REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 923/10

In the matter between:

CHRISTIAAN VAN AARDT Appellant

and

JOHN RICHARD GALWAY Respondent

Neutral citation: *Van Aardt v Galway* (923/10) [2011] ZASCA 201 (24 November 2011)

Coram: PONNAN, SHONGWE and WALLIS JJA.

Heard: 3 November 2011

Delivered: 24 November 2011

Summary: Sale of land – compliance with Alienation of Land Act 68 of 1981

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Jones J sitting as court of first instance) it is ordered that:

The appeal is upheld with costs, save that the costs of the preparation, perusal and copying of the record shall be limited to two-thirds of the costs incurred in those tasks. The order of the trial court is set aside and replaced by the following:

'1 Paragraph 1 of the Agreement of Lease between the parties concluded on 31 August 2000 and paragraph 1 of the Deed of Sale, annexure 'C' to the particulars of claim, are rectified by the deletion of the words 'the District of Grahamstown more fully described as Portion 9 (a portion of portion 5) of the farm Sevenfountain no 447' in the former and the deletion of the words 'Portion 9 (a portion of portion 5) of the farm Seven Fountains No 447' in the latter.

2 Against the tenders set out in paragraph 13 of the particulars of claim it is ordered that:

(a) the defendant is forthwith to take all steps necessary to transfer to the plaintiff the immovable property described as the farm Midhurst in the area of the Makana Municipality, District of Albany as more fully described in Deed of Transfer T21417/96 registered in the Deeds Registry Cape Town;

(b) in the event of the defendant failing to take such steps within a period of one month from 30 November 2011, the Sheriff is directed to take all such steps and sign all such documents in the name and on behalf of the defendant to give effect to paragraph 2(a) of this order.

3 The defendant is ordered to pay the plaintiff's costs.'

JUDGMENT

WALLIS JA (PONNAN and SHONGWE JJA concurring)

[1] This is a dispute between two dairy farmers over the sale of a farm. The respondent, Mr Galway, owns the farm Midhurst situated in the Makana Municipality near Grahamstown. The appellant, Mr van Aardt, owns one of the neighbouring farms. On 31 August 2001 Mr Galway leased Midhurst to Mr van Aardt for a period of five years for the purpose of dairy farming. He also leased his herd of Jersey cows to Mr van Aardt. The lease agreement contained an option to purchase 'the farm property'. On 3 March 2005 Mr van Aardt purported to exercise this option. Mr Galway disputed his right to do so. That led Mr van Aardt to commence these proceedings to compel Mr Galway to transfer the farm Midhurst to him. Mr van Aardt's claim was dismissed by Jones J and with his leave he appeals to this court.

[2] The relevant clauses of the lease are clauses 1 and 14, which read as follows:

'1 LETTING AND HIRING

The Lessor lets and the Lessee hires the farm property Midhurst in the district of Grahamstown being more fully described as Portion 9 (a portion of portion 5) of the farm Sevenfountain no 447 together with the dairy and its equipment but exclusive of the house presently occupied by the Lessor and his family.

2 – 13 …

14 OPTION TO PURCHASE

The Lessor extends to the Lessee an option to purchase the farm property for the sum of R700 000,00 in which regard the Lessee shall exercise the option not later than three months before the termination of the Lease and not before a date six months before the termination of the Lease by delivering to the Lessor a signed agreement of sale in the terms aforesaid.'

[3] On 3 March 2005 Mr van Aardt's attorneys addressed a letter to Mr Galway in the following terms:

'We enclose herewith a draft Deed of Sale which has been signed by our client, the Lessee of the property described in the enclosure hereto.

Our client exercises the option to purchase the immovable property in question at a purchase price of R700 000,00 as stipulated in the Agreement of Lease.

To the extent that it is necessary for our client to exercise the option in writing, he does so by appending his signature to the foot hereof which is to be read in conjunction with the Deed of Sale enclosed herewith.

Obviously should you require any reasonable amendments to the Deed of Sale, our client will give due consideration thereto.'

At the foot of this letter appeared the following inscription:

'I, Christiaan van Aardt do hereby exercise the option granted to me in terms of the Deed of Lease concluded between myself (as Lessee) and John Richard Galway (as Lessor). The exercise of this option to be read in conjunction with the annexed Deed of Sale.'

Mr van Aardt appended his signature below this.

[4] Attached to the letter was a deed of sale. For present purposes I need only quote the first three paragraphs thereof. They read as follows:

'1.

