REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: I 1137/2016
I 1140/2016

In the matter between:

PETHERBRIDGE LAW CHAMBERS **PLAINTIFF**

and

CL DE JAGER & VAN ROOYEN **FIRST DEFENDANT**
ZHOU JIANSHENG **SECOND DEFENDANT**

PETHERBRIDGE LAW CHAMBERS **PLAINTIFF**

and

CL DE JAGER & VAN ROOYEN **FIRST DEFENDANT**
THOMAS GANTZ **SECOND DEFENDANT**

Neutral citation: *Petherbridge Law Chambers v CL de Jager & van Rooyen* (I 1137/2016; I 1140/2016)[2019] NAHCMD 59 (11 March 2019)

Coram: **PRINSLOO J**
Heard: 1 – 5 October 2018

Delivered: 11 March 2019

Reasons: 20 March 2019

Flynote: Civil Practice – Contract – Tacit Agreement – Proof of – Court to look at conduct and circumstances of the Parties – conduct to be clear, unequivocal and unambiguous – Each case to be judged in light of own circumstances.

Summary: Mrs Petherbridge, practicing under the name and style of Petherbridge Law Chambers (hereinafter the Plaintiff) instituted action against the defendants in the aforementioned matters for the rendering of professional services and disbursements at the special instance and request of the defendants which, despite demand, the defendants refuses or neglects to pay. These actions were both opposed by the first defendant.

Held – The court must be satisfied that the conduct of the parties was clear, unequivocal and unambiguous in agreeing to the terms of the contract. The first defendant has failed to persuade the Court that there was a tacit agreement as it had failed to prove the terms of the said agreement

Held further – Ostensible authority flows from the appearances of authority created by the principal. An impression must have been created in another's mind. In terms of the estoppel principle, a representor may be held accountable when he has created an impression in another's mind. Ms Steyn therefore had no authority to enter into any agreement with the first defendant.

Held further – The discretion to decide what costs have been necessarily or properly incurred is given in the first instance to the taxing master and not to the Court Liability for the proposed reasonable fees and disbursements incurred could not be determined by the taxing master as it fell outside the scope of his authority. In my respective view, the taxing master, as per the *allocaturs* granted, determined the reasonable fees incurred for service rendered.

ORDER

Judgment is granted in favour of the Plaintiff in the following terms:

Case No.: I 1137/2016:

1. Payment in the amount of N$ 13 009.35.
2. Interest at a rate of 20% per annum calculated from 1 March 2014 on the said amount, until date of final payment.

Case No.: I 1140/2016:

3. Payment in the amount of N$ 5 223.32 against the Defendants, jointly and severally, the one paying the other to be absolved.
4. Interest at a maximum rate of N$ 5 223.32 as per the *in duplum* rule.

Both cases:

5. Costs of Suit.

JUDGMENT

PRINSLOO J:

Introduction

[1] For purposes of trial, the two actions were consolidated. As the two matters were heard simultaneously, the judgment herein is dealt with in the same manner.

[2] Mrs Petherbridge, practicing under the name and style of Petherbridge Law Chambers (hereinafter referred to as the Plaintiff) instituted action against the defendants in the aforementioned matters for the rendering of professional services and disbursements at the special instance and request of the defendants which, despite demand, the defendants refuses or neglects to pay. The plaintiff's claims in the respective matters are as follows:

1. a. Case no.: I 1137/2016 – Payment in the amount of N$ 60 982.49.
   b. Case no.: I 1140/2016 – Payment in the amount of N$ 64 830.47.
2. Interest on the above amounts at the rate of twenty percent (20%) per annum calculated, in respect of case no. I 1137/2016 from 1 March 2014 and in respect of case no. I 1140/2016 from 1 October 2013, on the aforesaid amounts until date of final payment; and
3. Costs of suit.

These actions were both opposed by the first defendant.

[3] Before I proceed with my judgment herein it is vital to note a few important aspects, in order to understand the dynamics between the parties, i.e.:

a. Ms Steyn was employed as a candidate legal practitioner at the plaintiff during 2011.
b. After Ms Steyn completed her practical training at the Justice training Centre in 2012 she continued to work for the plaintiff as a professional assistant. Ms Steyn remained so employed until April 2014.
c. During the same time the sole proprietor of the first defendant was Mr Steyn, Ms Steyn's father.
d. During Ms Steyn's period of attachment as well as after her admission as legal practitioner the plaintiff acted as a correspondent for the first defendant.
e) During September 2015 Ms Steyn took over her father's practice after he fell terminally ill and has since been practicing under the name and style

of CL De Jager & Van Rooyen. Ms Steyn is thus currently the sole proprietor of the first defendant.

Brief background

Zhou Jiansheng and Thomas Gantz matters

[4] Professional services and disbursements were rendered to the second defendants in both these matters by Petherbridge Law Chambers during the period from July 2012 until February 2014 and July 2012 to February2014 respectively. Such services were rendered at the special instance and request of CL De Jager & Van Rooyen (the first defendant herein), then owned and operated by Mr Steyn, the sole proprietor of first defendant, which instructions were carried out by Ms Steyn, in her capacity as professional assistant of the plaintiff. The plaintiff was therefore a correspondent attorney for the first defendant.

