IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

Not Reportable

CASE NO: 14581/99

DATE: 13/08/2010

In the matter between:

COMPANY UNIQUE FINANCE (PTY) LTD	First Plaintiff
FIRST NATIONAL BANK OF SOUTHERN ARFRICA LTD	Second Plaintiff

and

THE NORTHERN METROPOLITAN LOCAL COUNCIL OF JOHANNESBURG	First Defendant
DU PLESSIS, JOHANNES JACOBUS	Second Defendant

J U D G M E N T

BLIEDEN, J:

[1] Between October 1998 and January 1999 three sets of documents each bearing the heading “Master rental agreement” were concluded by the

first plaintiff (Compufin) then trading as Compufin Finance and the first defendant ("the Council").

[2] Each of these sets of documents constituted a contract for the rental of certain equipment by the Council from Compufin over a period of sixty months. The three agreements are annexed to the plaintiffs' particulars of claim and marked "A", "B" and "C" respectively.

[3] Annexure "A" which is dated 2 December 1998 is for the lease of a copier for a total rental of R971 703.96.

[4] Annexure "B" which is dated 21 January 1999 is for the lease of certain radiophones for a total rental of R6 272 032.80.

[5] Annexure "C" which is dated 21 January 1999 is for the lease of certain radiophones for a total rental of R6 272 032.80.

[6] On behalf of the Council the three agreements were signed by Johannes Jacobus du Plessis (du Plessis), who is the second defendant in these proceedings. At all relevant times he was employed by the Council as an acting senior superintendent: Support Services, within the Council's Security sub-cluster. He was described as "executive officer (acting) security" in each of these three agreements and signed each under that title.

[7] The second plaintiff "FNB" is the cessionary of Compufin's rights in terms of Annexure C, and it makes common cause with Compufin in its claim against the Council. The plaintiffs will be referred to collectively as such.

[8] It is the plaintiffs' case that the Council unlawfully repudiated its obligations as contained in the agreements by way of a letter dated 19 March 1999, a copy which is annexed to the plaintiffs' particulars of claim.

This letter reads:

> ***"PURPORTED RENTAL AGREEMENTS: NORTHERN METROPOLITAN LOCAL COUNCIL***
>
> *I refer to the 4(four) rental agreements which were purportedly entered into between yourselves and a certain Mr J. du Plessis, who allegedly acted on behalf of my Council. The agreements were signed by Mr du Plessis on 30 October 1998, 18 January 1999 (two agreements) and on 29 January 1999.*
>
> *I wish to record, however, that my Council was unaware of the existence of these agreements. Neither did my Council at any stage authorize the relevant transactions nor was Mr du Plessis authorized to sign the said agreements on behalf of my Council. From this it follows that the 4(four) purported agreements are null and void.*
>
> *From my records it further appears that three payments of R77 520-00 each have been paid into yourselves via bank debit orders on 15 February 1999, 22 February 1999 and 15 March 1999 respectively, which payments were irregular for the reasons set out above.*
>
> *As a result, I shall appreciate it to receive payment of the amount of R232 560-00 within seven days from date thereof, as well as payment of all other amounts which may have been made to you in respect of the abovementioned purported agreements and which may have not yet come to my attention.*
>
> *Your urgent attention is appreciated.*
>
> *Yours faithfully*
>
> *R. G. Bosman*
> *Strategic Executive Corporate Services"*

It is not in dispute that only three agreements were involved, and the writer of the letter was incorrect in referring to four agreements.

[9] This repudiation has been accepted by the plaintiffs and they have cancelled each of the contracts as a result thereof and their claims arise out of this cancellation. The Council disputes the validity of this cancellation as it is the Council's case that it was not at any stage bound by any of these contracts as du Plessis was not authorised to act on its behalf as claimed by the plaintiffs.

[10] As an alternative claim against the Council, Compufin (and not FNB) has sued du Plessis and the Council in delict. This claim is confined to the goods reflected in annexures "A" and "B". It is claimed that in the event of the plaintiffs not proving their claim in contract, du Plessis in signing the agreement warranted that he was authorised by the Council to do so. That warranty constitutes a representation which was false to the knowledge of du Plessis and was made in the course and scope of his employment with the Council, therefore making it vicariously liable for any claim for damages based on his wrongful conduct in acting as he did. This claim is for delictual damages.

[11] Du Plessis in his plea has denied that he lacked authority as claimed by the Council and consequently has denied any liability to the plaintiffs on their claims.

[12] The plaintiffs have replicated to the Council's plea and in the alternative pleaded that the Council represented that du Plessis had authority and that the Council is therefore estopped from denying his authority as pleaded by it.

[13] The facts relied upon by the plaintiffs for establishing these representations are pleaded as follows:

1. Willem van Wyk (van Wyk) in his capacity as head of security of the Council, signed an extract of a meeting recording that a resolution was taken by the Council authorising du Plessis to enter into contracts and to sign contracts and give effect to the resolution;
2. The Council caused or allowed the contents of the above extract to be published to the plaintiffs;
3. Van Wyk was appointed by the Council as head of security and the Council allowed him to act as such in circumstances where a person in such position usually has the authority to -
    3.1 sign extracts of minutes of the Council and to furnish or communicate them to third parties;
    3.2 instruct du Plessis in relation to the operations of the Council;
    3.3 arrange for the use of equipment and supplies for the Council's operations; and
    3.4 conclude contracts for the use of equipment and supplies for the Council's operations.
4. The Council appointed du Plessis to a position of Manager in circumstances where a manager usually has authority to –
    4.1 act in accordance with instructions from a person with authority such as that of van Wyk;

4.2 arrange for the use of equipment and supplies for the Council's operations;

4.3 conclude contracts for the use of equipment and supplies for the Council's operations.

5. The members of the Council and its authorised representatives–

5.1 knew that du Plessis, alternatively van Wyk, alternatively other unknown officials were involved in negotiations in relation to the use of equipment by the Council and allowed it to so continue;

5.2 accepted delivery of the equipment;

5.3 used the equipment;

5.4 failed to return the equipment or raise any objection to its delivery until a stage after the plaintiffs had already suffered prejudice;

5.5 failed to warn the plaintiffs of internal formalities necessary for the exercise of the authority of the Council or the authority of du Plessis or the authority of van Wyk in relation to the conclusion of the contract or the communication of resolutions of the Council;

5.6 caused or allowed payments to be made through the Council's bank account;

5.7 failed to request a reversal of payments or to raise an objection until after the plaintiffs had already suffered prejudice;

5.8 made insurance arrangements for the equipment;

5.9 made arrangements for the provisions of supplies or services relating to the equipment;

5.10 failed to safeguard against the unauthorised use of the Council's official stamp, thereby making it available for use in documents used to induce the plaintiffs to act to their detriment;

5.11 failed to take steps to safeguard the details of the Council's finances and budgetary allocation and to prevent their unauthorised use thereby making them available for the purpose of inducing the plaintiffs to act to their detriment as they did.

6. The plaintiffs allege that they acted on the correctness of the above representations to their detriment with the result that the Council is estopped from denying the authority of du Plessis and van Wyk to act on its behalf and, in particular, the authority of du Plessis to sign contracts on its behalf.

7. By the time each of the parties had closed their case, the plaintiffs' case based on contract was confined to one based on van Wyk's and du Plessis' ostensible authority, as it was conceded that the plaintiffs had no case based on actual authority as it was accepted that the representation made in the resolution was untrue.

<u>The evidence before the court:</u>

[14] The status of the documents in the bundles being exhibits A1, A2 and A3, which were handed up to court was agreed as follows:

14.1 Copies of the documents could be used instead of the originals save where any party elected to use an original;

14.2 The documents were what they purported to be;

14.3 There was no admission that what was contained in the documents was true;

14.4 Correspondence was admitted as having been sent by the addressor and received by the addressee on or about the date reflected in such correspondence;

14.5 What was said by witnesses as appears from the records of the disciplinary enquiries of du Plessis and Colin Lehmkuhl contained in the Council's discovery documents had been accurately transcribed and those records could be received into evidence without any admission as to the truth of what was said, upon their mere production.

[15] As the evidence relating to the events which are the subject matter of this case occurred some eleven years ago, it is hardly surprising that the witnesses who gave evidence were constrained to rely on reconstructions, often based on inferences drawn from the record of what must have happened at the relevant time. Even where witnesses claimed to have independent recollections of what had occurred, it must be accepted that because of the passing of time memories of the facts are less than perfect and witnesses can be forgiven for having forgotten certain things or for

incorrectly remembering others. The testimony of the witnesses who gave evidence must therefore be dealt with, with some circumspection.

