

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 770/2002

In the matter between:

LESOTHO NATIONAL LIFE ASSURANCE
COMPANY LIMITED

PLAINTIFF

and

STANDARD BANK UNIT TRUSTS LIMITED

DEFENDANT

CORAM:

VAN COPPENHAGEN J

HEARD ON:

17, 18, 19 FEBRUARY 2004
1, 2, 3, 4 FEBRUARY 2005

JUDGMENT:

VAN COPPENHAGEN J

DELIVERED ON:

24 FEBRUARY 2005

[1] An investment of R10 000 000,00 by Lesotho National

Insurance Co (Pty) Ltd on the 8th June 1995 at a rate of
16,96% with Standard Bank Trust Managers Ltd matured on

the 7th June 2001 at a guaranteed value of R16 000 000,00.

[2] In the interim several changes to the roll-players and the structures of the legal entities initially involved took place.

The investor, Lesotho National Insurance Co (Pty) Ltd, as legal entity disappeared and three new public companies Lesotho National Insurance Holding Ltd (LNIH), Lesotho National Life Assurance Co Ltd (LNLAL) in which African Life Insurance was a stakeholder (plaintiff) and Lesotho National General Insurance Co Ltd (LNGIL) were formed.

Mr. Babu, the initial negotiator on behalf of LNIC who graduated from Chief Accountant to Financial Controller in Lesotho National Insurance Co Ltd, was appointed as Financial Advisor to the three public companies referred to above.

Mr. Kaltenbrunn, stationed at Ladybrand, a roll-player and an employee of Standard Bank Financial Services (Pty) Ltd (Stanfin) during the negotiations in 1995 resigned; in fact the offices of Stanfin in Ladybrand were closed.

Stanfin as entity simply became usurped in the Standard Bank of South Africa Ltd and disappeared and Standard

Bank Fund Managers Ltd had its name changed to Stanlib Ltd.

[3] The allegations relevant to plaintiff's cause of action and issues involved reads as follows:

“3. On or about 19 June 1998 at Bloemfontein, Plaintiff, represented by Lesotho National Insurance Holdings Ltd, which was represented by C Khomari, and Defendant, represented by Standard Bank Financial Services (Pty) Ltd, which was represented by S L J van Jaarsveldt, concluded a written agreement, the terms and conditions of which are reflected in the correspondence annexed hereto, marked Annexures “A”, “B” and “B2”.

4. The following were material terms and conditions of the said agreement, which terms were express, alternatively implied, alternatively tacit:

4.1 Plaintiff would invest an amount of R16 million with Defendant;

4.2 the investment would be for a fixed term, expiring on 7 June 2001, upon which date

the investment and all growth thereon ('the maturity value') would become payable to Plaintiff by Defendant;

4.3 the maturity value of the investment was guaranteed to have a value of R25 278 400,00 on 7 June 2001;

4.4 the R16 million investment comprised;

4.4.1 a sum of R9 600 000,00 which was to be invested on behalf of Plaintiff's Corporate Bodies Pension Scheme;

4.4.2 a sum of R6 400 000,00 which was to be invested on behalf of Plaintiff's Life Division;

4.5 the maturity value of the investment referred to in paragraph 4.4.1 at 7 June 2001 was guaranteed to be R15 167 040,00;

4.6 the maturity value of the investment referred

to in paragraph 4.4.2 at 7 June 2001 was guaranteed to be R10 111 360,00;

4.7 Defendant was required to issue certificates in the names of Plaintiff's two divisions as set out in paragraph 4.4.1 to 4.6.

7. The investments matured on 7 June 2001, alternatively 9 June 2001, on which date the aforestated guaranteed maturity values of the investments became due, owing and payable to Plaintiff by Defendant.

9. On or about 17 October 2003, Defendant paid an amount of R21 680 994,08 into Plaintiff's bank account, leaving a balance in respect of the capital amount of R3 597 405,92 remaining due and payable.

10. The cause of action arose within the jurisdiction of this Honourable Court."

[4] The substance of the allegations by plaintiff were denied by

defendant in its plea, pertinently challenging the jurisdiction of this Court, the authority of the said Van Jaarsveldt and/or Stanfin to act on behalf of defendant.

