IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 40511/2018

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

SIGNATURE **DATE 02/05/2023**

In the matter between:

LUNGISA SWITCHGEARS AND TRANSFORMERS (PROPRIETARY) LIMITED	First Applicant
REEZA DUNN	Second Applicant
CHANCHE, COLIN MATLALA	Third Applicant
MOLIFI, THOMAS MOLAMU	Fourth Applicant

and

SASFIN BANK LIMITED	Respondent

Neutral Citation: Lungisa Switchgears and Others v Sasfin Bank Limited (Case No. 40511/2018) [2023] ZAGPJHC 409 (2 May 2023)

JUDGMENT

PULLINGER, AJ

INTRODUCTION

[1] This is an application for the recission of a default judgment granted against the applicants on 20 February 2019.

[2] Relief is sought in terms of Rules 42(1)(a), Rule 31(2)(b), Rule 42 or the common law.

[3] In order to succeed in their application, be it under Rule 32(1)(b) or the common law, the applicants are required to establish "good cause" with the rider that the application in terms of the Rule must be brought within 20 days of the order being granted or, under the common law, within a reasonable time of the applicants becoming aware thereof.

[4] Relief in terms of Rule 42(1)(a) or, Rule 42 in its entirety, requires the applicants to demonstrate a procedural mistake or irregularity.

[5] In relation to the former grounds for rescission, the Constitutional Court in **Ferris**,[1] described good cause as meaning that:

> "[24] … they must (a) give a reasonable explanation for their default; (b) show that the rescission application is brought bona fide; and (c) show that they have a bona fide defence, including a prima facie case on the merits."

[6] It is insufficient if any one of the elements to establish good cause are absent. Miller JA, said in **Chetty**[2] that:

> "It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[7] In relation to the latter, while Rule 42 does not require proof of good cause, mistake in the process of obtaining default judgment is required.[3]

[8] At the commencement of argument Advocate Kruger on behalf of the applicant very properly abandoned any reliance on Rule 42(1)(a) or the entirety of Rule 42. The founding affidavit does not make out any case for mistake.

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1 **Ferris and Another v FirstRand Bank Limited and Another** 2014 (3) SA 39 (CC)
2 **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 765 D/E
3 **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) at [5] to [7]; **Lodhi II Property Investments CC and Another v Bondev Developments Pty Limited** 2007 (6) SA 87 (SCA) at [27]

THE FACTS

[9] The facts are uncomplicated.

[10] At all material times the first applicant was the lessee of certain photocopying machines and telephony equipment. In or during March 2016, it decided to upgrade its equipment.

[11] On 14 March 2016 a sales representative unrelated to any of the parties hereto presented the first applicant with a proposal in respect of the proposed upgrade. In the period between March 2016 and August 2016 the first applicant, represented by one or more of the second, third and fourth applicants, considered the various further proposals and comparable quotes that were presented. At some point consensus was reached on the new equipment.

[12] On or about 31 August 2016 a bundle of documents was presented to the first applicant’s representatives to sign. These documents included a Rental Agreement and a document styled "Settlement Notification" which was signed by the fourth applicant. In terms of the Settlement Notification it stated as being recorded that a new agreement was entered into and the outstanding amounts in respect of the old equipment was being settled. Further other documents were also signed, these include, a document styled "New Requirement for Valid Tax Invoice" and a “Rental Application Form”. These were duly signed by the first applicant's representatives who provided the necessary Financial

Intelligence Centre Act, 2001 prescribed documents to the sales representative.

[13] It is stated that in the Rental Agreement it is recorded that Assetfin was not the supplier of the equipment but, rather, provided rental finance only. Assetfin was required to purchase the equipment from the supplier thereof for purposes of renting same to the first applicant and payment would commence once a firm commitment in the form of a signed Rental Agreement was in place.

[14] On or about 25 September 2016, Mr Dunn, a director of the first applicant, wrote to the sales representative requesting a breakdown of the agreement for the new equipment.

[15] Mr Dunn, again, on 26 September 2016 wrote to the sales representative regarding the terms of the agreement.

[16] However it is during the time that Mr Dunn was corresponding with the sales representative, so he asserts, that he came to realise that the agreements were entered into on the basis of false representations made by the sales representative.

[17] But, this was not raised in any of the correspondence at that time or that which followed much less, was any suggestion made that any of the signatories to the agreements were not authorised.

