REPORTABLE

CASE NO.: SA 35/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FACTCROWN LIMITED **Appellant**

and

NAMIBIA BROADCASTING CORPORATION **Respondent**

Coram: MAINGA JA, STRYDOM AJA and CHOMBA AJA

Heard: **24 October 2013**

Delivered: **17 March 2014**

APPEAL JUDGMENT

STRYDOM AJA (MAINGA JA and CHOMBA AJA concurring):

[1] The appellant, Factcrown Limited (Factcrown), issued summons in the High Court of Namibia claiming specific performance of a written agreement entered into with the Namibian Broadcasting Corporation (the NBC) on 12 December 2001.

The pleadings

[2] Paragraph 3.1 of the particulars of claim provided that Factcrown, in terms of the agreement, would supply the NBC with FM, TV and other electronic equipment for

their stations at Okongo, Omega, Kongola, Kamanjab, Sesfontein, Gam, Bethanie, Maltahöhe and Aus. Paragraph 3.2 of the particulars of claim stated that it was further provided in the agreement that delivery would take place over a period of 10 years from the date of the agreement and within 6 months after receipt by Factcrown of the first down payment made by the NBC in terms of the agreement.

[3] It was further alleged that it was an implied term of the said agreement that the NBC would place orders with Factcrown to the exclusion of all other suppliers and that Factcrown's obligation in that regard would only arise upon placement of such orders. Although Factcrown was at all times ready and able to comply with its obligations the NBC refused to comply with their obligations and more particularly refused to place any orders in terms of the agreement with Factcrown.

[4] The NBC initially admitted paras 1 to 5 of the particulars of claim but also pleaded that there was a further term and condition precedent for the agreement to become operative, namely, that it was the obligation of Factcrown to obtain the necessary funding for the implementation of the agreement, alternatively to assist in obtaining such funding, before the agreement would become operative. It was further alleged that Mr Benebo, who represented Factcrown, was at all times aware of this condition and that neither party was able to obtain the necessary funds with the result that this condition was not fulfilled and the contract was therefore void.

[5] Some two years after having filed the above plea, the plea was extensively amended. In regard to paras 1 to 5 of the particulars of claim it was now only admitted that Dr Mulongeni, at the time the Director-General of the NBC, signed the said agreement but it was denied that he had any authority to do so. It was pleaded that Dr Mulongeni had specific instructions not to conclude such agreement without the approval of the NBC Board of Directors (Board). Dr Mulongeni furthermore cancelled the agreement between the NBC and the Harris Corporation for the supply of the equipment notwithstanding specific instructions from the Board to honour such agreement. Because the NBC is an organ of State the terms of the agreement with Factcrown were also against the public interest.

[6] The plea continued to state that the said agreement was also not enforceable for the reasons that Factcrown never tendered for the supply and delivery of the equipment; that it never complied with any tender procedures or specifications; that following the tender procedure the NBC Board awarded the tender to the Harris Corporation and entered into an agreement with it; that Mr Benebo was at all times aware that Dr Mulongeni was not entitled to conclude the agreement with Factcrown without the approval of the NBC Board and without following the tender procedures of the NBC.

[7] Although the Factcrown agreement recorded that Factcrown would deliver the equipment and services on the same terms as stipulated for in the Harris agreement this was not the case.

[8] The amended plea also repeated the condition precedent contained in the initial plea by the NBC.

[9] Factcrown replicated to the amended plea and stated that the Harris agreement was cancelled by the NBC and stated that the Factcrown agreement concluded on 12 December 2001 was as per the tender annexed as 'B' to the Factcrown particulars of claim. In the alternative, and if the court should find that Dr Mulongeni had no authority to conclude the Factcrown agreement then the NBC, through its officials, intentionally or negligently, represented to Factcrown through words or conduct that he had the necessary authority to enter into the agreement on behalf of the NBC. Various grounds were relied upon to demonstrate the conduct and/or words conveying such representation. I will later refer more fully thereto if necessary.

[10] In the further alternative, and if the court should find that Dr Mulongeni had no authority to enter into the Factcrown agreement the replication stated that Factcrown dealt *bona fide* with the NBC; that it was unaware that Dr Mulongeni required the necessary authority to conclude the agreement; that it was therefore entitled to assume that the NBC's internal requirements had been properly and duly complied with and that the NBC was therefore bound by the agreement with Factcrown notwithstanding that such internal requirements were not complied with.

[11] Although extensive further particulars were asked by both parties, and a rule 37 conference was held, they did not succeed in narrowing down the issues in dispute.

