CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 52/15

In the matter between:

KENNETH NKOSANA MAKATE Applicant

and

VODACOM (PTY) LIMITED Respondent

Neutral citation:	*Makate v Vodacom (Pty) Ltd* [2016] ZACC 13
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J
Judgments:	Jafta J (majority): [1] to [107] Wallis AJ (concurring): [108] to [200]
Heard on:	1 September 2015
Decided on:	26 April 2016
Summary:	Contract — breach — oral agreement to negotiate in good faith Pleadings — Ostensible authority — Distinct from estoppel — Not necessary to plead ostensible authority in replication Prescription Act 68 of 1969 — Sections 10(1), 11(d), 129(d) — interpretation of "debt" Constitution — Section 39(2) — Narrow interpretation of "debt" — claim not prescribed

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Gauteng Local Division of the High Court, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Gauteng Local Division of the High Court, Johannesburg, is set aside and replaced with the following order:
   "(a) It is declared that Vodacom (Pty) Limited is bound by the agreement concluded by Mr Kenneth Nkosana Makate and Mr Philip Geissler.
   (b) Vodacom is ordered to commence negotiations in good faith with Mr Kenneth Nkosana Makate for determining a reasonable compensation payable to him in terms of the agreement.
   (c) In the event of the parties failing to agree on the reasonable compensation, the matter must be submitted to Vodacom's Chief Executive Officer for determination of the amount within a reasonable time.
   (d) Vodacom is ordered to pay the costs of the action, including the costs of two counsel, if applicable, and the costs of the expert, Mr Zatkovich."
4. The negotiations mentioned in 3(b) must commence within 30 calendar days from the date of this order.
5. Vodacom is ordered to pay the applicant's costs in this Court and in the Supreme Court of Appeal, which include costs of two counsel, where applicable

JUDGMENT

JAFTA J (Mogoeng CJ, Moseneke DCJ, Khampepe J, Matojane AJ, Nkabinde J and Zondo J concurring):

[1] This application for leave to appeal is about the enforcement of a contract concluded by the applicant and the respondent's agent. The case concerns payment of compensation for the use of the applicant's idea in developing a lucrative product which has generated billions of rands for the respondent. In resisting the claim, the respondent has raised a number of defences, two of which were upheld by the Gauteng Local Division of the High Court, Johannesburg (trial Court). These were that the agent had no authority to enter into the agreement and that the applicant's claim had prescribed. Both the trial Court and the Supreme Court of Appeal refused to grant the applicant leave to appeal, hence this application.

Factual background

[2] The applicant is Mr Kenneth Nkosana Makate, a former employee of the respondent, Vodacom (Pty) Limited (Vodacom). During 2000 the applicant was employed by Vodacom as a trainee accountant. In November 2000 he was involved in a long distance relationship with a student who later became his wife. They experienced communication difficulties, owing mainly to the fact that his girlfriend could not afford to buy airtime for purposes of making telephone calls to him. As a result the applicant was the one who initiated their telephone calls.

[3] Both of them were familiar with the practice in terms of which a cellphone user with low airtime would dial the number of another cellphone user and allow the cellphone to ring twice before cancelling the call. But for the message to be conveyed

the one who initiated the call had to have some airtime and therefore the practice did not resolve the couple's communication difficulty.

[4] Meanwhile the applicant came up with an idea in terms of which the cellphone user who has no airtime would be able to send the request to the other cellphone user who has airtime to call the former. The idea was reduced to writing and the applicant consulted his superior and mentor at Vodacom for advice on how he could sell it to any of the cellphone service providers, including Vodacom. His mentor, Mr Lazarus Muchenje advised him to speak to the Director of Product Development and Management, Mr Philip Geissler.

[5] The applicant and Mr Geissler negotiated and agreed that Vodacom would use the applicant's idea to develop a new product which would be put on trial for commercial viability. If the product was successful then the applicant would be paid a share in the revenue generated by it. Although the applicant had indicated that he wanted 15% of the revenue, the parties deferred their negotiations on the amount to be paid to the applicant for a later date. However, they agreed that in the event of them failing to agree on the amount, Vodacom's Chief Executive Officer (CEO) would determine the amount.

[6] Based on the applicant's idea Vodacom developed a new product which was called, "Please Call Me". This product enabled a cellphone user with no airtime to send a message to the other cellphone user, asking her to call him. The new product elicited excitement at Vodacom and the inventor of the idea on which it was built was praised for his innovative thinking. Vodacom's internal newsletter described the applicant's idea in these terms:

> "Vodacom has launched a new product called 'Call Me', thanks to Kenneth Makate from our finance department. Kenneth suggested the service to the product development team, which immediately took up the idea. 'Call Me' is a world first and allows Vodago prepaid users to send a free text message to other Vodacom customers requesting that they call them back. The main aim of this product is to

> allow Vodacom users who do not have balances on their accounts to keep in touch with their families and loved ones."

[7] The newsletter did not only exude excitement about the new product which was regarded by Vodacom to be the first of its kind in the whole world but also declared its success. In this regard the newsletter stated:

> "'Call Me' has been a big success. On the first day of operation about 140 000 customers made use of the service. It will be free until December 31 this year and thereafter cost users 15 cents per transaction."

[8] In the same newsletter, the Managing Director of Vodacom, Mr Mthembu, heaped praises on the applicant for his idea. He said:

> "Most impressive to me was the fact that the idea of the product came from one of our staff members whose job is not in any way related to product development. This led me to ask myself one question: what would happen in this company if we were all to come up with workable solutions to our company's problems like Kenneth did?"

[9] As stated in the newsletter the service was offered for free for a limited period from the date of its launch. Later Vodacom charged for it. Despite the fee charged the "Please Call Me" was an instant hit with customers and raked in a lot of money for Vodacom. It is common cause that this product has generated revenue amounting to billions of rands.

[10] As it was customary within Vodacom to make and implement business decisions before they received the approval of the board, the "Please Call Me" product was also launched before Vodacom's Board approved it on 15 March 2001.

[11] Despite the product being a success, Vodacom did not negotiate compensation for the use of the applicant's idea. Instead, as the High Court later held, Messrs Knott-Craig, Vodacom's CEO, and Geissler created a false narrative pertaining to the origin of the idea on which the "Please Call Me" product was based.

They dishonestly credited Mr Knott-Craig with the idea and this lie was perpetuated in the latter's autobiography. When the media queried the correctness of the story, Mr Knott-Craig solicited confirmation from Mr Geissler who was on holiday in Mauritius. Mr Geissler responded by email on 25 December 2009 in which he said:

> "As discussed, I read your latest book and agree, in principle with the way Please Call Me was created on the fourth floor outside your office with two of Vodacom's security guards playing a role of the two 'prepaid' users without any credit on their phones – communicating with each other.
>
> The concept of 'Call Me' refined inside your office minutes later and launched officially in late January 2001.
>
> I hope this helps with the media queries."

[12] Mr Geissler's email contradicted his earlier email of 9 February 2001 which was addressed to staff at Vodacom, informing them about the launch of the "Please Call Me" product. That email reads:

> "Dear All Vodacom Staff, Vodacom is launching a new product this weekend (Sunday Times) which will hopefully stimulate all traffic on the network as well as assist some of our subscribers who do not have balances on their Vodago accounts to be able to communicate with friends and family. This service is free until the end of the year and then will go to 15c per transaction. Kenneth Makate from our Finance Department came up with this idea a few months ago and brought it to the Product Development Division. We wish to thank Kenneth for bringing his idea to our attention."

[13] The fact that the applicant was the inventor of the idea was further acknowledged in Vodacom's newsletter that was published in March 2001. Its contents were quoted earlier in which even the Managing Director of Vodacom praised the applicant for his idea. Despite these facts, Messrs Knott-Craig and Geissler later claimed that it was the CEO's idea. This untrue story appears to have

been part of a stratagem to deny the applicant compensation for the idea. Vodacom first accused him of having stolen the idea from MTN, its competitor.

Litigation History

[14] Approximately two and a half years after the launch of the product, the applicant left Vodacom's employ. He instituted action to enforce his agreement with Vodacom in the High Court in 2008, some four years after the launch of the "Please Call Me" product. He sought an order directing Vodacom to comply with its obligations under the parties' oral agreement.[1] In the alternative the applicant sought the development of the common law in terms of section 39(2) of the Constitution and to infuse it with constitutional values of ubuntu and good faith. Flowing from the alternative claim, the applicant sought an order directing Vodacom to enter into good faith negotiations with him, to determine a reasonable remuneration payable to the applicant for the use of his idea in developing the "Please Call Me" service.

[15] Vodacom responded by filing two special pleas and raising a number of defences. The first asserted that the applicant's claim had prescribed in terms of section 11(d) of the Prescription Act.[2] The second contended that in terms of the applicant's employment contract, the idea in question was Vodacom's property for which the applicant was not entitled to compensation.

[16] In the main plea, Vodacom disputed the existence of the agreement on which the applicant relied. Furthermore, the authority of Messrs Muchenje and Geissler to conclude the agreement on behalf of Vodacom was placed in issue. Vodacom asserted that both of them did not have actual or ostensible authority to enter into the agreement on its behalf.[3]

[1] In addition he sought delivery of a statement of account and debatement of such account as well as ordering Vodacom to pay him 15% of revenue generated by the "Please Call Me" service.

[2] 68 of 1969.

[3] Mr Makate's particulars of claim alleged that Vodacom was represented by both Mr Geissler and Mr Muchenje.

[17] At the trial the applicant testified in support of his claim and also called Mr Muchenje and an American computer science and telecommunications expert, as witnesses. Vodacom led the evidence of Mr Knott-Craig only. For reasons that were not explained to the trial Court, Vodacom did not call Mr Geissler who received the applicant's business idea and caused it to be developed into a lucrative service for Vodacom. Nor did it call Mr Mthembu, its Managing Director, who applauded the applicant for this innovative idea.

[18] Following a detailed analysis of the evidence the trial Court furnished extensive reasons for accepting the applicant's evidence and that of his witnesses. The trial Court was impressed by the American expert and Mr Muchenje as witnesses. The Court described Mr Muchenje as "an honest witness who came to relate what he personally knew about the matter".[4] The Court held that the differences between his evidence and that of the applicant were not material and concluded that Mr Muchenje's testimony was consistent with the general probabilities. The Court also noted that Mr Muchenje had consulted with Vodacom's lawyers before he was called to testify on the applicant's behalf.[5] The trial Court observed further that Mr Muchenje remained calm and collected, despite the "lengthy, searching and gruelling cross-examination" he was subjected to by a "highly skilled and very experienced counsel" for Vodacom.

[19] With regard to the applicant, the trial Court found that he gave his evidence in a "reasonable manner", in spite of the lengthy and skilful cross-examination. The Court noted that the applicant's version was corroborated in material respects by the contents of the newsletter and the emails that came from Mr Geissler. The Court also took into account that the applicant's testimony on the existence of the agreement stood uncontroverted, despite Mr Geissler's availability. From Vodacom's failure to

[4] *Makate v Vodacom (Pty) Ltd* [2011] ZAGPJHC 241; 2014 (1) SA 191 (G) (High Court judgment) at paras 73-4.

[5] Id at para 74.

call Mr Geissler, the trial Court drew the inference that he was not able to deny the version furnished by the applicant and Mr Muchenje.[6]

[20] But Mr Knott-Craig performed dismally as a witness. The trial Court found no difficulty in rejecting his evidence. The Court's analysis of his evidence was rightly scathing. He was willing to lie about matters which were documented in the records of Vodacom. For example, he arrogated to himself, in his autobiography, the idea on which the "Please Call Me" service was based, despite the fact that in February 2001 Mr Geissler had sent out an email to all members of staff, informing them about the launch of the service and acknowledging the applicant as the author of the idea. This acknowledgement was repeated in the newsletter of March 2001 by Vodacom's Managing Director. In this regard the trial Court found that it was likely that Mr Knott-Craig was familiar with that newsletter because he also contributed an article to it.

[21] When the media queried the correctness of the assertion that Mr Knott-Craig was the source of the idea, he went a step further to find a willing participant, in Mr Geissler, to perpetuate the lie. He sought and obtained from Mr Geissler a written untruthful confirmation that the idea was that of Mr Knott-Craig. This Mr Geissler did despite the contents of his earlier email of February 2001 which was addressed to all employees of Vodacom in which the applicant was declared the author of the idea. Indeed, the trial Court's inference that Mr Geissler's credibility was compromised was fully justified. That Court described the explanation furnished by Mr Knott-Craig for the contradiction on the origin of the idea, as nonsensical. On the contrary, the trial Court found that Mr Knott-Craig knew the true version of how the "Please Call Me" service originated.[7]

[22] Having rejected Mr Knott-Craig's testimony for a number of reasons, the trial Court held that, for unexplained reasons, both Mr Knott-Craig and Mr Geissler

[6] Id at para 80.

[7] Id at para 87.

sought to "write the plaintiff out of the 'Please Call Me' script for financial and other reasons". The Court concluded that the applicant had established the agreement concluded by him and Mr Geissler.

[23] The conclusion that the agreement had been established drove the trial Court to determining whether Vodacom was bound by that agreement. This enquiry became necessary in the light of Vodacom's assertion that Mr Geissler had no authority to conclude the agreement on Vodacom's behalf. The trial Court commenced by directing its focus to the pleadings and analysed them with the view to determine whether the applicant had properly pleaded ostensible authority.

[24] With reference to *Amler's Precedents of Pleadings*,[8] the trial Court held that the applicant must have pleaded ostensible authority in replication. The Court regarded as insufficient the allegation in the applicant's particulars to the effect that Mr Geissler had ostensible authority. But, the Court proceeded to hold that on the evidence placed on record, the applicant had failed to show a representation by Vodacom itself, giving rise to an impression that Mr Geissler had authority to conclude the agreement on its behalf.[9]

[25] The last issue to receive the attention of the trial Court was whether the applicant's claim had prescribed. The trial Court held that under the Prescription Act, what prescribes is a "debt". With reference to section 10(1), read with section 11(d), 12(1) and 12(3) of that Act, the word "debt" was given a wide meaning which included a claim to pay the applicant a share of the revenue and the obligation to negotiate a reasonable compensation for the use of the applicant's idea.[10] For the

[8] Harms, *Amler's Precedents of Pleadings* 6 ed (LexisNexis, Durban 2007) (*Amler*) at 166-7.

[9] High Court judgment above n 4 at paras 165 and 173.

[10] Id at para 181.

wide meaning assigned to "debt", the trial Court relied on *Desai*[11] and *LTA Construction*.[12]

[26] Having concluded that the applicant's claim constituted a debt contemplated in the relevant provisions of the Prescription Act, the trial Court held that the claim had prescribed because the action was instituted after a period of more than three years had lapsed, from the date on which the debt arose. The Court found that the claim arose in November 2000 and that the summons was served on Vodacom on 14 July 2005.

[27] In view of its conclusions on ostensible authority and prescription, the trial Court did not consider it necessary to express any view on the other issues. These included the request for the development of the common law in terms of section 39(2) of the Constitution and the competence of the relief sought. Consequently the applicant's claim was dismissed with costs.

[28] The trial Court refused to grant leave to appeal and the subsequent approach to the Supreme Court of Appeal was also unsuccessful. The applicant has now turned to this Court for leave to appeal.

In this Court

[29] For the applicant to obtain leave, he must show that this Court has jurisdiction to entertain the matter and additionally that it is in the interests of justice to grant him leave to appeal. It cannot be gainsaid that this matter raises a constitutional issue located in section 39(2) of the Constitution.[13] In the pleadings before the High Court, the applicant asked for the development of the common law of contract to infuse it

[11] *Desai NO v Desai* [1995] ZASCA 113; 1996 (1) SA 141 (A).

[12] *LTA Construction v Minister of Public Works and Land Affairs* [1993] ZASCA 149; 1994 (1) SA 153 (A).

[13] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

with constitutional values such as ubuntu and good faith. In this Court the applicant took a step further and requested that section 39(2) be invoked when this Court construes the relevant provisions of the Prescription Act. He contended that the Act limits his right of access to court by declaring that his claim has prescribed. In these circumstances, it is not necessary to consider whether the matter also raises an arguable point of law of general public importance.

[30] Instead, what needs to be determined is whether the interests of justice favour the granting of leave. This case presents an opportunity to this Court to interpret the Prescription Act in accordance with section 39(2). The High Court grounded its construction of the relevant provisions on an interpretation of the pre-Constitution authorities.[14] Section 39(2) introduced an approach to statutory interpretation, different to the one followed under the doctrine of supremacy of Parliament. Moreover, there are prospects of success on the issues decided by the High Court in favour of Vodacom. Therefore, leave must be granted.

Issues

[31] Two main issues arise here. The first is whether the ostensible authority relied on by the applicant was established. In view of the High Court's approach, two subsidiary questions also occur. These are whether ostensible authority was properly pleaded and whether the common law ought to be developed in present circumstances.

[32] The second main issue is whether the applicant's claim had prescribed. The determination of this issue involves the proper interpretation of section 10(1) of the Prescription Act read with sections 11(d), 12(1) and 12(3). If it is true that the application of those provisions limited the applicant's right of access to court, then their interpretation must accord with section 39(2) of the Constitution. This interpretive approach will in turn require us to reassess the construction that was assigned to the Prescription Act under the era of the supremacy of Parliament because

[14] *Desai* and *LTA Construction* above n 11 and 12.

now the Constitution is the supreme law. All laws, including the common law of interpretation, derive their validity from the Constitution. I address these issues in turn but before doing so I must quickly dispose of an additional issue raised by Vodacom.

Was the agreement proved?

[33] Vodacom argued that the applicant has failed to establish the existence of the agreement on which his claim was based. It submitted that his evidence on the terms of the agreement was not consistent and that the trial Court accepted that the applicant confronted difficulties in relation to certain areas of his testimony.

