

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 09/52659

In the application between

SCREEN WORLD PROPRIETARY LIMITED

t/a OFF THE WALL

APPLICANT

And

MEDSHIELD MEDICAL SCHEME

RESPONDENT

JUDGMENT

EF Dippenaar AJ

[1] This is an application by the Applicant for payment of certain monies as contractual damages together with interests and costs pursuant to the repudiation and subsequent cancellation of a written agreement concluded between the parties in terms of which the Respondent procured certain

advertising services from the Applicant. The Respondent denies its liability on one ground only and contends that the agreement is not enforceable or binding on it because its chief principal officer at the time of conclusion of the agreement, a Mr Clinton Ally (“Ally”), was not authorised to conclude the agreement on its behalf and that the agreement is accordingly invalid.

- [2] The majority of the facts giving rise to the current application are common cause and are, in summary, the following: On or about 18 August 2009 a written agreement styled Advertising Contract was concluded between the Applicant and the Respondent, the latter represented by its executive principal officer, Ally, to perform certain advertising services. Prior to the conclusion of this agreement, the parties had previously and on the 16th of November 2007 concluded a similar written agreement for similar services, which had endured for a period of 15 months and in respect of which an amount in excess of R3,2 million was paid by the Respondent to the Applicant. At the time of conclusion of the earlier agreement, the Respondent had similarly been represented by Ally. The Respondent is a registered medical scheme, thus registered in terms of the Medical Schemes Act 131 of 1998. In terms of section 57 of the said Act, the business of the Respondent is governed by a board of trustees in terms of the Act and its rules, which, *inter alia*, regulate the powers of the board of trustees and its principal officer.

- [3] In terms of the written agreement here in issue, the Applicant would be entitled to a cancellation fee of 75% of the incomplete portion of the

advertising contract and would be entitled to payment of the advertising space already delivered by it.

- [4] There is no dispute between the parties that the amounts claimed relate to the aforesaid amounts. It is also common cause that the Respondent repudiated the terms of the agreement concluded between the parties and that the agreement was cancelled.
- [5] The main issue to be determined is accordingly the authority issue raised by the Respondent. In response thereto, the Applicant has raised an estoppel against the denial of authority of Mr Ally and it relies on Ally's actual or ostensible authority as chief principal officer of the Respondent.
- [6] In response to the Applicant's contention that the Respondent's board of trustees were aware of the earlier contract and authorised payment being made in respect thereof, and must have expressly or implicitly approved of Ally's conclusion of the agreement, the Respondent filed a further affidavit in which it denied that its board of trustees was aware of the fact that Ally had concluded the earlier agreement with the Applicant and was unaware of the payment made to the Applicant pursuant thereto. On this basis, the Respondent denies that it made any representation to the Applicant which can form the basis of an estoppel.
- [7] The Respondent contends that there is an irresolvable dispute of fact on the papers on the issue of whether any representation was made by the

Respondent and that the matter should be referred to trial, in the event that the application is not dismissed. The Respondent invited me to dismiss the application because the Applicant was, prior to institution of the proceedings aware of the Respondent's defence and the existence of irresolvable factual disputes and should have proceeded by way of action. On the other hand, the Applicant contends that the disputes of fact raised by the Respondent are not *bona fide* and that the matter can be resolved on the papers.

- [8] These contentions necessitate an analysis of whether there are any disputes of fact and if so, whether such disputes are *bona fide*. The true dispute is narrower than the issues surrounding the indication of estoppel as the only aspect of the estoppel which is disputed is whether or not the Respondent represented to the Applicant that Ally was authorised to conclude the agreement. It is trite that any disputes of fact must be genuine. See: **Soffiantini v Mould**, 1956 (4) SA 150E. The representation relied upon by the Applicant, lies in the following:

[8.1] Ally concluded the earlier contract with the Applicant in his capacity as executive principal officer of the Respondent;

[8.2] The earlier contract was implemented for its full duration of 15 months during which time the Respondent paid the Applicant in excess of R3.2 million for the services rendered;

[8.3] Ally was at all material times the executive principal officer of the Respondent, signed the agreements in that capacity and on at least one occasion confirmed to the Applicant that as such, he had the requisite authority to do so;

[8.4] The agreement here in issue was for all intents and purposes merely a renewal of the earlier agreement;

[8.5] The Applicant was at no stage prior to the current dispute arising, informed by the Respondent that Ally did not have the requisite authority to conclude the agreement, nor were the Respondent's Rules and Procurement Policy brought to the Applicant's attention; i.e. there was nothing which would have put the Applicant on its guard that Ally did not have the requisite authority to conclude the agreement in question;

[8.6] By virtue of the Respondent's conduct the Applicant, at all material times, believed that Ally was duly authorised to conclude the 2009 contract on behalf of the Respondent.

[9] The Respondent does not dispute that Ally was at all material times the executive principal officer of the Respondent, but contends that the board of trustees of the Respondent was not aware of the initial contract or the payments made in terms thereof and the board of trustees had not authorised Ally to conclude the agreements relied on by the Applicant. As such, it is

argued that the Respondent cannot in law be estopped from denying Ally's authority and the enforceability of the agreement.

