THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 378/2017

In the matter between:

BUFFALO CITY METROPOLITAN MUNICIPALITY **APPELLANT**

and

NURCHA DEVELOPMENT FINANCE (PTY) LTD **FIRST RESPONDENT**

TUSK CONSTRUCTION SUPPORT

SERVICES (PTY) LTD **SECOND RESPONDENT**

NEW BOSS CONSTRUCTION CC **THIRD RESPONDENT**

Neutral citation: *Buffalo City v Nurcha Development Finance* (378/2017) [2018] ZASCA 122 (21 September 2018)

Coram: Lewis, Seriti and Makgoka JJA, and Mokgohloa and Nicholls AJJA

Heard: 31 August 2018

Delivered: 21 September 2018

Summary: Unequivocal conduct on the part of Buffalo City in accepting a payment instruction, entering into a construction contract with a contractor after acknowledging the instruction, and making payment in terms of the instruction led to the inference that on a balance of probabilities, the City and the party issuing the instruction had concluded a tacit contract.

ORDER

On appeal from: Eastern Cape Division of the High Court, East London Circuit (Stretch J sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Lewis JA (Seriti and Makgoka JJA, and Mokgohloa and Nicholls AJJA concurring)

[1] Nurcha Development Finance (Pty) Ltd (Nurcha), the first respondent in this appeal, is a non-profit company that is a wholly owned subsidiary of the National Urban Housing and Reconstruction Agency, itself a non-profit company. The South African government owns 50 per cent of the shares in the holding company. It was established in the 1990s with the aid of the George Soros Foundation for the purpose of facilitating the provision of housing for the indigent and the development of businesses for historically disadvantaged people.

[2] The general arrangement with the holding company was that Nurcha would provide finances to emerging civil engineering contractors, since would-be builders and developers had difficulty gaining access to banking facilities. As a rule, because they had no credit record, they were 'unbankable'. The model envisaged by the holding company was that Nurcha would lend funds for development and construction to a contractor, which would be mentored by Tusk Construction and Support Services (Pty) Ltd (Tusk), the second respondent on appeal. Tusk would in turn administer the cash flow of the project, advance the drawdown payments to the contractor made in terms of a building contract, initially for the payment of materials and labour costs. For as long as progress payments were made by the building contract employer, Tusk maintained control of the contractor's finances so that loans

would be repaid to Nurcha, but the profits made, if any, would be kept by the contractor.

[3] The model required that bank accounts would be opened in the name of the contractor concerned so that it could build up a credit record. In order to maintain its own security, Nurcha required that the entity cede it's right to payment under the building contract to Nurcha. This background is drawn from that sketched by Lopes J in *Nurcha Finance Company (Pty) Ltd v eThekwini Municipality*, unreported decision of the KwaZulu-Natal High Court, Durban, case number 810/2011. It was confirmed by Mr H de Villiers, the managing director of Tusk, when he testified for Nurcha.

[4] In this matter, New Boss Construction CC (New Boss), the third respondent on appeal, was awarded a contract by the Buffalo City Metropolitan Municipality (the City), the appellant, for the construction of structures on 323 sites in Duncan Village, East London in October 2010. The written construction contract was signed in December 2010 for New Boss and for the City in January 2011.

[5] A written agreement of loan between Nurcha and New Boss was signed before then, by New Boss on 11 October and by Nurcha on 20 October 2010. The material terms of the loan agreement were that Nurcha would advance bridging finance to New Boss to enable it to perform in terms of the building contract; Tusk would administer the loan and New Boss would pay it a fee; New Boss would arrange for all the income from the project (progress payments) to be paid into a banking account in its name; Tusk would administer that account and have signing powers in respect of it; and New Boss ceded its rights to money due to it by the City to Nurcha as security for the performance of its obligations under the loan agreement.

[6] New Boss and Tusk entered into a written 'construction support agreement' on 11 October 2010. The material terms of this agreement were that: Tusk would administer the building agreement and the designated account which had been opened in the name of New Boss; Tusk would render administrative and support services to New Boss; and New Boss would repay its loan to Nurcha, and pay service fees to Tusk.

[7] On the same day, Mr N E Lushozi, the member of New Boss representing it, signed what was termed an 'irrevocable payment instruction', which was addressed to the City. Lushozi instructed the City to make all payments due to it under the construction contract into its account (account holder New Boss Construction CC) at First National Bank. He set out the bank account number and stated in the second paragraph (the format is not reproduced here):

'As the Contractor has entered into a loan agreement with Nurcha Development Finance (Pty) Ltd ("Nurcha") and provided security in terms of which Nurcha has agreed to advance bridging finance to the Contractor in respect of the abovementioned project, and whereas Nurcha has appointed Tusk Construction Support Services (Pty) Ltd . . . as intermediary to, amongst other things, provide financial, administration and construction support services to the contractor in respect of this project, this irrevocable instruction and bank account *may only be changed with the written consent of Tusk* . . .'.

