# DISPUTE RESOLUTION
## ALERT

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**KIETI LAW LLP, KENYA**

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### The devil is in the detail: tacit terms and provisos

Analysing several of the recent Supreme Court of Appeal (SCA) judgments on contract law, it seems some of the "*flavour of the year*" topics that have emerged are the reading in of tacit terms into written contracts, the attempt to resort to prior negotiations in interpreting written contracts, and the vital distinction between conditions and terms in a contract. These issues were (again) raised before the SCA in the case of *City of Tshwane Metropolitan Municipality v Brooklyn Edge* (Pty) *Ltd* and *another* [2022] ZASCA 23.

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# The devil is in the detail: tacit terms and provisos

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In particular, the Brooklyn Edge case highlights how important it is to exercise caution and foresight when incorporating the highly used "*provided that*" phrase as this phrase could imply either a condition or a term, with drastically different outcomes depending on which interpretation a court or arbitrator adopts.

## FACT OF THE CASE

The City of Tshwane Metropolitan Municipality (the City) and Brooklyn Edge (Pty) Ltd (Brooklyn Edge) concluded a deed of sale in terms of which the City sold to Brooklyn Edge immovable properties. The immovable properties had to be rezoned, which only the City could affect. Accordingly, the parties included a clause in the sale agreement which obliged the City to attend to the rezoning, and they also included a clause which read: "*Provided further that, should the closure and rezoning not be finalized successfully, this transaction shall be deemed to have been mutually cancelled by the parties*".

A term of the deed of sale provided that, any of the properties may be transferred into the name of a nominee of Brooklyn Edge. Pivot Property Development (Pty) Ltd (Pivot) instituted proceedings against the City claiming that Brooklyn Edge nominated it to receive the transfer and that the City failed to take any steps to execute the transfer. Pivot wished to enforce the deed of sale, and *inter alia* compel the City to carry through with everything that was required for the rezoning (and then subsequently effect transfer of the property).

The City raised four defences against Pivot's claim. For purposes of this article we will only focus on the defence that the deed of sale contained a tacit suspensive condition that the agreement would lapse if the properties were not rezoned within a reasonable period of time.

## NOT A TRUE PROVISO

Draftsmen, when incorporating a provision or clause, must ensure that it is clear whether one is dealing with a term or a condition.

A suspensive condition (or condition precedent) is a future uncertain event that holds the contract in abeyance. If the condition does not materialise, the contract lapses, and the parties go their separate ways. A term however is different in that it does not hold a contract in abeyance, and instead speaks to the obligations/performances to be rendered by the parties. A failure to comply with a term of the contract would generally imply that a party is in breach, and the normal remedies for breach of contract would follow, the primary remedy being specific performance. Part of the City's argument was that the wording in question – "*Provided further that, should the closure and rezoning not be finalised successfully, this transaction shall be deemed to have been mutually cancelled by the parties*" – implied a suspensive condition, which had to be fulfilled within a reasonable time (as is the usual position in common law where a contract does not state the exact date for fulfilment of a condition precedent). The court dismissed

# The devil is in the detail: tacit terms and provisos

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this argument and held that the meaning of the phrase "*provided that*" is context-specific and does not necessarily or universally imply a suspensive condition. In this case, the court held, one was concerned with a term and not a condition. Accordingly, the contract did not lapse.

## TACIT CONDITION

The City then attempted to read in a tacit suspensive condition regarding rezoning within a reasonable time. This was always going to be an uphill battle. A tacit term or tacit condition is an unexpressed provision of the contract. It is derived from the common intention of the parties which is inferred from the express terms and conditions, the context of the contract and the subsequent conduct of the parties. The inference must be that the parties necessarily must have or would have agreed to the suggested term or condition.

The test for the determination of a tacit term or condition is the "*officious bystander test*". The test poses the question: would the parties have agreed to the term if they were asked about its existence during the pre-contractual period. A relevant factor in this regard is whether the contract is efficacious and complete or whether, on the other hand, the proposed tacit term/condition is essential to lend business efficacy to the contract i.e. would the contract be frustrated if the term and condition was not incorporated.

Turning to the City's defence that the deed of sale would lapse if the properties were not rezoned within a reasonable time, it relied on direct evidence preceding the negotiations between the parties. In considering the City's evidence, the SCA first ascertained the intention of the parties by referring to a clause in the deed of sale that stated the deed of sale will constitute the agreement between the parties and that no addition, amendments or suspension of any of the provisions of the deed of sale will be valid and binding on the parties unless it was reduced to writing and signed by both parties. The Court stated that the deed of sale intended to be the sole memorial of the agreement between the parties. Further, the SCA stated that the negotiations, when looked at in the contextual setting of the deed of sale, were not relevant to the tacit condition that the City was relying on.

The court found that the direct evidence was therefore inadmissible, as is the general rule in this regard. In coming to this conclusion, the SCA stated that, applying the "officious bystander test" there was no compelling case for the reading in of the tacit condition as argued by the City. The test is not whether it is merely reasonable, or makes commercial sense, to read the term in, but whether it is necessary for the business efficacy of the contract.

In conclusion, contracting parties must be careful when adopting "*provisos*" in their agreements, and they must comprehensively spell out their terms and conditions. A court will be slow to come to their rescue and read in tacit terms or conditions.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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