REPORTABLE

CASE NO.: SA 53/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between

HANS-GUNTHER STIER	**FIRST APPELLANT**
BERNHARD VENTE	**SECOND APPELLANT**

and

CHRISTIANE HENKE	**RESPONDENT**

CORAM: Shivute CJ, Strydom AJA *et* Mtambanengwe AJA

Heard on: 31/10/2011

Delivered on: 03/04/2012

APPEAL JUDGMENT

MTAMBANENGWE, AJA:

[1] The appellants, as plaintiffs in the Court below, claimed that a tacit contract of partnership came into existence between them and respondent (as defendant) after 15 January 2004 under which they practiced as chartered accountants and auditors until respondent gave notice of resignation with effect from 31 December

2005 (that date was, by agreement, altered to 31 October 2005). The Court below (Namandje AJ) granted absolution from the instance at the close of appellants' case. It is against that order that this appeal lies.

[2] Appellants particulars of claim, as amended, allege in paragraph 6 thereof:

> "Subsequent to 15 January 2004, the first and second plaintiff and the defendant, (the parties) tacitly entered into a new partnership agreement with terms as set out in Annexure 'B' (the new partnership agreement). … The new partnership agreement was not signed, but the parties implemented Annexure 'B' by acting upon it with full knowledge of its contents."

First appellant (Stier) and respondent previously practiced as chartered accountants and auditors in the firm Price Waterhouse where the former had become a partner but not the latter. They both left that firm and established a partnership of their own governed by a written agreement which they both signed on 20 December 1996 (the Old Partnership Agreement). It is common cause that the Old Partnership Agreement had ceased to exist when the two partners invited second appellant (Vente) to join them as a partner, and it is not disputed that in January 2001, as Stier said, both he and respondent approached Vente to join them as a partner, and the resultant agreement was based on the Old Partnership Agreement; it was an oral agreement, the only changes made to the Old Partnership Agreement being that, whereas formerly Stier owned 70% of the interest (profit sharing) and respondent 30% the share holding changed to 55% for Stier, 28% for respondent and 17% for Vente.

[3] Clauses 19 and 20 of the Old Partnership Agreement, which became part of the oral agreement, provided:

> "19. If a partner shall cease for any reason whatsoever to be a partner save as is specifically authorised in advance by the Senior Partner, he shall not, directly or indirectly, whether as principal or agent, for a period of 2 years from the date upon which he ceases to be a partner ask for, or accept business from clients who are clients of the firm at the date of his ceasing to be a partner or who were clients within a period of twelve months prior to the date upon which he ceases to be a partner.
>
> 20. Should any partner who leaves the firm contradict 19 above, the remaining partners of the firm shall be entitled, as an alternative to seeking an interdict against the retiring partner, to claim from the retiring partner, who shall be obliged to pay on demand, an amount equal to the gross fees charged to that client or those clients for a twelve month period based on the latest billings of the firm to that client in respect of services rendered for an entire year."

Appellants allege in their pleadings that a tacit agreement replaced the oral agreement and that after 15 January 2004 the parties conducted their affairs in accordance with that alleged tacit agreement whose terms were embodied in an agreement drafted by Stier and typed by respondent (the New Partnership Agreement) but which was never signed by the parties. The New Partnership Agreement, Annexure "B" to the pleadings, provides, in clause 7 thereof, for the eventuality of termination, in particular in clause 7(a) and (d) – termination due to other reasons and says in clause 8(iii) thereof:

> "(iii) In the case of 7 d only the normal capital account is paid out within 6 months. The partner (resigning) shall not be entitled to the payment of any business value.

> In this case the partner shall not, directly or indirectly, whether as principal or agent, for a period of 2 years from the date upon he/she ceases to be a partner ask for, or accept business from clients who are clients from the firm at the date of his/her ceasing to be a partner or who were clients within a period of twelve calendar months prior to the date upon which he/she ceases to be a partner.
>
> Should any partner who leaves the firm contradict this proviso, the remaining partners of the firm shall be entitled, as an alternative to seeking an interdict against the retiring partner, to claim from the retiring partner, who shall be obliged to pay on demand, an amount equal to the gross fees charged to that client or those clients for a twelve month period based on the latest billings of the firm to that client in respect of services rendered for an entire year."