[34] Indeed in paragraph 76 of the judgment, having held that the applicant's version was corroborated by Mr Geissler's emails and was also consistent with probabilities, the trial Court identified two areas of difficulty:

> "In addition, the e-mails that came from Mr Geissler to others, including the plaintiff and Mr Muchenje, concerning the plaintiff's idea and the '*Please Call Me*' product, provides further vital corroboration of material aspects of the plaintiff's version. The plaintiff's version is also consistent with the general probabilities and the probabilities arising from the common cause facts. Areas of the plaintiff's evidence where he confronted difficulty related, in particular, to his version that Mr Geissler had agreed with him that he would be remunerated for the use of his idea if it proved to be feasible technically and from a business perspective; and that he had, concerning remuneration, proposed to Mr Geissler a 15% share of the revenue (profit) derived from the product developed from his idea and that Mr Geissler had agreed that in the event of them not being able to fix a figure between themselves, Mr Knott-Craig, in his capacity as Chief Executive Officer of the defendant, would determine the figure. However, the emails confirm the involvement of . . . Mr Geissler in the issue of remuneration. Another area of difficulty for the plaintiff, was the alleged inconsistency between his version in court regarding the terms of the agreement he concluded with Mr Geissler and the correspondence sent by him, or on his behalf, before this action was instituted against the defendant."

[35] The High Court proceeded to give a number of reasons for accepting the applicant's evidence pertaining to the remuneration term. The first one was that in an email sent to the applicant, Mr Geissler had stated that he would be discussing the issue of remuneration with Mr Knott-Craig.[15] Second, despite vigorous cross-examination, the applicant "consistently maintained his version". Third, the applicant's evidence that he wanted to be paid for his idea was corroborated by Mr Muchenje whom the Court found to be an impressive witness. Added to these reasons was Vodacom's failure to call Mr Geissler and the fact that the applicant's testimony on the terms of the agreement stood uncontroverted.

[36] If anything, this reasoning shows that the trial Court was alive to the shortcomings in the applicant's evidence, which were properly assessed. For the reasons already stated, the Court did not consider those shortcomings to be of the nature that warranted the rejection of the applicant's evidence which it had found to have been consistent with the probabilities.

[37] In these circumstances, interference with the factual findings made by the trial Court is neither necessary nor justified. Ordinarily appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.[16] In *Bitcon*, Wessels CJ said:

> "[T]he trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were."[17]

[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The

[15] High Court judgment above n 4 at para 77.

[16] See *R v Dhlumayo and Another* 1948 (2) SA (A) and the authorities referred to therein.

[17] *Bitcon v Rosenberg* 1936 AD 380 at 396-7.

disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings. In *Powell & Wife*, Lord Wright formulated the principle thus:

> "Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."[18]

[39] Moreover, this being the highest Court in the Republic which is charged with upholding the Constitution, and deciding points of law of general public importance, this Court must not be saddled with the responsibility of resolving factual disputes where disputes of that kind have been determined by lower courts. Deciding factual disputes is ordinarily not the role of apex courts. Ordinarily an apex court declares the law that must be followed and applied by the other courts. Factual disputes must be determined by the lower courts and when cases come to this Court on appeal, they are adjudicated on the facts as found by the lower courts. Of course, this principle does not apply to matters that come directly to this Court.

[40] But even in the appeal, the deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In *Bernert* this Court affirmed:

> "What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by

[18] *Powell & Wife v Streatham Nursing Home* 1935 AC 243 at 265.

> a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading 'the cold printed word'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it."[19]

[41] Here there was no misdirection and the trial Court did not reach a wrong conclusion. On the contrary, it comprehensively analysed the evidence and set out compelling reasons for accepting evidence led by the applicant and rejecting that of the respondent. Consequently, we must approach this matter on the footing that the existence of an agreement between the applicant and Mr Geissler was established.

Was ostensible authority pleaded?

[42] In the High Court, Vodacom argued that the applicant could not rely on ostensible authority because he had failed to plead it in replication. Relying on *Amler*,[20] it was submitted that for a party to invoke estoppel, it must plead it in replication because it does not serve as a basis for a claim but that it amounts to a shield. The applicant sought to counter this argument by pointing to the fact that his particulars of claim alleged that Mr Geissler had ostensible authority to negotiate and conclude the agreement on behalf of Vodacom.[21]

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[19] *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106.

[20] Above n 8.

[21] The applicant's particulars of claim alleged:

> "The Defendant (Respondent) was represented by Mr Muchenje and Mr P. Geissler (hereinafter referred to as the representatives) who were then occupying the positions of Head of Finance Divisions and the Director of Product Development respectively, in the employ of the Defendant. The representatives were acting in the course and scope of employ with the Defendant. The representatives had ostensible authority to negotiate and to contract for and/or on behalf of the Defendant."

[43] In upholding Vodacom's argument, the trial Court stated:

> "The mere allegation in the particulars of claim, that Mr Geissler has 'ostensible authority', was not enough. The plaintiff had to plead an estoppel in replication. If the plaintiff was aware at the outset of the true facts, namely, that there was no actual authority and that he was relying on ostensible authority, he should have pleaded the facts, as represented to him, to found such authority, in his particulars of claim. If he was not aware that Mr Geissler had no actual authority and had pleaded actual authority and the defendant had, in turn, pleaded the true facts (i.e. a denial of actual authority), the plaintiff may then have relied on estoppel in his replication. But it was essential for the plaintiff to have pleaded the facts as represented to him, if he was aware of those facts. The estoppel, which is not a cause of action, should then have been pleaded in a replication, in response to the defendant's plea." (Footnote omitted.)

[44] The High Court's conclusion on this aspect was based on flawed reasoning. That Court proceeded from the premise that the applicant raised the issue of estoppel and since estoppel is put up as a shield, it can only be pleaded in replication. By so doing, the trial Court moved from the footing that conflated ostensible authority with estoppel. Although ostensible authority and estoppel have at times been treated synonymously by our courts, they are not one and the same thing.[22]

[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority.[23] But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to

[22] *South African Broadcasting Corporation v Coop and Others* [2009] ZASCA 30; 2006 (2) SA 217 (SCA) and *NBS Bank Ltd v Cape Produce Company Pty Ltd and Others* [2001] ZASCA 107; 2002 (1) SA 396 (SCA) (*NBS Bank)*.

[23] Kerr *Law of Agency* 4 ed (LexisNexis Butterworths, Durban 2006) at 27.

the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority.

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

[47] A closer examination of the original statement on apparent authority by Lord Denning, quoted below, reveals that the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority. The statement indicates the absence of the elements of estoppel. It does not mention prejudice at all. That statement of English law was imported as it is into our law in *NBS Bank* and other cases that followed it.[24]

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

> "[A]ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of

[24] *NBS Bank* above n 22; *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd* [2012] ZASCA 66; 2012 (5) SA 323 (SCA) ; *South African Broadcasting Corporation* above n 22 and *Glofinco v Absa Bank* [2002] ZASCA 91; 2002 (6) SA 470 (SCA) (*Glofinco SCA*).

> directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it. *Ostensible or apparent authority is the authority of an agent as it appears to others.* It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the 'holding-out'. Thus, if he orders goods worth £1,000 and signs himself 'Managing Director for and on behalf of the company,' the company is bound to the other party who does not know of the £500 limitation, see *British Thomson-Houston Co Ltd v Federated European Bank Ltd*, which was quoted for this purpose by Pearson LJ in *Freeman & Lockyer*. *Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority.* Suppose the managing director orders £1,000 worth of goods from a new director who has just joined the company and does not know of the £500 limitation, not having studied the minute book, the company may yet be bound. Lord Simonds in *Morris v Kanssen*, envisaged that sort of case, which was considered by Roskill J in the present case."[25] (Footnotes omitted and emphasis added.)

[49] It is significant to note that in the statement, Lord Denning stressed that: "Ostensible or apparent authority is the authority of an agent as it appears to others". This underscores the distinction between it and estoppel. The features of estoppel make this distinction even more noticeable. The essential elements of estoppel in the field of agency are the following:

[25] *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) (*Hely-Hutchinson CA*) at 583 A-G.

(a) a representation made in words or by conduct, including silence or inaction;[26]

(b) the representation must have been made by the principal to the person who raises estoppel (the representee);[27]

(c) the principal must reasonably have expected that her conduct may mislead the representee;[28] and

(d) the representee must reasonably have acted on the representation to his own prejudice.

[50] But our courts have sometimes conflated apparent authority with estoppel and this resulted in attributing the elements of estoppel to apparent authority. Without any substantiation, the Supreme Court of Appeal treated them as one in *NBS Bank*. In that case, having quoted the statement above, Schutz JA said:

> "As Denning MR points out, ostensible authority flows from the *appearances* of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. *Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong.* Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, to take this case, the fact that Assante held himself out as authorised to act as he did is by the way. What Cape Produce must establish is that the NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of

[26] *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A).

[27] *NBS Bank* above n 22 at para 25.

[28] *Monzali v Smith* 1929 AD 382 at 386.

> the representation. It is also necessary that the representee should have acted reasonably in forming that impression."[29] (Reference omitted and emphasis added.)

[51] In the next paragraph, the learned Judge proceeded to state the features of estoppel as elements of apparent authority. His words were:

> "What Cape Produce therefore has to prove in order to establish Assante's ostensible authority is:
>
> 1) A representation by words or conduct.
> 2) Made by the NBS and not merely by Assante, that he had the authority to act as he did.
> 3) A representation in a form such that the NBS should reasonably have expected that outsiders would act on the strength of it.
> 4) Reliance by Cape Produce on the representation.
> 5) The reasonableness of such reliance.
> 6) Consequent prejudice to Cape Produce. (This last element is clearly present and requires no further mention)."[30]

[52] Notably it appears from the emphasised sentence and what was listed by the learned Judge as elements of apparent authority that he simply conflated ostensible authority with estoppel. In doing so he overlooked that the statement taken from *Hely-Hutchinson CA* underscored that apparent authority is the agent's authority as it appears to others. It bears repeating that estoppel is not a form of authority. Not even by appearance. Furthermore, in the emphasised words, when defining estoppel, the learned Judge proceeded to state that estoppel describes a situation where a representor may be held accountable if he had created an impression, "even though he may not have intended to do so and even though the impression is in fact wrong". These words are in conflict with one of the essential elements of estoppel to the effect that the principal must have expected that the other party would act on the strength of his representation. He cannot have this expectation if in the first place he did not intend to create the impression. This is illogical.

[29] *NBS Bank* above n 22 at para 25.

[30] Id at para 26.

[53] Moreover, in the statement there is nothing that suggests that apparent authority may be equated to estoppel. Instead the converse appears to be true. In addition, with regard to the elements that the learned Judge had attributed to ostensible authority, the oddity is that the principal must reasonably have expected outsiders to act on the strength of the representation. This contradicts the plain words of Lord Denning who said:

> "Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority. Suppose the managing director orders £1,000 worth of goods from a new director who does not know of the £500 limitation, not having studied the minute book, the company may yet be bound." (Footnote omitted.)

Therefore, it is clear that, even if the representee is not an outsider, under apparent authority the principal could still be bound.

[54] The conflation of estoppel and apparent authority continued in *South African Broadcasting Corporation*. There the Supreme Court of Appeal declared:

> "The plaintiffs in a replication relied on estoppel, otherwise described as ostensible authority. A person who has not authorised another to conclude a juristic act on his or her behalf may in appropriate circumstances be estopped from denying that he or she had authorised the other so to act. The effect of a successful reliance on estoppel is that the person who has been estopped is liable as though he or she had authorised the other to act."[31] (Footnote omitted.)

[55] The conflation in *NBS Bank* also led to a less than satisfactory enquiry into whether apparent authority was established. The Supreme Court of Appeal had to apply the test for determining whether estoppel was proved. In doing so, the Court unnecessarily got entangled in the elements of estoppel. With regard to the question whether the plaintiffs were induced by the principal's representation when they

[31] *South African Broadcasting Corporation* above n 22 at para 63.

concluded investment transactions with the bank's branch manager, the Court held that this was proved, despite the evidence showing that the plaintiffs acted solely on the representation by the branch manager who was the bank's agent.

[56] The Supreme Court of Appeal recorded the following facts as proof of what influenced the plaintiffs to act:

> "Lapiner is a businessman of experience. It was his practice to make regular enquiries as to what rates of interest were on offer in the market, with a view to investing surplus cash from time to time to best advantage. It was his practice to invest only in what he called 'Triple A' companies. One day he came to hear of the excellent return being offered by the Kempton Park branch of the NBS. Assante had informed various financial brokers what was on offer. The scheme presented was that the NBS was lending to property developers who were prepared to pay high rates of interest, which allowed the NBS to offer better than average rates to substantial investors who were willing to lend NBS the funds necessary for the purpose. One of these brokers was Bradley. Bradley spoke to another broker, Mason, who knew Lapiner. The result was a meeting between Lapiner and Mason in October 1994. The latter produced a blank letter of 'guarantee' from the Kempton Park branch of the NBS. The NBS complied with Lapiner's criterion of a Triple A company. The investment was to be for a period of some months. The interest rate offered was 15%, which Lapiner described as 'slightly above the going rate at the time'. Lapiner insisted in evidence that he lent on the strength of NBS's name. He would have been 'horrified' at the thought of his money being lent not to the NBS but to developers whose identity he did not even know. At no time was he aware of any developers' names, nor had he heard of Nel or NOK."[32]

[57] The Supreme Court of Appeal held that by appointing Mr Assante as the branch manager, NBS Bank created a façade of regularity and order that made it possible for him to pursue his dishonest schemes. The appointment with all its trappings, including the branch manager's authority to accept investment deposits and pay them out later with interest, held the Court, amounted to a representation by the

[32] *NBS Bank* above n 22 at para 11.

bank that Mr Assante had authority to conclude investment transactions of the kind made by him with the plaintiffs.[33]

[58] But the facts set out above show that it was not the appointment of Mr Assante and the usual powers of the branch manager that attracted the plaintiffs specifically to his branch. If that were the case, they could have made their investment at any branch of the bank. But they did not because no other branch offered that level of interest. The evidence revealed that the plaintiffs were resident in Port Elizabeth and Mr Assante's branch was in Kempton Park in Johannesburg. The plaintiffs were drawn to this specific branch by the representation made by the branch manager through Mr Mason, a broker known to the plaintiffs. They made their investment deposits through the same broker. When the investments failed, they sued the bank alleging that its branch manager, who created the scheme relating to those investments as his own private business while using the bank's name and resources, had ostensible authority to bind the bank. The Court upheld this contention.

[59] The trial Court here adopted an incorrect approach to pleadings. That Court held that the applicant should have pleaded estoppel in replication. It will be recalled that the applicant had alleged in his particulars of claim that Mr Geissler had ostensible authority. Vodacom denied this fact in its plea. Consequently, ostensible authority became one of the issues to be determined at trial, as properly defined by the pleadings. In the circumstances the trial Court erred in holding that apparent authority was not pleaded, because it was not introduced by means of replication.

Was ostensible authority established?

[60] What remains for consideration insofar as authority is concerned, is whether the applicant had established that Mr Geissler had ostensible authority when they concluded the agreement in question. The trial Court held that the applicant had failed to show that Mr Geissler had apparent authority. This was because he could not

[33] Id at paras 32-3.

establish a representation made by Vodacom, and in respect of which Vodacom had a reasonable expectation that such representation could mislead someone like the applicant to act to his prejudice. The trial Court followed decisions of the Supreme Court of Appeal in cases like *NBS Bank*. But as illustrated in this judgment, those cases applied an incorrect standard. As a result the trial Court applied the test for determining whether estoppel was established instead of whether apparent authority was proved. Consequently the conclusion reached was mistaken.

[61] The question whether ostensible authority was established must be assessed against the following facts which emerge from the evidence led by the applicant and was accepted by the trial Court. Out of his desperate situation, the applicant formulated a brilliant idea that was later described by one expert as "a genius idea". He wanted to sell this idea for financial gain. Since he was young and a junior employee at Vodacom, he was uncertain on how he could achieve his goal. He sought guidance from his mentor, Mr Muchenje, who was a senior manager at Vodacom.

[62] Since the idea would only be exploited if a product was developed as a new service to the public, Mr Muchenje knew that Vodacom had created a particular system through which the idea could be introduced. Crucial to the operation of that system was the authority conferred on Mr Geissler, one of the members of the Board of Vodacom. Mr Geissler was aptly given the title of Director of Product Development. Notably, he enjoyed enormous power in relation to his portfolio. He held the power to consider new products. He could subject them to the technical and commercial viability test before any of them could be accepted and form part of Vodacom's business offerings. He was not only Vodacom's front man in its dealings with third parties in relation to new products but he also held the key to the door through which every product was introduced. As the evidence suggested, he could make or break any new product. In other words a successful introduction of new products depended solely on the power held by Mr Geissler.

[63] Anybody who desired to sell a new product to Vodacom had to go through Mr Geissler. Consistent with this, Mr Muchenje advised the applicant not to send the memorandum containing his idea to the Managing Director and the CEO but to address it to Mr Geissler. Indeed Mr Geissler later negotiated with the applicant for the use of his idea in developing a new product which became known as the "Please Call Me" product. As the new product was still to be tested for commercial viability, the parties agreed to defer for later negotiations on remuneration. This was agreed after the applicant had intimated that he wanted 15% of the revenue generated, in the event the new product was successful.

[64] As stated the product was and continues to be a huge success, generating billions of rands for Vodacom. And yet the applicant has not been paid even a cent for the use of his idea. This is the position despite the fact that Vodacom had praised him for the brilliant idea. Vodacom contends that although it had conferred enormous power on one of its directors, Mr Geissler was given no authority to bind it. While this may be so, it is however not the real issue. The question that arises is whether as it appeared to others, Mr Geissler had ostensible authority to bind Vodacom.

[65] This question must be considered with the view to doing justice to all concerned. The concept of apparent authority as it appears from the statement by Lord Denning, was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent has authority to act on its behalf. If this appears to be the position to others and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement. It cannot be gainsaid that on present facts, there is a yearning for justice and equity.

