Case No 482/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

A.D. WILKINS N.O. (in his capacity as duly appointed Receiver for Creditors of STRONGHOLD CONSTRUCTION (PROPRIETARY) LIMITED)	Appellant
and	
TIMOTHEUS PIETER VOCES	Respondent

CORAM: JOUBERT, EM GROSSKOPF, KUMLEBEN, NIENABER et HOWIE JJA

HEARD: 1 MARCH 1994

DELIVERED: 29 MARCH 1994

J U D G M E N T

/NIENABER JA

NIENABER JA:

The fate of this appeal hinges on the proof of a tacit term in one or other of the forms pleaded by the appellant.

The appellant is the receiver for creditors of a company, Stronghold Construction (Proprietary) Limited, hereinafter referred to as "Stronghold". On 22 February 1988 Stronghold, then not yet in liquidation, purchased some 14 hectares of land known as Portion 186 of the farm Vlakplaas 138 IR situated near Vosloorus township, Boksburg, from the respondent for R570 000,00. Stronghold's business consisted of the development of residential townships for black communities, the construction of housing and the sale of improved and unimproved stands. After the conclusion of the sale and the payment of a portion of the purchase price, it was discovered by Stronghold that a plan existed for the construction of a provincial road across the parcel of land it had purchased which, if implemented, would impede the development of the contemplated black township. After some negotiations and a considerable exchange of correspondence,

Stronghold declined to pay the balance of the purchase price owing in terms of the deed of sale. This refusal resulted in two separate initiatives. The seller, the respondent, instituted action against Stronghold in the Witwatersrand Local Division under case number 89/6123 for the payment of the balance of the purchase price. More or less contemporaneously Stronghold, in the same court, launched motion proceedings against the respondent under case number 89/4136 for an order confirming its cancellation of the sale and for repayment of the sums paid to the respondent amounting to R350 000,00. Each party opposed the other. In the application proceedings the court eventually granted an order by consent referring the matter to trial with the direction that Stronghold was to seek its relief by way of a counterclaim to the respondent's action - a consolidation, in effect, of the two proceedings. To avoid confusion I shall henceforth refer to the seller, the respondent in the appeal, as the plaintiff and to the purchaser, Stronghold, currently represented by the appellant, as the defendant.

The defendant in its plea to the plaintiff's particulars of claim relied, in the main, on certain tacit warranties which it alleged had been breached by the plaintiff. In consequence, so it alleged, the defendant had cancelled the agreement between the parties during December 1988, alternatively March 1989, alternatively by means of the plea itself, and suffered heavy damages which it detailed in its counterclaim. The plaintiff, in turn, filed a replication to the plea and a plea to the counterclaim, denying the existence of the alleged tacit terms, their breaches, the validity of the cancellation and any liability for losses allegedly suffered by the defendant.

During the course of the exchange of pleadings Stronghold was liquidated but the liquidation was in turn superseded by a scheme of arrangement, with a corresponding adjustment of the appellant's position as Stronghold's representative from liquidator to receiver.

On the date set down for trial the plaintiff appeared through counsel and applied for a postponement. After a

lengthy debate the application was dismissed. Counsel thereupon withdrew and the trial proceeded in the plaintiff's absence. The court (Marais J) insisted on proof by the defendant of the existence of the tacit terms pleaded, the breaches thereof and the quantum of the resultant damages. Evidence was in due course led in support of the defendant's counterclaim. At its conclusion Marais J, in a terse judgment, found in the defendant's favour. He said:

> " I merely say that as a result of having heard the evidence I am satisfied that the defendant has established the tacit term set out in paragraph 2(b)(iii)(aa) of the defendant's plea and a breach thereof. I am also satisfied that the defendant in consequence of such breach has suffered the damages claimed in the counterclaim in paragraph 2(a). In fact it appears to me that the defendant has established a greater amount, but the claim is limited to that amount."

(The term referred to is quoted later in this judgment.)

The following order was accordingly made:

> "1. In respect of the plaintiff's claim in convention I grant absolution from the instance with costs.
> 2. In respect of the defendant's claim in reconvention I grant judgment for payment of R4 396 976,00 as damages. On that figure the defendant will be entitled to interest at the rate of 18,5% from date of judgment to date of payment.

