REPORTABLE
Case Number : 304 / 98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

SEEFF COMMERCIAL AND INDUSTRIAL PROPERTIES (PTY) LIMITED **Appellant**

and

COLIN SILBERMAN **Respondent**

Composition of the Court : **OLIVIER and ZULMAN JJA; NUGENT AJA**

Date of hearing : **16 FEBRUARY 2001**

Date of delivery : **26 MARCH 2001**

SUMMARY

Tacit acceptance of counter-offer. Terms of such acceptance.

J U D G M E N T

OLIVIER JA

[1] This appeal illustrates the truth of the statement by Lord Cairns LC in *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 at 672 that

> ' ... there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than the cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the partners.'

[2] Add to this the nearly insoluble problems caused in the present appeal by awkward pleadings; a pre-trial conference which failed to clarify the issues to be decided; an exception which was not taken at the proper stage and two unwarranted and obfuscating orders in terms of Rule 33 (4) - one

given at the commencement of the trial and one halfway through it.

[3] The respondent was the plaintiff in the court *a quo*, and will be referred to as such. He was the owner of a business plot with a building on it in Gezina, Pretoria. During 1994 he wished to redevelop the property by having the existing building demolished and a new one erected. However, he was at that time living in Australia. He therefore sought a project manager in Pretoria to supervise the envisaged undertaking on his behalf. He was introduced to the defendant, represented by one Braudé. Eventually, through the input of Braudé, the old building was demolished and a new one erected on the property.

[4] The plaintiff was not satisfied with the quality of the new structure. He also complained that it was delivered months too late; that there were serious defects which had to be rectified at considerable cost and that there was a serious overrun with respect to costs.

[5] The plaintiff's case is that the defendant, the present appellant, is liable to compensate him for the damages he suffered as a consequence of the aforesaid alleged facts. The basis of his case is that a contract was concluded between him and the defendant in terms of which the defendant would act as project manager; find the necessary tradesmen; oversee the project; and see to it that the building was delivered in time, that it was free of defects, and that the builders and tradesmen adhered to the original price quoted by the defendant for the project, except in so far as variations were agreed upon between the plaintiff and the defendant. He alleged that the defendant breached the terms of the contract in not fulfilling its obligations as project manager, giving rise to the above mentioned complaints; and he averred that he had suffered damage in an amount of approximately R 2 m. He instituted action in the Transvaal Provincial Division of the High Court for the recovery of this amount. The matter was defended, and a counterclaim for

payment of commission was launched.

[6] After the close of pleadings, an unhelpful and ineffective pre-trial conference was held, attended *inter alia* by senior counsel who appeared throughout for the parties. It was agreed that a separation of issues would be sought at the commencement of the trial : the court would be asked to determine firstly the terms of the agreement reached between the parties during or about September 1994 and secondly whether the later changes in design (which were admitted to have taken place) had been agreed upon between the parties.

[7] At the commencement of the trial the agreed order for the separation of issues was sought and granted and the trial proceeded. In the course of the trial the plaintiff sought a further order in terms of the said Rule to the effect that only the issue of the terms of the alleged contract between the parties during or about September 1994 would be adjudicated upon. This

application was unsuccessfully opposed. The effect of these orders was that the question whether agreement had been reached between the parties in respect of design changes - and, if so, what effect it would have on the agreed maximum contract price - was not considered. This brought about that an order was made at the end of the truncated trial on a part or phase of the whole contract, *i e* only on the initial conclusion, excluding later agreements as to design changes and consequent *sequelae* as to price and completion date. The dilemma created by this piecemeal approach will be highlighted hereafter.

[8] Before us, therefore, is the question whether the judge *a quo* was correct in his determination of the existence of and the terms of the contract between the parties during or about September 1994.

[9] During the trial it emerged that the defendant intended to rely, as far as this part of the proceedings are concerned, on two defences. The first

issue was whether a contract was concluded between the parties at all. The defendant averred that after the plaintiff had set out some proposed terms of a contract, the defendant had made a counter-offer, the acceptance of which was never communicated to it. Secondly, it was disputed that it agreed to act as plaintiff's project manager, and denied that it was obliged to supervise the project at all. The defendant averred that its only obligation was to introduce to the plaintiff the sub-contractors and various tradesmen who would then undertake and complete the project, as the plaintiff's agents and employees, the defendant itself disappearing from the scene.

[10] At the end of the trial of these issues, the judge *a quo* held that the plaintiff had proved the conclusion of a contract between the parties during or about September 1994 on the terms alleged by it. The learned judge disbelieved the defendant's witnesses, rejected its version of the contract and in effect dismissed the counterclaim.

