REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: 2157/2008

In the matter between:

1.1.1.1. **THEOPHILLIS MOFUKA**
PLAINTIFF

and

DAVID ABRAHAM SHIKWAMBI **1st DEFENDANT**
REMIGIUS TANGENI NAKALE **2nd DEFENDANT**
PEGMATITE DIAMOND & FISHING (PTY) LTD **3rd DEFENDANT**

Neutral Citation*: Mofuka v Shikwambi (I 2157/2008) [2013] NAHCMD 358 (27 November 2013)*

Coram: Smuts, J
Heard: 18, 19 November 2013
Delivered: 27 November 2013

Flynote: Action for rectification of share register, delivery of shares and ancillary relief based upon an alleged oral agreement between the plaintiff and

first defendant that they would each be 50:50 shareholders in the third defendant. It was incumbent upon the plaintiff to establish the terms of the agreement contended for. At the end of the plaintiff's case, the first defendant applied for absolution. The court found that the plaintiff had not established a *prima facie* case of consensus of the crucial term of case of consensus of the crucial term of equal shareholding. Absolution granted.

ORDER

There is absolution from the instance with costs.

JUDGMENT

Smuts, J

(b) The first defendant applied for absolution from the instance at the close of the plaintiff's case. In assessing this application, the pleadings are first referred to, followed by the evidence which was led and counsels submissions which were made for and against the application. The test in applications of this nature is then referred to whereafter the competing submissions in the context of the evidence are addressed in reaching the conclusion below.

Pleadings

(c) In his particulars of claim, the plaintiff alleged that he and the first defendant had entered into an oral agreement on 12 April 2006 in Windhoek to the effect that each of them would hold 50% in the third defendant, a company, whose shareholding the first defendant had previously acquired. The plaintiff alleges that the agreement had the following terms:

(a) The plaintiff and first defendant would each hold 50% of the issued shares in the third defendant;

(b) First defendant undertook to transfer to the plaintiff 50% of the 10,000 ordinary par value shares held by the first defendant in the third defendant and that the plaintiff and first defendant would each hold 50% of the issued shares in the third defendant;

(c) The first defendant undertook to appoint the plaintiff as a director of the third defendant;

(d) The first defendant undertook to cause the third defendant to resolve and approve the transfer of 50% of the shares into the name of the plaintiff and his appointment as a director;

(e) The plaintiff undertook to open a bank account in the name of the third defendant and to deposit N$2 000 into that account;

(f) The third defendant, represented by the plaintiff and first defendant, would apply for and obtain exclusive prospecting licenses ('EPL's') from the Ministry of Mines and Energy;

(g) The third defendant would in turn 'outsource' the EPL's to other companies either on a profit sharing basis or against payment of a once-off fee to the third defendant;

(h) All profits generated from these 'outsourcing' agreements as pleaded would be by way of dividends to be shared equally between the plaintiff and first defendant.

(d) The plaintiff further alleged that he had complied with the obligations upon him under the agreement. But despite this, the first defendant had breached the agreement by failing to transfer 50% of the shares to the plaintiff.

The plaintiff alleged that on 21 June 2007 the first defendant had breached the agreement by causing the second defendant to be appointed as a director of the third defendant and transferring to the second defendant a total of 1500 shares in the third defendant. It is alleged that the first defendant on 25 June 2007 transferred 1500 shares to the plaintiff – instead of 5000 shares in accordance with the agreement contended for by the plaintiff.

(e)

(f) The plaintiff contended that the appointment of the second defendant as a director had not been approved by the board of the third defendant, including himself and was thus null and void as well as the transfer of shares to him.

(g)

(h) The plaintiff accordingly sought an order declaring the appointment of the second defendant as director as null and void as well as the transfer of shares to him. The plaintiff further sought an order rectifying the third defendant's share register to reflect a 50% shareholding, as contended for by him. He also sought an order for the delivery by the first defendant to him of a further 3500 shares in the third defendant – to thus make up 5000 shares which would constitute 50% of the issued share capital of the third defendant. Plaintiff also sough an order that in the event of the defendants not taking steps to give effect to the order, that the deputy sheriff be authorised to sign all necessary documentation to do so.

