HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEAL CASE NO. A741/13

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~
(3) REVISED.
2016/02/24
DATE **SIGNATURE**

24/2/2016

IN THE MATTER BETWEEN

THE BODY CORPORATE OF THE BEL AIRE SCHEME NO: SS 1821/2006 — Appellant

and

SURE GUARD CC — Respondent

JUDGMENT

LEGODI J.

HEARD ON: 02 DECEMBER 2015

DATE OF JUDGMENT: 24 February 2016

[1] This is an appeal against the whole of the judgment of the court *a quo* (as per Phatudi J) in terms of which judgment against the appellant (the defendant in the main action) was granted in favour of the respondent (the plaintiff) in the amount of R324 558.00. The appeal is with the leave of the court *a quo*.

[2] The parties will be referred to as in the court *a quo*. The main two questions in this appeal are whether Mr Sean Ramesh (Ramesh) who was one of the trustees of the defendant had the authority of all or majority of the trustees of the Body Corporate to enter into and sign a binding agreement with the plaintiff. The second question is whether the plaintiff having pleaded and relied upon the written agreement for its damages, was entitled to lead evidence on the amount of R324 558-00 calculated on the number of guards and the amount payable for each guard, both of which not having been stipulated in the written agreement.

[3] The defendant is the Body Corporate of Bel Aire Scheme established and registered as a sectional title scheme or as a Body Corporate in terms of Sectional Titles Act no. 95 of 1986 ("the Act").

[4] On 2 February 2010 a written security service agreement was purportedly concluded between the plaintiff and the defendant and the latter being allegedly represented by Ramesh who signed the agreement as "Duly Appointed Representative" of the defendant. The authority to sign the agreement as such was disputed by the defendant.

[5] The defendant for its defence of lack of authority pleaded as follows:

> *"4.2.1.1* *Annexure "A" to the particulars of claim ("Annexure A") was not entered into on behalf of the defendant;*
>
> *4.2.1.2* *Neither Ribprop nor Sean Ramesh were authorized to conclude an agreement in terms of annexure "A" on behalf of the defendant; and*
>
> *4.2.1.3* *The defendant is not bound by the terms contained in annexure A".*

[6] In paragraph 4 of the particulars of claim the plaintiff pleaded:

> *"4. On or about 2 February 2010 and at Midrand the plaintiff, duly represented by Abdul Kader Mohammed and the Defendant, duly represented by Sean Ramesh entered into a written agreement ("the agreement"), the material terms of which are, inter alia..."*

[7] Ramesh signed on the last page of the agreement as "CLIENT OR THE CLIENT'S DULY APPOINTED REPRESENTATIVE." The client referred to in the agreement is the Body Corporate (the defendant) to which the provision of section 39 of Act applies. The section deals with the functions and powers of Body Corporates which have to be performed or exercised by trustees. Of relevance, it provides:

> *"(1) The functions and powers of the body corporate shall, subject to the provisions of this Act, the rules and any restrictions imposed or direction given at a general meeting of owners of section, be performed and exercised by the trustees of the body corporate holding office in terms of the rules.*
>
> *(2) ..."*

[8] The underlining is my emphasis. Subsection (1) should be seen in the context of what was pleaded by the defendant as quoted in paragraph 6 of this judgment, the point being that neither Ramesh nor Ribprop Body Corporate was authorized by the "trustees" of the defendant to conclude and sign the agreement.

[9] Three witnesses testified for the plaintiff and none for the defendant. Two of the witnesses were to testify on Ramesh's authority to sign the contract. Ramesh was one of the trustees of the Body Corporate (the defendant). He was also in charge of the security. The plaintiff started providing security services to the defendant in 2009 when it operated on probation for six months. In September 2009 one Mr Abdul Kadar Moosa Mahomed (Mahomed) who was the financial manager of the plaintiff signed and sent an uncompleted (blank) agreement to the defendant via one Mr Werner Niewoud (Werner) who at the time was representing Ribprop Properties. Ribprop Properties was apparently engaged by the defendant as its managing agent. Mahommed was at all times negotiating with either Werner or with one Johan Van der Westhuizen (Johan) who at the time was a caretaker of the defendant. Johan as a caretaker was responsible for overseeing all forms of complaints by the owners or tenants within the estate where the

defendant was operating. He was responsible to supervise and monitor all contractors like plumbers, electricians and garden contractors rendering services within the estate. He was also responsible for preparing and organizing the meetings of the trustees of the defendant. Furthermore, he was to ensure that the necessary items were put on the agenda for the meetings of the trustees of the defendant. It was not clear from the evidence how many and who were the trustees of the defendant. However, the Chairperson was one Perquash Dabujon.

