IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 20829/02

In the matter between:

HILTI (SOUTH AFRICA) (PTY) LTD Plaintiff

and

VODACOM SERVICES PROVIDER COMPANY (PTY) LTD First Defendant

VODAC (PTY) LTD Second Defendant

J U D G M E N T

MARAIS, J:

The plaintiff sues the two defendants in the alternative and in the further alternative seeks judgment against them jointly and severally. The plaintiff avers that it (apparently) contracted with the second defendant and subsequently tacitly contracted with the first defendant on the same terms and conditions as the plaintiff had contracted with the second defendant.

Pursuant to rulings in terms of Rule 33(4) the issues to be decided by this Court at the hearing before me do not include a determination of which defendant, if any, is liable to the plaintiff. However, the evidence led before me seemed to suggest that any liability attached to the first defendant.

The defendants were generally referred to in the particulars of claim as "*the defendant*". Save where it is necessary to distinguish between the defendants I similarly refer merely to "*the defendant*" in this judgment.

It is common cause that pursuant to a contract with the plaintiff the defendant provided services of a telecommunication nature enabling the plaintiff to make two way calls on a cellular telephone. Crisply the plaintiff maintains that it has been overcharged and has overpaid as services charged for were not rendered and/or the plaintiff was, by virtue of an implied term or terms, entitled to a form of credit for services not rendered by defendant.

The determination of this issue depends upon whether the implied terms pleaded in paragraph 14 of the particulars of claim (as amended) formed part of the contract between the parties.

The issue of whether such implied terms indeed formed part of the contract between the parties was ordered by a prior court to be determined first and separately from other issues in terms of Rule 33(4). The initial court order was amended by me to include a determination of additional or reformulated

implied terms added to paragraph 14 of the particulars of claim during the hearing before me.

Voluminous documents were placed before me in the form of a bundle Exhibit "A", but the only evidence led was that of a Mr Engelbrecht, a technical specialist and a director of a company associated with or enjoying a business relationship with the first defendant. The company in question is Vodacom (Pty) Ltd which is a network operator in respect of telecommunications services. That company according to the evidence of Engelbrecht sells "*wholesale airtime*" to service providers who enter into contracts with the end-customers (obviously users of cellular telephones). The first defendant was one such service provider and it appears from the evidence of Engelbrecht that the distinction between first and second defendants is only apparent and not real as the initial name of first defendant was that of the party cited as second defendant but such name has been changed to the name of first defendant. As it is outside the scope of the issue to be tried by me I do not make any finding in this regard but that is the effect of the evidence.

Before dealing with the terms sought to be implied into the contract it is appropriate to set out the contractual background and to define the dispute between the parties. This will enable the relevance and importance of the implied terms to be appreciated.

The particulars of claim in paragraph 11 aver that the contract between the parties was written, that it provided for the defendant to render certain cellphone network services to plaintiff and that a copy of the contract is annexed marked “A”. Save for an irrelevant reservation these averments are admitted in the plea.

Paragraph 13 of the particulars of claim alleges:

> “*13. It was a term of the said contract that:*
>
> *13.1 the Defendant provide the Plaintiff with services meaning the provision of a basic telecommunications service providing two-way communication of speech by wireless telegraphy via the system and such other additional telecommunication services as the Defendant may at its option choose to make available from time to time by means of the system;*
>
> *13.2 the Defendant connect and maintain the connection of the Plaintiff’s subscriber apparatus (meaning a mobile cellphone) to the system and use its reasonable endeavours to make the services available to the customer throughout the duration of the contract save and except for circumstances beyond the control of the Defendant;*
>
> *13.3 the Plaintiff pay to the Defendant the aggregate of all charges levied by the Defendant from time to time including:*
>
> *13.3.1 the connection charge, monthly access charge, call charges and other charges set out in the tariff from time to time;*
>
> *13.3.2 the Defendant invoice the Plaintiff monthly in advance in relation to the connection charge and monthly access charges and monthly in arrears in relation to the call charges;*

13.3.3 *a call is the connection of the Plaintiff's cellphone to the device called for the period required by the caller.*"

The first answer to this in the plea reads:

"*13.1 Save to admit the contents insofar as same have been correctly recorded, the remainder of the contents contained herein are denied.*"

The pleader is clearly saying that, insofar as the averments pleaded correctly reflect the terms of the admitted written contract Annexure "A", the averments are admitted but insofar as they do not correctly reflect or record the terms of the written agreement the averments are denied. On reading the record I note that during the course of the trial I commented acidly on this form of pleading (record p 5-6). I notice that I referred to this as being a form of pleading which I found "*appalling*". I added that it was "*an evasive plea*" and that it was "*something which I take the strongest exception to*". Save for my grammatical slip in the last quoted phrase, I wish on reflection only to underline what I have already said.

