



REPORTABLE

CASE NO: SA 85/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RIVER VIEW ESTATE CC

First Appellant

BONIFACE KANYETU KASHERA

Second Appellant

REGISTRAR OF DEEDS

Third Appellant

and

DTA OF NAMIBIA

Respondent

Coram: DAMASEB DCJ, FRANK AJA and UEITELE AJA

Heard: 9 March 2022

Delivered: 30 June 2022

Summary: The plaintiff, now respondent instituted an action against the appellants (defendants then) in the High Court for an order declaring an agreement for the sale of an immovable property entered into between the first appellant and respondent

null and *void ab initio*, and directing the re-registration of the concerned immovable property from the first appellant's name into its name. The second appellant, purporting to represent the respondent, executed a sale agreement in respect of which immovable property, then being leased by the respondent was sold to the first appellant. The respondent claimed that the second appellant did not have authority as per the party's constitution to conclude the purported agreement on its behalf. The first appellant defended the action and delivered a counterclaim in which it contended that it is a *bona fide* purchaser and it further claimed for monthly rental payment from the respondent for the continued presence of the respondent on the property.

The court *a quo* granted the relief sought by the respondent and declared the purported agreement null and *void ab initio* and ordered the re-registration of the property in question from the first appellant's name into that of the respondent. It held that the second appellant had no authority to conclude the agreement on behalf of the respondent. The first appellant's counterclaim was resultantly dismissed. Aggrieved by this outcome, the first appellant appealed to this court.

On appeal, this court principally considered whether on the proven and indisputable facts the first appellant could successfully invoke the doctrine of ostensible authority or the *Turquand* (internal management) rule so as to bind the respondent to the agreement entered into by its purported agent.

Held, in terms of the constitution of the respondent, the power to alienate the party's immovable property vests in the top administrative organs. The second appellant was not part of those organs nor was he authorised to act as an agent of the party in respect of the sale of its immovable property.

Held that, there is no evidence of any kind presented by the first appellant, apart from mere verbal communications with the second appellant and the other representatives who purported to act as agents of the party, that the respondent had authorised the second appellant to act on its behalf.

Held that, there was further no representation or overt act by those within the DTA with the power to bind it, as to the authority of the regional representatives who purported to act on its behalf.

Held that, a self-serving representation by the person making it does not pass muster to engage estoppel by agency arising from ostensible authority or the *Turquand* rule.

Held that, considering DTA's uninterrupted lawful occupation of the disputed land since 1988 under a permission to occupy (PTO) and the absence of any indication by it to terminate the PTO, there is no reason why DTA could not ratify the purchase of the immovable property in its name concluded by second appellant, albeit without authority.

Held that, the two agreements are separate juridical acts and one did not depend on the existence of the other for its validity and enforceability.

Held that, the first appellant did not make out a case for restitution by the respondent.

Held that, the court *a quo's* conclusion that s 97(1) of the Deeds Registries Act 47 of 1937 is peremptory is erroneous.

Appeal dismissed with costs.

APPEAL JUDGMENT

DAMASEB DCJ (FRANK AJA and UEITELE AJA concurring):

[1] This appeal concerns the sale of an immovable property gone awry. It involves admitted fraud perpetrated against the Receiver of Revenue by parties to an

agreement for the sale of immovable property and alleged fraud on the purported seller by person(s) purporting to act on its behalf.

[2] The first appellant, River View Estate CC (River View), a close corporation represented by its sole member, Mr Justus Hamusira Hausiku, negotiated a two-way land sale agreement with a Mr Boniface Kanyetu Kashera (Mr Kashera) and other regional leaders of the respondent, the DTA of Namibia (DTA), a political party. DTA's regional leaders purported to represent the DTA in the transaction. The transaction was in respect of Erf No. 1225, Extension 3, Rundu (the disputed land). At the time of the conclusion of the agreement giving rise to the actual transfer of the disputed land from the DTA to River View, the former was in occupation thereof since about 1988 by virtue of a permission to occupy (PTO) granted to it by the Rundu Town Council (RTC), until 2013 when the land was transferred to it as will soon become apparent.

[3] It is common cause that as part of the two-way transaction, the DTA would first buy the disputed land from the RTC and then, in terms of a separate transaction, sell it to River View.

The two-way transfer

[4] With the assistance of a conveyancer, Mr Kashera¹, purporting to act on behalf of the DTA, concluded a written agreement with the RTC for the settlement of outstanding rates and taxes, and for the purchase of the disputed land. DTA's financial obligations for that transaction were met with money provided by River View. Once the disputed land was transferred from RTC into DTA's name, it was on-

¹ He was cited as second defendant in the High Court proceedings.

transferred to River View in terms of a written agreement between Mr Kashera (purporting to act on behalf of the DTA) and River View.

[5] River View's Mr Hausiku and DTA's Mr Kashera agreed to understate the actual purchase price for the disputed land as being N\$82 740 in order for River View to pay considerably less transfer duty to the Receiver of Revenue. The actual price was considerably more than that recorded in the deed of sale between the DTA and River View.

Continuing occupation

[6] Although the disputed land was transferred to River View at the Deeds Registry, DTA remained in occupation of it. Whilst in such occupation, the DTA by combined summons brought a claim against River View to have the land retransferred into its name, alleging that its then regional leaders in the Kavango region had no authority under the DTA's constitution to conclude the sale of the disputed land to River View.

[7] River View defended DTA's action and also counterclaimed for (a) ejection of the DTA from the disputed land and (b) restitution in the event that DTA succeeds in its claim.