[5] Ms Steyn exclusively dealt with and liaised with first defendant and it was within the contemplation of the parties that defendants shall reimburse the plaintiff.

[6] The plaintiff issued invoices in respect of the professional services rendered and disbursements incurred.

[7] The mandates were fulfilled up until the final orders of divorce were issued. Final invoices were subsequently issued and settled by the first defendant.

[8] During December 2013 the plaintiff caused bill of costs to be drawn up on all the files that Ms Steyn worked on, including that of Messrs Zhou and Gantz. From the bills of costs it was deduced that not all the fees for work performed on the files were captured and monies were due and owing by the first and second defendants. The plaintiff thereafter obtained dates to have the bills of cost taxed during April 2015, but the taxed amounts were objected to by Ms Steyn by way of her legal practitioner.

[9] The plaintiff thereafter proceeded to institute the actions *in casu* based on the untaxed bills of cost, to recover the costs not charged for from the first defendant and the second defendants. In the Zhou matter the initial outstanding amount, as determined by the cost consultant, was N$ 60 982.49 and in the Gantz matter the initial outstanding amount was N$ 64 830.47. However the bills of costs were subsequently taxed by order of Court and *allocaturs*[1] were issued in the amount of N$ 24 726.53 in the Zhou Jiansheng matter and N$ 9 833.85 in the Gantz matter.

[10] It is of importance to note that an amendment was effected by Plaintiff at the commencement of the trial to reduce the claimed amount as follows:

(a) In respect of the Zhou matter from N$ 60 982.49 (as reflecting in the summons) to N$ 13 009.35. The latter amount was the amount the Plaintiff alleges the Defendants owes considering the *allocatur* amount (N$ 24 726.53) less what has already been paid by the Defendants (N$ 11 717.18). The Plaintiff therefore claims the amount of N$ 13 009.35 (as amended).

(b) In respect of the Gantz matter from N$ 64 830.47 (as reflecting in the summons) to N$ 5 223.32. The latter amount was the amount the Plaintiff alleges the Defendants owes considering the *allocatur* amount (N$ 9 833.85) less what has already been paid by the Defendants (N$ 4 610.55). The Plaintiff therefore claims the amount of N$ 5 223.32 (as amended).

[11] The First Defendant resists the claims on the basis of a denial of liability *in toto*.

The issues:

[12] The issues called for determination in these matters is whether or not Ms Steyn, who was then employed by the Plaintiff and dealt with Mr Zhou Jiansheng

[1] AC Celliers *Law of Costs Service* Issue 22 at para13.46: 'This is a statement under the signature of the registrar certifying the amount at which the bill has been taxed.'

and Mr Thomas Gants matters respectively, on instructions of the first defendant, had a mandate and was authorized to contract for and on behalf of the plaintiff.

[13] Furthermore, the following issues are also called for determination:

(1) Whether there was a contract between Ms Steyn and the first defendant; and
(2) What the terms and conditions of the aforesaid contract was.
(3) Whether the plaintiff and first defendant's agreement in regards to fees charged was based on the normal fee scale of Ms Steyn.

Evidence adduced by the parties

Plaintiff's case

[14] On behalf of the plaintiff, one witness was called to testify i.e. Mrs Mariaan Christine Petherbridge.

[15] Ms Petherbridge is the sole proprietor of the plaintiff and testified that professional services was rendered to Mr Zou Jiansheng and Mr. Thomas Gantz on instructions of first defendant, then owned by Mr Steyn and that such instructions were carried out by Ms Steyn herself.

[16] She further stated that the work that was sent by Mr Steyn was always marked for the attention of Ms Steyn and that she received the documents herself.

[17] The plaintiff testified that she realized that Ms Steyn undercharged the first defendant and did not invoice correctly for the work that was done i.e. professional services rendered and disbursements incurred. She then handed the files to a cost consultant, a certain Mr Jan Joubert, to draw up bills of costs on all of the files Ms Steyn worked on and it was then that it became apparent that she did not capture all the work performed on the files.

[18] The plaintiff further testified that Ms Steyn was never mandated nor had the authority to negotiate fee structures or special tariffs on behalf of the plaintiff and that Ms Steyn had no authority to act for and on behalf of the plaintiff. Plaintiff contends that she is a sole proprietor and can only be represented by the plaintiff herself, as the owner.

Defendant's case

[19] On behalf of the defendants one witness was called to testify i.e. Ms Esther Steyn. It should be noted that Mr Zhou did not take part in the current proceeding but Ms Steyn's evidence relates to both the matters *in casu*.

[20] Ms. Steyn testified that she was attached to plaintiff's firm as a candidate legal practitioner as from 2011 and Ms Petherbridge was her principal. She further stated that she was admitted in 2012 as a legal practitioner and became permanently employed at the plaintiff as a professional assistant. Both prior to and during her attachment, plaintiff acted as a correspondent for first defendant. Once she was admitted, Mr Steyn (her father) began instructing her to act as a correspondent as he only needed a post office. Her hourly rate was cheaper than that of Ms Petherbridge. At the time Ms Steyn's hourly tariff was about seven hundred Namibian dollars.