[66] When account is taken of Mr Geissler's position as a member of the Board, the enormous power he wielded in respect of new products, the organisational structure within which he exercised his power and the process which had to be followed before a new product could be introduced at Vodacom, there is only one appearance that

emerges. It is that Mr Geissler had authority to negotiate all issues relating to the introduction of new products at Vodacom. Those issues included agreements under which the new products would be tested before approval by him and once approved, the agreement in terms of which the new product would be acquired by Vodacom and the amount to be paid for it. After all, owing to his technical skills, he was best placed to determine the worth of a new product.

[67] A similar analysis was followed in *South African Broadcasting Corporation*. There the Supreme Court of Appeal stated:

> "As in the *NBS Bank* case, supra, the plaintiffs' 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 CEO's 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."[34] (Footnotes omitted.)

[68] I hold that the applicant had established that Mr Geissler had apparent authority to bind Vodacom. This finding makes it unnecessary to consider whether the common law should be developed.

Differences

[69] I have read the judgment prepared by my Colleague Wallis AJ (concurring judgment). While that judgment agrees that Mr Makate has established apparent authority, it differs with this judgment on a narrower point. This is whether apparent

[34] *South African Broadcasting Corporation* above n 22 at paras 74-5.

authority means estoppel. It concludes that it does and on the contrary I hold that it does not. I wish to stress that I accept the proposition that estoppel applies to a contract of agency based on apparent authority inasmuch as it applies to a contract based on actual authority.

[70] Despite the assertion that the concurring judgment follows well-established principles, there is not a single case referred to in our law that holds that apparent authority is estoppel, except *NBS Bank* and subsequent decisions that followed it. While acknowledging that the issue was not stated in clear terms in the early decisions of our courts, the concurring judgment relies heavily on *West*[35] and *Insurance Trust.*[36] But none of the statements quoted from these two cases says apparent authority means estoppel.[37] The statement made by Greenberg J in *West* merely illustrates how estoppel operates and its effect in that case. It states "the effect of estoppel is that the appellant is not entitled to deny that he gave this authority which ostensibly he gave". That statement makes two points only. The first is that the appellant was precluded from denying that he gave authority. The second point is that in proceedings to which estoppel applies, a party like the appellant was deemed to have given authority.

[71] *Insurance Trust*, on which the concurring judgment relies, does not take the matter further. Both statements by Hathorn JP and Broome J cannot reasonably be construed to be authority for the proposition that apparent authority is estoppel. The point made by both statements is that a principal would be held liable where there is actual authority or where the principal is estopped from denying the authority of the agent. The question that remains is: what is the authority for the conclusion that estoppel and apparent authority are one and the same thing? With regard to *NBS Bank*, I have already given a detailed analysis that shows that the conclusion was reached without motivation and no authority was cited for the conclusion. The subsequent cases merely followed *NBS Bank.*

[35] *West v Pollak and Freemantle* 1937 TPD 64.

[36] *Insurance Trust & Investments v Mudaliar* 1943 NPD 45 (*Insurance Trust*).

[37] Concurring judgment at [145] – [147].

[72] On the contrary, our law has always treated estoppel in the field of contracts as distinct. For example, if a person conducts herself in a manner that would reasonably cause another to believe that she was assenting to contractual terms proposed by the latter, and acting on that belief the latter enters into a contract with her, she would be bound as if she had intended to agree, even though that may not have been her intention.[38] Her liability may be based on either estoppel or the principle of objective theory of contract.[39]

[73] In our law this kind of contract is known as the apparent agreement because it does not have consensus as its foundation. What is clear though is that the objective theory of contract is not construed to mean estoppel, even though they both apply and arise from the same facts.[40] In *Saambou*,[41] Jansen JA acknowledged the distinction between these two concepts. There the Court observed that to some extent estoppel overlaps with the objective theory of contract but did not treat them as one.

[74] I can think of no reason in principle or logic which warrants a different approach in the case of apparent authority and estoppel. Both apparent contract and apparent authority derive their existence from the conduct of the party to be held liable. Both form part of our law of contract. They come into being from what reasonably appears to be the position. Therefore, if a distinction is drawn between estoppel and the objective theory of contract in the case of the apparent agreement, the same should be the position in respect of apparent authority and estoppel in contracts of agency.

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[38] *Spes Bona Bank v Portals Water Treatment* 1983 (1) SA 978 (A) at 984; *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 425 and *Peri-Urban Areas Health Board v Breet NO* 1958 (3) SA 783 (T).

[39] *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* [2007] ZASCA 162; 2008 (3) SA 327 (SCA) at para 10 and *Sonap Petroleum (South Africa) (Pty) Ltd v Pappadogianis* [1992] ZASCA 56; 1992 (3) SA 234 (A).

[40] Rabie *The Law of Estoppel in South Africa* 2 ed (Butterworth Publishers (Pty) Ltd Cape Town 2000) at 10-1.

[41] *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) (*Saambou*).

[75] It is apparent that estoppel and ostensible authority are different, even though there may be some overlap between them. Ostensible authority is the power to act as an agent indicated by the circumstances, even if the agent may not truly have been given the power.[42] Whereas estoppel, as observed in *West*, is the rule that precludes the principal from denying that she gave authority to the agent.

[76] In an attempt to show that the statement quoted in *NBS Bank* from *Hely Hutchinson CA* should not be literally construed, the concurring judgment cites other English cases, namely, *Freeman & Lockyer*[43] and *Armagas CA*.[44] However, a closer reading of these cases reveals the confusion in English law which was lamented by Hathorn JP in *Insurance Trust*. He said:

> "The law in England seems to me to be in a state of confusion, especially as applied to companies. There are signs that the same confusion, borrowed from England, is finding its way into our law. Unless precision of thought and expression are insisted upon in South Africa this branch of the law, principles which are simple and plain, will become clouded."[45]

[77] This state of confusion is illustrated by statements from *Freeman & Lockyer* and *Armagas CA*, quoted in the concurring judgment. In *Freeman & Lockyer* it was stated:

> "An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the

[42] Kerr above n 23 at 26-8.

[43] *Freeman & Lockyer (a firm) v Buckhorst Park Properties (Mangal) and Another* [1964] 1 All ER 630.

[44] *Armagas Ltd v Mundogas SA: The Ocean Frost* [1985] 3 All ER 385 (*Armagas CA*).

[45] *Insurance Trust* above n 36 at 61.

> existence of the representation. *The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel*, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract." (Emphasis added.)

[78] While the first part of this statement defines accurately apparent authority that renders the principal liable, the confusion arises from the last two sentences which introduce the issue of estoppel, as if it is an integral part of apparent authority. The fact that the same representation that gave rise to apparent authority may also be the basis of estoppel, does not collapse the two concepts into one. They remain separate and the principal's liability may be based on one or the other. But the last sentence heightens the level of confusion. It suggests that the principal is precluded from disputing liability where a representation was made and acted upon by the third party and adds that it is "irrelevant whether the agent had actual authority to enter into the contract".

[79] This sentence indicates that the Court was addressing the issue of estoppel in general terms. In that context, the application of estoppel was not limited to a case of apparent authority but also covered the situation where there was actual authority. In either case, if the principal had made a representation that was acted on by a third party, she would be prevented by operation of estoppel from denying that the agent had authority. This demonstrates beyond doubt that estoppel applies even in a case where actual authority had been conferred. If we accept, as we must, that in a case where actual authority was granted, the principal's liability may be based either on actual authority or estoppel, it follows that in the case of apparent authority, liability may equally be based on either apparent authority or estoppel. The fact that in the latter case, both apparent authority and estoppel derive their existence from the principal's representation does not alter this principle.

[80] The approach that collapses apparent authority and estoppel into the same thing, as illustrated here, is not underpinned by principle, let alone an established one as suggested. Instead that approach lacks, in my respectful view, the precision of

thought and expression for which Hathorn JP advocated in *Insurance Trust*, 72 years ago. The conflation of the two concepts in the cases cited in the concurring judgment does not constitute principle. Nor does the exercise of referring to a long line of cases on estoppel resolve the question whether estoppel and apparent authority are one. There is no doubt that our law has recognised estoppel and circumstances under which it applies for a century. But that does not mean estoppel is apparent authority.

Prescription

[81] Relying on its construction of section 10(1), read with sections 11(d), 12(1) and 12(3) of the Prescription Act, the trial Court held that the applicant's claim had prescribed. It will be recalled that the applicant sought a declaration to the effect that the parties had concluded an oral agreement and an order directing Vodacom "to commence with bona fide negotiations to determine a reasonable remuneration" payable to the applicant.[46] It was the claim relating to Vodacom being ordered to start negotiations which was held to have been extinguished by prescription and not the declaration. The declaration was withheld on the basis that it would be of academic value as it related to a prescribed debt.[47]

[82] The High Court's conclusion on prescription hinged on its interpretation of the word "debt" that appears in section 10(1) of the Prescription Act. The word "debt", the trial Court pronounced, has a wide meaning.[48] The Court proceeded to state that the wide meaning of the word—

> "would not only include a claim to pay a plaintiff a share of revenue, but also a claim that the defendant complies with its obligations in terms of the contract, including its obligation to negotiate with the plaintiff concerning reasonable remuneration for the use of his idea."[49]

[46] High Court judgment at paras 181-3.

[47] Id at para 2.

[48] Id at para 181.

[49] *Desai* above n 11 at 146I.

[83] For the conclusion that a debt contemplated in section 10(1) of the Prescription Act includes a claim to negotiate terms of an agreement, the trial Court relied on *Desai*,[50] a judgment of the Appellate Division (now the Supreme Court of Appeal) and *LTA Construction*,[51] a decision of the Cape of Good Hope Division (now the Western Cape Division of the High Court). More particularly it relied on the following passage in *Desai* for the wide meaning it assigned to the word:

> "S10(4) of the Prescription Act 68 of 1969 ("the Act") lays down that a 'debt' shall be extinguished after the lapse of the relevant prescriptive period, which in the instant case was three years (see section 11(d)). The term "debt" is not defined in the Act but in the context of section 10(1) it has a wide and general meaning, and *includes an obligation to do something or refrain from doing something.*"[52] (Emphasis added.)

[84] On this construction of *Desai*, every obligation irrespective of whether it is positive or negative, constitutes a debt as envisaged in section 10(1). This in turn meant that any claim that required a party to do something or refrain from doing something, irrespective of the nature of that something, amounted to a debt that prescribed in terms of section 10(1). Under this interpretation, a claim for an interdict would amount to a debt. However, the Appellate Division in *Desai* did not spell out anything in section 10(1) that demonstrated that "debt" was used in that sense. What needs to be determined is whether the pre-constitutional interpretation of the relevant provisions is still good law. In determining this question, we are guided by section 39(2) of the Constitution.[53]

[85] The absence of any explanation for so broad a construction of the word "debt" is significant because it is inconsistent with earlier decisions of the same Court that

[50] Id at 144H-147A.

[51] *LTA Construction* above n 12 at 849H.

[52] *Desai* above n 11 at 146I.

[53] Section 39(2) above n 13.

gave the word a more circumscribed meaning. In *Escom*[54] the Appellate Division said that the word "debt" in the Prescription Act should be given the meaning ascribed to it in the Shorter Oxford English Dictionary, namely:

> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated."[55]

Escom was cited and followed in subsequent cases.[56] It was also cited as authority for the proposition in *Desai NO*.[57]

[86] It is unclear whether the Court in *Desai* intended to extend the meaning of the word "debt" beyond the meaning given to it in *Escom.*[58] If it did, it does not appear that this followed either from any submissions made to the Court by the parties or any issue arising in the case. Nor, if that was the intention, did the Court give consideration to the constitutional imperatives in regard to the interpretation of statutes in section 39(2) of the Constitution.

Constitutional approach

[87] Since the coming into force of the Constitution in February 1997, every court that interprets legislation is bound to read a legislative provision through the prism of the Constitution.[59] In *Fraser*, Van der Westhuizen J explained the role of section 39(2) in these terms:

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[54] *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*) at 344E - G.

[55] *The New Shorter English Dictionary* 3 ed (Clarendon Press, 1993) vol 1 at 604.

[56] *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A) at 370B-C; *Joint Liquidators of Glen Anil Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A) at 110A-B.

[57] *Desai* above n 11 at 146H-J.

[58] It appears that the SCA may have so construed it in *Absa Bank Limited v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA) at para 12.

[59] *Investigating Directorate; Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (1) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 21.

> "When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation."[60] (Footnotes omitted.)

[88] It is apparent from *Fraser* that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

[89] The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this Court observed in *Fraser*:

> "Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights."[61]

[90] It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2), irrespective of whether the parties had asked for it or not. This is so

[60] *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43.

[61] Id at para 47.

because the operation of section 39(2) does not depend on the wishes of litigants. The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. That duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights.

[91] In *Road Accident Fund*,[62] this Court, having expressed reservations on whether an obligation may constitute a debt contemplated in the Prescription Act, stated that the failure to meet a prescription deadline set in terms of the Act, denies a litigant access to a court. What this means is that if the Act finds application in a particular case, it must be construed in accordance with section 39(2). On this approach an interpretation of debt which must be preferred, is the one that is least intrusive on the right of access to courts. In *SATAWU*,[63] this Court affirmed the principle in these terms:

> "Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations onto them, and when legislature provisions limits or intrudes upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning." (Footnotes omitted.)

[92] However, in present circumstances it is not necessary to determine the exact meaning of "debt" as envisaged in section 10. This is because the claim we are concerned with falls beyond the scope of the word as determined in cases like *Escom* which held that a debt is an obligation to pay money, deliver goods, or render services. Here the applicant did not ask to enforce any of these obligations. Instead, he requested an order forcing Vodacom to commence negotiations with him for determining compensation for the profitable use of his idea.

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[62] *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) (*Road Accident Fund*) at para 10.

[63] *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* [2012] ZACC 32; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at para 44.

[93] To the extent that *Desai* went beyond what was said in *Escom* it was decided in error. There is nothing in *Escom* that remotely suggests that "debt" includes every obligation to do something or refrain from doing something apart from payment or delivery. It follows that the trial Court attached an incorrect meaning to the word "debt". A debt contemplated in section 10 of the Prescription Act does not cover the present claim. Therefore, the section does not apply to the present claim, which did not prescribe.

Remedy

[94] The remedy sought by the applicant flows from the parties' agreement. In other words he seeks the enforcement of that agreement. It will be remembered that the relevant term he seeks to enforce is the one that required the parties to negotiate in good faith compensation for the use of his idea. This open ended term was necessitated by the special circumstances of this case. The applicant's idea was novel and the parties were not certain whether a commercially viable product could be developed from it. Hence they agreed to later negotiate the amount of compensation once the product was developed and tried for commercial sustainability and profitability.

Agreement to negotiate in good faith

[95] Agreements to negotiate in good faith are taken as a species of the *pacta de contrahendo* (agreements to agree). Generally they are regarded as a category of contracts whose purpose is to create other contracts in future. But sometimes contracting parties, as was the position here, may be confronted by a situation where they are not able to agree on some of the terms of the contract. To resolve the problem, they may arrange to negotiate and agree on the outstanding terms on a future date. The arrangement may form part of the concluded agreement. A dispute may arise, if one of the contracting parties, as was the case here, refuses to negotiate the outstanding term so that the parties' agreement may be executed. When

this occurs, the question that arises sharply is whether the term to negotiate is enforceable at the instance of the innocent party.

[96] Until 1992, our courts were reluctant to enforce agreements to negotiate in good faith, in the belief that contracting parties are free to drive a hard bargain and to withdraw from negotiations if they are no longer interested. The concern from our courts was that it was difficult, if not impossible, to enforce open-ended terms of that kind without an objective standard to which bargaining parties could be held. But in *Letaba Sawmills*[64] the Appellate Division held that a term to negotiate in good faith there was enforceable because it contained a deadlock-breaking mechanism. In that case the parties had agreed that should consensus on outstanding matters elude them, then an arbitrator may resolve the issue. The Court did not regard the arbitrator's role as amounting to a third party making the contract for the parties but as an enforcement of what the parties themselves had agreed. Our law considers the parties' freedom of contract to be sacrosanct and that the parties' consensus must be reached freely.

[97] Therefore, currently the position in our common law is that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus. This position was reaffirmed by the Supreme Court of Appeal in *Southernport Developments*.[65] In that case parties to a lease agreed to enter into good faith negotiations in respect of certain specified properties. The agreement provided that if the parties were unable to agree on any of the terms of the yet-to-be negotiated lease, the dispute would be referred to an arbitrator whose decision would be final and binding.

[98] When the defendant refused to negotiate, the plaintiff instituted action, seeking an order directing the defendant to negotiate in good faith. This was met with an

[64] *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* [1992] ZASCA 195; 1993 (1) SA 768 (A).

[65] *Southernport Developments (Pty) Ltd v Transnet Ltd* [2004] ZASCA 94; 2005 (2) SA 202 (SCA) (*Southernport Developments).*

exception grounded on the contention that the agreement to negotiate in good faith on which the plaintiff relied was not enforceable. Following *Firechem Free State*,[66] the High Court upheld the exception and dismissed the claim. The Supreme Court of Appeal in *Firechem Free State* had declared that—

> "[a]n agreement that parties will negotiate to conclude another agreement is not enforceable because of the absolute discretion vested in the parties to agree or to disagree."[67]

[99] In *Southernport Developments*, the Court distinguished *Firechem Free State* on the basis that the agreement in *Firechem Free State* had no deadlock-breaking mechanism. In rejecting the argument that the agreement was not enforceable Ponnan AJA stated:

> "I can conceive of no reason why the principle that *Letaba Sawmills* so firmly establishes should be circumscribed to the determination solely of the rental in a contract of lease. The flexibility that *Letaba Sawmills* introduces must logically extend to other terms as well as the formulation of which the parties to a contract may have chosen to delegate to a third party."[68]

[100] Whether an agreement to negotiate in good faith is enforceable where there is no deadlock-breaking mechanism remains a grey area of our law. This is because *Firechem Free State* suggests that it is not enforceable while *Everfresh*[69] suggests otherwise. In *Everfresh*, Moseneke DCJ said:

> "Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our

[66] *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* [2000] ZASCA 28; 2000 (4) SA 413 (SCA) (*Firechem Free State*).

