IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 26911/2010

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

27-JULY-2016 .....

DATE SIGNATURE

In the matter between:

TRI-STAR CONSTRUCTION (PTY) LTD Applicant/Plaintiff

and

SPANISH ICE PROPERTIES 21 (PTY) LTD Respondent/Defendant

DATE OF HEARING : **24 MAY 2016**

DATE OF JUDGMENT : **27 JULY 2016**

JUDGMENT

MANAMELA AJ

INTRODUCTION

[1] The applicant instituted an action for damages against the respondent in 2010. The action was set down for trial, over two years ago, on 29 January 2014. Towards the trial date, from around end of September 2013, the parties - through their attorneys - began discussions for possible settlement of the dispute between them. The settlement discussions (or the outcome thereof) are the subject matter of this application. This Court is asked in terms of this application, in the main, to determine whether or not settlement was reached between the parties during the discussions. The respondent opposes this application, mainly on the basis that, the person who participated in the discussions did not have authority to conclude a settlement agreement.

[2] The opposed motion was argued before me on 24 May 2016 and I reserved this judgment, after listening to oral submissions by Mr AW Pullinger, for the applicant, and Mr HF Oosthuizen SC, on behalf of the respondent. The merits or demerits of the matter can only be determined from correspondences exchanged between the parties over a period of about five months, from September 2013 to January 2014. Therefore, narration of the issues by way of background to the matter is warranted.

BRIEF RELEVANT BACKGROUND (INCLUDING RELEVANT SUBMISSIONS BY THE PARTIES)

[3] As indicated above, this part of the litigation between the parties comes at the back of action proceedings. Although, the action does not have current significance, as indicated

above, the action proceedings had advanced to such a stage that the matter was already set down for trial. The narration below explains what became of the matter and the ensuing trial.

[4] On 02 October 2013, Mr Kevin Hacker (Hacker) of the applicant's attorneys sent electronic mail (e-mail) to his counterpart, Mr Ivan Gurovich (Gurovich), the material part of which reads:

> "2. I confirm my request to you to furnish me with your client's contact information (for provision to our client) to facilitate without prejudice discussions between our clients directly, so as to curb further legal costs as we now step up preparation for trial."[1]

[underlining added for emphasis]

[5] I consider it necessary to hasten pointing out that, the applicant says the above was a "request to Gurovich to furnish him [i.e. Hacker] with the respondent's contact information to be provided to the applicant so as to facilitate settlement discussions directly between the litigants and curb further legal costs."[2] This is admitted by the respondent,[3] albeit for different reasons. Therefore, this is common cause between the parties.

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[1] See annexure "FA1" on indexed p 34.
[2] See par 10 on indexed p 15.
[3] See par 13 on indexed p108.

[6] On 25 October 2013, the respondent's attorneys[4] addressed a letter to their counterparts, which included the following:

> "We confirm that we have received information from our client, confirming that we may provide the contact details of the relevant person at our client which your client may contact should it wish to make any settlement proposals directly to our client.
>
> The relevant contact details are Mr Peet Erasmus with email address ... and cell phone number..."[5]

[underlining added for emphasis]

[7] On 09 December 2013, Erasmus sent an e-mail to Mr Derek Wheals (Wheals) of the applicant, whilst copying Mr Lawrence Bird of the respondent on the email, in which he, among others, said the following:

> "...we would without prejudice and without acceptance of any indebtedness or liability, be prepared to offer a settlement in the amount of R500k in full and final settlement of the matter.
>
> We will be prepared to commence payment of settlement if accepted, in April of 2014, at a rate of R50k per month.
> This is our stance at present, and we will await your response to the offer to finalise paperwork."[6]

[underlining added for emphasis]

[4] There was a change of attorneys on the side of the respondent and therefore references to respondent's attorneys will be to those attorneys that were retained at the material time. The first attorneys withdrew on 10 January 2014. See par 11 below.
[5] See annexure "LB1" on indexed p 127.
[6] See annexure "FA7" on indexed p 40.

