THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 223/2014

NOT REPORTABLE

In the matter between:

BOTHMA-BATHO TRANSPORT (PTY) LIMITED	**FIRST APPELLANT**
BOTHMA TERTIUS	**SECOND APPELLANT**

and

NEDBANK LIMITED	**RESPONDENT**

Neutral citation: *Bothma-Batho Transport (Pty) Ltd & v Nedbank Ltd* (223/14) [2015] ZASCA 31 (25 March 2015)

Coram: Ponnan, Leach, Willis and Saldulker JJA and Meyer AJA

Heard: **4 March 2015**

Delivered: **25 March 2015**

Summary: Life policy ceded as security for a debt – insurer cancelling the policy – whether court can order the debtor and the insured to 'procure a policy with at least similar benefits' and cede it to the bank – such an order not competent – tacit terms relied upon by high court inconsistent with written agreement and cannot be incorporated into the contract – appeal upheld – application in the high court dismissed.

ORDER

On appeal from: Free State High Court, Bloemfontein (Jordaan J sitting as the court of first instance)

1 The appeal is upheld.

2 The following is substituted for the order of the high court:

'The application is dismissed with costs.'

3 The respondent is to pay the appellants' costs in the appeal save that the costs of the preparation, perusal and copying of the record shall be limited to one quarter (25%) of the costs incurred in those tasks.

JUDGMENT

Willis JA (Ponnan, Leach and Saldulker JJA and Meyer AJA concurring):

[1] On 11 February 2008 in Sasolburg the first appellant, Mr Tertius Bothma (the insured), resolved in his capacity as a director of the second appellant, Bothma-Batho Transport (Pty) Limited (the debtor), to cede a Momentum Life Insurance Policy No 205810940/001 (the policy) to the respondent, Nedbank (the bank) as security for a loan which the bank had granted to the debtor. The policy insured the

life of the insured for R20 million. The premiums on the policy were to be paid by the debtor.

[2] The bank had extended lending facilities to the debtor described as follows:

(a) an 'on-demand Multi Optional Facility' in the sum of R20 000 000 (an overdraft facility);

(b) a 'Special Project/Asset–based Finance Facility' in the sum of R11 110 000 (relating to instalment sale agreements);

(c) a 'Nedfleet Facility' in the sum of R250 000.

[3] The business of the debtor was essentially one of transportation, making use of heavy duty trucks. In addition to the cession of the policy, the bank had a general notarial bond registered over the debtor's movable assets as security for the debt.

[4] During the beginning of 2009 the bank became aware of the fact that the debtor was experiencing financial difficulties. The bank thereupon terminated the so-called 'asset-based finance facility' or 'revolving credit' facility but, as 'bridging finance', extended a further R4.5 million as a temporary overdraft to be repaid on 30 April 2009. In addition, the bank granted the debtor a moratorium on the repayment of capital and interest for January and February 2009 in respect of the asset-based finance facility.

[5] The debtor defaulted in respect of these 'bridging' arrangements, resulting in the bank sending the debtor unrequited letters of demand. The bank obtained an order of court perfecting the notarial bond. In the meantime, in June 2009, the debtor applied, on an ex parte basis, to the Free State High Court for a provisional order winding it up. The order was granted and made returnable on 30 July 2009.

[6] Thereupon followed a flurry of negotiations. Another of the debtor's creditors, known as 'Izalinx', proposed a compromise in terms of s 311 of the old Companies Act 61 of 1973. This proposal was acceptable to the bank. Upon the application by Izalinx, the compromise was sanctioned by the court and the provisional order for the liquidation of the debtor was simultaneously discharged.

[7] The compromise was made conditional upon the following:

(a) The bank pardoned R3 million of the debt of approximately R28 million that it was owed by the debtor at the time;

(b) The bank, as a secured creditor, would receive a 100% dividend on the reduced amount of the debt;

(c) The bank would grant the debtor a moratorium on the payment of the installment sale agreements (also referred to as 'the asset-based finance facility') until the end of February 2010;

(d) The installment sale agreements would then be repayable over a period of 48 months and the medium term loan over a period of 120 months.

