mening geen gegronde rede waarom die verweerder nie verplig sal word om hierdie onderneming gestand te doen nie.

Na my mening het die verweerder nie daarin geslaag om die bewyslas wat op hom rus te kwyt nie. Dit was gemeensaak dat die kommissie van R1,9 miljoen aan die verweerder betaal is op 1 Oktober 1995. Dit was verder gemeensaak in terme van die ooreenkoms tussen die partye dat die R200 000 betaalbaar aan die eiser by ontvangs van die kommissie deur die verweerder binne sewe dae daarna sou geskied. Die verweerder was derhalwe *in mora* vanaf 8 Oktober 1995.

Mnr *Kades* het ten slotte betoog dat die saak van so 'n aard was dat dit nie die dienste van twee advokate regverdig het nie. Mnr *Coetzee*, bygestaan deur mnr *Roux*, het namens die eiser in hierdie aangeleentheid opgetree. Ek stem nie saam met hierdie argument van mnr *Kades* nie. Die dienste van twee advokate was na my mening wel geregverdig.

Ek maak derhalwe die volgende bevel.

1. Die verweerder word gelas om:
   1.1 die bedrag van R200 000 aan die eiser te betaal;
   1.2 rente op die bedrag van R200 000 te betaal *a tempore morae* teen 'n koers van 15,5 % bereken vanaf 8 Oktober 1995 tot op datum van betaling;
   1.3 die koste van hierdie geding te betaal insluitend die koste veroorsaak deur die gebruikmaking van twee advokate.

Eiser se Prokureurs: *Van Zyl, Le Roux & Hurter Ing*, Pretoria. Verweerder se Prokureurs: *Henk Strydom Ing*, Pretoria; *Young-Davis Ing*, Rosebank.

SWEETS FROM HEAVEN (PTY) LTD AND ANOTHER v STER KINEKOR FILMS (PTY) LTD AND ANOTHER

WITWATERSRAND LOCAL DIVISION

MALAN J

1998 October 2, 5

Case No 98/23931

Landlord and tenant—Lease—Rights of lessee—Right of undisturbed use (commodus usus) *of leased premises—Such right relating not only to property as such but also to profitability thereof and other aspects of its enjoyment—Infringing conduct need not have actual or direct physical bearing on leased property—Must however constitute breach of express, implied or tacit terms of contract—Accordingly, where lessee expressly or tacitly accepts risk or where lease concluded on supposition that lessee may be deprived of beneficial use of property, he cannot rely on breach by lessor in that regard—Whether such tacit term can be imputed depending on facts.*

The present dispute concerned the first respondent's right to sublet to second respondent a shop (shop 2) situated practically right next to that of second appellant (shop 3), from which second respondent intended to conduct a business selling sweets in competition with that of second applicant. A Local Division on 25 September 1998 granted an interim interdict prohibiting the first respondent from giving the second respondent occupation of shop 2 for the purpose of conducting business in competition with that of the applicants. Both shops formed part of a vast 'entertainment complex' which was in turn part of a shopping centre. The second applicant was first applicant's franchisee and occupied shop 3 through the first applicant, the sublessee, and with the consent of the first respondent, the lessee of the entire complex in terms of a head lease it had concluded with L Ltd, a large insurance company. The applicants claimed relief on the following grounds: (1) on account of an alleged failure by the first respondent to permit the first applicant the free and undisturbed use and enjoyment *(commodus usus)* of the leased premises, in particular in allowing second respondent to occupy shop 2 and conduct business from there in competition with second applicant; (2) by virtue of the breach of a tacit alternatively implied term that the first respondent would not permit a business to be conducted in competition with the business of the second applicant in close proximity to its shop; and (3) because the first respondent's conduct also amounted to knowingly interfering with the second applicant's contractual rights as against the first applicant 'in breach of a duty of care owed by the first respondent to the second applicant to permit second applicant to exercise her contractual rights'.