[8] On 10 December 2013 Hacker sent an e-mail [annexure "FA9"] to Gurovich in which he apparently recorded what was discussed in the afternoon before. He also stated that he is confirming that settlement has been reached in the matter as follows:

"a. Your client will effect payment of a total settlement consideration to our client in the sum of R550 000,00 in full and final settlement of the matter, payable as follows:

i. Payment in the amount of R20 000,00 (which you are presently holding in trust) will be released to our client forthwith and on signature of the written settlement agreement;

ii. Seven monthly instalments in the sum of R70 000,00 per month will be paid to our client on the first day of each and every succeeding month from 1 April 2014 until 1 October 2014 inclusive;

iii. Payment of the last instalment of R40 000,00 will be made on 1 November 2014;

b. The said settlement agreement will contain the following provisions:

i. An acceleration clause in there [sic] event of your client failing to pay any one instalment on the due date, subject to your client being afforded notice of 7 calendar days to remedy a breach, but provided further that should your client breach on three or more occasions your client shall not be entitled to any further notices;

ii. The agreement will be made an order of court on 29 January 2014 or sooner should our client so require;

iii. In addition to the invocation of the acceleration clause following breach and due notice, the following penalties apply:

1. Your client shall be liable for interest on the said outstanding settlement consideration at the rate of 15,5% per annum from 1 January 2012 until payment;

2. Your client shall be liable for our client's legal costs in enforcing its rights in terms of the settlement on the scale of attorney and own client.

2. The written settlement agreement embodying the above will follow as agreed."[7]

[underlining added for emphasis]

[7] See annexure "FA9" on indexed p 42.

[9] According to the applicant what is stated above (from annexure "FA9") confirms existence of an agreement reached between the parties. It is said that during a telephone conversation between Hacker and Gurovich something called "gentlemen's agreement between two colleagues" was reached to be followed by a written agreement.[8] However, the respondent denies that "a binding settlement agreement" was concluded. The respondent says that "FA9" envisaged that a binding agreement would only ensue when a written agreement had been signed on behalf of both parties.[9] Gurovich was not authorised to conclude an agreement as contained in annexure "FA9", it is contended by the respondent. Gurovich did not respond to "FA9", but had something to say about all these a little later.[10]

[10] On 18 December 2013 a draft agreement[11] was sent by Hacker to Gurovich. The applicant says that this was after Gurovich had stated during a telephone conversation with Hacker that his client was happy and did not have problems in the contents of "FA9" forming the contents of the agreement between the parties. This is denied by the respondent. The respondent contends that the second paragraph of an e-mail accompanying the draft settlement agreement [i.e. annexure "FA12"] clearly stated that any settlement agreement reached between the parties, had to be in writing and signed.[12] This is referred to as the "antecedent agreement" and it is dealt with a little later below.[13]

[11] Further correspondences followed regarding the signing or finalisation of the settlement agreement. On 09 January 2014 Erasmus sent to Hacker an amended draft

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[8] See par 21 on indexed p 20.
[9] See pars 19 and 20 on indexed pp 110-111.
[10] See par 27 below.
[11] See annexure "FA12.1-8" on indexed pp 46-53.
[12] See annexure "FA12" on indexed p 45.
[13] See pars 27-30 below.

agreement with tracked changes.[14] At this stage the respondent appears to have been communicating with the applicant from two fronts, through Gurovich on the one front and Erasmus on the other. Hacker advised Erasmus that the proposed changes, but two, were acceptable. The two unacceptable proposed changes had to do with the reduction of the proposed settlement instalments from R70 000 per month to R50 000 per month (in clause 4.1.2)[15] and for the agreement to be made an order of Court (in clause 6.2).[16] Gurovich and his firm withdrew the next day, on 10 January 2014, as attorneys of record for the respondent.

[12] After Gurovich's withdrawal, Hacker continued the interactions with Erasmus directly. Erasmus advised Hacker by e-mail on 14 January 2014 that Hacker should accept the "acceptable" tracked changes. This I understand to mean that Hacker was to reject those changes he had indicated as unacceptable. His e-mail ["FA24"] reads in the material part:

> "HI KEVIN PLS ACCEPT TRACK [sic] CHANGES IN PARA 3.1, 4.1.1 AND 9.1.2 AND RETURN FOR SIGNATURE ASAP."[17]

[13] According to the applicant what is quoted above from annexure "FA24" and a conversation Hacker had with Erasmus on 14 January 2014 confirm the existence of an agreement between parties. Erasmus is said to have agreed during the conversation that the agreement could be made an order of Court. But on 15 January 2014 Erasmus sent another e-mail to Hacker and said:

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[14] See annexures "FA20" and "FA20.1-8" on indexed pp 61-69.
[15] See indexed pp 65 and 70.
[16] See indexed pp 67 and 70.
[17] See annexure "FA24 on indexed p 75.

