

## WHAT'S IN A NAME AND IMPOSSIBILITY OF PERFORMANCE

### Wilma Petru Kooij v Middleground Trading 251 CC and Another (1249/18) [2020] ZASCA 45 (23 April 2020)

*Our law has always held that the title to an agreement cannot mask its real nature. This determination is a turning point, as this case illustrates: were parties to enter into a lease of part of a farm where peat can be harvested, the subsequent event that made continued harvesting impossible would not affect the continuance of the lease. On the other hand, if the agreement in truth was a prospecting agreement, the supervening impossibility relating to the peat harvesting would allow the 'tenant' to exercise its rights as relates to vis maior ("Act of God").*

The Judgment can be viewed [here](#).

## FACTS

In 2005 the Daleen Kruger Trust (the Trust) entered into an agreement with Middleground Trading 251 CC (Middleground). The heading read 'Rent and rental Agreement' and it recorded that the Trust, as owner of a farm, would allow Middleground to prospect, mine or harvest peat from a specified part of the farm in consideration for a minimum amount of R15,000.00 per month ('minimum amount payable').

The salient provisions of the agreement provided that:

- the Trust leased the relevant portion of the property to Middleground for purposes of giving it the exclusive right to prospect, extract or mine for peat and / or to harvest peat on the property;
- Middleground would be entitled to cancel the agreement if:
  - i. it was prohibited from harvesting peat in terms of new legislation; or
  - ii. the peatland was to become depleted and peat can no longer be harvested on it. In the event of a dispute as to whether the peat resources are depleted, the dispute would be referred to arbitration. Middleground would continue paying its monthly rentals until the arbitrator makes a decision or until the dispute is settled.
- Any form of *vis maior* will be a valid reason for Middleground not to perform its operations in terms of this agreement, if it results in a permanent impossibility.
- Middleground would pay the minimum rental for the lease of the property. In addition, an amount of R25 per cubic meter will become payable for any additional volume of peat that is extracted in excess of 600m<sup>3</sup> per month. The amount of R15,000 shall escalate at the rate of 10 per cent per annum. The payment of the minimum rental for the lease of the property and the granting of the rights in terms of the agreement is a prepayment of the amount of R25/m<sup>3</sup> for the peat extracted by Middleground monthly. The minimum rental will be taken into account against the amount that is due to the Trust for the peat that is extracted in terms of the agreement and for which Middleground would compensate the Trust. The calculation would be done monthly and the reconciliation thereof will be done monthly as well.

For some time prior to the conclusion of this agreement, peat had been extracted from the Trust's property by Stander Veen CC (Stander Veen) under a licence issued by the Department of Environmental Affairs (the Department). At the time of the conclusion of the agreement between the Trust and Middleground, Stander Veen was still the authorised

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licence holder; Middleground and Stander Veen had a separate arrangement in terms of which Middleground would harvest the peat under Stander Veen's licence.

Following the conclusion of the contract, Middleground took possession of the Trust's property. For the first ten months of the contract, no peat was extracted as Middleground was still setting up its business operations. Despite this, it paid the agreed minimum amount per month and submitted monthly reconciliation statements that reflected the amounts paid to the Trust as credits.

In August 2011 the Department issued a notice (pre-notice) indicating its intention to issue a Compliance Notice/Directive, under either the **National Environmental Management Act** and/or the **Environment Conservation Act**, because of what it contended was 'environmental degradation and serious harm caused by the unlawful activities conducted' on the property. The pre-notice was addressed to the Trust, Middleground and Stander Veen. In August 2011, the three entities jointly submitted representations to the Department in an effort to fend off the allegations made therein. Notwithstanding, on 17 November 2011, the Department proceeded to issue a Compliance Notice against the Trust, Middleground and Stander Veen which directed that the extraction of peat be stopped forthwith.

Middleground, the Trust and Stander Veen jointly used various available avenues to dispute the Compliance Notice, but to no effect. In the intervening period, Middleground had, in accordance with the Compliance Notice, stopped harvesting peat and had removed its equipment from the Trust's property. The last recorded payment made by Middleground to the Trust was for the month of February 2012. Considering Middleground to be in default of its payment obligations, the Trust sent a letter in May 2012, demanding payment of, what it termed, 'arrear rental'. Further correspondence was exchanged between the parties but the issue could not be resolved amicably. The Trust then sent a letter purporting to cancel the agreement and demanded payment of an amount of R1,051, 796.99 in respect of 'rental due and payable' for the period 1 March 2012 to 30 September 2014.

In the Magistrate's Court, the Trust's claim for arrear rental failed. Middleground argued that the agreement really was a prospecting agreement. Following from that, its primary defence was that, on a proper interpretation of the agreement, the amounts payable in terms of the agreement were only payable for so long as Middleground was able to legitimately exercise its right to prospect for, and to mine and/or harvest peat. Its defence also sought to invoke a tacit term to the effect that the amounts payable by Middleground were payable only for so long as Middleground was able to legitimately exercise its rights to prospect for and to mine and/or harvest peat. Middleground further pleaded that the issuance of the Compliance Notice resulted in it no longer being able to continue with peat extraction operations on the property, as a result of which performance in terms of the agreement became impossible; that this constituted *vis major* of a permanent nature as contemplated in their agreement, which entitled it to terminate the agreement.

