IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)
FULL BENCH

Case Number: A159/11

9/11/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

9/11/12 .....
DATE

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SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED **APPELLANT**

and

MZIMKHULU PROPERTY INVESTMENTS CC **1ST RESPONDENT**

TWALA, ERIC WINSTON **2ND RESPONDENT**

JUDGMENT

Fabricius J,

1.

In the Court *a quo* the Respondents herein, by way of motion proceedings, sought the following relief (before Kollapen A.J.):

That registration of transfer of a certain immovable property from the First Applicant to the First Respondent pursuant to a sale in execution held on 15 October 2002, in terms of which sale the First Respondent purchased the said immovable from the Sheriff, is stayed, and it be declared that upon payment by the First Applicant to the First Respondent of the amount owing by it to the First Respondent in terms of the judgment, which was annexed, (such calculation to be performed as if the sale of the First Applicant's property and execution had not taken place), the sale in execution shall be deemed to have been cancelled. A costs order was also sought against the First Respondent.

2.

The judgment that was annexed was that of Swartzmann J of 2 November 2006. This judgment consisted of two parts: It set aside a previous order by Heher J on 12 August 2002 in terms of the provisions of Rule 42(1)(a), and substituted it with another order pertaining to the First and Second Defendants in certain amounts, and declared the relevant immovable property executable. It also made a Settlement Agreement by the parties an Order of Court. In terms of this Settlement Agreement the First Applicant (the First Respondent herein) withdrew its rescission application and tendered the Respondent's (the present Appellant's) costs.

It was noted that the Second Applicant undertook to make payment to the Respondent, care of the Respondents' attorneys of an amount of R800,000.00 within 48 hours of that agreement having been made an order of Court in full and final settlement of the Second Applicant's obligations to the Respondent in terms of the consent to judgment signed by the Second Applicant personally on 20 March 2002.

3.

The action in this matter commenced initially by way of motion proceedings, and on 4 December 2007 Hartzenberg J referred the matter to trial by agreement between the parties. The matter than proceeded before Kollapen AJ who granted the prayers sought, and thereafter also granted leave to appeal to this court. The relevant facts were set out in the judgment of the Court *a quo*, and they are essentially not in dispute. I will refer to the relevant facts that are necessary for a proper understanding of the issues before the Court below and the issue before us:

3.1 The First Respondent lent the First Applicant monies which were secured by way of a mortgage bond registered over the Applicant's immovable property. In addition the Second Applicant bound himself in favour of the First Respondent as surety and co-principal debtor with the First Applicant in respect of the latter's indebtedness to the bank;

3.2 The First Applicant fell into arrears with its repayments under the bond and in consequence the First Respondent instituted action against both Applicants and on 12 August 2002 obtained judgment against both Applicants for payment of

(a) R971,12.56; and

(b) interest at a rate of 14.5% per annum from 16 May 2002;

3.3 The First Respondent obtained an order declaring the immovable property to be immediately executable;

3.4 It appeared that there was an error in the judgment and that the limit of the Second Applicant's liability under the suretyship was R713,000.00 plus interest and costs and charges. The judgment against the Second Applicant therefore in respect of the capital sum should not have exceeded R713,000.00;

3.5 On 2 November 2006 and in order to rectify the error made, the Court granted an order to the effect that the capital amount was limited to R713,000.00;

3.6 On 15 October 2002 the Sheriff sold the immovable property in execution and the First Respondent bought the property for R900,000.00;

3.7 In April 2003 the Applicants launched an application for rescission of the judgment but, as I have said, on 2 November 2006 concluded the Settlement Agreement with the bank and withdrew the rescission application.

4.

The issues before the Court *a quo*:

The First Applicant contended that it was a tacit term of the Agreement or Settlement that upon payment by the First Applicant of whatever amount remained payable to the bank after the payment of R800,000.00 the sale in execution would be deemed to have been cancelled. In addition the First Applicant contended that it was a further term of the agreement that the First Respondent would provide the First Applicant with details of what it (the First Respondent) alleged was thus owing to it, and details of the computation of that amount. The First Applicant contended that regard being had to the tacit terms of the Settlement Agreement, the Respondent was precluded from proceeding to transfer the property into its own name, and accordingly it sought the interdict preventing the Respondent from effecting transfer of the property. The Respondent denies the existence of the tacit terms referred to and contended that the Settlement Agreement had nothing to do with the Respondents' purchase of the immovable property and it was accordingly entitled to take transfer of such if it wished to do so.

5.

In the Court *a quo* parties were in agreement that the Court could rule on the First prayer, but that it was clear also that the declaration was framed in such a manner that the debatement of the indebtedness was not before Court. When the matter was referred to trial, it was ruled that the notice of motion would stand as a simple summons, and that a declaration had to be

filed. All that was pleaded in the declaration was that the Court should rule on the existence or otherwise of the alleged tacit terms of the Settlement Agreement. The bank was not required to meet a case for debatement.

6.

The Court *a quo* accordingly held that the manner in which the relief had been framed, contained no specific prayer for debatement. The First Respondent was therefore not required to meet such a case, or to prepare in that regard. Accordingly the learned Acting Judge ruled that the only issue on which he would adjudicate and hear evidence on, was the question of the existence or otherwise of the tacit terms of the Agreement of Settlement as contended for by the Respondents herein. The Applicant led evidence of one witness, attorney Garatt and the Respondent did not call any witnesses and closed its case.

7.

Having heard this evidence which was largely based on common cause facts and facts relating to what had occurred, and certain correspondence thereafter, the Court *a quo*, quite correctly decided that the only issue before the Court was whether the Settlement Agreement concluded between the parties on 2 November 2006 incorporated the tacit terms contended for. In essence Mr Garatt testified that his mandate had been to settle the dispute between the parties. It would have made no sense for the Second Applicant to have paid a substantial amount of money towards its indebtedness to the First Respondent, with no interest or no regard being had to the status of

the mentioned property, which at that stage, had been sold to the First Respondent. He held that one could only conclude that the payment of the amount was premised on the understanding that such payment had gone a long way towards clearing the indebtedness of the Applicants, and that given that dispute with regard to the outstanding amount, the First Respondent would provide such details and upon agreement thereof, the Applicants would settle that amount. Under those circumstances the First Respondent would have no further interest in the property. On that basis the learned Judge granted the orders sought, and those are the orders that formed the subject matter of the present appeal.

8.

The parties have been litigating in the present context for about 10 years. It is fortunately not necessary to deal in great detail with the evidence of Mr Garatt and various computations and amounts that where debated with him. There are however two significant aspects which import on the question whether or not the relevant tacit terms can be imputed into the Agreement. Mr Garatt agreed that his client did not trust the bank and given the history of the matter the bank probably did not trust the client either. He also agreed that if his client did not accept the computation forwarded by the banker, further litigation would in all likelihood result.

9.

It was submitted by the Appellant herein that the only issue that arose for

determination before us was the existence of the tacit term, and that is indeed so.

10.

Tacit terms: Applicable principles:

A tacit term or term to be implied from the facts was defined in ***Alfred McAlpine and Sons (PTY) LTD v Transvaal Provincial Administration 1974(3) SA 506(A) as follows at 531 to 532:*** *"An unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the expressed term 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 order to determine whether a tacit term is to be imported regard will first be had to the express terms of a contract.

See: ***Pan American World Airways Inc v SA Fire and Accident Insurance Company Ltd 1965(3) SA 150(A) at 175 C.***

It follows that a tacit term cannot be imported on the question to which the parties have applied their minds, or for which they have made express provision in the contract. A tacit term can obviously not be imported where it will contradict an existing express term. It can also not be imported because it is reasonable or convenient for the parties to have included it in their agreement. It must be necessary. It is also not to be imported on the basis that only an unreasonable person would not have agreed to the term. The question is rather, whether the Court is satisfied that both parties did, in

fact, agree. In the proper context, namely whether a tacit term exists or not, the so called "*bystander*" test will be applied. The tacit term must be capable of exact (although not concise) formulation. If there "*is difficulty and doubt as to what a term should be or how far it should be taken, it is obviously difficult to say that the parties clearly intended anything at all to be implied*".

See: ***Desai and others v Greyridge Investments (Pty) Ltd 1974(1) SA 509(A) at 522 to 523 A.***

11.

In: ***Wilkins NO v Voges 1994(3) SA 130(AD) the following was said by Nienaber JA at 136(H) to 137(C):*** "*a tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if parties thought about the matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they would have thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn, rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have*

agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into the contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not express, when such term is not necessary to render the contract fully functional." In the present instance, it is obvious that the tacit term is not "*actual*" but one that must be "*imputed*". It is clear from the evidence of Mr Garatt that the "*disputes*" to be determined by the process of "*debatement*" are fundamental in nature and relate at least to the following:

11.1 Whether the judgment was granted in the correct amount to begin with;

11.2 Whether simple or compound interest was permitted;

11.3 What the applicable interest rate was.

12.

