THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 697/10

In the matter between:

ABSA BANK LIMITED **Appellant**

and

THE SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION NATIONAL PROVIDENT FUND (UNDER CURATORSHIP) **Respondent**

Neutral citation: ***ABSA v SACCAWU*** **(697/10) [2011] ZASCA 150 (27 September 2011)**

Coram: Lewis, Ponnan, Cachalia, Bosielo and Shongwe JJA

Heard: 24 August 2011

Delivered 27 September 2011

Summary: Rental agreements in respect of office equipment signed only by principal officer of Provident Fund invalid: rules of Fund required meeting of trustees and contracts to be signed by three trustees.

ORDER

On appeal from South Gauteng High Court (Bashall AJ sitting as court of first instance):

The appeal is dismissed with costs including those of two counsel.

JUDGMENT

LEWIS JA (dissenting)

[1] At issue in this appeal is the validity of 15 contracts for the hire of office equipment by the respondent, the South African Commercial Catering and Allied Workers Union National Provident Fund (under Curatorship) (the Fund). The appellant, Absa Bank Limited (the Bank), is the cessionary of the rights of the lessors under the agreements. It instituted action against the Fund for payment of arrears in respect of each of the leases, the amounts claimed being substantial. The Fund pleaded that its Principal Officer, Mr A Mosiuoa, did not have the authority to conclude the contracts. The parties agreed that a stated case be placed before the high court on this issue alone, pending the final determination of various other matters, and agreed facts for the purpose. Bashall AJ in the South Gauteng High Court held that the principal officer was not authorised to enter into contracts on behalf of the Fund and that the contracts were thus 'ultra vires' and not binding. The appeal to this court is with his leave.

[2] Before turning to the stated case I shall set out in summary the background facts that are not in contention as well as those agreed for the purpose of determining the legal issue in question. During the course of 2000 and 2001 Sasfin Bank Ltd (Sasfin) and Sunlyn Investments (Pty) Ltd (Sunlyn), financed the acquisition of office equipment by the Fund by entering into rental agreements, negotiated and signed by Mosiuoa. The Fund took possession of the equipment (from the suppliers) but then defaulted on payment of rentals. The Bank, to which Sasfin and Sunlyn had ceded their rights to claim payment under the agreements, instituted action against the

Fund, Sasfin and Sunlyn, but subsequently withdrew the claims against the two companies. On 18 March 2003 the Fund was placed under the final curatorship of Mr A L Mostert.

[3] In the statement of agreed facts the parties acknowledged that Sasfin and Sunlyn 'had sight' of the rules of the Fund before signing the 15 rental agreements. Moreover, the companies had given the rules to the Bank before they discounted their rights to it. They also stated that the contracts 'were not signed by the chairperson and two trustees of the Fund as contemplated by Rule 4.13, at a duly constituted meeting of the Fund and by two trustees and the chairperson'.

[4] As will be apparent by now the argument by the Fund was that in order for it to be bound by the rental agreements these had to have been executed in a particular fashion prescribed by the rules. I shall turn to this issue shortly for it is pivotal to the issues to be decided. It is useful at this stage, however, to set out this rule in full. It is a subrule of rule 4 which regulates the Board of Trustees – its composition, procedures and the trustees' duties and powers. Rule 4.13 itself reads:[1]

'Signatures to documents

All documents or contracts effected by the Fund . . . shall be binding upon the Fund provided that they have been signed by the Chairperson and another two Trustees

a) at a duly constituted meeting, or

b) after such a meeting, provided that authorisation for the signing of these documents or contracts was granted at such meeting.

Where, however, the Act [the Pension Fund Act 24 of 1956] prescribes specific formalities for the signature of documents, such documents shall only be binding upon the Fund subject to compliance with these requirements.'

