



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between

Case No: 20028/14

ONE STOP FINANCIAL SERVICES (PTY) LTD

APPLICANT

and

**NEFFENSAAN ONTWIKKELINGS (PTY) LTD
THE CRL TRUST**

**FIRST RESPONDENT
INTERVENING CREDITOR**

Coram: ROGERS J

Heard: 2 JUNE 2015

Delivered: 17 JUNE 2015

JUDGMENT

ROGERS J:

Introduction

[1] The applicant ('OSF') applies for the provisional liquidation of the respondent ('Neffensaam'). The application is opposed by an intervening creditor, the CRL Trust ('CRL'). The only matter in dispute is OSF's locus standi as a creditor. OSF asserts three claims: (i) a claim of R1,35 million in terms of a suretyship signed by Neffensaam on 2 March 2011 ('the suretyship') for money advanced by OSF to the Molco Development Trust ('Molco') in terms of a written agreement of the same date ('the Molco loan agreement'); (ii) a claim of R150 000 for money lent by OSF to Neffensaam in terms of a loan agreement dated 24 December 2011 ('the first Neffensaam loan agreement'); (iii) a claim of R233 420 for money advanced by OSF to Neffensaam in terms of a loan agreement dated 5 March 2012 ('the second Neffensaam loan agreement').

[2] Neffensaam has at all material times had three directors, namely Messrs HS Coetzee, AS Moller and R Bock, to whom I shall refer by their surnames. The suretyship and the two Neffensaam loan agreements were purportedly signed on Neffensaam's behalf by Moller, who also signed the Molco loan on Molco's behalf. Coetzee signed the first Neffensaam loan agreement as a witness. It can be accepted on the evidence that he knew of and approved the suretyship and the loan agreements. If the suretyship and loan agreements are enforceable against Neffensaam, the amounts in question fell due on 9 May 2011 (the suretyship), 31 January 2012 (the first loan agreement) and 30 April 2012 (the second loan agreement).

[3] Discussions took place during the latter part of 2013 and during 2014 regarding the settlement of Neffensaam's indebtedness under the suretyship and loan agreements. Neffensaam was represented in these discussions by Moller and Coetzee.

[4] The application for provisional liquidation was launched on 7 November 2014. Neffensaam filed a notice of opposition. On 14 November 2014 the application was postponed to 12 March 2015 for hearing on the semi-urgent roll. During December 2014 and March 2015 there were further settlement discussions in which Bock for

the first time participated. Bock, apart from being a director of Neffensaan, is one of CRL's trustees. With the failure of these discussions, Neffensaan withdrew its opposition (this may have been because of the untenable position in which Moller and Coetzee found themselves) but CRL brought an application for leave to intervene to oppose. On 12 March 2015 CRL was granted leave to intervene and the application for provisional liquidation was further postponed to 2 June 2015. The order granted leave to CRL to file supplementary opposing papers by 10 April 2015. CRL failed to do so. OSF filed its replying papers on 11 May 2015. On 21 May 2015 CRL belatedly delivered supplementary opposing papers. OSF did not object or seek leave to file a supplementary reply. OSF was represented at the hearing by Mr Woodland SC and CRL by Ms Buikman SC.

The legal approach

[5] In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a prima facie basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour (*Kalil v Decotex (Pty) Ltd* 1988 (1) SA 932 (A) at 975J-979F). This would include the existence of the applicant's claim where such is disputed.

[6] Even if the applicant establishes its claim on a prima facie basis, a court will ordinarily refuse the application if the claim is bona fide disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence of which is bona fide disputed on reasonable grounds is part of the broader principle that the court's processes should not be abused. In the context of liquidation proceedings, the rule is generally known as the *Badenhorst* rule from the leading eponymous case on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348C, and is generally now treated as an independent rule not dependent on proof of actual abuse of process (Blackman et al *Commentary on the Companies Act* Vol 3 at 14-82 – 14-83). A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage, the other requirements must be satisfied on a balance of probabilities with reference to the

affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim is bona fide disputed on reasonable grounds; a court may reach this conclusion even though on a balance of probabilities, based on the papers, the applicant's claim has been made out (*Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783G-I). However, where the applicant at the provisional stage shows that the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds (*Hülse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218D-219C).

The facts

[7] CRL opposes the application on the basis that Moller and Coetzee were not authorized to sign the suretyship and loan agreements on behalf of Neffensaam. It appears that during July 2007 CRL sold a property in Paarl to Neffensaam for a price of R6 million. Part of the purchase price was to be satisfied by an issue of shares by Neffensaam to CRL. The shareholding in Neffensaam is regulated by a subscription agreement dated 31 July 2007. Following implementation Neffensaam's shares were to be held as follows: 63,12% by Kruismansbaai Ontwikkelings (Pty) Ltd ('Kruismansbaai'), being an entity represented by Moller; 26,24% by CRL, 0,71% by Molco (represented by Moller) and 4,965% each by two other persons. It appears that Neffensaam's business was to develop the property in Paarl with a view to erecting residential dwellings and selling subdivided erven.