3. The defendant will be awarded the costs of the claim in reconvention. Those costs will include the qualifying fees of Messrs Kline, Collard, Bleibaum and Rosarin,
4. The costs of the motion proceedings which were reserved in case number 89/4136 are awarded to the defendant.
5. The costs awarded to the defendant will include the costs consequent upon the employment of two counsel where two counsel were in fact employed. The award of costs of two counsel will also apply to the motion proceedings."

The plaintiff thereupon applied for leave to appeal against both the refusal of the postponement and the judgment granted by default. Such leave was denied in respect of the refusal of the postponement. A petition addressed to the Chief Justice on that issue was likewise unsuccessful, thereby in effect confirming the order absolving the plaintiff from the instance with costs. Leave was however granted by the court a quo in respect of the judgment granted by default.

That appeal was prosecuted before the Full Court of the Transvaal Provincial Division. It succeeded. The judgment of Stafford J (with whom Hartzenberg and Swart JJ agreed) is reported (cf Voges v Wilkins NO 1992 (4) SA 764 (T)). The order of Marais J was altered to read:

> "Absolution from the instance in respect of defendant's counterclaim with costs and the defendant is ordered to pay the costs of the application No. 89/4136, including the costs of two counsel where two counsel were employed."

An application, this time by the defendant, for special leave to appeal to this court was granted on petition. Hence this appeal. It is not directed against the order of the court a quo relating to the costs of application number 89/4136 or against the costs of the appeal to the Full Court.

The paramount issue is the alleged tacit term. A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a 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 had 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 a 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 expressed, when such a term is not necessary to render the contract fully functional. The above propositions, all in point, are established by or follow from numerous decisions of our courts (see, for instance, Rapp and Maister v Aronovsky 1943 WLD 68, 75; Alfred McAlpine & Son (Pty) Ltd V Transvaal Provincial Administration 1974 (3) SA 506 (A);

Delfs v Kuehne & Nagel (Pty) Ltd 1990 (1) SA 822 (A)).

Before turning to the tacit terms at issue it is necessary to refer to the express ones. Clause 3 provides for the payment of the purchase price in three instalments, the first on the date of signature of the agreement, the second on the 25th of March 1988 and the balance

> "...in cash on date of approval of the outlayplan of the township on the property by the Surveyor-General. If payment does not take place by 31st May 1988 the purchase price will increase by R10 000 (Ten Thousand Rand) per month or part thereof calculated pro rata. Full payment will however take place by not later than 31st October 1988."

This latter provision links up with clause 5 which, to the extent that it is relevant for present purposes, reads as follows:

"5.1 The Seller will have the following obligations:

5.1.1 To secure the approval of the general layoutplan of the township on the property by the Surveyor-General, which approval shall include approval in terms of Section 16 of Act 4 of 1984, as amended;

5.1.2 To pay all costs of town planners, surveyors and geologists excluding the costs of civil and electrical engineers to plan and install services to the

property.

5.2 The Purchaser will be liable for the costs of civil and electrical engineers to plan and install external and internal services to the property and will be responsible to furnish the necessary guarantees if necessary to the Local Authority and the Provincial Authorities. The Purchaser will also be responsible to enter into a services agreement with the local authority concerned namely Vosloorus for the contribution to the installation of bulk services and to satisfy the Provincial Authorities that this condition has been complied with.

5.3 The Purchaser and his contractors shall be entitled to take possession and occupation of the property before transfer to enable them to plan and install services on the property. From such date the risk and benefit will pass to the Purchaser and he will be responsible for the payment of any assessment rates or other levies on the property."

In terms of this clause the plaintiff's obligation to participate in the establishment of the township is limited to procuring the approval of the general layout plan and that obligation, unlike the defendant's obligation to effect payment, is not tied to specific dates; otherwise it is left to the defendant to take all the requisite steps for the establishment of the township and the plaintiff only remains liable for certain costs. Clause 8 is a voetstoots clause and clause 12 provides:

"12. Entire Agreement
This document contains the entire agreement between the parties in respect of the matters dealt with herein and any variation or mutual cancellation of this agreement, will only have legal force or effect if such variation or mutual cancellation is reduced to writing and signed by the parties hereto."

