THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 260/11
Reportable

In the matter between:

HORATIO STEPHEN MATHEWSON	First Appellant
ANNEMI MARGERETHA MATHEWSON	Second Appellant

and

MARTHA FRANCINA VAN NIEKERK	First Respondent
CHRISTOFFEL PETRUS PRINSLOO VAN NIEKERK	Second Respondent
STANDARD BANK BEPERK	Third Respondent
THE REGISTRAR OF DEEDS	Fourth Respondent
DITSOBOTLA LOCAL MUNICIPALITY	Fifth Respondent
WILLEM CHRISTOFFEL JANSEN VAN RENSBURG	Sixth Respondent

Neutral citation: *Mathewson & another v Van Niekerk & others* (260/11) [2012] ZASCA 12 (16 March 2012).

Coram: NAVSA, CLOETE, VAN HEERDEN and LEACH JJA, and

BORUCHOWITZ AJA

Heard: **8 March 2012**

Delivered: **16 March 2012**

Summary: Sale of land: tacit term: not excluded by 'sole contract' clause; motion proceedings: dispute of fact: rejection of respondents' version as farfetched or clearly untenable: test stringent and not easily satisfied.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ebersohn AJ sitting as court of first instance):

1. The appeal succeeds, with costs.

2. The order of the court a quo is set aside and the following order substituted:

'The application is dismissed, with costs.'

JUDGMENT

CLOETE JA (NAVSA, VAN HEERDEN and LEACH JJA, and BORUCHOWITZ AJA concurring):

[1] The first and second respondents, as applicants, brought motion proceedings in the North Gauteng High Court, Pretoria against (amongst others) the appellants as the first and second respondents, for relief that depended on the valid cancellation by the appellants of a deed of sale of immovable property. Ebersohn AJ granted the application and refused leave to appeal. The appeal is with the leave of this court. It would be convenient to refer in this judgment to the parties as they were in the court a quo.

[2] In terms of the deed of sale concluded on 26 March 2007 the respondents sold, and the applicants purchased, an erf in a township being developed by the respondents. Clause 17 of the deed of sale read as follows:

'17. DIENSTE

Die Ontwikkelaar waarborg dat die erwe voorsien sal wees met elektriese aansluiting, wateraansluiting sowel as riolering (septiese tenk of tenkstelsel soos goedgekeur deur die Plaaslike Munisipaliteit).'

[3] On 6 May 2009 the applicants' attorney wrote to the respondents in the following terms:

'Voormelde koopooreenkoms sowel as klousule 17 van die ooreenkoms verwys.
Ons kliënt se instruksies is dat geen dienste voorsien is aan die voormelde plaasgedeelte nie en dat hulle [sic: sc "u"] derhalwe waarborg breuk plaasgevind [sic: sc “gepleeg”] het, alternatiewelik repidiasie [sic] van die ooreenkoms plaasgevind het welke repidiasie [sic] van die ooreenkoms aanvaar word.
Gevolglik is dit ons instruksies om u in kennis te stel dat indien voormelde gebrek nie reggestel word binne 7 (sewe) dae vanaf datum van hierdie skrywe nie, ons kliënte die reg behou om hierdie ooreenkoms te kanselleer.'
The notice of motion which followed was issued on 2 June 2009.

[4] The court a quo, having quoted clause 17 of the deed of sale, reasoned as follows:

'15. Dit blyk oorvloediglik uit die stukke:
(a) die elektriese aansluiting was nie in plek nie;
(b) die wateraansluiting was nie in plek nie; en
(c) die riolering was nie in plek nie.
16. . . .
17. Die applikante, as kopers, het per kennisgewing gedateer die 6de Mei 2009 die verkopers in kennis gestel dat as die dienste nie verskaf is binne 7 dae die koop gekanselleer sal word. Aan hierdie aanmaning is nie voldoen deur die verkopers nie en die aansoek aan hierdie hof het gevolg.
18. Dit bly onteenseglik so dat die verkopers inderdaad kontrakbreuk gepleeg het en die applikante is geregtig op die regshulp wat hulle vorder.'

[5] The court a quo ignored the respondents' contention, which was plainly and unambiguously made in the answering affidavit, that the obligation to install the services referred to in clause 17 was subject to the tacit term that the applicants had to indicate to the respondents where the services were to be installed on the erf which they purchased. The court a quo further ignored the first respondent's assertion, also plainly and unambiguously made in the answering affidavit, that despite his repeated oral requests, the applicants had not given such an indication.

