

IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 6055/2007

DATE: 3/4/2009

NOT REPORTABLE

IN THE MATTER BETWEEN

THE STANDARD BANK OF SOUTH AFRICA LIMITED (Registration Number 1962/000738/06)	APPLICANT
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AND

THE LOCAL MUNICIPALITY OF MADIBENG	RESPONDENT
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IN RE:

THE LOCAL MUNICIPALITY OF MADIBENG	APPLICANT
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AND

ORACLEPROPS 17 (PTY) LTD	1 ST RESPONDENT
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THE DAM DEVELOPMENT CC	2 ND RESPONDENT
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THE STANDARD BANK OF SOUTH AFRICA	3 RD RESPONDENT
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REGISTRAR OF DEEDS, PRETORIA	4 TH RESPONDENT
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NEDBANK LIMITED	5 TH RESPONDENT
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JUDGMENT

RAULINGA, J

The applicant, the Standard Bank of South Africa Ltd, with its principal place of business at 1st Floor, 30 Baker Street, corner Oxford Road, Rosebank, Johannesburg Gauteng Province, launched an application against the respondent, The Local Municipality of Madibeng with its principal place of business situated at Civic Centre, 53 Van Velden Street, Brits, for an order in the following terms:

- 1.1 payment of the sum of R26 478,93;
- 1.2 payment of interest on the sum of R26 478,96 at the rate of 15.5% per annum calculated from and including 26 September 2007 to the date of payment;
- 1.3 payment of costs of this application on the attorney and own client scale.

The claim arises from an order of this court per BERTELSMANN, J, who ordered that the respondent should pay applicant's costs in the main application.

While the respondent admits that it was indebted to the applicant for the payment of the sum of R26 478,93 being an amount due in terms of a bill of costs taxed in favour of the applicant in the main application, the respondent, however, denies that it has not fulfilled its obligations to pay applicant the foresaid amount, because it issued a cheque number 078189 for the sum of R26 478,93 in favour of the applicant's attorneys of record. The foresaid amount was debited from the respondent's banking account. The respondent therefore discharged its indebtedness to the applicant.

The respondent contends that on forwarding the cheque to the applicant's attorney it was an implied, alternatively, a tacit term of the agreement between the parties that the applicant would be paid by cheque and that the cheque would either be forwarded by docex or sent by post to the applicant's attorneys. However, the applicant avers that at no stage did it ever authorise or request the respondent whether expressly or impliedly to send cheques to the applicant's attorneys by post or docex. Further that this is a decision taken by the respondent's attorneys of record acting on their own and fell and remained with the respondent.

The court is called up to determine whether or not there was an implied and/or tacit term of agreement between the parties that payment would be offered by the respondent by transmitting the cheques by docex and whether the underlying debt has been discharged when the respondent sent the cheque.

Prior to the hearing of this application the respondent sought condonation for:

- (i) the late filing of the heads of argument as well as
- (ii) the filing of the answering affidavit out of time.

The parties were *ad idem* that condonation be granted on both aspects and that no punitive costs should be awarded.

On 14 September 2007 the bill of costs submitted by the applicant in terms of the order granted in the main application was taxed in the amount of R26 478,93. A copy of the taxed bill of costs was annexed as "B".

The sequence of events can be gleaned from the correspondence between the two parties. On 18 September 2007 the applicant's attorney of record, through its Sandton office, addressed a letter by facsimile to Langenhoven Pistorius & Partners Inc, the respondent's attorneys of record in the main application, in which the respondent's attorneys of record were-

1. informed of the taxation of the two bills of costs in the main application, one for the costs of the applicant's attorneys in the main application and another for the costs of the applicant's correspondent attorneys appointed in the main application;
2. requested to revert on when the applicant could expect payment in the settlement of the two taxed bills of costs. A copy of the letter is annexure "C1".
3. On 19 September 2007 the respondent's attorneys of record addressed a response to the applicant's attorneys in a letter annexure "C2" in which they-
 - 3.1 noted the contents of the letter annexure "C1";
 - 3.2 advised that the letter and the taxed bills of costs had been forwarded to the respondent for "urgent instructions pertaining to payment";

3.3 requested the applicant's attorneys to pend its file as the respondent's attorneys were certain that the respondent would effect payment in settlement of the taxed bills of costs "expeditiously".

On 5 October 2007 the respondent's attorneys of record addressed a letter by facsimile to the applicant's attorneys in which they-

1. advised that they were provided with cheques by the respondent in settlement of the two taxed bills of costs;
2. advised that they had proceeded to forward these cheques to the applicant's attorneys in full and final settlement of the taxed costs – annexure "D1" refers.

Further correspondence between the attorneys are annexures "D2" and "D3".