"Hi Kevin let me be forthright. I sat with Laurence and the accountant yesterday and discussed the matter at length.

The offer made to Derek ie R50k pm is simply the best we are prepared to do at date [sic]. There is no sense in committing to something else, thus the original offer and mandate to Ivan. He was never mandated to negotiate a 30% increase in the monthly offer we put forth.

I need to you [sic] put it to Derek, and revert.

Apologies for the run around."[18]

[underlining added for emphasis]

[14] Hacker labelled the above e-mail (i.e."FA28") a "sudden about-turn" and retorted that same would not be countenanced. Hacker accused Erasmus of "backtracking" or "reneging from the agreement", which he obviously considered unacceptable.[19] The accusations appear to have had some sort of effect, as Erasmus thereafter e-mailed Hacker on 15 January 2015 and said

"we will agree to a monthly payment of R70k p/m, but must beg your indulgence to have this then commence a month later ie. 1 May 2014. This is purely a cashflow exercise."[20]

[15] However, the applicant wasn't prepared to grant the one month's grace, but insisted that the agreement is to be made an order of Court. With that the parties advised each other

[18] See annexure "FA 28" on indexed p 79.
[19] See annexure "FA 29" on indexed pp 80-81.
[20] See annexure "FA30" on indexed p 90.

that counsel will be briefed for the ensuing trial.[21] But, as indicated above, the trial did not proceed and eventually this application was launched.

ISSUES IN THE DISPUTE

General

[16] As already stated above, the applicant's case is that there was settlement as contained in a draft attached to its papers.[22] This Court, in the main, is asked to declare the damages action settled on the terms of the draft. The other prayers are for ancillary or consequential relief. They include prayers for declaration of the settlement agreement binding on the respondent; declaration that the respondent is in breach of the terms of settlement agreement, and for the respondent to be ordered to remedy the breach within 7 days. Should the respondent fail to remedy the breach as ordered, the applicant wants to be authorised to return to the Court for a monetary judgment.[23]

[17] As stated above, Mr AW Pullinger appeared for the applicant. His submissions were significantly under the segments: declaratory relief; contractual authority of Mr Erasmus and the antecedent agreement. I liberally adopt the aforesaid headings for purposes of discussions below, but I think there will be interlinks between the topics or headings and even some additions thereto.

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[21] See annexures "FA32" on p 92 and "FA 33" on p 93.
[22] See annexure "A" on indexed pp 5-12.
[23] See notice of motion on indexed pp 1-4.

Declaratory nature of the relief

[18] As indicated above, the relief sought by the applicant in this application, is of a declaratory nature.[24] In the main, the applicant seeks a declaration by this Court that a binding settlement agreement was reached in respect of the action lawsuit between the parties. The respondent disputed that the applicant qualifies for a declarator but, at the hearing of this application, Mr Oosthuizen SC, appearing for the respondent, advised that the respondent does not persist in this argument and therefore there is no need to rule on the issue. This is mentioned here simply for completeness. Next are the issues requiring determination by this Court.

Authority of Mr Erasmus to conclude an agreement

[19] Mr Pullinger submitted that an agreement between the parties was reached on 14 January 2014, when Erasmus requested Hacker to accept the proposed changes to the draft agreement.[25] The respondent's main contention is that no settlement could have been reached as Erasmus did not have the necessary authority to conclude an agreement or to settle the matter.

