

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

CASE NO.: 94261/16

DATE: 20 NOVEMBER 2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
DATE



In the matter between

**ROELOF LAUFS (PTY) LTD**

First Plaintiff

**MARNUS LAUFS BOERDERY (PTY) LTD**

Second Plaintiff

**R P LAUFS**

Third Plaintiff

**M J LAUFS**

Fourth Plaintiff

**W J LAUFS**

Fifth Plaintiff

**W J LAUFS N.O.**

Sixth Plaintiff

**L G LAUFS N.O.**

Seventh Plaintiff

and

**ABSA BANK LIMITED**

Defendant

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## J U D G M E N T

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### A B ROSSOUW AJ

- (1) This is an exception against the plaintiffs' particulars of claim on a number of grounds.
- (2) The plaintiffs did not file any heads of argument and all indications were there that the exception was not going to be opposed and that is the basis upon which I prepared this judgment. When the matter was heard, there was appearance on behalf of the plaintiffs, but only in respect of the costs order, with which I shall deal with at the end of this judgment.
- (3) I shall nevertheless deal with the merits of the exception, because it has a bearing on the costs order.
- (4) The first ground relied upon is that prayers 2 and 3 (quoted below) are not supported by the allegations contained in the particulars of claim, in other words that the particulars of claim lack the necessary averments to sustain the relief sought in these prayers.
- (5) The plaintiffs, ie two private companies, three individuals and two trustees of a trust issued summons against the defendant, a commercial bank, for the following relief based

on separate agreements entered into between each of the plaintiffs and the defendant:

‘1. That the Defendant provides to the Plaintiffs the documents referred to in paragraphs 8.1 and 8.2 of the Plaintiffs’ particulars of claim;

2. That the Defendant renders full accounts to the Plaintiffs pertaining to each and every of the agreements, as per paragraph 8.3 of the Plaintiffs particulars of claim;

3. A debatement of the account referred to in prayer 2;

4. Payment to the Plaintiffs of whatever amounts appear to be due to the Plaintiffs upon the debatement of the accounts;

5. That the Defendant pays the costs of this action on a punitive scale as between attorney and own client;

6. Further and/or alternative relief.’

(6) Paragraph 8 of the particulars of claim contains the citation of the defendant and nothing more.

(7) If the particulars of claim are read as a whole it is clear that the reference to paragraph 8 should be read as a reference to paragraph 11 of the particulars of claim.

(8) Paragraph 11 of the particulars of claim reads as follows:

‘11.It was express, alternatively tacit alternatively implied terms of the agreements that the Defendant would:

11.1 Furnish the Plaintiff’s with copies of all agreements, including but not limited to facility letters, for the Plaintiffs records;

11.2 Furnish the Plaintiffs with particulars and copies of all securities required by the Defendant and provided by the Plaintiffs, for the Plaintiffs' records;

11.3 Furnish the Plaintiffs on a regular basis, and not less than monthly, with statements of accounts, stating, inter alia, all credits and debits entered against the accounts as well as the balance due and owing by the Plaintiffs from time to time as at the end of each month.'

(9) On a proper interpretation of the particulars of claim as a whole the words 'statements of accounts' in paragraph 11.3 refer to bank statements or monthly statements as opposed to statements of account.

(10) In paragraph 12.2 of the particulars of claim the plaintiff alleges as follows:

'The Defendant, furthermore, failed to account to the Plaintiffs in order for the Plaintiffs to be able to identify whether the Plaintiffs remain indebted towards the Defendant, and, if so, the quantum of such indebtedness, alternatively, whether the Defendant is indebted to the Plaintiffs.'

(11) There are no allegations in the particulars of claim from which one could infer that the defendant does have a duty, contractually or otherwise, to account as opposed to a duty to deliver bank statements and other documents.

(12) As *Mr MP Van der Merwe SC*, who appeared for the defendant, correctly pointed out in his heads of argument

with reference to *Absa Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (A), the particulars of claim do not allege the existence of a fiduciary relationship between the plaintiffs and the defendant or that the defendant is contractually or otherwise bound to deliver and debate an account, which allegations are necessary to support the relief sought in paragraphs 3 and 4.

- (13) The second ground of exception relates to paragraph 10 of the particulars of claim. This paragraph reads as follows:

'10. At all material times and in terms of a written, alternatively oral, alternatively tacit, alternatively implied agreements ('the agreements') entered into between the Plaintiffs, severally, on the one hand, and the Defendant, on the other hand.'

10.1 The Defendant acted and still acts as a provider of financial services to the Plaintiffs severally;

10.2 The Defendant, from time to time, made available certain banking facilities and/or loans in terms of the agreements to the plaintiff's as per the following accounts: . . . '

- (14) This paragraph refers to 6 agreements entered into between the first to fifth plaintiffs and the trust, on the one hand, and the defendant on the other. It does not state where, when and by whom the agreements were concluded. It also leaves the reader in the dark as to whether the agreements or some of them are in writing, and, if so, no copies of the those portions of the agreements relied upon are attached

to the particulars of claim. In other words Uniform Rule 18(6) was simply ignored.