Held, that contention (3) could be dealt with first: there was no privity of contract between a sublessee and a landlord and thus no contractual relationship between the second applicant and the first or second respondent. The sublessee had no legal interest in the contract of lease between the landlord and the tenant despite the sublessee's financial interest in it. The second applicant occupied shop 3 with the consent of the first applicant and by virtue of the franchise agreement between her and first applicant. It followed that any breach of the obligation to give *commodus usus* could be vindicated only by the first applicant, who was entitled to the rights flowing from the agreement of lease between it and the first respondent. (At 800E–G.)

Held, further, that no particular facts were alleged from which the existence of a duty of care on the first respondent to heed the second applicant's rights could be inferred. The mere fact that the first respondent consented to the sublease did not give rise to such a duty. (At 800G/H–H.)

Held, accordingly, that second applicant did not show any basis for the relief claimed under (3). (At 801A/B.)

Held, as to contention (1), that it was possible to infringe the *commodus usus* of a lessee in an indirect manner in the sense that the infringing conduct did not have to have an actual or direct physical bearing on the leased thing. (At 801H/I–I.)

Held, further, that whether or not the first respondent had committed a breach of the contract of lease between it and the first applicant could only be determined with reference to the express, implied or tacit terms of the agreement. Where the lessee expressly or tacitly accepted the risk or where the lease was concluded on the supposition that the lessee could be deprived of the beneficial use of the property, he could not rely on any

breach by the lessor in this regard. It followed that the first applicant could only succeed if it was able to show that the lease tacitly or otherwise prohibited the conduct of the first respondent relied upon. (At 802G–G/H, 802J–803A and 803E–F.)

Held, further, that this led to contention (2), viz that the first respondent would, by giving occupation of shop 2 to the second respondent, be acting in breach of a tacit or implied term in the lease. Whether such a term could be imputed to the parties depended on the facts. (At 803F–F/G and I.)

Held, further, that even assuming that the lease of shop 2 to the second respondent would have an adverse effect on the business of the second applicant and, consequently, also on the royalties payable by the second applicant to the first applicant (in other words that the first applicant's *commodus usus* would be impaired by the lease of shop 2 to the second respondent), it was clear that the lease itself did not restrict the first respondent's right to lease out the shops in the entertainment complex. (At 804C–D and 805D–D/E.)

Held, further, as far as the importation of a tacit term that the first respondent would not permit a business to be conducted in competition with the business of the second applicant was concerned, that it was highly improbable that the first respondent would have agreed to a term limiting its conduct in such a manner. The term was in any event not necessary to render the lease functional: the sublease between the first respondent and the first applicant was perfectly capable of functioning whether or not the parties competed. (At 805I–J.)

Held, accordingly, that the applicants had shown neither a clear nor a *prima facie* right to obtain the relief claimed. (At 806B/C.)

The rule *nisi* was in the result discharged and the application dismissed.

Annotations:

Reported cases

Plettenberg Bay Entertainment (Pty) Ltd v Minister van Wet en Orde en 'n Ander 1993 (2) SA 396 (C): dictum at 400G–H applied.

Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk 1987 (2) SA 932 (A): applied

Wilkens NO v Voges 1994 (3) SA 130 (A): dicta at 136H–J, 138C–143I and 144C applied

Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co and Another 1986 (4) SA 796 (T): dictum at 802B applied.

Return day of a rule *nisi*. The facts appear from the reasons for judgment.

J L Kaplan (with him *P R V Strathern*) for the applicants.
A Kemack for the respondents.

Cur adv vult.

Postea (October 5).

Malan J:

[1] In this matter Navsa J on 25 September 1998 granted an interim interdict returnable on 2 October 1998 prohibiting the first respondent from giving the second respondent occupation of shop 2 in the entertainment complex at Sandton City for the purposes of conducting business in competition with the applicants.

The first respondent is the lessee of the whole of the entertainment complex in terms of a head lease with Liberty Life Association of Africa Ltd. The entertainment complex comprises 16 theatres, a compact disk outlet, an entertainment centre and fast food outlets and restaurants. The second applicant conducts a sweet and related products shop at shop 3 in the complex and the second respondent a shop or outlet selling similar products in the same complex. The present application concerns the closing of the second respondent's present outlet and the opening of an outlet by the second respondent in shop 2. This outlet will be separated from the premises of the second applicant only by a MacDonalds and the two outlets will be no more than 17 meters apart.

