REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 12398/2005

DATE:11/02/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

TRANSNET LIMITED Appellant
(Appellant *a quo*)

and

VUSA-ISIZWE SECURITY SERVICES (PTY) LIMITED Respondent
(Respondent *a quo*)

J U D G M E N T

WEPENER, J:

[1] This appeal, from a decision of a single judge of this Division, relates to a tender for the provision of security services submitted by the respondent to the appellant and concerns, in the main, the question whether or not a fixed term contract for a period of 24 months was concluded between the parties, and whether the agreement was repudiated by the appellant and properly cancelled by the respondent. These questions were answered in the affirmative by the court *a quo*.

[2] The appellant is made up of a number of divisions, one of which is its Spoornet Division, a division of rail and related services. On or about 17 August 2004 the appellant issued a tender for the provision of security services in the Johannesburg-East area. This area is comprised of a number of sub-areas or clusters which included six clusters, one of which was the Sentrarand cluster. The tender called for the supply of two distinct types of security services namely, an equestrian service and a vehicular service. I shall refer to both services simply as the security services unless the context demands otherwise.

[3] The respondent submitted a tender to the appellant for the provision of security services in respect of all clusters in the Johannesburg-East area. In addition to the respondent, a further 37 tenderers submitted tenders to the appellant for the provision of the security services. All of the tenderers were evaluated by a cross-functional team comprising, *inter alia*, of members of the appellant's procurement department. As part of this evaluation the cross-functional team checks the arithmetical calculation of the amounts quoted by

the tenderers and where the amounts are incorrectly computed they are corrected and recommendations are then made to the appellant's tender board (which was the body that had the authority to award a tender to a successful tenderer) based on these revised or corrected quotations. The respondent's tender was one such tender where the cross-functional team corrected the arithmetical calculation of the amounts quoted. The respondent quoted for an amount of approximately R600 000,00 per month for the rendering of the security services. Unbeknown to the respondent, the cross-functional team revised that figure to R338 780,00. As a result the respondent was ranked fourth amongst all the tenderers. But for the revision of the tender by the cross-functional team, respondent would have ranked 27th and would, so it was argued, not have been considered for the provision of the security services to the appellant. However, it is common cause between the parties that the amendment of the respondent's tender was never communicated to the respondent at all.

[4] It was stipulated in the tender documents that a tenderer could be advised by telegram or letter of the acceptance or non-acceptance of the tender – but no procedure was laid down for purposes of communicating the acceptance of the tender resulting in the fact that any method of acceptance conveyed to the respondent would be sufficient. Such acceptance would create a contract between the parties.

[5] After the tender was lodged, a site evaluation took place and the respondent was evaluated by a valuation team as per the requirements of the

tender documents. All the arrangements which the respondent had made in respect of equestrian services were disclosed to the appellant in detail. The tender period was from 1 December 2004 to 30 November 2006. The evaluation pertaining to the horses and the services indicated that the respondent did not have any stables and that it hired stables and all facilities from equestrian specialists. It was disclosed that the training of the guards would commence once the contract was awarded and that no operational plan was in place but that respondent would use the equestrian specialists' infrastructure to get everything in place once the contract was awarded. The respondent also intended to employ its own trained guards to ride the horses and for that purpose the respondent had entered into an agreement with the equestrian specialists in terms of which the respondent had purchased the required number of horses. In terms of an agreement the respondent obtained ownership of the horses and payment would be made once the tender was awarded to the respondent. The horses were therefore purchased on the basis of a suspensive condition and this was disclosed during the evaluation process. There was also an evaluation done pertaining to firearms which evaluation was not produced at the trial. During this evaluation it was disclosed to the appellant's representatives that the respondent would purchase firearms once the contract was awarded and that respondent would then have to wait for the firearm licences to be issued.

[6] Christie, *The Law of Contract in South Africa* (5th edition) at p 42 states:

> "*A call for tenders, then, is normally no more than a request to submit offers, and each tender is an offer which the employer calling for tenders may accept or reject at will*."

[7] On 30 November 2004 the tender board of the appellant approved the award of the contract to the respondent and the relevant documents were drafted but they still had to be signed. Services in terms of the tender had to commence on 1 December 2004 on an urgent basis although certain outstanding aspects were listed in a letter confirming the award of the tender. However, at a meeting held on 30 November 2004 at which the respondent was represented by Mr Ngidi and Mr Maseko and the appellant by Mr Naidu and Mr Stone, the respondent was advised that the respondent was one of the tenderers who had succeeded in being awarded the tender and that it had to commence with the services the following day. Ngidi's evidence was as follows:

> "*That we were one of the tenderers who had succeeded in being awarding the work. He then proceeded and said they have problems because companies that were working in the places that now will be given to us, they were then going to be working their last shift on that particular night. He also said this again, he also admitted that he knows that the time he has given us is extremely short and he requested us to please help him start the evening shift the following day. Your lordship he even said he knew that we were supposed to have been given the contract by then but that the contract was at head office and we would then be giving it not long. I then asked Your Lordship that would they not be able to give us anything that is written, he replied and said even the other companies had asked for something similar.*"

[8] On 1 December 2004 Mr Naidu handed out letters to those to whom tenders had been awarded. The contents of the letter to respondent clearly

indicate that the tender had been awarded and that an agreement had been entered into regarding the specific tender. There is a dispute regarding the authority of Mr Naidu to enter into the agreement. It is however important to note that a distinction must be made between Mr Naidu not having been authorised to sign the eventual agreement and the question if Mr Naidu was authorised to convey the acceptance of the tender and to enter into the tender contract on that basis. In November 2004 the tender had already internally been awarded to the respondent, and the agreement was already formulated and ready for signing on 29 November 2004. The only internal issue remaining was for the official written contract to be signed and the evidence on behalf of the appellant concerned authority to sign the written agreement and not the authority to convey the acceptance of the tender to a successful tenderer.

