IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

Appeal Case No. A5026/2008
WLD Case No. 23380/07

In the matter between

STEWART, DAPHNE ELIZABETH **1st APPELLANT**

NETWORK COURIER LOGISTICS CC **2nd APPELLANT**

and

POINT 2 POINT SAME DAY EXPRESS CC **1st RESPONDENT**

JACOBSEN, COLETTE **2nd RESPONDENT**

JUDGMENT

C.J. CLAASSEN J:

[1] This is an appeal against the judgment by Van Rooyen AJ handed down on 7 December 2007.[1] An application for leave to appeal the judgment was dismissed whereafter the appellants petitioned the Supreme Court of Appeal. The appeal comes before this court with leave granted by the Supreme Court of Appeal.

[2] The 1st and 2nd respondents were the applicants in motion proceedings wherein an interdict was sought against the appellants (respondents in the court *a quo*) to prevent them from competing with the business of the respondents for a period of 12 months as from 9 January 2007. The application was successful and the court *a quo* issued the following order:

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[1] The judgment of Van Rooyen AJ has been reported as **Point 2 Point Same Day Express CC and Another v Stewart amd Another** 2009 2 SA 414 (WLD).

"(1) That the 1st and 2nd respondents be interdicted from competing with the 1st applicant in the same day courier business within the Republic of South Africa for a period of 12 months, such period having commenced on the 10th January 2007. For purposes of this order the wording of the contract between P2P and Ms Stewart under the heading of "Daphne Stewart not to compete" applies as from the second sentence.

(2) The 1st and 2nd respondents must pay the costs of this application on the basis that if one respondent pays the costs or part thereof the other is absolved or *pro rata* absolved."

BACKGROUND

[3] The respondents contended that the 1st appellant was acting in breach of a restraint of trade clause imposed upon the 1st appellant as per the provisions of a "Sales Agent/Independent Contractor Agreement" concluded between the 1st appellant and the 1st respondent wherein the 1st appellant was appointed as an independent sales representative, acting on behalf of the 1st respondent.[2] The restraint of trade clause is in the following terms:

"DAPHNé STEWART NOT TO COMPETE

Daphné Stewart, having agreed to devote her time to Point 2 Point Same Day Express CC's business, shall not deal in another business in *direct competition* to the services offered by Point 2 Point Same Day Express CC, on her own account in any way during the continuance of this agreement. Daphné Stewart will not engage, directly or indirectly, either for herself or as employee of any other party, *in same day courier service*, within R.S.A., for a period of 12 (twelve) months after the termination of the agency created by this agreement, without the written consent of Point 2 Point Same Day Express CC."[3]

[4] The contract contains a clause confirming the fact that during the execution of the contract, the 1st appellant will acquire knowledge of the 1st respondent's trade secrets, sources of supply, business methods, suppliers and clientele. The parties, in the light of the aforesaid, expressly recorded a second restraint of trade provision in the following terms:

"The Sales Representative/Independent Contractor therefore undertakes not to knowingly solicit in competition with Point 2 Point Same Day Express CC, a client

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2 See Annexure "C" attached to the founding affidavit at pages 20 – 43.
3 See record, page 26.

> or any person who, as at the date of termination of this contract, is or was a client of Point 2 Point Same Day Express CC".[4]

[5] The need for a restraint to be placed upon the 1st appellant by contract, is obvious when one considers the allegations made by her in her answering affidavit. Since the inception of her employment history starting in 1990, she was exclusively involved in the courier, freight and logistics industry in South Africa.[5] Also, she alleges that she was employed in a permanent position with Messrs. O.C.S. Worldwide for 13 years.[6] In effect, she became associated with the 1st and 2nd respondents at a time when she already had 17 years extensive experience in the courier industry.[7] It is not seriously in dispute that O.C.S. Worldwide was the respondents' biggest client.[8] In the light of these allegations made by the 1st appellant, it follows that she would be in a strong position to seriously compete with the respondents after termination of their contract.

