concern myself only with the second category or concept which was described by Corbett AJA as follows:

> *'In the second place, "implied term" is used to denote 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. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention.'*

[4] 1974 (3) SA 506 (A).

The learned judge elected to refer to such a term as a tacit term and went on to state:

> *'The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. ... The Court does not readily import a tacit a 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.'*

[24] The latter sentiments were endorsed and expanded upon by Brand JA in *Bourbon-Leftley*.[5] Referring to the principle that a tacit term is not easily inferred by the Court, he stated as follows:

> *'The reason for this reluctance is closely linked to the postulate that the Courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so. ... It follows that a term cannot be inferred because it would, on the application of the well-known* "officious bystander" *test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the Court is satisfied that the parties would* necessarily *have agreed upon such a term if it had been suggested to them at the time. ... If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.*
>
> *20. In deciding whether the suggested term can be inferred the Court will have*

[5] *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO* 2006 (3) SA 488 (SCA) at para 9, 494 H – 495 A.

> *regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into.'*[6]

[25] Recently, in the matter of *Adhu Investments CC and others v Padayachee*,[7] the Supreme Court of Appeal referred with approval to the approach to tacit terms expressed in *Alfred McAlpine* and stated:

> *'Whether a contract contains such a term is a question of interpretation. Generally, a court would be very slow to import a tacit term in a contract particularly where, as in the instant case, the parties have concluded a comprehensive written agreement that deals in great detail with the subject matter of the contract, and it is not necessary to give the contract business efficacy.*
>
> *15. The first step in the enquiry as to the existence of such a term is whether, regard being had to the express terms of the agreement, there is any room for importing the alleged tacit term.'*

[26] The Court noted clauses in the contract in question providing that the written agreement was the whole agreement and for no variation thereto unless recorded in writing and signed on behalf of the parties. It stated in this regard:

> *'A sole testimonial clause or non-variation clause does not necessarily, of itself, exclude the existence of a tacit term. These clauses, however, contained as they are in a comprehensive contract dealing in the greatest detail with the subject matter, militate against the inclusion of the tacit term contended for. In my view, (the relevant clauses) give a strong indication that in the present matter the parties intended the written document to reflect the full agreement between them leaving little room, if any, for the incorporation of such a tacit term*.'

[27] In advancing its exception the first defendant similarly relies on an *'entire agreement'* and a *'non-variation'* clause which read respectively as follows:

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[6] At page 494/495 H – C.
[7] [2019] ZASCA 63 (24 May 2019).

'21.3 <u>Entire agreement</u>

21.3.1 This agreement constitutes the entire agreement between the Parties in regard to its subject matter.

21.3.2 Neither of the Parties shall have any claim or right of action arising from any undertaking, representation or warranty not included in this Agreement.

21.4 <u>Variation</u>

No agreement to vary, add to or cancel this Agreement shall be of any force or effect unless recorded in writing and signed by or on behalf of the Parties.'

[28] I accept, however, as was contended on behalf of the plaintiff, that the mere existence of a non-variation or an entire agreement clause does not preclude finding a tacit term in the agreement since, as was held in *Wilkins v Voges*,[8] a tacit term once found to exist is read into the contract and as such is *'contained in the written contract'*.

[29] On behalf of the first defendant it was contended that no surrounding circumstances were pleaded by the plaintiff in support of the inclusion of the tacit term contended for. In response the plaintiff argued that in terms of Rule 18(7) it was not incumbent on it to plead any facts upon which the claim for the importation of a tacit term relied and, secondly, that in any event such factors as are apparent from the particulars of claim read together with the SPA were *'more than sufficient'* to support the possibility of the importation of that term.

[30] In regard to Rule 18(7), the plaintiff relied on the commentary in *Erasmus Superior Court Practice*[9] and on *Roberts Construction Co (Ltd) v Dominion Earthworks*

[8] 1994 (3) SA 130 (AD).
[9] (2nd Ed) at D1-224

(Pty) Ltd.[10] It is correct that Rule 18(7) provides that it shall not be necessary in any pleadings to state the circumstances from which an alleged implied term can be inferred. However, this clearly cannot mean that any pleading containing a cause of action or defence based on the existence of a tacit term cannot be the subject of a successful exception and must invariably go to trial, since this would render obviously specious claims or defences in contractual disputes, exception-proof. Of relevance in this regard is the following statement by Harms JA in *Telematrix (Pty) Ltd v Advertising Standards Authority SA*:[11]

> *'Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that* "cuts through the tissue of which the exception is compounded and exposes its vulnerability." *Dealing with an interpretation issue, he added:*
>
> > "Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts." *'[12]*

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[10] 1968 (3) SA 255 (A) at 261 E.
[11] 2006 (1) SA 461 (SCA).
[12] Quoting from *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) 715H and 716C-E.

