

THE RELATIONSHIP BETWEEN THE DIFFERENT TYPES OF TERMS IMPLIED INTO CONTRACTS* (PART II)

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SUMMARY

In the first part of this contribution, I showed that the different categories of implied terms of a contract flow into each other in three respects. This raises the question whether the present approach of our courts to implied terms is satisfactory, especially given that it results in a blurring of borders between tacit and *ex lege* terms.

Two alternative approaches to the present understanding of the borderlines between different types of implied terms will be considered in this final part of this article, before conclusions are drawn.

1 POSSIBLE ALTERNATIVE APPROACHES TO THE COURTS' PRESENT APPROACH

1.1 Vorster's four categories of terms

Vorster argues that four separate categories of implied terms must rather be recognised.¹ He groups the first three together as "terms inferred by construction". First, he says, South African courts imply words or terms in contracts to give effect to an unexpressed but actual subjective *consensus*. Such terms are proved by circumstantial evidence.² Secondly, Vorster identifies terms implied to protect the reasonable (actual) belief of one contracting party that the term was tacitly agreed upon. The reasonable

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¹ Vorster *Implied Terms in the Law of Contract in England and South Africa* unpublished PhD thesis, St John's College, Cambridge (1987) (hereafter *Implied Terms*); and "The Bases for the Implication of Contractual Terms" 1988 *TSAR* 161 *et seq.*

² Vorster 1988 *TSAR* 161.

reliance principle therefore “augments unexpressed subjective consensus as a basis for the implication of terms in the same way that it augments subjective consensus as the basis for the formation of contracts”.³ Thirdly, Vorster identifies terms which are implied in order to place a rational construction on the contract. He says that these terms become relevant when the parties had no intention regarding a matter which later turned out to be the subject of litigation between them.⁴ Vorster argues that where the pleadings treat the dispute as turning on the true construction of the contract, the court should usually choose the “most rational of the competing constructions”. This exercise involves the reading in of words “to give effect to the inferences drawn from the meaning of the express words”.⁵ Often there is more than one logically valid alternative way of resolving the dispute and the court then chooses the more rational one in view of all the relevant propositions of law and fact, including the openly normative secondary rules on interpretation.⁶ Fourthly, Vorster recognises legal incidents or *naturalia* of particular kinds of contractual relationships.⁷ He emphasises that courts can and do make law by recognising new *naturalia*, for nominate as well as “new” or innominate contract types. The court then evaluates policy considerations relevant to a contractual relation of the kind before the court. However, in most cases there will be a precedent or custom that may be applied directly or by analogy, so that the cases where courts could justify a rule solely on a policy analysis will be rare.

Vorster argues that “the Moorcock doctrine”, that is, the bystander test coupled with the “business efficacy” test, should be jettisoned. Apart from the dangers of this doctrine, he argues that South African law does not need such fictions, unlike English law, which spawned these tests. English law did

³ Vorster 1988 *TSAR* 163.

⁴ *Ibid.*

⁵ The words read into the contract in *Van den Berg v Tenner* 1975 2 SA 268 (A) 276A are an example. The court stated that: “Die enigste uitwerking van klousule 2 van die ooreenkoms ... op die verpligting van die verweerder om die bedrag van R10 000 aan die eiser te betaal, was om nakoming van daardie verpligting uit te stel tot na die datum van afhandeling van die verkoper deur die verweerder van die [maatskappy] ... of totdat dit duidelik geword het dat daardie [gebeurtenis] weens omstandighede nie kon plaasvind nie.” The last phrase was not expressed in the contract in question. The court read it into the contract in determining the “true meaning” of clause 2, whilst conceding that the parties never thought about the situation for which it caters (277C). For a full discussion see Vorster 1988 *TSAR* 164-165.

⁶ Other examples mentioned by Vorster 143 include *Haak's Garages v Van Wyk* 1933 TPD 370 in which a hire-purchase agreement entitled the seller to recover instalments in arrear on cancellation. Although there was no express provision to that effect, it followed as a necessary consequence that the seller was entitled to retain instalments already paid. The court reasoned that “if this provision is not implied there would be no inducement to the seller to claim instalments, until they are all in arrear; and again assuming that all but one instalment has been paid, then on cancellation by the seller, he would only be entitled to recover the last instalment, but would have to refund the other instalments.” The court therefore considered the read-in words to be the only rational construction although strictly speaking, two possible readings were logically possible. See also *Marine and Trade Insurance v Van Heerden* 1977 3 SA 553 (A).