[5] The issues to be determined at the outset were framed as follows:

'2.1 Whether Mr Abie Mosiuoa . . . in his capacity as the principal officer of the First Defendant ("the Fund") acted ultra vires the applicable registered rules of the fund, read with the Pension Fund Act 24 of 1956 . . . and the Regulations promulgated

1 The use of capital letters and different fonts in this rule, as well as others cited, is not reproduced here.

thereunder, in concluding the 15 rental agreements referred to in the Plaintiff's Particulars of Claim ("the 15 agreements").
2.2 If held that Mosiuoa acted ultra vires the Rules as aforesaid, whether as a matter of law on the facts and defences pleaded in the Plaintiff's replication, the Fund may nonetheless be held bound in law by the 15 rental agreements.
2.3 Whether by virtue of what the Court holds as regards 2.1 and 2.2, the First Defendant may in law be held bound by the 15 rental agreements.'

[6] The high court, as I have said, found that Mosiuoa did act ultra vires; that the facts and defences pleaded in the replication (reliance on the Turquand rule or estoppel) did not bind the Fund and that the Fund 'may not in law be held bound by the 15 rental agreements'.

[7] The Fund did not before us contend that the agreements were ultra vires in the true sense – that rental of office equipment was not within the power of the Fund. The correct characterisation of the issue is whether there was compliance with peremptory formalities laid down by the Fund's rules. That raises the question whether rule 4.13 was applicable to the contracts that Mosiuoa in fact concluded.

[8] Before turning to the rules themselves it is important to note that regulation 30(2) (of the Regulations promulgated in terms of the Act) provides that the rules of a fund must provide for various matters, including '(k) the manner in which contracts and other documents binding the pension fund shall be executed'. The Fund's only rule regulating execution of contracts in express terms is 4.13. The question that arises, therefore, is whether this rule applies to all contracts entered into by the Fund.

[9] The Bank argued that by virtue of his appointment as principal officer, Mosiuoa was authorised to enter into contracts for the day-to-day running of the business of the Fund. He could do so orally or in terms of a written contract, and that written contracts executed by him did not have to be authorised at a meeting of the board of trustees and signed by the chairperson of the board and two other trustees. That, it argued, would make the administration of the Fund impossible. The safeguards imposed by rule

4.13 were unnecessary for the acquisition of office equipment and other small items – pizza and piffle, the Fund's counsel called it (though I hasten to add that he did not regard rental contracts which involved large sums of money as falling into this category).

[10] In making this argument the Bank relied heavily on two provisions in the preamble to the rules. Clause 4 provides that the Fund 'will, in its own name, be capable of suing and being sued and of acquiring, holding and alienating property, movable and immovable'. And clause 5 provides that the trustees will appoint a principal officer on terms determined by them. Clause 5 continues: 'The Fund will, for the purposes of 4, above, at all times be represented by the Principal Officer'.

[11] Did these clauses give authority to Mosiuoa to conclude written contracts for the hire of office equipment? The Bank contends they did. In representing the Fund – including for the acquisition of property – the principal officer would negotiate and conclude any contract on its behalf. Compliance with rule 4.13 was thus unnecessary.

[12] The obvious difficulty with this submission is that the clauses fall within the preamble, which is followed by an index of rules and then the general rules themselves. And the only rule that prescribes a mode of executing a contract, as required by reg 30(2)(k), is, as I have said, rule 4.13. Thus the question of its applicability to the 15 rental agreements arises.

[13] The Bank contended that the rule governs only those contracts entered into by the trustees, and that since they are not executive officers of the Fund they do not deal with its general administration. Their task is to exercise oversight over the Fund's investments and to protect the members of the fund. They meet only from 'time to time to conduct the business of the Fund' (rule 4.6.1) and are not required to meet more than twice a year. Rule 4.2 provides for the appointment of 24 trustees and a quorum for a meeting is 13 trustees (4.6.3). The duties of the trustees include ensuring that proper 'records of the operations of the Fund are kept' and ensuring that the rules

and the ‘operation and administration’ of the Fund comply with legislation such as the Income Tax Act.

[14] The trustees thus exercise an oversight role: they do not themselves administer the Fund. They appoint a principal officer and an administrator to deal with the business of the Fund – which is the investment of moneys for the benefit of the members. But what contracts are then referred to in 4.13? The Bank’s answer is those contracts that require a meeting of at least 13 trustees – major investments or the appointment of the principal officer, actuary or auditor.

