The Turquand Rule and section 20(7) of the Companies Act 71 of 2008 – a critical analysis

by

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I declare that the above dissertation/thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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Summary

The law relating to the representation of companies is complex and contentious. In this dissertation a critical analysis is provided of the Turquand Rule. The Turquand Rule is compared with other principles and doctrines in relation to the representation of companies such as the doctrine of Estoppel. The introduction of section 20(7) of the Companies Act 71 of 2008 may amplify and add to the complexity of the representation of companies, due to the fact that section 20(7) is substantially similar to the Turquand Rule. The overlap between section 20(7) and the Turquand Rule will be critically considered. It will be argued that section 20(7) cannot be equated to the common law Turquand Rule. Furthermore it will be argued that the Turquand Rule is not dependant on the application of the doctrine of constructive notice. The dissertation concludes with a proposal and recommendation for the amendment of section 20(7).

Key terms

Companies Act 71 of 2008; Turquand Rule; section 20(7) of the Companies Act; capacity; *ultra vires* doctrine; doctrine of constructive notice; RF companies; ostensible authority; doctrine of Estoppel; representation; authority; shareholders' protection; irrebuttable presumption; rebuttable presumption; internal requirements; formal and procedural requirements; substantive requirement.
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CHAPTER 1

1 Introduction

1.1 Chapter overview

Chapter 1 starts with a chapter overview, then a general Introduction and background to the common law Turquand Rule and the 2008 Act are provided. This chapter further contains a problem statement, with a detailed description of the legal problem that forms the subject matter of the research contained in this dissertation.

Chapter 2 contains an analysis of the common law Turquand Rule. Its origins, scope, nature, elements, requirements, limitations and exclusions are discussed. The interaction between the common law Turquand Rule and the concepts of capacity, ultra vires and intra vires actions, the doctrine of constructive notice, representation, authority, the doctrine of ostensible authority and the doctrine of Estoppel are briefly discussed. Due to the word constraints of this dissertation, only the common law Turquand Rule will be discussed in some detail. The other concepts mentioned above, will only be sketchily referred to. An understanding of the common law Turquand Rule is needed, to fully appreciate how section 20(7) changes the previous legal position in relation to the Turquand Rule.

Chapter 3 contains a critical analysis of section 20(7) of the 2008 Act, together with other relevant provisions in the Act. The scope, elements, requirements, limitations and formulation of section 20(7) are discussed. Some other relevant and related sections in the Act are also briefly referred to. This chapter concludes with a comparison between the common law Turquand Rule and section 20(7).

1 Some of the related aspects that also deserve further research will be, inter alia, the effect of the abolition of the doctrine of constructive notice on the common law Turquand Rule and s 20(7) of the Act, also the interaction between Estoppel, the common law Turquand Rule and s 20(7) of the Act. Although these aspects are referred to herein, an in depth discussion hereof fall outside of the scope of this dissertation. An understanding of these concepts are however important for this study because they are all interrelated and the one effects the working of the other, as will be seen from what is set out herein below. Consequently a brief discussion hereof is provided herein for context, but the main aim of this dissertation is the ambit of and interaction between the Turquand Rule and s 20(7) of the Act.
Chapter 4 contains conclusions and recommendations. Preliminary it seems as if the common law Turquand Rule and section 20(7) differ in content and scope. Accordingly, it appears as if section 20(7) is unnecessary and should be deleted from the Act.

1.2 Introduction and background

The common law Turquand Rule\(^2\) and the doctrine of constructive notice\(^3\) historically assisted the courts in deciding whether a third party\(^4\) would be entitled to bind a company to a specific contract.\(^5\) If so, the third party would have been entitled to enforce the contract as against the company.\(^6\) This was before the enactment of the Companies Act.\(^7\) The concepts of the Turquand Rule, the doctrine of constructive notice, the doctrine of ostensible authority\(^8\) and the doctrine of Estoppel\(^9\) are all intricately intertwined. All of these concepts, to a varying degree and with minor technical differences, deal with the authority of a person, purporting to act on behalf of a company\(^10\), to bind a company contractually. This additionally entails capacity, authority to act, agency as well as representation of a company. The concepts of *ultra vires* and *intra vires* actions also come into play. The Turquand Rule applies

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\(^{1}\) Hereinafter referred to as the “Turquand Rule”, alternatively the “common law Turquand Rule” also known as the indoor management rule. The Turquand Rule will be mainly discussed in para 2 below.

\(^{2}\) In this dissertation the words “the doctrine of constructive notice”, “constructive notice” and “constructive knowledge” are used interchangeably. Constructive notice will be mainly discussed in para 4 below.

\(^{3}\) In this dissertation “third party” refers to the person (outsider) dealing or contracting with a company. Due to word constraints, the third party will be referred to herein only as male and the pronouns “he”, “his” or “him” will be used. But all statements in regard to a third party herein, will equally apply to females and plurals, i.e. more than one person.

\(^{4}\) Bouwman 2011 *Without Prejudice* 25. The Turquand Rule were originally introduced to mitigate the consequences of constructive notice and to place dealings with companies on a more acceptable footing. This will be more fully discussed in para 2 below. The words “agreement”, “transaction”, “action”, “act”, “contract” and “dealing with” are used herein interchangeably.

\(^{5}\) Bouwman 2011 *Without Prejudice* 25.


\(^{7}\) Hereinafter referred to as “the doctrine of ostensible authority” alternatively as “ostensible authority”. Ostensible authority will be mainly discussed in para 5.1.3 below.

\(^{8}\) In this dissertation the words “the doctrine of Estoppel” and “Estoppel” are used interchangeably. Estoppel applied when the representative has no authority. Estoppel will be mainly discussed in para 5.2 below.

\(^{9}\) In this dissertation “company representative” or “representative” refers to a person or persons purporting to act on behalf of a company, and “agent” refers to a person purporting to act on behalf of a principal (mainly used in regard to Estoppel).
specifically when a company raised the non-compliance of internal requirements in order to avoid a contract concluded with a third party.

The 2008 Act brought about considerable changes to our known company law.\textsuperscript{11} It changed the existing South African corporate law as well as the common law radically.\textsuperscript{12} In fact, it was intended as a complete overhaul of our company law.\textsuperscript{13} The Act was meant to reform, modernise and simplify South African company law to bring it in line with internationally accepted general principles of good corporate governance.\textsuperscript{14} It was our legislature’s response to the problem of how to regulate the biggest and the smallest companies in a single statute.\textsuperscript{15}

The Act had a long and arduous inception, preceded by the King I, II and III reports on good corporate governance.\textsuperscript{16} There were a myriad of problems with the original version of the Act.\textsuperscript{17} So much so that it required major amendments in terms of the Companies Amendment Act 3 of 2011, even before commencement of the Act.\textsuperscript{18} The Act also introduces various foreign concepts into our mostly English based system.\textsuperscript{19}

\textsuperscript{11} Delport 2011 \textit{THRHR} 132; Rabie 2008 \textit{Transactions of the Centre for Business Law} 221; Swart and Lombard 2017 \textit{THRHR} 668.
\textsuperscript{12} Delport 2011 \textit{THRHR} 132; Rabie 2008 \textit{Transactions of the Centre for Business Law} 221; Swart and Lombard 2017 \textit{THRHR} 675.
\textsuperscript{13} Rabie 2008 \textit{Transactions of the Centre for Business Law} 220-221. This was due to South Africa’s movement from an isolated economy to an economy which is fully integrated with the world economy. Also our dispensation change to a Constitutional democracy necessitated such a corporate reform. See s 7 of the Companies Act 71 of 2008. Section 7 of the Act sets out the purposes of the Act and confirms that it was intended to, \textit{inter alia}, “promote compliance with the Bill of Rights as provided for in the Constitution”, “promote the development of the South African economy”, “balance the rights and obligations of shareholders and directors within companies” and “encourage the efficient and responsible management of companies”. See also Swart and Lombard 2017 \textit{THRHR} 675.
\textsuperscript{14} See s 7 of the Companies Act 71 of 2008 and footnote 13 above.
\textsuperscript{15} Katz 2010 \textit{Acta Juridica} 248-249; Rabie 2008 \textit{Transactions of the Centre for Business Law} 222 and footnote 6. See Sutherland 2012 \textit{Stellenbosch Law Review} 162 where the author states that this objective has not been achieved.
\textsuperscript{16} Sutherland 2012 \textit{Stellenbosch Law Review} 160; Botha 2009 \textit{Obiter} 703-705. The purpose of the King Reports on corporate governance was to align the interests of the different stakeholders and find an acceptable balance. Third parties dealing with companies are seen as included in these stakeholders. Not only the interest of shareholders but also the interest of stakeholders should be protected. The Turquand Rule also protects the interest of third parties by placing dealings with companies on an acceptable footing, as will be seen in para 2 below. The application of the Turquand Rule and the interests of third parties are therefore impacted by the King Reports.
\textsuperscript{17} Sutherland 2012 \textit{Stellenbosch Law Review} 158.
\textsuperscript{18} Sutherland 2012 \textit{Stellenbosch Law Review} 158.
\textsuperscript{19} Sutherland 2012 \textit{Stellenbosch Law Review} 160. These foreign concepts were mainly introduced from jurisdictions such as the United States of America and Canada. The many American influences in
Some authors praise the Act\textsuperscript{20}, while others heavily criticise it.\textsuperscript{21} Undoubtedly the Act has made the complex subject of capacity, representation and authority even more convoluted.\textsuperscript{22} Consequently the rigorous separation of matters relating to capacity and authority has been distorted.\textsuperscript{23} The fact is that the Act contains some ambiguities and impossibilities.\textsuperscript{24} A country’s economy and commercial prosperity is dependent on a good company law regime.\textsuperscript{25} For this clarity, certainty and accessibility is essential.\textsuperscript{26}

1.3 \textit{Problem statement}

In some ways the Act simplified our company law, but in other respects it only caused more confusion and chaos, especially with the inclusion of unclear foreign concepts.\textsuperscript{27} One of these perplexing changes is the so-called statutory Turquand Rule contained in section 20(7)\textsuperscript{28} of the Act. Since the commencement of the Act on 1 May 2011\textsuperscript{29}, we have been faced with a conundrum in that we now have a common law Turquand Rule and a statutory Turquand Rule. The two rules are not quite the same, nor do

\begin{thebibliography}{99}
\bibitem{20}Katz 2010 \textit{Acta Juridica} 248-249 and 262. Katz is of the opinion that the Act is “ground-breaking”, “world-class and places South Africa at the forefront of corporate law reform”.
\bibitem{21}With statements such as “it will require some naivety, bias or ignorance to be blind to the many failures of the new Act” and “[a]ll is certainly not rosy” it is clear that not all authors approve of the Act. Sutherland 2012 \textit{Stellenbosch Law Review} 158, 160 and 167; Locke 2016 \textit{SALJ} 169 and 187-188; Van Der Linde 2015 \textit{TSAR} 833; Rabie 2008 \textit{Transactions of the Centre for Business Law} 222 and 245; Latsky 2014 \textit{Stellenbosch Law Review} 361.
\bibitem{22}Locke 2016 \textit{SALJ} 169 and 188; Van Der Linde 2015 \textit{TSAR} 833.
\bibitem{23}Locke 2016 \textit{SALJ} 187.
\bibitem{24}Latsky 2014 \textit{Stellenbosch Law Review} 361.
\bibitem{25}Cassim \textit{et al} \textit{Contemporary Company Law} 3; Cassim 2010 \textit{SA MERC LJ} 157; Rabie 2008 \textit{Transactions of the Centre for Business Law} 247. As will be seen from para 2 below, the Turquand Rule assists in the determination of dealings with companies. This is essential for commercial prosperity of a country.
\bibitem{26}Cassim \textit{et al} \textit{Contemporary Company Law} 3; Cassim 2010 \textit{SA MERC LJ} 157. This is the reason why a proper understanding of the ambit of the Turquand Rule and s 20(7) of the Act and the interaction between the two rules is of the utmost importance.
\bibitem{27}Cassim \textit{et al} \textit{Contemporary Company Law} 2. For a discussion of the foreign concepts contained in s 20(7), see paras 6.1.1 to 6.1.7 below.
\bibitem{28}Hereinafter referred to as “s 20(7) of the Act”, “s 20(7)” or “section 20(7)”, alternatively as “the statutory Turquand Rule”. This will be fully discussed in para 6 below.
\end{thebibliography}
they have the same provisions.\textsuperscript{30} The question arises whether we really need both a common law and statutory Turquand Rule. This dissertation will consider whether the common law Turquand Rule and section 20(7) are mutually exclusive or inclusive. Furthermore, it will be considered which of the Rules, if either, will be applicable to fundamental transactions and special resolutions.

There are a lot of different views regarding the application of the Turquand Rule in our company law. Indeed our courts have misinterpreted and misapplied the Turquand Rule, even before the enactment of the Act.\textsuperscript{31} This situation will in all likely-hood be aggravated by section 20(7) and section 20(8) of the Act, due to the ambiguity created around the Turquand Rule. For these reasons clarity and certainty is required for all parties concerned.

Furthermore, different legal writers have varying opinions regarding the application of the Turquand Rule, in light of the provisions of the Act. Some authors are of the opinion that the Turquand Rule will no longer apply in our company law, except in certain special instances.\textsuperscript{32} While others are of the opinion that section 20(7) is superfluous and should be repealed and even more others advocate for amendment of section 20(7) and section 20(8).\textsuperscript{33}

\textsuperscript{30} Compare chapter 2 and chapter 3 below.
\textsuperscript{31} See paras 2.2.1 and 5.1.3.3 below.
\textsuperscript{32} See paras 2.3.4 and 6.4.1 together with the footnotes thereto below, for the opinions of the different authors.
\textsuperscript{33} This will be more fully discussed in chapter 3 and chapter 4 below.
CHAPTER 2

2 The common law Turquand Rule (alternatively known as the indoor management rule)

In this chapter the common law position will be discussed together with the position prior to the 2008 Act. An understanding of the common law Turquand Rule is needed, to fully appreciate how section 20(7) changes the previous legal position in relation to the Turquand Rule. Knowledge of the interaction between the Turquand Rule and other principles of representation is also required to adequately comprehend the implications of section 20(7).

2.1 Background and origin

The common law Turquand Rule, as stated by Cleaver J in Farren v Sun Services SA Photo Trip Management (Pty) Ltd provides generally that:

“a person dealing with a company in good faith is entitled to assume that all internal formalities or acts of management have been duly performed and carried out by the company”.35

The Turquand Rule was introduced into South African law by The Mine Workers’ Union v JJ Prinsloo; The Mine Workers’ Union v JP Prinsloo; The Mine Workers’ Union v Greyling which accepted the rule into our law from the English decision in Royal British Bank v Turquand. It has accordingly been part of our law for many

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34 2003 (2) All SA 406 (C) para 8. Hereinafter referred to as the “Farren case”.
35 Farren v Sun Services SA Photo Trip Management (Pty) Ltd 2003 (2) All SA 406 (C) para 8. See also Oosthuizen 1979 TSAR 6; Oosthuizen 1977 TSAR 210; Rutkowski 2009 Without Prejudice 31; Mthembu 2005 Juta’s Business Law 58; McLennan 1979 SALJ 345; McLennan 2009 Obiter 146; Anon 2010 Transactions of the Centre for Business Law 114; Havenga 2004 Juta’s Business Law 127; Locke and Esser 2011 Annual Survey of SA Law 298; Locke 2016 SALJ 169; Sutherland 2012 Stellenbosch Law Review 171; Swart and Lombard 2017 THRHR 672. See also the English cases of Royal British Bank v Turquand (1856) 6 E&B 327 (119 ER 886) 332 and Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 77 and 92. Internal management processes, requirements, formalities and procedures are hereinafter separately and collectively referred to as “internal requirements”.
36 1948 (3) SA 831 (A). Hereinafter referred to as the “Mine Workers’ Union case”.
37 (1856) E&B 248 (119 ER 474), confirmed on appeal in 6 E&B 327 (119 ER 886). Farren case para 8; Mine Workers’ Union case 844-849; Levy v Zalrut Investments (Pty) Ltd 1986 (4) SA 479 (W) 487C-D; Bouwman 2011 Without Prejudice 25; Delport 2011 THRHR 134; Jooste 2013 SALJ 465; Kutumela A critical analysis of the Turquand Rule 7; Cassim et al Contemporary Company Law 181; Cassim et al
decades. There exists some dispute between the authorities regarding which case actually incorporated the Turquand Rule into our law. Be that as it may, it is trite that the Turquand Rule undoubtedly and undisputedly forms part of our company law.

The main rationale for the Turquand Rule was to temper the “unrealistic doctrine of constructive notice”. In terms of constructive notice a third party dealing with a
company is deemed to know the contents, specifically the internal requirements, as contained in the public documents.  

“...In its simplest form the Turquand rule, or ‘indoor management rule’, entails that if nothing has occurred which is obviously contrary to the provisions of the registered documents of the company, an outsider may assume that all the internal matters of the company are regular. ... The effect of the rule is that the company is prevented from resiling from a contract with a bona fide third party on the ground that some internal requirement has not been satisfied”.

2.2  Nature and elements

Different justifications for the existence of the Turquand Rule have been put forward. The subparagraphs hereto set out the different justifications by some authors. It is notable that the justifications are quite diverse.

2.2.1  Application of the principles of agency law and representation

Some authors state that the Turquand Rule merely applies and supplements the principles of agency and representation. Others state that it applies the doctrine of Estoppel and the principles of usual and ostensible authority.

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42 Oosthuizen 1979 TSAR 6; Mine Workers’ Union case 844-849. See also the English cases of Ernest v Nicholls (1857) 6 HL Cas 401 Catchwords & Digest and Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 77. In this dissertation “public documents” refers to articles of association, memorandum, statutes, special resolutions, Memorandum of Incorporation and any other documents of a company accessible by the public.

43 Delport 2011 THRHR 134. See also Bouwman 2011 Without Prejudice 25; Kutumela A critical analysis of the Turquand Rule 9; Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Cassim et al Contemporary Company Law 181; Cassim et al The law of business structures 144; Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa 55; Oosthuizen 1979 TSAR 6; Oosthuizen 1977 TSAR 210 and 214; McLennan 1979 SALJ 333 and 345; McLennan 2009 Obiter 146; Anon 2010 Transactions of the Centre for Business Law 114; Katz 2010 Acta Juridica 252; Locke and Esser 2011 Annual Survey of SA Law 298; Locke 2016 SALJ 169; Rabie 2008 Transactions of the Centre for Business Law 170-171 and 194; Gouveia A Critical Analysis of the Turquand Rule 19. The South African position is similar to that in English law, for the position in England see Birds et al Boyle & Birds’ Company Law 178. See also the English case of Royal British Bank v Turquand (1856) 6 E&B 327 (119 ER 886). This is similar to company law in Botswana, see Baiketlile Authority of Agents under the Botswana Companies Act 2003 15-16. Constructive Notice will be more fully discussed in para 4.1 below.

44 Kutumela A critical analysis of the Turquand Rule 8-14; McLennan 1979 SALJ 347-348; McLennan 2009 Obiter 146-148. This is similar to Australian company law, see also Cain 1989 Bond Law Review 273-282, commenting on the company law reform in Australia, which is similar to our reform. This is also similar to company law in Botswana, see Baiketlile Authority of Agents under the Botswana Companies Act 2003 16 and 23.
As time went by a greater need emerged to protect shareholders from the abuse of power by directors. Consequently additional requirements were introduced for the application of the Turquand Rule. This was the reason for the conflation of the requirements of the Turquand Rule with those of Estoppel. The distinction between the Turquand Rule, Estoppel and ostensible authority has, predominantly in English but also in Australian company law, become obscured. This is unlike South African company law, where a definite distinction is drawn. The more onerous requirements of Estoppel do not need to be satisfied to rely on the Turquand Rule. Accordingly there exists a strong need to retain and apply the Turquand Rule in its untainted, authentic and independent form.

In Wolpert v Uitzigt Properties (Pty) Ltd Claassen J held that a third party is not entitled to assume that a specific person has been authorised to act on behalf of a company. The court further held that:

45 Kutumela *A critical analysis of the Turquand Rule* 13; Oosthuizen 1979 TSAR 7; McLennan 1979 SALJ 347-348; McLennan 2009 Obiter 146-148; Rabie 2008 *Transactions of the Centre for Business Law* 163; Makate v Vodacom (Pty) Ltd [2016] ZACC 13 (hereinafter referred to as the “Makate case”) para 110 of concurring judgment by Wallis AJ referring to the One Stop case. This is similar to Australian company law, see Cain 1989 *Bond Law Review* 273-282, commenting on the company law reform in Australia, which is similar to our reform.

46 Oosthuizen 1979 TSAR 7; McLennan 1979 SALJ 347-348; McLennan 2009 Obiter 146-149.

47 Oosthuizen 1979 TSAR 9.

48 Oosthuizen 1979 TSAR 9. See also para 5.1.3.3 below.

49 Oosthuizen 1979 TSAR 9; Rabie 2008 *Transactions of the Centre for Business Law* 160-161, 163, 191 and 193; Cassim *et al* *Contemporary Company Law* 184; Swart and Lombard 2017 THRHR 675.

50 Oosthuizen 1979 TSAR 9 and footnote 50; Oosthuizen 1977 TSAR 215 footnote 28; Rabie 2008 *Transactions of the Centre for Business Law* 165. There are however cases where the Turquand Rule may be applied, but where Estoppel will not apply. This will be especially where a deliberate or negligent representation by a company cannot be proven. The onus of proof on a third party is considerably less with the Turquand Rule than with Estoppel, even in scenarios where both rules may apply. See also para 2.2.2 below.

51 Cassim *et al* *Contemporary Company Law* 184.

52 Cassim *et al* *Contemporary Company Law* 184.

53 Oosthuizen 1979 TSAR 9-10; Rabie 2008 *Transactions of the Centre for Business Law* 244; Swart and Lombard 2017 THRHR 672 and 675.

54 1961 (2) SA 257 (W). Hereinafter referred to as the “Wolpert case”.

55 Loubser *Case Book* 111–115; Locke 2016 *SALJ* 177; Wolpert case 263. “After all, all he is entitled to assume is that someone has been appointed, but how can he assume that a specific person or persons have been appointed?” The third party therefore, must ensure that the company representative, with whom he deals, has been appointed and authorised to act on behalf of the company. See also paras 2.3.2, 2.3.4 and 5 below.
“In such a case where A purports to act for the company I cannot conceive of any principle which can debar a company from denying that A has been appointed. Why should a company in this respect be different from an ordinary human being?”

It was further held that a company representative acting within his usual authority, will bind the company, unless the public documents excluded actual authority. A further internal requirement may be assumed to have been complied with, in terms of the Turquand Rule.

It was ultimately decided that the board of directors, managing director and chairman of the board have authority to bind a company, but not necessarily an ordinary director or branch manager.

In the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation the court held that the knowledge of a third party relates to the authority of a company representative, rather than the capacity of a company. It was held that

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56 Loubser Case Book 111–115; Wolpert case 263. See also Locke 2016 SALJ 177; Gouveia A Critical Analysis of the Turquand Rule 20-21. This is similar to the situation in agency law and the right of a principal to deny the authority of a purported agent. Compare paras 2.3.4 and 5.2 below.

57 Loubser Case Book 111–115; Locke 2016 SALJ 177; Wolpert case 264. It was further held that: “If the act is outside the usual scope of authority mere knowledge that actual authority might have been conferred on the official is not sufficient to estop the company and the consequences of omnia praesumuntur rite ac solemniter esse acta do not help the third party. He must enquire further and either ensure that the official has actual authority or elicit some further facts which estop the company from denying it.” See also paras 5.1.2 and 5.1.2.2 below.

58 Loubser Case Book 111–115; Wolpert case 264; Locke 2016 SALJ 177. The Turquand rule is applicable when a representative has actual authority and potential authority that is subject to some internal requirement.

59 Hereinafter referred to as “the board” alternatively “the board of directors”.

60 Loubser Case Book 109-121; Wolpert case 265-267; Locke 2016 SALJ 177; Jooste 2013 SALJ 470-471. Delport 2011 THRHR 135. The reasons for this decision in the Wolpert case was due to the fact that the board of directors, managing director and chairman of the board have absolute powers in matters intra vires the company. On the other hand it is trite that an ordinary director, single director or branch manager does not have such powers. “[I]t is usual to confer the widest powers of management on those organs, but if he deals with a single director he will not normally be protected, because a single director usually has no authority to bind the company.” Tuckers land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T). The decision in the Wolpert case was referred to with approval in Tuckers Land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T) 15 (an appeal) by Nestadt J. From this it is clear that a company may also be bound on the basis of ostensible authority or Estoppel. See also para 5.1.2.2 and footnote 288, paras 5.1.3 and 5.2 below. Compare this to paras 6.1.2, 6.1.4 and 6.1.7 below. For critique on the Wolpert case see Rabie 2008 Transactions of the Centre for Business Law 18-21.

61 (1985) 3 All ER 52 (CA).

62 The South African position is similar to that in English law, for the position in England see Birds et al. Boyle & Birds’ Company Law 156 and 169. In English law some authors state that an improperly
the directors of a company are held out as having ostensible authority to bind the company, in any transaction falling within the capacity of the company.\textsuperscript{63}

The Turquand Rule, especially in English law, has become nothing more than applying Estoppel.\textsuperscript{64} Although our company law was mainly based on English law, South African company law currently differs vastly from English company law.\textsuperscript{65} It follows that English decisions cannot carry too much weight.\textsuperscript{66} Our company law is not completely codified but include common law doctrines as well.\textsuperscript{67} The Turquand Rule and Estoppel should be seen, not in conflict, but rather auxiliary to each other.\textsuperscript{68} The \textit{Wolpert} case is an example of where the courts have merged the Turquand Rule with Estoppel.\textsuperscript{69}

2.2.2 The Turquand Rule is an irrebuttable\textsuperscript{70} independent\textsuperscript{71} rule
Some authors state that the Turquand Rule is an independent rule of the material law of company law and is irrebuttable. Others state that it is a “special rule of company law”. Contrary to the requirements of Estoppel, the Turquand Rule does not require a representation by a company, nor that a third party acted on such representation. Only in exceptional cases will a provision in the public documents constitute a representation by the company, for purposes of Estoppel. In any event, the liability of a company in terms of the Turquand Rule is not subject to a third party having even read the public documents. This was expressly confirmed in the Mine Workers’ Union case. The basis for the Turquand Rule is therefore not subjective, but rather objective. The Mine Workers’ Union case also definitively recognised the Turquand Rule as an independent rule and that it should not be confused with Estoppel. It is also not a requirement that the third party acted to his detriment.

