THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 36/11

In the matter between: Reportable

NORTHERN METROPOLITAN LOCAL COUNCIL **Appellant**

and

COMPANY UNIQUE FINANCE (Pty) Ltd **First Respondent**

FIRST NATIONAL BANK OF SOUTHERN AFRICA LIMITED **Second Respondent**

JOHANNES JACOBUS DU PLESSIS **Third Respondent**

Neutral citation: *Northern Metropolitan Local Council v Company Unique Finance* (36/11) [2012] ZASCA 66 (21 May 2012)

Coram: MPATI P, CLOETE, SNYDERS and BOSIELO JJA and NDITA AJA

Heard: 21 February 2012

Delivered: 21 May 2012

Summary: **Estoppel – by conduct – whether council estopped from denying authority of one of its many employees – authority of one employee to tell the world that his subordinate had authority to bind council – employees lowly ranked in overall structure of**

council – no evidence of trappings of positions held – impression gained by third party on seniority of employees during visits to council premises not one created by employees' appointments – no liability attaching to council.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Blieden J sitting as court of first instance).

1 The appeal succeeds with costs, including the costs of two counsel.

2 Paragraphs a, b and c of the order of the court below are set aside and replaced with the following:

'The plaintiffs' claims against the first defendant are dismissed with costs, including the costs of two counsel.'

JUDGMENT

MPATI P (CLOETE, SNYDERS and BOSIELO JJA, and NDITA AJA CONCURRING):

[1] The third respondent, Mr Johannes Du Plessis (Du Plessis) was, at all times relevant to the issues in this matter, employed by the appellant as a superintendent in its security services department. On 30 October 1998 he signed an agreement, purportedly on behalf of the appellant, in terms of which the appellant would rent from the first respondent – which formerly traded as Compufin Finance – a Sharp photocopying machine at a monthly rental of R12 009.90 over a period of 60 months.[1] (For convenience I shall refer to the first respondent as 'Compufin'.) Two further rental agreements were signed by Du Plessis, purportedly on behalf of the appellant, in terms of which the latter would rent, from Compufin, radio phones and radio stations, respectively, at a rental of R77 520 per month in respect of each agreement over a period of 60 months.[2] The equipment was delivered to the appellant's security services section, but on 19 March 1999 and in circumstances which shall become apparent later in this judgment, the

[1] The agreement was signed on behalf of Compufin Finance on 2 December 1998.

appellant's Strategic Executive: Corporate Services, Mr Rudolph Bosman (Bosman), wrote a letter to Compufin advising that the appellant 'was unaware of [the three agreements]';[3] that it had at no stage authorised the relevant transactions and that they were accordingly null and void. Bosman also demanded payment of the total amount of R232 560, which appeared to him to represent three payments of R77 520 each made by the appellant 'via bank debit orders on 15 February 1999, 22 February 1999 and 15 March 1999 respectively . . .'.

[2] Compufin and the second respondent, First National Bank, to whom Compufin had ceded all its rights, title and interest in the third agreement, subsequently issued summons against the appellant and Du Plessis as first and second defendants respectively, claiming payment, from the appellant, of the sums of R971 703.96 and R6 272 032.80 to Compufin in respect of the first and second agreements[4], and R6 272 032.80 to the second respondent in respect of the third agreement as damages for breach of contract. In the alternative and in the event that Du Plessis did not have the requisite authority to sign the agreements on behalf of the appellant, Compufin claimed from the appellant and Du Plessis, jointly and severally, payment of the sum of R6 861 816.29 as delictual damages suffered by it as a result of Du Plessis falsely representing that he had such authority. Du Plessis's false representation, so it was alleged in the particulars of claim, was intended to, and did in fact induce Compufin 'to pay the price of the equipment to the supplier thereof so as to supply the equipment to the [appellant's] employees and officials'.

[3] In its plea the appellant denied liability and specifically denied that Du Plessis was authorised by it to sign the rental agreements. To this the respondents replicated and pleaded, in the alternative, that the appellant had represented that Du Plessis had authority and that it was therefore estopped from denying his authority. On the other hand, Du Plessis denied, in his plea, that he did not have the necessary authority to conclude

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[2] The two agreements were signed on behalf of Compufin on 21 January 1999.
[3] The latter refers to 'four purported agreements', which is an obvious error.
[4] The agreement in respect of the radio phones is referred to as the second agreement and the one in

the first and second agreements and pleaded that he did have the authority to do so. It appears from the judgment of the court a quo (Blieden J), however, that after all the evidence was led and after each of the parties had closed their cases, it was conceded on behalf of the respondents that Du Plessis lacked actual authority to conclude the rental agreements. At the stage of argument before Blieden J, therefore, and indeed in this court, the only issue to be decided was whether the appellant had created the impression that Du Plessis was authorised to conclude the agreements on its behalf, thus clothing him with ostensible authority.

[4] Having found that Compufin's witnesses had 'made it clear that as far as they were concerned they were not relying on any representation made by Du Plessis, but on a proper and acceptable resolution confirming Du Plessis's authority to sign the three contracts on behalf of the [appellant]', Blieden J concluded that Compufin 'cannot succeed in a [delictual] claim for damages against Du Plessis. . . '. He accordingly dismissed Compufin's claim against Du Plessis with costs, but granted the contractual claims against the appellant (albeit in slightly lesser amounts) with interest and costs on the scale as between attorney and client (as provided for in the contracts), including costs of two counsel. It is the order made in favour of the respondents against the appellant that is the subject of this appeal, which is before us with leave of the court below.