[2] The first applicant and the first respondent concluded a sublease in respect of shop 3 for an initial period of five years commencing on 11 November 1994 with an option to renew. The first applicant is in terms of the sublease entitled to 'use the leased premises for the purposes of the sublessee's business and for no other purposes whatsoever without the sublessor's prior written consent' (clause 13.1). Clause 20.2 defines the business to be conducted as: 'the operation of a shop relating to sweets and confectionery and other products substantially in line with the standard Sweets from Heaven product mix but excluding the selling of popcorn and including on a limited basis the sale of cooldrinks, fruit juices in cartons, health drinks and other novel-type drinks'.

[3] The second applicant is a franchisee of the first applicant that purchased the business of the first applicant and now occupies shop 3 with the consent of the first respondent. The first applicant, however, remained the sublessee of the first respondent, the agreement of sublease between them remaining in place, and the second applicant occupies the premises through the first applicant.

[4] The present dispute concerns the intention of the first respondent to lease to the second respondent shop 2. As I have said, shop 2 is some 17 meters from shop 3 and the two shops are separated by the premises that will be occupied by MacDonalds once the latter opens for business. There is no doubt that the second applicant and the second respondent are competitors, both selling sweets, confectionery and related products. Both parties, *inter alia*, use bins to display the sweets in and provide customers with packets in which to pack the sweets that are then weighed and priced. The customers in the cinema centre are primarily theatre patrons. The second respondent at present operates an outlet at the entrance to the area of the complex where 11 of the 16 theatres are situated. This outlet consists of six wall-mounted display cabinets with sweets as well as a counter, a spaceship trolley with counter items, a yogurt machine and a fridge for cold drinks. The respondents allege that the second respondent intended moving to shop 2 in order to get away from the congestion in the area where they are at present. There could well be other reasons as well for its move.

The second applicant fears that the occupation of shop 2 by the second respondent will have the effect of reducing its turnover and

profits. Shop 2 is closer to the foyer where most of the customers congregate and will attract the bulk of them.

[5] The applicants claim relief on the following grounds:

First, on account of an alleged failure of the first respondent to permit the first applicant the free and undisturbed use and enjoyment, *commodus usus*, of the leased premises, in particular in allowing the second respondent to occupy shop 2 and conduct business in competition with the second.

Secondly, by virtue of the breach of a tacit, alternatively, an implied term that the first respondent would not permit a business to be conducted in competition with the business of the second applicant as described in clause 2.20 of the lease. In argument the content of this alleged term was narrowed to refer to the conduct of a business at shop 2 or in close proximity of the second applicant's shop.

Thirdly, it is alleged that the first respondent's conduct also amounted to knowingly interfering with the second applicant's contractual rights as against the first applicant 'in breach of a duty of care owed by the first respondent to second applicant to permit second applicant to exercise her contractual rights to occupy the premises and to conduct business from there in accordance with those rights' (para 40.4 of the founding affidavit).

[6] This last contention can be dealt with first. The second applicant stands in no contractual relationship to the first or second respondent. There is no privity of contract between a sublessee and the landlord and a subtenant has no legal interest in the contract of lease between the landlord and the tenant, despite the subtenant's financial interest in it (*Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co and Another* 1986 (4) SA 796 (T) at 802B). The second applicant occupies the premises with the consent of the first respondent by virtue of the franchise agreement between the two applicants. It follows that any breach of the obligation to give *commodus usus* can be vindicated only by the first applicant, who is entitled to the rights flowing from the agreement of lease between it and the first respondent.

No particular facts have been alleged to infer the existence of a duty of care on the first respondent to heed the second applicant's rights. The mere fact that it consented to the sublease does not give rise to such a duty. Nor do I find that the fact that the first respondent removed a display cart belonging to the second respondent as evidence of an admission of such a duty of care. The conduct of the first respondent is also consistent with the exercise of its rights and duties in terms of clause 39 as well as with its intention to resolve a matter without getting into a dispute with the second applicant. If the removal of the cart amounts to anything, it is an admission by the first respondent of its responsibilities in terms of the contract of lease with the first applicant, not of a duty of care *vis-à-vis* the second applicant.

