

SOUTH AFRICA / JUDGMENT

Optimal Outcomes (Pty) Ltd v Go Canna Africa Ltd and Another (2021/1568) [2025] ZAGPPHC 376 (2 April 2025)

[2025] ZAGPPHC 376

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

2021/1568

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

numbers: 2021/1568

Date

of hearing: 26 and 27 March 2025

Date

delivered: 2 April 2025

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

2/4/2025

SIGNATURE:

In

the matter between:

OPTIMAL
OUTCOMES (PTY) LTD
Plaintiff
and
GO
CANNA AFRICA LTD
First Defendant
CRYO-SAVE
SOUTH AFRICA (PTY) LTD
Second Defendant

This
order is made an order of court by the Judge whose name is reflected
herein, duly stamped by the Registrar of Court, and is
submitted to
the parties or their legal representative by email. This order is
further uploaded to the electronic file of Caselines
by the Judge or
his Registrar. The date of this order is deemed to be 2 April 2025.

JUDGMENT

SWANEPOEL J:

- [1] This matter came before me as a commercial court case in terms of the Commercial Court Practice Directive of 6 October 2020. The plaintiff claims an order that the first defendant shall take all steps required to transfer 2% of its shares to the plaintiff, that the first defendant be ordered to effect the necessary changes to its company records to reflect the plaintiff's shareholding, and to provide plaintiff with a valid share certificate within 14 days.
- [2] The plaintiff claims payment of R 10 000 000 from the defendants jointly and severally, plus interest at the rate of 7.25% a tempore morae. It also seeks costs on an attorney/client scale, payable by defendants jointly and severally. The summons was served on both defendants at the same address. The first defendant did not oppose the action, and it is only the second defendant that is before me.
- [3] The facts of the case are uncontroversial. During approximately the beginning of 2019 the plaintiff, who was represented by one Mr. Gerhard Bester ("Mr. Bester"), was approached by Mr. Gerhard Naude ("Naude"). Naude was seeking assistance with transaction advisory services, with a view to developing the business of the first defendant. Mr. Bester came to know Naude as being a representative of the first defendant. First Defendant shared business premises with the second defendant.
- [4] During September 2019 Naude approached Bester seeking assistance in obtaining a R 1 m loan for the first defendant. Naude said that the money was required to finance a joint venture between the first defendant and a company called House of Hemp. The plaintiff was willing to put up the money, not as a loan, but as the purchase price for a 2% shareholding in

the first defendant. The parties anticipated that the first defendant would be listed on the South African Stock Exchange, and that it would achieve a market capitalization of not less than R 500 m within one year. Nevertheless, the plaintiff

required some manner of guarantee for its investment.

[5] Consequently, the plaintiff says, the first and second defendants, duly represented by Naude, entered into a written share purchase agreement with the plaintiff with the following material terms:

[5.1] The plaintiff undertook to pay R 1 m to the first defendant in exchange for 2% of the shareholding in the first defendant;

[5.2] In the event that the first defendant did not achieve a minimum market capitalization of R 500 m within one year the first defendant, and the second defendant as guarantor, would pay the plaintiff the sum of R 10 m.

[6] The agreement was signed by Naude, and by Mr. Bester. The agreement reflects that Naude signed the agreement twice on behalf of the first defendant ("Seller"), and there is no signature on behalf of the guarantor, the second defendant. The plaintiff says that this was an error common to the parties as a result of "cutting and pasting" whilst preparing the contract, and that Naude's one signature was appended to the document on behalf of the guarantor.

The plaintiff seeks rectification of the agreement to correct the allegedly incorrect description of both the first and second

defendants as "seller" instead of the first defendant as 'Seller' and the second defendant as 'guarantor'.

[7] Having signed the agreement, the plaintiff duly transferred R 1m to the first defendant. The shares were never transferred to the plaintiff, and the first defendant never achieved the minimum market capitalization of R 500 m. When the second defendant was called upon to pay the R10 million to the plaintiff in terms of the guarantee, it denied being party to the agreement on the basis that Naude was not authorized to represent it. It is not in dispute that, at the time,

Naude was an unrehabilitated insolvent, and was not a director of the second defendant.

[8] The crux of the matter is whether Naude had the authority to represent the second defendant. If he were authorized to act for the second defendant, the main claim and the rectification claim is clearly good in law. If he was not, then the main claim and the rectification claim must fail. There could then not have been an error common to the parties.

- [9] In addition to the authority defence, the second defendant raised a new defence in its responsive statement, to the effect that the transaction upon which the plaintiff relies is a guarantee for purposes of section 45 of the Companies Act, 2008, and that, unless there is a special resolution by the board of the second defendant, which is adopted within the previous two years, the agreement is void. This defence was not raised in the second defendant's plea, an issue that I will deal with hereunder.
- [10] At the commencement of the matter, counsel for the plaintiff, Mr. Stevens, made it clear that the plaintiff accepted that Naude was not actually authorized to act for the second defendant. The plaintiff's case is premised on the contention that Naude had ostensible (or apparent) authority to act for the second defendant.
- [11] In support of its case, the plaintiff filed an affidavit deposed to by Mr. Bester. In terms of the commercial rules, the affidavit is the evidence in chief of the plaintiff, and the only oral evidence allowed is cross-and-re-examination of the witness who deposed to the affidavit. The second defendant delivered a statement that was not commissioned. At the outset I took up this issue with the second defendant's counsel, Mr. Hoffman, who advised me that he intended to call the deponent, who could then confirm the affidavit under oath. That seemed to me to be a solution to the non-commissioning issue, and I allowed the matter to proceed.
- [12] The plaintiff's sole witness was Mr. Bester. When Mr. Hoffman was given an opportunity to cross-examine Mr. Bester he declined to do so. The plaintiff then closed its case, as did the second defendant, without the latter leading any witnesses. The result is that the only evidence in the matter is that contained in the affidavit of Mr. Bester.
- [13] Before I deal with the evidence presented by Mr. Bester, it is perhaps appropriate that I set out the principles applicable to ostensible authority. In *NBS Bank Ltd v Cape Produce Co (Pty) Ltd*[1], and with reference to *Hely-Hutchinson v Brayhead Ltd* and *Another*[2] the court explained the basis for holding a party liable on the basis of ostensible authority as follows:
[3]

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

- [14] The Court also explained that the representee must have acted reasonably in forming the impression that he/she did. What has to be established by a person relying on ostensible authority is the following[4]:

[14.1] A representation by word or conduct;

[14.2] made by the principal (and not merely by the agent) sought to be held liable;

[14.3] in a form that the representor would reasonably expect outsiders to act upon; and,

[14.4] That the representee actually relied upon the representation.

[14.5] That the reliance on the representation was reasonable.

[14.6] That there was prejudice to the person relying on the representation.

[15] The facts in this matter are in substance the same as the facts in *Afrasia Special Opportunities Fund (Pty) Ltd v Royal Anthem Investments 130 (Pty) Ltd*[5]. In that case the applicant launched an application claiming repayment of a loan from seven respondents. The application was granted, but was followed by a rescission application by Royal Anthem (the sixth respondent). The basis of the claim against Royal Anthem was a 'limited guarantee' allegedly executed in the applicant's favour. As security for the loan two immovable properties were hypothecated.

[16] Royal Anthem alleged that the person who was alleged to have represented it in the transaction, one Paget, had not been authorized to do so. At the relevant time the company had two directors, Paget being one of them. Paget forged the other director's signature to a purported shareholder's resolution authorizing the transaction. Notwithstanding that Paget was a director of the respondent, that he had taken control of the affairs of the company, and that he supported his claim that he was authorized to act by producing a resolution by shareholders authorizing the transaction, the Court asked the question: what evidence is there that the company clothed Paget with apparent (ostensible) authority to bind it to the transactions, or to convey to third parties that the board had made a decision to commit to the transactions.

[17] The Court considered the evidence for the proposition that Paget had ostensible authority, and said[6]:

"[44] The difficulty is that AfrAsia did not adduce any evidence in support of the contention that Paget was clothed with apparent authority by Royal Anthem either to bind it in the transactions, or to convey a decision by its board to commit to the transactions; or that it relied on any such representation in entering into the transactions...It was not sufficient for AfrAsia merely to point to facts that could notionally have been relied upon by it as representations by Royal Anthem of Paget's authority to represent it; it had to establish representations upon which it actually did rely."

- [18] What then does the evidence in this case show? On 23 August 2019 Naude, purporting to act for the first defendant, entered into an agreement with CAPIC, a company in which the plaintiff held a 49% shareholding, and of which Mr. Bester was managing director. In terms of the agreement CAPIC would render certain financial advisory services for and on behalf of the first defendant. Naude was described as being the "Group Founder". The discussions between CAPIC and Naude were all held at the offices of the first and second defendants.
- [19] Naude held himself out to be the "effective owner" of the second defendant. He said that he had purchased a majority shareholding in the second defendant, as Mr. Bester puts it, "with his shares from a company called Go Life". The exact meaning of the latter sentence is unclear.
- [20] Naude introduced the idea of financing the House of Hemp transaction through a R 1 m loan, and he later agreed to the transfer of 2% of the first defendant's shares. Various Whatsapp messages were exchanged between Naude and Mr. Bester, in which the share transfer agreement was discussed, and eventually agreed upon. Naude signed the agreement, ostensibly on behalf of both defendants.
- [21] Some three months after the agreement was concluded, Naude's personal assistant forwarded a completed questionnaire to the plaintiff ("Know your Client"), in which information relating to the first defendant was provided. The document listed Go Life International ("Go Life") as the first defendant's parent company, and it said that Go Life was situated in Mauritius. Both defendants were listed as subsidiaries of Go Life, and Naude was designated as the contact person for all of the companies. Naude was referred to as the Chief Executive Officer of the first defendant and its founder, but he was not a director, those being Messrs. Alt, Greenstreet and Linde. At more or less the same time, a mandate was sent to the plaintiff in which Naude was authorized to act in all respects for the first defendant.
- [22] Mr. Stevens, on behalf of the plaintiff, has urged me to take a holistic view of the matter, and to find that, in view of the fact that Naude seemed to be in control of the parent company and to have de facto control of the defendants, that the second defendant had represented that he was authorized to act on its behalf.
- [23] The difficulty with that proposition is that the information disclosed in the Know your Client document originated from Naude, and not from the second defendant. Furthermore, it was only sent to the plaintiff three months after the contract was signed, and did not result in the plaintiff concluding that Naude was authorized to act for the second defendant.
- [24] The aforesaid is the total sum of the evidence presented by the plaintiff. Quite properly, one would ask; where is the evidence that the second defendant made any representation by word or conduct that Naude was authorized to act on its behalf? There simply is none. The fact of the matter is that in entering into the agreement the plaintiff relied entirely upon the disclosures made by Naude, and as the authorities have made clear, the representation must be made by the principal and not by the agent himself.[7] The suggestion that the second defendant had, by allowing the meetings between Mr. Bester and Naude to be held at its

offices,

created the impression that Naude was authorized to act for it, is without any merit.[8] The same applies to the suggestion that the second defendant had, through its conduct, attracted an onus to prove that Naude was not authorized to act on its behalf. The onus of proving ostensible authority rests on the person seeking to rely on that ostensible authority.[9]

[25] Even had there been some manner of representation by the second defendant, the question must be asked how reasonable it would have been for Mr. Bester to assume that Naude was authorized to enter into what was clearly not a transaction in the normal course of the second defendant's business. In my view, on the evidence before me, Mr. Bester had no reasonable grounds to assume that Naude was authorized to enter into a guarantee agreement on behalf of the second defendant.

[26] That is really the end of the matter. I am, however, bound for the sake of completeness, to deal briefly with the issue raised by the second defendant relating to the provisions of section 45 of the Companies Act, 2008. The relevant portions of the section read as follows:

"45 Financial assistance

(1) In this section, 'financial assistance'

(a) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation;..

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorize the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-relater corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).

(2A).....

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorize any financial assistance contemplated in subsection (2), unless-

(a) the particular provision of financial assistance is -

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and,

(b) the board is satisfied that -

- (i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and
 - (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company."
- [27] Subsection 45 (6) provides that any agreement that is inconsistent with the provisions of section 45 is void, to the extent of its inconsistency.
- [28] The first question to be answered, is whether the second defendant is entitled to rely on the provisions of section 45 as a defence, having not raised the defence in its plea, but dealing with it squarely in its responsive statement of case. I was referred to the matter of Transnet SOC Ltd v Totalenergies Marketing South Africa (Pty) Ltd[10], a matter in which the Court heard a matter under the Commercial Rules, and was faced with a similar situation as in this case. There the Court said that procedurally, the proper approach would have been to require an amendment of the pleadings. However, the matter was being heard under rules aimed at determining a dispute "quickly, cheaply, fairly and with legal acuity", and that a Court should take a pragmatic approach.
- [29] I respectfully agree. In this matter the issue of section 45 was raised properly and timeously in the statement of defence. The plaintiff had an opportunity to engage with the issue, and it could have sought leave to supplement its statement of case and/or its affidavit. Such a request would hardly have been refused. In my view, the issue was properly raised and stands to be determined.
- [30] The plaintiff's answer to this defence is that there is no evidence that the first defendant is a related person as defined in section 2 of the Act. Section 2 (1) provides that a juristic person is related to another juristic person if either of them controls the other directly or indirectly as determined by subsection 2 (2), if one is a subsidiary of the other, or if a person controls each of them as determined in subsection 2 (2).
- [31] Subsection 2 (2) states that a person controls a juristic person if the juristic person is a subsidiary of the first person or, if the first person controls either a majority of the voting rights in the company or has the right to appoint directors who control a majority of the votes at a meeting of the board. One company is a subsidiary of another when the latter controls the majority of voting rights, or has the right to appoint directors who control a majority of the votes at a meeting of the board.
- [32] I agree with Mr. Stevens for the plaintiff. On the admissible evidence in this matter, there is no basis to find that the first and second defendants were related parties within the meaning of section
2. The provisions of section 45 do not, therefore, apply.

[33] Having held that the plaintiff has not proven ostensible authority, the claim must fail as far as the second defendant is concerned. As far as the first defendant is concerned, the agreement does not need to be rectified, as Naude has signed on behalf of the 'seller' which is correctly identified as being the first defendant. As far as costs are concerned, I have not been addressed on punitive costs, nor do I believe that punitive costs are appropriate.

[34] I make the following order:

AS AGAINST THE FIRST DEFENDANT:

[34.1] The first defendant is ordered to take all steps to transfer 2% of its shareholding to the plaintiff, and to sign all documents required to effect the necessary changes to the first defendant's company records to reflect the plaintiff's shareholding.

[34.2] The first defendant is ordered to effect the share transfer, and to provide the plaintiff with a share certificate reflecting the plaintiff's shareholding, within 14 days of this order.

[34.3] The first defendant shall pay the plaintiff R 10 000 000 (ten million rand), plus interest at the rate of 7.25% per annum calculated from date of judgment to date of payment.

[34.4] The first defendant shall pay the costs of the action.

AS AGAINST THE SECOND DEFENDANT:

[34.5] The claim is dismissed with costs on Scale C.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

Counsel for the plaintiff:

Adv. B Stevens

Instructed by:

Meyers & Partners Attorneys Inc

Counsel for the second defendant: Adv. J Hoffman

Instructed by:

Assheton-Smith Ginsberg

Date heard:

26 and 27 March 2025

Date of judgment: 2 April 2025

[1] NBS Bank Ltd Cape Produce Co (Pty) Ltd and Others 2002 (1) SA 396 (SCA)

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- [2] Hely-Hutchinson v Brayhead Ltd and Another [1968] 1 QB 549 (CA)
- [3] NBS Bank (supra) at para [25]
- [4] NBS Bank (supra) at para [26]
- [5] Afrasia Special Opportunities Fund (Pty) Ltd v Royal Anthem Investments 130 (Pty) Ltd [2016] 4 ALL SA 16 (WCC)
- [6] Afrasia (supra) at para [44]
- [7] See also: Glofinco v ABSA Bank Ltd t/a United Bank 2002 (6) SA 470 (SCA)
- [8] Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd 2012 (5) SA 323 (SCA)
- [9] Hosken Employees Benefits (Pty) Ltd v Slabe 1992 (4) SA 183 (W) at 190 I
- [10] Transnet SOC Ltd v Totalenergies Marketing South Africa (Pty) Ltd 2024 JDR 1559
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