The pleadings

DTA's claim

[8] In its particulars of claim the DTA alleged that whilst it was the lawful and registered owner of the disputed land, Mr Kashera (acting in person as the seller)

fraudulently misrepresented to an agent of River View (Mr Hausiku) that he was duly authorised by the DTA to sell the disputed land to River View. According to the particulars of claim, River View was aware of the misrepresentation by Mr Kashera and that the latter did not have the authority to alienate the disputed land on behalf of the DTA. It is alleged that River View was also aware that the DTA did not intend to sell the disputed land and for that reason River View was not a *bona fide* third party to the transaction.

[9] According to the DTA, when Mr Kashera made the representation to River View he knew it to be false as he was not acting within the course and scope of his employment with the DTA nor was he authorised to sell the disputed land as he purported to do. The DTA also alleged that the disputed land was transferred to River View in the absence of a written agreement between it and River View; alternatively, River View took transfer of the disputed land 'on the basis of a fraudulent transaction engineered by (Mr Kashera)'.

[10] It is alleged that in any event the purported sale of the disputed land took place without an underlying agreement between the DTA and River View and therefore in breach of s 1(1) of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969, as Mr Kashera was not authorised by the DTA to alienate the disputed land. The assertion goes that since there was no real agreement between the DTA and River View, the latter and the Registrar of Deeds are liable to restore ownership of the disputed land to the DTA; and that Mr Kashera is liable to make restitution to River View on account of his alleged fraudulent conduct.

The plea

[11] According to River View, Mr Kashera and another official of the DTA 'orally and in writing' offered the disputed land to River View on condition that DTA would take transfer of it from the RTC and on-transfer it to River View. It is for that reason, it is alleged, that the DTA never paid any money to take transfer of the disputed land from RTC: for the purchase price, outstanding rates and taxes, transfer duty and conveyancers' fees. Those costs were borne by River View as the common intention between Mr Kashera acting on behalf of the DTA and River View was to transfer ownership of the disputed land to River View.

[12] River View further alleged that Mr Hausiku on its behalf and Mr Kashera representing the DTA signed the deed of sale after Mr Kashera confirmed to Mr Hausiku and the conveyancers that they were duly authorised to enter into the transaction.

[13] According to River View, Mr Kashera acted in the same representative capacity as Regional Organiser of DTA in concluding the transfer from the RTC to DTA and from the DTA to River View. River View thus acted on the correctness of the representation made by Mr Kashera as DTA's office bearer. It is alleged that the representation made by Mr Kashera was by word and conduct, and was clear and unequivocal. Believing the representations to be true, Mr Hausiku on behalf of River View acted on the correctness of the facts represented by DTA's employee and/or office bearer and DTA is estopped from denying the representation.

Undisputed facts

[14] The DTA is a political party with a constitution (the Party constitution). The Party constitution spells out the decision-making processes within the DTA including how it may dispose of its assets. Clause 22.3 of the Party constitution empowers the DTA to 'sell, let, hypothecate, pawn, alienate, exchange, donate, develop, improve or deal in any way or means with its assets'. In terms of clause 15.2.1, the 'Central Committee' 'is the highest executive body' which 'supervises subordinate bodies' and 'executes all actions which are deemed to be in the interest of the DTA'. According to clause 15.2.2, the central committee 'Controls and manages the funds, assets and liabilities of the DTA at its discretion.'

[15] Below the central committee is the 'Executive Committee' described as 'the executive power and authority of the DTA and is vested with all the power and authority of the Central Committee when the Central Committee is not in session' Then there is the 'Management Committee' which 'is unrestrictedly empowered, subject only to broad guidelines determined by the Central Committee to deal with all the assets or properties of the DTA and to bind the DTA's credit as described in 22.3 and is furthermore empowered to delegate any of its powers and authority to a member or members of the Secretariat with the power of substitution'. The secretariat comprises the administrative secretary, an assistant administrative secretary and secretaries and personnel.

[16] In terms of clause 22.2 of the Party constitution:

'Any power of attorney, agreement or document which is executed by any member of the Management Committee together with the administrative secretary will be

deemed to be executed by the Central Committee, Executive Committee or Management Committee as the case may be. Any document professing to contain a resolution of the Management Committee, the Executive Committee or the Central Committee will be deemed as such if it signed jointly by the administrative secretary and any member of the management committee.'

[17] The Party constitution creates a number of offices on national level, including the office of the president, vice president, chairman, vice-chairman, secretary general and portfolio secretaries. At the local level, it creates 'Branch Committees' headed by a 'Chairman'; 'Constituency Committees' headed by a 'Chairman'; 'Regional Committees' headed by a 'Chairman', the 'Chief's Council'; 'Women's League'; 'Youth League' and 'Affiliated Political Parties or Groups'. These lower level organs enjoy no executive functions under the Party constitution.

[18] The power to alienate DTA's immovable property therefore vests in the top organs and officials of the party. The DTA's constitution further provides that in times of extraordinary crisis, the party president can act for the management committee until such a time as a quorum for the management committee can be established to ratify his or her actions. The persons who purported to represent the DTA in the sale of the disputed land to River View are regional leaders who clearly were not authorised to bind the party to such a transaction.

[19] The Party constitution is not publicly available and it was not proven that the agent of River View (Mr Hausiku) knew of its contents. Although they had no power to alienate DTA's immovable property, it is not in dispute that the regional leaders who purported to act on behalf of the DTA represented the public face of the party in the Kavango region. It is also common cause that they made the representation to

River View's Mr Hausiku that they had the authority to bind the DTA in the transaction. The representations were even repeated before a conveyancer who facilitated the transaction.