[6] It is common cause that the 1st appellant, at the time of concluding the contract with the respondents, was involved in a domestic life-partner relationship for some 8 years with Claude Jean-Marie Calisse ("Calisse") who was at the time, together with the 2nd respondent, a co-member in the 1st respondent.[9] Both the 1st appellant and Calisse have respectively been involved in the freight, courier and logistic industry in the Republic of South Africa since as far back as 1990. In fact, Calisse is also the sole member of another close corporation ("DMX") which is a transport and courier business[10].

[7] After having been associated with the 1st respondent as agent/independent contractor for some 7 months, the 1st appellant gave written notice terminating the contract with the 1st respondent with effect from 31 January 2007[11]. The 1st appellant

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4 See clause 15 at page 33 of the record.
5 See paragraph 9.2.1. of the answering affidavit at page 79 of the record.
6 See paragraph 9.3 of the answering affidavit at page 80 of the record.
7 See paragraph 9.5 of the answering affidavit at page 80 of the record.
8 See paragraph 9 of the founding affidavit at page 8 of the record as read with paragraph 14.1 of the answering affidavit at page 91 of the record.
9 See paragraph 7.3 of the answering affidavit at page 76 of the record.
10 See paragraph 7.4 of the answering affidavit at page 76 of the record.
11 See Exhibit "D" attached to the founding affidavit at page 44 of the record.

addressed this letter of resignation to both Calisse and the 2nd respondent.[12] The importance hereof will become apparent later in this judgment. Calisse resigned as member of the 1st respondent with effect from 2nd February 2007.[13] In response to the resignation of Calisse, the 2nd respondent wrote a letter to him dated 5 February 2007 wherein she reminded him of certain restrictions imposed on his activities arising from their partnership agreement. In particular she referred him to paragraph 2.2 of such agreement which provides as follows:

> "Restriction on activities
>
> 2.2 As from immediate effect I would like to respectfully request that you will have no further contact with any of the existing clientele of Point 2 Point Same Day Express CC i.r.o. Same Day Service Deliveries, i.e. Consign-It, O.C.S. …..
> I also strongly urge you not to try and solicit any business from existing clientele as per clause 22.1.1. and further like to draw your attention to the content of clauses 22.1.2, 22.1.3, 22.1.4, and 25."[14]

It is not in dispute that Annexure "E" was sent and delivered to Calisse on the 5th of February 2007 nor that he resigned from the 1st respondent on 2 February 2007.[15]

[8] Prior to the writing of Annexure "E" and allegedly on Monday 15 January 2007, the 1st appellant was purportedly released from all the terms and conditions of the "Sales Agent/Independent Contractor agreement" in terms of a letter signed by Calisse.[16] As to how this letter came into being, the appellants give no details other than the following:

> "12.5 Calisse confirms that Annexure "DS6" and its contents were discussed with Jacobsen (2nd respondent) and thereafter drafted, signed and furnished to me by the 1st applicant (1st respondent) with the knowledge and approval of Jacobsen."[17]

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[12] The letter is addressed to the "directors" of the 1st respondent, who, at that time, were Calisse and the 2nd respondent, and they are "both" thanked.
[13] See Exhibit "E" attached to the founding affidavit at page 45 of the record, as read with paragraph 13.1 of the answering affidavit at page 90 of the record.
[14] See page 2 of Annexure "E" attached to the founding affidavit at page 46 of the record.
[15] See paragraph 8 of the founding affidavit at page 8 as read with paragraph 13 of the answering affidavit at pages 90 and 91 of the record.
[16] See Exhibit "DS6" attached to the answering affidavit at page 114 of the record.
[17] See page 86 of the record.

