THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 274/07
REPORTABLE

In the matter between:

NEDCOR BANK LIMITED — Appellant

and

SDR INVESTMENT HOLDINGS CO (PTY) LTD — 1st Respondent
SPRINGGROVE CELLAR (PTY) LTD — 2nd Respondent
ZORGVLIET FARMS & ESTATES (PTY) LTD — 3rd Respondent

Coram: SCOTT, NAVSA, MTHIYANE, CLOETE JJA and SNYDERS AJA
Heard: 28 FEBRUARY 2008
Delivered: 20 MARCH 2008

Summary: Implied and tacit terms not to be imported into agreement when in conflict with valid, express provisions.

Neutral Citation: This judgment may be referred to as *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* (274/07) [2008] ZASCA 11 (20 March 2008)

SNYDERS AJA/

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[1] The respondents succeeded with several claims for damages in the Cape High Court before Yekiso J. The claims arose from a public auction conducted by the appellant at which three adjacent wine farms situate in the Stellenbosch area, belonging to the respondents, were sold. It is with the leave of that court that the appellant appeals.

[2] The appellant lent the respondents money and the loan was secured by two mortgage bonds registered over three wine farms, Zorgvliet, Le Pommier and Springgrove. For purposes of this judgment there is no need to distinguish between the respondents as debtors or owners on an individual basis as they agreed to put their individual fortunes together for collective decision. The appellant instituted action for the enforcement of this debt and launched liquidation proceedings against the respondents. Pursuant to this litigation and on 14 November 2001 the parties entered into an agreement that postponed the liquidation proceedings and determined:

'1. Hierdie ooreenkoms sal 'n bevel van die Hooggeregshof (Kaap die Goeie Hoop Provinsiale Afdeling) gemaak word.

2. Die likwidasie aansoeke onder saaknommers 8222/01 en 8223/01 in die Hooggeregshof word sine die uitgestel.

3. SDR, ZORGVLIET FARMS, ZORGVLIET MOUNTAIN en INGLESIDE (hierna kollektief na verwys as "die skuldenaars") erken hiermee dat hulle gesamentlik en afsonderlik die bedrag van R12 778 225.14 tesame met saamgestelde rente daarop bereken teen NEDCOR se prima uitleenkoers, vanaf 12 November 2001 tot datum van betaling, aan NEDCOR verskuldig is, welke bedrag huidig opeisbaar en betaalbaar is. (Voormelde verskuldigheid word hierna na verwys as "die skuld").

4. NEDCOR stem daartoe in dat die uitreiking van 'n eksekusielasbrief voortspruitend uit hierdie ooreenkoms (sodra dit 'n hofbevel gemaak is) oorgehou sal word terwyl die volgende reëling van krag is:

4.1 Die skuldenaars onderneem om die skuld terug te betaal uit die verkoop van:

4.1.1 die onroerende bates van ZORGVLIET FARMS, ZORGVLIET MOUNTAIN en INGLESIDE wat ingevolge die verbandaktes geregistreer ten gunste van NEDCOR onder nommer B47687/99 en B58639/99 verbind is; en/of

4.1.2 alle roerende bates van INGLESIDE, ZORGVLIET FARMS en ZORGVLIET MOUNTAIN; en/of

4.1.3 die bates, roerend of onroerend, van SDR, insluitend maar nie beperk nie tot die aandeelhouding van SDR in ZORGVLIET FARMS, ZORGVLIET MOUNTAIN en INGLESIDE.

4.2 Die skuldenaars word ‘n geleentheid gegun tot 6 Desember 2001 om voormelde bates te verkoop en die opbrengs (of sodanige gedeelte daarvan wat die skuld sal delg) aan NEDCOR te betaal ter delging van die skuld.