⁷ Vorster 1988 *TSAR* 166 *et seq.*

not receive the device of *naturalia contractus* (implied on the basis of the contractual purpose and *bona fides*) from Roman law, and therefore used the fiction of intention to evolve residual rules for specific contract types.⁸ All terms implied on the basis of the Moorcock doctrine can be explained by the four bases which Vorster identifies.

Vorster also argues that where the words used do not bear directly on the dispute, one should generally first determine whether the transaction belongs to a class of contracts to which is usually attached a legal incident which may be decisive of the dispute.⁹ This averts the danger of using “orthodox construction” as a mask for implying unclear and badly motivated legal incidents on the basis of non-existent presumed intention alone.¹⁰ If the contract cannot be classified as a nominate contract, this does not mean that no legal incidents can be attached to it. If there is a possibility that the type of contract may be concluded by other parties, it is helpful to treat the implication of terms for situations not provided for by the parties not as mere interpretation in the sense of identifying tacit terms, but as the determination of legal incidents so that “an exasperating goose chase after non-existent contractual meaning” and the resort to fictional intention is avoided.

1 2 Normative interpretation

An alternative approach to that of Vorster is to treat all cases where there is no existing *naturale* or general residual provision, as calling for normative interpretation. By “normative interpretation” I mean an approach to interpretation that does not regard “the intention of the parties” as the ultimate end of interpretation, but is premised on the filling of gaps in a manner consistent with the terms of the agreement and in accordance with business efficacy and fairness.¹¹ Factual elements are therefore openly combined with normative elements to reach a solution that is fair, and which can then serve as a precedent for a similar situation. Policy considerations are openly taken into account. Although the term eventually implied is based on an interpretation of the specific transaction, it becomes a residual rule for such situations should they ever arise in future. If a number of cases confirm the interpretation, it in effect becomes a *naturale* of the kind of transaction before the court. On this approach, the difference between terms implied on

⁸ Vorster 1988 *TSAR* 178 and authorities there cited. See also *CSIR v Fijen* 1996 2 SA 1 (A) 9H-10A where the court stated that: “It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to [that is, the reciprocal duties of trust and confidence between employer and employee] simply flow from *naturalia contractus*.”

⁹ Vorster *Implied Terms* 105.

¹⁰ *Ibid.*

¹¹ Normative interpretation is interpretation aimed not at establishing the subjective will of the parties, but rather the legal meaning of a factual act. On normative interpretation see Van Dunné *Verbintenissenrecht Deel 1: Contractenrecht* 2ed (1993) 124 *et seq*; Lubbe and Murray *Farlam & Hathaway Contract: Cases, Materials and Commentary* 3ed (1988) 463-464; and Van der Merwe *et al Contract: General Principles* (1993) 219.

the basis of normative interpretation and residual rules such as *naturalia* and general residual provisions, is not that their determinants differ, as Vorster seems to suggest by his distinction between terms implied by construction and terms implied by law.¹² In fact, terms implied on the basis of normative interpretation as well as residual rules are justified by notions of fairness and policy considerations and both have empirical elements and should be consistent with the parties' or typical parties' intention.¹³ As stated before, the real difference is rather the perception of each category's normative power for future transactions, which perception may change over time. Normative interpretation does not, therefore, exhort courts to lay down abstractly stated legal incidents from the start when faced with a new situation. It allows them to interpret the particularities of the situation in the light of normative ideals and to imply a fair term, which may later be regarded as a residual rule if more decisions confirm that interpretation and show that the situation is a recurring one.

"Normative interpretation" is not foreign to South African legal practice. Our courts have indeed at times used the implication of tacit terms to give expression to communitarian standards such as the underlying principle of good faith.¹⁴ The "objective application" of the bystander test approaches normative interpretation, provided that the court gives reasons why it considers one interpretation as more reasonable than another, instead of merely stating that reasonable persons in the position of the parties would have answered that the term should apply.

If normative interpretation is recognised, the distinction between the process of interpretation as far as the recognition of tacit terms is concerned, and the implication of *ex lege* terms, remains blurred. In the Netherlands, the doctrine of normative interpretation apparently entails that no rigid distinction is made between interpretation and supplementation of the agreement with the aid of good faith.¹⁵ The slogans of its proponents in the Netherlands are that "words are never clear" and that "interpretation is supplementation".¹⁶ They object to a separate treatment of supplementation

¹² However, Vorster's third category of terms, those implied to place a rational construction on a contract, approximates terms implied through normative interpretation, in that Vorster considers that the court chooses the more rational interpretation in view of all the relevant propositions of law *and* fact. See fn 6 above.