[8] The subscription agreement includes the following provisions: (i) The shareholders were forthwith to take steps to alter Neffensaam's memorandum and articles of association so as to reflect the provisions of the subscription agreement. In the meanwhile, and in the event of conflict, the subscription agreement was to prevail (clause 7). (ii) Each shareholder holding more than 20 shares is entitled to appoint one director (clause 9 – only Kruismansbaai and CRL so qualified). (iii) A quorum for a directors' meeting is two, one of whom must be a director appointed by Kruismansbaai and one of whom must be a director appointed by CRL (clause 10). (iv) Resolutions of directors must, in order to be valid, be approved by a majority of the directors present at a meeting (clause 13.1). (v) A resolution signed by all the

directors shall be valid and effective as if it had been adopted at a duly convened meeting (clause 13.2). (vi) Save for the authority granted to Moller to purchase the Paarl property on Neffensaans's behalf, none of the directors, shareholders, officers or employees of Neffensaans has authority to bind Neffensaans to resolutions or transactions of the kind listed in clause 13.9, and the directors and shareholders are prohibited from taking steps to propose, authorise or permit the company to become bound by any such resolution or transaction unless it has received the unanimous prior written approval of all the shareholders. (vii) Among the matters listed in clause 13.9 are 'the incurring of long-term debts, other than loan finance to execute the development of the property', and the issuing of guarantees or suretyships 'of any unusual nature'.

[9] The Molco loan agreement required suretyships to be furnished by Neffensaans, Moller and Coetzee. The agreement recorded that the Paarl property had been sold by Neffensaans in terms of an agreement dated 9 December 2010. Molco was required to procure a letter of undertaking from the conveyancing attorneys for payment of the sum of R1,35 million to OSF against transfer. (There is no evidence in the papers regarding this alleged sale. It is clear that no such transfer occurred.)

[10] The first Neffensaans loan agreement required Moller, Coetzee and Molco to furnish suretyships. Whether they did so does not appear. Attached to the agreement is what purports to be a resolution of Neffensaans's directors passed at a meeting held at Paarl on 24 December 2011 that the company borrow the money in question and that Moller be authorized to negotiate the terms and sign all documentation. The purported resolution was signed by Moller and Coetzee. Also attached to the agreement is a resolution of Molco's trustees authorising Moller to negotiate and sign the suretyship. This resolution, again signed by Moller and Coetzee, bears the typed date 24 December 2011 but the handwritten date 24 December 2012. (One can infer from the latter resolution that Moller and Coetzee were Molco's trustees.)

[11] No resolutions were attached to the second Neffensaans loan agreement.

[12] In each of the contracts signed by Moller he warranted his authority to represent Neffensaan.

[13] Bock says that he had no knowledge of the Molco loan agreement, the suretyship and the Neffensaan loan agreements until after the launching of the liquidation application. Those transactions were not considered at any meeting of the directors and there was no resolution signed by all three directors authorising the transactions. The transactions were not approved by Neffensaan's shareholders.

[14] OSF, which was represented in the relevant transactions by Mr JN Basson ('Basson'), does not challenge these facts directly. Basson makes reference, in his replying affidavit, to the settlement discussions of December 2014 and March 2015, stating that Bock did not dispute Neffensaan's indebtedness. In the supplementary answering affidavit Bock objects to evidence about the settlement discussions, adding that they were directed at a commercial solution to the advantage of all parties and that at no stage did he admit Neffensaan's liability.

[15] Since the discussions were admittedly without prejudice, I do not think evidence as to what Bock did or did not dispute is admissible. Mr Woodland submitted that in sequestration proceedings a creditor is entitled to rely on without prejudice discussions to establish that the debtor committed an act of insolvency in the form of an acknowledgment of an inability to pay his debts, and he referred me in that regard to the recent judgment of the Supreme Court of Appeal in *Absa Bank Ltd v Hammerle Group (Pty) Ltd* [2015] ZASCA 43 where the court, on grounds of public policy, considered that this exception should be extended to cases of liquidation where there has been an admission of insolvency (para 13). In that particular case, however, the court appears to have relied not an admission of insolvency but on an admission of liability, which was relevant as an interruption of prescription (paras 14-15). The admission was not made in the course of settlement negotiations (para 14).

[16] We are not concerned in the present case with an alleged admission of an inability to pay debts. Whatever the position may be where there is an express admission of insolvency or liability in the context of settlement discussions (in

Hammerle an 'unequivocal admission'), it would be going very far to allow evidence of without prejudice negotiations so as to draw an inference that a participant tacitly admitted the indebtedness. In order to ascertain whether a tacit acknowledgment could be inferred one would need have details of the whole discussion. This would be contrary to the underlying rationale for the privilege. OSF did not claim to be entitled to provide evidence of what was discussed. In the context of without prejudice discussions, there is a world of difference between an express acknowledgment and an inference from silence. Parties may often, for purposes of attempting to reach settlement, put aside any discussion of the underlying merits. A participant may not even have fully explored the merits or taken legal advice thereon.

