90/98

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 652/96

In the matter between:

AFCOL MANUFACTURING LIMITED Appellant

and

AFRIFURN INDUSTRIES C C Respondent

Coram: Hoexter, Howie, Scott, Zulman, JJ A et Ngoepe, AJA

Heard: 18 September 1998

Delivered: 28 September 1998

J U D G M E N T

HOEXTER, JA:

In the Transvaal Provincial Division Afrifurn Industries CC ("the buyer"), as plaintiff, obtained judgment against Afcol Manufacturing Limited ("the seller"), as defendant, for the sum of R620 000-00, interest thereon, and costs. With leave of the Court *a quo* the seller appeals to this Court.

The facts of the matter fall within a narrow compass. The sole member of the buyer is Mr Gerhard Vosloo ("Vosloo"). In a tripartite written agreement ("the contract") signed on 22 September 1994 by Vosloo on behalf of the buyer, and also in his personal capacity as surety, and signed on behalf of the seller four days later, the seller sold to the buyer certain plant and equipment ("the plant") detailed in Appendix I to the contract, at a price of R72 000-00, together with VAT thereon in the sum of R10 080-00. The VAT was payable by the buyer to the seller on the "effective date", which was defined as the date of signature of the contract.

The particular terms of the contract which are relevant to the appeal will be considered more fully later in this judgment. At this stage it suffices to say that in terms of clause 3 the purchase price of R72 000-00 was payable in eight quarterly instalments, beginning on 31 January 1995, of R9 000-00 each, and that on the balance of the purchase price outstanding from time to time the buyer was to pay interest at the rate of 14,25% per annum calculated quarterly in arrear on a simple interest basis ; that in terms of clause 4 the plant was to be delivered to the buyer on the effective date ; that in terms of clause 6 the risk attaching to the plant would pass to the buyer on the effective date, but that

ownership of the plant would pass to the buyer only against payment in full of the purchase price ; and that clause 9 provided that until payment in full of all amounts to the seller, it would insure the plant against loss through theft, fire and similar hazards. In terms of clause 9, furthermore, although the premiums for such insurance would be paid by the buyer, the insured amount would be determined by the seller.

The buyer duly paid the amount of VAT to the seller and the latter gave delivery of the plant to the buyer. The seller insured the plant against destruction, *inter alia*, by fire, in the amount of the unpaid purchase price, i e R72 000-00.

On 5 August 1995, and while it was in the possession of the buyer, the plant was totally destroyed by fire. In November 1995 the seller received from the insurer of the plant a cheque for R67 260-00. This sum represented the insured sum of R72 000-00 less salvage value (R10 000-00) with the addition of VAT (R8 680-00) less excess (R3 420-00). On 17 May 1996 the seller's attorneys wrote to the buyer's attorneys enclosing a cheque for R51 597-00. The amount of this cheque was derived by deducting from the amount which the seller should have received in terms of the contract the amount in fact paid by the buyer to date of the letter. This subtraction produced a shortfall of R15 663-00 which was deducted from the amount (R67 260-00) received by the seller from the insurer (= R51 597-00).

Meanwhile in November 1995 the buyer had instituted its action against the seller for damages for breach of contract. In its particulars of claim the buyer pleaded that upon a proper construction of the contract the seller had been legally obliged to insure the

plant for the replacement value, or alternatively, the market value thereof. The seller resisted the buyer's action. The relevant portion of the seller's plea reads as follows:-

> "6.1 In compliance with its obligations in terms of clause 9.1 of the agreement the defendant [the seller] insured the plant against, *inter alia*, destruction through fire, for a sum of R72 000-00.
>
> 6.2 The defendant's [seller's] insurable interest in respect of the plant at the time when the insurance was effected, was a maximum amount of R72 000-00."

On 29 August 1996 counsel for both parties held a pre-trial conference. Paragraph 1 of the pre-trial Minutes reads thus:-

> "Die eiser [the buyer] se kwantum word geskik op 'n bedrag van R620 000-00."

In due course the action was heard by McCREATH J. Before considering the arguments advanced before him the learned Judge in his judgment made the following observations:-

> "At the commencement of the trial counsel for both parties indicated that the agreement was capable of interpretation in regard to the defendant's [the seller's] obligations relating to insurance without recourse to evidence *aliunde*. However, both parties were in a position to lead evidence in the event that the court should come to the conclusion that there was an ambiguity in terms of the agreement warranting evidence to resolve the matter, or if recourse to evidence of surrounding circumstances was necessary. On this basis it had been agreed that the evidence would be placed before the court but without prejudice to the rights of both parties to argue that such evidence was neither

necessary nor admissible."