The plaintiffs' evidence:

[16] Compufin was at all material times a finance house which had as its main business the discounting of credit agreements with certain approved sellers of goods reflected in such agreements. It in turn discounted these agreements to registered banks after having ceded such agreements to them and after such banks were satisfied as to the integrity of the transactions concerned.

[17] The agreements being annexure A and B were ceded to African Bank Ltd, while the agreement relating to annexure C was ceded to FNB. The first two agreements were ceded back to Compufin, once African Bank became aware of the difficulties in the present case and before the issue of summons.

[18] The three contracts on which the plaintiff's case is based all emanated from Jeff Rahme Enterprises as supplier of the equipment concerned. It was either Mr Rahme (Rahme) or the two people who assisted him, being Karen Willemse or Ilsé Krause (the latter two trading as Africon), who provided nearly all the documents relied upon by the plaintiffs in this case. It was also Rahme enterprises who had been paid the discounted value of the three agreements.

[19] Rahme had been an approved broker with Compufin for some time and his relationship with Compufin was described by Deon Renier Blignaut (Blignaut), Compufin's then Advances Manager, as being one in which Rahme would discount various agreements to Compufin for finance in the normal course of business.

[20] It is in his capacity as Advances Manager that Blignaut had signed one of the three agreements on behalf of Compufin and he was instrumental in approving all three agreements for payment to Rahme. In his view, the documentation furnished by Rahme satisfied him, on behalf of Compufin, that the three transactions were in order.

[21] All three contracts were dependent on a resolution from the Council signed by van Wyk, describing himself as head of security. This resolution was on a Coucil letterhead. Because of the importance of this document in the present case it is reproduced below. The original of this document was presented to court as "O1". The printed portion of the document is in black ink. The manuscript writing is in blue ink as is the Council stamp at the foot of the document. This document is item 59 in the plaintiff's bundle and is reproduced below.

C.5

First Defendant
First and Second Plaintiff

Northern
Metropolitan Local Council
Greater Johannesburg

000059

Civic Centre
Cnr Hendrik Verwoerd Drive
Jan Smuts Avenue
Randburg

Private Bag
Randburg 2125

Tel: 789
Fax: 787

RESOLUTION

NORTHERN METROPOLITAN LOCAL COUNCIL

EXTRACT OF MEETING OF THE HIRER HELD AT Lyndhurst

ON THIS THE 26 DAY OF NOVEMBER 1998.

RESOLVED: "That the Hirer enters into a Rental Agreement with Compufin Finance (Pty) Ltd. for the renting of the device as specified in the Transaction Schedule and any further Transaction Schedule(s) upon such terms and conditions as are usually applicable to Rental Agreements and as may be agreed upon."

That **Mr. J du Plessis** in his capacity as **Manager** of the Hirer be and is hereby authorised to sign, endorse and execute all documents for and on behalf of the Hirer to give effect to this resolution.

Date 26/11/98

Signature .....

Full Names: WILLEM VAN WYK

Capacity: HEAD OF SECURITY

[22] Various witnesses from Compufin as well as Alexander Hector McClain (McClain) of FNB, at that time the head of that bank's relevant credit committee, regarded the above resolution as being sufficient and satisfactory evidence of Du Plessis having authority to bind the Council in respect of all three transactions reflected in Annexures A, B & C. These witnesses were

also adamant that were this resolution not so regarded, Compufin and FNB would not have entered into any of the transactions. As far as the plaintiff's witnesses were concerned, this resolution was the normal type of resolution in use in the financing industry and there was nothing untoward about it.

[23] The documents required by Compufin in order for it to decide to enter into the transactions concerned were all received from Rahme or from the Africon ladies assisting him, and appeared to Compufin to be satisfactory. In addition the same documentation was submitted to the banks which discounted the contracts for Compufin, namely African bank and FNB, and were also found by the credit committees of these banks to be acceptable.

[24] Two witnesses who gave evidence on behalf of the plaintiffs interviewed du Plessis or du Plessis together with van Wyk, or du Plessis, van Wyk and two African gentleman who appeared to be officials of the Council, before the transactions reflected in the contracts were finally concluded. Their evidence was to the following effect:

1. Anthony Raymond Patrick McLintok (McLintok) had been chairman and sole shareholder of Compufin during the relevant period of 1998 and 1999. He was only involved in the two transactions reflected in annexures B and C. On a date which he could not remember, but before the contracts had been accepted by the plaintiffs, he had attended a meeting at an office in a building occupied by the Council in which the radiophones referred in the two contracts had been discussed.

2. The office was an ordinary Council office containing a desk and some chairs. Present at the meeting was du Plessis and van Wyk as well as two "*African*" gentleman, whose names he could not remember. The purpose of the meeting was for McLintok to satisfy himself that the proposed transactions were genuine.

3. At the end of the meeting he came to the conclusion that it was "*a pretty good idea in terms of what they were trying to achieve*".

4. His impression of the people to whom he spoke at the Council's premises is that they appeared to be senior officials in the security department who acted as if they were duly authorised by the Council. When it was put to him in cross-examination that there would be evidence to show that no resolution as described in O1, had been taken at the Council meeting of 26 November 1998, he said he could not comment but "*I can tell you as far as I am concerned this was 100 percent*".

5. McLintok had had previous experience in dealing with government departments and he felt that there was nothing untoward in the present transactions. At a stage he had received the Council's balance sheet in manuscript. He could not remember how he got it, but his handwriting appears on the document, which to his mind proved that he had received it from someone at the Council.

6. Eric Brian Landberg (Landberg) had initially been employed as a senior member of the Compufin credit committee. However in

September 1998 he moved to African Bank who later took over Compufin.

7. It was in his capacity as head of the credit committee of African Bank and as a senior employee of Compufin that he became involved in the three affected transactions. He had met with either du Plessis or van Wyk at the Council offices in Randburg. His reason for holding such a meeting was to obtain financial information about the Council's credit-worthiness and not to discuss the intricacies of the transactions concerned. He had had no experience in dealing with municipalities or public bodies at that time. As far as he was concerned the persons he saw seemed to have authority to be representing the security department of the Council.

8. He had come into possession of the manuscript balance sheet to which McLintok had alluded. On a reading of the document it appeared that the Council was in a good financial position and certainly was able to afford to be involved in the three transactions concerned. If he had not been satisfied of the Council's ability to comply with the terms of the contracts, he would not have agreed that either African Bank or Compufin pay Rahme on the contracts.

9. In addition to these witnesses a number of Compufin's then employees gave evidence as to the adequacy and regularity of the documentation presented to it in order for the contracts to be

discounted. In their view everything was correct and above board.

[25] At no stage were any steps taken by Compufin or any of the banks to investigate du Plessis' authority to act on behalf of the Council, or for that matter van Wyk's authority to make the representation that du Plessis had such authority as is stated in the resolution, O1.

[26] It was only after the three agreements, A, B & C, had already been discounted that Maclean acting as the head of the relevant branch of the FNB credit department, made enquiries from the Council which ultimately resulted in the Council denying its liability in respect of all three contracts. The reason for these enquiries was that Compufin had presented FNB with certain further credit agreements by the Council for discounting. The amount now involved was over ten million rand. The FNB credit committee required further assurance as to the validity of these agreements. As a response to such enquiries the Council denied that such agreements were valid and further denied the validity of the three agreements which had already been discounted by Compufin.

<u>The Council's evidence:</u>

[27] A number of witnesses gave evidence as to how the Council, being a local authority, conducted its activities at the relevant time and the part they played in the present case. The most important witness in this regard is

Rudolph Gerhard Bosman (Bosman). His evidence on how the Council was supposed to operate was not put in issue in any meaningful manner.

[28] Bosman explained that the Council was governed by various legislative enactments which determined the manner in which it conducted its affairs. Its highest decision making body was the full Council, comprising Councillors duly elected in terms of the Municipal Electoral Act. Beneath the full Council sat the Executive Committee who, in turn appointed a number of portfolio committees, or as they were colloquially known at the time, section 60 committees. These committees were duly constituted in terms of the provisions of section 60 of the Local Government Administration and Election Ordinance of 1960.

