THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 262/09

In the matter between:

JOHAN DE LANGE Appellant

and

ABSA MAKELAARS (EDMS) BEPERK Respondent

Neutral Citation: *De Lange v Absa Makelaars* (262/09) [2010] ZASCA 21 (23 March 2010)

Coram: HARMS DP, VAN HEERDEN, CACHALIA, SHONGWE JJA *et* THERON AJA

Heard: 1 March 2010

Delivered: 23 March 2010

Summary**:** Contract – interpretation of contract of employment – importation of tacit term – tacit term relied on by employee imported into contract.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Griesel J sitting as court of first instance)

1 The appeal succeeds with costs.

2 The order of the high court is set aside and replaced with the following:

'Claims 4 to 15 are dismissed with costs.'

JUDGMENT

VAN HEERDEN JA (HARMS DP, CACHALIA and SHONGWE JJA, THERON AJA concurring):

Introduction

[1]The main issue in this appeal is whether a clause in a contract of employment between the respondent, Absa Makelaars (Edms) Beperk ('ABSA'), as employer, and the appellant, Mr Johan de Lange ('De Lange'), as employee, obliges ABSA to give De Lange a hearing before making a decision which renders De Lange liable to reimburse ABSA for 'damages' which the latter has paid out to its client or clients in certain circumstances.

[2]The clause in question (clause 16.6) reads as follows:

'Die Maatskappy is nie aanspreeklik vir enige verlies of skade wat gely mag word as gevolg van opsetlike of nalatige foutiewe of onvolledige advies wat

deur die Werknemer of die Werknemer se agente verskaf is nie en indien die Maatskappy vir enige sodanige verlies of skade aangespreek word, sal die Maatskappy dienooreenkomstig 'n verhaalreg teen die Werknemer hê vir enige sodanige skade of verlies wat deur die Maatskappy betaal word indien die Maatskappy van mening is dat die Maatskappy regtens aanspreeklik was.'[1]

[3]De Lange was previously employed by ABSA as a broker. According to the particulars of claim, De Lange, acting in the course of his employment, gave certain financial and investment advice to various clients, which advice was 'incorrect or incomplete' and that, in giving such advice, De Lange acted intentionally or, alternatively, negligently. The clients in question allegedly suffered loss as a result of De Lange's advice, for which they were compensated by ABSA. Relying on the provisions of clause 16.6, ABSA sued De Lange for recovery of the amounts paid to these clients by ABSA. There were 15 claims in all, but following a special plea of prescription, ABSA abandoned the first three claims. At the outset of the trial, the parties agreed that only two of the claims – claims 4 and 10 – would be placed before the trial court for determination as 'test cases' and that the fate of the remaining claims would follow the outcome of the trial in respect of claims 4 and 10; in other words, if ABSA succeeded with these two claims, then the remaining claims would also succeed, and vice versa. ABSA's claims 4 and 10 did indeed

[1] 'The Company is not liable for any loss or damage which may be suffered as a result of intentional or negligent incorrect or incomplete advice given by the Employee or the Employee's agents and if the Company is held liable for any such loss or damage, the Company will accordingly have a right of recovery against the Employee for any such damage or loss as is paid by the Company if the Company is of the opinion that the Company was legally liable therefor.' (My translation).

succeed in the court a quo, hence this appeal, which comes before us with the leave of the court below.

Factual background

[4]De Lange was employed by ABSA as a broker from 1995 to 2001. On 6 December 2001, the parties concluded a written contract of employment, effective from 1 September 2000, clause 2.1 of which provided that any previous agreement, whether of employment or otherwise, between the parties was cancelled, subject to certain provisos, none of which is relevant to this appeal.

[5]During the course of his employment with ABSA, De Lange gave financial and/or investment advice to various clients of ABSA, including a Mr Loubser (claim 4) and a Mr and Mrs Honiball (claim 10). All three clients testified at the trial.

[6]According to Mr Loubser ('Loubser'), he was 62 years old at the time of the trial. He had formerly been a member of the South African Police Service ('SAPS') and had invested the cash amount which he received upon his retirement from SAPS. As the investment turned out not to be a good one, causing him to lose a considerable portion of his capital, he consulted De Lange in about January 2001 (at which time he would have been about 54 years of age) and requested him for investment advice. He wanted a safe investment which would also provide him with a monthly income for living expenses. On the strength of De Lange's advice, he took out a number of policies, investing his capital of R320 000 in a cashbuilder

(annuity) policy which gave him a monthly income, more than half of which was used to fund the premiums on three endowment policies with Liberty Group Ltd and two further endowment policies with Momentum Ltd. The term of the latter two policies was ten years, while that of the former three policies was five years. All the endowment policies were invested in overseas shares, with no distribution of risk amongst various different investment 'destinations'.