[9] Subsequent to the oral communication there was a delay in signing the agreement which was caused by an internal investigation conducted by the appellant. This was not conveyed to the respondent. Mr Maelane on behalf of the appellant testified that the first time the issue of authority was brought up was during a meeting on 17 January 2005 and he conceded that the appellant did not know anything about the authority issue before then. It was conceded by Mr Maelane that it was reasonable of Mr Ngidi to have thought that the tender contract had been awarded to respondent and that it was reasonable of Mr Ngidi to have acted on the letter supplied to him by Mr Naidu. It was also clear from the evidence that the respondent proceeded with implementing the tender contract from 1 December 2004 and acting as if a

contract had been entered into and as if the tender had been awarded and accepted.

[10] Because there is no formal prescribed procedure for the acceptance of the tender, the uncontested evidence of Mr Ngidi that Mr Naidu confirmed to him that the tender had been accepted leads to the inescapable conclusion that the tender contract had been awarded and that it had been entered into on 30 November 2004. It was never any condition and it was never raised or argued or pleaded as a defence that the intention of the parties was at all relevant times that only the written agreement would be a binding agreement between the parties. Christie, *The Law of Contract in South Africa* 5th Edition deals with the issue as follows on page 106:

> "*This principle, that the burden of proof is on the party who asserts that an informal contract was not intended to be binding until reduced to writing and signed, was adopted by the Appellate Division in Goldblatt v Fremantle 1920 AD 123, in which Innes CJ said at 128-129:*
>
> > *'Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (Grotius 3.14.26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (see Voet 5.1.73; V Leeuwen 4.2, sec 2, Decker's note): and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction.'*
>
> *In Woods v Walters 1921 AD 303 305 Innes CJ referred to the above passage and added:*
>
> > *'It follows of course that where the parties are shown to have been ad idem as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of a written document lies upon the party who alleges it.'*

…

The conclusion in Goldblatt v Fremantle was explained by Blaine J in De Bruin v Brink 1925 OPD 68 73 in the following terms:

> *'An agreement to confirm in writing the written terms of a contract implies that what was arranged prior thereto was merely introductory and provisional, and of no binding force; and on that account furnishes very strong evidence of intention that the writings containing the terms and the confirmation should alone form the contract. But no such implication would, I think, arise merely from an agreement to embody in a written document terms which had been previously verbally arranged, as such an undertaking would be quite consistent with an intention to be bound by the verbal agreement, while a condition requiring confirmation in writing of written* (sic) *terms would not.'"*

It is furthermore important that the evaluations were done pertaining to the tender and that the tender board accepted the tender knowing full well about the outstanding issues pertaining to the horses and the firearms. In support of the evidence on behalf of the plaintiff Mr Stone, on behalf of the defendant, testified that he was under the impression that the letter of 30 November 2004 was the acceptance of the tender and that the tender was accepted on that day. Stone further testified that he acted under the impression that an agreement had been entered into and that he was required to deal with the execution and implementation of the agreement. In the light of the evidence, the contents of the letter, the probabilities and the absence of evidence by Mr Naidu himself there is no doubt that it must be accepted, on a balance of probabilities, that the tender was accepted on 30 November 2004. In the absence of any formal requirements regarding the acceptance of the agreement and because Mr Naidu had informed the respondent of the acceptance, the tender offer had formally, correctly and validly been accepted, leading to a binding agreement. This is supported by the letter of

30 November 2004, Mr Stone's evidence and the actions of the appellant thereafter until 23 December 2004.

[11] The appellant raises a dispute regarding the authority of Mr Naidu, who communicated the acceptance of the tender to the respondent. The dispute is, however, not supported by the evidence of Mr Stone who testified on behalf of the appellant. Mr Naidu was no stranger to Mr Ngidi – he was instrumental to communicating the acceptance of another contract in Durban to the respondent and Mr Ngidi was aware that Mr Naidu also orally communicated the acceptance of the tenders to other tenderers for other clusters on the same day namely 30 November 2004.

[12] On 23 December the respondent received a letter from Mr Maelane acting on behalf of the appellant denying that any valid contract had been entered into between the respondent and the appellant and stating that the adjudication process was still underway. He further mentioned that the respondent would only be deemed to have been the successful tenderer if the necessary documentation had been signed by all the parties. He alleged that respondent was on site without formal notification from the appellant's duly authorised representative and imposed certain conditions upon which the respondent could provide services on a month-to-month basis. The respondent refused to accept the contents of this letter.

[13] The appellant's operational staff proceeded with their duties from 1 December 2004 on the basis that there was a tender contract in existence

and the respondent was evaluated on that basis regarding to the respondent's performance. It is clear that the respondent was in a very difficult position after 23 December 2004 and the respondent attempted to arrange a meeting with representatives of the appellant, including Mr Maelane, which only occurred on 14 January 2005. In the meantime Mr Stone, on behalf of the appellant, sent a letter to the respondent referring to the deficiencies in terms of the contract requiring the respondent to deal with those within 48 hours of receiving the letter. Mr Stone testified that the 48 hours referred to in the letter was a way of putting respondent on terms to rectify alleged deficiencies. None of these letters were meant to have been formal demands in terms of clause 30 (the breach clause) of the tender agreement. On 5 January 2005 Mr Stone recorded in a document that firearm retaining could be finalised on 28 January 2005, horses could be deployed by 10 January 2005 and 31 January 2005 respectively and final training had to be finalised by 31 January 2005. According to the respondent, the time periods were agreed to. The requirement of firearm licences was extended with no time period attached thereto. In the meantime respondent rendered services and submitted accounts. A meeting was held on 29 December 2004 with Mr Stone during which he discussed certain issues that were outstanding regarding vehicles and horses. This was confirmed in a letter of 30 December 2004. In this letter the extensions of time already agreed upon, were confirmed. Respondent then wrote a letter on 7 January 2004 dealing with some of the concerns of the appellant and so also in another letter dated 12 January 2005. The respondent's evidence was that it had no choice but to render accounts on the lower amounts because the appellant refused to pay any other amounts. Mr

Ngidi, on behalf of the respondent, testified that it never waived its right to claim the full amount in terms of the agreement.