On 9 November 2007 the applicant's attorneys of record addressed a letter by facsimile to the respondent's attorneys in which the applicant's attorneys-

1. recorded that they had still not received the two cheques that had been sent by the respondent's attorneys;
2. requested the respondent's attorneys to investigate the matter surrounding the cheques and if the cheques had not been deposited arrange for them to be cancelled by way of a "stop payment instruction";

3. requested that the respondent provide new cheques in settlement of the taxed bills of costs and that the respondent's attorneys of record attend to the deposit of those cheques directly into the applicant's attorneys trust account, annexure "D4".

On 13 November 2007 the respondent's attorneys of record addressed a letter by facsimile to the applicant in which they-

1. attached copies of the letter dated 5 October 2007 addressed to the applicant's attorneys and the two cheques submitted in settlement of the taxed bills of costs;
2. confirmed that the two cheques were drawn by the respondent;
3. confirmed that they had requested the respondent to act as requested by the applicant's attorneys in the letter of 9 November 2007 – annexure "D5".

On 23 November 2007 the respondent's attorneys of record addressed a letter by facsimile to the applicant's attorneys in which they (among others)- ...

- recorded the deposit of the cheque drawn by the respondent in favour of the applicant's attorneys on 6 November 2007;
- assumed that the applicant's attorneys had received both the cheques.

A number of letters between the attorneys for the two parties were exchanged thereafter and what is important is that the applicant's attorneys confirmed that they neither received nor deposited the cheque.

The matter deadlocked on 30 January 2008 when the respondent addressed a letter to the applicant's attorneys in which it was stated that it ascertained that the cheque drawn by the respondent in favour of the applicant's attorneys was paid on 6 November 2007 after it was deposited into an account apparently held in the name of the applicant's attorneys at Absa Bank Ltd and that the other cheque had not been presented for payment. The respondent then enclosed a copy of a cheque drawn by the respondent in favour of the applicant's attorneys which incorporated an endorsement of payment after it was presented by a certain Somtaga G Monako at the Northam branch of FNB bank although it was marked "not transferable" – annexure "E1".

The respondent then claimed that it could not accept liability for the cheque drawn in favour of the applicant's attorney even if such cheque was paid to a party not authorised by the applicant's attorneys.

On 17 March 2008 the respondent addressed a letter to the applicant's attorneys *inter alia* informing them that it had concluded that it was of the opinion that once the cheques were issued and handed to the respondent's attorneys of record for dispatch to the applicant's attorneys in whatever mode or form agreed upon, expressly or tacitly, payment had been discharged by the respondent in full – annexure "E6".

As a prelude to the evaluation of this application I wish to quote a *dictum* of CORBETT, AJA as he then was.

In his dissenting judgment in *McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) at 531E-H and 532A-B he expressed the terms implied by law as follows:

"In legal parlance the expression 'implied term' is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual consensus: it is imposed by law from without ...

In the second place, 'implied term' is used to denote 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. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not

only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question or the situation requiring the term, had been drawn to their attention."

Having regurgitated the evidence in the form of the letters which were exchanged between the two parties it is necessary to indicate that these reflect the versions of both the applicant and the respondent. There does not seem to be any dispute in form, but an argument may arise as to interpretation and application.

The common cause issue is that there was money owing to the applicant by the respondent. The question is whether there was an agreement reached by the parties that the cheque should be sent by docex. In their submissions both counsel were *ad idem* in as far as the principle applied on implied and tacit terms is concerned. Both parties also agree that there was no express request to sanction the transmission of the cheque by docex.

As a point of departure one should observe that although the respondent refers to the implied agreement by way of transport through post or docex, it is clear from the evidence that a docex was used. The use of counter services by the applicant's attorneys is reflected on annexure "C1" as Docex 456 Johannesburg and that of the respondent's attorneys as Docex 3 Brits. Correspondence between the offices of the parties' attorneys

was transmitted either by fax or e-mail. There is no indication that counter service was used in this regard. This is evidenced from annexure "C1" and "C2".

It can be accepted that docex is a system of couriers which is used throughout South Africa by firms of attorneys. The complex question to answer is to find out the purpose for which the docex is used. Is it used to transmit ordinary correspondence, cheques and other bills of exchange? Is docex a safe system to be used to transmit original documents, such as original title deeds? It is indeed true that a number of original documents are transmitted by docex. Some do reach their destination and others do not.

One cannot conclude from annexure "D2" that the applicant's attorneys were aware that the cheques would be forwarded to them by docex. To do so will be a misnomer. In essence what should occur is that there must be an implied invitation by the creditor to the debtor to send an item by way of docex. If no such invitation is extended there is no need for the creditor to object to a mode that is to be utilised by the debtor. If a debtor chooses a mode that he wants to use then he must take the risk of the consequences. An implied term of agreement between the parties must not be too remote to discern.