The background

[12] The NBC, through its Board, aspired to bring its services to all corners of Namibia in order to reach and benefit all the people of Namibia. To achieve this goal it needed to expand its FM and TV services by erecting the necessary equipment at various stations throughout Namibia. These were the stations set out in para [2] above.

[13] The NBC set out its requirements in tender documents and called for tenders in order to acquire the equipment necessary to fulfil this self-appointed task. Various companies submitted tenders, and one such company was the Harris Corporation of the United Kingdom. The tender was described as a technical one and after the tenders had been closed a technical committee of the NBC evaluated all the tenders and recommended that the tender of the Harris Corporation be accepted. This was duly done. It seems that the NBC had had previous dealings with the Harris Corporation and was satisfied that not only would the latter be able to provide the necessary equipment but that the equipment manufactured by the Harris Corporation was of the best quality. They were informed that their tender was successful and an agreement was concluded dated 29 January 2001.

[14] The contract price for the supply of the equipment was fixed at an amount of USD11 528 633,88. The initial tender sum had been in excess of the amount of USD11,5 million but through negotiations, and after a breakdown was made of the amounts tendered under the various headings, the parties agreed on the contract sum.

[15] It seems that the NBC had difficulty in obtaining funds to implement the agreement. At one stage it was resolved to use a percentage of its funds budgeted and allocated for capital works to finance the Harris contract. However, this resolution was never implemented.

[16] How it came about that the Harris contract was cancelled and a contract concluded with Factcrown is relevant to these proceedings. Factcrown is a company registered in the United Kingdom whose driving force and managing director was Mr Setema Benebo. Mr Benebo acted at the relevant time as an agent for Harris and as such he submitted Harris's tender to the NBC. It seems that after the tender was awarded to Harris they either terminated the agency with Mr Benebo or they did not extend his previous contract which had been for a year only. The evidence is not very clear on this issue. As a result a dispute arose between Harris and Mr Benebo. Mr Benebo complained to Dr Mulongeni about his treatment by Harris whereupon Dr Mulongeni wrote a letter to Harris Corporation demanding that they quickly resolve their dispute with Mr Benebo. This did not happen and Dr Mulongeni, by letter dated

16 November 2001, cancelled the agreement with the Harris Corporation and then concluded a written agreement with Factcrown on 12 December 2001.

[17] Before the Factcrown agreement was implemented a new Board was appointed for the NBC and a new Director-General replaced Dr Mulongeni. During an interview Mr Benebo was informed by the new Director-General that the NBC regarded the Factcrown agreement as void and that they are therefore not bound to implement it.

[18] The present litigation was then instituted by Mr Benebo. After the close of pleadings the matter went to trial and three witnesses testified on behalf of Factcrown, namely Mr Benebo, Dr Mulongeni and a Mr Kavari, also a high ranking official of the NBC at the relevant time. After the case for Factcrown was closed application was made by counsel for the NBC for absolution of the instance. The application was successful and the court *a quo* granted absolution with costs. Factcrown then appealed against the whole of the court *a quo's* judgment and order and was herein represented by Mr Corbett. Ms Schimming-Chase, assisted by Mr Maasdorp, appeared for the NBC. These counsel had previously also represented the respective parties in the High Court.

Material findings by the court *a quo*

[19] In a well-reasoned judgment the learned judge *a quo* analysed the evidence and came to the conclusion that it was not proven that the Board of Directors of the

NBC at any time expressly or by implication authorised Dr Mulongeni to cancel the agreement with the Harris Corporation and to enter into a new agreement with Factcrown. The court further pointed out that the Harris Corporation and Factcrown were two different legal entities and for Factcrown to supersede the Harris Corporation and to conclude a contract with the NBC required a tender procedure which did not take place. Furthermore the court concluded, in regard to the plea of estoppel raised by Factcrown, that on the evidence led on behalf of Factcrown it could not find that Factcrown was induced to its detriment to enter into the agreement with the NBC as there was no evidence that the NBC Board held out to Factcrown that Dr Mulongeni had the necessary authority to enter into such an agreement on behalf of the NBC. With reference to various authorities the learned judge pointed out that regard must also be had as to whether Mr Benebo's reliance on any representation was a reasonable one. The court concluded, with reference to certain circumstances, that the conclusion of the present contract could not be characterised as part of the ordinary powers of Dr Mulongeni. The court found that all the circumstances should have alerted Mr Benebo to the possibility that Dr Mulongeni did not have the necessary authority to cancel the Harris agreement and to enter into the Factcrown agreement.