[5] It would be convenient, at this stage, to set out some facts, which appear to be common cause or undisputed. Corporate services, of which Bosman was the Strategic Executive, is one of seven clusters within the appellant. Within corporate services there are seven sub-clusters, one of which is security services. Each of the sub-clusters is headed by an Executive Officer. Mr Billy Mosiane (Mosiane) was the security sub-cluster's Executive Officer. At a level below him were the positions of two managers, one for operations and the other for strategic services. Yet a level below the managers was the position of senior superintendent, which was occupied by a Mr Wimpie van Wyk (Van Wyk). Du Plessis's position of superintendent was a level below Van Wyk and the latter

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respect of the radio stations as the third agreement.

was his immediate superior. A superintendent was one level above the lowest rank in the security sub-cluster, namely that of a security guard and law enforcement officer. Mosiane, Van Wyk and Du Plessis were, according to Bosman, housed in a building known as the Metro Building, separate and diagonally across the street from the appellant's main offices.

[6] Du Plessis testified that during 1998 (he could not remember the date) he met two ladies, Ms Ilse Krause (Krause) and Ms Karen Willemse (Willemse), who sought from him directions to the office of the Strategic Executive: Finance. After he had directed them and since they had introduced themselves to him as 'salespersons of office equipment' he requested from them a business card. He was interested in procuring a photocopy machine (photocopier) for the security department, because they had had to make copies of documents containing private and confidential information at other departments. This, according to him, posed a security risk. The following day he telephoned Krause and requested an interview with her. She obliged and after the interview she introduced him to Mr Jeff Rahme (Rahme) of Jeff Rahme Consultancy. It is not in dispute that Rahme was an approved broker who discounted various agreements to Compufin and that Krause and Willimse were the owners of a company known as Africon. (I shall henceforth refer to them collectively as the Africon owners.) There was an understanding between Compufin, Rahme and the Africon owners that when Africon had a sale agreement for which they required financing, the sale would be processed through Jeff Rahme Consultancy for discounting with Compufin. This was because Africon was not an approved broker with Compufin, although the Africon owners were, according to Mr Deon Blighnaut (Blighnaut), the advances manager at Compufin at the relevant time, well-known to Mr Anthony McLintock (McLintock) who was Compufin's managing director.

[7] Du Plessis testified further that after he had been shown a brochure, by Rahme, of Sharp photocopiers with all the necessary accessories he introduced the Africon owners to his superiors, Van Wyk and Mosiane. He said that the Africon owners 'requested that

we enter into an agreement with African Bank that would enable us to get the mentioned photocopier'. Van Wyk instructed him, so he testified, to purchase the photocopier after he had told the Africon owners that he (Van Wyk) and Mosiane would not be available as they were to attend a security conference for a certain period.[5] Van Wyk 'signed a resolution which gave [him] signing powers with [the Africon owners]'. A few days after he had signed the agreement for the rental, the photocopier was delivered by Rahme in the presence of both Van Wyk and Mosiane. The photocopier was installed in his office so as to avoid it being abused. This was on the instructions of Van Wyk.

[8] During the installation of the photocopier and having seen a radio supplier's business card on Du Plessis's desk, Rahme asked him if he was looking for a radio system. His response was that the security department wanted to upgrade their current security system. Rahme responded that he was selling a brand new system which comprised radio communication, cellular phone accessibility and a tracking unit. By then Du Plessis knew, having been told this by Mosiane, that the life of one of the appellant's councillors had been threatened and that the councillor concerned had requested protection from the security department. He saw this as an opportunity and later contacted Rahme and requested him 'to get the necessary documentation and authorisation in place in order for him to supply me with the radio phones'. After he had signed the necessary documents the radio phones were delivered to the appellant's premises. He ordered a Mr Frikkie Strauss, who worked in the stores, to issue the radios 'to all the security personnel'. A while later Mosiane telephoned him and summoned him to the office of one of the councillors, Councillor Nathan Jacobs (Councillor Jacobs), with a radio phone. There Mosiane ordered him to issue the radio phone to Councillor Jacobs.

[9] The three rental agreements signed by Du Plessis contained a debit order authorisation which he also signed. The signed debit order authorised monthly payments to be made from the appellant's bank account with Trust Bank in respect of each of the

[5] During his testimony Mosiane confirmed that he and Van Wyk attended a security conference over the period 26 to 30 October 1998.

three agreements to Compufin or its cessionary. It is common cause that a total amount of R60 049.42, including VAT, was paid in respect of the first agreement and R232 560 in respect of the second agreement. However, the amount of R232 560, including VAT was subsequently reversed and credited to the appellant's bank account.

[10] Du Plessis's purchasing spree came to an end in about February 1999 when he sought to make further purchases totalling R10.5 million. It appears from the evidence of Mr Alexander Maclean (Maclean), head of the vendor finance division of Wesbank at the time of these transactions, that the radio phones and radio stations delivered to the appellant's security clusters as mentioned above did not comprise the complete package. Wesbank were approached by Compufin to finance the balance of the package, ie the entire security system to the value of R10.5 million. In a facsimile letter dated 15 February 1999 addressed to the appellant for the attention of Mr C Lehmkuhl (Lehmkuhl), who was a manager in the finance cluster, Maclean wrote:

'…

The Rental Agreement [for 30 base stations and 300 radios] has been signed by Mr. J Du Plessis under authority of a resolution signed by Mr. W van Wyk (Head Manager: Services).

In order that we may satisfy ourselves that these gentlemen are authorised to transact on behalf of the Council we understand that the only department that would be in a position to authorise expenditure of this nature is the finance department.

This information has been given to us by Mr. Basie Lombard of the Greater Johannesburg Metro Council … who has suggested that we need to get the following information directly from the head of the Finance Department at you Randburg offices:

* Written authority whereby the Council has agreed to the renting of such equipment. I understand that this would have been a part of the budget for the security services department.
* Confirmation from the Finance Department that Mr. van Wyk has the necessary authority to authorise Mr. Du Plessis to sign rental agreements.

