THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 656/02

In the matter between:

SOUTH AFRICAN FORESTRY COMPANY LIMITED — APPELLANT

and

YORK TIMBERS LIMITED — RESPONDENT

CORAM: STREICHER, CAMERON, BRAND JJA, JAFTA

et PATEL AJJA

HEARD: 20 AUGUSTS 2004

DELIVERED: 9 SEPTEMBER 2004

Summary: Where contractual provisions became unworkable through statutory amendment while government still a party to contracts – appellant as successor to government's right and obligations cannot rely on supervening impossibility – role of good faith in contract – importation of implied terms that contracting party will act reasonably and in good faith – frustration of rights conferred upon other contracting party – amounting to breach in the form of both malperformance and repudiation.

JUDGMENT

BRAND JA/

BRAND JA:

[1] The outcome of this appeal will determine the fate of two contracts between the parties that were entered into more than 30 years ago. For present purposes, the terms of the two contracts were identical. In each case the South African Government, as the one contracting party, undertook to sell to the other contracting party softwood saw logs obtained from two government plantations in the Mpumalanga province. The contracts were referred to as the 'Witklip agreement' and the 'Swartfontein agreement' after the plantations from which the saw logs derived. In 1982 the respondent ('York') took over all the rights and obligations of the other party in terms of both contracts. With effect from 1 April 1993 the government, in turn, transferred all its rights and obligations under the contracts to the appellant ('Safcol') pursuant to the provisions of s 4 of the Management of State Forests Act 128 of 1992.

[2] In 1999 Safcol instituted action in the Pretoria High Court for an order declaring that the two contracts had been terminated. The court *a quo* (De Vos J) found that Safcol had failed to make out a case for an order to that effect. This appeal is with the leave of the court *a quo*.

[3] The two contracts were entered into at a time when the South African Government decided, as a matter of policy, to encourage

investment by the private sector in the sawmilling industry. One of the ways of giving effect to that policy was to enter into long term agreements with sawmills to supply them with softwood logs from government plantations so as to provide investors with some security of tenure in a capital intensive industry. In the contracts the government is described as the seller and the other contracting party as the purchaser. The intention on the part of the seller to provide the purchaser with security of tenure was specifically recorded in clause 4.1 of the contracts. In the same vein clause 4.2 went on to provide that the contract would, subject to certain terms and conditions, operate for an indefinite period. Safcol's first contention as to why the unlimited duration of the two contracts had come to an end, was that the contracts had lapsed through supervening impossibility, in that certain of their material provisions had become unworkable. In the alternative Safcol contended that the contracts had been validly cancelled by it on 10 November 1998 as a result of York's breach, either through repudiation of or through non-compliance with its obligations in terms of clauses 3.2 and 4.4. Since the provisions of these two clauses also underlie Safcol's contentions based on supervening impossibility, it is necessary to refer to their contents and context in some detail.

RELEVANT PROVISIONS OF THE CONTRACTS

[4] Clause 3.2 was substituted in the two contracts during 1979 and 1982, respectively. It is to be read in conjunction with clause 3.1 which listed the prices of saw logs in the various classes at the inception of the agreements. It was obviously foreseen by the parties, however, that these prices would not remain static for the indefinite contract period. Consequently, clause 3.2 from the outset provided a mechanism for future price revisions. Under the original clause 3.2 a deadlock in price negotiations would lead to advice being sought from the Board of Trade and Industries and the automatic termination of the contracts in the event that agreement could still not be reached on the basis of such advice. The import of the subsequent amendment of clause 3.2 was to change the mechanism for price revision. In its amended form, the relevant part of the clause reads as follows:

'Log prices shall be subject to revision provided that changes of price shall not take place more often than once every twelve months and provided further that:

(i) The Seller and the Purchaser shall both agree to new prices;

(ii) New prices shall become effective on a date to be agreed upon by the Seller and the Purchaser, or, if no agreement in regard to such date can be reached within 30 days of the date on which new prices were agreed to, on 26 March of the year in which negotiations between the Seller and the Purchaser, concerning such prices, commenced;

(ii) Should no agreement be reached by the parties as to whether new prices are to be introduced or the existing prices retained, within 120 days from the date on

which negotiations concerning new prices were first initiated, the matter shall be referred to the Minister of Environmental Affairs and if the Minister is of the opinion that no such agreement can be reached the matter shall be referred to arbitration.