The second applicant in its replying affidavit also relies on the fact that the two respondents have launched a scheme whereby customers are supplied with vouchers entitling them to a R2 discount on purchases at

the second respondent's outlet. This may or may not be an instance of unlawful competition but does not provide support for the existence of a duty of care with the content contended for.

It follows that the second applicant has not shown any basis for the relief claimed.

[7] Pothier in his *Treatise on the Contract of Letting and Hiring* (translated by *Mulligan*) (1953) states that it is a consequence of the lessor's obligation 'to the lessee, *praestare ei frui licere* that he may not disturb the lessee's enjoyment during any period of the lease'. This duty, the duty to provide the lessee with the *commodus usus* of the leased property, is one of the natural consequences of the contract of lease. *Pothier* cites two examples to illustrate this general principle (para 76): a lessor would be acting in breach of this obligation where he, after letting a house, proceeds to build a window in the party wall of the house or of an adjoining house enabling him to look into the leased property. The other example is where the lessor constructs a spout on the adjoining house causing water to fall onto the leased house. In both cases the lessee's enjoyment has been disturbed entitling him to resist the disturbance. These two examples illustrate a disturbance of the *commodus usus* by conduct affecting the property directly. More to the point is the following example (para 152):

> '(L)et us suppose that I have leased someone an inn situate on the main-road, and that thereafter, during the currency of the lease, the main-road has undergone such an alteration that the inn, which previously had been greatly frequented, being no more on the main-road, is no longer frequented. In such circumstances, although the lessee has occupation of every part of the house, he is nevertheless entitled to claim a reduction of rent, seeing that his beneficial occupation of the inn has been greatly impaired and diminished, by reason of the alteration of the main-road. But if the inn, which I have leased to an innkeeper, was, at the time of letting the only inn in the locality, and during the currency of the lease other inns were set up in that locality, causing a great diminution in my lessee's profits, can he, in those circumstances, claim a reduction of rent? The answer is in the negative. The reason for the distinction is that it was easy to foresee, and my lessee ought to have foreseen, that other inns might be set up in the locality; whereas the alteration in the main-road could not have been foreseen.'

Following the example of the diversion of the main road discussed by *Pothier*, the Court in *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* 1987 (2) SA 932 (A) accepted that *commodus usus* or the beneficial use of the leased property related not only to the property as such but also comprised the profitability of the thing as well as other aspects of its enjoyment. It follows that it is possible to infringe the *commodus usus* of a lessee in an indirect manner in the sense that the infringing conduct need not have an actual or direct physical bearing on the leased thing (see Hawthorne 'The Lessee's Right to *Commodus Usus*' (1989) 52 *THRHR* 124 at 129).

In *Sishen* a hotel was leased for a period of 20 years. A portion of the rental consisted of a percentage of the liquor sales at the hotel that was situated next to the national road. The lease required the lessee to maintain certain standards at the hotel as visitors, personnel and officials

of the lessor often frequented it. A number of years after conclusion of the lease the lessor persuaded the authorities to divert the national road with the result that the profitability of the hotel rapidly declined. It was eventually closed down. An action for damages was instituted by the lessee against the lessor based on an alleged breach of an implied term in the contract. It was alleged that the lessor had to give free and undisturbed use of the property to the lessee and, in particular, to take no steps to deprive the lessee of such use or to interfere with it by procuring the road to be diverted or to render access impractical, difficult or cumbersome or to preclude the passage of traffic to the hotel. In the further particulars the lessee stated that the essential content of the obligation of the lessor was to furnish *commodus usus* of the property to the lessee. The question the Court had to answer was whether the conduct of the lessor in diverting the road and so diminishing indirectly the profitability of the business constituted an impairment of the *commodus usus* and a breach of contract. The Court held that the hotel had been hired with the intention that the lessee conduct a business on it in order to make a profit. Although the procuring of the diversion on the road had no physical impact on the leased premises, it indirectly affected the *commodus usus* of the lessee. It diminished the flow of clients to the hotel and reduced its profitability. This constituted an impairment of the beneficial use of the hotel. Impairment of the *commodus usus* alone, however, is not sufficient to found liability. The defendant will only be liable if his conduct constitutes a breach of contract causing the impairment of the lessee's beneficial use. Botha JA said (at 953B–C):

