



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 28/13

In the matter between:

BLUE IQ INVESTMENT HOLDINGS (PTY) LIMITED

Appellant

and

DOUGLAS SOUTHGATE

Respondent

Heard: 11 March 2014

Delivered: 30 May 2014

Summary: Contract- existing contract of employment has ‘no variation/ no cancellation clause’ restricting variations and cancellations thereof to writing signed by or on behalf of the parties- Held: new alleged oral contract was to cancel and /or vary the existing contract- new contract not completely negotiated- and in any event not valid in light of the no variation clause in the existing contract. Authority to contract- Held: CEO had no authority to conclude new contract of employment with person on a management level without consulting the Board- intended position was at management level- *Turquand* rule of no assistance to alleged appointee.

Coram: WAGLAY JP, NDLOVU JA, COPPIN AJA

JUDGMENT

COPPIN AJA

- [1] This is an appeal against the judgment of the Labour Court (A C Basson J) ordering the appellant to pay the respondent “*contractual damages in the amount of R5 576 500*” as well as party and party costs. Leave to appeal was granted on petition by this Court. The case is about whether a three year employment contract was concluded between the parties and whether the appellant had repudiated that contract, resulting in the respondent suffering damages.
- [2] In the Labour Court, the respondent’s claim against the appellant, in terms of his statement of claim, was for reinstatement, an order directing the appellant to pay him the remuneration he would have earned between 15 February 2009 and the date the contractual relationship between them is restored, as well as costs of suit on the scale as between attorney and own client. The respondent claimed, alternatively, an order directing the appellant to pay him the remuneration he would have earned between 15 February 2009 and 15 October 2011, as well as costs on an attorney-client scale.
- [3] The basis of the respondent’s claims is as follows. The respondent alleged that while he was employed by the appellant as a Special Projects Programme Manager in terms of a fixed contract for one year (“*the second contract*”), which was to terminate on 15 February 2009, he, personally, negotiated and entered into a contract (“*the third contract*”) with the appellant, who was represented by its Chief Executive Officer (CEO) at the time, Ms Nomhle Canca (“*Canca*”) during or about October 2008, on the following terms:
- 3.1 The second contract would terminate with effect from 15 October 2008 and would be replaced by the third contract;
 - 3.2 The third contract would commence on 16 October 2008 and would endure for a period of three years;
 - 3.3 The respondent would be Group Programme Co-ordinator;
 - 3.4 The respondent would receive the same remuneration package as he had received in terms of the second contract;

3.5 The respondent's monthly salary would be subject to the appellant's normal salary review process.

- [4] The respondent alleged, in essence, that even though the third contract had not been reduced to writing it had effectively and validly been concluded; that Canca ceased to act as the appellant's CEO after the conclusion of the third contract and that Mr Jameel Chand ("*Chand*") had replaced her; that even though Chand was at all material times aware of the respondent's employment as Group Programme Co-ordinator he directed the letter to the respondent, through the appellant's legal officer, Mr Mulaudzi ("*Mulaudzi*"), which the respondent received on or about 10 February 2009, informing him that his employment with the appellant would terminate on 15 February 2009, which was the date upon which the second contract was to terminate; that despite protestations of the respondent and contentions that the appellant was bound to the third contract, the appellant maintained its stance and the respondent's employment was terminated accordingly.
- [5] Respondent also alleged, in essence, that the termination of his employment amounted to a repudiation of the third contract by the appellant. Respondent seemingly refused to accept such repudiation and tendered his services to the appellant who, according to the respondent, refused to accept it. The respondent consequently instituted the claim in which he sought the relief which I have mentioned earlier.
- [6] In the original response to the respondent's claim,¹ the appellant, in essence, admitted that the respondent was employed by it in terms of the second contract and admitted that prior to the termination of that contract, negotiations had commenced regarding a new contract of employment, but denied that the negotiations were concluded and that the third contract came into being. Furthermore, the appellant alleged that the parties had contemplated reducing their verbal negotiations to writing and to have the written documents signed by the parties; but that no such contract was concluded. It was further alleged that Canca instructed Mulaudzi on some of the aspects for the new contract, but she gave no instructions in respect of

¹ The original response is dated 1 September 2009.

two essential or material aspects, namely, the remuneration package and the duration of the new agreement. It was further denied that the respondent rendered services to the appellant as Group Programme Co-ordinator and that the respondent was appointed as such and that Mr Chand had knowledge of his appointment to that position. The appellant denied unlawfully terminating the respondent's employment and alleged that the termination happened as a result of the expiry of the second contract on 15 February 2009. In its original response, the appellant also raised other technical issues which are not relevant for the purposes of deciding this appeal.