. . .'

After certain correspondence had passed between Maclean and Rahme, who desperately tried to convince the former that all was in order, a meeting was held on 18 March 1999 at

the appellant's premises, where the Africon owners , Rahme, Bosman, two internal auditors of the appellant and representatives of Wesbank (including Maclean) and Compufin were present. It was at that meeting that Bosman advised all present that neither Van Wyk nor Du Plessis had been authorised to sign the agreements on behalf of the appellant. Following the meeting Bosman wrote the letter of 19 March 1999 referred to in para 1 above, in which the addressees were advised that the three agreements were null and void.

[11] At the meeting just referred to above Blighnaut and Mr Christo Olivier, an employee in the internal audit section of the appellant, were appointed to investigate and establish, jointly, the true position relating to the transactions. Those present at the meeting were also informed that Du Plessis had been suspended because he had had no authority to bind the appellant and to conclude the agreements on its behalf. A disciplinary enquiry was subsequently held, chaired by Bosman, at which Du Plessis was charged with misconduct, it being alleged that he, inter alia, had conducted himself in a disgraceful, unbecoming or dishonest manner prejudicial to the good and proper working of the appellant's service. He was found guilty and the disciplinary committee recommended his dismissal.

[12] It is common cause that the resolution which purportedly authorised Du Plessis to conclude the rental agreements on behalf of the appellant was signed by Van Wyk on an official letterhead of the appellant. It was signed, on the face of it, on 26 November 1998. The resolution purports to be an extract from a meeting of the appellant held at Randburg on 26 November 1998. Its relevant portion reads:

'RESOLVED: "That the Hirer enters into a Rental Agreement with Compufin Finance (Pty) Ltd for the renting of the device as specified in the Transaction Schedule and any further Transaction Schedule(s) upon such terms and conditions as are usually applicable to Rental Agreements and as may be agreed upon."

That **Mr. J du Plessis** in his capacity as **Manager** of the Hirer be and is hereby

> authorised to sign, endorse and execute all documents for and on behalf of the Hirer to give effect to this resolution.'

Beneath the resolution and to the right of the page appears Van Wyk's signature, below which are his full names: Willem van Wyk, and the capacity in which he appended his signature, viz 'HEAD OF SECURITY'. To the left of Van Wyk's signature is the date 26 November 1998, written in manuscript and beneath it is an imprint of the appellant's official date stamp.

[13] During his cross-examination Du Plessis testified that he never saw Van Wyk sign the resolution, nor did he see him give it (the document containing the resolution) to the Africon owners, although he knew that '[t]hey needed a document to say that I had signing power . . .'. He knew that at one stage they went to see Van Wyk without him. (He had taken them to him on a previous occasion.) But since he was giving evidence eleven years after the event he said he was unable to remember the date on which the Africon owners went to see Van Wyk – it could have been 26 November 1998. The Africon owners subsequently brought to him the documents relating to the first agreement, which he signed.

[14] The process followed by Compufin upon receiving a proposal for financing from a broker was set out by McLintock, who testified that he was involved in the second and third agreements, as follows:

'What would then happen, this would then go to our credit department who would then forward that information to the various financial institutions who[m] [we] had facilities with. After . . . examining who it was for, they would then come back to us and request certain information before they would be able to approve the deal. They would talk about a resolution, probably talk balance sheet, insurance information, a copy of a cancelled cheque, a debit order, various aspects that the banks would ask for. So our credit control committee would then evaluate the information. This would then

be sent to the banks, who would then in turn evaluate the information they requested. Thereupon,

if

they are happy with all the information, they would then approve the deal and send us a deal approved.'

Compufin would then consult with the supplier, who would receive payment after the equipment had been delivered. When asked what authority was required as part of the standard procedure McLintock said:

'Well, depending upon the clients, a resolution would be required, copies of minutes of meetings would be required, in other words where the topics of discussion were actually discussed in the meetings. But a resolution confirming that the person signing the agreement had the capacity to contract. This would have to be on an original document.'

[15] The extent of McLintock's involvement in the second and third agreements was to attend a meeting at the appellant's premises. He testified that at the meeting the appellant was represented by four people, to whom he referred as 'delegates from the council'. These were Du Plessis, Van Wyk and 'two African gentlemen' whose names he could not remember. He later said he thought one of them was Mosiane. The objective of the meeting 'was to discuss exactly what they were doing regarding the two-way radios'. According to him the appellant's employees 'came up with a very good cost justification and the reasons why [the appellant] required these radios, we then obviously put a process into action to finance the specific deals and discount the deals with various financial institutions'.

[16] Mr Eric Lundberg (Lundberg), who had been employed at Compufin as advances manager, but later moved to head the credit committee at African Bank, also testified to a meeting he had with either Van Wyk or Du Plessis at their office at the appellant's premises. He had gone to that meeting with McLintock 'to go and obtain the financial information that we needed and also to form my own personal thing to verify that there was in fact a deal in the offing'. He said his involvement 'was purely to obtain credit information so that a submission could be made'. At the meeting he was handed a balance sheet

reflecting the financial details of the appellant's security department.

[17] Blighnaut signed the third agreement on behalf of Compufin. He testified, however, that he would have been involved in organising the financing of the other two agreements approved. The approval for each was given by African Bank and Wesbank, a division of the second respondent. He said he had satisfied himself that the requirements in respect of all three agreements were met for further transmission to the banks. Blighnaut said he was the person at Compufin who had to be satisfied that the requirements were met, including a proper resolution. When asked during his evidence-in-chief whether he would have approved the second and third agreements without a separate resolution he answered in the affirmative 'because we have got a resolution on the first agreement that was done in November with Mr Du Plessis's signature and confirming that he can do a specific and any future transactions for the security division'. He thus relied on the original document signed by Van Wyk and dated 26 November 1998. It will be recalled that the second and third agreements were concluded in January 1999.

