REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

7 Septemeber 2016
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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2010/14665

In the matter between:

CHEVRON SOUTH AFRICA (PTY) LTD	Plaintiff
and	
UFUDU TRANSPORT (PTY) LTD	First Defendant
BANIPARSAD: NAVIN SITALPERSADH	Second Defendant
MOGALE: DANIEL SHIMANE	Third Defendant
NGWENYA: BONGANI STEPHEN	Fourth Defendant

JUDGMENT

PETER AJ:

Introduction

[1] The plaintiff, Chevron South Africa (Pty) Limited ("Chevron") claims an amount of R1 328 091,21 from the third and fourth defendants ("the defendants"), a Dr Mogale and a Mr Ngwenya, jointly and severally, as sureties for the first defendant, Ufudu Transport (Pty) Limited ("Ufudu"), for the outstanding balance in respect of petroleum products sold and delivered by Chevron to Ufudu during the period January 2008 to December 2008, in terms of a written distribution agreement between Chevron and Ufudu.

[2] There are three issues for determination in this matter. First, whether or not Chevron delivered the petroleum product relevant to the claim. Secondly, whether or not a third party Mooipan Boerdery CC ("Mooipan") had the authority of Ufudu to purchase petroleum products from Chevron on Ufudu's account and thirdly, if such authority did exist, whether or not such authority was validly revoked in late February 2008.

The Facts

[3] Chevron is a manufacturer and seller of petroleum products and services. It conducts its business through a network of distribution outlets. The sale and distribution of petroleum products is regulated by legislation; a seller of such products requires a licence from a statutory authority in order to trade lawfully. At all times material to this action Ufudu possessed the necessary licence to deal in wholesale quantities of petroleum products. In September 2004, Chevron and Ufudu entered into a written distributorship agreement, in terms whereof Chevron granted to Ufudu the non-exclusive right to sell and distribute Chevron's petroleum products and services for an initial period of five years commencing 1 October 2004. Also in September 2004, Dr Mogale and Mr Ngwenya, together with the second defendant, all three of whom were directors of Ufudu at the time, entered into individual written deeds of suretyship, in terms whereof they bound themselves as sureties and co-principal debtors to Chevron for the due payment by Ufudu of all such sums of money which might then or at any time become owing to Chevron or claimable from Ufudu by Chevron. Each of the suretyships provided that all admissions and acknowledgements of indebtedness by Ufudu were to be binding on the surety and that a certificate signed by any director or the secretary of Chevron was to be *prima facie* proof at all times of the amount owing by the surety under the suretyship.

[4] Dr Mogale is a medical practitioner by profession, who was engaged in a full-time general medical practice. Mr Ngwenya is a lawyer by training and qualification; his full-time occupation was that of a provincial electoral officer. Neither was engaged in the day-to-day conduct of Ufudu's petroleum distribution business. That was left to the second defendant. Ufudu's fortunes did not fare very well under the stewardship of the second defendant; by the end of May 2006 Ufudu was indebted to Chevron in excess of R2,2 million in respect of purchases which it was not able to pay in the ordinary course and its credit facility was terminated. By this time it appears that the second defendant had ceased to participate in the management of the business and Mr Ngwenya's wife, Mrs Ngwenya, was appointed as CEO, who had to deal with the situation. Ufudu then executed a written acknowledgement of debt to Chevron for the repayment of these arrears over an extended period. Thereafter Chevron undertook to supply Ufudu strictly on a cash on delivery basis.

[5] In October 2006, Ufudu represented by Dr Mogale and Mr Ngwenya, transacted with Mooipan represented by a Mr Henk Cilliers, who seemed to possess the necessary skill and experience to conduct the business of wholesale petroleum distribution, but lacked the regulatory licence. Mooipan entered into two written agreements with Ufudu. The first was a lease of Ufudu's premises from which the business was conducted for a period to coincide with the expiry of the initial term of Ufudu's agreement with Chevron. The second was styled as a "joint-venture" agreement. In terms of the second agreement, Mooipan was to market and sell petroleum products on behalf of Ufudu, principally diesel fuel, expressly excluding lubricants. Mooipan was given the right and responsibility of managing the day-to-day conduct of the business and was to see to the appointment of a manager who would be responsible for negotiations between Ufudu and any petroleum company, the handling of all administration of Ufudu as well as the general management of Ufudu. In consideration for this performance Mooipan was to be paid remuneration based on each litre of fuel sold. Mooipan undertook to pay a small premium on fuel sold to Ufudu, which payment was rebated in an amount equal to the monthly rent. Ufudu continued to maintain a presence on the premises through Mrs Ngwenya as Ufudu continued to sell lubricants independently of Mooipan. Although styled a "joint-venture", the transaction was that Mooipan was positioned effectively to conduct its own petroleum resale business in Ufudu's name. The "management fee" ostensibly paid to Mooipan was in reality the margin made by Mooipan on the resale of fuel, less a royalty payable to Ufudu which was the holder of the regulatory licence. In November 2006, Ufudu introduced Mooipan to Chevron's representatives, including its district sales manager and the sales representative servicing the site, all of whom were apprised of the relationship. Mr Cilliers forthwith made arrangements with Chevron to introduce Chevron's Star Card facility. A Star Card is a card issued by Chevron to certain approved large consumers of petroleum products which operates as a form of a credit card. The holder of the card, by presenting the card, could acquire petroleum products from a Chevron licensed distributor without payment to the distributor. Chevron honoured all such purchases, recouping the purchase price from the holder of the card and undertaking the risk of the cardholder's non-payment. The introduction of the Star Card facility would enable sales to be made at the premises to holders of Star Cards; this was calculated to increase turnover.

[6] Thereafter business was conducted by Mooipan, which placed purchase orders on Chevron in the name of Ufudu and paid for the purchases, in part from Mooipan's own bank account and in part from the Star Card sales made by Mooipan, which were credited by Chevron to the Ufudu account on which Mooipan purchased its fuel. Mooipan collected the other sales revenue independently of Ufudu. This continued until February 2008 when, two independent events occurred almost simultaneously which gave rise to Chevron's present

predicament. First, during February 2008, Dr Mogale and Mr Ngwenya became disenchanted with their relationship with Mr Cilliers and Mooipan; they felt they were not getting a sufficient return on their investment in Ufudu. On 19 February 2008 they sold their shareholding in Ufudu to a Mr Masinga. The auditors of Ufudu effected a change of registration of the directors on 22 February 2008. Mr Masinga had different ideas for the business of Ufudu. He was apparently not content to receive economic rents from the use of Ufudu's licence and wanted to conduct the business of Ufudu himself. Understandably this brought him into direct conflict with Mooipan and Mr Cilliers. Something of a conflagration ensued during late February and March 2008. According to court papers filed by Mr Cilliers, in support of a spoliation application and later contempt proceedings, in late February 2008 Mr Masinga employed people to remove Mooipan and its staff physically from the premises. Although initially successful with spoliation orders, by mid-March 2008 Mooipan had effectively ceased trading at the premises. Secondly, during February 2008, Chevron upgraded its computerised accounting system. Prior to the upgrade, the system was programmed not to make any payments of refunds in respect of Star Card purchases made from the Ufudu distribution point operated by Mooipan; the software was programmed with an instruction that the Star Card purchases were credited to the account and set off against subsequent purchases. In the course of the system upgrade, this instruction was not carried through to the upgraded system. From 22 February 2008, Chevron started making payments to the bank account of Ufudu, over which Mooipan had no control and which at the time was controlled by Mr Masinga. Over R371 000, was paid out in February 2008 and almost R742 000 paid during the month of March 2008.

[7] Chevron's representatives were made aware of the dispute between Mooipan and Ufudu. During March 2008, as an interim measure, Chevron permitted purchases to be made by Mooipan on Ufudu's account for roughly the amounts of the Star Card refunds which had been paid to the Ufudu bank account. At the end of February 2008, the Ufudu account with Chevron, notwithstanding the Star Card payments that had been made, was in credit in the sum of R124 135,94. At the end of March 2008, the account reflected a balance of R895 847,99 outstanding. The final amount claimed by Chevron is a balance adjusted for certain credit notes and purchases subsequently recorded which had not been captured on its system at the time they occurred. Chevron's claim is thus for post February 2008 sales and deliveries.

[8] In June 2010, Chevron obtained default judgment against all four defendants on two claims: the balance outstanding in terms of the acknowledgement of debt and the balance outstanding in respect of fuel purchases. In August 2012, Dr Mogale and Mr Ngwenya obtained rescission of the default judgment in so far as it related to them.

[9] At the commencement of the trial I was informed from the bar that the claim in respect of the acknowledgement of debt had been resolved by the parties and was not an issue before me. The defendants resisted the Chevron's claim for purchases on two bases. First, from October 2006 there existed a direct relationship between Chevron and Mooipan – either by virtue of an assignment of the distribution agreement by Chevron from Ufudu to Mooipan, alternatively by reason of an oral agreement concluded between Chevron's representatives and Mooipan. Secondly, the defendants denied that any product was sold or delivered either to Ufudu or Mooipan and put Chevron to the proof thereof. At a pre-trial conference on 9 October 2013, the parties agreed that a trial bundle of discovered documents would be prepared and such documents would, in the absence of a written notice disputing any such document, serve as evidence of what they purport to be. On 25 October 2013, the defendants' attorneys gave written notice that the defendants placed in dispute a document discovered by Chevron which purported to be a letter written by Mrs Ngwenya on 25 February 2008 addressed to Chevron. In its terms, the letter gave Chevron notice that Ufudu had terminated its agreement with Mooipan and that no new fuel orders should be authorised through Mooipan. That the defendants had disputed the authenticity of the letter was not surprising; it was utterly destructive of the principal defence, namely a direct relationship between Chevron and Mooipan. By the commencement of the trial in January 2015, the defendants wished the document to be admitted by agreement and Chevron required the document to be proved.

[10] On the third day of trial, the defendants moved an amendment, by agreement with Chevron, to introduce an additional alternative defence specifically disputing the authority of Mooipan to order petroleum products from Chevron in Ufudu's name and further that any such authority was revoked in February 2008. The trial continued into the fourth day while Chevron considered the new defence. On the morning of the fifth day, the trial was postponed at the instance of Chevron, which at that stage required a proper opportunity to consider the new defence and investigate possible evidence, arising from the legal proceedings between Ufudu and Mooipan which might provide an answer to this new defence. The trial resumed almost a year thereafter, when it proceeded for a further three days. On the penultimate day of trial, the defendants expressly abandoned their initial principal defence of a direct relationship between Chevron and Mooipan in all of its various alternatives.

Delivery

[11] In addition to the evidence of the account and the transactions thereon, spoken to by witnesses who occupied administrative positions within Chevron, Chevron relied on signed delivery notes evidencing the quantity of fuel delivered as well as signed certificates of balance

as contemplated in the suretyship agreements. The petroleum products were generally ordered electronically by Mooipan and made available for collection by Mooipan which would dispatch tankers vehicles to a distribution terminal of Chevron to collect the fuel ordered. The quantity that found its way onto the account was not necessarily what was ordered but was tied to the metered amount pumped from the terminal into the tanker vehicle at the time of pickup. This quantity was recorded in a delivery note which was signed by the driver who had been dispatched by Mooipan. From the quantity appearing on the delivery note, an invoice would be generated calculating the amount payable at the then prevailing rate per litre.

[12] In one instance, the quantity of fuel on an invoice dated 3 March 2008 exceeded the quantity recorded on the signed delivery note, by 103 litres of diesel at R7,083 per litre, thereby overstating the transaction amount in the sum of R729,55. Mr *Uys*, who appeared for the defendants, argued that on this basis the certificates of balance should be rejected as being unreliable. A provision in an agreement that a certificate of balance by a creditor would constitute *prima facie* proof has the effect that unless rebutted it becomes "sufficient proof" of the fact or facts on the issues with which it is concerned and which are necessary to be established by the party bearing the onus of proof, *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 382H – 383D. The presence of evidence rebutting the accuracy of the certificate does not destroy its admissibility but rather diminishes the sufficiency of the proof afforded by the certificate. The discrepancy between the invoice and the delivery note demonstrates that the certificate is not entirely correct but contains an error overstating the quantum of the claim by R729,55. The overall effect of this evidence before me is not that a judgment cannot be given at all on Chevron's claim, but that its claim falls to be reduced by R729,55.

Authority

[13] The provisions of the "joint-venture" agreement expressly provided that Mooipan would market and sell petroleum products on behalf of Ufudu. Ufudu further granted to Mooipan the right and responsibility of managing the day-to-day conduct of the business, the responsibility for the negotiations between Ufudu and Chevron and the general management of Ufudu. The subsequent conduct of the parties leaves no doubt that Ufudu, Mooipan and Chevron were fully aware that Mooipan had Ufudu's authority to transact with Chevron on Ufudu's account under the distribution agreement. Everyone was alive to the fact that Mooipan would conduct the business. It was Ufudu that had the regulatory licence to deal with petroleum products. For that reason Chevron could not and would not enter into a direct contractual relationship with Mooipan. Accordingly, there is no question but that the joint-venture agreement gave Mooipan the power and authority to contract with Chevron on its behalf. The

real issue between the parties is whether or not this authority was validly revoked by Mrs Ngwenya's letter dated 25 February 2008.

Revocation

[14] Mrs Ngwenya testified that following the sale of shareholding in Ufudu by the defendants to Mr Masinga, she stayed on at the premises for approximately a month to facilitate a handover. Mrs Ngwenya wrote and sent the letter on Mr Masinga's instructions as by that time, acrimony had arisen with Mr Henk Cilliers of Mooipan. The letter was in fact received by Chevron. The letter emanated from Chevron's discovery and Mr Oliphant, the sales representative of Chevron testified that the telephone number to which the letter was purportedly faxed was his fax to email number. He did not immediately act on the letter or report it to his superiors; at the time he was leaving Chevron and not motivated to act diligently.

[15] Ms *Ternent*, who appeared for Chevron, challenged the efficacy of the letter as an act of revocation on four principal grounds. First, Mrs Ngwenya had no authority as she was no longer the CEO of Ufudu and sent the letter on an old letterhead. Secondly, in its terms and context the letter did not revoke authority. Thirdly, insufficient notice was given by sending the letter by fax to email. Lastly, the authority could not be revoked without a valid cancellation of the "joint-venture" agreement of which the authority was a part; Mooipan had an interest in the authority and benefited by exercising the power in terms of the joint-venture agreement and Ufudu had not validly cancelled this agreement with Mooipan.

[16] As to the authority of Mrs Ngwenya, there is no reason not to believe Mrs Ngwenya's evidence that she wrote the letter on the instructions of Mr Masinga who was then the sole director of Ufudu and in conflict with Mooipan. The letter is clear and unequivocal – it demonstrates the spurious nature of the initial defence of a direct relationship between Chevron and Mooipan, acknowledging an authority to transact and expressly revoking such authority. A later letter by Mr Masinga, almost a month thereafter which did not refer to Mrs Ngwenya's letter does not alter its clear meaning. The use of a fax to email facility to the authorised sales representative dealing with the Ufudu account was not in any way irregular. The notice was in fact received by Chevron and thus operative. If a valid cancellation of the "joint-venture" agreement was a prerequisite, then the onus of proving such cancellation rests on the defendants pleading the revocation of authority. This has not been proved. On the probabilities it appears that Mr Masinga unlawfully repudiated Ufudu's obligations to Mooipan and that in fact the "joint-venture" agreement, which granted a mandate to Mooipan to transact in Ufudu's name, was never lawfully terminated. The question is thus whether or not Ufudu could effectively

revoke Mooipan's authority where such revocation was a breach of its agreement with Mooipan in terms whereof it granted Mooipan such authority.

[17] Mr *Uys* contended that the revocation of authority was effective and cited, in support of his proposition, the passage in *Consolidated Frame Cotton Corporation Ltd v Sithole and Others* 1985 (2) SA 18 (N) at 22 H – I, which reads as follows:

> "The general rule is that a principal may freely terminate the authority he has conferred on his agent. (Cf De Villiers and Macintosh *The Law of Agency in South Africa* 3rd ed at 614.) This is so even if it is asserted in the mandate establishing the authority that the authority is not to be revoked. In that event, the agent, it is true, may have a claim for damages for breach of contract (cf *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 171D - G; *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 (2) SA 881 (A) at 886D and *Pretorius v Erasmus* 1975 (2) SA 765 (T)) but as between the two of them he can no longer bind his former principal to any transaction he purports to enter into on his behalf (Joubert *The Law of South Africa* vol 1 para 125)."

[18] The judgment continues with the following passage:

> "To this general rule there are, as usual, certain exceptions. These exceptions may apply even if the authority is not expressed to be irrevocable.
>
> The appellant's main contention in the court below was that the matter falls within the ambit of what is considered to be one of the recognised exceptions, namely where the authority "is coupled with an interest" (cf *Natal Bank Ltd v Natorp and Registrar of Deeds* 1908 TS 1016; *Ward v Barrett NO and Another* 1962 (4) SA 732 (N) at 737)."

[19] Ms *Ternent*, submitted that the revocation was not effective because the authority was coupled with an interest. Mooipan clearly had an interest in the exercise of the mandate to purchase fuel from Chevron in Ufudu's name in order to conduct its own business and obtain the benefit of its bargain under the "joint-venture" agreement with Ufudu.

"Coupled with an interest"

[20] The general principle referred to in the passage from *Consolidated Frame* has been quoted with approval in *Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd* 2015 (3) SA 36 (SCA). The Supreme Court of Appeal determined the appeal without having to examine

precisely what is meant by "coupled with an interest". The passage from *The Law of South Africa* ("*LAWSA*"), currently paragraph 149 in volume 1 of the third edition, deserves careful reading. It appears that there is uncertainty surrounding the question whether authority can be given irrevocably. The learned authors attribute this in part to the failure to distinguish between the revocation of authority on the one hand and the termination of the relationships arising out of the contract of mandate on the other and in part to South African decisions of what the authors describe as the "rather vague proposition of English and American jurisprudence to the effect that authority is irrevocable is coupled with an interest or forms part of a security and the identification of this proposition with the *procuratio in rem suam* mentioned by Voet".

[21] Before embarking on an analysis of what appears to be a thorny question it is necessary to make some prefatory remarks. First, regard must be had to the potential ambiguity in the word "irrevocable". In a broad sense it might simply be used to indicate that a principal cannot revoke an authority with impunity and without adverse consequence; thus, although the authority is effectively terminated, arising from the act of revocation, the principal faces a potential claim for damages by the agent, or possibly a claim for an interdict or specific performance based on a promise in the agreement in which the authority is conferred. In a narrow sense, it is used to indicate that any purported act of revocation is of no force or effect and can thus simply be ignored. When referring to English and American texts it is not always clear in which sense the word is being used.

[22] Secondly, care must be taken to identify what power is being delegated or what authority is being granted, in order to identify the relevant juristic consequences. It appears to me that the general power to enter into contractual relationships and perform juristic acts is an incident of, and derives from, the exercise of a competency of personality or status as a person in law. It is an exercise of free will that attaches to personality. Thus someone of the age of majority and of sound mind has the capacity to enter into contractual relationships and create rights and obligations through the exercise of will. This capacity is lost with insanity or on death, see *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz* 1958 (1) SA 505 (A). I refer to this capacity as "personal competency". The power of a person to deal validly and competently with property has two sources. First there must be present personal competency and secondly, the power is also an incident of, and derives from, a competency arising from that person's status in relation to the property in question – that person's rights in the property. Thus an owner of property has the capacity to alienate or encumber that property by reason of such ownership. I refer to this capacity as "real competency". In the context of authority, a principal delegates to an agent the power to exercise the principal's competencies. In every instance there is a delegation of the personal competency, within the limits and scope of the authority,

and in respect of dealings with property, an accompanying delegation of the principal's real competency, so that the agent has the power to act in the name of, and on behalf of, the principal and pass title or grant rights in the principal's property to a third party.

[23] The starting point in the Roman Dutch common law is Voet *17.1.17*. The general proposition is that the authority, referred to as the mandate (Ganes' translation), is dissolved by revocation; this is so notwithstanding that there is an agreement that it should be irrevocable. Voet continues:

> "This can indeed be done with impunity on both sides if the matter is still in its entirety, since the direct as well as the contrary action on mandate is only available from the time when and to the extent to which there has started to be an interest in the plaintiff. If the matter is not in its entirety, damages caused by the renunciation or revocation having taken place untimeously must be made good.
>
> . . .
>
> But a mandate can nohow be revoked if a person has been created agent in rem suam by the cession of an action to him"

[24] This appears to be the foundation for the general rule, certainly at Roman Dutch common law, that a mandate can always be effectively revoked or renounced, although this might give rise to a claim for damages. The reference to an agency *in rem suam* with a cession of actions is apparently a reference to a procedure of Roman law, as opposed to Roman Dutch law, see *Natal Bank Ltd v Natorp and Registrar of Deeds* 1908 TS 1016 at 1022, a case to which I shall later refer. In early and classical Roman law, a debt was a personal right which was not transferable and could not be ceded. In order to circumvent this prohibition, a creditor would appoint the person to whom the claim was to be transferred as a *procurator in rem suam* who could sue the debtor in the creditor's name. Even then, prior to *litis contestatio*, this authority could be revoked by the creditor instituting action against the debtor in his own name. The position in Roman law and its later development is eloquently articulated in Zimmermann *The Law of Obligations* pp 58 – 67. The modern Roman Dutch law has echoes of this in the rule that claims for *injuria* and general damages arising from personal injury are too personal in nature to be capable of transmission prior to *litis contestatio*, see *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A).

The United States

[25] The South African reported cases that refer to the notion of a power or authority coupled with an interest have as their starting point Story, *The Law of Agency* and in particular §477. Story lists three instances in which a power is not revocable; where it is coupled with an interest, given for valuable consideration or part of a security. This is to be contrasted with the preceding section, §476, in which it is stated that an authority in which the agent has no interest and for which no valid consideration has been given is treated as a mere nude pact that may be revoked at the pleasure of the principal – with impunity. Accordingly it is not clear from the context that "irrevocable" is necessarily used only in the narrow sense referred to above but may be used in the broad sense that an act of revocation may result in a claim for damages by the agent, who has an interest or has given valid consideration, against the principal. In any event, the leading authority referred to by Story, and quoted fairly extensively, in the footnote to §477 is the 1823 US Supreme Court decision in *Hunt v Rousmanier's Administrators* 8 Wheat 174, 21 US 174 in which a debtor gave a creditor a power of attorney to sell the debtor's interest in two ships as security for the debt owed to the creditor. It was held that the debtor could not during his life by his own act have revoked the power of attorney but that it terminated by operation of law on his death. Importantly, the court found that this was not an authority "coupled with an interest". The opinion of the court, of which Story was himself a Supreme Court Justice at the time, was given by Chief Justice Marshall. The following was stated at 203 – 205:

> "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest", it survives the person giving it, and may be executed after his death.
>
> As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, "a power coupled with an interest?" Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.
>
> The words themselves would seem to import this meaning. "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power,

> then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be "coupled" with it.
>
> But the substantial basis of the opinion of the Court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle."

[26] This case identifies two principal propositions. The first is that where a power is exercised for and behalf of a principal, the recipient of the power is a substitute who cannot perform an act which the principal cannot perform. Thus where the principal dies so does the power. The second is the identification of the interest by drawing a distinction between an interest in the subject on which the power is to be exercised; a power "engrafted on an estate in the thing" as opposed to an interest in that which is produced by the exercise of the power. The former interest is a real right held, by the recipient as a principal, in the property, on which the power is to be exercised, and not merely as a substitute. The latter interest is one which arises as a consequence of exercising a power when acting as a substitute for the principal. The importance of this distinction is the logical consequence that where the power is "coupled with an interest", the exercise of that power by the recipient is as a principal and not as a substitute for another person. In this case the power runs with the interest; it is an incident of the interest.

[27] Reverting to the terminology and concepts which I have identified above, the power is in truth a real competency of the recipient, deriving from a status in relation to the subject matter and, in particular, real rights held in and to the property in question. Conversely, it is not a competency of the principal and thus not a true "authority" in the sense of agency. The

"principal" cannot revoke the "authority" simply because it is no longer an incident of the principal's property or estate, but that of the recipient. It is not a question of agency but rather one of property. To illustrate this, regard may be had to a situation in which an owner of property grants to another a lease which includes the power of the lessee to sublet. The exercise of possession or occupation of the property by the lessee, and the exercise of the power by the lessee to grant a right of possession or occupation to a sublessee, are aspects of a real competency deriving from the lessee's real right of possession or occupation. Similarly a debtor might grant a usufruct to a creditor in the debtor's property for so long as the debt remains unpaid with the accompanying power of the creditor as usufructuary to lease the property and collect the rents in respect thereof in partial satisfaction of the indebtedness, until the indebtedness is fully repaid. In both situations, the lessee and usufructuary exercise a power coupled with an interest, in the *Rousmanier* sense, but the power is not the exercise of the owner's competencies, either real or personal, but rather the exercise of the lessee's and usufructuary's personal and real competency, arising from rights in and to the property, independently of the owner. Although the rights are derivative, in the sense that the lessee and usufructuary acquire such rights from the owner, as real rights they are nevertheless held independently and are superior to the owner's rights who no longer has full dominium in the property. The onward transmission of a right of possession or occupation to a third party lessee is the exercise of the power deriving from a right held by the lessee or usufructuary, as part of their respective estates, and not the exercise of a delegated competency as substitute for and behalf of the owner. This is to be contrasted to a situation in which a debtor grants to a creditor an authority to lease the debtor's property, and collect the rents as security for and in satisfaction of the indebtedness. Here the interest arises from the exercise of the power. Prior to the conclusion of the lease by the creditor, or after the termination of one lease and prior to the conclusion of a second lease, the debtor could, albeit wrongfully, conclude a lease with a third party and validly give a right of occupation to such third party, thereby effectively revoking the authority.

[28] Although *Rousmanier* was the subject of academic criticism in the United States, see JCW, *Agency - Revocability of Power of Sale Coupled with an Interest*, 4 La. L. Rev. (1942), it remains US law. A recent application of *Rousmanier* is to be found in the opinion of the appellate division of the New York Supreme Court in *Frankel and others v JP Morgan Chase and others* 76 A.D.3d 664 (2010) 907 N.Y.S.2d 281, in which the following was stated:

> "A power of attorney that is coupled with an interest or which has been given in exchange for valuable consideration is irrevocable (*see Terwilliger v Ontario, Carbondale & Scranton R.R. Co.*, 149 NY 86, 95 [1896], citing *Hunt v Rousmanier's*

> *Administrators,* 8 Wheat [21 US] 174 [1823]; *French v Kensico Cemetery,* 264 App Div 617 [1942], *affd* 291 NY 77 [1943]; 2A NY Jur 2d, Agency § 57; *see also Ravallo v Refrigerated Holdings, Inc.,* 2009 WL 612490, 2009 US Dist LEXIS 23353 [SD NY 2009]). In order for a power to be "coupled with an interest," the agent must have an estate or interest of his or her own in the thing or matter underlying the power (*see Farmers' Loan & Trust Co. v Wilson,* 139 NY 284, 287 [1893]; *see also* 2A NY Jur 2d, Agency § 56). Numerous cases have held that an agent granted the power to collect debts on behalf of a principal, who takes his or her fee out of the proceeds, does not have a power coupled with an interest (*see Farmers' Loan & Trust Co. v Wilson,* 139 NY 284 [1893]; *Marbury v Barnet,* 17 Misc 386 [1896]; *cf. Babrowsky v United States Grand Lodge, Order Brith Abraham,* 129 App Div 695 [1908]).”

England

[29] The authorities quoted by Story for his various propositions accord with the English common law of the early 19th century. What is stated by Story and the decision in *Rousmanier* is to be compared with the authorities in England.

[30] In *Walsh v Whitcomb* (1797) 2 Esp 564 at 566, 170 ER 456 at 457 Lord Kenyon held that in general powers of attorney are revocable from their nature; but there are exceptions. Where a power of attorney is part of a security for money, made to levy a fine, as part of a security it is not to be revocable; the principle is applicable to every case where power of attorney was necessary to effectuate any security, such is not revocable. On the facts of that case, an insolvent debtor had assigned to his creditor, all his effects by a general deed of assignment together with the power to call in the debts for the benefit of creditors which was part of the security for the payment of creditors. It was not therefor revocable and payment by a debtor of the insolvent, to the creditor’s agent was a valid payment discharging the debt; the implied revocation by the insolvent, by giving a new power of attorney to another person, was an ineffective revocation.

[31] In *Bromley v Holland* (1802) 7 Ves Jun 3 at 28, 32 ER 2 at 12, Lord Eldon, the Lord Chancellor, held that receipt of rent and profits, not by virtue of any assignment but by virtue of a power of attorney which is a revocable instrument would in ordinary cases not found jurisdiction of the court of Chancery. But where the power was executed for valuable consideration, the court of Chancery would not permit it to be revoked. It is to be noted that at that time the remedies of an injunction and specific performance were only available in the court of Chancery, being a court of equity; the remedy in the Supreme Court was one of damages, being a court of law. In *Smart v Sanders* (1848) 5 CB 895 at 917, 136 ER 1132 at

1140, to which I refer further below, in a note in the judgment, it is stated that Lord Eldon's judgment seems to import not that the instrument of revocation would have no operation but that it was an act which the court of Chancery would restrain the principal from doing. It seems that the power is "irrevocable" in the wide sense that its revocation was not with impunity; the recipient of the power would be given a remedy. The distinction between a power of attorney and a power by virtue of an assignment is important, as in my view, it resonates with the distinction later drawn in *Rousmanier* and the distinction between the delegation of a personal competency and transfer of property rights arising from a cession of a right of action, or in the terminology of the English common law, an assignment of a chose in action.

[32] In *Lepard v Vernon* (1813) 2 V&B 51, 35 ER 237, a creditor that had received a power of attorney to receive monies payable to a debtor, and had received payment after the debtor's death, was required to pay the monies over to the debtor's executors. Here the powers held to be revoked by death as it was "a mere common Power, not accompanying any Assignment of the Debt, nor making Part of any Security" to the creditor. In *Watson and another v King* (1815) 4 Camp 272, 171 ER 87 on facts similar to *Rousmanier*, a debtor who owned a three-quarter share of a ship, gave a power of attorney to his creditor to sell his ownership interest. The subsequent sale by the creditor of the debtor's interest in the ship, in circumstances after the debtor had disappeared in a hurricane during an Atlantic crossing and was presumed to have perished, was considered to be un-authorised. It was held by Lord Ellenborough that: "A power coupled with an interest cannot be revoked by the person granting it but it is necessarily revoked by death. How can a valid act be done in the name of a dead man?"

[33] *Smart v Sanders* recognised that a factor, with the general power to sell a principal's goods, had a lien in the goods in his possession for advances made to the principal. The question to be decided was whether or not the factor could sell the goods to repay the debt where the principal had revoked the authority to sell and had defaulted in payment. After a review of the authorities, Wilde CJ held that where:

> "an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable."

[34] On the facts of the case, it was held that the power to sell was made independently and prior to the advances being made. The interest arose after the authority and it arose incidentally only. As a result this was not an authority coupled with an interest. The formulation of "coupled with an interest" as "given for a purpose of securing some benefit"

was adopted in *Clerk v Laurie* (1857) 2 H & N 199 at 200, 157 ER 83 and *In re Hannan's Empress Gold Mining and Development Company, Carmichael's Case* [1896] 2 Ch 648. In *Carmichael's Case*, the underwriter of an initial public offering of shares in the company that was to purchase the promoter's property, had given a power of attorney to the promoter to apply for shares in company not taken up by the public. Notwithstanding that the underwriter subsequently revoked the authority, the promoter applied in the underwriter's name for the shares which were registered accordingly. The underwriter failed to have his name removed from the share register, on the basis of being wrongly entered therein.

South African Decisions

[35] A number of South African courts have considered the revocability of an agent's authority. Some courts have simply repeated the English rules as if they apply in South Africa, without explaining why, and at times some courts have made reference to Voet. The distinction in *Rousmanier* has been mentioned in three reported South African decisions; *Fick v Bierman* (1883) 2 SC 26; *Hunt, Leuchars & Hepburn, Ltd. In re Jeansson* (1911) 32 NPD 493 and *National Bank of South Africa Ltd v Hoffman's Trustee* 1923 AD 247. In *Fick v Bierman* at 35, Smith J, possibly alluding to *Smart v Sanders*, said the following:

> "An ordinary instance of such an interest occurs when a factor has possession of the goods of his principal with a power to sell. He is entitled to sell and indemnify himself for any advance he may have made notwithstanding the insolvency of his principal, for he has a special property in the goods and can sell them in his own name he has a lien upon the goods, and upon the purchase price of goods lawfully sold. On the other hand, a mere broker having no special property has none of these rights, and his authority becomes extinct upon the insolvency of his principal."

[36] In *Koch v Mair* (1894) 11 SC 71, a power of attorney expressed to be irrevocable was held to be revocable in its terms after the lapse of a reasonable period of time. In the course of the judgment, De Villiers CJ made the following remarks:

> "There can be no doubt that, by our law, a principal may effectually bind himself by contract not to revoke his power. Such a contract would be implied, where the power is given to secure the performance of a promise made by the agent for valuable consideration, whether the power on the face of it purports to be irrevocable or not. On the other hand, as Voet (17.1.17) justly observes, a mere undertaking on the part of the principal not to revoke a power, does not make it irrevocable. In order to make

> the power irrevocable there must be consideration for the undertaking, or if there was no such consideration it must be shewn that the agent has done such acts under the power that its revocation would be to his prejudice."

[37] Two observations must be made. First, the requirement of consideration must be viewed with some circumspection. At the time, the question whether the English doctrine of consideration in a contract was part of South African law was unsettled. The learned Chief Justice was a strong proponent of its incorporation in South African law. That consideration was not a requirement to make a contract enforceable in the modern Roman Dutch law of South Africa, was finally settled 25 years later in *Conradie v Roussouw* 1919 AD 279. Secondly, in its context, the reference to consideration, a requirement for a contract to support a cause of action, or the presence of prejudice in the absence of consideration, suggests the wider meaning of "irrevocable"; that an act of revocation would be wrongful but not necessarily ineffective.

[38] In *Marcus' Executor v Mackie Dunn & Co* (1896) 11 EDL 29, prior to his death, a produce dealer had forwarded produce for sale to a factor to whom he was indebted for advances. The produce dealer's executor was held not to be entitled to restrain the factor from selling the produce in discharge the debt. In a separate concurring judgment, Solomon J held that the authority was irrevocable and thus not revoked by death, as there was no doubt that the goods consigned form part of the security for the advances made. In so doing, after a review of the English authorities, and referring to *Koch v Mair* and the remarks being *obiter*, the learned judge came to the conclusion on a narrower basis at 33:

> "The effect then of the English decisions is that the principle that an authority coupled with an interest is irrevocable, applies only to those cases where the authority is given for the purpose of being a security, or as part of the security."

[39] In *Van Niekerk v Van Noorden* (1900) 17 SC 63, sellers of certain immovable properties had obtained bridging finance from a creditor in anticipation of receiving the sale prices. The sellers granted a power of attorney, expressed to be irrevocable and *in rem suam*, to the creditor to attend to the transfers and collect payment. De Villiers CJ held that the creditor's refusal to agree to the appointment of the conveyancer selected by the sellers to attend to the transfers was not a breach of contract. Further, as between the sellers and the creditor it was held that the power was revocable to the extent that the sellers "could at any time by paying the whole of the amount of the debt due to the creditor claim that the power should be revoked, but so long as the debt remains it is really irrevocable".

[40] In *Natal Bank Ltd v Natorp and Another* 1908 TS 1016, a debtor firm had granted a power of attorney to its bank, expressed to be irrevocable, to register a mortgage bond over immovable property, the title deeds of which were deposited with the bank as security for an overdraft facility. It seems that this was a common form of security in those times; the practice of the bank was to hold such documents and only to register the mortgage bond when it believed there would be a need to rely on the security. Certainly this is not the modern practice which is to register the mortgage bonds as early as possible; the modern practice might be attributable to the provisions of section 88 of the Insolvency Act, 1936 which operate to deny any preference to such a covering mortgage bond on the insolvency of the debtor within a period of six months after being lodged for registration. Prior to Natal Bank acting on the power, Natorp resolved to revoke the authority and inform the registrar of deeds accordingly. Natal Bank brought an application for an order annulling the revocation of the power of attorney and authorising the registrar of deeds to register a bond passed under the power. Solomon J, having moved from the Eastern Districts of the Cape Province to the then recently established Transvaal Colony, gave judgment granting the relief sought by Natal Bank. Rather than apply the test in *Koch v Mair*, the learned judge followed the approach in *Van Niekerk v Van Noorden* and quoted Voet *3.3.8* as authority for the proposition that a power *in rem suam* is one in which the donee transacts business not for the benefit of the mandator, but for its own benefit. The submission that a power could not be given by way of security was rejected where the following was said at 1023:

> "Then it is contended that a power cannot be given by way of security. Why not, I fail to understand. If a bank is prepared to take a power as security, why should it not? Of course the bank runs a certain amount of risk, because if the donor becomes insolvent before the authority has been exercised the power would lapse. But if the bank is prepared to take that risk, I cannot understand what there is to prevent a bank from taking a power by way of security; nor can I see anything in law or in public policy to prevent a bank from acting in that way. And if a bank does accept a power as a security, it seems to me that it is only common sense that it is in the same position as if it has accepted any other security. Supposing some article of great value had been given to the bank as security: the pledgor could not recover it without payment; and the bank would be entitled to hold it until its debt had been discharged. So here the bank, having taken the power as security, is entitled to hold it until its debt has been discharged, and the power cannot be revoked by the person by whom it was given.'

[41] In a separate and concurring judgment, Mason J dealt with an alternative argument that the bank should have sued by action for a new bond. The promise to give a bond could be

enforced, the promise was admitted, the giving of the power of attorney was admitted and the intention was for the bank to have it as security. Since the bank had the power of attorney, the title deeds and had prepared the bond, Mason J at 1026, held that in those circumstances the action would be entirely superfluous and nothing less than a waste of money.

[42] Consistent with his earlier judgment in *Marcus' Executor*, the approach of Solomon J, was to apply a restricted version of the English rule of "coupled with an interest" to where the power is given for the purpose of being a security, or as part of the security, as opposed to the more general purpose of securing a benefit. The interest is one in that which is produced as a result of the exercise of power. This approach differs from Story and *Rousmanier* which distinguish a power given as security as a concept different from one "coupled with an interest" – the power in question had been given as security but lapsed on death because it was not "coupled with an interest". This approach treats the power as a species of property, capable of being possessed by an agent, when given for the purpose of being a security.

[43] In *Hunt, Leuchars & Hepburn, Ltd. In re Jeansson* (1911) 32 NPD 493, a debtor executed a power of attorney to his creditors to generally manage and administer a piece of land two and a half months before he died. Dove Wilson J quoted both Story and Story's reference to *Rousmanier*. On the strength of *Fick*, *Marcus' Executor*, *Van Niekerk*, and *Natal Bank*, the learned Judge President, with the other members of the court, granted the relief that the power of attorney could be enforced posthumously at 497 on the basis that:

> "As there can be no doubt here that, the power of attorney was given to the applicants in security of the indebtedness to them, and that their interest is an interest in the subject matter of the agency, I think they are entitled to the order which they ask."

[44] In my view, this conclusion is utterly irreconcilable with both US and English jurisprudence in *Rousmanier* and *Watson and Another v King*. As is apparent from the quotation from *Natal Bank*, an intervening insolvency would cause the power to lapse.

[45] In *National Bank of South Africa Ltd v Hoffman's Trustee* 1923 AD 247, a customer had executed a power of attorney in favour of his bank to register a mortgage bond. Six months thereafter, when the customer was in financial difficulty, the bank registered the mortgage bond. Three months later the customer was sequestrated. The customer's trustee sought to have the registration of the mortgage bond set aside as null and void, which the trustee could do unless the bank could discharge its onus of showing that both the bank and the insolvent were *bona fide*, in that there was no intention to prefer one creditor over another and that the

mortgage bond was registered in the usual and ordinary course of business. In dealing with the question of *bona fides* Innes CJ said the following in respect of the power of attorney at 249:

> "The power of attorney was given by the insolvent not to effectuate the immediate passing of a bond, but to be acted upon by the bank at its convenience. It did not in terms purport to be irrevocable; but it could not be withdrawn at the pleasure of the principal except upon payment of the indebtedness proposed to be secured. Having been given for the agent's sole benefit in return for a continuance of banking facilities, an arbitrary revocation thereafter would have been a fraudulent act which the law could not countenance. (See *Story* on Agency, sec. 477). But though it was a procuration *in rem suam* it was not accompanied by any cession of action or of rights in the sense referred to by *Voet* (17.1.17); nor was it coupled with an interest in the sense referred to by MARSHALL, C.J. in *Hunt v Rousmaniere* (see *Story* Introd. Note 1). It empowered the agent to execute a mortgage in his own favour on behalf of the principal; but it ceded to him no present right or interest in the assets to be charged. He was authorised merely to act in the name of the principal; and he could only do what the principal could rightly have done at the moment of action."

[46] In a separate concurring judgment, De Villiers JA said the following at 261:

> "Hoffman's want of *bona fides* would taint the transaction. The person who takes a power upon which he does not act at once takes it subject to that risk. And it makes no difference that the bank had an irrevocable power (assuming that to be so), for in spite of the fact that the power cannot be revoked (if that be so), the act remains the act of the principal. It is only where there is a transfer of a right by means of a cession of action, which the nature of the mandate here does not allow, that the cessionary takes the place of the principal. Apparently in England and America the law is the same, as Story on *Agency*, par. 488, points out. For when the power is coupled with an interest, the interest or estate passes with the power and vests in the person by whom the power is to be exercised (*Hunt v Rousmanier's Administrator*, 8 Wheat, 174)."

[47] Both judgments distinguish the power that was granted from a cession of action or rights and appreciate the distinction in *Rousmanier* of an interest in the subject matter of the power as opposed to an interest arising from the exercise of power. De Villiers JA does not necessarily accept that the power was irrevocable while Innes CJ quotes Story in characterising

an unlawful revocation as "a fraudulent act which the law could not countenance". Quite clearly, an unlawful revocation will ground a cause of action for a remedy. However Innes CJ does not go so far as to say that such an act would be a nullity which could be simply ignored. Neither of these two judgments appear to adopt the formulation of *Marcus' Executor* or *Natal Bank*. Most importantly, both judgments refer to the juristic nature of the agency; that the bank was acting in the name of its customer but was not dealing with its own then present property right. Neither of these judgments treat the power held by the bank as a species of property of, or possessed by, the bank. The dissenting judgment of Solomon JA does not refer to his earlier two judgments, nor does it deal at all with the nature of the power of attorney in coming to the conclusion that *bona fides* was present.

[48] The case of *Ward v Barrett NO and Another* 1962 (4) SA 732 (N) was concerned with a power of attorney executed by a deceased debtor granting to his creditor the authority to register a notarial mortgage bond, over the assets of a bottle store business, which had not been registered at the time of his death. The deceased estate was insolvent and in terms of the provisions of section 48(3)(b) of the Administration of Estates Act, 1913 the executrix commenced administering the estate for the benefit of creditors as if there had been a sequestration order. The executrix registered a mortgage bond after she had commenced such administration. In the accounts of the estate the creditor was accorded no preference in respect of the mortgage bond. The creditor challenged this, claiming that a preference should be accorded, notwithstanding that the mortgage bond had been registered after the commencement of a *concursus creditorum*, by reason of the irrevocable nature of the power of attorney given as security for the recovery of the debt. Caney J undertook a review of the authorities. Notwithstanding the criticism in the words of the authors of *LAWSA* that this was "a rather half-hearted attempt . . . to create order out of chaos", the judgment has certain notable features. The learned judge was constrained to distinguish *Hunt, Leuchars* and accepted, at 738A – B, that the power of attorney given by a principal as security for the recovery of what is owing was irrevocable, nevertheless addressed the issue that to make it effective as against creditors in a *concursus creditorum* something further was required. That was identified as a cession of rights of a proprietary interest which had not occurred. Two further points are worthy of note at 737 E – F. First, that there seems to be no particular magic in the use of the terms "irrevocable" or *procuratio in rem suam* or "a power coupled with an interest"; it is essential to discover precisely what the transaction was and secondly, an appreciation that "irrevocable" might have more than one meaning including an obligation contractually not to revoke the agent's authority, save on pain of liability of damages.

[49] The order dismissing the challenge was upheld on appeal in *Ward v Barrett NO and Another NO* 1963 (2) SA 546 (A). The judgment of Steyn CJ identifies that underlying the power to register a bond, was a right in the creditor to the registration of the bond but that this right was a personal right and not a real right and as such could not be registered after a *concursus* had supervened. At 553A the following was said:

> "The appellant's personal right to the registration of a bond could, therefore, not be converted into a *jus in rem* under a registered bond. Neither could such a transformation be brought about by the power of attorney, irrespective of whether or not it is a *procuratio in rem suam*. Even if irrevocable, the mere grant and existence of the power to effect registration could not and did not change the personal right into a real one."

The modern Roman Dutch law in South Africa

[50] It appears that the English law and US law have diverged with regard to what is meant by "coupled with an interest". The broader English formulation appears to include an interest arising from the exercise of the power and is not confined merely to an interest in the subject of the power, but absent an assignment of rights, the "irrevocable" power is nonetheless revoked on death. From the South African decisions there does not appear to be consistency or finality in precisely what is meant by "coupled with an interest" nor the extent to which a power of attorney is truly irrevocable in the sense that an act of revocation might be ignored as null and void. Some decisions apply a modified English meaning limited to when the power is given for purpose of being a security, others refer to *Rousmanier* where the power is given as part of the security, in the sense of an incident of a real right of security.

