

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 1053/08

In the matter between:

OPPEX CONSULTANTS CC

Plaintiff

and

THE UNIVERSITY OF KWAZULU - NATAL

Defendant

JUDGMENT

Delivered on: 01 June 2012

MNGUNI J

[1] The plaintiff is a close corporation duly incorporated in terms of the close corporation laws of the Republic of South Africa which, at all times material hereto and in particular on 21 November 2006, carried on business at Bell house, Bell Crescent, Westlake, Cape Town.

[2] The plaintiff operates a business of analysing the electricity consumption and costs on its clients' utility accounts and then advises them of possible savings. It achieves this by determining and applying the most cost effective billing structure suitable to a client's consumption profile. The implementation of the plaintiff's recommendation could result in a tariff change on a billing structure aimed at achieving future savings. This is but one of the components in the plaintiff's business profile. The other component focuses on the identification of any computational errors which the

municipality could have made on the utility account that could result in a refund to a client. The plaintiff applies a principle of 'no cure no pay' basis and earns its fees by participating in a saving or refund achieved for a client. The determination which I have to make concerns a refund achieved by the plaintiff from the municipality for the defendant.

[3] As part of its marketing and sales strategy, the plaintiff would identify a potential client which it could interest in its business. The defendant was identified through the same marketing and sales strategy. On 21 November 2006 at Westville, Durban, the plaintiff and the defendant entered into a consultancy agreement in the following terms: ('the client' refers to the defendant).

- "1. The client hereby authorises Oppex, to perform an analysis of the client's electricity consumption and costs. The client agrees that Oppex will perform an analysis of its electricity consumption and costs at no charge to the client and advise the client on possible savings and/or refunds that can be obtained.
2. The Client agrees to co-operate in such analysis and to furnish Oppex with the necessary information required for the analysis to be completed successfully.
3. On completion of the analysis, Oppex will submit a written report containing its recommendations on how cost savings and/or refunds can be obtained, if the possibility for such savings and/or refunds exists.
4. Should the client choose to implement Oppex's recommendations, the Client agrees to pay Oppex, 50% plus VAT, of total savings and/or refunds achieved for a period of thirty six (36) months, commencing from the first month in which such savings are achieved. Payment invoices showing calculation of savings and / or refunds as mentioned above will be made upon presentation, but no later than seven (7) days from the date of invoicing.

5. Oppex will only participate in savings and/or refunds achieved as a result of its recommendations.
6. Oppex agrees to keep all information furnished by the client strictly confidential. The client agrees to keep all information related to the service provide by Oppex strictly confidential.
7. Should it become impossible to achieve savings as a result of a legislative change, Oppex will not be entitled to participate in savings as discussed above.
8. The client agrees to furnish Oppex with copies of it's monthly electricity bills when and if required by Oppex.
9. For the duration of this agreement Oppex agrees to liase with the relevant authorities in respect of matters pertaining to this agreement on behalf of the client, to continuously monitor and analyse consumption in respect of utility and to provide the client with recommendation on how to best to optimise such consumption with the aim of minimizing costs
10. By signing this agreement the client agrees to all terms and conditions as contained in this agreement.'

[4] The plaintiff was represented by Anton Maine ("Maine") and the defendant by Rajesh Dhuni ("Dhuni") when the agreement was concluded. Pursuant to the agreement, by July 2007 the plaintiff had performed an analysis of the defendant's electricity consumption and costs. In compliance with its obligation as set out in clause 3 of the agreement, the plaintiff produced a written report setting out the findings on its analysis and its recommendations for savings and the refunds which the defendant could make on its electricity consumption and costs. The plaintiff, thereafter, submitted annexure "OC2" to the defendant in compliance with clause 3 of the agreement.

[5] The plaintiff's analysis revealed, *inter alia*, that the eThekweni Municipality

(Municipality) had overcharged the defendant for electricity consumption as a result of an incorrect meter reading taken on account number 16110228917 in the estimated amount of R1 043 000 (Vat inclusive). Consequently, defendant was entitled to a refund. The plaintiff recommended that the correct meter reading on account 16110228917 be applied and that the municipality refund the difference to the defendant with immediate effect.

