IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 3246/2020

(1)	REPORTABLE: NO/~~YES~~
(2)	OF INTEREST TO OTHER JUDGES: NO/~~YES~~
(3)	REVISED.

07/12/2020

In the matter between:

GABOINEWE INVESTMENTS (PTY) LTD **PLAINTIFF**

and

VARDOCAP (PTY) LTD **DEFENDANT**

JUDGMENT

NAUDÈ AJ:

[1] This is an opposed summary judgment application in which the Plaintiff seeks payment in the sum of R1 460 000.00 (One Million Four Hundred and Sixty Thousand Rand) form the Defendant.

[2] It is common cause between the parties that the Plaintiff, duly represented by its director, Kagiso Ivan Khabeng and the Defendant, duly represented by its director and/or duly authorised person W.A van der Walt entered into a written mandate agreement on or about 23 February 2018 at Centurion.

[3] In terms of the agreement the Plaintiff was appointed as a consultant and/or lead transaction advisor for the purpose of raising finance for the Defendant's project from the Industrial Development Corporation ("the IDC"). In terms of the

agreement the Plaintiff would secure debt funding for the Defendant's project from the IDC.

[4] The Defendant agreed to pay the Plaintiff's mandate fees. In terms of the agreement the Defendant would pay the Plaintiff's project development costs, which constituted of the following:

a) a commitment fee of R40 000.00 (Forty Thousand Rand);

b) a completion of proposal package submission fee to the funder of R100 000.00 (One Hundred Thousand Rand);

c) fees on the approval of basic assessment by the funder in the sum of R100 000.00 (One Hundred Thousand Rand); and

d) a success fee calculated at the applicable effective rate provided in clause 4.1.1 of the agreement.

[5] It was further agreed that the mandate fees rates on successful sourcing of capital for the Project shall be priced at a percentage of the total amount raised from the IDC Funding as

per a schedule contained in the agreement. In the case the IDC approves the funding by 31 March 2018, the full rate as per the schedule in the agreement will be payable to the Plaintiff. In the event that the IDC approves the funding after the 31st of March 2018, the Plaintiff will be paid an amount equal to two-thirds (66.67%) of the rates in the schedule.

[6] It was further an express payment term of the mandate agreement that the Defendant will advance an amount of R1 500 000.00 (One Million Five Hundred Thousand Rand) to the Plaintiff upon the first disbursement tranche by the IDC post approval of finance and the remainder of the Plaintiff's invoice would be settled upon the second disbursement tranche by the IDC.

[7] In terms of Clause 7.1 of the Mandate Agreement, the agreement will commence from the effective date set forth and continue for a period of one year from the effective date unless

terminated earlier. Either party may terminate this agreement at any time upon thirty (30) day notification. Upon termination the Plaintiff shall be entitled to receive compensation and reimbursement for any work accrued, but not paid by the Defendant.

[8] In terms of Clause 7.2 of the Mandate Agreement, in the event of the Defendant terminating the agreement after the IDC Term-sheet being issued, the Plaintiff will be entitled to receive the full amount of the Mandate Fees as outlined in Clause 4.1.2 of the agreement.

[9] Clause 7.3 stipulates that in the event that funding is not approved by any reason not related to the Consultant's work, the client does not have to pay the Success Fee.

[10] The Plaintiff claims remuneration or fees for performing its obligations in terms of the mandate agreement. The Plaintiff

submits that it discharged its obligations in terms of the mandate agreement by acting as Lead Consultant in developing and submitting a bankable business proposal for the purposes of raising finance from the IDC for the Defendant's project.

[11] The Plaintiff submits that the Defendant is in breach of its obligations in terms of the agreement in that the Defendant has failed to pay the Plaintiff's fees for the "completion of the proposal pack and submission" in the amount of R100 000.00 as well as fees consequent on the Plaintiff's proposal having passed initial basic assessment by the IDC in the further amount of R100 000.00.

[12] Approval for initial basic assessment was granted by the IDC on the 19th of March 2018. On the 17th of September 2018 the IDC approved a total debt finance facility of R27 000 000.00

(Twenty Seven Million Rand) for the Defendant's project, in consequence of the application submitted by the Plaintiff.

