REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/27890

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

5/12/2014
DATE

SIGNATURE

In the matter between:

SOUTH AFRICAN PETROLEUM ENERGY GUILD (NPC) Applicant

and

RMB PRIVATE BANK Respondent

JUDGMENT

SUTHERLAND J:

Introduction

[1] The applicant is a customer of the respondent bank with whom it has a current account. The bank froze the operation of the account in June 2014 and it remains frozen, some five months later. The application is to unfreeze it.

[2] The sole basis in law relied upon to freeze the operation of the account is an alleged power that the bank has in terms of an alleged term of the agreement between the parties, which is said to be either tacit or implied by law. The existence of the term contended for is denied by the applicant. The sole question for decision is the existence of the term.

[3] The controversial alleged term was formulated during argument by counsel for the respondent thus:

> " In the event of the bank discovering, or reasonably suspecting, that a client's account is being used for money laundering in terms of South African Law, or any other illegal activity, the bank may place a hold on such account to prevent operation thereof until such time as the bank is satisfied that the moneys in the account are not the proceeds of illegal activities, subject to the client approaching a court of law to challenge the reasonableness of the bank's suspicion of money laundering or illegal activity."

[4] Further, in argument, when asked about whether there is a time limit on how long the bank can maintain the freeze, the submission advanced was that a court would decide that fact, if necessary.

[5] The first leg of the argument was that the term is tacit, and the second leg, is that, in the alternative, the term is implied.

The origin of the controversy

[6] The bank is at present the defendant in an action by Sasol in which Sasol demands the bank pay some R300million rand on performance guarantees it issued for the due payment by an insolvent company to Sasol for payment of petrol. The bank contends one of its employees fraudulently issued the guarantees. The bank has sought to investigate what happened to the proceeds of the petrol sold and delivered. The fruits of that investigation have led the bank to adopt the stance that the shareholders and directors of several other companies were involved in a money laundering scheme. Among the people and other companies who it is believed connived in the scheme are the applicant and its directors. The money in the applicant's account, if the bank's suspicions are correct, is part of the booty misappropriated from the insolvent company which would have otherwise been used to pay Sasol.

[7] The applicant denies that there are any sound grounds to implicate it or its directors in that scheme, if it exists. Plainly a dispute of fact exists.

[8] For purposes of this application, whether or not it is true that the applicant and its associates are culpably involved in criminal activity, is not a question that can be decided, but for the purposes of the argument advanced about the legal basis of the bank's claim to act as it has, the applicants are prepared to assume that the banks suspicions are reasonable and that the applicants are engaged in money laundering and related illegalities. The applicant's case is simply that the bank may not lawfully freeze its account as it has done, even if it had good grounds to suspect the applicant's money was the proceeds of illegal activity.

The written agreement

[9] The parties relationship is of some seven years standing. It is regulated by what seems to be a boilerplate standard agreement for a single facility account. Clause 15.1 provides for no variations save in writing and signed by both parties.

[10] The subject of money laundering is expressly addressed. Clause 15.3 provides:

> 'You warrant to the bank that any funds transferred to your facility will not represent the proceeds of, or have not been derived from any activity which would be considered illegal or a crime under South African money

laundering legislation. The bank may be required to place a hold on your facility in accordance with directives issued in terms of the Financial Intelligence Centre Act 38 of 2001,(FICA) in which event the bank assumes no liability for any loss damage or claims that may occur as a result of such hold being placed on your facility.'

Is there a tacit term as alleged?

[11] An inspiration for the contention seems to include the decision in Afriq Medical Distributors v FNB 2010 JDR 1104 (GNP. The main issue was the validity of certain letters of credit. A hold had been placed on Afriq's account. It was held that the money in it could be traced to a contaminated transaction. At [21] it is recorded that a witness of Afriq 'conceded that it was a tacit term of the contract between [Afriq] and the [bank] that should an amount deposited into [Afriq's] account be traced to a fraudulent transaction or if the monies deposited are proceeds of crime, the [bank] would not be obliged to pay such proceeds.' The court thereafter held at [33] that ' the relationship between a bank and the client are regulated by a contract and the tacit terms of the law, for example, it is trite that a bank will have no obligation to pay out funds to its clients if it knows that funds are proceeds of a crime. A person who is entitled to the said funds can claim these funds from the bank.'