…'

[5] Both clauses 3.2 and 4.4 are to be read in their contextual relationship with clauses 4.2 and 4.3. These two clauses provide that:

'4.2 The contract shall operate for an unspecified period but shall in any event and subject to clauses 3.2(c), 4.3, 4.4, 28.1 and 28.2 [clause 28 deals with breach of contract on the part of York] remain in force for an initial period of five years commencing on [1 April 1968 and 1 April 1970, respectively] and shall remain in operation at the conclusion of the said initial period of five years for further successive periods of five years, provided that the parties shall have agreed mutually in advance as to the terms which shall apply during each successive period of five years. In the event of no agreement having been reached regarding the terms which are to apply in regard to any period of five years, the matter shall be referred to the Minister of Forestry for a decision, and should his decision be acceptable to both parties, the contract shall continue for such period of five years on the terms and conditions of this contract as modified by the Minister. Should however the Minister's decision not be acceptable to the Purchaser, the contract shall nevertheless continue for such a five year period on the same terms and conditions as laid down in this contract but it shall, unless otherwise agreed by the parties, terminate at the end of the five year period concerned.

4.3 Notwithstanding the provisions contained in clause 4.2 the Purchaser shall at any time have the right to cancel the contract by giving to the Seller one year's written notice of his intention so to do.'

[6] Clause 4.4 provides:

'4.4 Should it at any stage, in the opinion of the Minister of Forestry, be in the interest of the wood industry or the country as a whole to terminate this contract, then the Seller shall be entitled to cancel the contract on giving the Purchaser written notice of at least five years. In the event of the contract being cancelled in terms of this clause, the payment of compensation subject to Treasury and if necessary Parliamentary authority, will be considered by the Seller.'

FACTUAL BACKGROUND

[7] A proper understanding of the contentions advanced by Safcol on the basis of these clauses requires a somewhat more detailed exposition of the background facts. I start with the history of price revisions pursuant to the provisions of clause 3.2. While the government was still administering the contracts, it sought an upward revision of prices practically every twelve months. After Safcol stepped into the shoes of the government in 1993, it did the same. The way in which negotiations for the increases sought were initiated, was by means of a letter from the government and, subsequently, Safcol, setting out its motivation for the price increases sought as well as the new price structures proposed. The letter was sent to every individual sawmill that was a party to a long

term supply contract with the government in the same terms as the ones involved in this case. At all relevant times, there were about sixteen of them. These sawmill owners, including York, organised themselves into an informal association called the South African Lumber Millers Association or Salma. Although clause 3.2 of the respective contracts required an agreement to be reached with each individual contractor separately, negotiations were conducted between the government (later Safcol) and Salma.

[8] It was accepted by everybody concerned, albeit on an informal basis, that the price increases agreed upon between the government and Salma would be regarded as a newly established ruling price which would not be deviated from unless a particular contractor could persuade the government that there was good reason why it should pay less than the ruling price. Despite this common understanding that, as a matter of course, individual contractors would agree to the increases indicated by the new ruling price, York refused to do so in respect of the price increases agreed upon in 1991, 1992 and 1993. When Safcol took over the administration of the two contracts from the government with effect from 1 April 1993, it therefore inherited a price dispute with York for three different periods. In the meantime, Safcol was obliged to supply York with saw logs at 1990 prices while all other long term contractors were

paying the increased prices. This obviously gave York a substantial edge on its competitors in the marketplace.

