

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)



Case number: A 189/2020

Date:

DELETE WHICHEVER IS NOT APPLICABLE  
(1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHERS JUDGES: YES/NO  
(3) REVISED

29.3.2022 *[Signature]*  
DATE SIGNATURE

In the matter between:

SPP PUMPS (SOUTH AFRICA) (PTY) LTD

APPELLANT

AND

JACQUES STOOP

RESPONDENT

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JUDGMENT

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TOLMAY, J:

- [1] The appellant (SPP) appealed against the whole of the judgment of the Court *a quo* in which, in the amended order, SPP was ordered to pay the amount of R1 012 775-04 as commission to the respondent (Stoop). The quantum was agreed between the parties in the event of Stoop being successful. The counterclaims instituted by SPP were dismissed.
- [2] During September 2015 Stoop sued SPP for payment of commission in terms of two agreements. SPP's defence was that its Managing Director, Mr Louis Van Wyk (Van Wyk) lacked authority to enter into the commission agreements on behalf of SPP. No evidence was led regarding the counterclaims and no counter appeal was launched against the finding of the Court *a quo* in relation to them. As a result nothing needs to be said about the counterclaims.
- [3] The crisp issue on appeal is whether Van Wyk, in his capacity as Managing Director of SPP had ostensible authority to enter into the commission agreements with Stoop. It was common cause that Van Wyk's authority as Managing Director to manage and direct the business of SPP was not limited in terms of section 66 of the Companies Act 71 of 2008.
- [4] The evidence was set out in the judgment by the Court *a quo* and does not require repetition except in so far as it may be relevant for determination of the issue that this Court has to determine.

[5] The two commission agreements that Stoop relied on were dated 1 January 2011 and 26 March 2012 and made provision for respectively 2% and 3% commission. It was common cause that the one of January 2011 was backdated. Stoop said that was done because that was the date from which the commission was payable.

[6] It is common cause that SPP paid an amount of R762 437-94 to Stoop in terms of the aforementioned commission agreements. On the pleadings SPP alleged that these payments were made in the *bona fide* reasonable, but mistaken belief that it was owing and that SPP *inter alia* suffered damages in this regard, but as already stated no evidence was led to prove this claim.

[7] Stoop testified regarding the agreements and how he and Van Wyk entered into them. It was his evidence that Van Wyk instructed him to draft these agreements. The agreements were simply worded and merely recorded the fact that they were drafted following discussions between Van Wyk and Stoop and that the commission would be payable for every fire order after SPP was paid. Stoop's evidence was that he believed Van Wyk as Managing Director of SPP was authorized to enter into commission agreements with him. Mr Shevlin (Shevlin) a Director of SPP, based in the United Kingdom and who established SPP in South Africa denied that Van Wyk was authorized to do so, and pointed out that SPP would never have drafted an agreement in the way that was done in this instance.



[8] In order to determine whether Stoop proved the ostensible authority of Van Wyk one needs to determine what is required to prove it and then evaluate it against the evidence. In *Makate v Vodacom (Pty) Ltd*<sup>1</sup> the Constitutional Court dealt extensively with this issue and stated as follows:

*"A closer examination of the original statement on apparent authority by Lord Denning, quoted below, reveals that the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority. The statement indicates the absence of the elements of estoppel. It does not mention prejudice at all. That statement of English law was imported as it is into our law in NBS Bank and other cases that followed it.*

*In the leading case of Hely-Hutchinson CA, Lord Denning MR explained the concepts of actual and apparent authority as follows:*

*"[A]ctual authority may be express or implied..... Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it. Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the*

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<sup>1</sup> 2016 (4) SA 121 (CC) (Makate).

board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the 'holding-out'. Thus, if he orders goods worth £1,000 and signs himself 'Managing Director for and on behalf of the company,' the company is bound to the other party who does not know of the £500 limitation, see *British Thomson-Houston Co Ltd v Federated European Bank Ltd*, which was quoted for this purpose by Pearson LJ in *Freeman & Lockyer*. Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority. Suppose the managing director orders £1,000 worth of goods from a new director who has just joined the company and does not know of the £500 limitation, not having studied the minute book; the company may yet be bound. Lord Simonds in *Morris v Kanssen*, envisaged



*that sort of case, which was considered by Roskill J in the present case.*"<sup>2</sup>

[9] From the above it is clear that ostensible authority is simply "*authority as it appears to others*". It was held by the majority that ostensible or apparent authority should not be conflated with estoppel and the features of estoppel make this distinction more noticeable.<sup>3</sup>

[10] The question therefore is simply did Stoop prove that Van Wyk had the ostensible authority required to enter into the commission agreements with him. In this regard one needs to look at the evidence available. It is common cause that Van Wyk was the Managing Director of SPP and managed its business in South Africa with no limits to his authority in terms of the Companies Act. It is also common cause that he entered into employment contracts on behalf of SPP and even negotiated salary increases with employees, including Stoop. Shevlin testified that Van Wyk could enter into commission agreements on behalf of SPP, provided that he obtained the necessary authority from Shevlin. According to Shevlin's evidence there was a limitation to Van Wyk's authority. The question that should follow is whether Stoop was or should have been aware of the limitation to Van Wyk's authority. Shevlin's own evidence was that Van Wyk was authorized to enter into commission agreements including the percentage, with marketing staff in the rest of Africa. The question can legitimately be asked why Van Wyk would have such authority in the rest of

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<sup>2</sup> *Ibid* para 47 & 48.

<sup>3</sup> *Ibid* para 49 – 52.

Africa, but not locally and then if that is so why should Stoop reasonably have to question his authority to enter into commission agreements with him.