In paragraph 12.6 of the answering affidavit, the appellants allege that the letter of release was sent to Jacobsen in the "daily mail bag" to her residential address in Olivedale, Randburg where she attended to the administration of the 1st respondent's affairs. It is further alleged that the 2nd respondent had at all times been in possession of a copy of Annexure "DS6".[18]

[9] During March 2007 the respondents noticed a sharp drop in their turnover. The 2nd respondent began an investigation and ultimately established that the appellants were competing with her in the same type of business. It is not denied that the 1st appellant was so competing, as reliance was placed on the written release referred to above entitling her to do so. Furthermore it is not disputed that the respondents' business suffered substantially. The appellants allege, however, that the reason for such drop in turnover is due to the respondents' having altered the nature of their business from that of a "same day service provider" to a "same day service broker".[19]

[10] Prior to the launching of this application, the respondents' attorney of record sent a letter of demand, dated 14 September 2007, to the 1st appellant advising her of the fact that she is in breach of the restraint agreement and requested her to immediately refrain therefrom.[20] In response hereto an attorney, D.W. Morgan, acting on behalf of the 1st appellant, replied alleging that "at or about the same time as the agreement between her and your client was terminated, she obtained a written release from her restraint.[21] The respondents' attorney of record replied in a letter, dated 25 September 2007, requesting a copy of the release referred to in Morgan's letter and stating that should he not receive such letter within 3 days, "we accept that same does not exist and we will proceed against your client." Apparently this letter was wrongly addressed and the appellants deny ever having received such letter. Be that as it may, the respondents then launched the application for an interdict on 2 October 2007.

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[18] See paragraph 12.6 of the answering affidavit at page 87 of the record.
[19] See paragraphs 14.6 and 14.7 of the answering affidavit at page 92 of the record.
[20] See paragraph 13.1 of the founding affidavit as read with Annexure "L" attached thereto at pages 14 and 56 of the record.
[21] See Annexure "M" attached to the founding affidavit a page 59 of the record.

THE ISSUE IN DISPUTE

[11] During the hearing of the appeal counsel for the appellants confirmed that the only issue in dispute is the validity of the letter releasing the 1st appellant from the terms and conditions of the contract with the 1st respondent. Indeed, that was also the only point argued before this court. In regard to this issue the court *a quo* came to the following finding:

> "[12] Ms Jacobsen denies all knowledge of the release of Ms Stewart. She only learnt about it 9 months later. Mr. Calisse contradicts this. In terms of *Plascon Evans Paints vs Van Riebeeck Paints* 1984 3 SA 623 (A) at 634 – 5, I am bound by what the respondent states in his affidavit, unless it is "so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers….
>
> Ms Van Nieuwenhuizen, for the applicant, urged me to regard the statements by Mr. Calisse and Ms Stewart as untenable and reject them. I can only accede to this argument if I am satisfied on the papers that in terms of section 54(2)[22] Mr Calisse in fact had no power to act for the corporation in the particular matter and the person with whom he dealt had, or ought reasonably to have had, knowledge of the fact that the member had no such power. I am satisfied that, on the probabilities, Mr. Calisse did not have the authority to release Ms Stewart. I would, indeed, be particularly strange if one of the members could unilaterally abandon rights and just as strange if Ms Jacobsen would have authorised him to do so. The same-day brokerage market is, as appears from the papers, a vibrant and competitive business. The fact that Ms Jacobsen, in her letter to Mr. Calisse, when accepting his resignation, reminds him of his duties not to directly compete with P2P, is indicative of her attitude in this regard. Why would she have had a different attitude in regard to Ms Stewart, whom she knows, has a relationship with Mr Calisse and is experienced in this business? I therefore conclude that Mr. Calisse did not have the authority to release Ms Stewart.
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> [13] The last question is whether Ms Stewart ought reasonably to have had knowledge of the fact that Mr. Calisse had no power to release her. It is clear from the papers that Ms Stewart has wide experience of the brokerage business in this field. To reasonably believe that Mr. Calisse has the authority to release her from her obligation not to compete as contractor without having the letter co-signed by Ms Jacobsen is questionable. The belief is also unacceptable in the circumstances: why would a competitor in this field give a potential competitor free reigns to compete without receiving any payment for it? It is not as if Ms Stewart is a novice in this field and would pose no threat to the business of P2P. My conclusion is that in the light of the circumstances, Ms Steward either knew or should reasonably have known that Mr. Calisse did not have the authority to release her."