The purpose of pleading is to define the issues between the parties. This form of pleading serves only to obfuscate the issues. The pleadings should define the issues for the benefit not only of the parties but also for the court. Since the admission that the plaintiff's pleading is correct insofar as it correctly records the contents of the agreement is coupled with a denial of "*the remainder of the contents*" of the paragraph of the plea being replied to, the

only conclusion is that the defendant has detected a difference between the averments made and the contents of the written agreement.

How the pleader thinks that this form of pleading enables the plaintiff or the court to grasp what it is that the defendant denies in the plea and where it is contended by defendant that the plaintiff erred in its setting out of the terms of the contract is not readily understandable.

What the pleader on behalf of defendant is saying to the plaintiff (and the court) is: "*You have wrongly recorded some of the terms of the written agreement, go and find out why I say so.*"

I have occasionally during a long legal career come across pleading of this nature; it has always appalled me and continues to do so. The pleader in this case raises an issue but refuses to say what it is. He appears to wish to be able to raise arguments at the trial which have not been clearly foreshadowed in his plea. A plea in this form can only be described as being studiously vague and devious. It leaves the defendant free to argue that any pleaded term of the contract has been incorrectly set out without the pleader identifying that term or what the error is.

Pleading in this form offends the principle that the pleadings are intended to define the disputes between the parties; it also offends Rule 22 of the Uniform Rules of Court. Rule 22(2) requires that a defendant in his plea "*shall … either admit or deny or confess and avoid <u>all the material facts</u> alleged in*

the combined summons … or state which of the said facts are not admitted, and to what extent …". The averment that the agreement between the parties contains a particular term is clearly a material fact. In reply to which averment the defendant is obliged to state (in relation to each averred term) whether he admits or denies the averment and if he denies it "*to what extent*" he denies the averment.

The above requirements are again emphasised in Rule 22(3) which requires that "*if any explanation or qualification of any denial is necessary, it shall be stated in the plea*". It is self-evident that the vague and evasive denial inherent in this form of pleading requires an explanation, which could be that the agreement contains no such term as that averred or that the term has been misquoted and setting out the correct wording thereof.

To mark my disapproval of this pleading I will if any costs order is to be made in favour of the defendant exclude therefrom the costs attendant upon the drafting of this objectionable plea.

Having severely censured the defendant's plea I hasten to add that the plea was not the work of Mr Van Blerk SC or his junior Ms MacManus who appeared on behalf of the defendants.

The dispute between the parties concerns charges levied by defendant in respect of "*dropped calls*". A dropped call was defined by the witness Engelbrecht as: "*It is a call that is terminated by some other means and not*

by either one of the two parties that is party to that particular call. In other words it is a call that is terminated abnormally."

Broadly speaking the evidence showed that this situation where termination of a call occurred but was not intended or desired by one of the parties, occurs when there is some interference with the radio signal to or from one of the phones being used (such as when the user of the phone enters a lift or other area where the radio signal is totally ineffective) or because of some fault in the sending or receiving phone or because of a fault in one of the networks involved in the transmission of the call.

In short a dropped call occurs in circumstances when the parties wish to continue the conversation and some external cause prevents the continuation of the communication between the parties to the call. The present dispute arises from the fact that in such circumstances and because of the tariff system of the defendant the plaintiff, if it had initiated the call, would pay for airtime or communication time that it did not receive. Thus the plaintiff contends that it has been charged for services not rendered and/or airtime not received. Mr Van Blerk SC who appeared for the defendant explained by way of a simple example when dealing with the apparent meaning of the implied term pleaded by the plaintiff in paragraph 14.3 (to which I will come later) that: "*If there is a charge of R1 a minute and I intend speaking to my learned friend for a minute and the call is cut off after thirty seconds and I then re-phoned him, I will then be charged for two minutes because I was charged for the first*

minute or part thereof, the first 30 seconds, and I reconnect with him, and I now end up being charged for 2 minutes."

As I understand it the difficulty is that the charge made by the defendant was based on a period of one minute and if the call was dropped during this period when the parties wished to continue the conversation, then the plaintiff would lose the benefit of the unexpired portion of the period for which a charge was being levied. The plaintiff contends that in those circumstances and by virtue of the implied terms alleged the plaintiff should not be charged for the lost time and/or the consequences of such time being lost. It is not necessary for present purposes to go more deeply into the dispute as this would be a matter for decision if and when the court deals with the issue of quantum. I merely add that the claim is apparently defined in paragraph 18 of the particulars of claim as being "*the amounts charged by the defendant representing greater charges made by the defendant than it otherwise would have been entitled to in respect of calls which were terminated as a result of the defendant failing to maintain the connection of the cellphone to the system*".