- (15) Be that as it may, the defendant's objection is not directed at the non-compliance with the latter rule but at the lack of allegations regarding the alleged tacit contract.
- (16) The words 'tacit' and 'implied' are often used interchangeably (Compare the different terminology used in the Afrikaans and English texts of Uniform Rule 18(7), which I deal with below) or in the alternative of which the plaintiffs' particulars of claim are a good example
- (17) In paragraph 10 the plaintiffs allege the conclusion of implied agreements, alternatively tacit agreements (in the alternative) and in paragraph 11 they further allege that these implied, alternatively tacit agreements (in the alternative) have certain express, alternatively implied, alternatively tacit terms. This implies that the implied or tacit agreements relied upon (in the alternative) have express terms. This is very confusing, to say the least.
- (18) I think that the words 'tacit' and 'implied', whether they are used in the context of agreements or in the context of terms of an agreement, need some clarification to avoid further confusion.

- (19) Uniform Rule 18(7) provides that it shall not be necessary in any pleading to state the circumstances from which an alleged 'implied term' can be inferred. The Afrikaans text of the said rule uses the words "stilswyende bepaling" ('tacit term') as opposed to the words 'implied term' ('geïmpliseerde term') found in the English text.
- (20) There is a clear distinction between a term implied by law and an implied term based upon the actual or imputed intention of the parties to the contract. I shall henceforth refer to these terms as an 'implied term' and a 'tacit term' respectively after Corbett AJA (See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 532F- G and upon which the discussion that follows is based).
- (21) An implied term (a term implied by law) is an unexpressed provision of a contract which the law imports therein, unless excluded by the parties. *It is not a consensual term* and it simply represents a legal duty imposed by law in the case of certain classes of contracts. It is a *naturalium* of the contract in question.
- (22) A tacit term (also known as a term implied from the facts) denotes 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*.

- (23) If regard is had to the difference in terminology used in the English text ('implied term') and the Afrikaans text ('stilswyende bepaling') of Rule 18(7) and the discussion in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* 531D - 532H and mindful of what is stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) it becomes clear that nothing turns on the different terminology used in these texts because they refer to the same thing, namely a tacit term (a term implied from the facts) as opposed to an implied term (a term implied by law). This must be so because an implied term is not inferred by the Court from the express terms of the contract and the surrounding circumstances.
- (24) It follows that rule 18(7) can only apply to express (written and oral) contracts and not to contracts implied from the facts and circumstances.
- (25) A tacit term must be distinguished from a tacit contract, ie where an entire contract is implied from the facts and circumstances.
- (26) Where reliance is placed on a tacit contract (a contract implied from the facts and circumstances), a statement of the facts and circumstances constituting the implied contract relied upon is required. In order to establish a tacit agreement it is necessary to allege and prove unequivocal conduct which is capable of no other reasonable



interpretation and that the parties intended to and did in fact contract on the terms alleged. The facts and circumstances from which such an implied contract is inferred must be set out in the particulars of claim. Where a tacit contract is relied upon it is generally insufficient merely to refer to a large quantity of facts and evidence. In order to comply with the requirement of 'unequivocal conduct which is capable of no other reasonable interpretation' a catalogue of actions and specific conduct must be averred. Every relevant action or specific conduct must then be proved. It must, furthermore, be averred that the party concerned relies on a thus proven contract from which the remedies which he seeks to enforce flow. (*Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en andere* 1984 (2) SA 261 (A) 267.

- (27) The plaintiffs rely, in the alternative, on an agreement implied from the facts and circumstances without alleging any of the facts and/or circumstances from which such a tacit agreement can be inferred.
- (28) This renders the particulars of claim excipiable in that they lack all the averments which are necessary to sustain an action.
- (29) The defendant also objected to paragraphs 1 and 2 of the relief sought on the basis that paragraph 8 of the particulars of claim makes no mention of any documents referred to in these paragraphs. I have already dealt with this.

(30) I therefor find the exception to be well taken.

(31) At the hearing of this matter I was informed by counsel that the plaintiffs had amended their particulars of claim and that the defendant wanted to reconsider its position in the light of the amendment. I was also informed by counsel that the plaintiffs tendered the wasted costs in respect of the exception up to the date of the plaintiffs' amendment, ie 8 November 2017. This tender was made for the first time on the day of the hearing of this application. In view of these developments the defendant only sought a costs order in its favour.

(32) Mindful of the foregoing, I see no reason as to why the defendant should not be entitled to all its costs in respect of the exception.

(33) I therefor make the following order:

1. The plaintiffs are ordered, jointly and severally, the one paying the other to be absolved, to pay the defendant's costs of the exception, including the costs of today.

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**A B ROSSOUW AJ**

CASE HEARD ON: 20 NOVEMBER 2017

ORDER MADE ON: 20 NOVEMBER 2017

WRITTEN REASONS HANDED DOWN ON: 21 NOVEMBER 2017

APPLICANTS' ATTORNEYS: SCHOEMAN & ASSOCIATES

APPLICANTS' COUNSEL: J R MINNAAR

DEFENDANT'S ATTORNEYS: TIM DU TOIT & CO

DEFENDANT'S COUNSEL: M P VAN DER MERWE SC