[14] On 13 January 2005 a certain Mr Labuschagne of the appellant conducted an inspection of the respondent's premises and according to Mr Ngidi the inspection was not conducted properly. Mr Labuschagne did not discuss the arrangements between respondent and the equestrian specialists with Mr Ngidi at all. Mr Labuschagne simply came to the conclusion that the respondent was subcontracting all his services to the equestrian specialists. In fact Mr Ngidi testified that the respondent would have rendered the services by way of its own horses and its own trained guards on horses. The appellant's witness Mr Maelane agreed that that would not have constituted subcontracting as meant in the agreement and which would constitute a breach.

[15] On the basis of Mr Labuschagne's investigation the tender board purported to terminate the tender agreement and to award such tender to different tenderers. Mr Labuschagne's conclusion about the respondent's subcontracting the services regarding horses was wrong. He advised however, on that basis that the contract with respondent should be terminated. At a meeting on 14 January 2005 Mr Ngidi and Mr George Knight discussed the facts with Mr Maelane. Mr Ngidi testified that he made it clear that the respondent was awarded the tender contract and that it was communicated to him by Mr Naidu but that Naidu told him that he did not have the required delegation or authority to sign the agreement. He testified that

he told Mr Maelane that Mr Naidu promised that the agreement would be sent to the respondent the following week for signature. The view of Maelane was that they were informed of the contract by a person (Mr Naidu) who was unauthorised and that the tender board had not awarded the tender. This is in clear conflict with the objective facts and the evidence of all the parties concerned regarding the fact that the tender board had in fact awarded the contract and that the awarding of the tender was communicated to the respondent albeit not in the terms proposed by the tender board. According to Mr Ngidi all the issues pertaining to horses, firearm compliance and disclosure of arrangements pertaining to horses and firearm licences in terms of the tender were discussed at the meeting of 14 January 2005. In a letter dated 2 February 2005 the respondent indicated that it could not carry on on the basis it was rendering services at the time and that the respondent required finality.

[16] A decision was taken on 9 February 2005 by the appellant's tender board to cancel the agreement with the respondent and to enter into a new agreement with other service providers. This decision was taken notwithstanding the fact that the appellant's representatives had given the respondent an extension of time pertaining to the horses, training and firearm licences. At the time the appellant had already imposed penalties on the respondent for certain deficiencies in terms of the agreement on the basis that there was a tender agreement in place. This indicates an election not to cancel the agreement on the basis of deficiencies but to uphold the agreement and to impose the penalties. Mr Maelane accepted that appellant

decided not to cancel the agreement because of the alleged non-performance and deficiencies but that the appellant would rather levy penalties. Therefore it must be accepted that as at 31 December 2004 no decision had been taken to cancel the agreement. The respondent was at that time excused from performing in terms of the agreement as a result of the breach of the contract committed by the appellant, being the repudiation of the agreement on 23 December 2004. The appellant did not at that time or thereafter have a basis to cancel the agreement.

[17] On 10 February 2005 Mr Maelane wrote a letter to Mr Ngidi and prepared to cancel the agreement. At that time a decision had already been taken to appoint other parties to render the services. The basis for the cancellation appears from the letter of 10 February 2005 as non-compliance of tender conditions. However the evidence referred to indicates clearly that the parties were aware at all relevant times until 10 February 2005 that there was no compliance pertaining to certain issues when the tender was accepted. This, therefore could not constitute a lawful basis for the cancellation of the agreement. Furthermore, the respondent had been given extensions of time to comply therewith. In his evidence Mr Maelane testified that the only grounds for cancellation of the agreement were the reasons given in an internal letter to him by one Mr Gama, the Chief Executive Officer of appellant, on 4 April 2005. He limited the reasons for cancellation to ownership of horses and ownership of firearms. He conceded in cross-examination that he was wrong regarding the horses and accepted that the respondent owned the horses when the tender was awarded. He also

accepted that the respondent had already purchased firearms to comply with the firearms requirements of the appellant as contained in the tender documents and that obtaining of the licences could take some time. It is also to be noted that the deficiencies recorded by Mr Stone in terms of the contract were never a reason for the cancellation nor advanced for that purpose. Mr Stone himself testified that his demands were never intended to have been formal demands to place the respondent *in mora* in terms of the agreement.

[18] On 24 February 2005 the respondent's attorneys wrote a letter to the appellant advising it of the acceptance of the repudiation and cancellation of the agreement. In all the circumstances the court *a quo* correctly held that the acceptance by Mr Naidu orally and confirmed in the letter of 30 November 2004 constituted the conclusion of a valid and binding agreement as there is no dispute that Mr Naidu was authorised to communicate the acceptance of the tender on 30 November 2004. In *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) the court at paragraphs [50] to [52] dealt with this argument and similar issues as follows:

> "*[50] I do not agree with the court a quo's conclusion that there could be no binding contracts between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from Goldblatt v Freemantle, supra, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence. That this is so is clear, for example, from CW Decker's annotation on Van Leeuwen's Commentaries on Roman-Dutch Law 4.2 s 1 (not s 2 as*

Innes CJ says at 129) where he pointed out (Kotzé's translation 2 ed vol 2 p 12) that we no longer uphold the distinction drawn in Roman law between real, verbal, literal and consensual contracts because all contracts with us are made with consent. With regard to written contracts he referred to an observation by Samuel Strykius (Modern Pandect 2.14.7) as follows:

> *'(W)e must regard the written contracts as distinct, insofar as we should bear in mind that although the writing does not constitute the essentiality of the contract, which is contained in the mutual consent of the parties, they may nevertheless agree that their verbal agreement shall be of no effect until reduced to writing, in which case the agreement cannot before signature have any binding force, although there exists mutual consent; and it cannot be said that the writing served not in perfecting the transaction, but only as proof thereof , since here it is agreed that the consent should not operate without the writing, which must be observed as a legitimate condition.'*

[51] The passage in Wessels cited in the judgment in the Meter Motors judgment supports this approach. The learned author refers to Institutes 3.23 pr, and says that '(t)he plain meaning of this passage seems to be that if the parties agree to have their contract of sale in writing, then until a document is drawn up there is no vinculum juris and therefore no actionable contract. This is the interpretation which Voet (18.1.3) gives to this passage and it seems difficult to justify any other'.