The Seller hereby sells to the Purchaser who hereby purchases:

1.1 the farm Midhurst in the area of Makana Municipality, District of Albany more fully described as Portion 9 (a portion of portion 5) of the farm Seven Fountains No 447;

2.

PURCHASE PRICE

2.1 The purchase price of the immovable property hereby sold shall be the sum of R700 000,00 (Seven Hundred Thousand Rand);

2.2 The purchase price shall be payable in cash against registration of transfer of the said immovable property into the name of the Purchaser.

2.3 The Purchaser shall when called upon so to do by the Seller's Conveyancer furnish to such Conveyancer an acceptable guarantee for the due payment of the said purchase price against registration of transfer.

3.

VALUE ADDED TAX

The parties record that the said purchase price is inclusive of Value Added Tax.'

[5] The remaining six clauses of the deed of sale were relatively straightforward. Clause 4 was a voetstoots clause. Clause 5 provided that Mr van Aardt would be liable to pay all the costs of registration of transfer plus a pro rata share of rates, taxes and other levies in respect of the rateable year in which transfer was registered into his name. It also provided for him to bear the costs of preparing the deed of sale. Clause 6, dealing with occupation and possession, provided that this would be given against registration of transfer. Clause 7 provided for Mr Galway to appoint a conveyancer and required Mr van Aardt to pay to the conveyancer all amounts due in respect of rates, taxes and assessments, transfer duty, the costs of registration of transfer and other costs and charges on demand. Clause 8 was a breach clause and clause 10 (there is no clause 9) a clause in which the parties select *domicilia citandi et executandi*.

[6] In his plea Mr Galway contended on two grounds that clause 14 did not grant an enforceable option to purchase to Mr van Aardt. He said

first that the property that was the subject of the potential sale was insufficiently described in clause 14 so that the clause was void for vagueness. Second he said that the requirement that the option should be exercised by the delivery of a signed agreement of sale showed that the parties contemplated that the exercise of the option would be accompanied by further negotiations between them on the terms of that agreement and accordingly that the act of acceptance would not on its own give rise to a binding contract. For those same reasons he said that the option did not comply with s 2(1) of the Alienation of Land Act 68 of 1981 (the Act), which requires the provisions of a deed of alienation of immovable property to be in writing and signed by or on behalf of the parties thereto.

[7] If those contentions were not accepted Mr Galway turned his fire on the exercise of the option. Here he advanced three contentions. First he said that the option referred only to the farm property whereas the exercise of the option purported to include the dairy and its equipment, which he said were movable and not included in the option. Second he said that the terms embodied in the deed of sale were not those embodied in the option and in particular that the price was incorrect because of the reference to it being inclusive of VAT. By way of a late amendment to his plea[1] he alleged that it was implicit in the lease alternatively it was tacitly agreed that the purchase price would be exclusive of VAT. Third he said that the letter invited amendments to the deed of sale and hence it was not a final acceptance of the option contained in clause 14 of the lease. Although not pleaded as such reliance was again placed on non-compliance with the requirements of the Act.

[1] The application for amendment was brought during the argument of the case at the close of the evidence. The result and reasons for granting it in part are set out in the judgment.

[8] One other point needs to be mentioned before turning to address these contentions. It is that where the lease recorded that the farm property Midhurst was 'more fully described as Portion 9 (a Portion of Portion 5) of the farm Sevenfountain no. 447' this was an error. In turn that error was carried over into the deed of sale. The correct description of the farm property according to the title deed shows that it consists of four pieces of land described as follows:

'Portion 9 (Bayville) (Portion of Portion 5) of the farm Sevenfontein No. 447 8.502 hectares in extent ;

Remainder of Portion 5 (Midhurst) of the farm Sevenfontein No. 447 248.4576 hectares in extent;

Remainder of Portion 8 (Greylands) (Portion of Portion 5) of the farm Sevenfontein No. 447 169.2050 hectares in extent; and

Portion 20 (Portion of Portion 14) of the farm Sevenfontein No. 447 3.8354 hectares in extent;

all in the Division of Albany, Eastern Cape Province.'

This error in description prompted Mr van Aardt to seek the rectification of clause 1 of both the lease and the deed of sale and thereafter an order compelling Mr Galway to transfer the farm to him, against a tender to pay the purchase price and comply with his other obligations under the deed of sale. His entitlement to rectification, if he showed that a binding agreement had been concluded, was conceded before us. It is therefore unnecessary to deal with an argument based on the inability to rectify an acceptance of an offer prior to the conclusion of an agreement.[2] If there was a binding contract Mr van Aardt is entitled to an order for rectification of the documents embodying that contract.