[4] At 92F-G Harms JA *in Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88 referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of a appellant's case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A) at 409G-H:

> "…(W)hen 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 underlining.)

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* 4th 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."

[6] Discussing the question of silence as acceptance, Christie, in *The Law of Contract in South Africa* 5th ed, referred, at p 66, to the principle that "quiescence is not necessarily acquiescence", but went on to state:

> "Silence may, however, amount to acceptance of an offer in circumstances which give rise to a 'duty to speak' if the offeree is not prepared to accept the offer. Wessels in paras 270 – 271 has been taken by the courts as authoritative:
>
> > 'But if there is a legal duty upon me to speak and I refrain from doing so, the Court will presume that I assented. … Thus, if a merchant writes to his constant correspondent that he will forward to him certain goods at a certain price unless he hears from him to the contrary, and the addressee receives the letter but neglects to reply, the Court may well consider that silence in such a case gives consent. … The course of dealing between such merchants will legitimately lead the offeror to conclude that his correspondent would reply in case he rejected the offer, and the Court will infer that if the offeree had not intended to accept he would have answered that he did not want the goods.
> >
> > If, therefore, from the business relationship between the offeror and the offeree, the Court finds that the circumstances are such that the offeree could reasonably and fairly be expected to reply, then it may infer that by remaining silent the offeree did in fact intend to accept.'"

[7] That there was *animus contrahendi* in this case is borne out by what Mr Strydom, appearing for the respondent, put to Stier in cross-examination:

> "…She will say that from time, to time before January 2004 it was mentioned that an agreement must be drafted. --- That is correct.
> To stipulate the relationship to the parties. --- And be signed by them."

Stier was asked further:

> "But I want to go a step back. This is from a practical point of view. You got the old agreement, you effected changes and deleted certain things, you know how we do a document. And then you asked for the defendant to type it. Now, at that stage when you asked her to type it. Was anything said? Apart from please type the document. Or can't you remember? --- I asked her to type the document and pass it to the partners for comment. That is why it was given to us. Not to sign it, but to comment on it."

[8] It is common cause that several weekly meetings were held by the partners and, according to Stier's evidence, no comments on Annexure "B" (the document) were forthcoming from the respondent or Vente. Vente said he was satisfied with the document; the question of formalizing it by signing it came up several times in such meetings but each time none of the partners had a copy with him or her. Stier on being asked why he did not sign the document said that he wanted the parties to do it together. The opportunities any of the parties had to raise any complaint or suggest any amendments or alterations to the document were said to be between 40 and 50 times, and Stier's undisputed evidence was that this situation went on for nearly two years. Vente's evidence on the other hand was that only some three or four months before respondent's notice of resignation (i.e 29 April 2005) did respondent say to him she was unhappy with the document and

was not going to sign it; he then advised her to raise the issue with Stier. Respondent never did that.

[9] It is a fair assumption that respondent regarded the document as an offer open for acceptance or rejection. I say so because her actions, subsequent to the document being typed and distributed, indicate that she considered it serious enough to consult a lawyer friend of hers who advised her not to sign it; apparently only after that did she mention to Vente that she was not happy with the document and would not sign it. Vente's evidence (undisputed) was that he and respondent even met privately three or four times a year. It was also Vente's evidence that when it was said the agreement must be formalized, and subsequently, respondent never indicated that she had any problem with the document. The unsigned agreement was, as Mr Strydom put it, a new dispensation. Respondent did not even inform Stier what advice she got from her lawyer friend. The new agreement repeated more or less the restraint provisions of clauses 19 and 20 of the Old Partnership Agreement, in clause 8(iii) thereof. Respondent had signed the old agreement and practiced under it without any hint that she was unhappy with its provisions. When she read the new agreement, one would have expected her to seize the opportunity to voice her unhappiness or disagreement with it.