[20] River View paid in full the agreed purchase price for the disputed land. It is further common cause that the funds that made it possible for the DTA to take transfer of the disputed land from the RTC were paid by River View: both in respect of the then outstanding indebtedness of DTA to RTC for rates and taxes, the purchase price for the land paid to RTC, transfer duty, and conveyancers' fees. All told, Mr Hausiku on behalf of and in favour of DTA paid a total amount of N\$312 823 in respect of the two-way transaction.

[21] River View paid the purchase consideration for the land as demanded by DTA's regional leaders without the involvement of the national leadership with the actual authority to bind the party in respect of the sale of its immovable property. The purchase consideration for the disputed land paid by River View was paid into an account of the Youth League of the DTA operated and controlled by the regional leaders of the DTA.

The evidence

[22] The court *a quo* heard oral evidence from DTA and River View. On behalf of the DTA its president (Mr Venaani) and the national chairperson (Ms Van den Heever) testified while Mr Hausiku testified on behalf of River View.

Mr Mchenry Venaani

[23] Mr Venaani testified that Mr Kashera's representations to Mr Hausiku that he was duly authorised by the DTA to alienate the disputed land were false; that the DTA had not authorised the sale of the disputed land; that Mr Kashera's position in the party was not one of those contemplated in clause 22.2 of the Party's constitution and that there was no duly passed resolution which was necessary if the DTA were to sell its immovable property.

[24] The witness testified that although the transaction between Mr Kashera and the RTC was not authorised by the DTA it was to the benefit of the party and therefore not disavowed (voided) by it. It was Mr Venaani's position that any member of the party should work in the best interest of that party, so if a particular member of the party does something to promote the interest of the party, although not sanctioned by it, it is in the interest of the party to be able to benefit from that. However, if a member acts against the interests of the party and without authority that cannot be acceptable.

[25] When challenged under cross-examination by River View's counsel that on 15 August 2013 at the conveyancers' office three representatives of DTA informed the conveyancers that they had authority by signing and witnessing the power of attorney, Mr Venaani replied that there was no resolution giving them the power of attorney. He further testified that the buyer should have exercised due diligence. As to the money paid by River View to the DTA as purchase consideration, Mr Venaani testified that it was paid into the party's Youth League account opened by Mr

Kashera and from which they syphoned the money that was deposited in the said account without DTA's knowledge.

Ms Van den Heever

[26] Ms Van den Heever testified that she was tasked to investigate the 'illegal sale' of the disputed land. In furtherance of that mandate she convened a meeting of the management committee on 25 April 2014 at Rundu comprising of herself as the national chairperson, the vice president and the administrative secretary. Also in attendance were members of the regional structure of the DTA including Mr Kashera and Mr Kudumo. The latter were instrumental in the purported of sale of the disputed land to River View.

[27] According to the witness, at the meeting she established that the disputed land was purchased by DTA from RTC on 9 August 2013 where after it was sold to River View without the knowledge of the 'regional structure' of the DTA. The witness further testified in respect of the 'bank book' for the DTA Youth League account which partly reflected how the money in the account was used. She recounted that her investigation revealed the following transactions on the Youth League account: on 14 October 2014, N\$140 000 was paid into the bank account; on 4 November 2014, N\$5000 was withdrawn; on 10 November 2014, N\$10 000 was withdrawn; on 14 November 2014, N\$15 000 and another N\$11 000 was deposited by the head office; on 16 November 2014, N\$16 000 and an additional N\$6500 was withdrawn.

[28] On 25 November 2014, N\$18 000 was withdrawn and on 27 November 2014, N\$5000 was deposited by the head office and an additional of N\$8000 was

withdrawn; on 2 December 2014, N\$2400 was withdrawn; on 8 December 2014, N\$1366, and N\$347,13 reflected as bank charges and an additional N\$18 as bank charges. On 24 January 2014, N\$16 500 was withdrawn and on 7 February 2015, N\$297,10 reflected as bank charges and lastly on 11 February 2015 and amount of N\$50 000 was withdrawn. The balance in the account was said to be N\$10 971,22.

[29] Thus, all told there were cash withdrawals totaling N\$138 900 and deposits 'head office' totaling N\$30 000. The total bank charges amounted to N\$2010,23 leaving a cash balance of N\$10 971,22.

Mr Justus Hausiku

[30] According to River View's Mr Hausiku sometime in 2012 he had made an offer to a certain Mr Vincent Kanyetu of the DTA to purchase the disputed land which is adjacent to the land owned by River View. Mr Kanyetu rejected the offer as the disputed land did not belong to the DTA but to RTC and was being rented by the DTA. Mr Kanyetu further informed him that the process for DTA to purchase the disputed land from RTC would commence soon and that he would within the DTA establish whether there was a willingness to sell it once all the requirements were met.

[31] Sometime later in the same year, Mr Kanyetu telephonically informed him that DTA had approved the sale of the disputed land. In August 2013, he met Mr Kanyetu who was accompanied by Messrs Kashera and Kudumo - all senior officials of DTA in the Kavango region. At the meeting, they agreed on the purchase price and resolved to approach the RTC conveyancers for them to draft the necessary

agreements to transfer the property from RTC to DTA and simultaneously from DTA to River View. At this point, Mr Kashera had already signed the sales agreement between DTA and RTC on 9 August 2013 and when they met on the 15 August 2013 in Windhoek, they reduced the agreed terms in the deed of sale between River View and DTA.