[67] Id at para 35.

[68] *Southernport Developments* above n 65 at para 8.

[69] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (*Everfresh*).

> constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith."[70]

[101] Happily here, the agreement to negotiate in good faith the amount of the compensation payable, contained a deadlock-breaking mechanism. The parties had agreed that in the event that they disagreed on the amount to be paid, Vodacom's CEO would determine the amount. While choosing the CEO may not be regarded as a delegation of power to a third party, the choice still constitutes a deadlock-breaking mechanism. It is how the parties in their wisdom formulated the relevant clause and their choice must be respected and given effect. This is what they have bargained freely and consequently they must be held to it.

[102] However, it is not only difficult in the present circumstances but also undesirable to lay down an objective standard of good faith bargaining which the parties must undertake. Suffice it to say that what the parties are precluded from doing is to negotiate in bad faith. They are not allowed to enter into those negotiations just to go through the motions. For that would not be what they have agreed to do but a charade. Both sides must enter into negotiations with serious intent to reach consensus.

[103] But if despite best efforts agreement on the issue of compensation remains elusive, then the deadlock-breaking clause must be invoked. The matter must be referred to Vodacom's CEO for determination. This suggests that Vodacom may not be represented by its CEO at the negotiations. The CEO cannot negotiate and at the same time break the deadlock. That was not what was envisaged in the parties' agreement.

[70] Id at para 72.

Concluding remarks

[104] The stance taken by Vodacom in this litigation is unfortunate. It is not consistent with what was expected of a company that heaped praises on the applicant for his brilliant idea on which its "Please Call Me" service was constructed. The service had become so popular and profitable that revenue in huge sums of money was generated, for Vodacom to smile all the way to the bank. Yet it did not compensate the applicant even with a penny for his idea. No smile was brought to his face for his innovation. This is besides the fact that Vodacom may have been entitled to raise the legal defences it advanced. As a party, it was entitled to have its day in court and have those defences adjudicated. This is guaranteed by section 34 of the Constitution. However, it is ironic that in pursuit of its constitutional right, Vodacom invoked legislation from the height of the apartheid era, to prevent the applicant from exercising the same right.

[105] In not compensating the applicant and persisting in advancing the legal defences even after the trial Court had emphatically found that an agreement was concluded, Vodacom associated itself with the dishonourable conduct of its former CEO, Mr Knott-Craig and his colleague, Mr Geissler. This leaves a sour taste in the mouth. It is not the kind of conduct to be expected from an ethical corporate entity.

Costs

[106] As the applicant has succeeded and the *Biowatch*[71] principle finds no application here, costs must follow the event. Although each side had a team of four counsel, I consider it fair to award costs of two counsel only. Two issues were raised in the main. Neither renders the circumstances so exceptional as to justify employment of more than two counsel.

[71] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

Order

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

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Gauteng Local Division of the High Court, Johannesburg, is set aside and replaced with the following order:
   "(a) It is declared that Vodacom (Pty) Limited is bound by the agreement concluded by Mr Kenneth Nkosana Makate and Mr Philip Geissler.
   (b) Vodacom is ordered to commence negotiations in good faith with Mr Kenneth Nkosana Makate for determining a reasonable compensation payable to him in terms of the agreement.
   (c) In the event of the parties failing to agree on the reasonable compensation, the matter must be submitted to Vodacom's Chief Executive Officer for determination of the amount within a reasonable time.
   (d) Vodacom is ordered to pay the costs of the action, including the costs of two counsel, if applicable, and the costs of the expert, Mr Zatkovich."
4. The negotiations mentioned in 3(b) must commence within 30 calendar days from the date of this order.
5. Vodacom is ordered to pay the applicant's costs in this Court and in the Supreme Court of Appeal, which include costs of two counsel, where applicable.

WALLIS AJ (Cameron J, Madlanga J and Van der Westhuizen J concurring):

[108] I have had the pleasure of reading the main judgment by Jafta J. We arrive at the same destination in this case, namely that Mr Makate is entitled to the relief set out in the main judgment. But on one aspect, the issue of ostensible authority,[72] we differ. Even there the difference is small, one of jurisprudential nomenclature or categorisation. We agree that the key issue is whether Vodacom represented that Mr Geissler had authority to conclude the agreement with Mr Makate. We agree that it made that representation, although I rely on a wider range of facts than Jafta J in reaching that conclusion. We agree also that the representation justifies us in holding that Mr Geissler had ostensible authority to conclude that contract.

[109] We disagree on the juristic nature of ostensible authority where there is no actual authority. In my view it is settled law that this is a form or instance of estoppel, which is why it is commonly referred to in judgments and textbooks as agency by estoppel. He disagrees. Our disagreement is not relevant to the outcome of this case, but it has the potential to cause unnecessary confusion in a settled area of the law, which is undesirable. I am compelled to write by the following considerations. First, the issue was not debated before us and we were not asked to alter the settled legal position. Second, my Colleague's approach is based on his understanding of the English law. That understanding, based as it is on a single sentence in a judgment of Lord Denning in the Court of Appeal,[73] is inconsistent with the authoritative judgments of English courts. Third, his approach is inconsistent with the judgments of our courts since the early twentieth century as well as the views of our textbook writers. Fourth, he advances no reason of principle for adopting this approach and does not locate it in any constitutional imperative. Fifth, the enquiry arose only

[72] The terms "apparent authority" and "ostensible authority" are interchangeable and to avoid pointless repetition I will generally refer to ostensible authority, as does the main judgment. The particulars of claim referred to ostensible authority.

[73] See *Hely-Hutchinson CA* above n 25.

because of the erroneous approach of the trial Court to the proper pleading of apparent or ostensible authority.

[110] In the light of that disagreement it is perhaps best that I set out my own approach at the outset. I accept that estoppel is a wide-ranging equitable concept that finds application in a number of different settings, not only where issues of authority or agency arise. Cases that spring to mind are the well-known motor dealer cases,[74] share dealing transactions[75] and other vindicatory actions.[76] It has been said that the Turquand Rule of company law is merely an application of estoppel.[77] Estoppel has also been held to apply where a property owner failed to have an erroneous entry corrected in the Deeds Registry.[78] Countless other examples of estoppel are to be found in the reported cases. On both principle and authority I am convinced that ostensible authority is merely one more instance of estoppel. It is not by any means the only one, but it is one that crops up frequently in practice, where there is no authority, express or implied. There are cases in which ostensible authority coincides with actual authority arising by implication and in that event, to adopt my Colleague's metaphor, actual authority and ostensible authority will be two sides of the same coin, but this is a case where it is accepted that there was no authority at all, express or implied. That in my view takes it into the realm of estoppel.

The facts

[111] My Colleague has outlined the relevant facts in paragraphs [2] to [13] of the main judgment. I have little to add to that exposition and what I add focuses on the

[74] *Broekman v TCD Motors (Pty) Ltd* 1949 (4) SA 418 (T); *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A); *Kajee v HM Gough (Edms) Bpk* 1971 (3) SA 99 (N); and *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 (3) SA 188 (A).

[75] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A).

[76] *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W); *Pretorius v Loudon* 1985 (3) SA 845 (A); and *Konstanz Properties (Pty) Ltd (Edms) v Wm Spilhaus en Kie (WP) Bpk* [1996] ZASCA 28; 1996 (3) SA 273 (A).

[77] *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (C) at para 25.

[78] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* [2010] ZASCA 166; 2011 (2) SA 508 (SCA).

events surrounding the conclusion of the contract on which Mr Makate relied for his claim. Mr Makate had an idea for a new product that became "Please Call Me". From the outset he realised its commercial potential. He prepared a memorandum incorporating the idea addressed to his immediate line manager Mr Muchenje, but copied to the Group Chief Executive of the Vodacom Group, Mr Knott-Craig (CEO), and other senior executives.[79] He discussed it with Mr Muchenje explaining that he wished to be remunerated for the idea and, if Vodacom was not interested, he would take it to a competitor. Mr Muchenje thought the idea worthwhile, but said it would have to be approved by the Product Development Department before it could be taken to the executive. He undertook to discuss it with Mr Geissler, the Director of Product Development and Management. Mr Geissler responded favourably to an initial approach by Mr Muchenje and on that basis Mr Makate amended the addressees of the memorandum and sent it to Mr Geissler on 22 November 2000.

[112] It does not appear that Mr Makate spoke to Mr Geissler until after the Product Development Department had discovered how to make his idea technically feasible. This appears to have taken about a month because on 19 December 2000 Mr Muchenje informed Mr Makate that the company was going to introduce a product similar to his concept. On 26 December 2000 Mr Geissler sent him an email saying that he would be "kept in the loop" concerning the product. On 18 January 2001 Mr Makate sent an email to Mr Geissler asking about developments and recording that they had not yet met. Two days later Mr Geissler responded by email and asked him whether he had used the new function. He added: "Let me know if you are OK with it." Between 23 and 28 January 2001 the Product Development Department approved the launch of the product. On 30 January 2001 Mr Geissler told Mr Makate that Vodacom was launching the product for all phones and asked him for his suggestions in regard to a name for the new product.

[79] These were in order of seniority, the Group Financial Director, the managing and financial directors of the network operating company, Vodacom (Pty) Ltd, and the Group Director of Product Development and Management.

[113] Mr Makate's response to this enquiry is significant because, in addition to suggesting a possible name, he added:

> "Lastly as per our verbal conversation, I think we should start talking about 'REWARDS', can you please notify me when can this be feasible."

This shows that between 18 and 30 January 2001 a meeting had taken place between Mr Geissler and Mr Makate and among the topics discussed had been remuneration for his idea. This is consistent with Mr Makate's evidence that he and Mr Geissler met and discussed the fact that if Vodacom launched a product in accordance with his idea he would be remunerated for it. It is also consistent with Mr Geissler's response on 6 February 2001 that, once the product was launched and was successful, he would discuss the issue of a reward with Mr Knott-Craig. The launch occurred on about 10 February 2001 and was an immediate success.

[114] Mr Geissler did not give evidence so we do not have his version of his meeting with Mr Makate.[80] The latter's version that there was a specific agreement that he would be remunerated for his idea stands unchallenged and was accepted by the trial Court. However, no agreement was reached on the precise form or amount of such remuneration. Mr Makate said that he wanted a profit share and had suggested 15%. Mr Muchenje confirmed that this figure was mentioned in his discussions with Mr Makate. But the evidence is clear that Mr Geissler did not agree to this figure or

[80] In similar circumstances in *Legg & Co v Premier Tobacco Co* 1926 AD 132 at 137 Solomon JA remarked:

> "It is a remarkable and very unsatisfactory feature of the case that Levenson, the man with whom the alleged agreement was made, though he was available as a witness, was deliberately kept out of the box by the respondent company. Throughout the cross-examination of appellants' witnesses, they were told from time to time by counsel for the respondent company that Levenson would say this and that, yet when the time came to make good these statements, Levenson was not called. A party is, of course, free to put in the box only such witnesses as he pleases, but in a case like the present, where it is stated in the plea that the agreement alleged to have been made with Levenson was not in fact made, and further that Levenson had no authority to bind the company by any such agreement, it is certainly very remarkable that he should not have been called to substantiate the defence. It is not an unreasonable inference to draw, in such circumstances, that Levenson was unable to contradict the clear and specific evidence of Legg."

If one substituted Mr Geissler for Levenson and Mr Makate for Legg in that passage it would be entirely applicable to the present case.

any basis for determining the remuneration. Everything was to depend on the successful launch of the product after which the matter would be discussed. If those discussions did not lead to agreement the question of remuneration would be referred to Mr Knott-Craig for determination. As Mr Knott-Craig has now left the company Mr Makate says that the incumbent CEO should perform this tie-breaking function.

[115] On the basis of the facts and events summarised above Mr Makate sued Vodacom, basing his claim on a contract concluded between him and Vodacom represented by Mr Geissler. As often happens, his pleadings were more ambitious than the evidence led in support of this case. Over time they were amended. At the close of the trial he claimed only that the contract between him and Vodacom was that in return for his providing the idea to Vodacom it would enter into bona fide negotiations with him in order to agree on a reasonable remuneration for his idea. Should they be unable to agree on a reasonable remuneration the matter would be referred to Mr Knott-Craig for his adjudication. The trial Court held this to have been proved on a balance of probabilities.

[116] We were asked to revisit this conclusion and were furnished with detailed submissions attacking the trial Judge's conclusion. I agree with Jafta J where he says[81] that it is inappropriate for this Court to be asked to interfere with the factual findings by the trial Court. That should not be the function of this Court. Whilst there may be a few cases where it is appropriate and necessary for it to make factual findings on the basis of material in the record, where on a particular issue necessary for the proper determination of the case the trial Court has not made a factual finding, in general this Court should proceed on the basis that the factual findings by the court from which the matter emanates are correct.

[117] But in this instance that should not be taken as casting doubt on the correctness of those findings. The criticism addressed to them, largely on the basis of the terms in which the claim was couched in letters of demand sent some considerable time after

[81] See [37] above.

the relevant events, ignores that in all those letters it was consistently Mr Makate's case that he was to receive reasonable compensation if his idea proved commercially successful. It also ignores Vodacom's failure to call the one witness who could have rebutted Mr Makate, namely, Mr Geissler. Lastly, it ignores one of the more disgraceful aspects of this case[82] namely that, after the institution of this action, Mr Knott-Craig published his autobiography and falsely claimed credit for the "Please Call Me" idea. To make matters worse, when challenged, he procured an email from Mr Geissler to bolster his untruthful version.

Issues

[118] Accepting that Mr Makate and Mr Geissler concluded an agreement in the terms set out above, I agree with Jafta J that a contract on those terms is enforceable.[83] That renders it unnecessary for us to consider the issues raised in this Court in *Everfresh*.[84] The primary issue is whether that agreement was binding upon Vodacom. In the particulars of claim it was alleged that Mr Geissler had authority to conclude the agreement, alternatively had ostensible authority to do so. By the close of Mr Makate's case his case was expressly confined to one based on ostensible authority. The trial Court held that he failed to establish such authority and on that ground non-suited him. It went on to hold that in any event his claim had prescribed. These are the issues that must be decided by this Court.

Pleading ostensible authority

[119] At the outset it is necessary to deal with two technical issues raised by Vodacom. First, there was a complaint that ostensible authority may only be raised by way of a replication delivered in response to the defendant pleading a defence of lack of authority. But that was pedantry, and its acceptance by the trial Court was

[82] There are others, such as the email sent by Mr Geissler to Mr Makate on 8 March 2001 falsely accusing him of having stolen the idea from a competitor of Vodacom.

[83] See *Southernport Developments* above n 65.

[84] See *Everfresh* above n 69.

incorrect. Where the issue of authority has been pertinently raised before the commencement of the action it is usual for ostensible authority to be pleaded in the particulars of claim.[85] Where the plaintiff alleges authority and this is denied in the plea ostensible authority is raised by way of a replication.[86] It is necessary for me to expand on this because, as is apparent from the main judgment, the Judge's finding that ostensible authority could only be raised by way of a replication lies at the root of my colleague's endeavour to distinguish ostensible authority from estoppel.

[120] The only authority relied on by the Judge was *Amler*.[87] In the section dealing with estoppel the following statement appears:

> "A plaintiff wishing to rely on estoppel must plead it in the replication in reply to the defendant's plea where reliance is placed on the true facts."

But the case relied on in support of that proposition[88] contains no such statement. The judgment in the High Court also overlooked the fact that in the section of the same work dealing with agency and ostensible authority a less definitive stance is taken. First it is said that—

> "if reliance is placed on ostensible authority, the elements of estoppel must be alleged."[89]

Then the passage goes on:

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[85] As was done in *NBS Bank* above n 22 at para 9.

[86] As was done in *South African Broadcasting Corporation* above n 22 at para 63.

[87] See *Amler* above n 8 at 166-7. Edition 7 (2009) is unchanged at 195-6.

[88] *Mann v Sidney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (G) at 105E-F. Counsel in that case disavowed reliance on estoppel but said he was seeking to invoke a principle "akin to estoppel".

[89] Citing *Inter-Continental Finance & Leasing Corp (Pty) Ltd v Stands 56 and 57 Industria Ltd* 1979 (3) SA 740 (W) at 749 (*Inter-Continental Finance*) and *Beyleveld NO v Southern Life Association Ltd* 1987 (4) SA 238 (C) at 248.

> "Because estoppel can only be raised as a defence, a plaintiff intending to rely upon estoppel is well advised to allege actual authority and rely on estoppel as an alternative in the replication."

This is less dogmatic because "well advised" is not the same as "must". The author quotes neither reason nor authority for that proposition and it is inconsistent with what occurs in practice. It is pointless to say that, where there is no actual authority, either express or implied, the plaintiff must nonetheless allege authority and wait for the inevitable denial in order to raise what was all along the real issue, namely, ostensible authority. In a different capacity the learned author of *Amler* has pointed out that litigation is not a game.[90] The suggested approach to pleading ostensible authority is at odds with that notion. It also finds no support in *Beck*,[91] the other leading textbook on pleading, or the leading textbook on estoppel.[92] But the latter says:

> "[I]t is submitted that the terms 'agency by estoppel', 'apparent authority' and 'ostensible authority' in principle refer to the same circumstances."[93]

[121] Where a plaintiff is aware that the defendant will, or will probably, raise a defence of lack of authority, there can be no criticism of them for pleading ostensible authority from the outset, either as an alternative to actual authority, or on its own. There is no merit in the suggestion that this is impermissible because, in the colourful phrase of an English judge,[94] estoppel is a shield and not a sword. Where a party sues on a contract concluded with an agent whose authority is denied, proof that they had ostensible authority is as much part of their cause of action as would be proof of actual authority, and that would undoubtedly need to be pleaded from the outset. Estoppel serves two purposes. It either places an obstacle in the path of a case that might

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[90] *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others* [2010] ZASCA 10; 2011 (3) SA 570 (SCA) at para 10.

