

THE AUTHORITY OF COMPANY REPRESENTATIVES AND THE TURQUAND RULE REVISITED

FAROUK H I CASSIM *

*Former Professor of Law, University of the Witwatersrand and
Visiting Professor University of Johannesburg*

MALEKA FEMIDA CASSIM **

Associate Professor, Mercantile Law, University of Pretoria

ABSTRACT: It has become necessary to re-examine the issue of authority and representation in the sphere of company law as a result of the judgment of the Constitutional Court in *Makate v Vodacom (Pty) Limited* [2016] ZACC 13 and consequent to the enactment of the Companies Act 71 of 2008. This article analyses the authority of and representation by agents on behalf of companies in general, with a specific focus on the burning question of the juristic nature of ostensible authority and the Turquand Rule, and their relationship to the doctrine of estoppel.

I INTRODUCTION

As a result of the judgment of the Constitutional Court in *Makate v Vodacom (Pty) Limited*¹ and consequent to the enactment of the Companies Act 71 of 2008, it has become necessary to re-examine the issue of authority and representation in the sphere of company law. This article analyses the authority of and representation by agents on behalf of companies in general, with a specific focus on the burning question of the juristic nature of ostensible authority and the Turquand Rule and their relationship to estoppel.

* LLB (cum laude) LLM (mark of distinction) (London) HDip Company Law (Witwatersrand). Advocate of the High Court of South Africa.

** MBBCh (cum laude) LLB (cum laude) LLM (cum laude) (Witwatersrand) PhD (Cape Town). Attorney and Notary Public of the High Court of South Africa. I am grateful to the National Research Foundation for their financial assistance towards this research.

¹ [2016] ZACC 13.

II THE FINDINGS IN *MAKATE V VODACOM*

Makate v Vodacom (Pty) Limited concerned the payment of compensation (or lack of it) by the respondent, Vodacom (Pty) Ltd ('Vodacom'), for its use of the applicant's idea in developing a highly lucrative product which, in a short period of time, had generated billions of rands for Vodacom. Vodacom had subsequently refused to compensate the applicant on the ground first, of the lack of authority of its agent to conclude any agreement with the applicant relating to the product, and secondly, that the applicant's claim had in terms of s 11(d) of the Prescription Act 68 of 1969 prescribed.

The facts were that the applicant, Mr Kenneth Makate, was employed during 2000 by Vodacom as a trainee accountant. As a result of personal communication difficulties with a female companion who was later to become his wife, the applicant came up with an entirely novel idea which would enable a cellphone user with no airtime to send a text message to another cellphone user who had airtime to call the former. This idea was put into writing with the object of selling it to Vodacom or, failing Vodacom, then to any other cellphone service provider. The applicant was advised by his mentor at Vodacom to approach Mr Philip Geissler, who was Vodacom's Director and Head of Product Development, with a view to developing and marketing the idea. Mr Geissler was a member of the board of directors of Vodacom.

After negotiations with Mr Geissler, the parties reached an oral agreement that the applicant's idea would be put on trial for commercial viability. If the idea proved to be successful, the applicant would be given a share in the revenue generated by his idea. The applicant had indicated that he wanted 15 per cent of the revenue but no formal agreement had been concluded on the amount of or the rate of his remuneration. The reason for not finalising the rate of the applicant's remuneration was that the product had first to be tested for commercial viability. It was agreed between the parties that in the event of disagreement, the amount of the applicant's remuneration would be determined by Mr Alan Knott-Craig, the Chief Executive Officer ('CEO') of Vodacom.

In due course, Vodacom successfully developed the applicant's 'Please Call Me' idea. It proved to be a great success, from which Vodacom reaped billions of rands. In accordance with the customary practice at Vodacom to make and implement business decisions before they received the approval of the board, the applicant's idea had been launched on the market before

receiving the formal approval of Vodacom's board of directors. There was therefore nothing unusual about this fact.

Vodacom failed to negotiate any payment to the applicant. Instead its CEO and Mr Geissler dishonestly credited the CEO for the applicant's idea. Vodacom subsequently contended that neither the applicant's mentor nor Mr Geissler had actual or ostensible authority to conclude any agreement on behalf of Vodacom with the applicant.

The trial court, the South Gauteng High Court, rejected the applicant's claim for compensation on the ground that the applicant had failed to plead ostensible authority or estoppel in replication. The court held that instead of alleging it in his particulars of claim, the applicant should have pleaded ostensible authority in replication. The applicant had also failed to prove any representation by Vodacom itself that Mr Geissler had authority to conclude the agreement on its behalf. The court found further that the applicant's claim had constituted a 'debt' in terms of the relevant provisions of the Prescription Act and that the claim had prescribed. The Supreme Court of Appeal refused leave to appeal, hence the appeal to the Constitutional Court.

The two main issues for determination by the Constitutional Court were first, whether the applicant had established the requirements of ostensible authority and whether it had been properly pleaded, and secondly, whether the applicant's claim had prescribed in terms of s 10(1) read with ss 11(d), 12(1) and 12(3) of the Prescription Act. In this article, no comment is made on the second ground. According to the trial court, the applicant had to plead estoppel in replication because estoppel is not a cause of action. It is a shield not a sword, as so famously put by Birkett LJ in *Combe v Combe*.²

The majority judgment of the Constitutional Court delivered by Jafta J ruled³ that the trial court had erroneously conflated ostensible authority with estoppel. The two concepts, it held, were not synonymous. The court stated⁴ that '[a]ctual authority and ostensible or apparent authority are the opposite sides of the same coin'. Estoppel, according to Jafta J, is not a form of authority. It is rule that if the principal has conducted himself or herself in a manner that has misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority.⁵ The same 'misrepresentation' that gives rise to an estoppel

² 1951 (2) KB 215 at 224.

³ Supra note 1 para 44.

⁴ Ibid para 45.

⁵ Ibid para 45.

‘may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. ...It is distinguishable from estoppel which is not authority at all’.⁶

It must be emphasised, with respect, that the distinction drawn by Jafta J is a distinction without any difference. The view of Jafta J is open to criticism, as not only estoppel but also ostensible authority is “not authority at all”.

According to Jafta J⁷ estoppel and ostensible authority have different elements barring one that is common to both. The common element is the representation. Jafta J opined that the courts have incorrectly conflated ostensible authority with estoppel and this has resulted in attributing the elements of estoppel to ostensible authority. The trial court had, according to Jafta J, applied the test for estoppel instead of ostensible authority, and had consequently reached the incorrect conclusion. Jafta J stated that:

‘The presence of [ostensible] authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. [The representation] need not [even] be directed at any person.’⁸

The elements of ostensible authority and those of estoppel, and the distinction drawn between these concepts by the majority judgment, are discussed further in Paragraph III below.

The Constitutional Court found that Mr Geissler was a director of Vodacom, and was given the title of Director of Product Development. He enjoyed ‘enormous power in relation to his portfolio’.⁹ The successful introduction of new products depended solely on the power held by Mr Geissler.¹⁰ He could make or break any new product. Yet Vodacom contended that it had given no authority to Mr Geissler to bind it. The court stated¹¹ that the question of the ostensible authority of Mr Geissler must be ‘considered with view to doing justice to all concerned’. This was not an isolated or once-off transaction by Mr Geissler. It was an established course of conduct that Mr Geissler dealt with product development. The court thus took into account the position and the role of Mr Geissler as a director, the enormous power he wielded in respect of new products, the organisational structure, and the process which had to be followed before a new product could be introduced at Vodacom. Bearing this in mind, there is only one

⁶ Ibid para 46.

⁷ Ibid para 46.

⁸ Ibid para 47.

⁹ Ibid para 62.

¹⁰ Ibid para 62.

¹¹ Ibid para 64 – 5.