[20] The court *a quo* was of the opinion that it did not appear from the evidence, led on behalf of Factcrown, that Mr Benebo was unaware that Dr Mulongeni required the authority or approval of the NBC Board to enter into the Factcrown agreement, or that Dr Mulongeni was acting *ultra vires* his powers as Director-General.

[21] Lastly the court *a quo* was of the opinion that the Factcrown agreement was against the public interest and that that was a further reason why absolution should be granted.

Counsels' submissions

[22] In regard to the test applicable which a court must apply for absolution of the instance at the close of a plaintiff's case, the parties were *ad idem* as to the principles applicable and they referred the court to the same authorities such as *Claude Neon Lights (SA) Ltd v Daniel,* 1976 (4) SA 403 (A) and *Gordon Lloyd Page & Associates v Rivera and Another,* 2001 (1) SA 88 (SCA). Counsel however, differed in their application of these principles to the facts of this case.

[23] Mr Corbett first of all submitted that a court, in deciding whether absolution should be granted at the close of a plaintiff's case, must accept the evidence adduced as true and should not evaluate and reject the plaintiff's evidence, unless certain very special considerations are present.

[24] Regarding the evidence and the findings by the court *a quo*, counsel submitted that the following issues fell to be decided by this court, namely –

1. Whether the appellant has established on a *prima facie* basis that it is entitled to specific performance of the agreement;

2. Alternatively, whether the Director-General of the respondent had the required authority of the respondent's Board of Directors to enter into the agreement at the time, and if not whether this fact rendered the agreement *ultra vires* his powers and unenforceable;

3. Whether, in the circumstances the appellant may then rely on estoppel as pleaded in its replication;

4. In any event, whether the agreement is unenforceable by virtue of the fact that it is contrary to public policy; and

5. Further and in any event, whether the agreement is rendered unenforceable by virtue of the non-fulfilment of a condition precedent, namely that the necessary funding would first have to be obtained prior to the implementation thereof.

[25] In regard to the issue of specific performance counsel submitted that Factcrown has alleged and proved its agreement with NBC. It is a fact that the agreement was entered into and that the terms thereof were not disputed. What was disputed was its enforceability. Counsel further submitted that the credibility of the amended plea is in issue and because the application for absolution was granted it was denied an opportunity to probe these defences under cross-examination.

[26] The facts appearing from the evidence before the court, the conduct of Dr Mulongeni and what was stated by him on the very contract with Factcrown, the fact that he was the highest ranking official in the hierarchy, as well as the involvement of other high ranking officials of the NBC and the fact that it could not be expected of Factcrown to have knowledge of the internal tender procedures of the NBC at least constituted sufficient *prima facie* evidence to establish that Factcrown could avail itself of the doctrine of estoppel. Counsel consequently submitted that the court *a quo* erred in granting the application for absolution. In regard to the principles applicable to apparent or ostensible authority counsel referred the Court to various cases. (See, *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another,* 2010 (4) SA 122 (SCA); *Hely-Hutchinson v Brayhead Ltd and Another,* [1968] 1 QB 549 (CA) ([1967] 3 All ER 98); *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others,* 2002 (1) SA 396 (SCA) and *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others,* 2012 (5) SA 323 (SCA).)

[27] Counsel also addressed the issue of estoppel. With reference to various cases counsel extracted the principles applicable to the doctrine. (See, *inter alia, Mann v Sidney Hunt Motors (Pty) Ltd,* 1958 (2) SA 102 (G); *Road Accident Fund v Mothupi,* 2000 (4) SA 38 (SCA); *B & B Hardware Distributors (Pty) Ltd v Administrator, Cape, and Another* 1989 (1) SA 957 (A); *Standard Bank of SA Ltd v Stama (Pty) Ltd,* 1975 (1) SA 730 (A); *Absa Bank Ltd v De Klerk,* 1999 (1) SA 861 (W) and *Glofinco v Absa Bank Ltd t/a United Bank,* 2002 (6) SA 470 (SCA).)

[28] Mr Corbett relied strongly on the case of *Claude Neon Lights (SA) Ltd v Daniel,* 1976 (4) SA 403 (A) and more particularly on references made in the case to what was stated by Innes CJ in the case of *Blower v Van Noorden,* 1909 TS 890. In regard to the rule in *Turquand* counsel relied on the case of *Walvis Bay Municipality v Occupiers of the Caravan site at Long Beach Caravan Park, Walvis Bay,* 2007 (2) NR 643 (SC) and the cases referred to therein.