The implied or tacit terms that the plaintiff seeks to introduce into the contract are set out in paragraph 14 of the particulars of claim (as amended during the trial) which reads:

> "*14. It was an implied, <u>alternatively</u> tacitly agreed term of the contract that:*
>
> *14.1 the Defendant render the services in a proper and workmanlike manner;*

14.2 the Defendant only levy charges in respect of services actually rendered and calls actually made;

14.3 in the event of any call being terminated as a result of the Defendant failing to maintain the connection of the cellphone to the system that the Plaintiff would not be charged more than it otherwise would have been charged had the call not been terminated;

In the alternative:

14.4 The Defendant would not be entitled to payment of the specified unit charge for dropped calls dropped during the period to which the unit charge relates and occasioned by its failure to maintain the provision of the service set out in paragraph 13.1 supra.

In the alternative:

14.5 The Defendant would not be entitled to payment for the unit charge period during which a call terminated abnormally namely by reason of the system failing to maintain the signal and caused by a fault in the network."

I will later examine the law relating to the importing of implied or tacit terms into a contract. However, I should point out that Mr Van Blerk is correct when he maintains that in the strict sense of the word we are dealing not with implied terms but with tacit terms. That appears from the judgment of Corbett AJA in *McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (AD) at 531-2 where the learned judge of appeal pointed out that in the first place "*implied term*" could be used to denote "*an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties*". Corbett AJA then goes on to point out that in the second place "'*implied term' is used to denote an unexpressed provision of the contract which derives from the common intention by the parties*". Corbett AJA goes on to enlarge on his

remarks and to comment that writers in contract have used the expression "*implied term*" to denote the former category and the expression "*tacit term*" to describe the latter category.

It is not important what nomenclature is used so long as the distinction between terms implied by law and implied terms based upon the actual or imputed intention of the parties to the contract is recognised and applied. In this case it was common cause that we are dealing with the second category of implied term relying on an unexpressed common or imputed intention of the parties. It was not suggested that the terms sought to be implied are implied by law. Although I continue to use the expression "*implied term*" as used in the plaintiff's particulars of claim I do so fully mindful of the distinction between the two categories of implied term referred to by Corbett AJA.

In deciding whether a term is to be implied into a contract it is always relevant to look at the terms of the contract itself. In this case the document in question is a comprehensive one inserted in the bundle as page 2 although it comprises two substantial pages (the copy supplied has been enlarged) and runs to 25 clauses. Clause 1 dealing with interpretation contains no fewer than 24 sub-clauses.

The primary obligation of the defendant is contained in clause 2 which is headed "*Connection to the System and Provisions of the Services*". The interpretation section however provides that clause headings are not to be taken into account in interpretation of the contract. Clause 2 reads:

"***2. CONNECTION TO THE SYSTEM AND PROVISIONS OF THE SERVICES***

Subject to the terms and conditions of this agreement, Vodac shall connect and maintain the connection of the subscriber apparatus to the system and Vodac shall use its reasonable endeavours to make the services available to the customer throughout the duration of this agreement, save and except, for circumstances beyond the control of Vodac."

In the interpretation section in clause 1.1.13 it provides that "*the services*" means:

"*1.1.13.1* *a basic telecommunications service providing two-way communication of speech by wireless telegraphy via the system and such other additional telecommunication services as Vodac may at its option choose to make available from time to time by means of the system; and/or*

1.1.13.2 *…*"

It is to be noted that clause 2 very clearly contemplates the existence of "*circumstances beyond the control of Vodac*" may arise affecting the execution of the duties assumed by defendant.

Clause 1.1.3 provides:

"'*call charge' means the charge for a specified unit of time as set out in the tariff*."

Clause 1.1.16 provides that:

> "*'the tariff' means the tariff of charges as published and amended from time to time by Vodac in its sole discretion*".

Clause 8 which is headed "*Customer Acknowledgement*" provides:

> "***The customer acknowledges and agrees that***
>
> *8.1 service, quality and coverage available to the customer shall be limited to that provided by the system and the services may from time to time be adversely affected by physical features such as buildings and underpass as well as atmospheric conditions and other causes of interferences; and*
>
> *8.2 it shall not hold Vodac, any of its employees, directors or agents liable for any non-availability of the services of for any other reason whatsoever including damages, save as is specifically set out in clause 9.*"

Although clause 8.2 was relied upon in the plea as a defence to the present claim that defence, as Mr Lamont SC for the plaintiff correctly pointed out, must fail as the clause in its own terms clearly applies only to the liability of the defendant for non-availability of the services and does not apply to the issue in this case which is whether there are implied terms disentitling the defendant to claim charges arising from or caused by dropped calls.

