IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: 7958/2007

In the matter between :

SW DE WET N.O. Applicant

and

POLY CLEAR INTERNATIONAL CC
(Registration number 2000/051018/23) Respondent

JUDGMENT DELIVERED ON 17 FEBRUARY 2008

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[1] This is an opposed application for the provisional liquidation of the Respondent. The application is brought on the basis that Respondent is unable to pay its debt to Applicant and accordingly should be wound up in terms of section 68(c) of the Close Corporations Act 69 of 1984 read with the provisions of section 69(1)(a) and (c).

[2] The salient facts briefly are that the Applicant in his capacity as the trustee of the insolvent estate of Edward Carey Slater concluded a written agreement of sale on 1 September 2005 in respect of certain goods which were sold to Respondent for a purchase price of R1,1-million plus VAT. The agreement was subject to the following suspensive condition :

"9. **SPECIAL CONDITIONS**

9.1 This sale is subject to the Purchaser obtaining finance before or on 30 September 2005."

[3] It is common cause that Respondent was unable to raise the necessary finance and that the suspensive condition was accordingly never fulfilled. It is clear in the circumstances that the agreement of sale had lapsed on 30 September 2005 for non-fulfilment of the relevant suspensive condition.

[4] Applicant contends that Respondent is liable for payment of the balance due in respect of the purchase price of the goods and that it is unable to pay this debt which in turn constitutes the ground for Respondent's liquidation.

[5] In the answering affidavit, Respondent raised the defence that the agreement of sale had lapsed due to non-fulfilment of the suspensive condition and that the purchase price was accordingly not due and payable by Respondent. In response to this defence, Applicant averred that Respondent is estopped from denying the existence of the agreement of sale alternatively and in the event that the agreement of sale had lapsed, that a new tacit agreement of sale was concluded by the parties substantially on similar terms to that of the written agreement of sale, save for the suspensive condition. Applicant also averred that the parties had waived the suspensive condition.

[6] Subsequent to filing the replying affidavit, Applicant brought a successful application to supplement the founding affidavit. Leave to supplement was

granted in terms of an order of this Court dated 27 November 2007. The supplementary founding affidavit basically sets out the alternative averment that a new tacit agreement of sale was concluded between the parties as raised in the replying affidavit. In its answering affidavit to the supplementary founding affidavit, Respondent denied the existence of a tacit agreement of sale between the parties. Respondent furthermore averred that Applicant was at all material times aware of the fact that Respondent was not in a position to purchase the goods without the necessary funding from either a financial institution or an investor and that this constituted a condition precedent to any agreement concluded between the parties. Respondent made the following averments in the latter answering affidavit :

> *"3. Prior to 30 September 2005, Respondent had approached two financial institutions to finance the purchase consideration, but in both instances, the applications were unsuccessful and Applicant was personally informed of this state of affairs. After 30 September 2005, it was apparent that both parties were desirous to continue with their endeavours to conclude an agreement in respect of the sale of the assets. To this end, Applicant proposed that I approach First National Bank for financial assistance and in fact introduced me to one Robert Reed from First National Bank for this purpose. Unfortunately, also this attempt proved to be fruitless and Applicant was again advised accordingly.*

4. *In a further attempt to facilitate an agreement between the parties, it was proposed by Applicant that Respondent in the interim pay instalments of R30 000 per month towards the purchase consideration, pending the arranging of finance through a financial institution and/or an investor, neither of which unfortunately came to fruition. Respondent was unable to maintain the monthly instalments due to financial constraints.*

5. *In the premise, I reiterate that no agreement was ever concluded between the parties in respect of the sale of the assets and that the only remedy available to Applicant in the circumstances, is restitution. Respondent herewith tenders return of the assets against repayment of all payments made to Applicant."*

[7] In the further replying affidavit, Applicant admitted that subsequent to 30 September 2005 the parties continued with their endeavours to finalise the agreement. Applicant denied that these endeavours were aimed at concluding an agreement but averred that the agreement already existed, alternatively that a new agreement was tacitly concluded between the parties. Applicant admits having introduced Respondent to Mr Robert Reed of First National Bank and that Respondent's attempt to obtain financing from the bank was unsuccessful. Applicant, moreover, averred that the payment of instalments of R30 000 during July, August and November 2006 respectively was agreed to as an interim measure pending Respondent obtaining financing

in which event the full balance due in respect of the purchase price would be paid in a single payment.