In the event both sides led evidence at the trial. For the buyer the only witness was Vosloo. On behalf of the seller the following two witnesses were called: Mr M S Bloom, the attorney who, at the instructions of the seller, drew up the contract ; and Mr P R Barrable, the company secretary of the seller. Later in this judgment portions of the testimony of each of these three witnesses will require brief examination.

Of the evidence thus led at the trial the learned Judge remarked in his judgment:-

> "I have come to the conclusion that it is not necessary to resort to any extrinsic evidence in the interpretation of the agreement save for that of surrounding circumstances and then only in one respect, namely that the plant was sold at the defendant's [the seller's] book value thereof, which is common cause. It is also not in dispute that this was a price far below the market value as well as the replacement value of the plant. The agreed quantum of the plaintiff's [the buyer's] claim in the sum of R620 000 is in itself indicative thereof."

The conclusion at which the trial Court arrived is stated in the judgment as follows:-

> "The parties have expressly agreed that the defendant [the seller] has a discretion in determining the amount of the insurance. What have not been expressed are the limits of that discretion. Tacitly the parties have agreed on the officious bystander test that the amount shall, in the interest of the plaintiff [the buyer], be not less than the market or replacement value thereof and, in the interest of the defendant [the seller], not less than the balance of the purchase price should the market or replacement value be less than such balance.
>
> The discretion afforded the defendant must be exercised arbitrio boni viri. See in this respect the remarks of Hoexter JA

in *Dharumpal Transport (Pty) Limited v Dharumpal* 1956(1) SA 700 (A) at 702 *in fine* to 707D."

Against the background sketched above there must now be mentioned a number of provisions in the contract, all of which are designed to preserve and protect the rights of the seller against the buyer. Clause 3 provides that on the effective date the buyer is to give the seller eight post-dated cheques drawn by the buyer in favour of the seller in respect of the abovementioned instalments of R9 000-00 each. Each such cheque is to be endorsed by Vosloo as surety and co-principal *in solidum*. Each cheque is to bear an indorsement recording that, if any one of the eight remains unpaid for 14 days after notice to the buyer by prepaid registered post, the remaining cheques in the series will forthwith be due and payable despite the fact that their due dates for payment will not have arrived.

Clause 4 provides that simultaneously with signature of the contract Vosloo shall sign the deed of suretyship contained in Appendix III to the contract ; and that the buyer shall sign the deed of cession contained in Appendix IV.

In terms of clause 8 the buyer and Vosloo jointly and severally warrant that until payment in full of all amounts due to the seller, and without the latter's written consent, the buyer will not, *inter alia*, sell or move the plant from its location in Pretoria. The buyer further undertakes to give written notice to the landlord on the premises in which the plant is housed of the fact that ownership of the plant vests in the seller.

Clause 10 provides that should the buyer breach any of its obligations and persist therein for 14 days after written notice requiring remedy of breach, the seller will be entitled to (1) cancel the contract and retake possession of the plant and (2) claim payment of the full purchase price together with interest thereon.

Of critical importance are the full terms of clause 9 of the contract which read as follows:-

> "9 **INSURANCE OF THE PLANT**
>
> 9.1 Until such time as all amounts in terms hereof will have been paid in full to the Seller, the Seller shall insure the plant against loss through theft, riot (not including political riot) fire and similar hazards, public liability and any other foreseeable risks for such sum and through such insurance brokers or insurance companies as may be determined by the Seller.
>
> 9.2 The Purchaser shall pay to the Seller on demand all insurance premiums payable in connection with the insurance of the plant.
>
> 9.3 Alternatively to the aforegoing, and at the instance of the Seller, the Purchaser shall insure the plant in respect of the risks referred to in 9.1 above for such sum and through such brokers or insurance companies as may be nominated or approved by the Seller on the basis that the Purchaser shall pay all premiums in respect thereof. The Seller will be entitled to pay any insurance premiums on behalf of the Purchaser and to recover same from the Purchaser on demand. The Purchaser shall procure that the interests of the Seller are noted on the policy or, at the election of the Seller, that the said insurance policy is ceded to the Seller by the insurance company concerned."

It is necessary next to make brief reference to certain aspects of the evidence heard by

the trial Court. Before Vosloo negotiated with the seller with a view to the purchase of the plant by the buyer, the seller had granted an option to one King to buy the plant for R72 000-00. King failed to exercise his option. Thereafter Vosloo sought to acquire the plant for the buyer on extended credit terms. Vosloo told the trial Court that when he offered to buy the plant at the same price -

> "was ek bewus gewees dat dit [R72 000-00] die boekwaarde was van die masjinerie."