[29] There were seven clusters within the Council. The clusters were each headed by a strategic executive. Each cluster was divided into a sub-cluster and each sub-cluster was headed by an executive officer. There were seven sub-clusters within corporate services, namely fleet and plant, administration, property, legal services, communications and security, IT information services, information technology and finance. The executive officers reported directly to the strategic executive of the cluster concerned and the strategic executives in turn reported to the Chief Executive Officer (CEO) of the counsel.

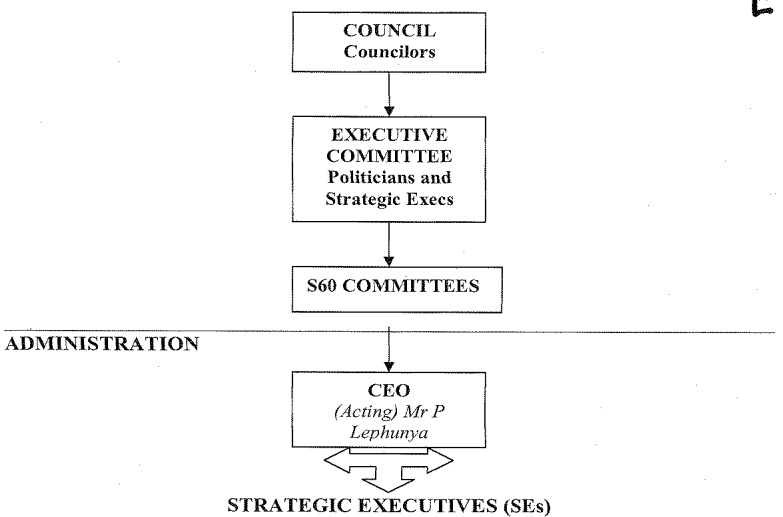
[30] The Executive Committee comprised a chairperson (who was a political representative) and nine other political representatives, the CEO and

finally the various strategic executives. An organagram was submitted in evidence setting out the relevant positions held by the officials and the line of authority under which they operated. This was exhibit E in the trial. It is reproduced below.

COURT

Exh "E"

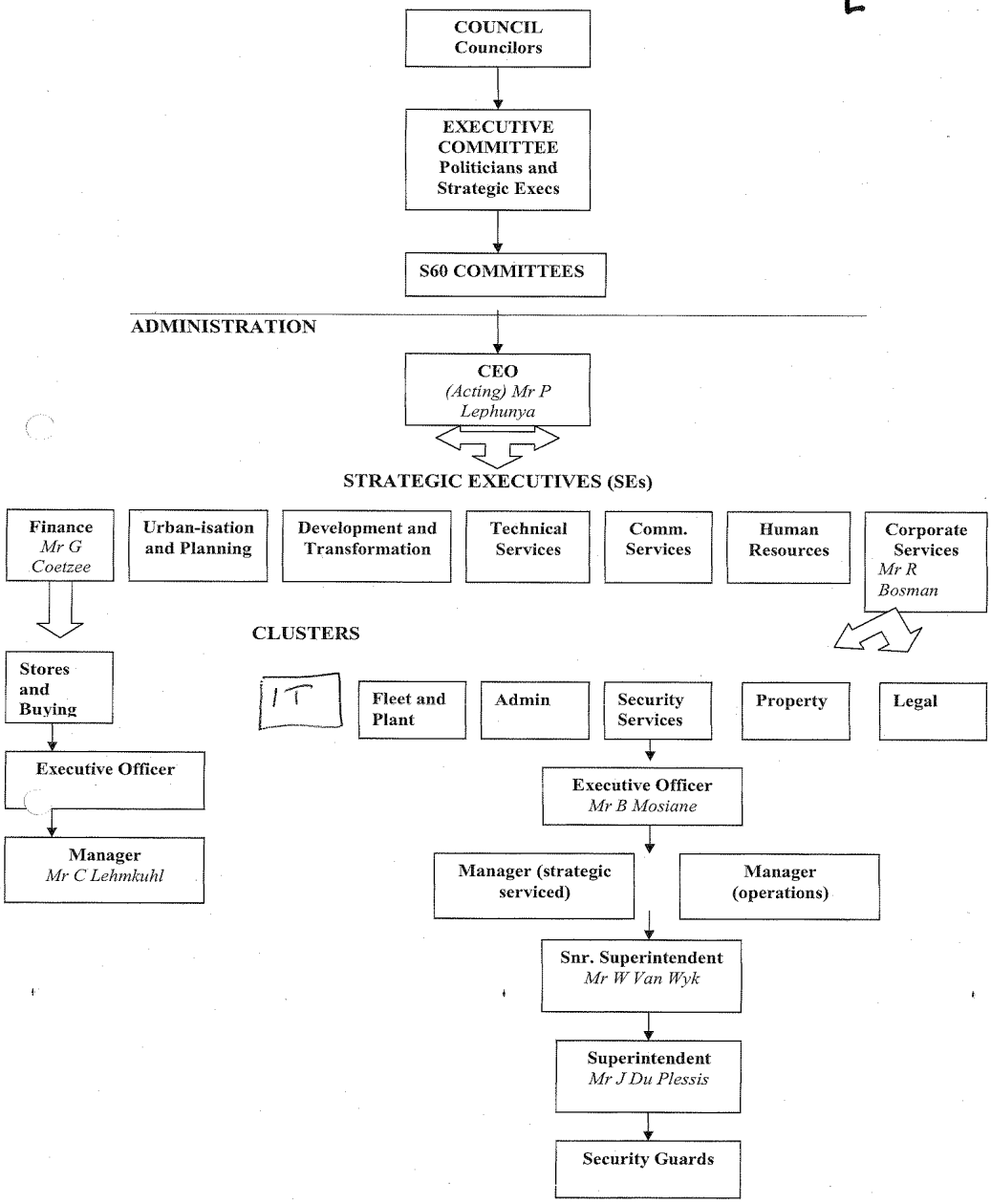
"E"


COUNCIL
Councilors
EXECUTIVE COMMITTEE
Politicians and Strategic Execs
S60 COMMITTEES
ADMINISTRATION
CEO
(Acting) Mr P Lephunya
STRATEGIC EXECUTIVES (SEs)

COURT

Exh "E"

"E"



[31] He explained the organagram as follows: The person at the head of administration was the CEO. At the relevant time this was Mr. Lephunya (Lephunya). Beneath him were the strategic executives who headed up each of the individual clusters. The security services sub-cluster fell under the

governance of the corporate services cluster. Bosman was the strategic executive in charge of corporate services and the security department therefore fell within his domain. Beneath the executive officer of the security sub-cluster were two manager positions, one for the operations and the other for strategic services. Below the managers were senior superintendents and beneath them were a number of superintendents. At the final rung of the ladder were the security guards and the law enforcement officers.

[32] At the relevant time Mr Willie Mosiane (Mosiane) was the Executive Officer of the security sub-cluster. The acting Manager was van Wyk and du Plessis was in the position of Acting Senior Superintendent.

[33] The Council at that time employed well over a thousand officials. Both van Wyk and du Plessis could be classified as senior officials, in the security sub-cluster of the Council. It had as its function the provision of security services for the Council in regard to its property and personnel.

[34] At no stage was van Wyk the head of the security sub-cluster. At the relevant time this position was occupied by Mosiane who was the executive officer of this sub-cluster.

[35] The Council was at all times a Local Government Body, constituted and administered as such by statute and none of its officials had the power, in their individual capacities, to act on its behalf without specific authorisation. Bosman said that as far as the incurring of debt and the spending of the

money was concerned, this was strictly controlled in that save for certain expenditure, which is not relevant in the present matter, the only body who could authorise expenditure was members of the Council, meeting as such, or in certain cases of lesser expenditure, the Executive Committee appointed by the full Council. He stated that as far as the public was concerned, a telephone call to the legal department of the Council would be sufficient to enable any person dealing with the Council to ascertain whether people professing to act on its behalf had authority to do so or not. Notwithstanding this he could not question the evidence given by the other witnesses who testified for the Council, that a reasonable businessman would be entitled to rely on the say so of senior members of the Council's staff insofar as their authority to act on its behalf was concerned.

[36] The then executive officer of the security subcluster, Mosiane, testified on behalf of the Council. He denied that there was any talk that Councillors were being threatened or subjected to high jacking threats as claimed by Jacobs, Lephunya and du Plessis when they gave evidence. He also denied that it was any part of the job of the security sub-cluster to ensure the safety of Councillors. He further denied that he was present in du Plessis' office when the photocopier was delivered as testified by du Plessis. He stated that he had told du Plessis to take it back but never checked the next day to see that it was gone, and merely instructed van Wyk to remove it but never followed up on this instruction. This is notwithstanding the fact that his office was in close proximity to du Plessis' office (20 meters) and immediately adjacent to van Wyk's office.