‘appearance’ that emerges, and that is that Mr Geissler had authority to negotiate all issues relating to the introduction of new products at Vodacom.¹² The court thus held in its majority judgment that Mr Geissler had ostensible authority to bind Vodacom.

In the concurring judgment given by Wallis AJ, it was agreed that the applicant was entitled to relief but the concurring judgment reached a different conclusion on ostensible authority. The concurring judgment differed on the pivotal issue of the juristic nature of ostensible authority. This is most regrettable as there now is uncertainty in our law over a previously settled issue.

With regard to the issue of ostensible authority, the concurring judgment held that it is settled law that ostensible authority is a form or instance of estoppel.¹³ Disagreement on this vitally significant issue has the potential to cause unnecessary and undesirable confusion. It was held that ostensible authority is no authority at all and this takes it into the realm of estoppel. Interestingly, Wallis AJ stated that the pedantic finding of the trial court that ostensible authority (being a form of estoppel) can only be pleaded by way of replication, lay at the root of Jafta J’s endeavour to distinguish ostensible authority from estoppel.¹⁴ It was found by the concurring judgment that ostensible authority is often pleaded in the particulars of claim, as opposed to the replication,¹⁵ and that the proposition that estoppel is a shield and not a sword does not relate to the manner in which it is pleaded but rather to the use to which it is put.¹⁶ There was consequently no reason for the majority judgment to hold that ostensible authority is not a form of estoppel in order to find that the applicant had properly raised ostensible authority in his particulars of claim..¹⁷ The juristic nature of ostensible authority, and the relationship between ostensible authority and estoppel are analysed further below in Paragraph III.

The concurring judgment, moreover, differed with the majority judgment on the nature of the representation that had been made by Vodacom and that had formed the basis of the ostensible authority of Mr Geissler. Wallis AJ held that the strict approach, that the representation must be rooted in the words or conduct of the principal himself and not merely

¹² Ibid para 66.

¹³ Ibid para 109.

¹⁴ Ibid para 119.

¹⁵ Ibid para 119.

¹⁶ Ibid para 122. The focus of this analysis is on the authority of company representatives, and no further comment is made on this issue of civil procedure.

¹⁷ Ibid para 123.

those of his agent, must be qualified. Insofar as an agent has actual, or even ostensible, authority to make representations on behalf of the principal, those representations will bind the principal.¹⁸

Wallis AJ pointed out that the CEO was the founder and the guiding spirit of Vodacom. In the eyes of the public, he was Vodacom. He was the driving force behind the company. The final decision rested with him and nobody else. He had approved the launch of the product without the need to obtain board approval of the project. Since Mr Geissler was aware that the applicant was seeking remuneration, it is very likely that he would have informed the CEO of the applicant's request for remuneration. The CEO had, if not actual authority, then ostensible authority to agree to Vodacom remunerating the applicant for his idea. According to Wallis AJ¹⁹ there was no reason why the CEO could not use Mr Geissler as his agent, in turn, to engage with the applicant. In this way, the chain of ostensible authority from the board to Mr Geissler was thus complete and estoppel had been established. The controversial issue of a chain of ostensible authority is examined in Paragraph IV below. Wallis AJ thus found that the board of directors of Vodacom had made a representation to the world, including the applicant, that the CEO had authority to conclude the agreement on behalf of Vodacom. The CEO had ostensible authority and that authority extended to authorising others to act on his behalf.²⁰ The finding of the concurring judgment was thus that the CEO had ostensible authority to conclude the contract and also had ostensible authority to invest Mr Geissler with the same authority. Vodacom was estopped from denying that authority.

Finally, a third issue of critical importance that was raised by the Constitutional Court in the *Vodacom* case was whether the Turquand rule is an independent rule of company law or whether it forms part of the doctrine of estoppel. The concurring judgment stated in passing, by way of an obiter dictum, that the Turquand Rule of company law is merely an application of estoppel.²¹ This statement is regrettable as it too has the potential to cause further confusion and uncertainty in South African company law, and to precipitate undesirable practical ramifications. The basis of the Turquand Rule is discussed in Paragraph V below.

¹⁸ Ibid para 164.

¹⁹ Ibid para 180.

²⁰ Ibid para 182.

²¹ Ibid para 110, with reference to *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) Ltd* 2015 (4) SA 623 (C) para 25.

III JURISTIC NATURE OF OSTENSIBLE AUTHORITY AND ITS RELATIONSHIP TO ESTOPPEL

A company, being an artificial or legal person, can do no act of its own. It can act only through the medium of its officers and agents.²² It can only make a representation through the natural persons who themselves have authority to represent it.²³ The court must examine how authority is exercised in the company in order to ascertain whose conduct was authorised and whose representations would bind the company.

An agent who contracts with a third party on behalf of a company must have authority either in the form of actual authority or ostensible authority (also referred to as apparent authority). Alternatively, authority may be given ex post facto in the form of ratification by the principal of an unauthorised contract entered into by the agent, which usually operates with retrospective effect.²⁴

It is useful to briefly examine here the types of authority that an agent or company representative may have.

(a) Actual authority

Actual authority may be either express or implied. Express actual authority is authority given in so many words, either orally or in writing, by the board of directors or by a person with the authority to delegate such authority. Implied actual authority, on the other hand, is authority given, not in so many words, but which arises as a reasonable inference from the conduct of the principal.²⁵

There are broadly three categories of implied actual authority. First, implied actual authority is that authority which is necessary or reasonably incidental to the effective execution of the agent's express authority. For instance where the agent has express authority to develop

²² *Webb & Co Ltd v Northern Rifles* 1908 TS 462; *Yarborough v Bank of England* (1812) 104 ER 991 (KB).

²³ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630 at 645 per Diplock LJ. Diplock LJ stated further that such actual authority may be conferred by the constitution of the company itself, or it may be conferred by those who under its constitution have the powers of management on some other person to whom the constitution permits them to delegate authority to make representations of this kind.

²⁴ Farouk H I Cassim 'Corporate Capacity, Agency and the Turquand Rule' in Farouk H I Cassim et al *Contemporary Company Law* 2ed (2012) at 188; Paul L Davies & Sarah Worthington *Gower and Davies Principles of Modern Company Law* 9ed (2012) 181; *New Falmouth Resorts Ltd v International Hotels Jamaica Ltd* [2013] UKPC 11.

²⁵ *Ibid*; *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA), per Denning MR; *Hopkins v TL Dallas Group Ltd* [2005] 1 BCLC 543 (Ch); *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630.

property for his principal, he will have implied authority to do all such things as are reasonably incidental to the development of that property such as appointing architects to prepare plans.²⁶ Secondly, implied actual authority may be implied from the nature of the office or the particular position to which the agent is appointed. This may be referred to as implied usual authority.²⁷ The appointment of a person as the managing director of a company, for instance, may carry with it implied usual authority to enter into contracts on behalf of the company and to do all such things as are within the usual scope of that office.²⁸ Where the board of directors appoint one of their members to an executive position, they impliedly authorise him to do all such things as fall within the usual scope of that office.²⁹ Implied usual authority must be distinguished from ostensible usual authority (see further Paragraph III(b)(ii) below). Thirdly, implied actual authority may arise as a reasonable inference from the conduct of the principal, where the principal acquiesces in the activities of the agent. An example of this category arose in *Hely-Hutchinson v Brayhead Ltd*.³⁰

In *Hely-Hutchinson* the board of directors of Brayhead by their conduct over many months had acquiesced in the agent, Richards, acting as the de facto managing director, although he had not been appointed as the managing director but had been appointed merely as the chairman. Lord Denning MR found that Richards had implied actual authority. Implied actual authority thus arose from the conduct of the parties, in that those with actual authority had acquiesced in the assumption of further powers by Richards. In this regard, Richards had on his own initiative made final decisions on financial matters of the company, and had often – without the knowledge or approval of the board – committed the company to contracts and merely reported to the board afterwards. In effect Richards had impliedly been appointed as the managing director of the company. His authority was thus not ostensible authority, but implied actual authority. (For further discussion of the, sometimes fine, distinction between implied actual authority and ostensible authority, see Paragraph III(b)(ii) below.)