[17] In his supplementary answering affidavit Bock says that Moller has admitted to him that he did not have the necessary authority to conclude the transactions but is unwilling to provide an affidavit to this effect. Bock expresses surprise, given what he claims to be the close relationship between Basson and Moller, that OSF has not procured an affidavit from Moller.

[18] I am certainly not able to find, on the probabilities, that Bock is lying and that he knew of and approved the suretyship and the two loan agreements. Put differently, OSF has not proved on a balance of probability, on the affidavits, that Moller had actual authority to conclude the transactions in question. At very least, his actual authority is bona fide disputed on reasonable grounds.

Is Neffensaan bound by the suretyship?

[19] This being so, it is necessary to address Mr Woodland's submission that Neffensaan is barred, by virtue of the *Turquand* rule and s 20(7) of the Companies Act 71 of 2008, from relying on Moller's supposed lack of authority. Since the new Companies Act only came into force on 1 May 2011, s 20(7) would only be of potential application to the two loan agreements. The validity of the suretyship needs to be assessed with reference to the law as it stood prior to the coming into force of the new Act.

[20] Bock erroneously referred to the subscription agreement as Neffensaan's memorandum of incorporation. Despite a suggestion from the bench, neither side placed before me the company's memorandum and articles of association. I thus do not know whether Neffensaan's shareholders caused its memorandum and articles to be brought in line with the subscription agreement. It was common cause in argument that a third party dealing with a company is not to be treated as having constructive notice of an agreement such as the subscription agreement. (For convenience in what follows I shall refer to a company's founding document simply as the articles. This should be read as including its memorandum under the old Act or memorandum of incorporation under the new Act.)

[21] The precise scope of the *Turquand* rule has given rise to much debate. Its source lay in the fact that persons dealing with a company were taken to have constructive notice of its articles, since the articles are a public document. This constructive notice could potentially operate adversely to a third party, because in seeking to evade liability the company might point to some provision of its articles with which there had not been compliance. In *The Royal British Bank v Turquand* (1856) 6 El & Bl 327 it was held that a third party was bound to read the company's articles but no more. If he finds in the articles that the directors are not prohibited from performing a transaction but rather given the power to do so subject to condition, a third party is not bound to investigate whether there was compliance with the condition, since this is an internal matter which a third party could not typically be expected to know. In *Turquand* itself the directors were authorized to borrow money on bond subject to shareholder approval. The authority of the shareholders was regarded as a 'condition', ie a matter of internal management.

[22] In *Mahoney v East Holyford Mining Co* (1875) LR 7HL 893 the rule was stated as being that a third party is bound to take notice of the 'external position' of the company. Beyond this, however, the company is taken to have all the powers and authorities which, by its articles, it appears to possess, so that everything the directors do with reference to 'indoor management' is their own concern and is known only to them.

[23] The *Turquand* rule forms part of our law and is not limited to trading corporations (*The Mine Workers' Union v Prinsloo* 1948 (3) SA 831 (A) at 844-849; *Nieuwoudt & Another v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) para 8). (It may be observed, in passing, that similar problems of lack of authority can arise in relation to persons to whom the *Turquand* rule would not apply, eg a person conducting business as a sole proprietor or a partnership or an association without a public constitution. As appears from the judgment of Nienaber JA in *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA), there is still in such cases a presumption of regularity which protects a third party from being prejudiced by internal limits on the purported agent's authority of which the third party could not reasonably have been aware, a proposition which the learned Judge of Appeal described as 'a principle as old as the law of agency itself' and which he traced back to Justinian (para 17). It may be that many of the cases decided in our law with reference to *Turquand* could as readily have been explained on the basis of this ancient principle. Indeed, the *Turquand* rule could be viewed simply as a specific instance of the general principle; it seems to have been so regarded by the House of Lords in *Morris v Kanssen* 1946 AC 459 at 474-475.)

[24] The leading authority of more recent vintage in England is *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd & Another* [1964] 1 All ER 630 (CA). I have also found assistance in *Northside Developments (Pty) Ltd v Registrar-General* [1990] HCA 32; (1990) 170 CLR 146, confirming in Australia the exposition of the law in *Freeman* (see in particular Brennan J paras 5-18, Dawson J paras 14-20 and 31 and Toohey J para 4). In South Africa the leading kindred cases include *Wolpert v Uitzigt Properties Pty Ltd & Others* 1961 (2) SA 257 (W) and *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T).

[25] I think it will be found, from an analysis of these and other leading authorities, that the *Turquand* rule is simply an adjunct, in the context of companies and other entities with constitutions available to the public, of the law on ostensible authority, which is in turn a particular form of estoppel by representation. (In *Northside*

Developments supra Brennan J said¹ that Diplock LJ's lucid exposition in *Freeman* of the general principles of estoppel 'provides the framework within which the specifically "indoor management" cases are to be placed'.)

