

148/79

N.v.H.

ADRIAAN LOUIS JORDAAN / GILLIAM CHRISTOFFEL VERMEULEN

HOIMES, AJA

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between :-

ADRIAAN LOUIS JORDAAN

Appellant

and

GILIAM CHRISTOFFEL VERMEULEN

Respondent

CORAM: RUMPF, CJ, JANSEN, JOUBERT, JJA,

et HOLMES, TROLLIP, AJJA

HEARD: 27 FEBRUARY 1981

DELIVERED: 17 MARCH 1981

J U D G M E N T

HOLMES, AJA :-

This is an appeal against a decision
of PHILLIPS, AJ, sitting in the Transvaal Provincial Division,

granting/.....

granting absolution from the instance at the conclusion of the case for the plaintiff (now appellant). The basic issue is whether, at the conclusion of the plaintiff's case, there was evidence upon which a reasonable man might hold that there was an implied term in the contract relied on. There is also an issue of prescription.

The appellant had sued the respondent for -

- (a) an order directing the respondent to furnish a statement of account, supported by vouchers, for each of the financial years ending February 1971 to 1977;
- (b) debate thereof;
- (c) payment of all monies found to be due thereunder.

As to the basic cause of action, it was averred, inter alia, that the respondent had employed the appellant for seven years as the foreman and works manager of his building construction business known as Cincor Ondernemings,

on/.....

on the basis of a weekly wage plus 15% of the profits
(there was an alternative basis which I shall mention in
a moment); that, in regard to his share of the profits,
sums were paid to him every year; that the agreement came
to an end on 31 December 1976; and that, in breach of his
obligation, the respondent had failed to furnish statements
of account to the appellant for any of the seven financial
years ending in February each year.

Because the respondent's plea indicated that
Cincor Ondernemings became Cincor Konstruksie (Edms) Beperk
from 1 March 1971, the appellant felt constrained to amend
of
part of his particulars claim to read as follows :-

"7 (b) During the whole period of the plaintiff's
said employment, the defendant continued
to conduct his said building contracting
business as a firm of which he was the
proprietor.

(c) /.....

(c) Alternatively to (b) :

- (i) During the period of the plaintiff's said employment, up to the 28th February 1971, the defendant continued to conduct his said building contracting business as a firm of which he was the proprietor.
- (ii) On or about the 1st March 1971, the defendant transferred his said building contracting business to, and for the remainder of the period of the plaintiff's said employment, conducted the said business through, a company controlled by him, known as Cincor Konstruksie (Edms) Beperk."

The amended particulars of claim also averred an implied term as follows -

"6. It was an implied term of the agreement that,

- (a) for as long as the defendant continued to conduct his said building contracting business as a firm of which he was the proprietor, he would,

(i) keep/.....

- (i) keep proper books, records and accounts of the affairs of his said building contracting business, and
 - (ii) after each financial year, furnish the plaintiff with a full, true and proper statement of account supported by vouchers, of the profits made in his said building contracting business during that financial year;
- (b) If the defendant transferred his said building contracting business to, and conducted same through, a company controlled by him, he would,
- (i) keep, or cause the said company to keep, proper books, records and accounts of the affairs of the said business so conducted, and
 - (ii) after each financial year, furnish the plaintiff with a full, true and proper statement of account supported by vouchers, of the profits made in the said business so conducted during that financial year."

The/.....

The respondent's plea may be summarised thus -

- (i) It denied that there was any implied term or any obligation to furnish statements.
- (ii) It averred that the contract between the parties came to an end on 28 February 1971; and that thereafter the appellant ceased to work for the respondent: as from 1 March 1971 he, together with all other employees of the respondent, entered the service of the company, Cincor Konstruksie (Edms) Beperk. (That was apparently the respondent's family company formed to succeed his firm of Cincor Ondernemings. He became sole director of the company although not, of course, its sole shareholder.)
- (iii) Alternatively, there was a plea of prescription, if it should be found that the company aforesaid took over the appellant's contract of employment; or if it should be found that the parties themselves remained in a contractual relationship of employment throughout. This defence of prescription was confined to the appellant's claim in respect of the financial years ending February 1971 to 1974; see section 11 (d) of Act 68 of 1969, which provides for a prescriptive period of three years.

The/.....

The trial Court held that there was no basis upon which the term, contended for by the appellant, could reasonably be implied. Hence the order of absolution from the instance at the close of the plaintiff's case.