[37] Mosiane did not ask du Plessis to give him the name of the supplier so that he could contact it directly and deny authority with regard to the supply of the photocopier. He also did not lay any disciplinary charge against du Plessis for obtaining the photocopier on a trial basis.

[38] Mosiane denied the truth of the admission made by van Wyk at the disciplinary enquiry that he agreed that du Plessis would be acting manager during the few days that he and van Wyk would be away at the International Crime Conference i.e. from 26 until 30 October 1998.

[39] He was unable to dispute Mr Lottering's evidence at the du Plessis disciplinary enquiry that it was around about the middle of January 1999 that he came to know du Plessis was involved in negotiations regarding radiophones. He was unable to explain why, instead of attempting to find fault with the report appearing in the bundle, Exhibit A1 pages 190 to 191, he had not simply adopted the expedient of speaking to Lephunya, if he thought that this was a fraudulent document.

[40] He confirmed that he knew Jacobs, the Councillor, personally but denied ever having attended a meeting with him in relation to his security concerns and radiophones.

[41] Mosiane's evidence in chief denying that it was his signature at page 23 of exhibit A1 (giving van Wyk certain signing powers), contradicts the

evidence he gave under oath at the disciplinary hearing, and also contradicts what is stated in his affidavit to the South African police which had been discovered by the Council. Mosiane was unable to explain this contradiction under cross-examination.

[42] Mosiane's evidence that he told du Plessis to return the Photostat machine is contradicted by his statement to the police where he said "*I said it would be fine as long as there is no contract signed to this. Mr van Wyk assured me that there was no contract".* Mosiane was unable to explain this contradiction. His further statement that he did not draw up a job description for du Plessis, and his denial that it was signed by van Wyk, contradicts what he told the police stating "*I drew up a job description for du Plessis which van Wyk signed on my behalf*". At a latter stage he contradicted himself by conceding that he did in fact draw up the job description for du Plessis which van Wyk signed on his behalf and that this job description included a point 6 which reads "*Contracts and Tenders*" as part of du Plessis's duties. He however refused to concede that an outsider would consider upon reading this document, that du Plessis had authority in respect of contracts and tenders.

[43] In addition to the above witnesses the Council called Ms MH Renny who had been its Committee Officer during 1998 and who testified that no resolution was passed by the Council as reflected in the extract signed by van Wyk in O1.

[44] Mr A Nortjé (Nortjé) who had been appointed a Legal Advisor at the end of 1995 and was still in the employ of the Council also gave evidence. He said that O1 is not the sort of document he would have expected to authenticate this type of resolution. He was asked to provide copies of the resolutions that had been utilised in respect of previous transactions regarding photocopiers of which he said there were a number. He undertook to find such resolutions and to bring them to court the following day. He however did not do so. To date no such resolutions have been produced by the Council.

[45] Nortjé conceded that an outsider, not party to the Council's internal requirements, on looking at O1 as a whole, would be entitled to accept that this document was in fact a genuine document which confirmed the passing of the resolution recorded in it. He also confirmed that the stamp on the document was an official Council stamp, although emanating form its records department.

[46] He said that one would assume that the Council's bank account would be checked carefully by the Finance Department who would pick up immediately if any unauthorised debit order went through.

[47] He conceded that the Council would rely on its own senior officials to warn the public as regards the limitation of their authority, although he would expect members of the public to know that the Council operates under a delegation of powers. He finally conceded that the ordinary businessman would rely heavily on the senior official he was dealing with and that official

had a duty to explain the inner workings of the Council and not to sign documents well knowing that he has no authority to do so.

Du Plessis' case:

[48] Du Plessis appeared on his own behalf. He called two witnesses. They were Mr Nathan Jacobs (Jacobs) who at the relevant time was a City Councillor and Mr Lephunya (Lephunya) the then Chief Executive Officer of the Council. Du Plessis also testified on his own behalf.

[49] Du Plessis had been employed as a Senior Superintendent in the security cluster of the Council. He shared an office in the building occupied by the cluster. In the past the only "*large*" purchase he had made on behalf of the Council was to buy a dog kennel for the dog squad. He could not remember how much it cost.

[50] He explained his designation as "*manager*" of the Security Cluster came about as a result of his two superiors, Mosiane and van Wyk attending an international security conference in Braamfontein for four days during the latter part of 1998. He was left in charge and it was for this reason that he was described as "*manager*" of that department for those four days. On their return to office he resumed his position as Senior Superintendent.

[51] He was under the impression that he was entitled to represent the Council in regard to contracts and purchases by the security subcluster. This

was part of his job description. He thought that this was in order as long as people senior to him gave him instructions to perform these tasks. He was acting in this capacity when he signed the documents concerned.

[52] He had been told of the need for the photocopier which is referred to in "A" and to the radiophones referred to in "B" and "C" respectively. This had been done by both van Wyk and Mosiane. He was also independently aware of the Council's need for such equipment. He had been shown the copier by the Africon ladies, Karen Willemse and Ilsé Krause, and the radiophones by Rahme. He signed the contracts A, B and C on behalf of the Council in good faith. He saw nothing wrong in signing the documents concerned and felt that he was acting in terms of his mandate and in the interests of the Council, as this was confirmed to him by both van Wyk and Mosiane.

[53] He confirmed having had discussions with both McLintok and Landberg. These took place in his office at the Council's premises.

[54] Because of his actions in signing A, B and C du Plessis had been criminally charged with fraud and he was also suspended by the Council and requested to attend an internal disciplinary enquiry held by it. Although ten years have now passed nothing has happened in the criminal proceedings. He did not attend the disciplinary enquiry as he had been advised by his then attorney not to do so because of the impending criminal case against him. In his absence he had been found guilty of dishonest conduct and was as a result dismissed from his employment with the Council.

[55] Jacobs gave evidence which corroborated du Plessis' evidence as to the Council's need for radiophones. This was in order to ensure the personal safety of the fifty Councillors who made up the City Council at the time. He confirmed that he had discussed this with both du Plessis and Mosiane who agreed with him.

[56] Lephunya also corroborated du Plessis' evidence as to the need to the radiophones concerned. He said that a draft resolution had been prepared for presentation to the Council in order to authorise the purchase of the radiophones, but this had not been proceeded with on the advice of Bosman, as the latter had stated that the statutory requirements for the presentation of such a resolution had not been complied with. This document was at pages 190 and 191 of exhibit A, to which reference has already been made.

[57] Other than signing the three contracts du Plessis had made no representations to anyone. The representations relating to his authority were by van Wyk, who was not called as a witness by any of the litigants in this case and had not been prosecuted by the Council, but continued in his employment with it as before.

[58] Du Plessis gained no personal benefit as a consequence of signing the contracts and according to him he was solely motivated by furthering the interests of the security sub cluster of the Council in obtaining the goods concerned, as they were needed by the Council at that time.

Agreed facts and admissions binding on the Council:

[59] In the week before the trial, the Council admitted that du Plessis (alleged to be senior superintendent security services), van Wyk (alleged to be Acting Manager Security) and Mr Lehmkuhl (Lehmkuhl) (alleged to be Buyer: Contracts and Purchasing) were its employees.

[60] During the trial further agreement on facts was reached and these agreed facts were handed in as Exhibit C.

[61] The underlying information necessary to calculate the plaintiffs' quantum of damages was admitted as part of the admitted facts.

[62] It was admitted that nearly all the items which had been delivered in terms of the contracts, A, B and C, including the photocopier and the radiophones, had been returned by the Council.

[63] In addition the contents of expert reports were admitted as regards:

1. The veracity of the signatures of van Wyk, Lehmkuhl and du Plessis;
2. The usage of the photocopier and the radiophones, by the Council.

[64] It was not seriously put in dispute that those documents in the bundle which constitute documents, statements and affidavits made in the course of the disciplinary proceedings conducted by the Council in respect of the du Plessis and Lehmkuhl cases, now relied upon by the plaintiffs, were all made by employees of the Council at the time and constitute admissions which are admissible in evidence as against the Council. (See LAWSA Vol 9 First reissue par 531 "*Informal admissions generally. Provided that the various requirements had been met, admissions are admissible against a party irrespective of whether he elects to give evidence. The Hearsay Rule does not exclude evidence of an admission. The reason for its admissibility is that whatever a person says to his detriment is likely to be the truth*."