[8] In the meantime, the debtor suffered the theft of vehicles from its business premises. The bank is sceptical of the truth of this but there is nothing to gainsay the debtor's version of events. Despite some intermittent successes, the terms of the compromise could not be met and as a result of this, a settlement conference took place in Sandton which was attended by the legal representatives of both parties. A settlement was reached in terms of which:

(a) The debtor would continue paying its normal monthly installments on the various installment agreements on 1 January 2011 and the reduction of the overdraft on February 2011;

(b) Thereafter the debtor would pay monthly installments of R450 000 until the amount of the outstanding balance had been paid in full;

(c) The debtor would sell all assets in respect of which there were extant installment sale agreements by 31 May 2011;

(d) Any breach of this agreement would result in the full amount outstanding immediately becoming due and payable to the bank and the bank would be entitled to proceed with execution against the debtor's immovable properties.

[9] The debtor defaulted in respect of this settlement agreement and, on 22 July 2011, advised the bank that it had ceased all operations on 30 June 2011. In the meantime, as a result of the non-payment of the premiums on the policy, Momentum Life (the insurer), which had issued the policy ceded to the bank, cancelled it with effect from 1 October 2012. As a result of the insurer's cancellation, the bank brought an application to court that the insured and the debtor take steps to reinstate

the policy, alternatively that they take steps to take out a similar policy and cede it to the bank. The high court (Jordaan J) made an order that the debtor and the insured 'procure a policy with at least similar benefits than the erstwhile Momentum Life Assurance policy no 205810940/001 (the policy), and cede such policy to the applicant [the bank]'. The high court also ordered the debtor and the insured to pay the bank's costs of the application. The debtor and the insured appeal, with the leave of this court.

[10] No allegation was made by the bank in its founding papers that there had been any tacit term either of the overdraft agreement or the agreement of cession that either the debtor or the insured would maintain adequate security for the bank in terms of a ceded life insurance policy with cover of R20 million.

[11] The agreement of cession between the bank and the debtor provided expressly that the bank could pay, in its 'sole discretion, and without any obligation to do so, any premiums which may fall due and charge the same to the cedent's account or to recover the same from the cedent'.

[12] The insured said that the policy replaced a previous policy with the same life assurer. He claimed that he took out the policy on the specific recommendation of a representative of the bank. The insured said he was diagnosed with prostate cancer in June 2011, as a result of which he had a radical operation. When he claimed in terms of the policy as a result of his diagnosis with cancer, the insurer repudiated liability. The insurer claimed that the risk had not been covered in the policy.

[13] The insured claimed that he was misled by both the bank and the insurer about the nature of the cover and, for this reason, had no obligation to maintain the cover. On 1 October 2012 the debtor requested the insurer to cancel the policy but the insurer responded that the policy could not be cancelled by mutual agreement without the consent of the bank.

[14] The high court accepted that, as the policy had lapsed, it could not be reinstated. The court found that there was 'at least' an implied term of the continuing agreements with the bank that the debtor and the insured would maintain adequate

security for the bank in terms of a ceded life insurance policy with cover of R20 million. It was on this basis that the high court made the order that it did.

[15] Even if an order of the kind made by the high court were competent – which it is not – it is amenable to criticism on account of its vagueness and lack of certainty. The desirability of court orders being clear and unambiguous has long been recognised.[1] The reason is not hard to find. There is little point in the making orders of court that are not effective. In the present case, what is meant by 'at least similar benefits than the erstwhile Momentum Life Assurance Policy' is unclear. In what degree must the benefits be 'similar'? Moreover, to whom must the policy appear to be 'similar'? Must the policy be taken out with the same insurer? What if it declines? Must the bank first approve the policy before it comes into operation? By when must performance take place? Must it take place within a 'reasonable time'? If so, how is one to ascertain what a 'reasonable time' might be in all the circumstances of the matter?