[18] This leaves one with no doubt that, at least Mr Dunn, was aware of the fact that the agreements had been concluded by a duly authorised individual.

[19] If that had, indeed, been the case, one would have expected Mr Dunn to have raised the issue immediately and sought to resile therefrom.[4] But, there were no such steps taken.

[20] The agreements as between the first applicant and Assetfin were subsequently ceded to the respondent.

[21] It appears, thereafter, that the first applicant failed to perform its obligations in terms of the agreements, leading to an action for payment of R 1 662 154.20 being instituted and, subsequently, being granted by default by this Court after due and proper service of the summons when the applicants failed to defend the action.

[22] During argument it was suggested that there was some kind of oral condition precedent to the agreement. This was, after exploring the evidence, correctly not persisted with.

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[4] *Cf* **Benefit Cycle Works v Atmore** 1927 TPD 524 at 530 - 532; **Seedat v Tucker's Shoe Co** 1952 (3) SA 513 (T) at 517 - 8; **Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd** 1960 (1) SA 531 (D) at 541; **Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd** 1963 (1) SA 632 (A) at 642A – G; **Mc Williams v First Consolidated Holdings (Pty) Ltd** 1982 (2) SA 1 (A) at 10 E - H

DELAY

[23] I begin with an examination of the reasons proffered for failing to defend the respondent's action and the delay of some sixteen months in launching this application.

[24] The threshold that the applicant must overcome is that of a reasonable and acceptable explanation for the delay. The evidence must demonstrate that the delay was not deliberate or wilful but as a result of some other impediment. The evidence is to be considered wholistically. In **United Plant Hire**[5], the Appellate Division said:

> "It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.
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> These factors are not individually decisive but are inter-related and must be weighed one against the other; thus a slight delay and a good explanation may be held to compensate for prospects of success which are not strong."

[25] Regrettably, the evidence falls far short in addressing the inter-related issues.

[26] There are two critical time periods. The first is from the date of service of the summons on the applicants in the period November 2018 to January 2019 and

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[5] **United Plant Hire (Pty) Ltd v Hills and Others** 1976 (1) SA 717 (A) at 720E - G

date of judgment on 20 February 2019. The second is from when the applicants became aware of the judgment to the date of institution of the application for rescission.

[27] The version in regard to the first time period is that in or during December 2017 a creditor of the first applicant initiated business rescue proceedings against it. There is no suggestion, however, that the business rescue proceedings were still pending in November 2018 and January 2019 when the respondent's summons was served on the various applicants. One cannot simply infer that. a year or more later, when the summons in the respondent's action was served, that any impediment in terms of the Companies Act, 2008 still subsisted in the absence of evidence to the contrary.

[28] The deponent, Mr Dunn, states that his understanding at the time was that the business rescue proceedings prevented any legal proceedings and execution steps against the applicants. It is stated, further, that regular emails were transmitted to their erstwhile attorneys regarding the status of "the matter" (whatever that may mean) and they were told everything was under control.

[29] The email correspondence upon which reliance is placed for this assertion, does not bear this out. It may well be that the applicants' erstwhile attorney did not fulfil her mandate diligently. There are insufficient facts before me to

comment hereon. But even if this is the case, a litigant cannot simply abandon litigation in the hands of their attorney. In **Saloojee**[6], the Appellate Division said:

> "I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."[7]

[30] An attorney can only act with instructions and there is no indication that the applicants remained involved in the litigation, diligently and studiously providing instructions where necessary.

[31] The overwhelming inference is that the litigation was abandoned to the applicants' erstwhile attorneys. This is clear when one considers the email exchanges between the applicants and their erstwhile attorneys, particularly, Mr Dunn's email to the applicants' erstwhile attorney on 26 April 2021 which

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6 Sa**loojee and Another NNO v Minister of Community Development** 1965 (2) SA 135 (A) at 141C - E

7 See further **Moaki v Reckitt & Colman (Africa) Ltd and Another** 1968 (3) SA 98 (A) at 101G - H; **Kgobane and Another v Minister of Justice and Another** 1969 (3) SA 365 (A) at 369 in fin - 370A; **Mbutuma v Xhoza Development Corporation Ltd** 1978 (1) SA 681 (A) at 685A - G; **HB Farming Estate (Pty) Ltd and Another v Legal and General Assurance Society Ltd** 1981 (3) SA 129 (T) at 132D; **Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others** 1985 (4) SA 773 (A) at 789C - D; **Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another** 1992 (4) SA 852 (A) at 859E – F; **Aymac CC and another v Widgerow** 2009 (6) SA 433 (W) at [38] to [40]

records "*I urgently need to know what done [sic] on Sasfin as they came to my house to detach [sic] assets*" and the ostensible reasons for the delay in the launch of this application to which I now turn my attention.