[20] The following, in my view, are the critical submissions by the applicant. Erasmus had authority as Mr Laurence Bird (Bird), the only director of the respondent, spoke through the mouth of Erasmus.[26] Erasmus's designation or identification as the contact person would have come from Bird. Erasmus was Bird's mouthpiece. Bird appointed Erasmus to compromise the claim with applicant. Although Bird was to sign the agreement, the

[24] See pars 1 and 16 above.
[25] See pars 12 and 13 above
[26] This is the case made out only in the replying affidavit. See par 9 on indexed pp 138-143.

agreement was reached with Erasmus. Not only did Bird not sign the agreement, but he did not give an explanation why he did not do so. This is indicative of a party who negotiated in bad faith. Something ought to be made of the respondent's constant referral to the absence of "binding agreement" as opposed to just agreement.

[21] The respondent denies that Erasmus had authority to conclude an agreement with the applicant. Regarding the contention that Erasmus was the mouthpiece of Bird, Mr Oosthuizen argued on behalf of the respondent that, on the face of the founding affidavit, the party or person who represented the respondent is Erasmus. Nowhere is Bird's name mentioned. And this is clearly denied in the opposing affidavit, wherein the argument is made that Erasmus "was merely the messenger who was requested by me [i.e. Bird] to hear what settlement proposals the applicant may have, to inform me [Bird] thereof and to provide the applicant with feedback on my [Bird's] response to such proposals."[27] Therefore, Erasmus was a messenger and not a representative.[28]

[22] Mr Oosthuizen further submitted that on the basis of the *Plascon-Evans*[29] rule[30] it has to be accepted that Erasmus was appointed a mere messenger. He submitted that, what is reflected in annexures "FA24"[31] and "FA28"[32] do not indicate a person who calls the shots, so to speak. Further that, when a messenger does not comply with the instructions, the handler [my words] is not bound. Therefore, the applicant has to show that Erasmus acted in terms of his instructions as a messenger.

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[27] See par 4.3 on indexed p104.
[28] See *Saambou Nationale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 989 F-H.
[29] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[30] The *Plascon-Evans* rule deals with disputes of fact in motion proceedings. See *Plascon-Evans* at 634H-635B
[31] See indexed p 75.
[32] See indexed p 79.

[23] On why the settlement agreement was not signed, Mr Oosthuizen had a very simple answer: because the parties were not *ad idem.*[33] He added that there is no merit in the submission that the respondent negotiated in bad faith, as what is referred to as the point at which agreement was reached on 14 January 2014 was corrected on the same date and communicated to the applicant by Erasmus the next day on 15 January 2014.[34] Also, the fact that there were no further attempts to reach settlement indicates that no agreement was reached with Erasmus.

Ostensible authority/ Estoppel

[24] It is also submitted, more fitting as alternative argument, that Erasmus had ostensible authority to conclude the agreement. It is said that Bird never disavowed the conduct of Erasmus, until only later. Mr Pullinger asked the question, perhaps rhetorically, how the appointment and involvement of Erasmus in the matter looked to a party on the other side. The respondent's view is that the applicant did not meet all the requirements for *estoppel* to succeed in this regard.[35] Further, the fact that Bird had to be copied on all e-mails is indicative of the lack of authority on the part of Erasmus. There is no proof that Bird approved the agreement in that Erasmus was authorised.

[25] On misrepresentation (as one of the requirements for raising *estoppel*) the following are the submissions on behalf of the respondent. There was no misrepresentation as Bird on 15 January 2014 directed Erasmus to immediately go back and communicate the correct

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[33] Defined as "*eensgesind; eenstemmig; van eenderse sienwyse // of one mind; unanimous*; (to be) *agreed* (as to)." in Hiemstra V.G. and Gonnin H.L. *Trilingual Legal Dictionary* 2nd ed (Juta and Co Cape Town 1986).
[34] See pars 12 and 13 above.
[35] See pars 14 and 15 of the respondent's heads of argument pp 8-9.

position, in as far as the respondent was concerned. There was no duty on Bird to say something, the submissions continue. There was simply no representation by Bird or indication that the applicant relied on such representation. If there was such reliance, same would not be reasonable.

[26] Further, there was no prejudice at the time of the alleged representation, it is submitted for the respondent. What is alleged to be prejudice was only that two years later the matter had not proceeded to trial. Prejudice has to manifest itself through patrimonial loss. Besides, the applicant could have proceeded with the trial, as it actually threatened to do. Therefore, reliance on *estoppel* is not established, it is submitted.