[12] In the court *a quo* and on appeal before this court, the appellants relied almost exclusively on the provisions of section 54 of the Close Corporation Act No. 69 of 1984 ("the Act") which provides as follows:

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[22] Section 54(2) of the Close Corporation Act No. 69 of 1984.

> "(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and in dealing with the corporation, be an agent of the corporation.
> (2) Any act of a member shall bind a corporation, whether or not such act is performed for the carrying on of business of a corporation unless a member so acting has in fact no power to act for the corporation in the particular matter and the person with whom he deals has, or ought reasonably to have, knowledge of the fact that the member has no such power."

[13] Counsel for the appellants argued before us that a dispute of fact existed on the papers regarding whether or not Calisse had authority to bind the corporation. The court *a quo* decided this issue on the probabilities and that, it was submitted, constituted a misdirection. In addition it was argued that no allegations were made by the respondents to the effect that the first appellant knew or ought to have known that Calisse did not have the authority to release her from the restraint of trade. Reliance was placed on the judgment of Koen AJ in the case of **J & K Timbers (Pty) Ltd t/a Tegs Timbers v G.L.& S Furniture Enterprises CC** 2005 3 SA 223 N. The court *a quo*, fairly comprehensively, referred to the judgment of Koen AJ as well as an extract from the commentary of Prof. Henning on the Close Corporations Act.[23] In my view the provisions of section 54 of the Close Corporation Act speak for themselves. The purpose thereof is to protect third parties who have contracted with a member of a close corporation against the negative effects of the *uItra vires* doctrine and the doctrine of constructive notice. Thus, section 54(2) expressly binds the corporation to a third party who had dealt with a member "unless the member so acting has in fact no power to act for the corporation in the particular matter **and** the person with whom he deals has, or ought reasonably to have had, knowledge of the fact that the member has no such power." (Emphasis added). I shall therefore be dealing with the questions regarding whether or not Calisse had the authority to bind the first respondent to the letter of release and thereafter the question whether or not the first appellant had, or ought reasonably to have had, knowledge of such lack of authority.

THE AUTHORITY OF CALISSE

[14] In dealing with the dispute of fact on the papers regarding the authority of Calisse to bind the corporation, one must be mindful of the approach adopted in the

[23] See paragraphs 5.14 and 5.15 of his commentary.

case of **Plascon-Evans Paints v Van Riebeeck Paints** 1984 3 623 (AD) at 634 H – 635 C where Corbett JA said the following:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact…… If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court….. and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks…… Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers….."

[15] It is common cause that the appellants did not invoke Rule 6(5)(g)[24] during the hearing in the court *a* quo, as contemplated in the quote aforesaid. Merely stating that a dispute of fact exists does not automatically render it incapable of a definitive judgment thereon. The court must establish whether or not such dispute is "real, genuine or *bona fide*". If not, the appellants should have availed themselves of the procedure in Rule 6(5)(g). Alternatively the court may resolve it on the papers. In my view this is indeed a case where the court would be justified in adopting a robust, common-sense approach to resolve the dispute on the papers in order to prevent this court from being hamstrung by a blatant stratagem on the part of the appellants. It has been said that the court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.[25] This is particularly so in cases like this where the facts lie "purely

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[24] "6(5)(g): Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[25] See **Soffiantini v Mould** 1956 4 SA 150 (EDLD) at 154 G – H; **Truth Verification Testing Centre v P.S.E. Truth Detection CC** 1998 2 SA 689 (W) at 698 H – I.

within the knowledge of the averring party".[26] When the facts averred are such that the disputing party necessarily possessed intimate knowledge of them but rests his case on a bare, incomplete or ambiguous denial, the court will have difficulty in finding that the test is satisfied.[27]

[16] Applying these principles, I now turn to the dispute regarding Calisse's authority. I respectfully agree with the finding of the court *a quo* that Calisse in fact had no authority to draft and send the letter of release to the first appellant. I say this for the following reasons:

1. *Ex facie* the letter it is clear that the official letterhead of the corporation was not used by Calisse. I say this for the following reasons:

    1.1 The logo appearing at the top left-hand corner is different to the normal logo used by the first respondent as seen in Annexure "E" at page 45 and Annexure "DS9" at page 119.