[32] In regard to the second time period, that between February 2020, when the applicants first became aware of the default judgment, and 29 June 2021 when this application was launched, the applicants place reliance upon Mr Dunn's medical conditions and certain IT related difficulties.

[33] The version is that in the course of 2019, almost a year before the applicants became aware of the judgment, Mr Dunn was seriously ill, having been diagnosed with obstructive sleep apnoea-hypopnoea syndrome which he asserts has a dramatic and stressful impact upon his life. This could, axiomatically, have no effect on the delay in the launch of this application in June 2021 nor is it asserted to have had any effect on the launch of this application some two years later.

[34] The version that after the order was received that any steps were taken to obtain the necessary information to bring this application is threadbare. In particular, reliance is placed on IT difficulties to obtain various emails. These emails have a bearing on the defence which has been proffered and I deal with that below.

[35] But, on a totality of the evidence, it is overwhelming that from the time that the summons was received until sometime after the order came to the applicants'

attention, the applicants took no steps, or at least no meaningful steps, to defend the action.

[36] Viewed wholistically, the difficulty with the applicants version is two-fold. First, it does not properly explain why the respondent's action was never opposed, particular regard being had to the email exchanges with their erstwhile attorney upon which reliance is placed, and, second, it does not properly explain the very substantial time gap between the default judgment coming to the applicants' attention and the launch of the application. One is constrained to infer that only once the sheriff attended at Mr Dunn's residence to attach his movable assets were the applicants galvanised, in any way, into action.

[37] It then follows that any condonation application must fail, similarly, there is no reasonable and acceptable explanation for the delay in either launching these proceedings or failing to defend them at the time. This is, on its own, sufficient grounds for refusing rescission.[8] Notwithstanding, I consider the defences raised by the applicants.

[8] **Chetty** (supra); **PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd** 1980 (4) SA 794 (A) at 799B - H; **Rennie v Kamby Farms (Pty) Ltd** 1989 (2) SA 124 (A) at 131I – J; **Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281G - 282A; Blumenthal and Another v Thomson NO and Another** 1994 (2) SA 118 (A) at 121C - 122C.

THE DEFENCE

[38] In evaluating a defence in a rescission application, the Court takes a similar approach to a Court hearing an application for summary judgment.[9] The defence set out by an applicant for rescission must be both *bona fide* and capable of sustaining a defence which, if proven at trial, would constitute a complete answer to the action. Marias J, in this division, provided a useful guideline of the correct approach to the evaluation of a rescission application. The learned judge said:

> "It seems to me that the situation is analogous to that under Rule 32(3)*(b)* of the Uniform Rules of Court, which requires that the Court must be satisfied that the defendant has a *bona fide* defence. This subrule was considered in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T). The relevant portion of the subrule requires the defendant to 'satisfy the Court by affidavit . . . that he has a *bona fide* defence to the action; such affidavit . . . shall disclose fully the nature and ground of the defence and the material facts relied upon therefor'. It will immediately be seen that the second portion of the sentence contains requirements different to those specifically required in an application for rescission. However, Colman J deals with the requirement that the defendant must satisfy that his defence is *bona fide* as:
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> *(a)* separate from the requirement that he must satisfy the Court that he has a defence and
>
> *(b)* separate from the requirement that he 'shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[9] **Standard Bank of South Africa Limited v El-Naddaf and Another** 1999 (4) SA 997 (W) at 784 *et seq*

At 227 *in fine* - 228A Colman J says:

> 'If, therefore, the averments in a defendant's affidavit disclose a defence, the question *whether the defence is bona fide* or not, in the ordinary sense of expression, will depend upon his belief as the truth or falsity of his factual statements. . . .'