With that introductory summary, I proceed to examine the facts more closely:

- (i) At the end of 1969 the appellant was an out-of-work bricklayer in his sixties, and of humble education. He had been unemployed for a year.
- (ii) The respondent was a building society inspector who also carried on an enterprise for the erection of buildings under the firm name of Cincor Ondernemings.
- (iii) About the beginning of 1970 the respondent invited the appellant to be his foreman and works manager in respect of his building firm, Cincor Ondernemings, at a wage of R65 per week plus 15% of the annual profits.
- (iv) The appellant accepted the offer and started work on 5 January 1970. He said in evidence that he had known the respondent for a long time. At all times he trusted him

to/.....

to pay the 15% of the profits due to him.
Even at the trial, ^{he} regarded him as an honest person.

- (v) On 2 February 1970 the parties signed a written contract embodying their oral agreement aforesaid. It included the following term -

"Die WERKNEEMER sal ook geregtig wees op 15% kommissie van die winste van die ONDERNEMING gemaak en bereken oor 'n periode van een jaar wat sal strek van die maand Maart tot Februarie, met dien verstande waar die ooreenkoms gedurende die loop van die finansiële jaar beëindig word, sal aanspraak op betaling in die verband eers kan gemaak word na voltooiing van die finansiële jaar alhoewel bereken net vir die tydperk van(werklike diensverrigting."

- (vi) The contract contained no express provision for the rendering of annual accounts to the appellant. His case is that this was implied.
- (vii) At no time during the seven years of his employment did the appellant query the correctness of the share of the profits paid to him each year; nor did he request inspection of the books or ask for a statement of account. He said in evidence that he thought that the respondent would give him a final reckoning when he left his employment.

-(viii) On/.....

(viii) On the question of the registration of the company Cincor Konstruksie (Edms) Beperk, this must have taken place in 1971, as pleaded, for the audited statements reflect Cincor Ondernemings to 28 February 1971, and Cincor Konstruksie (Edms) Beperk for the year ending 29 February 1972. The appellant said that at all times he continued to look to the respondent as his employer. There is no proof of the exact date when he first became aware of the registration of the company. It appears from his evidence that it was probably early in 1971. Furthermore, he started receiving company cheques for his salary and bonus from 9th December 1971. Moreover, his I.R.P. tax certificate from the Receiver of Revenue for the tax year 1973/74 reflects his employer as being the company; and shows the relevant period of service as being 1 March 1973 to 29 February 1974. Hence he must have known at least then that he was in the service of the company. Furthermore, on 1 May 1976 he signed a requisition to the Building Industry for holiday stamps, in the name of the company. Moreover, as works manager as well as foreman, it must have repeatedly been brought to his mind, through suppliers, deliveries and invoices, that the business was being carried on by the company. His duties, as listed in the original written contract, were extensive, and not merely manual.

(ix) /.....

(ix) In January 1977, after the contract had come to an end, the appellant, for the first time, asked the respondent if he could see the books. The respondent replied that he could get them at any time at the auditors' offices. The appellant then said that he would not be able to understand them: he asked that his son and the latter's wife be allowed to inspect them. The respondent's attitude was that only the appellant could see them. Thus the appellant, although he still regarded the respondent as an honest person, said that he did not know whether he had received his 15% in full over the years.

(x) The appellant then, through his son, consulted an attorney, who wrote to the respondent on 10 February 1977, demanding to be furnished with audited profit and loss accounts of "Cincor Undertaking" for each of the past several years. This was the first time that accounts had been demanded. The respondent's attorney denied that the appellant had the right which he claimed; but nevertheless he listed the bare figures of the annual profits of the company, and the 15% share, and stated that the appellant had actually received more than he was entitled to - which, on those figures, was the position.

(xi) /.....

(xi) The appellant issued summons against the respondent (not the company) in November 1977 and, after the customary thrust and parry in the pleadings and requests for further particulars, the parties went to trial in April 1979. During the proceedings the respondent's counsel produced the audited statements for the seven years in question - comprising some fifty pages - and they were by consent put in as exhibits, subject only to proof by the respondent of their arithmetical correctness. They had come to light in the respondent's discovery affidavit. Thus, substantially, the residuary issues were whether the appellant was also entitled (a) to delivery of the supporting vouchers, (b) to a debate of these accounts, and (c) to payment of any amounts found to be due - all based on an implied term. Holding against the latter, the trial Court granted absolution at the conclusion of the plaintiff's case.