[13] The Defendant opposes the application for summary judgment and submits that the Plaintiff is not entitled to payment of any fees, for mainly two reasons:-

a) First, the Plaintiff is not entitled to recover remuneration for commission in terms of the mandate agreement because it failed to perform its obligations in terms of the agreement, and

b) Secondly, it was a tacit or implied term of the mandate agreement that the plaintiff would only be entitled to payment of remuneration or commission in terms of the agreement if it was the effective cause for the raising of project funding by the Defendant from the IDC. According to the Defendant the Plaintiff was not the effective cause of the funding received by the Defendant from the IDC.

[14] The Defendant further argues that the Plaintiff would be entitled to be paid fees upon the successful sourcing of capital for the project. The Defendant's counsel further argued that in order to recover remuneration or commission for the performance of a mandate, an agent must allege and prove all of the following:

a) The contract of mandate;

b) An undertaking to pay remuneration. This involves the interpretation of the agreement according to the ordinary rules of interpretation.

c) Due performance of the mandate. Due performance of the mandate depends on the terms of the mandate. In the absence of special terms, it includes proving that the Plaintiff was the effective cause of the funding. This may involve considering whether there was a break in the chain of causation.

[15] The Defendant in its plea, admits the conclusion of the mandate agreement but pleads the existence of what it contends to be

tacit terms of the agreement. The alleged tacit terms are as follows:-

"4.3.1 the plaintiff would only be entitled to remuneration in terms of the contract if the raising of project funding from the IDC was as a result of the business proposal submitted by the plaintiff;

4.3.2 the plaintiff would not be entitled to remuneration in terms of the contract if the raising of project funding from the IDC occurred irrespective of the plaintiff's involvement, or if the plaintiff was not the effective cause of the raising of project.

4.3.3 the plaintiff would not be entitled to remuneration in terms of the contract if plaintiff's involvement did not persist in influencing the IDC to the point that it advanced project funding to the defendant."

[16] The Defendant argues that the plaintiff is not entitled to remuneration in terms of the Mandate Agreement because the

raising of project funding from the IDC was not as a result of the business proposal submitted by the Plaintiff. The Plaintiff is furthermore not entitled to remuneration in terms of the agreement because the raising of project funding from the IDC occurred irrespective of the Plaintiff's involvement and the Plaintiff was not the effective cause of the raising of project funding.

[17] The Defendant further contends that the Plaintiff's business proposal did not persist in influencing the IDC to the point that it advanced project funding to the Defendant. According to the Defendant, in fact, the proposal submitted by the Plaintiff, on behalf of the Defendant, was not approved by the IDC, and the Defendant had to submit a further business proposal to the IDC, which eventually persisted in influencing the IDC to advance a first tranche of project funding to the Defendant in the amount of R27 000 000.00.

[18] The Plaintiff's counsel argued that the tacit terms sought to be advanced by the defendant, are untenable in that their importation would conflict with and contradict the clear and express terms of the mandate agreement.

[19] It was further argued that the tacit terms sought to be pleaded cannot co-exist with the payment terms of the mandate agreement. This is inasmuch as the mandate agreement clearly stipulates different categories of payments. Some of these payments were to be made prior to the funding being received. It is only the success fee which was to be paid thereafter. The tacit terms alleged do not draw a distinction between these various categories.

[20] The Plaintiff's counsel argued that specifically at clause 4 of the mandate agreement, there is provision made for the payment of various monies prior to funding having in fact been received from the IDC, which include the following:-

a) a commitment fee of R40 000.00 (Forty Thousand Rand);

b) a completion of proposal pack and submission to the funder fee of R100 000.00 (One Hundred Thousand Rand);

c) an approval of basic – initial assessment by the funder and the IDC coming for due diligence fee of R100 000.00.

[21] The tacit terms the Defendant seeks to import in the agreement, which suggest that remuneration to the Plaintiff, was only payable upon receipt of project funds from the IDC, contradicts the clear terms of the mandate agreement which establishes triggers for certain payments, prior to funding being actually received.

[22] A tacit term, or term implied from the facts, was described by Corbett AJA in Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration [1974] 3 All SA 497 as,

"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. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties."

[23] In order to decide whether a tacit term is to be imported into the contract one must first examine the express terms of the contract. **Rumpff JA** in **Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd [1965] 3 All SA 24** stated as follows:

"When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term."