4.3 Indien enige gedeelte van voormelde skuld nog nie betaal is teen 6 Desember 2001 nie, word NEDCOR hiermee onherroeplik deur die skuldenaars gemagtig om binne NEDCOR se uitsluitlike diskresie enige bestaande ooreenkomste vir die verkoop van voormelde bates te kanselleer, en om die voormelde bates of enige gedeelte daarvan te bemark en te verkoop:

4.3.1 uit die hand op sodanige terme as wat NEDCOR in sy diskresie goeddink; met dien verstande dat die onroerende eiendomme en roerende bates na verwys in paragraaf 4.1 hierbo nie verkoop sal word teen minder as, onderskeidelik:

(a) R9,5 miljoen ten aansien van SDR se aandeelhouding in INGLESIDE, of die roerende en onroerende bates van INGLESIDE nie;

(b) R6,5 miljoen ten aansien van SDR se aandeelhouding in ZORGVLIET MOUNTAIN, of die roerende of onroerende bates van ZORGVLIET MOUNTAIN nie;

(c) R22 miljoen ten aansien van ZORGVLIET FARMS, of die roerende of onroerende bates van ZORGVLIET FARMS nie;

4.3.2 Indien die skuld nog nie ten volle gedelg is teen 14 Januarie 2002 nie, by openbare veilings op sodanige terme as wat NEDCOR in sy diskresie goeddink; met dien verstande dat daar geen reserweprys ten aansien van enige van die bates sal geld nie.

4.3.3 Alle uitgawes wat deur NEDCOR aangegaan word in die uitvoering van sy regte ingevolge paragraaf 4 hiervan word bygevoeg by en vorm deel van die skuld hierbo na verwys.

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8 Waar in hierdie dokument na ‘n verpligting van die skuldenaars verwys word, is sodanige verpligting ‘n gesamentlike en afsonderlike verpligting van SDR, ZORGVLIET FARMS, ZORGVLIET MOUNTAIN en INGLESIDE.

9 Hierdie ooreenkoms stel nie ‘n novasie van die bestaande ooreenkomste tussen die partye daar nie.

10 Indien enige van die skuldenaars in enige opsig die bepalings van hierdie ooreenkoms verbreek en versuim om sodanige verbreking te korrigeer binne 10 dae nadat skriftelike kennisgewing deur NEDCOR aan die skuldenaar(s) daaromtrent

> gegee is, sal NEDCOR geregtig wees, maar nie verplig nie, om onverwyld voort te gaan met eksekusiestappe en/of om die likwidasie-aansoeke weer terrolle te plaas.'

In compliance with the agreement it was made an order of the high court.

[3] No sale materialised but during early February 2002 the appellant received and forwarded three offers for the purchase of the three farms to Rymer, the controlling mind behind the respondents, for acceptance before 14 February 2002. The offers were made by an American businessman, Haskell, and amounted to R10 000 000 for Zorgvliet, the biggest of the three farms, R5 000 000 for Le Pommier and R5 000 000 for Springgrove. Rymer declined the offers and insisted that the appellant proceed to exercise its rights in terms of clause 4.3.2 of the agreement and arrange a public auction.

[4] The appellant issued instructions for a public auction to be held on 12 March 2002 for all three farms to be sold as one and advertisements were published in terms of those instructions on 23 February 2002. On 8 March 2002 Rymer accepted a written offer (the Bunker's Hill offer) for Zorgvliet in the amount of R18 000 000 from Bunker's Hill Investments 625 (Pty) Ltd, a company apparently obtained by Haskell for the purpose of acquiring Zorgvliet. The appellant was approached with a request to cancel or postpone the auction against payment of the 10% deposit of the purchase price, but the appellant declined. Thereupon the respondents, on the eve of the auction, launched an urgent application in the Cape High Court seeking, inter alia, that the public auction be cancelled or postponed, alternatively that the appellant be ordered to auction the three farms separately, Zorgvliet first and only in the event of the offer achieved being insufficient to discharge the indebtedness, then Le Pommier and Springgrove. After hearing evidence in the matter Van Heerden J dismissed the application with costs.

[5] The auction proceeded on 12 March 2002 as advertised and all three farms with movables thereon were knocked down for R31 000 000. Representatives of either Haskell or Bunker's Hill Investments 625 (Pty) Ltd

ceased bidding at R30 000 000. By that afternoon the appellant accepted the offer of R31 000 000.

[6] The respondents claimed damages under ten headings. Against two of the awards, for R10 779.85 and R83 206.80 respectively, the appellant did not appeal. Three of the awards were abandoned by the respondents on the morning of the appeal. A further two awards concern purely the correct calculation of the balance of the capital owed to the appellant and interest thereon and should never have been the subject of litigation. The parties agreed during the hearing that they would attempt to settle those, failing which, they would refer the dispute to a referee and be bound by that decision. This court is left to decide the main claim for damages (R18 627 100), a claim for damages on the auctioneer's commission (R825 250) and a claim for VAT paid on the auctioneer's commission (R92 750).