[51] The passage in *LAWSA*, to which I referred above, notes, with reference to Bynkerhoek *Obs Tum* 1 729, that the Hooge Raad in the Netherlands consistently refused to recognise the irrevocability of authority. None of the cases appear to identify a reason in principle why this should be so or why the converse should apply.

[52] In my view, the answer to this is to be found in an analysis of the transaction and identification of the rights and interests involved. A proper analysis of the transaction, notwithstanding the terminology used, might reveal that what is ostensibly the grant of a power is in fact a cession or transfer of rights, see *Netherlands Bank of South Africa v Yull's Trustee and Another* 1914 WLD 133 and *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C). A true authority or power is a personal competency delegated to the agent to "do what the principal could rightly

have done". That is to be distinguished from a right, either personal or real. A personal competency and any accompanying real competency is something personal and attached to the will of the person that, to adapt an expression from Zimmermann at 58, "hinges on the bones and entrails . . . and can no more be separated from his person than the soul from the body". A power which is no more than an incident of a person's will is not property that can be owned or possessed by another. The faculties of personality can be delegated, and with the will of the principal, exercised by the agent; they cannot be alienated nor can they be possessed or exercised against the will of the principal who has changed his or her will. Owning or possessing the will of another is a feature of slavery. The personal competency has, at least since the coming into effect on 1 August 1834 of the Slavery Abolition Act 1833 (3 & 4 Will. IV c. 73), in the then Cape Colony, been incapable of being sold or trafficked in South Africa. Slavery is now prohibited by the provisions of section 13 in the Bill of Rights of the Constitution of the Republic of South Africa, 1996.

[53] Where there is an authority "coupled with an interest" in the *Rousmanier* sense, there is a transfer of a real right. Consequently the exercise of the "authority" is no more than the exercise of the right held in the recipient and not an agency power. By transferring property, or rights in property, the real competency is lost and transferred with the property or the right concerned. Although derivative, it is independent and separately held by the transferee. In addition to factors referred to in the earlier decisions, there will be an authority "coupled with an interest", in the *Rousmanier* sense, where there has been a cession *in securitatem debiti*, a pledge of movable property with the right of *parate executie* – to sell the property on default of the pledgor's debt repayment obligation, and where there are provisions in a notarial bond, entitling the creditor to sell the property when the bond has been perfected by taking possession. In these examples, the creditor can sell and pass valid title to the property, including the debtor's ownership, to a third party. The creditor does so, not as a substitute for or on behalf of the debtor, but by reason of rights held in and to the property which were superior to those of the debtor.

[54] Where a power is given for the purpose of being a security, or as part of the security for advances made, absent a cession of rights, or delivery of possession property, it confers no security until exercised. With the exception of a registered special notarial bond in terms of section 1(1) of the Security by Means of Movable Property Act, 1993, modern South African Roman Dutch law, does not recognise a non-possessory security interest in movable property. Similarly absent registration in the deeds registry, a non-possessory security interest in immovable property is not recognised. Where there is a true delegation of authority in the sense of what I have referred to as a competency and the agent has an interest that is to be

served or in that which is produced by the performance of such authority, there will be an underlying promise, express, tacit or implied, by the principal to the agent in relation to that interest of a personal nature. That promise may be that something will be done, for instance the performance of an obligation to the agent or a third party, that property would be dealt with in a particular manner, and for these purposes the agent is given the power to do what the principal could do to fulfil that promise. The performance of this promise is a personal right of the agent against the principal. Where there has been an act of revocation of authority in these circumstances, there will also be a breach of the underlying promise which will afford the aggrieved agent a remedy. Depending on the circumstances, the nature of the promise and the interest, the remedy may be damages, an interdict or specific performance based on the underlying promise. However, absent the intervention of a court in giving such interdict or specific performance, the creditor or agent and, in particular, a third party, cannot simply ignore a revocation of an "irrevocable" authority. This may be illustrated by a debtor giving a creditor a power of attorney to execute a debit order on the debtor's bank account for the discharge of a debt. Should the debtor revoke the authority and countermand any standing debit order, neither the creditor nor the bank could simply ignore the revocation. Should the power be revoked, the correct remedy, in my view, is based on the underlying promise.

[55] For these reasons, notwithstanding that the act of revocation by Ufudu of Mooipan's authority was a breach of the "joint-venture" agreement, I am of the view that it was effective in terminating Mooipan's power to bind Ufudu to Chevron in respect of purchases of petroleum products on Ufudu's account. The interest Mooipan held in the exercise of the power was not one held in any property forming the subject matter of the power, but rather an interest in that which is produced by the exercise of the power. Although authority was arguably "coupled with an interest" within the meaning accepted in England, it was not "coupled with an interest" in the more limited sense of Solomon J in *Marcus' Executor* nor in the *Rousmanier* sense.

[56] I am alive to the fact that what I have set out herein may be incompatible with some of the South African decisions and in particular *Natal Bank.* Fortunately, because the power concerned was not given as a security, it is not necessary for me to determine whether or not *Natal Bank* remains good law. Notwithstanding the statement in *LAWSA* that is difficult to see how cases like *Natal Bank* and *Hunt, Leuchars*, can be supported, I would have considered myself bound to follow *Natal Bank* had the power been given as a security. This is because it is a decision of two judges of a colonial court which is the predecessor of the court in which I heard this matter, constituting a court composed of a single judge.

Costs

[57] The only defence upon which the defendants were successful is the one that was introduced on the third day of trial. Until the amendment, the plaintiff was entitled not to have any regard to an un-pleaded defence and to prepare for trial on the defence that the defendant had pleaded. The authenticity of the very document upon which the defence was founded, had been disputed by the defendants until the first day of trial. None of the other defences pleaded had any merit, some of which were abandoned, correctly so in my view. Had the defence been timeously pleaded and the trial limited to those issues, a great deal of costs and time would have been saved. Although the defendants are substantially successful, in my view this is a proper matter for the exercise of a discretion to deviate from the general rule that costs follow the result.

[58] In the result I make the following order:

1 Judgment is entered for the third and fourth defendants.

2 The third and fourth defendants are to pay the plaintiff's costs occasioned by the hearing on the first three days of trial being 26 – 28 January 2015 inclusive, jointly and severally, the one paying the other to be absolved.

3 The plaintiff is to pay the third and fourth defendants' costs occasioned by the defence of the action including and after 29 January 2015.

J R PETER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearance for plaintiff:
Ms *P V Ternent*, instructed by Wright Rose-Innes Inc, Johannesburg

Appearance for the third and fourth defendants:
Mr *P L Uys*, instructed by Gildenhuys Malatji Inc, Pretoria, Rossouw Leslie Inc, Johannesburg

Date of hearing:
26, 27, 28, 29, 30 January 2015; 18, 19 and 20 January 2016

Date of judgment:
6 September 2016