[29] In regard to the Court *a quo's* finding that the Factcrown agreement was also against public interest and could therefore not be enforced counsel referred the court to the case of *South African Forestry Co Ltd v York Timbers,* 2005 (3) SA 323 (SCA) where Brand JA, warned that courts, which are called upon to strike down or decline to enforce contracts on the basis that such militates against public policy must, in the light of constitutional values such as dignity, equality and freedom, exercise perceptive restraint before doing so. Setting out what is required to find that a contract freely made was against public policy counsel extracted certain principles from the case law and submitted that the Factcrown agreement did not militate against any of these considerations.

[30] Counsel submitted that neither the Harris agreement nor the Factcrown agreement contained a condition precedent concerning the availability of funding and that there was consequently no contractual basis for that part of the plea.

[31] In regard to the court's finding of absolution at the close of Factcrown's case Ms Schimming-Chase submitted that the onus to establish an estoppel rests on the party who pleads it. Counsel referred this court to the case of *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others,* 2002 (SA) 396 (SCA) where the requirements for holding a principal liable on the basis of the ostensible authority of its agent were articulated. On the authorities referred to by her, counsel submitted that the representation which induced an innocent party to act to his detriment must be based on the words or conduct of the principal and not merely on that of the agent. It was further submitted by counsel that a plaintiff could not rely on misrepresentations made by a defendant after, in this instance, the conclusion of the contract. The misrepresentation must relate to the time the contract was concluded.

[32] Counsel further pointed out that to hold a principal liable on the basis of the agent's apparent authority, might be express or implied depending on the particular capacity in which the agent had been employed and from the usual and customary powers that pertained to the particular agent in regard to his position. Thus the powers of a managing director are not unlimited and authority would only be implied where such agent perform the ordinary duties incidental to his or her position as managing director. What these duties are will depend on the facts of each case and the nature of the company's business.

[33] Applying the law to the facts counsel submitted that there was no evidence that any Board member expressly authorised Dr Mulongeni to conclude an agreement

with Factcrown. Counsel also submitted that the signing of an agreement committing the NBC, a body reliant on State funds, to an amount of U$12 million, with a company that did not follow the tender procedures, did not fall within the ordinary course of business, or the day to day business of the Director-General.

[34] With regard to the relationship between Mr Benebo and Dr Mulongeni it would be absurd not to conclude that Dr Mulongeni discussed with Mr Benebo the problems he had with the Board. Referring to various circumstances counsel concluded that the only inference which could be drawn from all the evidence was that if Dr Mulongeni made any representation he did so by himself which, for the purposes of proving estoppel, was not relevant.

The Law

[35] In the matter of *Hely Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A-G ([1967] 3 All ER 98 at 102A-E) Lord Denning, MR, made the following observation concerning the law of England in regard to agency and when a principal would be rendered liable for the acts of his agent. He stated the following:

> '(A)ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. 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 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. . . .'

[36] This excerpt in regard to the law of agency was referred to with approval in the cases of *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others,* 2002 (1) SA 396 (SCA) p 411B-F and *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others,* 2012 (5) SA 323 (SCA) at 334B-D.

[37] Dealing with ostensible authority and estoppel the following was stated by Schutz, JA, in the *NBS Bank*-case, *supra,* para 25 p 411G-J:

> 'As Denning MR points out, ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has

> borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, to take this case, the fact that Assante held himself out as authorised to act as he did is by the way. What Cape Produce must establish is that the NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression: *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy BPK,* 1964 (2) SA 47 (T) at 50A-D.'

See also *Glofinco v Absa Bank Ltd t/a United Bank,* 2002 (6) SA 470 (SCA).

[38] Ostensible authority is not open ended but is limited to what would fall within the ordinary powers of that particular CEO of that particular business. Dealing with the ordinary powers of a bank manager Nienaber JA, stated the following in the *Glofinco*-case para 15 p 481C-D:

> '[15] The appointment by a bank of a branch manager implies a representation to the outside world. The representation, to the knowledge of the bank, is that the branch manager is empowered to represent the bank in the sort of business (and transactions) that a branch of the bank and its manager would ordinarily conduct. The notion of "ordinary business" in turn implies a qualification in the form of a limitation: that the branch manager is not authorised to bind the bank to a transaction that is not of the ordinary kind. What the ordinary kind of business of the branch is remains a matter of fact and hence of evidence.'

(See also *South Africa Eagle Insurance Co Ltd v NBS Bank Limited,* 2002 (1) SA 560 (SCA) and *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others, supra.)*

[39] Where an agent's authority is implied the yardstick by which his actions would bind his principal is also that it must fall within the ordinary powers of that particular agent. (See the *Glofinco*-case, para 16 p 481C-E.)