[21] Ms Steyn further testified that her fee scale and manner of charging fees was at all times set by the plaintiff and were overseen by the plaintiff.

[22] Ms Steyn further testified that it was an express, alternatively implied, alternatively tacit terms of the agreement between the parties that the professional services and disbursements rendered by the plaintiff to first defendant was that such services would be at the normal fee scale of Ms Steyn, who handled the matters and that Ms Steyn would only charge for work she was specifically mandated to do. She further testified during examination-in-chief that the letter of instructions from first defendant implied that her role was merely as a post office and attend court when

necessary, as the majority of pleadings were prepared by first defendant. The normal practice was that first defendant drew the majority of the pleadings and then the pleadings were emailed to her for her signature and filing. If anything was to be settled by her, the first defendant was duly charged for her time.

[23] She further testified that her father was diagnosed with terminal cancer during August 2015 and he requested her to return to Walvis Bay to take over the practice, which she did. She has been practising as a sole practitioner under the name and style of CL de Jager & Van Rooyen since September 2015 to date.

Zhou Jiansheng

[24] With regard to the Zhou matter, Ms Steyn testified that on 18 July 2012 and while she was still employed by the plaintiff she received instructions from the first defendant to institute divorce proceedings on behalf of Mr Zhou and the said professional services were rendered for the period July 2012 until July 2013 wherein in July 2013 Mr Zhou terminated the mandate of first defendant and directly approached the plaintiff, more specifically Ms Steyn, to continue with his divorce matter.

[25] According to Ms Steyn, the last outstanding invoice provided to the first defendant for the instructed period of July 2012 to July 2013 by plaintiff was paid on 9 September 2013. She testified further that any outstanding fees after first defendant's mandate was terminated was to be for Mr Zhou's direct account. She further testified and conceded during examination-in-chief that after Mr Zhou terminated first defendant's mandate, she never thought to change the billing information on the file from CL de Jager & van Rooyen to that of Mr Zhou or inform the accountant of the plaintiff to effect the necessary changes. The failure to change the aforesaid information led to the first defendant continuing to receive the accounts on behalf of Mr Zhou.

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[26] The witness further testified that she finalised the matter on 24 February 2014 when she obtained the final order of divorce and that the plaintiff never personally worked with the file.

[27] She further testified that upon examination of the bill of cost that was attached to the summons and in comparison with the invoices provided to the first defendant it became evident that the plaintiff assigned new value to work that was already performed by her and plaintiff charged for work which was never done by Ms Steyn and nor by the plaintiff.

[28] The witness therefore testified that the professional services rendered to first defendant only amounted to N$ 11 717.18 until date of the final invoice and was paid to plaintiff upon termination of the mandate and it is unknown how the plaintiff calculated the claimed amount.

Thomas Gantz

[29] Ms Steyn testified that on 22 November 2012 first defendant instructed plaintiff, specifically Ms Steyn, to act as correspondent in the divorce matter of Mr Gantz. She further testified that Mr Gantz divorce was finalised in September 2013 and that all invoices issued by the plaintiff to the first defendant, for the period September 2012 until the final invoice dated September 2013, were fully settled.

[30] She further testified that the plaintiff personally never worked with the file.

[31] She further testified that during April 2014 plaintiff added perusal fees as well as random and unfounded deputy sheriff charges to Mr Gantz account which the first defendant rightfully refuses to pay. She further stated that perusal charges were only charged in isolated instances in regards to the first defendant.

[32] The witness conceded that, according to the practice between herself and first defendant, she would usually charge first defendant an email fee for the scanning

and mailing of the pleading to first defendant. As she operated as a post office she never took instructions from the client as there was no need for her to peruse pleadings. She further testified that the plaintiff personally checked the invoices every month prior to the invoices being sent to the clients and that her employee income transactions was the basis for the calculation of her monthly commission. In light thereof the plaintiff was well aware of the fee rate at which Ms Steyn was charging the first defendant.

[33] The witness therefore submitted on behalf of the first defendant that any items introduced after termination of the mandate, to which new prices were assigned by plaintiff, falls outside the scope of the agreement between the parties.

The parties' submissions

Submissions on behalf of the plaintiff

Agreement between the parties

[34] On the issue of the existence of an agreement, Ms Angula, counsel for the Plaintiff, submits in her heads of argument that the agreement that needs to be considered by court between the plaintiff and first defendant is the alleged tacit agreement relating to the rate and/or fee charged by the plaintiff to the first defendant for professional services rendered and disbursements incurred.