[65] The above principle has been recognised to be part of our law in a number of cases such as Randfontein Transitional Local Council v ABSA Bank Ltd 2000 (2) SA 1040 (W), Zungu v Minister of Safety and Security 2003 (4) SA 87 (D) and Maize Board v Hart 2005 (5) SA 480 (O).

[66] The following constitute admissions as against the Council:

1. Van Wyk admitted that he signed the resolution which is O1 and referred to in paragraph 21 of this judgment. This document was on original Council letterhead paper.
2. Van Wyk stated that he was asked to sign that resolution as both he and Mosiane would be going to the International Crime Conference during October 1998 from the 26 to the 30th. He under oath explained how he came to sign O1 (A(4) at the

enquiry) at the du Plessis disciplinary enquiry which was presided over by Bosman as follows:

"*<u>CHAIRPERSON:</u> But Mr van Wyk, explain how could you have signed A(4), what, I need some detail on this because this is important. Just let me read A (4), because I actually want to read it into the record. It reads: "RESOLVED", and then it quotes:*

" That the HIRA (should be "Hirer") enters into a rental agreement with Compu Finn Finance for the renting of the device as specified in the transaction schedule and any further transaction schedules on such terms and conditions as are usually applicable to rental agreements as may be agreed upon."

And then it closes the quote and then it has a second paragraph which reads:

"That Mr J du Plessis in his capacity as Manager of the HIRA (should be "Hirer") be and is hereby authorised to sign, endorse and execute all documents for and on behalf of the HIRA (should be "Hirer") to give effect to this resolution".

Now what I need to know is firstly this gives authority to or purports to give authority for the council to enter into a rental agreement. Did you check to establish whether this in fact was a council resolution?

<u>MR VAN WYK:</u> No, this wasn't a council resolution. I was not aware of the fact that they referred to a council resolution, resolution ja. The fact of the matter is these ladies told me the reason for me completing this is to give Du Plessis permission to go on with the administration process for the hiring of the photostat machine, to sign for the delivery and for the monthly instalments.

<u>CHAIRPERSON:</u> But, Mr Van Wyk, surely the hiring of a photocopy machine, just like the hiring of any other equipment has a certain procedure that has to be followed and this was not in line with council's procedure.

<u>MR VAN WYK:</u> <u>But how must I have known?"</u> (my underlining)

<u>CHAIRPERSON:</u> The hiring of photocopy machines, I put it to you, is dealt with by the Admin and Support Services Subcluster of Corporate Services and had to be dealt with by that specific Subcluster, not by any other Subcluster who wishes to hire a machine. Is that not your understanding of the council's procedure?

<u>MR VAN WYK:</u> ..(inaudible)

<u>CHAIRPERSON:</u> Well, what was your understanding if you see this document says resolution: Northern Metropolitan Local Council. What did you take this to mean when you signed this?

MR VAN WYK: *That I give Du Plessis permission to sign for the delivery and the administration process, you know that will follow the photostat machine. I have said it here in my statement. She gave me a document to sign."*

3. Mosiane had agreed that du Plessis would be acting manager during those few days (in place of Mosiane).

4. The radiophones in question were delivered and Mosiane received one of these radiophoness for his personal use.

5. Mr Strauss, an employee of the Council admitted in exhibit A1, page 417, that he signed a volume confirmation together with du Plessis in relation to the volumes used by the Photostat machine.

6. Minnie Regina Etsebeth, a records clerk then in the Council's employ, at exhibit A 1, page 421 admitted that her official stamp was taken from her and used by the Council's security department and returned to her by van Wyk. This was the same stamp as appears in O1.

7. Mr Michael Coetzee, exhibit A2, pages 327 to 333, admitted authorship of the manuscript financial statements that were furnished to McLintok and were referred to in paragraphs 24(5) and 24(8) of this judgment. These documents were prepared by him in the normal course of his employment with the Council.

8. Lehmkuhl admitted that he was Acting Manager of Contracts for the Council at the time and signed a rental agreement for a number of photostat machines, which rental agreement appears in exhibit A1 at pages 82 to 86.

9. Lehmkuhl admitted that he personally received a radiophone.

10. The document authored by Lehmkuhl appearing in exhibit A1 at page 391 to all clusters in relation to the proposed photocopier transaction is admitted to have been sent and received.

11. Mr Boucher, an employee of the Council, stated that late in March 1999 he was in a meeting with Christo Olivier with reference to the case of du Plessis purchasing radiophones for the Council. That meeting was held in his office. Lehmkuhl entered his office with one of the radiophones involved in the case and handed it back to Olivier

12. Van Wyk admitted that the vote number contained in the document bearing Lephunya's name which appears in exhibit A1 page 190 to 191, bears a genuine vote number. Although the Council has challenged this document bearing Lephunya's name, it has not challenged the sending and receipt of a fax attaching that document to Compufin.

13. The Council's employee, Sally Tshoeadi at A1 page 316, admitted giving information regarding the photocopiers to the Africon ladies in relation to all photocopiers in the service of the Council. She admitted that she supplied them with all payment vouchers regarding all photocopiers in the Council for the month of August 1998 and that Karen and Ilsé worked on all payment vouchers in the Strategic and Executive Finance boardroom over a period of approximately two weeks. Karen, Ilsé and René also from Africon, contacted her telephonically to request information regarding the photocopiers. She supplied that

information to them because they wanted to give a proposal to the Council that all photocopiers be supplied by one supplier. She also faxed a list with serial numbers of all Sharp copiers and the name of the internal contact person to René at Africon. Her supervisor also signed the document “Volume Confirmation” on a Council letterhead.

14. There are documents in the bundle, exhibit A, that demonstrate a prior history of dealing between the Council and Africon in relation to supplies for photocopiers going back to 1997.

15. The document in exhibit A1 at page 23 is not challenged by the Council and reveals that a memorandum dated 11 June 1998 was sent by Mosiane of Security services, to the Acting Strategic Executive Finance, advising that from 10 June 1998 the Acting Manager Security Services, van Wyk, will have the following signing authority pertaining to security services – Northern Metropolitan Local Council : (a) To certify invoices, (b) Approval of requisitions, (c) Direct purchases and (d) Petty cash.

16. The memorandum concludes stating that the following two signatures from the Acting Manager is for the information of the acting strategic executive finance. Then follow two signatures of van Wyk which are admitted to be genuine.

17. Prior to contracts “B” and “C” being concluded payments had been made by the Council in terms of contract “A”.

18. Compufin was given a letter from the Council’s insurers confirming that the goods listed in contracts A, B and C had

been insured on its behalf and confirming its interests in such goods.

The legal principles applicable:

Ostensible authority

[67] In order to act on behalf of another so as to affect that other's relationships, the necessary authority to do so must be present. Authority to act can either be actual or ostensible. The distinction between actual and ostensible authority was explained by Denning MR in **Hely-Hutchinson v Brayhead Limited and Another [1968] 1 QB 549** CA at 583 A – G). The Supreme Court of Appeal in **South African Broadcasting Co-operation v Coop and Others 2006 (2) SA 217 (SCA)** at 234 D – F has adopted this reasoning. It is to the following effect:

> *"Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out". Thus, if he orders goods worth £1 000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other party who does not know of the £500 limitation. . . ."*

[68] As has already been stated in the present case it is only ostensible authority which is in issue in the plaintiffs' case based on contract. This issue had been further explained by the Supreme Court of Appeal in **NBS Bank Ltd v Cape Produce company (Pty) Ltd and Others 2002 (1) SA 396 (SCA)** where the dictum in the Hely-Hutchinson case was applied by Schutz JA as follows:

> "*As Denning MR points out, ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. . . . But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, to take this case, the fact that Assante held himself out as authorised to act as he did is by the way. What Cape Produce must establish is that the NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression: Connock's (SA) Motor Co Ltd v Sentraal A Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T) at 50A - D. Although an intention to mislead is not a requirement of estoppel, where such an intention is lacking and a course of conduct is relied on as constituting the representation, the conduct must be of such a kind as could reasonably have been expected by the person responsible for it, to mislead. Regard is had to the position in which he is placed and the knowledge he possesses.*"

[69] Finally for an estoppel to operate certain essentials are necessary. These are stated in NBS Bank Ltd (supra) case as well as **Glofinco v ABSA Bank Ltd (trading as United Bank) 2002 (6) SA 470 (SCA)** at paragraph 12 as follows:

> (a) There must be a representation by words or conduct. (b) It must be made by the "*principa*l" and not merely by the "*agent*" that he had the authority to act as he did. (c) The representation must be in a form such that the principal would have reasonably have expected that

outsiders would act on the strength of it. (d) There must be reliance by "*the third party*" on the representation. (e) The reliance on the representation must be reasonable. (f) There must be consequent prejudice to "*the third party*".