[26] Where a person (X) who believes that he has contracted with a company can prove that the company's representative (Y) had actual authority to conclude the transaction, neither ostensible authority, nor its companion the *Turquand* rule, need be called in aid. The representative, Y, may however lack actual authority and usually the want of authority can be traced in one way or another to the company's articles. The implicated provisions in the articles may be of several different kinds, for example: (i) a provision placing a transaction of a particular kind altogether outside Y's authority (case 1); (ii) a provision making Y's actual authority in relation to specific types of transactions subject to compliance with a condition (for example, the approval of shareholders), and the condition has not been met (case 2); (iii) a provision under which authority might have been, but was not in fact, delegated to Y or was delegated subject to restrictions (case 3); (iv) a provision under which the company could have appointed directors or a managing director but did not in fact do so in circumstances where certain persons were nevertheless allowed to operate as its de facto directors or its de facto managing director (case 4). Case 4 may be regarded as a sub-species of case 3. This fourfold division is not exhaustive but provides a sufficient basis for the discussion which follows.

[27] In any of these four cases, X may wish to meet a defence of want of actual authority by replicating that the company is estopped from denying Y's authority (that is to say, that Y had ostensible authority). Estoppel in the form of ostensible authority rests on a representation made by the company that Y had authority, in reasonable reliance on which X altered his position in some way (see *South African Broadcasting Corporation v Coop & Others* 2006 (2) SA 217 (SCA) paras 63-65 and cases there discussed). However, in invoking ostensible authority in the context of a company, X has the disadvantage that, because the company's articles are a public document, knowledge of its contents are imputed to him. So the company might contend that, because X had constructive knowledge of the implicated provisions of

¹ Para 8.

the articles, he could not reasonably have assumed Y to have the authority in question. In case 1, X should have been aware that Y could never bind the company to a transaction of the kind in question. In the other three cases, X could not reasonably have assumed Y to have the authority in question without investigating whether the condition had been met (case 2) or whether and on what terms there had been a delegation (case 3) or whether the directors or managing director had properly been appointed (case 4).

[28] Where X needs to invoke ostensible authority, *Turquand* may ameliorate the effect of constructive notice in cases 2, 3 and 4 but not in case 1. In case 1, the bar in the articles to Y's authority being absolute, constructive notice of the articles is fatal to X's invocation of ostensible authority (cf *Freeman* at 637G). *Turquand* cannot help X because there is no internal step which could have made Y's authority complete and the fulfilment of which X was entitled to take for granted. In cases 2, 3 and 4, however, *Turquand* holds that X is not bound to investigate whether the condition was fulfilled or the power of delegation exercised or exceeded or the appointment properly made. Provided he is acting in good faith (ie does not know of the non-compliance and knows of no particular circumstances putting him on inquiry), he may assume that the condition has been met or the power of delegation exercised and observed or the appointment duly made. Accordingly, and if he has otherwise proved the facts necessary to establish ostensible authority, X's reliance thereon will not be defeated by his constructive knowledge of the articles coupled with non-fulfilment of the condition (case 2) or the non-exercise of the power of delegation or the non-observance by Y of its limits (case 3) or the absence of due appointment of directors or of a managing director (case 4).

[29] What is important to emphasise is that X must still prove the facts establishing ostensible authority. Although I have referred to Y as an individual, the company's representative for purposes of ostensible authority might be several persons or the whole board of directors. In case 2, authority might vest in the board subject (for example) to shareholder approval in relation to specific kinds of transactions (*Turquand* was such a case). Since a company's board usually has full authority to conduct its affairs and because the shareholders generally leave the conduct of the company's affairs to the board and thus hold the board out as the

company's representative, X will ordinarily be acting reasonably by assuming that the board has authority. And since *Turquand* does not require X, unless he is put on notice, to investigate whether any condition to which the board's authority in a given instance may be subject has been fulfilled, the case for ostensible authority is obvious, indeed so obvious that one would tend to explain the outcome solely with reference to the *Turquand* rule. But on analysis X in such a case would succeed because of the board's ostensible authority – this must be so, because on the assumed facts the board would not have had actual authority, given non-compliance with the condition. (As *Mahoney* illustrates, a company may through its shareholders represent that the board of directors or the persons operating as the company's de facto directors have authority. See also *Rolled Steel Products (Holdings) Ltd v British Steel Corporation & Others* [1968] Ch 246 (CA) at 295G-296A.)

[30] Where, however, Y is a single director rather than the full board, the requirements for ostensible authority, as distinct from the ameliorating effects of *Turquand*, require more careful attention. Whereas the board can usually be assumed to have full authority (even if, in relation to specific types of transactions, subject to a condition), the same cannot necessarily be assumed in the case of a single director.

[31] Where the company's articles permit the board to appoint one of their number as a managing director, the person so appointed may reasonably be assumed to have delegated authority to conduct transactions within the usual scope of a managing director's authority. If the company, through its board, holds Y out as its managing director, X may reasonably assume that Y has all the usual authority of a managing director. It may transpire that the board never actually resolved to appoint Y as managing director or that in so appointing him the board restricted his authority in some way, but unless X has been put on notice in regard to such matters he is not obliged, merely because of his constructive notice of the articles, to investigate whether a resolution appointing Y as managing director was properly adopted or what the precise terms of the delegated authority were – these are 'indoor management' matters which, in accordance with *Turquand*, X cannot be expected to investigate. In such instances, the board's holding out of Y as the company's managing director is the representation which founds Y's ostensible authority and on

which X can, despite Y's lack of actual authority, rely. Examples of successful reliance on ostensible authority in these circumstances include *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93, *Clay Hill Brick and Tile Co Ltd v Rawlings* [1938] 4 All ER 100 and *Freeman*.