It was contended on behalf of Appellant that this represented the first difficulty with the tacit term contended for: it was not capable of clear exact formulation and therefore was not capable of being formulated in a manner that would permit it to be given effect to. The first logical question that came to mind upon being confronted with the term as formulated by the Respondents was the following: What must happen if the parties do not agree to the calculation provided by the bank? Mr Garatt, as I have said, suggested that the parties would again have to litigate after 10 years, and

as a point of departure would again have to debate whether the initial judgment has been granted in the correct amount initially.

It must be remembered that there is no general duty upon a bank to account for and debate with its client.

See: ***Absa Bank Bpk v Janse van Rensburg 2002(3) SA 701(SCA) at 708 and 709.*** Also, an "*agreement to agree*", or an agreement to negotiate further in order to close gaps in an existing agreement is, as a basic point of departure, unenforceable and insufficient to cure an incomplete agreement, specifically because the parties retain an absolute discretion to agree or disagree.

See: ***Premier, Free State v Firechem Free State (Pty) Ltd 2000(4) SA 413(SCA) at 341.***

Appellants contended, and I agree therewith, that a tacit term would have to be formulated in this manner:

12.1 The bank would provide the CC with the calculation of what it – the bank – contends is owed to it;

12.2 The CC can then agree and pay, or disagree;

12.3 If the CC disagrees, the parties will litigate *inter alia* about the correctness of the judgment granted – by agreement with the CC – in 2002. Appellants submit that such a tacit term that would have to be formulated in this manner, could never be said to reflect the parties unequivocal yet unexpressed common intention, was incapable of being implemented, and made nonsense of, and rendered nugatory the express provision of

the Settlement Agreement in terms of which the First Respondent (the CC) withdrew its application for rescission of the judgment. For the same reasons, the proposed tacit term did not promote business efficiency. If implemented, it would in fact have the exact opposite effect. Business efficiency in the present context required *inter alia* that disputes between parties ought to be brought to finality and determined in a speedy fashion, that judgments that are not overturned on appeal or rescinded ought to be given effect to, that judgment debts ought to be satisfied, that litigation is not to be unduly protracted, and ought not to be left open-ended, and that commercial transactions ought to be given effect to. Accordingly, the Appellant submitted that the proposed tacit term would undermine all of these considerations. It would mean that the parties would somehow "*re-open*" a judgment that has stood unchallenged for 8 years. This would happen entirely at the discretion of the CC, because the CC would have the power to determine whether the banks calculations were correct or not. Therefore, on the application of the bystander test the Respondents had not established the tacit term. Applying the innocent bystander test it would be simply inconceivable, so it was argued, that the bank would have answered the bystander to the effect that the whole issue and dispute between the parties would be and could be re-opened, if the CC did not agree with the figure proposed by the bank. Also, what would

then happen to the Settlement Agreement? The effect of the tacit term would simply be that the Appellant would abandon its judgment and either settle or litigate further.

13.

It was contended that the only relevant enquiry must have been to ask, exhypothesi, whether Miss Cowley acting on behalf of the bank and Mr Garett would have agreed, if the bystander asked, at the time of contracting:

13.1 What would now happen in respect of the property?;

13.2 What would now happen in respect of a statement and debatement of account?;

13.3 What would happen if the statement and debatement did not result in an agreement?

If there was no consensus on these points, there was and is no room or basis for the importation of a tacit term. Having regard to the history of the matter it is inconceivable that the Appellant would have agreed to suspend and relinquish its rights in terms of the judgment, in the hope that there would be honest and *bona fide* future negotiations.

14.

In my view the Respondents herein failed to prove the facts and circumstances which could give rise to the tacit terms contended for. The Court *a quo* erred in finding otherwise, and the following order is accordingly made:

14.1 The appeal is upheld with costs;

14.2 The judgment in order of the Court *a quo* is set aside, and replaced with the following order: The application is dismissed with costs.

JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree:

JUDGE N RANCHOD
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree:

JUDGE T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

Date of hearing: 24 October 2012

Date of Judgment: 9 November 2012

Case no.: A159/11

Counsel for the Appellant:	Adv. J. Daniels
Counsel for the Respondents:	Adv. N.S. Kruger
	Adv. M.J. Kruger