[52] In the present case there were clearly no agreements between the parties that the mutual consent between them would not operate in the absence of a document embodying its terms signed by both buyer and seller. There were in fact no negotiations between the parties before Mr Pillay and Dr Motlanthe signed their offers. It follows that I am satisfied that the basis on which the case was decided by the full bench cannot be upheld. It follows also that the passage in the Meter Motors case on which Nicholson J relied, insofar as it is inconsistent with what I have said, is incorrect. I think that it is more correct to say, on the facts of the present case, that these offers prescribed a particular form of acceptance (cf Driftwood Properties (Pty) Ltd v McLean 1971 (3) SA 591 (A) at 597D; Withok Small Farms (Pty) Ltd v Amber Sunrise Properties (Pty) Ltd (664/07) [2008] ZASCA 131 (21 November 2008); and E Allan F Farnsworth Contracts 2 ed at 53.13 (pp 151 - 2))."

[19] The appellant's defence, however, is that Mr Naidu had no authority to award the tender to the respondent or to make such a communication. The respondent contended in its replication that the appellant is estopped from

denying the authority of Mr Naidu to sign the letter and to communicate the acceptance of the tender. The respondent contended that the appellant created the impression that Mr Naidu was authorised to do so. This appeared *inter alia* from the fact that Mr Naidu previously awarded and communicated acceptance to respondent of a contract in Durban on the same basis when the same procedure was followed. Mr Naidu at the same time i.e. 30 November 2004 communicated the acceptance of tenders in respect of other clusters to other tenderers. No one ever told respondent that Mr Naidu was not authorised to communicate the acceptance until long after respondent had already commenced rendering services. Mr Stone was also under the impression that Mr Naidu could have communicated acceptance of the tender – he even drafted the letter of 30 November 2004. No other contracts were cancelled for the same reason. Mr Naidu himself did not come and say that he was not authorised to communicate the acceptance of the tender and to enter into the tender contract on 30 November 2004 – he only confirmed to Mr Ngidi that he was not authorised to sign the written contract. On the basis of ostensible authority, the appellant should be estopped from denying that Mr Naidu was authorised to enter into the agreement.

[20] In *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) at 411A to 414H as referred to in *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) the requirements for holding a principal liable on the basis of ostensible authority of its acknowledged agent were recently articulated as follows:

"*[12] The requirements for holding a principal liable on the basis of the ostensible authority of its acknowledged agent were recently articulated in NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others (supra in para [26] at 412C - E) by Schutz JA to be:*

> *'1. A representation by words or conduct.*
>
> *2. Made by [the principal] and not merely by [the agent], that he had the authority to act as he did.*
>
> *3. A representation in a form such that [the principal] should reasonably have expected that outsiders would act on the strength of it.*
>
> *4. Reliance by [the third party] on the representation.*
>
> *5. The reasonableness of such reliance.*
>
> *6. Consequent prejudice to [the third party].'*

I proceed to discuss the first two of these requirements with reference to the facts of this case.

[13] A representation, it was emphasised in both the NBS cases supra, must be rooted in the words or conduct of the principal himself and not merely in that of his agent (NBS Ltd v Cape Produce Co (Pty) Ltd (supra at 411H - I)). Assurances by an agent as to the existence or extent of his authority are therefore of no consequence when it comes to the representation of the principal inducing a third party to act to his detriment. In the instant case counsel for the appellant relied principally on the very appointment by the bank of Horne as its branch manager, thereby enabling her to impress upon Braude that she was duly authorised, when in fact she was not, to commit the bank to stand surety for Playtime's post-dated cheques; this impression was reinforced, so it was further contended, by the fact that eight earlier cheques of Playtime that Horne had marked 'good for funds' had been met by the bank by the time Horne stood surety on its behalf for the last of the series of cheques.

[14] As was pointed out in both the NBS judgments supra, the appointment of someone to a position of authority, albeit in a subordinate position but with all the trappings pertaining to the post, is a factor that in itself is not to be underestimated (NBS Ltd v Cape Produce Co (Pty) Ltd (supra at 410C - D, 413B - D, 414C - D and G - H)). Thus it was stated, apropos a branch manager, by Marais JA in the SA Eagle Insurance Co Ltd case supra at 574E - G:

> *'The establishment of branches was plainly to facilitate convenient access by the public to it as an institution and to encourage the public living in the area concerned to make use of conveniently situated branches. These branches were the public face of the institution and they were intended by respondent to be so regarded. There was no*