[70] Therefore a claimant who relies on an estoppel will have to show that he or she was misled by the principal into believing that the party who purportedly acted on the principal's behalf had authority to conclude the act, that the belief was reasonable, and that the claimant acted on that belief to his or her prejudice. Assurances by the agent of the existence or extent of his own authority are of no consequence. It is further settled law that the onus to establish an estoppel rests on the party who pleads it.

Fraud and misrepresentation:

[71] In order to establish that there has been an actionable fraudulent misrepresentation or fraud the following must be shown:

a. A representation;

b. which the representor knows (or foresees or reconciles to the possibility) is false and which he intends the representee to act upon (or foresees and is reconciled to the possibility that the representee will act upon it);

c. the representation must induce the representee to act, causing patrimonial loss. **Ex parte Leboa Development Corporation Ltd 1989 (3) SA 71 (T)**. LAWSA Vol 17 (2) 2nd edition at

paragraphs 308 – 312. As was stated by de Villiers CJ in Dickson and Company v Levy 11 SC 36 "*if the defendant honestly believed his representations to be true, it cannot be relied upon as a fraudulent representation giving rise to action for damages…..if made recklessly without regard to its truth or falsehood it would be fraudulent, but the defendant's honest belief in the truth of his statement is sufficient to negative fraud on his part.*"

[72] In so far as the plaintiffs may rely on a negligent misrepresentation on the part of du Plessis, it is for them to establish the following as a basis for any claim for damages:

a. A misrepresentation by du Plessis that was wrongful (breaching a legal duty owed not to make a misrepresentation in the circumstances);

b. it must be made negligently;

c. the misstatement must have caused (factually and legally) these damages claimed. **Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 A.** Neethling et al Law of Delict (4th edition) at 304 – 310. LAWSA Vol 17(2) at head 316.

Vicarious liability:

[73] An employer is liable for damage occasioned by delicts committed by an employee in the course and scope of that employee's employment.

[74] As was stated by the Appellate Division in **Feldman (Pty) Ltd v Mall 1945 AD 73** per Greenberg JA " *A master… is liable even for acts which he has not authorised provided that they are so connected with the acts which he has authorised that they may rightly be regarded as modes – though improper modes – of doing them…*"

[75] In order to establish vicarious liability the plaintiff must prove, in addition to the usual allegations to establish delictual liability, that the party concerned was acting in the course and scope of his employment.

Applying the law on the case based on contract:

[76] On behalf of the Council it is submitted that an analysis of all the evidence led on behalf of the plaintiff shows that despite various senior representatives of Compufin visiting van Wyk and du Plessis and other unnamed officials at the Council's offices, not one of them made an enquiry as to the authority of van Wyk to authorise du Plessis to act on behalf of the Council as he did in the resolution O1.

[77] All the information required by those persons acting on behalf of Compufin was to satisfy themselves of the need of the Council to purchase the goods concerned and its ability to pay for such goods in terms of the contracts concerned.

[78] One must separate the contracts as such from the goods acquired in terms thereof. Because the Council needed the goods concerned, does not indicate that du Plessis had the power to enter into the actual contracts as he did. This is a *non sequitor*, so it was submitted.

[79] In addition counsel for the Council drew attention to the fact that large portion of the present case for the plaintiffs was taken up with evidence which was acquired by them from Rahme and the two Africon ladies. As none of these persons gave evidence it is impossible to say how they obtained the documents concerned, or whether those documents can be classified as representations made by the Council.

[80] In my view these arguments lose sight of the fact that what is plain is that from a conspectus of all the evidence led in this case, the documents could only have been obtained from the Council. This is particularly so with reference to the resolution O1. It is also plain from the evidence of the witnesses called by the Council that anyone dealing with the Council would be entitled to accept information given to him by senior Council officials as in fact occurred. As was said in **SABC v Coop 2006 (2) SA 217 (SCA)**:

> *"[74] As in the NBS Bank case (supra) the plaintiffs' case was not limited to the appointment of the various relevant officers who acted on the SABC's behalf. It included their senior status, the trappings of their appointment, the manner in which they went about their dealings with the plaintiffs, the use of official documents and processes, the apparent approval of subordinate and related organisations, such as the pension fund and medical scheme, the length of time during which the Ludick option was applied, the Board's own financial accounts and the conduct of CEOs who were Board members.*
> *[75] As in the NBS Bank case, the SABC created a façade of regularity and approval and it is in the totality of the appearances that the representations relied on are to be found."*

[81] The “façade” of regularity relied upon by the plaintiffs as submitted by their counsel can be summarised as follows:

81.1 The Council appointed Mosiane, van Wyk and Du Plessis to the top three positions in ranking in the Security sub-cluster hierarchy. As such, they were allowed to interact with the public and were expected to do so.

81.2 The Council provided these officials with offices in which to work, and they required equipment in order to fulfill their functions properly, in particular photostat machines and radios.

81.3 The Council allowed outsiders such as Rahme’s and Compufin’s representatives, access to its employees within the official premises of the Council, reinforcing the facade of regularity. In this regard, the evidence is clear that McLintok of Compufin and Landberg of African Bank seperately met with either du Plessis or van Wyk at the Council's premises prior to the conclusion of the photostat agreement, Agreement A. Also present were two other persons whom McLintok identified as African gentlemen, but whose names he could not recall, one of whom could have been Mosiane.

81.4 Prior to all of this the Council had, since during June 1997, dealings with the Africon ladies and had purchased consumables from them for its photocopy machines. The Council had also allowed the Africon ladies free access to their premises for the purposes of supplies, and

for the purposes of ascertaining their volume needs for photocopiers. The Council allowed them to work on its payment vouchers in the Strategic and Executive Finance Boardroom over a period of about two weeks. It allowed them to obtain details as to the existing photocopiers. This in turn enabled the Africon ladies to pass on information regarding volumes to the banks, which aided the facade of regularity.

81.5 The Council provided its employees with original letterheads which allowed van Wyk to use an original letterhead when certifying the existence of the non-existent Resolution. It also provided its employees with official stamps and allowed these to be used for its official documents, including the original Resolution, Exhibit O1.

81.6 The Plaintiffs' representatives in turn relied upon this appearance of regularity contained in the letterheads and the original official stamp in being persuaded that the Resolution O1 was genuine and granting the required finance for the Agreements A, B and C.

81.7 The Council appointed another official in the Finance Department, Lehmkuhl as the Acting Contracts Manager, which indicates to the outsider, that he had authority in relation to contracts. Lehmkuhl signed a contract for the purchase of a number of photocopiers prior to the conclusion of Agreement A, and this was sent by the Africon ladies to Compufin thereby lending an appearance of regularity to the Agreements A, B and C subsequently concluded.

81.8 Mosiane and van Wyk went away to an International Crime Conference from 26 to 30 October 1998, effectively leaving the du Plessis in charge.

81.9 The Council produced financial statements and allowed these to be furnished to McLintock, prior to the conclusion of Agreements B and C.

81.10 The Council allowed Lehmkuhl to send out a memorandum to all clusters in relation to the proposed photocopier transaction, without taking any steps to investigate or warn its own officials or anyone who might become involved as to any limitations on the authority of Lehmkuhl and other officials to conclude contracts.

81.11 Mosiane drew up and allowed Van Wyk to sign on his behalf a job description of du Plessis prior to the conclusion of Agreements A, B and C, listing as part of his job description *"Contracts and Tenders".* Although Mosiane tried to deny this when giving his evidence it is clear that he had earlier admitted that he had also signed the original of the document in A1 page 23 which ostensibly afforded Van Wyk signing powers.

81.12 The photocopier was delivered to the Council premises and used, on the probabilities, to make some 7000 copies for a period of some

seven weeks, without any objection from any official from the Council to Compufin, which would have alerted it to any lack of authority.

81.13 Mosiane was a party to the decision to acquire the photocopier, and was present when it was delivered and approved its purchase. Mosiane's protestations to the contrary, given the contradictions in his evidence and his changing of his version during the course of evidence, are not believable.