[18] Importantly, Blighnaut testified that in respect of all three transactions he received all documentation from Willemse and Rahme and the resolution from Rahme. He was never given any documents by any of the appellant's officials. He also agreed that the persons who signed the documents as witnesses for the appellant's signatory were the Africon owners. He met Du Plessis when the latter called at Compufin to sign the debit orders for the second and third transactions.

[19] Ms Susan Hall (Hall), who was at the relevant time an assistant advances manager with Compufin, signed the second agreement on behalf of Compufin. Her duties were to ensure that everything that was required for approval of a deal by the discounting bank or financial institution was in order. Hall testified that she would not have signed the agreement if she had not been satisfied with the required resolution authorising Du Plessis as signatory for the appellant. She said the resolution was on an original letterhead and there was no reason for her 'to question that it was not legal'. It contained the standard

wording used in the industry and the banking environment and at Compufin. There was therefore no reason for her to be suspicious.

[20] Another witness for the respondents, Ms Alet McTaggart, did not take the matter any further. She was an administrator with Compufin and her function was to check if all the documentation was in order, including a resolution authorising a signatory to a contract. Once she had done that the documentation would be passed on to Compufin's signatory. She also testified that she appended her signature on the first agreement as a witness to the signature of a Mr Pete Hopwood (Hopwood), who signed the agreement on behalf of Compufin. Hopwood, however, was not called as a witness.

[21] Besides Bosman, six more witnesses testified for the appellant, namely Ms Maria Renney (Renney) who was the appellant's committee officer, Mr Alwyn Nortjé (Nortjé), a legal advisor, Mr Patrick Lephunya (Lephunya), the acting Chief Executive Officer, Ms Rashida Albertus, Mosiane and Councillor Jacobs. (I shall refer to the evidence of these other witnesses only when it is necessary to do so.) As was observed by the court a quo, Bosman was the most important witness. He testified that the appellant was governed in terms of legislative enactments which determined how the appellant's affairs had to be conducted. The full Council, which comprised elected Councillors, was the appellant's highest decision making body. Immediately below the Council was the Executive Committee, which was also a decision making body in the absence of a Council meeting. The Executive Committee appointed a number of portfolio committees. The administration was headed by the acting Chief Executive Officer, Lephunya, and below him were the clusters and sub-clusters referred to above.

[22] According to Bosman none of the appellant's officials had the power, in their individual capacities, to bind it without specific authorisation. The full Council, at its meetings, was the only body that could authorise expenditure. In cases of lesser expenditure the Executive Committee, a body appointed by the full Council, could give the

authorisation. Where individual officials sought to bind the appellant a member of the public could telephone the legal department for verification of the official's authority to act on behalf of the appellant.

[23] In the respondents' heads of argument the question was posed whether Van Wyk had actual authority, or ostensible authority, to indicate to outsiders the contents of resolutions of the appellant. Before us counsel for the respondents submitted that Van Wyk had actual authority to pass information regarding persons with authority to sign documents on behalf of, and to bind, the appellant.

[24] Actual authority may be express or implied. In *Hely-Hutchinson v Brayhead Ltd & another*[6] (referred to with approval in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd & other)*[7] Lord Denning MR expressed himself thus:

'[Actual authority] 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.'

In support of his contention that Van Wyk had actual authority counsel for the respondents referred to the evidence of Nortjé, who was employed by the appellant as a legal advisor. Nortjé agreed during cross-examination that there was no sign on Du Plessis's office door, or on Mosiane's, to alert a member of the public to Du Plessis's lack of authority to bind the appellant. He testified, however, that an official who would be approached by a member of the public 'certainly has a duty of care to inform the visitor . . . that he does not have that authority'. When asked whether the appellant relied on its own officials to warn

[6] *Hely-Hutchinson v Brayhead Ltd & another* [1968] 1 QB 549 (CA); [1967] 3 All ER 98.
[7] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd & others* 2002 (1) SA 396 (SCA) ([2002] 2 All SA 262) para 24.

the public on the limitation of their authority Nortjé responded:

'Yes but I must say [the] public most certainly also know that the council operates under delegation of powers, I mean everybody knows that.'

He said that an ordinary businessman who wanted to conclude an ordinary photocopier deal 'would rely heavily on that official that he is dealing with and that official has a duty of care to explain exactly the inner workings of the council and not sign agreements well knowing that he does not have authority'.

[25] Counsel also referred to the testimony of Renney who also agreed that a member of the public dealing with a particular cluster or sub-cluster 'could expect to ask a senior person in the cluster as regards whether there had been a resolution or not and [that] he [the member of the public] would expect that [senior] person to answer' and that the member of the public would trust that answer. Reference was also made to the evidence of Bosman, who said the channel of communication about what had been decided higher up in the appellant's structures would be vested in senior officials of the security sub-cluster who would be expected to tell members of the public as to whether or not they had authority.

[26] What does emerge from the evidence referred to is, in my view, that an official of the appellant had a duty, when the issue of authority came up, to tell the truth to members of the public as to who had authority to bind the appellant. Non constat, however, that a failure to tell the truth or the deliberate forgery of a document containing an untruth would render the appellant liable were a member of the public to contract on the basis of the truth of what was conveyed by the official. As to Van Wyk, there was no evidence to the effect that the signing of documents containing resolutions and extracts from the appellant's Council meetings fell within the scope of the position to which he had been appointed, viz senior superintendent, nor of the position of acting manager, which Du Plessis suggested he held at the relevant time. It follows that it was never established as a

fact that Van Wyk had actual authority to tell the world, by signing the document concerned, that Du Plessis had authority to bind the appellant.

