Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 662/2005

Case Heard: 16/05/2006
Date delivered: 19/05/2006
In the matter:

David Schalk Fourie **Applicant / Defendant**

versus

Firstrand Bank Ltd **Respondent / Plaintiff**

Coram: Kgomo JP

JUDGMENT: LEAVE TO APPEAL

KGOMO JP:

1. This is an application for leave to appeal against the judgment of **Lacock J** dated the 7th October 2005 in which he granted summary judgment against the defendant/applicant in the amount of R177 433,70 plus interest on this amount and the costs of the opposed application which was heard on the 30th September 2005. The application served before me because **Lacock J** is on long leave and thus not available to hear the matter, which came on a semi-urgent basis because the plaintiff/respondent had scheduled an auction sale of the applicant's property for Wednesday 17/05/2006. After hearing argument from counsel I dismissed the application for leave to appeal with costs and reserve my reasons which now follow.

2. **Lacock J** has given a succinct and well-reasoned judgment. No useful purpose would be served in rehashing that judgment. Mr Fisher, for the defendant/applicant, has argued that **Lacock J** erred in not having found that the contract in terms of which the defendant/applicant had to pay the plaintiff/respondent-bank the amount of R177 443,70 was novated.

Novation, it is trite, means replacing an existing obligation by a new one and consequently that the existing obligation would thereby be discharged.

3. I wish to add the following to my Brother's judgment. In the founding document, Annexure "A dated the 7th June 2004, through which the defendant/applicant alleges that he has made the offer, does not stipulate how much he would pay per month over a period of five years. He unilaterally commenced paying R4 000,00 per month from September 2004. It is unclear from the offer what would happen after the expiry of the period of five years if there was an under-recovery or over-recovery of the amount owed. I am unable to understand exactly what the full terms of the purported novated contract are and what it is alleged that the plaintiff/respondent was supposed to have tacitly accepted.

4. According to the defendant/applicant the bank tacitly accepted the very vague offer he has made on the 7th June 2004 based on the fact that he paid R4 000,00 per month from September 2004 until January 2005 without any demur from the plaintiff bank. In February 2005 the defendant debtor experienced cashflow problems as a result of which the bank called up the overdraft, which is the cause of action. The defendant/applicant therefore only paid the R4 000,00 premium for five months before defaulting on his own undertaking.

5. A year after the defendant/applicant's letter of the 7th June 2004 (paras 3 and 4 above) the defendant's accountant wrote to the bank on the 6th June 2005 and complained to the bank that *"tot vandag toe nog (het Mnr Fourie) nog geen terugvoer vanaf Eerste Nasionale Bank ontvang sou hulle die aanbod aanvaar of afgewys het nie."* There could therefore not have been any illusion at that stage in the minds of the defendant/applicant and his accountant that the aforesaid vague offer had not been accepted by the bank. The accountant then went ahead to make a fresh offer in these terms: *"Mnr Fourie maak hiermee 'n amptelike aanbod van R4 000,00 per maand ter afbetaling van die oortrokke rekenig en dan vanaf 30 September 2005. Hy sal eers weer vanaf September 2005 inkomste genereer met die aanvang van lusernseisoen."*

6. This letter provoked the following reaction from the bank on the 19th July 2005:

"Thank you for your telefax of 7th *July 2005 together with the letter from André Visagie & Kie dated 6 June 2005 annexed.*

We have made some enquiries at the branch and the credit division from which it transpired that the branch's proposal to our credit division to convert the overdraft to a five year long term loan was not approved. The fact that the client in the meanwhile paid monthly instalments merely indicates his bona fides and his ability to stick to his offer of repayment over five years and does not indicate the bank's acceptance of the offer or the concluding of a long term loan agreement. The proposal was specifically declined during February 2005 and a letter of demand sent on 4 March 2005. The bank thereafter started realising security by surrendering the policy. This is normal practice and authorized in terms of the Deed of Cession and Assignment. During November 2004 our credit division instructed the branch that the conversion of the debt to a loan account would be considered once certain information has been provided by the client. In the meanwhile the client was required to deposit sufficient funds every month to cover the loan installment of R4 300,00. Upon receipt of the information during February 2005 a decision was taken by our credit division not to approve the conversion of the overdraft to loan account.

We are not in a position to reconsider the client's proposal and confirm that the debt will not be converted into a five-year loan. In the circumstances please put the Defendant to terms to enter an Appearance to Defend, alternatively please apply for Default Judgment."

7. From what has gone before I cannot discern any proper offer being made by the defendant/applicant and less still is there any manifestation of a tacit acceptance of the offer on the part of the bank. In short, a *consensus ad idem* between the parties was lacking. In **Joel Melamed and Hurwitz v Cleveland Estates** 1984 (3) SA 155 (A) at 164G – 165F **Corbert JA** (as he then was) held:

"As to tacit contracts in general, in ***Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others*** *1983 (1) SA 276 (A) it was stated (at 292B - C):*