- [7] During or about November 2009, the appellant delivered a notice to amend its response to the respondent's statement of claim. The proposed amendment was not opposed and on or about 8 March 2010, the appellant's attorneys delivered an amended response to the respondent's statement of claim. Of significance (beside other issues raised) the appellant alleged that negotiations in respect of the third contract had not been concluded and that the parties had contemplated that the third contract, if concluded, would be in writing; denied that the respondent was appointed as, or rendered services to the appellant as Group Programme Co-ordinator; denied that Chand had knowledge of the respondent's appointment as Group Programme Co-ordinator; denied that Canca had authority to unilaterally create a position of Group Programme Co-ordinator and to employ a person in such a position without first obtaining the approval of the appellant's board of directors for the creation of the position and for the employment of a person to the position; alleged that Canca had failed to comply with the Public Finance Management Act (*the PFMA*) and the appellant's delegation of authority policy; and accordingly, denied that Canca had the authority to enter into and/or bind the appellant on the terms alleged in respect of the third contract. Of further significance for this appeal, the appellant alleged in the amended response that the respondent was bound to the second contract, including the terms contained in clauses 13.2 and 13.4 thereof. Clause 13.2 is a no variation/no cancellation-except- in writing clause, requiring the parties to reduce to writing and to sign any variation or consensual termination of the second contract. Clause 13.4 is a no waiver clause. The appellant contended, accordingly, in

essence, that since the no variation/no cancellation clause was not complied with and there was no waiver by the appellant of its rights in terms of the second contract, the third contract could not have come into existence. I shall deal in more detail with the precise wording of the clauses, referred to, later in the judgment. The appellant accordingly sought a dismissal of the respondent's claim with costs.

- [8] At the hearing before the Labour Court, several issues remained for determination, but the two main issues were, firstly, whether the third contract came into existence even though it was not in writing and particularly in light of clauses 13.2 and 13.4 of the second contract. Secondly, whether Canca had the necessary authority to create the position of Group Programme Co-ordinator and employ a person to that position and whether the appellant was nevertheless bound by the agreement between the respondent and Canca (i.e. the third contract). In respect of the latter question it was in issue whether the respondent could rely on the so-called "*Turquand rule*".² This rule was adopted into our law in the earlier part of the twentieth century. For the application of the rule in our courts see for example *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*³ and *Potchefstroomse Stadsraad v Kotze*⁴.
- [9] The appellant called Mulaudzi as a witness. He was acting company secretary of the appellant and at the time of the alleged negotiation of the third contract he was also its Group Legal Adviser. The appellant also called Chand, who was acting CEO of the appellant after Canca was suspended, and Mr Waja, a non-executive director of the appellant, as witnesses. The respondent gave evidence in person and called Canca as a witness.

² This is a rule that was developed in *Royal British Bank v Turquand* (1856) 6 E & B 327; 1843-60 All ER 435, which provides that "persons contracting with a company and dealing in good faith may assume that acts within its Constitution and powers have been properly and duly performed and are not bound to enquire whether acts of internal management had been regular" – see per Lord Simons in *Morris v Kanssen* 1946 AC 459 at 474 (1946) 1 All ER 586 (HL) at 592 approving the formulation of the Rule in Halsbury's *Laws of England* 2nd Ed Vol 5 p 432 par 698.

³ 1958 (2) SA 473 (A) at 480.

⁴ 1960 (3) SA 616 (A) at 621-624. Also see section 20(7) of the Companies Act No 71 of 2008 which appears to contain the gist of the Turquand rule.

[10] The court *a quo* concluded as follows regarding the first issue:

'[54] ... I am, however, not persuaded that the non-variation clause contained in the second contract has the effect of rendering the third contract invalid simply on the basis that it (the third contract) was not reduced to writing. The purpose of a non-variation clause (except in writing) is to protect the parties to the agreement by preventing one of the contracting parties (for example the employer) from, for example, vary[ing] the salary that was agreed upon in the employment contract.'