[2] The argument was based on *Boerne v Harris* 1949 (1) SA 793 (A).

[9] Evidence was led at the trial from Mr van Aardt, Mr de la Harpe (the draftsman of the agreement and at the time a practising attorney), Mr Galway and Mr Parker. Almost all of this evidence was plainly inadmissible. It concerned the intention of the parties in regard to various issues and in particular whether the purchase price was inclusive or exclusive of VAT and whether the property subject to the sale was inclusive or exclusive of the dairy and the equipment in the dairy. That evidence was inadmissible because it was evidence of the intention of the parties and their prior negotiations and it is clear on the authorities that such evidence is inadmissible.[3] If there had been a prayer for rectification directed at these issues then it might have been relevant and admissible to explore the parties' intentions and discussions at the time of concluding the lease. However, there was no such prayer and it was not, contrary to counsel's submissions, relevant and therefore admissible as 'context' in relation to either the interpretation of the documents or the importation of implied or tacit terms into the lease.

[10] Furthermore the evidence was utterly unhelpful in resolving the issues in the case. It showed that the VAT issue was not raised by anybody when the lease was drafted. As regards the dairy Mr van Aardt said that he thought that the dairy and its equipment were included as fixtures. Mr Galway said that the attorney told him that it was unnecessary to mention them, because they were movables and therefore not included in the sale. There was no discussion of these matters at the time the lease was concluded. That serves only to turn the focus of attention back to the contractual documents. I stress again the point made

[3] *Van Wyk v Rottcher's Saw Mills (Pty) Limited* 1948 (1) SA 983 (A) at 991; *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454G - H; *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) 399 (SCA) para 39.

by Harms DP in *Securefin*[4] that it is undesirable to permit a trial to be conducted on the footing of letting in whatever evidence the parties tender and then trying at the stage of argument and judgment to sort the wheat from the chaff. That is not conducive to clarity in decision-making, the speedy adjudication of cases or the vitally important task of limiting legal costs. Had the inadmissible evidence been excluded the trial and the record on appeal would have been considerably shorter and less costly. I will revert to this when I deal with the costs.

[11] The enquiry must commence with the option. It was an option to purchase 'the farm property' for the sum of R700 000. There was no definition of 'the farm property' but in clause 1 it was said that Mr van Aardt was hiring 'the farm property Midhurst in the district of Grahamstown'. It was common cause that this referred to an identifiable farm. Had it been necessary, evidence of identification of the farm could have been led for the reason explained by Watermeyer CJ in *Van Wyk v Rottcher's Saw Mills (Pty) Limited*,[5] namely that it serves to identify the thing that corresponds to the idea expressed in the words of the written contract. Such evidence was unnecessary because the parties were agreed that the farm Midhurst was the farm owned by Mr Galway, the detailed description of which was set out in the deed of transfer under which he held his title to the farm.

[12] Clause 1 of the lease served to describe 'the farm property' and gave meaning to that expression where used elsewhere in the lease, in particular in the clause embodying the option. The trial court thought that there was some confusion because the property subject to the lease

[4] Paras 38 – 41.
[5] Supra at 990-991.

included ‘the dairy and its equipment’ and excluded a fenced off area surrounding the ‘house presently occupied by the Lessor and his family’. However that did not affect the reference to the ‘farm property’ in clause 1 of the lease or render it ambiguous. It was clearly stated to be the farm Midhurst and nothing else. The exclusion of the house in which Mr Galway and his family were residing made it clear that the ‘farm property’ encompassed the entire farm including the house and its surrounds, from which, for the purposes of the lease, the portion surrounding and including the house was excised.

[13] As far as the reference to the dairy is concerned, clause 11 imposed an obligation on Mr Galway to remove from ‘the farm property’ his excess livestock and equipment within one month of the commencement of the lease. However Mr van Aardt was leasing the farm as a dairy farm and simultaneously leasing a herd of Jersey cows for that purpose. In those circumstances it would have been highly inconvenient and destructive of the very basis upon which the lease was concluded had Mr Galway been both entitled and obliged to remove the equipment in the dairy. Hence the agreement made it clear that the dairy and its equipment were leased together with the farm property.

[14] The property was therefore adequately described without any confusion. Accordingly the option was not void for vagueness. Provided it was exercised in its terms, the ensuing contract would comply with s 2(1) of the Act with regard to the description of the property sold.[6] The first attack on the validity of the option must therefore fail.