[11] Another employee, Ms Trauchet, (Trauchet) entered into an agreement with Van Wyk regarding commission. SPP paid her commission. Shevlin's approval was not obtained for such commission either. The only difference was that Trauchet did pay tax on the commission. Much was made of the fact that Stoop received some of the commission in cash and cash cheques and did not pay tax on it and the inference that SPP requires the Court to draw is that it points to prove that Stoop was aware of the fact that Van Wyk was not authorized to agree to the payment of commission. His explanation for not personally paying any tax, was that Van Wyk said SPP would take care of the tax and it was argued on behalf of Stoop that in the light of the revenue brought in by Stoop for SPP, this was not unlikely. The explanation regarding the tax payments is however not persuasive and may require scrutiny by SARS, but the fact remains that SPP paid the commission in terms of the commission agreements, as is clear from the emails that were tendered as evidence. These emails show Stoop providing proof of invoices and Van Wyk authorizing payment and subsequent to that payments were made by SPP of the claimed commission.

[12] Importantly SPP itself relied on a written employment agreement signed by Van Wyk and Stoop on 10 October 2013, which made provision for 3% commission payable to Stoop, to enforce a restraint of trade against Stoop. SPP was successful in this endeavor. The argument that the clause pertaining



to commission was severable from the rest of the agreement is not borne out by any evidence. SPP can hardly rely on this agreement when it suits them and disputes the other terms contained in the agreement when those terms do not support its case. In my view this on its own provides proof on a balance of probabilities for the existence of ostensible authority.

[13] It is clear from the evidence that Van Wyk was involved in irregularities relating to SPP's business and although Shevlin implicated Stoop in similar activities there is no evidence to support this. Notably Van Wyk was criminally charged but Stoop was not. Despite both parties making much of the so-called whistleblower letter dated 27 February 2014, written by Stoop which referred to his commission, the manner in which it was paid and the problem with the stock losses. The stock losses seem to be part of alleged fraudulent activities perpetuated by Van Wyk. The contents of the letter contribute little to the question of whether ostensible authority was proven or not in relation to the commission agreements.

[14] Much was also made about the disciplinary hearing to which Stoop subjected himself, despite having resigned prior to it. This however does equally not assist in determining the issue before us. The evidence was that SPP in due course suspended Stoop because of alleged irregularities connected to stock losses. This is a totally different matter and SPP should have resorted to civil and/or criminal proceedings if they had sufficient evidence. It however has very little to do with the question of whether Van Wyk



ostensibly had the necessary authority to enter into the commission agreements with Stoop.

[15] It is also important to take note of the letter dated 28 July 2014, which was sent to SPP's attorneys in which reference was made to a meeting between Stoop and Shevlin on 8 July 2014. It was alleged that during this meeting Shevlin made derogatory and threatening remarks to Stoop. These included *inter alia* that Stoop will be subjected to long and protracted litigation and subsequent financial pressure. It also contained the allegation that SPP's lawyers would be able to get it out of paying the commission that is due or reduce it. Surprisingly SPP's lawyers never responded to this letter, nor did Shevlin succeed in giving any satisfactory explanation for such failure. Shevlin gave different versions during his evidence relating to whether this meeting took place or not and about what was discussed.

[16] I am of the view that Stoop succeeded in proving the existence of ostensible authority for the following reasons: Van Wyk negotiated the employment contracts and increases with him and other employees, why would Stoop then have to question his authority to negotiate a related issue, namely commission. On Shevlin's own evidence Van Wyk was authorized to negotiate commission as long as it was cleared with him. It cannot be expected of an employee to know that or to, even if he knows about it, to question the Managing Director in order to ascertain whether it was obtained. Commission was paid to Trauchet by SPP and this was negotiated by Van Wyk. Finally and persuasively the agreement on which SPP relied to enforce the restraint of

trade provided for commission and was signed by Van Wyk on behalf of SPP. This enforces the conclusion that ostensible authority for the conclusion of the commission agreements was proven.

[17] When one analyses the evidence there is no reason to believe that Stoop was aware of any limitation on Van Wyk's authority, or had any reason to question it. The evidence points to the existence of ostensible authority as defined in *Makate*.

[18] The court *a quo* found Stoop to be a credible witness and it is trite that an appeal court will not easily interfere with this finding. It did not emerge from the record that the trial court misdirected itself on the facts, or came to a wrong conclusion regarding credibility.<sup>4</sup>

[19] In the light of the aforesaid the appeal should be dismissed.

[20] The following order is made:

- a) **The appeal is dismissed; and**
- b) **The appellant must pay the costs, including costs of senior counsel.**



**R G TOLMAY**

**JUDGE OF THE HIGH COURT**

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<sup>4</sup> *Makate*, supra, para 40; *Bernet v Absa Bank Ltd* 2011 (3) SA 92 (CC) para 106.



N V KHUMALO

JUDGE OF THE HIGH COURT



V M NQUMSE

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING OF THE APPEAL:

26 JANUARY 2022

DATE OF JUDGMENT:

2022 . 03 . 29

ATTORNEY FOR APPELLANT:

WEBBER WENTZEL

ADVOCATE FOR APPELLANT:

A F ARNOLDI (SC)

ATTORNEY FOR RESPONDENT:

HILLS INCORPORATED

ADVACATE FOR RESPONDENT:

A SNIDER (SC)

A SWARTZ



25 March 2022

Hey Karen. Please note that Judge Khumalo has given her permission for Judge Tolmay to sign on her behalf. Thanks 😊

★ 16:22

Thanks Sweetie 👍 100



16:54 ✓✓

Yesterday

Boitimelo DUBE neukirche...

Hey Karen. Please note that Judge Khumalo has given her permission for



Good day Karen,

Acting Judge Nqumse is happy with the judgement and confirms that Judge Tolmay can proceed to pp for him.

Regards



kerlank@judiciary....  
Nimbusprop@gmail....

09:09