(i)

(j) The first defendant defended the action. In his plea, he denied the agreement contended for by the plaintiff. He stated that during 2005 the plaintiff had approached him and offered to introduce an investor who would make a substantial financial investment of some U$20 million for the third defendant's mining operations. The first defendant also states in his plea that the plaintiff had promised to set up a meeting between the first defendant and the potential investor and, on the strength of this promise, he had been appointed a director of the third defendant on 17 July 2006.

(k)

(l) The first defendant further pleaded that during May 2007 the plaintiff had requested a meeting with him. At the meeting, the first defendant pleads that the plaintiff complained that he had not received his shareholding and handed to

the first defendant a letter referring to the shareholding in the third defendant and a draft shareholders' agreement in terms of which it was proposed that the plaintiff, the first defendant and the second defendant each hold one third (33.33%) of the authorised share capital of the third defendant. The first defendant further pleaded that he refused this request and instead offered to grant the plaintiff a 15% shareholding in the third defendant subject to the condition that he secured the promised investment. 15% of the shares were then transferred to the plaintiff but, as he failed to introduce the investor, the first defendant proceeded to cancel the allocation of those shares. The first defendant further denied that the appointment of the second defendant and transfer of shares to him were null and void and sought the dismissal of the plaintiff's claim.

The evidence

(m) Two witnesses gave evidence in support of the plaintiff's claim. They were a certain Mr Peter Looijen and the plaintiff.

(n)

(o) Mr Looijen's evidence was to the effect that he is a director of a company called Namibia Underwater Technologies and Mining (Pty) Ltd ('NUTAM'). This concern had in turn formed a joint venture company known as Lavender Investments (Pty) Ltd '(Lavender)' with the third defendant. NUTAM had however the overwhelming majority of shares (80%) held in the joint venture company.

(p)

(q) The purpose of the joint venture company was for the third defendant to assign its EPL's to Lavender for the purpose of exploitation by NUTAM. He referred to an assignment agreement of the third defendant's EPL's, which was prepared for the purpose of the Minister's approval, as required by the Minerals (Mining and Prospecting) Act, 1992. In terms of the assignment agreement, NUTAM undertook to provide the third defendant with initial funding of N$500 000 by way of shareholder loans. The agreement also stated that there had been 'good and proper consideration' for the assignment of the EPL's. But in his evidence, Mr Looijen stated that the assignment agreement did not at all mean

what it said in this crucial regard. Instead, the amounts referred to as shareholder loans, including the sum of N$500 000, constituted a fee which was paid by NUTAM for the assignment of EPL's to Lavender. He referred to this as a "commercial agreement" but which he acknowledged was essentially an underhand agreement at variance – and indeed in conflict – with the terms of the assignment agreement prepared and presented to the Ministry for the purpose of approval by the Minister. As nothing further turns on the deed of assignment for the purpose of determining the absolution application, I shall not further refer to it except to express my dismay that an admittedly deliberately misleading document is prepared in such a manner for the purpose of securing ministerial approval under that Act when that agreement does not contain the true terms of the between the parties.

(r) Mr Looijen testified that he had in early 2008 informed plaintiff of the payments which NUTAM had made directly to the first defendant (for EPL's) because, so the first defendant had informed him, the third defendant did not have a bank account. These payments, Mr Looijen stated, were however designated for the third defendant.

(s) The plaintiff then gave evidence. He had provided a lengthy statement to constitute his evidence in chief. For the large part, he confirmed its terms. He did however state that the agreement between the first defendant and himself was not entered into in April 2006, but rather in the course of 2005. He was not able to provide any further precision as to a date or month during that year. The particulars of claim were amended accordingly. He also qualified his statement in a few other respects.