[10] The Applicant contends that irrespective of whether Ally had actual authority or not, the representation of his appointment as chief principal officer was sufficient to cloth him with such ostensible authority as to constitute the representation element of the estoppel.

[11] The relevant principles to import liability on a party based on ostensible authority are set out in **NBS Bank Limited v Cape Produce Co (Pty) Limited and Others**, 2002 (1) SA 396 SCA, at paragraph 26. The Applicant must accordingly prove:

[11.1] A representation by words of conduct;

[11.2] A representation made by the Respondent and not Ally that he had the authority to act as he did;

[11.3] A representation in a form such that the Respondent should reasonably have expected that outsiders would act on the strength of it;

[11.4] Reliance by the Applicant on the representation;

[11.5] The reasonableness of such reliance;

[11.6] Consequent prejudice to the Applicant.

[12] At 411H to 412B the Supreme Court of Appeal held:

“Where a principal is liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, it is accordingly the principal that must create the impression that the agent is entitled to act on its behalf. It is not enough that an impression was in fact created as a result of the presentation. It is necessary that the representee should have acted reasonably informing that impression. Although an intention to mislead is not a requirement for estoppel, where such an intention is lacking and a course of conduct is relied on as constituting the representation, the conduct must be of such a kind as could reasonably have been expected by the person responsible for it, to mislead. Regard is had to the position in which he is placed and the knowledge which he possesses. A court will not hold a person bound by consequences which he could not reasonably expect and are therefore not the natural result of his conduct.”

[13] The representations by Ally as to his authority accordingly do not assist the Applicant and it is the conduct of the Respondent itself which must be scrutinised. The first salient feature of this conduct is to examine the appointment by it of Ally as chief principal officer of the Respondent.

- [14] The Applicant contends that the Respondent's board of trustees in the circumstances and specifically through its conduct, represented to the Applicant that Ally had the necessary authority to conclude the initial and the contract upon which it relies in this application and that in the circumstances the Respondent is estopped from denying that Ally had the authority to conclude the agreement in issue.
- [15] The Applicant disputes that knowledge by the Respondent's board of trustees of the initial contract and its authorisation of the payment is the relevant information. Relying on the judgment in the **NBS** case, *supra*, the Applicant contends that the mere fact that Ally acted as the principal executive officer of the Respondent, to the knowledge of the Respondent's board of trustees, is sufficient to found the representation as required for a successful reliance on estoppel. The Applicant further pointed out that the Respondents new principal executive officer, who deposed to the affidavit of the Respondent, was at the relevant time not a member of the board of trustees of the Respondent and has no personal knowledge of what the state of knowledge of the Respondent's board of trustees was at the time the contracts were concluded. As such, the Applicant alleges that the Respondent's denial of knowledge rings hollow as it is not supported by evidence of an individual with personal knowledge thereof. On this basis the Applicant contends that there is no fact *bona fide* factual dispute regarding this issue.
- [16] The Applicant contends further, and I agree with this contention, that it is however not necessary for the Applicant to prove actual knowledge by the

board of trustees of the Respondent of the initial contract and the payments made to the Applicant, but that the element of a representation is sufficiently proved by the undisputed contention that Ally was at the time the chief executive officer of the Applicant and held himself out as such. In this context the knowledge of the board of trustees of the Respondent is not relevant as they clearly were aware of this fact.

[17] It is trite that the representations made by Ally himself and the fact that he held himself out as being authorised to act as he did, is irrelevant to the enquiry in the current matter. It needs to be determined whether it is undisputed on the papers that the Respondent had created the reasonable impression with the Applicant that Ally was entitled to conclude the agreement on its behalf. Irrespective of whether the Applicant was aware of the existence of the board of trustees of the Respondent, it cannot be expected of it to be aware of the inner dealings and ambit of the authority afforded to the Respondent's principals. The chief principal officer of an entity is its public face to the world and is the person who is authorised to speak and act on behalf of the Respondent. If something should have been beyond the competence of a lesser official.

[18] The Applicant in these circumstances was, in my view, entitled to accept that the individual involved, being the chief principal officer, knew of his own authority limitations and would respect them so that when he dealt with the Applicant, he had the full authority of the Respondent to do so. The Respondent had therefore created a platform for Ally to act, as he did, whilst

creating a code of regularity and order. It is in the totality of these appearances that the representation can be found upon which the Applicant relies.

[19] The Respondent's appointment of Ally as the chief principal officer is accordingly to be seen not as a nude appointment, but as an appointment with all its trappings, set in a specific context. Seen in this context, the appointment of Ally carries with it, at least to the mind of the Applicant the powers usually conferred upon a person thus appointed and the Applicant was not and could not reasonably have been aware of the Respondent's internal procedures and regulations and any curtailment of Ally's authority. The Respondent has not provided any evidence of what Ally's actual authority was and merely relied in general terms on its rules and procedures, provided by an individual with no personal knowledge of the actual position. In my view, the authority to conclude agreements is one usually to be associated with the chief principal officer of an entity, as envisaged by Bowstead on Agency and enunciated in **Monzali v Smith**, 1929 AD 382 at 385. See also **Glofinco v Absa Bank Limited**, 2002 (6) SA 470(A) paragraphs 14, 15 and 18.