That paragraph is preceded at 227G-H by the statement that the rule requires that the defendant 'set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence…

On the face of it, *bona fides* is a separate element relating to the state of defendant's mind.' This makes it quite clear that Colman J regarded the requirement that *bona fides* be demonstrated as separate and distinct from the requirement that the affidavit 'shall disclose fully the nature and grounds of the defence' etc, even though there would appear to be some inevitable overlapping between the two requirements. That Colman J regarded *bona fides* as a separate requirement, and was dealing with that *only* in the last sentence of the following passage, appears from the full passage itself. At 228B-E the relevant passage occurs and it reads:

> 'Another provision of the subrule which causes difficulty, is the requirement that in the defendant's affidavit the nature and the grounds of his defence, and the material facts relied upon therefor, are to be disclosed "fully". A literal reading of that requirement would impose upon a defendant the duty of setting out in his affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree, subject to one addition, with the suggestion by Miller J in *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 366-467, that the word "fully" should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. *What I should add, however*, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material *for the Court to consider in relation to the requirement of bona fides*.'

The last two sentences make it clear that Colman J separates the requirement to show *bona fides* and the requirement to 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'.

> I stress the distinction drawn by Colman J because, since he does not rely upon the other arguments of the Rule when he lays down what is required to demonstrate *bona fides*, I am satisfied that his remarks regarding what is required to demonstrate that a defence is *bona fide* are of equal application to applications for rescission where the applicant is also required to demonstrate that he has a defence which is *bona fide*."[10]

[39] An analysis of the applicants' version demonstrates that they fail on both grounds.

[40] The first defence asserted by the applicants is that of a fraudulent misrepresentation. The elements of a fraudulent misrepresentation were set out with precision by Coleman J in **Novick.**[11] The alleged fraudulent misrepresentation asserted by the applicants does not pass muster.

[41] The evidence does not traverse the elements of a fraudulent misrepresentation set out in **Novick**.

[42] The applicants' case is not that the respondent misrepresented the facts to them which induced them to enter into various agreements, but that another, unrelated party, a sales representative, made the representations upon which reliance is placed. Assuming in favour of the applicants that a fraudulent misrepresentation inducing a contract may be raised against a cedent, which it

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[10] The element of *bona fides* as part of an application for rescission is now settled law in light of **Ferris** (*supra*)

[11] **Novick and Another v Comair Holdings Ltd and Others** 1979 (2) SA 116 (W) at 159 D to 150 D approved in **Quartermark Investments (Pty) Ltd v Mkhwanazi and Another** 2014 (3) SA 96 (SCA) at [14]

does not,[12] the applicants' difficulty is that they allege they became aware of the so-called fraudulent misrepresentation in or during September 2016.

[43] At that time, the applicants were confronted with an election, that being to rescind the agreements and claim restitution or to abide them. The applicants, who took no steps, in relation to the former, must be deemed to have elected to abide the agreements.[13] Having elected to abide the agreements, the applicants are now precluded from going back on that election and asserting a fraudulent misrepresentation.

[44] As such, the first defence fails.

[45] The applicants' second defence concerns the Conventional Penalties Act, 1962. They assert that the Court who granted default judgment against them failed to take the ostensibly disproportionate nature of the damages into account contending, that the applicants were seriously overcharged in that the amount claimed does not reflect the true value of the goods.

[46] There are two difficulties with the version. First, the applicants misstate the incidence of onus. The onus is on the individual placing reliance on the Conventional Penalties Act to show that the penalty as disproportionate.[14]

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[12] **Hollcock and Another v Hillsage Investments (Pty) Ltd** 1975 (1) SA 508 (A) at 515 A - C; **Aussenkehr Farms (Pty) Ltd v Trio CC** 2002 (4) SA 483 (SCA) at 492 D

[13] S**egal v Mazzur** 1920 CPD at 645, applied in **Holzhuasen and another v Gore N.O and Others** 2002 (2) SA 141 (C) at 156 H

[14] **Smit v Bester** 1977 (4) SA 937 (A) at 942D – G; **Steinburg v Lazard** 2006 (5) SA 42 (SCA) at [7]

[47] There is a paucity of evidence to support any such a notion before me.

[48] Second there is a fundamental misapprehension that the contract related only to the value of the equipment. The applicants have failed to take into account the nature of the agreements that were concluded which included the settlement of the earlier outstanding amounts.