[8] The letter made provision for an acknowledgment of receipt by the City. On 14 October 2010, Mr Z Yako, who described himself as a 'Senior Accountant Bank Control' signed the document below the words 'noted and accepted by employer' and stamped it as 'Buffalo City Municipality' 'Assets and Risk Bank Control'.

[9] Work commenced in 2011 and the City paid into the dedicated account on four occasions from January to May 2011. From June 2011 the City made five progress payments into a different account, presumably at the instance of New Boss. Negotiations with the City about payment into a different account yielded no solution. New Boss was in serious financial difficulty and unable to perform its obligations under the loan agreement.

[10] Nurcha thus instituted action in the Eastern Cape Division of the High Court, East London Circuit (to which I shall refer for convenience as 'the high court') against the City in early 2012. It claimed some R3.8 million in damages for breach of contract. The contract alleged was that between Nurcha and the City concluded by conduct over the period from October 2010 to January 2011. Nurcha alleged that in a series of acts it and the City had concluded a contract in terms of which the City undertook to make any payment to New Boss under the construction contract to a dedicated account opened by Tusk in the name of New Boss. The basis of the

contract was that 'the parties conducted themselves in a manner which was only consistent with there being a valid and binding tacit agreement in place'.

[11] The material terms of the contract, said Nurcha, were that the City accepted the irrevocable payment instruction and agreed to make all progress payments to New Boss into the account reflected on the payment instruction signed for by Mr Yako for the City. It accepted that it would only make payments into a different account if Tusk had given its written consent, which Tusk had not done.

[12] The City pleaded first that Nurcha's claims lay against New Boss in terms of the loan agreement, and not against it. It asserted that the cession in that contract to Nurcha was invalid as it did not comply with the provisions of the Local Government: Municipal Finance Management Act 56 of 2003, and that Mr Yako did not have the authority to enter into any contract for the City. The City also contended that no tacit contract had been concluded by any official of the City in the circumstances alleged by Nurcha.

[13] Stretch J in the high court found that Nurcha had established a tacit contract and that the City was obliged to pay R1.9 million in contractual damages to Nurcha. The City appeals against the order of the high court with the leave of this court. It argues that a tacit contract was not established.

[14] It should be said at once that Mr Yako testified that he had not read the payment instruction but had taken it to be a document setting out payment details. His role at the City was to co-sign cheques requested by other departments, such as housing. He had no authority to conclude a contract. It should also be said that Nurcha did not sue as cessionary under the cession embodied in the loan agreement: the cession of the right to progress payments was Nurcha's security that payment would be made to it. The action is premised entirely on the alleged contract between Nurcha and the City, in terms of which the City undertook to pay amounts due to New Boss into a designated account managed by Tusk. It was argued on appeal in this way as well.

[15] Nurcha does not rely on Yako's authority to enter into a contract as the sole basis for contending that the City and Nurcha entered into a contract. It relies on a series of events and acts which, when considered as a whole, lead to the conclusion that the parties had intended to enter into a contract on the terms pleaded. Nurcha argues that the City, by signing for the irrevocable payment instruction, acknowledged that Nurcha had financed the construction contract; acknowledged that Tusk would act as intermediary between Nurcha and New Boss; accepted the payment instruction and acknowledged that the instruction could be changed only with the consent of Tusk. And then, most importantly, the City complied with that instruction for several months.

[16] The test for establishing the intention of the parties to conclude a tacit contract is now settled. In *Butters v Mncora* [2012] ZASCA 29; 2012 (4) SA 1 (SCA), where a universal partnership between co-habitees was relied upon, Heher JA said (para 34):
'This appeal is about an alleged tacit agreement. As in all such cases, the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, per contram, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement. Despite the different formulations of the onus that exists (see the discussion in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) . . . this is the essence of the matter.'
This statement is in a minority judgment but the majority did not take issue with the principle. It was only the application of the principle that was in dispute.

[17] As I see it, the principle expressed by Heher JA is clear and puts to rest the apparent conflict between two statements made by Corbett JA in *Joel Melamed (above) and Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A). In *Ocean Commodities* Corbett JA had held that the test was as follows (at 292A-B):
'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*.' (My emphasis.)

[18] In *Joel Melamed*, however, Corbett JA stated that although this was the 'traditional statement of the principle' (at 164I) there had been criticism of the formulation since it appeared to indicate 'a higher standard of proof than that of preponderance of probability as regards the drawing of inferences from proven facts' (at 165A-B). He went on to say (at 165C-E):

'While it is perfectly true that in finding facts or making inferences of fact in a civil case the court may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. . . . [I]t could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged.'