(t) The plaintiff testified as to the terms of the agreement as set out in his particulars of claim. He said he thereafter paid the amount of N$2 000 into the banking account of the third defendant and was appointed as a director of the third defendant on 17 July 2006.

(u) The plaintiff also gave evidence that the third defendant was the holder of EPL 3405 and that it had entered into a shareholders agreement with Lavender

and NUTAM, with the third defendant holding 20% of the shares in Lavender and NUTAM the other 80%. He also referred to the deed of assignment signed simultaneously with the shareholders agreement in terms of which the third defendant assigned its rights, title and interest in and to EPL's 3405 and 3406. He confirmed that the loan of N$500 000 referred to in the deed of assignment was in fact payment of a fee to the third defendant for those EPL's. He stated that he received the sum of N$250 000, which he said reflected his 50% shareholding, in respect of this payment.

(v)

(w) The plaintiff further testified that two other EPL's in the name of the third defendant were also subsequently assigned to Lavender and that a further payment of N$300 000 was paid to the first defendant in respect of the fee payable for these EPL's. He subsequently established from Mr Looijen in 2008 that NUTAM had paid cheques totalling the amount of N$850 000 to the first defendant, with the exception of one of those cheques which had been made out in the name of the third defendant but had been endorsed in favour of the first defendant. After this discovery he testified that he approached his current legal practitioner, Mr C Brandt.

(x)

(y) The plaintiff stated that he had never authorised the mode of payment of cheques which were payable to the third defendant being paid directly to the first defendant. Mr Brandt, as his attorney, took the matter up with the Mining Commissioner. The plaintiff thereafter discovered that his name had been deleted as a director and he was further informed by the first defendant that he was no longer a shareholder. The applicant thereafter instructed his attorney to further investigate the matter. These investigations revealed that the share register of the third defendant had been changed to reflect that the plaintiff had been removed as a shareholder of the third respondent and the plaintiff thereafter proceeded with legal action against the first defendant.

(z) The plaintiff had also in the course of his testimony stated that he was appointed as a director of the third defendant on 17 July 2006 and that two resolutions had been taken by the first defendant on 21 June 2007 and 26 June 2007 respectively. In terms of the second of these resolutions, the plaintiff had

been accorded 1500 of the 10000 issued shares in the third defendant.

(aa) The plaintiff stated that the third defendant did not have a permanent office and did not employ any staff. He stated that its management was attended to by the first defendant whom he had trusted at the time.

(bb)

(cc) The plaintiff stated that he had never agreed that the second defendant would become a shareholder or director of the third defendant. After discovering this, he said he raised the matter with his attorney, Mr C Brandt, to establish the exact position. As a consequence, Mr Brandt on 24 July 2007 addressed a letter to the company secretaries of the third defendant. But it was only after the plaintiff had heard from Mr Looijen in January 2008 concerning payments made to the first defendant, that the plaintiff took te matter further with Mr Brandt.

(dd)

(ee) In cross-examination, Mr Marcus, who appeared for the first defendant, referred to a letter from L&B Commercial Services (Pty) Ltd, setting out the directors and shareholding in the third defendant. This letter was addressed to LorentzAngula Inc and dated 15 May 2006 for attention Mr Angula. It reflected that the plaintiff was appointed as a director on 29 July 2005. Mr Marcus then also referred to a draft shareholders' agreement for the third defendant which the plaintiff acknowledged had been prepared upon his instruction to Mr Hosea Angula of LorentzAngula Inc during 2007. It was unsigned and was in the form of a draft shareholders agreement between the plaintiff, the first defendant and a certain Mr Naikaku. It turned out that the third party was a certain Mr Nakale, (cited as second defendant). The draft agreement reflected a 33.33% shareholding for each of them.