[35] Ms. Angula argued that in order for one to determine the existence of a contract in general, one has to have sight of the agreement concluded by consent by two or more parties. In this regard she cites R H Christie *The Law of Contract in South Africa*[2] wherein the learned author states that the most common and normally the most helpful technique for ascertaining whether there was an agreement, true or

[2]R H Christie *The Law of Contract in South Africa* 5 ed LexisNexis Butterworths at p. 28.

based on *quasi* mutual assent, is to look for an offer and acceptance. She quotes Christie[3] wherein he proposed the following test:

'In order to establish a tacit contract it is necessary to prove, by a preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement.'

[36] Counsel further submitted that the general principles of the law of contract states that contractual obligations must be defined or ascertainable and not vague or uncertain. She referred to the case of *Annalize Opperman & Two Others v Mutual and Federal Insurance Company Namibia Ltd*[4] wherein the court laid down a 3 stage test to be used in establishing a tacit contract, namely a) the conduct of the parties must be clear, b) unequivocal and unambiguous pointing to the existence of the contract and c) that the inference can be drawn from the conduct and circumstances of the parties that they agreed to the terms alleged by a party. This test so applied is an objective one.

[37] On this score, counsel for the plaintiff referred the court to Christie *The Law of Contract in South Africa*[5] wherein he explained in detail what to consider in order to determine whether a tacit agreement has been proved or not.

[38] Counsel submitted that Ms Steyn failed to plead the terms of the alleged agreement, and that case law indicated that the terms of an alleged tacit agreement must be clear, unequivocal and unambiguous pointing to existence.

[39] Counsel further submitted that with respect to the allegation made by Ms. Steyn that the agreement was a 'fluid agreement' and would change depending on each case, is an indication that the terms of the alleged agreement were not clear and very ambiguous, this is so because Ms Steyn had testified that perusal of

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[3] Ibid p. 85.
[4] I 1771/2004.
[5] 3 ed LexisNexis Butterworths at 28.

documents was not a term which was a part of the agreement, however she would peruse certain documents and not others when she felt the need to do so.

[40] With respect to the written fees, invoiced and paid, which Ms Steyn alleges as evidence of the tacit agreement, Ms Angula submits on behalf of the plaintiff that those documents cannot be regarded as an agreement and that the only documents to be adduced as evidentiary proof of the existence of the agreement is the agreement itself and if not, the conduct of the parties, which indicates the terms and conditions of the said agreement.

[41] She further submits that Ms Steyn was sitting in a very difficult chair as she was basically testifying on behalf of the plaintiff and first defendant and that no document nor evidence was presented before court on behalf of the first defendant to determine his conduct in relation to the terms of the agreement and that it was unfortunate that one party to the agreement, Mr Steyn, has since passed away to determine and prove his conduct.

[42] Counsel, therefore submits that the terms of the agreement were unclear and ambiguous and there cannot be an agreement and that Ms Steyn cannot be the sole party to such an agreement. She represented the plaintiff at the agreement and cannot as a result testify for the first defendant.

The authority/mandate to enter into an agreement

[43] Ms Steyn testified that she was an agent of the Plaintiff, however counsel's submission is that she failed to prove, through her pleadings and testimony, that indeed she was authorised by the Plaintiff to act as an agent on Plaintiff's behalf.

[44] Counsel further submitted that Ms Steyn failed to prove that there was any consent given by the plaintiff for her to enter into the agreement on behalf of the plaintiff. Ms Steyn however testified that the fact that the plaintiff paid her her remuneration at the end of each month is proof that the plaintiff was aware of the

agreement and that she had authority to act for and on behalf of the plaintiff. However, counsel submits that consent can only be given in writing as plaintiff was operating as a sole proprietor. And it was further submitted that even if Ms Steyn was to rely on ostensible authority, counsel submitted that the law is very clear when it comes to the principle of such authority and she cited the case of *Factcrown Ltd v Namibia Broadcasting Corporation* in this regard.[6]

[45] Counsel therefore submits that it has not been established by the first defendant that the plaintiff, from her action, appearances or through representations created the impression that Ms Steyn was authorised to enter into any agreement or negotiate terms and fees structure with the first defendant on behalf of the plaintiff. Counsels states that no such evidence was placed on record.

The bills of costs

[46] Counsel submits that if a party is dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed *mero motu* by the taxing master, the party may, within 15 days after the *allocatur* is issued require the taxing master to state a case for the decision of a judge and that the first defendant cannot simply refuse to pay amounts due and payable as per the *allocatur*. In this regard she pointed out that the taxing master has a discretion to allow, reduce and reject items in a bill of costs and that such a discretion must be exercised judicially. She referred to the case of *City of Cape Town v Arun Property Development (Pty) Ltd*[7] wherein it was opined that if the discretion is not exercised judicially, it will be subject to review.

<u>*Submissions on behalf of the Defendant(s)*</u>

Agreement between the parties

[6]2014 (2) NR 774.
[7]2009 (5) SA 226 (C) at 232.