¹³ See further Naudé par 6 2.

¹⁴ Cockrell "Substance and Form in the South African Law of Contract" 1992 *SALJ* 40 53; Hawthorne "The Principle of Equality in the Law of Contract" 1995 *THRHR* 157 172; Neels "Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg" 1999 *TSAR* 684 695-696; cf Neels "Regsekerheid en die korrigerende werking van redelikheid en billikheid (deel 2)" 1999 *TSAR* 256 257; Vorster 167 *et seq*; and Van der Merwe *et al* 199 and cases there cited.

¹⁵ Van Dunné 127 and 143. In the words of Scholten: "iedere interpretasie tevens is aanvulling en de tegenstelling eene is van meer of minder, niet van scherp te scheiden dingen." (Scholten *Uitlegging van testamenten* 350 cited by Van Dunné 128).

¹⁶ Cf Van Dunné 120 and 124.

and interpretation of terms, as this implies that interpretation fulfils a different function, namely ascertainment of the parties' actual intention, which they consider to be generally impossible.¹⁷

A detailed consideration of normative interpretation and especially its impact on the traditional distinction between interpretation and supplementation of terms is beyond the scope of this article. The benefits of calling all supplementation of a contract "normative interpretation" instead of working with the two categories of tacit terms and novel *naturalia* or *ad hoc ex lege* terms (in addition to recognised residual rules) requires further consideration elsewhere.

What is certainly correct is that interpretation cannot be merely "factual" but is instead always normative (thus a legal-*cum*-factual question),¹⁸ so that it allows no place for unreasoned policy decisions behind pronouncements on the unexpressed intention of parties in the implication of terms. A failure to openly consider the policy considerations and ethical postulates at stake can therefore find no justification. In a sense, even interpretation therefore amounts to "making a contract for the parties".

One dubious utilitarian advantage of an insistence that the implication of new terms remains "normative interpretation" (as opposed to the creation of rules) is that it may encourage courts to consider terms not actually intended, but required by fairness and reasonableness in the light of the particular circumstances, and therefore consistent with the reasonable expectation of the parties. In Cockrell's words, it allows courts to achieve a communitarian standard whilst remaining true to the language of individualism.¹⁹ Implication of the types of (*ad hoc*) "legal incidents" or "*ex lege* terms" argued for by Vorster and Neels (and more cryptically, by Van der Merwe *et al*) to be implied due to the special circumstances of the transaction even when it is not of common occurrence, may be easier for courts to swallow.²⁰ Regarding the process as interpretation may lead to greater sensitivity to the particular realities of each situation, coupled with more general notions on the demands of underlying principles of contract law and policy goals.

One would then simply distinguish between three categories of implied terms according to the generality of their application. General residual rules would *prima facie* apply to all contracts, *naturalia* to contracts falling within

¹⁷ Van Dunné 119 *et seq.* Cf Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 244.

¹⁸ Van Dunné 160 regards the distinctions between interpretation and supplementation, and between factual question and legal question, as distinctions that are difficult, if not impossible, to uphold in practice. He denies that interpretation of a contract is simply a factual question that can therefore not be appealed against, although he agrees that the question of interpretation involves a consideration of the facts.

¹⁹ Cockrell 1992 *SALJ* 40 54.

²⁰ Neels 1999 *TSAR* 684 697-698.

a certain class, and other implied terms to particular transactions and situations that may not be of common occurrence, but which are implied due to the special circumstances surrounding the transaction and the demands of fairness and justice. General residual rules would then be triply residual: they could be excluded by contrary *naturalia* of a specific contract type, or by *ad hoc* implied terms or by express agreement. *Naturalia* could, in turn, be excluded by *ad hoc* implied terms or by express agreement.