[10] On 2 February 2010 Ramesh signed the contract. The contract was terminated by the defendant in July 2010. The plaintiff regarded this as repudiation, alleging that the written agreement was for 12 months effective from 1 March 2010. The plaintiff claimed against the defendant damages calculated at R54 093-00 per month from August 2010 to February 2011. The amount of R54 093-00 was arrived at as follows:

10.1 2 armed Grade B security officers at R7500-00 each;

10.2 Extra charge for Sundays totaling to R2000-00;

10.3 5 armed Grade C security officers at R5250-00; and

10.4 Extra charge for Sundays totaling to R4 200-00.

[11] To be more precise, the first question is who bore the onus to prove authority of Ramesh to sign the agreement binding the defendant. The second question is whether the authority of Ramesh to bind the defendant was established, and lastly, whether the defendant for lack of authority can also rely on section 39.

[12] During oral argument, counsel for the plaintiff started by suggesting that the defendant has the burden of proof to show that Ramesh did not have the authority to conclude and sign the agreement on behalf of the defendant. In the same breath, she conceded that the plaintiff has the burden of proof regarding the authority of Mr Ramesh to sign the agreement.

[13] *"One of the mistakes made by many small businesses is in obtaining the signature of the correct person on contractual agreement. Legally, to bind a company to*

a contract, it must be signed by a person who has the authority to do so. This would normally be a director, its solicitor or a manager. Far too often in my experience small businesses enter into transactions sending a written contract for a signature and they fail to ask questions to confirm that the individual which they are dealing with is legally representing the company. It can be as easy as obtaining confirmation in the form of an email or fax stating that Joe B Loggs is the Director of X and authorized to sign on behalf of the Company".

[14] The observations in the statement quoted above were made by James Normington of the New Park Court Chambers, England. The statement was posted on the website on 2 April 2013 when Normington sought to explain some of the key points of English contract law. I cannot agree more with the statement and that's exactly what had happened in the present case.

[15] Mr Mohamed in September 2009 signed and sent a contract with blank portions in some of the clauses to Werner Niewoud of Ribprop Properties. As stated earlier in this judgment, Ribprop Properties was the managing agent of the defendant. The agreement was returned to Mohamed only in February 2010 signed by Ramesh purportedly authorized by the trustees of the defendant. The plaintiff was content with the agreement. In some respects, it was content with the blank portions in the agreement and the signature of Ramesh when it was returned to it, all without seeking to confirm the authority of Ramesh to sign on behalf of the defendant. When Mohamed was asked who had circled 12 months on the first page of the agreement, his evidence proceeded as follows:

> *"... And you did not circle 12 months? --- No, the client did.*
> *And you do not know if he did?---The client did.*
> *Who of the client did? --- I sent the contract to Werner from Repro Properties.*
> *Yes? ---Who entered the contract on behalf of Bell Aire Body Corporate, because he was employed by Body Corporate.*
> *So Mr Werner Niewoud entered into the contract? --- Mr Werner was a worker or a representative of Repro Properties, who is a managing agent, who represents Bell Aire Body Corporate. When I said to him that it is between him and Shaun, whoever filled in this, I was not present at that meeting. As I said I only initialed every page. I signed the last document.*
>
> *You have given that evidence. We do not have to carry on with it? --- And they signed it between the two of them. Whether it was Werner or Shaun, I do not have any detail.*

You do not know who completed that page? — At that time I knew Werner told me that Shaun Ramesh is the Trustee of the Bell Aire Body Corporate under Security Services. He would take it up with them and I think they even had a meeting between Johan, Werner ... (intervenes)".

[16] It is very clear from this evidence that Mohamed on behalf of the plaintiff casually dealt with the conclusion of the agreement before and after it was signed. He failed to ask questions. When he received back the contract, he failed to confirm if whoever signed the contract had the authority to represent the defendant. That could have been done with ease. For example, as Mr Normington suggested, the plaintiff could have sent an email or fax to the defendant. That he did not do, but most importantly, the plaintiff failed to call either Werner or Ramesh to testify about the signature and authority. Instead, the plaintiff called Johan, the former caretaker of the defendant.