[6] The defendant implemented the recommendation and, in August 2007 requested a refund of R 921 316.85 (excluding vat) from the municipality. The municipality acknowledged the error and overcharge and eventually refunded the amount to the defendant. On 17 October 2007 the plaintiff invoiced the defendant in the amount of R 525 150.60 (excluding vat) being 50% of the refund on the overcharge to which it was entitled, in terms of clause 4 of annexure "OC1" (the agreement).

[7] It is against the background of this synopsis of facts that on 24 January 2008 the plaintiff instituted the present action claiming the sum of R 525 150.60 (excluding vat) from the defendant. The defendant denied liability and specifically denied that Dhuni who signed the agreement on its behalf, had the necessary authority to conclude and bind it to a contract with the plaintiff. Confronted with the denial of authority, the plaintiff replicated to the defendant's plea adopting a two pronged approach in advancing its case. In the main, it persisted with its allegations that Dhuni represented the defendant in concluding the agreement and averred that Dhuni was duly authorised to do so on behalf of the defendant. In the alternative, the plaintiff contended that in the event of the Court finding that Dhuni was not duly authorised to conclude the agreement on behalf of the defendant, the defendant was estopped from denying Dhuni's authority to conclude

the agreement and set out the factual basis on which it relied on in support of this contention.

[8] Though it was initially denied, when the trial commenced, counsel informed me that the terms of the agreement and the fact that the plaintiff had performed its obligations in terms thereof, was no longer in issue and was regarded as common cause between the parties. Mainie and Johan Pierre Smit testified in support of the plaintiff's claim. The defendant adduced the evidence of Yagambaran Pillay, Gregory Diana and Jane Julia Meyerowitz. Counsel also handed up a bundle of documents which contained the documentary evidence upon which the parties relied on during the trial.

[9] It is trite that in order to act on behalf of another so as to affect that other's relationships, the necessary authority, either actual or ostensible, to do so must be present. Actual authority may be express or implied. In *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A - G [1967] 3 All ER 98 at 102A – E (referred to with approval in *NBS Bank Ltd v Cape Produce Co. (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) para 24) Lord Denning MR expressed himself as follows:

‘(A)ctual authority may be express or implied. It is *express* when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their members to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.’

[10] The foundation of the plaintiff's case on actual authority rests solely on the meeting of 21 November 2006 between Maine and Dhuni. Maine testified that on 21 November 2006 he had a meeting with Dhuni in Westville. During that meeting he asked Dhuni whether he had the requisite authority to conclude the agreement on behalf of the defendant. Dhuni answered that question in the affirmative. The defendant did not dispute Maine's evidence in this regard and did not call Dhuni to testify to contradict this evidence, because of his ill health. The defendant, however, adduced the evidence of Pillay and Meyerowitz who both testified that Dhuni did not have the requisite authority to conclude the agreement on behalf of the defendant and bind it contractually. At the time when the agreement was concluded, Pillay was employed by the defendant as a Financial Manager in the Finance Department. He was Dhuni's supervisor at the time, and Dhuni was the Head of Expenditure. Pillay testified that the authority to conclude the agreements on behalf of the defendant vested with the Registrar of the defendant. Dhuni knew this as he made payments on contracts which the Registrar had signed.

[11] Before the merger of the institutions which now constitutes the defendant, Dhuni handled the utility accounts for the former University of Durban Westville and was required to ensure that all invoices were captured on the system, and reconciled before payment was made to supplier.

[12] Meyerowitz, the Registrar of the defendant, testified that she is the custodian of the Council Minutes and Resolutions. She produced extracts of the relevant Council Minutes reflected at pages 90 to 94 in the Court's bundle of documents. She testified

that page 90 of the bundle is an extract from the Council Minutes of 5 May 2006 and page 91 thereof is the signatory list that is referred to on page 90 that was approved and was attached to the Council Minutes of 5 May 2006. On page 92 is the extract of the Council Minutes of 1 September 2006 and the reverse side of page 92 is the signatory list referred to in the Council Minutes of 1 September 2006. On page 93 is the extract of the Council Minutes of 4 May 2007 and the reverse side on page 94, is the signatory list referred to on page 93. She referred to pages 90 to 94 of the bundle. Having regard thereto, it is evident that the signatory list provides the names of the defendant's officials who are authorised to sign certain the documents on behalf of the defendant as well as the type of the documents they are authorised to sign. The signatory list is revised from time to time to cater for the changes on the defendant's personnel. Because Annexure "OC1" was signed on November 2006, page 92 of the bundle and the reverse side thereof are the relevant documents as the signatory list was approved in September 2006 and was only replaced in May 2007.