'[55] Clause 13.2 of the second contract is, in my view, valid only in respect of the second contract. This clause cannot be used to prevent the parties (in this case the applicant and Canca contracting in her capacity as the CEO on behalf of the respondent) from concluding a third or further contract. In the present case, the applicant and Canca did not negotiate the amendment of the second contract. They had negotiated the terms of another (third) contract in terms of which the applicant who was appointed to a different position and for a longer period. Clause 13.2 of the second contract is therefore in my view irrelevant vis-à-vis the third contract. Moreover, nothing in the second contract prevents the parties from entering into a new contract. Lastly, the two parties to the contract were ad idem that it was a requirement that the new contract had to be reduced to writing. Canca contracted on behalf of the respondent. She was the CEO at the time and she concluded the contract on behalf of the respondent and she concluded the third contract on the basis that it was not a material requirement that the contract had to be in writing.'

[11] The court went on to apply something in the nature of an estoppel, in that it held that even if it was wrong in finding that the third contract did not have to be in writing to be binding, the appellant was, nevertheless, bound by it because Mulaudzi, the appellant's legal adviser, had not drafted the third contract in time and the respondent had "*in fact commenced*" working in his new position since October 2008. Furthermore, the court *a quo* stated that it took into account that if Canca had not been suspended, the third contract would have been reduced to writing and held that "*in light of these factors ... the third contract came into being despite the fact that it was not in writing*".

- [12] Regarding whether the appellant was bound by the third contract, i.e. allegedly entered into between Canca (its CEO at the time) and the respondent, the court *a quo* concluded that Canca was empowered to appoint the respondent to the new position in terms of her delegated powers. The court *a quo* was not persuaded that the respondent was in fact a senior manager as defined in the regulations. It was seemingly accepted that Canca was not obliged to consult the Board in respect of the creation of the post of group programme co-ordinator and in respect of the appointment of the respondent, in terms of the appellant's delegation policies. The court *a quo* also held that Canca's evidence was not challenged that the respondent was not a manager and further that it was never put to her that the respondent was a senior manager and that she therefore had to consult with the board. Regarding the application of the Turquand rule, the court *a quo* held that if it was wrong in its conclusion that Canca had the necessary authority to appoint the respondent to the new position, then the Turquand rule was applicable and the respondent was entitled to assume in good faith that Canca had the necessary authority to appoint him and to conclude the employment contract on behalf of the appellant.
- [13] At the hearing before us counsel for both the appellant and the respondent were in agreement that there were only two issues that had to be addressed, namely, the issue regarding the validity of the alleged third contract in light of the no variation/no cancellation and no waiver provisions in the second contract and, secondly, whether the alleged third contract, if it was validly concluded, was binding on the appellant. With regard to the latter issue it had to be determined, in particular, whether Canca was empowered to bind the appellant without having consulted the board regarding the appointment of the respondent and, in the alternative, whether the respondent could invoke the Turquand rule. I shall now deal with those issues in turn.

Conclusion of the third contract

- [14] The argument of the appellant was, briefly, that in light of the no variation/no cancellation and no waiver provisions in the second contract, the third contract could not be validly concluded and in fact was not validly concluded.

Related to this point it was submitted on behalf of the appellant that with the third contract the respondent and Canca purported to terminate and/or vary the second contract orally; the prescription of the no variation/no cancellation clause, i.e. that any consensual termination be in writing and signed by the parties and that any variation, similarly, be in writing and signed by the parties, was not complied with. Accordingly, that in those circumstances the third contract was not validly concluded.

- [15] On behalf of the respondent, it was submitted that the third contract was not a variation of the second contract but was a new contract; that it was a novation of the second contract that did not require compliance with the prescriptions in the second contract relating to consensual terminations and variations. An alternative argument raised on behalf of the respondent was that even though the third contract was concluded during the currency of the second contract it did not come into effect during the currency of the second contract, but only came into effect upon termination of the second contract by the effluxion of time as was agreed in terms of the second contract. This latter argument was not the case made out by the respondent in the court *a quo* and was raised for the first time on appeal before us in response to a point that it could never have been the intention of the respondent and Canca that the parties would be bound by two contracts of employment simultaneously, or concurrently (i.e. both the second and the third contracts).
- [16] The appellant's counsel argued that for the third contract to constitute a novation, it had to substitute the contractual obligation in the second contract. The contractual obligation, according to this argument, was the employment relationship. The third contract, so it was submitted, did not substitute the contractual obligation in the second contract, but purported to vary certain terms of the second contract, more particularly, by extending the period and by slightly changing the respondent's job description and extending his duties. It was submitted that the third contract did not purport to change the respondent's salary and the other terms of the second contract.
- [17] In my view, the issue whether the non-variation clause in the second contract had the effect of rendering the third, oral, contract invalid should not have

been considered in an abstract sense. The actual wording and meaning of that clause was important in determining its purpose, range and impact.