The respondent submits that it is a normal practice between attorneys to transmit cheques by docex. As indicated *supra* it is normal to transmit original documents through docex but in modern business parlance it may not be normal to transmit cheques

by courier. It would appear that cheques are normally deposited into a bank account or banked through electronic transfer. Modes of transport and transmission of instruments come and go. The Post Office and telegraphs were modes which were employed for donkey years, but they have been abrogated by disuse as new modes were introduced. I am not convinced that a docex in the context *supra* is a safe system through which cheques may be sent whether marked "not negotiable" or "not transferable" or not. The case in point is a good example.

It is indeed true that the Acting Manager Legal Services states in paragraph 8 of his letter "E1" dated 30 January 2008 that the cheque in the sum of R453,25 would be forwarded by "ordinary mail". However, it is doubtful if Mr Laher of the applicant's attorneys ever made such a request. In his letter "E2" dated 21 February 2008, Mr Laher was replying to the respondent's letter "E1" dated 30 January 2008. Paragraph 1 of "E2" reads as follows:

"We are in receipt of, and thank you for, your letter dated 30 January 2008 together with certain enclosures, including a cheque drawn by you in favour of Findlay & Niemeyer Attorneys in the amount of R453,25."

When this letter was written the cheque was already dispatched by the respondent. There was no prior agreement between the parties that the cheque should be dispatched by way of docex. At the stage the letter "E2" was written the horses had already bolted. It was too late for the applicant's attorneys to indicate that the cheque should not be transmitted by docex. The letter was received *ex post facto*.

The *onus* is on the respondent to prove that there was an implied agreement between the parties. The agreement must have been made prior to the dispatch of the cheques. *In casu* the letters "D1" and "D2" were written after the cheques were sent. There was no need for an objection by the applicant's attorneys.

Except for the cheque in the amount of R453,25 which was dispatched by the respondents to the applicant's attorneys, there was no practice between the parties that cheques could be sent by docex or post. No inference can be drawn from this one isolated event. Further, there was no prior agreement.

The words of Lord Esher M.R. in *Pennington v Crossby & Sons* (1897, 77 L.T.R. 43) as quoted by RAMSBOTTOM J in *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 2 SA 763 (TPD) at 770:

"There was no course of business that the mere delivery of the cheque to the Post Office was equivalent to delivery to the plaintiff and was, therefore, a payment of the money due. The course of business was merely that the defendant sent cheques to the plaintiff by post, and the plaintiff never objected to being paid that way. It would be outrageous for the court to infer from that that the plaintiff ever requested the defendant to send cheques by post, and agreed to run the risk of (or) in the transit."

See also *Barclays National Bank Ltd v Wall* 1983 1 SA 149 (AD) at 159F-H.

In casu no inference can be drawn that the applicant ever requested the respondent to send the cheque by docex. For this agreement to qualify as an implied term, there must be step by step assurance that there was a request made by the applicant to the respondent, there must be a practice between the parties that docex is used in their business dealings. The practice must be employed in modern business parlance and should be common countrywide or internationally. The item must have reached the post box or if a docex is used it must have been properly secured (registered and dispatched).

The interpretation of letters "C1" and "C2" at pages 37 and 46 of the applicant's founding affidavit respectively does not help the cause of the respondent in its argument that there was an invitation by applicant to send by docex. Such a construction will be out of context.

In *Dadoo & Sons Ltd v Administrator, Transvaal* 1954 2 SA 442 (TPD) – the principle applied is the same as in the other cases. However, the two judges were not *ad idem* on the issue of implied request. I am inclined to agree with RUMPF, J (as he then was) that "there had been no specific or implied request" and that *in casu* since the cheque did not reach the applicant's attorneys the risk remains with the respondent. It may not always be accepted that because the parties conduct business in two different towns (cities) a probability exists that they conduct business through docex. It will depend on each individual case.

I am inclined to believe that the intention and expectation of the applicant was always that the cheques would be deposited – annexure "D4" confirms this. This is also confirmed by the fact that the respondent's attorneys of record requested the respondent to cancel and provide new cheques which had to be deposited. This is an indication that they knew that the cheques had to be deposited and not sent by docex.

I am therefore of the view that the respondent did not adduce sufficient evidence that there exist an implied/tacit term. There was neither a request nor authority by the applicant that the cheque be transmitted by docex.

In the premises the following order is made:

1. Condonation for the late filing of the heads of argument and for the filing of the answering affidavit out of time is granted.
 - 1.1 The respondent is ordered to pay the costs of condonation at party and party scale.
2. The applicant's application is granted with costs.

T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

6055-2007

HEARD ON:
FOR THE APPLICANT:
INSTRUCTED BY:
FOR THE RESPONDENTS:
INSTRUCTED BY: