

THE BASIS OF TACIT CONTRACTS

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SUMMARY

Tacit contracts are contracts that are inferred from the conduct of the parties as opposed to written or verbal agreements embodying coinciding expressions of intention. Positive law reveals that the basis of, and especially the test for inferring such contracts, are a source of contention. Generally over the years the courts have fluctuated between subjective and objective approaches to contractual liability and this dichotomy is evident on the level of tacit contracts as well. In this article it is suggested that conflicting rationales and tests for tacit contracts simply cannot coherently co-exist in positive law and although subjective intention does indirectly influence the issue of contractual liability, when the existence of any contract – especially a tacit one – is contested on the basis of *dissensus*, a court of practical necessity will have to adjudicate the matter on an objective basis. In this regard the conduct of the parties in performing or preparing to perform in terms of the alleged agreement tends to play a prominent role. In the result it is more plausible and indeed preferable that objective criteria are employed by the courts to ascertain whether a tacit contract has arisen, a process which also leaves room for policy considerations to play a role.

1 INTRODUCTION

Although the general *consensus* of opinion seems to be that the foundations of contractual liability are fairly well established in South African law,¹ there remain anomalies surrounding the ascription of responsibility in specific circumstances that require attention.² A prominent example of such an incongruity is the basis of tacit contracts, which are contracts that are inferred from the conduct of the parties as opposed to written or verbal agreements that embody coinciding declarations of intention.³ The nature of tacit contracts was stated thus in *Bremer Meulens (Edms) Bpk v Floros*:⁴

¹ See generally Reinecke "Toepassing van die Vertrouensteorie by Kontraksluiting" 1994 *TSAR* 372; and Van der Merwe and Van Huyssteen "Reasonable Reliance on *Consensus*, *Iustus Error* and the Creation of Contractual Obligations" 1994 *SALJ* 679.

² For instance, it is still unsure what the consequences are of *dissensus* caused by the fraudulent misrepresentation of an independent third party or the miscommunication of a messenger (see Floyd and Pretorius "A Reconciliation of the Different Approaches to Contractual Liability in the Absence of *Consensus*" 1992 *THRHR* 668; and Floyd and Pretorius "Mistake and Supervening Impossibility of Performance" 1994 *THRHR* 325).

³ See generally Christie *The Law of Contract in South Africa* 5ed (2006) 81-90; and Hutchison and Pretorius *The Law of Contract in South Africa* (2009) 240-241.

⁴ 1966 1 PH A36 (A) 129-130.

“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”⁵

This description seems straightforward enough and is consonant with the premise that contracts are generally concluded by real agreement, but case law actually reveals a far more complicated and divergent picture. In fact, at the elevated level of the Appellate Division/Supreme Court of Appeal one encounters different tests for inferring the existence of tacit contracts,⁶ and the provincial courts have also on occasion alluded to this quandary.⁷ It appears as if the dilemma here is at least partly reflective of an historical subjective/objective dichotomy in regard to contractual liability which persists in modern law. This article attempts to provide some clarity on the issue by analyzing tacit contracts in terms of various rationales of contractual liability in conjunction with the tests that the courts have devised for inferring such contracts.

2 RATIONALES OF CONTRACTUAL LIABILITY

For present purposes it is unnecessary to delve too deeply into contract theory, but since there should be conceptual links between the different grounds for contractual liability and tacit contracts, the relevant principles are briefly reiterated.⁸ The South African courts have vacillated between subjective and objective approaches to the issue of contractual liability.⁹ On the one hand the subjective approach takes the will theory as point of departure and qualifies it in instances of *dissensus* or material mistake with the doctrine of estoppel,¹⁰ or its close relative the reliance theory (doctrine of quasi-mutual assent).¹¹ On the other hand the more controversial objective

⁵ Compare also Wessels *The Law of Contract in South Africa* Vol 1 2ed (1951) par 261.

⁶ The Appellate Division has recognized the difficulty involved in formulating an authoritative statement of principle in regard to the test for tacit contracts (see *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 3 SA 155 (A) 164-165; *Charles Velkes Mail Order 1973 (Pty) Ltd v CIR* 1987 3 SA 345 (A) 357); and, as aptly noted by Christie 83, the guiding “principles have proved remarkably difficult to state definitively”.

⁷ See *eg, Alzu Ondernemings (Edms) Bpk v Agricultural and Rural Development Corporation* [2001] 2 All SA 368 (T) 374; and *Scopeful 130 (Pty) Ltd v Mechani Mag (Pty) Ltd* 2008 3 SA 483 (W) 487.

⁸ See more comprehensively Pretorius “The Basis of Contractual Liability in South African Law” 2004 *THRHR* 179, 383, 549.

⁹ See generally Hutchison “Contract Formation” in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 165 180-194; Kritzinger “Approach to Contract: A Reconciliation” 1983 *SALJ* 47; Van Rensburg “Die Grondslag van Kontraktuele Gebondenheid” 1986 *THRHR* 448; and Hutchison and Pretorius 15-20 91-107.

¹⁰ See *eg, Van Ryn Wine & Spirit Co v Chandos Bar* 1928 TPD 417 422-424; *Per-Urban Areas Health Board v Breet* 1958 3 SA 783 (T) 790; *cf Benjamin v Gurewitz* 1973 1 SA 418 (A) 425; *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 1002ff; see further De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol 1 5ed (1992) 22-23; De Vos “Mistake in Contract” 1976 *Acta Juridica* 177 180-181; and Van Rensburg 1986 *THRHR* 452-453.

¹¹ See *eg, Pieters & Co v Salomon* 1911 AD 121 130; *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) 78; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A) 984; see further Van der Merwe and

approach¹² manifests in a form of declaration theory, as corrected by the *iustus error* doctrine where there is material and reasonable mistake.¹³ In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis*¹⁴ the Appellate Division attempted to reconcile the subjective and objective approaches by in effect defining the *iustus error* doctrine as an indirect expression of the reliance theory, so that reliance (directly or indirectly) forms the link between the subjective will theory and the objective declaration theory,¹⁵ with direct reliance being the dominant manifestation.¹⁶ Although in recent times the will-reliance theory seems on balance to be favoured by the judiciary,¹⁷ the objective approach is very much still part of the South African law of contract.¹⁸ It is suggested that tacit contracts reflect patterns similar to the subjective and objective postulates sketched above, as will be seen.