[27] As I have alluded to above, the only issue the court a quo had to determine, which is also the issue in this appeal, was whether the respondents proved their case against the appellant based on the ostensible authority of Du Plessis and Van Wyk. In *Hely-Hutchinson* Lord Denning MR said this on the subject:

'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.'

Thus, where a principal (representor) has created an impression in another's mind – though such impression might be wrong – that his or her agent (employee) has the requisite authority to transact on his or her behalf he or she will be held liable under that transaction.[8]

[28] In order to hold the appellant liable on the basis of ostensible authority the respondents had to prove the following:

(a) A representation by words or conduct.
(b) Made by the appellant and not merely by Du Plessis and/or Van Wyk that they had authority to act as they did.

[8] *Cf NBS Bank*, fn 7 above, para 25.

(c) A representation in a form such that the appellant should reasonably have expected that outsiders would act on the strength of it.
(d) Reliance by the respondents on the representation.
(e) The reasonableness of such reliance.
(f) Consequent prejudice to the respondents.[9]

[29] With reference to the first two requirements Nienaber JA said the following in *Glofinco v Absa Bank Ltd t/a United Bank:*[10]

'A representation, it was emphasised in both the NBS cases *supra,* must be rested in the words or conduct of the principal himself and not only merely in that of his agent (*NBS Ltd v Cape Produce Co (Pty) Ltd* (*supra* at 411H-I)). Assurances by an agent as to the existence or extent of his authority are therefore of no consequence when it comes to the representation of the principal inducing a third party to act to his detriment.'[11]

It is common cause that the document containing the resolution was fraudulent: no such resolution was passed by the appellant's Council on 26 November 1998, nor on any other day. Secondly, the alleged capacity in which Van Wyk signed the document was false; he never held the position of Head of Security. But these representations by Van Wyk, that is that the appellant's Council had passed the resolution; that he held the position of Head of Security and that he had authority to tell the world as to who had authority to sign contracts on behalf of the appellant, are not the issue. Neither is Du Plessis's representation that he had signing powers. The issue is whether the appellant made any representation, by word or conduct, which induced the respondents to act to their detriment by concluding the agreements with Du Plessis. I proceed to deal with that issue.

[30] There is no evidence that any official in the security sub-cluster of the appellant had

[9] See *NBS Bank Ltd* fn 7 above, para 26.
[10] *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA).
[11] Para 13.

authority to bind the appellant to any extent, other than, possibly, making small purchases for daily necessities. Indeed, the uncontested evidence of Bosman on this aspect is to the contrary. The question whether the transactions on which the respondents rely can be said to fall within the parameters of ordinary security sub-cluster activities or procurement transactions[12] does not arise. As was said in *Glofinco*, no representation is made if the representee is aware that the transaction he is engaging in is not of the kind a particular official will ordinarily transact with an outsider.[13] When invited to clarify as to what the alleged representation relied upon was, counsel for the respondents listed four factors, namely (a) the resolution; (b) two face-to-face meetings at the appellant's offices which certain representatives of one or both respondents had with what counsel referred to as 'very senior officials' of the appellant who were clothed with authority; (c) that Lephunya, the appellant's acting Chief Executive Officer, had been party to negotiations and thus, being aware of the negotiations, there was representation by silence; and (d) a number of factors mentioned by Blieden J in paragraph 81 of his judgment, with which counsel agreed.

[31] All the respondents' witnesses who handled the documentation relating to the three transactions were clear in their testimony that they were moved to perform whatever function they had to perform regarding the transactions once they had satisfied themselves that a proper resolution was in place authorising the signatory to bind the appellant. Although it is not clear from the evidence who signed the first agreement on behalf of Compufin, Blighnaut said he would have dealt with it and that he would have been satisfied with the resolution. He was the person who had to be satisfied that all the requirements were met, including a proper resolution. He signed the third agreement after he had satisfied himself that the necessary requirements were met. Hall, who signed the second agreement on behalf of Compufin, said she would not have signed the agreement if she had not been satisfied with the resolution authorising Du Plessis as the appellant's signatory. Clearly, the meetings that were attended by Lundberg and McLintock at the appellant's premises played no part in their (Blighnaut and Hall's) decision to sign and

[12] *Cf Glofinco v Absa Bank,* fn 9 above, para 20.
[13] Ibid.

conclude the agreements between Compufin and the appellant. They are the representatives of Compufin to whom the representation would have been made. Counsel for the respondents submitted that the representation was made to Blighnaut, Hall and Hopwood.

[32] As to the meetings that took place at the appellant's premises McLintock merely wished to satisfy himself not with Du Plessis's or Van Wyk's authority but with a cost justification for the radios and the reasons why they were required. Similarly, Lundberg wanted to satisfy himself that the appellant (or security sub-cluster) would be able to pay for the equipment and not to ascertain who had authority to sign documents on behalf of the appellant. Counsel contended that these meetings were with 'very senior officials' in the security sub-cluster. Apart from the fact that Du Plessis was only one level above the lowest rank and Van Wyk one level above him in the security sub-cluster, positions that can hardly be categorised as 'very senior,'[14] there is no evidence that anything that came out of the meetings in any way influenced those who signed the agreements on behalf of Compufin. The impression that Lundberg and/or McLintock gained about the seniority of Du Plessis and Van Wyk and any other employee of the appellant who might have been present at the meetings cannot be placed at the door of appellant, who had employed them at almost the lowest ranks in its administration, even in its security sub-cluster.