[40] Where an agent's authority is limited such limitation falls within the internal arrangements and people doing business with the agent, and who were unaware of the limitation, will not be bound thereby. (See the *Glofinco*-case, para 17 p482B-H.)

<u>The appeal</u>

[41] Before dealing with the appeal this Court must decide the issue of condonation. Factcrown applied for the condonation of their late filing of the record and the reasons for judgment by the learned judge. As a result of the non-compliance with rule 5(5) the appeal has lapsed and application is also made for the re-instatement thereof.

[42] The application is not opposed and I am satisfied that full and acceptable explanations were given for the non-compliance with the rule. It is also clear that finality in this matter is important to both the parties. Bearing in mind the principles

that were laid down by this Court in the recent case of *Rainer Arangies t/a Auto Tech v Quick Build,* an unreported judgment by O'Regan AJA, in which the Chief Justice and myself concurred, delivered on 18 June 2013, I am of the opinion that this Court must grant the application for condonation and re-instate the appeal. This I now do.

[43] The NBC is a statutory body and juristic person established by s 2 of the Namibian Broadcasting Act 9 of 1991 (the Act) and as such it is owned by the State as set out in Schedule 1 of the State-Owned Governance Act 2 of 2006.

[44] The NBC is managed and controlled by a Board of Directors (the Board).

[45] The Chief Executive Officer (the CEO) of the NBC, known as the Director-General, is established by s 13(1) of the Act and he is a non-voting member of the Board. His powers are set out in s 13(3) of the Act which required him to exercise control and supervision over the other officials and employees of the corporation and exercise or perform the powers, duties and functions assigned to him by the Board.

[46] I agree with Mr Corbett that to all outward appearances a contract was concluded and the issue is whether, when Dr Mulongeni did so, he had the necessary authority to bind the NBC.

[47] In the present instance there is no evidence that Dr Mulongeni was expressly authorised to conclude the contract with Factcrown. This was correctly conceded by

Mr Corbett. For the reasons set out hereunder I am satisfied that, on the evidence, it could not be found that Dr Mulongeni had implied or ostensible authority to bind the NBC to the Factcrown agreement. I say this because the chain of events which led to the signing of the Factcrown agreement, and the agreement itself, were so patently irregular that it could not be said to have fallen within the ordinary powers of Dr Mulongeni as CEO of the NBC.

[48] This chain of events started when Mr Benebo complained to Dr Mulongeni that the Harris Corporation had cancelled his agreement as their agent. In this capacity Mr Benebo had submitted the tender of Harris. Dr Mulongeni, at the request of Mr Benebo, then addressed a letter to the Harris Corporation, on a NBC letterhead dated 12 April 2001. In this letter he accused the Harris Corporation of sending out confusing signals with regard to Factcrown's status as a representative of the Corporation. This situation, he continued to state, could lead to legal problems into which the NBC could be dragged. He, ie Dr Mulongeni, said that he wanted to make it abundantly clear that the NBC would not proceed further with the contract if that situation should arise or be threatened. He advised Harris to quickly resolve the difficulties. The letter was copied to Mr Benebo who admitted having received it.

[49] The letter by Dr Mulongeni was an attempt to get Harris Corporation to re-instate Mr Benebo as their agent. In doing so Dr Mulongeni was acting in the interests of Factcrown and Mr Benebo and not the NBC. His threat that the NBC would cancel the contract unless the situation had been resolved by Harris is a clear indication

thereof. By this letter Dr Mulongeni involved the NBC in a dispute between Harris Corporation and Factcrown, and although he accused Harris Corporation of the possibility of dragging the NBC into the dispute, this letter had the effect of doing just that, and more so when one considers the further history of events.

[50] When the Harris Corporation did not relent, Dr Mulongeni followed up his threat by cancelling the agreement between the NBC and Harris Corporation. This letter was again written on an NBC letterhead. Although Dr Mulongeni denied, under cross-examination by Ms Schimming-Chase, that he had cancelled the Harris/NBC contract, the letter and its intent is clear and there is no escape for Dr Mulongeni from this groundless action by him. The caption of the letter states in capital letters: 'TERMINATION OF MEMORANDUM OF AGREEMENT ENTERED INTO BY AND BETWEEN THE NBC AND HARRIS'. The first paragraph informs the Harris Corporation that the agreement, signed by the NBC on 29 January 2001, was thereby terminated. The second paragraph set out the reason for cancelling the agreement, namely the failure on the part of Harris to comply with the NBC's demand to come to an amicable solution of the dispute between Mr Benebo and itself. The third paragraph informed Harris that Factcrown had been invited to enter into a new working agreement with the NBC to ensure fulfilment of the Government's objectives.