Mr Strydom, who appeared for the respondent both in the Court below and before us, dealt at length on the issue whether there was, in the circumstances of this case, an unequivocal or unambiguous offer or acceptance by Stier and respondent respectively – an approach which Mr Heathcote, for the appellant, disagreed with. I think Mr Heathcote was correct; the fact is that the new agreement was not the "brainchild" of Mr Stier; it was a collective decision of the partners that it be

drafted. Hence, in my opinion, the classical question of offer by one party and acceptance by the other(s) as a basis of concluding a contract, strictly speaking did not arise in this case.

[10] The pleadings in paragraph 6 of the particulars of claim state in part:

> "…The new partnership agreement was not signed, but the parties implemented Annexure 'B' by acting upon it with full knowledge of its contents."

In her plea respondent admits, at least, that:

> "She had knowledge of the contents of Annexure 'B'."

and that:

> "The parties practised in partnership as chartered accountants and auditors from 1 January 2001 to 31 October 2005."

We know that an oral agreement came into existence when Vente joined first appellant and respondent in 2001. We know that the interest of the parties since then became 55% for Stier 28% and 17% for respondent and Vente respectively. We also know that the unsigned agreement reflects those percentages. The question remains to be answered, in the absence of any mention in the plea, under what agreement did the parties continue to practice after 15 January 2004. Respondent has to answer that question. This question arises in light of the amendment to paragraph 6 of the particulars of claim to read as already recorded above.

The amendment was not opposed. In addition, among the circumstances that, in my opinion, must be considered, are the following.

(a) Respondent’s notice of resignation states in part, that she was resigning for “personal and health reasons”; she was not going to continue working in the audit profession and that after a three months break “in which time I plan to further advance my studies in the computer field I plan to work as a freelance consultant”.

(b) Respondent’s lawyers’ letter dated 30 May 2005 to Mr Stier and Vente states in part.

> “Our instructions are that our client does not propose to continue practicing as an auditor but rather to perform consulting services. Furthermore she has not approached any of the clients of the partnership in order to solicit their business, nor will she be doing so…”

(c) Respondent’s letter to Stier Vente Associates, addressed to Bernhard (Vente) dated 24 November 2005 and written on a letterhead CH Chartered Accountant reads in part:

> “My lawyer indicated in his letter dated 26 May 2005 that I do not propose to continue practicing as an auditor and that I would not approach any clients of the partnership. … I have not approached any clients of the partnership at all. But if clients approach me that is another matter.”

(d) The fact, according to Stier's evidence, that during various meetings of the partners the signing of the unsigned agreement was discussed without the respondent raising any objection to indicate that she was not in agreement with the terms thereof.

(e) When the respondent left the partnership she was paid the capital amount as was stipulated in clause 8 of the unsigned agreement.

(f) The letter by her legal practitioner to the partnership, and her own letter to Vente, referred herein before, wherein it was stated that respondent did not intend to practice as an auditor and that she had not approached any of the clients of the partnership to solicit their business, nor would she do so, and that she was willing to forego payment in respect of the goodwill of the partnership, are all issues which are also covered by the provisions of the unsigned agreement, and in the absence of any other explanation, may raise the reasonable inference that respondent relied on these provisions of the unsigned agreement.

(g) Several letters to respondent as "CH Chartered Accountant" from the Institute of Chartered Accountants, and from her to the Institute of Chartered Accountants show that by 15 August 2005, while she was still working for the partnership, she had already started practicing as an independent chartered accountant, several claims for fees for services rendered all produced as exhibits tell the same story. The relevant documents in this regard, produced in evidence, start with page 6 and

continue from page 13 to page 41 in appellant's bundle "A" in Volume 1 of the record.

My view is that respondent has a duty to give an explanation as to what she was up to; otherwise her silence alone, as Mr Heathcote submitted, is sufficient to constitute an admission of the contract, "unless satisfactorily explained" (see quote from *McWilliams v First Consolidated Holdings* 1982(2) SA 1 (A) in *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001(3) SA 952 (SCA) at 959F at para [19].