On the facts of the *Vodacom* case, it significantly was the customary practice at Vodacom for the CEO to make and implement business decisions *before* receiving the formal approval of

²⁶ *Hopkins v TL Dallas Group Ltd* [2005] 1 BCLC 543 (Ch); *Coetzer v Mosenthal Ltd* 1963 (4) SA 22 (A); *Kahn v Leslie & Sons* 1928 EDL 416.

²⁷ Farouk H I Cassim op cit note 24 at 191; See further Paragraph III(b)(ii) below for a discussion of usual authority and relevant authorities on this matter.

²⁸ See eg *SA Securities v Nicholas* 1911 TPD 450; *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA).

²⁹ *Hopkins v TL Dallas Group Ltd* [2005] 1 BCLC 543 (Ch) at 572.

³⁰ *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA).

the board of directors.³¹ Had the applicant been able to show that the Vodacom board had acquiesced in past transactions where the CEO had exceeded his actual authority or had assumed further powers, the applicant would have succeeded by relying on the implied actual authority of the CEO. As a person with *actual* authority, the representation made by the CEO of Vodacom would undoubtedly have sufficed to establish the *ostensible* authority of Mr Geissler. In short, actual authority can be inferred by acquiescence, as had occurred in *Hely-Hutchinson v Brayhead*, which clearly illustrates the principle that implied actual authority may be inferred from the conduct of the board of directors in acquiescing in the agent acting without express authority from the board.

In light of the fact that *Hely-Hutchinson* is the leading case on implied actual authority, not ostensible authority, it is astounding that the majority judgment of Jafta J in the *Vodacom* case placed so much emphasis on the judgment of Lord Denning in *Hely-Hutchinson* in reaching its conclusions on the juristic nature of *ostensible* authority. It is widely acknowledged – including by Lord Denning himself in the *Hely-Hutchinson* case – that the locus classicus on ostensible authority is *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*.³² While *Hely-Hutchinson*'s judgment contained some discussion of ostensible authority, this was subject to the clear acknowledgment by Lord Denning MR that: 'I need not consider at length the law on the authority of an agent, actual, apparent or ostensible. This has been done in the judgments of this court in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*'.³³

(b) *Ostensible Authority*

Ostensible authority (or apparent authority) is the authority of an agent as it appears to others.³⁴ Actual authority and ostensible authority, though not mutually exclusive, are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may differ.³⁵ In the leading case of *Freeman & Lockyer*,³⁶ Diplock LJ defined apparent or ostensible authority as follows:

³¹ Supra note 1 para 10.

³² [1964] 1 All ER 630.

³³ [1967] 3 All ER 98 (CA) at 101 – 102. In *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 3 All ER 795 (CA) at 804, Robert Goff LJ stated that the locus classicus on the subject of ostensible authority is the judgment of Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*.

³⁴ *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA).

³⁵ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630.

³⁶ *Ibid* at 644.

‘a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority ... The representation, when acted on by the contractor entering into a contract with the agent, operates as an estoppel.’

Similarly, in *Armagas Ltd v Mundogas SA*³⁷ the court proclaimed that ostensible authority is created by a representation by the principal to the third party that the agent has the relevant authority, and the representation when acted on by the third party operates as an estoppel precluding the principal from asserting that he is not bound. These statements make it clear that in English law ostensible authority is based on an estoppel, and that by proving ostensible authority a legal estoppel is created. Ostensible authority thus is nothing more than agency by estoppel.

In accordance with this approach, in *NBS Bank Ltd v Cape Produce*³⁸ the South African Supreme Court of Appeal declared that ‘where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise.’ Ostensible authority is quite simply, an oxymoron; it is no authority at all – neither express nor implied authority – but the circumstances are such that the principal is estopped or precluded from denying the agent’s authority. Ostensible authority and estoppel refer to the same set of circumstances.

Ostensible authority and estoppel are subject to the same test, with substantially similar elements, as will be shown below. In *Freeman & Lockyer* Diplock LJ formulated a classical four point test for the establishment of ostensible authority, which has been widely followed throughout the common law jurisdictions. The four requirements of ostensible authority as laid down in *Freeman & Lockyer* are follows:³⁹

1. First a representation must have been made to the third party that the agent has authority to enter into a contract of the kind sought to be enforced. The most common form of representation is by conduct, that is to say, by the company permitting the agent to act in the management of its business, the company (or rather its board of directors) is thereby

³⁷ *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 3 All ER 795 (CA) at 804.

³⁸ 2002 (1) SA 396 (SCA) at 411. The court further stated that ‘[o]ur law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another’s mind, even though he may not have intended to do so and even though the impression was in fact wrong’ (at 411).

³⁹ On the facts of the *Vodacom* case, Diplock LJ’s four point test for ostensible authority would be satisfied. See further Paragraph IV below.

representing that the agent has authority to enter into contracts of a kind which such an agent normally has actual authority to enter into.

2. Secondly, the representation must have been made by a person or persons who have actual authority to manage the company's business, either generally or in respect of matters to which the contract relates. In practice the representation would usually be made by the board of directors. But more importantly, this point emphasises that the third party cannot rely on the agent's own representation that he has authority to act on behalf of the company.⁴⁰
3. Thirdly, the third party must have been induced by the representation to enter into the contract, that is to say, that the third party must have relied on the representation. The third point emphasises that one cannot be induced by a representation if one has no knowledge of the representation.
4. The fourth point of the test as laid down in *Freeman & Lockyer* needs to be modified due to legislative amendments both in the United Kingdom and in South Africa. The fourth point as stated by Diplock LJ was that under the memorandum of association of the company, the company must not have been deprived of the capacity to enter into a contract of the kind sought to be enforced or the power to delegate authority to the agent to enter into a contract of the kind sought to be enforced.

As a result of the abolition of the ultra vires doctrine in South African law and the provision in s 19(1)(b) of the Companies Act 71 of 2008 ('the Act') that companies generally have the capacity of an individual, the reference to lack of capacity in the fourth point of Diplock LJ's test may now be disregarded. The fourth point of the test, if appropriately modified, emphasises that to succeed on the basis of ostensible authority, it must not be unconditionally clear from the constitution of the company that the particular company representative could not have had actual authority to contract on the company's behalf. But if such authority is subject to compliance with an internal formality, the bona fide third party may simply assume that it has been complied with. In short the fourth point of the test incorporates the doctrine of constructive notice and the Turquand Rule.

It must be emphasised that, under the new company law regime introduced by the Act, the modified fourth point of the test of ostensible authority applies only to companies that are subject

⁴⁰ See also *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA); *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank* [1979] 1 All SA 89 (W) at 105: The representation relied on for ostensible authority must be a representation of the board of directors and not that of a director (or other company agent).

to the doctrine of constructive notice under the Act, that is, it applies only to ‘RF’ companies which are subject to the doctrine of constructive notice by virtue of s 19(5) of the Act. Due to the general abolition of constructive notice by s 19(4) of the Act, the fourth point of the *Freeman & Lockyer* test will not apply to most companies (or to non-‘RF’ companies).

The greater significance, however, of the fourth point of the *Freeman & Lockyer* test is that it by implication incorporates the Turquand rule.⁴¹ In so doing, it suggests that the Turquand rule is a mere adjunct of the rules of estoppel – a proposition that disturbingly seems to have been accepted by the Wallis AJ in the concurring judgment in the *Vodacom* case. This issue is discussed separately in Paragraph V below.