(ff)

(gg) The plaintiff, when questioned about this draft agreement which he had not referred to during his lengthy evidence in chief, stated that he had instructed Mr Angula to prepare the draft because, he felt that the first defendant was dragging his feet on registering the plaintiff's shares in the company. It was for this reason that he approached Mr Angula. He further stated:

> 'So I went to Angula and relayed to him that we are three people in the

> company. Angula then made this proposal. I took the proposal to Mr Shikwambi and I told him that Angula suggested 33.33% and I gave him this document as is as a proposal, but he never returned back to me or gave me feedback on this proposal. I did not sign it. It was never signed and nobody signed it and it was an envisaged working document. It is not something that can be relied upon because it was never implimented. It was just a proposal.' (sic)

(hh) The plaintiff was extremely vague as to the date when this was prepared on his behalf, but agreed that it was during 2007. The plaintiff further explained his instructions to Mr Angula as follows:

> '. . . stating to him that there were three shareholders in the company (who needed to be reflected in the shareholders agreement).'

(ii) The plaintiff further acknowledged that he gave the draft to the first defendant as a proposal to study and see if he agrees with the terms contained in it.

(jj)

(kk) It is clear to me that the draft agreement was thus given and provided to the first defendant as the plaintiff's proposal, having been prepared by his then attorney on his behalf. The plaintiff however stated that he did not discuss the breakdown of shareholding with Mr Angula and that the proposed shareholding breakdown in it was that of Mr Angula.

(ll) He also stated in cross-examination that the first defendant rejected the proposal outright and referred to it as 'corruption' and did not revert to him on the document. The plaintiff however conceded that he had proposed that he and the first defendant should further discuss the proposal (embodied in the draft) at Mr Brandt's office. The plaintiff accepted that he subsequently proceeded to Mr Brandt's office to discuss the draft agreement and said that after the meeting with Mr Brandt, the latter was supposed to change the agreement to reflect that the plaintiff was the owner of 50% of the shareholding.

(mm) The plaintiff was cross-examined extensively about his instructions to

Mr Angula and how it had come about that a shareholding of 33.33% was proposed in respect of the three specified shareholders as to their respective shareholdings. It was put to the plaintiff that he had informed Mr Angula as to what he had wanted to be incorporated in the agreement. In response, the plaintiff stated:

(nn)

> (oo) 'I went to him and I relayed to him concerning our company shareholding in Pegmatite (third defendant). I informed him that we are three shareholders in the company. I wanted him to draft us an agreement pertaining to shareholding. He asked how many we are in the company, and I said three. I gave him the names of the members without telling him how many percentages each should be allocated. I called him later or spoke to him on the phone and he said that the agreement is ready and I should go and fetch it.'

The plaintiff proceeded again to state that he then took the draft agreement directly to the first defendant after picking it up. He insisted that Mr Angula had himself decided as to what percentages each shareholder would get and acknowledged that this was 'a mistake' and acknowledged that 'maybe the mistake was mine because I did not direct him as to what shareholding each member should own in the company.'

(pp) Mr Marcus put to the plaintiff that further items contained in the agreement would have emanated from the plaintiff such as the objects of the company, its authorised share capital, as well as the specific reference to EPL's which the company had at the time. As to the objects, the plaintiff disagreed that he had discussed that item "because I did not go to Mr Angula to discuss objects of the company but rather to discuss the shareholding." He subsequently repeated that he had gone to Mr Angula "to discuss the shareholding". But when confronted with this statement, he had not stated to Mr Angula which shareholding should be allocated to the members. He had stated that Mr Angula "should draft us an agreement about the shares and then we will see how we are to handle it among ourselves."

(qq)

(rr) The plaintiff denied supplying information to Mr Angula. But when it was

put to him that the information concerning EPL's was set out in the agreement, he then stated "I do not recall whether I have told him that or not, but what is important is that I wanted him to draft an agreement setting out the shareholding of the company." He also acknowledged that the shareholder ratio would be of primary importance to him and the other shareholders. When it was put to him that he had neglected to inform Mr Angula the most important thing, namely that he had a 50% shareholding of the company already, the plaintiff responded:

> 'I have not failed or missed anything because I have not signed any agreement.'