[49] In the absence of cogent evidence which demonstrates that the agreement, the structure thereof, and in particular the fee structure, was unconscionable and gives rise to a disproportionate and unfair result, this defence, too, must fail.

[50] There are a number of tangential issues that are raised by the applicants. They raise, *inter alia*, the respondent's lack of legal standing in the action as well as the authority of certain individuals to have concluded the main agreements.

[51] In relation to the respondent's *locus standi*, this point was abandoned in the parties joint practice note.

[52] In relation to authority, the appropriate time for this to have been raised would have been at the time that the agreements were concluded. Again, there is no indication that the ostensible lack of authority was ever raised. The facts point in the opposite direction. It is difficult to conclude, in the circumstances, that the authority point is anything other than a belated after thought. In any event, the point is struck by the Constitutional Court's decision in **Makate**[15].

[15] **Makate v Vodacom** 2016 (4) SA 121 (CC) at [45] to [49]

[53] **Makate** decided, in relation to authority, that:

> "[73] In our law this kind of contract is known as the apparent agreement because it does not have consensus as its foundation. What is clear, though, is that the objective theory of contract is not construed to mean estoppel, even though they both apply and arise from the same facts. In *Saambou* Jansen JA acknowledged the distinction between these two concepts. There the court observed that to some extent estoppel overlaps the objective theory of contract, but it did not treat them as one.
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> [74] I can think of no reason in principle or logic which warrants a different approach in the case of apparent authority and estoppel. Both apparent contract and apparent authority derive their existence from the conduct of the party to be held liable. Both form part of our law of contract. They come into being from what reasonably appears to be the position. Therefore, if a distinction is drawn between estoppel and the objective theory of contract in the case of apparent agreement, the same should be the position in respect of apparent authority and estoppel in contracts of agency.
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> [75] **It is apparent that estoppel and ostensible authority are different, even though there may be some overlap between them. Ostensible authority is the power to act as an agent indicated by the circumstances, even if the agent may not truly have been given the power; whereas estoppel, as observed in *West*, is the rule that precludes the principal from denying that she gave authority to the agent**." (emphasis added)

[54] Succinctly stated, the principle in **Makate** is that authority is determined by the manner in which the agent conducted himself at the time of conclusion of the juristic act and distinct from the remedy of estoppel.

[55] The applicants rely, however, on the Cape decision in **One Stop**.[16]

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[16] **One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another** 2015 (4) SA 623 (WCC)

[56] In **One Stop** it was held:

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

[25] I think it will be found, from an analysis of these and other leading authorities, that the *Turquand* rule is simply an adjunct, in the context of companies and other entities with constitutions available to the public, of the law on ostensible authority, which is in turn a particular form of estoppel by representation. (In *Northside Developments* supra Brennan J said that Diplock LJ's lucid exposition in *Freeman* of the general principles of estoppel 'provides the framework within which the specifically indoor management cases are to be placed'.)

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

division is not exhaustive but provides a sufficient basis for the discussion which follows.

[27] In any of these four cases, X may wish to meet a defence of want of actual authority by replicating that the company is estopped from denying Y's authority (that is to say, that Y had ostensible authority). Estoppel in the form of ostensible authority rests on a representation made by the company that Y had authority, in reasonable reliance on which X altered his position in some way (see *South African Broadcasting Corporation v Coop and Others* 2006 (2) SA 217 (SCA) paras 63 – 65 and cases there discussed). However, in invoking ostensible authority in the context of a company, X has the disadvantage that, because the company's articles are a public document, knowledge of its contents are imputed to him. So the company might contend that, because X had constructive knowledge of the implicated provisions of the articles, he could not reasonably have assumed Y to have the authority in question. In case 1, X should have been aware that Y could never bind the company to a transaction of the kind in question. In the other three cases, X could not reasonably have assumed Y to have the authority in question without investigating whether the condition had been met (case 2) or whether and on what terms there had been a delegation (case 3) or whether the directors or managing director had properly been appointed (case 4).