[24] The express terms can deliberately exclude the possibility of importing tacit terms of a particular type. Nor can a tacit term be imported on any question to which the parties have applied their minds and for which they have made express provision in the contract. A tacit term cannot be imported in contradiction of an express term.

[25] The principle was well expressed by **Van Winsen JA in SA Mutual Aid Society v Cape Town Chamber of Commerce [1962] 1 All SA 583** as follows:

"A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only."

[26] **Solomon JA** in **Union Government (Minister of Railways) v Faux Ltd 1916 AD 105 112** said:

"Now it is needless to say that a Court should be very slow to imply a term in a contract which is not to be found there, more particularly in a case like the present, where in the printed conditions the whole subject is dealt with in the greatest importance on a matter which could not have been absent from the minds of the parties at the time when the agreement was made."

[27] In **Cassim v Kadir 1962 (2) SA 473 (N) 475B, Miller J** said of such a contract: *"The contract, in its existing form, is therefore efficacious and complete and needs no addition in the form of an implied term."* If an examination of the express terms does not immediately exclude the possibility of importing a tacit term, the next question is what general test the court should apply in order to decide whether the importation of a tacit term would be appropriate.

[28] **Millin J** in **Rapp and Maister v Aronovsky 1943 WLD 68 74-5** held as follows:

"It has often been pointed out that it is not sufficient to show that the term would be highly reasonable or convenient to one or other or even both the parties. The cases show that the court has to be continually on its guard against being persuaded to introduce a term which, on analysis of the argument, appears to be no more than a term which would make the carrying out of a contract more convenient to one of the parties or to both of the parties and might have been included if the parties had thought of it and if they had both been reasonable. You are not to imply a term merely because if one of the parties or a bystander had suggested it, you think only an unreasonable person would have disagreed. You have to be satisfied that both parties did agree. It is quite a different proposition, if in a hypothetical case Scrutton LJ puts it, you feel the parties might say: 'You have called our minds to something we have not thought of and what you say is not unreasonable, let us discuss it.' If that is all that

the Court feels might have happened, then the court is not entitled to imply the term."

[29] The second part of **Scrutton LJ's** test, the bystander test, is also known as the *"officious bystander"* test from its formulation by **MacKinnon LJ in Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 at 227**. *'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course'.*

[30] The Plaintiff's counsel argued that the tacit terms sought to be advanced by the Defendant contradict the express terms of the mandate agreement and are thus untenable and further

inasmuch as they are of the nature of an "imputed tacit term" do not bear up to scrutiny, in that the defendant has failed to allege that these "tacit terms it alleges" were matters discussed and which they agreed upon or would have agreed upon by necessary implication, as opposed to its mere preference. I agree with this argument.

[31] In the case of **Wilkins v Voges [1994] ZASCA 53; 1994 (3) SA 130 (A) at 1361, Nienaber JA** said:

"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."

[32] Subsequent circumstance, which could not have been present in the minds of the parties, will not be relevant, but in cases of doubt the subsequent conduct of the parties under the contract may be relevant in drawing an inference about their intentions at the time it was entered into.

[33] The Plaintiff's counsel argued that the belated defences raised by the Defendant are spurious, as the Defendant has admitted its liability to the Plaintiff.

[34] In the Plaintiff's particulars of claim, the Plaintiff pleaded that *"[10] On 11 April 2018 and in an email directed to the plaintiff and the IDC, the defendant undertook to pay the outstanding professional development fees."*

[35] In the email dated 11 April 2018 the following was stated by Thandi Dywili, a director of the Defendant:

"It is very strange of Kagiso to declare me liar, when he has been constantly reassured of his payment."

and then further:

"Why: Because we have not made an intentional decision to withhold his due Consulting Fees, we have cash flow challenges. And we completely respect that his fees earned by packaging the first stage of our application, is due to him. What we will try and do as a business, is to see if we cannot pay him a minimum, until his fees are paid up."

[36] It is of significance to note that all the other directors of the Defendant were included in the e-mail sent by Thandi. Not one of the other directors replied to state that the proposal made by the Plaintiff to the IDC was rejected and the Plaintiff was not entitled to its fees. It is clear that all the other directors of the Defendant were also aware that the Plaintiff was indeed owed and entitled to its fees as per the Mandate Agreement.

