IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO. 945/2014**

In the matter between:

LUNGISANI VILAKATI **Plaintiff**

and

PURELL (PTY) LTD **Defendant**

Neutral citation: *Lungisani Vilakati v Purell (Pty) Ltd, (945/14) [2017] SZHC158 (27th July, 2017)*

CORAM: C. MAPHANGA, JUDGE OF THE HIGH COURT

HEARD: 23rd MARCH, 2017

DELIVERED: 27th JULY, 2017

[1] This is a case whose facts are that in the month of December 2013 the Plaintiff engaged the defendant to drill a borehole for the suppply or water at his homestead in Ntabamhloshana. According to the Plaintiff when he enquired with the Defendant's office about

the service he was told to pay a deposit of **E15,000** and was subsequently invoiced for the work after the completion of the drilling. The total cost of the drilling works came to **E25,000.00** after payment of the balance by the Plaintiff.

[2] All was well until the Plaintiff consulted a supplier of borehole pumps to investigate and quote for the installation of a submessible pump in the borehole. During this process he learned from the consultant involved that the pump could not be installed as it could not reach water as the bottom of the borehole at the maximum depth was dry. But he also discovered a disparity between the depth of the borehole in the specifications stated in the invoice and the actual depth as determined by the consultant upon visiting the site for his quote.

[3] The Plaintiff immediately took the matter up with the Defendnat and reported the problem with one Mr Royet Ntshalintshali, the Defendant's director and manager. It is common cause that upon receiving this complaint the Defendant visited the Plaintiffs site to investige the cause of the problem. At the site he caused the borehole to be opened and worked on it with a view to identifying and rectifying the cause of the problem.

[4] It is also common cause that after the second visit to the site by the Defendant the Plaintiff was told by the Defendant that the borehold required the insertion of certain perforated PVC sleeves to line the borehole. Plaintiff says for this proposed solution he was required to pay an additional amount of **E12,000.00** as extra costs. It was then that the Plaintiff, keen to get a workable borehole, thereafter deposited to the Defendant a further sum of **E6,000.00** towards the cost of this work.

[5] From hence the evidence of the parties differs materially. According to the Plaintiff after receiving part payment of the additional sums quoted by the Defendant, the latter returned to the site to attend to the dysfunctional borehole and attempted to resolve the problem by carrying out some work which included the installation of the recommended PVC casing. As it turns out this was unsuccesful. The casing could not be rammed or knocked into place as it shattered and broke as it was worked. In the result the Defendant left the site without rectifying the cause of the failure of the borehole. There were further attempts to ask the Defendant to complete the work but the latter was not responsive.

[6] When it became clear to the plaintiff that the defendant was unwilling to return to the site to complete the work, he then resorted to hiring another drilling contractor to drill an alternative and new borehole for him. This process was succesfully carried out and this second borehole is functional and fully operational to date. It is only with this new borehole that he has been able to draw water. The original borehole having failed and become virtually abandoned. To this day it remains in that state dry as a bone.

[7] Consequently the Plaintiff has instituted the present action in terms of which he is seeking the cancellation of the contract with the Defendant, the restitution of the total sums paid and expended on the ill-fated borehole contract of **E31,097.00** together with interest theron.

The plaintiff's case

[8] When the plaintiff, Mr Vilakati, gave his evidence his story was simply that when he initiated the borehole project he and approached the Defendant's office and had been assisted by the Defendant's staff and was asked to complete a certain form which he did. His evidence is that the purpose and contents of this form

were never explained to him nor were they discussed between him and the defendant. He attributes this partly to of the timing of his visit- this being at a late hour and at a time of year when the staff were keen to close shop at the office.

[9] Essentially plaintiffs case is a simple one as set out in its particulars of claim. It is that it entered into an oral agreement for the sinking of the borehole. He alleges that it was a material term of this agreement that he would pay as consideration for the works, a sum of E15,000 as an initial deposit with the balance of the fee to be paid upon completion of the work. The defendant would issue an invoice of the total sum payable at that stage once it had worked out the full sums.

[10] Further plaintiff asserts that it was part of the material terms of the agreement that the defendant would commence and complete the works within a reasonable time. In the course of events defendant undertook the works, prepared a report setting out the work done for which it also issued an invoice for the settlement of the fee payable. In that report it set out *inter alia* that the borehole depth was 81 metres upon the handover of the site to the employer.

[11] However, as stated, upon the inspection of the borehole plaintiff discovered that the well was defective in that it was a far cry from the reported depth. In this regard the plaintiff called one George Texeira. He described himself as a consultant and supplier of boreholes who has several years of experience in the field and in the course of his career he has specialised in the installation, supply and maintenance of boreholes in the kingdom.

[12] His testimony was also straight-forward. He was consulted and engaged by the plaintiff to render a quotation for the supply a suitable pump for the borehole in question. He testified that upon reaching the plaintiff's homestead and being shown the site, he set about to inspect the borehole. As he found the borehole head sealed he had to break and remove the seal. Using a device from whose description is akin to a plumb-line lowered into the borehole, he was able to determine the depth of the borehole and was able to determine its condition. It was upon conducting this exercise that he testified that according to his readings the borehole only reached a depth of 60 metres and also determined that at the time the borehole was dry at the very bottom. For this reason and on account of the problem he concluded that he could not be of assistance to the plaintiff.

[13] Plaintiff alleges that despite reporting the defect and despite being made to pay an additional sum of **E6000.00** by the defendant, the latter had failed to remedy the defect or to continue and complete the borehold to a functional or serviceable condition.

[14] In the circumstances Plaintiff alleges defendant is in breach of the agreement on account of its failure or unreasonable delay in completing the works and make good on the defect it is in breach. It is on those premises therefore that the plaintiff seeks the cancellation and restitution as relief on account of the breach.

Defendants Case

[15] The defendant's case as set out in its plea can be summarised as follows:

1. ***That it entered into a written service contract with the Plaintiff for the drilling of a borehole;***

2. ***That the said contract contained and was subject to an express clause excluding any warranty that water would be found;***

3. ***That nonetheless the drilling works were carried out accordingly until water was reached at a depth of 81metres, and having achieved that the borehole was properly finished, developed and sealed; the plaintiff subsequently invoiced for the total costs – the invoice also serving as a drilling report.***

4. ***That thereafter it contracted seperately with the plaintiff for the installation of pvc casing on the borehole after delivery of a quotation for the supply of the casing for this process in the figure of E17 000 against which the Plaintiff only paid E6000; and***

5. ***That the reason the defendant did not return to complete the work was that plaintiff had failed to meet the condition of making full advance payment for the subsequent works and for that reason Defendant did not return to carry out the***

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The issues

[17] From the pleadings there are three issues do be determined in this case and these are:

a) whether the contract was in writing or oral;

b) what the material terms of the contract were; and

c) Whether there was a breach of the said terms by the defendant as alleged by the plaintiff.

[18] I now seek to deal with the facts in light of the issues germane herein at this time.

ANALYSIS

Was there a valid contract and was the contract in writing?

[19] The critical facts facts pertaining to the circumstances and conclusion of the contract as established may be examined as follows:

1. On the 15th December 2013 Vilakati approached defendant's office to enquire about their water borehole drilling services

required in his farm and was attended to by the defendant's clerk/secretary who informed him that:

a) they require a dep of E15,000 to be paid for the drilling service to commence the balance of monies to be payable upon completion;

b) that upon payment of deposit-defendant would go to survey site for borehole location and conduct drilling operations and once completed would issue an invoice whereupon the final fee payable would be worked out;

2. On the 16th December 2013 and pursuant to this offer plaintiff returned and paid the requisite deposit of E15,000. Whilst there he 'completed' and signed a document (which defendant presents as a pro- forma contract); Here I use the words 'completed' and 'contract' reservedly because the form was in fact neither 'complete' and its status as a 'contract' is one of the facts that are in issue herein. I deal

with this aspect further separately. This is in reference to the document titled 'STANDARD FORM DRILLING AGREEMENT bearing letterhead Purell (Pty) Ltd and MANZINI BOREHOLES that the defendant has pleaded and attached to its plea as the contract on the basis of which it was employed by the plaintiff (of course this is in dispute and therefore one of the issues I need to address).