[33] Lephunya's evidence took the matter no further. The sum total of his involvement was his becoming aware of the security sub-cluster's desire to procure radio phones when a report on the matter was placed on the agenda of the Executive Committee for approval by it. The report was withdrawn from the agenda by Bosman and Lephunya had nothing further to do with the matter. There is no evidence of his involvement in any representation. There is no evidence that he was aware that Van Wyk and Du Plessis proceeded to transact for the radio phones despite the Executive Committee report having

[14] The identity of the other persons who were present at one of the meetings testified to by McLintock is not known.

been withdrawn from the agenda.

[34] In its judgment the court a quo listed twenty-two factors on which counsel for the respondents relied in his submission to it that the appellant had created a façade of regularity. Some of these factors I have already dealt with, eg the so-called seniority of Van Wyk and Du Plessis; the meetings at the security sub-cluster offices at which Lundberg was given financial statements (obviously to prove that the appellant would be able to afford the procurement) and Lephunya's involvement in the saga. The last two factors relate to what occurred after the radio phones had been delivered. They were distributed amongst certain officials and Councillors. Dealing with this aspect the court a quo said:

'As submitted by Plaintiff's counsel the evidence of what occurred after the conclusion of Agreements A, B and C which, whilst not constituting direct evidence of events that can be relied upon to ground estoppel, since they occurred after the conclusion of the agreements, are nonetheless valuable as a source of inferential reasoning as regards the apparent approval prevailing before the conclusion of [the agreements] . . .'

The court then concluded that had the transactions been without the approval of a large number of the appellant's employees, and had Du Plessis acted alone as the appellant suggested, 'it is inconceivable that it would have taken approximately [two] months from the delivery of such a large number of radiophones, for the transaction to be rejected'.

[35] I am not sure to what approval the learned judge a quo refers. It is true that the document containing proposals to the Executive Committee that a radio phone system be hired and on which Lephunya's name appears, tend to indicate that someone – possibly Lephunya and others – was in agreement that radio phones should be acquired. But I fail to see how that apparent approval could, even after the document was withdrawn by Bosman, either by itself or considered with other factors, be said to have created a façade of regularity which gave the impression to Blighnaut and Hall that Van Wyk had authority to tell outsiders that Du Plessis had authority to bind the appellant. There is no evidence that Lephunya had any knowledge of Van Wyk and Du Plessis's dealings with the Africon

owners, or any of Compufin's or the second respondent's officials. In my view, the court a quo erred in this regard.

[36] In introducing these factors I have just dealt with and others, the court a quo referred to the following extract from the decision of this court in *South African Broadcasting Corporation v Coop & others* (*SABC*):[15]

'As in the *NBS Bank* case (*supra*) the plaintiff's case was not limited to the appointment of the various relevant officers who acted on the SABC's behalf. It included their senior status, the trappings of their appointment, the manner in which they went about their dealings with the plaintiffs, the use of official documents and processes, the apparent approval of subordinate and related organisations, such as the pension fund and medical scheme, the length of time during which the Ludick option was applied, the Board's own financial accounts and the conduct of CEOs who were Board members.

As in the *NBS Bank* case, the SABC created a façade of regularity and approval and it is in the totality of the appearances that the representations relied on are to be found.'

In both *NBS Bank* and *SABC* the court had to deal with senior officials and the usual authority that attached to their positions: in the former, a manager of a branch of NBS Bank and, in the latter case, with successive Chief Executive Officers and Group Heads of Human Resources.

[37] In *SABC* the court below had ordered the South African Broadcasting Corporation (SABC) to reinstate and continue to pay a 60% subsidy of the respondents' monthly medical scheme contributions and also to reinstate concessionary television licences. The respondents were formerly employed by the SABC and had retired with the benefits on the strength of written assurances to the first person to retire, Mr Ludick (Ludick), by the SABC Group Head of Human Resources (HR), that he could retire or resign with all the benefits. Subsequently the pension fund advisor in the HR office confirmed the benefits relating to the pension fund, ie that Ludick could withdraw the full value of his pension. The Group Chief Executive also confirmed to Ludick in writing that upon his resignation he could

[15] *South African Broadcasting Corporation v Coop & others* 2006 (2) SA 217 (SCA), paras 74 and 75.

retain his membership of the medical and group insurance schemes. After Ludick had left the SABC's employ many other employees left on the same conditions. When it felt the pinch on its finances the SABC sought to renege on the undertakings and disputed the authority of its own Chief Executive Officers and HR. It is in this context that this court observed that the respondents' cases were not limited to the appointment of the various relevant officers but 'included their senior status, the trappings of their appointment', etcetera.

[38] In *NBS Bank* the relevant senior official was a branch manager of NBS Bank, which, the court said, 'held out its branch managers as its front to the world and its local spokesmen'. In that case the manager had devised a scheme with the help of an attorney in terms of which he would take deposits from clients for which he issued typed letters in return. The deposits would not be entered on the computer as the bank's rules required, and the money would then be diverted to the account of a firm of attorneys from where advances were made to developers. Four plaintiffs instituted action against NBS Bank for payment of a combined sum of R31.5 million with agreed interest, on the basis that the branch manager had authority, either actual or ostensible, to bind NBS Bank. NBS Bank was ordered by the trial court to pay the monies to the plaintiffs. Certain ancillary orders were also made. NBS Bank had denied liability on the ground, first that the branch manager was acting in his own interest in fraud of the bank and, secondly, that there were internal restrictions on the actual authority of the branch manager.

[39] In this regard Schutz JA said on appeal:

'What emerges from the evidence is not a nude appointment [of the branch manager], but an appointment with all its trappings, set in a context. The context was a bank, whose business was the taking of deposits for a period at interest, and the lending of money on security at a higher rate of interest. It created branches to carry on this business and it appointed managers to manage them. [The branch manager] was appointed the local head of this business at Kempton Park. He commanded the staff, including his secretary, who typed the letters and then deleted them from her computer on his instructions, keeping her qualms to herself, whether out of fear, or loyalty, or both.