[31] This brings me to the plaintiff's contentions that such facts as are apparent from the pleadings, read with the SPA, are more than sufficient to support the possibility of the tacit term's existence. These facts or allegations comprise, as I understand the plaintiff's argument, first, the averment in paragraph 9.7.3 that the first defendant *'undertook to procure that the second defendant comply with its obligations pleaded above'*. However, this averment, apart from reflecting the first defendant's undisputed obligation in terms of clause 9.1 of the SPA to procure that the second defendant negotiate with the plaintiff for a Supply Agreement, takes the issue of the first defendant's co-liability in terms of clause 9.4.2 no further. The same difficulty arises in relation to the next averment relied on, namely, the preamble to paragraph 9 which broadly alleges that '*The following were the material express, alternatively implied, alternatively tacit terms of the SPA as amended …'*. Accordingly, neither of these averments take the plaintiff's case for a tacit term any further since they are merely general and unsubstantiated assertions of its existence.

[32] The plaintiff then relies on allegations of matters that were *'within the contemplation of the parties'*, referred to paragraphs 10 and 10A of the Particulars, and on the basis of which the SPA and the addenda were concluded. In these paragraphs reference is made to the plaintiff or Conradie having made commitments or being in the process of making commitments to a purchaser or intended purchaser of OFD and ODA and securing a supply of fruit to OFD and ODA for two years in respect of which the plaintiff would earn commission or, failing the conclusion of such a Supply Agreement, would be exposed to a penalty or forfeiture.

[33] Accepting these allegations as facts, I do not consider that the plaintiff's case for the tacit term contended for is in any way advanced thereby for the simple reason that

clause 9.4 of the SPA, as it stands, provides comprehensively for the consequences of a Supply Agreement not being concluded within the six-month period. Clause 9.4.1 provides that in such event, the first defendant forfeits its right to recover a loan of US$1 950 000.00 from the plaintiff and cedes its rights in that regard irrevocably to the plaintiff. Clause 9.4.2 provides a further negative consequence for the first (and second) defendant in that the company whose shareholding it purchases in terms of the SPA, the second defendant, undertakes in that event, as a fall back for the lack of a negotiated Supply Agreement, to supply fruit at a minimum amount of 500 000 units over two years, for the benefit of the plaintiff, to OFD and OFA. It is a breach of that latter fall back provision, clause 9.4.2, upon which the plaintiff's claim against the first defendant is based. What it seeks, by way of the importation of the tacit term, is to add the first defendant as a party co-liable with the second defendant for the consequences of a breach of subclause 9.4.2.

[34] The final averment relied on upon by the plaintiff in support of the possibility of the tacit term being established on trial, is that in terms of the SPA, the first defendant became the exclusive *'corporate controller'* of the second defendant, coupled with the submission that any liability arising from clause 9.4.2 should equally rest upon the first defendant. In my view, neither the averment (which must be accepted as a fact) nor the linked submission advance the plaintiff's case for the tacit term sought to be imported into the SPA. The mere fact that the first defendant is the corporate controller of the second defendant does not justify any imputation of co-liability to the first defendant in terms of clause 9.4.2, particularly against the background of clause 9.4.1 already providing a substantial financial penalty for the first defendant in the event that the

negotiations for a Supply Agreement were unsuccessful. Nor is there any suggestion to be gleaned, either from the pleadings or from the SPA, that the plaintiff's contractual remedies for breach of the provisions of clause 9.4.2 would be ineffectual inasmuch as they lie against the second defendant alone.

[35] As was referred to earlier and as stated in *Sun Packaging*, as a rule the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract but this is only where its meaning is uncertain. Furthermore, regard must be had to the test for the existence of tacit term, namely, that the Court does not readily import a tacit term since it does not make contracts for people.

[36] Before proceeding onto the issue of *'admissible evidence of surrounding circumstances'*, it is appropriate to mention another factor which must be brought into the balance when considering whether the tacit term relied upon by the plaintiff could possibly be imported into clause 9.4. That is the issue of the amendments to clause 9 of the SPA. As noted earlier, the SPA was the subject of three addenda over a period of little more than two months. The second addendum focussed *inter alia* on the amendment of clause 9, the Supply Agreement clause, and made detailed changes to clause 9.4.2. This is the very subclause which in effect the plaintiff wishes to amend by the importation of the tacit term for which it contends. On a plain reading clause 9.4.2 provides that it is the second defendant alone which would supply the minimum of 500 000 units of fruit per year for two years in the event that the negotiations for a Supply Agreement were unsuccessful. Accordingly, it is clear from the SPA, the addenda and the Particulars, that the plaintiff had three further opportunities after the conclusion of the SPA to reconsider the terms of subclause 9.4.2 and, if it felt they were lacking, inaccurate or did not fully

express the intention of the parties, to amend them to include the first defendant as a co-responsible party in terms of clause 9.4.2. The fact that the parties did not do so is in my view a strong indication that its terms were seen at all material times as comprehensive and accurate as far as the obligations and rights of the parties were concerned.