[7]During August 2003, Loubser realised that the greater part of his capital had been eroded. He thus made a statement which was given to ABSA, setting out the background to his taking out the various policies and pointing out that he had suffered loss as a result of De Lange's advice.

[8]Loubser's position was investigated on behalf of ABSA by a Mr van Reenen ('Van Reenen'), an accountant in ABSA's employ. Van Reenen testified that, although he interviewed Loubser, he did not contact De Lange and afford him the opportunity to explain his version of events (first, because De Lange was no longer employed by ABSA and, further, because he did not regard it as his duty, or within the ambit of his authority as investigator, to do so). Van Reenen further testified under cross-examination that, had De Lange still been in ABSA's employ, then the process of investigation would also have required obtaining a statement from De Lange. Moreover, although he tried to access Loubser's ABSA client file, it was

missing and he was thus unable to 'verify' the information in that file. He also indicated under cross-examination that a client file should contain an analysis of the client's investment needs and risk profile, as well as the reasons for the broker's 'recommendation' to the client.

[9]In his report to the ABSA Head Office dated 12 May 2004, Van Reenen concluded that De Lange had provided poor advice ('swak advies') to Loubser and had given him a wrong impression ('[het] klient . . . onder 'n wanindruk geplaas'). He recommended that ABSA compensate Loubser in the amount of R81 208.55 for the loss which he had sustained. This amount was calculated by taking the capital amount initially invested by Loubser, adding to it interest at the money market rate over the relevant period, then subtracting the total income paid out to Loubser in terms of the annuity policy, as well as the total amount ultimately paid out under the endowment policies.

[10]This recommendation was accepted by Mr le Roux, the managing (and financial) director of ABSA, who was the person with the authority to make the decision (in terms of clause 16.6)[2] whether ABSA would compensate a client for loss allegedly suffered. In making the decision that ABSA was indeed legally liable ('regtens aanspreeklik') for Loubser's loss, Le Roux also did not afford De Lange any opportunity to give his version of events. The

[2] The provisions of which are quoted in full in para 2 above.

abovementioned amount of R81 208.55 was paid out to Loubser on about 14 May 2004. This was the amount that ABSA claimed from De Lange under claim 4.

[11]As regards claim 10, Mr Honiball was a 68-year-old pensioner at the time of the trial. He had previously worked for LTA as a construction foreman and, upon his retirement, he had received a lump sum pension payment of about R285 000. He had been a client of Absa Bank for some 35 years and thus, in about May 2000 (when he would have been about 59 years old), he sought advice from the Mossel Bay branch of ABSA, in the person of De Lange, concerning the investment of this lump sum in a manner which would provide the Honiballs with a monthly income, as well as ensure that the capital remained intact.

[12]De Lange recommended that the Honiballs cash in their other investments (Absa Bank shares and several policies with Sanlam) and that the proceeds thereof, together with the lump sum pension payout (a total amount of R503 000), be invested in five Sanlam cashbuilder (annuity) policies for a period of five years. Of the monthly income generated by these policies, approximately two-thirds was used to pay the premiums on five endowment policies with Sanlam, two in the name of Mr Honiball and three in the name of Mrs Honiball, the balance being paid to the Honiballs as a monthly income. The term of all five endowment policies was 10

years. As in Loubser's case, all the endowment policies were invested in overseas shares, with no distribution of risk.

[13]In due course, Mr Honiball realised that his capital was diminishing and made enquiries with ABSA's Mossel Bay Branch, only to discover that De Lange was no longer employed by ABSA and that their files had been 'frozen'. Thereafter, on 15 October 2004, Mr and Mrs Honiball wrote to ABSA, demanding that ABSA (and Sanlam) investigate the matter and that they be compensated, at the very least, for the capital which they had invested on De Lange's advice.