Antecedent agreement

[27] The respondent raised, as a defence, the so-called antecedent agreement. This is in the event that this Court is to find that Erasmus had authority to settle and therefore a settlement agreement was been reached, then the respondent's defence is that the parties had agreed through their attorneys that the matter would only become settled if the settlement agreement was reduced to writing and signed by the parties. This was always an agreement between the parties, it is contended by the respondent. Gurovich returned from his retirement from the matter, so to speak, to forward an e-mail to Hacker on 20 January 2014 in this regard.[36] He also deposed to a confirmatory affidavit to that effect.[37]

[36] See annexure "LB2" on indexed pp 128-129.
[37] See annexure "LB3" on indexed pp 130-131.

[28] The applicant denies existence of the antecedent agreement. It adds, for good measure I suppose, that if ever there was an agreement reached between Gurovich and Hacker this expired when Gurovich's firm withdrew as attorneys of record. I have to immediately say this cannot be correct. Gurovich was an authorised attorney of record until the last day of his mandate and everything done by him whilst executing his client's mandate remains valid until set aside on good cause. Besides, there is no evidence suggesting that he was removed from the matter due to any misconduct on his or his firm's part or disagreement with client.

[29] The applicant argues that the respondent has failed to establish the antecedent agreement in its answering papers. The applicant contends that not all the elements to prove conclusion of the antecedent agreement has been proven in the answering affidavit. The absence of these allegations from the answering affidavit is fatal to the application, it is contended.[38] It is trite or even common cause that the onus of establishing the so-called "antecedent agreement" is on the respondent.

[30] Mr Oosthuizen pointed out that, the antecedent agreement is not located in annexure "LB2"[39] to the answering affidavit, but confirmed thereby. On the basis of the *Plascon-Evans* rule, the respondent's version has to be accepted that there was an antecedent agreement. There is further no need for the antecedent agreement to be in writing.[40] The Court can also infer from the conduct of the parties the existence of an agreement in this regard[41] and Gurovich confirmed this in his confirmatory affidavit. The applicant was well aware of this

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[38] See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at pars 12, 13 and 15.
[39] See indexed par 27 and footnote 36 thereto above. See further annexure "LB2" on indexed pp 128-129..
[40] See pars 31 and 36 of the respondent's head of argument.
[41] See further p 42, "FA9", p 20 and the decision of *Bailess v Highveld 7 Properties (Pty) Ltd* and Others 1998 (4) SA 42 (N) at 501-511.

defence before launching this application.[42] The application is the abuse of process of the Court.

[31] I proceed to an analysis of the issues above against applicable legal principles. In the meantime, I bemoan the fact, all of the above is clearly indicative of the existence of a dispute of fact in this matter. This much was known to the applicant long before it issued its application in July 2014.

APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

[32] Here is a recap of the material facts stated above, as I see them. With the date of trial looming in September 2013, the parties through their attorneys began discussing possible amicable settlement of the dispute. A little later in October 2013, the applicant's attorneys asked their counterparts for details of a person designated by the respondent for direct contact by the applicant to pursue the discussions. This, in the applicant's view, would have facilitated settlement of the matter without incurring legal costs. The respondent designated Erasmus. It is not clear as to who was nominated from the applicant's side as applicant's attorneys remained on record even after respondent's attorneys had exited the scene. Erasmus engaged with Hacker both telephonically and through electronic mail (e-mail). Their subsequent interactions, and to some extent the prior engagements between Hacker and Gurovich (the latter as erstwhile attorney for the respondent) would be critical for a determination to be made here.

[42] See par 4.4 on indexed p 105.

[33] Without much ado, I say that at face value the terms of the agreement appear to have been settled on 14 January 2014 when Erasmus and Hacker spoke about the tracked changes to the draft that were to be accepted.[43] But this is halted in the tracks, so to speak, by the denial of authority of Erasmus to bind the respondent. It is my view that, from the documents it is clear that any agreement reached was to be signed by someone other than Erasmus. Also the reason why Erasmus was brought into the matter is of vital importance. Therefore, it is necessary to deal with the issue of authority of Erasmus or lack thereof in order to answer the question whether or not settlement was reached between the parties.