[9] Safcol saw the solution to its problem in the reference to arbitration provided for in clause 3.2. In order to do so, however, it required an expression of opinion by the Minister of Environmental Affairs, or whoever was the Minister responsible for the Department of Forestry at the time ('the Minister'), that no agreement on the new prices could be reached by the parties. Consequently, Safcol approached the Minister with a motivated request to express an opinion to that effect. York's response in its letter to the Minister was that such opinion would be unwarranted because the possibility of an agreement could not be excluded. On this occasion, as on all other subsequent occasions relevant in this matter, York was represented by its chief executive officer, Mr Solly Tucker, who is an admitted but non-practising advocate. Despite Tucker's assertions to the contrary, the Minister agreed with Safcol that in all the circumstances an agreement between the parties was not a real possibility. This gave rise to a review application by York in the Pretoria High Court for the Minister's decision to be set aside. The ensuing litigation was eventually settled in April 1994. In terms of the settlement York undertook to pay the increased prices claimed by Safcol with effect from April 1991 without interest, by way of a surcharge on

future deliveries of saw logs by Safcol. It is common cause that the outcome of the litigation and the eventual settlement was to the substantial benefit of York.

[10] In terms of the settlement York also agreed to the new price increases, with effect from 1 April 1994, that had in the meantime been agreed upon by Salma and all the other long term contractors. As will soon transpire, that was the last time that York actually agreed to an increase in price.

[11] Towards the end of 1994 Safcol decided to negotiate an amendment of the terms of all the long term supply agreements in accordance with the provisions of clause 4.2. Safcol initiated these negotiations by way of a standard letter to all its long term contractors, including York. One of the amendments proposed was that the contract period stipulated in clause 4.2 be reduced from five years to three years and that the terms of the contract should therefore be revised at three year instead of five year intervals. Eventually, most of the long term contractors agreed, after extended negotiations, to an amendment of the agreements, more or less in accordance with Safcol's proposals. York's response, on the other hand, was that Safcol's proposal to shorten the contract period was in breach of the Constitution in that it would amount to an expropriation without appropriate compensation. Its

counterproposal was that the contract period be extended to 20 years. At a later stage it even suggested a contract period of 50 years. In November 1995 York went one step further. It sought an order in the Pretoria High Court declaring, *inter alia,* that it was not obliged in terms of the provisions of clause 4.2

'to negotiate in regard to the indefinite duration of the contract … or the fact that it is to be comprised of successive five year periods and that, should he be called upon to do so, it is not open to the Minister of Forestry to impose terms and conditions which impinge upon the aforesaid two matters …'

[12] In these circumstances, Safcol concluded that an agreement with York regarding the variation of the terms of the contracts under clause 4.2, was highly unlikely. Consequently, it redirected its efforts to obtain York's consent to the price increases for 1995. In a letter to York, dated 1 December 1995, it therefore proposed price increases and pointed out that these increases had already been agreed upon by the other long term contractors and had in fact been paid by them since 1 August 1995. York's reaction was not to make a counterproposal about price, but to revert to the pending litigation about the proposed amendments to the terms of the contract and to other issues between the parties. In order to avoid entanglement in disputes that were the subject of pending court proceedings, Safcol decided to suspend the price negotiations until the litigation had been resolved.

[13] In September 1996 the court case was settled. As a consequence, Safcol attempted to resume the suspended negotiations regarding 1995 prices which had in the meantime been overtaken by another price increase for 1996. Again Tucker's reaction on behalf of York was not to make any counterproposal about price, but to revert to the issues concerning either the amendment or the implementation of the contracts. From then onwards, this became Tucker's repeated tactic and strategy. Every endeavour on the part of Safcol to negotiate an increase in price was deflected by Tucker's insistence on discussing issues of a different kind.