(i) *Comparison of the requirements of ostensible authority and estoppel*

Contrary to what was held by the majority judgment in the *Vodacom* case, the requirements of ostensible authority, as laid down in *Freeman & Lockyer*, are substantially the same requirements of estoppel.

The requirements of estoppel (or ostensible authority) in South African law as adumbrated by the Supreme Court of Appeal in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd*⁴² and followed in *South African Broadcasting Corporation v Coop*,⁴³ are that:

1. There must be a representation, whether by words or by conduct;
2. The representation must have been made by the principal and not merely by the agent, that the agent had the authority to act as he did;
3. The representation should be in a form such that the principal should reasonably have expected that third parties would act on the strength of the representation;
4. There must be reliance by the third party on the representation;
5. Such reliance by the third party must be reasonable; and
6. There must be consequent prejudice to the third party.

The Supreme Court of Appeal did not regard negligence to be a requirement, although the third element above states that the representor should ‘reasonably’ have expected others to act on the strength of the representation.⁴⁴

⁴¹ Farouk H I Cassim op cit note 24 at 184; See further Paragraph V(a) below.

⁴² 2002 (1) SA 396 (SCA) para 26.

⁴³ 2006 (2) SA 217 (SCA).

⁴⁴ See further MP Larkin & FHI Cassim ‘Company Law’ in *Annual Survey of SA Law* (2002) 627 at 640 – 3.

From a comparison of the tests in *Freeman & Locker* and *Cape Produce* it is manifest that both estoppel and ostensible authority depend, first, on a representation by the company that holds out the agent as having actual authority even though he had not been granted such authority and, secondly, on a reasonable reliance by the third party on the representation.

Although the *Freeman & Lockyer* test for ostensible authority - unlike the *Cape Produce* test for estoppel - does not explicitly state that the third party's reliance on the representation must have been 'reasonable', this is implied in the judgment of Diplock LJ in *Freeman & Lockyer*.⁴⁵ The requirement of 'reasonable' reliance is moreover accepted in English law. In this regard, *Criterion Properties Plc v Stratford UK Properties LLC*⁴⁶ is authority for the principle that a third party dealing with an agent may rely on ostensible authority only if he does not know that the agent has no actual authority.⁴⁷ *Criterion* stated further that if the third party 'knows or has reason to believe that the contract is contrary to the commercial interests' of the company, an inference may be drawn that he did not rely on the representation.⁴⁸ Furthermore, it was held in *Hopkins v TL Dallas Group Ltd* that where a transaction is abnormal or there are suspicious circumstances, the third party must make such inquiries as reasonably ought to be made, to ensure that the agent's authority is sufficient to bind the company.⁴⁹ It is thus clear that both in English law, as well as in South African law, the reliance of the third party must be 'reasonable' in order for ostensible authority or estoppel to arise.

A further requirement that is explicitly stated in the *Cape Produce* test for estoppel but not explicitly in the *Freeman & Lockyer* test for ostensible authority is a reasonable expectation that the representation will be acted on.⁵⁰ It was declared in *Cape Produce* that:

'although an intention to mislead is not a requirement of estoppel, where such an intention is lacking and a course of conduct is relied on as constituting a representation, the conduct must be

⁴⁵ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630 at 647. Diplock LJ, in discussing *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] All ER Rep 421 and *J C Houghton & Co v Northard, Lowe and Wills Ltd* [1927] 1 KB 246, stated that it must be shown that 'the conduct of the board in the light of that knowledge [ie the third party's knowledge of a representation contained in a provision of the company's articles] would be understood by a *reasonable* man as a representation that the agent had authority to enter into the contract sought to be enforced' [emphasis added].

⁴⁶ [2004] 1 WLR 1846 para 31.

⁴⁷ *Criterion Properties Plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 para 31.

⁴⁸ *Ibid.*

⁴⁹ *Hopkins v TL Dallas Group Ltd* [2005] 1 BCLC 543 (Ch) para 94.

⁵⁰ See further MP Larkin & FHI Cassim 'Company Law' in *Annual Survey of SA Law* (2002) 627 at 640 – 3.

of such kind as could reasonably have been expected by the person responsible for it, to mislead.’⁵¹

Although ‘a reasonable expectation that the representation will be acted on’ is not an explicit element of the four point test in *Freeman & Lockyer*, a parallel (albeit far wider) consideration emerges from the definition of ostensible authority in that case, viz that ostensible authority is based on ‘a representation, made by the principal to the contractor, *intended to be* and in fact *acted on* by the contractor’ [emphasis added].⁵² It must however be emphasised that the classic four point test in *Freeman & Lockyer* patently – and, with respect, sensibly – does not require that the representation must be intended by the principal to be acted on by the third party. The fact that the representation is made by the company and that the third party has reasonably relied on it, will clearly suffice.

Ostensible authority and estoppel thus have substantially the same elements and requirements, contrary to what was held by the majority judgment in the *Vodacom* case. Why then is it necessary to distinguish between the two concepts? The weight of authority does not support the view expounded by Jafta J in the *Vodacom* case, relating to the interaction between estoppel and ostensible authority.

The ruling of Jafta J on the definition of ostensible authority, and its elements and requirements, may have important practical ramifications, particularly insofar as Jafta J seemed to reduce the requirements of ostensible authority to ‘nothing more’ than a ‘representation’ by the principal that ‘has created an appearance that the agent has [authority]’.⁵³ The apparent abandonment of the other essential requirements of estoppel / ostensible authority – such as a reasonable reliance by the third party on the representation, or the need for the representation to be directed at the third party⁵⁴ in order to create the requisite relationship between the principal and the agent⁵⁵ – are cause for concern, as these additional requirements are not only widely accepted but are also integral to the doctrine of ostensible authority and serve the useful purpose of tempering the effect of the doctrine.

⁵¹ 2002 (1) SA 396 (SCA) para 25. This dictum was approved in *South African Broadcasting Corporation v Coop* 2006 (2) SA 217 (SCA), which also approved and applied *Cape Produce*.

⁵² [1964] 1 All ER 630.

⁵³ *Supra* note 1 at para 46 – 47, as discussed in Paragraph I above.

⁵⁴ See the majority judgment *supra* note 1 at para 47.

⁵⁵ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630 per Diplock LJ; see further Paragraph III(b)(ii) below.

(ii) *Distinction between ostensible authority and implied actual authority*

The decision in *Freeman & Lockyer* may usefully be contrasted with that in *Hely-Hutchinson* (discussed in Paragraph III(a) above). In both cases an agent, who had not been formally appointed as the managing director of the company, had acted as if he were the managing director. While in *Hely-Hutchinson* the agent was held to have had actual authority (or more specifically, implied actual authority), in *Freeman & Lockyer* the agent was found to have had only ostensible authority.

On the facts of *Freeman & Lockyer*, no managing director had been appointed for the company but, to the knowledge of the board, Kapoor had acted as if he were the managing director of the company. He assumed responsibility for the management of the company's affairs in taking steps to find a purchaser of Buckhurst Park Estates, as if he were the duly appointed managing director, and this was done with the knowledge and acquiescence of the board. Kapoor instructed the plaintiffs, a firm of architects, to do certain work for the company. It is important to note that this type of contract would have fallen within the scope of the usual authority of a managing director responsible for finding a purchaser. When the company failed to remunerate the plaintiffs, the plaintiffs claimed remuneration for their services. The company's defence was that Kapoor had never been validly appointed as managing director of the company and had consequently lacked the authority as agent to bind the company to the contract. The court, applying the four point test of ostensible authority, held the company liable on the basis of ostensible authority since the board of directors, who knew that Kapoor had been acting as the managing director and had permitted him to do so, had made a representation by their conduct that Kapoor had the usual authority of a managing director, on which the plaintiffs had relied.⁵⁶

Significantly Diplock LJ stated that actual authority could have been conferred on Kapoor by the board, but to confer implied actual authority would have required not merely the *silent acquiescence* of the individual board members, but the communication by words or by conduct of their respective consents to one another and to Kapoor. Thus in contrast with *Hely-Hutchinson's* case in which the court on the salient facts discussed in Paragraph III(a) above, found that the de facto managing director had implied actual authority, on the basis that the

⁵⁶ The fourth point of Diplock LJ's test was also satisfied, as there was nothing in the articles of association of the company that deprived the company of the capacity to delegate authority to a director to enter into contracts of that kind on behalf of the company. In fact, the articles empowered the board to delegate its powers to a managing director or to a single director.

board by their conduct had impliedly appointed him as the managing director, there was not sufficient factual evidence of this in *Freeman & Lockyer's* case. In *Freeman & Lockyer's* case the conduct of the board had not amounted to an implied appointment of Kapoor as the managing director, but amounted merely to an implied representation by the company that Kapoor had the usual authority of a managing director. This implied representation formed the basis of the ostensible authority of Kapoor.