[20] It emerges from the evidence that the contents of the form were neither explained to the plaintiff upon the filling in thereof nor was his attention drawn to the particulars thereof by the clerk responsible. The plaintiff was cross examined at length by Mr Hlophe, the defendant's counsel, about the circumstances of the filling in of the form. During the discourse in the course of which it was suggested and put to the plaintiff that he was fully aware of the contents of the form of contract as these were explained to him by the clerk. Plaintiff refuted these suggestions. The clerk was not called by the defendant to present this version of circumstances with the defendant seeking to call only the director Mr Ntshalitshali who it turns out was not present during the transaction and interaction between the plaintiff and the

clerk at the office. His evidence was highly circumspect and hearsay and I was persuaded was to be rejected as highly unreliable.

[21] On the other hand Mr Vilakati's testimony was on the material aspects consistent and unswayed. He testified that when he signed the form the whole affair was done rather hurriedly as the office was about to close. He maintained under cross examination that the clerk never discussed the contents of the form with him nor were the same explained.

[22] From the pleadings there is in any case no question and thus it is common cause that there was an agreement between the parties. The only dispute is as to whether the contract was in writing and the document pleaded by the defendant on the one hand, or an oral agreement as maintained by the plaintiff.

Contracts in Writing

[23] When parties agree on the main provisions and sign a standard form contract.

[24] From the pleadings the defendant is asserting the standard form contract document signed by the parties to be the single embodiment o fthe contract between them. He relies on as a single memorial of the agreement between the parties and the applicable terms. The document he seeks to rely on and its clauses is what is termed *contrats d'adhesion* or contracts of adhesion or standard form contracts. It becomes a contract of adhesion because though a party may not be *au fait* or even fully cognisant of the terms contained therein, or such terms may not have been brought to his attention or explained to him, he is still bound by it. This is of particular interest in this case.

[25] Mr Magagula contented that as on the evidence before the court was to the effect that the Plaintiff's attention had not been drawn to the nature and contents of the document that the defendants clerk hurriedly got him to sign without so much as a mention of its purpose let alone explanation of its contents, then there could not have been a meeting of minds between the parties. That argument is partly not sustainable at least on the principles. For it is possible that such a form

could have been acceded to with the key provisions being acknowledged by the plaintiff. It would be no less valid simply on the basis that he was not aware of the various clauses, terms and conditions as well as exclusionary provisions that are contained in it.

[26] The learned Kerr, A.J., in ***The Principles of the Law of Contract,***makes a distinction between actual and apparent agreements and as an example of an apparent agreement he refers to an instance where one party signs a standard form which contains a provision that one of them does not understand but does not question. He is no less bound by it than that of whose contents he was fully aware.

[28] The rule regarding written contracts is partly to this effect: where a contract has been reduced to writing the writing is in general viewed as the exclusive memorial of the transaction. (***See Johnson v Leal 1980 (3) SA 927 (A); Affirmative Portfolios CC v Transnet Ltd t/a Metrorail 2009 1 SA 196 (SCA)***. This rule is equally applied and regarded as part of our law and its statement in the leading South African cases is persuasive authority in our jurisdiction.

[29] I would go so far as to say that he who asserts a written contract as the true and sole basis of the agreement between any two parties, he has to produce it and in so doing must have in evidence a complete and valid document containing the essential terms and provisions or elements for it to stand as such. I make this as a corollary and general proposition to the rule.

What is the legal status of the document the defendants has produced and annexed to its Plea as the contract?