[13] Counsel for the plaintiff argued that Pillay's evidence during cross examination revealed that Dhuni made payments on contracts which Pillay did not know whether they (the payments) were signed by the Registrar of the defendant or somebody else. Because of that, so the argument went, his evidence should be ignored as it did not assist the Court in the determination as to whether Dhuni had authority or not. Interestingly, he was unable to dispute that Dhuni was not on the signatory list. He, however, contended that the defendant was supposed to produce evidence proving that the resolution relevant to this contract was adopted in a properly constituted Council Meeting. I have carefully considered this submission, and in my view, this argument is untenable. It ignores the evidence of Meyerowitz who is the repository of the Council

Minutes, who testified that Dhuni did not have authority to conclude contracts on behalf of the defendant and her evidence was corroborated by Pillay and the determination.

[14] It is common cause that annexure “OC1” is a legal document and Dhuni does not appear in the signatory list which was approved in September 2006. I am therefore, inclined to conclude that Dhuni did not have any actual authority. There is one issue which merits consideration. The bundle of documents reveals that on 22 August 2007, Dhuni signed a document titled ‘Job Description’ and the contract which is the subject of dispute was signed on 21 November 2006. I raised with Meyerowitz why it was necessary for Dhuni to sign this document on 22 August 2007. Her explanation was that after the merger, the defendant went through all departments and sections to make sure that there was a proper job description for each of the employees of the defendant. Having carefully considered her explanation on the issue, I can find no causal link between the conclusion of the agreement and the drawing up of job description. Nothing untoward can therefore be read into that.

[15] Having found that Dhuni lacked actual authority to conclude the agreement on behalf of the defendant does not dispose off the matter. The next enquiry is whether the defendant, made any representation by word or conduct, which induced the plaintiff to act to its detriment by concluding the agreements with Dhuni, and is therefore estopped from repudiating liability. In *Hely-Hutchinson (supra)* Lord Denning MR pronounced on the issue:

‘Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible

authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his *actual* authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation,'

[16] The question is, therefore, whether is the defendant created any impression on outsiders that Dhuni, who had no authority at all, actually had the authority to transact and bind it. In order to hold the defendant liable on the basis of ostensible authority the plaintiff has to prove the following requirements formulated by *Schutz JA in NBS Bank Ltd v Cape Produce Co (Pty) and others* 2002 (1) SA 396 para 26:

- '1. A representation by words or conduct.
2. Made by...[the principal] and not merely by...[the agent], that he had the authority to act as he did.
3. A representation in a form such that...[the principal] should reasonably have expected that outsiders would act on the strength of it.
4. Reliance by...[the third party] on the representation.
5. The reasonableness of such reliance.
6. Consequent prejudice to...[the third party].'

[17] In *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) para 13 Nienaber JA referring to the first two elements pronounced:

'[a] representation, it was emphasized in both the *NBS* cases *supra*, must be rooted in the words or conduct of the principal himself and not merely in that of his agent (*NBS Ltd v Cape Produce Co. (Pty) Ltd* (*supra* at 411H – I).) Assurances by an agent as to the existence or extent of his authority are therefore of no consequence when it comes to the representation of the principal inducing a third party to act to his detriment.'

[18] But the law stresses that the appearance 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 the principal and the fact that Dhuni held himself out as authorised to act as he did is by the way (see *NBS Bank supra*).

[19] Central to the plaintiff's assertion that the defendant is liable on the basis of ostensible authority is, in my view, the evidence of Maine. In November 2006 Maine worked in the Marketing and Sales Division of the plaintiff. During the performance of his duties, he identified the defendant as a potential client and contacted its switchboard operator to whom he explained the nature of the services being offered by the plaintiff. He then asked to be referred to a person he could speak to regarding that. He was put through to the Finance Department where he again, he explained to a person in that department the nature of the services being offered by the plaintiff and asked to be referred to a person he could speak to about that.