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[6] *Clements v Simpson* 1971 (3) SA 1 (A) at 7F-G; *JR 209 Investments (Pty) Ltd & another v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA) para 19.

[15] It is convenient to deal with the arguments about the acceptance of the offer together. They were first that the option contemplated that a process of agreement on the terms of a sale agreement would have to take place before any final contract came into existence and therefore that it was nothing more than an unenforceable agreement to agree in the future. Second that the agreement of sale proffered by Mr van Aardt contained material provisions dealing with matters not covered by the option and accordingly the purported exercise of the option did not bring about a binding contract because it was not 'in terms of the offer, and the parties were accordingly not *ad idem'*.[7] Third, and this is perhaps merely a different way of expressing the second point, in view of those differences it amounted to a counter-offer that Mr Galway was not obliged to accept.[8] If any of those grounds were correct then there was no agreement complying with the Act. The trial court upheld these contentions.

[16] The parties stipulated in clause 14 that the mode of exercising the option was by the delivery of a signed agreement of sale by Mr van Aardt in the terms prescribed by the option. Did this contemplate that an exercise of the option would serve to commence a fresh process of negotiation around the terms of a sale agreement? If it did that would render it an agreement to agree in the future, which on well-established authority is not binding.[9] In my view it did not. It would have been extremely unbusinesslike for the parties to agree upon an option and then specify a mode of exercising it that was incapable of bringing about a binding agreement. That was not what they had in mind. It is accordingly

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[7] Per Innes J in *Joubert v Enslin* 1910 AD 6 at 29.

[8] *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 (2) SA 400 (SCA) paras 11 and 24.

[9] *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 35. It is unnecessary to reach the question whether the common law in this regard needs to be developed, a question left open by the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30.

not surprising to find authority against that proposition. Most recently the same argument on a clause that similarly provided for the exercise of an option to be by way of the delivery of a written agreement prepared by a firm of attorneys and signed by the parties was rejected by this court in *Du Plessis NO and another v Goldco Motor & Cycle Supplies (Pty) Ltd*.[10]

[17] The reason the argument is unsound was correctly expressed by Page J in *Dold v Bester*[11] in relation to an agreement written out on a page torn from a notebook and providing that:

'Formal documents to be drawn by Mrs J Millington of Bonnin Estates with no commission.'

The learned judge dealt with an argument that the parties could not be compelled to enter into an agreement in the future in the following way:

'In my view the premise upon which this argument is based is faulty. The agreement embodied in the handwritten document is not to enter into a new contract of sale, but to execute a formal document intended to replace the handwritten document as the memorial of the transaction. Such formal document would embody no more than the terms, expressed or implied, already agreed upon by the parties in the handwritten document.'

That precisely expresses what was intended by the option in the present case. A deed of sale would be prepared that would reflect the terms of the sale, express or implied, as set out in the option itself.[12] There were obvious reasons of convenience for adopting this course, not least that it would render the task of the conveyancer attending to the transfer of the property simpler, because they would only have to present one document to the relevant authorities for the purpose of paying transfer duty, obtaining a rates clearance certificate and registering the transfer.

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[10] 2009 (6) SA 617 (SCA) paras 14 to 17.
[11] 1984 (1) SA 365 (D) at 370H.
[12] It was tentatively argued that in order to constitute a proper acceptance the deed of sale had to be signed by both parties, but that is patently incorrect, as it would place the exercise of the option entirely within the power of the seller, which can never have been intended.

[18] The next argument was that the deed of sale contained provisions that were inconsistent with the terms of the option. Here reliance was placed on two aspects of the deed namely the provision concerning VAT and a later clause providing that possession and occupation of the farm property would pass to the purchaser on registration of transfer.[13] The latter can be disposed of simply. The option had to be exercised six months prior to the expiry of the lease when Mr van Aardt would already be in possession of the farm property. The parties must have contemplated that in the ordinary course of events transfer would take place before the lease expired. The lease would then fall away as the lessor and lessee would be the same person in consequence of the application of the rule that *huur gaat voor koop*.[14] The only potential issue related to the house occupied by the seller and his family, but there is nothing to indicate that they would have wished to remain in occupation once the farm was sold and transferred to a new owner. In any event the right to occupy and possess the property would vest in the purchaser as a matter of law once the property was transferred. The fact that circumstances can be imagined in which the Galway family might have wanted to stay beyond that date[15] does not mean that the deed of sale was not in accordance with the option.

