IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

Case No.: CA35/2002
Date delivered: 30/5/02

In the matter between:

NEVILLE ALLAN COETZEE Appellant

and

MERVYN GRANVILLE WHITFIELD First Respondent

LAURA ROSETTA WHITFIELD Second Respondent

J U D G M E N T

LEACH, J:

The appellant, the defendant in the court *a quo*, appeals to this Court against an order granted against him in the Grahamstown magistrate's court. For convenience, I intend to refer to the respective parties as the "plaintiffs" and the "defendant".

In March 1996, the defendant purchased a farm from the plaintiffs at an agreed price of R170 000,00 payable in cash against registration of transfer. The written deed of sale contained the following clause:

> "16.2 It is recorded that both (the plaintiffs) and (the defendant) are registered as Vendors and that the property is zero-rated but in the event of Value Added Tax being payable such Tax shall be paid by the (appellant)".

One must presume that the purchase price was paid and the property transferred to the defendant in due course. However, while the parties clearly envisaged that Value Added Tax ("VAT") would not necessarily be payable on the sale, the

Commissioner of the South African Revenue Services ("the Commissioner") apparently decided otherwise and levied VAT in the sum of R20 877,19 thereon. While this sum was eventually paid by the respondents, such payment was overdue and the Commissioner, presumably acting in terms of s. 39 (1)(a) of the Value-Added-Tax Act No. 89 of 1991 ("the Act"), consequently levied a further penalty of R7 098,32 upon the respondents.

In due course this led to the plaintiffs instituting action against the defendant, claiming that he was contractually bound to repay them both the VAT and the penalty (which they had also paid). In their amended particulars of claim, after having pleaded the conclusion of the agreement of sale (and the terms of clause 16.2 thereof in particular), the plaintiffs went on further to allege:

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> Value added tax was, in fact, payable in respect of the said transaction in the sum of R20 877,19 which said sum the Defendant wrongfully and unlawfully, failed and neglected and/or refused to pay.
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> 7
> It was an implied term of the said agreement that should the Defendant fail to effect payment of the said Value Added Tax, the Plaintiffs would be obliged in law to effect such payment in the said sum and that in the event of their effecting such payment, they would be entitled to recover such sum from the Defendant.
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> 8
> The Plaintiffs have duly paid the said value added tax in the sum of R20 877,19.
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> 9
> It was a further implied term of the said agreement that should the Defendant fail to effect payment of the said Value Added Tax timeously, and on due date, penalty interest thereon would be payable, that the Plaintiffs would be liable for payment of such penalty interest and would be entitled to recover same from the Defendant the said penalty interest having been determined in the sum of R7 098,32.
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> 10
> The Plaintiffs have paid the said penalty interest in the sum of R7 098,32."

In referring to "implied" terms in paragraph 7 and 9 of the claim, the pleader used

a somewhat loose description. It was not suggested before us that the terms relied upon were anything more than tacit terms i.e. terms implied from the facts rather than terms implied by law (as to the difference between tacit and implied terms, see for e.g. *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A) at 827 and Christie: The Law of Contract in South Africa (4th Ed. at 181 - 191). In any event, on pleading to this claim, the appellant admitted that VAT in the sum of R20 877,19 had became payable arising out of the sale but averred (a) that the respondents had been obliged to pay such VAT to the Receiver of Revenue and that, upon them doing so, he had become obliged to reimburse them, (b) that the respondents had failed to pay such VAT timeously upon it becoming due, and (c) that consequent upon such failure, the respondents had incurred penalty interest in the sum of R7 098,32. Finally, in response to paragraph 9 and 10 of the plaintiff's particulars of claim, the defendant concluded as follows:

> "6. Ad Paragraphs 9 and 10 thereof:
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> 6.1 Each and every allegation herein contained is denied as if specifically traversed.
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> 6.2 Defendant repeats his plea that it was the (respondent's) duty in terms of the agreement and in terms of the provisions of Act 89 of 1991 to effect payment of such Value Added Tax as may be payable, timeously, and on due date, and if they failed to do so penalty interest thereon would be payable and would be borne by the (respondents).
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> 6.3 . . . . . .
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> 6.4 Defendant pleads that Plaintiff failed to call upon Defendant to pay the Value Added Tax timeously, when had they done so, the Defendant would have made payment of the sum of R20 877.19 to the Plaintiffs forthwith.
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> 6.5 In the premises, the Defendant denies being liable to the Plaintiffs in respect of penalty interest, either as pleaded or at all.
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> 6.6 Immediately on having been informed that Value Added Tax was payable on the transaction in the sum of R20 877.19, Defendant made payment thereof to Plaintiff."