[37] There remains the notional possibility of surrounding circumstances coming to light in the trial which support the existence of the tacit term and the linked submission that this possibility militates against deciding the issue by way of exception. It seems widely accepted that a measure of conjecture or speculation is permissible as to the nature of such evidence and its materiality. There is understandably, however, a limit to the extent of such conjecture or speculation. This was well stated by Miller J (as he then was) in *Davenport Corner Tea Room*[13] in the passage quoted with approval by Harms JA in *Telematrix*.[14] That dictum was also quoted with approval in *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd*,[15] where Marcus AJ stated as follows:

> *'The possibility that evidence of surrounding circumstances may clarify any ambiguity in the contract must not be fanciful or remote'.*

[38] What must also be taken into account are the strictures on the plaintiff as regards the adducing of evidence at the trial in seeking to establish the tacit term contended for, and which evidence might establish an intention of the parties at variance with the clear provisions of clause 9.4.2. The growing trend in our courts is to reassert the parol evidence rule which largely precludes such evidence. The following extract from the judgment of Harms JA in *KPMG Chartered Accountants SA v Securefin Ltd*[16] is relevant:

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[13] See footnote 12
[14] Para 30 above.
[15] 1999 (1) SA 624 (W) at 632H – 633D.
[16] 2009 (4) SA 399 (SCA) at para 39.

'[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) at 943B). *Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses ... Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent ... Fourth, to the extent that evidence may be admissible to contextualise the document (since* "context is everything"*) to establish its factual matrix or purpose or for purposes of identification,* "one must use it as conservatively as possible" *(*Delmas Milling Co Ltd v du Plessis 1955 (3) SA 447 (A) at 455B-C*).'*

[39] These sentiments were recently confirmed and endorsed in *The City of Tshwane Metropolitan Municipality v Blair Athol Homeowners Association*[17] where the Court, per Navsa ADP and Mothle AJA, stated as follows:

'[63] This court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by further debate about whether evidence by the parties about what they intended or understood the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach, nor is it in juxtaposition helpful to continue to debate the correctness of the assertion that it will only lead to self-serving statements by the contesting parties. Courts are called upon to adjudicate in cases where there is dissénsus. *As a matter of policy, courts have chosen to keep the admission of evidence within manageable bounds. This court has seen too many cases of extensive, inconclusive and inadmissible evidence being led. That trend, disturbingly, is on the rise.'*

[17] 2019 (3) SA 398 (SCA).

[40] Having regard to all these factors, including the lack of any ambiguity in clause 9.4 (and specifically clause 9.4.2), the dearth of any indications of surrounding circumstances in the pleaded allegations read with the SPA, or elsewhere, which would militate in favour of the implied term contended for, and the fact that clause 9.4.2 was reconsidered and amended by way of an addendum which left the crucial provisions untouched, I consider that there is no room for the importation of the tacit term for which the plaintiff contends.

The proper interpretation

[41] This leaves the final basis upon which the applicant sought to defeat the exception, namely, that on a *'proper interpretation'* of the SPA, clause 9.4 tacitly imposes the contended for obligation upon the first defendant.

[42] The statements in *KPMG* and *Tshwane City* quoted above are also relevant to this leg of the plaintiff's argument to the effect that the first defendant's co-liability in terms of clause 9.4.2 of the SPA emerges on its *'proper interpretation'*. Also relevant to this issue is the well-known quotation from *Natal Joint Municipal Pension Fund v Endumeni Municipality*[18] regarding the interpretation of documents:

> *'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is*

[18] 2012 (4) SA 593 (SCA) at 603F – 604A and 604E-F.

directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[43] The wording of clause 9.4 is, to my mind, clear and unambiguous, *inter alia* for the reasons furnished earlier, and does not produce a result which is unreasonable, lacking in sense or unbusinesslike. In the circumstances I see no room for interpretation of the SPA which imposes any obligation on the first defendant in terms of clause 9.4.2.

[44] For these reasons I find that the allegation that the first defendant was in breach of any obligations in terms of clause 9.4.2 of the SPA is untenable on the pleadings in their present form and accordingly that they fail to disclose any cause of action against the first defendant.

[45] In the result the following order is made:

1. The first defendant's application to amend paragraph 5.2 of its notice of exception by the insertion of the words 'US$1mil alternatively' between the words 'sum of' and 'US$796 617.72', is granted;
2. The exception is upheld with costs, including the costs of two counsel and, by agreement between the parties, the costs occasioned by the earlier postponement of the hearing of the exception;

3. The allegations in paragraph 17, 19, 20 and 21 of the Particulars, to the extent that they allege that the first defendant was in breach of any obligations in terms of clause 9.4.2 of the SPA, are struck out;
4. The plaintiff is granted leave to amend its combined summons by the procedure prescribed in Rule 28, the notice of amendment to be served within 21 days of date hereof.

BOZALEK J

For the Plaintiff As Instructed by	:	Adv J Butler (SC) Hayes Inc
For the Defendant As instructed by	:	Adv J Muller (SC) et Adv W Jonker VanDerSpuy Inc