[20] Insofar as the Applicant has placed reliance on the conclusion of and performance in terms of the earlier agreement, the Respondent contends that it cannot be held liable when it did not even know of the earlier contract and the payments made by Ally in terms thereof.

- [21] The Respondent further placed reliance on **Concor Holdings (Pty) Ltd t/a Technicrete v Potgieter**, 2004 (6) SA 491 SCA at 495B and **Electrolux (Pty) Ltd v Khota and Another**, 1961 (4) SA 244 W at 246A-C, dealing with representation by conduct. The Respondent further contends that the Applicant has not sought to overcome the hurdle of its lack of knowledge, but has relied on some speculative conduct which the Respondent denies, to have been committed by its board of trustees. The Respondent contends that the Applicant's case hinges on the allegation that the Respondent's board of trustees knew about the initial contract and that it authorised payments of some R2,3 million in terms of that contract. I disagree with the Respondent that the Applicant's case hinges on such a narrow basis as on my reading of the papers, the basis of the representation relied upon by the Applicant is much wider and includes the conclusion of the agreement by a person appointed by the Respondent as chief principal officer, within the ambit of functions normally performed by such person.
- [22] The Respondent further contends that no evidence has been placed before the Court to establish that the Respondent's board of trustees knew about the initial contract and that it authorised the payment of sum R2,3 million to the Applicant. I disagree with the Respondent that it was incumbent upon the Applicant to do so. Moreover, it is not necessary for the Applicant to prove actual authority as it can rely on implied authority.
- [23] Other than relying in general terms on its internal procedures, rules and policies, the Respondent has not provided any evidence to clarify the extent of

Ally's actual authority and has not produced his employment contract or the minutes of any trustees' meeting where the extent of Ally's authority was determined. The Respondent, apparently because it was unaware of its existence, did not question the existence of the initial contract and did question Ally on his authority to conclude the initial contract. This explanation is unsatisfactory and does not begin to explain how it came about that the Respondent was unaware of the existence of the earlier agreement. The Respondent was in a position to set up more than a bald denial of the Respondent's knowledge of the earlier agreement and the payment made in terms thereof and to provide exact information regarding the actual authority of Ally, but failed to do so. In this context it must be borne in mind that the Respondent's denial of knowledge of the initial agreements and the other elements of the representation as relied upon by the Applicant does not stem from personal knowledge, but is made by an individual, occupying the same post as Ally who has not sought to explain how he has acquired knowledge of the board of trustees' lack of knowledge. As such, it is doubtful whether this dispute can be considered as being *bona fide*, for purposes of determining whether the matter should be referred to trial or oral evidence.

- [24] In any event, in considering whether the Respondent ought reasonably have expected that the Applicant may in the circumstances have been misled that Ally was authorised to conclude the agreement and whether the Applicant was reasonable in construing the available facts in the sense it did, in other words; that Ally was authorised. I am satisfied that the Applicant's interpretation of the available facts was reasonable and that the Respondent ought to have

reasonably expected the Applicant to be misled, even though it might not have been aware of the agreement, as it reasonably should have been. Even if I am wrong on this issue, it is not the crux of the matter, specifically in light of my above findings and the Applicant has on an undisputed basis illustrated that a representation was made by the Respondent, which can found an estoppel. It would in the circumstances serve no purpose to have this issue referred to evidence and a referral to trial or oral evidence would be superfluous and a waste of both time and money.

[25] I accordingly find that no genuine disputed fact exists on the issue of the Respondent's representation by conduct and that the conduct of the Respondent is sufficient to constitute a representation for purposes of the Applicant's reliance on an estoppel.

[26] The Respondent has not disputed that the Applicant had relied and acted on the representation that Ally was authorised to conclude the agreement and in doing so, acted to its prejudice. Moreover, the reasonableness of the Applicant's reliance on the representation of Ally's authority has not been contested.

[27] Mindful of the test enunciated in **Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd**, 1984 (3) SA 623 A and the admissions contained in the Respondent's affidavits, I am of the view that the matter can be decided on paper and that in the circumstances the Applicant is entitled to the relief it seeks.

[28] I accordingly make the following order:

[28.1] The Respondent is directed to make payment to the Applicant of the amount of R424 718,00;

[28.2] The Respondent is directed to make payment to the Applicant in the amount of R1 592 694,00;

[28.3] The amounts in [28.1] and [28.2] shall bear interest at the rate of 15,5% per annum calculated from 30 November 2009 to date of payment;

[28.4] The Respondent is directed to pay the costs of this application.

EF DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	11 May 2010
Date of judgement	:	24 November 2010
For Applicant	:	Adv C J McAslin Werksmans Inc
For Respondent	:	Adv K Tsatsawane Eversheds

