Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO. 23380/07

In the matter between :

POINT 2 POINT SAME DAY EXPRESS CC	First Applicant
JACOBSON COLETTE	Second Applicant

And

STEWART, DAPHNE ELIZABETH	First Respondent
NETWORK COURIER LOGISTICS CC	Second Respondent

JUDGMENT

VAN ROOYEN AJ

[1] This is an application, based on a restraint of trade clause, for an interdict to prohibit the respondents from competing with the applicant ("P2P"), a close corporation, in providing a same-day courier broker service for a year after the first respondent ("Ms Stewart") cancelled her contract with the applicant. Although the year commenced on the 10th January 2007 the interdict still remains relevant for the remaining weeks up to 9 January 2008.

[2] On the 16th of June 2006 P2P and Ms Stewart entered into a written sales agent/independent contractor agreement. It was signed by one of the two members of P2P, Mr Claude Jean-Marie Calisse (" Mr Calisse") on behalf of P2P. The other member is Ms Colette Jacobson, the

second applicant ("Ms Jacobson"). The main business purpose of P2P is that of a same-day broker in the same day delivery business, specialising in the collection and delivery of small, medium and large shipments, nationally and internationally.

[3] Ms Stewart resigned as a contractor on the 9th of January 2007 and on the 2nd of February 2007 Mr. Calisse resigned as member of the First Applicant, which resignation was accepted by Ms Jacobson. Ms Jacobson is currently the sole member of P2P.It is common cause that Ms Stewart and Mr Calisse have been involved in a domestic life partner relationship for approximately the past 8 years.

[4] The restraint of trade clause reads as follows:

> *"DAPHNÉ STEWART NOT TO COMPETE*
>
> Daphné Stewart, having agreed to devote her to Point 2 Point Same Day Express cc's business, shall not deal in another business in direct competition to the services offered by Point 2 Point Same Day Express cc, on her own account in any way during the continuance of this agreement. Daphné Stewart will not engage, directly or indirectly, either for herself or as employee of any other party, in same day courier service, within RSA, for a period of 12 (twelve) months, after the termination of the agency created by this agreement, *without the written consent of Point 2 Point Same Day Express cc." (emphasis added)*

[5] The Respondents do not dispute that they are competing with P2P in the same business and in fact are doing business with P2P's biggest client, namely *OCS Worldwide* and another big client of the Applicant,*Consign It CC.*

[6] The Respondents rely on a letter dated 15th of January 2007 addressed to Ms Stewart by Mr. Calisse acting in his capacity as Operations/Sales Director on behalf of the First Applicant. The letter releases Ms Stewart from the restraint of trade clause. The Respondents allege that the contents of the release letter were discussed with Ms Jacobson and thereafter drafted, signed and furnished to Ms Stewart by Mr Calisse with the knowledge and approval of Ms Jacobson. The Respondents and Mr Calisse averred that this letter of release was thereafter sent in the daily mailbag to Ms Jacobson at her residential address in Olivedale, Randburg where she attended to the administration of the affairs of the First Applicant from home, which mailbag was conveyed between the operational address of the First Applicant in Jet Park, Boksburg and the administrative address of the First Applicant in Olivedale Randburg on a daily basis. The Respondents aver that the Second Applicant has at all material times been in possession of a copy of the letter. Mr. Calisse confirms this.

[7] These allegations were rejected as a fabrication by Ms Jacobson. Ms Jacobson avers that she had sight of the release letter for the first time on the 8th of October 2007 when her attorney faxed it to her. The release was faxed to her attorney on the 4th of October by Mr D W Morgan, the Respondents' erstwhile attorneys. A letter from Mr Morgan dated the 16th September 2007 mentioned the existence of the aforesaid *"release"* letter for the first time. Ms Jacobson instructed her attorney of record to obtain a copy of the letter, which he did and forwarded it to her on the 8th of October 2007. Ms

Jacobson states that the existence of the release, indeed, only came to her knowledge in September 2007. Furthermore, she points out that the heading of the *"release"* letter differs substantially from the letterhead normally used by P2P. So, for example, the letter may be compared with her acceptance of Mr Calisse's resignation dated the 5th February 2007. Ms Jacobson states that the aforesaid letter was written by Mr. Calisse without her knowledge or consent and without having been authorised by the First Applicant. Mr Calisse purportedly wrote the contentious letter on the 15th of January 2007, some two weeks prior to his resigning from the First Applicant.