[11] In analyzing the evidence, Mr Strydom relied on what he said was a concession by Vente, *inter alia*, to advance the argument that considering the evidence in its totality it cannot be said that an unambiguous offer open for acceptance was made to the respondent or even to the second appellant. First of all, as I have already indicated, the decision that the unsigned agreement be drafted was a collective decision of the partners, and the question whether it was Stier's offer to the others does not arise. Secondly in referring to Vente's evidence Mr Strydom's written heads of argument omit the clear evidence of Vente that the parties acted on the unsigned document. To be fair the cross-examination of Vente was itself not a model of clarity. Apparent contradictions were not cleared up. For example he was asked; and answered as follows:

> "When you got the document did you see as a draft Agreement open for comment or as a final document ready for signature --- I saw it as an Agreement of what is the basis of what we have discussed two years or three years since I have become a partner.
>
> …

For clarity, when do you say this agreement took effect, the new agreement? --- The written only when I saw it, before it was only a verbal agreement.

Was to operate retrospectively up to the 1st of September rather 1st of January 2001 that come into effect after he saw it. --- As far as I am concerned the agreement can only be effective once you have signed it.

Yes? --- It's a written one, not a verbal one.

Ja. You testified that although the agreement was not signed that was according to you the Agreement that was in place is that correct? --- Yes

And this belief became stronger as time went on? --- Yes.

Why did you consider it? Why did the belief became stronger as time went on? --- Because none of the two other parties complained against that.
…

Who made an unequivocal offer to you to accept the agreement as that referring to the new agreement, who made that offer to you? Who said to you listen here this is our Agreement. Take it or leave it. Accept it or reject it. Who said that? --- No one.

So there was never offer made to you to accept or reject the agreement? --- No, it was just a formalisation of what we did the whole time.

In that office the senior partner Mr (Stier) made the important decisions is that correct? --- No, it's not correct. Most decisions, important ones are done collectively.

Apart from the negotiations you referred way back when you started and the one when the percentage was increased was there a negotiation that led up to the wording of the new agreement? Do you follow? --- Not a physical negotiation.

Court: What do you mean? What do you mean not physically negotiations? --- Not that we are sitting the three persons around the table and negotiate through each paragraph line by line.

But how did you negotiate? --- We discussed it in broad terms before hand. That was our verbal agreement before this we got this one.

…

Ja, but what things it ends in air what you discussed. The terms, the exact of the Agreement or what you missed on. I cannot speculate? --- It's is very difficult to say if it's outlined, because when you have the Agreement later in front of you, you will most probably you refer from the agreement which hadn't been signed at that time. And I want to do that because I might be lying."

With respect, I sympathise with Vente under such cross-examination.

[12] Both counsel in this matter accept the law as quoted in the judgment *a quo,* both as to what needs to be proved to establish a tacit agreement, and as regards the test for absolution from the instance. The difference between them is the application of the law to the facts and circumstances of this case. Mr Strydom supports the reasoning of the learned Acting Judge *a quo* while Mr Heathcote for the appellants does not, and in his written heads of argument referred to a number of authorities in arguing that the appeal should succeed; which authorities I proceed to enumerate:

(a) He makes the statement that "Where the terms of the agreement (are) already reduced to writing, like in this case, it is submitted that;

'It follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement that legal

> validity should be postponed until due execution of a written document lies upon the party who alleges it.'"

See: *Woods v Walters* 1921 AD 303 at 305.

In essence this is what respondent, in so many words, seems to allege. Mr Strydom laid a lot of emphasis on the fact that the document was unsigned.

(b) Secondly, Mr Heathcote referred to *Lyndley on Partnership*, 15th Edition p139, for the proposition that "An agreement for partnership maybe evidenced by informal documents; as for an example an unsigned memorandum or draft agreement acted on by the parties." Mr Strydom in his cross-examination of the appellants relied a great deal on the fact that the document Annexure "B" was a draft still to be formalized, meaning, apparently, signed. The evidence does not clearly suggest that meaning alone.