3 TACIT CONTRACTS AND RATIONALES OF CONTRACTUAL LIABILITY

3.1 The will theory

There is a fair amount of authority to the effect that tacit contracts are the product of actual agreement between the parties.¹⁹ This approach is squarely premised on the will theory and its hegemony as contractual

Reinecke "Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer 1979 4 SA 74 (A)" 1980 TSAR 81; and Van der Merwe "Die Duiwel, die Hof en die Wil van 'n Kontraktant" in Gauntlett (ed) *JC Noster: 'n Feesbundel* (1979) 13 31ff.

¹² The objective approach has been the subject of much criticism (see eg, De Wet and Van Wyk 12 ff; and Kerr *The Principles of the Law of Contract* 6ed (2002) 20-25), but for the most part the declaration theory, as corrected by the *iustus error* doctrine, is a perfectly feasible way to approach contractual mistake in instances where there is an ostensible contract between the parties (see Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* 3ed (1988) 180-181; Hutchison and Pretorius 97-103; and Pretorius "The Basis of Contractual Liability (2): Theories of Contract" 2005 *THRHR* 441 459-460).

¹³ See eg, *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 470-473; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) 479; *Springvale Ltd v Edwards* 1969 1 SA 464 (RA) 469-470; see further Van Rensburg 1986 *THRHR* 458-459; and Lubbe and Murray 180-181.

¹⁴ 1992 3 SA 234 (A) 239-240.

¹⁵ Hutchison *Southern Cross* 192-193; Hutchison and Pretorius 103-105; and Pretorius 2004 *THRHR* 555-556.

¹⁶ See further Hutchison "'Traps for the Unwary:' When Careless Errors are Excusable" in Glover (ed) *Essays in Honour of AJ Kerr* (2006) 39 44ff; and cf Hutchison and Pretorius 105-107.

¹⁷ See eg, more recently *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 5 SA 180 (SCA) par 22; *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) par 16; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 2 SA 599 (SCA) par 6; *Cecil Nurse (Pty) Ltd v Nkola* 2008 2 SA 441 (SCA) par 15; and *Pillay v Shaik* 2009 4 SA 74 (SCA) par 55.

¹⁸ See eg, *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 2 SA 59 (SCA) 66-67; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) 41-42; and further Pretorius 2004 *THRHR* 385-388.

¹⁹ See eg, Wessels 71; Christie 82-83; Kerr 31-32; Lubbe and Murray 108-109; Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 3ed (2007) 152; and Joubert *General Principles of the Law of Contract* (1987) 36.

basis.²⁰ The traditional test for inferring tacit contracts follows suit and was formulated as follows by Corbett JA in *Standard Bank of South Africa Ltd v Ocean Commodities Inc*:²¹

“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*”

This formulation had its genesis in a clutch of earlier decisions²² which almost all refer with approval to Wessels,²³ who states the requisites for a tacit contract as follows:

- “(1) The person whom it is proposed to fix with a tacit contract must be fully aware of all the circumstances connected with the transaction.
- (2) The act must be unequivocal.
- (3) The tacit contract must not extend to more than the parties contemplated.”

Subsequently, the traditional approach has been frequently referred to,²⁴ and more recently in *Gordon Lloyd Page & Associates v Rivera*²⁵ the Supreme Court of Appeal again seems to have stressed the consensual nature of this test.²⁶ Somewhat obscurely, however, the traditional test drew reaction mainly because it appeared to impose a higher standard of proof for tacit contracts than the usual balance of probability regarding the drawing of inferences from proved facts.²⁷ Perhaps this apparently stricter test was borne of a notion that tacit agreements should not be inferred lightly, actual *consensus* being hard to determine even at the best of times. Also indicative of a cautious approach to such contracts is the fact that the courts have frequently affirmed that where any doubt exists, a tacit contract must be

²⁰ See regarding the primacy of the consensual approach Joubert 36-37; De Wet and Van Wyk 9-19; Lubbe and Murray 106-109; Kerr 3-9; and Van der Merwe *et al* 21-25.

²¹ 1983 1 SA 276 (A) 292B.

²² *Festus v Worcester Municipality* 1945 CPD 186 192-193; *City of Cape Town v Abelson's Estate* 1947 3 SA 315 (C) 327-328; *Parsons v Langemann* 1948 4 SA 258 (C) 263; *Bremer Meulens (Edms) Bpk v Floros supra*; *Blaikie-Johnstone v Holliman* 1971 4 SA 108 (D) 119; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 281; and *Mühlmann v Mühlmann* 1981 4 SA 632 (W) 635.

²³ Par 266.

²⁴ See *eg*, *Kropman v Nysschen* 1999 2 SA 567 (T) 575E-F; *Samcor Manufacturers v Berger* 2000 3 SA 454 (T) 461E-F; and *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd* 2001 1 SA 313 (C) 320G-H.

²⁵ 2001 1 SA 88 (SCA) 95J-96A: “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*.”

²⁶ Compare also *eg*, *Frame v Palmer* 1950 3 SA 340 (C) 345; *Salisbury Municipal Employees Association v Salisbury City Council* 1957 2 SA 554 (SR) 557; *Salisbury Bottling Co (Pvt) Ltd v Lomagundi Distributors (Pvt) Ltd* 1965 3 SA 503 (SR) 512; see further Christie 83; Kerr 31; and Van der Merwe *et al* 152.

²⁷ Compare *eg*, *Fiat SA v Kolbe Motors* 1975 2 SA 129 (O) 140; and Christie *The Law of Contract in South Africa* (1981) 58-61.

restrictively construed in favour of the person upon whom it is sought to impose the obligation.²⁸

Nevertheless, it is suggested that there are more substantive considerations militating against a consensual approach to tacit contracts. Although it is generally assumed that contracts are created by agreement between the parties (at least as regards the salient features of the contract),²⁹ when the actual issue of contractual liability is called into question by a party it is highly likely that the courts are constrained to have recourse to objective considerations, such as imputed or objective intention, which may have little to do with real, subjective intention.³⁰ The distinction between actual and imputed intention is important when dealing with the ascription of contractual liability and suggests that the notion of *consensus ad idem* is more of a “philosophical than a legal concept.”³¹ While the will theory seems conceptually appealing, since generally contractual obligations should not be created without consent,³² the fact is that courts routinely impose such obligations on involuntary parties. The reason for this is that the will theory is unworkable as a criterion for actually determining contractual responsibility and inevitably must relent to normative criteria in the adjudication process. In the result, as a matter of practical necessity, actual intention gives way to objective intention or reasonable reliance when contractual liability is contested on the basis of *dissensus* material mistake.³³

Within the sphere of tacit contracts the case for objective theories of liability becomes even more compelling than with express agreements because there really is no effective way of determining actual *consensus* in the former instance. Where there is an antecedent contractual relationship between the parties which has come to an end, there may be a suggestion of inferred actual consent if the parties continue to honour and perform in terms of the defunct agreement, giving rise to a new contract such as the tacit relocation of a lease.³⁴ But even in such instances a contract is usually

²⁸ See eg, *Blaikie-Johnstone v Holliman supra* 119; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd supra* 281; and *Alzu Ondernemings (Edms) Bpk v Agricultural and Rural Development Corporation supra* 374.