[91] Daniels *Beck's Theory and Principles of Pleading and Civil Actions* 6 ed (Butterworths, Durban 2002) at 199.

[92] Sonnekus *The Law of Estoppel* 2 ed (Butterworths, Durban 2000) at 23-5, where the author makes the point that estoppel must be pleaded, but does not say that it can only be pleaded by way of a replication.

[93] Id at 159.

[94] Birkett LJ in *Combe v Combe* 1951 (2) KB 215 at 224.

otherwise succeed, or it removes an impediment in the path of a case that might fail without its removal.[95] In the latter case I can see no reason why the impediment should not be removed at the outset.

[122] The proposition that estoppel may only be used as a shield and not a sword does not relate to the manner in which it is pleaded, but to the use to which it is put. One of its proper uses is to remove an impediment to the successful prosecution of an action. Invoking it in relation to a plea that the representative of a contracting party lacked authority to conclude the contract is an obvious example. In that case it overcomes the hurdle of absence of authority and binds the other party to the contract concluded without authority. An example of an attempt to use it to create a cause of action is furnished by *Union Government v National Bank of South Africa Ltd*.[96] There, a number of postal orders had been stolen, fraudulently made out to various individuals and cashed with the bank. The Government sued to recover the amount that the Post Office had paid the bank when postal orders were presented for payment. The bank legitimately, albeit unsuccessfully, relied on an estoppel to resist a claim for repayment under the *condictio indebiti*. But it also tried to rely on the same facts to justify a claim for payment on further postal orders that it had cashed, but which it had not had an opportunity to present to the Post Office for payment. As the postal orders were fraudulent it had no legal right to demand that the Post Office cash them. It was in that context that Innes CJ said:

> "A plaintiff cannot invoke estoppel to create a cause of action where none existed before."[97]

[123] For all those reasons the finding by the trial Court that ostensible authority was not pleaded, because it had to be pleaded by way of replication was wrong. There is therefore no reason to say that ostensible authority is not a form of estoppel in order to

[95] Turner *Spencer Bower and Turner The Law Relating to Estoppel by Representation* 3 ed (Butterworths, London, 1977) at para 5.

[96] *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 128 (*Union Government*).

[97] Id.

hold that ostensible authority was properly raised in the particulars of claim. It clearly was raised and the argument advanced on behalf of Vodacom was pettifogging in the extreme.

[124] A more serious objection might have been that the issue of ostensible authority was not at any stage properly pleaded. I agree that the pleading was seriously deficient in detail and that the obligation to plead all the elements of estoppel was ignored. But Vodacom initially sought particularity by way of a request for particulars for trial and, when the answer failed to disclose the requested particulars, no attempt was made to compel a proper reply. When the case came to trial in 2013 Vodacom delivered a further very detailed request for further particulars for trial, but did not ask for any further information in regard to the question of ostensible authority.

[125] Against that background, the objections to Mr Makate's reliance on ostensible authority raised in the course of the trial, and in this Court, ring rather hollow. During the trial counsel went so far as to say that a case based on ostensible authority would be a wholly new case and that it would require full particularity of the nature of the representation founding the ostensible authority. This overlooked the fact that the allegation appeared in the particulars of claim; that the particularity he said he required had been sought and refused; that its production was not compelled by Vodacom; that during the application for absolution from the instance at the close of the plaintiff's case it was made clear that reliance was being placed on ostensible authority; and that both endeavours by the plaintiff to address these complaints by way of amendment were resisted by Vodacom. It has not been shown that the course of the trial would have been any different had the pleading of ostensible authority been more detailed, or that Vodacom has in any way been prejudiced by the lack of particularity in regard to this aspect of the case. The objection must be rejected.

Is ostensible authority based on estoppel?

[126] The trial Court held that ostensible authority is a form of estoppel and that Mr Makate failed to prove the requisites of estoppel. My Colleague holds that this approach is incorrect and that "although ostensible authority and estoppel have at times been treated synonymously by our courts, they are not one and the same thing".[98] His view is that: "[a]ctual authority and ostensible or apparent authority are the opposite sides of the same coin".[99] This is explained[100] on the basis that a misrepresentation that a person has authority may lead to the appearance that the agent has the power to act on behalf of the principal and that—

> "[t]his is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is no authority at all."

So ostensible authority is treated as a form of actual authority, in contrast to estoppel, which is no authority at all. As pointed out in [110] above that is correct if one is dealing with actual authority arising by necessary implication. But I understand this case to be dealing with a situation where it is accepted that there was no authority at all, either express or implied. That was the necessary inference from counsel's abandonment of reliance on actual authority during the argument on Vodacom's application for absolution from the instance at the close of Mr Makate's case.

[127] The foundation for the view expressed in the main judgment is a sentence in the judgment of Lord Denning in *Hely-Hutchinson CA*[101] that "*[o]stensible or apparent authority is the authority of an agent as it appears to others*".[102] The main judgment says that this was incorporated into our law when Schutz JA cited it with

[98] See [44] above.

[99] See [45] above.

[100] See [46] above.

[101] *Hely-Hutchinson CA* above n 25 at 102.

[102] Emphasis added.

approval in *NBS Bank*,[103] but that in doing so Schutz JA mistakenly conflated apparent authority and estoppel, an error that has been repeated in subsequent decisions.[104] It is said that he did this without any substantiation and in doing so overlooked that "apparent authority is the agent's authority as it appears to others" while "estoppel is not a form of authority".[105]

[128] There are two errors in this. The first arises because in English law apparent or ostensible authority falls under the broader rubric of estoppel and is treated as an instance of estoppel by representation. Lord Denning in *Hely- Hutchinson CA* did not differentiate apparent authority and estoppel. The English law emerges from the two leading cases in England, namely, *Freeman & Lockyer*[106] and *Armagas*.[107] The latter is the definitive statement of English law on the point and because it is a judgment of the House of Lords is binding on all other courts. The main judgment mentions[108] the Court of Appeal judgment in this case but does not refer to the decision in the House of Lords. Nor does it refer to the key passage where Lord Keith states unequivocally as a matter of English common law that ostensible authority is nothing more than estoppel.[109]

[129] The second error lies in the suggestion that treating apparent or ostensible authority as a form or instance of estoppel was a novel departure by Schutz JA from the principles applied in our law before his judgment in *NBS Bank.*[110] That is not so. The consistent view in our law has always been that apparent or ostensible authority is an instance of estoppel. That is reflected in the cases both prior to and after *NBS Bank*

[103] *NBS Bank* above n 22 at para 25.

[104] See [50] above.

[105] See [52] above.

[106] *Freeman & Lockyer* above n 43.

[107] *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] 2 All ER 385 (HL) (*Armagas*) at 389-90.

[108] See [76] and [77] above.

[109] Id at 389I.

[110] *NBS Bank* above n 22.

and in the academic writing. The main judgment states[111] that there is not a single case referred to in our law that holds that apparent authority is estoppel before *NBS Bank* and subsequent decisions that followed it. My researches have, however, uncovered a number that did. Like the main judgment I will start with the English law but will need to explore that in greater detail than does the main judgment.

English common law

[130] The proper approach to the determination of the law of a foreign country is to examine the authoritative decisions of its courts. In England that is the Supreme Court and was formerly the House of Lords. It pronounced on the relationship between ostensible authority and estoppel in *Armagas*,[112] where Lord Keith of Kinkel, giving the opinion of the House, said:

> "*Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed.* In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it."[113] (Emphasis added.)

[131] It should be unnecessary to delve any further into the English law in the light of that decision. If a foreign court were investigating whether the operation of the *in duplum* rule is suspended in South Africa once the plaintiff has instituted action, that question would be answered in the negative by reference to this Court's decision in

[111] See [70] above.

[112] *Armagas* above n 107 at 389-90. See also *Inland Revenue Commissioners v Ufitec Group Ltd* [1977] 3 All ER 924 at 937 and *Hely-Hutchinson v Brayhead Ltd and Another* [1967] 2 All ER 14 (QBD) (*Hely-Hutchinson QBD)* at 23.

[113] *Armagas* above n 107 at 389-390.

Paulsen.[114] One would not expect the foreign court to disregard *Paulsen* in favour of the judgment in *Oneanate.*[115] That would be inconsistent with the comity that the courts of one country have for those of another. But in view of the fact that the main judgment does not deal with what was said in *Armagas* and relies upon an understanding of English law that is inconsistent with it, I think it is necessary to examine the leading English cases in more depth to demonstrate why this leads to error.

[132] *Hely-Hutchinson CA* was decided in 1967 and is a decision by the Court of Appeal consisting of three judges, all of whom delivered judgments. The *ratio decidendi* of the decision can only be determined by examining all three. But first it is necessary to examine a judgment of the Court of Appeal handed down four years before. That necessity arises because the passage from Lord Denning's judgment in *Hely-Hutchinson CA* relied on in the main judgment starts as follows:

> "I need not consider at length the law on the authority of an agent, actual, apparent or ostensible. That has been done in the judgments of this court in the case of *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd*."[116]

It is therefore apparent that Lord Denning accepted the law as laid down in the earlier decision.

[133] In *Freeman & Lockyer*[117] the leading judgment was given by Diplock LJ (as he then was). In what has subsequently been described by English courts as a comprehensive[118] and lucid[119] exposition of the law, which has also been accepted as correct in Australia,[120] he said:[121]

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[114] *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (*Paulsen*).

[115] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* [1997] ZASCA 94; 1998 (1) SA 811 (SCA) (*Oneanate*).

[116] *Hely-Hutchinson CA* above n 25 at 102.

[117] *Freeman & Lockyer* above n 43.

[118] *Beloff v Pressdram Ltd and Another* [1973] 1 All ER 241 (ChD) at para 256.

"We are concerned in the present case with the authority of an agent to create contractual rights and liabilities between his principal and a third party whom I will call 'the contractor'. This branch of the law has developed pragmatically . . . [b]ut it is possible (and for the determination of this appeal I think it is desirable) to restate it on a rational basis. It is necessary at the outset to distinguish between an 'actual' authority of an agent on the one hand, and an 'apparent' or 'ostensible' authority on the other. Actual authority and apparent authority are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different. As I shall endeavour to show, it is on the apparent authority of the agent that the contractor normally relies in the ordinary course of business when entering into contracts.

An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties . . . . To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor.

. . .

An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract." (Emphasis added.)

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[119] *Hely-Hutchinson QBD* above n 112 at para 23.

[120] *Northside Developments (Pty) Ltd v Registrar-General* [1990] HCA 32; (1990) 170 CLR 146) in particular Brennan J paras 5-18, Dawson J paras 14-20 and 31 and Toohey J at para 4.

[121] *Freeman & Lockyer* above n 43 at 644.

[134] Diplock LJ thus clearly founded ostensible authority on estoppel. So did Pearson LJ in his judgment in that case where he said:

> "The expressions 'ostensible authority' and 'holding out' are somewhat vague. The basis of them, when the situation is analysed, is an estoppel by representation."[122]

There can be no doubt that the *ratio decidendi* of this case is that ostensible authority is an estoppel by representation. That is after all what the judges said. The main judgment suggests that the first part of the passage from the judgment of Diplock LJ accurately describes apparent authority, while the emphasised portion creates confusion because it "introduces the issue of estoppel, as if it is an integral part of apparent authority".[123] But that involves reading the passage through the filter of the view that apparent authority and estoppel are different concepts. Absent that filter it states quite clearly that ostensible authority is a matter of estoppel arising by virtue of a representation of authority.

[135] Diplock LJ summarised his conclusions in the following terms:[124]

> "If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown: (a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (b) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (c) that he (the contractor) was induced by such representation to enter into the contract, ie, that he in fact relied on it; and (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent. The confusion which, I venture to think, has

[122] Id at 641.

[123] See [78] above.

[124] Id at 646.

> sometimes crept into the cases is, in my view, due to a failure to distinguish between these four separate conditions, and in particular to keep steadfastly in mind . . . that the only 'actual' authority which is relevant is that of the persons making the representation relied on."

[136] That judgment has been repeatedly endorsed in subsequent cases. I need mention only two. In the Court of Appeal in *Armagas*[125] Robert Goff LJ (as he then was) described it as "the *locus classicus* on the subject of ostensible authority" and proceeded to re-affirm that—

> "*ostensible authority* is created by a representation by the principal to the third party that the agent has the relevant authority, and that the representation, when acted on by the third party, *operates as an estoppel*, precluding the principal from asserting that he is not bound." (Emphasis added.)

On appeal the House of Lords took the same view as is apparent from the passage quoted in [130] from Lord Keith's speech.

[137] I have already pointed out that Lord Denning MR himself, in *Hely-Hutchinson CA*, endorsed the decision in *Freeman & Lockyer*. So did Lords Wilberforce and Pearson[126] in their concurring judgments.[127] That is hardly surprising because Lord Pearson, as a Lord Justice of Appeal, had concurred in Diplock LJ's judgment in *Freeman & Lockyer*. And at the risk of being accused of heaping Pelion upon Ossa, immediately after the passage relied on in the main judgment, Lord Denning said that on the facts of the case there was actual implied authority and added:

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[125] *Armagas CA* above n 44 at 795.

[126] It is not clear why two Law Lords sat with the Master of the Rolls in a case in the Court of Appeal. But it is noteworthy that the judgments in question were all delivered by extremely distinguished judges all of whom were either members of, or went on to become, members of the House of Lords. It is unclear on what basis this Court can depart from their firmly expressed views on the content of English law.

[127] *Hely-Hutchinson CA* above n 25 at 104 and 108-9.

> "This finding makes it unnecessary for me to go into the question of ostensible authority . . . . I do not say that the judge was in error in what he said on these subjects. All I say is that I do not find it necessary to express any opinion on it."

The trial Judge[128] had followed Diplock LJ's statement of the legal position and the other two members of the Court of Appeal agreed that there was actual implied authority in the case. So the case did not turn on ostensible or apparent authority at all, nor did it depart from the accepted view in England that this falls within the field of estoppel.[129]

[138] I will briefly examine the passage from Lord Denning MR's judgment quoting it without the preamble set out in [132] above. It reads:

> "[A]ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it. *Ostensible or apparent authority is the authority of an agent as it appears to others.*"[130] (As it lies at the heart of the reasoning in the main judgment, I have like my Colleague italicised the key passage.)

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[128] Roskill J, himself also, at a later stage, a Law Lord.

[129] See Spencer Bower and Turner above n 95 at 181-2 in dealing with the relationship between estoppel and agency the authors say:

> "Such cases are most often dealt with as forming a part of the substantive law of agency … and in many of them the word 'estoppel' may be looked for in vain, and expressions such as 'holding out' and 'apparent' and 'ostensible' authority being preferred; but … the legal consequences of such 'holding out', 'appearance' or 'ostent' are none other than those which result from the application of the principles of estoppel to the representation thereby constituted."

See also Halsbury's *Laws of England*, 5 ed (Butterworth, London) vol 1, para 25; Handley *Estoppel by Conduct* (Thomson and Sweet & Maxwell, London 2006) at 9-001 to 9-004; and Fridman, *The Law of Agency* 7 ed (Butterworths, London 1996) at 122-3.

[130] *Hely-Hutchinson CA* above n 25 at 102.

[139] This cannot be taken as an indication that ostensible authority is a form of authority or that it is the other side of the coin from actual authority. It exists where the principal represents, either by words or conduct, that someone has authority to enter into a transaction on behalf of the principal. Where the representation of authority coincides with actual authority then it is actual authority and nothing more need be said. It is only relevant where the representation of authority diverges from and is greater than the actual authority. That much is clear from the example that follows, of a managing director, which is particularly pertinent to the present case, given Mr Knott-Craig's role in events. A person appointed to that office may have either the ordinary powers of a managing director, or some more restricted powers. But as a result of their appointment the company represents them as having the usual powers of a managing director. That is the appearance given, or representation made (the two expressions are synonymous), to people dealing with the managing director. And when people deal with the company relying on that appearance or representation the company is bound. That may be because actual and ostensible authority coincides, or because the principal is precluded, that is, estopped, from asserting the managing director's lack of authority. But they will only be bound in that case if the other party reasonably acted upon the representation to their prejudice. Were that not so a party could rely on ostensible authority arising from the appearance of matters even though they were aware of the limitation on the managing director's authority, for example, because they had been told that the contract would have to be referred to the board of directors for approval.

South African law

[140] In our case law ostensible authority has always been treated as a form of estoppel, and in my view that is the correct approach as a matter of principle. I need to deal with the suggestion that this was not so until matters went astray in *NBS Bank*, which has been followed in all the recent leading cases in the Supreme Court of

Appeal.[131] But no case and no authority is cited prior to *NBS Bank* that supports the notion that the latter case involved a deviation from established principle. It is not suggested that treating ostensible authority as a form of authority and not estoppel is a constitutionally mandated development of the common law. This necessitates an examination of the South African authorities. The earliest judgments I have discovered describing apparent authority as estoppel are two decisions by Lord de Villiers CJ in 1904 and 1906 respectively.[132] In the earlier of these Lord de Villiers CJ said in regard to a plea of estoppel relating to the authority of a person to dispose of shares that:

> "I am satisfied also that by our law, as by the law of England, a person who by his conduct has clothed his agent with the apparent ownership and right of disposition of a document, whether negotiable or not, is estopped from asserting his title as against a person to whom such agent has sold it, and who received it in good faith, and for value."

[141] The next case of importance is *Strachan v Blackbeard and Son*.[133] It dealt with loans made by Blackbeard and Sons to one McLeod. Strachan was McLeod's employer, but had not given him authority to borrow money on his behalf. The claim failed because Strachan had not represented that McLeod had authority to borrow on his behalf. But all three judges made it clear that where there was no authority to borrow, whether express or implied, the case necessarily had to rest on estoppel.[134] Innes J said that the plaintiff could—

> "make their case either by proving, expressly or impliedly, that McLeod had authority to bind the defendant's credit, or by establishing facts which operated to estop the

[131] *NBS Bank* above n 22*; South African Broadcasting Corporation* above n 22; *and Northern Metropolitan Local Council* above n 24 at para 28.