The real importance of this clause in respect of the instant issue is that it shows that the parties were well aware of circumstances which, according to the evidence of Engelbrecht could lead to dropped calls.

Clause 9 of the agreement was also pleaded as a defence and, for the same reason as I gave in respect of clause 8.2, Mr Lamont correctly contended that it did not provide a defence being limited to excluding the liability of the defendant for certain acts or omissions. It is unnecessary to burden this judgment by quoting the clause.

The only evidence was that of Engelbrecht and in the absence of challenge or counter-evidence there is no reason not to accept his evidence. He appeared to be knowledgeable about the matters concerning which he testified. I summarise briefly the relevant portions of his evidence.

Engelbrecht was at the time that he testified the director of Network Engineering and Support for Vodacom (Pty) Ltd which is a network operator which was used by the defendant to provide a network and operate it. The defendant was regarded as a service provider which entered into contracts with the end-customers.

Engelbrecht explained that there were three network operators operating in South Africa and that a cellular phone call could be made by a customer of defendant to a person using any of the other networks. Quite obviously a cellular telephone call could also be made to a landline operated by Telkom. That this can occur appears from the evidence of Engelbrecht at record p 29-30. It is in any event so notorious a fact that judicial cognisance can be taken of it.

Engelbrecht explained that there were numerous causes of dropped calls. Firstly, that the battery of one of the two parties to the call goes flat. Secondly, a cellphone could be abused and/or damaged. Thirdly, one of the parties to the call could drive out of a coverage area. Fourthly, persons could go into a lift or a basement where coverage could not reach them there being no radio signal available there. Fifthly, he said that there could be faults of the Vodacom system or the system of another network to which the call was connected. He consequently made the point that even if there was a failure of a network system that it need not be the system to which the customer (in the present case the plaintiff) is linked. Finally, Engelbrecht agreed with the proposition that if one analyses the possible causes of a dropped call "*you can have dropped calls that don't involve the system, those that involve the system, and in some instances it is not a failure of the system, and in others it can be a failure of the system … and if there is more than one system involved it can be a failure of a system other than that of the customer*". He also pointed out (record 36-7) that there was infrastructure, forming part of the Vodacom system, supplied by Telkom which could suffer a failure resulting in a call being dropped.

The next point made by Engelbrecht was that even if the customer entered an area of no signal, dropped his cellular phone or something went wrong with the phone or its battery went flat and a call was therefore lost or dropped that the cellular phone (and therefore the customer) still remained connected to the system. His words were:

> "*Even if the call drops for, as I said, an unnatural reason, you are still connected to the system. In other words you don't lose your connection to the system, you lose radio contact with the system.*"

He added that if someone during the period of lost radio contact were to send a voice message or a short message via the short message service that would be received as soon as the customer re-established radio contact with the network or the system. Engelbrecht added that even if a cellular phone was switched off for an extended period and its battery discharged completely the user would remain connected to the system and would be able to retrieve whatever messages destined for him have been recorded and stored and he will receive these as soon as he establishes radio contact again with the system.

Engelbrecht stated that if a dropped call was experienced that his company that is Vodacom (Pty) Ltd provided certain facilities which he claimed were indicated in the brochures presented to customers. Firstly, it was possible to endeavour to re-establish the connection by dialling 119 and if connection is re-established the first minute would then be free of charge. Furthermore, if there were continuous service difficulties in a specific area then a 24 hour customer care service could be called and would investigate and endeavour to resolve the problem. According to Engelbrecht these services are set out in the brochure made available by the service provider to the public which presumably included its customers such as the plaintiff.

Cross-examined by Mr Lamont, Engelbrecht agreed that the data gathered by the service provider would enable it to identify dropped calls but these calls were nevertheless billed for.

Engelbrecht was then referred to a clause in the brochure which provided: "*If a fault affecting the charge for the call is found we will inform your service provider and your bill will be adjusted accordingly*" (bundle p 47 para 3.5). Engelbrecht maintained that this referred to a fault in the billing system which could result in a call being rated incorrectly and did not refer to a charge for dropped calls. This interpretation appears reasonable and correct to me.

Engelbrecht then went on to point out: "*If a call is dropped you can determine that the call is dropped but you cannot determine why the call is dropped. In other words you will, after the fact it is not possible to determine whether the call dropped due to a fault or whether the call dropped for another reason like, for example, driving out of a coverage area*."

