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CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE >

Why contracting parties need to understand when contract terms are implied

The recent case of *Starways Trading 21 CC and Others v Pearl Island Trading 714 (Pty) Ltd and Another (232/2018)* [2018] ZASCA 177 has once again highlighted the importance of being aware that in addition to the express terms of a contract as agreed (whether orally or in writing) between the parties, other terms may be incorporated into the contract by implication, even to the extent of varying the express terms.

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CLIFFE DEKKER HOFMEYR

Why contracting parties need to understand when contract terms are implied

In the absence of a contrary agreement, even where the contract was silent, the law implied a term that the purchaser may deduct from the purchase price a reduction in import duties included in the contract price.

The recent case of *Starways Trading 21 CC and Others v Pearl Island Trading 714 (Pty) Ltd and Another (232/2018)* [2018] ZASCA 177 has once again highlighted the importance of being aware that in addition to the express terms of a contract as agreed (whether orally or in writing) between the parties, other terms may be incorporated into the contract by implication, even to the extent of varying the express terms.

In 2016 *Starways Trading 21 CC (Starways) and Pearl Island Trading 714 (Pty) Limited (Pearl)*, entered into an agreement (Agreement) whereby Starways sold sugar to Pearl. As an importer, Starways was obligated to pay an import duty on the sugar in terms of the Customs and Excise Act, No 91 of 1964 (Act). Between August and September 2016, the import duty on sugar was reduced significantly from the amount of R2 395 per metric tonne to R318,90 per metric tonne.

In terms of s59(2) of the Act, when the import duty is decreased on goods delivered to the purchaser in terms of an agreement concluded before the decrease becomes effective, the purchaser may, **in the absence of any agreement to the contrary**, deduct from the purchase price a sum equal to the benefit of the decrease to the seller. On the grounds of s59(2) of the Act, Pearl alleged that it was entitled to pay a reduced purchase price to account for this decrease in import duty.

Starways disagreed (for reasons which we shall not explore in detail in this article) and instituted action in the Western Cape Division of the High Court, Cape Town, which application was dismissed, whereafter Starways appealed to the SCA.

The SCA held that the Agreement did not expressly exclude the application of s59 of the Act and that s59 imposed terms implied by law in relation to the purchase price agreed upon in the Agreement. Accordingly, the purchase price was reduced by some R51 million.

The case demonstrates the importance of identifying which terms may be implied by law and thus incorporated into your agreement. As expressed in *Alfred McAlpine & Son v Transvaal Provincial Administration*, implied terms are "used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties." This does not however mean that the intention of the parties is ignored.

It is worth noting that in certain cases, non-compliance with an implied term (ie a term implied by law) may have no actual consequences for an agreement, such as in *Pottie v Kotze* 1954, in which it was held that non-compliance with an ordinance, which required the seller to obtain a certificate of fitness, did not affect the validity of the contract.

A term implied by law must be distinguished from a tacit term, which is sometimes described as a term implied by the facts. Put another way, if an officious bystander were to ask: why did you not expressly state that term, and a court determines that the contracting parties' answer would have been "of course, it is obvious so we did not bother stating it", that would be a tacit term. Our courts have held that where contracting parties did reach express agreement on unambiguous terms, it is not appropriate to use the

Why contracting parties need to understand when contract terms are implied...*continued*

Contracting parties are advised to acquaint themselves with the specific nature of their contract and ensure that those terms which may be implied by law and which would materially alter the intention of the parties are excluded, where exclusion is possible.

surrounding circumstances to try and subvert the meaning they gave in their agreement and import a contradictory tacit term.

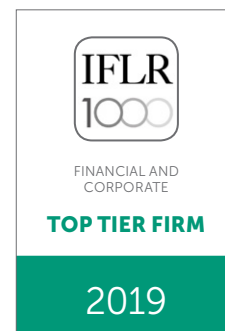
Contracting parties are advised to acquaint themselves with the specific nature of their contract and ensure that those terms which may be implied by law and which would materially alter the intention of the parties are excluded, where exclusion is possible.

Every contract must include the essential terms (if any) for a contract of that type as the absence of essential terms may render a contract void. For example, a valid sale contract must have a seller and

a purchaser, a thing which is sold, and a price which is determined (eg R1 million) or determinable (eg by applying a formula at a date after signature of the sale). Absent those essential terms there is no sale.

Once you have included those essential terms (and any other express terms of the contract which you think are important) consider whether any other terms are implied by law (ie. implied terms) or implied by the facts (ie tacit terms). If they are not already covered by the express contract wording, consider adding them for clarity.

David Thompson, Malerato Motloung and Mieke Vlok



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