A successful reliance on the Turquand Rule leads to liability of a company, even if the representative has deficient authority. Ultimately a company has to rely on representatives to contract. Therefore an unlimited application of the Turquand Rule

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72 Oosthuizen 1979 TSAR 7; Rabie 2008 Transactions of the Centre for Business Law 164.
73 Kutumela A critical analysis of the Turquand Rule 8; Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Rabie 2008 Transactions of the Centre for Business Law 163. This is similar to Australian company law, see Cain 1989 Bond Law Review 273-282, commenting on the company law reform in Australia, which is similar to our reform.
74 Oosthuizen 1979 TSAR 9 and footnote 53. This is also contrary to the decision in the Wolpert case as set out in para 2.2.1 above. For critique on the Wolpert case see Rabie 2008 Transactions of the Centre for Business Law 18-21.
75 Oosthuizen 1979 TSAR 9 and footnote 54; Jooste 2013 SALJ 470-471. If the public documents of a company make provision for the possibility that a managing director may be authorised to act on behalf of a company, it does not constitute a representation that such managing director was in fact so authorised. See also Nieuwoudt v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA) para 22.
76 Oosthuizen 1979 TSAR 9; Mine Workers’ Union case 848.
77 Oosthuizen 1979 TSAR 9 and footnote 55; Mine Workers’ Union case 848.
78 Oosthuizen 1979 TSAR 9 and footnote 55; Mine Workers’ Union case 849.
79 Rabie 2008 Transactions of the Centre for Business Law 166; Mine Workers’ Union case 844-849.
80 Oosthuizen 1979 TSAR 9-10; Rabie 2008 Transactions of the Centre for Business Law 163. Fault and harm are however requirements for Estoppel. See paras 5.1.3 and 5.2 below.
81 Oosthuizen 1979 TSAR 10; Rabie 2008 Transactions of the Centre for Business Law 164; Swart and Lombard 2017 THRHR 672. Authority will be deficient due to the non-compliance with an internal requirement.
82 Oosthuizen 1979 TSAR 10; Gouveia A Critical Analysis of the Turquand Rule 13. See also the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 91.
may tip the scales too heavily in favour of a third party, to the prejudice of a company.\textsuperscript{83} It is thus essential that the exact limits, within which the Turquand Rule will apply, be established.\textsuperscript{84}

Oosthuizen is of the view that the application of the following three limitations will assist with the authentic application of the Turquand Rule and prevent confusion and conflation with Estoppel:\textsuperscript{85}

\begin{enumerate}
  \item The Turquand Rule will only apply in situations where a company representative has a special relationship to the company.\textsuperscript{86} The appointment to such position must have been duly executed by the company.\textsuperscript{87} However an irregularity in such appointment may be cured with the application of the Turquand Rule.\textsuperscript{88} There must at least be an appointment action by the company.\textsuperscript{89} In our law, if there is no appointment whatsoever the Turquand Rule cannot apply.\textsuperscript{90}

  \item The transaction between a third party and a company representative must also be one which usually falls within the authority of such a position held in a
\end{enumerate}

\begin{footnotes}
\item Oosthuizen 1979 \textit{TSAR} 10.
\item Oosthuizen 1979 \textit{TSAR} 10.
\item Rabie 2008 \textit{Transactions of the Centre for Business Law} 166; Oosthuizen 1979 \textit{TSAR} 14. Outside of these limitations, the third party must make use of Estoppel to hold the company liable.
\item Oosthuizen 1979 \textit{TSAR} 11 and 13; Rabie 2008 \textit{Transactions of the Centre for Business Law} 165 and footnote 60; Swart and Lombard 2017 \textit{THRHR} 672. This will apply where a person was appointed by the company to hold a certain position in the company, and in fact holds that position. It will include a company organ and certain important positions such as managing director or chairman of the board. A third party will be entitled to invoke the Turquand Rule if he contracts with these representatives.
\item Oosthuizen 1979 \textit{TSAR} 11.
\item Oosthuizen 1979 \textit{TSAR} 11.
\item Oosthuizen 1979 \textit{TSAR} 13; \textit{Mine Workers’ Union} case 844-849; Rabie 2008 \textit{Transactions of the Centre for Business Law} 165. Compare paras 6.1.2, 6.1.4, 6.1.5, 6.1.6 and 6.1.7 below.
\item Oosthuizen 1979 \textit{TSAR} 12 and 13; Jooste 2013 \textit{SALJ} 470-471; Swart and Lombard 2017 \textit{THRHR} 672. On the other hand, the applicability of the Turquand Rule will be narrower where a third party contracts with a branch manager, single director, company secretary or any lesser officer. This is so due to the usual authority of such officers being more limited. The usual authority of the representative should be determined objectively. See para 5.1.2.2 below for a brief background of usual authority. However English courts have held a company liable in situations where there were no appointment, but then it was in terms of Estoppel in the form of ostensible authority, see the English case of \textit{Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd} 1964 1 All ER 630 (CA).
\end{footnotes}
company.91

iii. A third party must be *bona fide*, i.e. he must not have been aware of any non-compliance with the internal requirements.92 If however a third party is *mala fide* due to his subjective knowledge, the Turquand Rule will not apply.93

The Turquand Rule is in fact an equitability rule94, the protection of which is exclusively available to *bona fide* third parties.95 A third party will not be *bona fide* if he knew or suspected any irregularity.96 If the internal requirements are statutory, the Turquand Rule however cannot be relied on by a third party.97 This is so because the common law cannot negate a statutory requirement, as was decided in the *Farren* case.98 The precise applicability scope, content and elements of the Turquand Rule

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91 Oosthuizen 1979 *TSAR* 12-13; Rabie 2008 *Transactions of the Centre for Business Law* 165-166 and footnote 67. See also the Wolpert case 264 and Tuckers land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T). Should the transaction not normally fall within the ambit of that position held the Turquand Rule will not apply. It will then constitute an unusual transaction for the specific position held, which will put the third party on enquiry. This is usual authority, which will differ from case to case and is a factual enquiry. Also see usual authority in para 5.1.2.2 below. See also para 2.3.4 below. See also the English case of *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* (1985) 3 All ER 52 (CA) 77-87 and 92. Compare paras 6.1.2, 6.1.4, 6.1.5, 6.1.6 and 6.1.7 below.
92 Oosthuizen 1979 *TSAR* 10 and 13; Rabie 2008 *Transactions of the Centre for Business Law* 166; Mine Workers’ Union case 844-849; Jooste 2013 *SALJ* 472. See also the English case of *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* (1985) 3 All ER 52 (CA) 77-87 and 92. See para 2.3.4 below and compare para 6.1.5 below.
93 Oosthuizen 1979 *TSAR* 13. See also the English case of *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* (1985) 3 All ER 52 (CA) 77-87 and 92.
94 Referred to by Oosthuizen 1979 *TSAR* 6 as “billikheidsreël”.
95 Cilliers et al *Ondernemingsreg* para 14.24; Mine Workers’ Union case 844-849; Bouwman 2011 *Without Prejudice* 25; Oosthuizen 1979 *TSAR* 6 and 10; Oosthuizen 1977 *TSAR* 219; Rabie 2008 *Transactions of the Centre for Business Law* 159, 163, 171 and 194-195; Swart and Lombard 2017 *THRHR* 672. The Turquand rule is an independent rule and not a form of Estoppel. The Turquand Rule is also a positive rule “for the benefit of *bona fide* third parties”. This is similar to Australian company law, see also Cain 1989 *Bond Law Review* 273-282, commenting on the company law reform in Australia, which is similar to our reform.
96 Jooste 2013 *SALJ* 465 and 472; Mine Workers’ Union case 844-849; Vrystaat Mielies (Edms) Bpk v Nieuwoudt 2003 (2) SA 262 (O) 268; Swart and Lombard 2017 *THRHR* 672. There are different opinions in this regard. Some say the Turquand Rule is merged with Estoppel. Others say that the Turquand Rule “does no more than relieve a person raising Estoppel against a company from a duty to enquire”, but that the requirements for Estoppel must still be discharged. Also see the English case of *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* (1985) 3 All ER 52 (CA) 77. Compare paras 2.3.4 and 6.1.5 below in this regard. See also para 2.2.1 above and para 5.1.3.3 below.
97 Jooste 2013 *SALJ* 466. For a discussion hereof see para 2.3.2.1 below. Also compare paras 2.3.2.1, 6.5 and 7.4 below in this regard.
98 Jooste 2013 *SALJ* 466. The *Farren* case specifically dealt with s 228 of the old Act. The position relating to other statutory provisions are uncertain. For a discussion hereof see para 2.3.2.1 below. Also compare paras 2.3.2.1, 6.5 and 7.4 below in this regard.
are however uncertain and confused, due to unfortunate conflicting decisions by the courts.99

2.2.3 Application of the *dictum* that “all things are presumed to have been done correctly”100

Some authors state that the Turquand Rule is an application of the rebuttable101 *dictum* that “all things are presumed to have been done correctly”.102 If a third party deals with a director of a company, the Turquand Rule will apply where there was a defective appointment of the director.103 But not where there was no appointment of the director at all.104 If however the authority is expressly excluded in the public documents of a company, a third party will not be entitled to rely on the Turquand Rule.105 This is so due to the fact that constructive notice will indeed apply in such a situation.106

2.2.4 Disclosure by a company

Some authors state that a third party cannot require disclosure by a company of its internal requirements.107 Consequently he cannot ensure that an irregularity did not occur.108 A third party will not normally know of the internal requirements and the

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99 Rabie 2008 *Transactions of the Centre for Business Law* 194; Oosthuizen 1979 TSAR 7.
100 Referred to by Oosthuizen 1979 TSAR 7 as “omnia praesumptur rite esse acta”. This presumption that conduct is legal or lawful should not be confused with the role and function of the Turquand Rule.
101 Referred to by Oosthuizen 1979 TSAR 7 as “weerlegbare”.
102 Oosthuizen 1979 TSAR 7. This is similar to Australian company law, see Cain 1989 *Bond Law Review* 273-282, commenting on the company law reform in Australia, which is similar to our reform.
103 This is similar to Australian company law, see Cain 1989 *Bond Law Review* 279, commenting on the company law reform in Australia, which is similar to our reform. See also Oosthuizen’s limitation i. in para 2.2.2 above.
104 This is similar to Australian company law, see Cain 1989 *Bond Law Review* 279, commenting on the company law reform in Australia, which is similar to our reform. See also Oosthuizen’s limitation i. in para 2.2.2 above.
105 Cilliers *et al Ondernemingsreg* para 14.24. Compare paras 2.3.4, 4.1, 6.1.2, 6.1.5, 6.4 and 6.4.1 below.
107 Oosthuizen 1979 TSAR 6; Rabie 2008 *Transactions of the Centre for Business Law* 161. This is similar to Australian company law, see Cain 1989 *Bond Law Review* 273-282, commenting on the company law reform in Australia, which is similar to our reform.
108 This is similar to Australian company law, see Cain 1989 *Bond Law Review* 273-282, commenting on the company law reform in Australia, which is similar to our reform.
compliance therewith or not, by a company.\textsuperscript{109} The public documents of a company, will not necessarily inform a third party whether the internal requirements have been complied with, or whether it was duly and properly complied with.\textsuperscript{110} This is due to the fact that no publicity is given to the fulfilment of the internal requirements by a company.\textsuperscript{111} Also the directors cannot be compelled to produce proof regarding the internal affairs of a company.\textsuperscript{112} Consequently, a third party would have been expected to undertake further enquiries into a company's compliance with these requirements.\textsuperscript{113} Such investigation would have been expected of a third party, before contracting with a company, to establish whether the company representative in fact has the required authority or not, to contract on behalf of the company.\textsuperscript{114} It would be impossible and extremely unreasonable to expect a third party to investigate whether all the internal requirements have been duly and properly complied with.\textsuperscript{115} This situation would have imposed an unrealistic and unattainable demand on third parties.\textsuperscript{116} This is exactly the situation which the Turquand Rule aims to alleviate.\textsuperscript{117} In

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\textsuperscript{109} Anon http://www.roodtinc.com (consulted 29 March 2016); see also Bouwman 2011 Without Prejudice 25; Kutumela A critical analysis of the Turquand Rule 8; Cassim et al Contemporary Company Law 181; Cassim et al The law of business structures 144; Oosthuizen 1977 TSAR 210; McLennan 1979 SALJ 345; Rabie 2008 Transactions of the Centre for Business Law 158 and 170-171; Swart and Lombard 2017 THRHR 671 and 678.

\textsuperscript{110} Cilliers et al Ondernemingsreg para 14.22; Bouwman 2011 Without Prejudice 25; Cassim et al Contemporary Company Law 181; Cassim et al The law of business structures 144; Oosthuizen 1979 TSAR 6; Rabie 2008 Transactions of the Centre for Business Law 158 and footnote 11; Jooste 2013 SALJ 465; Swart and Lombard 2017 THRHR 671.

\textsuperscript{111} Oosthuizen 1979 TSAR 6; Oosthuizen 1977 TSAR 210; Anon 2010 Transactions of the Centre for Business Law 114; Locke and Esser 2011 Annual Survey of SA Law 298; Rabie 2008 Transactions of the Centre for Business Law 158-160 and 170; Cilliers et al Ondernemingsreg para 14.22; Bouwman 2011 Without Prejudice 25; Cassim et al Contemporary Company Law 181; Cassim et al The law of business structures 144; Swart and Lombard 2017 THRHR 671. For instance ordinary resolutions, or whether a specific person in a company have been duly authorised to act on behalf of the company, or whether a quorum was present at a meeting, or whether the necessary resolution was duly and lawfully passed, or the delegation of authority.

\textsuperscript{112} Oosthuizen 1979 TSAR 6.

\textsuperscript{113} Oosthuizen 1979 TSAR 6; Gouveia A Critical Analysis of the Turquand Rule 21.

\textsuperscript{114} Cilliers et al Ondernemingsreg para 14.23; Kutumela A critical analysis of the Turquand Rule 8-10; Cassim et al The law of business structures 144; Locke and Esser 2011 Annual Survey of SA Law 298; Sutherland 2012 Stellenbosch Law Review 171. This is similar to company law in Botswana, see Baiketlile Authority of Agents under the Botswana Companies Act 2003 15-16.

\textsuperscript{115} Cilliers et al Ondernemingsreg para 14.23; Mine Workers’ Union case 844-849; Kutumela A critical analysis of the Turquand Rule 8-10; Cassim et al The law of business structures 144; Locke and Esser 2011 Annual Survey of SA Law 298; Sutherland 2012 Stellenbosch Law Review 171. This is similar to Botswana law, see Baiketlile Authority of Agents under the Botswana Companies Act 2003 15-16.

\textsuperscript{116} Oosthuizen 1979 TSAR 6; Mine Workers’ Union case 844-849; Locke and Esser 2011 Annual Survey of SA Law 298. It follows that the third party's reliance on Estoppel will also be hampered by this, see para 5 below.

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order to temper this undesirable result, the courts developed the Turquand Rule, to place negotiations between third parties and companies on a more acceptable basis.\textsuperscript{118} The Turquand Rule is based on “pragmatism and business convenience” or else dealings with companies would be “inequitable and destructive to business confidence”.\textsuperscript{119}

The Turquand Rule will only apply to those internal requirements to which no publicity is given.\textsuperscript{120} A third party is entitled to assume that these requirements have been properly complied with.\textsuperscript{121} In terms of the Turquand Rule therefore, a company will be bound by a contract in certain circumstances\textsuperscript{122}, even if the internal requirements have not been duly complied with.\textsuperscript{123} There is thus a link between publicity and the Turquand Rule.\textsuperscript{124} It accordingly limits a third party’s duty of enquiry to those aspects to which publicity is given.\textsuperscript{125}

\begin{thebibliography}{9}
\bibitem{117} Jooste 2013 \textit{SALJ} 465; \textit{Mine Workers’ Union} case 844-849. See also the English case of \textit{Royal British Bank v Turquand} (1856) 6 E&B 327 (119 ER 886).
\bibitem{118} Oosthuizen 1979 \textit{TSAR} 6; \textit{Mine Workers’ Union} case 844-849; Rabie 2008 \textit{Transactions of the Centre for Business Law} 158-159, 170-171 and 194. See also the English case of \textit{Royal British Bank v Turquand} (1856) 6 E&B 327 (119 ER 886).
\bibitem{119} Anon \texttt{http://www.roodtinc.com} (consulted 29 March 2016); \textit{Mine Workers’ Union} case 844-849; Bouwman 2011 \textit{Without Prejudice} 25; Kutumela \textit{A critical analysis of the Turquand Rule} 8; Cassim \textit{et al Contemporary Company Law} 181; Cassim \textit{et al The law of business structures} 144; Oosthuizen 1977 \textit{TSAR} 210; McLennan 1979 \textit{SALJ} 345; Rabie 2008 \textit{Transactions of the Centre for Business Law} 158 and 170-171; Gouveia \textit{A Critical Analysis of the Turquand Rule} 23.
\bibitem{120} Oosthuizen 1977 \textit{TSAR} 210.
\bibitem{121} Oosthuizen 1977 \textit{TSAR} 210; \textit{Mine Workers’ Union} case 844-849; Gouveia \textit{A Critical Analysis of the Turquand Rule} 19. See also the English case of \textit{Royal British Bank v Turquand} (1856) 6 E&B 327 (119 ER 886).
\bibitem{122} The Turquand Rule will not be applicable, where the third party is not \textit{bona fide}, or where he knew about or suspected an irregularity, or where the representative has no authority. See para 2.3.4 below.
\bibitem{123} Cilliers \textit{et al Ondernemingsreg} para 14.22; \textit{Mine Workers’ Union} case 844-849; Bouwman 2011 \textit{Without Prejudice} 25; Cassim \textit{et al Contemporary Company Law} 182; Cassim \textit{et al The law of business structures} 144; Davis (ed) Geach (main ed) Mongalo \textit{et al Companies and other business structures in South Africa} 55; Oosthuizen 1979 \textit{TSAR} 6; Anon 2010 \textit{Transactions of the Centre for Business Law} 114; Rabie 2008 \textit{Transactions of the Centre for Business Law} 159 and 170-171; Gouveia \textit{A Critical Analysis of the Turquand Rule} 20; Swart and Lombard 2017 \textit{THRHR} 672. See also the English case of \textit{Royal British Bank v Turquand} (1856) 6 E&B 327 (119 ER 886).
\bibitem{124} Oosthuizen 1977 \textit{TSAR} 210-214; Oosthuizen 1979 \textit{TSAR} 10; \textit{Mine Workers’ Union} case 844-849. The Turquand Rule has been extended to municipalities, trade unions and to all juristic entities and statutory bodies. All these entities had legal personality, due to registration in terms of statutory law. Also the doctrine of constructive notice applied to all of these entities. It follows that the extension of the applicability of the Turquand Rule to these entities was no significant deviation from the traditional approach. Oosthuizen is of the opinion that this is in fact a departure from the traditional approach. Other authors are of the opinion that the Turquand Rule should not be extended in this manner, due to the difference between the extent of publicity given to the business of companies and that of other
2.2.5 Deficits from unauthorised actions

Some authors state that the deficits from unauthorised actions supposedly done on behalf of a company should, *prima facie*, be carried by the company and not by the third party dealing with the company.\(^{126}\) There exists strong support for the view that a *bona fide* third party should be protected where the action of the directors is *intra vires* the company but, without compliance with the internal requirements of the company.\(^{127}\) Supporters of this view argue that if the legislature intended a *bona fide* third party not to be entitled to rely on the Turquand Rule, the legislature would have expressly stated so.\(^{128}\) The wronged shareholders have recourse against the directors of a company for damages, due to breach of their fiduciary duties.\(^{129}\) While the *bona fide* third party has no recourse other than the Turquand Rule.\(^{130}\) Therefore

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\(^{125}\) Oosthuizen 1977 *TSAR* 210 and 214-215; Oosthuizen 1979 *TSAR* 6; Rabie 2008 *Transactions of the Centre for Business Law* 170 and 194.

\(^{126}\) Kutumela *A critical analysis of the Turquand Rule* 8; Rabie 2008 *Transactions of the Centre for Business Law* 196. This is similar to Australian company law, see also Cain 1989 *Bond Law Review* 273-282, commenting on the company law reform in Australia, which is similar to our reform.

\(^{127}\) *Farren* case para 11; Rabie 2008 *Transactions of the Centre for Business Law* 167; *Mine Workers’ Union* case 844-849.

\(^{128}\) *Farren* case para 12. The court in the *Farren* case set out the arguments of the opposing views of authors in this regard quite extensively. The opinions of the supporters of this view, i.e. that *bona fide* third parties should be protected, are set out in this paragraph. The opinions of the supporters of the opposing view, i.e. that shareholders should be protected and which view the court ultimately preferred, are set out in para 2.3.2.1 below. For a full discussion of the authors supporting this view as well as the opposing views of other authors see the *Farren* case paras 12-17. Compare also paras 6.5 and 7.4 below.

\(^{129}\) *Farren* case para 12. For a full discussion of the authors supporting this view as well as the opposing views of other authors see the *Farren* case paras 12-17.

\(^{130}\) *Farren* case para 12. For a full discussion of the authors supporting this view as well as the opposing views of other authors see the *Farren* case paras 12-17.
a court, in weighing the interests of the wronged shareholders against that of the *bona fide* third party, should find in favour of the *bona fide* third party.\footnote{Farren case para 12. Some authors agree with this view while others have criticized this view, resulting in contradicting opinions. For a full discussion of the opposing views see the Farren case paras 12-17. The court in the Farren case ultimately decided that non-compliance with statutory requirements cannot be validated by application of the Turquand Rule, based on policy considerations. Compare also paras 6.5 and 7.4 below.}

2.3 *Requirements, limitations and exclusions*

2.3.1 *Insiders*

In theory a director or shareholder of a company can contract with the company, as a third party, and may rely on the Turquand Rule.\footnote{Delport *et al* Henochsberg on Companies Act 71 of 2008 92; Jooste 2013 SALJ 471.} This will be where the director or shareholder is not acting on behalf of the company, but as an outside third party.\footnote{Cassim *et al* Contemporary Company Law 184; Cassim *et al* The law of business structures 145-146; Jooste 2013 SALJ 471; Gouveia A Critical Analysis of the Turquand Rule 22. Compare para 6.1.3 below.} Although it may be difficult to prove, especially if a director or shareholder, he was then not put on enquiry.\footnote{Delport *et al* Henochsberg on Companies Act 71 of 2008 92; Cassim *et al* Contemporary Company Law 183; Cassim *et al* The law of business structures 145. Cassim *et al* are of the view that because the Turquand Rule is meant to protect outsiders, directors and other insiders of the company may not rely on the Turquand Rule. The reason for this is that the directors are taken to know that the company's internal requirements have not been complying with. Other legal writers differ from this view.} There is thus a distinction between outside and inside transactions.\footnote{Delport *et al* Henochsberg on Companies Act 71 of 2008 92; Cassim *et al* Contemporary Company Law 184; Cassim *et al* The law of business structures 146; McLennan 1979 SALJ 352-357; McLennan 2009 *Obiter* 152. McLennan on the other hand is of the view that persons who effectively control a company, should be considered as insiders and should not be entitled to rely on the Turquand Rule. This is so due to their knowledge of compliance (or the lack thereof) with the internal requirements of the company. McLennan tends to heavily lean in favour of shareholders being considered as outsiders not insiders, especially if they do not hold a majority share. This is again in following English case law. Compare para 6.1.3 and footnote 371 below.} The third party in the Turquand Rule is classified on a functional basis and not an institutional basis.\footnote{Delport 2011 *THRHR* 136; Kutumela A critical analysis of the Turquand Rule 19; Jooste 2013 SALJ 471. Therefore even an insider may be a third party, depending on the function he performs and the circumstances. The test is whether the third party is *bona fide* and whether the circumstances necessitated an investigation into the situation. If an investigation was in fact required and the third party failed to undertake such investigation, the third party would be deemed to have acted negligently or *mala fide*. Compare para 6.1.3 below. Oosthuizen 1977 *TSAR* 212-213. Oosthuizen differ from Delport in this regard. Oosthuizen states that if the meaning of publicity for purposes of the Turquand Rule is unnerved, the distinction between outsiders and insiders should disappear altogether. In this instance an insider, with full access to the business and minutes of a company, would be afforded the same protection as an outsider, who has no access. This would lead to a situation where the Turquand...}
2.3.2 Internal requirements

The Turquand Rule will only apply where an internal irregularity is the only obstacle.\(^\text{137}\) Also it must be apparent to the third party that the company representative has authority, but for a specific action there is a prerequisite.\(^\text{138}\) Thus the Turquand Rule will only apply where the authority of the director, or any other company representative, is subject to an internal requirement only.\(^\text{139}\) The Turquand Rule may accordingly be applied where a third party \textit{bona fide} believes that the company representative is properly authorised to act on behalf of the company.\(^\text{140}\) In all cases the company may ratify the lack of authority to ensure the validity of the action.\(^\text{141}\)

2.3.2.1 Protection of third parties \textit{versus} shareholder protection – application of the Turquand Rule to statutory requirements of special resolutions

Rule may be applied to special resolutions (75% of votes exercised), which is unacceptable. The extension of this approach to publicity, would lead to avoidable confusion. See also para 2.2.4 footnote 124 above for Oosthuizen’s discussion of the extension of publicity.

\(^{137}\) Cilliers \textit{et al} Ondernemingsreg para 14.25; Cassim \textit{et al} Contemporary Company Law 184; Cassim \textit{et al} The law of business structures 145; Mine Workers’ Union case 844-849; Swart and Lombard 2017 THRHR 672. Compare para 6.1.4 below.

\(^{138}\) Delport \textit{New Companies Act Manual} 69 footnote 35; Delport \textit{et al Henochsberg on Companies Act 71 of 2008} 98; Bouwman 2011 \textit{Without Prejudice} 25; Mine Workers’ Union case 844-849; Kutumela \textit{A critical analysis of the Turquand Rule} 19. See also the English case of \textit{Royal British Bank v Turquand} (1856) 6 E&B 327 (119 ER 886).

\(^{139}\) Bouwman 2011 \textit{Without Prejudice} 25; Mine Workers’ Union case 844-849; Jooste 2013 SALJ 471; Swart and Lombard 2017 THRHR 672.

\(^{140}\) Mthembu 2005 \textit{Juta’s Business Law} 58 and 60; Havenga 2004 \textit{Juta’s Business Law} 128. The third party’s belief in this sense refers to the apparent authority of the representative. Also the third party must not have known or suspected any irregularity or non-compliance. See para 2.3.4 below. In analysing the case of \textit{FPW Engineering Solution (Pty) Ltd v Technikon Pretoria & others} [2004] 1 All SA 204 (T), (which followed the decision in the \textit{Farren} case), Mthembu states that: 1) The court decided that the Turquand Rule cannot protect a \textit{bona fide} third party where a provision of an Act, i.e. to obtain the Minister’s approval, was not complied with. 2) The court held that the Turquand Rule only applies where an internal requirement has not been complied with. 3) The court held that the requirement of Minister’s approval is not an internal requirement. 4) The court confirmed and agreed with the decision in the \textit{Farren} case and “the balancing approach applied” therein. 5) The court held that the Turquand Rule could be applied to the case, but chose rather to decide the case on different grounds. 6) The court confirmed that the Turquand Rule applied to “corporate entities such as Technikons”. 7) The author states that this case provides clarity with regard to when the Turquand Rule may be applied as well as what would constitute an internal requirement.

\(^{141}\) Cilliers \textit{et al} Ondernemingsreg para 14.30. This will be possible, except for actions in contravention of a statute or \textit{contra bones mores}. When the conduct is ratified, the contract will be valid and there will be no need for the application of the Turquand Rule. This is in contrast to company law in Botswana, see Baiketlile \textit{Authority of Agents under the Botswana Companies Act 2003} 20, giving a comparison between the Botswana and South African law reform which differs. Compare this to para 6.3.2 below.

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Initially uncertainty existed whether the Turquand Rule would apply to transactions requiring a special resolution.\textsuperscript{142} It is generally accepted that section 228 of the Companies Act 61 of 1973\textsuperscript{143} was enacted to protect the interest of the shareholders of a company.\textsuperscript{144} This is so especially in instances where the control of a company is in the hands of the directors.\textsuperscript{145} In the \textit{Farren} case it was accepted that the sole director of a company had implied authority to conclude a contract for the disposal of the company’s property.\textsuperscript{146} Accordingly the transaction was within the capacity of the company.\textsuperscript{147}

The question that arose in the \textit{Farren} case was whether an innocent third party should be protected by the application of the Turquand Rule where the transaction fell within the capacity of the company, but without the required approval of the shareholders.\textsuperscript{148} Consideration also had to be given to whether, since the approval of the disposal was required by the Act and not by the public documents of the company, the Turquand Rule applied to such approval.\textsuperscript{149} The court held that due to

\begin{itemize}
\item\textsuperscript{142} Delport 2013 \textit{De Jure} para 2; Havenga 2004 \textit{Juta’s Business Law} 127. Some authors argue that the Turquand Rule should overrule the statute and that the legislature would have expressly excluded its applicability if that had been the intention. Also that approval of the general meeting is an internal requirement and there are no public interests involved here. Others argue that the statute overrules the Turquand Rule and that if the intention of the legislature was the protection of shareholders, effect should be given to that intention.
\item\textsuperscript{143} Hereinafter referred to as the “old Act”.
\item\textsuperscript{144} \textit{Farren} case para 10; \textit{Levy v Zalrut Investments (Pty) Ltd} 1986 (4) SA 479 (W) 484H-485A and 486J-487A. This case also dealt with s 228 of the old Act. The court found that the intention of the legislature with s 228 “was to place a limitation on the powers of the directors of a company … s 228 was introduced with a view to regulating the procedure required for a disposal described therein and, as such, it was clearly designed for the benefit of shareholders.”
\item\textsuperscript{145} \textit{Farren} case paras 10 and 11. For critique on this view see the authorities cited in the \textit{Farren} case para 12 also Rabie 2008 \textit{Transactions of the Centre for Business Law} 176. Due to the fact that s 228 of the old Act makes provision for the ratification of a decision of the directors by the shareholders, the action or agreement will not automatically be void or invalid, just because the internal requirements have not been complied with. In this regard the court in the \textit{Farren} case referred with approval to \textit{Ally v Courtesy Wholesalers (Pty) Ltd} 1996 (3) SA 134 (N) 145E-G and 147G-H.
\item\textsuperscript{146} \textit{Farren} case para 7; Havenga 2004 \textit{Juta’s Business Law} 127.
\item\textsuperscript{147} \textit{Farren} case para 7; Havenga 2004 \textit{Juta’s Business Law} 127.
\item\textsuperscript{148} Havenga 2004 \textit{Juta’s Business Law} 127; Locke and Esser 2011 \textit{Annual Survey of SA Law} 299; Locke 2016 \textit{SALJ} 173 footnote 73; Swart and Lombard 2017 \textit{THRHR} 678. In \textit{Levy v Zalrut Investments (Pty) Ltd} 1986 (4) SA 479 (W) 486D-F, 487A-C and 487H-I this question was answered positively. Also see \textit{Ally v Courtesy Wholesalers (Pty) Ltd} 1996 (3) SA 134 (N) 145E-G and 147G-H. See also the English case of \textit{Rolled Steel Products (Holdings) Ltd v British Steel Corporation} (1985) 3 All ER 52 (CA).
\item\textsuperscript{149} Locke and Esser 2011 \textit{Annual Survey of SA Law} 298-299. Alternatively, whether this would be an unwarranted encroachment on the protection that the old Act provided to shareholders.
\end{itemize}
the provision being embodied in statute, it carried “far more weight”. The court concluded that if the intention of the legislature, with enacting section 228, was the protection of the shareholders, then effect must be given to that intention. Allowing the application of the Turquand Rule to prevail, will negate the effect of section 228 and defeat the intention of the legislature. It would ultimately result in a failure to protect the shareholders. This result could never have been the intention of the legislature. The court ultimately ruled that the legislature intended the statute to prevail over the Turquand Rule.

In Levy v Zalrut Investments (Pty) Ltd the court came to the opposite conclusion on this point. The court held that there is “no indication that the public interest or public policy played any part in the intention of the Legislature when it enacted the said s228.” It was further held that a third party will “undoubtedly be able to enforce such transaction, provided” that he is not aware of the non-compliance by the company. Accordingly the Turquand Rule should apply in such situations.

150 Farren case para 15; Locke 2016 SALJ 173 footnote 53.
151 Farren case paras 14 and 17. The opinions of the supporters of this view, i.e. that the shareholders should be protected and which view the court ultimately preferred, are set out in this paragraph. The opinions of the supporters of the opposing view, i.e. that bona fide third parties should be protected, are set out in para 2.2.5 above. For a full discussion of the authors supporting this view as well as the opposing views of other authors see the Farren case paras 12-17. Compare para 2.2.5 above and paras 6.5 and 7.4 below. See also Locke 2016 SALJ 173 footnote 73; Rabie 2008 Transactions of the Centre for Business Law 176; Jooste 2013 SALJ 470; Swart and Lombard 2017 THRHR 678.
152 Farren case paras 14 and 17; Locke 2016 SALJ 173 footnote 73; Rabie 2008 Transactions of the Centre for Business Law 176; Swart and Lombard 2017 THRHR 678.
153 Farren case para 17; Locke 2016 SALJ 173 footnote 73; Swart and Lombard 2017 THRHR 678.
154 Farren case para 14; Rabie 2008 Transactions of the Centre for Business Law 176; Jooste 2013 SALJ 470.
155 Farren case para 17; Locke 2016 SALJ 173 footnote 73; Havenga 2004 Juta’s Business Law 128; Locke and Esser 2011 Annual Survey of SA Law 298-300; Swart and Lombard 2017 THRHR 678. See para 2.2.5 above for a contrary view. Section 228 initially required approval by shareholders in terms of an ordinary resolution. After amendment in 2006, s 228 required a special resolution for approval of such disposals. Therefore constructive notice applied to such approval. This should put the third party on enquiry. Accordingly, should the third party fail to make further enquiry, he will not comply with the requirement of being bona fide. Compare paras 6.5 and 7.4 below. Compare also the reasoning of the court in the Levy case footnotes 159-160 below.
156 1986 (4) SA 479 (W).
158 Levy v Zalrut Investments (Pty) Ltd 1986 (4) SA 479 (W) 487A-C.
159 Levy v Zalrut Investments (Pty) Ltd 1986 (4) SA 479 (W) 487A-C, 487E-F and 487H-I. The court further held that Estoppel may be applied, even if the contract is illegal or invalid, as long as there are “no considerations of public policy which militate against the recognition of estoppel”. Estoppel should be applied if the contract is intra vires the company subject to an internal requirement.
This matter was finally settled by Lewis J.A. in *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd v Gœbel.* The precedent laid down in the *Farren* case was confirmed in the *Stand 242* case. The court decided that the Turquand Rule does not apply. Therefore any transaction of a company that requires a special resolution would be void, if no such special resolution was taken, due to the directors’ lack of authority.

2.3.2.2 The doctrine of unanimous assent

In *De Villiers v BOE Bank Ltd* the court held that regard had to be had to the role played by Hiscock (the representative), material events leading up to contracts and events subsequent to the conclusion of contracts. Navsa JA held that the resolutions were:

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160 *Levy v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) 487H-I. “In such a case persons dealing with the body in question may assume that the requisite formalities have been complied with and raise an estoppel should non-compliance with such formalities be pleaded, provided, of course, that the person raising estoppel does not have knowledge of such non-compliance.”

161 2011 (5) SA 1 (SCA) paras 22 and 16. Hereinafter referred to as the “*Stand 242 case*”. Delport 2013 *De Jure* para 2; Latsky 2014 *Stellenbosch Law Review* 367 and footnote 33. This case also dealt with s 228 of the old Act and the application of the Turquand Rule.

162 *Stand 242* case paras 22 and 16; Latsky 2014 *Stellenbosch Law Review* 367 and footnote 33; Locke and Esser 2011 *Annual Survey of SA Law* 299; Swart and Lombard 2017 *THRHR* 678. The court held that s 228 override the Turquand Rule, because the purpose of s 228 was the protection of the shareholders which would be nullified if a third party, to whom an invalid disposal was made, were allowed to enforce the contract through the Turquand Rule against the company.

163 Delport 2013 *De Jure* para 2; *Stand 242* case paras 22 and 16; Latsky 2014 *Stellenbosch Law Review* 367 and footnote 33; Swart and Lombard 2017 *THRHR* 678. Compare paras 6.5 and 7.4 below.

164 Delport 2013 *De Jure* para 2; *Stand 242* case para 12. The court further reiterated that the rationale of the Turquand Rule: “is based on commercial convenience: business might well be impeded if parties dealing with agents of a company had to investigate in all instances whether internal rules had been duly observed”. See para 2.2.5 above for a contrary view. Compare also the reasoning of the court in the *Levy* case and footnotes 159-160 above. Compare also paras 6.5 and 7.4 below.

165 2004 (3) SA 1 (SCA). Hereinafter referred to as the “*De Villiers case*”. This case did not deal with s 228, but rather authority and validity of contracts in general and acquiescence. Unanimous assent makes the application of the Turquand Rule unnecessary.

166 *De Villiers* case paras 19, 48, 56 and 57. The shareholders of the holding company (Macmed) passed resolutions ratifying the agreement and authorising any director to sign all documents with regard to the agreement. The directors of the wholly owned subsidiary company (Intramed) abided by the decisions of the holding company (Macmed). They also followed instructions from the authorised person (Hiscock, the company secretary and financial head of the holding company), although not a director of either company.
"no more than the formal embodiment of the pre-existing unanimous assent on the part of members of Macmed to do something \textit{intra vires} the company."\textsuperscript{167}

The court held that in the circumstances, the lack of formal resolutions by the directors either authorising the contracts or ratifying them, was not fatal to the claim.\textsuperscript{168} The contract was accordingly binding.

Although this case did not, strictly speaking, involve the Turquand Rule, the court’s \textit{dictums} regarding authority are very relevant, for the application of the Turquand Rule.\textsuperscript{169}

In \textit{Intramed (Pty) Ltd v Standard Bank of SA Ltd}\textsuperscript{170} Claassen J held that the evidence in the two cases\textsuperscript{171} was so similar “that a similar conclusion … is unavoidable and imperative”.\textsuperscript{172} The court came to the same conclusion, namely that the defendant had established on a balance of probabilities that the directors of the company had fully acquiesced and/or unanimously assented to the actions of Hiscock in concluding the contracts on behalf of the company.\textsuperscript{173} Their actions amounted to an express mandate to Hiscock to conclude such contracts.\textsuperscript{174}

In \textit{Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd}\textsuperscript{175} the court held that the requirements of section 228 can be complied with through the

\textsuperscript{167} \textit{De Villiers} case para 21.


\textsuperscript{169} The court’s \textit{dictums} regarding authority may be applied for purposes of the application of the Turquand Rule, due to authority (or the lack thereof) being an important part of the Turquand Rule. Unanimous assent may be used for compliance with a requirement of a special resolution, which has strictly speaking not been complied with, if all the requirements are met, as an alternative to the Turquand Rule or Estoppel. See also para 6.5 below.

\textsuperscript{170} [2005] 1 All SA 460 (W). Hereinafter referred to as the “\textit{Intramed case}”. This case also did not deal with s 228, but rather authority and validity of contracts in general and acquiescence.

\textsuperscript{171} The \textit{De Villiers} and \textit{Intramed} cases.

\textsuperscript{172} \textit{Intramed} case 491. In the \textit{Intramed} case the facts and the plaintiff were basically the same as in the \textit{De Villiers} case above.

\textsuperscript{173} \textit{Intramed} case 491. Hiscock was also the representative in the \textit{De Villiers} case above, see footnote 166 above. The court held that because Hiscock concluded numerous similar contracts on behalf of the company and was never challenged by any director or shareholder, that the contracts were duly authorised.

\textsuperscript{174} \textit{Intramed} case 491.

\textsuperscript{175} [2009] 4 All SA 448 (WCC).
2.3.3 “Assume” and the presumption requirement

The Turquand Rule provides an irrebuttable presumption in favour of a bona fide third party, that the internal requirements of a company have been duly complied with. This will be so unless the third party had actual knowledge to the contrary. Accordingly, even if a company can prove that the internal requirements have in fact not been complied with, or not properly complied with, the company would still be bound. A third party may therefore insist that a contract, falling within the ambit of the Turquand Rule, be enforced or cancelled, as he wishes.

The irrebuttable presumption in the Turquand Rule is a prima facie presumption which may be excluded and a third party will then be prohibited from relying on the

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176 Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd [2009] 4 All SA 448 (WCC) paras 16, 21, 23 and 26; Latsky 2014 Stellenbosch Law Review 364 footnote 11. The court decided that the word “disposal” in s 228 of the old Act, should be interpreted narrowly as an outright transfer. Not as a “transaction which exposes the company’s assets to the risk of forced disposal because of borrowing”. Otherwise even a mortgage bond, where the property hypothecated forms the greater part of the company assets, will constitute a disposal in this sense. See also Levy v Zalrut Investments (Pty) Ltd 1986 (4) SA 479 (W) 485E-F; Ally v Courtesy Wholesalers (Pty) Ltd 1996 (3) SA 134 (N) 145E-G, 146B-C, 147D-E and 147G-H; Simcha Properties v San Marcus Properties [2011] 1 All SA 287 (SCA) paras 13-14, 16, 31 and 35-36. See also para 6.5 below.

177 Referred to by Oosthuizen 1979 TSAR 7 as “onweerlegbare vermoede”. Anon http://www.roodtinc.com (consulted 29 March 2016); Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016). An irrebuttable presumption entails that the presumption will prevail, even if the contrary can be proven by a company. See para 2.2.2 above. Compare also para 2.2.2 above and paras 6.1.2, 6.1.6 and 7.3 below.

178 Oosthuizen 1979 TSAR 7; Anon http://www.vdma.co.za (consulted 29 March 2016); Anon http://www.roodtinc.com (consulted 29 March 2016); Jooste 2013 SALJ 473; Mine Workers’ Union case 844-849; Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016). The South African position is similar to that in English law, for the position in England see Birds et al Boyle & Birds’ Company Law 177. See also the English case of Royal British Bank v Turquand (1856) 6 E&B 327 (119 ER 886). Compare paras 6.1.2, 6.1.6 and 7.3 below.

179 Anon http://www.roodtinc.com (consulted 29 March 2016); Anon http://www.vdma.co.za (consulted 29 March 2016); Jooste 2013 SALJ 473; Mine Workers’ Union case 844-849; Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016). The South African position is similar to that in English law, for the position in England see Birds et al Boyle & Birds’ Company Law 177. See also the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 77.


Turquand Rule.\textsuperscript{182} Without the Turquand Rule no business confidence would be possible.\textsuperscript{183}

2.3.4 The knowledge requirement, suspicious circumstances and duty to enquire

A \textit{bona fide} third party is deemed to know of any provision in the public documents of a company, requiring compliance with an internal process.\textsuperscript{184} A third party is however not deemed to know, nor required to establish, whether the internal requirement have been duly complied with, in order to bind a company through the Turquand Rule to a contract.\textsuperscript{185} Even if the third party has actual knowledge, or is deemed to have knowledge, of the internal requirements of a company, the Turquand Rule will still apply.\textsuperscript{186} However, if the third party knew that the internal requirement have not been complied with, or knew of facts or circumstances that would have put the third party “as a reasonable man” on enquiry and he in fact failed to undertake such enquiry, the third party will not be \textit{bona fide}.\textsuperscript{187} Where the third party is put on inquiry, he must

\begin{footnotesize}
\textsuperscript{182} Rabie 2008 Transactions of the Centre for Business Law 173 and footnote 105. This will be in unusual (\textit{agtêrdogwekkende}) circumstances, which will place the third party on enquiry and cause him not to be \textit{bona fide}. Such will include the bestowing of authority on a particular representative and the exercising of such bestowed authority. Compare para 2.2.2 above and paras 6.1.2, 6.1.6 and 7.3 below.

\textsuperscript{183} Anon http://www.vdma.co.za (consulted 29 March 2016); Mine Workers’ Union case 844-849.

\textsuperscript{184} Delport \textit{et al} Henochsberg on Companies Act 71 of 2008 92; Swart and Lombard 2017 \textit{THRHR} 671; Mine Workers’ Union case 844-849. See also the English case of Royal British Bank \textit{v} Turquand (1856) 6 E&B 327 (119 ER 886). Compare paras 4.1, 6.1.2, 6.1.5, 6.4 and 6.4.1 below.

\textsuperscript{185} Delport \textit{et al} Henochsberg on Companies Act 71 of 2008 92; Mine Workers’ Union case 844-849; Rutkowski 2009 \textit{Without Prejudice} 31. See also the English cases of Royal British Bank \textit{v} Turquand (1856) 6 E&B 327 (119 ER 886) and Rolled Steel Products (Holdings) Ltd \textit{v} British Steel Corporation (1985) 3 All ER 52 (CA) 77-87.

\textsuperscript{186} Delport 2011 \textit{THRHR} 138; Mine Workers’ Union case 844-849. For a contrary view see Swart and Lombard 2017 \textit{THRHR} 678, where the authors state that knowledge of the internal requirement by the third party will cause that the Turquand Rule cannot be applied. The author hereof does not agree with Swart and Lombard as all the authorities consulted by the author hereof agrees that only knowledge by the third party of any non-compliance with an internal requirement will cause that the Turquand Rule cannot be applied. This is a significant difference in the knowledge requirement. See also the English case of Royal British Bank \textit{v} Turquand (1856) 6 E&B 327 (119 ER 886). See also paras 4.1, 6.1.2, 6.1.5, 6.4 and 6.4.1 below.

\textsuperscript{187} Delport \textit{et al} Henochsberg on Companies Act 71 of 2008 92; Mine Workers’ Union case 844-849; Rutkowski 2009 \textit{Without Prejudice} 31; Delport 2011 \textit{THRHR} 135; Kutumela \textit{A critical analysis of the Turquand Rule} 19; Cassim \textit{et al} Contemporary Company Law 182; Cassim \textit{et al} The law of business structures 145; Oosthuizen 1979 \textit{TSAR} 10; McLennan 1979 \textit{SALJ} 345; Locke 2016 \textit{SALJ} 169; Sutherland 2012 \textit{Stellenbosch Law Review} 171; Rabie 2008 Transactions of the Centre for Business Law 159-160 and footnote 13 and 171; Jooste 2013 \textit{SALJ} 472; Farren case para 9; TEB Properties CC \textit{v} MEC, Department of Health and Social Development, North West [2012] 1 All SA 479 (SCA) para 32; Bouwman 2011 \textit{Without Prejudice} 25; Gouveia \textit{A Critical Analysis of the Turquand Rule} 22; Swart and
\end{footnotesize}
make such inquiry. The Turquand Rule therefore restricts a third party’s duty to enquire within reasonable limits, to matters which are publicised. A company can thus not lawfully repudiate a contract “on the ground only that some ‘internal’ requirement was not observed”. Therefore a third party invoking the Turquand Rule must firstly plead that he was not aware of any non-compliance with the company’s internal requirements. Secondly he must plead that he is entitled to presume that all the relevant internal requirements have been duly complied with.

Just the nature of the transaction, may put a third party on inquiry, especially if the transaction is unusual. Also where a third party is deemed to be aware of the company representative’s deficient authority, in terms of constructive notice, the Turquand Rule will not apply. Consequently a third party’s constructive knowledge nullifies his bona fides. Not just actual knowledge, but also deemed knowledge of the irregularity by a third party, will cause that he cannot rely on the Turquand

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Lombard 2017 THRHR 672. The South African position is similar to that in English law, for the position in England see Birds et al Boyle & Birds’ Company Law 178. This is also as decided in the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 77-87. This is also similar to company law in Botswana, see Baiketlile Authority of Agents under the Botswana Companies Act 2003 16 and 23. Compare para 6.1.5 below.

188 Cassim et al Contemporary Company Law 183; Cassim et al The law of business structures 145; Sutherland 2012 Stellenbosch Law Review 171.

189 Rutkowski 2009 Without Prejudice 31. See also para 2.2.4 and footnote 124 above.

190 Delport et al Henochsberg on Companies Act 71 of 2008 92. However the company may lawfully resile from the contract on any other ground. This is similar to English law, see Royal British Bank v Turquand (1856) 6 E&B 327 (119 ER 886). See also para 2.2.3 above.

191 Farren case para 9; Mine Workers’ Union case 844-849. See also the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 78.

192 Farren case para 9; Mine Workers’ Union case 844-849. See also the English cases of Royal British Bank v Turquand (1856) 6 E&B 327 (119 ER 886) and Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 78.

193 Cassim et al Contemporary Company Law 183; Cassim et al The law of business structures 145; Gouveia A Critical Analysis of the Turquand Rule 22. See also the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 78. See also the limitations proposed by Oosthuizen in para 2.2.2 above.

194 Oosthuizen 1979 TSAR 10; McLennan 1979 SALJ 345-346; Rabie 2008 Transactions of the Centre for Business Law 171-172. This is as set out in paras 2.2.1 and 2.3.3 above. See also the Transctions of the Centre for Business Law 171-172. Thus where a third party is malafide, or reasonably ought to have known that the internal requirements have not been properly complied with, the Turquand Rule will not apply. Compare paras 6.4 and 6.4.1 below.

195 In the form of constructive notice.
Rule. The third party’s knowledge of the irregularity has to be personal knowledge.

As a consequence of constructive notice, third parties are deemed to know of any limitation on the authority of company representatives. The Turquand Rule places the enquiry expected of a third party, within acceptable limits. Some authors are therefore of the opinion that the absence of constructive notice should play a role in the applicability of the Turquand Rule. They argue that because constructive notice has been abolished, the Turquand Rule may no longer be applicable in our company law. This is possible due to the fact that the Turquand Rule was specifically developed to mitigate the consequences of constructive notice. The author hereof does not agree with this view, for the reasons that follow. Firstly, the Turquand Rule is in principle not necessary linked to constructive notice. Secondly,

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197 Rabie 2008 Transactions of the Centre for Business Law 171-172. See also the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 77-87.
198 Rabie 2008 Transactions of the Centre for Business Law 172 and footnote 100. Although in this regard, the knowledge a representative obtained in the course of exercising his responsibilities, is ascribed to his company. The representative therefore has a duty to inform his company of such information obtained.
199 Oosthuizen 1977 TSAR 214. See also the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA). See para 4.1 below.
200 Oosthuizen 1977 TSAR 214-215. See also para 2.2.4 above.
201 Oosthuizen 1977 TSAR 215. Where third parties are not deemed to have knowledge of internal limitations on authority, the entity may still incur liability on the grounds of ostensible authority. See also paras 6.4 and 6.4.1 below.
202 This will be discussed fully hereunder in para 6.4 below.
203 McLennan 1997 SA MERC LJ 336; McLennan 2009 Obiter 150. McLennan is of the opinion that if constructive notice is abolished, the Turquand Rule will no longer apply, as it then has no function. This of course cannot be correct, as shown by Oosthuizen and Delport here. Also see para 6.4.1 below.
204 Delport et al Henochsberg on Companies Act 71 of 2008 98-99; the Stand 242 case; Locke 2016 SALJ 173 footnote 73; Delport 2011 THRHR 138. Delport states that the Turquand Rule may still apply to requirements imposed by statute, because the doctrine of constructive notice does not apply to these requirements. But he then concludes that in light of the decision in the Stand 242 case, that this statement is incorrect as the Turquand Rule cannot apply to statutory requirements. Delport is however of the opinion that, as the Turquand Rule also applied where a third party had actual knowledge, for instance the third party knew that for a specific action there is a prerequisite, the Turquand Rule will still apply. The Turquand Rule does however not apply to internal statutory requirements. See para 4.1 below. Also see paras 6.4 and 6.4.1 below.
205 Oosthuizen 1977 TSAR 215. It can also assist with the adjustment of irregularities that has no relation to the doctrine of constructive notice. It follows that the Turquand Rule should apply to such situations even if constructive notice does not apply to the entity at all. There exists no reason why the protection under the Turquand Rule should be denied a third party, just because constructive notice is not applicable or Estoppel may be invoked. See also paras 2.2.4 and footnote 124 and 2.3.2 and footnote 140 above. As will be seen in paras 6.4 and 6.4.1 below, the doctrine of constructive notice
where the authority of the representative is limited due to an internal requirement, implied authority cannot be applicable. If the third party knew about the limitation it will be impossible for him to prove Estoppel. Thirdly it would be juristically unacceptable to deprive a third party of the protection afforded under the Turquand Rule where constructive notice is not applicable, but where the third party nonetheless has no access to the internal management of the entity. In this situation the Turquand Rule will actually provide optimal protection. The Turquand Rule is an equitability rule that stands completely separate and independent from legal personality as well as constructive notice. It is therefore an ordinary legal rule of entities.


has been partially abolished. This argument may accordingly be used for the continued application of the Turquand Rule to companies.

For Estoppel to apply, the third party will have to prove that the company made a representation that the specific person had authority. Furthermore the third party will have to prove that the company made a representation that the internal requirements were complied with. The Turquand Rule on the other hand will be applicable even if the third party knew about the internal requirements. Only knowledge by the third party of any non-compliance with the internal requirements will cause the Turquand Rule to be inapplicable. See para 5 below.

It follows that there can be no objection to the extension of the Turquand Rule to entities to which the doctrine of constructive notice does not apply. It is especially in situations where the third party is aware of the fact that the representative’s authority is dependent upon compliance with internal requirements, where applying the Turquand Rule will provide optimal protection. See paras 2.2.4 and footnote 124 and 2.3.2 and footnote 140 above. As will be seen in paras 6.4 and 6.4.1 below, the doctrine of constructive notice has been partially abolished. This argument may accordingly be used for the continued application of the Turquand Rule to companies. Also s 20(7) will only be applicable to companies. The Turquand Rule does not apply between individual natural persons contracting. It only applies to juristic entities. The fact that the Turquand Rule has only been applied to juristic entities, were mainly due to the working of the doctrine of constructive notice. If we accept that the Turquand Rule can apply, even in the absence of the doctrine of constructive notice, it follows automatically that it should apply also to entities without legal personality. The need for protection under the Turquand Rule exists, where not all of the members of an entity have individual representative authority. This coupled with the fact that a third party does not have access to the internal management of the entity, is the rationale for the need of the protection under the Turquand Rule. If the third party is bona fide, he should be entitled to rely on the protection afforded by the Turquand Rule. This is the only effective protection available for the third party in such situations.

McLennan has a contrary view of the Turquand Rule to Oosthuizen. McLennan, in following the development of the Turquand Rule in English case law, is of the view that the Turquand Rule is nothing more than the application of Estoppel and specifically applying the requirements of ostensible authority. This is not surprising in light of the fact that the Turquand Rule and Estoppel has been conflated, mostly in English law. The author hereof does not agree with McLennan’s view, and rather


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2.3.4.1 Forgeries and fraud

A third party, who relies on a forged document, will not be protected under the Turquand Rule, due to the forged document being a nullity.\textsuperscript{212} Where the contract has been entered into due to fraud or a forgery, the Turquand Rule will not apply.\textsuperscript{213} Oosthuizen however does not agree with this statement.\textsuperscript{214} Fraudulent acts may be binding on a company, in terms of the principles of agency law, if the representative acted within his implied or ostensible authority.\textsuperscript{215}

2.4 Proposals for law reform

McLennan and Rabie proposed various reforms including the abolition of the \textit{ultra vires} and constructive notice doctrines, which have to a greater extent been implemented in the Act.\textsuperscript{216} McLennan also proposed statutory amendment of the Turquand Rule to the application of Estoppel in the form of ostensible authority.\textsuperscript{217}
With respect, his proposal for reform of the Turquand Rule, very adequately sets out the requirements for Estoppel, specifically ostensible authority. It however atrociously fails to set out the true requirements of the Turquand Rule. It is therefore to be commended that the legislature did not implement any of McLennan’s proposals in regard to the Turquand Rule. Rabie on the other hand proposed the abolition of the common law doctrine of Estoppel and the Turquand Rule, and replacement thereof by statutory rules along the lines of the authentic requirements, including the clear limitations, of the rules.

2.5 Conclusion

The Turquand Rule will apply where a third party contracts with a company representative who has authority and potential authority, subject to an internal requirement which has not been properly complied with. The Turquand Rule is an independent rule that is separate from constructive notice. The Turquand Rule also vastly differs from Estoppel.

3 Capacity and the ultra vires doctrine

3.1 Background and origin

Some background is essential. The principles of agency law have been adapted to juristic entities through doctrines developed in English common law, which have been

See also paras 2.2.1, 2.3.1 footnote 135 and 2.3.4 and footnotes 201-211 above. Compare this to paras 6 footnote 351 and 6.1.3 footnote 371 below.

218 This is the opinion of the author hereof. None of the authorities the author hereof has consulted, considered the opinions of McLennan, but Rabie’s proposals differ. See also paras 6 footnote 351 and 6.1.3 footnote 371 below in this regard – McLennan’s proposal was not followed. The author hereof cannot begin to guess the reason why the legislature did not follow McLennan’s proposals in this regard, although the legislature implemented some of Rabie’s proposals. See para 6.1 below, specifically para 6.1.3 below. It may be that the legislature did not agree with McLennan and preferred the view of Rabie.

219 Rabie 2008 Transactions of the Centre for Business Law 167 and 195-196 and footnote 238. He is of the opinion that companies, rather than third parties, should bear the risk. Due to the fact that the company may appoint its own representatives, this will be equitable. Also the representatives will be liable to the company on grounds of their fiduciary duties. The author hereof rather agrees with Rabie. Rabie also proposed that the Turquand Rule should not apply to directors of a company. This proposal regarding the exclusion of directors of Rabie has been taken up in s 20(7), see para 6 footnote 351 and para 6.1.3 footnote 371 below.
accepted into our law. In general the difference between capacity and authority is that capacity relates to the ability of a company to enter into a specific contract. On the other hand authority relates to the acts of individual representatives, who purport to act on behalf of a company. But capacity can also be used to refer to the authority of representatives.

If a company did not have the legal capacity or powers to enter into a specific transaction, the transaction was ultra vires the company. An ultra vires contract was externally “absolutely null and void and could not be ratified”.

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220 Anon 2010 Transactions of the Centre for Business Law 109-111 and 135. These doctrines, inter alia, include the ultra vires doctrine, the constructive notice doctrine, and the Turquand Rule. Swart and Lombard 2017 THRHR 669. A principal cannot transfer more rights to an agent than he has himself.
221 Anon 2010 Transactions of the Centre for Business Law 112; Swart and Lombard 2017 THRHR 671.
222 Cassim et al Contemporary Company Law 22; Cassim et al The law of business structures 134; Anon 2010 Transactions of the Centre for Business Law 114; Rabie 2008 Transactions of the Centre for Business Law 167. The South African position is similar to that in English law, for the position in England see Birds et al Boyle & Birds’ Company Law 150 and the English cases of Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA) and Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 79.
223 Cassim et al Contemporary Company Law 22; Cassim et al The law of business structures 134; Anon 2010 Transactions of the Centre for Business Law 114; Rabie 2008 Transactions of the Centre for Business Law 167. The South African position is similar to that in English law, for the position in England see Birds et al Boyle & Birds’ Company Law 150 and the English cases of Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA) and Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 79.
224 McLennan 1979 SALJ 333. The South African position is similar to that in English law, for the position in England see Birds et al Boyle & Birds’ Company Law 150. See also the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA).
225 Oosthuizen 1979 TSAR 2; Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa 54; Anon 2010 Transactions of the Centre for Business Law 111-112; Locke 2016 SALJ 163; McLennan 1979 SALJ 330-331; McLennan 2009 Obiter 144; Gouveia A Critical Analysis of the Turquand Rule 8. The South African position is similar to that in English law, for the position in England see Birds et al Boyle & Birds’ Company Law 150. See also the English case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 79-87 and 91-94.
226 Oosthuizen 1979 TSAR 2; Cassim et al The law of business structures 134-135; McLennan 1979 SALJ 331; McLennan 2009 Obiter 144; Anon 2010 Transactions of the Centre for Business Law 111-112 and 114; Locke 2016 SALJ 163-164; Rabie 2008 Transactions of the Centre for Business Law 167; Gouveia A Critical Analysis of the Turquand Rule 8; Swart and Lombard 2017 THRHR 668-669. Not even the unanimous assent of all the shareholders or a deliberate wrongful (skuldige) representation (in terms of Estoppel) by a company could render such a transaction lawful. See also the English cases of Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA) 645 and Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA) 79-87 and 91-94. Compare paras 3.2 and 6.3.1 below.
*ultra vires* doctrine was to protect investors, shareholders and the creditors of a company.\(^{227}\)

### 3.2 Position under the Companies Act 61 of 1973 ("old Act")

Section 36 of the old Act\(^ {228}\) was introduced to mitigate and partially abolished the rigid consequences of the *ultra vires* doctrine.\(^ {229}\) In terms of section 36, neither a company nor a third party could raise the lack of capacity of the company, or the lack of authority of the directors due to the company’s lack of capacity, to assert that the transaction is void or as defence to escape liability.\(^ {230}\) An *ultra vires* contract would be

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\(^{227}\) Cassim *et al* *The law of business structures* 134; Davis (ed) Geach (main ed) Mongalo *et al* *Companies and other business structures in South Africa* 54-55; McLennan 1979 *SALJ* 330-331; McLennan 2009 *Obiter* 144; Gouveia *A Critical Analysis of the Turquand Rule* 8; Swart and Lombard 2017 *THRHR* 668. The consequences of an *ultra vires* transaction were that the directors entering into such a transaction could be held liable for breach of fiduciary duties. The shareholders could also prevent the company from entering into such a transaction *via* interdict.

\(^{228}\) *Companies Act* 61 of 1973. *36 Acts ultra vires the company not void*

No act of a company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact and, except as between the company and its members or directors, or as between its members and its directors, neither the company nor any other person may in any legal proceedings assert or rely upon any such lack of capacity or power or authority.”

\(^{229}\) Oosthuizen 1979 *TSAR* 2; Anon 2010 *Transactions of the Centre for Business Law* 113; Rabie 2008 *Transactions of the Centre for Business Law* 22 and 242; Swart and Lombard 2017 *THRHR* 668-669. In terms of the old Act a company could only pursue the objectives as set out in its public documents. Regarding the meaning of the word “directors” used in s 36, there is some dispute among the authors, but all agree that its meaning was unclear. For a full analysis of the word “directors” see Rabie 2008 *Transactions of the Centre for Business Law* 22; Oosthuizen 1979 *TSAR* 2-3 and footnote 11. Rabie states that the use of the word “directors” was unclear. There is uncertainty whether it relates to the board of directors as a whole or to every individual director. A company is rarely represented by the board of directors in transactions with third parties. Normally a managing director, committee of directors, executive officer or a specifically authorised person would represent a company. Compare para 6.3.1 below. In an analysis of the word “directors” in s 36 of the old Act, Oosthuizen is of the opinion that representation of the company by its board of directors would fall outside the application of s 36. It follows that the company would in this instance be able to rely on the lack of capacity and the *ultra vires* doctrine. Oosthuizen doubts that the actions of a single director are included in the word “directors”. This is so because directors can only act in their capacity as the board, unless authorised otherwise. Accordingly the actions of an individual director are not the same as the actions of the board of directors. The managing director of a company may, in certain instances, be seen as an organ of the company. The actions of the managing director may in these instances be seen as actions of the board of directors. Oosthuizen therefore proposes that the word “directors” in s 36 of the old Act be interpreted as the board of directors, managing director or authorised director or directors. See also Swart and Lombard 2017 *THRHR* 669 in this regard.

\(^{230}\) Oosthuizen 1979 *TSAR* 2-3; McLennan 1979 *SALJ* 335; Anon 2010 *Transactions of the Centre for Business Law* 107 and 114; Cassim *et al* *Contemporary Company Law* 167; Cassim *et al* *The law of business structures* 136-137; Sutherland 2012 *Stellenbosch Law Review* 166; Locke 2016 *SALJ* 164; Swart and Lombard 2017 *THRHR* 669. If the lack of authority of the directors was due to any reason other than the lack of capacity of the company, s 36 would not apply. In this instance the Turquand
valid and binding between a company and a third party, and not void. The protection under section 36 was not dependent on *bona fides*.

This section however only applied to external contracts between a company and third parties, but not to internal actions. Also only the external consequences were abolished. A company was protected by constructive notice and a third party was protected by the Turquand Rule.

Section 36 therefore changed the application of the *ultra vires* doctrine drastically. For all practical implications, a company had unlimited capacity. It also theoretically led to an extension of the Turquand Rule. This tips the scales unreasonably in favour of a third party.

4 The Turquand Rule and the doctrine of Constructive Notice

4.1 Background and origin

Rule may have assisted the third party. This illustrates that s 36 restricted the company's reliance on the lack of authority only in certain instances.

Cassim *et al* *Contemporary Company Law* 167; Cassim *et al* *The law of business structures* 136; Davis (ed) Geach (main ed) Mongalo *et al* *Companies and other business structures in South Africa* 55 footnote 80; Locke 2016 *SALJ* 164; Sutherland 2012 *Stellenbosch Law Review* 166; Rabie 2008 *Transactions of the Centre for Business Law* 22; Dharmaratne [http://www.cgblaw.co.za](http://www.cgblaw.co.za) (consulted 15 May 2016); McLennan 1979 *SALJ* 335; Anon 2010 *Transactions of the Centre for Business Law* 107 and 113-114; Oosthuizen 1979 *TSAR* 2; Gouvela *A Critical Analysis of the Turquand Rule* 8; Swart and Lombard 2017 *THRHR* 669. Compare para 6.3.1 below.

Accordingly an internal *ultra vires* contract between the company and its shareholders or directors would still be void. This will apply *mutatis mutandi* to an internal *ultra vires* contract between the shareholders and the directors of a company.

Cassim *et al* *The law of business structures* 136-137; Cassim *et al* *Contemporary Company Law* 167; Davis (ed) Geach (main ed) Mongalo *et al* *Companies and other business structures in South Africa* 55 footnote 80; Locke 2016 *SALJ* 166; Rabie 2008 *Transactions of the Centre for Business Law* 22; Van Wyk 2013 [https://nicolaasvanwyk.wordpress.com](https://nicolaasvanwyk.wordpress.com) (consulted 15 May 2016); Swart and Lombard 2017 *THRHR* 669. Internally, the director would still be liable for damages to the company or shareholders, for breach of fiduciary duty.

Dharmaratne [http://www.cgblaw.co.za](http://www.cgblaw.co.za) (consulted 15 May 2016). Accordingly an internal *ultra vires* contract between the company and its shareholders or directors would still be void. This will apply *mutatis mutandi* to an internal *ultra vires* contract between the shareholders and the directors of a company.

Cassim *et al* *The law of business structures* 136-137; Cassim *et al* *Contemporary Company Law* 167; Davis (ed) Geach (main ed) Mongalo *et al* *Companies and other business structures in South Africa* 55 footnote 80; Locke 2016 *SALJ* 166; Rabie 2008 *Transactions of the Centre for Business Law* 22; Van Wyk 2013 [https://nicolaasvanwyk.wordpress.com](https://nicolaasvanwyk.wordpress.com) (consulted 15 May 2016); Swart and Lombard 2017 *THRHR* 669. Internally, the director would still be liable for damages to the company or shareholders, for breach of fiduciary duty.

Oosthuizen 1979 *TSAR* 2; Anon 2010 *Transactions of the Centre for Business Law* 113; McLennan 2009 *Obiter* 146; McLennan 1997 *SA MERC LJ* 334-335. According to McLennan, there has been no reported case law in South Africa on the *ultra vires* doctrine since s 36 has been enacted. See para 6.3.1 below.

Rabie 2008 *Transactions of the Centre for Business Law* 168 and footnote 79.

Some background is again needed. The law relating to the authority of company representatives was developed along the lines of the law of partnerships.\textsuperscript{239} It was accepted that the board of directors has full authority to bind a company.\textsuperscript{240} Therefore the public documents of a company cannot create capacity.\textsuperscript{241} It can only limit the capacity and the authority of representatives.\textsuperscript{242} Accordingly shareholders would be completely exposed to the actions of the board.\textsuperscript{243}

This situation was untenable and the courts ultimately developed the doctrine of constructive notice, in order to protect the shareholders of a company.\textsuperscript{244} The case of \textit{Ernest v Nicholls}\textsuperscript{245} established the doctrine of constructive notice.\textsuperscript{246} This doctrine entails that “a person who deals with the company is deemed to have knowledge of the public documents” of that company.\textsuperscript{247}

\begin{itemize}
\item \textsuperscript{239} Oosthuizen 1979 \textit{TSAR} 4; Oosthuizen 1977 \textit{TSAR} 217-218. Company law has its origin in the law of partnerships. Every partner in principle had the authority to bind a partnership, with matters relating to the partnership. The authority of a partner may be internally excluded by mutual agreement. The doctrine of constructive notice was also not applicable to partnerships.
\item \textsuperscript{240} Oosthuizen 1979 \textit{TSAR} 4.
\item \textsuperscript{241} Oosthuizen 1979 \textit{TSAR} 4.
\item \textsuperscript{242} Oosthuizen 1979 \textit{TSAR} 4. This is in terms of the English common law, which was accepted into our company law. See also the English case of \textit{Rolled Steel Products (Holdings) Ltd v British Steel Corporation} (1985) 3 All ER 52 (CA).
\item \textsuperscript{243} Oosthuizen 1979 \textit{TSAR} 4.
\item \textsuperscript{244} Oosthuizen 1979 \textit{TSAR} 4. See also the English case of \textit{Ernest v Nicholls} (1857) 6 HL Cas 401.
\item \textsuperscript{245} (1857) 6 HL Cas 401.
\item \textsuperscript{246} Bouwman 2011 \textit{Without Prejudice} 25; Delport 2011 \textit{THRHR} 133; Kutumela \textit{A critical analysis of the Turquand Rule} 14; Cassim \textit{et al Contemporary Company Law} 179; Cassim \textit{et al The law of business structures} 143; Davis (ed) Geach (main ed) Mongalo \textit{et al Companies and other business structures in South Africa} 55; Oosthuizen 1979 \textit{TSAR} 3; McLennan 1979 \textit{SALJ} 342; McLennan 2009 \textit{Obiter} 145; Anon 2010 \textit{Transactions of the Centre for Business Law} 112; Locke and Esser 2011 \textit{Annual Survey of SA Law} 298; Locke 2016 \textit{SALJ} 169 and footnote 49; Gouveia \textit{A Critical Analysis of the Turquand Rule} 10. Specifically with regard to authority requirements see Sutherland 2012 \textit{Stellenbosch Law Review} 171; Rabie 2008 \textit{Transactions of the Centre for Business Law} 158, 170 and 241. See also the English case of \textit{Ernest v Nicholls} (1857) 6 HL Cas 401.
\end{itemize}
Constructive notice does not relate only to the capacity or authority of representatives, but was extended to all other matters stated in the public documents. Failure of a third party to consult the public documents was no defence. A third party would inevitably be deemed to have such knowledge. Should a company’s public documents limit the authority of the board or other representative, they cannot legally bind the company to transactions in contravention of such limitation. The company may however ratify such transactions.

Constructive notice only operates for the protection of a company and cannot be used against a company. It is therefore a negative doctrine and not a positive one. It is also directly linked to the statutory doctrine of disclosure. It follows that the severe

authority requirements, see Sutherland 2012 Stellenbosch Law Review 171. The English common law was accepted into our company law. See also the English cases of 

Ernest v Nicholls (1857) 6 HL Cas 401 Catchwords & Digest and Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA). This is similar to company law in Botswana, see Baiketlile Authority of Agents under the Botswana Companies Act 2003 13-14.

Oosthuizen 1979 TSAR 5 footnote 23.

Oosthuizen 1979 TSAR 5; Rutkowski 2009 Without Prejudice 31; McLennan 1979 SALJ 343; Rabie 2008 Transactions of the Centre for Business Law 170 and 241. See also the English case of Ernest v Nicholls (1857) 6 HL Cas 401 Catchwords & Digest.

Oosthuizen 1979 TSAR 5; Rutkowski 2009 Without Prejudice 31; McLennan 1979 SALJ 343; Rabie 2008 Transactions of the Centre for Business Law 170 and 241; Swart and Lombard 2017 THRHR 671.

Oosthuizen 1979 TSAR 5 and footnote 27; Rabie 2008 Transactions of the Centre for Business Law 171; Swart and Lombard 2017 THRHR 671. The third party cannot even invoke Estoppel to hold the company liable in terms of such a transaction. This is so because the third party will, due to his constructive knowledge, not be able to allege that he was misled by the company’s representation. The third party may be able to hold the company representative liable in terms of breach of implied warranty of authority. If however the limitation of the representative’s authority can be established from the public documents, the third party’s constructive notice will negate this reliance, unless the representative expressly gave such warranty. See also the English case of Ernest v Nicholls (1857) 6 HL Cas 401 Catchwords & Digest.


Delport et al Henochsberg on Companies Act 71 of 2008 92; Cilliers et al Ondernemingsreg para 14.21; Kutumela A critical analysis of the Turquand Rule 15; Rutkowski 2009 Without Prejudice 31; McLennan 1979 SALJ 343; Rabie 2008 Transactions of the Centre for Business Law 193; Swart and Lombard 2017 THRHR 671. Accordingly a third party cannot rely on his deemed knowledge of the provisions in the public documents of a company, to establish actual or ostensible authority. A third party can however rely on his actual knowledge of the provisions in the public documents of a company to prove actual or ostensible authority, or any other facts. The company can then “never lawfully resile from the contract”.

Jooste 2013 SALJ 468; McLennan 1979 SALJ 343. A negative doctrine operates only in favour of a company and against a third party. A positive doctrine operates also in favour of a third party. See also the English case of Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA) 645.

Cilliers et al Ondernemingsreg paras 14.20 and 14.21; Oosthuizen 1979 TSAR 3; Rabie 2008 Transactions of the Centre for Business Law 158; Swart and Lombard 2017 THRHR 671. This doctrine
consequences of constructive notice were extremely detrimental to a third party. To temper this detrimental effect on third parties, the Turquand Rule was developed by the courts to protect bona fide third parties. Constructive notice could also prevent a third party from relying on the Turquand Rule.

5  Representation, authority and the doctrine of Estoppel

5.1  Representation and authority

A little bit of background is once again needed. Our common law of representation originated from Roman-Dutch law, which was later influenced by English law.

5.1.1  Original authority

Before the 2008 Act, the shareholders had inherent and residual powers. But in terms of section 66(1) of the Act the ultimate power now lies with the board of
directors to manage the business of a company.\textsuperscript{262} It is accepted that the board\textsuperscript{263}, the managing director and the chairman of the board may act on behalf of a company, for the Turquand Rule to apply.\textsuperscript{264} The reason is that these persons have original authority to bind a company, except in exceptional cases where their authority to act has been excluded or limited in the public documents of a company.\textsuperscript{265} A 	extit{bona fide} third party contracting with one of these persons may therefore accept that all the internal requirements have been duly and properly complied with, in terms of the Turquand Rule.\textsuperscript{266} This is very important, for if not for the Turquand Rule, no normal flow of commerce will be possible and “no one would be safe in contracting with companies”.\textsuperscript{267}

SA 169 (D) 172; Kaimowitz v Delahunt 2017 (3) SA 201 (WCC) para 12; Pretorius v PB Meat (Pty) Ltd (1057/2013) [2013] ZAWCHC 89 (14 June 2013) paras 25-26; Swart and Lombard 2017 THRHR 675.\textsuperscript{262} Delport 	extit{New Companies Act Manual} 66-67; Delport et al Henochsberg on Companies Act 71 of 2008 250(1)-250(6); Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Kaimowitz v Delahunt 2017 (3) SA 201 (WCC) paras 12 and 27; Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd [2014] JOL 32101 (WCC) paras 29, 31 and 37; Pretorius v PB Meat (Pty) Ltd (1057/2013) [2013] ZAWCHC 89 (14 June 2013) paras 25-26; Swart and Lombard 2017 THRHR 675.\textsuperscript{263} Delport et al Henochsberg on Companies Act 71 of 2008 91. The board of a company will normally have the power to manage the business of a company and will therefore be authorised to act on behalf of a company. See also the Wolpert case.\textsuperscript{264}

Delport 2011 THRHR 135; Loubser Case Book 118. See also the Wolpert case and Tuckers land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T); Jooste 2013 SALJ 470-471; Delport 	extit{New Companies Act Manual} 66. The organs of a company do not need authority to act, as they will automatically bind a company. The organs of a company are the shareholders (acting in a meeting), the board and committees. These organs have original authority in terms of the Act. The organs’ powers and functions are also divided in terms of the Act and this division is absolute. Delport et al Henochsberg on Companies Act 71 of 2008 91. A single director on the other hand will not necessarily have authority to act. Loubser Case Book 120; Tuckers land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T). Also where a person acquiesce that another person acts on his behalf and do nothing to object thereto, that person so acting is presumed to have the necessary authority for those actions.\textsuperscript{265}

Delport 2011 THRHR 135; Loubser Case Book 118: Tuckers land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T); Kutumela A critical analysis of the Turquand Rule 9; Investec Bank Limited v Quick Leap Investments 34 (Pty) Ltd 2014 JDR 2516 (GP) para 37.6; Swart and Lombard 2017 THRHR 675. In Investec Bank Limited v Quick Leap Investments 34 (Pty) Ltd 2014 JDR 2516 (GP) (an unreported judgment ), Rossouw AJ held that: “[t]he ambit of authority conferred in a trust deed is not a matter of ‘internal management’ with which outsiders need not concern themselves.” See also Vrystaat Mielies (Edms) Bpk v Nieuwoudt 2003 (2) SA 262 (O) 267-268, overturned on appeal in Nieuwoudt v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA). See also the English case of Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA).\textsuperscript{266} Delport 2011 THRHR 135; Loubser Case Book 118-119; Tuckers land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T); Jooste 2013 SALJ 470-471. See also paras 2.2.1, 2.2.3 and 2.3.2 above.\textsuperscript{266} Delport 2011 THRHR 135; Loubser Case Book 119; Tuckers land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T).
If an ordinary director, a branch manager, the company secretary or any other person in a position of authority, acts as company representative, a third party may not necessarily accept that they have the required authority to do so.\(^{268}\) In such a case a company is entitled to repudiate liability, on the ground that the representative did not have the required authority to bind the company.\(^{269}\) In this sense the Turquand Rule has “limited application” in that the third party will be required to first prove that the company representative had the required authority to act, before the Turquand Rule will apply.\(^{270}\)

5.1.2 Actual authority

Actual authority relates to the relationship between an agent and his principal, whereas ostensible authority, relates to “the authority of an agent as it appears to others.”\(^{271}\) This is the critical difference between actual authority and ostensible authority.\(^{272}\) Actual authority, of a representative, may be express or implied\(^{273}\), but

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\(^{268}\) Delport 2011 \textit{THRHR} 135; Loubser \textit{Case Book} 116 and 119; \textit{Tuckers land and Development Corporation (Pty) Ltd v Perpellief} 1978 (2) SA 11 (T); Jooste 2013 \textit{SALJ} 470-471; Swart and Lombard 2017 \textit{THRHR} 676. See also Kutumela \textit{A critical analysis of the Turquand Rule} 8-14. There is not necessarily a link between the Turquand Rule and the capacity of the representative. The Turquand Rule will apply where the representative has actual authority and potential authority that is subject to an internal requirement. See also paras 2.2.1, 2.2.3 and 2.3.2 above.

\(^{269}\) Delport 2011 \textit{THRHR} 135; Loubser \textit{Case Book} 119; \textit{Tuckers land and Development Corporation (Pty) Ltd v Perpellief} 1978 (2) SA 11 (T). See also \textit{Nieuwoudt v Vrystaat Mielies (Edms) Bpk} 2004 (3) SA 486 (SCA) para 22. This is the same right a natural principal has, in terms of agency law. It is to deny that a particular person is his agent, and a company should be entitled to at least the same right. See also the discussion of the Wolpert case in para 2.2.1 above.

\(^{270}\) Delport 2011 \textit{THRHR} 135; Loubser \textit{Case Book} 116 and 119; \textit{Tuckers land and Development Corporation (Pty) Ltd v Perpellief} 1978 (2) SA 11 (T); Jooste 2013 \textit{SALJ} 470-471. See also Kutumela \textit{A critical analysis of the Turquand Rule} 8-14. See also paras 2.2.1, 2.2.3 and 2.3.2 above. For a discussion of the Turquand Rule in the wide and narrow sense see Delport 2011 \textit{THRHR} 135-136.

\(^{271}\) This is in terms of English law see Birds \textit{et al Boyle & Birds’ Company Law} 179, but the South African position is the same. See also the English case of \textit{Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd} 1964 1 All ER 630 (CA) 644. Compare para 5.1.3 below.

\(^{272}\) This is in terms of English law see Birds \textit{et al Boyle & Birds’ Company Law} 179, but the South African position is the same.

\(^{273}\) Through conduct of a company.
must be proven by a third party.\textsuperscript{274} The lack of actual authority may be cured by the Turquand Rule.\textsuperscript{275}

As a consequence of the board having original powers, this authority is no longer a delegated authority.\textsuperscript{276} This change in our company law will have a significant effect on the application of the Turquand Rule and the interpretation of section 20(7) of the Act.\textsuperscript{277} In light of the above, a representation by the shareholders of a company, may no longer bind the company by way of Estoppel, contrary to the decision in \textit{One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd.}\textsuperscript{278}

5.1.2.1 Express authority

Express authority may be conferred by the public documents of a company.\textsuperscript{279} Due to the board having ultimate original authority, it may delegate its powers\textsuperscript{280} to a person, for instance a single director, or a group of persons.\textsuperscript{281} The person, to whom the authority is delegated, must accept the express authority.\textsuperscript{282}

5.1.2.2 Implied or usual authority

Implied authority arises from the particular type of official capacity that an agent

\textsuperscript{274} Delport \textit{et al Henochsberg on Companies Act 71 of 2008} 91. See also the \textit{Wolpert case and Tuckers land and Development Corporation (Pty) Ltd v Perpellief} 1978 (2) SA 11 (T); Cassim \textit{et al Contemporary Company Law} 188; Cassim \textit{et al The law of business structures} 148; Oosthuizen 1979 TSAR 6.

\textsuperscript{275} Delport \textit{New Companies Act Manual} 67; Gouveia \textit{A Critical Analysis of the Turquand Rule} 13.


\textsuperscript{277} Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at http://www.litnet.co.za (consulted 12 July 2016). See also para 6.3 below.

\textsuperscript{278} 2015 (4) All SA 88 WCC. Hereinafter referred to as the “\textit{One Stop case}”. Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at http://www.litnet.co.za (consulted 12 July 2016). See also para 5.1.3.3 below.

\textsuperscript{279} Delport \textit{New Companies Act Manual} 66.

\textsuperscript{280} I.e. express authority.

\textsuperscript{281} Delport \textit{New Companies Act Manual} 67; Jooste 2013 \textit{SALJ} 470-471.

\textsuperscript{282} Delport \textit{New Companies Act Manual} 67 and footnote 25. This is so because authority is a contract. See also the English case of \textit{Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd} 1964 1 All ER 630 (CA) 644.
holds. It is the authority which that official may usually exercise, even if the official is exceeding his actual authority.

The Turquand Rule apply traditionally only in situations where a representative would normally have the authority for those kind of transactions. Alternatively it applies where the contract falls within the authority, which that type of official would usually have. As an equitability rule the Turquand Rule serves as sufficient clarity for the liability of a company. Accordingly it is unnecessary and undesirable to hold a company liable in Turquand Rule situations along the route of usual authority.

In Quintessence Opportunities Ltd v BLRT Investments Ltd; BLRT Investments v Grand Parade Investments Ltd, Blignault J held that the qualifications in the Turquand Rule “still reflect the legal position”. These qualifications entail that where

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283 Delport New Companies Act Manual 67; Cassim et al The law of business structures 151; Rabie 2008 Transactions of the Centre for Business Law 16 and 18; Gouveia A Critical Analysis of the Turquand Rule 14; Swart and Lombard 2017 THRHR 670. This is similar to English law, for the position in England see Birds et al Boyle & Birds’ Company Law 180 and the English case of Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA) 638.

284 Delport New Companies Act Manual 67; Rabie 2008 Transactions of the Centre for Business Law 16. This is similar to English law, for the position in England see Birds et al Boyle & Birds’ Company Law 180. Cassim et al Contemporary Company Law 188; Cassim et al The law of business structures 148; Swart and Lombard 2017 THRHR 670. Implied authority accordingly arises from the reasonable inference from the conduct of the principal.

285 Oosthuizen 1979 TSAR 8. Oosthuizen is of the opinion that the reference to usual authority is only a means to distinguish between usual and unusual transactions, for purposes of the Turquand Rule and Estoppel.

286 Oosthuizen 1979 TSAR 8. See para 2.2.1 and footnotes 57 and 60 and para 2.2.2 and footnotes 90-91 above.

287 Oosthuizen 1979 TSAR 8.

288 Oosthuizen 1979 TSAR 7-8. Some authors see usual authority as an independent ground for liability. Oosthuizen does not agree with this view. Usual authority relates to the doctrine of Estoppel. The principle of usual authority is uncertain, not only in South African law but also in English law. Oosthuizen is of the opinion that it would be unreasonable to make the third party’s remedy dependant on such an uncertain principle. Rabie 2008 Transactions of the Centre for Business Law 18. Rabie is of the opinion that unqualified inception of English decisions by our courts, specifically in the Wolpert case, led to confusion in our common law relating to representation. The author hereof quite agrees with this statement. For critique on the Wolpert case see Rabie 2008 Transactions of the Centre for Business Law 18-21. Rabie further states that, the learned Judge erred in that he confused the different principles of actual authority, Estoppel, ostensible authority and the Turquand Rule. Rabie is of the opinion that the company, in the Wolpert case, was not bound to the contract, due to the fact that there were suspicious circumstances present, which imposed a duty on the third party to undertake further enquiry. See para 2.2.1 and footnotes 60, 66 and 69 above.

289 [2008] 1 All SA 67 (C).

290 Quintessence Opportunities Ltd v BLRT Investments Ltd; BLRT Investments v Grand Parade Investments Ltd [2008] 1 All SA 67 (C) para 29; Cassim et al Contemporary Company Law 183 footnote 82.
a third party, relying on the Turquand Rule, knew that the representative was acting outside of his actual authority, or if the circumstances should have put the third party on enquiry, the Turquand Rule will not apply.\textsuperscript{291}

5.1.3 Ostensible or apparent authority

The doctrine of ostensible authority forms part of the law of agency.\textsuperscript{292} It entails that a representative without actual authority, may bind a company in certain circumstances.\textsuperscript{293} This will be where a person with actual authority, holds out the said representative as duly authorised.\textsuperscript{294}

The Turquand Rule may assist a third party to prove authority derived from the public documents of a company.\textsuperscript{295} This will be where actual authority is lacking.\textsuperscript{296} If the public documents of a company confer authority on the directors to perform a specific transaction, subject to a condition, such condition will be an internal requirement.\textsuperscript{297} A third party dealing with such a company is not required to investigate whether there

\textsuperscript{291} Quintessence Opportunities Ltd v BLRT Investments Ltd; BLRT Investments v Grand Parade Investments Ltd [2008] 1 All SA 67 (C) paras 29 and 30; Cassim et al Contemporary Company Law 183 footnote 82. The court held further that the fact that the company representative is the chairman of the board and attended meetings relevant to the contract, could be “sufficient to trigger the operation of the rule”. It was further held that where the third party wrongly assured the company representative, that the representative has the required authority to act, the third party cannot invoke the Turquand Rule. This is so due to the fact that the representation of authority was made by the third party and not by the company.

\textsuperscript{292} Rabie 2008 Transactions of the Centre for Business Law 16-17; Swart and Lombard 2017 THRHR 670. This is similar to English law, for the position in England see Birds et al Boyle & Birds’ Company Law 166 and the English case of Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA).

\textsuperscript{293} Rabie 2008 Transactions of the Centre for Business Law 16-17; Gouveia A Critical Analysis of the Turquand Rule 16. Ostensible authority will apply whether the principal is a company or a natural person. Swart and Lombard 2017 THRHR 670. Swart and Lombard are of the view that ostensible authority is a contradiction in terms, “as there is no authority at all when estoppel is established”. This is similar to English law, for the position in England see Birds et al Boyle & Birds’ Company Law 166.

\textsuperscript{294} Rabie 2008 Transactions of the Centre for Business Law 16-17; Gouveia A Critical Analysis of the Turquand Rule 16. This is similar to English law, for the position in England see Birds et al Boyle & Birds’ Company Law 166 and the English case of Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA) 641 and 645.

\textsuperscript{295} Stannard 2015 Without Prejudice 79.

\textsuperscript{296} Stannard 2015 Without Prejudice 79.

\textsuperscript{297} Stannard 2015 Without Prejudice 79; One Stop case para 28; Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Jooste 2013 SALJ 470-471. See also Rabie 2008 Transactions of the Centre for Business Law 17 and footnote 49. Where there is a provision in the public documents of a company excluding a particular action from the authority of a specific person, a third party concluding such a contract with that person will not be able to rely on the Turquand Rule, due to the doctrine of constructive notice.
was compliance with such internal requirement.\textsuperscript{298} The third party may indeed assume that the internal requirements have been complied with, provided that the third party is \textit{bona fide}\.\textsuperscript{299}

5.1.3.1 Requirements

There are thus four essential elements required to establish ostensible authority:

a) that a representation was made to the third party that the company representative, had authority to conclude the specific contract;\textsuperscript{300}

b) that such representation was made by a person who had actual authority to bind the company to that specific contract;\textsuperscript{301}

c) that the third party was induced by such representation to conclude the contract, and in fact relied on the representation;\textsuperscript{302} and

d) that the public documents of the company did not prohibit the company from concluding such a contract, or to delegate authority to do so.\textsuperscript{303}

\begin{itemize}
\item \textsuperscript{298} Stannard 2015 \textit{Without Prejudice} 79.
\item \textsuperscript{299} Stannard 2015 \textit{Without Prejudice} 79.
\item \textsuperscript{300} Cilliers \textit{et al Ondernemingsreg} para 14.29; Swart and Lombard 2017 \textit{THRHR} 670; \textit{Makate v Vodacom (Pty) Ltd} [2016] ZACC 13 (hereinafter referred to as “the \textit{Makate case}”) para 138 concurring judgment by Wallis JA. A company can create the impression of ostensible authority, through its actions or omissions and will be bound to such contract, in terms of Estoppel. See also the English case of \textit{Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd} 1964 1 All ER 630 (CA) 645.
\item \textsuperscript{301} Cassim \textit{et al Contemporary Company Law} 189; Cassim \textit{et al The law of business structures} 150. The representation must not have been made to the third party by a representative, who did not have actual authority. This is similar to Australian company law, see Cain 1989 \textit{Bond Law Review} 277, commenting on the company law reform in Australia, which is similar to our reform. See also the English case of \textit{Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd} 1964 1 All ER 630 (CA). Note that the concurring judgment in the \textit{Makate case} has a different view, see \textit{Makate case} paras 161-165.
\item \textsuperscript{302} Cassim \textit{et al Contemporary Company Law} 190; Cassim \textit{et al The law of business structures} 150; Gouveia \textit{A Critical Analysis of the Turquand Rule} 16. If a third party knew, or is deemed to know, that a representative did not have actual authority, he will not be entitled to rely on ostensible authority. Also where a third party knows or has reason to know that the contract is not in the interest of the company, he will not be able to allege that he believed that the representative had actual authority. See also the English cases of \textit{Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd} 1964 1 All ER 630 (CA) and \textit{Rolled Steel Products (Holdings) Ltd v British Steel Corporation} (1985) 3 All ER 52 (CA).
\item \textsuperscript{303} One Stop case paras 27, 31 and 35; \textit{Makate} case paras 135-136 concurring judgment by Wallis JA; Loubser \textit{Case Book} 121; \textit{Tuckers land and Development Corporation (Pty) Ltd v Perolleif} 1978 (2) SA 11 (T); Gouveia \textit{A Critical Analysis of the Turquand Rule} 16; Cassim \textit{et al The law of business
5.1.3.2 Nature of ostensible authority

The doctrine of Estoppel and ostensible authority are in essence the same, in terms of the current South African law. On the other hand, in the majority judgment by Jafta J in *Makate v Vodacom (Pty) Ltd*, the Judge came to the conclusion that “they are not one and the same thing”. Estoppel itself is not a form of authority, it is only a mechanism that prevents a company from denying authority, if the circumstances permit. On the other hand Estoppel by representation or ostensible authority may confer authority, where no actual authority exists.
5.1.3.3 Conflation of the Turquand Rule with ostensible authority

In the *One Stop* case Rogers J, erroneously equated the Turquand Rule as an auxiliary to the doctrine of ostensible authority. The court held that the Turquand Rule will only apply if a third party is *bona fide* and "has otherwise proved the facts necessary to establish ostensible authority". The quoted statement by the court is nonsensical. A third party may generally reasonably assume that the board and managing director has authority to act.

The court further held that it is important to plead the provisions of the public documents of a company and constructive notice, in order for a third party to rely on the Turquand Rule. This statement by the court is again irrational. It is unnecessary for a third party to have knowledge of the contents of a company's public documents, for the Turquand Rule to apply. It is also not a requirement of the Turquand Rule that a representation of ostensible authority be made by a company. The Turquand

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309 *One Stop* case para 25; Lombard and Swart 2016 (13) *Litnet Akademies* 658 available at http://www.litnet.co.za (consulted 12 July 2016); Delport *et al* Henochsberg on Companies Act 71 of 2008 92; Swart and Lombard 2017 *THRHR* 679. The court also, by extension equated the Turquand Rule as an auxiliary to that of Estoppel. The court sets out to explain, quite extensively but incorrectly as far as the Turquand Rule is concerned, the requirements and instances for the Turquand Rule to apply in relation to ostensible authority. For a contrary view see the *Makate* case para 110 of concurring judgment by Wallis AJ.

310 *One Stop* case para 28; Lombard and Swart 2016 (13) *Litnet Akademies* 658 available at http://www.litnet.co.za (consulted 12 July 2016); See also Rabie 2008 *Transactions of the Centre for Business Law* 17 and footnote 49; Stannard 2015 *Without Prejudice* 79.

311 *One Stop* case paras 29, 33-34 and 40; Kleitman 2015 https://www.cliffeekkerhofmeyr.com (consulted 15 May 2016). See also the *Wolpert* case; Stannard 2015 *Without Prejudice* 79. A third party may not however, automatically assume that a single director has delegated authority. In such a case the third party will have to prove some kind of representation by the company that the single director had authority to act. The public documents of a company cannot assist the third party in proving such a representation, if the action would not normally have fallen within that director’s power. The Turquand Rule cannot be used to confer authority on a representative, if that representative would not normally have had that authority. See usual authority under para 5.1.2.2 above.

312 *One Stop* case para 42; Stannard 2015 *Without Prejudice* 79. Failing which, the third party cannot invoke the Turquand Rule.


314 Lombard and Swart 2016 (13) *Litnet Akademies* 658 available at http://www.litnet.co.za (consulted 12 July 2016); Delport *et al* Henochsberg on Companies Act 71 of 2008 92. The fact that the representation of ostensible authority must be made separate from a company’s public documents, confirms that the Turquand Rule and ostensible authority are two separate legal rules. Although the Turquand Rule and ostensible authority are undoubtedly interwoven, the court in the *One Stop* case incorrectly merged the two rules into one rule. So if the representative had authority, but the authority was conditional upon an internal requirement, the Turquand Rule will apply. The Turquand Rule will
Rule is therefore not a form of ostensible authority, but an independent rule. The origin, rationale and requirements of the two rules differ considerably. The One Stop case was decided exclusively on the grounds of ostensible authority.

It is clear that a definite distinction between the Turquand Rule on the one hand, and ostensible authority on the other, must be drawn. The principles of these two rules should be applied untainted, authentically and accurately. This will prevent the merger of the two rules. Conflation of these two rules will further lead to legal uncertainty. Authors, courts and even legal practitioners often confuse these two concepts, which lead to incorrect application of the principles. This in turn may lead to unacceptable, unjust, inequitable and incorrect results and ultimately to the prejudice of the innocent third party.

“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.”

apply, even if the third party was aware of the internal requirement for authority. On the other hand, ostensible authority cannot apply in such a scenario. However, if the representative had no authority, just ostensible authority may be applied.

315 Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Cassim et al Contemporary Company Law 184; Rabie 2008 Transactions of the Centre for Business Law 164; Delport et al Henochsberg on Companies Act 71 of 2008 92; Gouveia A Critical Analysis of the Turquand Rule 17; Swart and Lombard 2017 THRHR 675. See paras 2.2.1 and 2.2.2 above.

316 Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Swart and Lombard 2017 THRHR 675. Compare paras 2.2.1 and 5.1.3 above.

317 Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Stannard 2015 Without Prejudice 79; Locke 2016 SALJ 181 footnote 107. The reason was because the public documents of the company were not placed before the court. Due to the fact that neither director was represented to be the managing director, ostensible authority was not established. Ultimately, the court failed to explicitly state that the application of the Turquand Rule is neither subject to the type of juristic entity nor to constructive notice. The court further failed to establish a definite distinction between the Turquand Rule and ostensible authority.