(ss) The question was again put to him and the plaintiff responded:

> 'For me it is exactly the same thing because I took the document. I brought it to my colleague for us to look into the document and agree on how the final draft should be.'

(tt) It was also put to the plaintiff if there had been an agreement as to his 50% shareholding, it would have been easy for him to disclose and explain this to Mr Angula and for that then to be contained in the draft which was after all the plaintiff's proposal to be put to the first defendant. In response to this, the plaintiff acknowledged:

> 'Yes a mistake can be made and if that mistake have been made it has been made. However it can be revisited and see if there was a mistake. And that is why when something is given in writing you go through it before you give your final approval in terms of the signature.'
>
> I accept it is a mistake I did not tell Mr Angula. I made a mistake by not telling Mr Angula about my shareholding but I have no other objective going to see Mr Angula other than getting the proposal setting out shares as I obtained it from him and therefore even when I got this draft agreement there was no pressure applied to anybody to sign in the form it was. There was no force. Nobody was forced to sign. And for me it was actually very simple. We have a draft we deal with it.'

(uu) It was then put to him whether he knew that a percentage of 33.33% was contained in the draft when he handed it to the first defendant. The plaintiff denied that he was aware of that. In further questioning by the court, the plaintiff stated that he only discovered the proposed breakdown in shareholding in the draft when legal action was taken during 2008. This clearly conflicted with his earlier testimony, quoted above, that the plaintiff said that he had told the first defendant that Mr Angula had proposed 33.33% when he took the draft to him. His acknowledgment that he knew of the 33.33% shareholding term in the draft is by far the most probable. Mr Angula was not called to give evidence and the plaintiff's counsel acknowledged in argument that he would have been available.

(vv) After the plaintiff's testimony, the plaintiff closed his case.

(ww) Mr Marcus then applied on behalf of the first defendant for absolution from the instance.

Counsels' submissions

(xx) Mr Marcus referred to the test for absolution. He submitted that it was well established and argued that upon an application of the test, there should be absolution from the instance. He argued that the basis of the plaintiff's case for rectification of the share register and the further consequential relief set out in the particulars of claim was an oral agreement in 2005 –originally pleaded as having been entered into in April 2006.

(yy)

(zz) Mr Marcus contended that the plaintiff had not established a *prima facie* case on the crucial element of consensus for that agreement. Mr Marcus also referred to the plaintiff's position as that of a director and with reliance upon *Bondi and another v Wood N.O.*[1] that the rectification of a register is a discretionary remedy and that where a director is partly responsible for an alleged wrong allotment of shares or the wrong registering in the register, different considerations may apply. He referred to the position of the plaintiff as a director of the third defendant and submitted that this would be a factor to be

[1] 1976(3) SA 680 (RAD).

taken into account in the exercise of the discretion with a remedy of this nature. Even though the first defendant, as opposed to the plaintiff, was, on the evidence thus far, responsible for the administration of the third defendant, (as opposed to a company secretary (a chartered accountant) in the *Bondi* matter,) the court found that the directors were grossly negligent in failing to apply their minds to what they signed. The court found that it was their duty, as directors to ensure that the register of members contained accurate and reliable information. The court found that a rectification of the register was not justified.

(aaa)

(bbb) Mr Marcus referred in detail to the evidence concerning the plaintiff's instruction to Mr Angula and the proposal which was then prepared on his behalf which he took to the first defendant. He referred to the plaintiff's testimony that at a subsequent meeting at Mr Brandt's office where it was discussed he wanted to change the 33.33% to 50%. He submitted that the plaintiff's evidence fundamentally contradicted an agreement to the effect that there was from the beginning a 50:50 shareholding in the third defendant. On the contrary, the plaintiff had instructed Mr Angula that there were three shareholders. Mr Marcus submitted that he had been given the opportunity to record his 50% shareholding in the company but inexplicably stated that he had not conveyed this to Mr Angula. It certainly was not contained in the draft prepared by Mr Angula.