[17] Johan was not helpful. His evidence did not go far enough to establish that the trustees of the defendant took a decision to allow Ramesh to conclude and sign the agreement on behalf of the defendant. He was to testify about the meeting of trustees which was to take place on 2 February 2010, being the date on which Ramesh had signed the agreement. In my view, to the disappointment of counsel for the plaintiff, Johan's evidence in chief on the issue proceeded as follows:

"Were you present when this contract was signed on behalf of Bell Aire? — I was present that night.

Can you just explain to the court the details surrounding the signing of this contract on behalf of the defendant. Who was present there? — Normally my duties on the days of these meetings, once a month. I was to get everything in order for the Committee to come and sit. I normally handed to each one of them the agenda that was going to happen that night and what was under discussion. At this stage they were waiting for people who were in the squash court to come over to the swimming pool and in my presence was Mr Werner Niewoud, the managing agent representative and Mr Shaun Ramesh.

Was the contract signed in your presence? — it was signed in my presence.
Now, if I can take you to the first page. To your recollection, do you recall who filled in the details, client's name and address details? — Is this annexure 69?

The first page on page 16. The first page where it says contract for the provisions of Guard Services. Where it says client's name Repro-Prop Body Corporate Langeveld Road Voma Valley? —Client's name Repro-Prop, Body Corporate, you are referring to that-one?

Yes — That is Werner Niewoud's handwriting.

Okay, And the contract period, do you recall who filled that in? — Well it was Werner and Shaun. What I noticed that night, it was mentioned that whatever occurs and what would they expect from a contractor, they will, you know, blotted it out, or make a line or something, which they expect to be reinforced in the contract. Any contract has been done this way.

If you turn to page 17, the next page, you will see there in paragraph 1.1 is written Bell Aire Body Corporate. Do you recall who filled that in, that information? — That was also signed the same evening.

Do your recall by who? — This could be Werner from Repro-Prop.

Now if you turn to the last page, page 20 of the contract, do you recall who signed the contract on behalf of Bell Aire? — I definitely can.

Who was that? — Werner was doing the filling in for the area and it was signed on the left hand side by Ramesh and on the right hand side it was signed by the contractor..."

And you were present when Mr Ramesh signed the contract? — I was

And this is his signature? — It is his signature"

[18] I turn to the underlining later in this judgment. It suffices for now to mention that it was not in issue that Ramesh had signed the contract. What was in issue was whether he had the authority to conclude and sign the contract on behalf of the defendant. What is quoted in paragraph 17 above captures the evidence of Johan with regard to the meeting of the trustees of the defendant on 2 February 2010. Instead of testifying about the details surrounding the signing of the contract as he was asked, he spoke about his duties in preparing for the meetings of the trustees. He indicated that he was responsible for ensuring that matters to be discussed at such meetings were put on the agenda and distributed amongst the trustees. However, he did not confirm nor was he asked whether the signing of the contract formed part of the agenda items for the meeting of 2 February 2010. When asked who were present when the agreement was signed, he only mentioned the names of Ramesh and Werner. In my view, the impression given was that the only trustee who was present was Ramesh. Other people present were Werner on behalf of Ribprop-Properties and Johan himself. No further

details of the events of 2 February 2009 were given. It was not even clear whether a meeting of trustees did take place. At the risk of repetition, Johan said:

"...At this stage they were waiting for people who were in the squash court to come over to the swimming pool and in my presence was Mr Werner Niewoud the managing agent representative and Mr Shaun Ramesh".

[19] These were some of the answers given when Johan was requested to provide the surrounding details leading to the signing of the contract on 2 February 2009 and the people who were present. The evidence is quoted in paragraph 17 above. Nothing further was said about the meeting and the decision authorizing Ramesh to sign the agreement.