'Pas mens die gedagtes . . . op die feite van die huidige geval toe, dan lei dit tot die gevolgtrekking dat die sluiting van die pad die gevolg gehad het dat die appellant se *commodus usus* versteur is; maar dit laat nog die vraag oop of die respondent daarvoor verantwoordelik is, in die sin dat sy optrede 'n verbreking was van sy verpligting in die verband, sodat gesê kan word dat dit kontrakbreuk van sy kant was wat as die oorsaak van die versteuring van die *commodus usus* aangemerk moet word.'

[8] Whether or not the first respondent has committed a breach of the contract of lease can be determined only with reference to the terms of the contract. These terms can be express, implied or tacit. The fact that the contract of lease in clause 40 provides that the written document 'constitutes the entire agreement between the parties' and that 'no modification, variation, alteration or consensual cancellation shall be of any force or effect unless reduced to writing and signed by the parties' does not exclude the recognition of a tacit term which is 'simply read or blended into the contract' and thus 'contained' in it (*Wilkens NO v Voges* 1994 (3) SA 130 (A) at 144C).

[9] The rules relating to the impairment of the *commodus usus* of a lessee and the consequent reduction of rent and the remedies of the lessee are based on ordinary contractual principles (*Sishen* at 955I–J; De Wet and Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 4th ed at 323). It follows that where the lessee expressly or tacitly accepts the risk or where the lease is concluded on the supposition that the lessee may be

deprived of the beneficial use of the property he cannot rely on any breach by the lessor in that regard. Cooper *Landlord and Tenant* (1994) 2nd ed at 126 says:

'It is self-evident that the lessee of a business premises *may* claim damages from a lessor who causes the profitability of the premises to be reduced. This accords with a lessor's obligations to afford the lessee *commodus usus*. At the same time a lessor's obligations to abstain from conduct which affects the lessee's profitable use of business premises is not absolute. A myriad of examples may be cited to illustrate this. For a lessee of business premises to succeed in a claim against the lessor for reduced profitability caused by the lessor's conduct the lessee must prove that the parties either explicitly or tacitly agreed they would abstain from such conduct.'

The examples given by *Cooper* relate to the *Sishen* case and include the following:

'(I)f at the time they entered into the lease both parties knew that Yskor intended diverting the national road once it obtained the provincial administration's approval, or that Yskor intended building a hotel in competition with Sishen Hotel once it obtained the approval of the appropriate authority, the lessee would not have been entitled to recover any loss it suffered as a result of Yskor's conduct because, in the absence of a contractual restraint, explicit or tacit, Yskor was free to act as it did.'

See also Kerr 'Impairment of Profitability of Premises Let; Implied Contractual Provisions; Standing of Pothier' (1987) 104 *SALJ* 550 at 554–6.

It follows that the first applicant can only succeed if it can show that the lease tacitly or otherwise prohibited the conduct of the first respondent relied upon. In this manner the quotation from *Pothier* above should be understood.

[10] This brings me to the second ground relied upon, viz that the first respondent in giving occupation to the second respondent of shop 2 will be acting in breach of a tacit or implied term in the lease. It must be stated at the outset that, in view of the comprehensive provisions in the lease regulating the relationship between the first applicant and the first respondent, there is little room for an implied or tacit term (see *Wilkens NO v Voges* (*supra* at 138C–143I)). The tacit term alleged is also not one that can be readily formulated. Is the implication that all competition between the first respondent and the first applicant be excluded or is it merely contended that the competing entity may not operate from an adjoining or a very close premises? If the latter, one may ask, given the limited area of the entertainment complex, how close? Assuming that one can determine the first question, it may be asked whether all competition is disallowed or only competition emanating from the first respondent? There are no ready answers to these questions.