It is clear from this that while the parties were *ad idem* on the pleadings that the amount of R20 877,19 had been levied as VAT arising out of the sale of the farm

and paid by the respondents, that such VAT had not been paid timeously and that the failure to do so had resulted in the revenue authorities levying the penalty of R7 098,32 against the respondents, the following were in issue:

(1) Whether the appellant had reimbursed the respondents the sum of R20 877.19 they had paid as VAT.

(2) Whether the appellant had been obliged to pay such VAT to the Commissioner.

(3) Whether the alleged "implied" term set out in paragraph 9 of the particulars of claim formed part of the agreement of sale.

These being the cardinal issues between the parties, they then proceeded to trial. It was at this stage of events things took a somewhat unusual turn. The notice of set down requested the clerk of the court to place the matter on the motion court roll for 5 June 2001, recording in addition that the matter was to be argued on the basis of written heads of argument submitted by the parties. That appears to have been what took place although there is no entry on the record as to what happened when the matter in fact came before court. It appears from the heads of argument filed by the parties in the court *a quo* (which were made available to this Court) that it was agreed that the appellant had paid the sum of R20 877,19 to the respondents as he had pleaded. Although Rule 29 (5) of the Magistrate's Courts Rules required this to be admitted either *viva voce* or by written statement and recorded by the court, this was not done. However we were informed from the Bar that such an admission had in fact been made and the matter was argued before us on that understanding.

In any event, in the light of the parties having been *ad idem* as to the defendant having made that payment, the remaining issues were whether he had been

obliged to pay the VAT to the Commissioner in the first place and whether the terms set out in paragraph 9 of the particulars of claim had tacitly been agreed when the agreement of sale was concluded - it being common cause that if the agreement did not incorporate those terms, the appellant would not have been obliged to pay the respondents the penalty of R7 098,32.

Four days after the matter was argued, the magistrate delivered the following judgment:

> "After consideration of the arguments submitted by the learned attorneys judgement *(sic)* is entered in favour of the plaintiffs with costs for the plaintiffs against the defendant".

As the plaintiffs claimed a total of R27 975,51 in their particulars of claim, being both the VAT and the penalty levied thereon, this judgment may well have been construed as a judgment for the full amount, together with interest thereon and costs as set out in the summons. However, we were informed that, in the light of the agreement which had been reached at the hearing that the appellant had paid the respondent the VAT which had been levied, both sides were *ad idem* that the judgment was to be construed as being no more than one for payment of the penalty of R7 098,32 plus the interest thereon and costs. It is against this order that the plaintiff now appeals to this Court.

Unfortunately it is necessary to record with a measure of censure the magistrate's failure to comply with his obligations under the Magistrate Courts' Rules upon the plaintiff having noted this appeal. In *Regent Insurance Company Ltd v Maseko* 2000 (3) SA 983 (W), the court emphasized the importance of a magistrate giving full and proper reasons for judgment under Rule 51 of the Magisrate's Court Rules and stressed that the failure to comply therewith undermines and delays effective legal administration. In the unreported judgment of this Court in *S v Mancam* (CA&R 558/2000), in circumstances almost identical to those which prevailed in the *Regent* case, *supra,* the same magistrate who presided in the present matter was stringently

reprimanded for failing to give proper reasons when the accused appealed to this Court. The magistrate must therefore have been well aware of his obligations to do so *in casu* but, once more, he has failed to properly discharge his obligations in that regard. As is apparent from his judgment quoted above, the magistrate gave no reasons for his decision and, in responding to the defendant's notice of appeal, he merely offered the following written "reasons" for judgment:

> "By agreement between the learned attorneys I decided this application on their heads of argument. After thorough consideration of same I was persuaded by mr. Barrow's submissions to find in favour of the plaintiffs."

This was meaningless and clearly did not amount to proper compliance with Rule 51. Consequently, shortly before the appeal was due to be heard the Registrar, at our request, informed the attorneys on both sides that we were of the view that Rule 51 had not been properly complied with and that, if that deficiency was not rectified, the appeal might not be heard. On 20 March 2002 the appellant's attorney made a copy of this communication available to the magistrate who, pursuant thereto, filed the following response:

> "The appellant purchased from the respondents immovable property. The parties entered into an Agreement of Sale. In terms of clause 16.2 of the agreement ". . . in the event of Value Added Tax being payable such Tax shall be payable by the Purchaser." (the appellant).
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> The wording of this clause, I submit respectfully placed an obligation on the appellant to establish, within a reasonable time, whether Value Added Tax was due and to pay same. The appellants failure to do so compelled the respondents to effect the required payment (including penalties).
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> The appellants thus, I submit respectfully, neglected his obligation in terms of clause 16.2 and is accordingly liable for payment of the penalties. Same having been paid by the respondents, the appellant must now reimburse the respondents.
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> Judgement was thus entered in favour of the respondents (the plaintiffs)."