318 Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Rabie 2008 Transactions of the Centre for Business Law 244; Swart and Lombard 2017 THRHR 675. The Turquand Rule is not a form of ostensible authority, but rather actual authority with potential authority, which is subject to an internal requirement. See para 2.2.2 above.

319 Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Rabie 2008 Transactions of the Centre for Business Law 244. This conflation may also be supplanted on the interpretation of s 20(7), see para 6.1 below.

320 Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Rabie 2008 Transactions of the Centre for Business Law 244; Swart and Lombard 2017 THRHR 675. If this conflation is not corrected it may also be applied to s 20(7) of the Act, to the prejudice of third parties. See chapter 3 below.

321 Makate case concurring judgment by Wallis JA 66 footnote 147.
This statement will be well applied in our law.

5.2  The principles of agency law and Estoppel

5.2.1 Principles of agency law in general

The Turquand Rule and the ordinary principles of agency law apply concurrently.\textsuperscript{323}

The basic rules of agency law are the following:

\begin{itemize}
  \item [a)] There will always be three parties involved namely: the principal, the agent and the third party;
  \item [b)] The agent has the authority to act on behalf of the principal; and
  \item [c)] Only the principal and the third party obtain rights and obligations in terms of the contract.\textsuperscript{324}
\end{itemize}

Estoppel may not have an illegal or prohibited effect, to nullify the law whether common law or statutory law, to protect the public interest.\textsuperscript{325} The requirements of

\textsuperscript{322} Due to word constraints, Estoppel will not be fully discussed herein, only certain elements will be mentioned in passing.

\textsuperscript{323} Delport \textit{et al} Henochsberg \textit{on Companies Act 71 of 2008 92}.

\textsuperscript{324} Delport \textit{New Companies Act Manual} 65-66 and 68; Cassim \textit{et al Contemporary Company Law} 187 and 191; Cassim \textit{et al The law of business structures} 148 and 150; Farren case para 18; Loubser \textit{Case Book} 116; Glofinco \textit{v Absa Bank Ltd t/a United Bank} 2002 (6) SA 470 (SCA) para 13; Louw \textit{v Absa Trust Limited} (19085/2007) [2014] ZAWCHC 159 (28 October 2014) para 26; Cilliers \textit{et al Ondernemingsreg} para 14.27; Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016); Oosthuizen 1979 \textit{TSAR} 9; Makate case para 49; Rabie 2008 \textit{Transactions of the Centre for Business Law} 14 footnote 29; Swart and Lombard 2017 \textit{THRHR} 674. The essential requirements of the delictual doctrine of Estoppel are the following: a) The principal must have made a deliberate or negligent (wrongful) representation. Fault, in the form of \textit{dolus} or \textit{culpa}, by the representor may in certain cases play a role. This representation must be made by a person or persons with actual authority relating to that specific contract. b) The representation must be in such a form that the principal should reasonably have expected that third parties will be misled and will act on the representation. c) The third party must have reasonably acted on the belief of the representation. d) The third party must have acted to his prejudice. e) The representation must also relate to the perceived authority of the agent. The requirement in (e) will be in relation to ostensible authority.

\textsuperscript{325} Farren case para 18; Havenga 2004 \textit{Juta’s Business Law} 128; TEB \textit{Properties CC v MEC, Department of Health and Social Development, North West} [2012] 1 All SA 479 (SCA) para 35; Stand 242 case para 23. This situation was confirmed by Lewis J.A. in the Stand 242 case, who stated "estoppel cannot operate to allow a contravention of a statute". This is contrary to company law in Botswana, see Baiketlile \textit{Authority of Agents under the Botswana Companies Act 2003 29}.
Estoppel are more onerous than that of the Turquand Rule.\textsuperscript{326} Where the representative does not have authority\textsuperscript{327}, the company will be bound in terms of statutory law, section 19(1) and section 20(1) of the Act, not in terms of Estoppel.\textsuperscript{328}

In \textit{Glofinco v Absa Bank Ltd t/a United Bank}\textsuperscript{329}, the court had to consider the extent of a branch manager’s authority to bind a bank.\textsuperscript{330} The majority judgment concluded that this was not an ordinary or routine transaction.\textsuperscript{331} The court ultimately concluded that it was not the bank’s representation that caused the third party to act to his detriment, but the representation made by the bank manager.\textsuperscript{332} In a dissenting judgment, Nugget JA held that the contract does not have to be an ordinary one, even a fraudulent act by an agent can bind the principle.\textsuperscript{333} The dissenting judgment concluded that an innocent third party should not bear the loss, as this is what Estoppel tries to avoid.\textsuperscript{334} Estoppel is therefore also an equitability rule and forms part

\textsuperscript{326} Farren case para 18; Rabie 2008 \textit{Transactions of the Centre for Business Law} 163 and 165.
\textsuperscript{327} Due to the fact that the contract is \textit{ultra vires} the company or contrary to the public documents of the company.
\textsuperscript{328} Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at \url{http://www.litnet.co.za} (consulted 12 July 2016).
\textsuperscript{329} 2002 (6) SA 470 (SCA).
\textsuperscript{330} \textit{Glofinco v Absa Bank Ltd t/a United Bank} 2002 (6) SA 470 (SCA) para 15. The majority judgment stated that just the appointment of a branch manager, is a representation by the bank that the branch manager has authority to represent the bank, in the sort of business that the branch and manager would ordinarily conduct.
\textsuperscript{331} \textit{Glofinco v Absa Bank Ltd t/a United Bank} 2002 (6) SA 470 (SCA) paras 15, 17, 20 and 23. "Ordinary business” puts a limitation on this authority, i.e. that the manager may not bind the bank to a contract that is “not of the ordinary kind”. The ordinary kind of business of a branch is a matter of fact and evidence. If the third party is aware that the contract does not fall within the ordinary business of the branch manager, no representation was made. Where third parties do not know of internal limitations on the authority of the branch manager, such limitations will not bind the third party and “[t]his is a principle as old as the law of agency itself”.
\textsuperscript{332} \textit{Glofinco v Absa Bank Ltd t/a United Bank} 2002 (6) SA 470 (SCA) paras 26 and 27. It concluded that therefore no representation was made by the bank for the application of estoppel.
\textsuperscript{333} \textit{Glofinco v Absa Bank Ltd t/a United Bank} 2002 (6) SA 470 (SCA) paras 32, 45, 46 and 47. In the dissenting judgment, Nugget JA came to the opposite conclusion. "In my view, it is the nature of the transaction, rather than the circumstances in which the bank is willing to enter into it, that defines whether it falls within the scope of its business.” He concluded that the bank made the representation to the third party that the branch manager had authority to act.
\textsuperscript{334} \textit{Glofinco v Absa Bank Ltd t/a United Bank} 2002 (6) SA 470 (SCA) paras 46 and 52. This is the reason why the rule was established in the first place, “Estoppel is concerned with appearances and not with idiosyncratic reservations.” The author hereof rather agrees with the dissenting judgment that \textit{bona fide} third parties should be protected. See also \textit{Louw v Absa Trust Limited} (19085/2007) (2014) ZAWCHC 159 (28 October 2014) para 26 where it was stated that the doctrine of Estoppel is "based on considerations of fairness and justice, and is aimed at preventing prejudice and injustice". 55
of our substantive law. It provides a defence to a claim, or denies a defence to a claim.

5.2.2 Interaction between Estoppel and the Turquand Rule

The Turquand Rule cannot be equated to Estoppel, due to the fact that with the application of the Turquand Rule, certain essential elements of Estoppel do not apply, namely:

i. With Estoppel the third party must prove that he was aware of the misrepresentation;

ii. With Estoppel the third party must also have acted on the misrepresentation;

iii. With the Turquand Rule there is no element of fault required with regard to the company’s representation;

iv. For the Turquand Rule to apply, the third party does not need to act to his prejudice;

v. Both apply the onus of proof applicable in civil actions;

vi. Estoppel cannot establish an independent cause of action where none existed before, it can only cause liability in an indirect manner.

335 Louw v Absa Trust Limited (19085/2007) [2014] ZAWCHC 159 (28 October 2014) para 26, Makate case para 110 concurring judgment by Wallis JA; Rabie 2008 Transactions of the Centre for Business Law 244; Swart and Lombard 2017 THRHR 673.


337 Rabie 2008 Transactions of the Centre for Business Law 163. See para 5.2.1 and footnote 324 above.

338 Rabie 2008 Transactions of the Centre for Business Law 163. See para 5.2.1 and footnote 324 above.

339 Whether dolus “skuldiglik” or culpa negligence.

340 Rabie 2008 Transactions of the Centre for Business Law 163. See para 5.2.1 and footnote 324 above. Compare also para 2.2.2 above.

341 Rabie 2008 Transactions of the Centre for Business Law 163. See para 5.2.1 and footnote 324 above. Compare also para 2.2.2 above. Harm is however a requirement of Estoppel.

342 Rabie 2008 Transactions of the Centre for Business Law 164.

343 Rabie 2008 Transactions of the Centre for Business Law 164 and footnote 52; Lombard and Swart 2016 (13) Litnet Akademies 658 available at http://www.litnet.co.za (consulted 12 July 2016). See also
vii. While the Turquand Rule can establish an independent cause of action.\textsuperscript{344}

Estoppel has not been codified, so the common law doctrine will still apply in our company law.\textsuperscript{345}

\textsuperscript{344} Rabie 2008 \textit{Transactions of the Centre for Business Law} 164. See para 2.2.2 above.

\textsuperscript{345} Rabie 2008 \textit{Transactions of the Centre for Business Law} 244. In general compare paras 2.2.1 and 2.2.2 above.
CHAPTER 3

In this chapter the reform, changes and current position under the 2008 Act will be discussed. The provisions of section 20(7) will be analysed and compared to those of the Turquand Rule. Other relevant sections of the Act relating to capacity, representation and authority will also briefly be discussed.

6 Section 20(7) of the Companies Act 71 of 2008 (Statutory Turquand Rule or misnomer?)

Section 20 of the Act deals with the validity of company actions. While subsections 20(7) and 20(8), are described by some authors as the so-called statutory Turquand Rule.

In short section 20(7) means that any person, excluding a director, shareholder or prescribed officer of that company, dealing bona fide with that company may accept that the company has complied with all the external and internal formal and procedural requirements for the exercising of its powers. This presumption will apply unless the person had knowledge of a failure by the company to comply with such

346 Van Der Linde 2015 TSAR 834; Swart and Lombard 2017 THRHR 677. Van der Linde is of the opinion that some of the subsections of s 20 deal with ultra vires conduct, others deal with common law principles, and others deal with matters unrelated to capacity. The “potential for confusion is increased” especially because these different matters are “sometimes dealt with in the same subsection”. For a summary of this part of the Act see Van Der Linde 2015 TSAR 835-843. Swart and Lombard on the other hand states that the heading of s 20 “could be construed as implying that company actions should be interpreted as valid, rather than invalid or void, except in exceptional circumstances.”


“7) A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.

(8) Subsection (7) must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers.”

348 Requirements contained in the Act and other statutes.

349 Requirements contained in the MOI, company rules and other company documents.
Section 20(7) is however, not a complete codification of the common law Turquand Rule.\textsuperscript{350} It should rather be seen as supplementing the deficiencies of the Turquand Rule:

"so that there remains scope outside the section for the development of the rule in Turquand, although the rules of law and equity should be developed upon a course parallel to that of the principles of the legislation".\textsuperscript{351}

Section 20(8) clearly provides that the provisions in section 20(7) must be construed in tandem with other common law rules\textsuperscript{352}, and not in substitution for those common law rules.\textsuperscript{353}

The legislature therefore did not intend to codify or substitute the common law Turquand Rule, but rather to add to it. In light of the fact that the ambit of the Turquand Rule is wider than that of section 20(7), it is submitted that the Turquand Rule still applies and will continue to apply in our company law. This will be especially in situations where section 20(7) is inapplicable or inappropriate, for the reasons as set out herein below.\textsuperscript{354}

\textsuperscript{350} Locke 2016 SALJ 170; Rabie 2008 Transactions of the Centre for Business Law 191 and footnotes 210-211; Swart and Lombard 2017 THRHR 672 and 677.

\textsuperscript{351} Cain 1989 Bond Law Review 281, commenting on the Company Law reform in Australia, which is similar to our reform. It is the view of the author hereof that although this was said with regard to the Turquand Rule applicable in Australian company law, it will be well applied in our law. McLennan 2009 Obiter 153. On the other hand, McLennan is of the opinion that this section "serves no purpose at all". From the wording of ss 20(7) and 20(8) it is clear that the legislature did not implement any of McLennan’s proposals to align the Turquand Rule with Estoppel. Rabie’s proposals in this regard have also not entirely been implemented. See also Swart and Lombard 2017 THRHR 677 where the authors state that s 20(7) “modified the common law form of the Turquand rule”. The author hereof does not agree with this statement by Swart and Lombard and prefer the view of Cain in this regard. The reason is that the wording of s 20(8) clearly states that s 20(7) did not substitute or amend the common law Turquand Rule and that both rules should be applied “concurrently”. See para 2.4 and footnotes 216-219 above.

\textsuperscript{352} For example the doctrines of ultra vires, constructive notice, the Turquand Rule, Estoppel and agency law etc.

\textsuperscript{353} Delport New Companies Act Manual 69; Locke 2016 SALJ 181. Section 20(7) will be analysed and discussed first in paras 6.1-6.1.7 and then s 20(8) will be analysed and discussed in para 6.2 herein below. Other relevant provisions of the Act will be briefly discussed in paras 6.3-6.5 below.

\textsuperscript{354} Cassim et al Contemporary Company Law 186; Cassim et al The law of business structures 147 and footnote 45; Oosthuizen 1977 TSAR 211; Anon 2010 Transactions of the Centre for Business Law
6.1  *Interpretation and effect*

6.1.1 General

Conduct of a company, based on a decision tainted by failure to comply with formal and procedural requirements, is regulated in section 20(7). The fact that section 20(7) is not exactly the same as the Turquand Rule may present difficulties in practice. Section 20(7) is in some respects wider than the Turquand Rule and in other ways narrower.

In the *One Stop* case it was held that section 20(7) was not intended to be a complete codification or revocation of any aspect of the Turquand Rule and that section 20(8) was included in the Act to retain “the whole ground” of the Turquand Rule.

6.1.2 Narrower ambit

In terms of section 20(7) a third party should now be allowed to accept that the general internal procedures and formalities for authorisation have been duly complied with and may presume that the action is proper. Jooste is of the opinion that the

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114; Sutherland 2012 *Stellenbosch Law Review* 171; Rabie 2008 *Transactions of the Centre for Business Law* 164 footnote 54 and 176. The Turquand Rule is not limited to only companies, but has been extended to other juristic entities, such as technicons, municipalities, trusts and trade unions. See *Mine Workers’ Union* case 844-849 and *Vrystaat Mielies (Edms) Bpk v Nieuwoudt* 2003 (2) SA 262 (O) 267-268, overturned on appeal in *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA). See paras 2.2.4 and footnote 124 and 2.3.2 and footnote 140 above. Section 20(7) on the other hand will only apply to companies.

355 Van Der Linde 2015 TSAR 835.

356 Cassim *et al* *Contemporary Company Law* 185; Cassim *et al* *The law of business structures* 146; Swart and Lombard 2017 *THRHR* 677. See paras 6.1.2-6.1.7 and 7.3 below for a discussion of the differences.

357 Section 20(7) may now override certain other requirements in the Act, which was never possible with the Turquand Rule. See also Swart and Lombard 2017 *THRHR* 677 in this regard.

358 Cassim *et al* *Contemporary Company Law* 185; Cassim *et al* *The law of business structures* 146-147. Certain insiders are excluded from the ambit of s 20(7), see para 6.1.3 below. Section 20(7) also contains other exclusions. See paras 6.1.2-6.1.7 below.


360 Delport *New Companies Act Manual* 69 footnote 35; Delport *et al* *Henochsberg on Companies Act 71 of 2008* 98; Swart and Lombard 2017 *THRHR* 677. Compare paras 2.2.1, 2.2.2 and 2.3.2 above.
delegation of authority to an ordinary director may, in terms of section 20(7), be viewed as a formal or procedural requirement in terms of the rules of a company.\textsuperscript{361}

Delport however, is of the view that only the action is presumed to be proper.\textsuperscript{362} This provision does not prohibit a company from utilising section 20(7) as a defence, specifically against directors, prescribed officers and shareholders.\textsuperscript{363} Section 20(7) accordingly encompasses only part of the Turquand Rule and is thus narrower.\textsuperscript{364} It is therefore contended that section 20(7) is “merely a rebuttable presumption”.\textsuperscript{365} Also the word “dealing” is not defined and may be construed widely, to include any transaction with a company, or narrowly to only include contracts.\textsuperscript{366}

6.1.3 Insiders

Delport is of the opinion that the ambit of the Turquand Rule is “much wider” than that of section 20(7), therefore making section 20(7) superfluous.\textsuperscript{367} Because in terms of the Turquand Rule, even directors, shareholders and officers of a company, the so-called insiders, would be capable of invoking the Turquand Rule against that company.\textsuperscript{368} In \textit{ABSA Bank Ltd v SACCAWU National Provident Fund}\textsuperscript{69} the court

\begin{flushright}
\footnotesize
\textsuperscript{361} Jooste 2013 SALJ 471. This view is supported by Delport, see Delport \textit{New Companies Act Manual} 69 footnote 35; Delport \textit{et al Henochsberg on Companies Act 71 of 2008} 98. A third party should now be allowed to presume, in terms of the provision in s 20(7), that such an appointment of a director was properly made, even though this was never part of the Turquand Rule. A third party was not entitled to assume that such authorisation has in fact been delegated in terms of the Turquand Rule. This is one of the instances where the Act is utterly unclear. For a full discussion hereof see Delport \textit{et al Henochsberg on Companies Act 71 of 2008} 98. Compare paras 2.2.1-2.2.3 and 2.3.2 above to paras 6.1.4-6.1.7 below.
\textsuperscript{362} Delport \textit{et al Henochsberg on Companies Act 71 of 2008} 98. See paras 2.2 and 2.3 above.
\textsuperscript{363} Delport \textit{New Companies Act Manual} 69 footnote 35; Delport \textit{et al Henochsberg on Companies Act 71 of 2008} 98; Locke 2016 SALJ 170.
\textsuperscript{364} Delport \textit{New Companies Act Manual} 69 footnote 35; Delport \textit{et al Henochsberg on Companies Act 71 of 2008} 98; Locke 2016 SALJ 170.
\textsuperscript{365} Delport \textit{New Companies Act Manual} 69 footnote 35; Delport \textit{et al Henochsberg on Companies Act 71 of 2008} 98. A rebuttable presumption does not prevent a company from raising it as a defence. Jooste 2013 SALJ 473. Jooste submits that the legislature should elucidate that s 20(7) does not only shift the \textit{onus} of proof to the company, so that the company has to prove any non-compliance with the internal requirements. This matter should be put “beyond doubt”. Compare paras 2.2.2 and 2.3.3 above.
\textsuperscript{366} Cassim \textit{et al Contemporary Company Law} 184 footnote 93; Cassim \textit{et al The law of business structures} 146 footnote 42.
\textsuperscript{367} Delport \textit{New Companies Act Manual} 69 footnote 36; Locke and Esser 2011 \textit{Annual Survey of SA Law} 300; Locke 2016 SALJ 170.
\textsuperscript{368} Delport 2011 \textit{THRHR} 136; Van Der Linde 2015 \textit{TSAR} 841; Kutumela \textit{A critical analysis of the Turquand Rule} 19-20; Jooste 2013 SALJ 471-472. See para 2.3.1 above.
\end{flushright}
quoted a passage in the Mine Workers’ Union case, which confirms that such a case should not be decided on a subjective basis, but instead:

“...It seems to me that the true position is that the necessary acts of internal management are presumed to have been performed and not that a particular person is entitled to assume that they have.”370

Section 20(7), contrary to the Turquand Rule, expressly excludes directors, prescribed officers and shareholders of a company from its ambit.371 None of these persons will be entitled to rely on the protection provided for in section 20(7).372 This effectively establishes an institutional basis for the application of section 20(7).373 The reference in section 20(7) to shareholders will not exclude other holders of a company’s securities374 from its protection.375 The rationale behind the exclusion is uncertain.376 It may be that shareholders, directors and prescribed offices will be deemed to have constructive knowledge of the content of all the company documents. They may also be deemed to have actual knowledge or should reasonably know of any non-compliance with the formal and procedural requirements, even internal processes, by the company.377 This arbitrary exclusion may still be irregular.

Section 20(7) apparently attempts to shift the focus of the classification of the third party, from the functional to the institutional, i.e. an external focus with regard to the...
third party in relation to the company. 378

6.1.4 Meaning of “formal and procedural requirements in the Act, MOI and company rules”

Section 20(7) applies to any formal or procedural requirement, whether external, in terms of the Act, or internal, in terms of the Memorandum of Incorporation379 or company rules.380 This is again contrary to the Turquand Rule.381 In this sense, in the opinion of the author hereof, the protection provided for in section 20(7) is much broader than that of the Turquand Rule. This is so due to the fact that section 20(7) may now apply to statutory requirements contained in the Act.382 The Turquand Rule never applied to statutory requirements, only to internal requirements contained in the public documents of a company.383 But in light of the decision in the Stand 242 case, section 20(7) will also not apply to all statutory requirements.384 In the Stand 242 case it was found that the Turquand Rule was not applicable to statutory requirements, “regardless of whether the requirement of shareholder approval was an ordinary resolution or a special resolution”.385 Therefore “the legislative protection of shareholders could not be superseded by the application of the Turquand Rule”.386

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379 Hereinafter referred to as the “MOI”.
380 Delport 2011 THRHR 137; Van Der Linde 2015 TSAR 841; Jooste 2013 SALJ 470.
381 Delport 2011 THRHR 137; Jooste 2013 SALJ 470. Compare para 2.3.2 above.
382 Jooste 2013 SALJ 470. This view is supported by Locke 2016 SALJ 171; Locke and Esser 2011 Annual Survey of SA Law 301; Van Der Linde 2015 TSAR 841 and Cassim et al Contemporary Company Law 184; Cassim et al The law of business structures 146; Swart and Lombard 2017 THRHR 677-678. A statutory internal requirement will therefore have no effect on the application of s 20(7), and the company may be bound. This may erode the protection of shareholders in some instances. This is contrary to Botswana law, see Baiketroit Authority of Agents under the Botswana Companies Act 2003 25-26 giving a comparison between the Botswana and South African law reform which differs.
383 Locke 2016 SALJ 171. See para 2.3.2 above.
384 Delport et al Henochsberg on Companies Act 71 of 2008 99; Stand 242 case. The court in the Stand 242 case did not specifically consider the effect of s 20(7), although the Act was available, but not in force, at the time. The formulation of s 20(7) utilised by the legislature may suggest that this position could have been changed. The author hereof however doubts that the legislature intended to change this position. See para 2.3.2.1 above, the argument set out in this para 6.1.4 and paras 6.5, 7.4 and footnote 605 below.
385 Locke and Esser 2011 Annual Survey of SA Law 300-301; Van Der Linde 2015 TSAR 841; Jooste 2013 SALJ 470. See para 2.3.2.1 above and paras 6.5, 7.4 and footnote 605 below.
386 Locke and Esser 2011 Annual Survey of SA Law 301; Jooste 2013 SALJ 470; Gouveia A Critical Analysis of the Turquand Rule 26. See para 2.3.2.1 above.
Future application of section 20(7) will depend on the courts’ interpretation of “formal and procedural requirements.”\textsuperscript{387} It is suggested that the decision in the \textit{Stand 242} case should prevail.\textsuperscript{388} Namely that statutory protection afforded to shareholders will carry more weight where the Act requires shareholder approval, than the protection of \textit{bona fide} third parties in terms of the Turquand Rule or section 20(7).\textsuperscript{389} Such provisions should therefore not be seen as formal and procedural requirements.\textsuperscript{390} This should be so even in light of the fact that constructive notice no longer applies to special resolutions.\textsuperscript{391}

The learned judge in the \textit{One Stop} case held, in regard to the applicability of section 20(7), that section 20(7) did not change the law with regard to the circumstances in which a company will be bound in terms of ostensible authority.\textsuperscript{392} This statement is confusing. Firstly section 20(7) does not deal with ostensible authority. Secondly section 20(7) is vastly different from the Turquand Rule in its scope and application. The court held that formal and procedural requirements must “be construed consistently with the conventional scope of Turquand.”\textsuperscript{393} The authority of the board

\textsuperscript{387} Locke and Esser 2011 \textit{Annual Survey of SA Law} 301.
\textsuperscript{388} Locke and Esser 2011 \textit{Annual Survey of SA Law} 301; Locke 2016 \textit{SALJ} 171-172; Gouveia \textit{A Critical Analysis of the Turquand Rule 25}.
\textsuperscript{389} Locke and Esser 2011 \textit{Annual Survey of SA Law} 301; Locke 2016 \textit{SALJ} 171-172.
\textsuperscript{390} Locke and Esser 2011 \textit{Annual Survey of SA Law} 301; Locke 2016 \textit{SALJ} 171-172.
\textsuperscript{391} Locke and Esser 2011 \textit{Annual Survey of SA Law} 301. All of the authorities consulted by the author hereof agree on this point with this statement. The Bill and the Act were already available at the time the \textit{Stand 242} case was decided, although not in force. It is therefore unlikely that the intention of the legislature, with enacting s 20(7), was to alter this position. None of the authorities the author hereof consulted suggested such an interpretation. See para 7.4 footnote 605 below.
\textsuperscript{392} \textit{One Stop} case para 55; Stannard 2015 \textit{Without Prejudice} 80.
\textsuperscript{393} \textit{One Stop} case para 55; Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at \url{http://www.litnet.co.za} (consulted 12 July 2016); Van Der Linde 2015 \textit{TSAR} 841; Stannard 2015 \textit{Without Prejudice} 80; Kutumela \textit{A critical analysis of the Turquand Rule 25}. Kutumela is of the opinion that the words “formal and procedural requirements in terms of the Act” is a new concept in our law. This new concept does not include matters where a special resolution is required in terms of s 65(11) of the Act, in which case s 20(7) will not apply. Delport 2011 \textit{THRHR} 137. Delport has a different opinion altogether, in that any formal or procedural requirements contained in any other documents, for example an internal contract, are not included in s 20(7). Again the reason and logic for this exclusion of certain contracts, is unclear and may be arbitrary. This is Deport’s interpretation. The legislature failed to provide a definition of or to clarify the phrase “formal and procedural requirements”. The author hereof does not think s 20(7) really introduces a new concept into our company law, for the reasons as set out herein, and therefore does not agree with Kutumela. The author hereof is of the opinion that s 20(7) will include all contracts concluded by the company or all actions of the company, whether external or internal, and therefore also differs from the opinion of Delport in this regard. On the other hand the phrase “all internal formalities or acts of management have been duly performed and carried out by the company” in the Turquand Rule, presumably qualifies the types of contracts or
and managing director may be regarded as formal and procedural requirements, but not that of an ordinary director.\textsuperscript{394} The court found that for section 20(7) to apply the third party must prove actual or ostensible authority on the part of the company representative.\textsuperscript{395}

The formal and procedural requirements are those that would be required for a company decision.\textsuperscript{396} The decision must also be \textit{intra vires} the company, else it would not be “in the exercise” of the company’s powers.\textsuperscript{397} There must at least have been an attempt to adopt a resolution.\textsuperscript{398} It follows that the requirement of a decision cannot, as such, be regarded as a formal and procedural requirement.\textsuperscript{399} Shareholder approval, either by special or ordinary resolution or even by unanimous assent cannot be equated to a formality or procedural requirement.\textsuperscript{400} On the other hand a third party should be able to assume compliance with the requirements of meetings and resolutions contained in the Act.\textsuperscript{401} A distinction will have to be made between actions of the company falling within the scope of the Turquand Rule, making it narrower than the provision in s 20(7). Compare para 2.3.2 above.

\textsuperscript{394} One Stop case para 55; Stannard 2015 \textit{Without Prejudice} 80. In analysing the One Stop case Stannard concludes that this case confirmed the Turquand Rule and clarified the effect of s 20(7) on the Turquand Rule. Which statement, with respect, is incorrect and cannot be accepted, as per Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at \texttt{http://www.litnet.co.za} (consulted 12 July 2016). She also concludes that the Turquand Rule will continue to apply despite the enactment of s 20(7), which statement the author hereof actually agrees with, albeit for different reasons. Van Der Linde 2015 \textit{TSAR} 841; Jooste 2013 \textit{SALJ} 470-471. Van der Linde and Jooste on the other hand is of the opinion that, s 20(7) will apply to the actions of an ordinary director representing a company, to whom authority has not been delegated, or who has not been held out by the company as an ostensible agent. But that with the Turquand Rule, actual or ostensible authority must be established before the provision can be invoked. The author hereof does not agree with this last statement, for the reasons as set out herein above in paras 5.1.2, 5.1.3 and 5.1.3.3. See also paras 2.2.1, 2.3.2 and 6.1.2 above.

\textsuperscript{395} Stannard 2015 \textit{Without Prejudice} 80. This will be applicable in a case where the representative had actual authority (or ostensible authority) and potential authority subject to an internal requirement.

\textsuperscript{396} Van Der Linde 2015 \textit{TSAR} 842.

\textsuperscript{397} Van Der Linde 2015 \textit{TSAR} 842. A decision of a company may be made either by the board of directors or by the shareholders. For a contrary view see Swart and Lombard 2017 \textit{THRHR} 681.

\textsuperscript{398} Van Der Linde 2015 \textit{TSAR} 842. The words “decision” rather than “resolution” and “making” rather than “adopting” points to an interpretation that this provision is aimed at technically defective resolutions. Compare paras 2.2.2 and 2.2.3 above.

\textsuperscript{399} Van Der Linde 2015 \textit{TSAR} 842. Van der Linde is of the opinion that as “formal and procedural requirements” are not defined in the Act, guidance should be taken from other areas of the law, such as the Insolvency Act 24 of 1936.

\textsuperscript{400} Van Der Linde 2015 \textit{TSAR} 842-843.

\textsuperscript{401} Van Der Linde 2015 \textit{TSAR} 843.
substantive\(^{402}\) requirements and formal and procedural requirements.\(^{403}\)

In *Blue IQ Investment Holdings (Pty) Ltd v Southgate*\(^{404}\) the appellant’s public documents provided that the CEO has to consult with the board, in the appointment of staff on management level, and where the management members report to the CEO.\(^{405}\) The court held that the requirement of consultation with the board was neither “a mere formality” nor “a simple internal formality”.\(^{406}\) The reason is that the outcome of the consultation cannot be predicted.\(^{407}\) The court stated that:

“The Turquand Rule can only apply where a person purporting to transact for the company would have had the actual authority if the necessary internal formalities had been complied with.”\(^{408}\)

Locke states the following regarding the meaning of “formal and procedural requirements in terms of this Act”:

a) Special resolutions required by the Act should not be considered mere “formal and procedural” requirements, but rather substantive.\(^{409}\)

b) Where there is any material\(^{410}\) defect in a meeting, the company could not perform a valid function.\(^{411}\) Our courts will have to “consider the extent of the

\(^{402}\) Must be complied with.