The letterhead on which the letters were typed was provided by the NBS. The facility was created, and it functioned, for the NBS to take Cape Produce's cheques into its bank account, and for its cheques to be issued in repayment. The state of affairs continued for some 18 months with numerous repayments, without the NBS's own system of control detecting the abuse.'

Clearly, then, what this court has considered to be a façade of regularity where ostensible authority is in issue is the appointment of the person who would have purported to act on behalf of an entity sought to be held liable for such act, the position to which the appointment was made 'with all its trappings, set in a context'.

[40] In the present matter Van Wyk and Du Plessis were lowly ranked officials in an elaborate administrative structure where authority below the full Council was exercised in terms of delegation. It is true that Van Wyk and Du Plessis were given offices, but these were not even in the main building – they were in a smaller side-building. There is no evidence that they were provided with secretaries, nor with letterheads or stamps. It is not known where the letterhead on which the so-called resolution was contained came from, so also the stamp whose imprint appears on it. But the fact that the two officials were given offices and might even have had letterheads and stamps does not mean they were clothed with authority to bind the appellant. What matters is their seniority in the overall structure of the appellant and what ordinarily goes with the senior positions they would have held.

[41] One of the factors mentioned by the court a quo as contributing to the creation of a façade of regularity is that the appellant provided its employees with original letterheads, which allowed Van Wyk to use an original letterhead when certifying the existence of a non-existent resolution. The court also observed that the appellant provided its employees with official stamps and allowed these to be used for its official documents. That may be so, but surely were an institution like the appellant to provide one of its employees at its receiving department, where letters and parcels are received, with an official stamp so as to indicate the date on which correspondence was received, it could not be held liable,

without more, if another employee were to borrow or steal the stamp for nefarious

purposes. Similarly, I do not believe that the law would require a manager in a bank to keep letterheads under lock and key and to take out one for his secretary every time he or she wants the secretary to type a letter, so as to avoid unforeseen fraudulent acts by the secretary. And where a secretary uses letterheads in his or her possession to commit fraud and purport to bind the employer it does not follow that the manager or the institution should be held liable.

[42] Another factor mentioned by counsel as contributing to the creation of a façade of regularity is that Mosiane drew up Du Plessis's job description and allowed Van Wyk to sign it on his behalf. The job description, so counsel argued, was drawn up prior to the conclusion of the three agreements and listed, as part of Du Plessis's functions, 'Contracts and Tenders'. I am not persuaded that the 'job description' document had anything to do with the conclusion of the agreements. There is no evidence that it formed part of the documents that were before Compufin's officials when the proposals to conclude the agreements were considered. The document only came up when McLean queried the authority of Van Wyk to certify that Du Plessis had signing powers to bind the appellant. McLean testified that it was sent by the Africon owners to Blighnaut on 18 March 1999 in preparation for the meeting that was scheduled for that day at the appellant's premises and at which Bosman informed everyone that neither Van Wyk, nor Du Plessis, had authority to sign the so-called resolution and the agreements, respectively.

[43] Yet another factor referred to by counsel for the respondents is that subsequent to the conclusion of the first agreement and prior to the conclusion of the second and third agreements a payment was made by the appellant via a debit order signed by Du Plessis, which indicated that even the appellant's bankers accepted Du Plessis's signing powers. Counsel accordingly submitted that although the bank account was checked regularly by the appellant's Finance Department at least on a monthly basis the debit was not picked up, 'giving a further appearance of regularity'. Had the debit been picked up timeously it

could have prevented the conclusion of the second and third agreements, so the argument continued. To my mind that does not assist the respondents. It is true that the appellant's

Finance Department did not pick up the debit payment timeously, but that fact had no influence whatsoever on any of the officials of Compufin, namely Hall and Blighnaut, who signed the second and third agreements respectively. They made no mention at all in their testimony that the debit payment was one of the factors they considered when deciding to sign the agreements on behalf of Compufin.

[44] But most importantly, what is lacking in this matter is evidence of the 'trappings' of the positions held by Van Wyk and Du Plessis. Other than a suggestion by McLintock that they appeared to be senior and that the meeting was held in their offices, there is no evidence as to what normally goes with the position of senior superintendent (Van Wyk) and superintendent (Du Plessis). Those were their positions until Mosiane and Van Wyk attended a conference in October 1998, when Du Plessis acted as senior superintendent. Mosiane, Van Wyk and Du Plessis may have been appointed 'to the top three positions in ranking in the security sub-cluster hierarchy', as the court a quo found - although I disagree with that finding because there were the vacant positions of two managers between Mosiane and Van Wyk's position - but in the overall administrative structure of the appellant they ranked very low. There is no evidence that the certification of any official document of the appellant was done by the security sub-cluster, which could have given the impression that Van Wyk had authority to certify a resolution of Council. Nor is there any evidence that the transactions in issue fell within the category of what may be termed the security sub-cluster's 'usual business'. Thus, other than the mere appointments and the fact that they occupied offices and might have had access to letterheads and stamps, and the fact that outsiders such as Rahme, Compufin's representatives and the Africon owners had access to them, sufficient evidence of a façade of regularity was lacking before the court a quo. It follows, in my view, that agency by estoppel (ostensible authority) on the part of the appellant has not been established on the evidence. There was no representation by it.