[19] A good deal of the dispute between the parties revolved around the issue of VAT. The deed of sale said that the price paid would be exclusive of VAT. In other words no more than R700 000 would be paid. That accorded exactly with the terms of the option and the emphasis

[13] Reliance for this latter point was placed on *King v Potgieter* 1950 (3) SA 7 (T).
[14] As to which see *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A).
[15] I say 'imagined' because in his evidence under cross-examination Mr Galway indicated that he had no difficulty with this clause.

added by the reference to VAT did not affect it. Presumably this clause was included in the deed of sale in anticipation that the transaction would attract VAT and so provide a foundation for a claim by Mr van Aardt to deduct any tax so paid as an input tax in his own accounting for VAT. However, alerted by this to the possibility of VAT being payable, it not having previously been discussed, the attorneys for Mr Galway wrote to Mr van Aardt's attorneys on 17 March 2005 saying that their client was to get 'R700 000 clear ie, not inclusive of VAT'. From there on this became a bone of contention between the parties.

[20] Somewhat surprisingly it does not appear to have occurred to anyone to ascertain whether the sale was in fact a transaction attracting an obligation to pay VAT in terms of the Value-Added Tax Act 89 of 1991 (the VAT Act). Whilst Mr Galway appears to have been a registered vendor in relation to his dairy farming activities that does not necessarily mean that the sale of his farm would have attracted a liability for VAT. In terms of s 7(1)(a) of the VAT Act, VAT is only payable on a supply by a vendor of goods 'in the course or furtherance of any enterprise carried on by him'. To determine whether the sale of the farm attracts VAT requires a consideration of the facts in the light of the provisions of para (a) of the definition of 'enterprise' in s 1 of the VAT Act, as read with para (i) of the proviso to that definition. Bearing in mind that the farm was also the family residence, and that it was the property that was sold not the farming business as a 'going concern', it is not clear that the sale of the farm was a sale in the course of the farming enterprise.

[21] There is accordingly uncertainty over the issue of the obligation to pay VAT on the sale of this farm. It is not appropriate to make any determination of this issue in this case or even to express a view on it as it

depends on facts not before us, the interpretation of the applicable legislation and the approach of SARS to the issue. We can only proceed on the footing that the sale may or may not attract a liability to pay VAT and construe the option in the light of that fact.

[22] The option says simply that on its exercise the purchaser will pay to the seller R700 000, no more and no less. No resort to surrounding circumstances can alter that amount and make it greater or less than the agreed figure. Ultimately this was recognised by counsel for Mr Galway who moved an amendment to the plea in the course of argument at the trial to aver that it was an implied term of the option, alternatively it had been tacitly agreed between the parties, that Mr Galway would receive payment of R700 000 exclusive of VAT. The effect of that amendment was to say that if there was a liability for VAT on the part of Mr Galway it would be paid by Mr van Aardt. The amount would be R98 000, which Mr van Aardt would have had to pay together with the purchase price, but could presumably have recovered thereafter as an input credit.

[23] An implied term is one implied by law and a tacit term is one flowing from the actual or imputed intention of the parties to the contract.[16] There is no scope here for an implied term. The VAT Act contemplates that transactions attracting VAT may be concluded on both a VAT inclusive and a VAT exclusive basis, subject to an obligation to advertise the basis upon which the price is quoted.[17] Where the consideration is in money the value of the supply for the purpose of

[16] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D - 532G*; South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) paras 11 and 12.
[17] Section 65 of the VAT Act.

calculating VAT is the amount of the money.[18] Where a sale is inclusive of VAT the VAT component is calculated using the tax fraction defined in s 1 of the VAT Act. To deal with instances where the vendor fails to take account of the incidence of VAT in determining the price, s 64(1) contains a presumption that any price charged by a vendor in respect of a taxable supply shall be deemed to include tax payable in respect of such supply even if the vendor has not included tax in the price. Given this and the other detailed provisions of the VAT Act it is impossible to imply the suggested term as a matter of law.

[24] As regards a tacit term, the fact that the sale of the farm may not have given rise to a liability on the part of Mr Galway to pay VAT is utterly destructive of his contention that the contract is subject to a tacit term that the purchase price that he would receive would be exclusive of VAT. No such term would arise from the actual or imputed intention of the parties, because they would have no need of such a term if VAT were not payable. The response to the hypothetical bystander's question, 'What about VAT?' would be that VAT was not payable. It would not be that the parties were agreed that VAT was payable by the purchaser if, contrary to their understanding of the position, the seller was liable therefor.