[47] Ms Delport, on this issue, submitted that it is an implied term in all service contracts that an attorney cannot charge for work not done. Plaintiff's stance that the parties' actions were unclear, unequivocal or unambiguous is not true in the sense that Ms Steyn did not claim for unnecessary charges for Mr Steyn to pay. First defendant does not agree with the argument advanced by the plaintiff that the terms so alleged by the first defendant are not clear and very ambiguous. First defendant argues that there was an agreement that existed between the parties, which terms were expressly, alternatively implied, alternatively tacitly agreed upon whereby the parties agreed that services would be rendered by the plaintiff at the normal fee scale of Ms Steyn. Plaintiff knew about Ms Steyn's fee scale in that she confirmed this on a monthly basis by approving the fee sheets by affixing her initials thereto for a continued period of some 16 months.

[48] Counsel further addressed the argument that should the courts finding be that there was no express agreement, she submits that a tacit agreement arose by the conduct of the parties. She argues that the terms of the agreement were not fluid and that what Ms Steyn refers to as a fluidity of each separate agreement basically refers to the nature and scope of each specific instruction as only specific instructions were issued on a case by case basis. The mandate to extend certain services fluctuated on a case by case basis. The terms of the agreement were thus clear. In this regard the court was referred to Christie *The Law of Contract*[8] p 92 wherein he stated the following:

'it being possible to make an offer tacitly, and to accept tacitly, it follows that a tacit offer may be tacitly accepted, giving rise to what is usually described as a tacit contract but may also be described as an implied contract or a contract by conduct (it being remembered that conduct may be negative as well as positive and there may be acceptance by silence). An express offer may also be tacitly accepted (unless some other method of acceptance is specified), and a tacit offer may be expressly accepted, the contract in each case being perhaps bes described as partly express and partly tacit or partly tacit and partly express. Except where the law prescribes a particular formality, such as writing a tacit contract once

[8] 4th ed (2001) LexisNexis Butterwoths.

proved id no different from an express contract. As it was put by Wessels JA in Bremer Meulens (Edms) Bpk v Floros 1996 1 PH A36 (A):

"In so far as the essential are concerned there is no difference between express and tacit agreements. Indeed the only difference lies in the method of proof, the former being proved either by evidence of the verbal declarations of the parties or the production of the written instrument embodying their agreement, the latter by inference from the conduct of the parties." '

[49] Ms Delport further disagrees with the argument advanced by Plaintiff's counsel that plaintiff did not, from her action, appearances or through representation, create the impression that Ms Steyn was authorised to enter into any agreement or negotiate terms and fees structures with the first defendant. She in turn referred to the *Factcrown case* wherein Strydom AJA referred to the 'ordinary powers of that particular business'. Counsel submitted that the dealings between Ms Steyn and first defendant fell within the ambit of the powers of a law firm. She also referred to the case of *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others*[9] wherein it was stated that a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong.

[50] Regarding conduct that can lead to a tacit contract being concluded, Ms Delport referred the court to *Ellisons Electrical Engineers Ltd v Barclay*[10], which was referred to by Christie *The Law of Contract in South Africa* at[11], wherein Beadle CJ stated that:

'A customer takes a machine which requires repairs to a firm skilled in such repairs in order that the firm may repair it, and nothing is said about price or about what repairs might or might not be necessary. In such a case a tacit contract comes into being between the customer and the firm under which the customer agrees to pay such charges for the repairs as are reasonably necessary.'

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[9] 2002 (1) SA 396 (SCA) at 411G-J.
[10] 1970 1 SA 158 (A) 160.
[11] 4th ed (2001) LexisNexis Butterwoths at 99-100.

The authority/mandate to enter into an agreement

[51] Ms Delport submits that on this issue, there was no evidence placed before court that Ms Steyn acted outside of her mandate as the terms of Ms Steyns' mandate or scope of employment were never alleged. Therefore, plaintiff cannot rely on her argument that Ms Steyn had no authority to enter into an agreement on behalf of the plaintiff. She cites Christie at[12] wherein in his book he opined that:

'On this interpretation the decision in the Van Ryn[13] case is sound on the facts: the company could not enforce its version of the contract because it was unreasonable in not discovering the fraud of its salesman. The decision is also sound in law because it is obviously correct as a general proposition that a person who is ignorant of facts of which the reasonable person in his position would not be ignorant cannot claim to be treated as a reasonable person, and therefore cannot avail himself of the doctrine of quasi-mutual assent.'

[52] Counsel therefore submits that the court must find that the plaintiff ought to have been aware of Ms Steyn's actions and that she cannot put into effect her version of the contract against the first defendant.

The bills of costs

[53] On the issue of the bills of costs, Ms Delport, counsel for the defendant(s) (counsel for the first and second defendants in the Gantz matter and for the first defendant in the Zhou matter) submits that the bills of costs as drawn by the cost consultant contained charges for work done by first defendant and not the plaintiff, charges that fell outside the scope of the agreement between the parties and also higher fees charged than the fee scale of Ms Steyn for work already done and for which work was already charged and paid for. She therefore submitted that the taxing master had no authority to determine liability for the proposed reasonable fees and disbursements incurred as reflecting in the bills of costs, as it falls outside the scope of his authority.

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[12] 5 ed (2006) LexisNexis Butterworths at 25.
[13] *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417.