[5] In reply to defendant's challenge to the allegations that Stanfin and/or Van Jaarsveldt were authorised to act on behalf of the defendant, plaintiff alleges:

“2. In the event, however, of this Honourable Court's finding that Standard Bank Financial Services (Pty) Limited (Stanfin) and/or Van Jaarsveldt was not duly authorized, Plaintiff replies that Defendant is estopped from denying the authority of Stanfin and/or Van Jaarsveldt for the following reasons:

2.1 For many years, Plaintiff conducted business and placed investments with Defendant through the agency of Stanfin.

2.2 In 1995 Stanfin, had, through its employee and Van Jaarsveldt predecessor, E Kaltenbrunn, negotiated and concluded an agreement on behalf of the Defendant with

the Lesotho National Insurance Group in respect of an investment of R 10 Million with a guaranteed maturity value of R 16 Million, after three years, on 8 June 1998.

2.3 This investment was reinvested with Defendant through Van Jaarsveldt in a similar manner, which reinvestment was accepted by Defendant.

2.4 At no time prior to accepting this reinvestment did Defendant inform Plaintiff that Stanfin was not authorised to procure the investment.

2.5 Both Defendant and Stanfin were wholly owned subsidiaries of Standard Bank Limited and part of the same group of companies.

2.6 They were both engaged in rendering financial and investment services to the public.

2.7 The very names '*Standard Bank* Financial Services (Pty) Limited' and that of Defendant '*Standard Bank* Fund Managers' confirm and reinforce the connection.

2.8 The letterhead used by Stanfin on its correspondence (which incorporated the same Standard Bank logo used by Defendant), its place of business in Bloemfontein (which was in the Standard Bank Building), and the business cards of its employees, such as Van Jaarsveldt, (which included the same references), all contributed further to the perception that Stanfin was a duly authorised agent of Defendant."

The aforementioned allegations were repeated as further particulars to a request for further particulars for purposes of trial and plaintiff's heads of argument as submissions on its behalf.

[6] At the conclusion of plaintiff's evidence and the close of

plaintiff's case, an application of absolution was submitted, but dismissed.

At the conclusion of the case two main issues arose for consideration and adjudication; firstly whether this Court is clothed with jurisdiction to hear the matter and secondly whether Van Jaarsveldt and/or Stanfin was authorised by defendant to conclude the contract as alleged by the plaintiff.

AD : JURISDICTION

- [7] Plaintiff, in argument, relies on annexures "A", "B1" and "B2" to its particulars of claim as the documents embodying the contract between the parties, submitting that annexure "A" which was sent to plaintiff in Maseru, contains the offer by plaintiff which was accepted as per annexure "B", a letter addressed to and received by plaintiff in Bloemfontein. Thus construed, plaintiff argues that the contract came into existence in Bloemfontein as the place when and where the offeree's acceptance was communicated to and received by the offeror. (**JAMESON v SABINGO** 2002 (4) SA 49 (SCA))

54 B – C.)

Defendant contends that because both parties are *peregrini*, jurisdiction can only be found if the cause of the action arose within the jurisdiction of this Court, it is that the contract contended for by plaintiff came into existence in Bloemfontein. Elaborating on the submissions, defendant argued that at the very least or very best for plaintiff annexure “B1”, contains a counteroffer by plaintiff, the acceptance whereof was communicated to and received as per plaintiff in annexure “B2”. Thus construed, the contract, so it was argued, came into existence in Lesotho, more particularly Maseru which is not within the area of jurisdiction of this Court.

[8] Annexure “A”, a letter to Stanfin addressed to plaintiff in Maseru reads:

“LNIC

Private Bag A65

MASERU
0100
Attention : Mr KC Babu
17 June 1998

Dear Mr Babu

RE : CAPITAL GUARANTEED GROWTH PLAN

QUOTATION

We have pleasure in providing you with the following
quotations:

Renewal Investment of R 16 Million
Guaranteed (After 3 Years) R25 278 400,00
I trust that the above will meet with your approval.
Yours faithfully

SLJ van Jaarsveldt
Consultant"

Annexure "B1", a letter by Lesotho National Holdings Ltd
reads:

"LESOTHO NATIONAL INSURANCE HOLDINGS Ltd.