Should the terms be implied?

The law relating to implying tacit terms into a contract is cogently and lucidly summarised by Corbett AJA in the *McAlpine* case at 532H-533C as follows:

> "*The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. (See Treital, p. 166). The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely*

because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner 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. (See Mullin (Pty.) Ltd. v. Benade Ltd., 1952 (1) S.A. 211 (A.D.) at pp. 214-5, and the authorities there cited; S.A. Mutual Aid Society v. Cape Town Chamber of Commerce, 1962 (1) S.A. 598 (A.D.)). The practical test to be applied – and one which has been consistently approved and adopted in this Court – is that formulated by Scrutton, L.J., in the well-known case of Reigate v. Union Manufacturing Co., 118 L.T. 479 at p. 483:

> *'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?" they would have both replied: "Of course, so-and-so. We did not trouble to say that; it is too clear."'*

This is often referred to as the 'bystander test'."

In *Rapp and Maister v Aronovsky* 1943 (WLD) 68 Millin J quoted with approval from an English case of *Hamlyn v Wood* the following:

"*The court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the court is necessarily driven to the conclusion that it must be implied.*"

Millin J went on to say (p 74):

"*It remains clear law that you are not entitled to imply a term unless it is necessary to give effect to what was clearly the intention of the parties as disclosed by them in the expressed terms they have used and in the surrounding circumstances; that is to say, unless it is necessary to give the contract that business efficacy which it can clearly be seen by the court both parties must have intended.*"

I draw particular attention to the emphasis on the necessity to conclude that both parties must have intended the tacit term sought to be implied and the necessity for the term to reflect what was clearly the intention of the parties. These requirements were emphasised at page 75 by Millin J in the *Rapp and Maister* case where he said that it was not appropriate to introduce a term which "*appears to be no more than a term which would make the carrying out of the contract more convenient to one of the parties or to both of the parties and might have been included in the parties had thought of it and if they had both been reasonable. You are not to imply the term merely because one of the parties or a bystander had suggested it, you think only an unreasonable person would have disagreed. You have to be satisfied that both parties did agree*" (my own underlining).

Paragraph 14.1

The first term sought to be implied is that contained in paragraph 14.1 of the particulars of claim in which it was contended that it was tacitly agreed that:

> "*14.1 the Defendant would render the services in a proper and workmanlike manner.*"

It seems to me that Mr Van Blerk is correct and that such a term is not appropriate in a contract which does not provide for a "*piece of work*" to be undertaken but to the rendering of a service defined in the contract itself. The service must be provided in accordance with the terms of the contract; if it is not there is a breach of the contract.

In particular I am of the view that where the services to be provided are defined by the contract that there is no room to find that both parties must have intended an additional clause to the effect that the services must be rendered "*in a proper and workmanlike manner*", an expression the interpretation of which would give rise to considerable difficulty in the circumstances of the present case and which can hardly be said, having regard to the detailed nature of the contract which provides for the obligations of the defendant to be "*necessary to give the contract that business efficacy which it can clearly be seen by the court that both parties must have intended*". The services to be provided and nature of defendant's obligation in this regard is set out in clause 2 of the agreement (*supra*).

Paragraph 14.2

The next implied term contended for was:

> "*14.2 the Defendant only levy charges in respect of services actually rendered and calls actually made.*"

At this point I must make an observation. It is that reading and re-reading the implied terms relied on I have again and again become conscious of the difficulty created by the fact that I am not hearing the whole case but only a portion thereof. However, during the argument statements were made by counsel on both sides regarding the true ambit of the dispute between the parties. That true ambit, as I understood both counsel to define it, is considerable narrower than the potential disputes as indicated by the implied

terms pleaded in the particulars of claim read with the denials thereof. I understood from Mr Lamont (record p 7) that the claims related only to dropped calls but that there was no claim for "*driving under a bridge or the cellphone itself being faulty or there not being a battery*" but only for the situation where "*the system rejects the call prior to the termination of the minute and the plaintiff doesn't obtain the services of the minute for which it is then obliged to pay in terms of the call structure*".

It is unnecessary to consider the effect of the limitation proposed by counsel on the implied term pleaded in paragraph 14.2. I mention counsel's statement for one reason only. I do not want it thought that I have ignored what I was told by counsel was the nature of the claim and the nature of the dispute. But I would be leading myself into a labyrinth of uncertainty were I to endeavour to interpret the implied term other than by reading its plain words. Should it become relevant for purposes other than determining the meaning and scope of a term sought to be implied, I may be able to have regard to what both counsel are agreed on, which is that the claim concerns only dropped calls.

I now turn to the interpretation of paragraph 14.2.

