IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4057/2013

In the matter between:

ENGEN PETROLEUM LIMITED Plaintiff

and

AAC AGRI FOODS CC (*Reg: 2005/052381/23*) 1st Defendant

ADAM JOHANNES SWANEPOEL 2nd Defendant

HEARD ON: 18 APRIL 2017

JUDGMENT BY: REINDERS, J

DELIVERED ON: 31 AUGUST 2017

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[1] The plaintiff is Engen Petroleum Limited, a company incorporated in terms of the company laws of South Africa with head offices in Cape Town ("Engen South Africa"). The summons avers that the

first defendant AAC Agri Foods CC (and for that matter the second defendant Mr Adam Johannes Swanepoel, a surety) is indebted to plaintiff for payment of the amount of R 8 077 714.98 together with interest at the rate of 15,5% calculated from 3 March 2011 to date of final payment. A further order as to costs is sought.

[2] The defendant's alleged indebtedness arose in that the first defendant did business with Engen Lesotho Pty Ltd, a company registered as such in the Kingdom of Lesotho ("Engen Lesotho"). Engen South Africa acquired this claim on or about 10th October 2013 when Engen Lesotho sold the aforesaid claim to plaintiff. Plaintiff further avers that delivery of such claim took place by way of a cession of rights of action by Engen Lesotho in favour of the plaintiff. A copy of the sale agreement and cession of rights of action is annexed to the particulars of claim as respectively "**POC 2.1**" and "**POC 2.2**."

[3] The defendants deny being indebted to the plaintiff in the amount alleged or any amount at all. In particular for purposes hereof the defendants deny the sale agreement and cession of rights of action upon which plaintiff relies.

[4] In a minute of pre-trial conference held on 21 September 2015 it was agreed between the parties that the court at the commencement of the trial would be requested to first adjudicate two questions, to wit whether the claim of Engen Lesotho has been effectively ceded to the plaintiff as evidenced in annexures "**POC 2.1**" and "**POC 2.2**" and further whether the written deed of

surety annexed as annexure "**POC 3**" to the particulars of claim complies with the provisions of sec 6 of the **General Law Amendment Act 10 of 1956** (the "Act") at the time of the execution thereof. At the commencement of the trial I so ordered and all remaining issues were to stand over in terms of rule 33 (4) of the Uniform Rules of Court for later adjudication.

[5] The plaintiff called six witnesses in total to testify. The first three witnesses, Messrs Francis Kennedy, Francis (Moonsamy) Chetty and Theodor Molopo testified as to the authority of the parties to enter into the agreement ("**POC 2.1**" and "**POC 2.2**"). The remaining witnesses Mrs Hooper, Mr Hooper and Mr Visser testified *inter alia* as to the completeness of the suretyship when it was executed. All the witnesses were good and honest witnesses and their testimonies were not gainsaid or seriously broken down in cross-examination. The defendants did not adduce any evidence.

[6] Relevant for purposes hereof Mr Kennedy's testimony boiled down thereto that he was the signatory on behalf of Engen South Africa of "**POC 2.1**" and "**POC 2.2**". He did not rely on any delegation or decision by the board of directors of Engen South Africa to sign the documents but was instructed to do so by Mr Chetty. He was a business manager of Engen South Africa but not a director of the company. In cross examination he conceded that none of the delegated authorities authorised him to so purchase on behalf of Engen South Africa any moveables nor incorporeal rights to the value of eight million rands.

[7] Mr Chetty for purposes of his authority relied on a written resolution of the board of directors of Engen South Africa which was passed apparently at Cape Town on 10 August 2014 (the "resolution"). The said document resolves as follows:

" JUDICIAL, ADMINISTRATIVE AND OTHER PROCEEDINGS

RESOLVED,

1. That any Director of this Company or any Legal Advisor of Engen Petroleum Limited for the time being be, and each of them individually is hereby authorised, for and on behalf of this Company to:

   1.1 institute, prosecute, defend, oppose or partake in any legal administrative or other proceedings (urgent or otherwise) whether in a court of law, special court arbitration tribunal, mediation or other forum in the RSA or elsewhere and generally to represent this company in any proceedings of whatever nature and to make any affidavit and execute powers of attorney and/or any other document on behalf of this Company and in regard thereto.