[20] He was referred to Dhuni and was told that he was in charge of the section. He spoke to Dhuni and again explained to him the nature of the services being offered by the plaintiff. After discussing the matter with him, they agreed to meet in Durban on 21 November 2006. On 21 November 2006 he flew to Durban to meet Dhuni at the defendant's Westville Campus. On arrival at the Campus, he was directed to a building in which Dhuni was stationed. When he arrived at that building, he was informed that Dhuni worked from the fourth floor of the building and he took a lift to that floor. On alighting from the lift, he immediately saw two notice boards hanging side by side

written Finance Division with the names of persons on them. He then realised that he was in the right place.

[21] Dhuni's name was at the top of the list and that made him conclude that he occupied a high position in the department. The access in and out of the department was controlled with a door which was securely locked and fitted with a buzzer. He hit the buzzer and a person opened for him. He went into the office and advised the person who opened the door that he had an appointment with Dhuni. That person walked him down an open plan office to a private office occupied by Dhuni and was delivered to a lady that was sitting at a desk near Dhuni's office. The lady knocked on the door and announced his presence to Dhuni. Each time he went to Dhuni's office, he would report to that lady who appeared to be a person who controlled the access to Dhuni's office.

[22] Dhuni told the lady that he was still busy and would attend to him as soon as he finished. When he finished, the lady ushered him into his office. He introduced himself to Dhuni. Whilst he was still busy with him, a female subordinate employee of Dhuni came in with some documentation. Dhuni and the subordinate employee had a discussion around the documentation. He signed something and left the office. From that, an impression was created to him that Dhuni was in charge and that the defendant's employees come to him for authorization of their work. He began with his presentation and explained to him what the plaintiff does. When he finished, he said to Dhuni 'in order for us to proceed, we need your authority in the form of an agreement or somebody who has the necessary authority in the university to carry on.', because the plaintiff was going to undertake the analysis at its own costs.

[23] He produced annexure “OC1”, which is a standard agreement used by the plaintiff in transactions of this nature. He went through annexure “OC1” with him and explained it in its entirety to him. At that stage he did not have any doubts that he was at the right department and was dealing with the right person. He specifically expressly said to Dhuni ‘who has the authority to conclude this agreement?’ and Dhuni had an expression of how could he doubt that he had the authority. Dhuni picked up the agreement and signed it on behalf of the defendant and below his signature wrote ‘Head of Expenditure’. That cemented his belief that he was dealing with the right person. He, in turn, took the agreement and signed it. After they both signed he was thereafter satisfied that the parties had concluded a binding agreement which entitled the plaintiff to commence the work.

[24] Maine’s evidence is echoed in the reply to the defendant’s notice in terms of Rule 21(2). At this stage, it is apposite to state that on 20 February 2009, the defendant’s attorneys delivered a notice in terms of Rule 21(2) of the Uniform Rules of Court to the plaintiff’s replication. Among the enquiries which the defendant made in terms of the said Rule was the following:

‘2.3 Who were the representatives of the Defendant to whom such an enquiry was allegedly made?

2.4 What were the exact words used in making such enquiry?’

The plaintiff responded to the said enquiries as follows:

‘Ad paragraph 2.3

7. In a telephone call by Mayne to the main switchboard of the defendant, Mayne explained to the switchboard operator the nature of the services being offered by the plaintiff and asked to be referred to the appropriate person handling the utility accounts.
8. Mayne was referred by the switchboard operator to the defendant's department of expenditure.
9. The plaintiff has no knowledge of the identity of the switchboard operator who referred Mayne to the defendant's department of expenditure.

Ad paragraph 2.4

10. To the best of Mayne's knowledge and recollection he used the following words, or words to similar effect:

"Hello my name is Anton Mayne. I am calling from a company called Opex. We look for ways to help reduce the cost of our client's utility accounts, specifically the charges for electricity. We work on a 'no-cure-no pay' basis. I would like the opportunity to come and explain what we do in more detail. Please refer me to the person responsible for handling those accounts."