    1.2 The typing font used for the registration and VAT numbers of the corporation is different to the typing font used in Annexure "E" and Annexure "DS9".

    1.3 The official letterhead of the first respondent includes the words "SAEPA Reg. No.: PR 2006/07/GP 199." These do not appear on the letter of release.

    1.4 The letterheads in Annexure "E" and "DS9" include a Post Box address which does not appear on the letter of release.

    1.5 Annexures "E" and "DS9" contain the following:
    "ACCOUNTS - Cellular: 083-677-0469, Facsimile: 086-615-2483, E-mail: p2pexpress@iafrica.com." This information does not appear on the letter of release.

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[26] See **Wightman t/a JW Construction v Headfour (Pty) Ltd. 2008** 3 SA 371 (SCA) at 375 H.
[27] *Ibid* at 375 H-I.

1.6. The letter of release does not contain the names of the members of the corporation as is required by section 41 of the Close Corporation Act and thus renders the corporation guilty of an offence.[28]

In these circumstances, it is difficult to accept that the letter of release was a valid and *bona fide* written release. The question comes to mind, why use a document with a letterhead other than the official letterheads of the 1st respondent? Why redesign the letter in such a way that it constitutes a breach of the statutory provisions in clause 41 of the Act? The only reasonable inference to be drawn in these circumstances is that Calisse, in conjunction with the 1st appellant, surreptitiously prepared, signed and issued this letter without consulting the 2nd respondent. If this is so, it would follow that the letter could never have been lawfully issued by Calisse. He could never have had any authority to act contrary to a statutory obligation on behalf of the 1st respondent.

2. The letter of release in effect constitutes a waiver by the 1st respondent to hold the 1st appellant to the provisions of the restraint. It is trite that waiver constitutes a special plea which has to be proved by the person alleging such waiver. Also, there is a presumption against a waiver. In this case the respondents, in two clauses of the contract, secured and spelt out in great detail the restrictions under which the 1st appellant will labour upon termination of the contract. In these circumstances, rebutting the presumption will, necessarily, be problematic. It has also been said that although waiver has to be proved on a balance of probability it is difficult to prove such a defence. This is so because it has to be proved that the person who had waived his or her rights was fully aware of exactly what rights are being waived.[29] In the present instance the appellants allege that Calisse discussed the release of the 1st appellant with the 2nd respondent and thereafter "DS6" was "drafted, signed and furnished to me by the 1st applicant with the

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[28] "41(1) A corporation shall not issue or send to any person any business letter, whether in electronic or any other format, bearing a registered name of the corporation, unless the forenames (or the initials) and surname of every member thereof are stated thereon. (2) Any corporation which contravenes any provision of sub section (1) shall be guilty of an offence".

[29] See Christie, The Law of Contract in S.A., Fifth Edition pages 441 and 442.

knowledge and approval of Jacobsen". No details are supplied as to when and where these discussions took place. No details are given as to whether such discussion took place *inter partes*, or by telephone or by an interchange of emails or faxes. Furthermore, there is no confirmation that the contents of the letter was discussed with the 2nd respondent after it was drafted, signed and delivered. All of the above details lie purely within the knowledge of 1st appellant and Calisse. Their failure to supply these must redound to their detriment because it supports the inference that such letter was surreptiously drafted as a ploy by 1st appellant and Calisse to enable her to compete with the respondents immediately after 31 January 2007. In my view, the 1st appellant's allegations in this regard constitute a bald statement that carries little weight and does not pass muster to discharge the onerous proof to establish waiver.