[32] There may be other types of executive positions, whether held by a director or an employee, which carry with them a representation of an authority usual to that type of position (for example a financial director or branch manager) and to whom similar principles would apply (see *Glofinco* supra paras 14-15).

[33] Outside of these cases, however, X is not ordinarily entitled to assume that an individual director has authority to represent the company (*Wolpert* at 267H-268A; *Tuckers Land and Development Corporation* at 15E; *Northside Development* para 31 per Dawson J). X may be able to prove that, in relation to the specific transaction, the board held Y out as having authority to represent the company. But the mere fact that the company's articles permit the board to delegate authority to a single director does not entitle X to assume that any director with whom he deals has been the recipient of delegated authority (see *Nieuwoudt* supra para 22; *Northside Development* para 15 per Brennan J). To prove ostensible authority, X must establish some representation made by the company (usually its board) that Y was authorized to represent it. It must be remembered that although X is fixed with constructive knowledge of the articles, he often will not in fact have knowledge of their content and will thus not usually be able to claim that he placed any reliance on the articles. Even if X does have actual knowledge of the articles, the fact that the board could have delegated the power to Y does not constitute a representation by the company (represented by its board) that it *has* delegated the power to Y. For ostensible authority to exist there must be a representation by the company, quite apart from its articles, that Y has authority to represent the company. In *Freeman* the court explained that this was the reason why, despite the existence in the articles of a power of delegation, the claimants failed in *JC Houghton & Co v Northard Lowe and Wills Ltd* [1927] 1 KB 246, *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826 and *Rama Corporation Limited v Proved Tin and General Investments Ltd* [1952] 1 All ER 554.

[34] In *Freeman Willmer* LJ approved the following as a correct statement of the law in this regard (at 640C-E, citation of authority omitted):

‘If the articles merely empowered the directors to delegate to an officer authority to do the act, and the officer purported to do the act, then – (a) if the act is one which would ordinarily be beyond the powers of such an officer, the plaintiff cannot assume that the directors have delegated to the officer power to do the act; and if they have not done so, the plaintiff cannot recover; ... But (b) if the act is one which is ordinarily within the power of such an officer, then the company cannot dispute the officer’s authority to do the act, whether the directors have or have not actually invested him with the authority to do it...’.

[35] Diplock LJ, in his judgment in *Freeman*, considered it desirable, in explaining the earlier cases, to ‘restate [the law] on a rational basis’ (644B). He proceeded to distinguish between actual and ostensible authority, concluding at 646B-C:

‘If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against the company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown: (a) that representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (b) that such representation was made by a person or persons who had “actual” authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (c) that he (the contractor) was induced by such representation to enter into the contract, ie that he in fact relied on it; and (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent’.

[36] Diplock LJ said that in those cases where the contractor had succeeded the company, usually represented by its board, had made a representation by permitting the purported agent to act in the management of the company’s business. By contrast, in *JC Houghton*, *Northard Lowe*, *Kreditbank Cassel* and *Rama Corporation*, where the contractors failed, the contractors had advanced a more ambitious (or novel) argument. Diplock LJ said (at 647B—F) that they were

‘ ...all cases where the contract sought to be enforced was not one which a person occupying the position in relation to the company’s business, which the contractor knew that

the agent occupied, would normally be authorized to enter into on behalf of the company. The conduct of the board of directors in permitting the agent to occupy that position, on which the contractor relied, thus did not of itself amount to a representation that the agent had authority to enter into the contract sought to be enforced, ie condition (a) was not fulfilled. The contractor, however, in each of these three cases sought to rely on a provision of the articles, giving to the board power to delegate wide authority to the agent, as entitling the contractor to treat the conduct of the board as a representation that the agent had delegated to him wider powers than those normally exercised by persons occupying the position in relation to the company's business which the agent was in fact permitted by the board to occupy. Since this would involve proving that the representation on which he in fact relied as inducing him to enter into the contract comprised the articles of association of the company as well as the conduct of the board, it would be necessary for him to establish, first, that he knew the contents of the articles (ie that condition (c) was fulfilled in respect of any representation contained in the articles) and, secondly, that the conduct of the board in the light of that knowledge would be understood by a reasonable man as a representation that the agent had authority to enter into the contract sought to be enforced, ie that condition (a) was fulfilled.'

(There do not appear to be any cases in which a claimant has successfully established ostensible authority along the lines reflected in this passage.)

[37] In *Tuckers Land and Development Corporation* Nestadt J (as he then was) distinguished between corporate representation by the board, by the managing director/chairman, and by any other person such as an ordinary director or branch manager or secretary. In the first two instances (the board or the managing director/chairman) the company would usually be bound because, unless the articles otherwise decreed, they would be taken to have authority to bind the company (ie have at least ostensible authority). All acts of internal management or organisation on which the exercise of the authority was dependent could, in terms of *Turquand*, be assumed by a bona fide third party to have been properly and duly performed (at 15C-D). In relation, however, to the third instance (for example, a single director) Nestadt J said (at 15E-H):

'... Here a third party is not automatically entitled to assume that such person has authority and the company is not precluded from repudiating liability on the ground that he had no authority to bind it. To hold the contrary would deprive a company of the rights which any natural principal would have of denying the allegation that a particular person is his agent.

The application of the *Turquand* rule in this sphere is limited. It only comes into operation once the third party has surmounted the initial hurdle not present in cases [of representation by the board or managing director/chairperson] and proves that the director or other person purporting to represent the company had authority. Once this is proved then, if the actual exercise of such authority is dependent upon some act of internal organisation, such can, by a bona fide third party, be assumed to have been completed. But in dealing with the type of person in question the other contracting party cannot use the *Turquand* rule to help him surmount the hurdle mentioned.'

(When Nestadt J spoke in this passage of proof that the director 'had authority', he was including ostensible authority, as is apparent from 14D-15A.)

[38] In *Northside Development* supra Brennan J expressed the matter thus (paras 12-13, my emphasis):

'[12] The indoor management rule is really a presumption of regularity... The presumption is no more than a presumption of fact. Whence does it arise? It arises from the likelihood that a company has given to its officers and agents the authority needed to carry on its business and to act for its benefit within the limits of the authority which officers and agents in their respective positions would ordinarily possess. The presumption might reasonably be made when the officers or agents of a company engaged in a transaction for the purpose of a company's business or otherwise for the benefit of the company and the transaction is one that officers or agents in their respective positions would ordinarily be expected to have the company's authority to undertake...

[13] ... To found an estoppel as to the authority of an officer or agent who is engaged in a transaction for the purposes of the company's business or otherwise for the company's benefit and who is purporting to exercise an authority which an officer or agent in that position would ordinarily be expected to have, the mere carrying on of the company's business with officers and agents performing particular functions on its behalf and in its interest is a sufficient representation by the company. Although such representations by the company seem a slender foundation on which to build an estoppel, the indoor management rule treats them as sufficient unless the party relying on the rule is put on notice to enquire into the authority of the officers or agents to do what they did in the transaction. The slenderness of the foundation enhances the importance of the qualification. In transactions other than those engaged in for the purposes of a company's business or otherwise for the benefit of the company, and in transactions where the officer or agent has purported to exercise an authority over and beyond the authority which an officer or agent in that position

would ordinarily be expected to possess, a party seeking to bind the company by estoppel must rely on particular representations of authority made by the company – that is, by officers or agents of the company having actual or ostensible authority to make those representations.’

[39] In the same case Dawson J said (para 19):

‘In other words, the indoor management rule only has scope for operation if it can be established independently that the person purporting to represent the company had actual or ostensible authority to enter into the transaction. The rule is thus dependent upon the operation of normal agency principles; it operates only where on ordinary principles the person purporting to act on behalf of the company is acting within the scope of his actual or ostensible authority..’

[40] In an equally trenchant passage, Toohey J stated the position as follows (para 4):

‘But where the question is whether an officer of the company has authority to bind the company by his actions, the context moves from one of indoor management to one of agency and the ordinary rules of agency then come into play. The indoor management rule is in effect a concession to the outsider in dealing with a company; it does not confer authority on an officer of the company to enter into a contract where that authority does not otherwise exist. Authority must actually exist to enter into the transaction in question or it must be found in principles of agency, as in the concept of ostensible authority. This place for the operation of agency principles in the affairs of companies was made clear by *Freeman...*’.

[41] In short, *Turquand* only comes to X’s aid once he has, subject only to the implications of his constructive knowledge of the articles, made out a case for ostensible authority. Having done so, X cannot then be non-suited only because, by virtue of his constructive knowledge of the articles, he should have made enquiry into the fulfilment of a condition (case 2) or the existence and terms of Y’s delegated authority (case 3) or the formal appointment of directors or the managing director (case 4). Thus in *Wolpert supra* Claassen J, after setting out four categories of company representatives and distinguishing between actual, implied and ostensible authority (at 265D-267A), said that that *Turquand* could be invoked ‘if any one of the enumerated agents had contracted with the third party, but there was still an act of

internal organisation not completed in order to complete the necessary authority' (at 267B-C).

[42] I return now to the facts of the present case. Because neither side adduced evidence of Neffensaam's articles, the question of constructive knowledge and the related *Turquand* rule do not arise. The issue is solely one of ostensible authority without the refinements which constructive knowledge and *Turquand* bring to such an enquiry.

[43] One does not know in the present case whether the articles as at March 2011 included a power on the part of the directors to delegate their authority to one of their number. If the articles did not include such a power, OSF would fail for that reason alone, because OSF must be taken to have been aware that one or two directors did not on their own have, and could not be given, authority to enter into the suretyship.

[44] If it be assumed, however, that the articles did include a power on the part of the directors to delegate their authority, there is no evidence that OSF was aware of that power and relied upon it. On the contrary, OSF's representative, Basson, says in the replying affidavit that OSF was at no stage aware of the terms of Neffensaam's articles. Without actual knowledge of the articles, OSF could not even begin to mount a case for ostensible knowledge along the lines sketched by Diplock LJ at 647B-F of *Freeman* (and see also *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W) at 284H-285A). In any event, and as I have observed, there are no cases where the mere existence of a power of delegation has been held to entitle a third party to treat a purported representative as the recipient of delegated authority. OSF has nowhere in its papers alleged facts to show that Moller and/or Coetzee had ostensible authority to conclude any particular types of transactions. It is not said that either of them was held out as the managing directors of OSF or conducted all its business with Bock's knowledge and acquiescence. No mention of ostensible authority is made at all in the papers. Basson states no more than that OSF acted in good faith and under the impression that Moller, as a director of Neffensaam, was duly authorized to conclude the

suretyship and the loan agreements.² For the rest, Basson invokes the *Turquand* rule.³

[45] Needless to say, a representation by Moller and Coetzee themselves as to their authority would not suffice. In order to bind the principal, the representation founding the ostensible authority must proceed from the principal, not the purported agent (*Glofinco* supra paras 12-13). Nor does it matter, if such be the case, that Neffensaans's articles stated that two directors would constitute a quorum for meetings of the board. If the articles followed the subscription agreement, one of those two directors would have had to be a CRL appointee. In any event, a company is not bound by the act of a lesser number of directors than the full board merely because they would have constituted a quorum (see *Legg & Co v Premier Tobacco Co* 1926 AD 132 at 139).

[46] This is a sufficient basis for concluding that OSF has failed, on the affidavits, to show on a balance of probability that Moller had ostensible authority to sign the suretyship on Neffensaans's behalf. It is thus unnecessary to decide what the position would be if Neffensaans's articles had, by March 2011, been amended to accord with the subscription agreement. In that event, OSF would be fixed with constructive notice that suretyships of an unusual nature could not be concluded except with the unanimous prior written approval of the shareholders. It could be argued that clause 13.9 is not an authority in favour of the directors subject to a condition but rather a provision placing authority in the shareholders acting unanimously (in which case *Turquand* would not apply). Alternatively, it could be said that a third party with notice of that provision could reasonably be expected to make some enquiry as to the existence of the unanimous approval of the shareholders, since it is an unusual requirement. But conceivably *Turquand* could apply to overcome the absence of shareholder approval, provided Moller otherwise had ostensible authority to represent the company.

[47] Of course, clause 13.9 only applies to suretyships 'of any unusual nature'. The papers do not deal with the commercial purpose of the loan taken out by Molco

² Para 27 record 187.

³ Paras 24-25 record 187.

and the related suretyship signed by Neffensaam on 2 March 2011. On the face of it, it seems unusual for a company to stand surety for a loan taken out by an entity having a 0,71% shareholding in the company and it is not apparent how the furnishing of the suretyship could have advanced Neffensaam's business.

[48] In argument Mr Woodland said that even if Neffensaam was not contractually bound by the transactions, OSF would have an enrichment claim. That argument has no bearing on the suretyship.

Is Neffensaam bound by the loan agreements?

[49] The Neffensaam loan agreements were concluded after the new Companies Act came into force. In terms of s 19(4) of the new Act the rule that a third party is fixed with constructive notice of a company's articles has been abolished. This is subject to s 19(5), which retains constructive notice in relation to a company whose memorandum includes restrictive conditions as contemplated in s 15(2)(b) and/or (c) to which attention has been prominently drawn in accordance with s 13(3) and where the company has included the letters 'RF' in its name. Neffensaam has not been shown to be a RF company.

[50] Sections 20(7) and (8) of the Act read as follows:

'(7) A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.

(8) Subsection (7) must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers.'

[51] Section 20(7) has been regarded by some as a codification of the *Turquand* rule (Davis et al *Companies and Other Business Structures in South Africa* 2006 at p 42). Other writers have pointed out that the abolition in general of the principle of

constructive notice has made the retention of the *Turquand* rule largely unnecessary, because the rule was only ever an amelioration of the ramifications of constructive notice (Katz *Governance under the Companies Act 2010 Acta Juridica* 248 at 252-253; Delport *Companies Act 71 of 2008 and the 'Turquand' Rule* 2011 *THRHR* 135-138). Katz suggests that the *Turquand* rule has been retained in s 20(7) to deal with constructive notice in relation to RF companies. Delport points out that the retention of the *Turquand* rule may also come to the aid of a third party who has actual notice of a non-RF company's articles. Delport also mentions possible differences in the scope of the *Turquand* rule and its supposed codification in s 20(7).

[52] If s 20(7) is a codification of *Turquand*, s 20(8) might be thought to be a puzzling provision. However, I do not think that its existence justifies a strained interpretation of s 20(7). It is more likely, in my view, that the lawmaker was concerned that its attempts to formulate the *Turquand* rule in s 20(7) might not cover the whole ground. Section 20(8) was thus added to foreclose an argument that s 20(7) had inadvertently repealed any part of the *Turquand* rule.

[53] One significant change brought about by the abolition in general of constructive notice is that a company can now be bound on the basis of ostensible authority even where the articles place authority on the matter in question completely beyond the potential scope of authority of the purported representative (my case 1 above). Because a third party would not be fixed with constructive notice of this restriction (unless the company were an RF company), the third party could potentially hold the company liable if the purported representative was held out by the company as having the authority in question. However, this is a change flowing from the abolition of constructive notice and has nothing to do with *Turquand* or s 20(7).

[54] Whatever differences there might be between *Turquand* and s 20(7), I do not think the new provision has brought about any change in the law governing the circumstances in which a company can be held bound on the basis of ostensible authority. In the present case it is difficult to see what scope there could be for *Turquand* or s 20(7), given the absence of evidence regarding the content of

Neffensaar's articles and given in any event that OSF would not be fixed with constructive knowledge of the articles and that there is no evidence that OSF had actual knowledge thereof.

[55] However, if one assumes that the articles contained at the relevant time a power of delegation in terms of which the board could have delegated to Moller and/or Coetzee the authority to conclude loan agreements of the kind in question, and if one assumes that OSF had knowledge of this power, s 20(7) would not in itself have entitled OSF to assume that the board had in fact delegated the authority in question to Moller and/or Coetzee any more than the *Turquand* rule would have entitled OSF so to assume. There is no indication that the lawmaker, in enacting s 20(7), intended to introduce so radical a change to the legal position relating to ostensible authority. The expression 'formal and procedural requirements' in s 20(7) must, I think, be construed consistently with the conventional scope of *Turquand*. Where the board's authority is qualified by a condition of prior shareholder approval, the said condition could be regarded as a formal or procedural requirement. Where a person is, or is held out to be, the company's managing director, the precise terms of and restrictions on the authority delegated to the managing director might be regarded as a formal or procedural matter. In relation to an ordinary director, however, the conferral of authority to bind the company is not merely a formal or procedural matter.

[56] Another way of looking at this question is by giving due weight to the requirement in s 20(7) that the third party should have been dealing with the 'company'. The section does not state that the third party may make any assumptions when dealing with a purported representative per se. This reinforces the view that in order for s 20(7) to apply the third party must establish that he was dealing with someone who had actual or ostensible authority to bind the company, because only in those circumstances can he say that he was dealing with the 'company'. This was the first of the two fundamental questions Claassen J posed in *Wolpert*: 'When does one deal with or contract with a company?' (at 265A). The answer he gave (at 265D-267A) was that one deals with the company when the latter is represented by a person having actual or ostensible authority. Once the third party has established the actual or ostensible authority of the representative,

he cannot be non-suited because of non-compliance on the part of the company with some formal or procedural requirement which would have been necessary to make the ostensible agent's authority complete.

[57] It follows that Neffensaan would only be bound by the loan agreements if Moller and/or Coetzee, who lacked actual authority, had ostensible authority to bind the company to the agreements. As I have said, there is no evidence that Moller and/or Coetzee were held out as persons authorized to manage the company's affairs.

[58] For this reason it is unnecessary to decide what the position would have been if Neffensaan's articles had, by the time of the conclusion of the loan agreements, been brought into line with the subscription agreement. On the face of it, such amendments would have no effect as between OSF and Neffensaan, since OSF would not have been fixed with constructive knowledge of the amended articles. Furthermore, short-term borrowings are not among the restricted transactions listed in clause 13.9. The loans in the present case were repayable within one to two months.

[59] Mr Woodland submitted that if I concluded that OFS had not prima facie established its contractual claims, I should find that OSF has shown, at least on a prima facie basis, that it has a claim for repayment of the sums advanced on the basis of unjustified enrichment. A defence of non-enrichment is available even where money has been received. The onus rests on the recipient, however, to prove that he was not enriched (*African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 709C-D and 713 *in fine*). The incidence of onus will certainly assist OSF if and when it advances a claim based on the *condictio indebite*. However, OSF at no stage in the present proceedings pleaded an alternative claim based on unjustified enrichment. It was raised for the first time in the heads of argument. The incidence of onus makes it all the more important that OSF should have pleaded unjustified enrichment. In the particular circumstances of this case, OSF could have done so in its replying affidavit, since it may have had no reason when launching the application to anticipate the defence of lack of authority. Fairness would then have dictated that CRL be entitled to file a further set of

affidavits to deal with the enrichment claim. Neither Neffensaam nor CRL has been called upon to answer an enrichment case. There is no evidence as to what became of the money paid to Neffensaam. I cannot exclude the possibility of a defence of non-enrichment.

Conclusion

[60] For these reasons I conclude that OSF has not established on a prima facie basis that it is a creditor of Neffensaam. At very least, its claims are bona fide disputed on reasonable grounds. It is unnecessary to deal with the question of prescription. Since OSF persisted in its application after CRL filed its answering papers, costs must follow the result.

[61] I make the following order: The application is dismissed. The applicant is directed to pay the costs of the intervening creditor.

ROGERS J

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