81.14 Subsequent to the conclusion of the Photocopier transaction Agreement A, a payment was made via a debit order signed by the du Plessis, prior to the conclusion of the radiophone contracts agreements B and C. Even the Council's bankers accepted the signing power and authority of du Plessis on behalf of the Council.

81.15 This bank account was checked regularly by the Finance Department, at least on a monthly basis, yet this debit was not picked up giving a further appearance of regularity. Had this debit been picked up timeously it could have prevented the conclusion of the Agreements B and C.

81.16 On Mr Lottering's admission, Mosiane knew of the negotiations regarding radiophones, as early as the middle of January 1999. Mosiane admitted that he had become aware of these negotiations and was unable to dispute this date supplied by Mr Lottering. This means

that Mosiane was aware of the negotiations prior to the conclusion of Agreements B and C and yet did nothing effective to stop them or to question the authority of the du Plessis.

81.17 In the light of Mosiane's admitted knowledge of the photocopier deal, and his protestations that he had told du Plessis to return the photocopier, it is inconceivable that Mosiane would have acted as he claimed. Instead he would at least as at the middle of January 1999 have taken immediate disciplinary steps against the du Plessis, and immediately notified the suppliers to stop the proposed transactions, yet he did nothing. This indicates his apparent assent, which further buttresses du Plessis's version that all of the photocopier and radiophone agreements were with the express approval and apparent authority of his superiors being both van Wyk and Mosiane.

81.18 There was no secret made of the proposed acquisitions of the radiophones and all of those who heard of it, including Councillors, were in favour of their acquisition. Even the Chief Executive Officer, Lephunya, became aware of the desire to conclude the radiophone transactions when the p 190-191 document was placed on the agenda for approval by EXCO. He himself would have been in favour of the transactions and he confirmed that the Councillors were in favour of the radiophones. On his evidence and the probabilities, the p 190-191 document reached the EXCO agenda prior to the conclusion of Agreements B and C, but were stopped by Bosman who,

notwithstanding his denials, knew about the radiophones and had a discussion with Lephunya about it, yet himself failed to stop the conclusion of these transactions, and only took action once it was too late.

81.19 Although the Council had in place existing written delegations of authority, it took no steps to train its employees as regards the precise limits of their authority. This led at best to ignorance and at worst to wholesale confusion and assumption of authority which created a dangerous situation to innocent outsiders who would perforce be obliged to rely upon what they were told by the officials themselves (untrained as they were) as to the limits of their own authority. This is well illustrated by van Wyk's evidence at du Plessis' disciplinary enquiry which is quoted in par 66(2) above.

81.20 The Council had an existing insurance policy, on the evidence. It allowed its insurance information to be accessed and to be used as part of the agreement documentation, thereby aiding the appearance of regularity and creating a false sense of security in the financiers that the equipment was not only authorised but that it was insured.

81.21 As submitted by the Plaintiff's counsel the evidence of what occurred after the conclusion of Agreements A, B and C which, whilst not constituting direct evidence of events that can be relied upon to ground

estoppel, since they occurred after the conclusion of the agreements, are nonetheless valuable as a source of inferential reasoning as regards the apparent approval prevailing before the conclusion of Agreements A, B and C and in this regard:

[a] the radiophones were delivered in large quantities (some 200-odd in total) to the Council's official premises, without any person responding immediately to say that the radiophones had not been ordered;

[b] a number of the Council's senior employees were issued with the radiophones including Mosiane and van Wyk;

[c] a number of Councillors, including Jacobs were issued with radiophones, liked them, and used them;

[d] there was substantial use of the radiophones as demonstrated by the expert testimony and on the probabilities this could only have been by the Council employees and Councillors who were issued with these radiophones. (Exhibit "C" par 12 – 14)

[f] this situation prevailed from about 21 January 1999 until 19 March 1999, nearly two months before Bosman rejected the agreements, by way of his letter of 19 March 1999 which is quoted above.

81.22 Had the transactions been without the approval of a large number of the Council's employees, and had du Plessis acted alone as the Council suggested, it is inconceivable that it would have taken approximately 2 months from the delivery of such a large number of radiophones, for the transactions to be rejected.

Conclusion on the claim based on contract:

[82] I therefore hold that there was a representation by both words and conduct made by the Council, that du Plessis had the authority to sign the Agreements A, B and C, and that Van Wyk had the authority to record that an authorizing resolution had been passed, and this was in such a form that the Council should reasonably have expected that outsiders such as the plaintiffs would act on the strength of it.

[83] There can be no doubt that each of the Plaintiffs' witnesses who testified that they relied upon the appearance of the Resolution, and the fact of the prior visits, were honest and truthful and steadfast in their belief.

[84] There was some suggestion in the evidence, although somewhat faint, that if enquiries such as those ultimately pursued by FNB in relation to the two uncompleted radio transactions had been pursued at the outset in respect of Agreements A, B and C, the lack of actual authority would have been uncovered at an earlier stage.

[85] In considering this suggestion, first it should be borne in mind that it is only the fact that funds had already been advanced by FNB in relation to Agreement C, and the substantial further amount required to be financed, and the possibility of even more finance in the future, that the matter was pushed into a category involving the further active participation of FNB's Credit Department. In this regard, the original credit limit approved by FNB was R4 332 000.00 on 22 December 1998, without making any of the further enquires that were ultimately made.

[86] The new credit requirement would be in the order of R25-30 million and it was recommended by Maclean that the limit be increased to R10.5 million to cater for the rental of further radiophones.

[87] What prompted the additional enquiries was that subsequent to doing the first transaction and in considering the proposed further transactions, it became apparent that the budget approved, amounted at best to R6 600 000.00 and FNB was now being asked to finance R10.5 million. Then one of the members of the Credit Committee, Robin Du Plessis, decided to speak to people who would have been on joint committees with him in FNB, and it came to its attention that the people who normally approved transactions of this kind come out of the Finance Department and not out of the Security Department. That is why Mr Maclean then wrote to Lehmkuhl of the Finance Department.

[88] These are different circumstances from those prevailing at the time of the approval of the lesser amounts required for Agreements A, B and C and it does not follow that because further questions were asked in relation to the proposed further transactions, that the same questions ought to have been asked at the outset.

[89] I agree with the Plaintiffs' counsel that it does not follow that a reasonable man, in the face of the visits to the Council's business premises by no less than two officials, to speak to high-ranking officials in the Council, and after receipt of the Resolution on an original letterhead bearing an original stamp with original handwriting, completed in the typed form, would necessarily have made enquiries with any additional or other officials. See also *SABC v Coop 2006 (2) SA 217 (SCA) at paragraph 72 and NBS v Cape Produce at par 23* (supra).

[90] As was held in *NBS v Cape Produce*, an ultra cautious person may have done that, but it was the seniority of the officials that were dealt with, and the trappings of authority already referred to that would cause a reasonable man not even to consider such a step.

[91] Insofar as it was suggested by counsel for the Council that the wording of the resolutions should have put the Plaintiffs on their guard, all of the Plaintiffs' witnesses testified that the wording of the Resolution was a standard form wording used in the finance industry, and that there was nothing unusual in that wording that would have alerted any suspicion on their part. Bosman

on behalf of the First Defendant was of the view that the wording did not accord with the normal Council wording but he did not pretend to be an expert on what applied to other Councils, and he could only comment on his personal experience with the present Council.

[92] I agree with plaintiffs' counsel that there was accordingly nothing wrong with the wording such that it should have elicited suspicion in the mind of the reasonable financier in the position of the Plaintiffs.

[93] I therefore find that the Plaintiffs acted reasonably in relying upon the representations made by the Council as to the authority of du Plessis to sign the agreement.

[94] It therefore cannot be disputed that on the strength of the representations, Compufin to its actual or potential prejudice paid out the price of the photocopier and the radiophones as invoiced to it by Jeff Rahme.

[95] The position regarding the Cessions and the consequent liability to repay has been agreed in terms of the admitted facts, from which prejudice and potential prejudice are apparent.

[96] As in the NBS v Cape Produce case, I find that prejudice has clearly been established.

[97] The Council is therefore estopped from denying the authority of du Plessis to act on its behalf in concluding the Agreement A, B and C, and from denying the authority of Van Wyk in making the representation he made. The Plaintiffs are therefore entitled to judgment with interest and costs accordingly. It was not in dispute that the present case was one which justified the employment of two counsel by each party. Costs are therefore awarded on this basis. It was also a term of each of the contracts, A, B and C, that these costs would be attorney and client costs.