   1.2 Sign all such proofs, affidavits, powers of attorney (containing such terms and conditions as he/she in his/her discretion deemed fit) as may be required from time to time for the proof of this Company's claims or object or oppose any other claims of any nature whatsoever against any insolvent, deceased or other estates, any natural or legal persons in liquidation (provisional or final), or under judicial management, or in respect of any procedures regarding an offer of compromise, arrangement or any other scheme and to attend and vote at any meeting (either in person or by proxy) of any nature whatsoever and to vote thereat in respect of this Company's claims as he/she in his/her discretion deems fit.

1.3 Note, prosecute and partake in any appeal or review against any judgement, decision, order or other determination made in respect of any of the aforesaid proceedings.

2. That any Director of this Company or Legal Advisor of Engen Petroleum Limited may delegate all or any of these powers and authorities in this regard to anyone else.

3. That a written certificate under the hand of the said authorised person, or the Secretary or any Director of this Company, as to any such delegation, shall be proof of that fact for all purposes."

[8] Mr Chetty who was the credit manager of Engen South Africa at the time opined that "**POC 2.1**" and "**POC 2.2**" were documents contemplated in clause 1.1 of the written resolution of the board of directors.

[9] Mr Molapo is the managing director of Engen Lesotho and signed "**POC 2.1**" and "**POC 2.2**" at the time in his capacity as the territorial manager. According to the plaintiff's trial bundle the authority that was delegated to Mr Molapo at the time reflects similar provisions as the Engen South Africa's resolution dated 10 August 2004 alluded to herein before.

[10] On behalf of the plaintiff Mr Van der Spuy contended that the plaintiff could rely on the Kingdom of Lesotho's Companies Act 18 of 2011 (with the regulations thereto) and that in terms of sec 1(1) and (2) of the **Law of Evidence Amendment Act 45 of 1998** I could take judicial notice of the law of a foreign state. I was referred to **KWIKSPACE MODULAR BUILDINGS LTD V SABODALA MINING CO SARL AND ANOTHER** 2010 (6) SA 477 (SCA) where the Supreme Court reiterated *inter alia* the principle that there is a presumption that South African and foreign law are the same. I agree with him.

[11] Mr Van der Spuy submitted that Engen South Africa merely took over the bad debt of Engen Lesotho as it was crippling to the Lesotho company and that similar cessions were frequently executed in order to assist them with various operational requirements. The decision to execute the documentation was however taken for legal purposes by Engen South Africa. In that regard Mr Molapo merely complied with the holding company's wishes and executed the documents on 10 October 2013. He did so with the knowledge of Mr Kennedy. On the face of it, so was argued, the transaction was performed in the ordinary course of business and between Messrs Chetty, Kennedy and Molapo was

never any doubt that their actions were properly authorised. As such they reported to their superiors in the normal course of business.

[12] With regards to authority the plaintiff accepted that it carries the onus to proof same on a balance of probabilities. It was contended that the facts suggest that Mr Molapo had ostensible authority having regard to the following factors:

12.1 His job description.

12.2 His position as director of Engen Lesotho.

12.3 Engen Lesotho is a subsidiary company and (in the ordinary course of business) follows the instructions of the holding company (Engen South Africa), and/or that repeatedly different constituted boards failed to object to Mr Molapo's management of the company.

12.4 Mr Molapo's actions have been reported via management reports and audits without questioning his authority.

[13] It was submitted that in dealing with Engen Lesotho the officials of Engen South Africa would have been under the impression that Mr Molapo was duly authorised to execute the documents. I was urged to find that the impression created by his position and title was similar to a façade of regularity.

See: **NBS BANK LTD V CAPE PRODUCE CO (PTY) LTD AND OTHERS** 2002 (1) SA 396 (SCA) at 414 par [33] ;

NORTHERN METRO COUNCIL V COMPANY UNIQUE 2012 (5) SA 323 (SCA) at 340 E to 341 E.