[30] The form of contract has glaring omissions in several key respects in regard to certain essential information fields and these emerged during the cross examination of Mr Ntshalinshali by Mr Magagula when he also confirmed the gaps and is also evident from the examination of the document.

a) The names and particulars of the 'Drilling Contractor' is not filled in;

b) Details of the location and geo-physical co-ordinates and position of the borehole are also blank on the

form; further a diagram or sketch of the borehole as required in the form with the specifications described as a sketch with measurements from two fixed points is missing or not attached to the form;

c) Further information fields in clauses or paragraphs 3 and 4 of the form requiring technical dimension data as to the proposed maximum and minimum depths as well as width of the borehole are also blank; and lastly

d) The spaces for dates on the attestation or signature section of the form are also incomplete with no dates recorded thereon although the form itself bears a date at the top.

e) The form does not give details of the fees or charges payable or terms of payment nor are any such particulars attached to the form.

[31] It is clear that the particulars listed under sections B and C of the standard form would fall and form part of the general key terms of

the agreement. However as the form evinces serious gaps or omissions on key and material particulars in the aspects where certain essential information intended to be completed by the parties the document's integrity is circumspect and as such in its complete state cannot be relied on as the contract or a memorial of the agreement of the parties.

[32] The defendant's contention that this document was the written contract between the parties and as its reliance thereon for the terms is untenable and I cannot accept it. Most of all it is missing a fatal element. The full particulars of one of the parties to the agreement. It is a nullity.

[33] The defendant therefore cannot seek to rely on provisions of a non-existent contract. All the document was is a form of no useful practical value as to the terms and conditions of the drilling works contract.

[34] It may seem apparent when one considers the fields of the 'pro-forma agreement' or standard form contract that what the form was intended to do when complete in all material fields; which was to procure and record a contract whose terms would depend on the

supplied and agreed specifications of the borehole. For instance the parties would be agreeing that the contractor would drill within the stipulated depth parameters. One could also suppose that in the event the drilling process hit water of the desired volume of supply, say before reaching even the minimum depth, then the drilling would stop; on the other hand if the drilling were to advance beyond the minimum depth until the maximum point then even at that point the drilling works would be technically complete as the contractor would have no mandate or instruction to go beyond unless authorised specifically to do so.

[35] That's a scenario that one can imagine as reasonably reconcilable with the form design and as such would have been within the contemplation of the parties. However that is not of much relevance here as, in our view, whatever the intent behind the form design, the parties by not completing the vital fields of information as would give meaning to those specifications, actually never incorporated or subsumed their agreement to those terms and as such never intended the same to constitute their contract. So much of the content would therefore be purely speculative in the case before us.

[36] It is my veiw therefore that outside this form we have the oral agreement that the parties apparently entered into in terms of which the defendant was contracted to drill the borehole. That is the essence of the agreement between the parties and I have no hesitation in the circumstance that such was principally an oral one.

The material terms?

[37] From the evidence and the circumstances of the dealings between the parties it emerges that in fact there was only one contract- an oral one-to provide a working borehole; there was no separate and second contract. What the defendant alleges was a second contract was no more than a device on the basis of which sought to charge the plaintiff for further remedial works arising from his own poor workmanship.

[38] In summary what remains is the Plaintiff's uncontroverted evidence that the parties did agree a service contract for the drilling of a borehole on his premises. As the depth and position of the borehole was neither surveyed nor estimated prior to the drilling I am prepared to accept that the implied terms were that the

Defendant was to drill and complete the works until he struck water or for that matter instructed to stop operations.

[39] There was an implied common law warranty that the Deft would carry out the work in a workmanlike manner to a standard in keeping with that of a contractorof his standing; that he would deliver a functional borehole that yielded water or fit for purpose.

Was there a breach?

[40] The defendants key witness Mr Royet Ntshalintshali when giving evidence and upon cross examination described the cause for the failure of the borehole to have been the instability of certain water bearing soil formation which became unstable.

[41] It is therefore common cause that the borehole failed due to the caving in or subsidence of soil formations of sections of the borehole. It is also common cause that the reason or cause for the collapse was due to the fact that no casing had been installed hence the Defendant called for the correction or rectification of this problem by re-drilling, clearing and re-development of the well and

the insertion of casing to the requisite depth to secure the unstable parts of the well and prevent the ingress of sand into the well.