[12] Several observations about the judgment bear mention. First, the remarks seem to be obiter, and the finding made no contribution to the finding necessary for the order invalidating the letters of credit. Second, the concession made by

the witness absolved the court from making a finding on the existence of such a term. Third, it is not certain what was meant by the phrase 'tacit terms of the law' as that terminology is at odds with the notion that a tacit term is one which is imputed, in accordance with certain principles, to the intention of the parties to a contract, and that the law implies certain terms, sometimes called the naturalia to a contract. Fourth, I must respectfully disagree that the proposition is trite. In the Afriq Case, no basis was laid for the proposition, and the judgment does not narrate any evidence that might afford a foundation for concluding that the concession was correct. Accordingly, the decision is unhelpful in deciding the present case.

[13] The approach to determining the existence of a tacit term in any contract begins with an examination of the text of the contract and an understanding of the purpose for which the contract was concluded. The aim of imputed such a term is to avoid the contract being ineffective and as a result, the purpose of the contract being unfulfilled.

[14] Corbett AJA in Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974(3) SA 506 (A), having described a term implied by law, at 531-532 went further to state the following about what is now universally called a tacit' term:

> 'In the second place, "implied term" is used to denote an unexpressed provision of the contract which derives from the common intention of the

parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention (see Dahl v Nelson, Donkin and Co. (1881) 6 App. Cas. 38 at p. 59; Techni-Pak Sales (Pty.) Ltd. v Hall, 1968 (3) SA 231 (W) at pp. 236 - 7; Chitty, Contracts, 23rd ed., p. 313; Weeramantry, The Law of Contracts, p. 573; but cf. Trollope & Colls v N.W. Hospital Board, (1973) 2 All E.R. 260 at pp. 267 - 8). This same general concept would appear to underline the following dictum of VAN DEN HEEVER, J.A., in Van der Merwe v Viljoen, 1953 (1) SA 60 (AD) at p. 65:

"Die uitdrukking 'stilswyende beding' dui reeds daarop dat dit iets moet wees wat die partye bedoel het, of geag moet word te bedoel het, maar waaraan hulle geen uiting gegee het nie."

(My underlining).'

And at 532 H – 533B;

'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) SA 211 (AD) at pp. 214 - 5, and the authorities there cited; S.A. Mutual Aid Society v Cape Town Chamber of Commerce, 1962 (1) SA 598 (AD)). The A 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".'

[15] Moreover, in Wilkins v Voges 1994(3) SA 130 (AD) at 140D, Nienaber JA held that:

'...., an imputed tacit term is only read into the contract if both parties overlooked or failed to anticipate the event in question; it is based on their assumed intent in respect of a situation they had not bargained for.'

[16] The express term alluding to money laundering, clause 15.13 has already been mentioned. What could justify the imputation of the tacit term, as expressed by counsel? On the Reigate test, would a client have answered 'of course', if it had been put that if the bank believes reasonably that you are depositing dirty money, the bank can keep it sterilised until a court orders its release? Alternatively, is the operation of a bank account such that clients would

readily agree that the bank has a discretion to put a hold on money based on its belief, before any objective adjudicative process has occurred? Moreover, given the express protection enjoyed by the bank in clause 15.13 should the bank be compelled by the Centre to put a hold on a client's account, would the parties have really gone further taken and agreed that the bank on its initiative could freeze the account for an indefinite period, based on its subjective belief, and that it would require court proceedings to test the reasonableness of such belief to get the money released?

[17] I am unpersuaded that the parties would have agreed to such an unbalanced arrangement in whereof, in effect, a client is held ransom to the bank's discretion. No such term is necessary to operate an account, nor necessary to protect the bank. The case for a tacit terms fails.

Is there such a term implied by law?

[18] The argument advanced to support the existence of a term implied by law is said to be premised on this dictum from Alfred McAlpine (supra) at 531 E-F:

> 'In the first place, it [ie an 'implied term'] is used to describe 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. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions 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 law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract. Ready examples of such terms implied by law are to be found in the law of sale, e.g. the seller's implied guarantee or warranty against defects; in the law of lease the similar implied undertakings by the lessor as to quiet enjoyment and absence of defects; and in the law of negotiable instruments the engagements of drawer, acceptor and endorser, as imported by secs. 52 and 53 of the Bills of Exchange Act, 34 of 1964. 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 a naturalium of the contract in question.'

[19] The term to be implied does not differ from what was advanced as a tacit term. Why would such a term be implied? The argument falls into two categories:

19.1. The implications of warranty given by the applicant in clause 15.13.

19.2. The social role of a bank and a duty of integrity, given the moral norms of society.

[20] The warranty is an important contractual obligation. However, to link the breach of that warranty to a discretion to withhold a client's money is a stretch too far. Breach of a material term of a contract, of which this warranty is an

example, gives the innocent party an election to cancel the contract. The right to cancel is the limit of what a breach of a warranty implies. It cannot be construed as a springboard for unilateral seizure of an asset of the defaulting party. Thus, standing alone, a breach of warranty is unhelpful for the respondent's argument. Can it contribute as part of a greater whole to support the overall argument? This aspect is addressed again hereafter.

[21] It is contended that a bank has certain duties of integrity which include refraining from allowing its facilities being used for unlawful means. What would be the source in law of such a duty? No common law rule was invoked; instead two statutes are referred to.

[22] The first is FICA, which exists to inhibit unlawful activity in financial dealings and includes specific provisions to combat money laundering. It defines what is money laundering and incorporates section 4 of Prevention of Organised Crime 121 of 1998 (POCA) which criminalises money laundering.

[23] Part 3 (SS 27 – 37) of FICA imposes specific obligations on banks. The Centre may require the banks to do various things, including reporting suspicious transactions in terms of section 29 and in terms of section 34, instruct a bank ad hoc to put a hold on moneys. These are the provisions that were obliquely alluded to in clause 15.13 of the contract.

[24] From out of the plethora of these provisions, it was argued on behalf of the respondent that Section 4(b) ii (bb) of POCA was relevant to imputing an implied term: Section 4 provides:

> 'Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-
>
> (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
>
> (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,
>
> which has or is likely to have the effect-
>
> (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
>
> (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-
>
> (aa) to avoid prosecution; or
>
> (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence.' (emphasis supplied)

[25] The contention is that the provision will be transgressed if the respondent does not put a hold on the applicant's account, and later if it is proven that the money was dirty, the fact of respondent's suspicions will damn it if were to be

supine. However the answer to such a dilemma, if it were to exist, is Section 29 (1) & (2) of FICA:

29 Suspicious and unusual transactions

(1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that-

(a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(b) a transaction or series of transactions to which the business is a party-

(i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(ii) has no apparent business or lawful purpose

(iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act;

(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or

(v) relates to an offence relating to the financing of terrorist and related activities; or

(c) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities,

must, within the prescribed period after the knowledge was acquire or the suspicion arose, report to the Centre the grounds for the

knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1) (a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.'

[26] What happens if a bank does make such a report as section 29 envisagres? Among other possibilities, Section 34 is triggered; it provides:

'Intervention by Centre

(1) If the Centre, after consulting an accountable institution, a reporting institution or a person required to make a report in terms of section 28, 28A or 29, has reasonable grounds to suspect that a transaction or a proposed transaction may involve the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities or may constitute money laundering or a transaction contemplated in section 29 (1) (b) it may direct the accountable institution, reporting institution or person in writing not to proceed with the carrying out of that transaction or proposed transaction or any other transaction in respect of the funds affected by that transaction or

proposed transaction for a period as may be determined by the Centre, which may not be more than five days, in order to allow the Centre-

(a) to make the necessary inquiries concerning the transaction; and

(b) if the Centre deems it appropriate, to inform and advise an investigating authority or the National Director of Public Prosecutions.

(2) For the purposes of calculating the period of five days in subsection (1), Saturdays, Sundays and proclaimed public holidays must not be taken into account.

(3) ....'

[27] It seems to me that the obligations of a bank to initiate action about money laundering are wholly regulated by statute. There is no space, and indeed no need that is discernible in this regard, to imply additional duties on the bank into its contracts with its clients. This outcome can be contrasted with the circumstances illustrated in Van Nieuwkerk v McCrae 2007 (5) SA 21 (W) at 28D where Goldblatt J construed a sale of residential property to include ex lege an term that the buildings were erected in compliance with building regulations applicable to that area, and consciously developed the common Law to reflect that such a term was a naturalium. The respondent's role in combatting money laundering is already spelt out in the legislation: in essence to be vigilant about possible unlawful activity and report it when it is noticed and if lawfully instructed to put a hold on funds, to do so. There is no scope to develop a role for what would be a cousin of the Lex Commissoria to add to the battalions arrayed

against rich crooks. The existence of the warranty, in my view, does not disturb this overall outcome; rather it tends to support the notion that the protections against legitimate criticism of the respondent have been comprehensively addressed.

[28] Moreover, the term sought to be imputed and its radical intrusion on the rights of a client far exceed what FICA authorises the Centre to do. What is sometimes overlooked is that even criminals have rights; the more basic of which is to be convicted before being punished. With the sole exception of the process of Asset forfeiture provided for in chapter 6 of POCA, our law adheres to this order of things.

[29] By contrast, the respondent claims a term that entitles it to freeze R5 million of a business for over five months, and further claims it may continue to do so until the applicant convinces a court that the bank's belief in its wickedness is unreasonable. In my view to imply such a term is untenable. In Schoeman v Constantia Insurance Co Ltd 2003(6) SA 313 (SCA) at [21] Marais JA was moved to remark that 'our common law is basically anti-penal'. In my view that is a salutary thought and the adverse consequences to a client's cash flow, market reputation, and solvency if a bank could invoke such a power over the client is so intrusive, that in my view, the only way to found such a power would be an express term of an agreement. If a bank should desire to operate bank accounts on such a basis in order to pursue its public spirited commitment to the promotion

of an ethos of integrity, it should do so on express terms, not ambush a client ex post facto.

[30] The languid, if not moribund response from the authorities in response to the report by the respondent of a possible crime is lamentable. But the harsh reality is that a bank is not the sheriff in a frontier town. I refrain from offering gratuitous advice about what a bank might do to invigorate the centre, and the police. Self–evidently, if a proper case exists to interdict the operation of the account such an application may be brought by anyone who has a plausible cause of action.

The Costs

[31] Both parties sought penal costs including that of two counsel. As I have found the conduct of the respondent to be without any foundation, the costs must follow that result. As regards, the penal aspect, it is not avoidable that the respondent is not a disinterested person in this controversy; ie a bank merely acting in the public interest alone, albeit in error about its powers in law. Its material interest derives from the litigation with Sasol, and the prospect of holding the applicants to account for the insolvency of the defaulting debtor and the linked alleged fraudulent guarantees. That factor, together with the harshness of the burden the respondent's conduct placed on the applicants, as yet unconvicted crooks as they might be, warrant attorney and client costs.

The Order

[32] I make the following orders:

32.1. It is declared that the decision by the respondent to suspend the operation of the applicant's bank account with it and to effectively retain the moneys therein is unlawful.

32.2. The respondent shall within 2 days of service of this order comply with its obligations in terms of the agreement between it and the applicant concerning the account, and if so directed by the applicant, release all or any funds from the account.

32.3. This order shall not affect any right the respondent has to terminate the agreement with the applicant concerning the account.

32.4. Compliance with this order is subject to any instruction to the respondent in terms of the Financial Intelligence Centre Act 38 of 2001.

32.5. The costs of this application shall be borne by the respondent on the attorney and client scale and include the costs of two counsel.

ROLAND SUTHERLAND

Judge of the High Court of South Africa,
Gauteng Local Division.

Hearing: 27 November 2014
Delivered: 8 December 2014

For the Applicant:
Adv N Cassim SC, with him, Adv Y Ali
Instructed by Saley Laher & Hoosen Inc.

For the Respondent:
Adv R Bhana SC
Instructed by Norton Rose Fulbright South Africa.