²⁹ This is a feature of contract law that even writers who strictly speaking do not support the will theory concede (compare eg, Atiyah *An Introduction to the Law of Contract* 5ed (1995) 9; and see further Pretorius 2005 *THRHR* 446). Also in most instances the subjective intention of a contractual party probably will coincide with the outward manifestation of that intention (see De Wet and Van Wyk 14; Van Rensburg 1986 *THRHR* 448; and Pretorius 2005 *THRHR* 446).

³⁰ See Collins *The Law of Contract* 4ed (2003) 123; Barnett “A Consent Theory of Contract” 1986 *Columbia LR* 269 272-274; and Pretorius 2005 *THRHR* 447-452.

³¹ Christie 22.

³² The actual role of the will theory as indirect premise for contractual liability as opposed to being directly applied to determine such liability has been dealt with elsewhere (Pretorius “The Basis of Contractual Liability (4): Towards a Composite Theory of Contract” 2006 *THRHR* 97 107-111).

³³ For more comprehensive arguments in this regard see Pretorius 2005 *THRHR* 447-452; and cf Collins 123.

³⁴ See eg, *Doll House Refreshments (Pty) Ltd v O’Shea* 1957 1 SA 345 (T); *Shell South Africa (Pty) Ltd v Bezuidenhout* 1978 3 SA 981 (N); *Pareto Ltd v Mythos Leather Manufacturing* 2000 3 SA 999 (W); see further Cooper *Landlord and Tenant* 2ed (1994) 350-352; Kerr *The Law of Sale and Lease* 3ed (2004) 503-505; De Wet and Van Wyk 380-381; Christie 88; and Du Bois (gen ed) *Wille’s Principles of South African law* (2007) 922-923.

implied irrespective of whether the parties actually applied their minds to its conclusion.³⁵ Moreover, the courts are inclined to imply provisions³⁶ and eliminate others³⁷ to render the end result more palatable with reference to assumptions that really have nothing to do with actual intention.³⁸ Now certainly where the parties clear up any form of misunderstanding as to the existence of a fresh agreement one appears to be dealing with actual *consensus*. However, where one of the parties contests the tacit renewal of the antecedent contract, one is really dealing with *dissensus*, which falls to be decided in terms of an objective theory of contract. Furthermore, when one looks at more problematic but prevalent examples, such as boarding a bus or train, it seems far more likely that some form of objective theory of liability is applicable.³⁹ Hardly surprising then that parallel bases for tacit contracts, as well as an alternative test for inferring their existence, are evident in case law, which will be considered next.

3 2 Generally objective approach (modified declaration theory)

In terms of the declaration theory contracts are premised on coinciding declarations of intention.⁴⁰ However, since there are no apparent concurring declarations of intention in the case of tacit contracts, a modified declaration theory posits that in such instances the approach is generally objective in that an apparent or presumed agreement is inferred from the facts. It is plausible that such a generally objective approach provides a suitable explanation for the imposition of liability in the case of tacit contracts, without dogmatically attempting to force all manifestations under this banner. Since an objective concurrence of intentions is not immediately discernible, it is fairly probable that a court would be inclined to construe the facts to determine whether the contract denier manifested conduct that justified an objective inference of assent to the transaction in question, irrespective of actual intention. In this regard performance or even partial performance by the contract denier should go a long way to indicating an objective intention to be contractually bound.⁴¹ Notionally, however, the process also leaves much room for considerations of reasonableness and fairness to play a role in the outcome.⁴²

³⁵ Hutchison and Pretorius 240-241.

³⁶ For instance, where there is no indication of the duration of a tacit relocation of a lease, it seems that it may be assumed that the lease is for an indefinite period subject to termination on reasonable notice (see De Wet and Van Wyk 381; Cooper 351; Kerr *Sale and Lease* 505; and Du Bois *et al* 923).

³⁷ For instance, a right of pre-emption that formed part of an original lease is excluded in the tacit relocation of that lease because such a term is not "incident to the relation of landlord and tenant" (*Doll House Refreshments (Pty) Ltd v O'Shea supra* 348G-H; approved in *eg, Fiat SA v Kolbe Motors supra* 139F; and *Shell South Africa (Pty) Ltd v Bezuidenhout supra* 984C).

³⁸ Cf Pretorius 2005 *THRHR* 452.

³⁹ See Atiyah *Essays on Contract* (1986) 19ff; Collins 117-119; and Cooke and Oughton *The Common Law of Obligations* 3ed (2000) 127.

⁴⁰ See the authorities cited at fn12 *supra*.

⁴¹ Cf Atiyah *Essays* 22.

⁴² Cf Cooke and Oughton 142-143.