[132] *Van Blommenstein v Holliday* (1904) 21 SC 11 at 17 and *In Re Reynolds Vehicle and Harness Factory Limited* (1906) 23 SC 703 at 712.

[133] *Strachan v Blackbeard and Son* 1910 AD 282.

[134] Id at 287 per De Villiers CJ and at 295-6 per Solomon J.

latter from denying the existence of such authority – even though, in truth, it did not exist."[135]

[142] That decision was followed in *Monzali v Smith*,[136] where Stratford JA said:

"To establish agency by estoppel there are two requisites: first, the principal sought to be bound must represent by his words or conduct that the person professing to bind him has authority to do so, and secondly, that the person to whom the profession is made acts on the faith of the representation to his prejudice. The rule is stated in Bowstead on *Agency* (4 edition, art 88) thus: 'Where any person by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority which he was so represented to have.' But the representation whether by words or conduct must be of such a nature that it could reasonably have been expected to mislead. In dealing with estoppel by course of dealing De Villiers CJ laid down the following in the case of *Strachan v Blackbeard & Son* (1910 AD at p 288), (I quote the headnote which, with the omission of the names of the parties, is substantially what the learned Judge held): 'To prove a course of dealing which would estop a principal from denying an authority which, in fact, he never conferred on his agent and which could not be legally implied from the nature of the agency, it is not sufficient to show that the plaintiff may possibly have been mislead, but the plaintiff must show that the course of dealings was of such a nature that it could reasonably have been expected to mislead, and that it did in fact mislead him.'"

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[135] Id at 290.

[136] *Monzali* above n 28 at 385. See also the classic statement on estoppel by Watermeyer JA in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 48 that—

> "[w]here one person (the representor) has made a representation to another person (the representee) in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time and in the proper manner objects thereto."

Further authority for that proposition can be found in *Rossouw and Steenkamp v Dawson* 1920 AD 173; *Baumann v Thomas* 1920 AD 428; and *Union Government* above n 96.

[143] This situation is frequently described as agency by estoppel, although in truth it is no agency at all. The point is that the agent does not have authority to represent the purported principal, but the latter is precluded by estoppel from disputing the agent's authority.[137] This is, to borrow my colleague's metaphor, the opposite side of the coin to actual authority, whether that authority is actual or implied. Is there any basis for thinking that ostensible or apparent authority is any different from agency by estoppel? In my view there is not.

[144] There are a number of references to ostensible authority in the early judgments of our courts, where it is used as the equivalent of implied authority.[138] Most of these involved persons in a similar position to the managing director in *Hely-Hutchinson* and implied authority was inferred from the position they held in the affairs of the company or entity concerned. In these cases references to ostensible authority are no more than a misleading way of describing actual authority and they can accordingly be disregarded. In others the discussion of the concept is only compatible with it being treated as a species of estoppel by representation.[139]

[145] The terms ostensible authority and estoppel were linked by Greenberg J in *West*.[140] The plaintiff had given certain shares in pledge to a broker together with share transfer forms signed in blank.[141] The broker dishonestly, and in breach of the pledge, sold and transferred the shares to innocent third parties. The plaintiff sought their recovery in a vindicatory action. The action failed on the basis that the broker

[137] See for example, *Lucey & Co Ltd v Martial & Son* 1931 NPD 47 at 56; *Peddie and Drummond v Heydorn* 1913 OPD 102 at 104; and *Quinn and Co Ltd v Witwatersrand Military Institute* 1953 (1) SA 155 (T) at 159E G.

[138] *Acutt v Seta Prospecting and Developing Co Ltd* 1907 TS 799 at 819; *Norwich Union Life Insurance Society v Dobbs* 1912 AD 484 at 491; *Turner, Visser & Co v Minister of Defence* 1916 CPD 84; *Klopper v Van Rensburg* 1920 EDL 239; *Kahn v Leslie and Son* 1928 EDL 416 at 418-9; and *Baldachin's Trustees v Sloman & Sloman* 1944 SR 55.

[139] *Adam v Mocke* 1906 23 SC 782; *Central South African Railways v James* 1908 TS 221 at 231-2; *Welgedacht Exploration Co Ltd v Transvaal and Delegoa Bay Investment Co Ltd* 1909 TH 90 at 103 and 106; and *Coetzee v Kakamas Labour Colony Committee* 1927 CPD 417.

[140] *West* above n 35.

[141] This was in the days prior to dematerialised shares and the implementation of the STRATE system by the Johannesburg Stock Exchange.

had ostensible authority to sell the shares, such authority being based on estoppel. Greenberg J explained his decision as follows:

> "Estoppel operates by preventing a person from denying the truth of a representation he has made. In the present case the representation which is relied upon is the representation created through the documents, namely, that by giving the scrip and the blank transfer forms to Hunt, appellant represented that Hunt was authorised to deal with the shares. It appears to me that *the effect of estoppel is that the appellant is not entitled to deny that he gave this authority which ostensibly he gave*, with the result that in proceedings to which estoppel applies he is deemed to have given the authority. The transaction is looked upon as if he has actually given the authority, and as a result of this authority, combined with the delivery, ownership to the shares passes."[142] (Emphasis added.)

In a further passage on the same page Greenberg J spoke of a situation where "the purchaser from the agent with ostensible authority, has established the estoppel". He was specifically referring to the fact that proof of the ostensible authority, and that it had been acted upon, "established the estoppel". That would have been wholly unnecessary if the ostensible authority, as a form of actual authority involving something less than estoppel, sufficed to render the principal liable.

[146] In another case arising out of the same fraud,[143] Centlivres J said in regard to the plea of estoppel:

> "I cannot do better perhaps than to refer to the authority . . . of *Fuller v Glynn, Mills, Currie & Co.* [1914 2 KB 168 at 177], where Pickford J, said: 'I must therefore consider the principle on which this estoppel rests. In my view it does not rest on the mere manual act of signature. That act is not an essential element in the estoppel. Its importance, where it exists, is as one step towards placing in the power and disposition of another an instrument which carries with it a representation of authority

[142] *West* above n 35 at 68.

[143] *West v De Villiers* 1938 CPD 96.

> to that other person to deal with it, and which when produced to a third person will convey to that third person that such an authority exists'."[144]

[147] That ostensible authority is a manifestation of estoppel by representation is clear from the judgments in *Insurance Trust*.[145] Broome J said that the legal position is that—

> "[t]he plaintiff can only succeed if there were real authority . . . express or implied, to bind the company, or if there was such ostensible authority as to create estoppel."[146]

Hathorn JP said:

> "My view is that the law relating to the branch of agency, here under discussion, is perfectly clear, whether it be applied to companies or natural persons. The principal is liable in two cases only. First, where there is actual authority, express or implied. Second, where the principal is estopped from denying the authority of the agent."[147]

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[144] Id at 103-5.

[145] *Insurance Trust* above n 36.

[146] Id at 58.

[147] Id at 61-3. Hathorn JP added the following explanation of the confusion that may arise in this area:

> "The law in England seems to me to be in a state of confusion, especially as applied to companies. There are signs that the same confusion, borrowed from England, is finding its way into our law. Unless precision of thought and expression are insisted upon in South Africa in this branch of the law, principles which are simple and plain will become clouded.
>
> It is easy to see what causes the confusion. First of all, lawyers are inclined to forget that cases of actual authority are totally different from cases of estoppel. In the former, the simple question is, had the agent actual authority, express or implied? *In the latter, the enquiry is, did the person sought to be bound as principal make a representation to the person seeking to bind him, in such circumstances as, by an application of the principles of estoppel, the person sought to be bound is estopped from denying the authority of the agent.* It is obvious that in cases of estoppel the question whether there was actual authority, express or implied, is not a major issue. If the facts involved in that question are relevant at all, they are only relevant as evidence to prove the estoppel.
>
> The second cause of confusion is the habit, in which Judges are inclined to indulge, of using the same facts to base a conclusion that there is implied authority as they would use to base a conclusion that there is an estoppel.
>
> . . .
>
> The third cause of confusion is the use of the expressions 'apparent authority' or 'ostensible authority' in conjunction with actual authority, express or implied. I venture to suggest that the first two phrases are apt to describe a conception which is confined to cases of estoppel, that is, the conception of the authority of a supposed agent to act for a supposed principal, when in fact there is no actual authority or when the fact that there is actual authority is not a

In the main judgment it is said that these statements "cannot reasonably be construed to be authority for the proposition that apparent authority is estoppel".[148] I am unable to read them as saying anything else. Broome J said that "there was such ostensible authority as to create an estoppel". Hathorn JP said, in the passage more fully quoted at n 147 that those two expressions apparent authority and ostensible authority "are apt to describe a conception which is confined to cases of estoppel". Both clearly made the point that ostensible authority falls within the general concept of estoppel.

[148] A similar statement of the position is to be found in the judgment of Quenèt J in *Clifford Harris*.[149] The relevant passage reads:

> "It is clear that in contract the principal's liability to third parties for the acts of his agent depends either upon the agent's actual authority, express or implied, or upon the agent's ostensible authority, that is, in consequence of a holding-out and, in such a case, there is said to be an agency by estoppel."

In *Inter-Continental Finance*[150] Botha J said in relation to ostensible or apparent authority that they are terms used to describe a situation:

> "Where there is no authority in fact but the principal is estopped from denying the existence of authority, according to the ordinary principles of estoppel. This situation is frequently referred to as one of agency by estoppel, which is in itself, notionally, a misnomer."

He went on to point out that the terms ostensible and apparent authority are also sometimes used to describe situations where express authority cannot be shown but it

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major issue. But unfortunately the phrases are often used in cases of actual authority." (Emphasis added.)

[148] See [71] above.

[149] *Clifford Harris (Rhodesia) Ltd and Another v Todd NO* 1955 (3) SA 302 (SR) (*Clifford Harris*) at 303F-H. See also *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) at 14C-E and 18H-19A.

[150] *Inter-Continental Finance* above n 89 at 748B-C.

can be implied from the conduct of the principal, and summarised the relevant principles as follows:

> "A is bound by an agreement purportedly entered into on his behalf by B with C if B had authority from A to enter into that agreement on A's behalf, or if A is precluded from denying such authority by virtue of the principles of estoppel. Between actual authority and estoppel I can perceive no intermediate situation in which A is bound by B's agreement with C."[151]

[149] There is a comprehensive discussion of ostensible authority on the basis of estoppel in *Connock.*[152] But it did not cast doubt on the law as stated in these earlier cases. In *Service Motor Supplies* and *Southern Life*[153] the then Appellate Division dealt with the issue on the basis of estoppel. And in two cases leading up to *NBS Bank*, one of which dealt with the same fraud and the same bank manager as that case, ostensible authority was expressly dealt with on the basis of estoppel.[154] This was also the stance of the textbook writers.[155]

[150] *NBS Bank* was the first of a number of relatively recent cases in the Supreme Court of Appeal to deal with these issues. It concerned a fraudulent scheme of taking investments orchestrated by the branch manager of one branch of the bank.

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[151] Id at 748 E-G.

[152] *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) (*Connock's*) at 49A-53B.

[153] *Service Motor Supplies (1956) (Pty) Ltd v Hyper Investments (Pty) Ltd* 1961 (4) SA 842 (A) (*Service Motor Supplies*) and *Southern Life Association Ltd v Beyleveld NO* 1989 (1) SA 496 (A) (*Southern Life*). See also *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 (3) SA 352 (A) at 364; *Dicks v South African Mutual Fire and General Insurance Co Ltd* 1963 (4) SA 501 (N) at 506H-509G; and *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T) at 304F-305B.

[154] *African Life Assurance Co Ltd v NBS Bank Ltd* 2001 (1) SA 432 (W) at 451E-H; *Glofinco v ABSA Bank Ltd (t/a United Bank) and Others* 2001 (2) SA 1048 (W) at 1064A-B (*Glofinco HC*) describing "[t]he requirements for establishing ostensible or apparent authority or agency by estoppel".

[155] Kerr *The Law of Agency* 3 ed (Butterworths, Durban 1991) at 112-148; De Villiers and Macintosh *The Law of Agency in South Africa* 3 ed (Juta, Cape Town 1981) at 119; Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* (Juta, Cape Town 1979) at 109-15; De Wet and Yeats "*Kontraktereg en Handelsreg"* 4 ed (Butterworths, 1978) at 101, a paragraph that appears in each of the earlier editions; Wille and Millin's *Mercantile Law of South Africa* 18 ed (Hortors, Johannesburg 1984) at 466-8, repeating in substance what appears in earlier editions and Wille's *Principles of South African Law* 9 ed (Juta, Cape Town 2007) at 991 also repeating in substance what appears in earlier editions.

When the investment was stolen and the investor sued the bank it resisted the claim on the grounds of the manager's lack of authority. Giving the judgment of the court, Schutz JA cited the passage from the judgment of Lord Denning MR in *Hely Hutchinson CA*.[156] I have dealt with that fully in the analysis of the English law and need say no more.

[151] In accordance with the lengthy and unbroken line of authorities dealt with above, Schutz JA placed the question of ostensible authority squarely within the framework of estoppel. He said:[157]

> "As Denning MR points out, ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him." (Emphasis in original.)

[152] Since *NBS Bank* the Supreme Court of Appeal has several times reaffirmed this approach.[158] For present purposes I need quote only two passages. I do not do so because it is necessary to add further authority to show that ostensible authority (under that name, or when described as apparent authority, or agency by estoppel) is a form of estoppel by representation precluding reliance on a denial of authority. My purpose

[156] *Hely-Hutchinson CA* above n 25 at 101-2.

[157] *NBS Bank* above n 22 at para 25.

[158] *South African Eagle Insurance Co Ltd v NBS Bank Ltd* [2001] ZASCA 118; 2002 (1) SA 560 (SCA); *Glofinco SCA* above n 24 at para 13; *South African Broadcasting Corporation* above n 22 at paras 64-6; *MEC for Economic Affairs, Environment and Tourism v Kruizenga* [2010] ZASCA 58; 2010 (4) SA 122 (SCA) (*MEC for Economic Affairs*) at paras 15-6; *Northern Metropolitan Local Council* above n 24 at paras 28-9.

is to stress the point that the representation founding that estoppel must be a representation by the principal, either by words or conduct. Absent a representation that draws its authority from the words or conduct of the principal there can be no estoppel. This is in harmony with the main judgment's acceptance that the only requirement for a finding that there is ostensible authority is that "a principal by words or conduct has created an appearance that the agent has the power to act on its behalf".[159] I stress the point because we received argument based on the proposition that a representation by Mr Geissler alone, unsupported by any representation by Vodacom, should suffice. These cases refute that proposition and inform my approach to the facts.

[153] In *Glofinco SCA*,[160] Nienaber JA said:

> "A representation, it was emphasised in both the *NBS* cases, *supra*, must be rooted in the words or conduct of the principal himself and not merely in that of his agent. 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." (Footnotes omitted).

And in *MEC for Economic Affairs*,[161] Cachalia JA said:

> "It is well established that to hold a principal liable on the basis of the agent's apparent authority, the representation must be rooted in the words or conduct of the principal, and not merely that of his agent. Conduct may be express or inferred from the 'particular capacity in which the agent has been employed by the principal and from the usual and customary powers that are found to pertain to such an agent as belonging to a particular category of agents'. It may also be inferred from the 'aura of authority' associated with a position which a person occupies, at the principal's instance, within an institution." (Footnotes omitted).

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[159] See [46] above.

[160] *Glofinco SCA* above n 24 at para 13.

[161] *MEC for Economic Affairs* above n 158 at para 16.

Conclusion on ostensible authority

[154] The argument before us accepted the analysis of the present state of our law set out above. That analysis shows that in English law ostensible authority is an estoppel by representation and that the earlier decisions of our courts that say that ostensible or apparent authority is a form of estoppel are correct. That is also the view of the academic commentators both here and overseas.[162] This characterisation was not and is not challenged on the basis that it is inconsistent with the spirit, purport and objects of the Bill of Rights. It should in my opinion be applied in this case. Therefore, once Mr Makate accepted that Mr Geissler did not have actual authority, whether express or implied, to conclude a contract with him on behalf of Vodacom, he had to show that Vodacom made a representation to him that Mr Geissler had the requisite authority and that he reasonably acted upon it.

[155] Before leaving the question whether ostensible authority is a matter of estoppel there are two further points to be made. The first is that no difficulty of principle or practicality arises in characterising ostensible authority as estoppel. That is illustrated by the facts of this case. The main judgment accepts that there must be a representation by Vodacom as the party Mr Makate seeks to bind. Presumably, as the basis is misrepresentation, it is a requirement that Mr Makate should have relied on that representation.

[162] The sole exception I have found in South Africa is Kerr *The Law of Agency* above n 23 at 26-31 and 94-126 where the author seeks to draw a distinction between apparent authority and estoppel. But this is a very curious endeavour. The reason is that in the third edition (above n 154) the author treated apparent authority as part of the law of estoppel. See pages 112-7 where he said that: "the language of the courts is the language of estoppel". He then dealt at length with the different requirements to be extracted from *Monzali*, which is expressly based on estoppel. In the fourth edition, subject to moving a few paragraphs in which he discussed the general principles of estoppel before dealing with *Monzali*, he repeats the contents of the earlier edition, including the exposition of *Monzali*, under the heading of "Apparent authority" (at 94-107). After this he re-inserts the deleted sections on estoppel (at 109-113) and applies to this concept the very same rules he derived from *Monzali*. It is unclear what is to be made of this. No reason is given for saying that principles of law that in the third edition applied to estoppel are no longer applicable to that subject, but now relate to a different concept of apparent authority. It is even more puzzling when he says that the applicable cases are the same in both fields and the same principles apply in both. If two legal concepts are established by the same authorities and have identical principles then they are the same and calling them by different names does not alter that.