(ccc)

(ddd) Mr Marcus also referred to the fact that the objective of the company and its issued share capital was the same as what was alleged to have formed part of the oral agreement contended for. The plaintiff's answer in cross-examination as to how the change at Mr Brandt's office to a 50% shareholding would affect the other shareholders, was to the effect that they would need to share the other 50%, Mr Marcus pointed out that this contradicted the plaintiff's evidence in chief.

(eee) Mr Marcus accordingly submitted that there was not even *prima facie* evidence of a consensus on a 50:50 shareholding ratio and that this had been contradicted in material respects by the plaintiff's own evidence.

(fff) Mr Marcus referred to the payment the plaintiff had received which the plaintiff had contended was a 50% share in the N$500 000 fee for EPL's and pointed out that this did not take into account other payments which were made by NUTAM.

(ggg) Mr Marcus submitted that the plaintiff, as a director, had a responsibility for ensuring that the documentation of the third respondent accorded with what was agreed. He submitted that he was responsible for the proper management of the third defendant and if he chose to perform his duty as a director without applying his mind as to what was being done, then this would amount to grossly negligent conduct which, with reference to the *Bondi* matter would in the exercise of a court's discretion, disentitle him to relief by way of rectification of the company's share register.

(hhh) Mr Schickerling, who together with Mr Denk appeared for the plaintiff, also referred to the test applicable in applications of this nature. He relied upon *Aluminium City CC v Scandia Kitchens and Joinery (Pty) Ltd*[2] where the court noted:

> (iii) '[12] It is often said that, in order to escape absolution from the instance, a plaintiff has to make out a prima facie case in that it is on prima facie evidence - which is sometimes reckoned as evidence requiring an answer (Alli v De Lira 1973 (4) SA 635 (T) at 638B - F) - that a court could or might decide in favour of the plaintiff. However, the requisite standard is less stringent than that of a prima facie case requiring an answer. Prima facie evidence does not necessarily have to call for an answer, it is sufficient for such evidence to at least have the potential for a finding in favour of the plaintiff.'

(jjj)

He also relied upon two other judgments of Namibia courts, *Bidoli v Ellistron t/a Ellistron Truck and Plan*[3] *and Kaese v Schacht and another*[4] as well as *Myburg v Kelly*[5].

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[2] 2007(2) NR 494 at 496 E-G.

[3] 2002 NR 451 (HC) at 453.

[4] 2010(1) NR 199 SC.

[5] 1942 EDL 202 at 206.

(kkk) Mr Schickerling confirmed that the plaintiff's claim is based upon contract – the oral agreement set out in the particulars of claim. He submitted that the appointment of the second defendant as a director and the transfer of shares to him had not been approved by the board of directors and was thus null and void and that the allotment of only 1500 shares was also in breach of the agreement between the parties and that 50% of the shares in the company should have been transferred to the plaintiff.

(lll) Mr Schickerling accepted the discretionary nature of the relief sought in respect of the rectification of the register but relied upon *Botha v Fick*[6] *Barnard v Carl Greaves Brokers (Pty) Ltd and others*[7]and *Watt v Sea Plant Products Ltd and Other.*[8]_

(mmm) Mr Schickerling submitted that the admissible evidence given in the matter thus far had established important components of the plaintiff's case, namely depositing an amount in the third defendant's bank account (of N$2000), the shareholders' agreement between NUTAM, Lavender and the third defendant, the payment of N$500 000 by NUTAM to the first defendant and the further payment by the first defendant of 50% of that amount on the same day to the plaintiff. Mr Schickerling submitted that the application for absolution should be dismissed with costs.

The test for absolution

(nnn) Counsel did not differ as to the nature of the test to be applied in applications for absolution but rather upon the application of that test. The test was recently restated by the Supreme Court in *Stier v Henke*[9] as follows:

> '[4] At 92F – G Harms JA in Gordon Lloyd Page & Associates v Rivera and

[6]1995 (2) SA 750 at 780.