It is submitted that there may in many instances be a fine and hazy distinction between a “silent acquiescence” by the board (which does not suffice to confer implied actual authority as in *Freeman & Lockyers' case*) and an acquiescence by conduct (which may suffice to confer implied actual authority as in *Hely-Hutchinson's case*). Nonetheless, it may be far clearer in other instances. Where, for example, a principal routinely ratifies unauthorised contracts entered into by the agent, a court may find that the principal has his by acquiescence granted implied authority to the agent.

The practical importance of this distinction is that implied actual authority is a relationship between the principal and the agent, created by a consensual agreement to which they alone are parties. To this agreement the third party is a stranger.⁵⁷ If there is an implied delegation of authority by the principal to the agent (ie implied actual authority), contracts concluded by the agent will be binding on the company regardless of the third party's good faith or his reasonable reliance. In contrast, ostensible authority depends on the relationship between the principal and the third party; the agent is a stranger to this relationship.⁵⁸ If an implied representation is made by the principal to the third party that the agent has authority, in order to assert ostensible authority, the third party must be able to show that he had relied on the representation and that his reliance was reasonable.

With regard to the term ‘usual authority’, it is important to appreciate that ‘usual authority’ may refer either to implied actual authority or to ostensible authority. Implied usual authority is implied from the nature of the office or the particular position to which the agent is appointed. For instance, the appointment of a person as the managing director of a company may

⁵⁷ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630 per Diplock LJ at 644.

⁵⁸ *Ibid.*

carry with it the implied usual authority to enter into contracts on behalf of the company and to do all such things as are within the usual scope of that office.⁵⁹

On the other hand, ostensible usual authority may arise where the principal imposes private restrictions on the usual authority of the agent, in which case such restricted usual authority could form the basis of ostensible authority but cannot form part of implied usual authority. By appointing a person say, as a managing director, despite limiting his actual authority to enter into contracts, the company thereby makes a representation that the managing director has the authority usually associated with managing directors to enter into contracts on the company's behalf. This would form the basis of ostensible authority if, unknown to the third party, restrictions are imposed on the usual authority of the managing director.

IV CHAIN OF OSTENSIBLE AUTHORITY

As so cogently expounded by Lord Pearson in *Hely-Hutchinson's* case,⁶⁰ for ostensible authority to arise, the representation which creates ostensible authority must be made by the principal to the third party. Since there is usually no direct communication between the board and the third party, it must be shown that the communication which is made directly by the agent to the third party is made ultimately by the board of directors. That may be shown by inference from the conduct of the board, for instance, by placing the agent in a position where he can hold himself out as their agent and by acquiescing in their activities, so that it can be said that they in effect caused the representation to be made.

The two most important types of representations that give rise to ostensible authority are, first, the holding out, or acquiescence by the company in a person acting in a particular way, as occurred on the facts of *Freeman & Lockyer's* case; and secondly, the appointment of a person to a particular office, for instance as managing director, in which case he has usual authority in the

⁵⁹ See eg *SA Securities v Nicholas* 1911 TPD 450; *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA). In *SA Securities v Nicholas* for instance, Bristowe J stated (at 461) that the mere fact of appointing a person as managing director gives him prima facie certain powers and that 'a person dealing with the managing director is entitled to assume that he has all the powers which his position as managing director would ostensibly give him'. This echoes the dictum in *Biggerstaff v Rowatt's Wharf Ltd* (1896) 2 ChD 93 that persons dealing with the managing director of a company are entitled to assume that he has the powers that he purports to have. In *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* [1979] 1 All SA 89 (W) (at 103) the court cautioned that this principle is subject to the proviso that the person relying on the authority of the managing director must have seen or heard nothing to put him on inquiry as to the validity of his assumption relating to that authority. This is in harmony with the general principle that usual authority does not extend to unusual or abnormal contracts.

⁶⁰ *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA) at 108.

sense of ostensible authority to do all acts that fall within the usual scope of the office – even if he exceeds private restrictions imposed by the principal on his actual authority.

For ostensible authority to arise, the agent must have been held out by the *principal* or by a person *with actual authority* to carry out the transaction. An agent cannot hold himself out as having authority. This is clear from the second point of the classic test of ostensible authority laid down in *Freeman & Lockyer*, and has since been affirmed by the House of Lords in subsequent cases.⁶¹ In the same vein, an agent who lacks authority may not bind his principal by over-representing (or overstating to a third party) someone else's authority, as held by the House of Lords in *British Bank of Middle East v Sun Life Assurance Co of Canada (UK) Ltd*,⁶² where a branch manager, without actual or ostensible authority, had made a representation that a junior manager had the requisite authority to enter into a contract.

The majority judgment in the *Vodacom* case remained true to the test in *Freeman & Lockyer*, in holding that Mr Geissler – taking into account his position and role as a director, the enormous power he wielded in respect of new products, the organisational structure and the process which had to be followed before a new product could be introduced at Vodacom – had by the conduct of the board been conferred ostensible authority to negotiate the contract with the applicant. In effect the majority judgment found that the board of Vodacom, ie the principal, had held out Mr Geissler as having authority to represent the company. The crucial representation made by the principal, which is required to establish ostensible authority, was thus found in Vodacom's appointment of Mr Geissler as Director of Product Development and the fact that he had been clothed by the board with the indicia of authority.

In contrast, the concurring judgment in the *Vodacom* case is, with respect, inconsistent with a strict reading of the test laid down in *Freeman & Lockyer*, in so far as Wallis AJ found that ostensible authority had been conferred on Mr Geissler by way of a representation made by the CEO, who himself had *no actual authority* but had merely ostensible authority. On a precise reading of *Freeman & Lockyer*, the CEO of Vodacom could not have conferred ostensible authority on Mr Geissler; only the board of Vodacom could have done so.

In light of the facts of this case the finding of Wallis AJ was arguably founded on an unnecessary analysis, as there was sufficient evidence to show that Mr Geissler had been held

⁶¹ *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] BCLC 78; *Armagas Ltd v Mundogas SA* [1986] 2 All ER 385, HL.

⁶² *Ibid.*

out by his principal, the Vodacom board, as having the necessary authority to contract with the applicant.

An alternative interpretation of the facts – that would still remain consistent with the test in *Freeman & Lockyer* – is that for the purposes of ostensible authority the representation in relation to Mr Geissler was made, not by the CEO, but by the board of directors in both appointing the CEO as such as well as in *acquiescing* in the CEO's further delegation of authority to Mr Geissler (in his capacity as director of the product development division) to conclude the contract with the applicant.⁶³

Nevertheless, the finding of Wallis AJ is a welcome one in so far as it extends the principles relating to ostensible authority in South African law. Wallis AJ stated that for the purposes of establishing ostensible authority, the representation need not necessarily be made by the principal; the representation may be made by an agent who has *ostensible* authority to make representations on behalf of the principal.⁶⁴ On this burning issue, there are two divergent schools of thought.