[7] The respondents' cause of action is that the appellant breached implied, alternatively tacit, terms of the written agreement by not accepting the Bunker's Hill offer, by not auctioning the three farms separately and by accepting the highest bid of R31 000 000 that same afternoon. The alleged breach on the part of the appellant consisting in the refusal to postpone the auction against a guarantee for the indebtedness pending a potential French offer was not persisted in on appeal.

[8] The implied, alternatively tacit, terms that the respondents pleaded are that the appellant, in the exercise of its authority to sell the farms, was obliged to display good faith towards the respondents, to exercise the skill and diligence reasonably expected from a large banking institution, to take all reasonable steps to procure the highest possible purchase price for the assets and, to the extent that the appellant was given a discretion in the exercise of its authority, it had to be exercised *arbitrio boni viri*[1].

[1] A fair translation in the current day context would be 'with the judgment of a fair minded person'.

[9] A mere reading of the agreement in the light of the facts summarised reveals that the appellant did not contravene the express terms of the agreement. This was conceded by counsel on behalf of the respondents. The express terms entitled the appellant to arrange a public auction at the time that it did and to put all the assets or any part thereof up for auction without reserve. Clause 3 of the conditions of sale applicable to the auction entitled the appellant to accept the highest bid on the afternoon of the auction. That clause provides: 'The sale is subject to confirmation by the Seller to the Auctioneer within 14 (FOURTEEN) days of the sale but before 26 March 2002 at 17H00 and the PURCHASER is held bound by this bid until the expiration of the period.'

[10] An implied term is described in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531E-F as:

'. . . . 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.'

At 532G of the same case Corbett AJA further expounds:

'The implied term. . . is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation.'

[11] Every breach alleged by the respondents involved action that the appellant was entitled to take in terms of the express provisions of the agreement. The respondents never suggested a rule of law that would entitle a court to imply terms contrary to the valid, express agreement of the parties. The facts by no means illustrate that the appellant did not act in good faith, did not procure the highest possible price or did not make decisions as a fair minded person would have. To the contrary, the appellant was virtually standing with a warrant of execution in its hands when it agreed to indulge the

respondents with further opportunities to settle their indebtedness before executing.

[12] A tacit term is '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'.[2] As the inference is also drawn from the express terms of the agreement between the parties it is hardly imaginable that a term contrary to the valid, express terms would be inferred. As in the case of the implied terms discussed above the facts do not support the alleged breaches.

[13] In reaching the above conclusion on implied and tacit terms, I remain mindful of the principle of bona fides that underlies and informs our law of contract.[3] There is nothing to suggest that the parties were not acting in good faith when they entered into the contract.

[14] In relation to the acceptance of the highest bid the respondents pleaded that the appellant undertook 'to ensure that any sale concluded at the auction would not be confirmed within a period of less than the 14 days, which undertaking was tacitly accepted'. In the alternative it was pleaded that, because of the tacit or implied terms alleged, the appellant owed the respondents a 'contractual and/or legal duty to ensure that such confirmation period be fully exploited'. During the hearing of this appeal counsel on behalf of the respondents conceded that the facts do not illustrate that any undertaking was given or accepted and did not pursue the alternative. However, he submitted that the facts give rise to an 'inevitable' inference that the appellant accepted the offer during the afternoon after the auction 'with an improper motive'.

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[2] *Alfred McAlpine* above at 531H. See also at 532H.
[3] *Neugebauer & Co Ltd v Hermann* 1923 AD 564 at 573; *Macduff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573; *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1962 (3) SA 565 (C) at 571E-F; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para [22] and [68].

[15] The respondents rely on evidence by the appellant's attorney, Mr Van Zyl, elicited by the presiding judge during the urgent application to the effect that clause 3 of the conditions of sale would permit of higher offers and the acceptance of higher offers during a period of 14 days subsequent to the auction. In addition evidence was led during the trial that the representative who stopped bidding at R30 000 000 obtained additional instructions after the auction to increase the offer and when he conveyed that to the auctioneer and Van Zyl he was told that it was too late for further offers. This evidence was disputed, but even if accepted does not assist the respondents' case.