[14] At the beginning of 1997, Safcol decided that the parties had reached deadlock in their price negotiations and that arbitration was the only way out. It therefore resolved to obtain the Minister's opinion that the parties were unable to reach agreement, as contemplated in clause 3.2. York denied that the reference to the Minister was warranted. As a result, Safcol sought an order in the Pretoria High Court confirming the propriety of its approach. This application was opposed by York. One of the defences raised by Tucker was that, on a proper interpretation of clause 3.2, a reference to the Minister could occur only if the parties were unable to agree that there should be any price variation at all. This argument would entail that if the seller was seeking a price increase

while the purchaser suggested a downward variation in price, that would exclude any approach to the Minister and, consequently, any reference to price arbitration. Another defence raised by Tucker was that Safcol was too pessimistic in that, given time, the parties would eventually be able to reach agreement. The court was not impressed by Tucker's arguments. In the result, the declaratory order sought was granted. York lodged an appeal to the full court. That appeal was dismissed on 7 September 1998.

[15] The effect of the full court's judgment was that the first stumbling block in Safcol's way to refer the 1995 price increases to arbitration was eventually removed. In the meantime, however, the train had moved on. Price increases were agreed upon and were in fact being paid by virtually all the other long term contractors, in respect of 1996, 1997 and 1998 while York was still paying 1994 prices. On average it was paying 58,6 per cent less for saw logs than its competitors. As a consequence, it was able to undercut prices and extend its market share without sacrificing any profit. Safcol realised that in these circumstances it would not be able to win approval for further price increases with Salma until its problems with York had been resolved. To avoid further delay, Safcol therefore proposed, after York's appeal had been dismissed by the full court, that the reference to the Minister be abandoned and that they

proceed directly to arbitration on all four suggested price increases between 1995 and 1998.

[16] This proposal was rejected by York. Whereas it had previously resisted any reference to the Minister, it now proclaimed his involvement indispensable in that he could facilitate a settlement between the parties. Moreover, Tucker found support for York's cause in the injunction against more than one price increase during any twelve month period provided for in clause 3.2. In the light of York's attitude, Safcol had to approach the Minister. It did so in October 1998. York, however, again opposed any expression by the Minister of an opinion that agreement could not be reached. Apart from the recurring argument that, despite the odds, the parties could still come to an agreement, Tucker raised the objection that Safcol had approached the wrong Minister. The fact that this objection was in direct conflict with a pertinent admission by him in earlier court proceedings, obviously did not perturb him. A further argument raised by Tucker was that the Minister could not consider the matter until the parties had agreed on his terms of reference. Finally he suggested that the Minister should recuse himself on grounds of perceived bias in the light of pending litigation between York and the Minister's department on matters of a similar kind. This suggestion was difficult to reconcile with Tucker's earlier insistence that the Minister should remain involved.

[17] If Tucker's objections were aimed at persuading the Minister to distance himself from the matter, he was successful. On 31 December 1998 the Minister responded:

'I decline to form an opinion as to whether an agreement on log prices can be reached between SAFCOL and Yorkcor. I therefore cannot accept the referral.'

[18] At more or less the same time, Safcol approached the Minister to take a decision under clause 4.4. It will be remembered that while York had the right to cancel the contract by giving one year's written notice to that effect in terms of clause 4.3, the contracts afforded Safcol no such opportunity. Clause 4.4 provides in the absence of a breach of contract by York that Safcol can only cancel the contract on five years' written notice and only if the Minister of Forestry is of the opinion that it would 'be in the interests of the wood industry or the country as a whole to terminate this contract'. Safcol's request to the Minister to express the opinion contemplated in 4.4 was also opposed by York, *inter alia* on the basis that the Minister was biased. This time the Minister did not decline to become involved but he refused to express the opinion sought by York.