[25] The same result follows even if it is assumed (as did the parties and their legal advisers) that VAT was payable. In response to the hypothetical bystander's question I find it impossible to accept that Mr van Aardt would have agreed without more to pay an additional R98 000 by way of VAT. That would have had a material effect on his cash flow even assuming he could thereafter recover it as an input credit. I think it

[18] Section 10(3)(a)of the VAT Act.

more likely that his response would have been: 'I hadn't thought of that. I'd better speak to my accountant or attorney to see what can be done.' or 'That's your problem. My price is R700 000'. This court took that view in similar circumstances in *Strydom v Duvenhage NO en 'n ander*[19] and pointed out that in addition the imputation of such an intention to the parties was not necessary to lend business efficacy to the contract.[20] The same is true here.

[26] No issue was raised with regard to the other provisions of the deed of sale. They were either in accordance with ordinary common law principles applicable to all sales of land or, as in the case of the voetstoots clause and the clauses requiring Mr van Aardt to pay the costs of procuring transfer, beneficial to Mr Galway and hence unobjectionable. In fairness to Mr Galway he accepted this in his evidence.

[27] The last major issue related to the dairy and its equipment. Mr Galway said that the equipment, but not as I understand it the shed within which it was housed, was movable property that did not form part of the farm property and hence was not included in the option. It was argued that when the option was exercised and the deed of sale provided that:

'4.3 The Purchaser acknowledges that the said immovable property, including the buildings, erections and improvements thereon, are purchased as they stand on the date hereof, subject to all defects, latent and patent, that may exist or may in future be

[19] *Strydom v Duvenhage NO en 'n ander* 1998 (4) SA 1037 (SCA) at 1045C-D.

[20] The 'officious bystander' and 'business efficacy' tests are derived from the English law where the expression 'implied term' is used to encompass both the implied term and the tacit term of South African law. In England these two cases are distinguished by referring to them as terms implied by law or custom, or terms implied by fact. See Sir Guenter Treitel QC, *The Law of* Contract, (11ed, 2003) at 201. These two tests evolved in relation to terms implied in fact and are used in South Africa as tests for the imputation of a tacit term. However, they are not necessarily congruent, as pointed out by Lord Hoffmann in *Attorney General of Belize & others v Belize Telecom Ltd & another (Belize)* [2009] UKPC 10; [2009] 2 All ER 1127 (PC) paras 21 to 27. Nor are they necessarily the only basis upon which to determine whether there is a tacit term in a contract. They are rather 'different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means.'

found to exist in respect of the said property, buildings, erections or improvements, any implied warranties being expressly excluded, that is to say voetstoots';

the effect was to say that the movable dairy equipment was included in the property sold because it improved the value of the farm. The basis for this submission was that, whatever meaning the word 'improvements' would ordinarily bear in a contract of this type, in the context of the present case it bore a special meaning. That meaning so it was argued would be dictated by a layperson's understanding that equipment in a dairy that was bolted down would be an improvement even though the bolts could be undone and the equipment removed.

[28] This argument is fallacious. First the clause in question does not deal with what is sold but provides that whatever has been sold is sold voetstoots. It does not alter or affect the identity of the *merx*. Second there is nothing to indicate that in a deed of sale drafted by an attorney the word 'improvements' was intended to bear a special meaning discernible by a layperson and inconsistent with its ordinary meaning in the context of a sale of immovable property, namely as a reference to additions to the property that by their nature as well as the manner in which they are affixed have adhered to and become an integral part of the property.[21] Third this requires that the court have regard to matters extraneous to the written document embodying the agreement, which is contrary to the parol evidence rule that provides that where a contract is reduced to writing, as this contract had to be, evidence to contradict, add to or modify its meaning is inadmissible.[22]

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[21] The approach to determining whether something has been annexed to immovable property in such a way as to become a part of that property is dealt with in *Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A) at 677 and *Theatre Investments (Pty) Ltd & another v Butcher Brothers Ltd* 1978 (3) SA 682 (A) at 688D-H.

[22] *Johnston v Leal* 1980 (3) SA 927 (A) at 943B.

[29] The deed of sale did not, as contended by Mr Galway, seek to include, as part of the property sold, items of movable equipment not referred to in the option. Whether the dairy equipment has acceded to the farm property is a question that may have to be dealt with on another occasion but it is irrelevant to the issues before us. We hold that the deed of sale relates only to the immovable property constituting the farm. If the assumption that the dairy equipment is movable, on which assumption the trial was fought, is erroneous and the dairy equipment or any part of it has adhered to the farm property, then it will have been sold as part of the farm.