[8] Ms Jacobson also states that she dealt with the day to day management of the personal finances and the administration of the First Applicant. She wrote termination letters, acceptance letters, reviews of performance by staff, signed leave letters etc. Mr Calisse attended to operations only and never interfered in the administration. Ms Jacobson's view is that the release letter was unilaterally written by Mr Calisse without her or the First Applicant's knowledge or consent and is therefore null and void. This is, according to her, substantiated by the fact that Mr Calisse and Ms Stewart worked together and have been so working together for a substantial period of time, while also being involved in a relationship for 8 years.

Evaluation

[9] Ms *Bedeker*, for the Respondents, argued, with reference to section

54 of the Close Corporations Act 69 of 1984 that since at the signing of the release Mr Calisse was a member of the close corporation, he acted as an agent in terms of section 54(1) and that the close corporation was bound by his act.Section 54 of the Act deals with the 'Power of members to bind corporation' and provides:

> '(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 in 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 business of a 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 he deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.'

In *J & K Timbers (Pty) Ltd t/a Tegs Timbers v GL & S Furniture Enterprises CC* 2005 SA 223 (N) Koen AJ said the following in regard to the section:

> "It seems clear that the intention of the Legislature is that every member of a corporation, merely as such, is to be an agent of the corporation for all purposes, including, even, a purpose which has nothing whatever to do with the carrying on of the actual business of the corporation, in relation to a person who is not a member of the corporation and is 'dealing with' the corporation - see *Henochsberg on the Close Corporations Act* para 54.1 at 149 in the commentary on s 54. That the member is such an agent is the case even if in fact no authority, express or implied, has been conferred upon him by the corporation, and the corporation is bound by the related act unless the third party knew, or ought reasonably to have known, of the absence of such power."
>
> "... the crux of respondent's opposition appears to arise from its belief that J K Sewpersad and its attorney could not have been entitled/authorised to sign the settlement agreement 'as no resolution was obtained from respondent to undertake such an act'. That belief is in my view misplaced5

> as the existence of a resolution or unanimous consent of all the members is not a prerequisite to a close corporation being bound to a third party by one of its members. Section 54 of the Act is specifically aimed at avoiding the application of, inter alia, the ultra vires doctrine and the doctrine of constructive notice which applies in respect of companies, insofar as the dealings by third parties with a close corporation is concerned - see the comments of J S McLennan in 'Contracting with Close Corporations' 1985 SALJ 322 (in respect of the wording of s 54 prior to its amendment).
>
> Even in the absence of a resolution from the remaining member (in casu Mr Gunpath Sewpersad), the respondent would be bound to the terms of the settlement agreement, in accordance with s 54(2) of the Act concluded by a member of that 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 he deals has, or ought reasonably to have had, knowledge of the fact that the member has no such power'. In casu there was no suggestion that this was the case. It accordingly follows, and I did not understand Mr Naidoo to suggest the contrary, that, had the settlement agreement been concluded by Mr L Ganapathia signing the agreement, the respondent would be bound to the terms of the agreement."

Prof Henning (ed) *Beslote Korporasiediens* states as follows:

> 5.14 Die bevoegdheid van 'n lid om 'n beslote korporasie te bind word in artikel 54 uiteengesit. Die effek is dat, sover dit bona fide buitestanders betref wat met die korporasie sake doen, elke lid van die korporasie 'n verteenwoordiger van die korporasie is.'n Handeling van 'n lid bind die korporasie teenoor so 'n buitestander wat met die korporasie sake doen, hetsy sodanige handeling verrig is vir die dryf van die besigheid van die korporasie al dan nie.
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> 5.15 Indien 'n lid se verteenwoordigingsbevoegdheid beperk of uitgesluit word, sal hy nogtans die korporasie teenoor die buitestander bind, tensy die buitestander kennis dra, of redelikerwys kennis behoort te dra, van die feit dat die lid in werklikheid geen bevoegdheid het om namens die korporasie in die besondere aangeleentheid te handel nie.

[10] I respectfully agree with the reasoning of Koen AJ and the conclusions reached by Prof Henning. The operation of section 54(1) is, however, not absolute. Section 54(2) makes it possible for a member of the close corporation to argue that the member who contracted with or as in the present matter, released, the third party was not authorised to do so.

The mere fact that the contract or act did not fall within the ordinary course of the business would not, in itself, be a defense. However, if the third party knows or ought reasonably to have known that the member did not have authority, it would be a defense. In this sense the doctrine of ostensible authority is introduced by section 54(2).

[11] The distinction between actual and ostensible authority was explained by Denning MR in *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A – G [[1967] 3 All ER 98) at 102A – E:]

> "(A)ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.
>
> Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than P500 without the sanction of the board. In that case his actual authority is subject to the P500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the ''holding-out''. Thus, if he orders goods worth \P1 000 and signs himself ''Managing Director for and on behalf of the company'', the company is bound to the other party who does not know of the \P500 limitation. . .'"

In *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA

396 (SCA) Schutz JA stated as follows at para [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. . . . But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, to take this case, the fact that Assante held himself out as authorised to act as he did is by the way. What Cape Produce must establish is that the NBS created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression..."

Navsa JA quotes these passages with approval in *South African Broadcasting Corporation v Coop and Others* 2006(2) SA 217(SCA). Also see *Glofinco v Absa Bank Ltd t/a United Bank* 2002(6) SA 217(SCA) per Nienaber JA.

[12] Ms Jacobson denies all knowledge of the release of Ms Stewart. She only learnt about it 9 months later. Mr Calisse contradicts this. In terms of *Plascon Evans Paints v Van Riebeeck Paints* 1984(3) SA 623 (A) at 634-5 I am bound by what the respondent states in his affidavit, unless it is "so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers..." Ms *van Nieuwenhuizen,* for the applicant, urged me to regard the statements by Mr Calisse and Ms Stewart as untenable and reject them. I can only accede to this argument if I am satisfied on the papers that in terms of section 54(2)

Mr Calisse in fact had no power to act for the corporation in the particular matter and the person with whom he dealt had, or ought reasonably to have had, knowledge of the fact that the member had no such power. I am satisfied that, on the probabilities, Mr Calisse did not have the authority to release Ms Stewart. It would, indeed, be extraordinary if one of the members could unilaterally abandon the rights of P2P and just as extraordinary if Ms Jacobson would have authorised him to do so. The same-day brokerage market is, as appears from the papers, a vibrant and competitive business. The fact that Ms Jacobson, in her letter to Mr Calisse, when accepting his resignation, reminded him of his duties not to directly compete with P2P, is indicative of her attitude in this regard. Why would she have had a different attitude in regard to Ms Stewart, whom she knows, has a relationship with Mr Calisse and is experienced in this business? I therefore conclude that Mr Calisse did not have the authority to release Ms Stewart. This is not a case where there is a genuine dispute of fact and where he matter should be referred to evidence. The respondent's averment is untenable and must be rejected in the light of the *Plascon Evans* rule - see *SA Veterinary Council & Another v Szymanski* 2003(4) SA 42 at para [25].

[13] The final question is whether Ms Stewart ought reasonably to have had knowledge of the fact that Mr Calisse had no power to release her. It is clear from the papers that Ms Stewart has wide experience of the business in this field. To reasonably believe that Mr Calisse had the authority to release her from her obligation not to compete as contracted, without having the letter co-signed by Ms Jacobson, is untenable The belief is unacceptable in the circumstances: why would a competitor in

this field give an experienced potential competitor free reigns to compete with her business? It is not as if Ms Stewart is a novice in this field and would pose no threat to the business of P2P. The only factor which counts against Ms Jacobson is the fact that Mr Calisse signed the initial contract with Ms Stewart. However, to limit competition in this field is natural; to release a potential competitor in this field is so strange that only the gullible would believe it. Ms Stewart is all but gullible, as clearly appears from the papers.

My conclusion is that in the light of the circumstances, Ms Stewart either knew or should reasonably have known that Mr Calisse did not have the authority to release her.

[14] There was no dispute that the respondents were and are competing with the applicants. Even the risk of competition would have justified an interdict (*IIR SA BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas)* 2004 (4) SA 174 (W); [2004] 4 All SA 646(W) per Malan J) and if there had been any sense in having made this interdict retroactively applicable, I would have done so as from the time when Ms Stewart was released by Mr Calisse. Had this been an application for a declaratory order, I would have held the conduct of the respondents to have been in conflict with the restraint since 15 January 2007.

Order:

(1) That the First and Second Respondents be interdicted from

competing with the First Applicant in the same day courier business within the Republic of South Africa up to the 10th January 2008. For purposes of this order the wording of the contract between P2P and Ms Stewart under the heading of "Daphne Stewart not to compete" applies as from the second sentence.

(2) The First and Second Respondents must pay the costs of this application on the basis that if one respondent pays the costs or part thereof, the other is absolved or pro rata absolved.

JCW Van Rooyen 7 December 2007

Acting Judge of the High Court

For the Applicant: Ms M van Nieuwenhuizen instructed by Neels Engelbrecht and Partners, Johannesburg.

For the Respondents: Ms L Bedeker, instructed by Kevin Hyde Attorneys, Randburg.