I will assume (again in favour of plaintiff) that this implied term applies (*inter alia*) to dropped calls. It is also clear that the scope is much wider. If the term does not apply to dropped calls then no purpose is served by implying a term irrelevant to the plaintiff's claim. Trial cases are not intended to resolve purely academic issues. When I said that I could possibly refer to what counsel are

agreed on is the scope of the trial in certain circumstances it is to this aspect, i.e. the possible irrelevance of an implied term to the dispute between the parties, that I was referring.

The term, relating as it does to the levying of charges (as opposed to giving some form of "*credit*") where a call is dropped may mean that the defendant cannot charge for the unit of time during which a dropped call occurs, or it may mean that defendant must charge some lesser amount than the full unit charge, which lesser amount would presumably be determined in accordance with the time for which an actual service was rendered.

Before a tacit term can be implied, it must be "*capable of clear and exact formulation*" and be "*precise and obvious*" (*Desai and Others v Greyredge Investments (Pty) Ltd* 1974 (1) SA 509 (A) 522C-D).

The difficulty with the meaning of the clause is whether it means (1) that the defendant can only charge its unit charge (for one minute) if the call is not dropped before the full unit time has expired or does it mean (2) that that the defendant can only charge for 30 seconds if the call is dropped thirty seconds into the unit charge period?

In my view not only is the term as pleaded ambiguous and neither clear nor precise but it seems to conflict with the provision of the contract that a charge is levied for a complete unit where any part of the unit is used for a call.

Furthermore, as the term as pleaded is not limited to dropped calls resulting from some failure on the part of the defendant or the system/network provided, it would mean in situation (1) that defendant could not charge for dropped calls where the defendant's inability to render the services specified in clause 1.1.13.1 for the full unit time of one minute is because the battery in the cellphone of the client of the defendant has gone flat or the customer has dropped the phone into his bath. It would also apply where the defendant could not continue to provide the two-way communication specified as "*the services*" to be rendered in clause 1.1.13.1 because the other party to the call has a flat battery or adverse conditions *inter alia* as specified in clause 8 break the two-way connection. The term would also apply to dropped calls occurring as a result of one of the parties to the call entering a lift or a basement or driving under an underpass.

It would be strange indeed if defendant, fully aware that the circumstances stipulated which were beyond the control of the defendant, could result in a dropped call, must have intended that defendant was not entitled to exact its normal tariff for the tariff unit or part thereof.

It is fanciful to suggest that the defendant tacitly agreed to a term having such an effect particularly where the system cannot detect what fault caused the dropped call. Such a term would deny the defendant its stipulated unit charge where the dropped call occurred through no failure on the part of the defendant or the system provided by defendant.

The method of charging being laid down it is not necessary for business efficacy that a term be implied which in effect provides that the tariff does not apply to *inter alia* the situation where a call is dropped.

The above reason not to imply the term may be formulated somewhat differently. For the purpose of implying a term into a contract (as opposed to holding that the term pleaded is wholly irrelevant to the claim according to counsel), as I understand the authorities, I cannot imply into a contract any variation or modification of the implied term as pleaded and consequently I must look at the term pleaded and not read it subject to the statements of counsel regarding the limits of the claim actually made in this case. The term would apply to calls dropped as a result of the subscriber to the system offered by the defendant either failing to charge his battery or having a defective cellphone. It would also apply to calls dropped as a result of the other party to the call similarly having a defective cellphone or having failed to charge his battery or as a result of a lack of coverage on the part of a system other than the Vodacom system utilised by the other caller. The term would also apply to dropped calls occurring as a result of one of the parties to the call entering a lift or a basement or driving under an underpass.

The question to be posed is whether the parties intended to agree that in the circumstances that I have postulated the subscriber to the system offered by the defendant (in this case the plaintiff) is not to be liable on the basis provided by the tariff i.e. for the full unit time (or minute) where some portion of it has been utilised and provided two way communication.

In regard to the consideration that the terms sought to be implied would result in the defendant not being entitled to any charge where a two way communication is interrupted ten seconds short of the end of the time unit, it is relevant to note that clause 8.1 of the agreement provides:

> "*8.1 service, quality and coverage available to the customer shall be limited to that provided by the system and the services may from time to time be adversely affected by physical features such as buildings and underpass as well as atmospheric conditions and other causes of interferences, …*"

The parties therefore had in mind when they contracted that the services to be rendered in terms of the contract may not be capable of being rendered because of the various possible causes of interference preventing two-way communication. No provision was made in the contract for the unit charge to fall away where the matters dealt with in clause 8.1 prevented the call running for the full unit time. In *Union Government v Faux Ltd* 1916 AD 105 at 112 Solomon JA said:

> "*Now it is needless to say that a Court should be very slow to imply a term in a contract which is not to be found there, more particularly in a case like the present, where in the printed conditions the whole subject is dealt with in the greatest detail; and where the condition which we are asked to imply, is one of the very greatest importance on a matter which could not possibly have been absent from the minds of the parties at the time when the agreement was made.*"

There being no provision of the nature now sought to be implied dealing with a matter which was present to the minds of the parties when they contracted and was indeed recorded in the contract, a court should be slow in the

extreme to imply such unexpressed term into the contract, particularly a term which is not necessary to give business efficacy to the contract. This is accordingly a very strong factor against implying the term contained in paragraph 14.2. What I have already said about whether the term should be implied into the contract assumes that the term applies (*inter alia*) to dropped calls. I do so in favour of the plaintiff. If the term does not apply to such calls then no purpose is served by implying a term irrelevant to the plaintiff's claim. Trial cases are not intended to resolve purely academic issues, a resolution of which would not result in any relief sought being granted.

For these reasons I cannot find tacit agreement in respect of the term pleaded in paragraph 14.2 of the particulars of claim.

Paragraph 14.3

Paragraph 14.3 reads:

> "*14.3 in the event of any call being terminated as a result of the Defendant failing to maintain the connection of the cellphone to the system that the Plaintiff would not be charged more than it otherwise would have been charged had the call not been terminated;*"

When considering the implied term set out in paragraph 14.3 of the particulars of claim one matter initially troubled me. The evidence of Engelbrecht (record p 35 l 22-3) was:

"*Q: And if there is a dropped call is that as a result of the disconnection from the system?*

A: No."

It seemed to me that if this evidence was to be taken literally and at face-value that there was no room for the tacit term set out in paragraph 14.3 to operate in which case it could hardly be contended that the defendant intended to agree to such a superfluous term and in any event it would be futile for this Court to imply it as it could not operate.

However, having re-read the evidence the answer given was preceded on the same page by evidence from Engelbrecht regarding how a client could become disconnected from the system in circumstances where the disconnection would be deliberately effected by the defendant and the defendant was entitled to so disconnect the client. *Prima facie* on a full reading it seem to me that it could well be that Engelbrecht when he spoke of "*the disconnection from the system*" was referring to the type of disconnection which he had mentioned (indeed it was the only type of disconnection which he had mentioned). This possible reading of the evidence is strengthened by the next set of answers by Engelbrecht (foot p 35 to foot p 36) in which he appears to talk of a system linked dropped call being caused by "*a failure*" (in the physical infrastructure which connects the various elements to each other) which could cause the call to fail.

I shall therefore assume in favour of plaintiff that the evidence does not exclude the possibility of a dropped call resulting from "*the defendant failing to maintain the connection of the cellphone to the system*".

At first blush it may seem that it is unnecessary to imply a term to enable the *exceptio non adimpleti contractus* to be raised if the defendant failed to connect and maintain the plaintiff's connection to the system as required by clause 2 of the contract. However, if the plaintiff is entitled to levy a charge for a dropped call despite the units of time not having expired before the call dropped then the term sought to be implied could affect the accounting between the parties and hence it needs to be considered.

The issue is again whether this term could be considered to have been tacitly agreed by the parties. The background to this issue is that it is clear that the agreement meant that the plaintiff was to be charged a tariff determined by defendant for each minute or part thereof that a call was made. That is the only inference from the terms of the agreement (as I have already said) and it was the way in which the agreement was executed.

It therefore follows that when a call was commenced and then dropped before the minute had expired that in terms of the tariff provision the charge for the unit of a minute was payable. The question is then whether the plaintiff was entitled to some form of adjustment (so that the plaintiff would lose nothing in consequence of the dropping of the call).

I cannot with conviction say that the condition which I am being asked to imply was of the greatest importance to the plaintiff when the contract was entered into, in that the issue of charges relating to dropped calls may not have occurred to the representatives of plaintiff. I am therefore uncertain whether it

would be correct on the very limited material placed before me to say that the term "*is one of the very greatest importance*" to the parties. It may well be that it was of the very greatest importance to the defendant but I do not think that I have sufficient material to make such a finding although it seems likely to me. However, the present case must be viewed against the background that the defendant had drawn and the parties contracted on the basis of a very detailed written agreement which on the only reasonable interpretation and that common to the parties provided that the defendant was to pay a tariff fee for usage for a minute or part thereof. The implied term contended for relates to failure of the defendant "*to maintain the connection of the cellphone to the system*", an obligation undertaken by defendant in terms of clause 2 of the agreement. If it was possible that some fault in defendant's own connecting arrangements could result in the connection not being maintained and thus causing a dropped call, then defendant could hardly not have been aware of this. The failure to include a clause in the agreement of the nature now contended for is therefore an indication that defendant did not intend that such term should be included and/or a reason why the court should be "*very slow to apply a term in the contract which is not to be found there*".

