THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No:
876/12

Reportable

In the matter between:

ABSA BANK LIMITED **Appellant**

and

MAHOMED ARIF **First Respondent**

ABDUL SHIRAZ **Second Respondent**

Neutral citation: *Absa Bank Ltd v Mahomed* (876/12) [2012] ZASCA 1 (20 January 2014)

Coram: Maya, Malan, Petse, Willis and Saldulker JJA

Heard: 21 November 2013

Delivered: 20 January 2014

Summary: Banker – liability of a commercial bank for illegal and unauthorised transactions purportedly concluded in its name by its agent – appellant bank's agent and respondents concluding interest bearing deposit investment agreements using fictitious account holder names to conceal undeclared taxable funds from SARS – bank agent misappropriating funds – no trace of respondents' deposits on bank's processing systems and records – bank agent not duly authorised to represent bank in concluding illegal agreements designed to defraud the fiscus – respondents failing to establish their pleaded causes of action and bank's appeal upheld.

ORDER

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

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

2 The order of the court below is set aside and replaced with the following:

'(a) The first plaintiff's action is dismissed with costs, including the costs of two counsel.

(b) The second plaintiff's action is dismissed with costs, including the costs of two counsel.'

JUDGMENT

MAYA JA (MALAN, PETSE, WILLIS and SALDULKER concurring):

[1] This is an appeal against the judgment of the South Gauteng High Court (Maluleke J) which granted the respondents' claims against the appellant, Absa Bank Limited (Absa), for payment of money together with interest. The appeal is with the leave of the court below.

[2] The two respondents, Mr Arif Mohamed and his nephew Mr Shiraz Abdul, are retail businessmen based in Pretoria. The litigation arose out of interest bearing

deposit investment agreements which the respondents alleged they concluded with Absa's agent, Mr Naresh Rama Mistry. The transactions were made at Absa's Marabastad agency, one of two Absa agencies in Pretoria (the second agency was in Laudium) that were operated by Mistry, as a sole proprietor of Mistry's Financial Services and Mistry's Estate Agencies**,** on Absa's behalf. Mistry ran the agencies under an agency agreement concluded between his entities and United Bank Limited, Absa's predecessor, before the latter was amalgamated with three other commercial banks (Volkskas, Allied and Trust Banks) to form Absa (formerly called the Amalgamated Banks of South Africa Limited) in the 1990's.

[3] In February 2009, it came to light that Mistry had perpetrated massive frauds at the two Absa agencies. A forensic investigation and audit revealed that he had stolen millions of Absa clients' investments. Absa promptly launched sequestration proceedings against Mistry, which were unopposed, and obtained a final order in May 2009. It does not appear though that any of the misappropriated proceeds were ultimately recovered from Mistry who reportedly fled the country.

[4] The respondents, armed with purported Absa investment (deposit) certificates (receipts), were among Absa's clients who came forward claiming to be victims of the swindle and seeking compensation from Absa. Mahomed alleged that he invested various sums of cash, handed to Mistry for deposit, totalling R5 432 099.88 under four investment accounts as follows: R1 million paid into JT Investments account on 24 May 2007, R1million paid into RD Family Fund account on 1 June 2007, R3 million paid into Rishi Family Fund account on 11 August 2007 and R432 099.88 paid into Judson Trading account on 18 August 2007. The investments would mature

in 12 months and bear interest at the rate of 17,5 per cent per annum. Abdul on the other hand claimed payment of a sum of R2 020 843 which he alleged to have handed to Mistry as cash for investment into three accounts: R808 752.34 into Goden Store account on 19 March 2008, R246 419.91 into Judson Agency account on 5 February 2007 and R965 670.85 into HIF Investments account on 15 May 2007. The investments would earn interest at 7,45, 7,35 and 7,20 per cent per annum, respectively, over a 12 month investment period.