Du Plessis' fraud and misrepresentation:

[98] The unchallenged evidence of du Plessis is that he believed that he had the authority to enter into the agreements concerned by virtue of his job description. In addition he made it plain that he did not do anything without the specific authority of those in authority above him such as van Wyk and Mosiane.

[99] His uncontradicted evidence is that he was not shown the resolution O1 which was signed by van Wyk. He was told by those acting on behalf of Rahme that such a resolution was necessary, but it was never presented to him. The witnesses for the plaintiff made it clear that as far as they were concerned they were not relying on any representation made by du Plessis, but on a proper and acceptable resolution confirming du Plessis' authority to sign the three contracts on behalf of the Council. They were unanimous in

their evidence that had such a resolution not been furnished Compufin would not have proceeded with the transactions concerned.

[100] In circumstances, the plaintiffs cannot succeed in a claim for damages against du Plessis, when the evidence of their own witnesses is that they did not rely on any representation made by him, but on the representation of van Wyk who signed the resolution. In addition there is no evidence that du Plessis was aware that the statement in O1 was false. In the circumstances it cannot be said that the plaintiffs at any stage relied upon either a fraudulent or negligent misrepresentation from du Plessis in concluding the transactions described in the three contracts, annexures A, B and C.

[101] For these reasons the plaintiff's claim against du Plessis cannot succeed and falls to be dismissed. Therefore it becomes unnecessary to deal with the issue of vicarious liability on the part of the Council, such a claim also falls to be dismissed.

Quantum of the Claim

[102] The plaintiffs have prepared a schedule in which their claim for contractual damages is set out.

[103] In terms of this schedule the Plaintiffs have chosen to reduce their contractual claim by the value of the equipment returned. This has been done in order to limit any dispute by any parties as to the proper quantification of

the contractual claim, which has been raised by the Council in its reliance on the Conventional Penalties Act 15 of 1962. This latter reliance is as a consequence of the Council's amended plea.

[104] The value of the equipment has been calculated by an expert and it is no longer in dispute. The only issue in dispute is the rate of interest to be charged.

[105] Clause 8.2 of each contract provides that in the event that the Council defaulted in the punctual payment of any payment as it fell due in terms of the contract, or failed to comply with any of the terms and conditions of or its obligations under the contract, then Compufin would be entitled immediately to terminate the contract, take possession of the equipment, retain all amounts already paid by Compufin and claim all outstanding rentals (which in context means arrear rentals), all legal costs, including legal expenses on the attorney and client scale, and as agreed pre-estimated liquidated damages the aggregate of the rentals which would have been payable had the contract continued until expiry by effluxion of time.

[106] In terms of clause 3.3 of each contract the overdue amounts bear interest at a rate of 6% per annum above the publicly quoted base rate of interest per annum of any South African Registered Commercial Bank nominated by the Compufin after the conclusion of the agreements.

[107] The Plaintiffs have elected the prime overdraft rate of FNB.

[108] On behalf of the plaintiffs it was therefore submitted that they are contractually entitled to claim the interest rate as per clause 3.3 of the contracts, which is 6% above the FNB's prime interest rate which interest is to run from the 19th of March 1999 until date of final payment.

[109] The Council has in its amended plea raised a defence based upon the Conventional Penalties Act 15 of 1962 ("the Act") in relation to clauses 3.3 and 8.2 of the agreements.

[110] The position of the Plaintiffs in this case who are claiming the penalty has been authoritatively stated by the Supreme Court of Appeal, per Jafta JA in **Steinberg v Lazard 2006 (5) SA 42 (SCA) 42** at 45 C – G:

> *"[6] Since it is common cause that the appellant has breached the undertaking, the respondent is entitled to the full penalty amount unless it is reduced in terms of s 3 of the Conventional Penalties Act 15 of 1962. This section provides:*
>
> *'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'*
>
> *[7] The Legislature provided protection to a debtor against an excessive penalty. In terms of the section, as construed by this Court, the debtor bears the onus of proving that the penalty is disproportionate to the prejudice suffered and to what extent (see Smit v Bester 1977 (4) SA 937 (A) at 942D - G).*
>
> *[8] It was submitted on behalf of the appellant that, although the onus lies upon a debtor to establish the absence of prejudice, some prejudice is nonetheless an essential allegation to be made by a creditor who seeks enforcement of a penalty. That submission has no*

merit. There is absolutely no need for the creditor to allege prejudice in claiming a penalty. The onus being on the debtor, it is for the debtor to allege and prove its absence, albeit that that might call for only prima facie evidence initially."

[111] In the present case the Council led no evidence of any nature to justify a reduction of the penalty in terms of section 3 of the Act.

[112] Counsel for the Council sought to rely on the judgment in **Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance 2008 (3) SA 47 (C)** where the Court adopted a comparison between what the Plaintiffs' position would have been had the Defendant not defaulted and what the Plaintiffs' position would be if it obtained judgment in the amount claimed. This approach is unobjectionable as a starting point, but questionable in that if followed rigorously it would deny the application of any penalty whatsoever, which would be contrary to section 1 of the Act and Steinberg (supra). It is significant that in Plumbago no mention was made of the Supreme court of Appeal judgment in Steinberg. That judgment seems to have been overlooked.

[113] In *Plumbago* the Court found that because photocopying machines that had been repossessed had been utilised to make additional income (one was sold, the other rented out) that should be deducted from the accelerated rentals that were claimed by the Plaintiff. It also found that interest at a rate of 6% above prime on the accelerated rentals was disproportionate to the amount of prejudice and instead ordered that interest should be at the prescribed rate *a tempora morae*. This latter finding is questionable in the light of what was said in Steinberg, quoted above.

[114] In any event the facts in the Plumbago case are distinguishable from the present one, as no such evidence was led in this case as was led in that case.

[115] In relation to interest, the principles stated in Steinberg (supra) are applicable. It is the Council who has chosen to repudiate the agreements and return the equipment. It should have paid the liquidated damages on that date. It has chosen not to, with full knowledge of the interest that would be paid by it if its actions were held to amount to a wrongful repudiation. Had it paid on repudiation, no interest at the higher rate would have been incurred. In the meantime the Council has not paid anything further and has had the use of the money that it would otherwise have had to pay. The Plaintiffs have in their turn been deprived of the benefit of the receipt of that money and the benefit of investing it or earning a return in some other manner.

[116] It would not be equitable in these circumstances for the Council to escape the consequences of what it had agreed to pay by way of interest as a result of its own unilateral act contrary to the will of the Plaintiffs, particularly where in the meantime the 5 year periods of the agreements have long since elapsed, and it has enjoyed the benefit of the money and any returns thereon (not to mention the benefits of paying in now depreciated Rands).

[117] Moreover, the Plaintiffs have already agreed that the value (and where

sold - the sale value) of the equipment can be deducted from their claim, in circumstance where this is not strictly necessary. In this respect it should also be remembered as has already been said given the nature of the contracts, the equipment would in any event have been returned to the Plaintiffs at the end of the 60 month rental period (as per clause 11.2).

[118] In the circumstances it I find that the agreed interest rate should not be reduced.

[119] In the circumstances the following order is made:

There will be a judgement against the First Defendant as follows:

a. Payment of the sum of R 7,070,607.34 to the First Plaintiff in respect of Contracts "A" and "B", together with interest thereon at the rate of 6% per annum above the prime overdraft rate charged by the Second Plaintiff from time to time, from 19 March 1999 until date of final payment;

b. Payment of the sum of R 6,208,952.80 to the Second Plaintiff in respect of Contract "C", together with interest thereon at the rate of 6% per annum above the prime overdraft rate charged by the Second Plaintiff from time to time, from 19 March 1999 until date of final payment;

c. Costs of suit on the scale of attorney and client, such costs to include the costs consequent upon the employment of two counsel.

d. As against the Second Defendant: The First Plaintiff's claim is dismissed with costs.

_____

P BLIEDEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE 1ST & 2ND PLAINTIFF:	Adv. Harpur(SC)
	Adv. Coutsoudis
INSTRUCTED BY	Lynn & Main Incorporated
COUNSEL FOR THE 1ST DEFENDANT:	Adv. Franklin (SC)
	Adv. Wood
INSTRUCTED BY	Moodie and Robertson

THE SECOND DEFENDANT APPEARED IN PERSON.

DATE OF HEARING	10 May 2010