Authority to conclude an agreement

[34] The respondent says Erasmus did not have authority to conclude any agreement, but that only Mr Laurence Stephen Bird (Bird), as the sole director of the respondent, had such authority. Erasmus was merely a messenger only authorised to hear what offers were being made, relay these to Bird and revert to the applicant with Bird's response. I will deal with this issue against the background of principles of company law, as well as, the law of agency.

[35] In *Tuckers Land and Development Corporation v Perpellief*[44] Nestadt J (as he then was) dealt with the issue of authority in companies as follows. In terms of both common law and statute, companies act through natural persons under its authority.[45] This authority may

[43] See par 12 above.
[44] 1978 (2) SA 11 (T).
[45] See *Tuckers Land and Development Corporation* at 14C. The learned judge stated that section 69 of the repealed Companies Act 61 of 1973 was a "statutory enforcement" of the common law principle. Section 69 read as follows: "(1) Contracts on behalf of a company may be made as follows:- (a) Any contract which if made between individual persons would by law be required to be in writing signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority, expressed or implied, and may in the same manner be varied or discharged;

be in express, implied or ostensible forms.[46] Express authority may be derived from the articles of association[47] or resolution of the company. The latter may be at the level of board of directors or shareholders. Implied authority exists when an official of a company who usually has the particular authority act as if he or she indeed has authority when this is not the case.[48] Ostensible authority may be proven by successfully raising *estoppel* from the particular facts of the matter.

[36] When contracting with a company, one would encounter, on the one hand, the board of directors and managing director or chairman of the board of directors, and branch manager or secretary, on the other.[49] The first group would entitle a person contracting with the company through either of those persons to assume that they have authority.[50] However, when contracting with the latter group a third party would not be entitled to automatically assume that they have authority and the company would not be disentitled from denying authority.

[37] However, the parties herein do not agree as to the designation of Erasmus in relation to the respondent. According to the applicant he is "the financial and legal manager of the

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(b) any contract which if made between individual persons would by law be valid though made orally only and not reduced to writing, may be made orally on behalf of the company by any person acting under its authority, expressed or implied, and may in the same manner be varied or discharged.
(2) All contracts made in accordance with this section shall be effectual in law and shall bind the company and its successors and all other parties thereto." The equivalent of section 69 of the repealed Companies Act 61 of 1973 in the new Companies Act 71 of 2008 will, in my view, be section 20, read with section 66. See generally chapter 5 of Delport P *The New Companies Act Manual* 2nd ed (LexisNexis SA 2011) on pp 63-69.

[46] See generally *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 SCA in which the Court quoted from the English case of *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A-G ([1967] 3 All ER 98 at 102A-E).

[47] Now the Memorandum of Incorporation together with memorandum of association. See ...of Companies Act 71 of 2008.

[48] See *Wolpert v Uitzigt Properties (Pty) Ltd and Others* 1961 (2) SA 257 (W) at 266.

[49] See *Tuckers Land and Development Corporation* at 15A-B.

[50] I will not deal with the *Turquand rule* (derived from the decision of *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886) as I don't think it is even remotely relevant here.

respondent",[51] which is obviously denied by the respondent.[52] It is however common cause that Erasmus is the financial and legal manager of Kusile Group of Companies, which may or may not include the respondent.[53] In my view, it doesn't really make any difference to which entity Erasmus belongs. Financial and/or legal managers do not automatically or by virtue of their position have authority to conclude agreements on behalf of their companies.[54] Although, I hesitate to follow this appellation, Erasmus was merely a messenger.[55] This much is borne by the reason or purpose for which he was brought onto the scene. The applicant wanted to communicate directly with the respondent and not through the medium of attorneys. Erasmus was brought in for this purpose. He became the contact person of the respondent for purposes of making settlement proposals to the respondent.[56] In my view he merely replaced the attorneys. Just like the attorneys, Erasmus was required to act and participate in the settlement discussions in terms of the respondent's instructions. This is not to say he could not conclude an agreement, but the ultimate authority to conclude an agreement would have come from the respondent. Of course he may have embellished his role, which is not my finding, but the moment the respondent denies his authority, it becomes a different matter altogether. But, in my view, the applicant was always aware that the person that was to sign the agreement is Bird and not Erasmus.[57] After all Erasmus was there to pursue the so-called "without prejudice" discussions on behalf of Bird or the respondent.[58]