[156] It can hardly be suggested that, had Mr Makate known that Mr Geissler lacked authority, Vodacom would nonetheless have been bound on the basis of a representation that did not influence his conduct, or that it should be held bound by a contract that he knowingly concluded with someone lacking authority to represent Vodacom. Then there is the twofold requirement of reasonableness, namely that the representation must have been one that Vodacom should reasonably have thought would be relied on and that Mr Makate reasonably relied on it. These do not seem to pose any difficulty. If Mr Makate behaved unreasonably it would be wrong to hold Vodacom liable for it. Lastly there is the issue of prejudice. That is obvious. For Mr Makate to permit Vodacom to develop his idea in a false belief that he would be compensated for it plainly redounds to his prejudice.

[157] The second point relates to the suggestion that my approach is contrary to principle and the approach our law takes to the doctrine of quasi-mutual assent.[163] The example is given of a person who is held liable on a contract because they reasonably caused the other party to believe that they were agreeing to conclude a contract with them.[164] That has on several occasions been treated as estoppel,[165] but in *Saambou*[166] Jansen JA said that it would lead to greater clarity to distinguish quasi-

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[163] See [72] to [74] above.

[164] The rule reflects the generally objective approach that South African law adopts to the existence of a contract as embodied in the well-established principle stated by Wessels CJ in *South African Railways and Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715-6:

> "The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even, therefore, if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract."

This approach is consistent with the oft-quoted statement by Blackburn J in the English case of *Smith v Hughes*, (1871) LR 6 QB 597 at 607 which has been consistently and repeatedly followed by our courts:

> "[W]hatever a man's real intention may be, [if] he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

[165] *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417 at 424; *Peri-Urban Areas Health Board v Breet NO* 1958 (3) SA 783 (T) at 790A-G; and *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 425E-G.

[166] *Saambou* above n 41 at 1002C-E.

mutual assent and the reliance theory of contract from estoppel. The problem he was addressing was whether our law of contract is wholly subjective and based on the existence of *consensus ad idem* (subjective agreement, which he referred to as the "wilsteorie" of contract),[167] or whether it includes objective elements, which he described as the reliance theory. This bears no resemblance to the issue that arises in relation to the authority to conclude a contract. In the former case the issue is a single one of whether there is any contract at all. In the latter there is a contract, but one of the parties claims that the person purporting to represent it lacked authority to contract. This involves two separate enquiries, namely, whether there was express or implied authority and, if not, whether there was ostensible authority. Whatever reasons there may be for distinguishing between quasi-mutual assent and the objective approach to whether a contract was concluded, they have no bearing on the issue of ostensible authority. The two situations are not in my view comparable.

Source of the representation

[158] The focus of the enquiry must turn to the issue of representation. There can be no doubt that Mr Makate acted upon the belief that Mr Geissler had authority to conclude a contract with him. In view of his position in the company – and despite some suggestions in argument that as an employee he ought to have known that this was not the case – it was reasonable for him to rely upon any such representation. So the crucial issue is whether Vodacom made such a representation to Mr Makate.

[159] The primary submission by Mr Makate's legal advisers is that the requirement that the representation must be that of Vodacom and not Mr Geissler stated the requirements too stringently, for reasons I will discuss shortly. Only in the alternative was it contended on constitutional grounds that it should be relaxed in the case of a person in Mr Makate's position. The scope of such relaxation was not clearly defined in their submissions and amounted to little more than a contention that on the facts of this case Mr Makate should be held to have discharged the onus of proving ostensible

[167] Id at 993D-F.

authority and, to the extent that in strict law he had not done so, the strict law should be relaxed.

[160] That is not a satisfactory basis upon which to ask this Court to discharge its constitutional function of developing the common law so as to ensure that it accords with the spirit, purport and objects of the Bill of Rights. Such a process requires in the first place a clear understanding and exposition of the current state of the common law as it applies to the problem at hand and a precise identification of the manner in which it is suggested that it should be developed.[168] We cannot simply overthrow the existing law – which the Constitution explicitly preserved, subject to its being consistent with the Constitution[169] – because a particular case evokes sympathy or because of the disgraceful conduct of a party. Notoriously, hard cases make bad law. Constitutional development of the law, as our jurisprudence demonstrates, requires that changes to existing law be articulated with the same clarity as the rules and principles that they replace. When urging this Court to develop the common law it is appropriate for legal practitioners to bear this in mind and seek to formulate the development they propose with the greatest possible clarity.

[161] I do not see the need for any development of the common law along the lines suggested by counsel. I agree with counsel that in some of the cases it has been stated too stringently and without necessary qualification. I also agree that in this case the trial judge erred by following that overly stringent approach. The statements that say or indicate that the representations of the agent cannot be taken into account at all, fail to take account of the fact that companies can only make representations through natural persons who themselves have authority to represent them. That requires in any particular case that the court examine closely how authority was exercised in the company sought to be held liable in order to ascertain whose conduct was authorised and whose representations would bind the company. It goes without saying that this

[168] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) at para 38.

[169] Item 2(1)(b) of schedule 6 to the Constitution.

exercise may be complex and that the actions of various different people will need to be taken into account in the analysis.

[162] A helpful starting point is the judgment of Lord Pearson in *Hely Hutchinson CA*,[170] where this very problem was explored. Lord Pearson said:

> "There is, however, an awkward question arising in such cases how the representation which creates the ostensible authority is made by the principal to the outside contractor. There is this difficulty. I agree entirely with what Diplock LJ said . . . that such representation has to be made by a person or persons having actual authority to manage the business. Be it supposed for convenience that such persons are the board of directors. Now there is not usually any direct communication in such cases between the board of directors and the outside contractor. The actual communication is made immediately and directly, whether it be express or implied, by the agent to the outside contractor. It is, therefore, necessary in order to make a case of ostensible authority to show in some way that such communication which is made directly by the agent is made ultimately by the responsible parties, the board of directors. That may be shown by inference from the conduct of the board of directors in the particular case by, for instance, placing the agent in a position where he can hold himself out as their agent and acquiescing in his activities, so that it can be said that they have in effect caused the representation to be made. They are responsible for it and, in the contemplation of law, they are to be taken to have made the representation to the outside contractor." (Footnote omitted.)

[163] Frequently, as in that case, the conduct constituting the representation will be the conduct (not the claims to authority) of the purported agent. The reason is that, when one is concerned with the ostensible authority of a managing director, the conduct conveying to the outside world that the incumbent has the authority in issue is almost inevitably that of the managing director. In that sense at least some of the representation is to be found in the conduct of the agent. This is a point that Robert Goff LJ made in *Armagas CA*:[171]

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[170] *Hely-Hutchinson CA* above note 25 at 108-9.

[171] See *Armagas CA* above n 44 at 795.

> "Diplock LJ confined his analysis to ostensible authority of an agent to bind his principal to a contract. I, for my part, can see no reason why the same principles should not be applicable to other acts by an agent, for example the making of representations by the agent, provided that it is clearly understood that, to give rise to ostensible authority, *the representation by the principal must be to the effect that the agent is authorised to make the representation on his, the principal's, behalf, so that the third party is entitled to rely on it as such.* On this basis, a representation by an agent within his ostensible authority may give rise to an estoppel against his principal." (Emphasis added.)

[164] I agree with that analysis.[172] It follows that the strict approach postulated by Nienaber JA in *Glofinco SCA*[173] must be qualified. Insofar as the agent has actual authority to make representations on behalf of the principal those representations, even as to the agent's own authority will bind the principal. Equally, if the agent has ostensible authority to make those representations and a third party acts on them to their prejudice, they will bind the principal on the basis of estoppel. The aura of authority created by the principal, both by its actions, but also by its acceptance of the acts of its employees, is the central consideration.

[165] In summary the position in regard to representations of authority founding a claim of ostensible authority is the following. The statements or conduct constituting the representation must be those of persons, individually or collectively,[174] who have

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[172] I consequently disagree with its rejection by the High Court of Australia in *Crabtree-Vickers Pty Ltd v Australia Direct Mail Advertising & Addressing Co Pty Ltd* [1975] HCA 49; (1975) 133 CLR 72 at para 15. See Handley above n 127 at 137, who likewise criticises the decision. The High Court of Australia accepted *Freeman & Lockyer* as the authority on this point. So did the Supreme Court of Canada in *Canadian Laboratory Supplies Ltd v Engelhard Industries of Canada Ltd* [1979] 2 SCR 787 at 797 and 815. In that case, Laskin CJ said (at 800):

> "I do not subscribe to the proposition, in so far as it purports to be a general statement of the law, that a representation by an agent himself as to the extent of his authority cannot amount to a holding out by the principal. It will depend on what it is an agent has been assigned to do by his principal, and an overreaching may very well inculpate the principal".

[173] See *Glofinco SCA* above n 24.

[174] Such as a board of directors.

actual authority to bind the principal to the transaction in dispute. The conduct may include the appointment of an individual to a position ordinarily carrying with it a particular level of authority. If the appointment is made, but some of that authority is withheld or subjected to limitations, it is essential that this is made clear to persons dealing with that individual. Otherwise they will be entitled to hold the company to the representation of authority created by the appointment. A representation may also be made by permitting the putative agent to engage in a course of dealing on behalf of the principal. Representations by the agent alone without more are insufficient, whatever form they may take. But the conduct and statements relied upon may be those of the agent, provided the conduct or statements are themselves within the actual or ostensible authority of the agent. The statements and conduct must, when taken as a whole, be such as reasonably to convey to a person dealing with the agent the impression that they have authority to conclude the transaction in question, and thereby to induce the belief in that person that they have that authority.

[166] The issue of Mr Geissler's ostensible authority must therefore be viewed not only in terms of his positive conduct and that of others, but also in the light of the overall picture of the sources of authority created by Vodacom in relation to the conduct of its business and the identity of those to whom it delegated authority to act on its behalf and represent it in the conclusion of a contract of the type in issue. Against that background I turn to deal with the facts.

Was ostensible authority proved?

[167] The source of authority in a company such as Vodacom is principally the board of directors. While there are some matters, such as the disposal of the business of the company, which can only be undertaken with the approval of the shareholders, in general it is the board of directors that is responsible for the conduct of the business of the company. But in a modern company, as was the case with Vodacom, the board of directors consists of both executive and non-executive directors. The executive directors are usually those who are critically involved in the day to day operations of the company. The most important of these will be the CEO and the chief financial

officer (CFO). The non-executives are usually in the majority and play more of an oversight role, ensuring that the executives perform to shareholders' expectations and overseeing their actions and the strategic direction of the company. And it is for the board to fix the parameters of the authority of the executives and especially the authority of the CEO.

[168] In this case the CEO was Mr Alan Knott-Craig. He is an unusual individual. There can be few CEO's of public companies in South Africa whose lives and performance in that role have warranted the production of an autobiography. But Mr Knott-Craig had achieved what few others had done, at an exciting time in this country's history in a period of extraordinary technological development in the world. Mobile telephony is a relatively recent development. Most people, not only in South Africa, but elsewhere, have probably not owned a mobile phone for much more than twenty years. Yet, as we see everyday, they have become not just ubiquitous but an essential item in modern life. Vodacom is one of two or three major suppliers of mobile telephony services in South Africa and elsewhere on the African continent. It is a giant company. And in large measure it was created and has achieved its current eminence as a result of the vision, drive and energy of Mr Knott-Craig.

[169] So what was the extent of Mr Knott-Craig's authority? He was the Group CEO of the holding company of Vodacom and the Executive Chairman of the operating company. He was in many ways the founder and guiding spirit of Vodacom through its early years. In the eyes of the public he was Vodacom. And someone who regarded his contribution as worthy of an autobiography was not someone who stood quietly in the background waiting for things to happen. The clear impression is that he was the driving force behind the company. Of course he had to account for his running of the company to its board of directors and ultimately its shareholders, but so long as it was a success, as it undoubtedly was, it is improbable that the board would have stood in the way of any project that he had approved. In the trial Court in *Hely-*

Hutchinson QBD [175] Roskill J described the role of the managing director in that case in the following terms:

> "Sometimes, I daresay, the directors persuaded him to take or to refrain from taking a particular step; no doubt, like any wise chief executive, he sought and obtained advice before he made up his mind; but in all these cases the final decision . . . rested with him and with nobody else".

That description seems apt in relation to Mr Knott-Craig.

[170] This point is well illustrated by the launch of "Please Call Me". Mr Knott Craig approved the launch of the product without waiting for board approval. The launch was reported to the meeting of the Vodacom Group Directing Committee on 15 March 2001, by which stage the product had been launched and was generating thousands of calls a day. Mr Knott-Craig, the CFO (Mr Crouse) and the managing director of the network company, Mr Mthembu, were at that meeting by invitation. The report they tabled suggested that the planned implementation date would be 31 March 2001. But by then the product had been rolled out and was enjoying success. Not only had all employees been told of the roll-out in a general email from Mr Geissler sent on 9 February 2001, but in the company's in-house magazine for March 2001 Mr Mthembu congratulated Mr Makate on his initiative and his idea.

[171] The inescapable conclusion is that if Mr Knott-Craig approved a project that project would be undertaken. And if he approved of a new product that product would be launched in the marketplace. This would occur without any need to obtain board approval for the product. No doubt if it involved substantial capital expenditure that would have had to be put to the board for its approval, but that was not the case with "Please Call Me", at least in its initial stages.

[175] *Hely-Hutchinson QBD* above n 112 at 21.

[172] In that light it seems to me that Mr Knott-Craig had, if not actual authority, at least ostensible authority to agree to remunerate Mr Makate for his idea. He testified that there was a delegation of authority document that was the company's "bible" on authority to which strict adherence had to be paid. All contracts had to be scrutinised by the Group Board. But this evidence appears to have been led in the context of Mr Makate's claim to a revenue share, which Mr Knott-Craig said could never be approved. That may well have been so, but it is no answer to the more general claim to reasonable remuneration. Nor is it a full answer to the validity of the agreement to compensate Mr Makate for his idea. While the amount of any compensation might well, if large, have had to be approved by the Board that does not necessarily mean that no agreement for compensation could be concluded. All it meant was that the scope for negotiating such compensation was possibly restricted and subject to further approval.

[173] But Vodacom objects that there is no evidence that Mr Knott-Craig or other executives and board members were even aware of the possibility of Mr Makate wanting to be remunerated for his idea. On the probabilities, at least in respect of Mr Knott-Craig, I do not accept that this was the case and nor did the trial Court. Mr Knott-Craig was the chief executive. Mr Mthembu, the managing director of the operating company reported to him, as did Mr Geissler. Given the nature of the "Please Call Me" idea and its potential importance for the company in the future, it is inconceivable that he was unaware of it before the launch of the product. And the evidence shows that he was fully aware of it.

[174] Mr Muchenje testified that the reason he directed Mr Makate to Mr Geissler was because a project would not be put before the executive before it had received product approval. In other words it required product approval before being put to Mr Knott-Craig for his imprimatur. On 24 January 2001 Mr Geissler approved the product development plan. That document revealed potential revenues in round figures of between R239 000 and R322 500 per day. Even for Vodacom that was a significant amount. Five days later Mr van der Watt, the finance director of the

network company, reported to Mr Crouse, the CFO Director, on the financial implications of "Please Call Me". In the memorandum he noted that he understood that "Alan", that is, Mr Knott-Craig, had given instruction for urgent consideration of the service and to launch it after Board approval. That was not refuted by Mr Knott Craig, save that the product was launched, at least on a limited basis, without board approval. The probabilities are overwhelming that Mr Knott-Craig was intimately involved in the roll-out of "Please Call Me".

[175] But would he have known of Mr Makate's desire, over and above any public congratulations, to be remunerated for his idea? Again resort must be had to the probabilities. The evidence of Mr Muchenje was that Mr Geissler was close to Mr Knott-Craig and was one of the executives who had access to him if required. Mr Geissler knew from the outset that Mr Makate was seeking remuneration and had indicated that he wanted a revenue share. In those circumstances it is improbable that Mr Geissler, in introducing this exciting new product to Mr Knott-Craig, would not have told him of its provenance and of Mr Makate's desire to be remunerated therefor. Mr Knott-Craig's evidence was restricted to saying that he could not remember whether he was told of this. That was a weak response in the circumstances. Why would Mr Geissler not tell him this important fact? After all, the only basis upon which Vodacom was entitled to use Mr Makate's idea was that he would be remunerated for it. A flat rejection of any payment of remuneration would have led Mr Makate to look elsewhere to exploit his idea. As Mr Geissler knew that, there is every reason to believe that Mr Knott-Craig also knew.

[176] This is not speculation. At least two people know the true story and they are Mr Geissler and Mr Knott-Craig. (There are possibly others within Vodacom but like Mr Geissler they have said nothing.) Of these two, Mr Geissler did not give evidence and Mr Knott-Craig was a poor, and in some respects plainly dishonest, witness. A court does not in those circumstances draw the inference most favourable to the party that called or could have called these witnesses. It examines the overall probabilities, which include the absence of credible evidence from the one party. That is how the

then Appellate Division approached a similar case in *Pirie*[176] and that, in my view, is how this Court must approach this case. In addition the information known to the executives of Vodacom concerning their authority and how it was exercised in the company was not a matter within Mr Makate's knowledge. It was within the exclusive knowledge of Mr Knott-Craig, Mr Geissler and possibly other executives. In those circumstances it is a long-established principle of our law of evidence that less evidence will be required from the plaintiff to discharge the onus of proof.[177]

[177] The implications of Mr Knott-Craig being aware of Mr Makate's demands are considerable. If he wished to reject them several things had to occur. Most importantly Vodacom could not develop and launch the product without agreeing to them. Its only basis for adopting the idea and using it to create the "Please Call Me" product was that it would remunerate Mr Makate. So, if Mr Knott-Craig was aware, as I hold him to have been, of Mr Makate wanting to be remunerated, his failure to reject that notion and instruct Mr Geissler to do so is only consistent with his representing to Mr Makate that he accepted it. Crucial to a rejection of Mr Makate's demand was that Mr Knott-Craig, or Mr Geissler on his behalf, had to tell Mr Makate that he would not be paid for his idea. Neither did so. In fact the opposite occurred. Mr Geissler told Mr Makate that everything depended upon the technical and commercial viability of the idea, but once this had been established he would discuss the matter of his reward with Mr Knott-Craig.