[6] Clause 11 of the deed of sale is no answer to this case. That clause (which is poorly drafted) reads:

'GEHELE OOREENKOMS

Die partye kom ooreen dat hierdie dokument die enigste ooreenkoms tussen hulle daar stel en dat enige [sic; sc "geen"] ander waarborge of voorstellings van watter aard ookal gemaak is, anders as wat hierin vervat is nie. Geen ander of verdere ooreenkoms of ooreenkomste met betrekking tot die onderwerp van hierdie kontrak is op enige van die partye bindend nie tensy op skrif gestel en deur beide partye onderteken.'

The reason why the clause is no answer is set out in *Wilkens NO v Voges* 1994 (3) SA 130 (A). In that matter Nienaber JA was dealing with a written agreement for the sale of land which contained a clause 12 reading as follows:

'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' (at 138B).

The learned judge of appeal held (at 143J-144D):

'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 Land 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 s 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) at 58A-B) or the Act.'

[7] Counsel for the applicants in argument before us did not rely on clause 11 but advanced a different argument. He acknowledged that, as his clients had instituted motion proceedings and because of the dispute of fact as to the existence of the tacit term relied upon by the respondents, the appeal would have to be decided on the respondents' version unless he could persuade us that the allegations made by the respondents were so far-fetched or clearly untenable that we were justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 623 (A) at 634E-635C. It needs to be emphasised that the test is a stringent one not easily satisfied. Two submissions were made.

[8] First, it was submitted that the defence should be rejected as an afterthought because it had never been raised in the emails which passed between the parties. But counsel was unable to refer us to an email from his clients to which one would have expected the respondents to have replied by asserting the tacit term. The only email which could possibly be relevant in this context was dated 16 September 2008, wherein the first appellant said:

'Ons het daardie erf gekoop met die wete dat daar 'n infrastruktuur gaan wees, wat daar nie is nie.'

But that statement did not specifically refer to the services in clause 17 (it could also, or exclusively, have referred to roads and a surrounding wall, as counsel readily conceded) and the statement was made in the context of a more general complaint ─ the email continues:

'Daar is gesê ander het gekoop, insluitende Willem van Rensburg, wat nie waar was nie.

Daar is gesê ons mag nie uitklim nie, terwyl ander dit gedoen het sonder gevolge.

So kan jy ons kwalik neem as ons ongeduldig klink.

So asb Horatio, ons weet jy het ook dinge om uit te sorteer, en dit respekteer ons.'

It is also important to bear in mind the wider context in which the email was sent. At that stage the parties were negotiating on the basis that the respondents would repurchase the erf from the applicants ─ not that the applicants wanted the services referred to in clause 17 to be installed because they intended building on the erf.

[9] Second, it was submitted that further proof that the defence was an afterthought is to be found in the contradiction between, on the one hand, the first respondent's assertion that the services referred to in clause 17 were available 'op die landgoed' at the time the deed of sale was concluded (which, as I have said, was on 26 March 2007), and on the other, his statement (supported by documentary evidence) that the electricity supply agreement with Escom was only concluded on 5 June 2007. It may well be that the first respondent's first assertion was false. But the contradiction (assuming that there is one) is on an irrelevant aspect because it was not a term of the deed of sale that the services referred to in clause 17 had to have been installed at the time the deed of sale was concluded ─ clause 17 reads 'Die Ontwikkelaar waarborg dat die erwe voorsien sal wees . . .', not 'Die Ontwikkelaar waarborg dat die erwe voorsien is . . . .' The apparent contradiction would provide ammunition for cross-examination of the first respondent had the applicants requested a reference to oral evidence or trial (which they did not), but it is not a sufficient reason for rejecting the respondents' defence based on the tacit term, particularly for the reason given in the next paragraph.

[10] The probabilities support the existence of the tacit term for which the respondents contend. The erf was 10 500 square metres in extent. In those circumstances, the following statement by the first respondent in his answering affidavit has the ring of truth:

'[A]s gevolg van die groottes van die standplase (erf groottes wissel van 1.030 en 1.43 hektaar) is dit vir my as Ontwikkelaar 'n onbegonne taak om te bepaal waar iedere eienaar sy of haar woning gaan oprig en waar hy of sy byvoorbeeld sy elektrisiteits, water en rioleringspunt . . . geïnstalleer wil hê.'

[11] In the circumstances it cannot be said that the respondents' version that the deed of sale contained the tacit term on which they found their defence, is so far-fetched or clearly untenable that the court would be justified in rejecting this version merely on the papers. As counsel on both sides agreed that this conclusion would dispose of the matter, the following order is made:

1. The appeal succeeds, with costs.

2. The order of the court a quo is set aside and the following order substituted:

'The application is dismissed, with costs.'

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	A Vorster
	Instructed by Van Rooyen Thlapi Wessels, Pretoria Symington & De Kok, Bloemfontein
FIRST and SECOND RESPONDENTS:	M Ackermann
	Instructed by Couzyn Hertzog & Horak, Pretoria Hill, McHardy & Herbst Inc, Bloemfontein