The first line of reasoning, which was accepted in the Australian case *Crabtree-Vickers (Pty) Ltd v Australian Direct Mail Advertising & Addressing Co (Pty) Ltd*,⁶⁵ is that for the purposes of ostensible authority a representation of authority must be made by a person with actual authority, and may not be made by a person who has only ostensible authority. In *Crabtree-Vickers*, an employee had signed a purchase order on behalf of the company and had purported to do so on the authority of the managing director. The managing director would have had usual authority to sign the purchase order but, since his actual authority had been restricted, he lacked the authority to make the purchase in question. The court found that had the managing director himself signed the purchase order, the company would have been liable on the basis of the ostensible authority of the managing director. But, because the managing director had lacked actual authority to sign the purchase order, he did not have the authority, actual or ostensible, to

⁶³ Had the board of directors of Vodacom acquiesced in past transactions in the CEO exceeding his limited actual authority, there may well have been implied actual authority on the part of the CEO, as occurred for instance on the facts of *Hely-Hutchinson's* case (see above). As a person with *actual* authority, a representation by the CEO would have sufficed to establish the *ostensible* authority of Mr Geissler. It is relevant to the question of implied authority that it was the customary practice at Vodacom for the CEO to make and implement business decisions *before* receiving the formal approval of the board. This fact could have supported a finding that the *CEO* had implied actual authority.

⁶⁴ *Supra* note 1 para 164.

⁶⁵ (1975) 133 CLR 72.

make a representation on behalf of the company that the employee had authority to sign. Accordingly the employee could not have had ostensible authority, and the company was not bound by the purchase order. In other words, a person who merely has ostensible authority cannot make representations as to the authority of other agents.

Had Wallis AJ adopted the approach in *Crabtree-Vickers*, the outcome would have been that, while the Vodacom CEO himself had ostensible (usual) authority to bind the company to a contract with the applicant, due to his lack of actual authority the CEO could not have made a valid representation in respect of Mr Geissler's authority. The result would have been that Mr Geissler would lack ostensible authority and that Vodacom would not have been liable to remunerate the applicant for his 'Please call me' concept.

The second and alternative line of reasoning is that an agent can have ostensible authority to make representations as to the authority of other agents, provided that his own authority can be traced back to a representation by the principal or to a person with actual authority from the principal to make it.⁶⁶

This principle has been accepted by some English case authority subsequent to *Freeman & Lockyer*, for instance by the court of first instance in *ING Re (UK) v R & V Versicherung AG*.⁶⁷ In *The Raffaella*⁶⁸ Browne-Wilkinson LJ stated as follows:

'It is obviously correct that an agent who has no actual or apparent authority either (a) to enter into a transaction or (b) to make representations as to the transaction cannot hold himself out as having authority to enter into the transaction as to affect the principal's position. But, suppose a company confers actual or *apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction; why should not such a representation be relied on as part of the holding out of Y by the company?*' [emphasis added].

On the basis of the second approach, the representation as to the authority of Mr Geissler could be made by a person with *ostensible* authority, such as the Vodacom CEO since, first, the representation in relation to the CEO was made by persons with actual authority (viz the Vodacom board) and, secondly, it could reasonably be interpreted as giving the CEO the authority to make representations to third parties about the authority of the Mr Geissler.

⁶⁶ See *Bowstead and Reynolds on Agency* 20ed (2014) 8-019.

⁶⁷ [2006] EWHC 1544 per Toulson J.

⁶⁸ [1985] BCLC 404.

It seems that the concurring judgment in the *Vodacom* case, by its obiter dictum, has now introduced this approach to South African law.

V IS ESTOPPEL THE BASIS OF THE TURQUAND RULE?

The Turquand Rule, developed in the famous case of *Royal British Bank v Turquand*,⁶⁹ was expressed as follows by the House of Lords in *Morris v Kanssen*:⁷⁰ persons dealing with a company in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular. This amounts to saying that proof by the company that its internal formalities and procedural requirements, as specified in its Memorandum of Incorporation, have not been complied with, is not sufficient to enable the company to escape liability under an otherwise valid contract – unless the third party knows or suspects that they have not been complied with.

The Turquand Rule is purposed at protecting bona fide third parties who are not aware of internal irregularities that may affect the validity of their contracts with the company. The rule, as stated in *Mahony v East Holyford Mining Co Ltd*,⁷¹ limits the inquiries that outsiders must make when dealing with companies.

The Turquand Rule is justified on the basis of business convenience.⁷² Business dealings with a company would be very inconvenient, if not perilous, if third parties were bound to inquire whether all the internal formalities required to authorise an agent have been complied with, each time a transaction is undertaken with the company.⁷³ The wheels of business would not run smoothly if third parties had to inquire whether all the internal formalities for a valid transaction have been complied with.

Wallis AJ in the concurring judgment in the *Vodacom* case baldly, and without considering all the authorities, stated in an obiter dictum with reference to *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) Ltd*⁷⁴ that the Turquand Rule of company

⁶⁹ (1856) 119 ER 886.

⁷⁰ [1946] 1 All ER 586 at 592.

⁷¹ (1875) LR 7 HL 869.

⁷² Cassim op cit note 24 at 181, 183; see also MP Larkin & FHI Cassim ‘Company Law’ in *Annual Survey of SA Law* (2002) 627 at 640 – 3; MP Larkin & FHI Cassim ‘Company Law’ in *Annual Survey of SA Law* (2001) 506 at 529; *Northside Developments (Pty) Ltd v Registrar-General* (1990) 2 ACSR 161 (HC of A); *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409.

⁷³ Farouk H I Cassim op cit note 24 at 181.

⁷⁴ 2015 (4) SA 623 (C) para 25.

law is merely an application of estoppel.⁷⁵ On the facts of *Vodacom*, it was unnecessary for the concurring judgment of Wallis AJ to make any pronouncement on this important issue in South African law. The *One Stop* case in turn held that:

‘I think it will be found, from an analysis of these and other leading authorities, that the Turquand Rule is simply an adjunct...of the law on ostensible authority, which is in turn a particular form of estoppel by representation’,⁷⁶

and that:

‘[i]n short, Turquand only comes to [the third party’s] aid once he has...made out a case for ostensible authority’.⁷⁷

This, with respect, is doubtful. The weight of authority in South African law – which the court in *One Stop Financial Services* also failed to consider – is against this approach.

In English law and Australian law, the common-law Turquand Rule had become interwoven with estoppel or ostensible authority – but not so in South African law, as discussed immediately below.

(a) *Authority in South African, English and Australian law*

In English law, *Freeman & Lockyer*⁷⁸ by implication introduced the proposition that the Turquand Rule formed part of estoppel. As explained in Paragraph III(b) above, the fourth point of the test of ostensible authority laid down in *Freeman & Lockyer* implicitly incorporates the Turquand Rule, and in so doing implies that the Turquand Rule is an element of the doctrine of estoppel when applied to companies. In other words, the inference is that the Turquand Rule operates only if the requirements of estoppel are satisfied. The practical consequence is that if the Memorandum of Incorporation of a company is relied upon to establish an estoppel, the third party must have known of, and have relied on, its contents.⁷⁹

In Australian law, the view expressed in *Freeman & Lockyer* was followed by the High Court of Australia in *Northside Developments (Pty) Ltd v Registrar-General*.⁸⁰ Although the five judges in the *Northside* case adopted significantly divergent opinions on the theoretical basis of

⁷⁵ Supra note 1 para 110.

⁷⁶ 2015 (4) SA 623 (C) para 25.

⁷⁷ Ibid para 41; see also para 29.

⁷⁸ [1964] 1 All ER 630.