[15] Rule 5 regulates the ‘method of investment and financial structure of the Fund’. Rule 5.2 states that the trustees have the power to invest in immovable property or to lend moneys at interest and generally deal with the money and the property of the Fund. But the same subrule states that the trustees may delegate their power to make investments to a subcommittee of members, or to a financial institution. And rule 5.2.6 provides that every ‘cheque, contract or other document pertaining to the Fund will be signed by such persons as the trustees by resolution appoint and executed in such manner as the trustees may determine’. The rules do therefore envisage that delegation is permissible and that even investment contracts may be concluded other than by way of a formal meeting of trustees and with the signature of three of them. Why then should contracts for the hiring of office equipment be treated differently?

[16] The rules are far from clear. They do not prescribe in express terms how the principal officer should represent the Fund. They do not indicate what contracts must comply with rule 4.13, nor why the trustees, as non-executive officers, should be burdened with the daily administration of the Fund’s business. Thus there is apparent non-compliance with reg 30(2)(k), unless the Fund’s contention (that all contracts entered into by the Fund must be authorised in a trustees’ meeting and signed by three trustees) is accepted. We were urged to adopt this contention on the basis that the Fund is not a business: it is not a trading company that requires regular intervention by

executive managers. Moreover, argued the Fund, since compliance with prescribed formalities is necessary to protect the members of the Fund – vulnerable pensioners – a strict approach should be taken to the interpretation of the rules.

[17] In my view, however, the rules must be examined having regard to their purpose and the context in which they operate. Rules, like contracts, must be given a sensible meaning.[2] And all the rules must be considered – not one plucked out of context.[3]

[18] It is not sensible or reasonable to require that at least 13 trustees should meet and authorise the hiring of office equipment. That is the function of the principal officer. Even the conclusion of investment contracts, the prime business of the Fund, may be delegated to a subcommittee of members or a financial institution. It is inconceivable that the trustees would have to meet to decide whether to hire a photocopier when a chief executive officer (principal officer) must be appointed in terms of the Act. Section 8 of the Act lays down stringent requirements that must be met before a person can be appointed as a principal officer of a pension fund.

[19] The Fund did not contend that the running of the office of the Fund is not the domain of the principal officer. It conceded that some contracts could be concluded without a meeting, a written document and three signatures. But it could not suggest where the line is to be drawn between those contracts that do not require the rule 4.13 formalities, and those that do.

[20] The Fund's principal argument was that only rule 4.13 prescribed the mode of executing contracts, as required by reg 30(2)(k), and thus that all contracts (except for piffle and pizza) concluded by the Fund had to comply with rule 4.13. The result of that contention is that rule 4.13 and rule 5.2 are in

---

2 *Ekurhuleni Mertopolitan Municipality v Germiston Municipal Retirement* Fund 2010 (2) SA 498 (SCA) paras 12-14. And see *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) para 14; *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC* 2008 (1) SA 67 (SCA) paras 14 and 15;

3 *Ekurhuleni Metropolitan Municipality* above para 12, citing *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A).

conflict. The contracts that are crucial to the fund – investments – may be concluded by other bodies, but contracts for the rental of office equipment must comply with unnecessary and burdensome procedures. That is not a reasonable or sensible interpretation of the rules. And it undercuts the role of a principal officer who is the only executive employed by the Fund and who, in the preamble to the rules, is expressly said to represent the Fund in the acquisition and holding of property.

[21] While I do not accept that clauses 4 and 5 in the preamble are in themselves rules, I consider that they do indicate clearly (and in this they reflect the provisions of the Act) that it is the principal officer who is charged with the administration of the office of the Fund. This conclusion is reinforced by rule 4.1, dealing with the board of trustees, which records that the object of the board is to 'direct, control and oversee the operations of the Fund' – an echo of s 7C of the Act. It is not to run the daily business of the Fund.

[22] There is undoubtedly a gap in the rules: they do not prescribe how contracts are to be executed when they do not fall within the ambit of rules 4.13 and 5. That cannot mean, however, that any contract concluded by the Fund that does not comply with rule 4.13 is invalid. In my view what the framers must have intended is that the principal officer was authorised, by virtue of his office, to conclude contracts within the powers of the Fund (intra vires) in the usual fashion.