[42] In my view here duty of care questions arise. This is a specialised type of work in which the contractor claimed the requisite skill and expertise. The technical matters and issues involved were only known and appreaciated by the defendant. So were the niceties to do with the mechanics and possible risks involved. Mr Ntshalitshali testified that he became aware, at the time of the drilling, that the well would require fortification with appropriate casing- indeed it is evident from the report he rendered after the drilling work that he did install some steel and pvc casing with a variety of specifications in the original job. These are described and itemised in the report/invoice.

[43] If it is true that indeed he did believe that the borehole would require further casing at that critical time; which apprehension he says was confirmed when the borehole failed – then he failed to take reasonable precautions and exercise the degree of care and diligence to avert the foreseen catastrophe-he cannot blow hot and cold and benefit from his negligence- despite all this he demanded

that the plaintiff pays him more money for the casing and on top of that abandoned the site.

His was a serious dereliction of duty.

Modus operandi of Defendant

[44] It is the Defendant's case that the remedial work that was to be undertaken on the borehole after the collapse or silting was a separate and additional contract. It asserts that for this work it had given the Plaintiff a quote of **E17, 985.78** and in regard to which the Plaintiff paid a deposit of **E6000.00** but failed to pay the balance. It is the Defendant's evidence that it was made plain to the Plaintiff that unless and until he had paid the full amount quoted for the casing, Defendant would not commence the work.

[45] During cross examination Mr Ntshalitshali was to testify that

a) no quotation of the kind allegedly given to the plaintiff for the casisngs was issued for the main drilling works (lack of consistency in Defendants modus operandi);

b) the so-called quotation is undated;

c) It is unclear why, if the defendant was minded additional casing (to the initial casing going as far as 14metres) was required, this sum would not have been included and formed part of the initial work and why such casing was not incorporated and installed in the first place; as opposed to requiring an additional transaction as alleged by the Defendant;

d) the receipt given for the payment of E6000.00 does not tie up with or even make any reference to the 'quotation' nor does it refer to purchase or supply of pvc casings- instead it refers to drilling;

e) Defendant was able to undertake work in the earlier drilling operation despite the payment of a deposit; it therefore begs the question why the insistence of payment of full purchase price as alleged became a strict condition this time.

f) No evidence of any demand for the full purchase price for the casings as alleged has been furnished. In cross examination Mr Ntshalintshali was unable to say with any certainty if such demand had been made as he claimed he did not do so himself but said his Secretary did. Again without calling the Secretary to corroborate his testimony this constitutes unreliable hearsay evidence.

g) Defendant has not tendered to refund the Plaintiff the sums allegedly paid by Plaintiff in part payment for the sleeved.

[46] The defendant's plea is replete with vague and ambiguous averments. In it there are several references to 'initial' or 'first drilling stage; these averments and phrases are not being consistent with the position that there were separate contracts for the drilling and remedial works or that they were regarded as such by the defendant. Again this scenario is as much at such variance with the established facts as to render the same inconceivable and highly improbable.

[47] Instead these facts are consistent with one scenario or inference, which is this: that the Defendant being apprised of the failure of the borehole, investigated the cause and discovered the source of the blockage to the borehole and thereupon undertook to remedy the same. In so doing it passed the costs of sourcing material for the recommended solution to the Plaintiff (being the additional casing) and demanded a deposit which he paid and on that basis then attempted to resolve the problem and carry out the remedial work.

[48] Alas the remedial work proved unsuccesful when the casing material collapsed and failed when they tried to insert it with their equipment. This could have been due to the poor materials chosen for the work or a wrong specification for the problem encountered. I do not accept that it specified the casing or issued a written quotation at the time of taking the deposit. That is consistent with the rather informal manner defendants way it conducted its transactions and its dealings with the Plaintiff.

[49] It was suggested by Mr Hlophe on behalf and indeed he put this position to the plaintiff in cross-examination that he planted the evidence and re-created or staged the damaged casing debris at he borehole site. However no evidence was called to support this

assertion nor was any factual foundation made for the allegation. I have for this reason treated it as purely speculative.