⁷⁹ As discussed in Paragraph III(b) above; *Rama Corporation Ltd v Proved Tin and General Investments Ltd* [1952] 1 All ER 554.

⁸⁰ (1990) 2 ACSR 161 (HC of A).

the Turquand Rule and its relationship with agency principles, Brennan and Gaudron JJ in particular adopted the approach that the Turquand Rule is based on estoppel. The theoretical basis of the common-law Turquand Rule, however, has not been further developed in Australia after the *Northside* case, as a result of the statutory formulation of the Turquand Rule that was introduced into Australian law in the mid 1980s. Moreover the *Northside* case is not binding in South African law. It is at best persuasive.

In striking contrast with English and Australian common law, estoppel has not formed the basis of the common-law Turquand Rule in South Africa.⁸¹ In South African law the Turquand Rule has been used to impose liability on the company for unauthorised contracts where all that was lacking was compliance with internal formalities. In *Royal British Bank v Turquand*,⁸² the court made no reference to agency law and nothing was said about ostensible authority or estoppel. Furthermore in the leading South African case on the Turquand Rule, *Mine Workers Union v Prinsloo*,⁸³ the Appellate Division held, in effect, that the Turquand Rule is patently not part of estoppel.⁸⁴ The Turquand Rule in South African law has been treated as a separate and distinct company law principle designed to regulate dealings with a company. As such, it is not dependent on the requisites of estoppel.

To elaborate on the leading case of *Mine Workers' v Prinsloo*,⁸⁵ the Appellate Division ruled that a third party may rely on the Turquand Rule even if he does not have actual knowledge of the constitution of the company or actual knowledge of the relevant internal formality contained in the constitution. In so ruling, the Appellate Division effectively decided that estoppel does not form the basis of the Turquand Rule. This is because the doctrine of estoppel clearly requires the third party to have had actual knowledge of the particular clause (constituting a representation) in the company's constitution. But on the approach adopted in *Mine Workers' v Prinsloo* the outsider can rely on the Turquand rule even if he is not aware of the internal formality, for instance a clause in the company's Memorandum of Incorporation which states that the managing director may enter into a particular contract if he has the consent of the shareholders in general meeting.

⁸¹ See MJ Oosthuizen 'Aanpassing van die verteenwoordigingsreg in maatskappyverband' 1979 TSAR 1.

⁸² (1856) 119 ER 886.

⁸³ *The Mine Workers' Union v JJ Prinsloo*; *The Mine Workers' Union v JP Prinsloo*; *The Mine Workers' Union v Greyling* 1948 (3) SA 831 (A).

⁸⁴ *Ibid* at 849.

⁸⁵ *The Mine Workers' Union v JJ Prinsloo*; *The Mine Workers' Union v JP Prinsloo*; *The Mine Workers' Union v Greyling* 1948 (3) SA 831 (A).

In sharp contrast to the Turquand Rule, *Houghton v Northard Lowe & Wills*⁸⁶ and *Freeman & Lockyer*⁸⁷ are decisive authority that for the purpose of ostensible authority, the third party relying on a representation in the company's constitution must have actual knowledge of the constitution. Knowledge of the company's constitution is essential if the outsider is relying on a representation in the constitution to set up an estoppel. Without knowledge of the constitution, the third party cannot satisfy the requirement of 'reliance' on the representation, which is an essential element of estoppel (as explained in Paragraph III above). Since in South African law the Turquand rule – on the approach adopted in *Mine Workers' v Prinsloo*,– is not based on an estoppel, the third party in that case was protected despite his lack of knowledge of the relevant provision in the company's constitution.

The decision of what was then the Appellate Division in *Mine Workers' v Prinsloo* was followed in *Mahomed v Ravat Bombay House (Pty) Ltd.*⁸⁸ In *Mahomed v Ravat* the court correctly, with respect, stated that:

'[i]t is implicit in the judgment of the Appellate Division [in *Mine Workers' v Prinsloo*] that the [Turquand] rule is not based on estoppel'.⁸⁹

In *Farren v Sun Service SA Photo Trip Management (Pty) Ltd.*,⁹⁰ in an obiter dictum it was implicitly accepted that the Turquand Rule is independent of estoppel. The court in *Farren's* case stated that:⁹¹

'the onus to be discharged in order to establish estoppel is far greater than that which is necessary to establish the operation of the Turquand rule.'

It seems therefore, that the weight of authority in South African law favours the proposition that the Turquand Rule is in an independent company law rule, which operates independently of the principles of ostensible authority or estoppel.

One Stop Financial Services seems to have overlooked all the above South African authorities in stating that:

'I think it will be found, from an analysis of these and other leading authorities, that the Turquand rule is simply an adjunct...of the law on ostensible authority, which is in turn a particular form of estoppel by representation'.⁹²

⁸⁶ [1927] 1 KB 246.

⁸⁷ [1964] 1 All ER 630.

⁸⁸ 1958 (4) SA 704 (T).

⁸⁹ Ibid at 706.

⁹⁰ 2004 (2) SA 146 (C).

⁹¹ Ibid para 28.

The endorsement of this approach by Wallis AJ in the concurring judgment in the *Vodacom* case is most regrettable and disappointing.

(b) Policy considerations

Quite apart from existing authority in South African law, there are compelling considerations of policy for treating the Turquand Rule as an independent sui generis rule of company law, which operates independently of estoppel.

If the Turquand Rule is regarded as an independent rule of company law, the practical significance is that a company would be bound to a contract *either* on the basis of the Turquand Rule or on the basis of ostensible authority. The third party would be entitled to rely on the Turquand Rule even though the requirements of estoppel or ostensible authority have not been fulfilled, and even if he had no knowledge of the contents of the company's Memorandum of Incorporation. This widens the scope of the Turquand Rule.

If, on the other hand, the Turquand Rule (or presumption that internal formalities have been complied with) is treated as a mere adjunct of estoppel, the practical effect would be that a company would not be bound to a contract where the Turquand Rule applies, unless the third party also proves the requirements of estoppel. This would have the effect of undermining the Turquand Rule in our law. It would increase the burden on the third party, who would have to prove, additionally, all the requirements of estoppel in order to hold the company liable on a contract. This would reduce the protection of bona fide third parties dealing with companies, and would run contrary to the interests of business convenience on which the Turquand Rule is founded. As a matter of policy, why should a company be allowed to prejudice bona fide third parties by failing to comply with its own internal formalities and procedures?

The effect of treating the Turquand Rule as being part of estoppel would be to undermine a common law rule that over the years has proved to be most useful. It would also have the result that in many situations where the company has failed to comply with an internal formality contained in its constitution, the third party would be unable to set up an estoppel and the company would escape liability on the contract. Two requirements of estoppel that are particularly problematic in these situations are, first, the requirement that a representation must have been made by the company and, secondly, the requirement that the third party must have

⁹² *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) Ltd* 2015 (4) SA 623 (C) para 25.

relied on the representation, ie he must have had knowledge of it. The practical problems associated with the second requirement have been illustrated above in discussing the facts and the decision of the Appellate Division in *Mine Workers' v Prinsloo* (see Paragraph V(a)).

As for the practical obstacle imposed by the first requirement, this is best demonstrated by way of an example. For instance, a clause in the Memorandum of Incorporation of a company authorises the chairman to enter into a contract on behalf of the company provided that the contract is approved by a resolution of the shareholders in general meeting. If this internal formality has not been complied with, insofar as no shareholder resolution was in fact obtained, the third party may rely on the Turquand Rule as an independent company law rule to hold the company bound to the contract – even though the requirements of estoppel are not satisfied. If, however, the Turquand Rule is reduced to a mere application of estoppel, the consequence is that the third party would fail to set up an estoppel and the company would escape liability on the contract. This is because there is no representation by the company that would give rise to an estoppel. The clause in the Memorandum of Incorporation does not amount to a representation by the company that the internal formality of obtaining a shareholder resolution has in fact been complied with. Nor does the mere appointment of the representative as the chairman amount to a representation by the company that he has authority, bearing in mind that the chairman of the board has limited usual authority to bind the company. It is thus clear that the question of the juristic nature of the Turquand Rule is not merely an academic issue – it will give rise to significant and far-reaching practical consequences for third parties who deal with company representatives.