(c) Mr Heathcote then goes on to submit that the best which can be said for respondent is that she had a reservation in her own mind and quotes *I Pieters and Company v Salomon* 1911 AD 121 where it was said at 137:

> "When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person (to) whom it is addressed, and accepted by him *bona fide* in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant." (My underlining)

Mr Strydom referred to a number of cases where it was emphasized that an offer and an acceptance must be unequivocal direct or unambiguous. In the

circumstances of this case, I find nothing ambiguous or equivocal in Stier having drafted and distributed the document to the partners after it was admittedly agreed that an agreement be drafted, a collective decision, as I have already said, "to stipulate the relationship to the parties". The unexpressed reservation by respondent for nearly two years, after she typed the document and had full knowledge of its contents, is a silence that speaks volumes against her. It is trite that inaction or silence in law amounts to an act, like the act of omission, particularly where you have a duty to speak out. Mr Stier repeatedly said he expected comments to come from his partners and concluded, in the absence of any such comments, that the document was accepted by them. A chartered accountant is not a simple unsophisticated person from the street.

(d) Mr Heathcote lastly submitted, correctly, I must say, that the unsigned partnership agreement did not stipulate what mode of acceptance will constitute an agreement, and referred to *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman*, *supra*, at para [19] where the following was stated:

> "In my view, the defendant did not require or expect acceptance of its proposal as regards para 1 of A1. The comment, however, clearly placed a duty on the plaintiff to object to the proposal if he did not agree to it. The plaintiff's silence and his conduct in proceeding with the project constituted acceptance of the said proposal and it was so understood by the defendant. The evidence in this case brings the matter squarely within the principle discussed above and expressed as follows by Miller JA in *McWilliams v First Consolidated Holdings* (*supra* at 10E):

> ‘I accept that “quiescence is not necessarily acquiescence” (see *Collen v Rietfontein Engineering Works* 1948(1) SA 413 (A) at 422) and that a party’s failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party’s silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute.’”

(e) Mr Heathocte concluded his submissions by stating:

> “22.7 Moreover, the respondent must have seen the material differences, if compared with the old agreement. It is submitted that the *McWilliams* – case quoted above finds downright application given the fact that partners owe good faith to each other. The defendant had to speak out, particularly in circumstances where, in her presence, it was said that the agreement should be signed. Yet, she did not do so until she decided to resign.”

[13] I agree with the above submissions and must repeat that Stier was asked several questions in cross-examination, all of which putting to him that all that he did was to ask respondent to type the unsigned agreement; he repeated and emphasized that the other partners, including respondent, were asked to comment on the new agreement, that this went on for over a year, and that respondent had over fifty opportunities when she could have expressed her unhappiness or suggested any changes or alterations to the draft in areas she might have had problems with. In the circumstances I find it was reasonable for Stier to conclude,

as he said in evidence, that the agreement was accepted by respondent and Vente. I must also make it clear that quite much of Mr Strydom's criticism of the unsigned agreement related to the interpretation of the agreement itself. In this connection, it was pertinently said in *Boerne v Harris*, 1949(1) SA 793 (AD) at 799 that "…although a contract, even if it be ambiguous, may be and generally is binding…" Greenberg JA who wrote the judgment in that case, was referring to the difference between the rules of interpreting a contract and those of interpreting an offer. He further down on the same page stated:

> "In regard to the difference in the rules of interpretation to which I have referred, what I have said about the binding force of an ambiguous contract is not, I think, in dispute (see Halsbury, 2nd ed, vol 7, secs. 458, 459)."

The principle that in interpreting a contract the courts will endeavour to give it validity is well known – *ut res magis valeat quam pereat,* and is applicable both to oral and written agreements. It is well to remember that the test for absolution is not whether the evidence led by the appellant establishes what would finally be required to be established and that the inference to be drawn from the facts and circumstances of a case need not be the only reasonable inference.

The evidence raises at least a reasonable inference that the respondent, who was aware of the terms of the unsigned agreement, was conducting her affairs on those provisions. In the words of Harms, JA, in the *Gordon* matter, *supra*, the appellant has made out a *prima facie* case and is therefore entitled to put the respondent to her defence.

[14] The appeal succeeds with costs, including the costs of one instructing and one instructed counsel. The Court *a quo's* judgment is altered to read that the application for absolution from the instance is refused with costs, including the costs of one instructing and one instructed counsel. The matter is referred back to the trial Judge to deal with the matter further according to law.

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MTAMBANENGWE AJA

I concur.

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SHIVUTE CJ

I also concur.

____
STRYDOM AJA

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