[23] In view of this conclusion it is not necessary to consider whether the Fund would have been bound by virtue of the Turquand rule or estoppel. Whether in fact Mosiuoa had authority is a matter that could have been explored in the trial.

[24] I would accordingly have upheld the appeal with costs and replaced the order of the high court with one to the effect that the contracts concluded by the principal officer were not invalid by reason only of the fact that they did not comply with the requirements of rule 4.13.

C H Lewis
Judge of Appeal

PONNAN JA (CACHALIA, BOSIELO and SHONGWE JJA concurring)

[25] I have had the benefit of reading the judgment of Lewis JA with which I regret I am unable to agree. The parties agreed to a written statement of facts in the form of a special case for adjudication before the high court. The facts agreed upon or assumed to be correct for the purpose of the special case are:

'3.1 The Plaintiff is ABSA Bank Limited, a public company duly registered and incorporated in accordance with the laws of the Republic of South Africa, carrying on business as a bank duly registered under the Banks Act 94 of 1990 with branches throughout the country and having its principal place of business situate at 160 Main Street, Johannesburg.

3.2

3.2.1 The First Defendant is the South African Commercial Catering and Allied Workers Union National Provident Fund ("the Fund"), a body corporate capable of being sued under its own name by virtue of its due registration as a pension fund under the Pension Funds Act 24 of 1965, ("the Act") and having its principal place of business at 6th floor, SA Centre Building, 253 Bree Street, Johannesburg.

3.2.2 The First Defendant was placed under provisional curatorship by order of the Transvaal Provincial Division under case number 24187/02 on 10 September 2002. The said order was made final on 18 March 2003 in terms of which Antony Louis Mostert, a director of A L Mostert & Company Incorporated, was appointed the curator.

3.2.3 The Fund is and was a pension fund in terms of the Act and governed by it, by the Regulations under the Act (a copy of which is attached marked A) and by the consolidated Rules of the Fund, ("the Rules") effective from 1 January 1999 (a copy of which is attached, marked B), and which have been registered under the Act.

3.3 Sasfin Bank Limited ("Sasfin") is a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, carrying on business as such and having its principal place of business situate at 29 Scott Street, Waverley, Johannesburg.

3.4 Sunlyn Investments (Pty) Limited ("Sunlyn") is a private company duly registered and incorporated in accordance with the laws of the Republic of

South Africa, carrying on business as such and having its principal place of business situate at Sasfin Place, 29 Scott Street, Waverley, Johannesburg.

3.5 Sasfin and Sunlyn had sight of the Rules before signing the 15 rental agreements (which Rules Sasfin and Sunlyn also furnished to the Plaintiff before the conclusion of the three discounting agreements and the cessions and payments as pleaded in the particulars of claim).

3.6 Mosiuoa was appointed by the First Defendant to the position of principal officer as envisaged by section 8 of the Act read with clause 4.10.1 of the Rules.

3.7 Mosiuoa signed each of the 15 rental agreements referred to in the Particulars of Claim, purportedly on behalf of the First Defendant.

3.8 The 15 rental agreements were not signed by the chairperson and two trustees of the fund as contemplated by Rule 4.13, at a duly constituted meeting of the Fund and by two trustees and the chairperson.'

[26] The principal question is whether, notwithstanding non-compliance with rule 4.13 of its rules, the Fund is nonetheless bound by the agreements in question. The rules of the Fund are its constitution. It is the document by which the Fund was constituted and is binding on the Fund and its members. The appeal turns upon the interpretation to be placed on the rules of the Fund. And whilst it is not seriously contested that the scope and functions of the various organs of the Fund fall to be determined, primarily from its rules, it is nonetheless necessary in interpreting the rules to examine the general framework according to which the Fund has been constituted.

[27] The Act read together with the regulations and the rules define the limits of the Fund's contractual capacity. In deciding how to approach the problem raised by this appeal one would thus do well to start with the Pensions Fund Act 24 of 1956 (the Act). The Fund is a juristic person (s 4B(1)), a body corporate capable in law of suing and being sued (s 5). Section 7A(1) of the Act provides that every fund shall have a board consisting of at least four board members. The objects of the board are set out in s 7C[4] and

4 Section 7C reads:

'(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.