[16] Clause 3 was there for everybody to read and interpret and act accordingly. It imposed no duty on the appellant to delay acceptance of the bid. To the contrary, it entitled the appellant to accept the bid at any stage within the 14 day period, including the afternoon of the auction. It was open to any other prospective purchaser to approach the auctioneer in terms of clause 3 with a higher offer and have the right that the offer be put to the highest bidder, if that happened prior to acceptance by the appellant.[4] No higher offer ever materialised.

[17] Some additional remarks are necessary about the principle of the exercise of a discretion with the judgment of a fair minded person. The principle operates when a contracting party acquires the right in a valid agreement to decide the prestation of the other contracting party.[5] The facts in the present case are vastly different and the application of the legal principle is inappropriate.

[18] The respondents' construction of the agreement that it appoints the appellant as the respondents' agent to act in the best interests of the respondents to sell the properties and that it provides the appellant with a

[4] Clause 3 read with Clause 3.3, which reads: 'Any further offers during the confirmation period may be presented once, strictly in writing to the Auctioneer subject to the same terms and conditions of this sale. Any higher offers will be presented to the highest bidder at this auction who will have the right to equal or better such higher offer. Any higher offer will be received 24 hours prior to the expiration of the confirmation period.'

[5] *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 935B-937E.

discretion to determine the price at which it is sold is untenable in the circumstances. The appellant is the respondents' judgment creditor. In lieu of issuing and executing a warrant of execution the appellant granted the respondents a series of indulgences to facilitate payment of the indebtedness and at the same time obtained for itself the mandate[6] to sell the properties in satisfaction of the indebtedness. The appellant was fully entitled to exercise its rights expressly conferred in terms of the agreement, subject only to the limitation that it did not act in bad faith.

[19] The award of damages by the court below based on a finding that the appellant breached implied or tacit terms was made in error for the reasons stated.

[20] It is the respondents' case that the appellant did not reasonably incur the amount of R1 325 250[7] it paid the auctioneers. It was said by Mr Duncan, an auctioneer who testified for the respondents, that he would have conducted the auction for R500 000. The court below awarded the respondents a refund of R825 250, the difference between the commission paid and the amount of R500 000.

[21] R162 750 value added tax (VAT) was recovered from the respondents on the commission of R1 325 250. The court below ordered the appellant to refund R92 750 to the respondents, the difference between the VAT paid and VAT on R500 000.

[22] The figure of R500 000 is arbitrary. Duncan conceded under cross-examination that between 2% and 7.5% is generally accepted in the industry and that 5% was a fair and reasonable commission on the sale of immovables at an auction. Mr Joubert, an attorney and estate agent in the area, who testified for the respondents, also said during cross-examination that

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[6] *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) para [7] with particular emphasis on the distinction of movables held in pledge; *Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 (1) SA 613 (T) at 616D-G.

[7] This figure represents 4,275% of the knock down price.

auctioneer's commission of up to 10% is generally regarded as acceptable. The evidence does not support the finding and the award made.

[23] Consequently the appeal should succeed with costs.

[24] The respondents' claim in the court below amounted to well over R20 000 000. They should only have been successful in respect of the two claims that the appellant did not appeal against, in the total amount of R93 986.65. Although the two claims involving pure calculation of the outstanding balance of the debt are not insignificant, they should never have formed part of the litigation to begin with. The fact that they did is largely attributable to the appellant's failure to deal with the explicit and detailed calculations sent to it by the respondents. The success to which the respondents were entitled in the court below does not amount to substantial success and the respondents should not be awarded all the costs of the trial. However, they did have some measure of success and should not be deprived of all their costs. In the circumstances the following order is made:

1 The appeal is upheld with costs;

2 The order of the court below is replaced with the following:

> 'Judgment is granted in favour of the first, second and third plaintiffs as follows:
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> (a) Payment of the amount of R93 986.65;
> (b) Interest on R93 986.65 at the rate of 15,5% per annum from 27 April 2002 until date of final payment;
> (c) The defendant is to pay 20% of the plaintiffs' costs.

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S SNYDERS
ACTING JUDGE OF APPEAL

AGREE:

SCOTT JA
NAVSA JA
MTHIYANE JA
CLOETE JA