[32] Mr Hausiku also testified about the payments he made in terms of the two-way agreements. I have already referred to the amount paid by River View in respect of the two-way transactions and since there is no dispute that such payment was made, I find it unnecessary to set out Mr Hausiku's detailed evidence on the payments.

[33] Mr Hausiku testified that despite the transfer of the disputed land in the name of River View, DTA remains in occupation of it and since November 2014 River View has not derived any benefit from the property. In support of River View's counter-claim he stated that a reasonable rental for the property is N\$3000 per month and River View continues to suffer a loss in that amount every month that DTA remains in occupation.

[34] Mr Hausiku maintained in cross-examination that although the transfer from RTC to DTA and from DTA to River View were two separate transactions, both were consummated by the same DTA representative. Therefore, according to the witness it cannot be correct that the first transaction is valid although allegedly not authorised by the DTA, whilst the transfer to River View is invalid because it was allegedly not authorised.

[35] The core of the dispute before the High Court was whether the regional representatives of the DTA were duly authorised, alternatively should, because of the manner in which they conducted themselves *vis a vis* the representative of River View, be deemed to have been authorised to act on behalf of the DTA in effecting the transfer of the disputed land to River View.

The High Court's approach

[36] The High Court first dealt with two anterior issues which it had raised of its own motion, (a) whether the case was properly before it in the light of the common cause failure by the DTA to comply with s 97(1) of the Deeds Registries Act 47 of 1937, and (b) the effect of the admitted fraud on the Receiver. Section 97(1)² provides that:

'Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days' notice before the hearing of such application and such registrar may submit to the court such report thereon as he may deem desirable to make.'

[37] At the end of this judgment I deal with how the court *a quo* resolved this issue.

[38] The learned judge *a quo* held that there was no valid real agreement between the DTA and River View for the sale of the disputed land because Mr Kashera was not authorised under the constitution of the DTA to perform such a juridical act. The court rejected all the defences raised by River View, including its reliance on

² Deeds Registries Act 47 of 1937.

ostensible authority and estoppel. According to the learned judge, since Mr Kashera lacked authority in concluding the deal with Mr Hausiku, there was non-compliance with s 1(1) of the Formalities in Respect of Contracts of sale of Land Act 70 of 1969 which provides:

‘No contract of sale of land . . . shall be of any force or effect . . . unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.’

[39] Having held that the real agreement was null and void the court (a) cancelled the deed of sale in terms of which River View took transfer from the DTA and (b) ordered re-transfer of the property into DTA’s name. That finding of necessity required the court *a quo* to dismiss River View’s counterclaim for the ejection of the DTA and the payment of rent for the occupation of the disputed land.

[40] On account of the admitted fraud perpetrated on the Revenue authorities, the learned judge took the view that the conduct by Mr Hausiku and Mr Kashera merits investigation by the permanent secretary of the ministry of finance, in his or her capacity as the person responsible for the administration of the Transfer Duty Act 14 of 1993³; to consider whether Mr Hausiku and Mr Kashera knowingly made false declarations in the manner contemplated by ss 14 and 17 of that Act. The High Court further directed the Registrar of the High Court to deliver a copy of the judgment to the said permanent secretary.

[41] The High Court did not make any order of restitution in favour of River View by DTA for the payments made to and on its behalf: that is the payment of the

³ See section 10 of Act 14 of 1993.

transfer duty costs, rates and taxes paid to RTC and the purchase consideration for the transfer of the disputed land into River View's name.

Grounds of appeal

[42] River View challenges the whole of the judgment and order of the High Court. In particular, it impugns the order of the High Court for the alleged misdirection in its application of:

- a. the *Turquand* rule;
- b. ostensible authority;
- c. *restitutio in integrum*;
- d. Non-divisibility (severability) of the two-way contracts.

[43] The grounds of appeal also assert that the High Court erred in not granting River View's counter claim.

Submissions on appeal

River View

[44] At the hearing of the appeal, Mr Heathcote for River View accepted that estoppel was not the appellant's strongest argument and that instead reliance is placed on the doctrine of ostensible authority and the *Turquand* rule. According to Mr Heathcote, Mr Hausiku, as agent of River View, did not know of Mr Kashera's lack of authority and was therefore entitled to assume that the relevant provisions of the DTA's constitution had been duly complied with. Counsel added that if regard is had to the manner the regional representatives of the DTA related to Mr Hausiku, the

latter was entitled to assume that all the necessary internal formalities within the party had been complied with.

[45] According to counsel for River View, although the *Turquand* rule was not pleaded, it was fully argued in the court *a quo* and River View is thus entitled to place reliance on it on appeal because, in any event, the essential elements for the rule's application are established by the facts in that: (a) River View acted *bona fide* in concluding the transaction for the purchase of the disputed land, (b) Mr Hausiku bore no knowledge of Mr Kashera's lack of authority to bind the DTA and was accordingly entitled to assume that the DTA's internal procedures had been complied with.

[46] Relying on what is probably the strongest circumstance in favour of River View, Mr Heathcote submitted that considering that both in respect of the transfer from RTC to DTA and from the DTA to River View, Mr Kashera was the DTA's representative, Mr Hausiku had no reason, objectively, to doubt the representation made to him that Mr Kashera was authorised by the DTA to conclude the transaction in respect of the disputed land.

[47] In support of its reliance on ostensible authority, River View amongst others cited the majority's dictum in *Makate v Vodacom Ltd*⁴:

[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the

⁴*Makate v Vodacom Ltd* 2016 (4) SA 121 (CC).

authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent had authority, the principal is precluded from denying that the agent had authority.