SUPERVENING IMPOSSIBILITY

[19] Safcol's case that the contracts had lapsed through supervening impossibility is primarily based on the Minister's alleged refusal to perform his assigned functions in terms of clauses 3.2 and 4.4. With regard to the latter clause Safcol has failed to establish that the Minister had actually refused to perform the function allocated to him. For that reason alone Safcol's case, insofar as it is based on clause 4.4, cannot be sustained. As to clause 3.2, the Minister had clearly refused to become involved. Given this, Safcol contended that the Minister's involvement was an integral cog in the mechanism for price revisions created by clause 3.2, while this mechanism in turn formed an essential part of the contracts as a whole. Consequently, Safcol's argument went, the Minister's refusal to perform his allocated function made price revisions impossible and these contracts of inordinate duration unworkable. For its contention that the contracts had thus been terminated through supervening impossibility, Safcol sought authority in the decision of this court in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA). The contract in that case contemplated that the parties should reach agreement on the amount of what was referred to as the 'CAG loan account'. Failing such agreement the amount of the loan was to be determined by a firm of auditors, KPMG. The parties could not reach agreement on the amount of the loan account and KPMG was either unwilling or unable to resolve their dispute. Because of

this, so it was held, the contract had failed. The reason for this finding appears from the following statement by Navsa JA and Heher AJA (at 201H-I):

'Caterna's case was one of a lawful agreement which afterwards failed without fault because its terms could not be implemented. The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependent upon the conduct of a third party (KPMG) who was unable or unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual *nexus*: …'

[20] Though I agree that in the present case it can also be said that the intention of the parties became frustrated when the Minister refused to become involved, there is one feature which, in my view, renders the *Kudu Granite* case distinguishable on the facts. In the latter case KPMG could not be compelled to perform its allocated function. That was not the Minister's position at the time when clause 3.2 was introduced by way of an amendment to the two contracts under consideration in 1979 and 1982, respectively. At that time the Minister was under a statutory duty to exercise the discretion conferred upon him by clause 3.2 when requested to do so. This statutory duty originated from the provisions of s 30(2) of the Forest Act 72 of 1968 which read as follows:

'Whenever on revision of prices of forest produce derived from State forests and in respect of which contracts of sale for a period of 5 years or longer have been concluded, a dispute arises on which, in the opinion of the Minister, agreement cannot be reached, such dispute shall be submitted to arbitration.'

[21] Section 30(2) was introduced by s 9 of the Forest Amendment Act 87 of 1978. It was tailor-made for long term contracts of the present kind and it was obviously intended to provide the statutory substructure for the Minister's involvement contemplated in the new clause 3.2 proposed at the time. Soon thereafter clause 3.2 was grafted upon all these contracts. Succinctly stated, the new s 30(2) was aimed at creating a specific statutory power and duty for the Minister to exercise the discretion conferred upon him by clause 3.2 of the contracts.

[22] When the 1968 Forest Act was replaced by the Forest Act 122 of 1984 with effect from 27 March 1986, the essential provisions of s 30(2) were re-enacted in s 17(4) of the latter Act. A fundamental change was brought about, however, with the passing of the Management of State Forests Act 128 of 1992 ('the Management Act'), which came into operation on 1 August 1992. Section 4(3)(c) of Management Act provided in effect that, once the State's rights and obligations in terms of a particular long term contract had been assigned to Safcol, as envisaged by the provisions of the Act, s 17(4) of the 1984 Forest Act

would no longer apply to that contract. Consequent upon the enactment of s 4(3)(c) of the Management Act, the position was that although the Minister still had the power to perform the role allocated to him in clause 3.2, he was no longer under an express statutory duty to do so and his involvement could thus no longer be compelled on this basis.