"In order to establish a tacit contract it is necessary to show, by a preponderance of probabilites, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem. (See generally ***Festus v Worcester Municipality*** *1945 CPD 186 at 192 - 3;* ***City of Cape Town v Abelsohn's Estate*** *1947 (3) SA 315 (C) at 327 - 8;* ***Parsons v Langemann and Others*** *1948 (4) SA 258 (C) at 263;* ***Bremer Meulens (Edms) Bpk v Floros and Another****, a decision of this Court reported only in Prentice Hall, 1966 (1) A36;* ***Blaikie-Johnstone v Holliman*** *1971 (4) SA 108 (D) at 119B - E;* ***Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd*** *1979 (3) SA 267 (W) at 281E - F;* ***Muhlmann v Muhlmann*** *1981 (4) SA 632 (W) at 635B - D.)" This is the traditional statement of the principle, as is borne out by the cases cited; and it was accepted as being correct by appellant's counsel. The correctness of this general formulation has nevertheless been questioned on the ground that it would appear to indicate a higher standard of proof than that of preponderance of probability as regards the drawing of inferences from proven facts (see* ***Christie The Law of Contract in South Africa*** *at 58 - 61; cf also* ***Fiat SA v Kolbe Motors*** *1975 (2) SA 129 (O) at 140;* ***Plum v Mazista Ltd*** *1981 (3) SA 152 (A) at 163 - 4;* ***Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd*** *1983 (1) SA 978 (A) at 981A - D). In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence (see Plum's case supra at 163 - 4). It may be that in the light of this the principle as quoted above from* ***Standard Bank of SA Ltd v Ocean Commodities Inc*** *(supra) requires reformulation. In this regard, however, there is this point to be borne in mind. While it is perfectly true that in finding facts or making inferences of fact in a civil case the court may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract (see* ***Van den Berg v Tenner*** *1975 (2) SA 268 (A) at 276H - 277B and the cases there cited). By analogy it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged."*

8. Having regard to **Lacock J**'s judgment, and what has been said above together with the facts of this matter I cannot perceive how the defendant, who bears the onus to prove the novation, can ever hope to establish at the principal hearing that a new contract has been entered into between the parties. In **Woolfsons Credit (Pty) Ltd v Holdt** 1977 (3) SA 720 (N) at 724D-G Leon J stated:

> "In considering the defence (of novation) raised it is relevant to point out that the onus lies on the defendant to prove that he is likely to succeed in the principal case. (***Union Share Agency & Investment Ltd. v Spain****, 1928 AD 74 at p. 78;* ***Galaun v Newton****, 1961 (1) SA 405 (D) at p. 409G - H;* ***Rich and Others v Lagerwey****, supra at p. 759H;* ***Basinghall Investments****, supra at pp. 113E and 124A.)*

Moreover in the principal case the onus will lie upon the defendant to establish the

*defence of novation. Clear and cogent proof of such novation would be required in view of the fact that it involves a waiver of rights. (**Marendaz v Marendaz**, 1953 (4) SA 218 (C) at pp. 226 - 227.) Where an intention to novate is sought to be established by implication the intention must be "clear and unequivocal" because it is more likely that a creditor, who has an existing enforceable right, will intend, when he enters into any new arrangement in regard thereto, to reinforce rather than destroy that right and accept something else in its place. (**Trust Bank of Africa Ltd. v Dhooma**, 1970 (3) SA 304 (N) at p. 307D - G.)"*

9. The evidence produced by the defendant/applicant is of such a flimsy nature and does not even begin to measure up to the requirements set out in the quoted cases, with which I respectfully agree.

The other aspects on the merits by Mr Fisher have been sufficiently dealt with by **Lacock J** or are peripheral and inconsequential and need no further examination.

10. The defendant/applicant's application is out of time by several months. The applicant pleads something close to impecuniosity for his default. It does appear to me that the defendant/applicant has fallen on some hard times because he experienced some poor harvests. His failure to keep up with the payment of a paltry R4 000,00 per month that he set himself is strongly indicative of his financial doldrums. I therefore accept his explanation and condone his failure to lodge this application timeously. However, the condonation does not detract from the fact that there are no reasonable prospects of a successful appeal and that another Court is highly unlikely to come to a different conclusion than the one reached by **Lacock J**.

11. On 5 May 2006 the defendant/applicant brought a defective application for condonation for the late filing of his application for leave to appeal whereas no application for leave to appeal had yet been filed or delivered. The respondent/plaintiff brought an application to set aside this irregular procedure in terms of Rule 30 of the Rules of Court. The latter application was equally flawed and there was a mutual simultaneous withdrawal by each party of his/its application and costs were reserved.

12. Counsel agreed that these applications (para 11) were deadlocked, as none of the parties was successful, and that there should accordingly be no order

as to costs in that regard. I agree. Where a disputed application is settled on a basis which disposes of the merits except in so far as costs are concerned, the court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the court has, with the material at its disposal, to make a proper allocation as to costs. **Jenkins v SA Boilermakers, Iron and Steel Workers and Shipbuilders Society** 1946 WLD 15; **Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd** 1996 3 SA 692(C) 700G-H; **First National bank of Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd** 1999 4 SA 1073 (SE) 1079G-I.

ORDER:

1. It was for the aforegoing reasons that the application for leave to appeal by the defendant/applicant (Mr David Schalk Fourie) was dismissed with costs on 16/05/2006.

2. As regards the applications by each one of the parties on the 5th May 2006 it is ordered that each party will bear his/its own costs.

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F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the Applicant/Defendant:	**Adv P U Fischer**
Instructed by:	**Attorney Theunissen**
For Defendant/Applicant:	**Adv C Botha**
Instructed by:	**Duncan & Rothman**