In the light of these fairly elaborate express provisions, dealing with particular aspects of the establishment of the township, the scope for a tacit term dealing with other aspects is somewhat circumscribed. Nevertheless the defendant maintained that the document was incomplete and that the express terms had to be supplemented by "certain terms and warranties", namely

"2.(b)(i) The Plaintiff undertook that prior to the date of the agreement:
(aa) the land which formed the subject matter of the agreement had been designated a development area in terms of Section 33(1) of the Black Communities Development Act 4, 1984; and
(bb) application had been made for the establishment of a Black residential township on the said land. (ii) The Plaintiff undertook that, by no later than
31st May 1988:
(aa) the layout plan of the proposed township on the property would be approved by the Surveyor-General; and

(bb) the establishment of the township would have reached a stage at which the Defendant would be legally entitled to sell stands therein.

(cc) alternatively to sub-paragraph (bb):

The Plaintiff undertook that by no later than 31st October 1988 the establishment of the township would have reached a stage at which the Defendant would be legally entitled to sell stands therein. (iii) The Plaintiff warranted that;

(aa) no obstacle existed which might reasonably delay, interfere with or limit the establishment of a Black residential township on the property;

(bb) Alternatively to sub-paragraph (aa), he knew of no obstacle which might reasonably have the effects aforesaid."

No breach of the alleged tacit term pleaded in paragraph 2(b)(i) is alleged. Any reliance on the tacit term pleaded in paragraph 2(b)(ii), and its alleged breach, was expressly abandoned. The term pleaded in paragraph 2(b)(iii)(aa) was the one which was accepted by Marais J but rejected by the Full Bench. In argument before this court the defendant again relied on that term or its alternative, paragraph 2(b)(iii)(bb), as pleaded. In addition certain other variants were suggested, to which reference will be made later in this

judgment.

Paragraph 8 of the plea then reads:

"8. In breach of the terms and warranties which are set out in paragraphs 2(b)(ii) and 2(b)(iii) above -

(a) the proposed township was, at the date of the agreement, and remains at date hereof, affected by the planning of the PWV15 road and such planning constituted an obstacle which might reasonably delay, interfere with or limit the establishment of a Black residential township on the property;

(b) the town planners, Messrs Van der Schyff, Van Bergen and Druce, had, as agents of the Plaintiff, been informed by the Director of Roads during December 1987 that the proposed township was affected by the planning of the PWV15 road and that further steps in relation to the township should be withheld until the planning of the road had been finalised and the said information and its consequences were such as to constitute an obstacle which might reasonably delay, interfere with or limit the development of a Black residential township on the property.

(c) The layout plan of the proposed township on the property was not approved by the Surveyor-General by 31st May 1988 or at all.

(d) The establishment of the township did not reach a stage at which the Defendant was legally entitled to sell stands therein by 31st May 1988 or 31st October 1988 or at all,"

The essential averment is paragraph 8(b). It is based on a letter LK7 addressed by the "Uitvoerende Direkteur: Paaie"

to the "Uitvoerende Direkteur: Gemeenskapsdienste" which stated:

> "VOSLOORUS UITBREIDING 27
> Hierdie dorp word geraak deur die beplanning van PWV 15 wat teen Februarie 1988 gereed behoort te wees. U word derhalwe versoek om die dorp terug te hou totdat die beplanning van PWV 15 gefinaliseer is."

A copy of this letter was forwarded to the town planners, Messrs Van der Schyff, Van Bergen and Druce, "ter inligting". They had been engaged by the plaintiff.

According to the defendant that letter had the effect of freezing the development of the township for the time being. And being an impediment to such development, of which the plaintiff must have been aware, it constituted, so it was contended, a breach of the tacit term pleaded, in either of its forms.

According to counsel for the defendant the tacit term relied on, in either form, was an imputed rather than an actual one - it was designed to provide for a situation which the defendant at any rate had not foreseen at the time the contract was concluded but for which the agreement would

clearly have catered had it been so foreseen. I am afraid that I cannot agree. In my view the imputed tacit term relied on has not been established, not in the forms pleaded nor in any of its variants developed during argument. I say so for a number of reasons.