[7]2008 (3) SA 663 (C) ft 15.

[8]1999 (4) SA 443 (C) and also *Brink and Others v Mampudi Mining (Pty Ltd)* 2003 (5) SA 221 (T).

[9]2012 (1) NR 370.

Another 2001 (1) SA 88 (SCA) referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of an appellant's case as appears in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G – H — D

> '. . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)'
> [My Emphasis.]

Harms JA went on to explain at 92H – 93A:

> 'This implies that a plaintiff has to make out a prima facie case — in the sense that there is evidence relating to all the elements of the claim — to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G – 38A; Schmidt Bewysreg 4 ed at 91 – 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne (loc cit)) — a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice. . . .'

[5] In Gordon's matter supra at 95I – 96A Harms JA also set out the test where a

tacit agreement is alleged, as follows:

'Since this case is concerned with the test for absolution at the end of a plaintiff's case I am obliged somewhat to restate the ordinary test for proof of tacit contract (Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investment (Pty) Ltd 1984 (3) SA 155 (A) at 164G – 165G; cf Samcor Manufacturers v Berger 2000 (3) SA 454 (T)). It was, at that stage, at least necessary for the appellant to have produced evidence of conduct of the parties which justified a reasonable inference that the parties intended to, and did, contract on the terms alleged, in other words, that there was in fact consensus ad idem. . . .'

In South African Railways and Harbours v National Bank of South Africa Ltd 1924 AD 704 at 715 Wessels JA stated:

'The Law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract. . . .'

(ooo) That matter, essentially related to the question of silence as acceptance and whether there was *animus contrahendi* in respect of the tacit agreement contended for. The Supreme Court concluded that the evidence raised at least a reasonable inference that the respondent, who was aware of the terms of an unsigned agreement, was conducting her affairs on those provisions and that the appellant had made out a prima facie case and that absolution should not have been granted. The facts in this matter differ fundamentally.

Application of the test to this matter

(ppp) The basis for the plaintiff's relief, as was correctly accepted in argument

by Mr Schickerling, was the oral agreement as alleged by the plaintiff and disputed by the first defendant as to a 50:50 shareholding in the third defendant. The plaintiff would thus need to make out *prima facie* case in the sense of adducing evidence which justified an inference that the parties contracted and that there was consensus on the terms alleged and most particularly on the 50:50 shareholding. In the particulars of claim this agreement was said to have been reached on 16 April 2006. This was also stated in the plaintiff's statement prepared in advance of the trial as his evidence in chief. But when he gave his evidence, the plaintiff stated that the agreement was in 2005 and the particulars of claim were, as I have said amended accordingly. The agreement contended for and confirmed under oath by the plaintiff included items such as the issued share capital and the objective of the company which had already formed part of the company documentation well before 2005, as was pointed out by Mr Marcus.

(qqq) But most significantly, the evidence of the plaintiff as to the instruction he had provided to Mr Angula to prepare a draft agreement in my view fundamentally contradicts the basis for the plaintiff's claim consensus on a 50:50% shareholding in the oral agreement entered into in 2005.

(rrr) The plaintiff stated more than once in cross-examination that he had discussed the issue of the shareholding in the third defendant (between the three members) with Mr Angula. On another occasion during his cross-examination he had also stated that he had 'relayed our shareholding' (in third defendant) to Mr Angula and elsewhere said he had also discussed the shareholding in the third defendant with him. Yet despite his repeated statements to this effect and his acceptance of the importance of the issue of the percentages in shareholding, the plaintiff denied that he had made any suggestion to Mr Angula as to what to insert. He went further and said that the breakdown in the draft – despite his acknowledgment of discussing the issue - was Mr Angula's and did not emanate from him. This in the context of his reason for approaching Mr Angula in the first place – because the first defendant was 'dragging his feet' in registering shares to him and his allegation of a 50:50 agreement on shareholding.