[11] There is no appeal by the defendant against the dismissal of its counterclaim. The appeal solely turns on the question whether a contract was concluded at all in September 1994 and if so, the terms thereof. In particular, the issue raised by the defendant is as follows:

(a) The plaintiff expressly pleaded that the terms of the contract, entered into during or about September 1994, were reduced to writing in a series of letters, annexed to the pleadings as Annexures A1 to A5.

(b) There are in fact only two relevant letters, A1 and A5. A1 is a letter dated 12 September 1994 and was written to the defendant by the plaintiff's attorney, on his instructions. It reads as follows:

> 'Dear Sir
>
> RE : PROPOSED DEVELOPMENT - CORNER VOORTREKKERS ROAD AND MICHAEL BRINK STREET, GEZINA, PRETORIA
>
> Our client, Colin Silberman, has requested us to acknowledge receipt of your letter dated the 9th September 1994 together with costing of the proposed development on the abovementioned premises. A copy

of the aforesaid letter, costing and drawings are annexed hereto and initialed by our client for identification purposes.

Our client has further instructed us to record the following, which our client requires you to acknowledge receipt and to confirm your acceptance thereof per return facsimile.

1 The building to be erected on the said premises will be erected at a maximum cost of R 1 616 500,00. You will however endeavour to wherever possible reduce the final cost of the building. However, our client, under no circumstance whatsoever will still be liable for any further costs over and above the aforesaid maximum costing.

2 The demolition of the said premises shall commence on the 16th October 1994.

3 The Management Fee for the "Turn Key Project" is a fixed fee of R 220 000,00. There shall be no further costs in respect hereof to our client.

4 Diagonally across the Reception area in the shop (in Michael Brink Street) a staircase for customers of approximately one metre in width must be provided, as per drawings attached.

5 A goods staircase of not less than two metres wide must be erected in the south east corner of the Building. The loading bay must be truck height.

6 A steel door must be provided at the entrance and security door

at the top of the staircase.

7 Each separate unit is to have its own electricity and water meters.

8 No hoist is to be installed.

9 The roof on the first floor is to be suitably insulated.

Should it be necessary ceiling fans are to be provided. The cost of the fans must be acceptable to our client.

10 Occupation has been granted to our client's tenants in the building to be erected on 1st June 1995. It is therefore specifically agreed that the building will be totally completed for occupation and trading by no later than 15th May 1995.

We await your acknowledgement and confirmation of the above per return.

Yours faithfully

(Sgd.??)

JACOBSON & LEVY inc'

(c) Annexure A5, dated 13 September 1994, is written by one Max Braudé on behalf of the defendant, and is addressed to the plaintiff's attorneys. It is the defendant's response to annexure A1, and reads as

follows:

'Attention Mr Levy

RE: Proposed Development Gezina

Dear Sirs,

We acknowledge receipt of your fax of the 12th instant and accept the contents in principle. There are one or two comments that are needed which we are sure will be acceptable to all the parties.

Ad paragraph 1.

> We have erred slightly on the high side with our costings for the structure and must state that any changes to the design or any unforeseen price rises in, for example steel or bricks, are not catered for. We do not expect this to happen, but will, if need be, add BIFSA increases should these occur and budgets change.

Ad paragraph 2.

> We were under the impression that demolition would commence on October 1. The sooner that everything starts the better and the more the chance that price hikes will be avoided.

Ad paragraph 3.

> We confirm the price of R 220 000 for the project fee. Portion of this, will however attract VAT and suitable

> invoices will be provided to your client to ensure the these amounts are claimed back by the owners of the property.
>
> All other items in your fax are hereby confirmed.
>
> We thank your client for entrusting this project to us and look forward to creating a successful investment for you client.
>
> Yours faithfully
>
> **Seeff Commercial Properties**
>
> (Sgd.)
>
> **Max Braudé**'

(d) Defendant's case is that A1 constituted an offer by the plaintiff which called for acceptance and that, failing acceptance, no contract would or could have come into being.

(e) Defendant then avers that A5 is not an unequivocal acceptance of A1, but was a counter offer made by it to the plaintiff.

(f) However, so the defendant argues, plaintiff's pleadings do not allege that the terms of A5 were accepted by him, nor that acceptance, if any, was communicated to the defendant.

(g) Consequently, there are insufficient allegations in the pleadings to support the conclusion that a written agreement was concluded and that Annexures A1 - A5 constitute such agreement.