[46] The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct.’
[My emphasis]

[48] River View’s counsel further submitted that regarding ostensible authority and the *Turquand* rule, the sole question is whether River View could have accepted that the DTA could have given authority to its regional coordinator.

DTA

[49] Mr Ravenscroft-Jones for the DTA submitted that none of the representors purporting to act on behalf of the DTA had authority to sell the disputed land. Counsel added that since Mr Hausiku was not aware of the existence of DTA’s constitution, River View cannot rely on ostensible authority.

[50] Counsel relied on the South African case of *NBS Bank Ltd v Cape Produce Company (Pty) Ltd and others*⁵ wherein the Supreme Court of Appeal held that where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is set to arise. However, the appearance or representation must

⁵ 2002 (1) SA 396 (SCA) at 411 B-J.

have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on the principal.⁶

[51] Counsel for the DTA also referred to the matter of *Offshore Development Co (Pty) Ltd v First National Bank of Namibia Ltd*⁷, holding:

“That because the rule in *Turquand’s* case is not an absolute and unqualified rule of law but applies only in favour of persons dealing with the company in good faith, it is not a mere plea of law which does not have to be pleaded. Rather, it is a plea of mixed fact and law. Therefore, it is at the very least incumbent on the person invoking it to plead that he did not know of the irregularity and was entitled to assume that the relevant provision of the company’s constitution had been properly and duly complied with.”

[52] According to Mr Ravenscroft-Jones, River View had not pleaded any facts capable of engaging the *Turquand* rule. The facts it pleaded are that the DTA’s regional representatives orally and in writing offered the property and secondly that Mr Kashera was the regional coordinator of the DTA. River View never pleaded that it was acting in good faith.

Discussion

[53] This appeal turns on whether on the proven and undisputed facts, River View’s defences against DTA’s claim for the re-transfer of the disputed land into its name can be sustained either on the *Turquand* rule or the doctrine of ostensible authority.

⁶ At 411 par 25.

⁷ *Offshore Development Co (Pty) Ltd v First National Bank of Namibia Ltd* 2014 (4) NR 1198 (HC) para 20.

Turquand rule

[54] The *Turquand* rule operates to ameliorate the severity of the principle of constructive notice in terms of which persons contracting with a body corporate or *universitas* such as the DTA are 'deemed to know' the contents of the company's (or an association's) constitutive documents such as the articles and memorandum of association or constitution. In other words, the doctrine operates 'in the negative' against the person contracting with the company or association and who failed to inquire about the authority of those with whom he or she seeks to transact.⁸

[55] On the other hand, as the learned authors of *Lawsa* correctly point out:

'Although a person dealing with a company has constructive notice of all internal formalities required by its memorandum and articles, he of course does not have constructive notice of whether or not they have been complied with; and he is not obliged to inquire.'⁹

[56] The effect of the *Turquand* rule, borrowed from English law¹⁰, is that in the absence of facts putting him or her on inquiry, a person dealing with a company or association is entitled to assume that there has been due compliance with all matters of internal management and procedure required by the corporate constitution. The purpose of the rule, as Lord Simonds suggests, is to allow the wheels of business to go smoothly.¹¹

[57] There are limits to the *Turquand* rule. It does not avail a third party that had failed to make further inquiries in circumstances that raise suspicion as to the

⁸ *Rama Corporation Ltd v Proved Tin & General Investments Ltd* (1952) 2 Q.B. 147 at 149.

⁹ *Lawsa*, First Reissue Vol.4 Part 4 para 181 and authorities cited at fn 8.

¹⁰ *British Royal Bank v Turquand* (1856) 6 E&B 327.

¹¹ *Morris v Kanssen* [1946] A.C. 459 at 474.

authority of the purported agent.¹² The rule ‘cannot be used to create authority where none otherwise exists’; and it ‘only has scope for operation if it can be established independently that the person purporting to represent the company had actual or ostensible authority to enter into the transaction. The rule is thus dependent upon the operation of normal agency principles; it operates only where on ordinary principles the person purporting to act on behalf of the company is acting within the scope of his actual or ostensible authority’.¹³ This is not surprising because, as Sargant LJ warns in *Houghton & Co v Northard, Lowe & Wills Ltd*,¹⁴ without such limitation there is a danger ‘to place limited companies, without sufficient reason for doing so, at the mercy of any servant or agent who should purport to contract on their behalf.’

[58] When one considers the South African cases, the application of the principle has been problematic, resulting in what seems to be inconsistent outcomes on broadly comparable facts.¹⁵ It is important therefore that decided cases be seen only as being illustrative. What is clear though from the main decisions that I have considered from South Africa and the United Kingdom (UK) is that where the rule was invoked against the principal, it was in circumstances where there was going for

¹² *Houghton and Co v Northard, Lowe and Wills* 1927 (1) K.B. 246 at 266-7; *Wolpert v Uitzicht Properties (Pty) Ltd & others* 1961 (2) SA 257 (W) at 20.

¹³ *Northside Developments Pty Ltd v Registrar general* [1990] 170 CLR 146; [1993] ALR 385 cited with approval by Lord Neuberger in Hong Kong’s Court of Final Appeal in *Akai Holdings Ltd v Kasikornbank Public Co Ltd* [2010] HKCFA 64; [2011] 1 HKC 357 para 59.

¹⁴ [1927] 1 KB 246 at 266.