[5] None of the alleged investment accounts showed on Absa's banking systems and records. And as it emerged, the respondents and Mistry, unbeknown to Absa, used fictitious names in concluding the investment agreements to conceal the substantial taxable funds which the respondents had deliberately failed to declare to the South African Revenue Service (SARS) to evade tax. Therefore, the entities in which the investments accounts were held did not exist. Except for the deposit receipts relied upon by the respondents, which Absa's on-going forensic investigation (conducted in tandem with police investigations) suggested were forgeries, the respondents did not furnish Absa with documentation requested by its investigators which would facilitate the verification and investigation of their claims. Instead they threatened, through their attorneys, to liquidate Absa and lay criminal charges against its directors and Chief Executive Officer for breach of the provisions of the Financial Intelligence Centre Act 38 of 2001 (FICA).[1]

[1] Absa consequently launched urgent proceedings, which were successful, to interdict the threatened liquidation application. And, interestingly, the respondents' threats were carried out. These proceedings were preceded by litigation supported by Mahomed which challenged the appointment of the then Governor of the Reserve Bank, Ms Gill Marcus, Absa's chairperson at the material time, for allegedly suppressing fraudulent activities at Absa. Mahomed had also laid criminal charges against the Governor and Ms Maria Ramos, an Absa director, for collusion in Absa's alleged attempted extortion and concealing Absa's breach of FICA requirements. However, both proceedings came to naught; the criminal case was aborted and the application proceedings were held vexatious and dismissed with punitive costs.

[6] Absa denied any liability to the respondents who then turned to the high court and launched application proceedings for payment of their respective claims as described above.[2] The respondents based their claims on contract.[3] They alleged a breach of the investment contracts by Absa which they pleaded misappropriated, divested, lost or stole their investments and failed to automatically reinvest the investment funds. In addition to the claims for the capital investment deposits, Mahomed sought interest at the agreed rate of 17,5 per cent per annum whilst Abdul demanded interest at the legal rate. They contended that their investment contracts were substantiated by the deposit receipts issued by Absa. These receipts, they alleged, bore the material terms of each of the investment agreements with which they complied. The receipts each bore the names of the fictitious account holders, the capital amount of the purported investments, the purported maturity date of the investments and the purported applicable interest rates. They also contained the following terms:

'On maturity, unless you instruct Absa otherwise, your investment will automatically be renewed for the original term, but at the rate applicable at the time of maturity. Should you find this unsatisfactory you may change details of this automatic reinvestment within 30 days from the date of reinvestment, without incurring a penalty fee.

Clients are requested to insist on this receipt bearing a teller's stamp which is the only official form of receipt issued by Absa Bank.'

[7] In its pleas, Absa admitted only Mistry's authority to operate its Marabastad agency as its agent and denied liability. It disputed the genuineness of the deposit receipts. It further denied the conclusion of the alleged investment agreements

[2] In para [4].The respondents' individual application proceedings were subsequently referred to trial and consolidated for trial purposes.
[3] Mahomed's alternative cause of action of a breached duty of care, which Absa pleaded was vague and embarrassing, was not pursued at trial.

alternatively, if they were so concluded, Mistry's authority to act as its authorised agent or representative when contracting with the respondents and the payment to it of the funds represented by the deposit receipts. It then pleaded that the respondents, acting independently or in concert with Mistry, intentionally and unlawfully concealed the investments, their entitlement thereto and the source of the investment funds from SARS to evade tax. Absa proclaimed its innocence and alleged that the respondents assumed all risks associated with such conduct from which it did not benefit. It finally pleaded that granting the respondents' claims would offend public policy, fairness and equity as it would constitute the enforcement of illegal, dishonest and immoral conduct.

[8] The respondents replicated jointly and admitted that the underlying intent of the investments was to evade tax. But they contended that they subsequently sought and obtained amnesty from SARS for their non-disclosure and that this cured any illegality that tainted the investments. They contended further that as Mistry concluded the investments agreements on Absa's behalf with the full knowledge of their intent to defraud the fiscus, it would be unjust and against public policy to allow Absa to be enriched by retaining the funds.