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[51] See par 12 on indexed p 16.
[52] See par 14.1 on indexed p 108. It is submitted that Erasmus was financial and legal manager of another company named Kusile of which Bird is the director (see par 4.3 on indexed p 104).
[53] See par 4.3 on indexed p 104; see pars 10.2-10.5 on indexed p 144.
[54] See *Tuckers Land and Development Corporation* at 17B-C.
[55] See pars 43 and 44 below.
[56] See par 6 above; annexure "LB1" on indexed p 127.
[57] See annexure "FA15" on indexed p 56.
[58] See par 4 above and annexure "FA1" on indexed p 34.

[38] I do not agree that Bird had a duty to speak or to get involved when he was copied on the e-mails. I do not make much about his silence, but I will deal with this further later on under the subheading *estoppel*. Suffice for now to state that, I find that there was no actual authority, whether express or implied, given to Erasmus by Bird as the sole director or the respondent.

Ostensible authority

[39] In the absence actual authority, be it in its express or implied form, I then move to deal with ostensible authority. This in our law is dealt with under the principles of *estoppel*.[59] The requirements for *estoppel* [60]are well-known and I would avoid lengthening this judgment with a repeat of same.

[40] As indicated above, the applicant contends that the fact that Bird was copied on all correspondences and did not speak, when according to the applicant he had a duty to speak if he did not agree, should be presumed that he had assented. I have already disagreed with this contention. Erasmus was brought onto the scene to be the contact person for the respondent in the "without prejudice" settlement discussions when the parties decided to negotiate directly to avoid legal costs inherent in the involvement of attorneys. This was his role from the beginning and I am not aware of anything to the effect that the respondent changed this role. Other than his silence, I am not aware of anything Bird did or didn't do, that could be argued to have misrepresented Erasmus's authority. For *estoppel* would not avail the applicant, unless it is shown that Bird or the respondent and not Erasmus himself made the alleged

[59] See par 35 and its footnote 36 above.
[60] See Harms LTD *Amler's Precedents of Pleadings* 8th ed (LexisNexis SA 2015) on pp 184-187; Rabie PJ (update by Daniels H) *Estoppel* in *The Law of South Africa* (vol 9) 8th ed (LexisNexis SA 2015) on pp 405-428.

representation.[61] Any reliance by the applicant would not be reasonable, as the applicant, among others, appears to have known the designation or position, even if incorrectly so, of Erasmus within the respondent or the Kusile Group of Companies as the financial and legal manager.[62]

[41] The respondent argued that even if other elements of *estoppel* were met, the application should be unsuccessful on the ground that the applicant has shown no prejudice. Absent settlement the applicant was entitled to enrol the action for a trial. Further, prejudice suffered has to be of a patrimonial nature[63] and the action may be enrolled for trial, should the applicant be so minded or advised. I agree.

[42] Further, the applicant places heavy reliance on the silence of Bird. It terms this to be "acquiescence" and cites *dictum* from the decision of Miller JA in *McWilliams v First Consolidated Holdings*[64] in which the learned judge of appeal, among others, said

> "... a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion..."[65]

[61] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* at 412C-D.
[62] See par 37 above.
[63] See *Jonker v Boland Bank Pks Bpk* 2000 (1) SA 542 (O) at 549F-550A.
[64] 1982(2) SA 1 (A).
[65] See *McWilliams v First Consolidated Holdings* at 10E-H.

But, in my view, proper context is required to the above quoted words. In *McWilliams v First Consolidated Holdings* a letter was sent by an attorney acting for the respondent, who later passed away, and received by the appellant. Attached to the letter was an unsigned memorandum which the sender attorney stated that it reflected the terms agreed upon by the parties for the purchase of shares by the appellant. The appellant never responded to the letter. This is obviously the opposite of what happened in this matter. Herein the respondent responded to all correspondences including on 15 January 2014 when the parties appeared to have deadlocked. So there was never a reasonable opportunity for the appellant to conclude that there was acquiescence by the respondent. Therefore, I do not agree with the applicant submission that this is a classical case where the party should be *estopped* from denying authority of its agent.