[14]The Honiball's matter was then investigated on behalf of ABSA by Ms Joubert ('Joubert'), also an accountant in ABSA's employ. Part of the information which Joubert considered in the course of her investigation was the letter written to ABSA by the Honiballs. She also telephoned the Honiballs to enquire whether they had additional information and they telefaxed to her several pages in De Lange's handwriting which were apparently used by De Lange to explain various investment options to the Honiballs at the time they sought his advice. She did not, however, ask De Lange for his version of events or even for an explanation of his handwritten notes – in her opinion any 'input' by De Lange would not have changed the facts of the matter and she did not deem it necessary for the purposes of her investigation. She conceded that she could have contacted the Honiballs to ascertain the meaning of certain of the handwritten

pages (which she was unable to explain to the court), but that she did not. According to Joubert, she did not take these pages into account in making her 'decision'. She also did not access the ABSA client files of the Honiballs, although she conceded that a client file should contain an analysis of the client's existing investments, as well as a risk analysis by the relevant broker to determine what the client's risk profile was.

[15]In a report and memorandum addressed to the ABSA Head Office (both dated 22 November 2004), Joubert concluded that De Lange was 'guilty', giving as her reasons the fact that the term of the annuity policies was five years while that of the endowment policies was ten years, meaning that the client would not be able to fund the latter policies for the second five-year period. She also pointed out the latter policies were invested in high-risk overseas shares, with no distribution of risk. She thus recommended that an amount of R188 809.77 be paid to the Honiballs as compensation for the loss they had sustained. This amount was calculated in exactly the same manner used in respect of claim 4 (ie Loubser's claim).[3]

[16]Joubert's recommendation was forwarded to Le Roux, who decided (in terms of clause 16.6) that ABSA was legally liable to the Honiballs and thus accepted Joubert's recommendation. As in Loubser's case, Le Roux simply relied on the documents sent to him by the investigator (Joubert) and made no further enquiries himself.

[3] See para 9 above.

On or about 24 November 2004, Le Roux approved payment of the abovementioned amount to the Honiballs. This was the amount claimed by ABSA from De Lange in terms of claim 10.

The high court

[17]In interpreting clause 16.6 of the contract of employment, the court below emphasised that the question was not whether ABSA was, as a fact, 'legally liable' vis à vis the relevant clients, but rather whether ABSA had *reasonably* formed the opinion that it was indeed legally liable. ABSA's opinion was thus not unfettered, but had to be based on reasonable grounds. In other words, ABSA's discretion in this regard had to be exercised *arbitrium boni viri*, 'with the judgment of a fair-minded person'. This set an objective standard, with which the court would not normally interfere unless it was of the view that the decision was so unreasonable, improper, irregular or incorrect that it would give rise to obvious unfairness.[4]

[18]According to the high court, the *audi alteram partem* principle was not 'automatically' included in the concept of *arbitrium boni viri*.[5] The high court agreed with the argument advanced by counsel for ABSA, pointing out the distinction drawn in our law between *arbitri* (arbitrators), on the one hand, and *arbitratores* (valuers or *aestimatores)*, on the other. With reference to *Estate Milne v*

[4] See the judgment of the Western Cape High Court (Case No. 10367/06), delivered on 10 March 2009, para 20.

[5] Ibid para 24, read with paras 21-22.

Donohoe Investments (Pty) Ltd & others[6] and *Perdikis v Jamieson*,[7] the high court appeared to regard ABSA's role, in the context of clause 16.6, as that of a 'referee' acting as a 'valuer' (*arbitrator* or aestimator), and not that of an arbitrator (*arbiter*) who performs a quasi-judicial function.[8] According to the court, therefore, ABSA could decide the question before it without hearing either party, and could form its opinion independently on its own knowledge and experience.[9]

[19]In my view, this approach was incorrect. The matter is not simply one of classification. In given circumstances valuers may, by virtue of a tacit term, have at least to hear both sides. In any event, in this case ABSA was neither an arbitrator nor a valuer. It was called upon to judge an issue and create a liability. Having regard to the main defence raised by De Lange,[10] the first question to be asked in interpreting clause 16.6 was whether it contained the tacit term relied on by De Lange. If it did, then *caedit questio.*

Tacit term

[20]In his plea, De Lange contended that it was a tacit term of the contract of employment that, when ABSA was 'held liable' ('aangespreek word') for loss or damage, in accordance with clause

[6] 1967 (2) SA 359 (A) at 373H-374C.

[7] 2002 (6) SA 356 (W) para 5.