It was wholly unnecessary for this Court to have been obliged to act to prise these reasons from the magistrate. This is now the second occasion that it has been necessary for the magistrate in question to be reminded of his obligations under Rule 51 and I trust that the necessity to provide proper reasons has now

finally been brought home to him. Should it ever again be necessary to remind him of his obligations in this regard, I will have no hesitation in referring the matter to the Magistrates' Commission - a step that was taken in the *Regent* case, *supra*.

Be that as it may, I turn now to consider whether the magistrate was correct in concluding that clause 16.2 of the written agreement resulted in a necessary inference being drawn that the parties had tacitly agreed that the plaintiff would establish whether VAT was payable on the sale and pay such VAT to the Commissioner and, further, that should he fail to do so, he would pay the respondents whatever penalty might be levied.

A tacit term, or term implied from the facts, was classically described as follows by Corbett AJA (as he then was) in *Alfred McApline & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531 H - 532 A:

> ". . . an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the expressed 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."

The inference must be a necessary and not merely a reasonable one - see *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105 at 112 and *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 131 I - 137 C where Nienaber JA said:

> "The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. 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."

Moreover, as was stated by Corbett AJA in the *Alfred McApline* case, *supra* at

532 H - 533 A:

> "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."

It is also necessary to bear in mind that the respondents, who were the plaintiffs in the court below, bore the onus of establishing the existence of the term upon which they allowed - see for example *Da Silva v Janowski* 1992 (3) SA 202 (A) at 219. Bearing that obligation in mind, one of the principal difficulties facing the respondents is their failure to place before court any of factual surrounding circumstances upon which they relied for the necessity to import the tacit term into the contract. After all, as regard is to be had to the surrounding circumstances, the task of deciding what the officious bystander would say in a given situation is made all the more difficult if there is no evidence of the surrounding circumstances to which the bystander would have regard.

Be that as it may, it seems to me that as the disputed provisions relate to the payment of VAT, it must be permissible to have regard to the legislative framework whereunder VAT is paid as being part of the surrounding circumstances to which the bystander would have regard.

The obligation to pay VAT is prescribed by the Act. It provides that VAT shall be paid by "vendors" - who were described by Kriegler J in *Metcash Trading Ltd v Commissioner, South African Revenue Service & Another* 2001 (1) SA 1109 (CC) at 1122 CC para. [17] as being: "in a sense involuntary tax-collectors". In terms of s. 28 of the Act , every vendor in respect of each defined tax period is obliged to furnish the Commissioner with a return, to calculate the VAT payable

in accordance therewith and to pay such VAT to the Commissioner. All of this should be done on a monthly basis. The obligation to pay tax is therefore a system of self assessment by the vendor - see *Singh v Commissioner, South African Revenue Service* 2002 (3) SA 94 (DC) at 97 C – F. As was therefore observed by Kriegler J in the *Metcash Trading* case, *supra*:

> "In principle VAT is payable on each and every sale; the VAT percentage, the details for its calculation and the time table for periodic payment are statutorily pre-determined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated and paid over in respect of each tax period".

The practical implementation of this system and the duties incumbent upon a vendor were summarized as follows at paras. [15] to [18] of the *Metcash* case, *supra*:

> "[15] Of course it would be wholly impracticable to expect merchants to pay and the fiscus to receive individual payments of VAT on each and every separate supply. Therefore the Act provides a detailed mechanism for vendors to keep certain kinds of records and periodically to calculate, account for and pay VAT to the Commissioner. In broad outline the mechanism provides how the deduction of input tax from output tax is to be made and specifies the kinds of vouchers that have to be kept; and then when and how vendors are to make their payments and complete their supporting returns to the Commissioner. In the result vendors are entrusted with a number of important duties in relation to VAT. First there is the duty to calculate and levy VAT on each supply of goods; then to calculate the output tax and the input tax on that transaction correctly; also to keep proper records supported by the prescribed vouchers, periodically to add up the sum of output and input taxes attributable to that period and appropriately deducting the total of the input taxes from those of the out put taxes; and, ultimately and crucially, to make due and timeous return and payment of the VAT that is payable in accordance with the vendor's allocated tax period.
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> [16] It would be convenient to pause at this point to recapitulate and fill in some details before moving on to the next phase of the Act, which deals with assessments by Commissioner and what they may set in train. The first significant point to note is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT is a multi-stage tax, it arises continuously. Moreover VAT vendors/taxpayers bear the ongoing obligation to keep the requisite records, to make periodic calculations of the balance of output totals over and above deductible input totals (and any other permissible deductibles) and to pay such balances over to the fisc. It is therefore a multi-stage system with both continuous self-assessment and predetermined periodic reporting/paying.
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> [17] An even more important feature of VAT, particularly in contradistinction to income tax, is that vendors are in a sense involuntary tax-collectors. In principle VAT is

> payable on each and very sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily predetermined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated and paid over in respect of each tax period. By like token the regularity of VAT payments on the one hand ensures a steady and generally more accurately predictable stream of revenue via a multistaged taxation that is perceived as resting less heavily on the taxpayer, but on the other hand it does require a great deal of book-keeping by vendors and policing by the revenue authorities."

Consequently, VAT becomes due and payable in terms of the Act by operation of law, and it is up to the vendor to calculate his own liability and make payment thereof to the Commissioner who is only required to make an assessment should the vendor fail to meet his obligations in that regard. However VAT becomes due and payable even if the Commissioner has not yet made an assessment - see *Traco Marketing (Pty) Ltd & Another v Minister of Finance & Another* [1996] 2All SA 467 (SE) at 470 - 471. Indeed it is to cater for those vendors who fail to fulfil their obligation to furnish accurate and timeous returns that the Act provides for the Commissioner to make an assessment. And, presumably in an attempt to induce vendors to comply with their obligations and to punish them if they do not do so, s. 39(1)(a) of the Act provides:

> "39 (1)*(a)* If any person who is liable for the payment of tax and is required to make such payment in the manner prescribed in section 28 (1), fails to pay any amount of such tax within the period for the payment of such tax specified in the said provision, shall, in addition to such amount of tax, pay –
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> i) a penalty equal to 10 per cent of the said amount of tax; and
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> ii) where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on the said amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month of part of a month in the period reckoned from the said first day."

The underlying problem facing the respondents is that their allegation that it was tacitly agreed that the appellant would pay the VAT directly to the Commissioner flies directly in the face of the burden placed upon them by the legislature to calculate and pay their own VAT in the manner described above. They were not able to contractually relieve themselves of their obligation to the fiscus imposed on them by statute. As the framework under which VAT is assessed and paid is

to be taken into account, the bystander would accordingly never have inferred that the parties had agreed that the plaintiff would calculate the defendants' VAT and pay it on their behalf to the Commissioner. As a result, respondents counsel was obliged to concede, correctly in my view, that clause 16.2 could never have been intended by the parties to oblige the appellant to pay VAT directly to the Receiver of Revenue and that it had to be construed as merely placing an obligation upon the appellant to reimburse the appellants once they had paid the VAT.

Not only was this concession correctly made but, in my view, it is decisive of the entire matter. As, the appellant was only obliged to reimburse the respondents once they had paid VAT, the contract cannot be construed as containing a tacit term that he would reimburse them for any penalty which they might incur by failing to pay VAT timeously.

The appellant's alleged obligation to pay penalty interest was premised upon his alleged obligation to pay VAT directly to the Commissioner on behalf of the respondents, who would then become liable for penalties if such payment was not made. But as there can be no question of the parties having tacitly agreed that the VAT would be paid by the appellant directly to the Commissioner, this underlying premise fails. That being so, the alleged tacit agreement that the appellant would reimburse the respondents if they became obliged to pay a penalty arising out of his failure to pay VAT timeously, must also fail.

In my view, the respondents' claim was ill conceived. The tacit terms they seek to import into the written agreement of sale cannot be supported and the magistrate therefore erred in reaching the conclusion that he did. He ought to have held that the respondents had failed to establish the terms and that their claim should therefore be dismissed.

In the result, the appeal succeeds, with costs. The magistrate's order is set aside and is replaced with the following:

"The plaintiffs' claim is dismissed, with costs."

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L.E. LEACH
JUDGE OF THE HIGH COURT

JANSEN, J:

I agree.

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J.C.H. JANSEN
JUDGE OF THE HIGH COURT