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

[29] What is important to emphasise is that X must still prove the facts establishing ostensible authority. Although I have referred to Y as an individual, the company's representative for purposes of ostensible authority might be several persons or the whole board of directors. In case 2, authority might vest in the board subject (for example) to shareholder approval in relation to specific kinds of transactions (*Turquand* was such a case). Since a company's board usually has full authority to conduct its affairs and because the shareholders generally leave the conduct of the company's affairs to the board and thus hold the board out as the company's representative, X will ordinarily be acting reasonably by assuming that the board has authority. And since *Turquand* does not require X, unless he is put on notice, to investigate whether any condition to which the board's authority in a given instance may be subject has been fulfilled, the case for ostensible authority is obvious, indeed so obvious that one would tend to explain the outcome solely with reference to the *Turquand* rule. But on analysis X in such a case would succeed because of the board's ostensible authority — this must be so, because on the assumed facts the board would not have had actual authority, given non-compliance with the condition. (As *Mahony* illustrates, a company may through its shareholders represent that the board of directors or the persons operating as the company's de facto directors have authority. See also *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*[1986] 1 Ch 246 (CA) at 295G – 296A.)

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

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

to investigate. In such instances, the board's holding-out of Y as the company's managing director is the representation which founds Y's ostensible authority and on which X can, despite Y's lack of actual authority, rely. Examples of successful reliance on ostensible authority in these circumstances include *Biggerstaff v Rowatt's Wharf Ltd* 1896 (2) Ch 93 (CA); *Clay Hill Brick and Tile Co Ltd v Rawlings* [1938] 4 All ER 100 (KB); and *Freeman* supra.

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

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

[57] **Makate**, which was decided on 26 April 2016. The judgment in **One Stop was handed down** on 17 June 2015. And, although **Makate** does not reference

One Stop, the effect is of **Makate**, is to overrule **One Stop** as it conflates the distinct legal principles of ostensible authority and estoppel.

[58] The applicants' reliance on **One Stop** to avoid the agreements is, therefore, misplaced.

[59] There is no suggestion that the officer of the first applicant who concluded the agreements failed to bring this ostensible defect to any person's attention at any time. But, in any event, this is all an afterthought. It was not raised in any correspondence or at the time the applicants elected to abide the contracts and not cancel them.

[60] On the evidence before me I cannot find that triable issues arise.

CONCLUSION

[61] This is a case, like so many others, where the timeline established by the objective and contemporaneous facts simply do not accord with the version that is asserted. This gives rise to the inescapable inference that the application is not *bona fide*, not in the sense of it being an abuse of process, but rather so ill-conceived that it places an unnecessary burden on the opposing party to defend the proceedings that are devoid of merit.[17] This warrants an order dismissing the application for rescission with costs on the scale as between attorney and client.

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[17] ***In re*** **Alluvial Creek** 1929 532 at 535

[62] I am fully cognisant of decisions such as **De Witts**,[18] where Jones J said:

> "An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and hence that the application for rescission is not *bona fide*."

[63] But, this is not a case where the applicants are being penalised for mere non-compliance with the rules of court. If this were the case, and in the absence of prejudice, the Court would come to the assistance of the applicants.[19]

[64] Rather, the proper administration of justice as pointed out by Miller JA in **Chetty**[20] requires that an applicant for rescission must make out a proper and frank case for recission. After all, the respondent has an interest in the finality of the judgment and legal uncertainty undermines the proper functioning of the courts and the administration of justice.[21]

[65] Whilst the applicants may have endeavoured to be frank with this Court, they have failed to make out a proper case for rescission. The analysis of their evidence in relation to delay is simply not cogent. The gaps and incongruencies

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[18] **De Witts Auto Body Repairs Pty Limited v Fedgen Insurance Company Limited** 1994 (4) SA 705 (E) at 711 E - F

[19] **Sasol South Africa t/a Sasol Chemical v Penkin** [2023] ZAGPJHC 329

[20] **Chetty** (*supra*)

[21] **United Plant Hire** (*supra*)

in their contemporaneous conduct and the assertions now made cannot be accepted.

[66] This leads to the defences on the merits being wholly unsustainable. No triable issue is disclosed in the founding affidavit. It barely needs repeating, that the founding affidavit is the place where an applicant must make out its case by setting out not only the necessary allegations to establish the defence upon which it relies, but the facts, even if in a broadline, that if proved at trial would support them.[22] The applicants failed to do so.

[67] In the result I make the following order:

The application is dismissed with costs on the scale as between attorney and client.

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A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 12h00 on 2 May 2023.

[22] **Quartermark** (*supra*) at [13]

DATE OF HEARING: **28 February 2023**

DATE OF JUDGMENT: **2 May 2023**

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