- [18] The no variation clause provides: *'No amendment of this agreement or any consensual cancellation thereof or any part thereof shall be binding on the parties unless reduced to a written document and signed by them.'*

In my view, the meaning of this clause is clear and unambiguous. A variation or consensual termination of the second contract, in order to be valid, had to be reduced to writing and signed by the parties (or on their behalf). The case made by the respondent in the Labour Court was that in terms of the third oral contract, the second contract was consensually terminated. In my view, that cannot be a valid termination in light of the no variation/no cancellation clause in the second contract.⁵ There was no contention either in the court *a quo* or before us that the no variation/no cancellation clause was not sufficiently entrenched in the second contract.

- [19] It is furthermore apparent from an examination of the second contract and the alleged terms of the third contract that the latter was not a novation, but an attempt to vary the second contract by, firstly, extending the period of the respondent's employment contract for three years from the date of the alleged conclusion of the third contract, i.e. during or about October 2008 and, secondly, by altering the job description of the respondent, although not materially. Whereas the respondent was employed by the appellant under the second contract as a special project programme manager in respect of, principally, the Blue Umbrella Project, in the third contract, his responsibilities were to be extended to other projects and he was to be employed, on his suggestion, as *"Group Programme Co-ordinator"*. Other than these variations, the employment relationship was to persist. The respondent was to continue earning the same salary that he earned in terms of the second contract and

⁵ See *Impala Distributors v Taurus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) following the Appellate Division decision in *S A Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) where it was held that the parties could effectively stipulate in a written agreement that no variation of that contract would be valid unless it was in writing. In *Impala Distributors* the court held that where the parties stipulate in a written contract that the contract can only be terminated in writing and that restriction is entrenched by a clause in the contract, prohibiting variation of the contract other than in writing, an oral termination will be of no effect. The decision in *Shifren* was confirmed by the Supreme Court of Appeal in *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

the other standard terms, which were part of the second contract, were to continue to apply.

[20] A contract is novated when an existing contractual obligation is replaced by a new obligation.⁶ The main obligation in the second contract was not replaced by a new obligation in the third contract, but the effect of the latter agreement was to extend and vary certain obligations in the second contract. Even if it was to be assumed that the third contract did not vary the second contract, the respondent and Canca clearly never envisaged that the two contracts would bind the parties simultaneously or concurrently. One cannot ignore the fact that according to the respondent, one of the terms of the third contract involved the termination of the second contract. The respondent's evidence was also to the effect that he had already begun performing in terms of the third contract by about October 2008. Prior to the hearing of the appeal, it had never been the respondent's version that he and Canca had intended the third contract to apply only after the second contract had expired by the effluxion of time on 15 February 2009.

[21] The formalities for the consensual termination or variation of the second contract were laid down in the no variation clause in that contract. It is therefore not correct to conclude that the no variation clause was only valid in respect of the second contract. The parties intended to lay down formalities for any further contracts in terms of which the second contract was either terminated or varied. If such further contracts were not in writing and signed by the parties as ordained by the no variation/no cancellation clause in the second contract, they were not valid. The alleged third contract was accordingly not valid and the court *a quo* erred insofar as it held the contrary. In any event, I am not persuaded on the evidence that was led that the third contract was negotiated to finality. Over and above the fatal lack of compliance with the formalities of writing and signature by the parties, it was at best nothing more than a "*limping*" contract that was in the process of being negotiated and finalised.

⁶ See for example, *Tauber v Von Abo* 1984 (4) SA 482 (E); *Havenga v Havenga* 1988 (2) SA 438 (T) at 439.