The tacit term pleaded or suggested is not, to begin with, readily reconcilable with the scheme of the agreement. It purports to saddle the plaintiff with a responsibility and to tie him down to a time schedule in connection with the establishment of the township when, with one exception, the agreement otherwise places no such obligation on him and, as seller, he retains no direct interest in the development of the township as such. There was accordingly no incentive to the plaintiff to agree to the obligations foisted on him in terms of the alleged tacit term.

Moreover, there is a fundamental inconsistency in the defendant's approach. The defendant seeks to rely on an imputed tacit term i.e. one which arises when both parties would have regulated a certain situation, had they thought

about it, in the manner suggested. Both parties. Yet at the same time the defendant alleges that the plaintiff could not have been unaware of the letter LK7 and that he wilfully-withheld that information from the defendant in order to trick the latter into concluding the contract. Indeed, in its initial application the defendant relied exclusively on fraudulent non-disclosure as the justification for its failure to effect payment, This line of defence was expressly abandoned before the trial court and it was not sought to revive it thereafter. Nevertheless it was contended in this court on behalf of the defendant (but denied by the plaintiff) that the plaintiff must have been aware of the obstacles to the development of the township created by the prospect of PWV 15. But if that is so there can be no room for the importation of a tacit term along the lines suggested, for two reasons. First, an imputed tacit term is only read into the contract if both parties overlooked or failed to anticipate the event in question; it is based on their assumed intent in respect of a situation they had not bargained for. In this

instance the plaintiff, on the defendant's approach, was aware of the true state of affairs. He deliberately remained silent in order to obtain a contractual advantage. An intention based on absence of appreciation can accordingly not be attributed to him. Secondly, it is inconceivable, on the probabilities, that the plaintiff would have agreed to a warranty along the lines suggested if he had been briefed about possible difficulties in the way of the development of the township. To be amenable to a warranty in those circumstances would be to court disaster.

But this, so it was argued on the authority of Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co. Ltd. 1932 AD 25, is not a legitimate line of reasoning. In that case the owner of proclaimed land was granted permission to lay out a township on the land. It was a condition of the grant of permission that the transfer of each erf should contain a condition prohibiting, inter alia, a general dealer's business from being conducted on any erf transferred. The court a quo held that this condition did not

prevent the owner himself from trading on unsold erven. That decision was reversed on appeal. This court held that a term could readily be implied restricting the township owner from trading as a general dealer in the township. In the course of his judgment Wessels CJ said, at 33:

> "In the present case, therefore, we must consider all the circumstances surrounding the grant of permission to lay out the Crown Township, and ask ourselves whether the parties did or did not intend that the owner who laid out the township should be as much bound as any erf-holder not to carry on the business of a general dealer, butcher or keeper of a Kaffir eating house. If we come to the conclusion that both parties must have entered into the transaction with a knowledge and intention that no trade should be carried on in the township area, then we must imply such a term in the contract. This involves an accurate appreciation of the nature of the whole transaction. Here however this difficulty arises. Are we to consider the intention of the particular individual who enters into the contract? Suppose that he asserts: 'I thought of this matter but I purposely made no mention of it, because I thought that by keeping quiet I might avail myself of the fact that the owner himself was not mentioned in the grant' ; are we to say that this concludes the matter and that therefore the term cannot be implied? In my opinion the Court is not bound to accept his assertion. The Court is to determine from all the circumstances what a reasonable and honest person who enters into such a transaction would have done, not what a crafty person might have done who had an arrière pensée to trick the other party into an omission of the term. The transaction must be regarded as a normal business

transaction between two parties both acting as reasonable business men."

To the extent that this dictum fosters the impression that the enquiry is directed at the intention not of the actual parties to the agreement but of archetypes of reasonable men, it may be an oversimplification. One is certainly entitled to assume, in. the absence of indications to the contrary, that the parties to the agreement are typical men of affairs, contracting on an equal and honest footing, without hidden motives and reservations. But when the facts show that the one or the other had special knowledge, which would probably have had a bearing on his state of mind, that fact cannot simply be ignored. For otherwise the enquiry as to the existence of the tacit term becomes a matter of invention not intention. Ex hypothesi the parties are not communicating with one another on the matter in issue. Hence there is no room for a reservatio mentalis on the part of the one or the other.