[51] There was no legal basis on which Dr Mulongeni could have cancelled the agreement with Harris, and the basis on which he professed to have cancelled the agreement was no more than a self-created and non-existent ground which had

nothing to do with the Harris contract. Again Dr Mulongeni acted in the interests of Factcrown and Mr Benebo and not the NBC. Initially the Harris Corporation indicated that it would defend its rights. However, they later-on decided to withdraw from the contract and let Factcrown carry on.

[52] These actions by Dr Mulongeni demonstrated his involvement with Factcrown and Mr Benebo to such an extent that he was willing to draw the NBC into costly litigation which they had little hope of defending successfully. However, by cancelling the contract with Harris and entering into a new contract with Factcrown, he severed the direct link between the NBC and Harris and purported to force the NBC into accepting a totally new entity in the form of Factcrown. In the event of any problems arising in the implementation of the contract the NBC would now have to look to Factcrown, an entity whose financial status and viability was seemingly unknown to Dr Mulongeni let alone the NBC. There was now also no direct payment to the Harris Corporation for delivery of the equipment required, but prior payment was now to be deposited into an account to be identified by Mr Benebo.

[53] The next step taken by Dr Mulongeni was to enter into a new contract with Factcrown, purportedly on behalf of the NBC. That happened on 12 December 2001. Although it is stated in the pre-amble to the contract that the understanding was that Factcrown would deliver the equipment and services on the same terms as set out in the Harris contract, that decidedly would not have happened since there were

material differences between the two contracts. The conclusion of the new contract with Factcrown also took place without going through a tendering process.

[54] In the following instances the contracts differed materially from each other:

1. The contract price of USD 11 528 633,89 with Harris was increased to USD 12 000 000,00 in the Factcrown contract and the parties to the Factcrown contract did away with the Beama rate of exchange (ie the rate of exchange applicable to the British Electrical and Allied Manufacturers Association).

2. Payment for the equipment which was to be ordered was now no longer by way of an irrevocable letter of credit or guarantee directly to the Harris Corporation but was now to be done by a transfer of an amount equivalent to the value of the equipment as advised by Factcrown and to be paid into a banking account to be determined by Factcrown.

3. Whereas the Harris Corporation would only deliver their own product as tendered the Factcrown contract now provided that the latter was required to deliver equipment of the type described in the Tender document from any manufacturer whose equipment met the description of the equipment, as defined in the Tender document.

[55] The contract was described as a technical one and when Mr Benebo was cross-examined on this issue he admitted that he was a ‘marketing man’ which, so it seems to me, is to say that he was not a technical man or a man with technical knowledge.

[56] Mr Corbett submitted in regard to point 3 above that Mr Benebo testified that he would obtain all equipment from the Harris Corporation. However, the fact of the matter was that the Factcrown contract now allowed him to obtain such equipment from any manufacturer, which was not the case as far as the Harris contract, was concerned. What is significant in this regard is that such equipment, obtained elsewhere than from Harris, had only to be of the same type as described in the Tender documents and should meet the description of the equipment in the Tender documents. Whereas it was known that the equipment manufactured by Harris was of the best nothing was however said about the quality of such equipment when obtained elsewhere. Obviously the contract, containing now such a wide term where it concerns the supply of equipment, was creating uncertainty where there had earlier been certainty. In this regard, therefore, the Factcrown contract cannot be said to be for the benefit of the NBC.

[57] In regard to the Factcrown agreement, the attitude of Dr Mulongeni was that it was the same as the Harris agreement. He later conceded that there were differences between the two agreements but he insisted that the one was just a continuation of the other because Factcrown was the agent of Harris and the equipment was to be

obtained from Harris. This attitude of Dr Mulongeni showed a lack of understanding of corporate governance and liability. The Factcrown agreement was not just a continuation, or the same, as the Harris agreement. I have pointed out some of the material differences between the two. Factcrown also did not merely act as an agent for Harris. That is clear from a reading of the agreement which shows that Factcrown entered into it on its own behalf and not on behalf of anybody else.

[58] According to the law ostensible authority is the authority of an agent as it appears to others. Ostensible authority is, however, limited to what the usual or ordinary powers of a particular agent are. Ostensible authority may be wider than actual authority. This is illustrated by the banking cases referred to above where the agent's powers are limited but in regard to those dealing with the agent, who are not aware of the limitation, ostensible authority still binds the principal.