[23] In this light, York's answer to this part of Safcol's case was that the impossibility relied upon amounted to self created impossibility in that it was brought about by the South African Government, while it was still a party to the contracts, through the enactment of s 4(3)(c) of the Management Act. As a matter of law, so York's argument proceeded, self created impossibility does not discharge the contract, but leaves the party whose conduct created the impossibility liable for the consequences (see eg Christie, *The Law of Contract in South Africa* 4th ed 552 and the authorities there cited). Accordingly, York contended, Safcol's reliance on supervening impossibility cannot be sustained. Safcol's counterargument was twofold. Firstly, that it (Safcol) cannot be held responsible for the passing of legislation by its predecessor. Secondly, that, in any event, legislation which renders performance of a government contract impossible can be described as self created impossibility in the contractual sense only where the legislation had been employed by the government as a stratagem to avoid its obligations in

terms of the contract. If the legislation was intended to bring about change on a much wider front, so the argument went, it cannot be regarded as an instance of self created impossibility of a particular contract. Safcol sought authority for this line of argument in *Gordon v Pietermaritzburg-Msunduzi Transitional Local Government and Another* 2001 (4) SA 972 (N) 978B-C.

[24] I find Safcol's counterargument unpersuasive in both its constituent parts. It is true that Safcol is not the government and that it cannot be held responsible directly for the enactments of Parliament. However, when s 4(3)(c) of the Management Act came into existence, the government was still one of the contracting parties. Indeed s 4(3)(c) formed part of the very same legislation that enabled the government to transfer its rights and obligations under the contracts to Safcol without the cooperation of York. If, before the actual transfer of the contracts to Safcol, the government were to rely on the impossibility of performance created by its own legislation, it would clearly be open to York to raise the argument that the impossibility was a self created one. If that response was valid against the government, it could not be avoided by the subsequent transfer of the contracts to Safcol. After all, the notion that Safcol can be in a better position than the party from whom it obtained its contractual rights, appears to be untenable, particularly

where York had no say in the assignment of the government's obligations to Safcol.

[25] The second leg of Safcol's counterargument is based on the supposition that the government can be denied reliance on impossibility created by its own legislation only if the legislation in question amounted to a legal stratagem by the government to avoid its contractual obligations. In my view the supposition is invalid. Why should the government be allowed to rely on its own legislative enactments to avoid its contractual obligations where the legislation was due, say, to legislative mistake? After all, as a matter of law, the sanction against reliance on self created impossibility is not limited to situations where the act causing the impossibility could somehow be described as wrongful or reprehensible (see Christie *op cit*). Of course, the position could be quite different if the legislative enactment under consideration relates to matters of general public interest (see eg *Gordon v Pietermaritzburg-Msunduzi Transitional Council, supra* 978B-D). That, however, does not appear to be the position in this case. Here we have the rather peculiar situation that s 17(4) of the 1984 Act was enacted solely to facilitate the contracts of the present kind. As a consequence, neither s 17(4) nor its revocation in terms of s 4(3) of the Management Act could be said to affect the interests of anyone but the parties to these contracts. Though

we do not know why it was thought necessary that s 17(4) of the 1984 Forest Act should be rescinded, the most likely reason appears to be legislative mistake. After all, I can think of no reason why Parliament would have intended that Safcol should be saddled with an unworkable contract (cf also s 74(5) of the National Forest Act 84 of 1998). For these reasons Safcol's case based on supervening impossibility cannot be sustained.

BREACH OF CONTRACT BY YORK

[26] This brings me to that part of Safcol's case which is based on York's breach of contract. The particular breach relied upon was that York, by its conduct over an extended period of time, had acted in breach of an implied term of the contracts, alternatively that York repudiated its obligations arising from the same term. This implied term, as formulated by Safcol, was said to have imposed an obligation on York to act in accordance with the dictates of reasonableness, fairness and good faith when Safcol exercised its rights in terms of clauses 3.2 and 4.4 of the contracts.

[27] York's answer to these contentions, which found favour with the court *a quo*, was that they were in conflict with the judgments of this

court in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 21-25 and 93-95 and *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA) paras 31-32. In these cases it was held by this court that, although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder. In addition, it was held in *Brisley* and *Afrox Healthcare* that – within the protective limits of public policy that the courts have carefully developed, and consequent judicial control of contractual performance and enforcement – constitutional values such as dignity, equality and freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint.