Should the position therefore be, as contended by the

defendant, that the plaintiff was aware of the instruction contained in the letter LK7, whether he deliberately withheld that information from the defendant or not, it may well be a factor refuting rather than supporting the existence of a tacit warranty along either of the two lines suggested by the defendant in paragraph 2(b)(iii) of the plea. In that event the defendant would be confined to its defences and remedies based on misrepresentation.

In fact, the plaintiff in his affidavit denied any personal knowledge of the letter LK7 or of any other circumstance which might interfere with the defendant's programme for the marketing of properties in the proposed township. The probabilities in this case are not such as to defeat that denial. Knowledge of the letter, a copy of which was forwarded to the town planners, may conceivably and for particular purposes be imputed to the plaintiff who instructed them (cf Town Council of Barberton v Ocean Accident & Guarantee Corporation Ltd 1945 TPD 306, 311; Oatorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A) 787H;

Anderson Shipping (Pty) Ltd v Guardian National Insurance Co Ltd 1987 (3) SA 506 (A) 518D-F). But such a translation cannot in my opinion be enlisted to found a tacit term: knowledge can thus be imputed; intention not. And if the plaintiff was indeed unaware of any impending disruption of the defendant's plans it is, in my opinion, unlikely that he would have committed himself as a matter of course to the warranty suggested in paragraph 2(b)(iii)(aa) of the plea. Why should he have been prepared to guarantee a state of affairs of which he had no certainty at the time, over which he had no control and which could conceivably plunge him into an abyss of debt - to the extent, according to the trial court, of an amount in excess of four million rand? The reason, it was submitted in argument, was that the plaintiff was anxious to close the deal while the defendant was on site because of the immediate profits a sale to the defendant would generate for him. But that submission overlooks the fact that the plaintiff did not approach the defendant; the overtures came from elsewhere. At that stage the plaintiff had planned

to develop the township himself, no doubt in the expectation of attractive profits. Nor is there anything to suggest that the supposed warranty was dangled as an incentive without which the sale would not have eventuated. The point, quite simply, never occurred to anyone.

But even if it did there is no telling what the parties might have agreed. The plaintiff's attitude might well have been: take it or leave it, in which event the defendant might not have insisted on the warranty. The defendant, after all, had its remedies under the common law in case the plaintiff acted improperly. On the other hand the plaintiff might have been more accommodating by agreeing to a sale which was conditional on clarity being obtained as to the precise positioning of the proposed road. Such a condition might have been suspensive or it might have been resolutive. The possibilities are legion. One cannot be confident that if the question had been posed to the two parties, the answer would inevitably have been: "Of course the warranty in paragraph 2(b)(iii)(aa) of the plea would have been furnished: we did

not trouble to say that, it is too clear" (Reigate v Union Manufacturing Company [1918] 1 KB 592 at 605, Barnabas Plein & Company v Sol Jacobson & Son 1928 AD 25 at 31).

As for the warranty in the form pleaded in paragraph 2(b) (ill) (bb) of the plea, if the plaintiff was unaware of any obstacle which might interfere with the establishment of the township, as seems likely on the facts, it had not been breached and hence falls away. It would only be relevant if it were to be expanded to read: "The plaintiff warranted that neither he nor his town planner or his estate agent knew of any obstacle which might interfere with the establishment of the township." But a warranty in that form is itself so improbable that counsel for the defendant was not prepared to press for it. The alternative form of the warranty pleaded may therefore be disregarded.

There are additional reasons for rejecting the warranty proposed in paragraph 2(b)(iii)(aa) of the plea. One such reason is that the warranty was not essential in order to give "business efficacy" to the agreement. A warranty, as opposed

to an ordinary term which governs the performances to be rendered by the parties - delivery as against payment - confers a benefit on one party only i.e. on the party in whose favour the warranty is stipulated. Ex hypothesi such a warranty cannot readily have a bearing on the efficacy of the contract. The mere possibility, moreover, of a national road which might in future traverse the property, would not as such affect the operation of the agreement. It would only become a reality, confirming the defendant's worst expectations, if expropriation in fact took place - which would be a post-contractual event which may or may not have contractual repercussions (cf Rood's Trustees v Scott and De Villiers 1910 TPD 47, 67; Van der Westhuizen v le Roux and le Roux 1947 (3) SA 385 (C)). As was stated by Van den Heever JA in Van der Merwe v Viljoen 1953 (1) SA 60 (A) at 65F-H:

> "As doelmatige regshandeling (vgl. die maatstaf toegepas in Reigate v. The Union Manufacturing Co., 118 L.T. 483) kan die onderhawige ooreenkoms die voorgestelde beding ontbeer. Dit is 'n alledaagse verskynsel dat kontrakterende partye teleurgestel word in die verwagtinge wat hulle tydens die kontraksluiting gekoester het en dat hulle hoop aangaande die wasdom of

> standhouding van wat hulle uitbeding het verydel word. Daardie ontnugtering regverdig egter geen wysiging deur die hof van hulle regshandelinge en ding nie af nie van die regsgeldigheid van hulle ooreenkomste."

Another consideration, which has a bearing on the probabilities, is the defendant's failure to mention the alleged warranty at the first appropriate opportunity. Nowhere in the correspondence or in the affidavits filed during the application which preceded the trial is there even a hint of reliance on a tacit term. What was raised was the plaintiff's alleged fraud. Mention of the alleged tacit term was first made in the plea. The very fact that a term supposedly so obvious as to speak for itself escaped the attention of the defendant at the earlier stages of the proceedings is an indication, in my view a strong one, that it was nothing more than an afterthought when it was eventually mooted during the later stages of the proceedings.

Finally, there are the difficulties the defendant experienced with the formulation of the tacit term. A term so obvious as to occur as a matter of course will most likely be

uncomplicated and capable of ready definition (cf Rapp and Maister v Aronovsky supra 75). One's scepticism about its existence increases in direct proportion to its complexity and the number of alternatives it spawns. In this case a number of terms were pleaded with a number of alternatives. During the course of argument before this court further variations were suggested to each alternative. The word "reasonably" in paragraphs 2(b)(iii)(aa) and (bb) of the plea created considerable problems for counsel. He conceded that it was "unfortunately worded". According to him it meant "which might cause an unreasonable delay". In effect, therefore, the word "reasonably" in the tacit terms pleaded meant "unreasonably". At best for the defendant the term might be construed to mean that the plaintiff warranted that no obstacle existed, or that he or his agent knew of none, which one might reasonably anticipate would cause an unreasonable delay. A term so formulated is so enigmatic as to be illusory. It is inconceivable that both parties, simultaneously, without saying a word, could or would have

contemplated it.

As has frequently been stated (e.g. Union Government (Minister of Railways and Harbours) v Faux Ltd 1916 AD 105, 112) a court is slow to import a tacit term into a written contract. One reason, no doubt, is that parties who choose to commit themselves to paper can be expected to cover all the aspects that matter. This, in my opinion, is such a case. Not a single compelling reason has been advanced why the tacit term suggested by the defendant should be drafted into the contract. Failing such a term there can be no breach of it. Failing a breach there can be no claim for damages. These aspects of the case accordingly do not have to be considered. One final observation: it was argued on behalf of the plaintiff apropos of certain remarks in the judgment of the court a quo (at 783C-784D) that the tacit term pleaded, if found to exist, would offend against both clause 12 of the agreement and the provisions of the Alienation of Lands Act, 68 of 1981 ("the Act"). Clause 12 is quoted earlier in this judgment. Section 2 of the Act provides:

> "2. Formalities in respect of alienation of land.-
> (1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

A tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms - reading, as it were, between the lines - or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances. Either way, a tacit term, once found to exist, is simply read or blended into the contract: as such it is "contained" in the written deed. Not being an adjunct to but an integrated part of the contract, a tacit term does not in my opinion fall foul of either the clause in question (cf Marshall v LMM Investments (Pty) Ltd 1977 (3) SA 55 (W) 58A-B) or the Act. To the extent that there are passages in the judgment of the court a quo which may create a contrary impression I must respectfully record my disagreement. The cases quoted by the court a quo (Thiart v Kraukamp 1967 (3) SA 219 (T) and Phame (Pty) Ltd v Paizes 1973

(3) SA 397 (A)) are not concerned with tacit terms. But that is all by the way since, in the circumstances of this case, none of the tacit terms pleaded can be found to exist.

The appeal is dismissed with costs including the costs of two counsel.P M Nienaber JA

Joubert JA)
E M Grosskopf JA) Concur
Kumleben JA)
Howie JA)

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