¹⁵ Compare, for example, the different outcomes in *Insurance Trust and Invests (Pty) Ltd v Mudaliar* 1943 NPD 45 and *The Mine Workers’ Union v JJ Prinsloo*; *The Mine Workers’ Union v Greyling* 1948 (3) SA 831 (A) (both referred to in *fn* 17 below. *Mahomed v Ravat Bombay House (Pty) Ltd* 1958 (4) SA 704 (T) is particularly difficult to reconcile with *Mudaliar* (see *fn* 16 below): In *Mahomed*, the articles of association of the company required a prior board resolution to authorise a single director to bind the company. No such resolution was passed and a contract concluded by a single director was validated by the court. In *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) Ltd & another* 2015 (4) SA 263 (WCC) two directors concluded a loan agreement and a suretyship on behalf of the company while the company’s internal procedures required board resolutions to be signed by all directors and the approval of shareholders. The third director refuted any knowledge of the contracts and stated that no resolution was passed to authorise the transactions. The court voided the purported agreements rejecting reliance on *Turquand*.

the party seeking to enforce the contract more than the mere representation of the purported agent as demonstrated in the cases cited in the footnotes in 16 to 18 below. For example, a non-compliant resolution of a competent body or fewer than the required number of authorised functionaries¹⁶; existence of a power to delegate any person in the organisation and not just, say, the directors of the company.

[59] What distinguishes the present case from the reported cases¹⁷ is the absence of evidence, apart from mere verbal communications of those purporting to act as agents, that those with the necessary decision-making powers within the DTA made any representation (even if inchoate, defective or incomplete) that the transaction was authorised.¹⁸ There is no letter, no resolution or any other written communication from anyone, not even from the regional structure to which the representors belonged, suggesting that the sale was authorised. The high watermark of Mr Hausiku's evidence is that Mr Kanyetu told him that he would conduct internal discussions within the DTA to determine whether there was a desire to sell the disputed land. At the very least, that should have put him on notice that persons other than Mr Kashera would be involved in sanctioning a valid sale. The next thing that happened is that he received another verbal communication from Mr Kanyetu

¹⁶ In *Mudaliar* supra the articles of association of the company empowered the directors to decide who may sign on behalf of the company and a resolution was passed stating that promissory notes in the name of the company may be signed by any of its directors. The promissory note in dispute was signed by one director only. The company sought to avoid the promissory note and the third party in addition to estoppel raised a defence akin to the *Turquand* rule. Because the instrument was not signed in compliance with the resolution, the court held that it was void. Yet, in *Mine Workers Union v Prinsloo* supra the constitution of the union required the approval of the 'General Council' for the consummation of contracts of the kind in issue. The union's president and general-secretary purported to act as its agents in concluding contracts and during the negotiations provided the third party a document (executed by the Executive Committee) purporting to authorise them to conclude the contracts on the union's behalf. The Appellate Division held that the union was bound.

¹⁷ *The Mine Workers' Union v JJ Prinsloo*; *The Mine Workers' Union v J P Prinsloo*; *The Mine Workers' Union v Greyling* 1948 (3) SA 831 (A); *Mahomed v Ravat Bombay House (Pty) Ltd* 1958 (4) SA 704 (T); and *Wolpert v Uitzigt Properties (Pty) Ltd and others* 1961 (2) SA 257 (W).

¹⁸ Compare, *East Asia Company Ltd (Respondent) v PT Satria Tiratama Energindo (Appellant) (Bermuda)* [2019] UKPC 30 para 65: 'It could not be established independently that [the company] had made any representation as to the scope of the [purported agent's] authority to agree a sale of its only asset . . .'

that the sale was authorised. It was this verbal communication that triggered the conclusion of the two-way transaction.

[60] In those circumstances, the fact that Mr Kashera made self-serving representations before a conveyancer that he was authorised is neither here nor there. One would in any event have expected the conveyancer to ask for some form of written authorisation to Mr Kashera to consummate the transaction considering that it was obvious to everyone involved that the property sought to be sold belonged to a *universitas*.

Ostensible authority

[61] 'If reliance is placed on an ostensible authority, the elements of estoppel must be alleged, including a representation by the alleged principal and the necessary causation.'¹⁹

[62] A succinct statement of the law on ostensible authority is to be found in a judgment of the UK Supreme Court in *East Asia Company Ltd v PT Satria Tirtatama Enegindo (Bermuda)*²⁰ where Lord Kitchin put it as follows:

'41. The general principles governing the existence of ostensible authority of an agent of a company are well established. It must be shown that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of the particular matter to which the contract relates; that the contractor was induced by the representation to enter into the contract; and that under its memorandum or articles

¹⁹ *Amlers Pleadings/Precedents of Pleadings* 3 Ed p 34.

²⁰ *East Asia Company Ltd v PT Satria Tirtatama Enegindo (Bermuda)* [2019] UKPC 30 (27 June 2019), at 10 paras 41-42.

of association the company was not deprived of the capacity to enter into a contract of the kind sought to be enforced or to delegate authority to the agent to enter into the contract of that kind.

