IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: AR242/10

In the matter between

Gerald Leslie Mundell **Appellant**

and

Gavin Wright **Respondent**

JUDGMENT

Delivered on: 25 January 2010

STEYN J

[1] This is an appeal against the judgment of the Magistrate Ixopo delivered on 20 November 2009. The appeal was not lodged timeously, and hence the appellant lodged a substantive condonation application.

[2] It is trite that the court has to exercise its discretion by taking into account the reasons for non-compliance with the Rules and the prospects of the main application, i.e. the appeal.[1]

[3] We are not satisfied that the reasons proffered on behalf of the appellant are entirely satisfactory, and are mindful that the

1 See *Chetty v Law Society, Tvl* 1985 (2) SA 756 (A) at 765B-C.

delay caused in all likelihood can be ascribed to a lack of diligence on behalf of the legal representative. There appears to be no reason why the appellant however should be penalised for the delay and ultimately we have been persuaded to grant condonation in order for the appeal to proceed.

Ad merits

[4] The appellant issued summons on 22 January 2009 for the payment of R55 000 for goods, i.e. curtains that were sold and delivered plus interest at the rate of 17,5% per annum as from 01/10/2008. At the commencement of the trial it was common cause that the respondent had effected certain payments leaving an outstanding balance of R36 000. The issue before the court *a quo* was whether there was an agreement between the plaintiff and the defendant with regard to the curtains. The learned Magistrate decided that no agreement was concluded and granted judgment in favour of the defendant with costs.

[5] Mr Pretorius acted on behalf of the appellant and Mr Nirghin

on behalf of the respondent.

[6] When the appeal was lodged it was submitted that the learned Magistrate erred in:

> *"1. in finding that there was no evidence to indicate that terms of payment in respect of the sale of the curtains were ever discussed;*
> *2. in finding that plaintiff never provided those terms of payment to the defendant;*
> *3. in finding that no terms of payment were agreed upon between plaintiff and defendant in respect of the sale of the curtains;*
> *4. in not considering the plaintiff's evidence-in-chief when the plaintiff testified as to a telephone conversation that took place between plaintiff and defendant when the terms of payment was agreed upon, namely that the defendant had to pay within six months;*
> *5. by not considering paragraph 1.1 of the defendant's pleas where defendant on his own version pleaded that "the parties negotiated the purchase of the goods . . . The plaintiff made it clear that it was subject to the goods being paid for in instalments".*
> *6. as the method of payment was not in dispute (it was cash), the learned Magistrate incorrectly found, with respect, that "in this particular case the method of payment was left vague";*
> *7. in using as authority R H Christie, 4th ed, 'Law of Contract' on page 39, in that the said authority relates to "method of payment" whereas the issue in dispute was whether "terms of payment" were agreed upon."*

[7] It is also common cause that the only issue that had to be decided by the court *a quo* was whether the parties concluded a valid agreement in respect of the curtains.

The question that remains is whether the plaintiff succeeded in his claim that there was any oral or tacit acceptance of the terms agreed upon.

As to tacit contracts in general, in *Standard Bank SA Ltd v Ocean Commodities Inc*,[2] it was stated:

> *"In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, 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 Capet Town v Abelsohn's Estate*, 1947 (3) SA 315 (C) at page 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 119 B-E;* Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd*, 1979 (3) SA 267 (W) at 281 E-F;* Muhlmann v Muhlmann*, 1981 (4) SA 632 (W) at 635 B-D.L)."*

More recently the SCA in *Transman (Pty) Ltd v Dick*[3] held that the ordinary test for determining whether a tacit term exists remain the bystander test, and hence it is incumbent on a party to prove facts from which it could be inferred.

In *Du Plessis N O and Another v Goldco Motor and Cyele*

2 At page 292 B-C.
3 2009 (4) SA 22 (SC).

Supplies (Pty) Ltd[4] the majority of the Supreme Court of Appeal re-affirmed what was stated by Corbett JA in *Johnston v Leal*:[5]

> *"The material terms of the contract are not confined to those prescribing the* essentialia *of a contract of sale,* viz *the parties to the contract, the* merx *and the* pretium*, but include, in addition, all other material terms . . . . It is not easy to define what constitutes a material term." (at 937 (H)).*

[8] In *casu* the parties discussed the purchase and sale of the curtains coupled with the other items for sale. It is also evident that consensus was reached on the purchase of the other items. The respondent proceeded in his negotiations on the purchase of the curtains provided that the appellant is "prepared to negotiate some form of terms."

[9] In my view the court *a quo* correctly concluded that the parties discussed the terms, but never agreed on the specific terms of sale. Without the specific terms, including the exact date of payment the appellant could not demand payment. There was no agreement on the number of instalments to be paid nor when the amounts should be paid. In the light of the aforesaid it cannot be said that the court *a quo* was

4 2009 (6) SA 617 (SCA).
5 1980 (3) SA 927 (A).

misdirected when it dismissed the plaintiff's claim.

[10] Accordingly, the appeal is dismissed with costs.

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Steyn, J

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Nkosi, AJ: I agree.

Date of Hearing:	18 October 2010
Date of Judgment:	25 January 2011
Counsel for the appellant:	Adv C Pretorius
Instructed by:	Mason Incorporated
Counsel for the respondent:	Adv R Nirghin
Instructed by:	Barry Botha & Breytenbach Incorporated c/o Foster Govender Attorneys