At the time when he and Barrable were discussing the financial terms which might enable the buyer to acquire the plant, so testified Vosloo -

> "Toe het ek vir hom [Barrable] gevra dat die aanleg en die masjinerie ook verseker moes word, deur Afcol [the seller], namens my..."

During his evidence in chief Vosloo stated that it had never been mentioned to him -

> "dat die versekering vir R72 000-00 sal plaasvind nie."

In cross-examination, however, Vosloo was constrained to concede, albeit somewhat grudgingly, that in fact he had never requested the seller to insure the plant at its replacement value -

> "Is ek dus reg dat u nooit enigeen by Afcol versoek het dat die aanleg verseker word teen vervangingswaarde nie? ----
> Nie pertinent nie, nie direk nie.

> U skud u kop - U moet net antwoord vir doeleindes van die rekord? ----
>
> Ek het die woorde nooit gebruik nie."

In the course of his testimony Barrable firmly denied that in the course of their meetings Vosloo had ever raised the question of the insurance of the plant. According to Barrable the signature of the contract by Vosloo was preceded by a lengthy meeting. Inasmuch as Vosloo was unrepresented by an attorney at this meeting, so explained Barrable, Bloom went through the contract "in great detail" and very carefully.

When Bloom came to testify he told the trial Court that he had met Vosloo for the first time at the meeting in his (Bloom's) office on 22 September 1994 at which Vosloo signed the contract. He said that on this occasion -

> "I went through the agreement, on a clause by clause basis, because Mr Vosloo was not represented by an attorney and I felt, it was only correct that I go through the amended document with him, in full and that he should know what he is signing.."

Vosloo, on the other hand, denied that any such exposition by Bloom preceded his signature of the contract. In cross-examination Vosloo gave the following version -

> "Elke klousule is nie deurgegaan nie.
>
> Kan ek net iets verstaan? Suggereer u, met u antwoord dat u onvoldoende geleentheid gehad het om die ooreenkoms deur te lees? ----
>
> Nee, ek het reeds 'n konsep van die finale ooreenkoms gehad. Ek het daardeur gelees en ek het tevrede gevoel dat dit is wat ons ooreengekom het."

After the plant had been destroyed by fire on 5 August 1995 Vosloo, on behalf of the buyer, on 9 September 1995 sent to Barrable a fax message in which he requested urgent assistance in regard to the seller's position in the matter of the insurance claim. In response to this request Barrable on 11 September sent to the buyer, for attention of Vosloo, a fax message the first paragraph of which read as follows -

> "Further to your fax ... we confirm that in terms of clause 9 of the agreement between ourselves, Afcol insured the plant to the extent of its interest. Afcol's interest in insuring the plant would have been the balance of the purchase price still outstanding from time to time. Consequently the maximum value of insurance would at any time have been the sum of R72 000 being the purchase price of the plant."

The abovementioned exchange of fax transmissions led to a telephone conversation between Vosloo and Barrable. During this dialogue, so Barrable testified, Vosloo was "agitated", and he gave Barrable the stong impression that -

> "he was unhappy with the level of insurance that had been indicated in my reply, at R72 000 ..."

In cross-examination Vosloo was unable to recall whether or not during the telephone conversation in question he had accused the seller of breaching the contract in respect of its provisions for insurance of the plant -

> "Kan u onthou, soos u vandag in die getuiebank staan, of u tydens daardie gesprek, vir mnr Barrable gesê het dat Afcol het nie hulle kontrakverpligtinge nagekom, met betrekking tot die versekering. Kan u dit onthou? ---

Ek kan dit nie onthou nie."

The way has now been cleared for a closer scrutiny of the terms of clause 9 of the contract. While in contracts the word "shall" is usually a word of command signifying an obligation, it is sometimes, depending upon the contextual setting in which it is used, more properly to be construed as merely permissive, and as an equivalent of "may". In clause 9 the verb "shall" occurs five times. Clause 9.1 provides that until all amounts in terms of the contract will have been paid in full to the seller, the seller "shall" insure the plant against certain losses. Clause 9.2 provides that in respect of such insurance the buyer "shall" pay to the seller the premiums on demand. Under the alternative provisions of clause 9.3, and at the election of the seller, it is said that the buyer "shall" insure the plant ; that the buyer "shall" pay all premiums ; and that the buyer "shall" procure that the seller's interests are noted on the policy.

A survey of the contract's main terms reveals that the emphasis throughout is on securing elaborate protection for the seller in the matter of securing payment of the purchase price. It is tolerably clear that in clauses 9.2 and 9.3, whenever performance of an act by the buyer is prefixed by the word "shall", it donates unequivocal and absolute contractual obligation.