\(^{403}\) Van Der Linde 2015 TSAR 842; Gouveia A Critical Analysis of the Turquand Rule 24. Compare para 2.3.2 above.

\(^{404}\) (2014) 35 ILJ 3326 (LAC).

\(^{405}\) *Blue IQ Investment Holdings (Pty) Ltd v Southgate* (2014) 35 ILJ 3326 (LAC) para 26.

\(^{406}\) *Blue IQ Investment Holdings (Pty) Ltd v Southgate* (2014) 35 ILJ 3326 (LAC) para 32.

\(^{407}\) *Blue IQ Investment Holdings (Pty) Ltd v Southgate* (2014) 35 ILJ 3326 (LAC) para 26. It is noteworthy that the court a quo in *Southgate v Blue IQ Investment Holdings* 2012 JDR 1570 (LC) came to the opposite conclusion. *Southgate v Blue IQ Investment Holdings* 2012 JDR 1570 (LC) paras 64-65. That is that consultation with the board is an internal formality or procedure and that if the consultation had taken place, the CEO would have had the authority to conclude the contract.

\(^{408}\) Locke 2016 SALJ 171. For a contrary view see Swart and Lombard 2017 THRHR 678.

\(^{409}\) The definition of “material” in s 1 of the Act reads as follows:

“*material*, when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is-

(a) of consequence in determining the matter; or

(b) might reasonably affect a person's judgement or decision-making in the matter”.

\(^{411}\) Locke 2016 SALJ 172. For instance the improper convening of a general meeting, deficient quorum, improper notice or the counting of the votes.
defect compared to the potential prejudice to the third party” in each case.\textsuperscript{412}

c) Section 20(7) will apply to some instances where the Act requires an ordinary resolution\textsuperscript{413}, but not to others\textsuperscript{414} that afford protection to shareholders.\textsuperscript{415}

d) Section 20(7) would not apply to transactions that contravene sections 44 and 45, i.e. financial assistance, as these are substantive requirements.\textsuperscript{416}

e) The solvency and liquidity test constitutes a substantive requirement, for the protection of creditors.\textsuperscript{417} It would therefore not be considered a “formal and procedural” requirement for purposes of section 20(7).

Regarding “formal and procedural requirements in terms of the MOI” Locke states the following:

a) The possibility of delegation of authority in the MOI of a company or company rules should not automatically lead to the application of section 20(7).\textsuperscript{419} This is so due to the fact that a third party was not entitled to assume that authority has in fact been delegated in terms of the Turquand Rule.\textsuperscript{420} Also due to “the presumption of interpretation of statutes that the legislature does not intend to alter the law more than is necessary”.\textsuperscript{421}

b) Where a representative has authority, but such authority is subject to approval,
section 20(7) will apply.422

c) Section 20(7) should also apply to more stringent requirements in the MOI than contained in the Act, specifically unalterable provisions.423 Unless the third party is deemed to have constructive notice of these requirements, such will be the case with a RF company, in which case section 20(7) might not apply.424

d) Section 20(7) does not exclude the common law and “without authority a person cannot bind another person”.425

But what will constitute a formal and procedural requirement and what will constitute a substantive requirement remains unclear and uncertain.426

6.1.5 The knowledge and good faith requirement contained in section 20(7) – the meaning of “knew” and “ought to have known”

Section 20(7) will only assist a third party acting bona fide.427 A third party who “knew or reasonably ought to have known of any failure by the company to comply with any such requirement”, will be excluded from the protection provided for in section 20(7).428 The word “knew” in this sense means actual knowledge.429 This will be knowledge the third party already had, or knowledge provided by a required
investigation which the third party should have undertaken.\(^{430}\) The fact that section 20(7) repeats the requirement that the third party reasonably obtain the knowledge, effectively establishes a “double reasonableness test”.\(^{431}\) The definition of “knew” in the Act\(^{432}\) read with the provisions in section 20(7) will significantly extend the scope of exclusions in section 20(7), to the detriment of third parties.\(^{433}\)

This requirement sets “an almost impossible double objective test”.\(^{434}\) The words “reasonably ought to have known” in section 20(7) goes further than the Turquand Rule requirement of “suspected”.\(^{435}\) This is now an objective test and not a subjective test as required by the Turquand Rule.\(^{436}\) It diminishes the presumption afforded to third parties.\(^{437}\) In this respect section 20(7) is narrower than the Turquand Rule.\(^{438}\) A third party may however be rescued by application of the Turquand Rule, instead of

\(^{430}\) See s 1 of the Companies Act 71 of 2008; Delport 2011 \textit{THRHR} 137; Kutumela \textit{A critical analysis of the Turquand Rule} 24-25; Davis (ed) Geach (main ed) Mongalo \textit{et al} \textit{Companies and other business structures in South Africa} 56 footnote 84; Locke 2016 \textit{SALJ} 179-180.

\(^{431}\) Delport 2011 \textit{THRHR} 137; Kutumela \textit{A critical analysis of the Turquand Rule} 24. Compare para 2.3.4 above.

\(^{432}\) The definition in s 1 of the Act reads as follows:

“\textit{knowing}', \textit{knowingly} or 'knows}', when used with respect to a person, and in relation to a particular matter, means that the person either-

- (a) had actual knowledge of the matter; or
- (b) was in a position in which the person reasonably ought to have-
  - (i) had actual knowledge;
  - (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
  - (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;”

\(^{433}\) See s 1 of the Companies Act 71 of 2008; Delport 2011 \textit{THRHR} 137; Davis (ed) Geach (main ed) Mongalo \textit{et al} \textit{Companies and other business structures in South Africa} 56 footnote 84; Locke 2016 \textit{SALJ} 180; Jooste 2013 \textit{SALJ} 472.

\(^{434}\) Delport 2013 \textit{De Jure} para 3.

\(^{435}\) Cassim \textit{et al} \textit{Contemporary Company Law} 185; Cassim \textit{et al} \textit{The law of business structures} 147; Cassim 2010 \textit{SA MERC LJ} 174; Locke 2016 \textit{SALJ} 180; Gouveia \textit{A Critical Analysis of the Turquand Rule} 28.

\(^{436}\) Cassim \textit{et al} \textit{Contemporary Company Law} 185; Cassim \textit{et al} \textit{The law of business structures} 147; Locke 2016 \textit{SALJ} 180; Van Der Linde 2015 \textit{TSAR} 841; Jooste 2013 \textit{SALJ} 472; Gouveia \textit{A Critical Analysis of the Turquand Rule} 28. Compare para 2.3.4 above.

\(^{437}\) Jooste 2013 \textit{SALJ} 472; Cassim \textit{et al} \textit{Contemporary Company Law} 185; Cassim \textit{et al} \textit{The law of business structures} 147. Compare para 2.3.4 above.

\(^{438}\) Jooste 2013 \textit{SALJ} 472; Cassim \textit{et al} \textit{Contemporary Company Law} 185; Cassim \textit{et al} \textit{The law of business structures} 147. Compare para 2.3.4 above.
section 20(7) in such a situation.\textsuperscript{439} A distinction will have to be made between “put on inquiry” in terms of the Turquand Rule and “ought to have known” in section 20(7).\textsuperscript{440}

6.1.5.1 Forgeries and fraud

The position regarding forgeries and fraud should be unchanged, as sections 20(7) and 20(8) are silent on this subject.\textsuperscript{441} Section 20(7) will “probably not apply to forgeries”.\textsuperscript{442}

6.1.6 Meaning of “presume”

After investigating the dictionary definitions of the words “assume” and “presume”, Kutumela submits that the use by the legislature of the word “presume” in the Act, instead of the word “assume”, as in the Turquand Rule, is another significant difference between the two rules.\textsuperscript{443} The author concludes that section 20(7) “provides that the third party supposes on the basis of probability that a decision was taken”.\textsuperscript{444} As opposed to the Turquand Rule, where the third party is allowed to assume “that there ‘was an actual decision and that it was properly taken’”.\textsuperscript{445} None of the other authorities which the author hereof has consulted takes this view. The author hereof therefore submits that Kutumela is too technical here. These two concepts have the same meaning or were used interchangeably and as synonyms.

The Act was drafted in plain language and contained various technical and grammatical errors, before its amendment by the Companies Amendment Act 3 of 2011.\textsuperscript{446} This fact enhances the view that the words “assume” and “presume” should be read as synonyms.\textsuperscript{447} Delport states that the presumption in section 20(7), that a third party may presume that all the formal and procedural requirements have been

\begin{itemize}
\item \textsuperscript{439} Cassim \textit{et al} \textit{Contemporary Company Law} 186; Cassim \textit{et al} \textit{The law of business structures} 147.
\item \textsuperscript{440} Cassim \textit{et al} \textit{Contemporary Company Law} 186. Compare para 2.3.4 above.
\item \textsuperscript{441} See ss 20(7) and 20(8) of the Companies Act 71 of 2008. See also para 2.3.4.1 above.
\item \textsuperscript{442} Cassim \textit{et al} \textit{Contemporary Company Law} 185; Cassim \textit{et al} \textit{The law of business structures} 146; Cassim 2010 \textit{SA MERC LJ} 174.
\item \textsuperscript{443} Kutumela \textit{A critical analysis of the Turquand Rule} 23-24. Compare paras 2.3.3 and 6.1.2 above.
\item \textsuperscript{444} Kutumela \textit{A critical analysis of the Turquand Rule} 23-24.
\item \textsuperscript{445} Kutumela \textit{A critical analysis of the Turquand Rule} 23-24.
\item \textsuperscript{446} Cassim \textit{et al} \textit{Contemporary Company Law} 2; Sutherland 2012 \textit{Stellenbosch Law Review} 158.
\item \textsuperscript{447} This view is supported by Delport. See Delport 2011 \textit{THRHR} 137. See para 6.1.2 above.
\end{itemize}
complied with, is the same as the Turquand Rule in the wide sense.\(^{448}\) This “presumption” does not mean that there is a presumption that a decision was actually taken, only that if a decision was taken that it was properly taken.\(^{449}\) This covers the assumption in the Turquand Rule.\(^{450}\) It however does not necessarily include the second part of the Turquand Rule, i.e. that the company is prohibited from repudiating the contract.\(^{451}\) Section 20(7) is accordingly a rebuttable presumption.\(^{452}\)

6.1.7 Meaning of “in making any decision in the exercise of its powers”

Section 20(7) should apply to all actions of the company “in making any decision in the exercise of its powers”.\(^{453}\) The presumption does not entail the enforceability of a possible invalid contract, where the internal requirements have not been duly complied with.\(^{454}\) The phrase is generally accepted as referring to the authority of the directors to act on behalf of a company.\(^{455}\) It has been submitted that section 20(7) rather refers to the capacity of a company to act, instead of authority to act.\(^{456}\) This is in fact the meaning given to the word “powers” in section 20(1).\(^{457}\) This interpretation will effectively mean that section 20(7) is superfluous, due to the fact that section 20(1) provides that the contract will be valid with regard to third parties, notwithstanding the knowledge of the third party.\(^{458}\)

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\(^{448}\) Delport 2011 *THRHR* 137; Van Der Linde 2015 *TSAR* 841. Therefore upholding a fictitious state of affairs that there has been compliance. See paras 2.3.3, 5.1.2 and footnote 270 above.

\(^{449}\) Delport 2011 *THRHR* 137. Jooste 2013 *SALJ* 471. Jooste differs from the opinion of Delport. Jooste states that the delegation of authority to an ordinary director may, in terms of s 20(7), be a formal or procedural requirement in terms of the rules of a company. See also para 6.1.2 above.

\(^{450}\) Delport 2011 *THRHR* 137. See para 2.3.3 above.

\(^{451}\) Delport 2011 *THRHR* 137. Compare paras 2.2.2, 2.3.3 and 6.1.2 above.

\(^{452}\) Compare para 2.2.2 above, where it is stated that the Turquand Rule is an irrebuttable presumption.

\(^{453}\) See s 20(7) of the Companies Act 71 of 2008; Delport 2011 *THRHR* 137; Delport *et al* Henochsberg on Companies Act 71 of 2008 98.

\(^{454}\) Delport *et al* Henochsberg on Companies Act 71 of 2008 98. Compare paras 2.2.2, 2.3.3, 6.1.2 and 6.1.6 above.

\(^{455}\) Delport *et al* Henochsberg on Companies Act 71 of 2008 98.

\(^{456}\) Delport *et al* Henochsberg on Companies Act 71 of 2008 98; Van Der Linde 2015 *TSAR* 841-842; Locke 2016 *SALJ* 170 footnote 58. Compare paras 2.2.1, 2.2.3 and 2.3.2 above.

\(^{457}\) Delport *et al* Henochsberg on Companies Act 71 of 2008 98.

\(^{458}\) Delport *et al* Henochsberg on Companies Act 71 of 2008 98; Van Der Linde 2015 *TSAR* 842; Locke 2016 *SALJ* 170 footnote 58. Section 40(1) of the Companies Act 2006 in English law, is the equivalent to our s 20(1). For an analysis of s 40 in English law see Birds *et al* Boyle & Birds’ Company Law 167 and 170-178. This should apply to our s 20(1). See para 6.3.1 below.
Although the board of directors is now the supreme authority of a company, there exists a resounding difference between the capacity of a company, i.e. powers, and the authority of directors. The authority of directors is not the same as the powers of a company. The words “making any decision” in section 20(7) should apply only to non-compliance with internal requirements. But this will depend upon the type of non-compliance and the type of authority involved.

6.2 Meaning, interpretation and effect of section 20(8)

In section 20(8) of the Act we are faced with another conundrum. That is that section 20(8) expressly states that section 20(7) and other common law rules, apply simultaneously. These other common law rules, *inter alia*, include the Turquand Rule. This may lead to confusion and interpretational difficulties due to the fact that the ambit of section 20(7) and the Turquand Rule differs significantly, as set out herein.

It has also been submitted that:

“It does not appear to be a case of the common law continuing to apply but subject to s 20(7), or vice versa – the wording [of section 20(8)] does not appear to permit such a meaning. The words ’concurrently with’, it is submitted, mean ‘along with’ and the phrase ‘not in substitution for’ reinforces the interpretation that the common law and the statutory rule co-exist”.

The fact that the Turquand Rule and the provisions of section 20(7) conflict, presents problems with this interpretation. This begs the question, what other “relevant common law principle” section 20(8) may refer to.

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459 Delport *et al* Henochsberg on Companies Act 71 of 2008 98.
460 Delport *et al* Henochsberg on Companies Act 71 of 2008 98.
461 Delport *et al* Henochsberg on Companies Act 71 of 2008 98.
462 Delport *et al* Henochsberg on Companies Act 71 of 2008 98.
464 Jooste 2013 *SALJ* 469.
465 Jooste 2013 *SALJ* 469.
466 Locke 2016 *SALJ* 181 footnote 107; Jooste 2013 *SALJ* 474. Jooste submits that the doctrine of Esstoppel is not included in the words “any relevant common law principle” contained in s 20(8), for the following reasons: 1) When Esstoppel applies in this context, a company is prohibited or estopped from
Section 20(8) mainly relates to the Turquand Rule, and we now have a common law and statutory indoor management rule. It is submitted that the Turquand Rule will be available to third parties, in addition to section 20(7), or as an alternative. The Turquand Rule will apply unless suspicious circumstances were present regarding non-compliance. Where the MOI excludes authority “of any person to enter into specific transactions” the Turquand Rule will not apply.

Sutherland states, with regard to section 20(7), that:

“It seems that the statutory and common law Turquand Rules will probably now apply side-by-side”.

6.3 The Act and capacity, representation and authority

The general common law principles of agency and representation should still apply, subject to the provisions of the Act. Although, the partial abolition of the doctrine of constructive notice will now limit the application of the common law principles of agency law.

raising the defence that the internal requirements have in fact not been complied with. A “presumption of validity”, as envisaged in s 20(8), does not form part of the doctrine of Estoppel. If s 20(8) also includes Estoppel, s 20(7) may be used to contravene a statute, which is not allowed for at common law. Estoppel “does not apply to statutory requirements”, see para 5.2.1 above. It cannot refer to constructive notice, as this doctrine was partially abolished – see para 6.4 below. It can also not relate to the ultra vires doctrine, as this doctrine has also been abolished – see para 6.3.1 below.

Cassim et al Contemporary Company Law 185; Cassim et al The law of business structures 146; Cassim 2010 SA MERC LJ 174. This implies that s 20(7) will “probably not apply to forgeries”. See para 6.1.5.1 above.

Locke 2016 SALJ 181. Locke is of the opinion that in instances where constructive notice apply, the Turquand Rule will only apply “if the restrictive condition entailed an internal requirement to confer authority on the person to act on behalf of the company”. See para 6.4.1 below.

Locke 2016 SALJ 182.

Sutherland 2012 Stellenbosch Law Review 171; Locke 2016 SALJ 177 footnote 98. Section 18(1)(a) of the New Zealand Companies Act, 1993 is the counterpart of s 20(7) of the Act. But in New Zealand a company is also prohibited from asserting that a company representative, who has usual authority to act on behalf of a company, and who carries on the business of that company, did not have authority to act on behalf of the company. Constructive notice has been completely abolished in New Zealand. Accordingly complete exclusion of authority of a company representative with usual authority will therefore not protect the company.

Delport New Companies Act Manual 65; Van Der Linde 2015 TSAR 840.

Delport New Companies Act Manual 65. This will be further discussed in paras 6.4 and 6.4.1 below.
The decision in the *Wolpert* case may continue to apply to section 20(7).\textsuperscript{474} The court in the *One Stop* case confirmed this statement.\textsuperscript{475} The court further stated the requirements of section 20(7) as follows:

i) the third party must deal with the company and not "a purported representative *per se*",\textsuperscript{476}

ii) the third party must therefore prove that the company representative had actual or ostensible authority;\textsuperscript{477}

iii) once this has been proven, the third party cannot be excluded from relying on the Turquand Rule, and failure by the company to comply with internal requirements to complete the ostensible authority, will not be a defence.\textsuperscript{478}

So there must be a representative with authority to bind the company, but who failed to comply with some internal requirement, for section 20(7) to apply.\textsuperscript{479} If the representative did not have authority to bind the company in the first place, section 20(7) will not be applicable.\textsuperscript{480}

The other relevant statutory provisions of the Act are set out hereunder.

6.3.1 Capacity and the *ultra vires* doctrine - current position under the 2008 Act

\textsuperscript{474} Cassim et al *Contemporary Company Law* 187. See para 2.2.1 above.
\textsuperscript{475} *One Stop* case para 55.
\textsuperscript{476} *One Stop* case para 56.
\textsuperscript{477} *One Stop* case para 56. Compare para 5.1.3.3 above.
\textsuperscript{478} *One Stop* case para 56; Van Der Linde 2015 *TSAR* 841. Van der Linde is however of the opinion that s 20(7) will apply to the actions of an ordinary director representing a company, to whom authority has not been delegated, or who has not been held out by the company as an ostensible agent. While with the Turquand Rule, actual or ostensible authority must be established before the provision can be invoked. The author hereof does not agree with this statement, for the reasons as set out herein above in paras 2.2.2 and 5.1.3.3. See also para 6.1.4 footnote 394 above.
\textsuperscript{479} Kleitman 2015 https://www.ciffedekkerhofmeyr.com (consulted 15 May 2016).
\textsuperscript{480} Kleitman 2015 https://www.ciffedekkerhofmeyr.com (consulted 15 May 2016).
Section 19(1) of the Act changed the *ultra vires* doctrine in our company law, so that companies now have unlimited capacity, only the authority of the directors may be restricted.\(^{481}\)

In terms of the provisions of section 19(1)(b) of the Act, a company now has the legal capacity and powers of an individual that a juristic entity may exercise, subject to its MOI.\(^ {482}\) A company is therefore no longer restricted to a specific business activity, may conduct any legal activity it wishes and has unlimited capacity.\(^ {483}\) Accordingly this section partially abolishes the *ultra vires* doctrine, except where the company’s MOI restrict its capacity.\(^ {484}\) Section 19(1)(b) is similar to the position under the Close Corporations Act, 69 of 1984\(^ {485}\), as a close corporation had the same capacity.\(^ {486}\)

\(^{481}\) The South African position is similar to the current English law, for the position in England see Birds *et al* Boyle & Birds’ *Company Law* 163. From the wording of s 19(1) it is clear that the legislature implemented McLennan’s and Rabie’s proposals for abolition of the *ultra vires* doctrine. See para 2.4 and footnotes 216-219 above.

\(^{482}\) See s 19(1) of the Companies Act 71 of 2008; Cassim 2010 *SA MERC LJ* 170-171; Cassim *et al* Contemporary *Company Law* 168; Cassim *et al* The law of business structures 137-138; McLennan 2009 *Obiter* 150; Locke 2016 *SALJ* 164; Van Der Linde 2015 *TSAR* 835; Rabie 2008 *Transactions of the Centre for Business Law* 239; Gouveia A Critical Analysis of the Turquand Rule 7 footnote 11; Delport New Companies Act Manual 63; Swart and Lombard 2017 *THRHR* 669-670 and 676. Section 19(1) of the Act provides that from the date and time a company is registered, it is a juristic person which has all the legal powers and capacity of a natural person, except those powers which a juristic person cannot exercise or those actions that are excluded in the MOI of the company. Compare paras 3.1 and 3.2 above.

\(^{483}\) See s 19(1)(b) of the Companies Act 71 of 2008; Cassim *et al* Contemporary *Company Law* 22 and 168; Cassim *et al* The law of business structures 137-138; Cassim 2010 *SA MERC LJ* 170-171; Locke 2016 *SALJ* 164; Swart and Lombard 2017 *THRHR* 677. The legislature implemented McLennan’s and Rabie’s proposals for reform in this respect, see para 2.4 and footnotes 216-219 above.

\(^{484}\) Cassim *et al* Contemporary *Company Law* 22; Cassim *et al* The law of business structures 138; McLennan 2009 *Obiter* 151; Rabie 2008 *Transactions of the Centre for Business Law* 243. For a contrary view see Swart and Lombard 2017 *THRHR* 670.

\(^{485}\) Hereinafter referred to as the “Close Corporations Act”.

\(^{486}\) Rabie 2008 *Transactions of the Centre for Business Law* 239; Anon 2010 *Transactions of the Centre for Business Law* 107, 118, 135 and 136. With close corporations the validity of transactions depended solely on the authority of the person representing the close corporation. The *ultra vires* doctrine therefore did not apply to close corporations neither did the constructive notice doctrine. This was so to facilitate the participation of close corporations in commercial ventures. Similar to partnership or agency law, each member could in principle represent the close corporation.

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Section 66(1) of the Act provides that the company will act through its directors and board, who has authority.\(^{487}\) A company can therefore only act to the outside through natural persons, as representatives of the company.\(^{488}\)

Section 20(1) of the Act is equivalent to section 36 of the old Act.\(^{489}\) Section 20(1)(a) states that an action by a company is not void due only to a prohibition in the MOI, or a lack of authority of the directors due to such prohibition.\(^{490}\) Only the power and capacity of RF companies will be restricted.\(^{491}\) Section 20(1)(b) states further that neither a company nor a third party may raise the prohibition to assert that the action is void as *ultra vires*, in legal proceedings.\(^{492}\) This effectively abolishes the *ultra vires*

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\(^{487}\) See s 66(1) of the Companies Act 71 of 2008; Kutumela *A critical analysis of the Turquand Rule* 8; Gouveia *A Critical Analysis of the Turquand Rule* 13.

\(^{488}\) Loubser *Case Book* 118; *Tuckers land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T); Delport *New Companies Act Manual* 65; Locke 2016 SALJ 169; Rabie 2008 *Transactions of the Centre for Business Law* 13 and 193; Gouveia *A Critical Analysis of the Turquand Rule* 13; Swart and Lombard 2017 *THRHR* 667. See s 66(1) of the Companies Act 71 of 2008. These will mostly be directors, but other persons in a company’s employ may also represent a company and act on a company’s behalf. Cassim *et al Contemporary Company Law* 187; Cassim *et al The law of business structures* 147; Oosthuizen 1979 *TSAR* 1 and footnote 2. It follows that where a company contract with an outsider, normal agency principles will in part determine the contractual liability of the company. This will be the agency principles relating to the authority of the representative to bind a company. Representation and the principles of agency law thus play an important role in company law. Delport 2011 *THRHR* 132. Due to the importance of these concepts of capacity and representation, they should be clear for certainty of the company and third parties.

\(^{489}\) McLennan 2009 *Obiter* 145; Katz 2010 *Acta Juridica* 252; Locke 2016 SALJ 164; Van Der Linde 2015 *TSAR* 834; Delport *New Companies Act Manual* 63. See s 20(1) of the Companies Act 71 of 2008. Section 20(1) provides that the MOI may limit, restrict or qualify the powers, purpose and activities of a company, but a contravening action will not be void. See para 3.2 above.

\(^{490}\) Limitation, restriction or qualification.

\(^{491}\) See s 20(1)(a) of the Companies Act 71 of 2008; Cassim 2010 *SA MERC LJ* 171; Davis (ed) Geach (main ed) Mongalo *et al Companies and other business structures in South Africa* 56; Katz 2010 *Acta Juridica* 252; Van Der Linde 2015 *TSAR* 834; Rabie 2008 *Transactions of the Centre for Business Law* 240; Cassim *et al Contemporary Company Law* 170-171; Cassim *et al The law of business structures* 138-139 and footnote 17; Gouveia *A Critical Analysis of the Turquand Rule* 11; Swart and Lombard 2017 *THRHR* 670 and 677. There must be no other reason for the lack of authority. If the lack of authority of the representative is however due to a reason other than or additional to the lack of capacity of the company, then the contract will not be binding on the company, unless ratified by the company. This will be so even against a *bona fide* third party. The author hereof is of the opinion that s 20(7) or the Turquand Rule may still validate the contract without ratification. See in general para 2 above and this para 6.

\(^{492}\) Sutherland 2012 *Stellenbosch Law Review* 166.

\(^{493}\) See s 20(1)(b) of the Companies Act 71 of 2008; Cassim *et al Contemporary Company Law* 171; Cassim *et al The law of business structures* 138; Cassim 2010 *SATHR* 171; Davis (ed) Geach (main ed) Mongalo *et al Companies and other business structures in South Africa* 56; Katz 2010 *Acta Juridica* 252; Van Der Linde 2015 *TSAR* 834; Rabie 2008 *Transactions of the Centre for Business Law* 240; Swart and Lombard 2017 *THRHR* 677.
doctrine externally. Externally, the contract will be valid and binding as between a company and a third party and no ratification is required.

Section 20(1) will only apply to external contracts, but not internally between the company, its shareholders, directors or prescribed officers. Ultra vires may be raised as between a company, shareholders, directors and prescribed officers inter se, therefore internally. This then retains a limited ultra vires doctrine internally, as protection for the company and shareholders. Ratification of the ultra vires act, in terms of section 20(2) will validate the act retroactively and the internal consequences will be nullified. The contract may still be void, if it contravenes the Act.

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494 Cassim et al Contemporary Company Law 171; Cassim et al The law of business structures 138; Cassim 2010 SA MERC LJ 171; Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa 56; Katz 2010 Acta Juridica 252; Van Der Linde 2015 TSAR 834; Rabie 2008 Transactions of the Centre for Business Law 240.

495 Cassim et al Contemporary Company Law 170; Cassim et al The law of business structures 138-139; Cassim 2010 SA MERC LJ 171; Katz 2010 Acta Juridica 252; Locke 2016 SALJ 166. Different authors have varying views regarding the effectiveness of these provisions. Rabie 2008 Transactions of the Centre for Business Law 243 and 246. Rabie is of the opinion that the protection afforded to third parties and shareholders are essential and that this is an improvement on the old Act. He states further that the use of the word “directors” is still unclear, as only the word “director” is defined in the Act. See para 3.2 footnote 229 above. Sutherland 2012 Stellenbosch Law Review 166. Sutherland is of the opinion that this provision will only “give greater protection to directors”. McLennan 2009 Obiter 151. McLennan suggests that the limitation of the powers of directors can better be achieved through the law of contract. Cassim 2010 SA MERC LJ 171-172. Cassim states that s 20 generally “attempts to strike a proper balance between the company, its shareholders and directors and the third party to the contract.” Cassim et al Contemporary Company Law 170, 172 and 179; Cassim et al The law of business structures 139. Cassim et al are of the opinion that this is a statutory estoppel. The authors further state that s 20 “does not provide a clear, unambiguous and logically consistent solution to the problem of capacity and the effect of constitutional restrictions on the authority of the directors of the company.” They also state that the word “action” in s 20(1) is wider than merely a transaction entered into by a company. It would include unilateral non-commercial acts such as a donation.


497 See s 20(1)(b) of the Companies Act 71 of 2008; Cassim et al Contemporary Company Law 170; Cassim et al The law of business structures 139-140; Cassim 2010 SA MERC LJ 171; Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa 59; Katz 2010 Acta Juridica 252; Locke 2016 SALJ 166; Rabie 2008 Transactions of the Centre for Business Law 243 footnote 100; Swart and Lombard 2017 THRHR 670. Accordingly the shareholders, directors and prescribed officers may still incur liability as against the company and inter se.

498 Cassim et al Contemporary Company Law 170-171; Cassim et al The law of business structures 139; McLennan 2009 Obiter 151. Compare para 3.2 above.

499 Rabie 2008 Transactions of the Centre for Business Law 240-241; Swart and Lombard 2017 THRHR 670; Locke 2016 SALJ 164-166. Locke is of the opinion that two separate resolutions are required for ratification of the breach. One to validate the ultra vires action of the company and a second to validate the lack of authority of the directors. Cassim et al Contemporary Company Law 172-174; Cassim et al The law of business structures 139-140. Although, due to the reference in s 20(2) only to directors, no act of any other representative, including prescribed officers, may be ratified. The statutory provisions relating to lack of capacity will not be applicable to illegal contracts. Cassim 2010.
6.3.2 Ratification and restraining

Sections 20(2) and 20(3) provides for a contravening action of the MOI to be ratified by the shareholders in terms of a special resolution. Only acts in contravention of the Act may not be so ratified. The limitation of directors’ authority in section 20(2) refers to lack of authority to conclude *intra vires* contracts. The unauthorised actions of a single director should be treated the same as the unauthorised actions of the board in terms of section 20(2), if the limitation is contained in the MOI.

Section 20(5) provides that one or more shareholders, directors or prescribed officers, may apply to the High Court for an order restraining the company or directors from contravening any limitation, restriction or qualification in the MOI. This right is without prejudice to the rights of a *bona fide* third party, who did not have actual knowledge of the limitation, to damages.

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501 See ss 20(2) and 20(3) of the Companies Act 71 of 2008; Delport *New Companies Act Manual* 64 and 68; Van Der Linde 2015 *TSAR* 834 and 839; Van Wyk 2013 https://nicolaasvanwyk.wordpress.com (consulted 15 May 2016).