[59] The steps taken by Dr Mulongeni, which culminated in the agreement with Factcrown, were not part of the ordinary powers of Dr Mulongeni as the CEO of the NBC. All the steps taken were aimed to benefit Factcrown and to further their interests and not that of the NBC. The steps taken carried with them a measure of harm for the NBC as I have tried to set out herein before. I need only refer to one such instance. Knowing that funding for the project was a problem Dr Mulongeni, on the suggestion of Mr Benebo, agreed to increase the obligations of the NBC from some USD11 500 000 to USD12 000 000. A transaction which is demonstrably

harmful to a company cannot be said to fall within the ordinary powers of a CEO. (See *Golfinco's* – case para 23 p 485E-F.)

[60] I agree with the court *a quo* that Dr Mulongeni could not give any acceptable explanation for his actions. At one stage during his cross-examination, Dr Mulongeni attempted to justify his actions by referring to an instance where Mr Mocks Shivute informed the Board that he could get the equipment at half the tender price. The Board nibbled on this possibility and even gave Dr Mulongeni instructions to investigate the possibility. Dr Mulongeni declared that if he had been instructed to cancel the Harris agreement and enter into a new agreement he would not have done so because such instruction would have been illegal. That was however precisely what he did when he cancelled the agreement with the Harris Corporation on bogus grounds and entered into an agreement with Factcrown without any tender procedure.

[61] I therefore find that Dr Mulongeni was not clothed with any authority to enter into the agreement with Factcrown.

[62] Notwithstanding my finding above I am also of the opinion that Mr Benebo did not act reasonably in all the circumstances and as required of him by the law referred to above. Mr Benebo stated, in his own words, that he was a seasoned businessman who obviously operated on an international level. He testified that he had been involved in international trade since 1976, a period of 24 years. This is one of the factors which is relevant to determine what, under the particular circumstances, would

be reasonable action on the part of the representee. (See *Glofinco's* – case para 26 p 487B-F.)

[63] To judge Mr Benebo's reasonableness in coming to his conclusion that Dr Mulongeni was authorised to conclude the Factcrown agreement one has to see what was known to Mr Benebo in the run up and conclusion of the Factcrown agreement, bearing in mind that he was a seasoned businessman. In favour of Mr Benebo I shall accept that he was not aware of the Boards instructions to Dr Mulongeni to honour the Harris agreement and not to have anything to do with Mr Benebo.

[64] However, the very first letter written by Dr Mulongeni to the Harris Corporation and in which he unequivocally threatened Harris with cancellation of the agreement with them unless they came to terms with Mr Benebo, should already have alerted Mr Benebo to the fact that the threat to cancel the agreement in order to accommodate him went way outside the ordinary powers of a CEO in the position of Dr Mulongeni. When this was followed by actual cancellation of the agreement on non-existent grounds any reasons he still might have had to believe that he was dealing with a CEO who scrupulously was acting within his powers, could no longer be sustained.

[65] All this is followed by the conclusion of an agreement whereby the obligation to pay for the equipment was increased by almost USD500 000,00 and where Factcrown was given a free hand to buy the equipment from whomever it chose.

[66] To all this must be added that Mr Benebo knew that the NBC was a parastatal which was dependent on public money; that the contract was awarded to Harris Corporation by the Board after going through a process of tender. In this regard I agree with Mr Corbett that the requirement to go on tender was an internal rule of the NBC and was not required by any statutory enactment. However, Mr Benebo knew that previously tenders had been called for, *inter alia,* also for the sake of transparency. As an international and seasoned businessman he could not have thought that he could sidestep all these procedures and enter directly into a contract with Dr Mulongeni, bearing also in mind the differences between the Harris contract and the Factcrown contract. The fact that the Board had awarded the tender should have alerted Mr Benebo to the fact that an agreement of this dimension fell outside the scope of Dr Mulongeni's authority. Moreover the tender process has an element of competition amongst the tenderers, and also enables the party inviting the tenders to find a tenderer who will offer him the most favourable terms of which he is prepared to contract. In this sense Factcrown can be said to have been brought in through the back door against the interests of both the party inviting the tenders, in this case the NBC, and the tenderers.