3. In terms of section 42 of the Act, each member of a corporation shall stand in a fiduciary relationship to the corporation to act honestly and in good faith and in particular to manage the affairs of the corporation in the interest and for the benefit of the corporation. Furthermore, such members shall avoid any conflict between his or her own interests and those of the corporation. It would have been a simple matter for Calissse to obtain the signature of the 2nd respondent indicating her approval with the letter of release. No reason whatsoever is given by the appellants for such failure other than the bald statement referred to in the previous paragraph. Had the letter of release been signed by the 1st appellant there would have been no doubt as to its validity. Calisse must have realized the contentious nature of absolving the 1st appellant of her onerous obligations contained in 2 separate clauses in the contract, previously referred to. In order to avoid any later attack on his *bona fides* and any accusations of breach of duty, written approval of his co-member would have brought him within the protection of section 42(4)[30] of the Act.

[30] See in this regard section 42(4) which provides: "Except as regards his or her duty referred to in sub section (2)(a)(i), any particular conduct of a member shall not constitute a breach of a duty arising from his or her fiduciary relationship to the corporation, if such conduct was preceded or followed by the written approval of all the members where such members were or are cogniscant of all the material facts".

His failure in this regard tends to confirm his lack of *bona fides* and a knowledge that he in fact had no authority to bind the respondents in this way.

4. The appellants allege that the letter was sent to the 1st respondent by mail bag. No proof of such postage and/or delivery is provided by the appellants other than a bald allegation which can hardly be disproved.

5. To my mind, the letter obviously constitutes a devious stratagem by Calisse and the 1st appellant to allow her to compete fairly in the industry with which she has been involved for the last 17 years. This, in my view, is the only inference to be drawn from the fact that, 2 weeks prior to her and Calisse's resignations were to take effect, the letter of release is issued. Both Calisse and the 1st appellant must have realised the serious implications the letter would have for the respondents. Yet there is no allegation of any intent to make sure that the 1st respondent in fact received the letter and agreed to its contents.

6. The inference is inescapable that the respondents would have acted immediately and with strenuous opposition upon the receipt of the letter of release, similar to the 2nd respondent's response in the case of the resignation of Calisse. The absence of any similar conduct by the 2nd respondent in regard to the letter of release leads one to only one reasonable inference, and that is that she never received it, consistent with 2nd respondent's allegations on affidavit.

7. The fact that all three parties were aware of the expertise of the 1st appellant made the need for such a clause of restraint absolutely necessary for the survival of the respondents. The potential loss that the respondents may suffer in the event of the restraint clause being rendered ineffective could not have escaped either Calisse or the 1st appellant. Furthermore, on the allegations made by 1st appellant, it is clear that after leaving, she would have no income if she was restrained from operating in the field of courier business. The incentive for the 1st appellant and Calisse to conspire the release of the 1st appellant in a furtive and dishonest manner, was, therefore, so much greater.

[17] All of the aforegoing considerations justify the inference that Calisse knew that the 2nd respondent would not agree to such a release. That being the case, it follows that Calisse executed the letter of release without authority and contrary to the fiduciary duties owed to his co-member. I therefore agree with the conclusion of the court *a quo* that despite the dispute regarding Calisse's authority, a robust and common-sense approach justified the inference that the allegation of Calisse having acted within his authority is so far-fetched and untenable that it was justified in rejecting the appellants' version in this regard on the papers.

THE 1ST APPELLANT'S KNOWLEDGE OF THE AFORESAID LACK OF AUTHORITY

[18] It is trite that the onus of proof to establish the validity of the letter of release rested upon the appellants. Counsel for the appellants argued that the onus of proof reverted to the respondents to prove that the 1st appellant had, or ought reasonably to have had knowledge of the lack of Calisse's authority. Without deciding the issue, I am prepared to assume the correctness of the aforesaid proposition of law. The problem I see in this regard is, however, that the appellants never made any allegation to the effect that, should the court find that Calisse lacked the necessary authority to issue the letter of release, then the 1st appellant was in any event unaware of such lack of authority. The case made out by the appellants in the answering affidavit was exclusively concerned with an attempt to establish that Calisse was duly authorized to issue the letter of release.[31] In these circumstances it seems hardly likely that the respondents would have sought to deal in their replying affidavit with the 1st appellant's knowledge of Calisse's authority.

[19] It goes without saying that proving what knowledge another person had of a certain set of facts, can only be done by way of inference drawn from the surrounding circumstances. In my view the respondents succeeded by inference to establish that the 1st appellant indeed knew of Calisse's lack of authority to issue the letter. To counter this inference, the appellants rely on the fact that Calisse signed the contract on behalf of the 1st respondent. It is argued that such fact must have led the 1st appellant to believe that the letter of release, signed by Calisse, was therefore in order.

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[31] See paragraph 12.5 of the answering affidavit at page 86 and paragraph 12.9 at page 88.

However, nowhere is it alleged that the 1st appellant in fact assumed or accepted that Calisse had the authority to sign the letter of release on behalf of the 1st respondent. On the contrary, the 1st appellant alleges that Calisse was authorized to sign such letter of release without the necessity of any written resolution of the members having been passed confirming such authority.[32] No allegation is made by the 1st appellant as to her lack of knowledge or belief regarding Calisse's authority in the event that he was in fact unauthorised.

[20] Strictly speaking, 1st appellant was not an "outsider" to the inner workings of the 1st respondent. It would appear that the 1st appellant had knowledge of the inner workings of the 1st respondent regarding the method of decision making by Calisse and the 2nd respondent, when they were still co-members. That is why she addressed her own letter of resignation to both 2nd respondent and Calisse i.e. to both directors.[33] She also displays a knowledge of the respective duties and responsibilities of the two members by stating that the 2nd respondent was concerned with the administrative part of the business, which normally would include staff appointments and dismissals. Calisse was concerned with the operation of 1st respondent's operational activities. As of necessity she must have realised that Calisse was acting on his own when he signed the letter of release, an action which falls squarely within an administrative field belonging to the 2nd respondent. The 1st appellant must have realised the inherent danger to the 1st respondent's business if she was allowed to compete with it free from any restraint. She was a signatory to the contract which twice placed restrictions upon her as far as competition with the 1st respondent is concerned. She must therefore have realised the importance of these clauses to the 1st respondent. As such, she knew that the 2nd respondent would never have agreed to such a release from those restraints. The only way to side step such objection by the 2nd respondent, would have been to issue such letter without the approval or authority of the 2nd respondent.

[21] The overwhelming inference to be drawn from the facts in this case is that the 1st appellant connived with Calisse to extricate her from the restrictive provisions of the contract, full well knowing that Calisse did not have the authority to do so. To the

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[32] See paragraph 12.9 at page 88 of the answering affidavit.
[33] See Annexure "D" at page 44 of the record.

extent that this conclusion may be overly strong, I am satisfied that the respondents proved on the papers that the 1st appellant ought reasonably to have known that Calisse lacked authority to issue the letter.

[22] I therefore conclude that for the reasons set out above the respondents proved that the 1st appellant in fact had knowledge that Calisse was unauthorized to issue the letter of release

[23] For the aforesaid reasons I am of the view that the court *a quo* came to the right conclusion and that the appeal cannot succeed.

I therefore make the following order:

1. The appeal is dismissed with costs.

DATED AND SIGNED AT JOHANNESBURG ON THIS …….. DAY OF MAY 2009

_____
C.J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

_____
M. JAJBHAY
JUDGE OF THE HIGH COURT

I agree

_____
H. MAYAT
ACTING JUDGE OF THE HIGH COURT

The matter was argued on 4 May 2009-05-05

Counsel for the appellant: A Bedeker
Attorney for the appellants: Kevin Hyde Attorneys

Counsel for the respondents: M. van der Westhuizen
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