[30] It follows that the exercise of the option as embodied in the deed of sale, was strictly in accordance with the terms of the option. Accordingly it did not amount to a counter-offer to contract on different terms. The fact that in the covering letter Mr Galway was afforded the opportunity to put forward possible amendments if he wished was no more than a courteous indication that if there was some other provision that he wanted or some difficulty with the language of the deed he was free to ask that it be dealt with. It did not render the exercise of the option conditional or subject to further negotiation and agreement. There was a valid option and a valid exercise of the option. That brought into existence a binding agreement of purchase and sale of the farm property. Once that occurred it was permissible for the court to order the rectification of that agreement so that it correctly reflected the description of the property. The appeal must therefore succeed with costs. The issues raised by the case are not such that they required the services of two counsel.

[31] Before closing it is necessary to make some remarks about the record and the approach of counsel to compliance with certain of the

requirements of Rule 10A of the rules of this court that incorporates much of what has previously been required by practice direction 3 issued by the President of the Supreme Court of Appeal on 17 August 2007 and its predecessors.[23]

[32] I turn first to the record. It consists of nine volumes and runs to 877 pages. It includes the trial bundle and exhibits covering 171 pages. Of these the lease, deed of sale and covering letter were annexed to the particulars of claim and should have been excluded in terms of rule 8(i)(iv) and the other documents played little part in the trial[24] and no part at all in the appeal.[25] The belated application for amendment, running to 95 pages, was included on the insistence of Mr Galway's attorneys.[26] It was not mentioned in the heads of argument for Mr Galway. Another 72 pages were taken up with expert notices and summaries for four expert witnesses, only one of whom testified and then not as an expert. A further 27 pages consisted of a notice under rule 35 and photographs of dairy equipment that were attached to further particulars for trial. In 2009 the issue of the validity of the option and its exercise was separated from the alternative cause of action and a claim in reconvention. Nonetheless the pleadings relating to these were included as was a request for particulars in respect of quantum. So too was the opening address of counsel.[27] The evidence of Mr de la Harpe was included but never referred to, as was that of Mr Parker who was mentioned once.

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[23] 2007 (6) SA 1 (SCA). The first such practice directive was published on 26 May 1997. See 1997 (3) SA 345 (SCA)

[24] The inclusion of many of these was contrary to the agreement at the pre-trial conference that documents not referred to in evidence would not form part of the record of the trial.

[25] The heads of argument for Mr Galway referred to four letters of which one was mentioned in oral argument.

[26] This was an entire volume of the record of 877 pages.

[27] Contrary to rule 8(j)(i).

[33] On any basis very little regard was had to the rules of this court and the true issues in the case in preparing the record. The impression is that the pleadings, notices and bundle for trial were included as a matter of rote and the evidence typed without any consideration of its relevance. Had both parties observed the rules at least 400 to 450 pages would not have been in the record. This would not only have eased our task but would have reduced the costs substantially.

[34] Turning to the practice note, rule 10A(ix) enjoins counsel to provide a list reflecting those parts of the record that *in the opinion of counsel* are *necessary* for the determination of the appeal. The purpose of this provision was spelled out by Harms JA in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another*[28]:

'The object of the note is essentially twofold. First, it enables the Chief Justice in settling the roll to estimate how much reading matter is to be allocated to a particular Judge. Second, it assists Judges in preparing the appeal without wasting time and energy in reading irrelevant matter. Unless practitioners comply with the spirit of this requirement, the objects are frustrated and this in turn leads to a longer waiting time for other matters.'

He warned that if practitioners failed to give proper attention to the requirements of the practice note that might result in an order disallowing part of their fees. That threat came to fruition in *Firechem*, supra.[29]

[35] Notwithstanding that and later judicial complaints[30] and advice[31] we were told in the practice notes in this case[32] that, save for the expert notices and summaries, 'counsel contend that the remainder of the record

[28] *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd & another* 1998 (3) SA 938 (SCA) para 36.
[29] *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 434D–G.
[30] *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) paras 40 to 45.
[31] L T C Harms, *Heads of argument in courts of appeal* (2009) 22 Advocate 20 at 22.
[32] The two were identical.

is relevant for the determination of the appeal.' That was manifestly not correct. When we raised this with counsel it appeared that there is some confusion about what is required of counsel in complying with this rule. It is therefore appropriate to say something on that topic.