[67] Mr Benebo relied on the fact that Dr Mulongeni signed the Harris contract after stating that he was doing so in his capacity as Director-General of the NBC and after being duly authorised thereto. Words to a similar effect had also been included in the Factcrown agreement and, so Mr Benebo testified, that satisfied him that Dr Mulongeni had the necessary authority to act. This lost sight of the fact that the Harris

contract was, to the knowledge of Mr Benebo, only awarded by the Board, and not Dr Mulongeni, after a process of tender. These words should have alerted Mr Benebo that Dr Mulongeni needed authority to conclude contracts. This is so because Mr Benebo was made aware of the fact that the NBC had a Board of Directors. He in fact testified that he knew that parastatals always have Boards but he said such Boards only deal with policy matters whereas the day to day running of the business is taken care of by the CEO. However, under cross-examination, Mr Benebo had to admit that in correspondence to him, a letter dated 26 November 1998, he was made aware of the fact that recommendations were prepared in connection with the tenders, for the consideration of the Board. Also, when the tender was awarded to Harris, he was aware that the letter, dated 11 January 1999, spelled out that the tender was awarded to Harris by the NBC Board. Mr Benebo further conceded that only the Board had the authority to accept a tender and that he knew this in 1998 and 1999.

[68] Mr Corbett also lamented the fact that the granting of absolution deprived him of an opportunity to cross-examine the NBC witnesses to get an explanation why the amended plea was so late in coming. It is not uncommon for litigants to amend their pleadings even during the trial. In the present instance I fail to see that any explanation given by a witness could change the facts on which I have based my findings herein before.

[69] Mr Benebo therefore not only had knowledge of all the steps taken before and after the signing of the Factcrown contract he also, in certain instances, actively took

part in bringing about a desired result such as the increase of the contract sum. Further to his knowledge Dr Mulongeni had overruled his own Board on at least two occasions. Firstly when he cancelled the agreement with Harris Corporation and secondly when he entered into a new agreement with Factcrown on the terms set out in the agreement. With the clear indications as set out above and the knowledge of Mr Benebo it does not auger well for him to say that he accepted that Dr Mulongeni had authority to do all the things he did. It seems to me that the court *a quo* was correct in its finding that notwithstanding all the indications Mr Benebo just turned a blind eye because it did not suit his purposes.

[70] It is, as was submitted by Mr Corbett, that the trappings and other circumstances pertaining to the representation is important. (See *South African Broadcasting Corporation v Coop and Others*, 2006 (2) SA 217 (SCA).) But where there are, as here, clear indications to the opposite one cannot simply close one's eyes and forge on. It seems to me that most of the representations went out from Dr Mulongeni. He himself stated that Mr Storm, one of the NBC officials relied upon by Mr Benebo, who by his alleged conduct represented that Dr Mulongeni was authorised to have concluded the Factcrown contract, was a much junior official. Mr Kavari denied that he made any representation to Mr Benebo and his evidence that there was some grey areas as to what the powers of the Board were, and what the powers of the CEO were, cannot refer to the conclusion of contracts as the evidence was clear that only the Board could award or accept a tender. The excerpts from the

Claude Neon case, relied upon by Mr Corbett, dealt with the liability of an ostensible agent who acted without authority and is distinguishable from the facts of this case.

[71] In the result I agree with the findings of the learned judge *a quo* that Dr Mulongeni had no authority, either express or ostensible, to conclude the agreement with Factcrown; that there were clear indications which should have alerted Mr Benebo to this fact and that he reasonably should have realised that Dr Mulongeni did not have the authority to enter into the Factcrown contract.

[72] Should the Court *a quo* have refused the NBC's application for absolution of the instance? I have earlier herein indicated that I accept the submissions by counsel in regard to the law applicable to absolution. I accept what was stated by Harms, JA in the case of *Gordon Lloyd Page & Associates v Rivera and Another,* 2001 (1) SA 88 (SCA) at 92H, after discussing the issue of absolution and analysing various case law in that regard, namely-

> 'This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff,* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2).'

[73] My findings above made it clear that in my opinion there is no *prima facie* evidence relating to all the elements of Factcrown's claim and that the learned judge *a quo* correctly allowed the application for absolution of the instance at the end of

Factcrown's case. This further takes care of Factcrown's reliance on the doctrine of estoppel and the rule in *Turquand*. There was in any event no representation by the NBC that Dr Mulongeni had been authorised to conclude the Factcrown agreement.

[74] Because of my conclusions above it is not necessary for me to deal with the defence of public interest or the other issues referred to by Mr Corbett.

[75] In the result the following order is made:

1. The application for condonation is allowed with costs and the appeal is re-instated.

2. The appeal is dismissed with costs including the costs of one instructing and two instructed counsel.

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STRYDOM AJA

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MAINGA JA

CHOMBA AJA

APPEARANCES

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