



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE:	no
(2)	OF INTEREST TO OTHER JUDGES:	no
(3)	REVISED:	
Date: Signature: [Redacted]		

23/7/2025

CASE NO: 26936/2015

DATE: 23 July 2025

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

LEO CHARLES BAXTER

Respondent

Coram: Terner AJ

Heard on: 23 May 2024

Delivered: 23 July 2025

Summary:

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 July 2025.

JUDGMENT: LEAVE TO APPEAL

TERNENT, AJ:

[1] The respondent seeks leave to appeal the judgment granted in favour of the applicant, on 3 January 2024, together with the costs order on the attorney client scale. The respondent's counsel clarified the request in the application for leave to appeal¹ and confirmed that, if leave is granted, it should be to the Full Court of this division. He also contained his argument (and the heads of argument filed on behalf of the respondent), to the grounds of appeal set out in paragraphs 1, 2 and 7 of the application for leave to appeal. The remaining grounds were not persisted with.

[2] As I understood the respondent's counsel's argument there was "*sufficient evidence*" disclosed, in the respondent's answering affidavit, to establish *bona fide* disputes, that should have resulted in my exercising my discretion in favour of a referral of the matter to trial.

[3] In this regard and, as set out in the heads of argument,² it was submitted that the respondent's defences allegedly comprised :

[3.1] the proper construction of the special power of attorney;

[3.2] the market value of the properties;

[3.3] the conduct of the applicant in having sold the properties for R12 000 000,00 and not more; and

¹ CaseLines 023-3 to 023-6

² Paragraph 9.4, CaseLines 024-6

[3.4] the *quantum* of the respondent's damages.

[4] As is clear from my judgment these alleged disputes were not raised at the time and have been clarified and raised, in argument, for the first time in this leave to appeal. There was no clarity as to what was to be referred to trial at the hearing of the matter before me.

[5] Albeit that they were not raised in the hearing, I intend to deal with each of these alleged defences in the context of whether they do indeed raise *bona fide* disputes capable of being referred to trial, as submitted by the respondent's counsel.

The proper construction of the Special Power of Attorney

[6] In the application for leave to appeal the respondent contends that I erred in not finding that there was an "*implied*" term agreed upon in the special power of attorney ("*SPA*"). This term is allegedly to the effect that the properties comprising the Stonefield Polo Estate, would be disposed of "*for a market related rental*". I accept that this was a typographical error and that the respondent meant to refer to a market related purchase price.

[7] In the submissions made to me by the respondent's counsel he, also contended for a tacit term to this effect. This, he submitted, arises from the wording of the indemnity, contained in the SPA, which the respondent gave the applicant provided that it acted *bona fide* in exercising its rights under the SPA. The contention was that the applicant did not conduct itself in a *bona fide* manner because it sold the properties for less than their market value in breach of the indemnity.

[8] In ***Food & Allied Workers Union v Ngcobo N.O.***³ a tacit term is defined

³ 2014 (1) SA 32 (CC), paragraph 37

as follows –

“... A tacit term is an unspoken provision of the contract. It is one to which the parties agree, though without saying so explicitly. The test for inferring a tacit term is whether the parties, if asked whether their agreement contained the term, would immediately say, “Yes, of course that’s what we agreed.” Before a court can infer a tacit term, it must be satisfied that there is a necessary implication that they intended to contract on that basis.” [my emphasis]

- [9] In contrast an implied term, as set out in Rule 18(7) of the High Court Rules, is a term implied by law and the pleader is not required to state the circumstances from which an implied term is to be inferred.
- [10] In ***Nel v Nelspruit Motors (Edms) Bpk***⁴ it is set out that reliance on a tacit term requires a party to prove that there was no express agreement reached on this aspect in question and, to the extent that it departs from the *prima facie* meaning of the text, the circumstances relied upon for this interpretation must be pleaded.⁵
- [11] In ***Hartog v Daly and Others***⁶, in an appeal, Strydom J was seized with this very issue. The Judge had to determine whether a tacit term should have been incorporated in the agreement between the parties and whether the Court in the face of this alleged dispute could have decided the matter on the papers or should have referred it to trial.
- [12] In so doing, with reference to Amlers, the Judge found that in order to

⁴ 1961 (1) SA 582 (A)

⁵ ***Société Commerciale De Moteurs v Ackermann*** 1981 (3) SA 422 (A)

⁶ 2023 JDR 0189 GJ

determine whether a tacit term albeit unexpressed was agreed to by the parties the common law requires an assessment of whether the intention to include the term could be inferred from the express terms of the contract and from the surrounding circumstances which would include the conduct of the parties after the conclusion of the contract.