[20] The onus was on the plaintiff to prove on the balance of probability that Ramesh had the authority to conclude and sign the agreement on behalf of the defendant. Just before I conclude on the issue of authority and burden of proof, I find it necessary to refer to one judgment and section 39 of the Act. In *Thorpe and Others v Trittenwein and Another*[1], the Supreme Court of Appeal had occasion to deal with the validity and enforceability of an agreement of sale signed by one of the three co-trustees. In paragraphs 12 and 14 Scott JA held:

> *"[12] It is necessary to observe that the position of a trustee is distinguishable from that of a partner. A partnership, like a trust, is not a legal persona. But there is fundamental difference between the two. In the absence of any provision in the partnership agreement to the contrary, each partner has authority to perform acts in the furtherance of the business of the partnership. That authority arises by implication of law and the partnership will accordingly be bound. For this reason, a deed of alienation of immovable property need be signed by one partner only... Different considerations similarly apply in the case of corporations, tutors and curators ... But none of these is applicable to trusts. On the other hand, in case of joint executors who, like trustees, are obliged to act jointly, it was held in Tabethe and Others v Mtetwa NO and others 1978 (1) SA 50 (D) that an agreement of sale of immovable property was invalid for want of compliance with s1 of Act 71 of 1969 (a predecessor of the present section) as it had been signed by one of two co-executors only and without the written authority of the non-signing executrix".*
>
> *[13] ...*

[1] 2007 (2) SA 172 (SCA)

[14] The answer I think is that even if one regards the decision of the co-trustees to enter into the agreement of sale as no more than a matter of internal trust administration, the point remains that in the absence of joint decision of the co-trustees (or the majority if that is all the trust deed requires the assent of a single trustee to contract, (unlike in the case of a partner) will not bind the trust. The reason is the rule that requires co-trustees to act jointly. This much is well established and was readily conceded by counsel. A trustee who was not party to the decision making process and who therefore has not authorized the contract would be free to contest the validity of the transaction. In that event the other contracting party wishing to hold the trust bound would be obliged to prove the existence of that authority. The discharge of such a burden of proof would ordinarily be no easy matter".

[21] The underlining is my emphasis. The plaintiff in the present case had an uphill battle to discharge the burden of proof. As indicated in the quotation above, 'the discharge of such burden of proof would ordinarily be no easy matter'. The plaintiff's key witness (Johan) in this regard, in my view, failed dismally. His evidence alluded to in paragraph 17 of this judgment did not establish such authority. For this, the trial court should have found in favour of the defendant.

[22] Section 39 of the Act quoted in paragraph 7 above is not immaterial and cannot be ignored. Furthermore, there is no merit in the suggestion that because section 39 has not specifically been pleaded, the defendant is not entitled to rely on it to contest Ramesh's authority to bind the defendant. It was not the plaintiff's contention that Ramesh did not need the approval of other co-trustees. Instead the contention was that such authority existed and was given during the meeting of the trustees on 2 February 2010. Any prejudice arising from reliance by the defendant on section 39 is averted. Furthermore, the defendant pleaded lack of authority on the part of Ramesh to bind the defendant as quoted in paragraph 5 of this judgment. Therefore the plaintiff cannot claim to have been caught by surprise with regard to the defence of lack of authority of Ramesh based on section 39.

[23] The very object of section 39 in my view is on the grounds of public policy. That is, the powers and functions of the Body Corporate (in the instant case, the defendant) shall be performed and exercised by the trustees of the Body Corporate. In other words, decisions must be taken by the trustees of the Body Corporate. There are about 300 units in the estate. The interest of the unit owners need to be protected by those who

have been elected into the office as trustees. Therefore, it is paramount that decisions are taken by all trustees or the majority thereof. The plaintiff in my view had failed to establish that such a decision was ever taken or that Ramesh was authorized by other trustees to conclude and sign the agreement. For this, the trial court should have found in favour of the defendant. I now turn to deal with the other issue.

[24] The plaintiff pleaded the entire agreement as the basis for its cause of action alleging also that it was for a fixed period of 12 months. Then in paragraph 11 of the particulars of claim it is pleaded as follows:

> *"11. As a result the Defendant's repudiation the plaintiff has suffered damages in the sum of R378 651-00 calculated at the sum of R54 093-00 per month for the period August 2010 to February 2011".*

[25] The amount as claimed appears to arise from what is pleaded in paragraphs 5, 6 and 7 of the particulars of claim as follows:

> *"5. A copy of the agreement is annexed hereto marked as Annexure "A".*
>
> *6. The Plaintiff complied with its obligations in terms of the agreement and, in particular, provided guards and guarding services to the Defendant.*
>
> *7. As at August 2010 Plaintiff provided the following services to the Defendant totaling the sum of R54 093-00.*
>
> *7.1 2 unarmed Grade B security officers at R7500-00 each;*
>
> *7.2 Extra charge for Sundays totalling to RR2000-00;*
>
> *7.3 5 unarmed Grade C security officers at R5250-00 each; and*
>
> *7.4 Extra charge for Sundays totalling to R4 200-00.*
>
> *The plaintiff duly rendered its invoice totalling the sum of R54 093-00 to the Defendant. A copy of the said invoice is annexed hereto marked as Annexure "B".*