[16] Not only is the order of the high court unacceptably imprecise but it purports to order that which, in all probability, may be impossible to perform, because it may be unlikely that, having had a radical prostatectomy as a result of his diagnosis with cancer, that the insured and the debtor would be able to procure a policy 'with at least similar benefits' to that of the policy in question. Even if they had, the premiums may well have been prohibitive

[17] Sight must not be lost of the fact that the agreement of cession was ancillary to the overall overdraft agreement: the cession was given in compliance with one of the terms of the overdraft agreement. Although, as set out above, the particular terms of the facilties granted by the bank to the debtor varied from time to time, both the debtor and the insured have admitted that 'Bothma-Batho ceded the policy to Nedbank as security for all and any sums of money which Bothma-Batho may from time to time owe the bank'. In addition to the remedy which the bank had, in terms of the agreement of cession, to pay the insurance premiums and to recover them from

[1] See for example *Administrator, Cape & another v Nyshwaqela & others* 1990 (1) SA 705 (A) at 715H; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-G; *Garlick v Smartt & another* 1928 AD 82 at 87; and *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 186-195 in which reference is made to the old authorities.

the debtor, it had a further remedy: in the light of the debtor's breach of a material term of the overdraft agreement, it could have 'called up' (cancelled) the overdraft and claimed damages (the amount owing to the bank in terms of the loan).[2] An overdraft is ordinarily repayable on demand.[3]

[18] There is a more fundamental reason why the high court ought not to have made the order which it did: it impermissibly imported terms into a contract which were not even alleged in the founding papers, never mind appear from the contract between the parties. It is not apparent from the judgment of the high court why it found that there was 'at least' the implied term upon which it relied in making its order. It seems the high court may have used the word 'implied' when what it had in mind was a 'tacit' term. Since *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*[4] the distinction between 'implied terms' in a contract on the one hand and 'tacit terms' on the other has been clear.[5] Counsel conceded that the high court had meant to use the expression 'tacit term'.

[19] Even if what the high court had in mind was, in truth, a tacit term, such a term cannot, in the circumstances of this particular case, be imported into the contract. As was said by Trengove JA in *Robin v Guarantee Life Assurance Co Ltd*:[6]

'A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract.'[7]

Here the parties made express provision in respect of this matter. The bank could, in terms of a clause in the agreement of cession pay, in its 'sole discretion, and without any obligation to do so, any premiums which may fall due and charge the same to the cedent's account or to recover the same from the cedent'. This express provision not only points to the remedy which had been available to the bank but also prohibits

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[2] See for example *Nash v Golden Dumps (Pty) Limited* 1985 (3) SA 1 (A) at 22D-H.
[3] See *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA (C) at 546I-551B in which Selikowitz J gives a helpful overview of the authorities around the world on this aspect.
[4] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).
[5] See 531C-535G.
[6] *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A).
[7] *Robin v Guarantee Life Assurance Co Ltd* (supra) 567C-D. See also *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd* [2011] JOL 27883 (SCA); *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175C; *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A) at 215D-216E; *Richter v Bloemfontein Town Council* 1922 AD 57 at 70.

the importation of the terms found by the high court. It follows that the appeal must succeed.

[20] Despite frequent and increasingly insistent remonstrations by this court concerning the unnecessary burdening of an appeal record with documentation that is irrelevant to the determination of the issues,[8] the appellant produced a record 75% of the contents of which were superfluous. For example, not only is the record replete with duplication but it even contains a transcript of counsel's argument in the high court. The order for costs will take account of this.

[21] The following order is made:

1 The appeal is upheld.

2 The following is substituted for the order of the high court:

'The application is dismissed with costs.'

3 The respondent is to pay the appellants' costs in the appeal save that the costs of the preparation, perusal and copying of the record shall be limited to one quarter (25%) of the costs incurred in those tasks.

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N P WILLIS

JUDGE OF APPEAL

[8] See for example *Premie*r of the *Free State Provincial Government & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 42; *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd 2*002 (4) SA 681 (SCA) paras 40-45; Van Aardt v Galway 2012 (2) SA 312 (SCA) paras 35-39 and see also, LTC Harms 'Heads of Argument in Courts of Appeal' 20 *Advocate* December 2009.

APPEARANCES:

For the Appellant:	F Strydom Instructed by: Nolte Incorporated, Vereeniging c/o Mthembu & Van Vuuren Inc, Bloemfontein
For the Respondent:	JJ Buys Instructed by: Baloyi Swart & Associates, Johannesburg c/o Botha Hefer Inc, Bloemfontein