[14] It was contended by Mr Van der Spuy that Mr Chetty had express authority to instruct Mr Kennedy to execute the documentation and at worst Engen South Africa had ratified the actions of Messrs Chetty and Kennedy.

[15] Mr Pretorius argued that plaintiff had to properly identify the signatories as well as their authority so to act and plaintiff in its pleadings did not rely on either estoppel or ostensible authority. In its replication it relied on ratification by Mr Chetty. He referred me to **ROSEN V BARCLAYS NATIONAL BANK LTD** 1984 (3) SA 974 (W) and contended that in our law estoppel can in any event only be used as a weapon of defence and it cannot create a cause of action where none existed before (at 983 I). It was contended if neither of the signatories to the deed of sale or the cession had the necessary authority they were invalid.

See: **CITY OF TSHWANE METROPOLITAN MUNICIPALITY v RPM BRICKS (PTY)** LTD 2008 (3) SA 1 (SCA).

[16] Relying on **MAKATE v VODACOM** 2016 (4) SA 211 (CC) Mr Pretorius argued that ostensible authority had to be pleaded and proved whilst *in casu* it was not relied upon in the pleadings.

[17] The authority of an agent is a question of fact and may either be actual or implied.

See: **INTERCONTINENTAL FINANCE AND LEASING CORPORATION (PTY) LTD v STANDS 56 AND 57 INDUSTRIA LTD AND ANOTHER** 1979 (3) SA 740 (W);

MAKATE *supra* at par [120];

NBS BANK LTD *supra*

[18] Having studied the written resolution of the board of directors on behalf of plaintiff I am not convinced that the company authorised in terms thereof Mr Chetty to enter into agreements such as "**POC 2.1**" and "**POC 2.2**". It rather on a reading as a whole seems to authorise who may authorise, act and institute legal proceedings on its behalf. As correctly conceded on behalf of plaintiff it bears the onus to convince me on a balance of probabilities that the plaintiff authorised Mr Chetty (and therefore also Mr Kennedy) to enter into these agreements. The plaintiff did not so convince me. But even if I am wrong, no actual authority was proven of Mr Molapo to enter into these agreements at the time on behalf of Engen Lesotho. In order to prove that plaintiff acquired the claim and the right to enforce same from Engen Lesotho I am not convinced that it is good enough for plaintiff to rely on ostensible authority to do so. In relying on ostensible authority it is conceded that he did not have actual authority. Where reliance is placed on ostensible authority, the elements of estoppel have to be pleaded and proved. *In casu* it was not only not pleaded but could in any

event not be raised against the present defendants as they were not parties to "**POC 2.1**" and "**POC 2.2**". This could explain why the plaintiff in its replication did not rely on estoppel but in stead ratification. In as far as ratification is relied upon I share defendants' view that a nullity cannot through ratification achieve the status of a binding contract.

[19] I refused an application for absolution at the end of plaintiff's case as the test at the time was merely whether a court acting carefully could (and not should) find for the plaintiff. The *viva voce* evidence of the witnesses were that they were authorised to act on behalf of Engen South Africa and Engen Lesotho. However, the test changed and the question now is whether plaintiff on a preponderance of probabilities proved the authority of its signatories.

[20] Having concluded that the plaintiff failed to prove the various signotories' authority, it is not necessary to consider the second question whether there was compliance with sec 6 of the **General Law Amendment Act 50 of 1956**. As mentioned I accepted the evidence of the three witnesses on behalf of plaintiff in this regard and the second defendant did not testify. I would have been inclined therefore to have found in favour of the plaintiff on this issue.

[21] Accordingly the following order is issued:

1. The plaintiff's claim is dismissed with costs.

C REINDERS, J

On behalf of plaintiff:	Adv C. van der Spuy Instructed by: Lanham-Love Attorneys c/o McIntyre Van der Post Bloemfontein
On behalf of respondents:	Adv. B. Pretorius Instructed by: Kramer Weihmann & Joubert Attorneys Bloemfontein