Whether or not a tacit term can be imputed to the parties depends on the facts. It is not disputed that the agreement of sublease between the first applicant and the first respondent was concluded on 1 February 1995. Nor is there any doubt that the second applicant occupies the premises through the first applicant. The first respondent is a 50% shareholder in the second respondent and they share at least one director. The first respondent has sublet shop 2 in the entertainment

complex to the second respondent. The latter is a competitor of the second applicant and they deal in substantially the same line of products. It is also clear that shop 2 is approximately 17 meters away from shop 3. I can add to the facts that are not in dispute: the second respondent occupies at present a shop, to use the word, in the area reserved for people visiting one of the group of 11 threatres in the complex. The public may or may not be entitled to access to this shop—there is a dispute on this matter—but if they do it is somewhat limited. I will also accept that the second applicant paid a substantial amount for the business situated at shop 3.

I will assume for the purposes of this judgment that the lease to the second respondent will have an adverse effect on the business of the second applicant and, consequently, also on the royalties payable by the second applicant to the first applicant. In other words, I will assume that the *commodus usus* of the first applicant is impaired by the leasing of shop 2 to the second respondent. The only question is then whether the first applicant in so doing acted in breach of its obligations under the lease. That will only be the case if a term to that effect can be read into the lease. In *Wilkens NO v Voges* (*supra* at 136H–J) Nienaber JA said:

> 'A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it—which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The *onus* to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. 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.'

In contending that a tacit or implied term existed restricting the first respondent from competing (to use this wide phrase) the applicant relies on several terms in the lease. First, it is contended that first respondent is obliged to prohibit the conduct of business similar to the business the first applicant is allowed in terms of clause 2.20. The implication suggested is neither necessary nor in accordance with the other terms of the lease. Clause 2.20 defines the first respondent's business and clause 13.1 limits its use of the premises to the defined use. No obligation at all is placed on the first respondent. On the contrary, these clauses serve the interests of the first respondent in regulating the use and occupation of the leased premises. To imply from them any obligation on the first respondent is entirely unwarranted. Secondly, the same considerations apply to the exclusion from the business of the first applicant the selling

of popcorn. The applicant contends that the implication arising from this exclusion is that the first applicant will enjoy exclusivity in respect of the other products set out in clause 2.20. Again, this implication is quite unwarranted: the clause is intended to prevent the first applicant from selling popcorn, and the facts are that the first respondent is doing and has been doing exactly that. The clause serves to protect, so to speak, its popcorn monopoly. To imply that the first applicant is given an exclusive right with regard to the other products is a *non sequitur*. Moreover, from clause 2.7 of the lease it can be inferred that the parties to the lease knew and contemplated that the tenants of the various outlets in the entertainment complex may change from time to time. The 'entertainment complex' is defined in the lease as including

> 'the basement floor of the shopping component of the building which comprises 15 (now 16) cinemas and certain ancillary premises, including, in the first instance, a speciality theater, certain restaurants, a video games arcade and other retail space, but which uses may vary from time to time'

(clause 2.7). That other and competing businesses may be introduced in future seems to me to have been foreseeable by the parties. There is no restriction in the lease itself limiting or curbing the first respondent's right to lease out the shops and outlets in the entertainment complex. Thirdly, the applicants also relied on clause 5.1.2 which includes in the rental payable a percentage of the turnover generated on the leased premises. I fail to see how this clause affects the existence or not of the tacit term contended for.

Whether competition by the first respondent itself is impliedly or tacitly prohibited is equally doubtful. The first respondent and the first applicant are competing already, albeit not in respect of precisely the same products. The first respondent has been and is selling cold drinks, popcorn and other sweets while the first applicant through the second applicant is engaged in the selling of more specialised products. There has also been competition between the second respondent and first applicant in the selling of the same products since September 1997. The applicants also rely on a letter dated 11 August 1994 written on behalf of the first applicant to the first respondent containing proposals to establish a long-term relationship between the parties. These proposals were not accepted and, in any event, do not contain the slightest hint of a restriction in the nature of the one contended for. The parties were not *ad idem*. To infer in these circumstances the tacit term alleged would amount to rewriting the contract between them.