Moreover in South African law, unlike in English and Australian law, the approach that the common-law Turquand Rule is an adjunct of estoppel cannot be justified on the basis of policy considerations, as our Companies Act does not have any statutory formulation or provision equivalent to s 40 of the United Kingdom Companies Act of 2006 or for that matter, ss 128 and 129 of the Australian Corporations Act, 2001. The indoor management rule (or Turquand Rule) and the concept of ostensible authority in Australian law are now encapsulated in ss 128 and 129 of the Australian Corporations Act, 2001. In contrast the South African Companies Act 71 of 2008 has in s 20(7) a statutory indoor management rule but not a statutory concept of ostensible authority. According to ss 128 – 129 of the Australian Corporations Act, a person dealing with a company may make certain important assumptions. He may assume, inter

alia, that the company's constitution has been complied with, and that a director has been duly appointed and that he has the powers customarily exercised by a director of a similar company. He may make a similar assumption with regard to anyone who is held out by the company to be an officer or agent.⁹³ These assumptions may, however, not be made if at the time of the dealings with the company the third party knows or suspects that the assumption is incorrect.⁹⁴ Similarly, the Turquand Rule has been codified by s 40 of the United Kingdom Companies Act, 2006. The English statute not only supplements but even exceeds the protection that is given to third parties by the common-law Turquand Rule. The section states that in favour of a person dealing with a company in good faith, the power of the board of directors to bind the company or to authorise others to do so is deemed to be free of any limitation under the company's constitution. A person dealing with the company is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorise others to do so.⁹⁵ Notably, a person is not to be regarded as acting in bad faith merely because he knows that an act is beyond the powers of the directors under the constitution of the company⁹⁶ or beyond their authority. Unlike the common-law rule, s 40 is not negated by actual knowledge of the irregularity. The section thus surpasses the protection given to third parties by the common-law Turquand Rule.

In South African law the scope and ambit of the Turquand Rule are already sufficiently limited by qualifications that temper the effect of the rule. If a person knows of the company's failure to comply with an internal formality, or if there are suspicious circumstances which put him on inquiry, he is barred from relying on the Turquand Rule.⁹⁷ The Turquand Rule cannot be relied on by a person who is put on inquiry.⁹⁸ The Turquand rule does not apply to an insider such as a director, where the insider is in a position to know whether there has been compliance with internal requirements.⁹⁹ Of fundamental importance, as laid down in *Houghton v Northard*

⁹³ Section 129 of the Australian Corporations Act, 2001.

⁹⁴ Section 128(4) of the Australian Corporations Act, 2001.

⁹⁵ Section 40(2)(b)(i) of the United Kingdom Companies Act, 2006.

⁹⁶ Section 40(2)(b)(iii) of the United Kingdom Companies Act, 2006.

⁹⁷ *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 (CA); *Morris v Kanssen* [1946] 1 All ER 586; *Burnstein v Yale* 1958 (1) SA 768 (W); *Houghton v Northard Lowe & Wills* [1927] 1 KB 246.

⁹⁸ *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48.

⁹⁹ *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 per Roskill J, who held that a director is an insider only if the transaction with the company was so intimately connected with his position as to make it impossible for him not to be treated as knowing of the limitations on the powers of the officers through whom he dealt. See also *Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 1576; *Morris v Kanssen* [1946] 1 All ER 586.

*Lowe & Wills*¹⁰⁰ and *Wolpert v Uitzigt Properties*,¹⁰¹ is that the Turquand rule does not entitle a person contracting with a company to assume that the board of directors has delegated its powers to a particular person merely because the constitution contains a power to delegate. While the Turquand rule may entitle an outsider to assume that the board had as a matter of internal management delegated its authority to someone in *general*, it does not - in the absence of any ostensible authority - entitle the outsider to assume that the board has appointed a *specific* person as the authorised agent of the company. In this situation the outsider would have to rely on ostensible authority and the principles of agency to resolve the issue. As stated in *Wolpert v Uitzigt Properties*¹⁰² it cannot be assumed that a particular person has been appointed to a position within the company merely because he could have been appointed in terms of the constitution. To apply the Turquand Rule in this situation would be to place companies at the mercy of any person who purports to contract on their behalf. A further limitation is that the Turquand Rule does not apply to forgeries.¹⁰³ In view of these limitations to the Turquand Rule, there is no need to further limit the rule by treating it as part of estoppel.

In conclusion, an analysis of leading authorities in South African law favours the approach that the Turquand Rule is an independent rule of company law, which operates independently of the principles of ostensible authority or estoppel. As asserted above, this approach is also supported by considerations of policy. The introduction of the statutory formulation of the Turquand Rule in 20(7) of the Companies Act 71 of 2008 in no way lessens the importance of this issue, for the common-law Turquand Rule remains relevant in South African law both as a supplementary rule to s 20(7) and as an aid to the interpretation and application of s 20(7). The Turquand Rule has an important residual role to play in South African law. For sound policy considerations, the temptation must be resisted to reduce the Turquand Rule to purely agency concepts.

VI CONCLUSION

It is not a bad thing when the courts attempt to do justice between the parties to a legal dispute. It is unacceptable, however, when the courts do this by unsettling settled law that is backed by

¹⁰⁰ [1927] 1 KB 246.

¹⁰¹ 1961 (2) SA 257 (W).

¹⁰² Ibid at 263.

¹⁰³ Farouk HI Cassim op cit note 24 at 183; *Ruben v Great Fingall Consolidated* [1906] AC 439.

authority. This, in effect, is what the majority and the concurring judgments of the Constitutional Court in *Makate v Vodacom (Pty) Limited* did.

Ostensible authority and estoppel, with respect, refer to the same set of circumstances, and have substantially the same elements and requirements. The weight of authority in both South African and English law overwhelmingly supports this view. Insofar as the majority judgment in the *Vodacom* case held otherwise, it has the potential to create an undesirable conundrum in our law when company representatives enter into contracts with third parties.

The Turquand Rule has always been regarded in South African law as a separate and independent company law principle, that does not depend on proof by the third party of the requisites of estoppel. The weight of South African authority, as laid down by the Appellate Division and supported by later obiter dicta, is clearly in support of this approach. Quite apart from existing authority, there are compelling considerations of policy and fundamentally important practical reasons for the Turquand Rule to continue to operate as an independent sui generis rule. The bald obiter dictum to the contrary in the concurring judgment in the *Vodacom* case is, with respect, disappointing and ought not to be followed. The approach that the Turquand Rule is an independent rule of company law rather than being a part of estoppel is the preferable view as, unlike the *One Stop Financial Services* case, it is backed by judicial authority in South African law.

Company law in general and the courts in particular must seek to draw and preserve a proper balance between the interests of bona fide third parties dealing with a company, and the interests of the company itself and its directors and shareholders. In setting out the purposes of the Companies Act 71 of 2008, s 7 envisages this sort of fine and delicate balancing of the conflicting interests of the various stakeholders of a company. This to a large extent is the task of the courts. The common law principles of ostensible authority and the Turquand Rule have always been designed to protect bona fide third parties contracting with companies. The courts must continue to cultivate and maintain the careful balance which these company law doctrines have sought to achieve.

Finally, there are two divergent schools of thought on the burning issue of whether it is possible to establish a chain of ostensible authority. The suggestion by the concurring judgment in the *Vodacom* case that it is indeed possible to do so is a welcome one, for it may usefully expand the principles relating to ostensible authority in South African law.