The evidence showed that the system could detect a dropped call but not its cause. It was not suggested to Engelbrecht that any other situation prevailed when the contract was entered into.

The contract thus operated in the context of a system which according to Engelbrecht could detect a dropped call but not what caused it. It would therefore follow that the system could not detect that the fault which caused the dropped call was a break in the connection between the client and the system i.e. the defendant "*failing to maintain the connection of the cellphone to the system*". It also operated in the context of the billing being based on one minute or less of use.

In these circumstances the implementation of the implied term contended for would obviously give rise to practical difficulties. Firstly, by some means the cause of the dropped call would have to be identified and isolated as being a failure to maintain the connection to the system. Secondly, the system of charging per minute or part thereof would have to adapted to give the client the benefit of the unexpired portion of the minute for which had been charged. Alternatively to that the client would have to be given a full free minute that being the normal charge unit. This in turn would lead to the client gaining an advantage or potential advantage in that he could now have the period of the dropped call plus an extra full minute for the normal charge for one minute. If, on the other hand, the term was not implied then the defendant had an advantage in that it was entitled to charge for a full minute which had not been fully utilised and in circumstances where the client wished to utilise more of the minute than had expired before the call was dropped.

I do not see it as being necessary for commercial efficacy of the contract that the term contended for be implied. To imply the term would certainly result in a potential advantage (which could be considered unfair) being obtained by the defendant but to imply it would also result in considerable practical difficulties the defendant and would potentially give the client an advantage which could be considered to be unfair in relation to billing.

The factors which lead me to the above conclusion are the comprehensive nature of the contract; the fact that the agreed system of billing which made no provision for any form of credit or reduction of charge for a dropped call; the fact that the charge which the plaintiff wishes to avoid in the case of a dropped call is the inevitable result of the fee system agreed on; the manifest inconvenience to the defendant of implying the term in the context of the billing system in operation; and the possibility in certain circumstances that the application of the implied term would give the client a potentially unfair advantage in the form of airtime for which the client does not have to pay.

Given the factors which I have enumerated I am unable to conclude that the defendant (in particular) concluded the contract intending to agree to the term sought to be implied. Indeed the indications seem to me all to be against such intention or tacit agreement on the part of the defendant.

Accordingly I conclude that the term pleaded in paragraph 14.3 of the particulars of claim has not been shown to have been tacitly agreed on by the parties nor is it necessary to imply it in order to give business efficacy to the contract.

Paragraph 14.4

"*The Defendant would not be entitled to payment of the specified unit charge for dropped calls dropped during the period to which the unit charge relates and occasioned by its failure to maintain the provision of the service set out in paragraph 13.1 supra.*"

For reasons already included in those related to paragraph 14.2 I can find no legal basis for implying this term.

Paragraph 14.5

"*The Defendant would not be entitled to payment for the unit charge period during which a call terminated abnormally namely by reason of the system failing to maintain the signal and caused by a fault in the network.*"

For reasons already included in respect of paragraph 14.2 I can find no legal basis for implying this term.

Order

In the result I find that the plaintiff has failed to establish that any of the terms pleaded in paragraph 14 of the particulars of claim are to be implied into the contract between the parties.

Mr Van Blerk asked that the claim be dismissed with costs would *prima facie* seems to me the correct order if the terms are not to be implied. I have checked my notes and I cannot find any answer to this from Mr Lamont. In the result I will make the order sought by Mr Van Blerk but *ex abundante cautela*, I will allow a period for either party to make submissions in this regard, failing which the order dismissing the action will become final.

The claim raised an issue of very grave importance particularly to the defendant and I am of the view that it was a reasonable precaution to employ the services of two counsel whose costs will be allowed.

In the result I make the following order:

1. The court finds that the plaintiff has not established that any of the terms pleaded in paragraph 14 of the particulars of claim (as amended) should be found to be implied or tacit terms of the contract between the parties.

2.

(a) The action is provisionally dismissed with costs which will include the costs attendant upon the employment of two counsel, but not the costs drafting, copying or serving defendants' plea.

(b) Either party may within one month make submissions in regard to the order in (a) above, on notice to the other party.

(c) Should no submissions be made then the order in paragraph 2(a) above will become final.

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D MARAIS
JUDGE OF THE HIGH COURT