503 Van Der Linde 2015 *TSAR* 839.

504 Van Der Linde 2015 *TSAR* 839.

505 See ss 20(5)(a) and 20(5)(b) of the Companies Act 71 of 2008; Delport *New Companies Act Manual* 65; Van Der Linde 2015 *TSAR* 834; Swart and Lombard 2017 *THRHR* 677 and 680; Katz 2010 *Acta Juridica* 252; Rabie 2008 *Transactions of the Centre for Business Law* 240; Cassim *et al Contemporary Company Law* 170-171; Cassim *et al The law of business structures* 138-139 and footnote 17; Cassim 2010 *SA MERC LJ* 171-172. The prohibition will restrict the right of a third party only if the third party acted *mala fide*, or had actual knowledge, not constructive knowledge, of the prohibition contained in the company’s MOI. Cassim states that it is unclear what will constitute a prohibition. Similarly it is unclear what good faith means in this context. It may be the suspicion that a limitation has not been complied with, coupled with failure to enquire by the third party. It may also exclude *mala fide* insiders. *Bona fides* are not the same as actual knowledge. Davis (ed) Geach (main ed) Mongalo *et al Companies and other business structures in South Africa* 56. In these circumstances a third party would not be entitled to institute an action for damages. The third party’s actual knowledge will constitute “an obstacle to a cause of action.” On the other hand a mere suspicion of a breach will not be sufficient to bar a claim. This is contrary to Botswana law, see Baiketlile *Authority of Agents under the Botswana Companies Act 2003* 20 giving a comparison between the Botswana and South African law reform which differs.
Section 19(4) of the Act provides that no person will be deemed to have knowledge of the content of any document of a company, just because the document has been filed with the Companies and Intellectual Property Commission or is accessible for inspection at an office of the company. This section thereby effectively and expressly repealed the doctrine of constructive notice and the doctrine of disclosure. Most authors welcome the abolition of constructive notice, as it contributes nothing to a modern South African company law.

Then we have section 19(5) containing two exceptions, confusing the issue. It provides that a person will be deemed to have notice and knowledge of the content of the MOI and Notice of Incorporation of a “Ring Fenced” company. This will be under the Botswana Companies Act 2003 giving a comparison between the Botswana and South African law reform which differs.

6.4 The partial abolition of the doctrine of constructive notice

Section 19(4) of the Act provides that no person will be deemed to have knowledge of the content of any document of a company, just because the document has been filed with the Companies and Intellectual Property Commission or is accessible for inspection at an office of the company. This section thereby effectively and expressly repealed the doctrine of constructive notice and the doctrine of disclosure. Most authors welcome the abolition of constructive notice, as it contributes nothing to a modern South African company law.

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restrictive conditions in the MOI in terms of section 15(2)(b) and prohibitions against amendment of its particular provisions in terms of section 15(2)(c), also the effect of section 19(3) on a personal liability company. Accordingly the Act repealed constructive notice in certain instances and retained the doctrine in the case of RF companies.  

A third party will not automatically be required to scrutinise the public documents of a company with which he is dealing. The potentially arduous results of section 19(5) will however compel a third party to inspect the NOI and MOI of a company, resulting in a time consuming expedition and unnecessary expenses being incurred. This would be a needless hindrance to commerce and can possibly be utilised to the detriment of third parties. 

A third party will only be deemed to know about restrictive or prohibitive provisions in the MOI, if the name of the company includes RF and the company has complied with the requirements of the Act. Bowman is of the opinion that sections 19(4) and 19(5) read together makes it clear that the legislature implemented McLennan’s and Rabie’s proposals for law reform in respect of the abolition of constructive notice only partially.

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Cassim 2010 SA MERC LJ 165-166 and 173; Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa 56; Rutkowski 2009 Without Prejudice 32; Locke 2016 SALJ 167-170; Gouveia A Critical Analysis of the Turquand Rule 10; Swart and Lombard 2017 THRHR 671 and 680. This is contrary to company law in Botswana, see Baiketlile Authority of Agents under the Botswana Companies Act 2003 21. Compare para 4.1 above.

515 See ss 15(2)(b), 15(2)(c), 19(3) and 19(5) of the Companies Act 71 of 2008; Delport New Companies Act Manual 63-64; Kutumela A critical analysis of the Turquand Rule 16; Cassim et al The law of business structures 143; Cassim 2010 SA MERC LJ 165-166 and 173; Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa 56; Rutkowski 2009 Without Prejudice 32; Locke 2016 SALJ 167-170; Swart and Lombard 2017 THRHR 671 and 679-680. This is contrary to company law in Botswana, see Baiketlile Authority of Agents under the Botswana Companies Act 2003 21.

516 Delport 2011 THRHR 136; Bouwman 2011 Without Prejudice 25; Rutkowski 2009 Without Prejudice 32; Katz 2010 Acta Juridica 252; Swart and Lombard 2017 THRHR 671. Compare para 4.1 above. Sections 19(4) and 19(5) read together makes it clear that the legislature implemented McLennan’s and Rabie’s proposals for law reform in respect of the abolition of constructive notice only partially. See para 2.4 and footnotes 216-219 above.

517 Wainer 2009 SALJ 810.

518 Wainer 2009 SALJ 811.

519 Wainer 2009 SALJ 810. This will be possible only in the case of RF companies.

520 Bouwman 2011 Without Prejudice 25; Van Wyk 2013 https://nicolaasvanwyk.wordpress.com (consulted 15 May 2016); Cassim et al Contemporary Company Law 22; Cassim et al The law of business structures 143; Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa 57; Locke 2016 SALJ 167-168; Swart and Lombard 2017 THRHR 679-680; Wainer 2009 SALJ 810-811. Wainer differs from this opinion and states that the provisions of s 19(5) are “peculiar” in that a third party will still be considered to have knowledge of special provisions contained in the MOI of a company, where the NOI contains “a prominent statement drawing attention to” the special provisions, as set out in s 13(3) of the Act. But a third party will only know about the
reduce the potential for a company to rely on constructive notice as a defence.\textsuperscript{521} Bowman states that the rationale for these RF requirements in section 19(5), read with sections 11(3), 13(3), 15(2)(b) and 15(2)(c), is therefore clear.\textsuperscript{522} Firstly it draws attention to the name of a company and the presence of these restrictive and prohibitive provisions.\textsuperscript{523} Secondly it draws attention to the “content and location” of these provisions.\textsuperscript{524} Wainer on the other hand states that this establishes an unacceptable onus on third parties to inspect the NOI and MOI of a company and therefore sections 19(4) and 19(5) is unclear.\textsuperscript{525}

Bouwman lists two possible consequences which may arise: firstly, a third party dealing with a RF company will be considered to have knowledge of the deficient authority of a director.\textsuperscript{526} Secondly, certain provisions may be entrenched in a company’s MOI.\textsuperscript{527}

In the first scenario listed above and contrary to Bouwman, Rogers J is of the opinion that even if the MOI puts authority for the action entirely \textit{ultra vires} a company representative, a company may now still be bound to the contract on the basis of

\textsuperscript{521} Bouwman 2011 \textit{Without Prejudice} 25; Wainer 2009 \textit{SALJ} 810-811. Wainer however states that where a third party does not inspect the NOI, and the MOI indeed contains special provisions, the third party will be considered to have constructive notice of the special provisions. In these circumstances a third party will be deemed to know or reasonably ought to know of any non-compliance with the internal requirements of a company and will not be able to rely on the protection afforded by s 20(7).

\textsuperscript{522} Bouwman 2011 \textit{Without Prejudice} 25.

\textsuperscript{523} Bouwman 2011 \textit{Without Prejudice} 25; Thekiso and Mnguni 2016 \url{http://today.moneyweb.co.za} (consulted 15 May 2016); Katz 2010 \textit{Acta Juridica} 252; Locke 2016 \textit{SALJ} 167; Cassim 2010 \textit{SA MERC LJ} 166. Cassim is of the opinion that as “special condition” is undefined, it is unclear exactly what it will entail.

\textsuperscript{524} Bouwman 2011 \textit{Without Prejudice} 25; Thekiso and Mnguni 2016 \url{http://today.moneyweb.co.za} (consulted 15 May 2016); Katz 2010 \textit{Acta Juridica} 252; Locke 2016 \textit{SALJ} 167.

\textsuperscript{525} Wainer 2009 \textit{SALJ} 811.

\textsuperscript{526} Bouwman 2011 \textit{Without Prejudice} 25; Cassim \textit{et al} \textit{Contemporary Company Law} 180; Locke 2016 \textit{SALJ} 167. Accordingly the third party might be prevented from relying on ostensible authority. Therefore the company will not be bound to a contract “based on actual authority (that did not exist) or ostensible authority (which is over-ruled by the third party’s constructive notice of the ‘ring fenced’ provisions)”.

\textsuperscript{527} Bouwman 2011 \textit{Without Prejudice} 26; Locke 2016 \textit{SALJ} 167. This will limit the capacity of a company to enter into or contract business in, for instance a specific trade. A third party dealing with a company contrary to such provisions may only be entitled to claim damages, if the third party was \textit{bona fide} and did not have actual knowledge of the deficient capacity of the company.
ostensible authority, due to the general repeal of constructive notice in section 19(4).\textsuperscript{528} In the opinion of the author hereof the company may also be bound to the contract in terms of the Turquand Rule or section 20(7), although the \textit{bona fides} of the third party may be in doubt.\textsuperscript{529} The author hereof submits that in the second scenario above, the company may still be bound to the contract in terms of section 20(1) of the Act, whether it is a RF company or not.\textsuperscript{530}

Due to the massive confusion of the public with regard to these provisions of the Act, Practice Note 4 of 2012: in terms of Section 188(2)(b) of the Companies Act, 2008 Interpretation of Section 11(3)(b) read with Section 15(2)(b) and (c) of the Companies Act, 2008, in relation to the use of ‘(RF)’ in the name of a company, was published under GenN 203 in GG 36225 of 15 March 2013.\textsuperscript{531} This practice note relieved some of the confusion.\textsuperscript{532} It confirmed all the speculation of the legal writers, as set out above and reaffirms the care companies and third parties must take in complying with the provisions of the Act. It however does not alleviate any of the practical implementation difficulties presented as to when a company will be bound to a contract and when not. Companies are cautioned to strictly adhere to the provisions of the Act.\textsuperscript{533} The partial abolition of constructive notice exposes companies and

\textsuperscript{528} \textit{One Stop} case para 53; Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at http://www.litnet.co.za (consulted 12 July 2016).

\textsuperscript{529} Locke 2016 \textit{SALJ} 168.

\textsuperscript{530} Thekiso and Mnguni 2016 http://today.moneyweb.co.za (consulted 15 May 2016); Locke 2016 \textit{SALJ} 168. Compare para 6.3.1 above.

\textsuperscript{531} See Practice Note 4 of 2012 of the Companies Act 71 of 2008 in GenN 203 in GG 36225 of 15 March 2013.

\textsuperscript{532} “3. To understand the rationale behind the requirement the difference between the repealed Act and the Companies Act, 2008, in relation to the powers of a company must be understood.

3.2 … section 19(4) specifically excludes the operation of the doctrine of constructive notice under the Act. … therefore a person who interacts with a company can accept that the company has the necessary power and capacity to participate in that activity and to bind the company. However, should there be any limitation the outsider would in terms of section 19(5)(a) only be bound by it if the company’s name includes the element ‘RF’ as contemplated in section 11(3)(b) and the company’s Notice of Incorporation or subsequent Notice of Amendment has drawn attention to the relevant provision.

3.3 The doctrine of constructive notice would, therefore, under the Companies Act, 2008, only apply in very limited circumstances.” See Practice Note 4 of 2012 of the Companies Act 71 of 2008 paras 3-7 in GenN 203 in GG 36225 of 15 March 2013.

\textsuperscript{533} Bouwman 2011 \textit{Without Prejudice} 26.
makes them more vulnerable. Third parties on the other hand are cautioned to meticulously study the RF provisions of companies, to ensure that a contract entered into will be enforceable against a company.

6.4.1 Effect of the partial abolition of constructive notice and RF companies

As a consequence of the abolition of the doctrine of constructive notice, it may seem that there is no longer any need for the Turquand Rule in our company law. This is presumably argued by authors like Katz, because third parties will be able to rely on Estoppel. It is however doubtful that the need for the Turquand Rule will disappear completely, as it “serves a useful purpose in protecting third parties”. This reasoning and confusion may be the very reason why the legislature decided to include sections 20(7) and 20(8) in the Act.

Indeed some authors are of the opinion that third parties dealing with RF companies, cannot rely on the Turquand Rule due to the application of constructive notice. Other authors state that a third party may not rely on section 20(7) if the company is a RF company. With all due respect, this is a contradiction which cannot be accepted as correct. It needs to be remembered that the Turquand Rule was specifically

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534 Rutkowski 2009 Without Prejudice 32.
536 Rabie 2008 Transactions of the Centre for Business Law 243; Delport 2011 THRHR 138; Locke and Esser 2011 Annual Survey of SA Law 300; Locke 2016 SALJ 181; Sutherland 2012 Stellenbosch Law Review 171; Cassim et al Contemporary Company Law 186; Cassim et al The law of business structures 147. See in general also paras 2.2.4 and footnote 124, 2.3.2 and footnote 140 and 2.3.4 and footnotes 201-211 above. Compare also paras 4.1 to 6.4 above.
537 Sutherland 2012 Stellenbosch Law Review 171. This is in line with McLennan’s proposals for law reform in para 2.4 above. The author hereof does not agree with this view of Katz and McLennan, but rather agrees with the views of Rabie, Delport, Oosthuizen and Sutherland, for the reasons set out hereunder. Although Oosthuizen did not consider the provisions of the 2008 Act, his approach and principles are still applicable and relevant. See paras 2.2.1 and footnote 51, 2.2.2, 2.2.4 and footnote 124, 2.3.2 and footnote 140, 2.3.4 and footnotes 201-211 and 2.4 and footnotes 216-219 above.
538 Rabie 2008 Transactions of the Centre for Business Law 244; Sutherland 2012 Stellenbosch Law Review 171. The author hereof agrees with this view.
539 Firstly s 20(7) to create public awareness of the rule and secondly s 20(8) to ensure that the Turquand Rule still applies to all companies. Swart and Lombard 2017 THRHR 681. Swart and Lombard are of the opinion that s 20(7) and the Turquand Rule will now apply “irrespective of whether the transaction or agreement is ultra vires or intra vires.”
540 Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa 58.
541 Rutkowski 2009 Without Prejudice 32.
developed to mitigate the consequences of constructive notice.\textsuperscript{542} It will accordingly especially apply to RF companies.

Some authors on the other hand are of the opinion that section 20(7) will only apply to RF companies, where the doctrine of constructive notice has been preserved.\textsuperscript{543} This is argued due to the fact that these two doctrines are intricately linked.\textsuperscript{544} It needs to be remembered that the Turquand Rule can also be applied in cases where constructive notice is not applicable.\textsuperscript{545} Accordingly, section 20(7) will not only apply to RF companies.\textsuperscript{546} Section 20(7) can be applied irrespective of whether a third party is, or is not presumed to have knowledge of the internal requirements.\textsuperscript{547} The Turquand Rule will also still apply irrespective of whether the company is a RF company or not.\textsuperscript{548} Furthermore, section 20(7) will only apply to companies, whereas the Turquand Rule applies to all juristic entities.\textsuperscript{549}

A third party dealing with a RF company will however not be \textit{bona fide} if the third party has failed to enquire regarding compliance with the requirements contained in

\textsuperscript{542} Sutherland 2012 \textit{Stellenbosch Law Review} 171; Delport 2011 \textit{THRHR} 138; Locke and Esser 2011 \textit{Annual Survey of SA Law} 300; Locke 2016 \textit{SALJ} 181. See also paras 2.3.4 and footnotes 201-211, 4.1 and 6.4 above.

\textsuperscript{543} Rutkowski 2009 \textit{Without Prejudice} 32; Katz 2010 \textit{Acta Juridica} 252-253; Sutherland 2012 \textit{Stellenbosch Law Review} 171; Delport 2011 \textit{THRHR} 138; Locke and Esser 2011 \textit{Annual Survey of SA Law} 300; Locke 2016 \textit{SALJ} 180-181. See also paras 2.2.4 and footnote 124, 2.3.2 and footnote 140, 2.3.4 and footnotes 201-211, 4.1 and 6.4 above.

\textsuperscript{544} Delport 2011 \textit{THRHR} 138; Locke and Esser 2011 \textit{Annual Survey of SA Law} 300; Locke 2016 \textit{SALJ} 180-181.

\textsuperscript{545} Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at http://www.litnet.co.za (consulted 12 July 2016). Furthermore the Turquand Rule is not conditional upon the type of juristic entity. The Turquand Rule is also not dependant on constructive notice, nor is constructive notice a requirement for the application of the Turquand Rule. Rabie 2008 \textit{Transactions of the Centre for Business Law} 195-196. Rabie states that the abolition of constructive notice will not necessitate the demise of the Turquand Rule. This is so due to the fact that compliance with many internal requirements does not form part of the public documents of a company. Also see paras 2.2.4 and footnote 124, 2.3.2 and footnote 140, 2.3.4 and footnotes 201-211, 4.1 and 6.4 above in this regard.

\textsuperscript{546} Sutherland 2012 \textit{Stellenbosch Law Review} 171.

\textsuperscript{547} Sutherland 2012 \textit{Stellenbosch Law Review} 171; Delport 2011 \textit{THRHR} 138; Locke 2016 \textit{SALJ} 181. The Turquand Rule applied where a third party had actual knowledge, for instance the third party knew that for a specific action there is a prerequisite. The Turquand Rule was also applied to Trusts, where there were no constructive notice of the contents of the Trust Deeds. See also Vrystaat Mielies (Edms) Bpk v Nieuwoudt 2003 (2) SA 262 (O) 267-268, overturned on appeal in Nieuwoudt v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA). Compare paras 2.2.4 and footnote 124, 2.3.2 and footnote 140, 2.3.4 and footnotes 201-211, 4.1 and 6.4 above.

\textsuperscript{548} Delport 2011 \textit{THRHR} 138; Locke 2016 \textit{SALJ} 181. See also paras 2.2.4 and footnote 124, 2.3.2 and footnote 140, 2.3.4 and footnotes 201-211, 4.1 and 6.4 above.

\textsuperscript{549} See para 2.3.2 and footnote 140 above.
the MOI. Third parties dealing with RF companies should automatically be put on guard to enquire regarding requirements contained in the MOI and compliance therewith. The Turquand Rule will still apply in these circumstances and may assist the third party. Also the *bona fides* or reasonability of a third party, relying on a representation by a RF company, cannot be determined by considering an express limitation on authority contained in the MOI. The express limitation of authority may only be considered if actual knowledge of the limitation by a third party can be proven by a company.

6.5 **Shareholder protection and transactions requiring a special resolution**

Third parties are required to be *bona fide* and to not have known or reasonably ought to have known that there is no authority for the transaction. If the third party had such knowledge, he will not be considered to be *bona fide*. Sections 20(7) and 20(8) will not apply to share issues in terms of sections 41(1) and 41(3). If the Turquand Rule could apply, the share issue would be valid. Section 20(7) on the other hand, only creates a rebuttable presumption of validity.

For the disposal of all or the greater part of its assets or undertaking, a company now has to comply with the requirements of sections 112 and 115 of the Act. These requirements include a special resolution, amongst others, due to the fact that such a

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550 Locke 2016 *SALJ* 180.
551 Locke 2016 *SALJ* 180.
552 Locke 2016 *SALJ* 181.
555 Delport 2013 *De Jure* paras 2-3. Sections 221 and 222 of the old Act dealt with the issue or allotment of shares by a company, which required a special resolution in certain instances, i.e. to insiders. Section 41(1) of the 2008 Act now regulates the issue of shares to insiders. If the insider is a director, prescribed officer or future director or prescribed officer or is interrelated to the company, s 20(7) will not apply.
556 Delport 2013 *De Jure* para 3.
557 Delport 2013 *De Jure* para 3. Such a share issue can also not be ratified in terms of s 20(2). This is due to the fact that the lack of authority of the directors is “due to provisions of the Act”.
558 Delport 2013 *De Jure* para 3.
559 Delport 2013 *De Jure* para 3. Compare para 2.2.2 above, where it is stated that the Turquand Rule is an irrebuttable presumption. See also paras 6.1.2 and 6.1.6 above and para 7.3 below.
transaction may have an economic effect for shareholders.\textsuperscript{561} The special resolution must authorise a specific transaction, not unspecified transactions in future.\textsuperscript{562} Section 218(1) does not provide conclusive guidance regarding the validity and enforceability of such a disposal that does not comply with the requirements of the Act.\textsuperscript{563} Whether the Turquand Rule or section 20(7) will apply to such a non-compliant disposal is debatable.\textsuperscript{564} It is submitted that in light of the decisions in the Farren and Stand 242 cases, neither will apply.\textsuperscript{565} These sections of the Act have the purpose of protecting the shareholders’ interests.\textsuperscript{566} The non-compliant disposal should accordingly be unenforceable but not void.\textsuperscript{567}

In Simcha Properties 6 CC v San Marcus Properties (Pty) Ltd\textsuperscript{568} the appellant alleged that the authority of the respondent’s representative was defective.\textsuperscript{569} The court held that, due to the principle of unanimous assent, approval of the disposal by the single shareholder of the company “would suffice to comply with the requirements” of section 228.\textsuperscript{570} Therefore the representative had the necessary authority to conclude the disposal.\textsuperscript{571} Consequently unanimous assent should be allowed to adopt special resolutions.\textsuperscript{572}

\textsuperscript{564} Latsky 2014 Stellenbosch Law Review 367; Swart and Lombard 2017 THRHR 678. See paras 2.3.2.1 and 6.1.4 above and para 7.4 and footnote 605 below.
\textsuperscript{565} Latsky 2014 Stellenbosch Law Review 367; Locke and Esser 2011 Annual Survey of SA Law 301. See also para 2.3.2.1 above and para 7.4 and footnote 605 below.
\textsuperscript{566} Latsky 2014 Stellenbosch Law Review 367; Swart and Lombard 2017 THRHR 678.
\textsuperscript{568} [2011] 1 All SA 287 (SCA).
\textsuperscript{569} Locke and Esser 2011 Annual Survey of SA Law 301-302. This case involved the sale of land, which was the only asset of the respondent.
\textsuperscript{570} Locke and Esser 2011 Annual Survey of SA Law 302; Simcha Properties v San Marcus Properties [2011] 1 All SA 287 (SCA) paras 13-14, 16, 31 and 35-36. Also see Levy v Zalrut Investments (Pty) Ltd 1986 (4) SA 479 (W) 485E-F; Ally v Courtesy Wholesalers (Pty) Ltd 1996 (3) SA 134 (N) 145E-G, 146B-C, 147D-E and 147G-H. See para 2.3.2.2 above.
\textsuperscript{572} Locke and Esser 2011 Annual Survey of SA Law 303. A requirement of unanimous assent is that all the shareholders must have been informed about the matter which they approved. If the shareholders have not been properly informed, there can be no unanimous assent. If no special resolution was adopted, there has been non-compliance with an internal requirement. Unanimous assent may cure this non-compliance as an alternative to the Turquand Rule or s 20(7). See para 2.3.2.2 above.
Cassim et al is of the opinion that, due to the partial abolition of constructive notice, the Turquand Rule and section 20(7) will now apply even to the requirement of a special resolution by the Act or the MOI for validation of a particular transaction.\textsuperscript{573} This statement cannot be entertained as correct. Should section 20(7) be applicable to the statutory requirements in the Act for a special resolution by shareholders\textsuperscript{574}, and validate a contract concluded contrary to the statutory requirements, section 20(7) will then negate other provisions contained in the Act. Such a situation will be untenable, as it will expose shareholders to unacceptable risk. This will mean that shareholders will have no protection against rogue company representatives.

7 Discussion and comparison

7.1 General

The Act fails to state which of section 20(7) and the Turquand Rule should prevail and when which of the two rules will apply.\textsuperscript{575} It further fails to state how the conflict between the two rules should be determined.\textsuperscript{576} The intention of the legislature in enacting sections 20(7) and 20(8) is uncertain, which makes the purpose of these provisions unclear.\textsuperscript{577} The question arises whether the intention was to alter the law or just to create public awareness.\textsuperscript{578} Should it be the latter, Jooste is of the opinion that the Turquand Rule will prevail in the case of a divergence.\textsuperscript{579} Furthermore, there is a:

“presumption in our law that legislation should be interpreted in such a way that is in

\textsuperscript{573} Cassim et al Contemporary Company Law 186; Cassim et al The law of business structures 147. This is possible due to the fact that constructive notice is no longer applicable to special resolutions. See also Swart and Lombard 2017 THRHR 678-679, where the authors state that s 20(7) “brought about important clarification. … To decide otherwise negates the whole purpose of the Act and its reform concerning company acts towards the outside world.” The author hereof does not agree with this statement for the reasons as set out in para 6.1.4 above, this para 6.5 and para 7.4 below. A proper balance between the interests of the respective parties concerned must be sustained. Compare paras 2.3.2.1 and 6.1.4 above.

\textsuperscript{574} For instance to dispose of the whole or the greater part of the business.

\textsuperscript{575} Jooste 2013 SALJ 472.

\textsuperscript{576} Jooste 2013 SALJ 472. Compare in general paras 2 and 6 above.

\textsuperscript{577} Jooste 2013 SALJ 472.

\textsuperscript{578} Jooste 2013 SALJ 472.

\textsuperscript{579} Jooste 2013 SALJ 472.
accordance with the common law, or changes it as little as possible".580

The Turquand Rule may therefore be invoked in situations that fall within or outside of the ambit of section 20(7) of the Act. The decisions in the *De Villiers* case and the *Intramed* case regarding unanimous assent should also still prevail.581

7.2 Similarities between the Turquand Rule and section 20(7)

Both section 20(7) and the Turquand Rule:

a. prevent a company from relying on the non-compliance with certain requirements to avoid contractual obligations and render the transaction or contract binding as between the third party and the company;582

b. provide protection to the *bona fide* third party, without knowledge of the non-compliance with internal requirements.583

7.3 Differences between the Turquand Rule and section 20(7)

The conflicts between section 20(7) and the Turquand Rule are, *inter alia* the following:

i. Section 20(7) expressly includes formal and procedural requirements in terms of the Act.584 It may therefore seem to be wider than the Turquand Rule due to the fact that section 20(7) may now apply to statutory requirements.585 In light

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580 Jooste 2013 *SALJ* 473.
581 See paras 2.3.2.2 and 6.5 above. See also *Simcha Properties v San Marcus Properties* [2011] 1 All SA 287 (SCA) paras 13-14, 16, 31 and 35-36; *Levy v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) 485E-F; *Ally v Courtesy Wholesalers (Pty) Ltd* 1996 (3) SA 134 (N) 145E-G; 146B-C; 147D-E and 147G-H.
582 Van Der Linde 2015 *TSAR* 841. Compare paras 2.3.2 and 6.1.4 above.
583 Van Der Linde 2015 *TSAR* 841. Compare paras 2.3.4 and 6.1.5 above.
584 Van Der Linde 2015 *TSAR* 841; Jooste 2013 *SALJ* 470; Gouveia *A Critical Analysis of the Turquand Rule* 32. Contrary to the Turquand Rule, s 20(7) applies to any decision or exercise of power by a company and to any formal or procedural requirement (whether external or internal) and is therefore in this sense, in the opinion of the author hereof, wider than the Turquand Rule. This will accordingly include all contracts concluded by the company or all actions of the company, making it wider than the Turquand Rule. See para 6.1.4 above. Compare paras 2.2.2 and 2.3.2 above.
585 Jooste 2013 *SALJ* 470; Gouveia *A Critical Analysis of the Turquand Rule* 32. It is unclear how far this rationale can be extended to other situations where the Act provides protection to the shareholders. The Turquand Rule can evidently not apply. But it remains unclear whether s 20(7) will
of the precedent set in the *Farren* and *Stand 242* cases, it is however doubtful whether section S20(7) will apply to statutory requirements enacted for the protection of shareholders.\(^{586}\)

ii. Section 20(7) expressly excludes shareholders, directors and prescribed officers from its protection.\(^{587}\) While any third party, whether outsider or insider\(^{588}\), in principle, may have invoked the Turquand Rule in certain circumstances.\(^{589}\) There is no clear reason or logic behind the exclusion.\(^{590}\) This exclusion is arbitrary and may be seen as irregular – only time will tell when this point is eventually adjudicated in a court of law.\(^{591}\)

iii. The precise limits to the presumed knowledge of the third party differ.\(^{592}\) Section 20(7) is much narrower than the Turquand Rule in this sense.\(^{593}\)

iv. The nature of the requirements that may be assumed to have been complied be applicable and whether it can protect a third party even where the action is void, in terms of the Act. See paras 6.1.4, 6.4.1 and 6.5 above.

\(^{586}\) Delport *et al* Henochsberg on Companies Act 71 of 2008 99; *Stand 242* case; Van Der Linde 2015 *TSAR* 841. See paras 2.3.2.1, 6.1.4, 6.4.1 and 6.5 above. Section 20(7) may however apply to other provisions of the Act, not intended as protection of shareholders' interests. For a contrary view see Swart and Lombard 2017 *THRHR* 678-679 and 681-682.

\(^{587}\) Van Der Linde 2015 *TSAR* 841; Delport 2011 *THRHR* 136; Jooste 2013 *SALJ* 471; Gouveia *A Critical Analysis of the Turquand Rule* 30. See para 6.1.3 above.

\(^{588}\) Including directors, shareholders and prescribed officers.

\(^{589}\) Van Der Linde 2015 *TSAR* 841; Delport 2011 *THRHR* 136; Jooste 2013 *SALJ* 471; Gouveia *A Critical Analysis of the Turquand Rule* 30. This will be so if they were not involved, on the company's behalf, in the action, i.e. in outside transactions. See para 2.3.1 above. This is contrary to Botswana law, see Baiketlile *Authority of Agents under the Botswana Companies Act 2003* 44 giving a comparison between the Botswana and South African law reform which differs. Baiketlile is of the opinion that the Act offers good protection to third parties due to the fact that "its remedies are widely framed and extended to other stakeholders like employees and trade unions". But this statement is incorrect, as employees and trade union would in any event have been included for the application of the Turquand Rule, as per Delport and Oosthuizen in paras 2.2.4 footnote 124, 2.3.2 footnote 140 and 2.3.4 footnote 209 above. See also the *Mine Workers' Union* case para 2.1 footnotes 37 and 38 above. Compare also para 6 footnote 354 above.

\(^{590}\) Delport 2011 *THRHR* 136; Jooste 2013 *SALJ* 471-472. This exclusion of insiders by the legislator is decidedly debatable, in light of the fact that there may arise circumstances where these insiders will be as exposed as any outsider. Section 19(4) on the other hand makes no such discrimination between outsiders and insiders. Accordingly both will not be deemed to have constructive notice of the public documents of a company, which is not an RF company. Compare paras 2.3.1 and 6.1.3 above.

\(^{591}\) Compare paras 2.3.1 and 6.1.3 above.

\(^{592}\) Van Der Linde 2015 *TSAR* 841; Gouveia *A Critical Analysis of the Turquand Rule* 31-32. Compare paras 2.3.4 and 6.1.5 above.