42. It is also important to have in mind that ostensible authority is a relationship between the principal and the contractor and it is one created by the representation of the principal that the agent has authority on behalf of the principal to enter into a contract of a particular kind. The representation, if acted upon by the contractor by entering into the contract operates as an estoppel which prevents the principal from contending that he is not bound by the contract²¹

[63] Agency cannot be established from the declarations of the purported agent. It must derive from the actual conduct of the principal.²²

[64] The act of alienating immovable property of the DTA falls within the party's competence. That Mr Hausiku was induced by the conduct of Mr Kanyetu and Mr Kashera to conclude the transaction is clearly supported by the probabilities. I cannot see how he could have parted with such a substantial sum of money as he did, if he was not so induced. However, as I already demonstrated, when discussing the *Turquand* rule, a remarkable feature of this case is the absence of any representation or overt act by those within the DTA with the power to bind it as to the authority of the regional leaders who purported to act on its behalf. It is in that respect that River View fails to meet an essential element of ostensible authority as enunciated by Lord Kitchin: 'ostensible authority is a relationship between the principal and the contractor and it is one created by the representation of the

²¹ See also *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503 and 505.

²² *Hosken Employee Benefits (Pty) Ltd v Slade* 1992 (4) SA 183 at 191A; *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T); *Inter-Continental Finance & Licensing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd & another* 1979 (3) SA 740 (W) at 748B-C; *Rodgers v SWE Power and Pumps (Pty) Ltd* 1990 NR 230 (SC) at 233G.

principal that the agent has authority on behalf of the principal to enter into a contract of a particular kind.’

[65] Again, to borrow from the learned authors of *Lawsa*:²³

‘Clearly, the representation of the very person purporting to contract on behalf of the company [or a *universitas* such as the DTA] cannot be relied upon to create an estoppel. Such a representation is a representation by the company [or association] if, and only if, it was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates; or had actual authority to make representations on the company’s behalf; or were held out by the company as having authority to make representations on the company’s behalf; or were held out by the company as having authority to make such representations.’

[66] If a comparison is drawn with the *Tuckers*²⁴ case, a representation made by a person holding office at the national level of the DTA hierarchy could reasonably be thought to be by a person with actual authority to manage the business of the party.

[67] In *Tuckers* the court stated that when contracting with a company, the persons that may be encountered to be acting on its behalf are (a) the board of directors, (b) the managing director or chairman of the board of directors and (c) any other person such as the ordinary director or branch manager or secretary. In relation to these three groups the court stated that:

‘5. Where someone contracts with a company through the medium of the persons referred to in paras 4 (a) and (b) above, the company will usually be bound because these persons or bodies will, unless the articles of association decree otherwise, be taken to have authority in one form or another to bind the company in all matters

²³ *Ibid* para 183, footnotes omitted.

²⁴ *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA at 15A-H.

affecting it. Moreover, all acts of internal management or organisation on which the exercise of such authority is dependent may, in terms of the *Turquand* rule, be assumed, by a *bona fide* third party, to have been properly and duly performed. Indeed, unless some such principle was accepted no one would be safe in contracting with companies.

6. The same does not apply where the company is represented by the category of person referred to in para 4 (c) above. Here a third party is not automatically entitled to assume that such person has authority and the company is not precluded from repudiating liability on the ground that he had no authority to bind it. To hold the contrary would deprive a company of the rights which any natural principal would have of denying the allegation that a particular person is his agent. The application of the *Turquand* rule in this sphere is limited. It only comes into operation once the third party has surmounted the initial hurdle not present in cases falling under paras 4 (a) or (b) above and proves that the director or other person purporting to represent the company had authority. Once this is proved then, if the actual exercise of such authority is dependent upon some act of internal organisation, such can, by a *bona fide* third party, be assumed to have been completed. But in dealing with the type of person in question the other contracting party cannot use the *Turquand* rule to help him surmount the hurdle mentioned.²⁵ [My emphasis]

[68] As far as ostensible authority goes, what is it that those with the necessary power to alienate DTA's immovable property represented to Mr Hausiku? The only thing that River View puts up as evidence is the fact that Messrs Kanyetu and Kashera were the public face of the party in the region and that they acted on behalf of the party in a related contemporaneous transaction that benefitted it (ie the transfer from RTC to DTA) and then effecting transfer to River View.

[69] That is not good enough. As I have already demonstrated a self-serving representation by the person making it does not pass muster to engage estoppel by agency arising from ostensible authority. Even if one accepts that Mr Hausiku was

²⁵ *Tuckers supra* at 15C-G.

misled by Messrs Kanyetu and Kashera, it was not as a result of any representation 'permitted by or made by'²⁶ the purported principal, the DTA. The representations were made by Kanyetu and Kashera and as Lord Kitchin put it, courts resist the notion that an agent can cloth himself with authority.²⁷

[70] I am satisfied therefore that River View has not made out the case for the application of the *Turquand* rule or estoppel by agency arising from ostensible authority. That makes it unnecessary to decide whether the fraud perpetrated on the Receiver of Revenue vitiated the agreement.

The indivisibility of the agreement

[71] I still have to consider the non-severability argument advanced on behalf of River View. It is said in that regard that the transfer to DTA from RTC was inseparable from and not possible without the transfer to River View. In other words, the parties at all times contemplated that the DTA's taking transfer of the disputed land from RTC was conditional upon it on-transferring it to River View.

[72] Mr Heathcote for River View argued that there is only one agreement (not two) as the registration in DTA's name and then in that of River View at the deed's registry could not have occurred without the other. In other words, it was a 'composite deal' as counsel put it. Counsel further submitted that if it was not for the purpose of River View purchasing and paying for the disputed land there would have been no transfer to DTA from RTC. Therefore, the agreements are not separable and based on this, DTA could not ratify only the agreement giving it transfer.

²⁶ *Tuckers supra* at 18H-19A.

²⁷ *East Asia Company Ltd v PT Satria Tirtatama Energindo* para 61.