(sss) The plaintiff stated that he had told the first defendant upon taking the draft agreement to him that Mr Angula had 'suggested (a shareholding of) 33.33% and I gave him this document as is as a proposal.' This evidence is consistent with discussing shareholding ratios and providing an instruction to that effect. But this portion of his evidence was however later directly contradicted by him in stating that he was unaware of the proposed shareholding until much later – in 2008 when he decided to institute proceedings against the first defendant.

(ttt) Mr Angula was not called as a witness and plaintiff's counsel very properly acknowledged that he would have been available.

(uuu) The probabilities are overwhelmingly against the acceptance of the plaintiff's version on this issue. Whilst his credibility would not be at issue at this stage, what is relevant are the contradictions in his own evidence on this issue (of not knowing the proposed breakdown when he took the draft to the first defendant which he emphatically subsequently contradicted) and the inherent improbability of his version of not providing an instruction as to what should be stated in the shareholding clause in the context of being unhappy that the first defendant was 'dragging his feet' and not being a registered shareholder of the third defendant as well as his repeated acknowledgment that shareholding was discussed with Mr Angula. At one point he said he 'relayed to him (Mr Angula) concerning <u>our</u> company shareholding in Pegmatite (the third defendant).' The plaintiff said that Mr Angula had asked how many 'we are in the company' in the context of the express instruction given to him prepare an agreement pertaining to shareholding.' Yet the plaintiff persisted with his denial that he ever provided an instruction as to what the ratio should be. This denial is plainly self serving as the plaintiff would realise that an admission that he had provided such an instruction would be destructive of his version of the disputed oral agreement. Significant in this regard is the failure to call Mr Angula when he was available to be called as a witness. I also take into account that, if there was a 50:50 agreement, this would have been conveyed to Mr Angula in preparing the draft given its importance in the context of the task at hand. I find that the plaintiff's

version as to the draft agreement prepared on his behalf is so fundamentally improbable and inherently unacceptable that it negate any basis for a reasonable inference that the plaintiff and first defendant had agreed upon a 50:50 shareholding in 2005 as alleged by the plaintiff.

(vvv) Quite apart from this, it is in any event clear that upon the evidence of plaintiff's own version, he had provided the draft to the first defendant as his proposal – one prepared on his behalf by an attorney engaged by him to do so. It was thus his proposal. He also stated that he knew its terms – even though he subsequently repeatedly denied this. This evidence is in any event destructive of the plaintiff's case that he had an oral agreement concluded two years before in terms of whereof a 50:50 shareholding ratio had been agreed upon.

(www) What is clear to me at the conclusion of the plaintiff's testimony and his case is that he has fallen far short of *prima facie* establishing consensus on the crucial element of a 50:50 shareholding as alleged. Indeed his own evidence as to his instruction to Mr Angula as to three shareholders and discussing shareholding and the proposal which emerges is, on his own version, destructive of having reached consensus on that fundamental question. This is quite apart from the inherent improbabilities in and inherent unacceptability of his unsatisfactory version which was internally inconsistent and contradictory as I have pointed out already. There is thus in my view no evidence on this crucial element of the plaintiff's claim upon which a court could or might find for the plaintiff.

(xxx) The plaintiff's repeated acceptance of the second defendant as a shareholder of the third defendant in his instructions to Mr Angula fundamentally contradicts his evidence in chief concerning the second defendant. Although there was relief on this score sought in the particulars of claim, this aspect was understandably not pressed or even referred to in argument by Mr Schickerling. This may be because of the second defendant's affidavit filed in which he in March 2009 relinquished both his shareholding and directorship in the third defendant.

(yyy) It follows in my view that this is one of those rare instances where absolution form the instance should be granted. The order I make is follows:

There is absolution from the instance with costs.

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DF SMUTS

Judge

PLAINTIFF:	J Schickerling (with him A Denk) Instructed by Chris Brandt Attorneys
RESPONDENT:	N Marcus Instructed by Nixon Marcus Public Law Office