[26] Compliance with its obligations in terms of the agreement as pleaded in paragraph 6 of the particulars of claim insofar as it is intended to be linked to what is pleaded in paragraph 7 thereof, in my view, goes beyond what is permissible. In *KPMG*

Chartered Accountants v Securefin [2009] 2 ALL SA 523 (SCA), Harms DP had an opportunity to deal with parol evidence and interpretation of a written document/agreement. In paragraph 39 he warned as follows:

> *"First, the integration or parol evidence rule remains part of our law. However it is frequently ignored by practitioners and seldom enforced by the trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) 943 B). Second, interpretation is a matter of law and not of fact and accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (PTY) Ltd v Kimberly –Clark Corp [19885] ZA SCA 132 at www.saflii.org.za), 1985 Burrel Patent Cases 126 (A). Fourth, to the extent that evidence may be admissible to contextualise the document (since context is everything) to establish its factual matrix or purpose or for purposes of identification, one must use it conservatively as possible (Delmas Milling Co Ltd v du Plessis 1955 (3) SA 447 (A) at 455 B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (see Van der Westhuizen v Arnold 2002 (6) SA 453 (SCA) at paras 22 and 23 and Masstores (PTY) Ltd v Murray and Roberts (PTY) Ltd 2008 (6) SA 654 (SCA) para 7)".*

[27] Zffert and Praizes in the South African Law of Evidence 2nd edition page 378 it is stated:

> *"On the other hand, if the language of the document is so vague as to be incapable of being given any definite meaning, the court cannot give effect to an intention gathered solely from extrinsic facts. (See Scammel & Nephew Ltd v Ouston [1941] AC 251 [1941] ALL ER 14. The same applies to a case in which the document contains a complete blank. Thus in Estate Gouws v Estate Marais (1906) 23 SC 72 the testator who had several children, left a bequest "to her child called..."*
>
> The child's name was not mentioned and the court refused to act upon evidence that she had intended to bequest to one particular child.

[28] In the present case, nowhere in the agreement is there any mention of a number of guards armed or unarmed. What is pleaded in paragraph 7 of the particulars of claim

is not provided for in the written agreement. Furthermore, no amounts as stipulated in paragraph 7 of the particulars of claim are recorded anywhere in the agreement. The fact that invoices were issued for the period March to July 2010 and that payments were made, do not, in my view, found a cause of action based on the written agreement. That should in any event be considered in the light of the fact that there was previously an oral agreement on probation.

[29] The so called 'Appendix A to guard contract', cannot be relied upon. First, it is not signed by any of the parties other than the initials appearing on each page of the written agreement which were also not properly explained. Secondly, where number of guards was to be filled in, the space is left blank and Mahommed in his own handwriting recorded: "as per contract". In the space 'amount per month' no such amount is filled in; and 'payment date' is also not filled in. The space for the hours which each guard must do is also left blank. Therefore inasmuch as the plaintiff relied solely on the written agreement and pleaded in paragraphs 5, 6 and 7 of its particulars of claim as if all what is pleaded therein formed part of the written agreement, it was not entitled to adduce evidence as warned by Harms DP in *KPMG supra.* What is pleaded in paragraph 7 of the particulars of claim quoted in paragraph 25 above and the evidence thereto, in my view, was to 'add to' the written terms of the contract. That the plaintiff could not do because for its cause of action it relied entirely on the written agreement which was intended to provide a complete memorial of a jural act as pleaded in paragraphs 5, 6, 7 and 11 of the particulars of claim quoted in paragraphs 25 and 24 of this judgment. The salient terms of the agreement are pleaded in paragraphs 4 of the particulars of claim and having done so the entire agreement was annexed to the particulars of claim and was marked "A".