- [22] Even though the point relating to the validity of the third contract is decisive of this case I shall now briefly turn to deal with the issue of authority of Canca and the applicability of the Turquand rule. I would also have to proceed on the assumption that the third contract was complete (i.e. not a "*limping*" contract).
- [23] The appellant's argument on the authority point was briefly the following. One had to look at the written delegation of authority document of the appellant which was applicable at the time of the alleged conclusion of the third contract. The board has to be consulted when the Chief Executive Officer deals with staff at a management level. The respondent was at such a level and therefore Canca, as the CEO was obliged to consult with the board regarding the respondent's employment in terms of the alleged third contract. Since it was common cause that she did not consult with the board, the appellant was not bound by her unilateral decision, as it were, to enter into the third contract with the respondent. Furthermore the respondent could not rely on the Turquand rule because the respondent was not an "*outsider*". At the time of the alleged third contract, the respondent was employed by the appellant in terms of the second contract. In terms of, at least, that contract, he was obliged to know about the policies and procedures that were applicable in the employment relationship and could not merely assume that internal procedures or policies, that were applicable to his appointment in terms of the third contract, had been complied with by Canca. He, being at a senior management level, had the responsibility to see to it that they were indeed complied with. According to this argument, it was eminently clear from his contract of employment and the alleged third contract that the respondent was functioning and was to continue functioning at an executive management level. At least one person, a Mr Cook had to report to the respondent. The respondent in turn had to co-ordinate projects and aspects of projects and reported directly to the Chief Executive Officer. The respondent's job description (including the key performance indicators that were applicable to him), anticipated that in the course of his work, the respondent would also manage people. The respondent's salary was also in excess of R5 million and the board therefore had to be consulted. Even if it was anticipated (or agreed in terms of the third contract) that the respondent was to continue earning the

same salary as he earned under the second contract the third contract had an unanticipated financial impact since it was going to endure for a period of three years, in other words, for more than two years after the second contract would have expired.

[24] The appellant's counsel was dismissive of the contention by the respondent's counsel that two members of the remuneration committee of the appellant's board knew of the respondent's appointment in terms of the third contract and had approved of it, on the basis that there was no evidence whatsoever that the remuneration committee had authority to appoint people, let alone people at the level at which the respondent was appointed or supposedly appointed. On behalf of the appellant, it was further submitted that Canca had exceeded her authority in appointing or purporting to appoint the respondent in terms of the third contract. In conclusion, it was submitted that all the relevant material was before the court *a quo* and that if it had examined the material, it could not reasonably have come to the conclusion it came to on the issue of Canca's authority and the binding nature of the third contract.

[25] On behalf of the respondent, it was submitted that the appellant could not argue that the respondent was a manager because it was never put to him in evidence that he was a manager, nor was it suggested to Canca that the respondent was a manager, nor was Canca's evidence, that he was not a manager, ever challenged and Mr Waja did not even know what the respondent's duties were. It was furthermore submitted that the respondent could not be a manager unless there was a key human resources component. Furthermore, that there was no merit in the appellant's budget point and that the court could not be 'locked into' an organogram that was never produced. It was further submitted on behalf of the respondent that, in any event, the Turquand rule applied. The respondent did not know of the delegations and was like an outsider. He was therefore entitled to assume that the internal procedures and policies relating to his appointment in terms of the third contract had been complied with.

[26] The primary purpose of the delegation of authority document of the appellant, according to the document itself, was to provide a policy with regard to the

delegation of powers, duties and functions to management. The document describes the powers and duties of certain functionaries including the Chief Executive Officer (“CEO”). The CEO, *inter alia*, has the power “to appoint, determine the conditions of employment of and dismiss the staff of Blue IQ, including members of staff on management level; where the management members are reporting to the CEO the board must be consulted”. The document does not define “management level”, or the term “management members”, but does define the term “Executive Manager” as meaning “a manager who is responsible for the management of [a] Blue IQ Department”. A “Department” is defined as “a functional unit within Blue IQ tasked with specific functions which are related to the achievement of that unit’s objectives, i.e. finance, marketing and communications etc”. The term “Senior Manager” is defined as “a manager who exercises direct managerial control over specific human resources utilised in a department or section in the achievement of that department or section’s objectives.”

- [27] It is instructive that the powers of the CEO relating to the employment of staff on management level does not only refer to an executive manager or a senior manager, but refers generally to “members of staff on management level”. It furthermore provides where “management members” are reporting to the CEO the board must be consulted. There is no reference to executive managers or senior manager, the reference is generally to “management members” who are reporting to the CEO.
- [28] It is noteworthy that in the second contract, the respondent is referred to as “the executive” and his job description is “Special Projects – Programme Manager”. He was to report directly to the CEO or the board of the appellant for the duration of the second agreement. His job was to oversee and manage the implementation of business plans and particular aspects thereof. He is described elsewhere in that contract in particular in a portion dealing with working hours that he occupies a “senior position” or is a “senior employee”.
- [29] On 23 October 2008, Canca sent to the respondent a pro forma job profile of a Programme Co-ordination Officer. In terms of that document, the skills and qualification required for the position included having five years project

management experience and having held an executive position for at least three years. The tasks and outputs envisaged were to assist the management of the Blue Umbrella Programme to plan with milestones, scope, budget, deadlines and programme deliverables, to compile management reports; relate and provide all information and documentation requests submitted to the programme officer; oversee the participation and delivery of all stakeholders including public and private sectors participants; develop and implement key PMO deliverables; and be responsible for billing management.