Standard Bank Financial Services

P.O. Box 3791

Bloemfontein

19 June 1998

Fax: 00 27 51 4470810

Dear Sirs

For the Attention of Mr. SLJ Van Jaarsveldt

Deposit of R 16 Million

We refer to your quotation of 17 June 1998 and in accordance with the quotation would like to renew the deposit for a further period of three years from the date of maturity on 8.6.1998 to 7.6.2001. We understand from your quotation that R.16 Million reinvested on 8.6.1998 will be guaranteed to have a value of R.25 278 400 on 7.6.2001.

Two certificates should be issued in the following manner:

1.

Name of Client	Lesotho	National	Life
	Assurance Company Ltd		

Corporate Bodies Pension Scheme
P Bag A 65 Maseru, Lesotho.

Amount Invested	R 9 600 000.
Date Deposited	8.6.1998
Date of Maturity	7.6.2001
Guaranteed Maturity	
Value	R 15 167 040.

2.

Name of Client	Lesotho	National	Life
	Assurance Company Ltd		

Life Division
P Bag A 65 Maseru, Lesotho

Amount Invested	R 6 400 000.
Date Deposited	8.6.1998
Date of Maturity	7.6.2001
Guaranteed Maturity	
Value	R 10 111 360.

Please confirm the above by signing and returning the duplicate of this letter.

Yours faithfully

C.Khomari

Financial Controller.”

(My emphasis)

In response to annexure “B1” Stanfin by means of Van Jaarsveldt addressed per fax to plaintiff in Maseru as per annexure “B2” the following:

“FAX

To: LNIC

From: Louw van Jaarsveldt

Fax: 09266-310007

Pages: 1

Phone: 09266-313031

Date: 23/6/98

Re: Renewal Dep R16 million CC:

L Urgent For Review J Please Comment Please Reply Please Recycle

ATT Carol K. Khomari

Comments:

I acknowledge your fax dated 19/6/98 and confirm that the R16 million is renewed as requested from 8/6/1998.

Regarding the new deposit that is available on the

6/7/1998 I will personally be in Maseru at your office at 12:00.

We thank you for your support.”

- [9] The evidence of Mr. Babu, the representative of the plaintiff and draughtsman of annexure “B1” is informative and conclusive regarding the intention of plaintiff (c.f. **AUSSENKEHR FARMS (PTY) LTD v TRIO TRANSPORT CC** 2002 (4) SA 483 (AA) at 493 paragraphs 24 and 25) in addressing annexure “B1” to Stanfin. His evidence in this regard reads:

“You say in this letter, I refer to you as you the drafter, that:
 ‘Lesotho National Insurance Holdings would like to renew the deposit for a further period of three years.’

You see that? --- Which number is that?
 Page 83. I am reading from the second line of the body of the letter. --- Yes, we would like to renew the deposit for a further period of three years.
 You say in the second sentence, which is in the third line:
 ‘We understand from your quotation ...’
 And so on. Do you see that? --- Yes.
 Over the page, if you will turn to page 84. In the last sentence you say:
 ‘Please confirm the above.’

Does that mean that Lesotho National was seeking an acceptance of the proposal which was being put in this letter? --- Yes.

Because you knew that you needed to confirm the rate, did you not? --- The rate, there was no further confirmation required of the rate.

Well, you could not confirm a quotation three months later, could you? --- The quotation was not three months later.

I am putting to you a hypothetical situation. The letter containing the quotation was dated two days prior to this letter? --- Yes.

You know those letters from prior correspondence that there is much talk about rates changing on a daily basis? --- Yes.

So you knew that you required a confirmation from the institution that this proposal was acceptable to them, is that not right? --- Yes.

What is more, you required the investment to be done in a particular fashion, you wanted it in the name of two separate companies. Is that not right? ---

Under the name of one company under two different funds.

One company and? --- Two different funds.

Two different? --- Types, both in the name of ... (intervenes).

Life Division and Corp[orate Body Pension Scheme? --- Both in the name of Lesotho National ... (intervenes).

Yes, I see that, I apologise. It is the same company, two different ... (intervenes). --- Funds.

Divisions, can we call them divisions? --- No, two different funds.

Two different funds. You required confirmation also that

that would be done? --- Yes.

You also wanted the institution to accept that the deposit

would run from 8 June 1998, did you not? --- Yes, it is

very important.

Yes, so that proposal is put in the letter where you say:

‘We would like to renew for a further period of three years from 8 June 1998.’

That was important to you? --- It is very important, yes.

You wanted Stanfin to accept that, is that not right? --- Yes.