[54] Counsel further submits that the existence of a document does not necessarily imply an actual perusal, as the relationship between two correspondent attorneys deviate from the usual client/attorney relationship and that a taxing master, where a correspondent attorney and instructing attorney is involved, would refuse a duplication of charges under the principle of unnecessary costs.

[55] With respect to the allegation made by the plaintiff that the defendants are bound to the *allocatur* and could have followed the review procedure as set out in the High Court Rules if unhappy with the taxed costs, counsel submits that this is ill-considered as he could not determine if work was actually done or not, which is a bone of contention. It was submitted that he could only attribute value to work done.

The Applicable Law and application thereof

The Agreement between the parties

Whether there was an agreement between the plaintiff, concluded by Ms Steyn, and the first defendant and what the terms and conditions of the aforesaid agreement was

[56] The answer to the plaintiff's case lies first in determining whether there was an agreement between the plaintiff and first defendant. This answer is to be found in the law of contract.

[57] In *Wasmuth v Jacobs*[14], with approval in a recent judgment of Masuku J in *Kamwi v The Chairperson of the Local Authority of Katima Mulilo*[15] para 31, Levy J said:

[14] 1987 (3) SA 629 (SWA) 633D.
[15](HC-MD-CIV-MOT-GEN-2017/00201) [2018] NAHCMD 367 (15 November 2018).

'It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror'.

[58] This basically means that any offer, with its terms, given by the offeror to the offeree, should be as definite, clear and certain as possible, as these terms will form part of the agreement between the parties and upon which the offeror will be bound. The terms must be as clear as possible in the sense that a third party may be able to deduce what the terms of the agreement are.

[59] With regard to the issue at hand, there are two conflicting versions. The plaintiff is of the view that there was no agreement between the plaintiff and first defendant as the terms of the tacit agreement were unclear and ambiguous. While first defendant insists that there was a tacit agreement which terms were expressed between the parties and could be inferred from the conduct of the parties. In dealing with different versions, giving rise to different probabilities, Damasab, AJA, as he then was, stated the following in the matter of *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz*[16], which was adopted in the case of *Hranov v Nekwaya*[17] by Miller AJ[18] :

'[30] . . . Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although in so doing does not exclude every reasonable doubt . . . for, in finding facts or making inferences in a civil case, it seems to me that one may . . . by balancing probabilities select a conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[60] In the present matter, first defendant was represented by Ms Steyn, who was an employee of the plaintiff at the time the said tacit agreement was concluded. During her testimony she was unsure on behalf of whom she was giving evidence

[16] 2008 (2) NR 775 (SC)
[17](I 2465/2013) [2017] NAHCMD 71 (10 March 2017).
[18] Para 9.

for, whether for first defendant or plaintiff. Only after cross-examination did she concede that she was giving evidence on behalf of the first defendant as it was put to her by plaintiff's counsel that she had no authority to testify on behalf of the plaintiff. The fact that the Mr Steyn has since passed on pose a challenge for the court to determine the alleged existence of the agreement and the terms thereof. The only evidence before court to determine the existence of the contract is through the conduct of the parties, and in so doing the court has to have sight of what case law says on tacit agreements.

[61] In the case of *Opperman*[19], Damaseb JP cited with approval the case of *Bremer Meulens (Edms) Bpk v Floros 1966 PH A36 (A)* wherein Wessels JA said that:

"In so far as the essentials are concerned there is no difference between express and tacit agreements. Indeed the only difference lies in the method of proof, the former being proved either by evidence of the verbal declarations of the parties or the production of the written instrument embodying their agreement, the latter by inference from the conduct of the parties.''

[62] In the case *of Malamed and Another v Cleveland Estate Malamed and Another vs Vorner Investments (Pty) Ltd*[20] Corbett JA said the following:

'In the cases concerning tacit contracts which have hitherto come before our Courts, there have always been at least two persons involved; and in order to decide whether a tacit contract arose the Court has had regard to the conduct of both parties and the circumstances of the case generally. The general approach is an objective one. The subjective views of one or other of the persons involved as to the effect of his actions would not normally be relevant (cf Spes Bona Bank case supra at 985-H).'

[63] To elaborate more on ascertaining whether a tacit contract has been proven or not in a particular case, Damaseb JP said the following in the *Opperman*:

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[19] I 1771/2004 para 73.
[20](02/84) [1984] ZASCA 4; [1984] 2 All SA 110 (A); 1984 (3) SA 155 (A) (28 February 1984) at 29.