[9] The key issue at the trial was whether Mistry was duly authorised to represent Absa in concluding the investment agreements. Both respondents testified in support of their claims. Their respective versions were substantially similar. The nub of their evidence was that they invested with Absa, represented by Mistry, large sums of cash – Abdul stated that he also transferred some of the funds he invested from three business accounts he held with Absa, BEE Central, Shy Prop Investments CC and SM Store Manufacturers – made from their business activities which they had squirreled

away over the years. Neither of them was a registered taxpayer and they had no intention of paying tax. They had legitimate accounts with Absa and had known Mistry, whom they trusted, for years. They used fictitious investment account names to hide the investments from SARS on advice given by Mistry who doubled as their financial adviser and bookkeeper.[4] In 2007, they applied to SARS for the Small Business Tax Amnesty, again on Mistry's advice. They declared all their income including the investments, which they declared as assets. Mahomed, who had declared all his income from 1989 to 2007, was allegedly granted amnesty and SARS' response in respect of Abdul's application was still pending at the time of the trial.

[10] Several flaws in the respondents' evidence were laid bare in their cross-examination. Apart from the disputed deposit receipts, neither respondent had any other record or accurate recollection of the actual amounts of the initial deposits, the agreed interest rates applicable to the investments and the calculation of capitalised interest. It transpired that an addition of the alleged accrued interest to the capital amounts of the investments oddly resulted in figures which did not tally with the investment amounts reflected in the deposit receipts.

[11] Mahomed could not say with any certainty whether the deposit receipts upon which he relied for his claim were the most recent ones from Mistry. He contradicted himself on whether he ever witnessed a teller affix a stamp on them. (Abdul, on the other hand, said he always collected his receipts from Mistry who would hand them to him in an envelope and never saw a teller affix stamps on them.) Nor could he explain the exorbitant interest rates applicable to his investments, which were

[4] Mistry operated a private accounting bureau on the floor above the Marabastad agency.

glaringly out of kilter with the normal bank rates. He also could not explain why Absa periodically corresponded with him in respect of his other investments with it but sent him no communications, including the mandatory income tax certificates, at all in respect of the disputed investments, which he did not query. It turned out that he lied in his evidence-in-chief about the extent of his honesty to SARS in his tax amnesty application, and had sought amnesty only in respect of a sum of R225 000 generated as rental income in the 2006 tax year. He was then constrained to admit that he did not make full disclosures regarding the 2002/2003 tax returns and perpetrated yet another fraud on SARS.

[12] Mahomed's evidence that the amounts reflected in his deposit receipts in 2008 represented the amounts actually invested in 2005 did not withstand scrutiny. He changed this version cross-examination and stated, as did Abdul, that the interest on his investments was automatically capitalised when reinvested 12 months after initial investment. But he then said as a Muslim he could not keep the interest and gave it to charities in accordance with the prescripts of his faith. Strangely though, the amounts stated in the deposit receipts were in the round figures which were allegedly deposited with Mistry initially. And he still claimed payment of capitalised interest which, on his version, would already have been included in these amounts.

[13] As mentioned, there were material defects in Abdul's evidence too. He admitted when questioned about the transfers he now alleged to have made from his trading accounts into the investment accounts that he had previously given Absa's attorney, Ms Wright, a contrary version that the funds he invested comprised of cash that he kept and accumulated in a safe. He could not explain satisfactorily why he said he invested 'R1.4 million to R1.5 million' in his founding affidavit whereas his

oral version was that the investment amount was ‘approximately R2 million’. It also came about that his tax amnesty application, which SARS ultimately rejected, was curiously brought under his wife’s business, Nadrav Wholesalers CC, to which he said he advanced his ‘total capital investment held with [Absa] in the names of Goden Stores, Judson Agencies and HIF Investments’ in 2009.