What is less clear, perhaps, is the effect of the provisions in clause 9.1 that the seller "shall" insure the plant. Now it is true that the wording of paragraph 6.1 of the seller's plea (quoted earlier in this judgment) conveys that the seller admits that in terms of clause 9.1 it was the seller's "obligation" to insure the plant. It seems to me,

nevertheless, that looking at clause 9.1 against the backdrop of the whole contract it might be reasonable to assign to the words "shall insure" in cause 9.1 the meaning of "may insure". So to construe clause 9.1 would be destructive of the buyer's case. Nor, so I consider, would the seller's admission in its plea (involving a matter of law) necessarily be binding on a court so as to preclude such a construction. However, as this point was neither advanced by counsel for the seller nor tested in argument before us, this judgment will proceed on the assumption that in terms of clause 9.1 the seller has a legal obligation to insure the plant.

Bearing in mind the nature and the purpose of the contract and the words of clause 9 in the context of the contract as a whole, the language of clause 9.1 appears to me to be clear and unambiguous. Upon their ordinary grammatical meaning the words used in clause 9.1 in my view mean simply that sum at which the seller insures the plant is to be determined at its own and completely unfettered discretion. It would have been unwise, no doubt, for the seller to insure the plant for a sum less than the balance of the purchase price owing to it under the contract; but as a matter of interpretation it was, I think, entirely free to do so.

In the event, as we know, the seller decided to insure the plant for R72 000-00. Having due regard to the terms of the contract counsel for the buyer, quite correctly I think, conceded that R72 000-00 was in fact the extent of the seller's insurable interest. The burden of the argument advanced on behalf of the buyer was that, irrespective of the seller's own insurable interest, the contract should be so construed as to render the seller legally obligated, in the interests of the buyer, to insure the plant for not less than its

market or replacement value.

On the face of the contract there is nothing whatever to suggest that in insuring the plant the seller was acting as the buyer's agent ; or that it was obliged, by insuring the plant, to protect anything more than its own interest. A recognition of this fact necessarily entails that the buyer can succeed in its claim only if it establishes that clause 9.1 is governed by a tacit term obliging the seller to insure the plant at its market value.

The trial Court found that such a tacit term was properly to be inferred. It reached this conclusion by the application of the celebrated "bystander" test. It appears to me, with great respect, that on the facts of the case before us an application of that test cannot sustain the importation of the tacit term for which the buyer contends.

It is not here necessary, I think, to detail the many cases of this Court dealing with the principles to be applied in order to determine the existence or otherwise of a tacit term. A tacit term is derived by a process of inference as to what ***both*** parties must or would have had in mind at the time when their contract was concluded. In the course of his judgment the learned Judge remarked that it was clear that the buyer -

> "would not wish to insure the plant for any amount but the market or replacement value thereof"

I shall assume that this finding is correct. The crucial question, when the bystander test is applied, is whether the seller was of a like mind. So far from suggesting that this was

the light in which the seller saw the matter, the evidence points in the opposite direction.

There is a conflict of fact, which the trial Court found it unnecessary to resolve, as to whether Vosloo so much as raised the issue of the insurance at any meeting with Barrable. Vosloo says he did ; Barrable firmly denies it. However, as already pointed out, Vosloo himself admitted that he had never requested the seller to insure the plant at its replacement value. There is nothing in the evidence to suggest that at the time of the conclusion of the contract Barrable was even aware of any glaring disparity between the purchase price of R72 000-00 and the market value of the plant. Moreover, Barrable's own conduct very soon after the conclusion of the contract makes plain that nothing was further from his mind than either the desirability or the necessity of insuring the plant at its market or replacement value. His subjective state of mind in regard to the insured sum is mirrored in the first paragraph of a letter written by him on 19 October 1994 — that is to say, less than a month after the conclusion of the contract — to the seller's insurance brokers:-

> "Afman has recently resold the old Sealy steel bedding plant to Gerhard Vosloo. The selling price was R72 000, but as we have reserved ownership over the machinery until such time as it has been paid in full, we are going to continue insuring the goods. The goods are being stored in premises situated 333 Zasm Street, Waltloo, Pretoria. Gerhard Vosloo may be contacted per telephone at (012) 803-6415."

The buyer bore the onus of proving the existence of the tacit term for which it contended. In my opinion it came nowhere near discharging such onus.

The appeal succeeds with costs. The order made by the Court *a quo* is set aside. It is replaced with the following order:-

"Judgment is granted in favour of the defendant with costs."

G G HOEXTER

HOWIE JA)
SCOTT JA) concur
ZULMAN JA)
NGOEPE AJA)