[45] But that is not the only basis upon which the respondents should have failed in the court a quo. In my view, the acceptance, by Compufin's officials, of the resolution was unreasonable. I have already rejected the submissions that the appellant had created a

façade of regularity that could have led any member of the public to believe, reasonably, that Van Wyk had authority to tell the world that Du Plessis had authority to bind the appellant. Although the resolution was contained in a letterhead bearing the name of the appellant, it is introduced as 'EXTRACT OF MEETING OF THE HIRER' (my underlining) and not as an extract of a meeting of the Northern Metropolitan Local Council, being the name of the appellant. In the documents constituting the three agreements Compufin is referred to as 'HIRER' and the appellant as 'USER'. The discrepancy of the reference, in the resolution, to the appellant as the hirer would have drawn the attention of business persons whose function it was to satisfy themselves that contracts to be entered into by them or their employers are properly concluded, particularly that all documents relating to those contracts are in order. Blighnaut, Hall and, it must be accepted, Hopwood failed in their duty to scrutinise the resolution, in my view. Indeed, when it was put to him that the resolution did not come from the appellant Blighnaut replied:

'We do not know we accepted that it did getting it from Jeff Rahme and trusting him.'

And when asked earlier, whether he did not think he should have telephoned someone from the appellant to check that they knew Du Plessis's authority, he said they had placed their faith in the operations of Rahme. Blighnaut clearly abdicated his duty of ensuring that the resolution was genuine.

[46] Moreover, the resolution purported to confer authority on Du Plessis to bind the appellant as and when he wished and to conclude agreements for any amount and in respect of any item which may happen to be recorded on a transaction schedule, such as, for example, the schedules to the rental agreements in issue, with the description of the equipment to be purchased. I do not believe that any reasonable businessman who knows the operations of an entity such as the appellant, relating to decision making (McLintock said Compufin did discounting for a lot of town councils around the country), could ever be satisfied with such an open ended resolution. To do so would, in my view, clearly be unreasonable.

[47] Lastly, McLintock testified as follows when asked, during his evidence-in-chief, what

proof of authority was required by Compufin as part of standard procedure (when considering a proposal for a rental agreement where someone acted on behalf of a principal):

'Well depending upon the clients, a resolution would be required, copies of minutes of meetings would be required, in other words where the topics of discussion were actually discussed in the meetings. But a resolution confirming that the person signing the agreement had the capacity to contract. This would have to be on an original document.'

Later, when shown the undated document containing the proposals to purchase radiophones and which was withdrawn by Bosman from the agenda of the Executive Committee of the appellant McLintock identified it as the minutes of the meeting 'extracted [from] the general minutes of the meeting . . .'. One of the recommendations made in the document was that 'the rental expense be debited against vote number 280-010-2595 (Guarding, NMLC Property)'. When asked what the significance of the vote numbers was he said:

'Well that is very important because those numbers would be allocated with regarding the way I understand various councils work because we did a lot of discounting for a lot of the town councils around the country and that was quite a crucial factor with regarding minutes.'

From these extracts it appears that the minutes of a meeting of a town council at which a resolution was passed authorising one of its officials to act on its behalf in concluding agreements was quite important for Compufin. Yet the resolution that authorised Du Plessis to conclude any number of agreements on behalf of the appellant was not accompanied by the minutes, or at least that part of the minutes, that related to it. The undated document shown to McLintock was no such minutes.

[48] I can only conclude that Compufin's officials dealt very casually and superficially with the question of Du Plessis's authority. Their acceptance of the resolution was not reasonable.

[49] In view of my conclusions on the requirements of the alleged representation and the reasonableness of its acceptance, it becomes unnecessary to consider the other

requirements necessary for estoppel to arise. But there is one aspect that I should mention in passing. The court a quo admitted in evidence what it referred to as admissions binding on the appellant. The admissions were contained in evidence given at the disciplinary hearings of Du Plessis and another employee, Lehmkuhl, and statements and affidavits made during the investigations in preparation for the disciplinary proceedings. The record of the disciplinary proceedings had been discovered by the appellant and the parties recorded their agreement in their rule 37 minute that the documents 'may be received in evidence … upon their mere production', but 'without any admission as to the truth of what was said'. The statements were made by employees of the appellant and, as I have mentioned above, Bosman presided over the disciplinary proceedings. The basis for the admission of the contents of the statements and evidence was a passage in *Lawsa*[16] where the following appears on the topic of informal admissions generally:

'Provided the various requirements have been met, admissions are admissible against a party irrespective of whether he elects to give evidence. The hearsay rule does not exclude evidence of an admission. The reason for its admissibility is that whatever a person says to his detriment is likely to be the truth.'

Regrettably the court a quo did not mention any of the requirements, one of which is that the statement containing the admission must have been made to a third party. (See *In re SS Winton; Avenue Shipping Co Ltd (in Liquidation) & others v South African Railways and Harbours & another* 1938 CPD 247 at 249 – 251.)

[50] When confronted with this requirement counsel for the respondents contended that the statements were indeed made to a third party, viz Blighnaut, who was not an employee of the appellant and who was mandated with Bosman to conduct the investigations around Du Plessis's signing of the agreements on behalf of the appellant. He submitted that all the

[16] 9 *Lawsa* First Reissue para 531.

documents were made available to Blighnaut, who, together with Bosman, compiled a joint report. But making a statement to a third party and an already made statement being given to a third party are two different things. What the law requires is that the admission, to be admissible in evidence in these circumstances, must have been made by its maker to a third party. There is no evidence that this is what occurred in the present case. In my view, the court a quo erred in admitting the admissions as evidence against the appellant. They were inadmissible.

[51] In the result, the appeal must succeed and the following order is made:

1 The appeal succeeds with costs, including the costs of two counsel.

2 Paragraphs a, b and c of the order of the court below are set aside and replaced with the following:

‘The plaintiffs’ claims against the first defendant are dismissed with costs, including the costs of two counsel.’

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L Mpati

President

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