

# MDA CONSULTING



## FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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### **GENERAL: IMPLIED TERMS IN SOUTH AFRICAN CONSTRUCTION CONTRACTS**

#### **INTRODUCTION**

The words “implied term” are often bandied about by legal practitioners in, what inevitably become, rather lengthy exchanges about the correct interpretation of the contract.

This usually signifies that one or other or both of the parties have come to the realisation that a particular dispute, while each party (presumably genuinely) considers it to be quite logically resolvable in their own favour, is not expressly dealt with by the terms of the contract.

The terms of the contract may be defined as the promises agreed upon by the parties, which together make up the contract<sup>1</sup>, and the contract itself may be defined as an agreement that is intended to be enforceable at law.<sup>2</sup>

In the aforementioned lengthy exchanges, the phrase “the express terms of the contract” will also crop up fairly frequently.

The words “implied term” are often bandied about by legal practitioners in, what inevitably become, rather lengthy exchanges about the correct interpretation of the contract. The difficulty is determining exactly what these “implied terms” are and where you can find them.

One of the many definitions of the word “express”, if it is used as an adjective, is to state “in a clear and unambiguous way”.<sup>3</sup>

The express terms of a contract are exactly that. Promises that the parties have made to each other in a clear and unambiguous way and which they intended to be enforceable by law.

These terms would be those actually written into the contract or, if you have the misfortune of attempting to run a construction contract in terms of an oral agreement, those terms which were expressly discussed and agreed upon between the parties prior to the conclusion of the contract.

What then are implied terms?

Implied terms are those, which are not specifically stated, but which are implied or inferred into the contract by the law or by trade usage.<sup>4</sup>

Unstated terms may also be imported into the contract from the facts. These are referred to as tacit terms because they are based on the unexpressed or tacit intention of the parties, rather than being implied into the contract by law or trade usage.<sup>5</sup>

<sup>1</sup> RH Christie, GB Bradfield *Christie’s The law of contract in South Africa* (6<sup>th</sup> ed) LexisNexis 2011 at page 159

<sup>2</sup> PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 13

<sup>3</sup> Encarta *Concise English Dictionary* Bloomsbury Publishing Plc 2001 at page 504

<sup>4</sup> RH Christie, GB Bradfield *Christie’s The law of contract in South Africa* (6<sup>th</sup> ed) LexisNexis 2011 at page 165

<sup>5</sup> RH Christie, GB Bradfield *Christie’s The law of contract in South Africa* (6<sup>th</sup> ed) LexisNexis 2011 at page 174

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## TERMS IMPLIED BY LAW

Some contracts, such as construction contracts, are so often used that the common law has developed terms to be implied into all construction contracts, whether these terms are expressly stated in such contracts or not.<sup>6</sup>

This is generally done as a matter of course, without referring to the actual intentions of the parties to the contract, unless, it conflicts with an express provision of the contract.<sup>7</sup>

Our courts have simplified (or complicated, depending on your point of view) this further by stating that the use of the phrase “implied terms” is, in fact, a misnomer.<sup>8</sup>

What our courts have said is that the law imposes a legal duty on one or other of the parties to a contract to behave in a certain way, whether the contract expressly states this or not. This gives rise to a correlative right by the other party to the contract to expect and enforce such behaviour. This legal duty and correlative right amount to the term implied into the contract.<sup>9</sup>

An exhaustive examination of all of the terms, which may be implied into a construction contract, by law, would turn this into a very lengthy and involved article; however, a few examples will not go amiss.

A contractor’s principal duties, implied into the contract, by law are:

*“to complete the work in accordance with the contract and any plans and specifications attached to it or incorporated in it (by reference or otherwise)”*;<sup>10</sup>

to *“complete the work within the time stipulated in the contract or, in the absence of any time stipulation, within a reasonable time”*;<sup>11</sup> and

*“perform the work in a proper and workmanlike manner and with suitable materials”*.<sup>12</sup>

Much more importantly, if you are a contractor, the primary duty of an employer, is to pay the contractor for work done.<sup>13</sup>

In addition, legislation regulates the content of certain kinds of contracts. The consequences of this legislation cannot, generally, be excluded from a contract, even by agreement between the parties.<sup>14</sup>

For example, the Consumer Protection Act (the Act)<sup>15</sup> provides that a consumer, in this instance an employer (who is not a juristic person with an asset value or annual turnover which equals or exceeds R 2 000 000.00)<sup>16</sup> may, if a supplier, in

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<sup>6</sup> PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 32

<sup>7</sup> Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at page 531 in RH Christie, GB Bradfield *Christie’s The law of contract in South Africa* (6<sup>th</sup> ed) LexisNexis 2011 at page 165 - 166

<sup>8</sup> Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at page 531 in RH Christie, GB Bradfield *Christie’s The law of contract in South Africa* (6<sup>th</sup> ed) LexisNexis 2011 at page 166