> *suggestion by respondent that its branches were not intended to be available to the public for certain classes of lending and borrowing and that it made that generally known. There was no publicly proclaimed or advertised policy of dealing with transactions of a particular magnitude only at its head office. The branches were held out by respondent as the places to which anyone wishing to deposit money with it could and should repair. The branch manager was held out to be the person clothed with the most authority at a branch by his very designation as branch manager.'*
>
> *Of course that does not mean that a bank is liable to a third party ex contractu for all the actions and transactions of the branch manager when the latter is in truth minding not the bank's business but his own. The NBS judgments dealt with the branch manager receiving substantial deposits ostensibly on behalf of the bank; the instant case is concerned with a branch manager purporting to bind the bank in the future as surety and co-principal debtor on a series of post-dated cheques. As Marais JA pointed out at 573H - 574B of his judgment, in dealing with the scope of a branch manager's authority to bind a bank: …*
>
> *[15] The appointment by a bank of a branch manager implies a representation to the outside world. The representation, to the knowledge of the bank, is that the branch manager is empowered to represent the bank in the sort of business (and transactions) that a branch of the bank and its manager would ordinarily conduct. The notion of 'ordinary business' in turn implies a qualification in the form of a limitation: that the branch manager is not authorised to bind the bank to a transaction that is not of the ordinary kind. What the ordinary kind of business of the branch is remains a matter of fact and hence of evidence. There is this passage in the evidence of Strang, the expert witness called by Glofinco on banking practise: …*"

[21] Recently, in *Jacobs v Imperial Group (Pty) Ltd* 2010 (2) All SA 540 (SCA) the court dealt with the way in which an agent's own actions pertaining to his authority should be considered, in paragraph [8] of the judgment:

> "*I now consider the appellant's argument that Jacobs, as his agent, did not have authority to bind him to the owner's risk notice. This brings to the fore the question whether in fact Jacob's authority was limited. There is no evidence from Jacobs or anyone else to suggest that Jacobs' authority was limited. In fact, the evidence is clear that, when handing over the motor vehicle, and signing the necessary paperwork, there was nothing circumscribing his authority. The respondent was*

> *perfectly justified in relying on Jacobs' conduct, which evidenced all the attributes of actual authority. It is trite that 'the law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract'. The conclusion of the High Court that Jacobs had the necessary authority to conclude the contract is beyond reproach. He properly bound his principal, the appellant, to the terms of the contract which included the owner's risk notice.*"

[22] In order to succeed with estoppel, respondent showed the following: that appellant and also Mr Naidu conveyed acceptance of the tender contract and entered into an agreement; the representation was made by both the principal and the agent; it was reasonable to have expected of the respondent to have acted on the strength thereof; (this was confirmed by Mr Maelane in cross-examination); the evidence of Mr Ngidi was clear that there was reliance placed on the representation and that the respondent acted in accordance therewith; the reliance was clearly reasonable in the light of the aforegoing; respondent clearly acted to its prejudice if it is correct that Mr Naidu was not authorised to have acted as such.

[23] It can, in any event, not be expected of an outside party, such as the respondent, to have known of the internal arrangements of the appellant pertaining to authority to enter into contracts. In terms of the so-called *Turquand* rule, outside persons contracting with a company and dealing in good faith, may assume that the procedures within its constitution and powers have been properly and performed, and they are not bound to enquire whether the acts of internal management have been regular or not.

It must be determined if:

23.1 A person acted beyond his authority;

23.2 If the outside party knew that the official was acting beyond its actual authority;

23.3 If the circumstances should have put him on enquiry.

[24] It appears clearly from the a foregoing facts that the respondent could not have been put on his enquiry, that he did not know that Mr Naidu was acting beyond his initial authority, (if that was the case), and he could not have thought that Mr Naidu was acting beyond his usual authority in the light of the evidence.

[25] In the circumstances the appellant should not be allowed to rely on Mr Naidu's lack of authority to have communicated the fact that the tender contract was awarded.

[26] The conclusion must be that the tender contract was awarded and entered into on 30 November 2004 and came into operation on 1 December 2004.

[27] In any event, it is clear from the actions of the appellant that the appellant, from 1 December 2004 to 23 December 2004, and even thereafter, through Mr Stone and others, acted as if there was a valid contract in existence.

[28] In addition to the clear terms of the letter of 30 November 2004, in terms of the doctrine of *quasi*-mutual assent the appellant should be held bound to the agreement contended for by the respondent.

[29] In the most recent decision on the subject, *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA), *quasi*-mutual assent was dealt with as follows in paragraphs [54] to [60] of the judgment:

> "*[54] It is now necessary to consider whether, on the application of the doctrine of quasi-mutual assent, Mr Pillay and Dr Motlanthe have established their entitlement to the relief sought.*
>
> *[55] The approach to be adopted in a case such as this was set out in Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis, supra, at 239F - 240B, as follows:*
>
> > *'If regard is had to the authorities referred to by the learned Judges (see Logan v Beit 7 SC 197 at 215; I Pieters and Company v Salomon 1911 AD 121 at 137; Hodgson Bros v South African Railways 1928 CPD 257 at 261; Van Ryn Wine and Spirit Co v Chandos Bar 1928 TPD 417 at 422 - 4; Irvin & Johnson (SA) Ltd v Kaplan 1940 CPD 647 and, one could add, Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 430 - 1), I venture to suggest that what they did was to adapt, for the purposes of the facts in their respective cases, the well-known dictum of Blackburn J in Smith v Hughes (1871) LR 6 QB 597 at 607, namely:*
> >
> > > *"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*
> >
> > *In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? Compare Corbin on Contracts (one volume edition) (1952) at 157. To answer this question, a three-fold enquiry is usually*

necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? See also Du Toit v Atkinson's Motors Bpk 1985 (2) SA 893 (A) at 906C - G; Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986 (1) SA 303 (A) at 316I - 317B. The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A) at 984D - H, 985G - H.'

[56] The answers to the questions set out in that passage, when applied to the facts of this case, are clear: the party whose actual intention did not conform to the common intention expressed (ie that there were contracts on the terms set forth on the standard form) was Mr Blake, acting for himself and the other developers. He led Mr Pillay and Dr Motlanthe, as reasonable men, to believe that the declared intention represented his actual intention. With regard to the threefold enquiry: (a) there was a misrepresentation as to his intention; (b) made by his agents (in the various letters sent by Mooney Ford to Mr Pillay and Dr Motlanthe which unmistakably represented that the offers had been accepted and binding contracts had come into existence); and (c) Mr Pillay and Dr Motlanthe were actually misled, as reasonable men in their position would have been.