[28] Safcol's argument is, however, that its case is not directly based on the abstract notions of fairness and good faith, but on a term implied by

law under the informative influence of good faith. Thus understood, Safcol's argument went, its case amounts to an application and not a negation of the judgments in *Brisley* and *Afrox Healthcare*. This argument is not without appeal in logic, particularly in the light of established principles regarding implied terms. Unlike tacit terms which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of development of our contract law, there is no *numerus clausus* of implied terms and the courts have the inherent power to develop new implied terms. Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith (see eg *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 651C-652G; *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A) 417F-420A; *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W) 226I-227G). 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 (see eg *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531D-H). 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 serve only as catalysts in the process of legal development.

[29] Conceptually, Safcol's argument is therefore well founded in the principle that a term can be implied if it is dictated by fairness and good faith. The further progression of the argument is, however, flawed by misconception. It confuses the rationale for implying a term with the contents of the term to be implied. To say that terms can be implied if dictated by fairness and good faith does not mean that these abstract values themselves will be imposed as terms of the contract.

[30] The acceptance of the new implied term contended for by Safcol will mean that it becomes a term of every contract that the parties must not only perform their obligations in compliance with the provisions of the contract, but that they must do so in accordance with the dictates of fairness and good faith. This is in conflict with the established principles of our law. The question whether parties have complied with their

contractual obligations depends on the terms of the contract as determined by proper interpretation. The court has no power to deviate from the intention of the parties, as determined through the interpretation of the contract, because it may be regarded as unfair to one of them (see eg *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465-466; *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) 566 H-I). Once it is established that a party has complied with his or her obligations as properly determined by the terms of the contract that is the end of the inquiry.

[31] Moreover, acceptance of Safcol's contentions will result in negation of the considerations and reasoning underlying the decisions in *Brisley* and *Afrox Healthcare*. To say that contractual stipulations cannot be avoided on the basis of abstract notions such as fairness and good faith, but that the same result can be attained when a party's conduct is said to offend these same abstract notions, because they have been imported by means of an implied term, amounts to a distinction without a difference. The outcome will again depend on the individual judge's perception of what is just and fair. I therefore find myself in agreement with the finding by the court *a quo* that Safcol's argument based on an implied term demanding reasonableness and good faith on the part of York, is in conflict with the decisions of this court.

[32] Unlike the court *a quo*, I do not believe, however, that this is the end of the matter. The pivotal question remains whether York has complied with its obligations in terms of clauses 3.2 and 4.4 of the contracts. This will depend on a proper interpretation of these two clauses. In the interpretation process, the notions of fairness and good faith that underlie the law of contract again have a role to play. While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith (see eg *Trustee, Estate Cresswell & Durbach v Coetzee* 1916 AD 14 at 19: *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) 706-707; *Mittermeier v Skema Engineering (Pty) Ltd* 1984 (1) SA 121 (A) 128A-C; *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 (3) SA 373 (C) 383E-F. See also Farlam and Hathaway, *Law of Contract*, 3 ed (by Lubbe and Murray) 468, para 6).

[33] Having regard to the provisions of clause 3.2 it is clear that it confers the right upon a party (in this instance, Safcol) who found it impossible to come to an agreement on revision of price, firstly, to approach the Minister as a preliminary step to arbitration and, secondly,

to refer the matter to arbitration if the Minister should express the opinion that no agreement could be reached. Although the clause does not expressly impose any duty or obligation on the other party (York) the corollary of the rights conferred upon Safcol is an obligation or duty on the part of York not to frustrate Safcol in the exercise of these rights. This follows logically from the structure of the rights and duties the parties themselves created.

[34] However, had there been any interpretative ambiguity as to the existence of such a duty or obligation on the part of York, it is removed by considerations of reasonableness, fairness and good faith. In other words, even where the logical consequences of the rights and duties may not necessitate such an inference, the underlying principles of good faith requires its importation.