[178] I find it impossible to accept that throughout this period Mr Geissler was deliberately stringing Mr Makate along with promises of payment and a promise that he would discuss the basis for it with Mr Knott-Craig, while concealing that from Mr Knott-Craig. That would be inconsistent with the evidence as to the relationship between the two men. The only proper conclusion is that Mr Knott-Craig knew what was demanded and knew what promises Mr Geissler was making to Mr Makate to

[176] *Pirie v Frankel* 1936 AD 397.

[177] *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4 and *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39G-H.

ensure that he co-operated with the development and roll-out of "Please Call Me". To have done otherwise would have put the entire project at risk. Various scenarios come to mind, all of them adverse to Vodacom's interests. If Mr Makate had been told that Vodacom intended to go ahead with "Please Call Me" without paying him anything, he might have consulted lawyers and sought an interdict. He might have found ways of going over Mr Knott-Craig's head to the board of directors. He might have gone to the press. The risk of reputational damage to the company was considerable. So steps needed to be taken to ensure his co-operation. That was the effect of Mr Geissler's agreement and his promises once the product was a success to discuss rewards with Mr Knott-Craig.

[179] I do not accept that the company would not have concluded a contract with an employee in order to procure the advantage of a profitable idea. While I accept that it would not have concluded an agreement on a revenue share basis, I do not accept that it would not have agreed to pay an employee, who generated, in his spare time and outside the scope of his ordinary duties, a highly profitable idea for a new product, a reasonable remuneration commensurate with the financial benefit enjoyed by the company. In fact the article in the company newsletter urged employees to come up with good ideas in the way that Mr Makate had done. The suggestion that this was precluded because it was "against the policy and practice" of Vodacom is improbable and unbusinesslike. Vodacom's business involves the exploitation of profitable concepts in the telecommunications industry. To say that it would not contract with an employee, who offered on a contractual basis to make such a concept available to it, because it was against its policy and it would not deal with an employee as it would deal with an outsider, flies in the face of common sense. In the words of the old saw, it is cutting off one's nose to spite one's face.

[180] Starting from the premise that Mr Knott-Craig had either actual or ostensible authority to agree to remunerate Mr Makate for his idea, there is no reason why he could not use Mr Geissler as his agent, in turn, to engage with Mr Makate. That was entirely compatible with the corporate hierarchy. Mr Makate was no longer dealing

with his seniors via the agency of Mr Muchenje. Instead he was in direct communication with a member of the board of the network company who in turn had the ear of the CEO. Mr Makate would not expect Mr Knott-Craig to deal directly with him. He would expect that his dealings with the upper echelon of the company would come through others, and in this case it was through a very senior individual. The internal hierarchy of the company reinforced the representation in regard to Mr Geissler's ostensible authority.

[181] Mr Makate did not say that he questioned Mr Geissler's authority or that Mr Geissler made any express representations to him about the scope of that authority. Nor did he tell him that his authority to agree to Mr Makate's demands was limited. Any such statement would inevitably have caused alarm bells to ring. This is not therefore a situation of reliance on assurances of authority by an unauthorised agent. It is a case of reliance on the conduct of those senior in the company's hierarchy that cloaked Mr Geissler with the appearance of authority to conclude the agreement that he did with Mr Makate. Once I reject, as I do, the contention that Mr Knott-Craig was unaware of what was being discussed between Mr Geissler and Mr Makate the chain of ostensible authority from the board to Mr Geissler is complete and the estoppel is established.

[182] To summarise. Mr Makate had to prove that Vodacom represented to him that Mr Geissler had the necessary authority to conclude the agreement for remuneration with him. The necessary source of authority had to be the main board. For the reasons given above I hold that the board represented to the world, including Mr Makate – one is almost inclined to say that the representation to employees would have been even stronger than the representation to the world outside the company – that Mr Knott-Craig had authority to conclude such an agreement on behalf of the company. He may have had actual authority, but for present purposes it is sufficient to say that it was represented that he had authority, in other words, ostensible authority. And that authority extended to authorising others to act on his behalf.

[183] The next link in the chain lies in the relationship between Mr Knott-Craig and Mr Geissler. Their closeness was well-known within the company and it is improbable that Mr Geissler would have concealed from Mr Knott-Craig what he was doing with and saying to Mr Makate. That is reinforced by the very public knowledge that Mr Knott-Craig wanted to speed up the launch of this product as shown in Mr van der Watt's memorandum to Mr Crouse. Combined with this was the fact that Mr Geissler was a director of the network company and the head of product development. He was therefore more than a mere subordinate in relation to Mr Knott-Craig. He was both a confidant and a person likely to be entrusted to act on his behalf.

[184] So Mr Knott-Craig had ostensible authority in his own right to conclude the contract and also had ostensible authority to invest Mr Geissler with the same authority. Once it is accepted that he knew in substance what was happening between Mr Geissler and Mr Makate and did nothing to make it clear to Mr Makate that no agreement could be concluded without reference to higher authority in Vodacom, that created the classic situation of knowingly permitting someone to exercise an authority they did not have. That is what occurred. The consequence is that Mr Geissler had ostensible authority to conclude a contract with Mr Makate and Vodacom is estopped from denying that authority. It is bound by the contract Mr Geissler concluded on its behalf.

Prescription

[185] The onus of proving prescription rests on the party asserting it.[178] Vodacom pleaded that Mr Makate's claims were based on "an oral commercial contract" and that his "claims and debt according to his allegations" became due prior to 13 July 2005. No attempt was made to spell out the nature of the debt that was said to have prescribed. In Vodacom's heads of argument reference is made generally to "a contractual debt" and to Mr Makate pursuing his claim at any time after "Please Call Me" was shown to be successful. Vodacom noted that the only relief

[178] *Gericke v Sack* 1978 (1) SA 821 (A) at 827H.

being sought at the trial was an order that Vodacom negotiate with Mr Makate to determine a reasonable remuneration for the right to use his idea. It said, without elaboration, that the alleged obligation to negotiate was a debt in terms of sections 10, 11 and 12 of the Prescription Act 68 of 1969. The plea of prescription must be viewed against this background.

[186] The main judgment holds that the obligation that Mr Makate seeks to enforce in this case is not a debt within the meaning of that term in the Prescription Act. I agree. In my view the plea of prescription is not established in this case for the simple reason that on the established meaning of "debt" the obligation in issue – an obligation to negotiate a reasonable remuneration – is not a debt at all. Until those negotiations reach a conclusion there will be nothing that is due by Vodacom to Mr Makate and nothing in respect of which he is able to make any claim. The Prescription Act provides for debts to be extinguished by prescription, as they would be by payment or performance. But as yet nothing exists that can be extinguished and participation in negotiations will not extinguish any obligation. One can test that by asking at what point in time the obligation would be extinguished as a result of negotiating. There was accordingly no debt that was due prior to the commencement of the present litigation and there could accordingly be no question of prescription. I will briefly deal with my reasons for reaching that conclusion.

[187] Section 10 of the Prescription Act provides for a "debt" to be extinguished by prescription. In terms of section 12(1) prescription begins to run when the debt is due. The meaning that has been given to the word "debt" since the Prescription Act came into force has been in accordance with the definition in the New Shorter Oxford Dictionary,[179] namely:

[179] This meaning was first adopted in *Escom* above n 54 at 344E-G. It was followed thereafter in *Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A) at 110A-B; *Oertel* above n 56 at 370B-C; and *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) (*Cape Town Municipality*) at 330F-H.

> "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
> 2. A liability or obligation to pay or render something; the condition of being so obligated."[180]

I agree with the main judgment that if the statement in *Desai*[181] that debt "has a wide and general meaning, and includes an obligation to do something or refrain from doing something" was intended to extend this meaning, that was an error.[182]

[188] The correlative of a debt in this sense is a right of action vested in the creditor in which the payment of money, or the delivery of goods, or the rendering of services is claimed. And, when payment, delivery or the rendering of services extinguishes the debt, the right of action is likewise extinguished.[183] That is why section 12(1) of the Prescription Act provides that prescription will commence to run once the debt is due. If the debt is not due then prescription cannot run. Debts become due when they are immediately claimable or recoverable.[184]

[189] Not all rights of action give rise to debts. That is well illustrated by the recent decision in *Keet*.[185] Based on an ambiguous and obiter statement in the first instance Court in *Evins*[186] it had been said in a series of cases in the Supreme Court of Appeal[187] that a vindicatory claim, that is, a claim to assert a right of ownership in an asset, gave rise to a debt capable of being extinguished by extinctive prescription under section 10 of the Prescription Act. This occasioned confusion because the

[180] Above n 54 at 604.

[181] *Desai* above n 11 at 146H-J.

[182] See [93] above.

[183] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842E-F.

[184] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136*;* 1991 (1) SA 525 (A) at 532G; approved in this Court in *Road Accident Fund* above n 62 at para 13.

[185] *Keet* above n 58.

[186] *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F-G.

[187] *Barnett and Others v Minister of Land Affairs and Others* [2007] ZASCA 95*;* 2007 (6) SA 313 (SCA); *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) at para 18 and *Leketi v Tladi NO and Others* [2010] ZASCA 38; [2010] 3 All SA 519 (SCA) at paras 8 and 21.

owner would remain the owner of the asset, but would not be entitled to exercise its rights of ownership against the possessor thereof. In effect it would be deprived of its rights of ownership by way of extinctive prescription, whereas the loss of the right of ownership by way of prescription is a matter of acquisitive prescription, which is dealt with in Chapter I and sections 1 to 5 of the Prescription Act, not Chapter III and sections 10 to 12 of that Act.

[190] The Court in *Keet* overruled these earlier cases and held that acquisitive prescription dealt with the acquisition (and corresponding loss) of real rights such as ownership, while extinctive prescription dealt with the extinguishment of debts and their correlative rights of action, in other words, with personal rights. The relevance of the case to the present one is that it illustrates that not every right to approach a court for relief will amount to a debt for the purposes of extinctive prescription. So the right to claim delivery of the motor vehicle in that case did not give rise to a "debt" for the purposes of extinctive prescription in terms of section 10 of the Prescription Act.

[191] It will be apparent from this that, depending on their source, rights of action directed at the same purpose and seeking identical relief may in one case give rise to a debt for the purposes of prescription and in another not. For example a right to claim occupation under a lease is a personal right and the obligation to satisfy that right by delivering possession of the property leased will be a debt capable of prescribing. But a claim to possession of the same property arising from a registered right of *usus* or *habitatio* will not.

[192] In the case of a continuing wrong there can be no question of prescription even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred at a past time the wrong itself continues for

so long as it is not abated.[188] But the running of prescription in respect of any financial claim arising from the same wrong will not be postponed. Accordingly, if financial loss was occasioned by the original wrongful act, the debt in relation to that loss would become due and prescription would commence to run when the original wrongful act occurred and loss was suffered.[189] The result is that the impact of prescription on claims having their source in the same right may differ depending on the nature of the claim.

[193] The issue in the present case is whether any debt in this sense arose until after the parties had negotiated in regard to Mr Makate's remuneration and either reached an agreement or referred the issue for determination by Mr Knott-Craig or his replacement as CEO. This may have a parallel with the provision sometimes encountered in construction contracts, and apparently a consistent feature of standard form commodity contracts,[190] that requires, as a pre-requisite to any claim arising, that the claimant must obtain an arbitration award, with the result that the very existence of a claim depends on the outcome of the arbitration.[191] This is not the same as the more commonly encountered situation where the parties simply agree that any disputes they may have about the validity of existing claims will be determined by arbitration. Where the contract contains a *Scott v Avery* clause, as these are known, no cause of action justiciable in the ordinary courts can arise until after arbitration has taken place.[192] In other words, the parties by their agreement ensure that a claim will only arise after a particular event has occurred.

[194] In this case, once agreement had been reached on the remuneration due to Mr Makate, he would have had a right of action to recover that remuneration from Vodacom. That would have been a debt in respect of which prescription would have

[188] *Barnett* above n 187 at para 20 and *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A).

[189] *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 590 and *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1*;* 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at paras 21-2.

[190] *B v S* [2011] EWHC 691 (Comm); [2011] Lloyd's Rep 18.

[191] *Scott v Avery* 10 ER 1121 (1856); 25 LJ Ex 308; 5 HLC 811.

[192] Sutton & Gill *Russell on Abitration* 22 ed (Sweet & Maxwell, London 2003) at paras 2-16.

run. But no such agreement has been reached. The parties have not yet arrived at the point where there is anything that is, "owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another". If they had, then Vodacom ought by its own actions to be able to discharge what is owed. But it cannot. Vodacom could not extinguish its liability by paying Mr Makate for the simple reason that the amount it will be liable to pay has not been determined. If it were to tender payment of an amount and Mr Makate accepted it that would resolve the dispute, but as a result of a compromise concluded by the parties,[193] not as a result of payment of the debt.

[195] This led Vodacom to submit that the obligation on Vodacom to negotiate remuneration is itself a debt for the purposes of prescription. But, if so, it is a debt of a very unusual kind. As Corbett JA said in *Evins*[194] and Van Heerden JA said in *Oertel*,[195] a debt is the correlative of a right of action and when one is extinguished so is the other. That is why debt has been defined by reference to the means by which the debtor can discharge it, namely payment, or the delivery of goods, or the provision of services.[196] The obligation that underlies the existence of the debt must be one that is capable of being discharged by one or other of these means. But doing so is not possible here because there is nothing determinate in existence that can be discharged by payment, the delivery of goods or the rendering of services.

[196] I do not think that *Duet and Magnum*[197] on which Vodacom relied is of any assistance here. The case concerned liquidators seeking to set aside, under section 32 of the Insolvency Act[198], dispositions made prior to the liquidation of the close corporation. The question was whether their right to do so and recover the amount of

[193] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC).

[194] *Evins* above n 183.

[195] *Oertel* above n 56.

[196] De Wet & Yeats above n 155 at 1, where the authors explain the nature of an *obligatio*.

[197] *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] ZASCA 34; 2010 (4) SA 499 (SCA) (*Duet and Magnum*).

[198] 24 of 1936

the payments was a debt for the purposes of prescription. The argument on behalf of the liquidators was that a debt would only come into existence once the court set aside the dispositions and ordered that the amounts in issue be repaid. But, as the Court correctly held, that was to confuse the process whereby the liquidators would be enabled to recover the debt with the debt itself. The right being enforced was the right to obtain a declaration that the beneficiary of the dispositions should repay them. Once obtained that would give rise to a further right to obtain payment of a money debt. But the first right was a debt in that it could be extinguished by payment. The recipient of the dispositions was under no obligation to wait for a court order in order to repay what he had received and had he done so the liquidators' right would have been extinguished. While there are some remarks in the judgment[199] that might be construed as suggesting that any right that can found a cause of action is necessarily encompassed by the word "debt" they were not addressed to the present situation and should not be regarded as affecting it.

[197] Likewise, I do not find anything in *Cape Town Municipality*[200] that bears upon the present problem. The question that arose in that case was whether the commencement of an action, seeking a declaratory order that an insurer was liable to indemnify the insured, had the effect of judicially interrupting prescription in terms of section 15 of the Prescription Act in respect of a claim for payment of the amount of the indemnity. Having drawn attention to the different senses in which "debt" is used in different sections of the Prescription Act, the Court held that the claim for a declaration that the insurer was obliged to indemnify the insured had interrupted the running of prescription, even though such an order is not susceptible of execution in terms of section 15(4) of the Prescription Act.

[198] The obligation of Vodacom to negotiate with Mr Makate concerning the remuneration to which he is entitled for coming up with the idea underlying "Please Call Me" can only be fulfilled by undertaking such negotiations. That will

[199] *Duet and Magnum* above n 197 at paras 22, 24 and 27.

[200] *Cape Town Municipality* above n 179.

not involve the payment of money, the delivery of goods or the rendering of services. All those presuppose that the debtor can discharge the debt by what are in essence unilateral actions on its part.[201] The obligation cannot therefore be extinguished by conduct by Vodacom on its own. The negotiations will involve the active participation of Mr Makate. On both sides they will require conduct that is bona fide and reasonable. None of that is consistent with the simple concept of a debt and its discharge.

[199] The present situation is unusual but that is what renders the issues worthy of the attention of this Court. It is unlikely to be one that is much encountered in practice. But in my view the right that Mr Makate has is one of that probably small category of rights that do not constitute a debt for the purposes of prescription. It is far more akin to the right to claim rectification of a contract that was held not to be a debt for the purposes of prescription in *Boundary Financing Ltd*,[202] than it is to a debt in the sense in which that expression has hitherto been understood. In any event Vodacom, on whom the onus lay, has not persuaded me that it is a debt. Accordingly I would dismiss the plea of prescription.

Conclusion

[200] For those reasons I concur in the order proposed in the main judgment.

[201] I do not mean by this to suggest that payment is not a bilateral juristic act. See *Vereins- und Westbank AG v Veren Investments and Others* [2002] ZASCA 36; 2002 (4) SA 421 (SCA). All that I intend to convey is that payment can usually be effected by way of conduct on the part of the debtor alone. As with delivery of goods and the rendering of services that is always subject to the creditor accepting the discharge of the debt in this way but in most instances that is a formality.

[202] *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* [2008] ZASCA 139; 2009 (3) SA 447 (SCA) at paras 12-4. This Court has not yet resolved the question whether prescription runs in respect of a debt owed by an organ of state in executing its public functions. See *Njongi v MEC Department of Welfare, Eastern Cape* [2008] ZACC 4; 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC) at paras 42-3.

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