- [13] In so doing, Strydom J referred to the decision of ***City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd & Another***⁷ which held as follows:

“[16] A tacit term is an unexpressed provision of a contract. It is inferred primarily from the express terms and the admissible context of the contract. A court will not readily infer a tacit term, because it may not make a contract for the parties. The inference must be a necessary one, namely that the parties necessarily must have or would have agreed to the suggested term. A relevant factor in this regard is whether the contract is efficacious and complete or whether, on the other hand, the proposed tacit term is essential to lend business efficacy to the contract. The ‘celebrated’ bystander test constitutes a practical tool for the determination of a tacit term. To satisfy the test the inference must be that each of the parties would inevitably have provided the same unequivocal answer to the bystander’s hypothetical question. Even if the inference is that one of the parties might have required time to consider the matter, the tacit term would not be established.”

- [14] In referring to the innocent bystander test, Strydom J referenced from ***Reigate v Union Manufacturing Co Ramsbottom Ltd*** that:⁸

⁷ Para [47] of the judgment

⁸ Para [50] of the judgment

[50] *A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case,' they would have both replied: 'Of course, so-and-so will happen; we did not trouble to say that; it is too clear'.*"

[51] *The business efficacy of the contract, and what reasonable parties to a contract would have agreed upon in the circumstances of the particular case, are part of the facts from which the inference of the alleged intention can be made. To this extent, the bystander test has been objectified. If such an inference cannot be made, a consensual tacit term cannot be read into the contract."*

[15] In considering whether or not there should be a referral to trial in the face of a factual dispute, Strydom J held that there were two separate enquiries namely:

[63] *First, whether as a result of a factual dispute, the matter should have been referred to trial and second, if the matter was not to be referred to trial, whether the relief sought by the respondents could have been granted on the papers before court.*"⁹

[64] *In my view, the mere allegation of the existence of a tacit term on the papers of the appellant and the denial thereof by the respondents does not create a factual dispute in itself for the simple reason that a tacit term is to be inferred or imputed, having regard to the express terms of the mandate, the surrounding circumstances and the conduct of the parties. ...*

⁹ Para [63]

The dispute of fact must present itself at the level of the express terms, the surrounding circumstances and the conduct of the parties in the implementation of the mandate. If there is a factual dispute at this level, then the probabilities cannot be considered, and the matter stands to be referred to oral evidence. Final relief would not be competent. If no factual dispute has arisen on that level, then the court can consider the probabilities and decide the matter.

[65] *It is trite that in motion proceedings probabilities are not to be weighed and considered to establish the facts of a matter. In my view, the situation is different when it comes to establishing the existence of a tacit term. If the facts are common cause or if the facts stated by a respondent are to be accepted, probabilities can be considered upon such facts to decide whether such probabilities support the existence of a tacit term."*

- [16] Having weighed up the probabilities, in the face of a tacit term which was baldly alleged and unsubstantiated, Strydom J found that the tacit term contended for did not arise.
- [17] At the outset this alleged term contradicts the express provisions of the SPA, which authorised the applicant to sell the properties, in its own interest. There is no explanation provided by the respondent to explain this contradiction away, and indeed the respondent's counsel, constrained by the respondent's answering affidavit, could not and did not do so.
- [18] It was submitted, however, that I must have regard to the context, purpose, and surrounding circumstances which existed at the time of the conclusion of the SPA namely the sale of the properties to reduce the indebtedness of the respondent to the applicant. This would allegedly provide the basis for this tacit term.

- [19] On the sale of the properties, and in the face of the valuation referred to below, the applicant did reduce the respondent's indebtedness to it by R12 million. This says the respondent was not enough.
- [20] The respondent, other than a vague allegation for a tacit or implied term did not even attempt to provide any context or circumstances in support thereof. At best he says, without more, that it was agreed with the applicant that when it received an offer to purchase the properties it was obliged to present the offer to him so that he could agree that the price was fair and reasonable. And that if the properties were sold below market value so that he suffered damages, he would be entitled to institute an action to recover his damages, as deduced from the use of the words "*bona fides*" in the indemnity clause, as already mentioned. The clear and unambiguous wording in the SPA, concluded in the applicant's interest, in my view, prohibits any such interpretation. The SPA permits the applicant to sell the properties on such terms as it deemed fit, as if the respondent himself had done so, which steps were ratified by him, and which authority was irrevocable.
- [21] As already set out in the judgment, the respondent, on his own admission, had tried, to sell the properties for a year. It was Noble, who called for a valuation of the properties, by the applicant, when instructed by the respondent to attempt to sell the properties, in March 2014. The applicant did just that. Having received the valuation, Noble, the respondent's estate agent and Park Village Auctions, who was authorised by the applicant to proceed with the auction, affirmed that at R15 million this was a realistic value for the properties. Notably the respondent himself in an e-mail to Noble, on 16 May 2024, affirms that he has given a power of attorney to the applicant and that Park Village Auctions is attending to the auction process. Despite this he says that Noble can still work through him and attempt to help him to sell the properties privately. This was in response to an e-mail from Noble to the respondent in which he informed him that he had been told by Jaco at Park Village Auctions that he had a mandate