[14] Absa called only one witness, Mr Uwe Erich Otto, its long-time employee and ‘specialised forensic investigator’. Otto’s evidence mainly concerned his investigations into and findings on Mistry’s large scale fraud which he said spanned 2007 to 2009. He explained the investment deposit process and significance of a teller’s stamp as follows. The cardinal requirements whenever the bank collected funds from a client for saving or investment were (a) the completion of application documents by recording the client’s details and stipulations for the relevant transaction and (b) the issue of an official acknowledgement of the receipt of funds by a bank official in the form of a deposit receipt or certificate. In the case of an investment transaction, the receipt had to be endorsed by a teller’s stamp which identified the official who collected the deposit and indicated the date of collection and the site or branch code. The importance of the teller stamp was that it enabled the bank, if any problem arose with a transaction, to trace it back to the specific branch and the specific staff member, who attended the transaction, for confirmation and rectification.

[15] His investigation, prompted by an anonymous tipoff received in February 2009, revealed that the account numbers on the respondents’ deposit receipts did not exist in Absa’s systems and platform, as he called it. The only exception was the number which suspiciously appeared on the deposit receipts in respect of both Judson

Trading and JT Investments. His search revealed that this account number was in fact a genuine Absa number. But it was allocated to a different client, Judson Timber CC, which had no connection whatsoever to Mahomed and his entities.[5] This went against Absa's practice of allocating a unique account number to each client. He confirmed that the trading accounts, BEE Central, Shy Prop Investments CC and SM Store Manufacturers, from which Abdul claimed to have transferred funds for his investments, in fact existed in Absa's client records. But according to him, no withdrawals or transfers matching the alleged investments were made from these entities' accounts. He also disputed Abdul's version that he made the investment transfers in 2003 and 2004 with the use of the old style, barcoded bank books which Mistry had given him. Absa had phased out the bank book system in 1998 and replaced it with the bank card system and regularly issued bank statements in respect of all accounts. Otto also dismissed the respondents' deposit receipts, which he said bore an unfamiliar print font and style and no teller stamps but generic bank stamps, as falsified. But he could not dispute the respondents' evidence that they concluded the investment agreements and deposited money with Mistry.

[16] Against this background, the court below found that Absa's denial of the agreements and deposits was without substance as no evidence supporting it was adduced. The court below found that it was not disputed that Mistry held himself out as, and was in fact, Absa's duly authorised agent with actual and ostensible authority to transact on Absa's behalf as he did when the investment transactions were effected. In the court's view, 'the contract to make a fixed deposit investment . . . was separate and distinguishable from the financial advice on how to evade . . . tax . . . [and] was irrelevant to the issue that the branch manager of the bank, with the requisite actual or ostensible authority, solicited and took deposits from the

[respondents] and issued fixed deposit deposits in respect thereof'. Thus, the respondents had established the

[5] This entity had lodged its own claim which was subsequently found legitimate and paid by Absa.

requirements to hold Absa liable for its agent's acts on the basis of estoppel and proved their pleaded case on a balance of probabilities. Absa was held liable and ordered to pay the respondents' claims as prayed plus interest on the total capital amount at the legal rate from the date of the institution of the proceedings to date of payment. It is this decision that is the subject of this appeal.

[17] A few weeks before the hearing of the appeal, long after the parties had filed their heads of argument, Mahomed lodged an application to amend his replication by adding that Absa was estopped from denying Mistry's authority to represent it. The reason given for his failure to raise this defence previously was that Absa had admitted its liability for Mistry's fraud and other facts satisfying estoppel in the sequestration proceedings it launched against Mistry. It was also contended that Absa waived its right to object to the amendment, which would not occasion any prejudice to it anyway, as the subject matter was canvassed in the court below and that if Absa 'was genuinely prejudiced it would have asked for remittal'. Absa opposed the amendment application on various grounds, including its lateness and the attendant prejudice it said it would suffer because the defence was not properly canvassed at trial and is not supported by available evidence.

[18] The application, which was argued during the appeal hearing, may be dealt with shortly. According to Mahomed's affidavit, the reason given for the lateness of the application was known to him even before he approached the high court for relief. As indicated above, Absa expressly denied that Mistry was authorised to represent it in the circumstances of the respondents' claims in its plea. Neither respondent raised estoppel to this denial in their replication. And it appears from the affidavit filed in support of the amendment application that this was a deliberate choice by Mahomed

and his legal representatives. Significantly, on several occasions thereafter, Absa pertinently raised the respondents' failure to plead estoppel in respect of Mistry's authority, the genuineness of the deposit receipts and the issue of the teller stamps – in its heads of argument filed in the court below and, subsequently, in further submissions filed in support of its application for leave to appeal in that court, in its notice of appeal as a specific ground of appeal and in its heads of argument in this appeal. None of these repeated cautions evoked any response until the eleventh hour and it remains unclear why Mahomed suddenly saw the need to raise it at this late stage.