'[74] As Christie observes (*The Law of Contract in South Africa* 3rd edn at 89-90), there are two conflicting tests adopted by the Appellate Division[21] in South Africa for determining whether or not a tacit contract has been proved. I am not aware of any decided case in Namibia resolving the issue authoritatively. After attempting to reconcile the conflicting authorities (at 90 – 91), Christie goes on to suggest a formula for how a court must approach the issue. I in respectful agreement with that formula and do adopt it in the present case. He says (at 90 -91):

"…in deciding whether a tacit contract …has been proved the court is undertaking an inquiry that involves three stages…the first stage is to decide, on the preponderance of probabilities, what facts have been established. The second… stage is to decide, also on the preponderance of probabilities, what conclusion consistent with those facts is most likely to be correct. [The intermediate stage between these two] …is to decide how the proved facts, that is, the conduct of each party and the surrounding circumstances, must have been interpreted by the other. The word ''must'' is used advisedly, because at this intermediate stage of the inquiry the court is not concerned with the resolution of an issue of fact , but with the subjective effect of the parties' conduct and the surrounding circumstances on the mind of each party. Our law of contract is based on true agreement, and a party whose state of mind is ''On balance I think we are probably in agreement'' does not have a contract. So at this stage of the inquiry the court is looking through the eyes of the parties at their conduct and the circumstances, **and unless that conduct and those circumstances were so clear, so unequivocal, so unambiguous** that the parties must have regarded themselves as being in agreement there is no contract''. (Footnotes omitted; emphasis supplied.)

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[21] **Bank of South Africa Ltd v Ocean Commodities Inc.** 1983 (I) SA 276 (A) at 292 A-B where it is said:

*"In order to establish a tacit contract it is necessary to show**, by a preponderance of probabilities**, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem,"*

And **Joel Melamed and Hurwirtz v Cleveland Estates (Pty) Ltd** 1984 (3) SA 155 (A) at 165 B, where it is said:

*"In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that **the most plausible probable conclusion** from all the relevant proved facts and circumstances is that a contract came into existence."*(My emphasis)

[64] Having regard to the authority as stated above, I am of the view and in agreement with the courts finding in the *Opperman* case that the court must be satisfied that the conduct of the parties was clear, unequivocal and unambiguous in agreeing to the terms of the contract.

[65] Unfortunately, Mr Steyn who was a party to the agreement and represented the first defendant then has since passed on and his evidence was therefore absent. First defendant's evidence could have been corroborated by Mr Steyn. Ms Steyn testified that the agreement between the plaintiff and first defendant was a fluid agreement, which changed depending on each case. She could therefore not indicate to the court clearly the terms of the alleged tacit agreement and only referred the court to the employee income transactions, invoice generated and the payments made based on the invoices. However, the Court is of the view that the documents provided during evidence cannot be construed as the terms of the agreement. The terms of the agreement must be proven and the court must firstly be satisfied that there was an agreement between the parties, which the first defendant has failed to prove.

[66] The court is not satisfied that the terms of the agreement have been proven. The court cannot infer the terms of the said agreement from the conduct of the parties, as the conduct and circumstances were neither clear, nor was it unequivocal and unambiguous. Ms Steyn testified on behalf of the first defendant that it had a fluid agreement with the plaintiff. She further testified that plaintiff was merely acting as a 'post office', whereby her instructions were to receive documents from the first defendant, sign it and send it out to be issued then courier it back to the first defendant for service. She testified that it was never a term of the agreement that she will peruse documents, which is what the plaintiff is alleging, i.e. that documents were perused without Ms Steyn having charged the first defendant. She testified that where work was done, including perusal, it was duly charged and paid for and that perusal charges were only charged in isolated instances. Although it was testified that plaintiff personally checked Ms Steyn's employee income transactions every month, it was not proven that she was aware that perusal charges were only charged

during isolated instances for as it was testified that Ms. Steyn was always rushing the Plaintiff to sign of the employee income transactions for her to receive her monthly commission, which was not disputed by Ms Steyn.

[67] The balance of probabilities favors the evidence of the plaintiff in that the conduct and circumstances of the parties to determine the terms of the agreement was vague, unclear and ambiguous in that the court cannot come to the conclusion that there was a contract.

[68] Under the circumstances, the Court must conclude, based on the authority at hand that the first defendant has failed to persuade the Court that there was a tacit agreement as it had failed to prove the terms of the agreement.

The authority/mandate to enter into an agreement

[69] The court must further determine the issue of whether or not Ms Steyn had a mandate and was authorized to contract for and on behalf of the Plaintiff. The law is very clear on this issue and I will take it no further than to refer to the classic case of *Factcrown Limited v Namibia Broadcasting Corporation*[22], wherein Strydom AJA, with his learned brothers, Mainga JA and Chomba AJA concurring, said the following:

'[35] In the matter of *Hely Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A-G ([1967] 3 All ER 98 at 102A-E) Lord Denning, MR, made the following observation concerning the law of England in regard to agency and when a principal would be rendered liable for the acts of his agent. He stated the following:

"(A)ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others,

[22] (SA 53-2011) [2014] (17 March 2014).

whether they are within the company or outside it. Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the ''holding-out''. Thus if he orders goods worth £1,000 and signs himself ''Managing Director for and on behalf of the company'', the company is bound to the other party who does not know of the £500 limitation. . . .”

[36] This excerpt in regard to the law of agency was referred to with approval in the cases of *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others,* 2002 (1) SA 396 (SCA) p 411B-F and *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others,* 2012 (5) SA 323 (SCA) at 334B-D.