[25] The evidence of Maine as well as the pleadings reveals that the representation was made by the switchboard operator and a person to whom she referred Maine's call. I have carefully considered the nature of the representation allegedly made by these two individuals and it seems to me that Maine made a request to them to be directed to a person dealing with utility accounts. I am unable to find evidence in support of the plaintiff's argument that they had requisite authority to represent the defendant. In any event, it seems to me that the switchboard operator and a person in the Finance Department to whom the switchboard operator referred Maine's call, are lowly ranked

employees of the defendant in an elaborate administrative set up.

[26] The second aspect of the representation on which the plaintiff relied, was the fact that Dhuni had an office and a private secretary in the department in the circumstances where the majority of the employees in the department were in an open plan office. This gave him the impression that Dhuni was the head of the department and, accordingly, that he had the necessary authority to conclude the agreement on behalf of the defendant. On this aspect the evidence was that four employees on the fourth floor had private offices and that he was a senior person in the Finance Department. The lady whom Maine referred to as a 'private secretary' was a floor receptionist.

[27] I am not persuaded by the argument and evidence that the fact that the defendant housed Dhuni in an office in an area where most of the employees were in an open plan could lead to a representation of authority at all. In my view, if this proposition is accepted, it will lead to an absurd conclusion that the employees in the offices as opposed to the employees in an open plan office were authorised to contract for the defendant. I can find no representation at all about authority in the manner in which the offices were configured.

[28] Maine testified in relation to the names on the notice boards, Dhuni's name was on top of the list and the plaintiff's counsel sought to suggest that a representation by the defendant was made that Dhuni was a person in charge and the person in charge of finance. Pillay's evidence was that the names on the notice boards were in alphabetical order and Dhuni was not the most senior person in the department. The fact that Dhuni's name was on top of the list did not mean that he was in charge of the section.

The lady who ushered Maine into Dhuni's office was the receptionist who managed the floor, flow of documents and was responsible for answering the buzzer. He conceded that his office would sometimes be visited by members of the public. Pausing here for a moment, it is to be noted that the fact that Dhuni and three other officials of the defendant were given offices, does not mean they were clothed with authority to bind the defendant. In my view, what is important is their seniority in the overall structure of the defendant and what ordinarily goes with the senior positions they would have held.

[29] Importantly, in its replication, the plaintiff stated that in large organisations such as the defendant, contracts such as the agreement are usually concluded with representatives of the organisation in the department of expenditure or its equivalent. The evidence of Meyerowitz was that the defendant has a staff compliment of about 5000 members with a main budget of about R2 billion. She testified further that the defendant has a procurement policy which sets out conditions under which a person can enter into a contract with an individual without going through a tender or quotation bid process. She also testified that any contract which the defendant intends entering into with any party is referred to the defendant's legal services to be vetted before it is signed. To my mind the fact that Maine had never dealt with an institution like the defendant, does not assist the plaintiff's case further for the reason that the representations allegedly made by the defendant were not in a form that the defendant, would have reasonably been expected the outsiders to act on the strength thereof.

[30] Based on the evidence aforementioned, I have to conclude that the plaintiff's official (Maine) could not have relied on the representations as pleaded and alluded in his evidence, as there were no representations made by the defendant or its officials

either in words or conduct that he could have reasonably relied on, and acted upon.

[31] With regard to the question of costs, plaintiff's argued that the Court should not allow costs occasioned by the employment of two counsel because the matter did not merit the employment of two counsel. I see no reason why I should deny the defendant the costs properly incurred to enable a proper ventilation of the matter. In my view, the defendant has been successful in this matter and accordingly the costs should follow the result.

In the result, I make the following order:

The plaintiff's claim is dismissed with costs, including the costs of two counsel.

Date of Hearing : 30 August 2011

Date of Judgment : 01 June 2012

Counsel for the Applicant : Adv. S. Miller

Instructed by : Abrahams and Gross Inc

Counsel for the Respondent : Adv. N. Pillemer SC

Assisted by : Adv. L. Naidoo

Instructed by : Garlicke & Bousfield Inc