[8] See the judgment of the high court para 23.

[9] See the judgment of the high court para 23-24, citing *Estate Milne* loc cit.

[10] See the next paragraph.

16.6 of the contract, then, as part of the process of forming an opinion in regard to the question whether ABSA was legally liable to the relevant third party, ABSA –

'1. alle relevante feite in ag sal neem, insluitende maar nie beperk nie tot die omstandighede wat geheers het tydens die verskaffing van advies deur [De Lange] aan derdes asook [De Lange] se weergawe van gebeure; en

2. [ABSA] die *audi alteram partem*-reël sal eerbiedig deur [De Lange] die geleentheid te gee om sy kant van die saak te stel voordat [ABSA] 'n mening vorm met betrekking tot die vraag of [ABSA] regtens aanspreeklik is teenoor 'n spesifieke derde.'[11]

[21]The test for establishing the existence of a tacit term, which this court has recognised and applied in many cases, is the so-called 'bystander' or 'officious bystander' test.[12] In *City of Cape Town (CMC Administration) v Bourbon-Leftley & another NNO*,[13] Brand JA set out the legal principles governing tacit terms as follows:

'[19] . . . [A] tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is

---

[11] '1. will take into account all relevant facts, including but not limited to the circumstances prevailing at the time [De Lange] gave advice to third parties, as well as [De Lange's] version of events; and

2. will respect the *audi alteram partem*-rule by giving [De Lange] the opportunity to present his side of the matter before [ABSA] forms an opinion in respect of the question whether [ABSA] is legally liable to a specific third party.' (My translation).

[12] See eg *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H-533B; *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H-137D; *Botha v Coopers & Lybrand* 2002 (5) SA 347 (SCA) paras 22-25 and *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) paras 50-51.

[13] 2006 (3) SA 488 (SCA).

closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so (see eg *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H). It follows that a term cannot be inferred because it would, on the application of the well-known "officious bystander" test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would *necessarily* have agreed upon such a term if it had been suggested to them at the time (see eg *Alfred McAlpine (supra)* at 532H-533B and *Consol Ltd t/a Consol Glass (supra)* at para [50]). If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.

[20] In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. It has also been recognised in some cases, however, that the subsequent conduct of the parties can be indicative of the presence or absence of the proposed tacit term (see eg *Wilkins v Voges (supra)* at 143C-E; *Botha v Coopers & Lybrand (supra)* at para [25].'[14]

[22]An examination of the express provisions of clause 16.6 makes it clear that these do not 'immediately exclude the possibility of importing'[15] the tacit term pleaded by De Lange. Clause 16.6 effectively makes it possible for ABSA to impose a potentially

[14] Paras 19-20.

[15] R H Christie, assisted by Victoria McFarlane *The Law of Contract in South Africa* 5ed (2006) p 169.

unlimited liability upon De Lange simply by forming the 'opinion' that ABSA is legally liable vis à vis a client who has allegedly suffered loss or damage as a result of intentional or negligent incorrect or incomplete advice given by De Lange, and by paying out to the client such loss or damage as ABSA may determine the client has sustained. In my view, the importation of the tacit term pleaded by De Lange would ensure that clause 16.6 'functions efficiently'[16] and fairly. Indeed, the form for the so-called 'report' ('verslag') to the ABSA Head Office, which must be completed by the ABSA employee doing the investigation (and making the recommendation) – in this case, Van Reenen and Joubert, respectively – and submitted to Le Roux to enable him to make a decision ('form an opinion') in terms of clause 16.6, makes provision for various documents/information to be annexed to it. These include 'toestemming tot debitering van rekening – makelaar'; 'appèl teen bevinding – makelaar'; 'reëlings vir afbetaling met makelaar'; 'dissiplinêre stappe word geneem'; 'datum waarop verhoor plaasvind' and 'klagstaat van dissiplinêre verhoor'.[17] All this documentation/information presupposes the involvement of the broker in the process of investigation and, in my view, indicates that, at the time of concluding the contract of employment, ABSA itself thought that, before a decision could be made in terms of clause 16.6, the broker concerned would have had to be involved in the

[16] *Wilkins NO v Voges* above n 12 at 137B-C.