However, Corbett JA did not consider that the case was an appropriate one in which to resolve the tension between the two tests, nor did he suggest what matters of legal policy might be relevant.

[19] In *Christie's Law of Contract in South Africa* (7 ed) by G B Bradfield a 'synthesized approach' is suggested (pp 100 -101).

'A synthesis embracing both the no other reasonable interpretation test and the balance of probabilities test . . . could be stated as follows: In order to establish a tacit contract it is necessary to prove on a preponderance of probabilities, conduct and circumstances that are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on the preponderance of probabilities that the parties reached agreement in that manner, it may find the tacit contract established.'

[20] In my view, we need not go to any great lengths to reconcile the 'no other reasonable inference' test with the 'balance of probabilities test'. There appears to me to be no reason why the onus of proof should be more burdensome for the party alleging a tacit contract than in other civil matters. I do not see why, as a matter of legal policy, the onus should be greater. And in *Butters*, the court was unanimous in

finding that the party alleging a tacit contract need prove unequivocal conduct giving rise to an inference of consensus on a balance of probabilities.

[21] In *Butters*, Brand JA for the majority, in deciding whether a universal partnership had been established, held that (para 18):

'Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement has been reached.'

[22] Accordingly I consider that we need to ascertain whether Nurcha has shown on a balance of probabilities unequivocal conduct on the part of the City that proves that it intended to enter into a contract with Nurcha that it would pay New Boss progress payments into the designated account managed by Tusk. There is no doubt as to Nurcha's intention to enter into such a contract. It would not have advanced funds to New Boss in terms of the loan agreement had it not had the security that the City would make progress payments into the designated account. But what of the City's conduct?

[23] There is no dispute as to the sequence of events leading to the conclusion of the construction contract between the City and New Boss. We know that the bid had been awarded to New Boss by the City in early October. Nurcha and New Boss had entered into the loan agreement pursuant to that, New Boss signing the written agreement acknowledging the way in which the loan would be administered on 11 October 2010. The construction support services agreement had been signed on the same day. The irrevocable payment instruction was also signed by New Boss on 11 October. It was delivered to the City and signed for by Mr Yako on 14 October. The construction contract was signed by New Boss only after that, on December 2010, and by the City in January 2011.

[24] Thus at the time of concluding the construction agreement, officials of the City knew precisely how the arrangement with Nurcha and Tusk was to proceed. And it must have intended to make payment into the designated account administered by Tusk, and knew it should not pay into any other account without the written consent of Tusk. Indeed, it acted in accordance with that instruction over a period of five

months. That is unequivocal conduct manifesting the intention that it was bound to comply with the instruction.

[25] Moreover, the subsequent conduct of the City, after it had paid into a different account, was acknowleged by it to be in conflict with the payment instruction. This is recorded in a letter written by Nurcha's legal adviser to the City, after a meeting between Nurcha and City officials in the housing department had been held. The letter, dated 12 August 2011, recorded that:

'[Y]ou recognized the fact that there is documentation in place, signed and acknowledged by [the City], regulating the payment of the contractor, which documentation was not considered when the contractor was paid directly. We record that you confirmed that you would amend the banking details of the contractor to reflect the correct position as a matter of urgency.'

[26] The material facts alleged in the particulars of claim by Nurcha were not disputed. It was only when the plea was filed that the City denied that it had undertaken to pay into the designated account. The City did not lead any evidence to gainsay that of Mr De Villiers of Nurcha that the entire scheme had been agreed with officials of the housing department in the City. Mr Yako could not say what arrangements were made by the housing department, but there would not have been progress payments to be made without the approval of that department. In the circumstances it is not necessary to consider whether the officials in question had the authority – actual or ostensible – to conclude the agreement to pay into a designated account. They did so and there was no evidence led to rebut the evidence of De Villiers as to the nature of the contract with the City and its approval by municipal officials. There can be no better evidence of a contract's conclusion than the parties' performance of their obligations under it.

[27] In the circumstances I consider that Nurcha has proved on a balance of probabilities that there was a tacit contract between it and the City that all progress payments payable to New Boss would be paid into the account designated by it, managed by Tusk. Nurcha is entitled to be paid what was due to it under the loan agreement in the form of damages payable by the City, which was in breach of the contract.

[28] Accordingly the appeal is dismissed with costs.

_____

C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	R G Buchanan SC (with him S Swartbooi)
	Instructed by:
	Makhanya Attorneys, East London
	Bezuidenhouts Inc, Bloemfontein
For Respondents:	S D Wagener SC
	Instructed by:
	SB Coetzer Inc t/a Coetzer & Partners
	Honey Attorneys, Bloemfontein