(2) In pursuing its object the board shall -

its duties in s 7D.[5] In terms of s 8 every fund shall have a principal executive officer. Section 8 then deals with who may be appointed a principal officer, considerations of such person's fitness to hold office and the termination of such person's appointment. Section 11(1) empowers the Fund to adopt rules, which shall be in the prescribed format and form and shall comply with the prescribed requirements. Section 13 provides:

'Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.'

[28] Section 36 authorises the Minister of Finance to make regulations not inconsistent with the provisions of the Act in respect of all matters which he considers necessary or expedient to prescribe in order to achieve the purposes of the Act. The Minister has done so. The Regulations provide for a

(*a*) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;

(*b*) act with due care, diligence and good faith;

(*c*) avoid conflicts of interest;

(*d*) act with impartiality in respect of all members and beneficiaries.'

5 Section 7D provides:

'The duties of a board shall be to —

(*a*) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(*b*) ensure that proper control systems are employed by or on behalf of the board;

(c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;

(*d*) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;

(*e*) obtain expert advice on matters where board members may lack sufficient expertise;

(*f*) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and all other applicable laws.'

variety of matters. Regulation 30(2)(k) states that the rules shall provide for ‘the manner in which contracts and other documents binding the pension fund shall be executed'.

[29] Of the rules adopted by the Fund only one – Rule 4.13 – meets that purpose. It provides:

'Signatures to documents

All documents or contracts effected by the FUND … shall be binding upon the FUND provided that they have been signed by the Chairperson and another two TRUSTEES

(a) at a duly constituted meeting, or

(b) after such a meeting, provided that authorisation for the signing of these documents or contracts was granted at such meeting.

Where, however, the ACT [the Pension Fund Act 24 of 1956] prescribes specific formalities for the signature of documents, such documents shall only be binding upon the Fund subject to compliance with these requirements.'

[30] As Centlivres CJ put it in *Cape United Sick Fund Society v Forrest* 1956 (4) SA 519 (A) at 527H -528A:

'The Society's constitution is in writing and, to use the words of Stratford, JA, *in Wilken v Brebner and others*, 1935 AD 175 at p 187,

"we have only to solve the question submitted to us by ascertaining the meaning of a written document according to the well-established rules of construction."

This *dictum* is in consonance with a long line of cases in which emphasis is laid on the necessity of adhering to the terms of the constitution of a body like the Society.'

[31] Rule 4.13 is the only effective overriding control over the legal capacity of the Fund to enter into written contracts. It is common cause that it has not been complied with. That one would have thought would be the end of the matter. For, as Trollip J stated in *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 79B-E:

'As the defendant is a corporate body its legal capacity to enter into a particular contract must be sought for exclusively within the expressed and implied provisions of its constitution and if it is not found there then the defendant has exceeded its powers in entering into the contract and it is null and void. That is because according to the Act, the constitution not only defines defendant's legal capacity but also

confines it to what is expressly or impliedly contained therein. That is the effect of the sections of the Act quoted above. In other words the doctrine of *ultra vires* applies to defendant like any other corporation (see Street, *Doctrine of Ultra Vires*, pp 4, 22, 23; *Cape United Sick Fund Society & others v Forrest & others* 1956 (4) SA 519 (AD); *The Mineworker's Union v Prinsloo* 1948 (3) SA 831 (AD) at 843-4, 847). *Street's* summary of the position at p 4 is so lucid and apposite that it is worth quoting in full:
"A corporation is commonly styled a 'legal person', but the appellation 'person' is applicable to it only by analogy; and the analogy fails when it is thus clearly stated that this legal person is wanting in much that belongs to a natural person - that its course of existence is marked out from its birth; that it has been called into being for certain special purposes; that it has all the powers and capacities, and only those, which are expressly given it, or are absolutely requisite for the due carrying out of those purposes; and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes, are null and void." '

[32] But, as Lewis JA points out, great stress was laid by the Bank on clauses 4 and 5 of the preamble to the rules. Clause 4 headed 'Legal Persona' provides: 'The Fund will, in its own name, be capable of suing and being sued and of acquiring, holding and alienating property, movable and immovable'. Whilst clause 5 headed 'Principal Officer' reads:

> 'The TRUSTEES will appoint a Principal Officer in terms of Rule 4.10.1[6] on such terms and conditions as they may determine.
>
> The FUND will, for the purposes of 4. above, at all times be represented by the Principal Officer.'