[50] I am satisfied with the Plaintiff's version of the events in the aftermath of the silting of the borehole and specifically with the Mr Vilakati's evidence which was confirmed in material respects by Mr Ntshalitshali's own testimony. Specifically it us noteworthy that when the plaintiff reported the problem of the borehole to the Defendant, the latter sent out two successive missions –namely: the investigating team that went to find out what had happened and to verify if in fact it is true that the borehole and become blocked, and secondly a subsequent visit, this time in the presence of the Defendant's director, Mr Ntshalintshali who led the team, to carry out work on the borehole. This is the aspect that, according to Mr Vilakati, constituted the corrective work the Defendant carried out in an attempt to rectify the silting issue and involving the installation of the sleeves or casings.

[51] Mr Nthsalitshali denies that the purpose of the second visit was to remedy the failure of the borehole and to fix additional pvc casing, but instead tenders the far fetched explanation that he had gone there with the full drilling equipment simply to investigate and

verify the status of the well for purposes of determining what type of pvc casing he had to instal. By all accounts this was elaborate and involved technical work in which only he is specialist and knowledgeable. In his testimony he impressed in his level of technical and specialist insight in the field. He was especially persuasive in his diagnosis of the cause of the failure of the borehole. It appears as stated earlier that with this knowledge he was able to cut the sail according to the wind and adapt his testimony as he went along. Some questions do however arise to which I remain unclear. One is the fact is he did not charge a fee for the 'extra' work and or even incorporate the additional work in the so-called quotation. It renders his testimory that much more circumspect in this regard especially as he insists this constituted additional work. It remains unclear who would bear the cost of the extra attendances if the 17000 was only for casing material.

Implied or tacit warranty that borehole fit for purpose

[52] Important element in the Defendants evidence is that it asserts that during the initial drilling operation it had struck water when it drilled the well to 81 metres. Mr Nshalintshali also testified that at this stage the Deft had undertaken the standard procedures for

finishing the borehole including the so-called 'development' process of the borehole, to ensure the water drawing from it was clean and clear. This is consistent with its position that according to Defendant it had finished the work hence it accordingly submitted its report and invoice for the work done.

[53] This is also consistent however that it was a material term of the contract that the Defendant would:

a) survey and identify the site for drilling position; and

b) accordingly drill a seviceable borehole

[54] Indeed the defendant carried out the process and having 'completed' the work vacated the premises after sealing the borehole. There was an implied warranty that the borehole was fit for the purpose. No indication that any difficulties or anything untoward had been encountered during the sinking of the borehole by defendant. In fact, in the circumstances the defendant effectively held out that the works had been all but succesfully completed. Mr Ntshalintshali's overall testimony gave the impression that to all concerned all was well and the object of the contract had been achieved. His version is that the Plaintiff himself

witnessed the event of the 'striking water' so that it was not necessary to report this to him. Vilakati refuted this version when put to him in cross examination.

[55] He maintained that he was not present when the crew finished the work on the day in question but did receive a telephonic confirmation from the defendant's staff that the works on the site had been completed and that water had been found. This was reaffirmed by Mr Ntshalintshali who said that he presented the invoice to the Plaintiff who was all too eager to pay based on the assurance given. He himself had seen the evidence of the sealed borehole and took defendant on their word. That was not to be as there were defects in the works.

Breach

[56] On the facts the defendants case seeks to gloss over the real issue giving rise to this action- i.e., the failure of the borehole and the responsibility for the catastrophe. It emerged the borehole was not what it was represented to be. Firstly it was found to fall short of the 81metre depth as held out in the defendant's report and secondly it did not yield any water. Clearly the work was defective.