<sup>9</sup> Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at page 531 in RH Christie, GB Bradfield *Christie’s The law of contract in South Africa* (6<sup>th</sup> ed) LexisNexis 2011 at page 166

<sup>10</sup> R Sharrock *Business Transactions Law* (6<sup>th</sup> ed) Juta & Co, Ltd 2002 at page 392

<sup>11</sup> R Sharrock *Business Transactions Law* (6<sup>th</sup> ed) Juta & Co, Ltd 2002 at page 394

<sup>12</sup> R Sharrock *Business Transactions Law* (6<sup>th</sup> ed) Juta & Co, Ltd 2002 at page 394

<sup>13</sup> R Sharrock *Business Transactions Law* (6<sup>th</sup> ed) Juta & Co, Ltd 2002 at page 395

<sup>14</sup> R Sharrock *Business Transactions Law* (6<sup>th</sup> ed) Juta & Co, Ltd 2002 at page 176

<sup>15</sup> The Consumer Protection Act No. 68 of 2008

<sup>16</sup> The Consumer Protection Act No. 68 of 2008, section 5(2)(b) read with section 6(1) and Government Notice No. 34181, 1 April 2011, No. 294

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this instance a contractor, does not perform a service or supply goods to the standards required by the Act, require the contractor to either remedy any defect in the quality of the services performed or goods supplied or, at its discretion, require a refund of a reasonable portion of the price paid for those services or goods.<sup>17</sup>

This is not an obligation, which a contractor can contract out of.

### TERMS IMPLIED BY TRADE USAGE

Terms implied by trade usage may be more difficult to ascertain and prove.

These terms will have all of the characteristics of terms implied by law except that they are only applied to the particular market or trade in which they are in use.<sup>18</sup>

This is fine where both parties are aware of the trade usage and don't attempt to exclude it from their contract but what happens when one party claims ignorance?<sup>19</sup>

Our courts have held that before a trade usage will be implied into a contract, as an implied term, where one party claims ignorance of that trade usage, it must be shown that this trade usage is “*universally and uniformly observed within the particular trade concerned, long established, notorious, reasonable and certain, and does not conflict with positive law (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract.*”<sup>20</sup>

The court will then determine whether the party professing ignorance has so conducted him or herself that the other party is entitled to assume that he knew of the trade usage and intended it to be incorporate into the contract.<sup>21</sup>

It must be noted, however, that a term implied by trade usage has no higher status than any other term and the parties cannot contract illegally.<sup>22</sup>

### TERMS IMPORTED BY FACT (TACIT TERMS)

Tacit terms of the contract are those, which are inferred from the express terms of the contract and the surrounding circumstances.<sup>23</sup>

These terms can only be implied if they are “necessary in the business sense to give efficacy to the contract”,<sup>24</sup> and not merely because it seems reasonable to do so.<sup>25</sup>

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<sup>17</sup> The Consumer Protection Act No. 68 of 2008, section 54(2)

<sup>18</sup> PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 33

<sup>19</sup> PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 33

<sup>20</sup> Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd 1973 (2) SA 642 (C) at page 645 in PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 33 - 34

<sup>21</sup> RH Christie, GB Bradfield *Christie's The law of contract in South Africa* (6<sup>th</sup> ed) LexisNexis 2011 at page 168

<sup>22</sup> RH Christie, GB Bradfield *Christie's The law of contract in South Africa* (6<sup>th</sup> ed) LexisNexis 2011 at page 172

<sup>23</sup> Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at page 531 – 532 in PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 34

<sup>24</sup> Reigate v Union Manufacturing Co (Ramsbottom) [1981] 1 KB 592 at page 605 in PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 34

<sup>25</sup> Rapp and Maister v Aronovsky 1943 WLD 68 in PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 34

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Their necessity is judged by what is called the “officious bystander test”.<sup>26</sup> This means that it must be “*something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common “Oh, of course!”*”<sup>27</sup>

Finally, this common “Oh, of course!” must, of course, be in relation to a term, which can be clearly and exactly formulated.<sup>28</sup>

### **IN CONCLUSION**

As every good legal practitioner, and now every reader of this article, knows, the resolution of a dispute between the parties to a contract may not end at the express provisions of this contract.

There are a myriad of laws, trade usages and facts applicable to each contract, which may result in a term being implied or imported into a contract.

A good understanding of what these are, and how they affect the interpretation of the contract is essential, not only when attempting to resolve a dispute between the parties, but whilst the terms of the contract are being negotiated.

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<sup>26</sup> PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 34

<sup>27</sup> *Shirlaw v Southern Foundaries (1926) Ltd* [1939] 2 KB 206 at page 227 in PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 34

<sup>28</sup> *Rapp and Maister v Aronovsky* 1943 WLD 68 in PC Loots *Construction Law and Related Issues* Juta & Co, Ltd 1995 at page 34

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