to sell the properties, on auction, unless the respondent could find buyers and that Park Village Auctions had been mandated by Standard Bank to do so. As appears from the replying affidavit the properties were placed on tender from the 11 April 2014 to the 5 May 2024 with no offers. It was then, as reflected in the e-mails, that were exchanged, that discussions ensued between Park Village Auctions, Noble and the applicant and a decision was taken to auction the properties with the involvement of all of the aforesaid. Noble, acting on behalf of the respondent, sought to identify buyers privately in the local market. The applicant explains that there were three interested buyers, identified by Park Village Auctions and Noble, but only one formal offer was received being that of the purchaser. Both Noble and Park Village Auctions attempted to get offers from the remaining interested buyers but to no avail. As also stated in the judgment, the respondent was always fully aware of events during the sale process and his denials in regard thereto cannot be sustained. The respondent did not, despite being invited to do so, put up an affidavit by Noble or himself to dispute this and as such these facts remain undisturbed.

- [22] As such, the email communications, dealt with in the judgment, do not support the inference of a tacit term. The respondent, was afforded an opportunity until 20 August 2013, by the applicant to sell the properties privately. The respondent did not find an international buyer to purchase the properties, at his undisclosed price, prior 20 August 2013. He was unable to do so.
- [23] The respondent's last e-mail to the applicant, dated 28 July 2014, is referred to in the judgment. In this e-mail, he concedes that a buyer that he had found is aware of the difficulty in selling the properties and that he is going to try and negotiate an acceptable price. When asked by the applicant's representative, Clay, to disclose his acceptable price, he does not respond other than to say that he hopes he will be able to negotiate the potential buyer up to an acceptable price and also hopes that he will

get more than what the other Polo Estate, Bitou sold for which he says was in the region of R20 million.

- [24] As a consequence and, having mandated Park Village Auctions to sell the properties, the applicant proceeded under the SPA and the respondent with full knowledge, played no further role in the auction and price raised. This inaction accords with the express wording of the SPA and the indemnity furnished to the applicant by the respondent arising from its *bona fide* and lawful exercise of its rights in selling the properties.
- [25] I do not accept that the parties intended to contract on the basis contended for by the respondent. Hence the contention for a consensual tacit term must fail.
- [26] It remains undisputed therefore that the respondent knew that the applicant would auction the properties, subsequent 20 August 2014, and that the applicant would proceed to auction the properties, on its own terms, as provided in the SPA, a document which he negotiated and signed. This to my mind makes business sense for the applicant who sought to recover, as best as it could, the indebtedness owed to it. One would have anticipated evidence by the respondent that he impressed upon the applicant persistently that the properties could only be sold, on auction, at market value and that he had established that value. When the properties were sold for R12 million, and in the scope of the applicant's valuation, albeit R3 million less, the respondent did nothing to prevent the auction failing to even bring an application to stay the sale of the properties.
- [27] Rather the respondent's affidavit paints a picture of a respondent who has accepted his position, and as stated in the judgment, fallen on hard times.
- [28] I disagree that the context, purpose and circumstances, surrounding the conclusion of the SPA assist the respondent in establishing "*sufficient*

evidence” favouring the existence of a tacit term, as contended for by the respondent’s counsel.

- [29] The bald and vague manner in which this defence was raised in the respondent’s affidavit, did not create a dispute. As such, there was no basis for a referral to trial.

The market value of the property and the conduct of the applicant in achieving R12 million

- [30] There is, also, no basis for the contention that the market value of the properties was significantly more. The respondent vacillates between R31 million and R40 to R50 million as being the market value of the properties. These unsubstantiated allegations arise from his failure to put up a sworn valuation, despite many opportunities to do so, and his concession that he would do so¹⁰. He did not do so, and this is telling.