[36] The practice note requires a statement of counsel's view, in the form of a list, of those parts of the record that need to be considered in order to decide the case. The fact that his or her opponent may disagree is neither here nor there. That will emerge from the opponent's practice note. In addition the list is to be confined to those parts of the record that are 'necessary' for that purpose. Documents and evidence are not to be included in the list on the off chance that someone might wish to refer to them. The list should include only those parts of the record that counsel is likely to refer to either in support for the argument, or for rebuttal, or to highlight flaws in the judgment appealed against. It is inappropriate to include material on the basis that if a particular question is asked, or explanation is sought, it may be necessary to refer to it. What is required is a list setting out the portions of the pleadings, the documents and the particular passages in the record of evidence that counsel believes are necessary to determine the case. The list must identify by reference to volumes and pages where those parts of the record are to be found. Lastly, it would be a salutary practice for counsel to prepare the list in positive terms, identifying the parts of the record necessary for the determination of the appeal, rather than, as seems frequently to be the case, identifying portions that need not be read. The list is supposed to assist the judges in identifying what needs to be read. It should not be treated as the commencement of a process of elimination of unnecessary material.

[37] Applying that approach in this case and on this record we should have been told that only those portions of the pleadings and annexures that related to the claim to enforce the option were necessary.[33] The four letters referred to in the heads should have been identified. As regards the evidence it would have sufficed to say that the judge's summary of facts in paragraphs 2 to 8 of his judgment was accurate and to refer to those pages in the evidence where statements were made on which reliance was to be placed. I estimate that if that had been done somewhere between one and two volumes of the record, including the judgment, would have been identified as truly relevant to and necessary for the determination of the appeal.

[38] A judge may choose to read more than counsel regards as necessary, but that is for the judge to decide. The first advantage of proper compliance with the rule in the preparation of the practice note is that the judges will be able to assess whether they have read sufficient or need to consider the record in greater detail. The judges may be satisfied that the case can be determined on the portions identified by counsel, bearing in mind that the respondent's counsel will be able to remedy any perceived shortcoming in the appellant's counsel's list. The second advantage is that the careful preparation of the list will serve to focus the argument in the heads and at the hearing in due course and facilitate the expeditious preparation of a judgment.

[39] In view of possible confusion amongst counsel as to what is required under the rule it would be unfair to penalise those involved in this case for their non-compliance. As regards the record Mr Galway is

[33] By way of example of how to do it the list would have reflected the pleadings in Vol 1, pp 3-10, 16 – 38; the separation order, Vol 2, pp 132-3; the relevant passages in the evidence; the letters in Vol 7, pp 654, 676, 678 and 681 and the judgment in Vol 9, pp 836-854.

going to have to bear the costs of the appeal as well as those of the trial. It would not be right for him to be burdened with costs that should not have been incurred in the preparation of the record. Some of those are the fault of his attorneys in insisting on the inclusion of the application for amendment. That issue he will have to resolve with them. The rest are a result of Mr van Aardt's attorneys' failure to pay heed to the rules of this court. Had they done so the record would have been reduced by around one third. The order for costs will take account of this.

[40] The appeal is upheld with costs, save that the costs of the preparation, perusal and copying of the record shall be limited to two-thirds of the costs incurred in those tasks. The order of the trial court is set aside and replaced by the following order:

'1 Paragraph 1 of the Agreement of Lease between the parties concluded on 31 August 2000 and paragraph 1 of the Deed of Sale, annexure 'C' to the particulars of claim, are rectified by the deletion of the words 'the District of Grahamstown more fully described as Portion 9 (a portion of Portion 5) of the farm Sevenfountain no 447' in the former and the deletion of the words 'Portion 9 (a portion of Portion 5) of the farm Seven Fountains No 447' in the latter.

2 Against the tenders set out in paragraph 13 of the particulars of claim it is ordered that:

(a) the defendant is forthwith to take all steps necessary to transfer to the plaintiff the immovable property described as the farm Midhurst in the area of the Makana Municipality, District of Albany as more fully described in Deed of Transfer T21417/96 registered in the Deeds Registry Cape Town;

(b) in the event of the defendant failing to take such steps within a period of one month from 30 November 2011, the Sheriff is

directed to take all such steps and sign all such documents in the name and on behalf of the defendant to give effect to paragraph 2(a) of this order.

3 The defendant is ordered to pay the plaintiff's costs.'

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	E A S Ford SC (with him M L Beard) Instructed by: Neville, Borman & Botha, Grahamstown Symington & De Kock, Bloemfontein
For respondent:	Johann Gautschi SC Instructed by: Wheeldon, Rushmere & Cole, Grahamstown Phatshoane, Henney Inc, Bloemfontein.