[17] 'Consent to debiting of account – broker'; 'appeal against finding – broker'; 'arrangements with broker for paying [the broker's debt to ABSA] off'; 'disciplinary steps are taken'; 'date on which hearing takes place' and 'charge sheet of disciplinary hearing' (all my translation).

investigative process.

[23]Counsel for ABSA argued that, while clause 16.6 may well contain a tacit term of the kind relied upon by De Lange, this tacit term would be limited to the situation where the 'offending' broker was still in ABSA's employ.

[24]In my view, there is no indication in clause 16.6 or in any of the other provisions of the contract of employment that, should the relevant tacit term be imported into clause 16.6 of the contract, it would be limited in this way. It is true that, in terms of clause 27 of the contract, if the broker in question is still in ABSA's employ, he or she can dispute the decision taken by ABSA in terms of clause 16.6 and, if the dispute cannot be resolved through the mediation and/or conciliation process of the Commission for Conciliation, Mediation and Arbitration, then the broker can refer the dispute to the Arbitration Foundation of Southern Africa for arbitration.

[25]It is also true that certain of the documents/information referred to in paragraph 19 above as possible annexures to the report (and recommendation) form submitted by the relevant 'investigator' to Le Roux appear to presuppose that the broker is still in ABSA's employ (eg the reference to disciplinary steps, a disciplinary hearing, the charge sheet of the disciplinary hearing), but this is not the case with other documents/information referred to (such as the consent by the broker to debiting his or her account, an appeal by the broker against

the finding, arrangements with the broker for paying the 'debt' off). All the latter documentation would seem to apply equally to a situation where the broker is no longer in ABSA's employ. The mere fact that, if still in ABSA's employ, the broker concerned may have additional remedies open to him or her, certainly does not justify the contention by counsel for ABSA that, while a tacit term of the kind pleaded by De Lange may well form part of the contract, it does *not* apply to the situation where the broker is no longer in ABSA's employ.

[26]In considering the surrounding circumstances under which the contract was entered into –

'One is certainly entitled to assume, in the absence of indications to the contrary, that the parties to the agreement are typical men of affairs, contracting on an equal and honest footing, without hidden motives and reservations.'[18]

In this regard, the following evidence given by Le Roux under cross-examination is particularly relevant:[19]

'Het dit ooit oor u gedagtes gekom dat u miskien net vir die ondersoeker moet vra wat sê mnr De Lange van hierdie beleggings? — Ek kan nie onthou of ek so iets gedink het en dalk gevra het nie.

Hier skryf mnr Van Schalkwyk vir u ses maande voor die Honiball besluit daar is geen inligting voor hom van die maakelaar nie. Toe die Honiball aanbeveling voor u dien, het u nie gesê maar verskoon my net, wat sê mnr De Lange van

[18] *Wilkins NO v Voges* above n 12 at 141C-D.

[19] Cf in this regard *Richard Ellis South Africa (Pty) Ltd v Miller* 1990 (1) SA 453 (T) at 460B-461B. See also Christie *op cit* p 172, Schalk van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract – General Principles* 3ed (2007) p 281-282 and the other authorities cited by these writers.

hierdie saak nie? — Ek weet nie. Ek kan nie onthou wat ek gesê het of gedink het nie.

Sal u met my saamstem, mnr Le Roux, dat 'n volledige ondersoek sal insluit dat die ondersoeker beide kante van die saak ondersoek en nie net een kant nie? — Dit maak vir my sin dat ja.

Dit is wat redelikerwys verwag word of verstaan word onder die woord "ondersoek"? — Korrek.'[20]

[27]The allusion to the communication sent to Le Roux by Mr van Schalkwyk ('Van Schalkwyk') refers to an e-mail dated 13 May 2004, sent by Van Schalkwyk to, inter alia, Le Roux. Le Roux testified that Van Schalkwyk was a legal services consultant, the head of ABSA's legal services division. The e-mail dealt with the complaint by Loubser (claim 4) and seems to have been sent around the time Le Roux decided to accept Van Reenen's recommendation and pay 'damages' to Loubser. In this e-mail, Van Schalkwyk indicated that he had perused the file relating to Loubser's complaint and highlighted various aspects which he thought required attention. These included the following:

- There was no form of comment from the broker concerned. Van Schalkwyk stated that he was aware of the fact that the broker was no

[20] 'Did it ever enter your mind that you should perhaps just ask the investigator what Mr de Lange says about these investments? — I cannot remember whether I thought such a thing and perhaps did ask.