R H Christie *The Law of Contract in South Africa* 6 ed (2011) at 219 states:
'Preambles or recitals in a written contract present more of a problem. The general principle is that they should be regarded as subordinate to the operative part which, if its meaning is clear, must be taken as expressing the common intention of the parties and so must prevail over anything to the contrary in the preamble. If the operative part is not clear, recourse may be had to the preamble to assist in elucidating it.'
It is therefore wrong to approach a written contract as though every provision is intended to create contractual obligations (*Absa Bank Ltd v Swanepoel NO* 2004 (6) SA 178 (SCA) at para 6). Indeed *Standard Bank v Fisher's Trustee* 1919 TPD 83 at 88 makes the point that the operative parts of the document

6 Rule 4.10.1 provides: 'The TRUSTEES will appoint a Principal Officer, an ACTUARY and an AUDITOR for such periods as they may determine. The TRUSTEES may withdraw any such appointment and make another appointment in its place.'

(a bond in that case) had to be construed first without construing the recitals, because ‘one ought to determine first what the operative part of the bond clearly lays down'. The recital, so *Clayton, NO v Metropolitan and Suburban Railway Company and Walker* (1892-1893) 10 SC 291 at 304 held, can only control the operative part of the deed if the operative part is doubtful in its meaning. In my view no words can be less ambiguous than those employed in rule 4.13. I thus do not think that clauses 4 and 5 of the preamble carry the matter any further.

[33] No doubt it may be said to be desirable that there should be a provision in the rules that would enable the principal officer to enter into written contracts with regard to the day-to-day functioning of the Fund. But there is no such express provision. Nor for that matter does one find any such provision in the Act. The question that then arises is whether it can be inferred by necessary implication from the rules (*Cape Union Sick Fund Society v Forrest* at 532D). Needless to say a court should be very slow to do so (*Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A)). Solomon JA held in *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105 at 112:

'The rule to be applied by a Court in determining whether or not a condition should be implied, is well stated by Lord Esher in the case of *Hamlyn & Co v Wood & Co* (1891 (2) QBD 491) as follows: "I have for a long time understood that rule to be that a Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." '

[34] In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532G-533A Corbett JA pointed out:

‘The implied term . . . is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention

of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. . . The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.'

Here if a term is to be imported at all it is not one to be imported by law from without (an implied term) but rather one to be based on the inferred intention of the parties – a tacit term (*South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 28). Any such term as may be imported seems though to be against the Bank in view of the specific requirements of rule 4.13. For, as Trengrove JA put it in *Robin v Guarantee Life Assurance Ltd* 1984 (4) SA 558 (A) at 567C-D:

'A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract. As was said by Van Winsen JA in *SA Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D:

"A term is sought to be implied [a tacit term in the terminology of *Alfred McAlpine*] in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms, no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only." '

(See also *Pan American Airways Incorporated v SA Fire and Accident Insurance Company Ltd* 1965 (3) SA 150 (A) at 175C.)

[35] The further difficulty with the Bank's case is that even if one construes the rules as conferring capacity on the principal officer to conclude binding written agreements on behalf of the Fund, it is not clear what the limits of that capacity will be or how it is to be exercised. As I have pointed out, in terms of rule 4.13 the trustees have to follow a fairly rigorous procedure to bind the Fund to written agreements. One finds no similar provision in respect of the principal officer. The absence of any such provision pertaining to the principal officer, as complete and comprehensive as rule 4.13, may be the clearest

indicator that it was never intended that the principal officer should be endowed with the capacity to bind the Fund to written contracts. It may be a contradiction in terms to say that the trustees control and administer the Fund, but that the principal officer, who is appointed by them, has, by virtue of his or her unlimited capacity to bind the Fund to written contracts, the power to control the Fund and in turn the trustees. Needless to say the principal officer cannot control the board of trustees in respect of matters where authority is specifically conferred on them by the Act and the rules of the Fund. To allow that would constitute a violation of the Act and the rules.