- [31] Having attached the incomplete valuation (albeit not a sworn valuation),¹¹ the respondent sought to contend that this valuation emanated from the applicant, and revealed that the applicant knew that the properties had a realistic market value of R31 million, and with this knowledge sold the properties for R12 million, conduct which was not *bona fide*. The complete valuation was, as explained in my judgement, uploaded to CaseLines by the respondent’s legal representatives subsequent argument, and without my leave. Having done so, the document revealed that the respondent had sourced and secured the valuation. The respondent must therefore have had the complete document at all times. There is no explanation for his statement, which was clearly misleading. This coupled with the fact that only a portion of the document was disclosed, remains questionable. As stated above, an independent

¹⁰ Paragraph 8.3, CaseLines 003-27

¹¹ Annexure “A1”, CaseLines 003-31 to 003-52

valuation was never done by the respondent. It is probable that the respondent appreciated that he could not get the required valuation to affirm his bald allegations as to the value of the properties at the time of their auction, particularly because Noble had agreed to the valuation of R 15 million.

- [32] It is apparent therefore that on the respondent's own showing he accepted that the applicant was entitled and authorised to act as it did, in compliance with the SPA, and that he had no defence to the auction and price achieved for the properties. This, together with the other findings in the judgment, as to the knowledge and conduct of the respondent puts paid to any suggestion that the applicant did not act in good faith.
- [33] The respondent's counsel sought to take me to this document. Unfortunately, the document was not admitted in evidence, and cannot be considered. But even if it were it does not support the contentions made by the respondent in his affidavit, quite the contrary.
- [34] I disagree with the respondent's counsel that there was "*sufficient evidence*" to establish a *bona fide* dispute at trial that the property could and should have been sold for more than the R12 million at auction.

The quantum of the damages

- [35] The respondent's counsel referred me to the decision of ***Academy of Learning (Pty) Ltd v Hancock***.¹² I accept the principle, as also provided in Rule 22(4) of the High Court Rules, that an illiquid counterclaim, properly and *bona fide* raised in motion proceedings, may in the discretion of the Judge be referred to trial.
- [36] The issue in this matter is that I cannot and did not find that the

¹² 2001 (1) SA 941 (C)

respondent's counterclaim is *bona fide*. As already set out in the judgment, and despite the lapse of seven years, he took no steps to institute an action for these alleged damages which he made no attempt to quantify. As also submitted by the applicant's counsel, should he now do so, his claim will have prescribed. In all of the circumstances then any damages claim which the respondent may have had, and which I do not find that he did have, has been eroded by the passage of time and his inaction.

CONCLUSION

[37] Accordingly, the respondent has not demonstrated, as is required in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, that "*the appeal would have a reasonable prospect of success*".

[38] In ***Ramakatsa and Others v African National Congress***¹³ it was said that an applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success. An applicant must convince the Court on proper grounds that he has prospects of success on appeal and those prospects are not remote, but have a realistic chance of succeeding. More is required than a mere possibility of success, or that the case is arguable on appeal, or that the case cannot be categorised as hopeless.¹⁴

[39] In the decision of ***Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others***¹⁵ Wallis JA observed that a Court should not grant leave to appeal and, indeed is under a duty not to do so, where the threshold which warrants such leave has not been cleared by an applicant

¹³ (724/29) [2021] ZASCA 31 (31 March 2021)

¹⁴ ***S v Smith*** 2012 (1) SACR 567 (SCA)

¹⁵ 2013 (6) SA 520 (SCA)

in an application for leave to appeal:

[24] ... The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal."

[40] Accordingly, it is required of a lower Court that it act as a filter to ensure that the Appeal Court's time is spent only on hearing appeals that are truly deserving of its attention and that the test for the grant of leave to appeal should thus be scrupulously followed.

[41] I am of the view that the application for leave to appeal has no merit and there are no reasonable prospects of another Court coming to different conclusions than those reached by me. The appeal does not, in my view, have a reasonable prospect of success. Leave to appeal should therefore be refused.

[42] The costs must follow the result. As also ordered, in the judgment of this Court, the scale of costs is governed by the loan agreements to which the respondent was a party and provide for costs on an attorney client basis.

[43] In the circumstances I make the following order:

[43.1] The respondent's application for leave to appeal is dismissed with costs.

[43.2] The respondent shall pay the applicant's costs for leave to appeal on the attorney client scale.


P V TERNENT

*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON: 23 May 2024

DATE OF JUDGMENT: 23 July 2025

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