[30] The parole evidence rule is a substantive common law rule in contract cases that prevent a party to a written contract from presenting extrinsic evidence that discloses an ambiguity and clarifies it, or adds to the written terms of the contract. The supporting rationale to this rule is that since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms, should not be considered when interpreting that writing as the parties had decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract. The plaintiff should have been found not entitled to lead evidence on thenumber of guards, hourly rate and the amount payable per guard

[31] There is of course another problem which in my view the plaintiff was confronted with. Whilst the issue was not vigorously argued by counsel for the defendant, it is a factor which worries me. In clause 1.3 appearing on the second page of the agreement, a fixed period was to be filled in. However, the space was left blank. Clause 1.3 reads as follows:

"*1.3 The **"fixed period"** shall mean a period of .....months, calculated from the commencement date, i.e the date on which the Contractor shall commence the service, being the date reflected in the schedule."*

[32] The plaintiff contented itself with the first page of the agreement wherein 12 months is circled. On the first page of the agreement the plaintiff and Ribprop Body Corporate are indicated as parties to the agreement.

[33] The only witnesses who testified with regard to page 1 of the written agreement were Mahomed and Johan. Mahomed's evidence in chief regarding page 1 was, of relevance, as follows:

> *"...Now for what period was the contract entered into...? Basically after our six months probation period, obviously the contract was signed for a further 12 months. It was written on top of the contract. It was circled '12 months'. The front page of the contract. So obviously I take it that after your probation period, that they enter into a contract and then it is extended for that period of time, either 3, 12, or 24, 36.*
>
> *Okay so now the contract was signed on 2 February 2010? — Yes*
> *For what period was this contract then entered into? — What month period? — To my understanding the contract had already been entered into on the 2nd. So effectively after that month, because you are already in that month, effectively after that it would take 12 months. Otherwise the contract, I mean, we sign these contracts on a daily basis. If the contracts are signed ... [Intervenes]*
>
> *Which month then would it have commenced? — From March.*
> *That was our understanding.*
>
> *Okay. It would commence from 1 March 2010 for a 12 months period until 28 February 2011? — Yes*

[34] In cross-examination his evidence inter alia unfolded as follows:

> *"Okay. And you did not circle 12 months? — No, the client did.*
> *And you do not know if he did? — This client did.*
>
> *Who of the client did? — I sent the contract to Werner from Repro Properties.*
> *Yes? — Who entered the contract on behalf of Bell Aire Body Corporate? Because he was employed by Body Corporate.*
>
> *So Mr Werner Niewoud entered into the contract? — Mr Werner was worker or a representative of Repro Properties, who is a managing agent, who represents Bell Aire Body Corporate. When I said to him that it is between him and Shawn, whoever filled in this, I was not present at that meeting. As I said, I only initialed every page. I signed the last document ... [intervenes]*
>
> *You have given that evidence. We do not have to carry on with it? — And they signed it between the two of them. Whether it was Werner or Shaun, I do not have any detail.*
>
> *You do not know who completed that page? — At that time I knew Werner told me that Shaun Ramesh is the Trustee of the Bell Aire Body Corporate under security services. He would take it up with them and I think they even had a meeting Johan, Werner..(intervenes).*

[35] At the risk of repetition, on the first page of the agreement parties to the agreement are indicated as "SURE GUARD CC" and "Ribprop Body Corporate." Whilst Johan testified that Werner filled in by hand whatever needed to be filled in on the contract; and that Ramesh only appended his signature thereon, neither Mohamed nor Johan explained why "Ribprop Body Corporate" was indicated as a party or client to the agreement on the first page of the written agreement. To want to bind the defendant to the 12 months period in the circumstances, was lacking in evidence and therefore no conclusion that the agreement was for 12 months could have been reached. Neither Ramesh nor Werner was called as a witness to explain page 1 and why "Ribprop Body Corporate" was indicated as a client or contracting party. If it was Werner who circled '12months' on the first page of the agreement and filled in "Ribprop Body Corporate" as a contracting party why on the second page did he fill in "Bel Aire Body Corporate" as a contracting party and then failed to fill in the fixed period of the agreement as provided for in clause 1.3? It was incumbent on the plaintiff to show on the balance of probability that the contract was authorized and signed for 12 months and that the defendant was

bound by the first page of the agreement. The defendant was not a party to the first page of the contract, 'Ribpro Body Corporate' was. I am not satisfied that the trial court was correct in finding that the defendant was bound to the 12 months period.