[57] It is clear on the evidence that Mooney Ford had authority to call for and receive deposits paid under contracts for the sale of member's interests in the close corporation to which units were to be allocated; to call for guarantees under the contracts; to allocate close corporations, from the list made available to them by Mr Blake's accountants, to particular units; to call for copies of identity documents and marriage certificates so as to be able to open the sectional title register and transfer member's interests; to write to the buyers regarding the finishes of the units and to ask for additional payments occasioned by changes thereto; and to give notices under clause 13 of the standard form contracts threatening cancellation.

[58] All these acts, which they were authorised to perform on behalf of Mr Blake and his fellow developers, amounted, in my view, to a clear representation that the offers made by Mr Pillay and Dr Motlanthe had been duly accepted.

[59] Although the acceptance by the developers of the Pillay and Motlanthe offers did not comply with the prescribed mode of acceptance they conducted themselves in such a manner as to induce the reasonable belief on the part of Mr Pillay and Dr Motlanthe that the developers were accepting the offers according to the prescribed mode.

[60] It follows in my view that Balton J correctly held, on the basis of the doctrine of quasi-mutual assent, that the developers were bound by the agreements in respect of units 402 and 502."

[30] If the abovementioned test is to be applied to the current facts, it is clear that the appellant conducted itself in such a way that a reasonable person in the position of the respondent would have believed that appellant was assenting to the terms proposed by the respondent in its tender, and that the respondent upon that belief entered into the contract with appellant and acted as if a contract had been entered into. Therefore, even though the appellant's case is that it never had the actual intention to enter into the agreement, its actions led the respondent as a reasonable person to believe that appellant had accepted the respondent's tender even if it can be said that the agreement was not formally entered into and even if Mr Naidu had no authority to enter into the agreement or to convey acceptance of the tender.

[31] It consequently follows from the aforegoing that on one or more of the grounds referred to above, a valid and binding agreement came into existence between appellant and respondent.

[32] However the main thrust of the argument on behalf of the appellant on appeal developed by Mr Soni on behalf of the appellant is what counsel for the appellant referred to a constitutional issue. For this, Mr Soni relied on the defendant's amended plea, which reads as follows:

> "*Alternatively, to paragraph 6.2 above, and in the event of the above Honourable Court finding that Mr Naidu informed the plaintiff that the 'tender' had been awarded to the plaintiff and that Annexure 'A'*

> *constituted acceptance of the plaintiff's tender, then in that event the defendant avers that:*
>
> *6.3.1 …*
>
> *6.3.2 The defendant is not bound to the agreement arising therefrom as it constituted a breach, alternatively was contrary to the Public Finance Management Act 1 of 1999* ('*the Act*')."

This, Mr Soni argued, was the constitutional or purely legal issue which it is entitled to raise on appeal although not fully dealt with in the court below. The question that arises is whether a legal or constitutional point has been pleaded issuably and raised adequately for the respondent to be aware that the question is indeed an issue to be dealt with. Mr Soni argued that the reference to the aforesaid Act was sufficient to have placed the respondent on its guard and to deal therewith. Upon questioning, Mr Soni stated that reliance is placed on section 76 of the Act.

[33] In *Wildner v Compressed Yeast Ltd* 1929 TPD 166 Tindall J after setting out the provisions of the Rule regarding pleading remarked:

> "*A plea ought to state expressly that defences which the defendant relies on, but it may happen to be so drafted that it indicates impliedly that the defendant intends to rely upon a certain defence. And if the terms of the plea do indicate, by implication, that the defendant intends to rely upon a certain defence, then I think it is the duty of the defendant to state clearly and concisely the material facts on which the defence is based. …*"

In *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623 Trollip JA stated as follows:

"*That the drawer should have stated with at least reasonable clarity which of the two pleas he relied on, admits of no doubt. Rule 19(4) of the 1968 Magistrates' Courts' Rules (like Supreme Court Rule 22(2)) requires of a defendant that he shall in his plea*

> *'clearly and concisely state the nature of his defence and all the material facts on which it is based'.*

Hence, if he relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it (cf. Ketteringham v. City of Cape Town, 1934 A.D. 80 at p. 90). And if his defence is illegality, which does not appear ex facie the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded. It is true that it is the duty of the court to take the point of illegality mero motu , even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears ex facie the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it. (See Jones and Buckle, Civil Practice of the Magistrates' Courts , 6th ed., pp. 529 - 530, where the authorities are collected, to which Cape Dairy and General Livestock Auctioneers v Sim, 1924 AD 167, and Dada & Sons v Makhetle , 1949 (2) SA 485 (T) , can be added).

Those rules of practice are substantially the same as those in English law; perhaps they even originated therefrom. The instructive and lucid summary of the English Rules derived from their authorities on the need to specially plead any statute or illegality relied on as a defence is given in the White Book (The Supreme Court Practice 1973) at pp. 266 - 7. It is to the same effect as stated above. The leading English case is North Western Salt Co. Ltd. v Electrolytic Alkali Co. Ltd. , 1914 A.C. 461. There Viscount HALDANE, L.C., at p. 469, summed up the position in language most apposite to the situation in the present case:

> *"My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."*

A fortiori in the present case, where two possible pleas were available to the drawer of the cheque, the one consistent with the transaction being innocent, albeit unenforceable, and the other involving charges of criminality and illegality,

> *"he must say which he means, and if he intends to charge illegality, he must state facts for the purpose of shewing what the illegality is"*

(per Lord DAVEY in Bullivant v Attorney-General for Victoria, 1901 A.C. 196 at p. 204).