[19] Quite obviously, the introduction of this defence, if allowed, will alter the foundation of Mahomed's case and the issues that were to be determined by the court below. That has a direct bearing on the manner in which the parties would have conducted their cases at the trial. For example, had the defence been raised properly, Absa could well have filed a rejoinder, interrogated the issue in further particulars if necessary and dealt with it in evidence. Allowing the proposed amendment at this stage would undoubtedly prejudice Absa as it would deprive it of its right to have taken the above steps. It would also deprive the trial court, this court and the parties themselves of a proper ventilation of the issue. As a result, the amendment cannot be allowed and is refused. Furthermore, as neither respondent relied on the apparent authority of Mistry at the trial, it simply was not an issue before the court below despite the latter's finding in this regard, which I deal with later in the judgment.

[20] About two weeks before the appeal hearing, Mahomed's attorneys made yet another approach to this court on his behalf. They wrote the Acting President of the court recording Mahomed's apprehension that two of the justices assigned to

adjudicate the appeal, Malan and Willis JJA, were biased against his cause. This perceived partiality reportedly arose from the justices' 'interest' in or 'association' with Absa, discovered by the attorneys pursuant to their investigation into the issue. According to the letter, Malan JA was a director at HRSC-RAU research unit for Banking Law between 1987 and 1997 and Willis JA was a Fellow of the Institute of Bankers of South Africa in 1995.

[21] The attorneys' letter continued:

'The reported case from the Constitutional Court Bernert v Absa Bank 2011 (3) SA (CC) revealed that:

i) Prior to Malan JA's appointment to the bench he was employed by the Institute of Banking and Finance Law at Rand Afrikaans University (now the University of Johannesburg).

ii) The Institute founded by Malan JA, was mainly sponsored by five major South African Banks, with Absa Bank being the main sponsor.

iii) Absa Bank paid the salary of Malan JA.

iv) Absa Bank paid for Malan JA's overseas research trips whilst he was employed by the Institute.

. . .

The interest and / or association Malan JA and Willis JA have with [Absa] was information exclusively in the domain of Absa, Malan JA and Willis JA. [They] did not at any stage disclose this to [Mahomed].The suppression of this material information in disregard to the law as expressed by the Chief Justice in Bernert … has undermined [Mahomed's] confidence in the judiciary. . . . The failure by Malan JA and Willis JA to discharge the obligation of disclosure imposed by them by law of the land fortifies our client's reasonable apprehension of bias.'

[22] In response to this letter, the Acting President of this court referred to the Constitutional Court's ratio in this regard in the *Bernert* judgment which decided the exact issue. But he directed Mahomed to file a substantive application for the

justices' recusal by the date of the appeal hearing, if he so wished. All was quiet until three days before the hearing when another letter from Mahomed's attorneys addressed to the two justices, was delivered at the court. Referring to the *Bernert* judgment, the letter stated that Mahomed was considering his options and needed to know 'the current nature, extent and value of Malan JA and Willis JA's interest and / or association with Absa Bank'. No recusal application had been filed when the appeal was called in court on the date of its hearing. Instead, Mahomed's attorney informed us that he would not be pursuing a recusal application and sought the court's leave merely to place on record that the two justices failed to disclose their ties with Absa, as they were enjoined by the law, and did not timeously respond to his written query.