Whether a tacit term should be imputed depends on whether *both* parties at the conclusion of the lease, had they thought of it, would have regulated the matter in the manner suggested. It is not enough that only the first applicant would have replied that 'obviously' the term had to be included: both would have had to. On the facts of the matter it is highly improbable that the first respondent would have agreed to a term limiting its own conduct in the manner suggested. There was no incentive for it to have agreed to the term. Nor am I persuaded that the suggested term is necessary to render the lease functional. To my mind, the sublease between the first respondent and first applicant was perfectly capable of functioning whether or not the parties competed.

The fact that the turnover and hence the rental may, to put it no stronger, have been reduced in the event of competition does not affect the functionality of the contract. A court is slow to import a tacit term in a contract:

'(O)ne reason, no doubt, is that parties who choose to commit themselves to paper can be expected to cover all the aspects of the matter.'

(*Wilkens NO v Voges* (*supra* at 143H–J).)

[11] It follows that the applicants have failed to show a clear right to obtain the relief claimed. Nor have they established a *prima facie* right. I have no discretion to grant an interdict to protect a right that does not exist (*Plettenberg Bay Entertainment (Pty) Ltd v Minister van Wet en Orde en 'n Ander* 1993 (2) SA 396 (C) at 400G–H).

The rule is therefore discharged and the application dismissed. The applicants are ordered jointly and severally to pay the costs, including the costs reserved by Navsa J.

Applicants' Attorneys: *Goldman, Judin & Werner.* Respondents' Attorneys: *Moss-Morris Inc.*

APPENDIX

SCOTT-KING (PTY) LTD v COHEN

WITWATERSRAND LOCAL DIVISION

STEGMANN J and NUGENT J

1995 May 30; June 26

Case No A1230/94

Appeal—In what cases—Against granting or refusing provisional sentence by a magistrate's court—Decision to grant or refuse provisional sentence not falling within category of judgments appealable in terms of s 83(a) *of Magistrates' Courts Act 32 of 1944—Decision to grant provisional sentence not 'rule or order having the effect of final judgment' and accordingly not appealable in terms of s 83*(b)*—Decision to refuse provisional sentence on ground which shows provisional sentence summons to be invalid is 'rule or order having effect of final judgment' and therefore appealable in terms of s 83*(b)*—Decision to refuse provisional sentence on ground which does not show provisional sentence summons to be invalid is not 'rule or order having effect of final judgment' and not appealable in terms of s 83*(b).

A decision in a magistrate's court to grant or refuse provisional sentence cannot correctly be held to fall within the category of judgments for which s 48 of the Magistrates' Courts Act 32 of 1944 makes provision, and is therefore not made appealable by s 83*(a)*. Further, (i) a decision to grant provisional sentence is not a 'rule or order having the effect of final judgment' and is accordingly not appealable in terms of s 83*(b)*; (ii) a decision to refuse provisional sentence on a ground which shows the provisional sentence summons to have been invalid puts an end to the suit, is a 'rule or order having the effect of a final judgment' and is therefore appealable in terms of s 83*(b)*; and (iii) a decision to refuse provisional sentence on a ground which does not show the provisional sentence summons to have been invalid, so that it stands as the summons in the principal case, is not a 'rule or order having the effect of a final judgment' and it is not appealable in terms of s 83*(b)*. This is largely in conformity with the appealability of decisions on provisional sentence in the common law and the appealability of decisions on provisional sentence in the Supreme Court. (At 827H–828G, paraphrased.)

Annotations:

Reported cases

Abromowitz v Jacquet and Another (3) 1950 (3) SA 378 (W): followed
Bell v Bell 1908 TS 887: referred to
Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance) 1915 AD 599: referred to
Campbell Bros, Carter & Co Ltd v Abrahams 1937 WLD 11: referred to
Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A): referred to
Caruth v Enslin 1904 TS 785: referred to
Dickinson and Another v Fisher's Executors 1914 AD 424: referred to
Donoghue and Others v Executor of Van der Merwe (1897) 4 OR 1: referred to
Globe and Phoenix Gold Mining Co Ltd v Rhodesian Corporation Ltd 1932 AD 146: referred to
Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A): followed
Heyman v Yorkshire Insurance Co Ltd 1964 (1) SA 487 (A): referred to
Jones v Krok 1995 (1) SA 677 (A): dictum at 688H–689A applied
Kowarsky & Co v Sable 1923 WLD 156: referred to
Mears v Nederlandsch Zuid Afrikaansche Hypotheek Bank Ltd 1908 TS 1147: referred to
Oliff v Minnie 1952 (4) SA 369 (A): applied
Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A): applied
Searles Ltd v Hammersley and Sons 1923 WLD 227: referred to
Steytler NO v Fitzgerald 1911 AD 295: referred to
Swartzberg v Barclays National Bank Ltd 1975 (3) SA 515 (W): referred to
Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A): applied
Zweni v Minister of Law and Order 1993 (1) SA 523 (A): applied.