[36] In my view questions of equity cannot, when the rule is clear and unambiguous, affect the interpretation to be placed on it. The question that naturally arises is what was the purpose of the Fund in adopting rule 4.13 if it can simply be ignored as the Bank postulates. And, the further rhetorical question that then remains unanswered is: if rule 4.13 does not apply to these contracts then when precisely would it apply? Here we are dealing with an elaborately framed constitution from which it is clear, as I hope I have shown, the control of expenditure is entrusted to the trustees. Indeed that is precisely what the Act envisages, given the public interest at stake. In those circumstances it is not difficult to appreciate why such an elaborate and cumbersome procedure was chosen in rule 4.13. It was to ensure the greatest measure of protection for the funds entrusted to the Fund which was to be administered by the board of trustees. The chosen procedure thus has a legitimate and rational purpose. One looks in vain for similar protection were the principal officer to act as postulated by the Bank. There is nothing to suggest that although somewhat cumbersome the chosen procedure is unworkable or that the Fund cannot regulate its affairs in such a way as to ensure compliance with the requirements of the rule. Moreover the Fund is free, if so advised, to effect such amendments as it may desire to its rules. For, even if we were to hold that the constitution of the Fund may be a foolish contract, this Court has no power to make a new contract for its members.

[37] In *Gründling v Beyers & others* 1967 (2) SA 131 (WLD) at 139 Trollip J drew the following important distinction:

'Now, the constitution does specify certain acts which the Union is required or permitted to do; it often specifies too the manner in which those acts are to be done. The former are the Union's powers, the latter, its internal management (cf. *Mine Workers' Union v. Prinsloo*, 1948 (3) S.A. 831 (A.D.)). If it exceeds the former powers, that is, does an act that the constitution does not require or permit it to do, that act is *ultra vires*, and null and void. Such an act cannot be validated by ratification or estoppel, and the Union, any outsider affected by it, or a member may, if necessary, have it set aside or declared null and void. On the other hand, if the act is within its powers, but the manner of doing it deviates from or is contrary to the constitution, it is not null and void; at most, it is voidable, but it can be validated by ratification or estoppel.'

I have approached the matter thus far on the basis of the former of the two postulates articulated by Trollip J. But even if rule 4.13 were to be approached on the basis of the latter, namely that it is a simply a matter of internal management - for the reasons that follow, the conclusion to which I have come remains unaltered. In *The Mine Workers' Union v J J Prinsloo; The Mine Workers' Union v J P Prinsloo; The Mine Workers' Union v Greyling* (3) 1948 SA 831 (A) at 849 Greenberg JA held:

'I do not think that the validity of a transaction such as the one in question in *Turquand's* case is to be decided on a subjective basis, depending on whether the other party does or does not know of the constitution or whether — as would follow if the basis were subjective — even though he knew of the constitution, he did or did not apply his mind to the question whether the internal acts of management had been performed. It seems to me that the true position is that the necessary acts of internal management are presumed to have been performed and not that a particular person is entitled to assume that they have. (See also per Scrutton, L J in the *Kreditbank Cassel* case at pp 837/8.) I have already said that this presumption does not arise when the other contracting party knows that the acts have not been performed.'

Here as the agreed facts in the stated case reveal both third parties to the contract, as also the Bank, to whom the contracts were ceded, knew of the existence of the rule and knew, furthermore, that it had not been complied with.

[38] It follows, in my view, that the appeal must fail and I would, in the result dismiss it with costs including those consequent upon the employment of two counsel.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	A Subel SC (with him D K Nigrini) Instructed by Schwellnus Spies Haasbroek (Gauteng) Inc Randburg Symington & De Kok Bloemfontein
For Respondent:	J J Gauntlett SC (with him L J Van Tonder and S B Rose) Instructed by A L Mostert & Company Inc Bryanston Matsepes Inc Bloemfontein