[23] First, Willis JA has never had any 'interest and/or association' with Absa as alleged in Mahomed's first letter and has never had any dealings of whatever nature with the bank. The objection against him was unfounded also in so far as the objection against Willis JA was premised on the fact that he is a Fellow of the Institute of Bankers in South Africa. The insitute is a professional body whose objective is to further the interests of the banking profession, bankers and the general public. It exists to raise the professional standards of the banking industry in this country, a fact which Mahomed's attorney conceded during the hearing of the appeal. An enquiry into the nature of the institute, which Mahomed's attorney admitted he did not exactly know, would have been expected before an objection against Willis JA's involvement in the appeal was raised.

[24] As for Malan JA, the precise allegations about his purported ties with Absa contained in Mahomed's letter were raised to support a finding of bias against Malan JA in the *Bernert* case. At the foot of page 92 of that judgment it is recorded that they

are 'wholly untrue or substantively incorrect'. And the Constitutional Court dealt pertinently with the issue, on the exact set of facts, and had this to say:[6]

'Prior association with an institution cannot form the basis of a reasonable apprehension of bias, "unless the subject-matter of the litigation in question arises from such associations or activities". Most judicial officials would have been engaged in a number of activities in pursuit of their professional lives before their appointment. These activities contribute to the expertise that judicial officers bring to the bench. What is required is that judicial officers should decide cases that come before them without fear, favour or prejudice, according to the facts and the law, and not according to their subjective personal views. Of course, where a judicial officer, in his or her former capacity, either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for that judicial officer to sit in that case. . . . There is no suggestion in this case that the subject-matter of the litigation arises from the association which ... Malan JA had with Absa Bank prior to [his] appointment to the bench. Nor is there any suggestion that in the course of [his] association with Absa Bank, [he] acquired personal information that was relevant to the appeal before [him]. Nor do I consider that there was any obligation on [him] to disclose [his] prior association with Absa Bank. In *SARFU II* [1999 (4) SA 147 (CC) para 89] this court said that "(j)udicial officers are obliged to disclose only such facts as might reasonably be relevant to a recusal application". Non-disclosure of irrelevant facts cannot, therefore, be a basis for a reasonable apprehension of bias. . . . No case, therefore, has been made that ... Malan JA should have recused [himself] because of prior association with Absa Bank.'

[25] The above comments are clear and need no explanation. Without doubt, the subject-matter of this appeal does not arise from any association Malan JA might have had with Absa. Nor is there even a hint that in the course of that association they acquired personal information that is relevant to this appeal. Mahomed's or his attorneys' apprehension of bias had no basis whatsoever in the circumstances. The justices owed Mahomed no obligation to disclose their prior association with Absa. It must be said that it seems rather mischievous of Mahomed and his attorneys (who incidentally invited television media to record the appeal proceedings without first

[6] At paras 78 to 80.

asking this court's permission as is required), with the full awareness of the *Bernert* decision, to raise this issue as they did and to persist with their allegations of bias even after their correspondence with the Acting President of this court which pointed out that the *Bernert* judgment to which they referred did not support Mahomed's 'apprehension of bias'.

[26] I turn to deal with the merits of the appeal. The issues on appeal were whether (a) Mistry was duly authorised to represent Absa in concluding the investment agreements, which were designed to defraud SARS (and whether the court below was entitled to have regard to the issue of estoppel which had not been pleaded), (b) the respondents had established and proved their pleaded causes of action, (c) the respondents were to be non-suited in enforcing illegal agreements against Absa from which it did not benefit, and (d) the respondents were satisfactory witnesses.

[27] It was contended on Absa's behalf that the respondents, who were poor witnesses, failed to prove the alleged agreements. Mistry was not, and could not, have been authorised to represent Absa in concluding the unlawful agreements, it was argued. And the issues of ostensible authority and estoppel were irrelevant because the respondents did not replicate an estoppel. But even if they had done so, their claims would still fail. This was so, it was argued, because the relevant representations were made by Mistry and not by Absa, and the respondents could not reasonably have understood that Mistry was authorised to bind Absa to unlawful agreements. And the respondents failed to prove an essential requirement of the agreements, that the deposit receipts bore Absa's teller stamps. It was finally contended that even if the respondents succeeded on these points, the claims could not be allowed as to do so would sanction their unlawful conduct in circumstances where Absa is an innocent party.