Messenger vis-à-vis agent

[43] In the seminal work on *Agency and Representation*[66], agency is said to denote many branches of law, but its meanings include "an agreement in terms of which one person, called the agent, performs some task for another person, called the principal, in connection with a juristic act by or for the principal". In the same work an agent or representative is contrasted with a messenger and the following is what I consider relevant in this regard:

> "The representative or agent concludes a juristic act on behalf of another person by an expression of his or her own will. The messenger, on the other hand, merely conveys the words of one person to another person. The juristic act is concluded by the person whose words he or she conveys. It has been suggested that the essential difference between the agent and the messenger is that the former exercises discretion to a greater or lesser degree, whereas the latter does not. It is true that a messenger merely transmits the statement of one person to

[66] Dendy M (original text by JC de Wet) *Agency and Representation* in *The Law of South Africa* (vol 1) 2nd ed (LexisNexis SA 2014) on p 111.

another person, but that does not mean that a person whose powers are circumscribed to such an extent that he or she has no scope to determine the terms of a contract or other juristic act is necessarily a messenger and not an agent. The crucial point is whether he or she acts in the name of another person."[67]

[quoted without references, but with added underlining for emphasis]

[44] As indicated above, Erasmus was brought into the matter to be the contact person for the respondent in the settlement discussions. He was appointed by Bird or the respondent to participate in the discussions in the name of the respondent or Bird, its director or both. The discussions were without prejudice to the rights of the parties. I agree that Erasmus was a messenger. It may well be that Erasmus exceeded his capacity as messenger, which is not my finding, but clearly that would be another issue, possibly capable of a decision elsewhere.

Antecedent agreement

[45] I have already found that there was no settlement of the action. Therefore, there is no need for determining the issue relating to the antecedent agreement.

CONCLUSION AND COSTS

[45] From my conclusions or findings above, it is clear that this application ought to be dismissed. But there is something else I would like to add. The events premising this

[67] See *LAWSA Agency and Representation* at par 128 on p115 and the authorities cited there. See further Kerr AJ *The Law of Agency* 4th ed (LexisNexis Butterworths Durban 2006) on p 18.

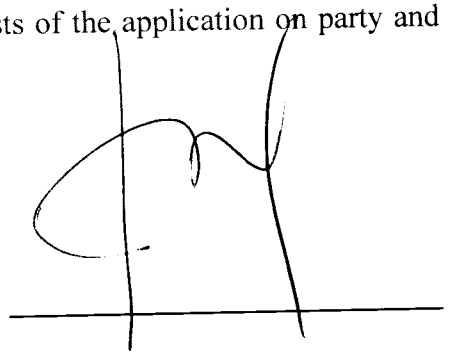
application spanned over a period of almost five months. They included what was said on the telephone or electronic mail by representatives or persons acting on behalf of the parties. There were allegations, counter-allegations and denials long before the application was issued. It was clear that there is dispute of facts and, in my view, motion proceedings were inherently bound to pose challenges for determination of the issues by the Court. There was merit in the dispute of authority. I am mentioning this under the heading of costs because it is relevant here, even though the matter is disposed of for different reasons. In my view, it is only that the applicant doesn't appear to have been motivated by bad motives and was *bona fide* in its pursuit of the relief sought and denied, that I will not contemplate a punitive costs order. Also, the respondent settled for a normal costs order, which would be awarded with the inclusion of costs of senior counsel.

ORDER

[46] In the premises, I make the following order:

1. The application is dismissed;

2. Applicant is liable to the respondent for costs of the application on party and party scale.



K. La M. Manamela

Acting Judge of the High Court

27 July 2016

Appearances:

For the Applicant	:	Adv AW Pullinger
Instructed by	:	Fairbridges Wertheim Becker Inc, Johannesburg
		c/o Adams and Adams, Pretoria
For the Respondent	:	Mr HF Oosthuizen SC
Instructed by	:	Krügel Heinsen Inc
		c/o Martin Terblanche Attorneys, Pretoria