The Magistrates' Court dismissed the action on the basis that there was a supervening impossibility that prevented Middleground from exercising its rights in terms of the agreement. The Trust subsequently appealed against that judgment to the High Court, but the dismissal of the Trust's claim was upheld. It specifically upheld Middleground's reliance on a tacit term excusing it from the obligation to pay the minimum monthly payment for the period when peat could not be extracted between February 2012 and September 2014. It held that given that finding, it was not necessary to decide the question whether the Compliance Notice constituted a permanent impediment excusing Middleground from the obligation to pay the minimum monthly amount on the basis of the defence of supervening impossibility of performance. The High Court held that what the Department sought to prohibit by virtue of the Compliance Notice was peat extraction *per se*. It found that it could therefore not be said that the issuance of the Compliance Notice and Middleground's consequent inability to legitimately carry out its peat extraction activities were as a result of its failure to comply with the required authorisations or legislation.

The Trust then appealed to the Supreme Court of Appeal. The issues for determination were:

- i. whether the written agreement was one with significant features of a lease of immovable property, or whether

it was merely an agreement granting Middleground the right to extract peat from the Trust's property, with the prepayments being consideration paid in advance for the right to prospect for, mine and harvest peat.

- ii. Should a tacit term be imported into the agreement, the effect thereof being that the amounts payable by Middleground would be payable to the Trust only for so long as Middleground was able to legitimately carry out its rights to prospect for, and to mine and/or harvest peat?
- iii. Did the issue of the Compliance Notice constitute *vis major* of a permanent nature as contemplated in the parties' agreement?

## HELD

### ***Nature of Agreement***

- The law holds that once parties conclude a written agreement, it becomes the only memorial of their legal act. All other utterances of the parties on that topic are legally immaterial for the purpose of determining the terms of their agreement. Although the objective meaning of a provision is determined both with reference to its language and in the light of its factual context, the 'inevitable point of departure' is the language of the agreement.
- The label attached to an agreement is not, of itself, determinative of its character. It is the nature of the performance agreed upon by the parties that determines its true nature.
- In the present case, it was clear that the agreement had a lease element because Middleground had to have access to the property in order to extract the peat. However, that was not conclusive and all the provisions of the agreement must be considered and must be given a commercially sensible meaning. Where more than one meaning is possible, a sensible meaning should be preferred to one that leads to 'insensible or unbusinesslike results, or one that undermines the apparent purpose.'
- After careful consideration of the provisions of the agreement and the mechanism for payment, the Court held that it was evident that various provisions thereof tended to show that the lease element was of less significance and that the dominant right conferred in the parties' agreement was not a lease and the minimum monthly payment was not rental but constituted a prepayment in respect of peat, which would be taken into account and reflected in the reconciliation statements on a monthly basis.
- A claim based on arrear rental therefore had to fail.

### ***Tacit term***

- A tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. 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. Before a court can infer a tacit term, it must be satisfied, on a reasonable and businesslike consideration of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.
- The tacit term proposed by Middleground is that the minimum monthly payments were payable only for so long as Middleground was able legitimately to carry out the peat extraction activities. This proposed tacit term is fully compatible with the express terms of the agreement and the surrounding circumstances. It is a term that will render the parties' agreement fully functional. It is plain that it could never have been envisaged that

Middleground would be expected to pay for the peat that it did not extract. Middleground thus established a basis for the importation of the tacit term it proposed.

### *Vis maior*

- The Trust asserted that Middleground's inability to legitimately carry out its peat extraction activities was brought about by the latter's failure to comply with the then existing permit and/or authorisations and/or legislation in the course of its business activities.
- It was common cause however that the cessation of the extraction of peat was on account of a Compliance Notice issued not only against Middleground but also against the Trust and Stander Veen. One of the reasons proffered by the Department for the issuance of the Compliance Notice was that Middleground was not entitled to extract peat under the authorisation granted by it to Stander Veen. It was also of the view that the problem with the extraction of peat was 'peat extraction as a whole.'
- Where performance of an obligation by a party to an agreement becomes impossible after conclusion thereof, that party is discharged from liability if it was prevented from performing its obligation by *vis maior*, but not if the impossibility was due to its own fault. In this matter, the parties expressly stipulated that Middleground would be discharged from its obligations if the *vis maior* was of a permanent nature.
- It was clear from the Compliance Notice that the Department seemed implacably opposed to peat mining at the peatland situated on the Trust's property. The Compliance Notice was a directive that was issued in terms of various statutory provisions, it constituted administrative action and would therefore remain in force until set aside. These were objective facts that showed that the performance of Middleground's obligations was impossible.
- As a result, Middleground discharged the onus of showing that the supervening impossibility was of a permanent nature and that it was in no way attributable to its fault.

## CONCLUSION

The appeal was dismissed.