[28] The respondents contended that the court below decided the matter correctly. Their main submission was that Absa was liable and could not distance itself from its agent's action with whom they contracted and secured deposit receipts as proof of payment. They emphasised that Otto was unable to gainsay that they concluded the agreements with Mistry and gave him money. It was insisted that they honestly made full disclosures in their tax amnesty applications and relied entirely on their financial advisor and accountant, Mistry, at all material times. Absa's omission to call Mr Sheldon Martin of its legal department, who deposed to the sequestration affidavit, as a witness was criticised. A point was made that Absa suppressed the full reports of its forensic investigation and insurance claims in respect of Mistry's fraud and could well have been reimbursed for all its losses, including for the respondents' stolen investments, by its underwriters. Absa was also castigated for failing to comply with FICA requirements. Mahomed's attorney further urged us to consider the matter with reference to the country's apartheid past as the respondents decided to evade tax so as not to empower the apartheid government and that they were granted amnesty by SARS upon full disclosure of their financial status. For Abdul it was also argued that his case was different because Absa had records of his investment accounts and the bank did not disclose what was yielded by its search into the four legitimate accounts from which he claimed to have transferred funds to the investment accounts.

[29] As I see it, the real issue in the parties' dispute, in light of their pleadings, having regard to the refusal of the amendment application to introduce estoppel to Mahomed's replication, and the evidence adduced at the trial, is whether Mistry was duly authorised to represent Absa in concluding the alleged investment agreements.

In view of Absa's categorical denial of such authority, the respondents were obliged to

prove that Mistry had actual authority ie express authority given by words or implied authority inferred from the conduct of the parties and the circumstances of the case.[7]

[30] Even assuming that the respondents concluded the investment agreements with Mistry and handed him money as they alleged, it nevertheless remains clear from the evidence led at the trial and the agency agreement concluded between Mistry and Absa that the latter did not give express authority to Mistry to conclude the alleged agreements. Clause 5.5 of the agency agreement specifically set out the precise scope of Mistry's authority regarding the collection of money from the bank's clients as follows:

'Subject to the Agency directives at all times being strictly complied with, the Agent may receive money from clients on United's behalf only against completion of the necessary documents in each case and in each case the Agent shall give the official United acknowledgement to the person making the deposit or payment.'

Otto's testimony that the official bank acknowledgement was in the form of teller stamps and that the stamps on the respondents' deposit receipts were ordinary bank stamps and not the teller stamps demanded by the very receipts, was not gainsaid. Therefore, the respondents did not have official Absa acknowledgement of their deposits. Whether the difference between the two types of bank stamps was readily discernible to a bank customer is irrelevant in the light of the pleaded terms of the agreements.

[7] *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A ([1967] 3 All ER 98 at 102A; *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) at para 24.

[31] Moreover, on their own version, the respondents intentionally and knowingly colluded with Mistry to open investments accounts with Absa in fictitious names to facilitate their tax evasion, unlawful conduct which Absa was not shown to have authorised Mistry, expressly (or otherwise), to undertake on its behalf. In this regard, I cannot agree with the view espoused by the court below that the respondents' underlying unlawful intent to circumvent tax laws has no bearing on the validity of their claims and is a matter to be dealt with by SARS.

[32] Having failed to establish express authority, the respondents were obliged to prove that Mistry had implied authority to contract with them under the circumstances and on the terms they alleged he did, within the usual scope of his office.[8] As this court has pointed out:

'The appointment by a bank of a branch manager [or, as in this case, an agent] implies a representation to the outside world that the branch manager [or agent] is empowered to represent the bank in the sort of business (and transactions) that a branch of the bank and its manager [or agent] would ordinarily conduct. The notion of "ordinary business" in turn implies a qualification in the form of a limitation: that the branch manager [or agent] is not authorised to bind the bank to a transaction that is not of the ordinary kind. What the ordinary kind of business is remains a matter of fact and hence of evidence. . . . A branch manager [or agent] clearly does not have, nor can he reasonably be believed by anyone to have, free hand to bind the bank at will. His authority to do so is not unlimited both as to the nature and the extent of the business he purports to transact in the bank's name. . . . An outsider dealing with a branch manager [or agent] is entitled to assume that the latter's functions encompass, but do not exceed, the activities that a branch manager [or agent] would commonly be known to perform.'[9]

[8] *Hely- Hutchinson*, above, n 7.
[9] In *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) para 15.