\(^{593}\) Jooste 2013 *SALJ* 472; Gouveia *A Critical Analysis of the Turquand Rule* 31-32. Compare paras 2.3.4 and 6.1.5 above.
A third party not dealing with the board of directors or a managing director will be put on enquiry, in terms of the Turquand Rule. On the other hand, in terms of section 20(7), a third party dealing with an ordinary director may possibly presume that such authority has in fact been delegated and that the requirement has been duly complied with.

v. The provision contained in section 20(7) constitutes a rebuttable presumption and is therefore narrower than the Turquand Rule’s irrebuttable presumption.

7.4 Shareholders’ protection versus protection of third parties and transactions requiring a special resolution

In terms of the Act, the Turquand Rule and section 20(7) may now be applicable to internal requirements of special resolutions. Especially coupled with the partial abolition of the doctrine of construction notice, this may be possible. Locke is of the opinion that statutory requirements for special resolutions should be viewed as substantive in nature, not as mere formal and procedural requirements. It is the nature of the requirement in the Act that is relevant and not the abolition of

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594 Van Der Linde 2015 TSAR 841. Compare paras 2.2.2 and 2.3.2 to paras 6.1.2 and 6.1.4 above.
595 Jooste 2013 SALJ 470-471. If a company represents to a third party that a company representative has authority, and the person purporting so to act, acts ultra vires his usual authority, the company may be bound to the contract in terms of Estoppel. The third party will have to establish, according to the law of agency, whether the representative is appointed to act on behalf of the company. Although the author hereof is of the opinion that this is conflation with Estoppel and that a third party does not have to first establish the authority of the representative in terms of Estoppel, in order for the Turquand Rule to apply. See paras 2.2.1, 2.2.3 and 2.3.2 above. See also footnote 596 below.
596 Jooste 2013 SALJ 471. The delegation of authority to an ordinary director may, in terms of s 20(7), be a formal or procedural requirement in terms of the rules of a company. See paras 6.1.2 and 6.1.4-6.1.7 above.
597 Delport New Companies Act Manual 69 footnote 35; Delport et al Henochsberg on Companies Act 71 of 2008 98. Compare paras 2.2.2 and 2.3.3 to paras 6.1.2 and 6.1.6 above.
598 Cassim et al Contemporary Company Law 720 footnote 152; Cassim et al The law of business structures 147; Swart and Lombard 2017 THRHR 678-679. Compare in general paras 2.3.2 and 2.3.2.1 to paras 6.1.4 and 6.5 above. Locke 2012 Stellenbosch Law Review 612. Locke differs from this view. The author hereof also does not agree with the view of Cassim et al.
599 Cassim et al Contemporary Company Law 720 footnote 152; Cassim et al The law of business structures 147. This may even occur in instances of a disposal of the whole or the greater part of the business or assets, and validation of a contract concluded contrary to the statutory requirements. For critique on this view see Locke 2012 Stellenbosch Law Review 612.
constructive notice.\textsuperscript{601}

Although the provisions of sections 115(1), 115(9) and 112(2) imply that the Turquand Rule does not apply to section 112 disposals, the Act does not exclude this possibility explicitly.\textsuperscript{602} Should section 20(7) indeed be applicable, section 20(7) will then nullify or overrule other provisions of the Act. The courts will therefore have to decide this point.\textsuperscript{603} The author hereof is of the opinion that the decisions in the \textit{Farren} and \textit{Stand 242} cases should still be upheld.\textsuperscript{604}

We are now faced with a situation where the Act itself is contradictory. One section provides that it can possibly prevail over another section in the Act, and ignore non-compliance with the latter section. This is not conducive to legal certainty. At first glance it may therefore seem that the legislature, with enacting section 20(7), effectively changed the precedent set in the \textit{Farren} and \textit{Stand 242} cases, due to the inclusion of the provisions of section 20(7) in the Act.\textsuperscript{605} But with transactions where sections 112 and 115 are applicable, the precedent laid down in the \textit{Farren} and \textit{Stand 242} cases should still apply.\textsuperscript{606} The provisions of sections 112 and 115 will accordingly prevail over the provisions of section 20(7) and the Turquand Rule.\textsuperscript{607}

The author hereof is however of the opinion that it may be possible for the protection provided for in section 20(7) to prevail over some statutory requirements now. This

\textsuperscript{601} Locke 2012 \textit{Stellenbosch Law Review} 612. The author hereof rather agrees with Locke.
\textsuperscript{602} Cassim \textit{et al} \textit{Contemporary Company Law} 720. For critique on this view see Locke 2012 \textit{Stellenbosch Law Review} 612.
\textsuperscript{603} Cassim \textit{et al} \textit{Contemporary Company Law} 720. The author hereof is of the opinion that this could never have been the intention of the legislature.
\textsuperscript{604} Locke 2012 \textit{Stellenbosch Law Review} 612. The reasons for the opinion of the author hereof is set out in paras 2.3.2.1 and 6.5 above and this para 7.4.
\textsuperscript{605} Jooste 2013 \textit{SALJ} 475. Jooste concludes by stating: “Finally, if the provisions of s 20(7) read with s 20(8) do have the effect that a person acquiring the whole or the greater part of the assets of a company may assume that the statutory special resolution requirement has been complied with, and the court in Stand 242 was aware of the provisions of the 2008 Act, the conclusion that one must come to is that the court in Stand 242 disagreed with the view taken by the legislature. The Act and the Bill on which the Act was based were in the public domain (although not in force) long before the judgement in Stand 242 was handed down, so it is likely that the court in Stand 242 was aware of the stance taken by the drafters of the Act. Be that as it may, the court a quo and the Supreme Court of Appeal in Stand 242 (all judges concurring) and the court in Farren’s case all agreed that the protection of shareholders should trump the protection of the third party dealing with the company – yet it appears that the legislature has taken the opposite view”. See also Swart and Lombard 2017 \textit{THRHR} 679.
\textsuperscript{606} Latsky 2014 \textit{Stellenbosch Law Review} 367.
\textsuperscript{607} Latsky 2014 \textit{Stellenbosch Law Review} 367.
will be in cases other than provisions intended as protection of shareholders’ interests. In the latter instances the decisions in the Farren and Stand 242 cases will stand, as stated above - only time will tell when this point is eventually adjudicated in a court of law.

It will be interesting to see the reasoning of the court overturning the decisions in the Farren and Stand 242 cases. This will leave the shareholders unprotected and at a considerable disadvantage. It will furthermore be a disproportionate and an inappropriate application in favour of the third party to the prejudice of shareholders.

7.5 Conclusion

From what is set out herein above it is apparent that section 20(7) does not have the same provisions or ambit as the Turquand Rule. It is also clear that section 20(7) did not change the precedent laid down in the Farren and Stand 242 cases. 608

Furthermore it is submitted that section 20(7) and the Turquand Rule will still apply to all companies, including RF companies. This is as a consequence of the fact that the Turquand Rule is not subject to the application of constructive notice, but an independent rule of companies. 609

608 See paras 6.1.4 and 6.5 above. The interest of third parties may conflict with those of shareholders in some instances. But legislative protection afforded to shareholders should prevail over the protection of third parties through application of the Turquand Rule and s 20(7) of the Act.

609 See paras 2.2.2, 2.3.4 and footnotes 201-211 and 6.4.1 above. The Turquand Rule also applies to entities to which constructive notice is not applicable, so there is no specific link between the Turquand Rule and constructive notice. Section 20(7) will however only apply to companies. The Turquand Rule should also not be confused nor conflated with Estoppel or ostensible authority, as it is an independent rule.
CHAPTER 4

8 Conclusions and recommendations

In this chapter the conclusions and recommendations of the author hereof will be set out, which should be viewed in light of what have been set out in the above chapters.

8.1 Conclusions in general

This subject is an exceedingly intricate area of our law. This is evident from the “large body of jurisprudence that has built up over the years”.

The underlying principle of the Turquand Rule, that companies rather than third parties should bear the risk, still applies today. The partial abolition of the doctrine of constructive notice has increased this protection of third parties. Also, where the third party relies on a representation by the company or the ostensible authority of the company representative, the common law principles of agency law will still apply.

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610 It is the protection of third parties dealing with companies in circumstances where a non-compliance with an internal requirement has occurred.
611 Jooste 2013 SALJ 474; Swart and Lombard 2017 THRHR 680.
612 Jooste 2013 SALJ 474.
613 Rabie 2008 Transactions of the Centre for Business Law 196. See in general para 2.2.5 above. Rabie proposed the abolition of the doctrine of constructive notice, and states that this will not necessitate the demise of the Turquand Rule. Due to the fact that the company may appoint its own representatives, this will be equitable. Also the representatives will be liable to the company on grounds of their fiduciary duties. See also Swart and Lombard 2017 THRHR 680. This is similar to Australian company law, see Cain 1989 Bond Law Review 282, commenting on the company law reform in Australia, which is similar to our reform. See also paras 2.2.2, 2.2.4 and footnote 124, 2.3.4, 2.4 and footnotes 216-219, 6.4 and 6.4.1 above.
614 Rabie 2008 Transactions of the Centre for Business Law 167, 195-196 and footnote 238. This is so due to the fact that compliance with many internal requirements does not form part of the public documents of a company. Rabie further proposed the abolition of the common law doctrine of Estoppel and the Turquand Rule, and replacement thereof by statutory rules along the lines of the authentic requirements, including the clear limitations, of the rules. See also Swart and Lombard 2017 THRHR 681. This is similar to Australian company law, see Cain 1989 Bond Law Review 282, commenting on the company law reform in Australia, which is similar to our reform. See paras 2.2.2, 2.2.4 and footnote 124, 2.3.4, 2.4 and footnotes 216-219, 6.4 and 6.4.1 above.
615 Also the principles of Estoppel will still apply. Swart and Lombard 2017 THRHR 681. See para 5 above. This is similar to Australian company law, see Cain 1989 Bond Law Review 282, commenting on the company law reform in Australia, which is similar to our reform.
Sections 20(7) and 20(8), among others in the Act, confuse the entire existing legal position relating to representation and the *ultra vires* doctrine.\(^{616}\) Instead of expressly abolishing or specifically codifying all of the old common law doctrines, all of the common law doctrines have been specifically preserved.\(^{617}\) This amplifies the perils not only for companies but also for third parties contracting with companies, specifically with the application of the Turquand Rule.\(^{618}\)

A clear and unambiguous provision on the Turquand Rule would have been welcome.\(^{619}\) The “glaring defects and unintended consequences” must be remedied.\(^{620}\) Plain language drafting of legislation is not always the best, as ambiguity and uncertainty arises.\(^{621}\) The Act “sadly and ironically” introduces “new complexities”, which should have been avoided.\(^{622}\)

From what is set out herein above, it is thus patently obvious that there is a significant distinction between Estoppel and the Turquand Rule.\(^{623}\) Likely, there is a substantial divergence between the Turquand Rule and section 20(7) of the Act. The development of the Turquand Rule will be problematic and challenging alongside section 20(7), especially in light of the apparent conflict.\(^{624}\) It is uncertain which one will apply and when.\(^{625}\) Due to the scope of the Turquand Rule being vastly broader

\(^{616}\) Delport 2011 *THRHR* 138.  
\(^{617}\) Delport 2011 *THRHR* 138.  
\(^{618}\) Delport 2011 *THRHR* 138.  
\(^{619}\) Cassim 2010 *SA MERC LJ* 174. “It is this sort of approach that inevitably causes conflict, uncertainty and confusion in the proper formulation and application of the relevant legal principles.” See also Swart and Lombard 2017 *THRHR* 681-682.  
\(^{620}\) Cassim 2010 *SA MERC LJ* 174.  
\(^{621}\) Cassim 2010 *SA MERC LJ* 174. The language used in and formulation of s 20(7) causes more confusion than clarity on an already contentious subject. The legislature failed to make use of the opportunity in drafting the 2008 Act to remove the ambiguity existing around the Turquand Rule. Instead the legislature contributed even more to the existing ambiguity on this subject. See also para 7.3 above for the differences between the Turquand Rule and s 20(7). See in general also para 6 above.  
\(^{622}\) Cassim 2010 *SA MERC LJ* 175. “What is really required is good, careful and meticulous drafting that does not unfairly shift responsibility to the courts…[W]hat is essential is a careful fine-tuning rather than a radical overhaul of fundamental principles.” See also para 7.3 above for the differences between the Turquand Rule and s 20(7). See in general also para 6 above.  
\(^{623}\) Swart and Lombard 2017 *THRHR* 682. Compare paras 2.2.1, 2.2.2, 5.1.3 (specifically 5.1.3.3) and 5.2 above.  
\(^{624}\) Delport *et al Henochsberg on Companies Act 71 of 2008* 99. See also para 7.3 above for the differences between the Turquand Rule and s 20(7). Compare in general also paras 2 to 6 above.  
\(^{625}\) Delport *et al Henochsberg on Companies Act 71 of 2008* 99.
than that of section 20(7), it is submitted that section 20(7) is superfluous.\textsuperscript{626} However recognizing the narrower ambit of section 20(7), the suggested interpretations of section 20(7) will resolve some of the difficulties.\textsuperscript{627} Application of section 20(7) should be parallel with the Turquand Rule instead of trying to merge them.\textsuperscript{628} This may avoid the problematic outcome that essential statutory shareholder protection provisions could become worthless when a company deals with an innocent third party.\textsuperscript{629}

We have to remember what the Constitutional Court stated in \textit{Kubyana v Standard Bank of South Africa Ltd}\textsuperscript{630}:

\begin{quote}
"It is well established that statutes must be interpreted with due regard to their purpose and within their context… Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."\textsuperscript{631}
\end{quote}

Representation of companies, intimately affect the daily business of juristic entities.\textsuperscript{632} The Act did not bring any legal certainty in this regard.\textsuperscript{633} Incorrect application of the different rules by our courts further complicates this very delicate area of our company law.\textsuperscript{634} The time has come for uniformity and legal certainty on this essential area of our company law.

\subsection*{8.2 Recommended application}

\textsuperscript{626} Delport \textit{New Companies Act Manual} 69 footnote 36.
\textsuperscript{627} Van Der Linde 2015 \textit{TSAR} 843.
\textsuperscript{628} Van Der Linde 2015 \textit{TSAR} 842.
\textsuperscript{629} Van Der Linde 2015 \textit{TSAR} 843.
\textsuperscript{630} 2014 (3) SA 56 (CC) para 18.
\textsuperscript{631} \textit{Kubyana v Standard Bank of South Africa Ltd} 2014 (3) SA 56 (CC) para 18, footnotes omitted.
\textsuperscript{632} Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at \url{http://www.litnet.co.za} (consulted 12 July 2016).
\textsuperscript{633} Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at \url{http://www.litnet.co.za} (consulted 12 July 2016).
\textsuperscript{634} Lombard and Swart 2016 (13) \textit{Litnet Akademies} 658 available at \url{http://www.litnet.co.za} (consulted 12 July 2016); Swart and Lombard 2017 \textit{THRHR} 682. See paras 2.2.1 and 5.1.3.3 above.
Section 20(7) is not a complete codification of the common law Turquand Rule, but should be seen as augmenting the deficiencies of the Turquand Rule. So that the Turquand Rule may be developed beyond the ambit of section 20(7), parallel to the principles of the rules of law, equity and the legislation. The statement that it “would be ironic if a legislative attempt to correct defects in the common law resulted in other flaws becoming ossified in the common law”, will be well applied in our law. In light of the fact that the ambit of the Turquand Rule is wider, it is submitted that the Turquand Rule still applies and will continue to apply in our company law, in cases where section 20(7) is inapplicable or inappropriate or as and alternative, for the reasons as set out herein above.

8.3 Recommended amendments to section 20(7)

Common law rules should stay common law and should not be incorporated in statutes, unless the legislature intends to amend the common law. In which case, the legislature must expressly state so in the statute. Otherwise it only creates confusion.

Section 20(7) should be either repealed or “amended to align it properly with the” authentic limits of the Turquand Rule in order to provide clarity which is critical. The best way to deal with this will be “to repeal s 20(7) and (8) altogether, leaving the common law and the development thereof to deal with the matter”.

Currently a single director cannot bind a company, unless he is expressly authorised thereto in the MOI of a company, or by the board, or the requirements for Estoppel is fulfilled. It is submitted that section 20(7) be aligned equivalent to section 54 of

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635 Rabie 2008 Transactions of the Centre for Business Law 191 and footnotes 210-211. This is similar to Australian company law, see Cain 1989 Bond Law Review 281, commenting on the company law reform in Australia, which is similar to our reform.
636 Rabie 2008 Transactions of the Centre for Business Law 191 and footnotes 210-211. This is similar to Australian company law, see Cain 1989 Bond Law Review 281, commenting on the company law reform in Australia, which is similar to our reform.
637 Rabie 2008 Transactions of the Centre for Business Law 191 footnote 211.
638 See para 6 above. This is similar to Australian company law, see Cain 1989 Bond Law Review 283, commenting on the company law reform in Australia, which is similar to our reform.
639 Cassim 2010 SA MERC LJ 174; Jooste 2013 SALJ 474.
640 Jooste 2013 SALJ 474.
the Close Corporations Act. This will simplify the law regarding representation of companies enormously, at least as far as directors are concerned. This would be a welcome amendment, especially in light of the provisions of sections 66(1) and 66(11) of the Act. Then a third party dealing with any director of a company may assume that the director is properly authorised to bind the company. This will however have the effect that a director may bind a company to an unapproved contract with unintended consequences. Such protection of third parties however has another down side, i.e. it will diminish the protection afforded to companies and shareholders.

Power of members to bind corporation

(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

(2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.

Section 54 of the Close Corporations Act is very relevant in respect of authority. This may assist in clarifying the uncertainty regarding authority when dealing with companies, especially with respect to directors. See para 6.3.1 and footnote 48 above and footnote 64 below.

Section 54 of the Close Corporations Act gives members wide statutory power to bind the corporation to contracts entered into with bona fide third parties. The members may even authorise outsiders or non-members to act as representatives for the corporation by the words “any act”. In this instance the general principles of agency law will apply, in the form of either actual authority or ostensible authority. Our courts have held that: “the intention of the legislature in enacting s 54 of the Close Corporations Act is that every member of a close corporation is to be an agent of the entity for all purposes, irrespective of any actual authority conferred on the member”. This will be so even if the contract entered into is not related to the business of the corporation. This only applied if the non-member third party has no knowledge, subjectively or objectively, of the lack of authority by the representative. Some authors are of the opinion that the doctrine of ostensible authority is thus introduced by s 54(2) of the Close Corporations Act.

These sections state that the board of directors must act together and that if the minimum required number of directors is not present, it does not negate the authority of the board.

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These sections state that the board of directors must act together and that if the minimum required number of directors is not present, it does not negate the authority of the board.
Alternatively section 20(7) should be amended to eliminate the following critique against the section:

a. The arbitrary exclusion of certain insiders.\(^{649}\)

b. Clarity should be given regarding whether a single director may be presumed to be properly authorised to represent a company and enter into any transaction which falls within the normal scope of such director's authority.\(^{650}\)

c. The double knowledge requirement should be eliminated from this section.\(^{651}\)
The definition of “knows” in section 1 of the Act should also be amended to include the word “knew” used in the section and to eliminate the double knowledge requirement in this section.

d. The application of this section to requirements of internal procedures contained in the Act, such as a special resolution, should be clarified. Thereby also eliminating the possibility of this section negating another requirement contained in the Act, intended for the protection of shareholders. This will put an end to the speculation of whether the decisions in the *Farren* and *Stand 242* cases will prevail.\(^{652}\)

e. Re-establishing an irrebuttable presumption.\(^{653}\)

f. Avoidance of conflation of the Turquand Rule with ostensible authority and

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\(^{649}\) The author hereof submits that every *bona fide* third party dealing with a company (whether outsider or insider) should be afforded the same protection. Compare para 2.3.1 to para 6.1.3 above. See also para 7.3 above.

\(^{650}\) The author hereof submits that a *bona fide* third party dealing with any company representative (whether a single person or more than one person) in the internal employ of the company (being an employee, director, prescribed officer, shareholder or group or combination of these persons) or in the external employ of the company (including but not limited to sub-contractors and service providers), should be able to accept that such company representative has been properly authorised to act on behalf of the company. Compare paras 2.2.1, 2.2.3 and 2.3.2 to paras 6.1.2 and 6.1.4-6.1.7 above.

\(^{651}\) Compare para 2.3.4 to para 6.1.5 above.

\(^{652}\) The author hereof submits that s 20(7) should not be applied to negate other requirements contained in the Act. Compare para 2.3.2.1 to paras 6.5 and 7.4 and footnote 605 above.

\(^{653}\) Compare para 2.2.2 to paras 6.1.2, 6.1.6 and 7.3 above.
g. Clarity should be provided regarding which contracts or actions will be subject to the application of section 20(7) and when the Turquand Rule should be applied.\textsuperscript{655}

8.4 Conclusion

The author hereof is of the opinion that section 20(7) should be seen to only augment the Turquand Rule. The Turquand Rule is necessary and serves an extremely important purpose in our company law. We however, do not need two indoor management rules (statutory and common law) to achieve this purpose, only one would suffice. The author hereof therefore recommends that section 20(7) be repealed, to leave only the common law Turquand Rule.

The legislature ultimately failed to provide clarity and to remove the legal uncertainty that existed around the application of the Turquand Rule. In fact, the introduction of section 20(7) had the opposite effect and only created more uncertainty in this regard.

Undoubtedly this subject will form the causa of and be tested in our courts in a myriad of complex litigation.

\textsuperscript{654} Compare paras 2.2.1 and 5.1.3.3 to para 2.2.2 above.
\textsuperscript{655} Compare para 2.3.2 to para 6.1.4 above.
Bibliography

South African Literature

Books

Baiketlile Authority of Agents under the Botswana Companies Act 2003

Baiketlile L Corporate Capacity and Authority of Agents under the Botswana Companies Act 2003 (LLM-dissertation University of Cape Town) 1-48

{This dissertation contains some foreign law relating to Botswana company law but also South African company law. Where this dissertation is referred to, it will be indicated whether it is in relation to the Botswana law or the South African law.}

Cassim et al Contemporary Company Law


Cassim et al The law of business structures

Cassim FHI et al The law of business structures 3rd Impression Juta & Co Ltd 2013 134-152

Cilliers et al Ondernemingsreg

Cilliers HS et al Ondernemingsreg (Butterworths Durban 1993) 150-152

Davis (ed) Geach (main ed) Mongalo et al Companies and other business structures in South Africa

Davis D (ed) Geach W (main ed) Mongalo T et al Companies and
9.1.2 Publications – Journal articles

Anon 2010 Transactions of the Centre for Business Law

Botha 2009 *Obiter*

Botha MM “The role and duties of directors in the promotion of corporate governance: a South African perspective” 2009 *Obiter* Vol 30 702-715

Bouwman 2011 *Without Prejudice*

Bouwman N “The ‘ring fenced’ provisions: company law” July 2011
*Without Prejudice* Vol 11 Issue 6 25-26

Cassim 2005 *Annual Survey of SA Law*

Cassim FHI “Company Law (including Close Corporations)” 2005
*Annual Survey of SA Law* – Company Law (JU Assal) 466-493

Cassim 2010 *SA MERC LJ*


Delport 2011 *THRHR*

Delport P “Companies Act 71 of 2008 and the ‘Turquand’ Rule” 2011
*THRHR* Vol 74 132-138

Delport 2013 *De Jure*

Delport PA “Share issues and shareholder protection” April 2013 *De Jure* (Pretoria) Vol 46

Havenga 2004 *Juta’s Business Law*

Havenga M “Shares and shareholders, reduction of capital, the Turquand rule, winding-up, and deregistration” 2004 *Juta’s Business Law* Vol 12 Issue 3 122-131
Jooste 2013 *SALJ*


Katz 2010 *Acta Juridica*

Katz MM “Governance under the Companies Act 71 of 2008: Flexibility of the keyword” 2010 *Acta Juridica* 248-262

Latsky 2014 *Stellenbosch Law Review*


Locke 2012 *Stellenbosch Law Review*

Locke N “Contemporary Company Law” 2012 *Stellenbosch Law Review* 610-613

Locke 2016 *SALJ*

Locke N “The legislative framework determining capacity and representation of a company in South African law and its implications for the structuring of special purpose companies” 2016 *SALJ* 160-188

Locke and Esser 2011 *Annual Survey of SA Law*

Locke N and Esser I “Corporate Law (including stock exchanges)” 2011 *Annual Survey of SA Law* 293-335

McLennan 1979 *SALJ*

McLennan JS “The *ultra vires* doctrine and the Turquand Rule in
company law – a suggested solution” 1979 SALJ Vol 96 Issue 2 329-371

McLennan 1997 SA MERC LJ


McLennan 2009 Obiter

McLennan JS “Contract and agency law and the 2008 Companies Bill” 2009 Obiter Vol 30 Issue 1 144-153

Mthembu 2005 Juta’s Business Law

Mthembu M “The long arm of the Turquand rule” 2005 Juta’s Business Law Vol 13 Issue 2 58-60

Oosthuizen 1977 TSAR

Oosthuizen MJ “Die Turquand-reel as reël van die verenigingsreg” 1977 TSAR Vol 3 210-219

Oosthuizen 1979 TSAR

Oosthuizen MJ “Aanpassing van die verteenwoordigingsreg in maatskappyverband” 1979 TSAR Vol 1 1-15

Rabie 2008 Transactions of the Centre for Business Law


Rutkowski 2009 Without Prejudice
Rutkowski N “Modifying common law doctrines: company law” September 2009 *Without Prejudice* Vol 9 Issue 8 31-32

Stannard 2015 *Without Prejudice*


Sutherland 2012 *Stellenbosch Law Review*


Swart and Lombard 2017 *THRHR*

Swart WJC and Lombard M “Representation of companies under the Companies Act 71 of 2008” 2017 *THRHR* Vol 80 666-682

Van Der Linde 2015 *TSAR*

Van Der Linde K “The validity of company actions under section 20 of the Companies Act 71 of 2008” 2015 *TSAR* 833-843

Wainer 2009 *SALJ*


9.2 *Foreign Literature*

9.2.1 English Books

*Birds et al Boyle & Birds’ Company Law*

9.2.2 Australian Publications – Journal articles

Cain 1989 Bond Law Review


9.3 Internet sources

Anon http://www.vdma.co.za (consulted 29 March 2016)


Anon http://www.roodtinc.com (consulted 29 March 2016)

Anonymous “A director who fails to disclose his personal interest in company contracts risks imprisonment” date unknown at http://www.roodtinc.com/newsletter76.asp (consulted 29 March 2016)

Dharmaratne http://www.cgblaw.co.za (consulted 15 May 2016)


Pilane and Forgan 2010 http://www.legalcity.net (consulted 29 March 2016)


Thekiso and Mnguni 2016 http://today.moneyweb.co.za (consulted 15 May 2016)

Thekiso T and Mnguni T 13 May 2016 “Ring-fencing of companies in South Africa” at http://today.moneyweb.co.za/dm-article?id=508083# (consulted 15 May 2016)

Van Wyk 2013 https://nicolaasvanwyk.wordpress.com (consulted 15 May 2016)


9.4 *Law reports*
9.4.1 South African case law

*ABSA Bank Ltd v SACCAWU National Provident Fund* [2012] 1 All SA 121 (SCA)

*Ally v Courtesy Wholesalers (Pty) Ltd* 1996 (3) SA 134 (N)

*Blue IQ Investment Holdings (Pty) Ltd v Southgate* (2014) 35 ILJ 3326 (LAC)

*De Villiers v BOE Bank Ltd* 2004 (3) SA 1 (SCA)

*Ex Parte Russlyn Construction (Pty) Ltd* [1987] 1 All SA 169 (D)

*Farren v Sun Services SA Photo Trip Management (Pty) Ltd* 2003 (2) All SA 406 (C)

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

*Intramed (Pty) Ltd v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W)

*Investec Bank Limited v Quick Leap Investments 34 (Pty) Ltd* 2014 JDR 2516 (GP)

*Kaimowitz v Delahunt* 2017 (3) SA 201 (WCC)

*Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC)

*Levy v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W)


*Makate v Vodacom (Pty) Ltd* [2016] ZACC 13

*Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd* [2014] JOL 32101 (WCC)

*Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA)
One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd [2015] 4 All SA 88 (WCC)

Pretorius v PB Meat (Pty) Ltd (1057/2013) [2013] ZAWCHC 89 (14 June 2013)

Quintessence Opportunities Ltd v BLRT Investments Ltd; BLRT Investments v Grand Parade Investments Ltd [2008] 1 All SA 67 (C)

Simcha Properties v San Marcus Properties [2011] 1 All SA 287 (SCA)

Southgate v Blue IQ Investment Holdings 2012 JDR 1570 (LC)

Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd v Göbel 2011 (5) SA 1 (SCA)

Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd [2009] 4 All SA 448 (WCC)

TEB Properties CC v MEC, Department of Health and Social Development, North West [2012] 1 All SA 479 (SCA)

The Mine Workers’ Union v JJ Prinsloo; The Mine Workers’ Union v JP Prinsloo; The Mine Workers’ Union v Greyling 1948 (3) SA 831 (A)

Tuckers land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T)

Vrystaat Mielies (Edms) Bpk v Nieuwoudt 2003 (2) SA 262 (O)

Wolpert v Uitzigt Properties (Pty) Ltd 1961 (2) SA 267 (W)

9.4.2 English case law

Ernest v Nicholls (1857) 6 HL Cas 401 Catchwords & Digest

Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd 1964 1 All ER 630 (CA)
Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1985) 3 All ER 52 (CA)

Royal British Bank v Turquand (1856) 6 E&B 327 (119 ER 886)

9.5 Legislation

Close Corporations Act 69 of 1984

Companies Act 71 of 2008

Companies Act 61 of 1973

9.6 Government publications

Proc R32 in GG 34239 of 26 April 2011

GenN 203 in GG 36225 of 15 March 2013

10 List of abbreviations

“Anon” – Anonymous

“CEO” – Chief Executive Officer

“etc.” – Etcetera

“GenN” – General Notice

“GG” – Government Gazette

“i.e.” – that is, in other words, namely, specifically

“MOI” – Memorandum of Incorporation

“NOI” - Notice of Incorporation

“para” – paragraph
“paras” - paragraphs

“Proc” - Proclamation

“RF” – Ring Fenced

“s” – section

“ss” - sections

“SALJ” - South African Law Journal

“SA MERC LJ” – South African Mercantile Law Journal (Suid-Afrikaanse Tydskrif vir die Handels Reg)

“THRHR” – Journal of Contemporary Roman-Dutch Law (Tydskrif van Hedendaagse Romains-Hollanse Reg)

“TSAR” – Journal of South African Law (Tydskrif vir die Suid-Afrikaanse Reg)

11 List of key words

Companies Act 71 of 2008;

Turquand Rule;

Section 20(7) of the Companies Act;

Capacity;

Ultra vires doctrine;

Doctrine of constructive notice;

Ring Fenced “RF” companies;

Ostensible authority;

Doctrine of Estoppel;
Representation;

Authority;

Shareholders’ protection;

Irrebuttable presumption;

Rebuttable presumption;

Internal requirements;

Formal and procedural requirements;

Substantive requirement.