Here Mr van Schalkwyk writes to you, six months before the Honiball decision, that he has no information from the broker before him. When you were considering the Honiball recommendation, did you not say, excuse me, what does Mr de Lange say about this matter? — I do not know. I cannot remember what I said or thought.

Will you agree with me, Mr le Roux, that a full investigation would include the investigator hearing both sides of the matter and not just one side? — This makes sense to me.

This is what is reasonably expected or understood by the word "investigation"? — Correct.' (My translation).

longer in ABSA's employ, but that he could not find any attempt made by ABSA to obtain the broker's 'side of the matter'.

- In spite of the fact that the broker concerned was plainly not given a hearing in the course of the investigation, a decision was taken to pay an amount of more than R80 000 to the client.
- Moreover, despite the fact that the broker's version of events was not obtained, it was nonetheless decided to hold him liable for this amount. Van Schalkwyk pointed out that ABSA would have to sue the broker and the relevant court would certainly take into account the fact that ABSA had obtained no explanation from the broker and 'possibly hold this fact against' ABSA ('moontlik teen ons hou'). It was possible that the broker would be able to give the court a good explanation of why he gave the advice in question to the client and, in this case, ABSA would have paid the client without needing to do so.
- Finally, Van Schalkwyk expressed the view that there was in any event not enough information to form a 'good' opinion as to whether the broker acted negligently/intentionally or was 'innocent'.

[28]As indicated above, these concerns expressed by Van Schalkwyk had been sent to Le Roux at about the same time that he took the decision to pay Loubser's 'claim', and more than six months before he took the decision to pay the Honiballs' 'claim'. In spite of this (and of his testimony set out in paragraph 23 above), he did not require the respective investigators to give De Lange the opportunity to furnish ABSA with the latter's side of the story, nor did he find it

necessary to do so himself, before 'forming his opinion' in terms of clause 16.6 and taking the decision to pay 'damages' to the respective clients.

[29]All the above must also be seen in the light of the fact that, in both cases, the so-called investigation did not include perusing the client files of either Loubser or the Honiballs. In the case of the former, it would appear from Van Reenen's evidence that Loubser's file had gone missing, whereas in the case of the latter, Joubert's evidence was to the effect that she made no attempt to access the Honiball's client file at the Mossel Bay branch as she was of the view that the information she had obtained from Sanlam about the policies taken out by the Honiballs was 'sufficient proof' to make a decision. This despite the fact that, like Loubser, she testified that the client file should contain a risk analysis done by the broker to ascertain the risk profile of the client in question. She also conceded that it would not be inappropriate for a pensioner to make the kind of investment taken out by the Honiballs on De Lange's advice, if his or her risk profile allowed it.

[30]Considering, as I am required to do, the express terms of the contract and the surrounding circumstances under which it was entered into, as well as the subsequent conduct of the parties, I am firmly of the view that the tacit term pleaded by De Lange can, and should, indeed be imported into the contract of employment between ABSA and De Lange. To use the words of Scrutton LJ in the

frequently quoted case of *Reigate v Union Manufacturing Co*,[21] it can certainly be said that this tacit term –

'. . . is necessary in the business sense to give efficacy to the contract; that is . . . it is such a term that you can be confident 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. We did not trouble to say that; it is too clear." '

[31]As it is common cause that this tacit term was not complied with by ABSA in forming its opinion and making its decision in terms of clause 16.6, it follows that ABSA's claims against De Lange, based entirely on the provisions of this clause, should have been dismissed by the high court.

[32]This conclusion renders it unnecessary to deal with any of the other arguments advanced by counsel for each party and I do not propose to do so.

Order

[33]The following order is therefore made:

1. The appeal succeeds with costs.
2. The order of the high court is set aside and replaced with the following:

'Claims 4 to 15 are dismissed with costs.'

[21] 118 LT 479 at 483, as quoted by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* above n 5 at 533A-B.

_____

B J VAN HEERDEN
JUDGE OF APPEAL

Counsel For Appellant: D J Coetzee

Instructed by: Nico Smit Inc

GEORGE

Correspondents: Honey Attorneys

BLOEMFONTEIN

Counsel for Respondent: B C Stoop

Instructed By: Erasmus Inc

p/a Bisset Boehmke McBlain

CAPE TOWN

Correspondents: Naudes Attorneys

BLOEMFONTEIN