And that is why in your letter you drafted:

‘Please confirm the above by signing and returning the duplicate of this letter.’

--- Yes.

There was a difference form of acceptance, was there not, Van Jaarsveldt, well, let me put it this way: neither Van Jaarsveldt nor anyone else signed this letter, is that correct? --- Which letter?

The letter at page 83. Look at the last sentence of that letter which is at page 84. --- That was C. Khomari, Financial Controller.

Yes, but read the text before ‘yours faithfully’

‘Please confirm the above by signing and returning the duplicate of this letter.’

--- Yes.

Yes, that was not done. What happened is that you got an acceptance of this

proposal on 23 June at page 88, is that not correct?

--- Yes.

Do you accept that there on 23 June, Van Jaarsveldt writing on a Stanfin letterhead purports to accept this proposal which is contained in your letter of 19 June? I say 'purports' because there is an issue about his authority. --- Yes.

Do you accept that? --- Yes.

Thank you. Just on that point,"

From the above it must follow that Babu required acceptance of the terms at set out in annexure "B1" and that legally construed annexure "B" must be interpreted as an offer or counter offer, acceptance whereof was communicated by means of annexure "B2" which was received by plaintiff in Maseru.

[10] The foregoing conclusion required the assumption that Stanfin represented by Van Jaarsveld was authorised by defendant to conclude the alleged agreement.

As mentioned earlier the alleged authority of Stanfin and as represented by Van Jaardveldt is an issue.

AD : AUTHORITY OF STANFIN AND/OR VAN JAARSVELDT

[11] Mr. Viljoen, on behalf of plaintiff, conceded that plaintiff did

not prove that Van Jaarsveldt as representative of Stanfin or Stanfin for that matter was in fact authorised to conclude the contract as alleged by the plaintiff. He, however, argued, that (I quote from the heads of argument in reply to defendant's heads of argument):

“While defendant understandably seeks proof that each and everyone of the representations relied upon by plaintiff emanated from defendant and defendant alone, that is not what is required. It is submitted that it is sufficient if plaintiff proves, as it has, that various divisions of Standard Bank, including defendant, gave out that they were authorised to act for one another.”

I understood the bold state submission quoted above to convey that any agency or company in the Standard Bank Group of Companies will be accountable because of the impression created by one or more of the agencies in the Standard Bank Group of Companies. The submission negates the principle that each company within a group is a separate legal entity (c.f. **REX v MILNE AND ERLEIGH (7)**)

1951 (1) SA 791 (AD) 827 and **WAMBACH v MAIZECOR INDUSTRIES (EDMS) BPK** 1993 (2) SA 669 (AD) 675).

[12] In **NBS BANK LTD v CAPE PRODUCE CO (PTY) LTD AND OTHERS** 2002 (1) SA 396 (SCA) at 411 Schutz JA considered the requirements for imputed authority based on estoppel thus:

“[25] As Denning MR points out, ostensible authority flows from the *appearances* of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our 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 is in fact wrong. Where a principal is held 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, to take this case, the fact that Assante held himself out as authorised to act as he did is by the way. What Cape Produce must establish is that the NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression: *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) at 50 A – D. 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 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 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: *Monzali v Smith* 1929 AD 382 at 386, *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 (3) SA 352 (A) at 364 A – B.”

[26] What Cape Produce therefore has to prove in order to establish Assante’s ostensible authority is:

1. A representation by words or conduct.
2. Made by the NBS and not merely by Assante, that he had the authority to act as he did.
3. A representation in a form such that the NBS should reasonably have expected that outsiders would act on the strength of it.
4. Reliance by Cape Produce on the representation.
5. The reasonableness of such reliance.
6. Consequent prejudice to Cape Produce. (This last element is clearly present and requires no

further mention.)”

[12] What plaintiff had to prove to establish Stanfin and/or Van Jaarsveldt authority to bind defendant is:

- (a) a representation by words or conduct;
- (b) made by defendant it is Stanlid Ltd that Stanfin and/or Van Jaarsveldt had the authority to conclude the contract;
- (c) a representation in the form such that it could reasonably have expected others would act on the strength of that; and
- (d) reliance by plaintiff on representation;
- (e) the reasonableness of such reliance;
- (f) the consequent prejudice to the plaintiff.

[13] The facts herein are uncomplicated.