[36] Clause 1.3 should also be seen in the context of the evidence of Johan. Part of his evidence is quoted in paragraph 17 of this judgment. When he was asked who had filled in the '12 months' period on the first page of the contract, he inter alia, answered:

"Well it was Werner and Shaun. What I noticed that night, it was mentioned that whatever occurs and what would they expect from a contractor, they will, you know, blotted it out or make a line or something, which they expect to be reinforced in the contract..."

[37] The evidence meant that what was circled '12 months' on the first page of the agreement, was to be 'reinforced in the contract', presumably, in clause 1.3 quoted in paragraph 32 above. However, the expectation of reinforcement of the 12 months period into the agreement Johan spoke about did not to see fruition. Instead, the space for the inclusion of '12 months' period was left blank. In the circumstances, the trial court could not have relied on the evidence tendered on behalf of the plaintiff to find that the contract was for 12 months.

ESTOPPEL

[38] The essence of doctrine of estoppel by representation is that a person is precluded or estopped from denying the truth of a representation previously made by her or him to another person if the latter, believing in the truth of the representation, acted thereon to her or his detriment (see, SA Broadcasting Corp v Coop [2006} 1 All SA 333 (SCA), 2006 (2) SA 217 (SCA). The onus is on the party wanting to rely on estoppel and must plead it and prove its essentials (see, ABSA Bank Ltd v IW Blumberg & Wilkinson 1997 (3) SA 669 SCA), [1997] 2 All SA 307 (A).

[39] One of the essentials of estoppel relevant to this case is that the person who made the representation should have made such a representation in the circumstances

capable of binding the defendant. This means that a representation, for example, by A that he or she is entitled to act on behalf of B cannot estop B from denying A's authority unless B was a party to the representation. The situation will be different had B represented that A could act on behalf of B. (see AMLER's PRECEDONGS OF PLEADING 8th edition at page 186, Glofinco v ABSA Bank Ltd t/a United Bank 2002 (6) SA SCA at 470). Therefore, if a contract cannot be enforced against an entity because the person who signed the contract on behalf of that entity was not authorized, then, a representation as to the authorization will be unenforceable too. In other words, the plaintiff in the present case cannot succeed with the estoppel defence once authority of Ramesh to sign the agreement is found to be lacking. A finding has already been made that the trial court erred in finding that Ramesh's authorization to sign the agreement was established. The consequence of this finding is that the estoppel defence must fall by the way side.

[40] In paragraph [28] of the court a quo's judgment a finding was made as follows:

> *"[28] It is clear from the evidence that Mr Mahomed, who represented the plaintiff, acted on the correctness of the facts, being that Ramesh was the trustee and signed the contract for and on behalf of the defendant as duly authorized thereto"*

[41] With respect, I think the trial court moved from the wrong premise. The fact that Ramesh was a trustee and signed the agreement, without more, is not proof that he was authorized to act on behalf of the defendant. What is quoted in paragraph 13 of this judgment, should find application here. That is, Mahomed sent the contract document for signature without asking questions regarding the authority of Ramesh to sign the contract. He knew or ought to have known that that Ramesh was a trustee and could only act on the authority of all trustees or majority thereof. Furthermore, the trial court in paragraph [29] of its judgment stated:

> *"[29] As evident, Mr Mahomed acted on the facts presented to him to the plaintiff's detriment. He reasonably believed that Ramesh is acting on behalf of the defendant as the trustee duly authorized thereto by the board".*

[42] In my view, Mahomed could not reasonably have acted on the mere information he had obtained from either Werner (the managing agent of the defendant) or Johan (the caretaker of the defendant). As stated earlier in this judgment, Mahomed casually dealt with the question of authorization of Ramesh to sign the agreement on behalf of the defendant. Mahomed never spoke to Ramesh. The least Mahomed could have done was to ask for confirmation that Ramesh was indeed authorized to sign the agreement. His signature alone did not in my view, justify and establish a defence of estoppel to the claim of lack of authority of Ramesh. The estoppel defence should have been rejected.

[43] Consequently an order is hereby made as follows:

43.1 The appeal is upheld with costs;

43.2 The judgment by the trial court granted in favour of the appellant is hereby set aside and is substituted as follows:

"The plaintiff's action is hereby dismissed with costs".

M F LEGODI
JUDGE OF THE HIGH COURT

I agree

W R C PRINSLOO
JUDGE OF THE HIGH COURT

I agree

pp **T J RAULINGA**
JUDGE OF THE HIGH COURT

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