[35] The next question is whether it can be said that York failed to comply with its obligation not to frustrate or delay Safcol in the exercise of its rights under clause 3.2. I believe that the answer to this question must be in the affirmative. From the background facts it is clear, in my view, that York had no intention of agreeing revised prices with Safcol. It therefore knew all along that no agreement would be reached in this regard. It also knew that in these circumstances Safcol was entitled to refer the matter to the Minister and to obtain the Minister's opinion that

agreement could not be reached so as to enable it to proceed to arbitration. Nevertheless, York did its utmost over a period of several years to prevent or delay Safcol from obtaining such an opinion with the obvious intent to avoid arbitration. It did so by pretending that it was prepared to negotiate; by contending that it was possible to reach agreement whereas obviously it was not; by contending, contrary to the whole scheme of the agreements revealed by clauses 3.2 and 4.2, that revised prices could not be negotiated before the terms of the long term contracts had been settled; by raising contentions which can only be described as absurd, as for example, that a reference to the Minister was inappropriate where the parties were in agreement on the principle that there should be price revision, thus creating an obvious deadlock; by insisting upon the Minister's involvement only to raise the objection subsequently that Safcol had approached the wrong Minister and that the Minister should recuse himself on grounds of bias.

[36] Essentially the same considerations apply, in my view, with reference to clause 4.4. This clause confers the right on Safcol to approach the Minister to express the opinion contemplated as a preliminary step to cancellation of the contract by York. Again, the corollary of this right is an obligation on the part of York not to frustrate this right. Again York acted in breach of this obligation by seeking to

inhibit or intimidate the Minister through thinly veiled threats of court proceedings if the Minister should decide to get involved.

[37] York's further contention was that even if it is found to have failed to comply with its contractual obligations, Safcol was not entitled to resort to cancellation on the basis of breach, because Safcol failed to comply with the procedural requirements for cancellation. These procedural requirements are stipulated in clause 28.1 of the contract. It required of Safcol, before it was entitled to terminate the contract on the grounds of breach by York, to give written notice to York to remedy such breach as well as a reasonable opportunity to do so. It is common cause that no such notice was given to York prior to Safcol's letter of cancellation. The answer to York's argument is in my view to be found in those cases where it was held that the requirement of notice prior to cancellation contemplated in clause 28.1 of the contracts does not apply where the breach of contract complained of was in the form of anticipatory breach or repudiation (see eg *Taggart v Green* 1991 (4) SA 121 (W) 124D-126I; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Limited* 1994 (3) SA 673 (A) 683G-I).

[38] Repudiation occurs where one party, without lawful grounds, indicates to the other party, by word or conduct, a deliberate and unequivocal intention that all or some of the obligations arising from the

contract will not be performed in accordance with its true tenor (see eg *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) 294H-I; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd supra* at 684-685B). It is clear, I think, that in particular circumstances conduct of a contracting party can constitute both a breach of contract in the form of malperformance and a repudiation. A fair example of this is to be found in the present case. York's conduct amounted to breach in the form of failure to comply with his obligations in terms of clause 3.2 and 4.4. However, at the same time it also amounted to a repudiation in that York conveyed the clear indication to Safcol of its intention not to comply with those obligations in the future either. In these circumstances, the contracts were in my view duly terminated when Safcol accepted York's repudiation in its letter of 10 November 1998.

[39] For these reasons, the appeal is upheld with costs, including the costs of two counsel, and the following order is substituted for that of the court *a quo*:

'(a) An order is issued declaring that the plaintiff validly cancelled the two contracts between the parties, referred to as the Swartfontein agreement and the Witklip agreement, on 10 November 1998.

(b) The defendant is ordered to pay the plaintiff's costs, including the costs of two counsel.'

……
F D J BRAND
JUDGE OF APPEAL

Concur:

Streicher JA
Cameron JA
Jafta AJA
Patel AJA