Tacit contracts cover a number of transactions where the conduct of the parties, as opposed to clear verbal declarations or written instruments, grounds liability.⁴³ Prominent in this regard are simultaneous transactions,⁴⁴ which have a somewhat mechanical element to them, such as purchasing an item from a vending machine, travelling by public transport, or parking a car in a parking lot at a fee.⁴⁵ In such instances one would be hard pressed to construe subjective coinciding intentions,⁴⁶ especially where some form of self-service facility is involved.⁴⁷ Despite their prevalence these simple transactions are rarely the object of judicial scrutiny and really only pose problems from a conceptual viewpoint. A plausible rationale for such transactions is that liability is based purely on the rather mechanical, but voluntary actions of a party because they justify a reasonable inference of apparent assent on his or her part. A person is bound simply because of what they have done and not necessarily subjectively agreed to. With simultaneous transactions the conclusion and discharge of contractual obligations tend to converge in the act of performance,⁴⁸ and committing to a specific act or series of acts seals the transaction irrespective of actual intention.⁴⁹

As opposed to simultaneous transactions there are situations covered by tacit contracts that are more involved, especially as regards the nature of the contract and performances in question. Aside from contracts where formalities are required, generally contracts that are concluded by verbal or written declarations may also be concluded tacitly.⁵⁰ Some common examples of tacit contracts which are not simultaneous exchanges are the relocation of a lease,⁵¹ a contract of master and servant⁵² and a partnership agreement.⁵³ There is, however, no *numerus clausus* of contracts that can be expressly as well as tacitly concluded⁵⁴ and, it is suggested, a generally

⁴³ See Kerr 31; and Christie 87-89.

⁴⁴ The phrase is adopted from Atiyah *Essays* 19: "But large numbers of contracts are regularly made in which the making and the performance, or at least part performance, are simultaneous or practically simultaneous events."

⁴⁵ Cooke and Oughton 127; and Atiyah *Essays* 19-20.

⁴⁶ Some South African textbooks suggest or at least imply that such transactions can be based on actual consent, but can that really be the case? (see *eg*, Joubert 36).

⁴⁷ *Cf Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401 (CA); Kahn, Lewis and Visser *Contract and Mercantile Law: A Source Book* 2ed (1988) Vol 1 83-85; and Cooke and Oughton 127.

⁴⁸ Although not quite the same thing, one cannot help but be reminded of the real contracts (*contractus re*) of Roman law where the contract was only regarded as being concluded once a specific form of delivery had taken place (*cf* Kleyn "The Reality of Real Contracts" 1995 *THRHR* 16 17-18).

⁴⁹ Compare also Christie 88: "A type of sale which is very common but which, not unnaturally, has not attracted the attention of the courts, is a sale by means of an automatic vending machine. In contrast to the usual situation when goods are displayed for sale in a shop, the controller of the machine must be taken to be making the offer because he has put it out of his power to exercise any choice in the conclusion of the contract, and the customer accepts by his conduct in inserting his coin or doing whatever else the writing on the machine invites him to do."

⁵⁰ Joubert 36; and Van der Merwe *et al* 152.

⁵¹ See *eg, Doll House Refreshments (Pty) Ltd v O'Shea supra*.

⁵² See *eg, Pougnet v Ramlakan* 1961 2 SA 163 (D).

⁵³ See *eg, Fink v Fink* 1945 WLD 226.

⁵⁴ See the examples cited by Kerr 31; and Christie 87ff.

objective approach could very well provide the justification for the imposition of liability within the latter context. A fairly strong statement to this effect is to be found in *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC*,⁵⁵ where, in applying the principles applicable to the tacit relocation of lease to a franchise agreement, the court held:

“After the termination of the initial agreement ... the parties ... conducted themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before. Taken together, those facts establish a tacit relocation of a franchise agreement (comparable to a tacit relocation of a lease) ... A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement ... The fact that the appellant had forgotten that the agreement had lapsed is beside the point because in determining whether a tacit contract was concluded a court has regard to the external manifestations and not the subjective workings of minds.”⁵⁶

Of particular interest in this regard is the fact that the contract denier failed to realize that the initial agreement had lapsed (and continued to perform and accept performance in terms of it),⁵⁷ which means that it laboured under an error as to the existence of a contract with the other party. Effectively this denotes a lack of subjective intention to conclude a new agreement (*dissensus*), which could only then have been established on objective grounds. In this respect the court seems to have opted for a generally objective approach, as evidenced by the final part of the *dictum*,⁵⁸ which is a facet of tacit contracts that quite frequently has surfaced in other cases as well.⁵⁹

There is also an alternative to the traditional test⁶⁰ for inferring the existence of tacit contracts that requires an inference from the relevant facts

⁵⁵ 2002 1 SA 822 (SCA) 825D-F.

⁵⁶ Referred to with approval in *Cell C (Pty) Ltd v Zulu* 2008 1 SA 451 (SCA) 454J. Compare also *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd supra* 165G-H: “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.”

⁵⁷ Par 3.

⁵⁸ The wording harks back to the rather infamous *dictum* of Wessels JA in *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 715-716: “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.” Although somewhat controversial, there is clear authority to the effect that this *dictum* denotes a form of declaration theory (*Saambou-Nasionale Bouvereniging v Friedman supra* 995H; and see further De Wet and Van Wyk 24).

⁵⁹ See eg, *Fiat SA v Kolbe Motors supra* 138A-B; *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd supra* 165G-H; *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 1 SA 396 (SCA) 408E-F; and cf *Bayer v Frost* 1991 4 SA 559 (A) 584F.

⁶⁰ See 3 1 above.

and circumstances,⁶¹ and which does not imply a higher standard of proof than in the case of express agreements.⁶² Corbett JA authoritatively formulated the alternative test as follows in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd*:⁶³

“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.”

This test does seem to lend itself to a generally objective approach to ascertaining the existence of tacit contracts⁶⁴ and in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd*⁶⁵ Schutz JA noted with reference to *Joel Melamed*:

“In deciding whether a tacit contract has been concluded, the law objectively considers the conduct of both parties and the circumstances of the case generally.”

Despite the controversy surrounding the actual test for ascertaining tacit contracts,⁶⁶ it appears that not much actually turns on this aspect. Rather the dichotomy in this regard on a technical, procedural level seems to be symptomatic of the struggle on a deeper, substantive level between subjective and objective postulates of contractual liability.⁶⁷ It is suggested that in actual fact a court merely has to determine on a balance of probabilities⁶⁸ whether, objectively speaking,⁶⁹ (apparent or presumed) agreement to a tacit contract can be inferred on a reasonable interpretation⁷⁰ of the conduct of the parties and circumstances of the case.⁷¹ In this regard an act of performance or preparation to perform in terms of the alleged

⁶¹ Compare *eg, Plum v Mazista Ltd* 1981 3 SA 152 (A) 163-164; *Mülmann v Mülmann* 1984 3 SA 102 (A) 124; and *NBS Bank Ltd v Cape Produce Co (Pty) Ltd supra* 408.

⁶² *Cf Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd supra* 981.

⁶³ 1984 3 SA 155 (A) 165B-C.