[8] In view of the fact that these are motion proceedings, the well-known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A)* applies to any dispute of facts on the papers. The matter must accordingly be decided on the basis of the facts set out in the answering affidavits together with the undisputed facts set out in the founding and supplementary founding affidavits.

[9] Approaching the matter on this basis, it is clear that Respondent never waived the suspensive condition. In any event, the written agreement of sale contains a non-variation clause requiring all amendments to the contract to be reduced to writing and to be signed by the parties. It is not in contention that such a variation of the agreement never occurred.

[10] Insofar as the issue of estoppel is concerned, it must be accepted on the strength of Respondent's version that the parties continued their efforts subsequent to 30 September 2005 when the original agreement of sale lapsed, to successfully conclude the sale of the assets. It is apparent that under those circumstances Applicant could not have been under a misapprehension with regard to the true state of affairs and that there simply is no basis for estoppel to apply in the circumstances.

[11] Insofar as the conclusion of a new tacit agreement of sale is concerned the existence of a tacit agreement must clearly and unequivocally be inferred from the conduct of the parties. The following dicta in *Nedcor Bank Limited v Withinshaw Properties (Pty) Ltd 2002(6) SA 236 (C) at 247 C-H* are apposite:

> *"[30] ...* [A tacit agreement] *must, in accordance with what has been described as the 'traditional' approach, in fact be the only reasonable inference that can be drawn from such conduct. See in this regard the dictum of Corbett JA in Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc. and Others 1983(1) SA 276 (A) at 292 B:*
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> > *'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that 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.'*
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> *[31] Corbett JA adopted a somewhat less stringent approach in Joel Melamed and Hurwitz v Cleaveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd 1984(3) SA 155 (A) at 165 B-C :*
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> > *'In this connection it is stated that a Court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable*

conclusion from all the relevant proved facts and circumstances is that a contract came into existence....'

See also Muller v Pam Snyman Eiendoms Konsultante (Pty) Ltd 2001(1) SA 313 (C) at 320 G-I... where Comrie J expressed a preference for 'the so-called traditional test, the only reasonable interpretation test provided that the test is applied in a common-sense and businesslike way'. ...

[32] Whether or not there was an implied agreement ... is likewise dependent on the facts and circumstances of the case. More specifically, it must be unequivocally inferred from the conduct of the parties ... that a renewed or new [agreement] has come into existence.

...

[36] ... Similarly, the belief, or impression, of one of the parties ... that there has been a tacit [agreement] is not sufficient to bring a new [agreement] into existence. There must be compliance with the requirements for an implied or tacit agreement."

[12] Applying the above approach to the facts of this matter, it is clear on Respondent's version that subsequent to 30 September 2005, the parties were endeavouring to conclude a new agreement pursuant to the lapsing of the original written agreement of sale. Respondent moreover indicates that

any agreement of sale was always subject to successfully obtaining financing from a financial institution or an investor in order to pay the purchase price of the goods. It cannot, accordingly, be unequivocally inferred from the facts and circumstances of the case or the conduct of the parties that a new agreement of sale had come into existence.

[13] In the circumstances Applicant has failed to establish that Respondent is liable, but unable to pay the purchase price of the goods in question and that a provisional liquidation order should be granted.

[14] I accordingly make the following order :

(a) The application is dismissed with costs.

DENZIL POTGIETER, A.J.