- [30] On 24 October 2008, the respondent responds to Canca in connection with the job description document and informs her that he has changed the document significantly to *“more mirror the role”* that he has been playing with the Blue Umbrella Programme to include the fact that his responsibility would be for more than one programme. It states further *“the role, as defined, is essentially that of Group Programme ‘Manager’, but I have stayed with ‘co-ordinator’ as I am comfortable with the same”*. A document as reviewed by the respondent, sets out the responsibilities of the Group Programme Co-ordinator. It *inter alia* mentions that the Group Programme Co-ordinator is responsible, on behalf of the senior responsible owner, for successful delivery of the portfolio of programmes and projects. It further sets out the role of the Programme Co-ordinator which includes managing the overall budgets on behalf of the senior responsible owner and monitoring the expenditures and costs against benefits that are realised as the programme progresses. He would also be responsible for facilitating the appointment of individuals to the programmes and projects delivery teams. He was furthermore to be responsible for ensuring that the delivery of new products or services from programmes and projects meet requirements and was of appropriate quality, on time and within budget, in accordance with the plans and governance requirements. He was also to ensure maximum efficiency in the allocation of resources and skills within the portfolio and then he was also responsible for managing third party contributions to the programmes and projects; managing the communication with stakeholders; managing the dependencies and interfaces between programmes and projects; managing risks to the programme and projects’ successful outcome. He was also responsible for

initiating extra activities and other management interventions wherever gaps in the programmes and projects were identified or issues arose. He was also to report progress of the programmes and projects at regular intervals to the senior responsible owner. In the ultimate paragraph the following is stated: *'Throughout the programmes and projects, the Group Programme Co-ordinator provides the ongoing 'health check' of the programmes and projects by re-assessing whether the programmes and projects continue to meet their objectives and continue to use available funds and resources efficiently. This requires the timely management of exceptions, slippage and conflicting priorities.'*

[31] It appears from his responsibilities that although he was not responsible for the day to day management and delivery of the programmes and projects, which was the responsibility of designated teams, he was playing a management and oversight role over those teams. The respondent continued to be an executive or to be employed at an executive level and was to report directly to the CEO in terms of the alleged third contract. In my view, he was part of management, or at least at management level. Once he was at management level and reported directly to the CEO, the CEO had to consult the Board concerning his appointment and the conditions of his employment. The fact that Canca's evidence, that he was not in management, was not contradicted, does not assist the respondent. His job profile and the nature of his responsibilities clearly placed him on the management level and the fact that he reported and was required, in terms of the third contract, to report directly to the CEO was never a point of contestation.

[32] The issue that now arises is whether the respondent could invoke the Turquand rule and, nevertheless, hold the appellant to the third contract. I am of the view that the Turquand rule cannot be of any assistance to the respondent in the circumstances of this case. Consultation with the Board was not a mere formality. It was not a simple internal formality which had to be complied with. One cannot anticipate what the outcome of the consultation with the Board could have been concerning the creation of the position and the employment of the respondent to that position. The Turquand rule can only apply where a person purporting to transact for the company would have had the actual authority if the necessary internal formalities had been

complied with. When the rule applies, it entitles the third party to assume that the company has in fact contracted. There is nothing to show that the appellant purported to authorise Canca, the CEO, to create the position and to appoint the respondent to the position in terms of the third contract. The fact that the remuneration committee might have known, does also not assist the respondent. The committee is not the Board. There has been no evidence that the functions of the Board regarding consultation with the CEO in respect of the appointment of staff on management level who are to report to the CEO directly, had been delegated to the remuneration committee.

[33] Accordingly, I am of the view that the court *a quo* erred in finding in favour of the respondent in the abovementioned issue and in awarding damages for the alleged repudiation of the third contract. Accordingly, the appeal must succeed. However, taking into account the law and fairness, I am of the view that there should be no costs order on appeal, which, effectively, means that each party should bear its own costs.

[34] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and is substituted with the following order:

"The applicant's claim is dismissed with costs."

Coppin AJA

I agree

Waglay JP

I agree

Ndlovu JA

APPEARANCES:

FOR THE APPELLANT:

Adv J G Rautenbach SC

Instructed by Mkabela Huntley Adekeye INC

FOR THE RESPONDENT:

Adv MYBURGH SC

Instructed by Webber Wentzel