Statutes

The Magistrates' Courts Act 32 of 1944, ss 48, 83*(a)*,*(b)*: see Erasmus and Barrow *The Supreme Court Act 59 of 1959 and the Magistrates' Courts Act 32 of 1944* 11th ed (1997) at Part B at 23 and 62.

Appeal from a decision in a magistrate's court. The facts appear from the reasons for judgment.

L Silberg for the appellant.

The fact that the turnover and hence the rental may, to put it no stronger, have been reduced in the event of competition does not affect the functionality of the contract. A court is slow to import a tacit term in a contract:

'(O)ne reason, no doubt, is that parties who choose to commit themselves to paper can be expected to cover all the aspects of the matter.'

(*Wilkens NO v Voges* (*supra* at 143H–J).)

[11] It follows that the applicants have failed to show a clear right to obtain the relief claimed. Nor have they established a *prima facie* right. I have no discretion to grant an interdict to protect a right that does not exist (*Plettenberg Bay Entertainment (Pty) Ltd v Minister van Wet en Orde en 'n Ander* 1993 (2) SA 396 (C) at 400G–H).

The rule is therefore discharged and the application dismissed. The applicants are ordered jointly and severally to pay the costs, including the costs reserved by Navsa J.

Applicants' Attorneys: *Goldman, Judin & Werner.* Respondents' Attorneys: *Moss-Morris Inc.*

APPENDIX

SCOTT-KING (PTY) LTD v COHEN

WITWATERSRAND LOCAL DIVISION

STEGMANN J and NUGENT J

1995 May 30; June 26 Case No A1230/94

Appeal—In what cases—Against granting or refusing provisional sentence by a magistrate's court—Decision to grant or refuse provisional sentence not falling within category of judgments appealable in terms of s 83(a) *of Magistrates' Courts Act 32 of 1944—Decision to grant provisional sentence not 'rule or order having the effect of final judgment' and accordingly not appealable in terms of s 83*(b)*—Decision to refuse provisional sentence on ground which shows provisional sentence summons to be invalid is 'rule or order having effect of final judgment' and therefore appealable in terms of s 83*(b)*—Decision to refuse provisional sentence on ground which does not show provisional sentence summons to be invalid is not 'rule or order having effect of final judgment' and not appealable in terms of s 83*(b).

A decision in a magistrate's court to grant or refuse provisional sentence cannot correctly be held to fall within the category of judgments for which s 48 of the Magistrates' Courts Act 32 of 1944 makes provision, and is therefore not made appealable by s 83*(a)*. Further, (i) a decision to grant provisional sentence is not a 'rule or order having the effect of final judgment' and is accordingly not appealable in terms of s 83*(b)*; (ii) a decision to refuse provisional sentence on a ground which shows the provisional sentence summons to have been invalid puts an end to the suit, is a 'rule or order having the effect of a final judgment' and is therefore appealable in terms of s 83*(b)*; and (iii) a decision to refuse provisional sentence on a ground which does not show the provisional sentence summons to have been invalid, so that it stands as the summons in the principal case, is not a 'rule or order having the effect of a final judgment' and it is not appealable in terms of s 83*(b)*. This is largely in conformity with the appealability of decisions on provisional sentence in the common law and the appealability of decisions on provisional sentence in the Supreme Court. (At 827H–828G, paraphrased.)

Annotations:

Reported cases

Abromowitz v Jacquet and Another (3) 1950 (3) SA 378 (W): followed
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Appeal from a decision in a magistrate's court. The facts appear from the reasons for judgment.

L Silberg for the appellant.