Turning now to the drawer's pleas, I think that he only relied on the common law defence relating to gambling, that he did not plead any defence of illegality based on sec. 6 of the Gambling Act, either as required by the above-mentioned rules of practice or at all, and that he did not at any stage of the proceedings in the two lower Courts raise such a defence. The following facts and circumstances, I think, bear that out.

Para. 3 (b) of his initial alternative plea reads:

> *"Alternatively to sub-para. (a) hereof, and if the plaintiff is the holder of the said cheque, the defendant denies that it is the holder thereof in due course or that it gave value for the said cheque and says that the said cheque was negotiated to the plaintiff in payment of a gambling debt not recoverable at law."*

That clearly relates to the common law defence of gambling.

The drawer was then asked to particularise those allegations as follows:

> *“(a) When and where is it alleged that the said cheque was negotiated to the plaintiff in payment of a gambling debt.*
>
> *(b) The nature of the alleged 'gambling' is required.*
>
> *(c) The amount of the alleged 'gambling debt' is required."*

He replied:

> *" (a) Defendant does not admit that the cheque was negotiated to the plaintiff.*
>
> *Alternatively,*
>
> *If the above Honourable Court should hold that the cheque was negotiated to the plaintiff, then the cheque was delivered to the plaintiff in payment of a gambling debt not recoverable at law at the plaintiff's place of business, The Apollo Club.*

(b) The gambling was chemin de fer which was conducted by the plaintiff at the Apollo Club at its place of business in circumstances prohibited by law.

(c) The precise amount of the gambling debt is unknown to the defendant but it was in excess of the amount of the cheque sued upon."

The mention of the place where the gambling occurred was in answer to the specific questions as to where and how the gambling occurred. The allegation, "in circumstances prohibited by law", relates to the common law defence in the plea, and, therefore, takes that plea no further. The pleader apparently misunderstood the common law to prohibit gambling. If the Gambling Act had been in his mind, he would undoubtedly have said "prohibited by the Gambling Act" and not simply "prohibited by law".

The alternative plea was later amended (I assume the amendment was granted) by the substitution for the words "in payment of a gambling debt not recoverable by law" of the following:

> *"'in return for chips or counters bearing a total money value equivalent to the value of the cheque, to be used by defendant (sic) for the purpose of gambling at plaintiff's premises, where plaintiff permitted, encouraged and organised such gambling, and from which gambling plaintiff profited. Plaintiff's claim is thus based on an illegal transaction or one contrary to public policy and is accordingly unenforceable.'"*

The purpose of the amendment was to allege that the plaintiff was the keeper of a gaming house who had advanced the proceeds of the cheque to Phedonas for gambling on its premises. A clear reference, I think, to the common law principle enunciated in Krasner v Maleta, supra. The pleader again erred in thinking that such a transaction was not only unenforceable but illegal. That defence seems to have been present to the drawer's mind, too, when he filed his affidavit resisting the application for summary judgment. He there said the transaction was "a gambling transaction in circumstances prohibited by law in the gaming house unlawfully conducted by the plaintiff in Hillbrow, Johannesburg".

Even if that affidavit could be regarded as constituting a part of the drawer's plea, it still merely relates to the common law defence founded on Krasner v Maleta. I pause here to observe, therefore, that nowhere in the drawer's plea or its further particulars is the Gambling Act or its relevant provisions referred to by name or number; nor, if it was intended to base any defence thereon, was it clearly formulated, as is required by Ketteringham's case, supra. Moreover, the alleged transaction between the club and Phedonas was not ex facie illegal as being contrary to the Gambling Act. Such illegality, if any, would essentially have to depend upon the circumstances surrounding it, in particular whether, the premises in question being a club, the public in

general nevertheless had access to it or, if not, it was habitually used for gambling (see sec. 6(2) of the Act). Those sine qua non circumstances were not alleged in the plea or its further particulars, as is required by the rules of practice canvassed above. Putting it another way: the drawer, if he intended relying on illegality, should have alerted the club by his plea to the fact that he was charging it with criminal and illegal conduct which vitiated the transaction. That he did not do. Indeed, of the two pleas available to him, I think he chose the common law and not the statutory one.

That that was his intention is also confirmed by how his counsel conducted his defence at the trial and on the appeal before the Court a quo. When the club had closed its case, counsel informed the court that the drawer's only defence was that the cheque was "negotiated to Apollo Club in respect of a gambling transaction".

Not a word was apparently said about the Gambling Act. Nor did the magistrate in his reasons for giving judgment in the drawer's favour mention it. On the contrary, he relied exclusively on the common law. Having dealt with the facts, he posed the question, "how does this render the defendant not liable on the cheque?" And then he immediately proceeded to say what the common law is quoting Krasner v Maleta, supra. He found that the club was a gaming house and that, as the proceeds of the cheque were advanced for gambling there, the club could not recover on it. It is therefore obvious that the Gambling Act was not invoked during argument. On the appeal to the Court a quo the same counsel appeared for the drawer. That he did not rely on any illegality under the Act seems clear from the concurring judgment of DE KOCK, J. He said:

> *"It will be seen from the judgment of my Brother MARGO and it is, I think, important that the point should be emphasised, that there was nothing illegal in the transaction between the payee and the plaintiff in this case. At worst, from the plaintiff's point of view, it can be said of the transaction that it was contra bonos mores . But the plaintiff's title as such is not tainted with illegality. The question whether he would have succeeded in an action on the cheque against the drawer if he had taken the cheque for an illegal consideration as distinct from one that is merely against public policy does not, therefore, arise in this case. It may well be that where the holder takes a cheque for an illegal consideration, e.g., an undertaking by him to commit a crime, the rule ex turpi causa non oritur actio would preclude the plaintiff from recovering on the cheque as against the drawer therefor,... However, on the facts of the present case, I am in full agreement with the judgment and the order proposed by MARGO, J."*

In the heads of argument for the drawer in the appeal to this Court, the same counsel raised the question of the transaction being illegal by reason of sec. 6(1) of the Gambling Act, contending that a court is obliged to take cognizance of it "even if the matter that affects it is not pleaded". (I mention counsel's conduct above merely to confirm that

the defence of illegality was never previously pleaded or raised and not to criticise him).