Lesotho National Insurance Co (Pty) Ltd during 1995 decided to spread its investments, as a result whereof quotations were called for from Standard Bank. Two or three people from Standard Bank Johannesburg together with one Kaltenbrunn, a representative of Stanfin in Ladybrand, attended a meeting whilst LNIC was represented by the

aforementioned Babu and others including one Hepburne. This discussion concluded with Kaltenbrunn being tasked to deal with “quotations and things”.

Kaltenbrunn, labelling himself as “Konsultant Nr. C1033 Standard Bank Finansiële Dienste”, submitted at least two quotations to LNIC to which quotations were annexed a quotation by defendant addressed to Kaltenbrunn. The wording of the annexure exhibits “A1” and “A2” were to a large extent similar.

The investment in the amount of R10 million resulted and Kaltenbrunn issued two certificates exhibits “A8” and “A9”.

During 1998 Van Jaarsveldt without appointment arrived at Babu’s office in Maseru, handed him his business card and enquired about the possibility of investments with specific reference to the investment which was made in 1995 and which was to mature in due course.

Babu, instructed by the Chief Executive Officer of LNIH, called for and obtained quotations from Syfrets Trust and First National Bank and Van Jaarsveldt or Stanfin for the investment of the amount which was to become available on maturity.

Van Jaarsveldt, on behalf of Stanfin, submitted various quotations culminating in the quotation annexure “A” to the particulars of claim. To the latter quotation dated 17 June 1998 LNIH Ltd responded on 19 June 1998 annexure “B1” and Van Jaardsveldt replied as per annexure “B2”.

[14] The evidence calls for some comment.

- (a) No evidence was adduced to prove or suggest that the defendant represented Stanfin and/or Van Jaarsveldt to be its authorised agent; whatever Van Jaarsveldt’s representations might have been same are in fact immaterial.
- (b) Correspondence from defendant were on defendant’s letterheads clearly identifying defendant as a separate legal entity;
- (c) Assuming that Kaltenbrunn was introduced as defendant’s agent by defendant’s authorised

representatives, and that the inference that Kaltenbrunn and thus Stanfin represented defendant, can be drawn, the evidence clearly reveals that Van Jaarsveldt as representative of Stanfin, was not so introduced by defendant – he simply introduced himself

- (d) The only conduct to establish a nexus between defendant and Stanfin is the fact that defendant accepted investments from LNIC and perhaps LNIH through the agency of Kaltenbrunn.

[15] Reference to the fact that Van Jaarsveldt's contact with plaintiff, through Babu, was not by prior arrangement, in fact, Babu testified that Van Jaarsveldt "pitched up" and introduced himself *inter alia* by handing out his business card, was already made.

Van Jaarsveld business card exhibit "A257" introduces him
as

"'Broker/Consultant' Standard Bank Investment Services (Pty)
Ltd."

No reference to defendant as legal entity can be found on

the business card.

Fact is, that Babu, and thus plaintiff, was alerted to the fact that Van Jaarsveldt was a broker, it is an intermediary

“who is not empowered to treat, but to explain the intention of both parties and to negotiate and seek in such a manner as to put those to who employ him in a condition to treat personally”

(per McGregor J quoting Domat in **JACOBS LEVITATZ AND BRAUDE v KROONSTAD ROLLER MILLS** 1921 (OPD) 38 at 40 – 41).

[16] It follows that plaintiff on the evidence adduced, did not prove that Van Jaarsveldt or Stanfin was either actually or ostensibly authorised by defendant to enter into the contract contented for by plaintiff.

[17] In passing it must be noted that whatever Babu’s own notions about Van Jaarsveldt’s status and function might have been insofar as same are not based on fact or conduct

by defendant can never serve as a basis for a representation by defendant let alone a misrepresentation by the latter.

[18] No arguments suggesting an order on cost different to the usual, was advanced. Counsel were *ad idem* that costs should include the cost of two counsel.

[19] I make the following order:

Absolution from the instance with costs such costs to include the costs of two advocates.

G. VAN COPPENHAGEN, J

On behalf of plaintiff:

Adv. H.P. Viljoen SC
Instructed by:
Webbers Attorneys
BLOEMFONTEIN

On behalf of defendant:

Adv. R.G.L. Stelzner

Instructed by:
Werksmans Attorneys
SANDTON

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