[12] A basic procedural problem is that the defendant failed to note an exception against the plaintiff's particulars of claim. However, at the commencement of the trial, and before any evidence was led, the defendant orally sought to raise an exception on the basis set out above. When faced with this belated and unusual step, counsel for the plaintiff surprisingly did not deem it necessary to seek an amendment of the pleadings to aver a tacit or an oral acceptance, but convinced the learned judge *a quo* that evidence could cure the obvious defect in his pleadings. An order to that effect was made, and the trial proceeded on that basis.

[13] It is not disputed that the plaintiff thereafter failed to adduce any evidence of expressly communicating acceptance of A5 to the defendant.

But the trial court, correctly in my view, found as a fact that the plaintiff had tacitly accepted the terms of A5. There is also no doubt that Braudé, on behalf of the defendant, assumed that the plaintiff had tacitly accepted the terms of A5, and on that basis proceeded with the project.

[14] That being the situation at the end of the trial, it cannot be said that the parties had not concluded a contract. If one construes A5 as a counter offer made by the defendant, the ordinary rules of offer and acceptance ought to be applied. A basic rule is that

> 'an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together.'

(per Bowen LJ in *Carlill v Carbolic Smoke Ball Company* [1893] 1 Q B 256 (CA) at 268. See also *R v Nel* 1921 AD 339 at 344; *Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241).

[15] But there is a gloss to this rule, formulated in *Carlill v Carbolic Smoke Ball Company, supra*, at 269, as follows

> 'that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so ... and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.'

(see also *R v Dembovsky* 1918 CPD 230 at 241, approving the said gloss; *R v Nel* 1921 AD 339 at 344 and 354; *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 22).

[16] The next logical question was formulated in *Carlill v Carbolic Smoke Ball Company, supra*, at 270 as follows:

> 'Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain?'

Bowen LJ answered the question as follows :

> 'In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with.'

[17] If, in a particular instance, it is found that the offeror has indicated that express notification of acceptance is not necessary in order to constitute a binding contract, it follows that the offeree's quiescence will amount to acquiescence, i e that the offeree's failure to object to and reject the offer will justify an inference that the offer has been accepted (see *Mcwilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 A at 429 - 430; *Commaille v Steyn* 1914 CPD 1100 at 1103 :'Silence is equivalent to consent when it is one's duty to speak.')

[18] In my view, A5 contains a clear indication that express acceptance of the terms thereof was not required in order to constitute a binding contract in terms of A1 read with A5.

(a) A5 accepts the proposals in A1 ‘ in principle’, subject to ‘one or two comments’ which ‘we are sure will be acceptable to all the parties.’

(b) A5 then comments on three paragraphs in A1, stating that all the other items in A5 are confirmed.

(c) It then concludes : ‘We thank your client [the plaintiff] for entrusting this project to us and look forward to creating a successful investment for your client.’

(d) The comment in A5 on paragraph 2 of A1, dealing with the date of commencement of the demolition, is not a counter offer which needs acceptance, but in fact an acceptance of the date proposed in A1, and requires no response.

(e) The comment on paragraph 3 of A1, dealing with the payment of VAT on the commission payable by the plaintiff, is also not a counter offer, but a reminder of the legal position relating to VAT, and requires no response.

(f) The comment on paragraph 1 of A1 dealt with two separate issues. First, it was pointed out that no provision had been made in A1 for design changes. Apart from pointing that out, no proposals were made to fill the lacuna. Secondly, it was pointed out that no provision was made for price rises of materials. In that respect it went further and proposed that, if need be, BIFSA increases should apply.

[19] In my view, the defendant did not require or expect acceptance of its proposal as regards paragraph 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 10 E :

> '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.'

[20] The learned judge should, therefore, have held that a contract was concluded between the parties during September 1994 on the terms set out in

Annexure A1 as amended by paragraph 1 of A5 (insofar as it relates to increases in the price of materials). In other words, no agreement was reached at that stage as to what would occur if there were changes to the design. No doubt further agreement was indeed reached in that regard, either expressly or tacitly, as and when design changes occurred and were incorporated in the building, but the terms of such further agreements are matters that fall outside the present appeal. I need only add that the learned judge appears to have misconstrued the amendment made by paragraph 1 and in that respect his order falls to be amended.

[21] In the result, the appeal is dismissed with costs, including the costs of two counsel. Paragraphs 1,2, and 5 of the order made by the court *a quo* are confirmed subject to the following amendments : In the term referred to in paragraph 2 the words ‘changes in design or’ are deleted. The words ‘including the costs of two counsel’ are added at the end of paragraph

5.

P J J OLIVIER JA

CONCURRING :

ZULMAN JA

NUGENT AJA