It was NOT what the defendant had said it was: **a functional water-bearing boredhole of 81 metre depth.**

[57] In a contract of service (not least one for a specialised service as in the instant case) there is an implied warranty that the contractor bears out that the work will be done in a good and workmanlike manner. I should also go so far as to say that he also impliedly bears out that what he constructs will be fit for the purpose for which it is made. (***See Vilho Elifas Sheetheni Kamanja v Willem Andries Stephanus Smith Case No: (P) I 467/2008; also Simon v Klerksdoorp Weldeng Works 1944 TPD 52; Hughes v Fletcher 1957 (1) SA 326 (SR); Myres (GH) & Co v Brent Cross Service Co. [1934] KB 46 at 55; Young and Marten Ltd v McManus Childs Ltd [1968] 2 ALL ER 1169 (HL).***

[58] It follows from the above that a contractor necessarily is also expected that he will execute his reponsibility with due skill and care.

[59] The duty of establishing the existence and operation of an implied term in a contract falls within the onus of proof which is ordinarily on a balance of probabilities. In discharging this onus the courts

have come to recognise the so called hypothetical *officious* bystander fiction as an aid for assigning the common intention of the parties. In the classic oft-quoted dictum of *De Villiers J in Simon v DCU Holdings (Pty) Ltd* and others where he said:

> *"In order to establish a tacit[used here in the same meaning as 'implied'] contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem"*

[60] ***In Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 A at 531*** this is how the court explained and articulated the concept of an implied term of contract:

> *"In legal parlance the expression "implied term".,, is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of cause, without reference to the actual*

intention of the parties. The intention of the parties is not totally ignored. Such a terms is not normally implied if it is in conflict with the express provision of the contract. On the other hand it does not originate in the contractual consensus: it is imposed by the law from without. Indeed, terms are often implied by the law in cases where it is by no means clear that the parties would have agree to incorporate them in their contracts. Such implied terms may derive from the common law, trade usage or custom, or from statute. In a sense "implied term" is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts, it is naturalium of the contract in question. "

[61] Warranty or representation that water had been found and that borehole would produce water. See Kamanja case;.

In the circumstances of this case and in light of the assumption by the defendant of complete responsibility to

survey, design and conduct the drilling procedure without any specifications or input from the client as to the parameters of the borehole and other technical aspects, it is reasonable to infer that the defendant a 'design and construct' responsibility if one were to borrow the term from the construction field.

[62] In such cases certain duties arise and I can do no more than refer to the case of ***Kohler Flexible Packaging (Pinetown)(Pty) Ltd v Marianhill Mission Institute & Others 2000 (1) S/A 141 (D) at*** *144E* There the court held that:

> *"Although the full terms of the consulting contract and the construction contract have not been pleaded, it is clear that in each case the alleged duty to design and/or construct the buildings with due care, skill and diligence arose from the contract, that the alleged failure to do so constituted a breach of contract and that the consequent damages allegedly suffered by the plaintiff are those which would place it in position it would have occupied if the contract had been properly performed."*

[63] I would say the relationship between the parties in the instant case is akin to the circumstances in the Kohler case in so far as laying the liability for the failure of the works and incidence of fault and breach.

[64] I am satisfied from the evidence that after the failure of the borehole what the defendant was attempting to do was shirk this responsibility and to transfer it to the plaintiff by simulating an additional contract. It is also clear from the established facts that in effect the defendant was doing remedial work and even then it does appear that even then the damage it was 'out of its depth' when confronted by the enormity of the problem and in undertaking effective remedial work. At the end it simply abandoned the work under the subterfuge of an alleged 'breach' in attributing its failure to complete the work to the plaintiff's failure to pay the 'balance' of the cost for the materials. To date it still retains the plaintiff's so called deposit and defendant has not tendered to return the same even in its papers herein.

[65] In the circumstances I find for the plaintiff that there was a breach of contract by the defendant both in its failure to complete the work within a reasonable time and in failing to deliver a serviceable borehole but a defective one. I accordingly grant the relief claimed for the restitution of the sums paid by plaintiff. I accordingly make the following order:

a) cancellation of the agreement;

b) payment by defendant to the plaintiff of the sum of E31 097.00; and

c) interest of 9% per annum on the sum of E31 097.00; plus

d) costs of suit on an ordinary party and party scale.

MAPHANGA J

For the Plaintiff : S. HLOPHE

For Defendant : M. MAGAGULA