On a conspectus of all of the foregoing facts I consider it to be clear that the company took over the firm of Cincor Ondernemings, and also took over the


appellant/.....

appellant on his original terms of employment. In other words, the company took over the respondent's obligations to the appellant under the contract of 2 February 1970. To put it another way (as this is a case of absolution) there is insufficient evidence upon which a reasonable man might hold that the appellant proved his basic averment in paragraph 7 (b) of his particulars of claim (supra), namely that, during the whole period of his employment, the respondent continued to conduct his business as a firm of which he was the proprietor.

As to the appellant's alternative basis in paragraph 7 (c) (supra), I consider that on the facts, this was proved. This means substantially that the implied term, pleaded in paragraph 6 (b) of his particulars of claim, is now the relevant one. I say this because the claim arising out of the period of service ending 28

February/.....

February 1971, which is the only claim relating to the period when respondent was carrying on business as a firm, is prima facie barred by prescription; and the appellant, on whom the onus of proof was thereby cast, did not aver or prove that, by reason of interruption or suspension or otherwise, it was not so barred. It is therefore not necessary to inquire into the implied term contended for in paragraph 6 (a).

As to prescription (assuming that the claim in respect of the year ending February 1971 is otherwise valid) Act 68 of 1969 came into force on 1 December 1970. It provides for a prescriptive period of three years, insofar as the instant claim is concerned; see section 11 (d). The debt (i.e. monies found to be due on a debate of the financial accounts for the year ended 28 February 1971) was claimable on the auditor's financial statements dated 3 December 1971. That was much more than three  years/.....

years before the appellant's summons was served. We do not know the exact date of service; but the summons was issued in December 1977 and further particulars were requested on 20 February 1978. Service must have been between those two dates.

The defence of prescription also applies to the claim in respect of the financial years ending February

1972/.....

1972 and 1973 (again, assuming that they are otherwise valid). The relevant auditor's statements were dated 1 November 1972 and 31 July 1973, respectively.

Even if one allows a reasonable time after those dates for the claims to crystallise, the prescriptive period of three years is safely applicable. Prescription cannot apply in respect of the claim relating to the year ending February 1974, (assuming it to be valid) because the auditor's accounts are undated. One cannot therefore hold that three years elapsed between the coming into being of the claim and the service of the summons.

I turn now to deal with the claims relating to the years ending February 1974, 1975, 1976 and 1977.

It is necessary to enquire whether there is an implied term as averred in paragraph 6 (b) of the appellant's particulars of claim, supra. There seems to me to be

considerable/.....

considerable difficulty confronting the implication. If the possibility of a company being formed in the future had been mooted when the parties were entering into their contract, they might well have then thought in terms of the company taking over the appellant's contract. That does not assist the implied term now contended for. Indeed, it was only when the plea was filed, with its references to the company, that the appellant ex post facto sought to rely on this implied term.

Furthermore, the term sought to be implied in para 6(b) would be of scant benefit to the appellant in suing the respondent. On the hypothesis in the opening lines of the paragraph, the company, and not the respondent, would be making a profit, and it would be the company's accounts that would have to be the subject of the debate. Yet the company is not before the Court, and the appellant is suing the respondent for, inter alia, a debate of the company's accounts and payment of all monies found to be due thereunder. Payment by the respondent or payment by the company?

Moreover/.....

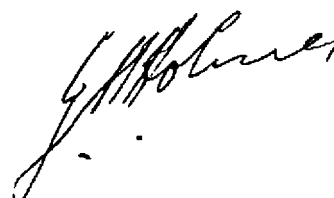
Moreover, the appellant himself said that at no time during his seven-year employment did he ask for an annual statement of account - a point which rightly weighed with the learned Judge in the trial Court. The appellant's evidence, which has an air of frankness, was to the effect that he thought that the respondent would give him a final reckoning when his employment terminated - but that is not the implication now sought. Again, when the appellant did eventually approach the respondent at the end of his seven-year employment, he asked him, not for the annual accounts now claimed, but for a sight of the books.

To sum up on this issue, the facts strongly point to the conclusion that the appellant, an ageing artisan who had been out of work for a year, gladly accepted the employment and remuneration which the respondent offered to him. He says that he had known the respondent for some time and knew him to be an honourable man; and he says that he trusted him to pay a correct 15% of the profits every year. It seems that he was content to leave it at that.

All in all, whatever test one applies for implying a term, it seems to me clear that the term in question does not qualify.

In the result I find no reason for disturbing the decision of PHILLIPS, AJ.

The appeal is accordingly dismissed with costs.



G N HOLMES
ACTING JUDGE OF APPEAL

RUIPF, CJ)
JANSEN, JA)
JOUBERT, JA) CONCUR
TROLLIP, AJA)