⁶⁴ See also Pretorius 2004 *THRHR* 387-388.

⁶⁵ *Supra* 408E.

⁶⁶ See Christie 82-83; Hutchison and Pretorius 241; and Pretorius 2004 *THRHR* 387-388. It also seems as if the provincial courts cannot help but add their voices to the existing clamour. For instance, in *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd supra* 320G-1 the court criticized a synthesis solution proposed by Christie and expressed a preference for the traditional test, “provided that the test is applied in a common sense and businesslike way.” Then again in *Landmark Real Estate (Pty) Ltd v Brand* 1992 3 SA 983 (W) 985I-J the court seems to have been quite taken with Christie’s proposition (see Christie 83-85 regarding his suggested synthesis of the traditional and alternative tests).

⁶⁷ See par 2 above.

⁶⁸ *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd supra* 981B-C; and *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd supra* 320G.

⁶⁹ *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd supra* 165H; *NBS Bank Ltd v Cape Produce Co (Pty) Ltd supra* 408E; and *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC supra* 825F.

⁷⁰ *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd supra* 165F.

⁷¹ *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd supra* 165G-H; and *NBS Bank Ltd v Cape Produce Co (Pty) Ltd supra* 408E.

agreement should play a telling role.⁷² Hence, for instance, the recognition of the tacit relocation of a lease based on continued performance by the parties despite the expiration of the original contract.⁷³ It is further suggested that reference to “unequivocal” conduct evidencing that the parties intended to contract in the traditional test is unnecessary and potentially clouds the issue.⁷⁴ Conduct can also comprise written or verbal declarations of intention between contractual parties,⁷⁵ and requiring “unequivocal” conduct in the case of tacit contracts tends to blur the distinction between these and express agreements: it is precisely because clear, coinciding expressions of intention are lacking in the case of tacit contracts that they may be differentiated from express agreements. Furthermore, if a party has not actually applied his or her mind to the conclusion of a tacit contract,⁷⁶ how can conduct on his or her part conjure up the subjective intention to contract? More plausibly the law must seek a resolution to this conundrum by reasonably inferring an objective intention to be bound on the basis of the actions of the party, irrespective of his or her subjective intention.

Several other features of tacit contracts tend to strengthen the case for a generally objective approach as to their basis. For instance, it has been noted that “it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy.”⁷⁷ On occasion the courts have also appropriately drawn an analogy between the importation of tacit terms and the inferring of tacit contracts.⁷⁸ Although tacit terms are implied under the guise of the presumed intention of the parties, it is fairly evident that the supplementation of contractual content in this manner has more to do with normative factors than subjective intention,⁷⁹ and similar considerations should apply in the case of tacit contracts. Consequently, although the courts often pledge allegiance to the actual intention of the parties (probably out of a sense of loyalty to the Roman-Dutch tradition),⁸⁰ there are strong indications that the inference of a

⁷² Compare *eg*, *Fiat SA v Kolbe Motors supra* 140A-B; *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC supra* 825A-F; and *Cell C (Pty) Ltd v Zulu supra* 454J-455B.

⁷³ See the authorities cited at fn 34 above.

⁷⁴ Compare also *eg*, Christie 85.

⁷⁵ Conduct notionally comprises any voluntary act or omission by a party (*cf* Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) 23; and Van der Walt and Midgley *Principles of Delict* 3ed (2005) par 58).

⁷⁶ Compare *eg*, *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC supra* 825E-F.

⁷⁷ *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd supra* 165D-E; and referred to with approval in *eg*, *Muller v Pam Snyman Eiendoms-konsultante (Pty) Ltd supra* 320G.

⁷⁸ *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd supra* 165E-F; *Bayer v Frost supra* 583-584; and *cf* Christie 84. See, however, *Landmark Real Estate (Pty) Ltd v Brand supra* 986.

⁷⁹ See generally Findlay and Kirk-Cohen “On Fictitious Interpretation” 1953 *SALJ* 145 147; Van der Walt “Die Huidige Posisie in die Suid-Afrikaanse Reg met betrekking tot Onbillike Kontraksbedinge” 1986 *SALJ* 646 653; Cockrell “Substance and Form in the South African Law of Contract” 1992 *SALJ* 40 53-54; Neels “Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg” 1999 *TSAR* 684 695-696; Zimmermann “Good faith and equity” in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217 244; Lubbe and Murray 418-419; and Pretorius 2005 *THRHR* 452.

⁸⁰ See Joubert 24-30; Van der Merwe *et al* 19-21; Christie 3-8; Hutchison *Southern Cross* 165; Kleyn 1995 *THRHR* 17-25; and Pretorius 2004 *THRHR* 185.

tacit contract really rests on considerations of an objective nature, including quite plausibly a generally objective approach. Conversely, where courts have declined to infer such contracts, despite perhaps formal reasoning relating to a lack of *consensus*, it seems more likely that an absence of objective agreement or reasonable reliance actually grounds the decision.

There is, however, a proviso to bear in mind when linking the creation of tacit contracts to a generally objective approach, and that is that the *iustus error* doctrine cannot be applied where ostensible agreement⁸¹ between the parties is lacking.⁸² Typically cases of disputed tacit contracts involve scenarios where apparent agreement between the parties is not immediately discernible, with the result that the *iustus error* approach loses relevance. In such instances the courts may of course be inclined to focus on the mechanics of consent, or rather the rules of offer and acceptance,⁸³ in order to ascertain whether an objective contract in effect can be stitched together in the circumstances.⁸⁴ In the case of simultaneous exchanges, however, such an exercise tends to become rather artificial.⁸⁵ Nevertheless, while the reconciling link between the subjective and objective approaches tends to fade in such circumstances,⁸⁶ in the absence of this mechanism for potentially effecting fairness between the parties,⁸⁷ it is highly likely that the courts will often inject their own elements of reasonableness and fairness in the process of determining whether a tacit contract has arisen or not. And in this regard the party whose version is the more reasonable will probably have a greater chance of success.⁸⁸

3.3 The reliance theory

While the argument for a generally objective approach (modified declaration theory) to tacit contracts seems far more appealing than the search for actual agreement, the case for an objective approach of sorts is perhaps in some respects even more compelling when considering the potential reach of the reliance theory, although applying the doctrine of quasi-mutual assent

⁸¹ Or rather a "common intention expressed" as referred to in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* *supra* 239I-J.