[73] Mr Ravenscroft-Jones on behalf of DTA argued that there were two different agreements that took place and not one continuous agreement. Counsel argued that there is therefore no reason why the first agreement could not be ratified by DTA because although Mr Kashera did not have authority to represent DTA, in relation to the transfer from RTC, he acted in the best interest of the DTA.

[74] The argument that the two agreements were considered as one and therefore indivisible implies that the DTA did not have the right to ratify the unauthorised purchase of the disputed land from RTC. The DTA's president had under oath confirmed that his party ratified the agreement because it was to its benefit. I cannot see why on legal principle it could not ratify the purchase in its name concluded by Mr Kashera. More so, because it had been in uninterrupted lawful occupation of the disputed land under a permission to occupy since 1988 and there is no suggestion by River View either in its pleaded case or in evidence that the DTA intended to forego its lease of the disputed land. After all, ratification is a unilateral act which may be express or by conduct.²⁸

Restitution

[75] Mr Heathcote argued that River View bore the entire financial obligation for the two-way transaction and that DTA was unable to pay any of the costs, not even the municipality bills. With regards to restitution, River View's counsel submitted that if a contract is voidable, the aggrieved party can either enforce or avoid the contract by cancelling it. It was submitted that the DTA had not sought to avoid the contract

²⁸ *Wilmot Motors (Pty) Ltd v Tuckers Fresh Meat Supply Ltd* [1969] 4 All SA 395 (T); 1969 (4) SA 474 (T).

and by so doing cancelling it. Counsel added that the DTA was therefore not entitled to reclaim the property by seeking an order for it to be registered in its name. In the event that the DTA cancelled the contract, counsel submitted, it would have had to tender restitution of the purchase price for justice requires that parties to a contract retrospectively declared null and void *ab initio* be put in the position in which they would have been had the contract not been concluded.²⁹

[76] Mr Ravenscroft-Jones countered that Mr Kashera was never authorised to act on behalf of the DTA and perpetrated fraud against the party and that it is he who is liable to River View for restitution.

[77] To uphold River View's contention that the DTA should forfeit the disputed land as a result of the two agreements being factually connected because of River View's payment of the costs associated with the transfer to the DTA would, in effect, deny it all rights arising from its lawful occupation of the disputed land but for the unlawful conduct of its regional representatives. Although contemporaneous,³⁰ the two agreements are separate juridical acts each one of which, for its validity and enforceability, did not depend on the existence of the other. The reliance on the indivisibility of the two agreements must therefore fail.

[78] All possible defences available to River View having failed, the question is whether the High Court ought to have granted restitution to River View for the payments made in respect of the two-way transactions. The obvious objection to granting restitution is that the RTC is not a party to the proceedings although it had

²⁹ *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd & others* 1973 (3) SA 739 (NC) at 743H.

³⁰ *Middleton v Carr* 1949 (2) SA 374 (A) at 391.

received the benefit of some of the money paid by River View, nor was the DTA a party to the agreement to sell the property, as this judgment finds. It is not a satisfactory answer to that objection to argue that the DTA benefitted both from the transfer into its name and the moneys paid to it for the transfer to River View. That is so because the evidence suggests that the moneys intended for DTA's benefit under the agreement between River View and it might have been syphoned off and applied for a nefarious purpose. The present is therefore not a case that readily lends itself to the grant of restitution to achieve justice between the protagonists.

[79] The appeal therefore fails and costs must follow the result.

[80] I wish to finally deal with the High Court's conclusion that compliance with s 97(1) of the Deeds Registries Act 47 of 1937 was peremptory. In its judgment the court *a quo* reasoned as follows:³¹

[49] In so far as the applicability of *section 97 (1) of the Deeds Registries Act 47 of 1937* is concerned, I am in support of the authorities to the effect that compliance therewith is peremptory.³² Where a particular matter falls within the ambit of *section 97 (1)*, like the present matter is, the plaintiff is obliged to comply with the provisions of *section 97 (1)*. A plaintiff who does not do so, does so at his or her own peril.

[50] In the present matter I have found that the plaintiff had no intention to transfer ownership of the property to the first defendant. The plaintiff, therefore, cannot lose its ownership of the property in these circumstances. I am of the view that in the present circumstances, it would lead to an absurdity and manifest injustice to uphold the first defendant's contention that the plaintiff's claim be dismissed on account of plaintiff's non-compliance with the provisions of *section 97 (1)*. It is my view that upholding the first defendant's contention on this score and allow a void transaction

³¹ *The DTA of Namibia v River View Estate CC* (I 2003/2015) [2019] NAHCMD 491 (15 November 2019).

³² *Ex Parte Sanders et Uxor* 2002 (5) SA 387E.

to stand, in these circumstances, would produce a result that could not have been intended by the legislature. I would, therefore, not uphold the first defendant's contention in this matter.'

[81] If, according to the court *a quo*, the provision is in indeed peremptory it is curious that the court was prepared not to non-suit the DTA for its non-compliance. There was consensus between the parties at the hearing of the appeal that the provision is only directory and that in an appropriate case its non-compliance may be condoned. There is authority in support of that approach which, in my view, represents the correct position.³³ Although it is not critical to the outcome of the present appeal, it is important that an incorrect precedent is not perpetuated. The High Court's conclusion that s 97(1) of the Deeds Registries Act 47 of 1937 is peremptory is therefore erroneous.

Order

[82] In the result, the appeal is dismissed with costs consequent upon the employment of one instructing and one instructed legal practitioner.

DAMASEB DCJ

FRANK AJA

³³ *Ex parte Sanders et Uxor* 2002 (5) SA 387C.

UEITELE AJA

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