

REPRESENTATION OF A COMPANY WHEN CONTRACTING WITH ANOTHER PERSON UNDER SOUTH AFRICAN COMPANY LAW

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

1 Introduction

A company is an artificial person and has no mind, will or hands of its own. It is, therefore, compelled to act through human agents. The board of directors is responsible for the management and direction of the business affairs of the company. Under South African company law the directors' powers of management are statutorily entrenched (S 66(1) of the Companies Act 71 of 2008). The board of directors may, however, delegate its powers to an individual director (or individual directors), a committee of the board, a managing director or other officers of the company. Before an individual director or officer of the company can conclude a binding transaction on behalf of their company, they must have the authority to do so. In South Africa, the issue of authority to enter into a transaction or agreement on behalf of a company is dealt with using the principles of the law of agency.

The crisp issue in this note relates to the circumstances in which an individual company director or officer who, when contracting with another person, purports to be acting on behalf of the company will bind the company. In the recent case of *Makate v Vodacom (Pty) Ltd* ([2016] ZACC 13 (hereinafter "*Makate v Vodacom*")), which involved a claim for reasonable compensation by the inventor of the concept of "Please Call Me" against Vodacom (Pty) Limited (hereinafter "Vodacom"), the Constitutional Court dealt specifically with the authority of a director to conclude a contract with a third party on behalf of the company. This note discusses *Makate v Vodacom* and the approach of the court regarding when a company will be bound by contracts concluded by its director or another person purporting to represent the company in a transaction with a third party. It examines the main judgment of Jafta J and the concurring judgment of Wallis J in relation to the legal nature of ostensible authority in the absence of actual authority.

The note further looks at the issue of prescription, which Vodacom in its defence raised against the claim for compensation brought by Mr Makate. It explores the circumstances in which prescription can be successfully invoked to deflect a contractual claim brought against a company, the impact of the Constitution in this area of the law and whether the claim lodged by Mr Makate amounted to a "debt" for purposes of the Prescription Act (68 of 1969). To this end, again, both the main judgment of Jafta J and the concurring judgment of Wallis J are examined. This is followed by critical insights on the implications of this case and some concluding remarks.

2 Factual background

2.1 Facts

The applicant in this matter was Mr Kenneth Makate, a former employee of the respondent, Vodacom (Pty) Limited. While serving as a trainee consultant at Vodacom, Mr Makate conceived a business idea of a new product known as “Please Call Me”. In terms of his idea, a cellphone user who does not have airtime would be able to request a call from another cellphone user. Mr Makate intended to sell his idea to Vodacom or any other cellphone company that would be willing to buy it. He related his idea to his mentor, Mr Muchenje, the Head of Vodacom’s Finance Division. Based on his mentor’s advice, Mr Makate further discussed his idea with the Director of Product Development and Management, Mr Philip Geissler. Mr Makate and Mr Geissler then agreed that should Vodacom develop a commercially viable product based on Mr Makate’s idea, Vodacom would compensate Mr Makate for the use of his idea. They, however, agreed that they would discuss the amount of the compensation at a later date after the new product had been successfully launched. They further agreed that if they failed to reach an agreement on the amount of the compensation, the matter would be referred to Vodacom’s Chief Executive Officer, Mr Knott-Craig, for his determination of the amount.

Vodacom subsequently developed and launched a commercially successful new product called “Please Call Me”, based on Mr Makate’s idea. Mr Makate, the author of the concept, received praises from *inter alia* Mr Geissler and Vodacom’s Managing Director, Mr Mthembu, for his idea. It is noteworthy that the “Please Call Me” product was launched before Vodacom’s Board approved it on 15 March 2001. This was in line with the common practice within Vodacom to make and implement business decisions before the board approved such decisions. Although “Please Call Me” became a commercially successful product, Vodacom neither compensated Mr Makate nor negotiated the compensation due to him for the use of his idea to develop the lucrative product.

2.2 The trial court

Mr Makate instituted a lawsuit in the High Court to enforce his verbal contract with Vodacom represented by its director, Mr Geissler, in 2008 (see *Makate v Vodacom (Pty) Limited* (08/20980) [2014] ZAGPJHC 135). In his particulars of claim, he alleged that Mr Geissler had ostensible authority to conclude the contract with him on Vodacom’s behalf and argued that Vodacom was bound by the resultant contract. He, therefore, prayed for an order compelling Vodacom to comply with its obligations under the contract. Alternatively, Mr Makate sought development of the common law (as provided for in s 39(2) of the Constitution) through infusion of the Constitutional values of *ubuntu* and good faith into it, as well as an order compelling Vodacom to negotiate in good faith with him to determine a reasonable compensation for the use of his idea. Notably, at the time that Mr Makate sued Vodacom, he had terminated his employment with Vodacom and four years had lapsed since the launch of the “Please Call Me” product.

In its special pleas, Vodacom argued *inter alia* that Mr Makate's claim had prescribed in terms of section 11(d) of the Prescription Act (68 of 1969). In the main plea, Vodacom denied the existence of the agreement between Mr Makate and Mr Geissler (the latter representing Vodacom). It further claimed that Mr Geissler did not have actual or ostensible authority to conclude the contract on its behalf.

The four main issues before the High Court related to whether there was an agreement between Mr Makate and Mr Geissler; whether, if such an agreement existed, it bound Vodacom; whether Mr Makate's claim arising from that agreement had prescribed; and whether the common law could be developed in terms of section 39(2) of the Constitution such that the court could compel Vodacom to negotiate a reasonable compensation in good faith with Mr Makate for the use of his idea.

The High Court found that, on a balance of probabilities, Mr Makate had successfully established the existence of the contract between himself and Mr Geissler. However, the High Court also found that Mr Makate had not properly pleaded the ostensible authority on the part of Mr Geissler to conclude the contract on behalf of Vodacom. It ruled that the ostensible authority could only be pleaded in replication. At par 157 of its judgment, the High Court stated as follows:

"But it was essential for the plaintiff to have pleaded the facts as represented to him, if he was aware of those facts. *The estoppel, which is not a cause of action, should then have been pleaded in a replication, in response to the defendant's plea.*"
[Emphasis added]

Therefore, according to the High Court, it was necessary for Mr Makate to have pleaded ostensible authority in the replication as such authority is a form of an estoppel. The High Court further held that the contract was not binding on Vodacom as Mr Makate failed to establish that Vodacom had represented that Mr Geissler had authority to enter into the agreement on its behalf and also failed to establish the requirements for an estoppel (par 165 and par 173–174 of the High Court's judgment).

On the issue of prescription, the High Court regarded Mr Makate's claim to be a "debt" in terms of the Prescription Act (68 of 1969) (par 181 of the High Court's judgment). It held that his claim had prescribed since a period in excess of three years had lapsed between the date on which the debt arose and the date on which the action was instituted. (The High Court found that the claim had arisen in November 2000 yet the summons was served on Vodacom on 14 July 2005.)

Having concluded that the contract did not bind Vodacom and that Mr Makate's claim had prescribed, the High Court deemed it unnecessary to consider the remaining issues, including whether the common law should be developed. It dismissed Mr Makate's claim with costs. Both the High Court and the Supreme Court of Appeal dismissed his subsequent application for leave to appeal. He eventually approached the Constitutional Court for leave to appeal.

3 Issues before the Constitutional Court

There were two key issues that the Constitutional Court had to decide. The first was whether the agreement concluded by Mr Geissler with Mr Makate was binding on Vodacom – i.e. was the ostensible authority of Mr Geissler to conclude a binding contract on behalf of Vodacom properly pleaded and established by Mr Makate? The second key issue related to whether Mr Makate's claim had prescribed.

4 Main judgment by Jafta J

4.1 *The issue of ostensible authority*

The main judgment delivered by Jafta J found that the High Court was correct in its conclusion that Mr Makate had successfully established the existence of an agreement between himself and Mr Geissler. Regarding whether Mr Geissler's ostensible authority to conclude the contract on behalf of Vodacom was properly pleaded, the main judgment held that the High Court had followed the approach that Mr Makate relied on estoppel which, as a shield to a defence of lack of authority, can only be pleaded in replication. It held that the High Court's approach to the pleadings in this regard was incorrect and had conflated ostensible authority with estoppel (par 44).

The main judgment found that although South African courts have at times regarded ostensible authority and estoppel as the same thing (*South African Broadcasting Corporation v Coop* [2009] ZASCA 30; 2006 (2) SA 217 (SCA) and *NBS Bank Ltd v Cape Produce Company Pty Ltd* [2001] ZASCA 107; 2002 (1) SA 396 (SCA)), these two concepts are distinct. Each of them has its own unique elements with the exception of representation by the principal (whether express or by conduct) which is common to both estoppel and ostensible authority (par 46).

The main judgment held that ostensible/apparent authority is distinct from an estoppel in that the former refers to a situation where a misrepresentation creates an appearance that the agent has the power to act on the principal's behalf whereas the latter is not a form of authority at all (par 46). Jafta J emphasised the point that whereas estoppel may be used as a shield against the defence that a party does not have actual authority, ostensible/apparent authority refers to the agent's authority as it appears to others. Citing a pronouncement by Lord Denning MR in the leading case of *Hely-Hutchinson v Brayhead Ltd* ([1968] 1 QB 549 (CA)), the main judgment held that for ostensible authority to be established all that must be shown is that the principal, either by words or by conduct, "has created an appearance that the agent has the power to act on its behalf" (par 47). Jafta J further explained as follows (par 47):

"The means by which that appearance is represented need not be directed at any person. In other words, the principal need not make the representation to the person claiming that the agent had apparent authority. The statement indicates the absence of the elements of estoppel. It does not mention

prejudice at all. That statement of English law was imported as it is into our law in *NBS Bank* and other cases that followed it.”

The main judgment further found that, while ostensible/apparent authority refers to the authority of the agent as it appears to others, estoppel is simply a rule that prevents the principal (who has represented to the third party that the agent has authority) from denying that he gave authority to the agent (par 45 and par 75). It confirmed the four essential elements of estoppel as the following:

- (a) representation made in words or by conduct, including silence or inaction;
- (b) the representation must have been made by the principal to the third party that raises estoppel;
- (c) the principal must reasonably have expected that its conduct may mislead the third party; and
- (d) the third party must reasonably have acted on the representation to its own prejudice.

Regarding whether Mr Geissler’s ostensible authority had been established, the main judgment held that the High Court had incorrectly applied the test for estoppel instead of applying the test (essential elements) for ostensible authority and had, consequently, arrived at an incorrect conclusion. The correct test to be applied was whether as it appears to others, Mr Geissler had the authority to act on Vodacom’s behalf. This question must be considered with the purpose of achieving justice to all the parties concerned (par 64–65).

Applying the above test for ostensible authority, the main judgment held that Mr Makate had indeed established that Mr Geissler had ostensible authority to bind Vodacom. In this regard, it considered Mr Geissler’s position as a director of Vodacom, the power that he had in respect of the introduction of new products, the organisational structure within which he exercised his power and the process which had to be followed before the introduction of new products at Vodacom.

Having found that Mr Geissler’s ostensible authority was properly pleaded and established, the main judgment considered it superfluous to consider whether the common law could be developed in terms of section 39(2) of the Constitution.

4.2 *The issue of prescription*

The main judgment considered the finding made by the High Court that Mr Makate’s claim had prescribed due to the action having only been instituted after the lapse of more than three years from the time the debt arose. Having initially requested the High Court to address the issue of prescription by developing the common law of contract through infusion of the Constitutional values of *ubuntu* and good faith into it, Mr Makate went further to ask the Constitutional Court to invoke section 39(2) of the Constitution to declare that the Prescription Act (68 of 1969) unduly limited his right of access to court by declaring that his claim had prescribed (par 29).

Jafta J acknowledged that the present case offered an opportunity to interpret the Prescription Act (68 of 1969) in terms of section 39(2) of the Constitution. He observed that, while the High Court had interpreted the relevant provisions relating to prescription based on pre-Constitution authorities anchored on the supremacy of Parliament, section 39(2) introduced a different approach to statutory interpretation (par 30). He further noted that whether or not Mr Makate's claim had prescribed depended on the proper interpretation of section 10(1) read with sections 11(d), 12(1) and 12(3) of the Prescription Act (68 of 1969) (par 32). Section 10(1) of the Prescription Act (68 of 1969) provides that a debt will be extinguished by prescription after the lapse of the period designated for such debt in terms of the relevant law; section 11(d) declares three years as the prescription period for any debts not covered by section 11(a), (b) and (c) except where an Act of Parliament provides otherwise; section 12(1) provides that prescription will start to run immediately when the debt becomes due, but subject to the provisions of subsection (2) and (3); and section 12(3) provides that a debt is not deemed to be due until the creditor knows the identity of the debtor and the facts from which the debt arises.

The main judgment found that the High Court's decision that Mr Makate's claim had prescribed was based on its interpretation of the word "debt", which it found to have a wide meaning (par 82). The High Court had relied on the judgment of the then Appellate Division in *Desai NO v Desai* (1996 (1) SA 141 (A)) and the decision of the then Cape of Good Hope Division in *LTA Construction v Minister of Public Works and Land Affairs* (1994 (1) SA 153 (A)) to arrive at that conclusion. The relevant passage in the *Desai* case relied upon by the High Court to ascribe "debt" a wide meaning read as follows:

"S10(4) of the Prescription Act 68 of 1969 ("the Act") lays down that a 'debt' shall be extinguished after the lapse of the relevant prescriptive period, which in the instant case was three years (see section 11(d)). The term "debt" is not defined in the Act but in the context of section 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something" (see par 83).

This interpretation of the *Desai* decision, according to Jafta J, suggests that all claims requiring a party to do something or to refrain from doing something, irrespective of what that "something" is, amount to a "debt" as contemplated in section 10(1). However, Jafta J noted that there is nowhere in the *Desai* judgment where the Appellate Division made reference to anything in section 10(1) that showed that "debt" was used in the sense purported by the High Court (par 84).

In order to determine whether the pre-constitutional interpretation of the relevant provisions of the Prescription Act (68 of 1969) remained good law, Jafta J looked to section 39(2) of the Constitution. Section 39(2) provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". He ruled that the lack of an explanation as to why the High Court had interpreted "debt" so broadly was significant considering that this interpretation was inconsistent with previous decisions of the same court that accorded the word a more restricted

meaning, including those referred to in the *Desai* case (par 85). If it was the intention of the court in *Desai* to stretch the meaning of “debt” beyond the one ascribed to it in the earlier cases, Jafta J concluded, this could not be deduced from the submissions made by the parties nor from any issues arising from the case. He further ruled that having such intent would have meant that the court in *Desai* failed to take the Constitutional imperatives relating to the interpretation of statutes in section 39(2) into account (par 86).

Quoting the ruling of Van der Westhuizen J in *Frazer v Absa Limited* (2007 (3) SA 484 (CC)) regarding the role of the courts in interpreting legislation, Jafta J stressed the centrality of the Constitution in the interpretation of statutes by the courts, whose role he said is to promote the spirit, purport and objects of the Bill of Rights contained in section 39(2). He further expressed support for the view that section 39(2) created a new rule for construing legislation and that this rule is mandatory (par 87). This means that the courts must always bear the contents of section 39(2) in mind when executing their interpretative role and that if the provision in question has implications for the Bill of Rights, the obligation in section 39(2) is triggered. He held that where the provision to be interpreted is capable of more than one meaning, the objects of the Bill of Rights are advanced if the meaning adopted does not limit a right in the Bill of Rights (par 88–89).

Reverting to section 10(1) read with sections 11 and 12 of the Prescription Act (68 of 1969), Jafta J held that these provisions restricted the rights guaranteed by section 34 of the Constitution. In these circumstances, the High Court was, therefore, compelled to give effect to section 39(2) regardless of whether or not the parties had so requested. This was because the operation of section 39(2) is not contingent upon the wishes of the parties. The duty embodied in the section is activated the moment the provision under interpretation affects the Bill of Rights (par 90).

The main judgment referred to earlier Constitutional Court rulings in *Road Accident Fund v Mdeyide* (2011 (2) SA 26 (CC)) (This case dealt with the question of whether an obligation constituted a debt envisaged by the Prescription Act (68 of 1969). The court held that the effect of failing to meet a prescription deadline in terms of the Prescription Act amounted to denying a litigant access to a court) and *South African Transport and Allied Workers Union (SATAWU) v Moloto NO* (2012 (6) SA 249 (CC)). It held that where the relevant provisions of the Prescription Act (68 of 1969) apply to a specific case, the statute must be interpreted in accordance with section 39(2). Furthermore, it said the term “debt” must be accorded an interpretation that is least invasive of the right of access to the courts. The main judgment reaffirmed the position in the *SATAWU* case that “[c]onstitutional rights conferred without express limitation should not be cut down by reading implicit limitations onto them ...” (par 91).

Concerning the issues before the Constitutional Court, the main judgment found that there was no need to establish the precise meaning of “debt” contemplated in section 10 of the Prescription Act (68 of 1969) since Mr Makate’s claim fell outside the scope of the term as discussed in some of the earlier cases alluded to above. It found that rather than request enforcement of any of the obligations arising from a “debt”, Mr Makate had sought an

order compelling Vodacom to negotiate with him to determine compensation due to him for the use of his idea (par 92).

In the end, the main judgment found that the *Desai* case was wrong in so far as it went beyond what was decided in the cases that preceded it in determining the meaning of “debt”. Nothing in those cases suggested that “debt” has such a wide meaning as to cover every obligation to do something or refrain from doing something besides payment or delivery (par 93). The main judgment concluded that the High Court had attached an incorrect meaning to the term “debt”, and that the debt contemplated in section 10 of the Prescription Act (68 of 1969) was not applicable to the claim before it.

5 Concurring judgment by Wallis AJ

5.1 *The issue of ostensible authority*

The concurring judgment delivered by Wallis AJ agreed with the main judgment that Mr Makate had successfully proved the existence of the agreement concluded by him and Mr Geissler, and that the key issue was, therefore, whether Vodacom was bound by the agreement. The concurring judgment further agreed that, in order to establish that Vodacom was bound, it was crucial for Mr Makate to prove that Vodacom had represented that Mr Geissler had ostensible authority to conclude the contract with him (par 182).

However, the concurring judgment differed with the main judgment regarding the jurisprudential characterisation of ostensible authority. Whereas the main judgment held that ostensible authority and estoppel are two different legal concepts, the concurring judgment held that ostensible/apparent authority is a form or instance of estoppel arising from a representation of authority. With reference to some leading decisions by English courts (*Freeman & Lockyer (a firm) v Buckhorst Park Properties (Mangal)* ([1964] 1 All ER 630); and *Armagas Ltd v Mundogas SA: The Ocean Frost* ([1985] 3 All ER 385)) as well as some judgments by South African courts both before and after *NBS Bank Ltd v Cape Produce Company Pty Ltd (supra)*, Wallis AJ argued that the law has consistently regarded ostensible/apparent authority as the equivalent of estoppel. (For the relevant South African case law authorities, see *Strachan v Blackbeard and Son* (1910 AD 282); *Monzali v Smith* (1929 AD 382); *West v Pollak and Freemantle* (1937 TPD 64); *Insurance Trust & Investments v Mudaliar* (1943 NPJ 45); *Clifford Harris (Rhodesia) Ltd v Todd NO* (1955 (3) SA 302 (SR)); *Service Motor Supplies (1956) (Pty) Ltd v Hyper Investments (Pty) Ltd* (1961 (4) SA 842 (A)); *Connock's (SA) Motor Co Ltd v Sentraal Westelike Kooperatiewe Maatskappy Bpk* (1964 (2) SA 47 (T)); *Inter-Continental Finance & Leasing Corp (Pty) Ltd v Stands 56 and 57 Industria Ltd* (1979 (3) SA 740 (W)); *Glofinco v Absa Bank* ([2002] ZASCA 91); (2002 (6) SA 470 (SCA)); and *MEC for Economic Affairs, Environment and Tourism v Kruizenga* ([2010] ZASCA 58); (2010 (4) SA 122 (SCA)).

Wallis AJ further noted that most academic writers also held the view that ostensible/apparent authority is the equivalent of estoppel (Kerr *The Law of Agency* 3ed (1991); De Villiers and Macintosh *The Law of Agency in South*

Africa 3ed (1981); Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979); De Wet and Yeats *"Kontraktereg en Handelsreg"* 4ed (1978); Wille and Millin's *Mercantile Law of South Africa* 18 ed (1984); and Wille's *Principles of South African Law* 9ed (2007)).

Therefore, according to the concurring judgment, in the absence of Mr Geissler's actual authority to conclude the contract on behalf of Vodacom, Mr Makate had to prove that Vodacom had represented to him that Mr Geissler had ostensible authority; that he had reasonably acted upon that representation; and that he had suffered prejudice as a result (par 155–156). In other words, it was necessary for Mr Makate to establish estoppel. This is different from the approach taken by the main judgment that all that a party alleging or pleading ostensible authority needs to prove is that the principal has, by words or conduct, "created an appearance that the agent has the power to act on its behalf" and that "nothing more is required" (par 47).

Applying its analysis of the legal position regarding ostensible authority to the facts, the concurring judgment found that Vodacom represented to Mr Makate that Mr Geissler had the necessary authority. Mr Makate reasonably acted on the basis that Mr Geissler had authority to conclude the agreement with him in view of Mr Geissler's position within Vodacom. He suffered prejudice as a result of Vodacom's use of his idea in a false belief that it would compensate him. The concurring judgment, therefore, concluded that Mr Geissler had ostensible authority to conclude a binding contract with Mr Makate on behalf of Vodacom and that Vodacom was estopped from denying that authority (par 184).

On the issue of whether ostensible authority (which the concurring judgment deemed to be the equivalent of estoppel) had been properly pleaded, the concurring judgment held that ostensible authority can be invoked not only as a shield, but to create a cause of action as well (par 122). It dismissed the High Court's assertion that ostensible authority can only be pleaded in replication and found that Mr Makate had properly pleaded ostensible authority. This accords with the view taken by the main judgment that the High Court erred in holding that ostensible authority can only be pleaded in replication.

Having held that Mr Geissler's ostensible authority was properly pleaded and established, the concurring judgment concluded that there was no need to develop the common in terms of section 39(2) of the Constitution as suggested by Mr Makate's counsel.

5.2 *The issue of prescription*

In the concurring judgment, Wallis AJ agreed with the main judgment on the question of prescription. He maintained that the obligation in issue in the present case, namely to negotiate reasonable remuneration, was not a debt at all since nothing would be due to the applicant from the respondent until the negotiations had been finalised. He reasoned that while the Prescription Act (68 of 1969) allows debts to be extinguished by prescription the same way they would be by payment or performance, in the current case nothing was yet in existence that could be extinguished (par 186). He concluded that

no debt was due before commencement of the present case which, in turn, meant that there could be no question of prescription.

In further explaining the court's ruling, Wallis AJ pointed out that the meaning that has been accorded to "debt" in the context of the Prescription Act (68 of 1969) is: "[s]omething owed or due, something (as money, goods or service) which one person is under an obligation to pay or render to another; or a liability or obligation to pay or render something; the condition of being so obligated" (par 187). He agreed with the position taken by the main judgment that the suggestion in the *Desai* case that "debt" has a wider meaning than the one set out above was wrong.

Referring to *Absa Bank Limited v Keet* (2015 (4) SA 474 (SCA)), the concurring judgment drew attention to the fact that not every right to approach a court for relief amounts to a debt for purposes of extinctive prescription. Notably, in the *Keet* case, a distinction was drawn between acquisitive prescription and extinctive prescription. Whereas the former involves the acquisition (along with the corresponding loss) of real rights such as ownership, the latter deals with the termination of debts and their related rights of action, i.e. personal rights (par 190).

Wallis AJ further averred that where a continuing wrong is concerned, there could be no question of prescription despite the wrong arising from a past single act. This, he asserted, is based on a well-established principle that even though the original wrongful act may have occurred at a past time, the wrong itself continues for so long as it is not abated (par 192).

The concurring judgment concluded that once an agreement had been reached on the remuneration due to Mr Makate, his right to recover the remuneration from Vodacom would arise. This would be the debt in respect of which prescription would have run. As no such agreement had been reached, the issue of prescription did not come into the picture (par 194).

6 The court order

The Constitutional Court granted Mr Makate leave to appeal and the appeal was upheld with costs. It declared that Vodacom was bound by the agreement concluded by Mr Makate and Mr Geissler. Vodacom was ordered to commence negotiations in good faith with Mr Makate to determine the reasonable amount of compensation for the use of his idea in terms of the agreement within 30 calendar days from the date of the order. In the event that the parties failed to reach an agreement, the Constitutional Court ordered that the matter be referred to Vodacom's Chief Executive Officer for his determination of the amount within a reasonable period.

7 Further discussion

It is trite that for a company director or another agent to enter into a binding agreement on behalf of the company, he must be having authority to do so. In *Makate v Vodacom*, the Constitutional Court has affirmed a number of long-standing agency principles regarding authority to represent a company. These include that such authority may be an actual authority,

ostensible/apparent authority or usual authority. (See par 45, in which Jafta J referred with approval to Kerr *Law of Agency* 4ed (2006) 27 on the issue of actual authority. See also Cassim FHI, Cassim MF, Cassim R, Jooste, Shev and Yeats *Contemporary Company Law* (2012) 188 at which the learned authors point out that in some cases authority to represent the company may be given *ex post facto* through ratification).

Citing Lord Denning MR's judgment in the leading English case of *Hely-Hutchinson v Brayhead Ltd* (*supra*) as authority, both the main judgment and the concurring judgment in *Makate v Vodacom* ruled that a company will be bound where it has given the director (agent) actual authority to represent it in a particular transaction either expressly or impliedly. Express authority arises when the company confers authority on the director concerned by express words (*Hely-Hutchinson v Brayhead Ltd* (*supra*)). Even though the Constitutional Court in *Makate v Vodacom* did not make a pronouncement on the effect of the *Turquand* rule on representation, it is noteworthy that where the express authority of a director to represent the company in a transaction is subject to compliance with an internal procedural requirement, the common law *Turquand* rule and section 20(7) of the Companies Act (71 of 2008) ("the statutory *Turquand* rule") will operate to protect a third party that is acting in good faith (Cassim *et al Contemporary Company Law* 188). The company would, in such circumstances, be bound by the contract notwithstanding the non-compliance with an internal procedural requirement.

The Constitutional Court also confirmed the legal position that implied authority is one that is inferred from the principal's (company's) conduct and the circumstances of each case (see *Hely-Hutchinson v Brayhead Ltd* (*supra*)). In *Hely-Hutchinson v Brayhead Ltd* (*supra*), for example, the court expressed the view that when a board appoints one of its members as managing director, it confers on him the implied authority as well as the ostensible authority to do everything that falls within the scope of the managing director's office. Implied authority may, therefore, also take the form of usual authority (see Cassim *et al Contemporary Company Law* 188). In terms of usual authority, a director's authority to represent the company may be determined by reference to the particular director's position within the company as well as the duties and responsibilities associated with that position.

In *Makate v Vodacom*, the Constitutional Court further confirmed the long-standing legal position that a third party who entered into an agreement with an agent may prevent the company as principal from denying that it had not given the necessary authority, by pleading estoppel (Par 45; see also *Freeman & Lockyer (a firm) v Buckhorst Park Properties* (*supra*)). In such an event, the third party will have to prove the essential elements of estoppel as discussed in paragraph 4.1 above.

One significant change that the decision of the Constitutional Court in *Makate v Vodacom* has brought to South African law is that it has made it clear that ostensible/apparent authority is different from estoppel. It, thus, overrides earlier court decisions and academic commentary that ostensible/apparent authority is a form of estoppel. The decision has altered the definition of ostensible/apparent authority and distinguished its essential requirements from those of estoppel. Notably, the Constitutional Court held

that although ostensible/apparent authority and estoppel may in most instances arise out of the same set of facts, they are two separate concepts and have different essential elements. According to the main judgment, for one to be able to rely on ostensible/apparent authority one simply needs to show that the principal, either by words or by conduct, has created an appearance that the agent has the power to act on its behalf, and nothing more. The only element that is common to both concepts is a representation by the principal. It would, therefore, not be necessary for a party wishing to rely on ostensible/apparent authority to prove further elements of estoppel, namely that the principal reasonably expected that its conduct may mislead third parties, reliance by the third party on the representation, the reasonableness of the reliance and the consequent prejudice to the third party.

It is submitted that this aspect of the main judgment in *Makate v Vodacom* is quite problematic in so far as it excludes the elements of reasonableness and reliance from the test of ostensible authority. The company would, as a result, be bound even if the third party was not induced by the representation or was aware or ought to have been aware that the company director or the purported representative lacked authority.

A further notable aspect of the Constitutional Court's decision in *Makate v Vodacom* is that the court clarified that ostensible/apparent authority may be used to create a cause of action in the absence of actual authority. This trumps earlier court decisions and academic commentary that asserted that ostensible/apparent authority, as a form of estoppel, can only be pleaded in replication, i.e. as a shield when the company raises the defence that the director or another purported representative of the company did not have the necessary authority to conclude the contract on its behalf. It is, therefore, possible for a plaintiff, who foresees that the defendant company will plead that the director or other purported representative of the company lacked authority, to plead ostensible/apparent authority at the outset rather than to wait for the defendant to first plead that the agent lacked authority. This further enhances the protection of third parties. The Constitutional Court should be applauded for taking a pragmatic and logical approach in this regard.

A further issue that the Constitutional Court had to determine in this case was the correctness of the High Court's decision to ascribe a meaning to the term "debt" that went beyond the interpretation previously given by the same court. As pointed out above, in the main judgment Jafta J held that nothing in the *Desai* decision, which was cited as the basis for the High Court's ruling, suggested that "debt" was intended to assume the wider meaning assigned to it. He further held that "debt" in the context of the Prescription Act (68 of 1969) meant "something owed or due". Likewise, in the concurring judgment, Wallis AJ criticised the High Court's ruling and held that Vodacom's obligation to negotiate reasonable remuneration as claimed by Mr Makate was not yet a "debt" since there was nothing due to the applicant until the negotiations had been finalised. All this is in line with section 12(1) of the Prescription Act (68 of 1969) which provides that prescription will commence to run immediately when "the debt is due".

The position taken by the Constitutional Court in *Makate v Vodacom* is also in accordance with a number of earlier decisions by South African courts including, for example, *Truter v Deyssel* (2006 (4) SA 168 (SCA)). In the *Truter* case, the court held that “[f]or purposes of the [Prescription] Act, the term ‘debt due’ means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim” (See also *Evins v Shields Insurance Co Ltd* (1980 (2) SA 814 (A) 838D–H) and *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* (1991 (1) SA 525 (A)).

Another significant aspect of the ruling in *Makate v Vodacom* is that it emphasises the obligation on a court interpreting legislative provisions to take section 39(2) of the Constitution into account. In the post-Constitution order in South Africa, the court must always be mindful of whether or not the provision it is interpreting will affect the Bill of Rights or not. If it does, the court is compelled to adopt an interpretation that gives effect to the spirit, purport and object of the Bill of Rights. In this way, section 39(2) has reconfigured the rules of interpretation such that, irrespective of the wording of a particular provision or the purpose for which it was originally enacted, the provision will always be subject to section 39(2) as long as it impacts on the Bill of Rights.

8 Conclusion

This note has discussed the Constitutional Court’s judgment in *Makate v Vodacom* regarding the authority of a director to conclude a contract with a third party on behalf of the company. It has examined the main judgment delivered by Jafta J and the concurring judgment delivered by Wallis AJ, focusing on the legal nature of ostensible authority in the absence of actual authority as well as the prescription of corporate debts. It further considered the impact of the Constitution in the area of prescription. It is submitted that whereas the Constitutional Court has affirmed the long-standing agency principles applicable to a director or other officer to bind the company, it has significantly altered the pre-existing legal position regarding the jurisprudential nature of ostensible/apparent authority. Contrary to a long-standing line of case law authorities and the view held by most academic commentators that ostensible/apparent authority is a form of estoppel, the Constitutional Court, in its main judgment, has emphasised that ostensible/apparent authority and estoppel are two separate concepts that have different essential elements. In order to be able to rely on ostensible/apparent authority, one only needs to establish that the company (principal) has created an appearance that the purported representative has authority to act on its behalf. It is not necessary to prove the requirements of estoppel. In addition to being a shield against a defence of lack of the necessary authority, the ostensible/apparent authority may be used to create a cause of action in the absence of actual authority. The effect of the judgment is to strengthen the protection of third parties dealing with the

company. It appears, however, that in seeking to protect third parties, the Constitutional Court went a little bit too far when it excluded the elements of reasonableness and reliance from the test of ostensible/apparent authority.

On the question of prescription, the Constitutional Court has confirmed the position taken in a number of previous judgments to the effect that prescription will start to run only when the debt becomes due and payable. It dismissed, rightly so it is submitted, the suggestion that the term “debt” must be interpreted so widely as to include situations where the obligation to act or to refrain from acting has not yet arisen. Instead, the Constitutional Court ruled that such a wide interpretation of “debt” deviated from the earlier court decisions without any explanation or justification.

The note also discussed how the Constitutional Court considers section 39(2) of the Constitution to be central to the interpretation of statutory provisions. Thus, a court interpreting a statutory provision should consider whether the provision in question impacts on the Bill of Rights and, if it does, the court is compelled to interpret the provision to give effect to the spirit, purport and objects of the Bill of Rights. The Constitutional Court also emphasised that it is not necessary for the litigants to make a request to the court to take section 39(2) into account before it can do so. It further said that the objects of the Bill of Rights are advanced where the meaning adopted does not restrict a right contained in the Bill of Rights.

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