⁸² See Van Rensburg 1986 *THRHR* 453; De Vos 1976 *Acta Juridica* 181; and Hutchison and Pretorius 99-100.

⁸³ Compare *eg, Blaikie-Johnstone v Holliman* *supra* 119; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* *supra* 983-984; and *Scopeful 130 (Pty) Ltd v Mechani Mag (Pty) Ltd* *supra* 489.

⁸⁴ See the examples cited by Christie 87ff; and see further Pretorius "The Acceptance of a Lapsed Offer Within the Context of the Alienation of Land Act 68 of 1981" 2009 *THRHR* 519 521-522.

⁸⁵ When, for instance, someone purchases something from a vending machine can it really be determined who makes the offer and who makes the acceptance? (See, however, Christie 88.) See also for divergent views on the effect of advertisements, price tickets and the like used by shop owners in regard to their wares Kahn "Some Mysteries of Offer and Acceptance" 1955 *SALJ* 246 250-253; Wessels *par* 275; Kahn *et al* 81-83; Joubert 39-41; and Christie 39-42.

⁸⁶ See *par* 2 above.

⁸⁷ See Lubbe and Murray 181; and Pretorius "*Caveat Subscriptor and Iustus Error*" 2006 *THRHR* 675 683.

⁸⁸ *Cf* Cooke and Oughton 143; and Atiyah *Essays* 110.

to tacit contracts is certainly not without controversy. In this regard Christie⁸⁹ states:

“An enquiry into whether a contract has been concluded by conduct differs from an enquiry into whether a contract has been concluded by quasi-mutual assent. In the quasi-mutual assent situation it is accepted that there is no true *consensus ad idem*. The one party says ‘But I never agreed’, to which the court replies ‘Quite so, but your conduct led the other party reasonably to believe you agreed, so you will be treated as if you had agreed’. The enquiry is concerned with the effect of the one party’s conduct upon the other as a reasonable person. In the tacit agreement situation the one party says ‘But we truly agreed; our (or my, or his) conduct proves it’, and the enquiry is concerned with the proper inference to be drawn from the proved facts.”

Well that is one way of looking at the situation if one assumes that tacit contracts rest solely on actual *consensus*, but that in itself is not an inescapable conclusion if the matter is considered from both conceptual and positive law perspectives. Of course, as previously alluded to, in the vast majority of instances contractants are in agreement, at least as regards the salient features of their contract; but when one party contests assent to the contract in question the matter inexorably devolves upon an objective enquiry of sorts, including possibly reasonable reliance.⁹⁰ And the cases that actually reach court deal with the latter situation (*dissensus*), not the former (*consensus*).

The case for the application of the reliance theory in appropriate instances to tacit contracts begins with this theory’s reception in South African law⁹¹ as the principle formulated by Blackburn J in the seminal English case of *Smith v Hughes*:⁹²

“I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v Cooke* [(1848) 2 Ex 654 663]. If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

Now clearly this principle applies to instances of *dissensus* and premises the grounding of contractual liability on reasonable reliance induced by the *conduct* of the contract denier.⁹³ It is suggested that this *dictum* does not preclude the possibility that conceptually the reliance matrix extends to all contracts, express and tacit, as long as the element of assent is questioned

⁸⁹ 82-83.

⁹⁰ See par 3 1 above.

⁹¹ See Christie 10-12 24-28; Hutchison and Pretorius 92; and Pretorius 2004 *THRHR* 188-191.

⁹² (1871) LR 6 QB 597 607.

⁹³ *Saambou-Nasionale Bouvereniging v Friedman supra* 995; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis supra* 239; *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A) 61; *Constantia Insurance Co Ltd v Compusource (Pty) Ltd supra* 353-354; *Cecil Nurse (Pty) Ltd v Nkola supra* 445-446; and *Pillay v Shaik supra* 84-85.

and there is conduct that generated reasonable reliance. In this regard Kerr⁹⁴ rather aptly acknowledges that the rule in *Smith v Hughes* may be applied to an implied lease (tacit relocation). This is but one example, and once one considers the far-ranging factual scenarios that resort under tacit contracts, the potential effect of the reliance theory increases markedly.

In English law the principle in *Smith v Hughes* certainly does not seem to be restricted to express agreements. There the Blackburn *dictum* is regarded as an authoritative statement of the “objective theory of assent.”⁹⁵ Collins⁹⁶ implies the wide ambit of this precept:

“It follows from the objective test of consent that apparent consent to an agreement suffices to establish contractual responsibility, and that actual consent in the sense of an intention to enter a contract is not strictly necessary. It is no good, for instance, to fill up a car with petrol at a self-service petrol station, and subsequently claim that no contract for the sale of the petrol was made because you did not intend to make the contract. A court will infer from the conduct of filling up the car with petrol that consent was given to a contract for the sale of petrol. Equally the court will infer from the conduct of the garage proprietor of permitting the tank to be filled that the proprietor consents to the sale of the petrol.”⁹⁷

Consequently, the general approach of English law is that a person’s words or actions are to be interpreted as they were reasonably understood by the person to whom they were addressed,⁹⁸ which clearly boils down to reliance-based liability.⁹⁹

Although from a South African perspective the reliance theory has not been associated with tacit contracts as prolifically as it has with express agreements, the evidence that it applies to both is incontrovertible. There are clear statements in case law to this effect. For instance, in an earlier decision, *Festus v Worcester Municipality*,¹⁰⁰ the court noted:

⁹⁴ *Sale and Lease* 504: “In *Parkin v Lippert* [(1895) 12 SC 179 187-188] De Villiers CJ said that receipt of rent by a lessor who thinks that the old lease is still in force does not bring a new implied lease into existence. This may be supported if the lessor does so for a short period and does not mislead the lessee into thinking that he consents to an implied lease. The difficulty with *Parkin’s* case is that there the lessor continued ‘for some years’ to receive rent. It is suggested that in such circumstances, on the rule in *Smith v Hughes* and other authorities, there is an implied lease.”

⁹⁵ See Cooke and Oughton 142-143; Collins 118; Cartwright *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (1991) 6-8; Treitel *The Law of Contract* 12ed (2007) 1-2; Cheshire, Fifoot and Furmston’s *Law of Contract* 14ed (2001) 272; Spencer “Signature, Consent and the Rule in *L’Estrange v Graucob*” 1973 *CLJ* 104 105-107; Howarth “The Meaning of Objectivity in Contract” 1984 *LQR* 265 272; and Pretorius “The Basis of Contractual Liability in English Law and its Influence on the South African Law of Contract” 2004 *CILSA* 96 107-109.