[33] It should go without saying that the type of agreements which Mistry purportedly concluded with the respondents on Absa's behalf do not fall within the

category of business or transactions that a branch of a bank and its agent would ordinarily conduct. And the respondents most certainly could not reasonably have believed that engaging in fraudulent conduct fell within Mistry's functions and that Absa had authorised him to represent it in unlawful activity. The respondents, therefore, failed to prove that Mistry had implied authority to conclude the alleged investment agreements on Absa's behalf. The court below, which referred to the *Glofinco* judgment for its finding in this regard, obviously misapplied the decision of the majority judgment in that case.

[34] I have dealt with the issue of estoppel which bears on ostensible authority, albeit in another context. As I have said, the court below was not entitled to address it for the simple but compelling reason that it was not pleaded and was therefore not an issue between the parties. The court's finding that it was not in dispute that Mistry had (actual and) ostensible authority to represent Absa as he did was, of course, wrong. That should be the end of this issue. But I should perhaps add that even if the defence of estoppel had been raised pertinently the respondents would not have succeeded in their claims. They simply would not be able, on the available evidence, to meet the essentials of estoppel: a representation by words or conduct, made by Absa as the principal that Mistry had the authority to conclude the unlawful agreements, that their belief in the representation was reasonable and that they acted on that belief to their prejudice.[10] A party which knows that a transaction is unlawful or is part of an unlawful scheme and is aware or should reasonably be aware that the principal of the agent with whom it is contracting would not countenance the

[10] *NBS Bank Ltd* above, n 7.

conclusion of such a transaction, is, in any event, precluded from relying on ostensible authority.[11]

[35] In sum, in the light of the terms of the agreements pleaded by the respondents and the absence of the teller stamps on the deposit receipts, there was no admissible acknowledgement or admission by Absa of the amounts allegedly deposited with Mistry. The respondents thus failed to prove not only that Absa misappropriated their investments but even the very quantum of their claims. They failed to establish their pleaded causes of action. For these reasons, their claims should have been dismissed and there is no need to consider the other issues raised in the appeal and the further misdirections of the court below.

[36] Lastly, there is another matter that requires mention. After we heard the appeal, a document titled '1st Respondent's Elucidation on Issues Raised by Learned Judges on the 21 November 2013' was filed on Mahomed's behalf without our permission. According to this court's practice, parties may not file new material after the hearing of an appeal without the court's leave.[12] But, in any event, the document essentially rehashes submissions that were made during the appeal and does not add any value to Mahomed's case. Nothing more need be said about it.

[37] In the result, the following order is made:

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

2 The order of the court below is set aside and replaced with the following:

---

[11] *Absa Bank Ltd v IW Blumberg & Wilkinson* 1997 (3) SA 669 (SCA) at 667G-H and 681G-H; *Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249 (A).

[12] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and others* 2013 (4) SA 557 (SCA) para 7.

‘(a) The first plaintiff’s action is dismissed with costs, including the costs of two counsel.

(b) The second plaintiff’s action is dismissed with costs, including the costs of two counsel.’

MML Maya
Judge of Appeal

APPEARANCES

APPELLANT:	KW Luderitz SC (with GW Amm)
	Instructed by:
	Lowndes Dlamini Attorneys, Johannesburg
	Matsepes Inc., Bloemfontein
1ST RESPONDENT:	Z Omar
	Instructed by:
	Zehir Omar Attorneys, Johannesburg
	Ben van der Merwe Attorneys, Bloemfontein
2ND RESPONDENT:	DR Thompson / S Ebrahim
	Instructed by:
	Saleem Ebrahim Attorneys
	Bokwa Attorneys, Bloemfontein