[37] Dealing with ostensible authority and estoppel the following was stated by Schutz, JA, in the *NBS Bank*-case, *supra,* para 25 p 411G-J:

‘As Denning MR points out, ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, to take this case, the fact that Assante held himself out as authorised to act as he did

is by the way. What Cape Produce must establish is that the NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression: *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy BPK,* 1964 (2) SA 47 (T) at 50A-D.'

[70] First defendant alleges that no evidence was placed before court by the plaintiff that Ms Steyn acted outside her mandate and that plaintiff knew at all times about the agreement as she would sign off Ms Steyn's employee income transactions and pay her on that basis. I however tend to differ because plaintiff clearly testified that she was unaware of the agreement entered into between Ms Steyn and Mr. Steyn, on behalf of the first defendant and that she had not given consent to Ms Steyn to enter into any agreement with the first defendant to act as a post office. This is also evident from the fact that plaintiff submitted that she was unaware that, for example, a perusal fee was only charged in certain instances.

[71] Having therefore considered the evidence before me, I am of the considered view that Ms Steyn had no authority to enter into any agreement with the first defendant, let alone agreeing to only charge a perusal fee in certain instances. It is common knowledge that in a law firm of this nature the only person who has the authority to set fees and to agree on what to charge for and what not to charge for is the proprietor of the firm, and in this case it was Mrs Petherbridge. Negotiating the terms of an agreement whereby one agrees to only charge for specific work did not fall part of the purview of Ms Steyn's work, in other words her authority to act on behalf of the plaintiff was not open-ended but was limited to what would fall within the ordinary powers of a professional assistant.

The bills of costs

[72] The objective of taxing a bill of costs was stated by my learned brother Ueitele J in *Wise v Shikuambi*[23], where he referred to the case of *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers Van Christus Kerk*[24] by Maritz AJ, as he then was, that:

'[13] Generally, the objective of taxation is to award "the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded" … If the costs have been awarded on a party-and-party basis, the Taxing Master is required to "allow all such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to counsel, or special charges and expenses to witnesses or to other persons or by other unusual expenses'.

[73] And on par [16] of the Wise judgment Ueitele J states as follows:

'[16] . . . It is for that purposes, said the Judge, that the courts have recognised and reiterated that the discretion to decide what costs have been necessarily or properly incurred is given in the first instance to the Taxing Master and not to the Court'.

[74] I must agree with the first defendant in her submission that, although there were *allocaturs* issued with respect to the bills of costs prepared by the cost consultant, liability for the proposed reasonable fees and disbursements incurred could not be determined by the taxing master as it fell outside the scope of his authority. However, this was a special case in which the bills of costs were ordered to be taxed before the court had made a determination on the issue of liability. In my respective view, the taxing master, as per the *allocaturs* granted, determined the reasonable fees incurred for service rendered and the *allocaturs* were only to have

[23]N.O (A 293/2014) [2017] NAHCMD 148 (24 May 2017) para 22.
[24] 2002 NR 14 (HC) at 15I-17E by Maritz.

effect or to be acted upon once the determination of the issue of liability was resolved.

[75] Seeing now that the issue of liability has been resolved as enunciated above, I come to the conclusion that the parties are bound by the taxing master's *allocaturs* as the order to be issued in this case will be in line with the *allocaturs* as taxed. Plaintiff's submission that the defendant(s) are bound by the *allocaturs* only comes to play now since the court has determined the issue of liability. I can go no further than come to the conclusion that the issue of the *allocaturs* has been resolved and the defendants are bound by the *allocaturs*.

[76] In the *Wise* matter the court went on further to point out that:

'[18] The Court in the performance of its supervisory function, is entitled to and will interfere with the Taxing Master's rulings:

"If (a) he has not exercised his discretion judicially, that is if he has exercised it improperly; (b) he has not brought his mind to bear upon the question or (c) he has acted on a wrong principle" '.[25]

[77] In the matter in casu I must accept that the Taxing Master exercised his authority judicially as the defendants did not raise any issues in this regard. I therefore do not see the need to interfere with the *allocatur.*

[78] With regard to the issue of costs, I am satisfied that the cost should follow the event.

[79] In the result, the following order is made:

Judgment is granted in favor of the Plaintiff in the following terms:

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[25] Kock v SKF Laboratories (Pty) Ltd 1962 (3) SA 764 (E) at 765E). See also Preller v Jordaan and Another 1957 (3) SA 201 (O) at 203C-E.

Case No.: I 1137/2016:

1. Payment in the amount of N$ 13 009.35.
2. Interest at a rate of 20% per annum calculated from 1 March 2014 on the said amount, until date of final payment.

Case No.: I 1140/2016:

3. Payment in the amount of N$ 5 223.32 against the Defendants, jointly and severally, the one paying the other to be absolved.
4. Interest at a maximum rate of N$ 5 223.32 as per the *in duplum* rule.

Both cases:

5. Costs of Suit.

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Prinsloo J

Judge

APPEARANCES:

PLAINTIFF: Ms E M Angula

Instructed by AngulaCo

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FIRST AND SECOND
DEFENDANTS: Ms A Delport

Instructed by Delport Legal Practitioners