⁹⁶ 118.

⁹⁷ Compare also *eg*, Atiyah *Essays* 21-22.

⁹⁸ See *eg*, *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 128; *Henry Kendall & Sons v William Lillico & Sons* [1969] 2 AC 31 33; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 502; *The Hannah Blumenthal* [1983] 1 AC 854 914; *The Leonidas D* [1985] 2 All ER 796 805; *Harvela Investments Ltd v Royal Trust Co of Canada* [1986] AC 207 225; *Cambridge Nutrition Ltd v British Broadcasting Corp* [1990] 3 All ER 523 542; and *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409 1417.

⁹⁹ See further on the associated elements of reliance and benefit in English law Cooke and Oughton 122-131; Atiyah *Essays* 20ff; *cf* Collins 123; and Pretorius 2004 *CILSA* 116-121.

¹⁰⁰ *Supra* 192-193.

“In McKeurtan’s *Law of Sale* (2nd ed.; at p. 55) the learned author, after referring to *Voet* and *Grotius* to the effect that contracts may be ‘derived from presumptions and conduct’, enunciates the rule as follows: ‘Where a person so acts towards another as to lead the latter reasonably to infer that he intends to assume an obligation, his consent to that effect will be presumed, and an implied contract will result.’”

Also in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd*,¹⁰¹ in discussing whether tacit contracts had arisen in the circumstances, the court referred with approval to *Pieters & Co v Salomon*,¹⁰² where De Villiers CJ remarked on what can only be described as reliance-based liability in the following terms:

“if their course of dealing with the defendant was such as reasonably to lead him to believe that they intended to pay him the full amount of his claim, the plaintiffs’ unexpressed intention to pay the lesser sum cannot avail them.”

Interestingly, *Pieters & Co v Salomon* seems to be the first incarnation of the reliance theory in South African law.¹⁰³ Nonetheless, aside from these *dicta*, clear confirmation that the reliance theory pertains to tacit contracts is to be found in *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd*,¹⁰⁴ where the Appellate Division was prepared to apply the rule in *Smith v Hughes* to an alleged tacit contract.¹⁰⁵ Although the contract assessor failed in his bid to prove such a contract in the circumstances, the court was unanimous in concurring with the sole judgment of Botha JA, who accepted in principle that *Smith v Hughes* could apply to tacit contracts.¹⁰⁶

More recently in *Sewpersadh v Dookie*¹⁰⁷ the court found that the revival of a validly cancelled deed of alienation of land could be based on the reliance theory. Section 2(1) of the Alienation of Land Act¹⁰⁸ requires an alienation of land to be in writing and to be signed by both parties, or by their agents acting on their written authority, for validity. However, in certain circumstances the courts have been prepared to countenance the effective informal revival of such contracts provided there is no alteration of the material terms of the original agreement.¹⁰⁹ Although *Sewpersadh v Dookie* was overturned on appeal because a fresh meeting of the minds was regarded as necessary to restore the *status ante quo*,¹¹⁰ the provincial decision portends a willingness on the part of some judges to extend the

¹⁰¹ *Supra* 408E.

¹⁰² *Supra*.

¹⁰³ See Christie 11.

¹⁰⁴ *Supra*.

¹⁰⁵ 984E-G. See also Kerr 354-355.

¹⁰⁶ Generally writers also link this case with the reliance theory (compare *eg*, Reinecke “Regstreekse of Onregstreekse Toepassing van die Vertrouwensteorie” 1989 *TSAR* 509; Cockrell “Reliance and Private Law” 1993 *Stell LR* 41 47 fn 34; Christie 24 fn13; and Van der Merwe *et al* 39 fn 102).

¹⁰⁷ 2008 2 SA 526 (D) 532.

¹⁰⁸ 68 of 1981.

¹⁰⁹ See *eg*, *Neethling v Klopper* 1967 4 SA 459 (A) 465-466; *Cronje v Tuckers Land and Development Corporation (Pty) Ltd* 1981 1 SA 256 (W) 259; and see further De Wet and Van Wyk 325-326; Hutchison and Pretorius 158; and Pretorius 2009 *THRHR* 524.

¹¹⁰ *Sewpersadh v Dookie* 2009 6 SA 611 (SCA) 616 par 16. Compare also *Fairoaks Investment Holdings (Pty) Ltd v Oliver* 2008 4 SA 302 (SCA) par 19.

application of the reliance theory, including to the informal revival of contracts. The question, which seems not to have been addressed on appeal, is whether reliance could effectively ground the tacit revival of such a contract despite the provisions of the Act. That, however, is a matter all on its own and best left for discussion at another opportunity.

3 4 Estoppel

Where reliance may be applied in the ascription of contractual responsibility, estoppel in some or other guise will not be far off. The reliance theory and estoppel by representation are inter-related - the former having evolved from the latter – and both entail reliance-based doctrines.¹¹¹ Estoppel may be invoked to uphold the fiction of a contract in circumstances similar to those suited to an application of the reliance theory.¹¹² Although there seems to be little need to uphold a fiction of a contract on the basis of estoppel when an actual contract can be grounded on the reliance theory, the principle nevertheless stands that if the requirements for estoppel are met the contract denier may be estopped from denying consent to an apparent contract.¹¹³ That this precept extends to tacit contracts tends to follow since a representation need not only be explicit but can also consist of other conduct,¹¹⁴ or even remaining silent when there is a duty to speak in the circumstances.¹¹⁵ It comes as no surprise then that occasionally estoppel surfaces in case law in connection with such contracts.¹¹⁶ Theoretically estoppel deals with representations of a factual nature,¹¹⁷ whilst the reliance theory deals with representations as to intention.¹¹⁸ However, within the context of *dissensus* this distinction becomes rather fine since there seems to be little practical difference between alleging facts creating the impression that *consensus* existed (estoppel) and averring that the contract denier misrepresented his or her intention to the effect that he or she assented to the contract in question (reliance theory). It also seems that if the reliance theory would fail in the circumstances, estoppel would tend to follow suit, which again attests to the commonalities between these principles.¹¹⁹

¹¹¹ See Christie 24-28; Hutchison and Pretorius 92-97; and Pretorius 2004 *THRHR* 188-192.

¹¹² See the authorities referred to at fn 10 above.

¹¹³ See Rabie and Sonnekus *The Law of Estoppel in South Africa* 2ed (2000) 194-196; Visser and Potgieter *Estoppel: Cases and Materials* (1994) 48-54; Van der Merwe *et al* 32-37; and Pretorius 2004 *THRHR* 389-393.

¹¹⁴ See *eg*, *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 6 SA 491 (SCA); and *South African Broadcasting Corporation v Coop* 2006 2 SA 217 (SCA).

¹¹⁵ Rabie and Daniels "Estoppel" in 9 *LAWSA* (2005) par 656; Rabie and Sonnekus 75ff; and Visser and Potgieter 79ff.

¹¹⁶ See *eg*, *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd supra* 985-986; and see further interestingly Kritzing 1983 *SALJ* 66.

¹¹⁷ Rabie and Daniels *LAWSA* par 657; Rabie and Sonnekus 87ff; and Visser and Potgieter 108ff.

¹¹⁸ See *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis supra* 2391-240B, confirmed in *eg*, *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A) 61F-H; and *Constantia Insurance Co Ltd v Compusource (Pty) Ltd supra* par 17.

¹¹⁹ Compare *eg*, *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd supra* 985-986; and *cf* *HNR Properties CC v Standard Bank of SA Ltd* 2004 4 SA 471 (SCA) 479-481.

A further manifestation of estoppel in regard to tacit contracts deals with the situation where a party denies that an apparent representative had the necessary authority to bind it to the contract in question.¹²⁰ What a court has to determine is whether the principal is bound by the actions of the alleged representative on the basis of ostensible authority, which is squarely premised on estoppel.¹²¹ In such instances a court will have to find that a tacit contract may be inferred from the circumstances, as well as the existence of ostensible authority, for liability to lie.¹²²

4 CONCLUSION

It is fairly clear that elements of will, presumed or objective intention, reliance, estoppel, reasonableness and perhaps even fairness tend to dot the broad landscape that encompasses tacit contracts. Although frequently the courts have pledged allegiance to the basing of contracts primarily on actual intention, the practical difficulties involved in such an approach have led to the adoption of objective theories of contractual liability. This has been the legacy of express agreements and, it is suggested, it applies perhaps with even greater conviction to tacit contracts. In the latter instance actual concurring intention seems to be even more of a philosophical precept than in the former. Once one appreciates that simultaneous exchanges, such as purchasing an item from a vending machine, also fall within the ambit of tacit contracts, it is evident that a very thin theory of consent actually applies. This is not to say that actual agreement is entirely irrelevant. On the contrary, most contracts are the result of subjective agreement between the parties, but these are not the instances that courts are confronted with. The matters that reach court deal with the situation where one party denies assent to the contract, and in such circumstances it seems far more plausible that a court of necessity will have recourse to an objective determinant of liability as opposed to a subjective one. The preceding discussion reveals that there is ample authority for such a broad proposition and while the courts feel compelled to honour the shibboleth of subjective agreement, they more than likely employ objective criteria when setting about the actual business of determining contractual liability. In this regard, as in the case of express agreements, a generally objective approach (modified declaration theory) and the reliance theory feature prominently.

The case for objective bases for tacit contracts is not merely theoretical in nature and has some rather significant practical implications. For one thing, the existence of apparently conflicting tests for determining tacit contracts should be done away with. The traditional test, which seemingly enquires as to actual intention and implies a higher standard of proof for tacit contracts,

¹²⁰ Of course this situation is not unique to tacit contracts and may also occur where there are concurring declarations of intention (compare *eg, National and Overseas Distributors Corporation (Pty) Ltd v Potato Board supra*; and *Hlobo v Multilateral Motor Vehicle Accidents Fund supra*).

¹²¹ See Rabie and Daniels *LAWSA* par 670; Rabie and Sonnekus 156-159; Visser and Potgieter 286-301; and Kerr *The Law of Agency* 3ed (1991) 112-148.

¹²² Compare *eg, Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd supra*; *NBS Bank Ltd v Cape Produce Co (Pty) Ltd supra*; and *cf South African Eagle Insurance Co Ltd v NBS Bank Ltd* 2002 1 SA 560 (SCA).

has already at least partially succumbed to an alternative formulation, which seems to be more lenient and arguably in line with a generally objective approach to the determination of such contracts. It is suggested, however, that there should be no real difference between the standard of proof required for express or tacit contracts; the question merely being whether on a balance of probabilities the contract assertor has proved by way of reasonable inference objective or presumed agreement between the parties, or that the requirements of the reliance theory or estoppel have been met. Although such an approach seems deceptively simple the actual adjudication process should as a matter of course be much broader and potentially focus on the following aspects: the relative reasonability of the conduct of the parties and the plausibility of their opposing accounts; the general circumstances of the case, including the nature of the alleged tacit contract and a possible antecedent contractual relationship between the parties; other policy considerations advancing the case for, or militating against, the imposition of liability, such as prejudice to the contract assertor and/or benefit to the contract denier; and possibly further normative factors requiring reasonable limitation or supplementation of the contractual obligations in question.

For another thing, should the courts further more openly and consistently embrace objective rationales of liability in such instances, they would probably have much more leeway in acknowledging the role that normative considerations could play in given instances. For example, prejudice (with mirror-image benefit) occasioned by the performance of a party is a strong indication that a tacit contract should be found to exist, and actually seems to underlie instances such as the tacit relocation of a lease, despite the possibility that the parties have not actually applied their minds at all to the conclusion of a new contract. Ultimately, tacit contracts, much like tacit terms, really have little to do with actual intention and the courts have further acknowledged that the inference as to the conclusion of such a contract tends, at least partly, to be matter of law, involving matters of legal policy.

A final observation is that tacit contracts clearly reflect fluctuations between subjective and objective approaches to liability, so evident in regard to express agreements. Conflicting rationales and tests for tacit contracts simply cannot coherently co-exist in positive law and although subjective intention does indirectly influence the issue of contractual liability, when the existence of any contract – especially a tacit one – is called into question on the basis of *dissensus*, it is suggested that a court of practical necessity will have to adjudicate the matter on an objective basis of sorts.