On the other hand, although “normative interpretation” of contracts has been recognised in many decisions of the highest court in the Netherlands,²¹ it apparently remains somewhat controversial there.²² Use of the term “interpretation”, with its traditional connotation of decoding terms that already exist, arguably obscures the true nature of the implication of terms in cases where the parties did not even consider the situation at hand.²³ No wonder then that our courts profess to be declaring the intention of the parties when implying tacit terms, yet generally do not call this process “interpretation”, a term limited to the elucidation of express terms.²⁴

When normative interpretation amounts to supplementing the contract, it is criticised as a fiction by which an intention is ascribed to the parties that they never had.²⁵ On the other hand, it creates the danger of ignoring the parties’ actual intention, and therefore the important value or principle of party autonomy, on the basis of other policy goals. The distinction between interpretation and the implication of *ex lege* terms is so firmly entrenched in our law that it is doubtful that South African courts could be persuaded to regard all implication of novel terms as “interpretation”.²⁶ Nevertheless, further reflection on this controversial issue may perhaps persuade courts to regard all implication of terms, including the implication of “tacit terms”, as

²¹ The *Hoge Raad*. See Van Dunné 133 *et seq.*, and cases discussed by the author.

²² Van Dunné 123 and 125 *et seq.*, gives an overview of critical academic contributions and contrary decisions. Although lately the flag of normative interpretation seems to be flying at the top, to use his metaphor, some confusion still exists. On the latest decisions and academic contributions as from 1985 see 159 *et seq.*

²³ The famous Dutch jurist, Meijers, was a strong supporter of a distinction between interpretation and supplementation of an agreement, and vehemently criticised cases following the “normative interpretation” approach for this reason. Cf Van Dunné 135-136.

²⁴ Van der Merwe *et al* 219.

²⁵ Cf Houwing’s criticism against the decision of *rederij Koppe* (1949) (1950 *NJ* 72) cited by Van Dunné 140.

²⁶ The distinction drawn between tacit and *ex lege* terms emphasised by Corbett AJA (as he then was) in *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) has been quoted with approval in numerous subsequent cases. Legal writers such as Kerr have also repeatedly criticised decisions which have blurred this distinction. See Kerr “The Need to use Words with Different Meanings to Describe Different Categories of Provisions of Contracts” 1999 *SALJ* 711; “Dangers in the use of Synonyms to Describe Different Categories of Contractual Terms” 1994 *THRHR* 279; “Some Problems Concerning Implied (Tacit) Provisions of Contracts” 1993 *THRHR* 114; “To which Category of Provisions of a Contract do Provisions Originating in Trade Usage Belong? Problems in Regard to *Quasi-Mutual Assent*” 1996 *THRHR* 331; and other articles cited by Kerr *The Principles of the Law of Contract* 6ed (1998) 341 fn 27.

a “normative” process. This may facilitate the recognition of suitable terms on the basis of underlying principles such as good faith and other policy considerations or at least promote reflection on the policy justifications and repercussions of the tacit and *ex lege* terms that courts imply or refuse to imply.

2 CONCLUSION

It is submitted that, what courts should be exhorted to do when faced with a contractual gap is to seek to ascertain the true intention of the parties. Giving effect to the principle of party autonomy is an important aspect of the fairness ideal, where this does not result in oppression of one of the parties, or clearly conflicts with other communal goals. However, courts must also realise the limitations of language and of unreasoned reliance on “logic” in seeking to ascertain the parties’ intention.²⁷ (The officious bystander test sanctions unreasoned reliance on logic (“of course” arguments) to some extent.) Courts must realise that there is often a variety of logically valid interpretations that can be placed on a situation, so that the choice between them should be done on normative, fairness or policy grounds. Courts must in addition not pretend to find an intention when none exists. They must also realise the normative effect of their interpretation and the term implied, and therefore consider the decision’s relationship with and effect on existing authoritative rules and principles of law, whilst attempting to achieve coherency, consistency and legal certainty. For the same reason, the policy implications of their decisions must be taken into account.

It is probably too presumptuous for legal writers to prescribe, in addition, that courts must seek to rather imply *ex lege* terms or *naturalia* than factual or tacit terms, or to state that these categories be kept strictly apart. Courts should always be responsive to the facts (the actual intention of the parties) and the requirements of the law and justice when implying terms and these empirical and normative aspects of adjudication cannot be rigidly separated. Ultimately, it is not so important for a court implying a novel term to categorise it as a general residual provision, *naturale, ad hoc ex lege* term, standard interpretation or *ad hoc* tacit term, as long as the court followed all the guidelines mentioned above.

The new term’s normative status will depend not so much on whether it is normative or empirical in origin as on the commonness or level of abstraction of the situation which led the court to imply it and the commonness of the type of contract into which it was implied. The soundness and persuasiveness of the court’s reasoning, and therefore the reaction of later courts to the decision, will be of decisive importance.

²⁷ See further Naudé par 6 2.