[37] In another email dated 3 April 2018 sent by Thandi Dywili, the following was stated:

"You will be paid when the company has money. We have continuously made it clear that you will be paid."

[38] It is clear from the above e-mails that the admissions made by the Defendant's director does not only establish that the Defendant has conceded to the fact of liability, but that the Defendant concedes that the Plaintiff was the effective cause of the Defendant receiving funding and has the Plaintiff performed its obligation. The Defendant's argument that the proposal was rejected by the IDC and did not lead to the IDC performing a due diligence, cannot hold water.

[39] On 19 March 2018 Lesibana Ramaoka, the Regional Officer, Limpopo Province, IDC, sent an email to Kagiso Khabeng the director of the Plaintiff, as well as to Thandi Dywili, the director of the Defendant wherein the following was stated:-

"Dear Kagiso

Please note that the deal has been recommended to go on DD [due diligence] pending the following.

1. *Confirm valuation (please provide assets register)*
2. *How much has been spent so far, how much each shareholder contributed so far,*
3. *Clarity on the shareholders loan*
4. *Existing shareholders to contribute 40% towards the R105 million*
5. *New shareholders to contribute 40% towards the R30 million*
6. *Please clarify the shareholders share distribution or provide shareholders agreement and memorandum of understanding.*
7. *Raw material supplier – supplier contract from Exxaro.*

   Please note the following need to be addressed before DD commences, for further information please do not hesitate to contact me."

[40] It is clear from the plain reading of the above wording of the e-mail that the proposal was accepted by the IDC, but the IDC requested for further information prior to the due diligence process commencing. The fact that the IDC requested the aforementioned further information, and the fact that the further information was provided by the Defendant, does not render the Defendant's submission of further information to be a new application and proposal as submitted by the Defendant. The Defendant failed to attach any documentation or other proof that the proposal by the Plaintiff was rejected and a totally new proposal was submitted by the Defendant.

[41] It is further noteworthy that the IDC on 17 September 2018 approved a total debt finance facility of R27-million for the Defendant's project. The Defendant at no stage cancelled the agreement with the Plaintiff. The debt finance was further

approved within the one year contract term as per clause 7.1 of the Mandate Agreement.

[42] It is trite law that the Defendant must fully disclose the nature and grounds of the defence and the material facts on which it is based. The Defendant must depose to facts, that if accepted as the truth or proved at the trial, with admissible evidence, would constitute a defence to the Plaintiff's action.

[43] If the defence is averred in a manner that appear in all the circumstances to be needlessly bald, vague or sketchy, it will constitute material for the court to consider in relation to the requirement of *bona fides.* ***(See Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 228E-F).***

[44] In **Meek v Kruger 1958 (3) SA 154 (T) at 159H-160A** it was held that the purpose of summary judgment is to assist a plaintiff where a defendant who cannot set up a bona fide

defence or raise an issue to be tried, enters appearance simply to delay judgment.

[45] In my view, the Defendant has failed to show that there exists a *bona fide* defence to the Plaintiff's claim and is it thus appropriate in the circumstances that the application for summary judgment, as sought by the Plaintiff be granted with costs.

[46] In respect of the success fee rate applicable, it is common cause that the debt finance was finally approved after 31 March 2018 and the Plaintiff is therefore only entitled to 66.67% of the mandate success fee rate.

[47] I therefore make the following order:-

1. Summary Judgment is granted against the Defendant.

2. The Defendant is ordered to pay the amount of R1 460 000.00 (One Million Four Hundred and Sixty Thousand Rand) to the Plaintiff.
3. Payment of interest on the sum of R1460 000.00 *a tempore morae* from date of summons, 3 June 2020, until date of final payment.
4. Costs of suit.

M. NAUDÈ

ACTING JUDGE OF

THE HIGH COURT

APPEARANCES:

HEARD ON:	**1 DECEMBER 2020**
JUDGMENT DELIVERED ON:	**7 DECEMBER 2020**

For the Plaintiff:	ADV. AE AYAYEE

Instructed by:	MAPHOKO MHAHLELE INC.
	C/O DDKK ATTORNEYS INC.
For the Defendant:	ADV. PL UYS
Instructed by:	SAVAGE JOOSTE & ADAMS INC.
	C/O PRATT LUYT & DE LANGE ATTORNEYS