LOM Business Solutions t/a Set LK Transcribers/

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG **CASE NO**: 3623/06

2008-09-25

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

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DATE SIGNATURE

In the matter between

THE WANDERERS CLUB **PLAINTIFF**

and

CHRIS BOYES-MOFATT **FIRST DEFENDANT**

CITY OF JOHANNESBURG **SECOND DEFENDANT**

J U D G M E N T

VAN OOSTEN, J: In this application, the first defendant seeks leave to amend his plea in terms of Rule 28(4) pursuant to the plaintiff's objection to the first defendant's notice of intention to amend in terms of Rule 28(1). The plaintiff's claim against the defendants is for payment of damages caused to The Wanderers Club buildings by a fire allegedly resulting from the defendants' negligence. The plaintiff's action against the first defendant is premised upon a written lease agreement

concluded between the parties (the agreement), regulating the relationship between the plaintiff as lessor and the first defendant as lessee of the area of the Wanderers Club known as the Chariots Bar Terrace and Chariots Kitchen, which was let to the first defendant for the purposes of providing a food and beverage service to members of the Wanderers Club and their guests. Arising from the agreement, the plaintiff pleads that the first defendant and his employees as lessee and occupier of the lease premises, owed the plaintiff a duty of care, firstly, not to damage or destroy the premises or the contents thereof and, secondly, "to ensure that no negligent act or omission on their part would result in the premises or its contents being damaged or destroyed".

The first defendant has delivered a plea in which he admits that the agreement was concluded. Some 20 months later the first defendant delivered a notice of amendment to his plea in terms of which he firstly, seeks to introduce into the agreement, the following term as an "express, alternatively tacit, alternatively implied" term of the agreement (the new term):

> 6.4 It was an express, alternatively tacit, alternatively implied term of the agreement, Annexure "POC1", that-
>
> 6.4.1.1 Plaintiff was obliged to take out insurance cover in favour of the plaintiff and the first defendant in respect of *inter alia* damage to the premises and its contents;

6.4.1.2 Such cover would include damage caused by the negligence or breach of contract of the first defendant; and

6.4.1.3 In the premises, any loss suffered by plaintiff which was covered by that insurance cover would be recouped by plaintiff from the insurer and not from the first defendant.

Secondly, the amendment introduces an "Assets All Risks Policy" of insurance procured by the plaintiff pursuant to the agreement, which of course must be read in conjunction with the new term.

The plaintiff's objection to the proposed amendment relates to the proposed introduction of the new term as an express term of the agreement, on the basis that the new term is not contained in the agreement and further that no legal basis exists for the incorporation of the new term as an implied term into the agreement. The objection is premised on a non-variation clause contained in the agreement and the plaintiff accordingly contends that the proposed amendment if allowed, would not introduce a sustainable defence to the plaintiff's claim and that it would in any event render the first defendant's plea excipiable.

No objection has been raised against the proposed amendment introducing the new term on the basis of it tacitly having been agreed upon. It follows that the amendment introducing the new term as a tacit term ought to be allowed. It remains to deal with the alleged express or implied agreement on the new term.

As to the express terms of an agreement, the notion of introducing a new term into a written agreement on the basis of it having

been expressly agreed upon by the parties in the face of a non-variation clause, seems to me paradoxical. An express term can only exist within the confines of the written document. It is either there or it is not. The amendment is clearly aimed at diverting liability for the damages claimed to the insurer in terms of the "Assets All Risks Policy". The aspect of insurance, I should mention, is dealt with in clause 26 of the agreement, which reads as follows:

> Wanderers (the plaintiff) will take out insurance cover for the facility and existing equipment, however damage caused to perishable stocks related to refrigeration breakdowns or negligence, will be the lessee (sic) responsibility.

The new term of course is much wider in its ambit. It is however nowhere to be found in the agreement. Counsel for the first defendant submitted that the wording of the new term, though not utilising the precise wording of clause 26, "constitutes a fair reflection of the import of clause 26". The argument brings to the fore the fundamental flaw in the first defendant's approach to the proposed amendment which is a failure to properly distinguish between, on the one hand, a new term of the agreement which would only become part thereof upon its introduction into the agreement and on the other hand, the effect to be given to an existing term of an agreement by a proper interpretation thereof. Clause 26 may conceivably be interpreted as encompassing what is reflected in the new term, or it may not. This is an issue the court eventually hearing th a matter will have to decide.

The converse of a party to a contract relying on a specific interpretation of one of its provisions and then merely introducing that interpretation into the agreement as an express term, needs no more than mention for it to be rejected. The defendant's proposed introduction of the new term by implication suffers the same fate. It is well-established that 'implied' in this context means, "an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties" per Corbett AJA (as he then was) in *Alfred McAlpine & Son (Pty) Limited v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531E. In the instant matter there is no law or legal principle contained in the new term that would allow it to be applied to the agreement (see *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 374B-G). Nor in the circumstances of this case, can there be a duty on this court to develop an implied term in the nature of the new term, to be incorporated into all contracts of lease (see *South African Forestry CO Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA)): no case has been made out for such development.

Again, should it be the defendant's case that clause 26 is capable of an interpretation so as to conform to the import of the new term, it will be for the defendant to make out such a case, which, at least at this stage, he has not done.

In view of what I have set out above, the proposed amendment, if allowed, would render the defendant's excipiable which is sufficient reason for disallowing it (see *Krishke v Road Accident Fund*

2004 (4) SA 358 (W) 363A-D). It follows that the proposed amendment should be allowed but limited to the defendant's allegation that the new term was a tacit term of the agreement. The plaintiff's opposition was reasonable and the first defendant accordingly should bear the costs of this application.

In the result, I make the following order:

1. The amendment to the first defendant's plea set forth in the first defendant's notice of amendment dated 5 March 2008 excluding the words "express, alternatively …, alternatively implied …" in the opening sentence of the new paragraph 6.4 is allowed.
2. The first defendant is ordered to pay the costs of the application for amendment.

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Counsel for the plaintiff *Adv (Ms) G M Goedhart*

Counsel for the first defendant *Adv J B Berridge*