Hence, it is, in my view, clear that the defence of the alleged illegality was not pleaded or raised at any stage of the proceedings in the lower Courts. It was raised for the first time during the appeal to this Court. It is true that counsel for the club - he did not appear in the lower Courts - did not object to its being raised, but then he could not object. For, according to the authorities canvassed above, this Court, despite such illegality not having been pleaded or raised, is obliged, even at this late stage, to take cognisance of it if the evidence establishes it. But the importance of its not having been pleaded or raised at the proper time is (and I emphasise this) that, before taking cognisance of it, we must be satisfied, in order to avoid any miscarriage of justice, that all the necessary and relevant facts were canvassed at the trial and are before us."

See also: *Tucker's Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 267.

[34] I am not satisfied that the issue pursuant to the Act had been pleaded and properly raised. It certainly was not dealt with in evidence or argument in the court below. Mr Soni also argued that it is a purely legal issue which may be raised on appeal. It is doubtful whether this is purely a legal issue. In order to decide whether respondent (or any other tenderer) falls within the rules relied upon by the tender board, certain factual matters need to be canvassed. It was argued that after applying its arithmetical corrections the tender board arrived at certain figures which placed the respondent fourth on the list of prospective contractors and the recalculations were the reasons why the respondent was ranked fourth. If the arithmetical calculations had not been made the respondent would have ranked 27th and the allocation of the tender would not have been cost-effective pursuant to section 76 of the Act. Other tenderers, so it was argued, may have then had an unassailable case

on review. I do not agree. The internal workings of the cross-functional team of the appellant's procurement department are not before the court – it is not possible to ascertain on all the facts that were canvassed whether the respondent's ranking would have remained at number 27 or would have improved by virtue of other factors which the team may have taken into account. Indeed, on the evidence that have been canvassed, no successful review would have been possible. For the proposition that this Court could now consider this new point of law (the constitutional point) reliance was placed on *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 477 where it was held at paragraph [44] as follows:

> "*[44] It is therefore open to Alexkor and the Government to raise in this Court the legal contention which they abandoned in the SCA. However, they may only do so if the contention is covered by the pleadings and the evidence and if its consideration involves no unfairness to the Richtersveld Community. The legal contention must, in other words, raise no new factual issues. The rule is the same as that which governs the raising of a new point of law on appeal. In terms of that rule 'it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness . . . and raises no new factual issues'.*"

In the matter under consideration the issue was not raised on the pleadings and would require a consideration of facts which were not canvassed during the trial. Clearly a new point of law can be considered if it involves no unfairness to the other party and raises no new factual issues. See *Naude and Another v Fraser* 1998 (4) SA 539 (SCA) at 558A. Also see *Correia v Commanding Officer, Windhoek Prison and Another* 1999 (2) SA 939 (NmSC) at 945G-946E. During argument counsel for the appellant accepted that the issue was not pertinently raised in the court *a quo* but that it is raised for the first time on appeal. He argued that it was referred to obliquely in the plea by

reference to the Finance Management Act, but it has been held that constitutional points are to be raised particularly so that it can be dealt with properly:

> "*Dit is myns insiens vir die behoorlike ordening van die praktyk absoluut noodsaaklik dat konstitusionele punte nie deur advokate as laaste debatspunt uit die mou geskud word nie maar pertinent in die stukke as geskilpunt geopper word sodat dit volledig uitgepluis kan word deur die partye ten einde die Hof in staat te stel om dit behoorlik te bereg*",

per Van Dijkhorst J in *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 849A-B. See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F-G and *Gauteng MEC for Health v 3P Consulting (Pty) Ltd,* unreported case no. 179/10 of the Supreme Court of Appeal which held, after referring to the *Swissborough* matter that "*The dictum is not only of application to constitutional issues – it applies to all issues*". See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* 2010 (5) BCLR (CC) at para [18]. The argument for the appellant was further developed in that the tender agreement would be illegal and contrary to the provisions of the Constitution in that in terms of section 217(1) of the Constitution it is required when an organ of state contracts for services, it is required to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In addition so it was argued in terms of section 33 of the Constitution the appellant is obliged to respect the administrative of justice rights of all tenderers with the consequence that the appellant may not enter into a contract that is not a product of a system that complies with section 217(1) or

section 33 of the Constitution. Consequently, so it was argued, in determining whether or not to recognise the contract contended for by the respondent, it is essential to consider whether these mandatory provisions have been complied with. Mr Soni argued that the appellant explained the "*system*" and that the respondent would not have been accepted as a tenderer were it not for the arithmetical adjustments as testified to by Mr Maelane. However, Mr Maelane's evidence was only from the prospectus of the tender board of which he was a member. No evidence of any nature was forthcoming from the cross-functional team of the appellant's procurement department. That is the evidence which would be required to ascertain whether the respondent's position would have changed and if so, to what extent. That is the evidence which might have indicated whether the agreement was indeed illegal for want of compliance with the Constitution. In the absence of such evidence it would be speculative to decide that the court would be upholding an agreement that is illegal. Price was not the only factor. There were a host of factors taken into account, none of which were canvassed in the court *a quo* in order to determine whether there was any illegality or not. The fact that the issue was not canvassed in the court *a quo* and the absence of evidence which would place a court in a position to determine the illegality of the contract or otherwise, distinguishes this matter from what was said in *Logbro Properties CC v Bedderson NO and Another* 2003 (2) SA 40 (SCA). In the circumstances the "*constitutional point*" or "*legal argument*" raised on behalf of the appellant on appeal cannot be entertained.

[35] In the circumstances, the appeal is dismissed with costs.

_____

W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

_____

P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

_____

R MATHOPO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG