**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No:- 10995/2009

In the matter between:

**ZELPY 1780 (PROPRIETARY) LIMITED** Plaintiff

And

**POOVANTHIRAN MARK MUDALY** First Defendant

**SHARITA MUDALY** Second Defendant

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**JUDGMENT**

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**VAN ZÿL, J:**

1. The plaintiff was the developer of La Palma Terraces, a sectional title residential complex in uMhlanga, just north of Durban. By deed of sale dated 10 July 2007 it sold proposed unit L41 to the defendants, a couple married to each other in community of property, at a purchase consideration of R2 270 000-00 and payable upon registration of transfer.

2. In terms of the deed of sale occupation would have been given upon date of the registration of transfer. However, in the event of the purchasers taking earlier occupation they would then become liable

*inter alia* to pay occupational interest monthly in advance at a rate equal to one percent (1%) of the purchase price.

3. It is common cause that the defendants took occupation with effect from 21 September 2007 and that registration of transfer of the property into their names occurred on 28 September 2008. The plaintiff, in instituting action against the defendants, claimed alleged unpaid occupational interest in the sum of R275 426-67, interest a tempore morae and costs on the scale as between attorney and own client. The claim for costs is based upon the provisions of clause 21.3 of the sale agreement which provides for such a claim in the event any breach of the provisions of the agreement and the plaintiff then instructing attorneys to take action against the defendants.

4. Save for disputing the amount of the occupational interest accruing, the defendants effectively admitted the plaintiff's allegations with regard to their liability for occupational interest. However, the defendants pleaded that, simultaneously with the conclusion of the aforesaid written agreement of sale, they entered into an oral agreement with the plaintiff which gave rise to an obligation by the plaintiff to them and which offset the plaintiff's claim and left the plaintiff obligated to pay the defendants a balance of R465 691-67, mora interest and costs, in respect of which the defendants delivered a claim in reconvention.

5. With regard to the conclusion of such oral agreement the defendants alleged that they acted in person and that the plaintiff was represented by one Freddy Pierre Paul van den Bergh (Van den Bergh), a director of the plaintiff and who also represented plaintiff in the conclusion of the written agreement of sale of the unit.

6. In reconvention the defendants asserted that the contemporaneous oral agreement referred to in their plea was one in terms of which the defendants would lend to the plaintiff the total sum of R600 000-00 to be advanced during the period from 10 July 2007 to 30 October 2007 and that they duly did so. In amplification and according to the pleadings the initial advance of R50 000-00 was made on 10 July 2007, being the date of signature of the agreement of sale pertaining to the unit. Then, during September 2007 they made further advances of R50 000-00 on the 5th, R200 000-00 on the 7th, R100 000-00 on the 19th and finally R200 000-00 on the 27th. It was further alleged that the occupational interest, accruing to the plaintiff in terms of the agreement of sale and once the defendants had taken occupation of the unit, would be set off against the sum so advanced to the plaintiff. Upon registration of transfer the plaintiff would become obliged to reimburse any excess remaining to the defendants.

7. The plaintiff responded to the claim in reconvention by admitting the written agreement of sale, but denying the conclusion of the alleged oral agreement. In amplification the plaintiff denied that the said Van

den Bergh had been authorised to conclude any such oral agreement on behalf of the plaintiff and consequently that he acted as the plaintiff's agent in any such dealings.

8. The issue of the actual or deemed authority of Van der Bergh was further developed in the defendants' somewhat belated replication to the plaintiff's plea to the claim in reconvention. Therein the defendants alleged that Van der Bergh was at all material times duly authorised to represent the plaintiff, both as a director and as an agent. Such actual authority derived, so it was alleged, from a resolution. The reference to a resolution was presumably intended to denote a resolution by the board of directors of the plaintiff company.

9. In the alternative the defendants alleged that the plaintiff was estopped from denying the authority of Van den Bergh to act on behalf of the plaintiff and to represent it in all dealings with the defendants. In this regard it is desirable to set out in full the defendants' averments, as contained in paragraph 2.1 of the replication, as follows:-

> "Alternatively;
> 2.1 The Plaintiff is estopped from denying that Van der Burgh did not have authority to act on behalf of the Plaintiff in all dealings with the Defendants in that Van der Burgh represented to the Defendants that;
> 2.2.1 He was duly authorised to conclude any transactions/agreements on behalf of the plaintiff;
> 2.2.2 He was the Plaintiff's agent in all agreements;
> 2.2.3 He was the Plaintiff's representative."

10. By agreement between the parties as recorded in the minutes of their pre-trial conference, the defendants accepted the duty to begin and the trial commenced with the evidence of the first defendant. He related how he had first met with Van den Bergh whilst the La Palma Terraces development was still in stage 1 of the development, whilst the defendants purchased their unit during stage 3. He explained that at the critical time he had known Van den Bergh for a period of some two to two and a half years, had on occasions visited him at home and regarded him as a friend. During this period Van den Bergh had told him that he owned the development, as well as Belgian Land & Estate, the agency marketing the units. The first defendant also confirmed that at all times material both to the purchase of the unit, as well as the alleged loan agreement in terms of which the sum of R600 000-00 was advanced to the plaintiff, he dealt only with Van den Bergh.

11. The first defendant explained the background against which he and his wife agreed to make the loan to the plaintiff. According to him the third phase of the development comprising some 80 units had been delayed for about a year after litigation ensued because the owners of a nearby property had claimed that the development obstructed their views. By the time the litigation was resolved in favour of the plaintiff, the project was over budget and Van den Bergh said that they required the loan money to pay subcontractors on site. The monies thus borrowed were paid to Van den Bergh in cash, as he requested it and it was only at the time of the final payment on 27 September 2007 and upon the

insistence of the second defendant, that Van den Bergh was asked to sign some form of acknowledgment for the monies advanced to him.

12. In the result the first defendant prepared a manuscript document which, so it was claimed, Van den Bergh then signed in order to acknowledge receipt of the monies. A copy of this receipt appears at page 28 of the Exhibit A, being the bundle of trial documents. This receipt does not indicate the instalments making up the "total" sum of R600 000-00 as advanced. The receipt also incorrectly refers to a deposit on unit K41 whilst the defendants purchased unit L41. Under cross examination the first defendant was unable to account for this error and he explained the absence of any reference in this receipt to the plaintiff on the basis that he understood Van den Bergh to have been both the owner and the developer.

13. There was also some confusion as to the instalments making up this sum. For instance, the final instalment on 27 September 2007 according to the pleadings and as already indicated was R200 000-00, but the first plaintiff in evidence referred to a final instalment on that date of R250 000-00.

14. There was likewise confusion as to the terms of the alleged loan agreement. In paragraph 4.1 of their plea the defendants alleged that the monies would be advanced during the period from 10 July to 30 October 2007, in paragraph 4.3 that the occupational interest would be

set off against the amount so advanced and in paragraph 4.4 that any balance remaining as at date of registration of transfer would be refunded to the defendants.

15. However, in evidence the first defendant said that initially there was no discussion as to when the loan would be repaid, but that when the final advance was made on 27 September 2007 there was a discussion in terms of which the defendants indicated that they required some repayment the following year, that being in approximately some 6 months' time. According to the first defendant Van den Bergh then indicated that he expected an inflow of funds from the registration of the transfer of units during the forthcoming December period and that he would accordingly be in a position to effect repayment after the new year.

16. The first defendant said that he pressed Van den Bergh for payment during February and March 2008, but that the latter then evaded him. Eventually he went and confronted Van den Bergh at his office on site and that Van den Bergh then claimed that the R600 000-00 formed part of the purchase price of the unit the defendants bought from the plaintiff. As a result the first defendant said that he was upset and disappointed and that he stormed out. Subsequently Van den Bergh would not take or return any calls from him.

17. Under cross examination it was put to the first defendant that until delivery of the defendants' plea and claim in reconvention, there had been no mention of the alleged loan to the plaintiff. The first defendant responded that he had made mention thereof in his letter to the plaintiff's attorneys, who also acted as the conveyancers, in his letter of 20 January 2009. In this letter, however, the first defendant referred to the R600 000-00 as his cash deposit and asserted that the defendants had been unaware that this amount would not be reflected in the purchase agreement which, in context, must have been a reference to annexure "A". It was further alleged in this letter that Van den Bergh had agreed to waive the occupational interest in lieu of the interest lost by the defendants upon the R600 000-00 advanced to the plaintiff and that the final advance to the plaintiff in the sum of R250 000-00 was made during October 2007.

18. The first defendant explained that although initially the defendants intended paying cash for the unit, upon the advice of their accountants they later resolved to apply for a loan, secured by a mortgage over the unit. This was arranged for them by the conveyancers, they qualified for a loan in the amount of R2 050 000-00 and they were required to pay in the shortfall of R220 000-00 in order for the registration of transfer to proceed. Under cross examination he was asked why the defendants had not requested that the shortfall be debited against the R600 000-00 they had advanced to the plaintiff. The first defendant sought to explain that they did not do so because they did not wish to

delay the registration of transfer and understood that the loan to the plaintiff would be offset against occupational interest and not the cost of the apartment, that is the unit they had purchased.

19. It is clear from the evidence of the second defendant, in whose name the defendants' funds were invested at the time, that they possessed sufficient funds to have made the advances to Van den Bergh. Of the funds so advanced the second defendant, with reference to her records said that she withdrew and passed in cash to the first defendant the payments then given by him to Van den Bergh in her presence. The exception was the initial payment of R50 000-00. According to her the source of this payment was a Mr Alan Maharaj, the first defendant's brother in law and the amount was paid by them to Van den Bergh at the latter's offices. She was not, however, present at the time.

20. The second defendant confirmed that the receipt for R600 000-00 was later signed by Van den Bergh at her insistence. She further confirmed that Van den Bergh was the only person with whom the defendants dealt at all times relevant to the conclusion of the sale and in agreeing to advance the loan, but she was unsure whether she was present when the finer details of the loan were discussed and agreed with Van den Bergh.

21. At the conclusion of the evidence of the second defendant, the defendants' case was closed and the plaintiff called its only witness, Mr

E S Roelofsen. According to the witness the controlling hand in the affairs of the plaintiff at all times material to the dispute had been the late Mr Frans de Ruyter, a Belgian citizen who owned 99% of its shareholding and who died during 2010. The witness himself had been a businessman in Durban when he was put in contact with the late Mr de Ruyter who needed someone who could act as his interpreter and who was also familiar with South African conditions, legal matters and accounting practices. Mr De Ruyter was Flemish speaking and unable to communicate in English. In the result the witness became involved with the plaintiff during 2003 and locally handled its accounting and legal matters. He confirmed that Van den Bergh owned the remaining 1% of the plaintiff's shareholding.

22. Mr Roelofsen explained that the La Palma Terraces development was a large one and that the late Mr De Ruyter, whilst residing in Belgium, used to come out to South Africa at least four times a year and at the time also maintained a local residence. According to the witness the land for the development was acquired at a cost of R25 million for which the late Mr De Ruyter paid in cash. The sectional title development itself was financed through an Investec Bond facility of about R65 million. With reference to a copy of the plaintiff's bank statement dated 27 August 2007 and appearing at page 36 of Exhibit A, the witness confirmed that the plaintiff at the time maintained this banking account for the payment of value added tax and funding out of pocket or administrative expenses, whilst the development costs were

funded from the Investec facility which he could draw from. The witness explained that during 2007 there was still about R40million credit available from the Investec facility, but that this debt was settled by the beginning of 2008 and that plaintiff made a profit of some R39 million on the development as a whole.

23. Mr Roelofsen was asked if during 2007 the plaintiff needed R600 000-00 to urgently pay a contactor, whether he could have found the necessary funds to do so. He replied that he could have paid this out of the plaintiff's current account which at that time held a credit balance of some R4,3 million. However, he pointed out that payments to contractors were made from the Investec facility through the intervention of one Anthony Arbuthnot, the plaintiff's project manager. Mr Roelofsen acted as interpreter when the late Mr De Ruyter needed to interact with local role players during the course of the development.

24. According to this witness Van den Bergh originally found the land upon which the La Palma Terraces development later took place and approached the late Mr De Ruyter with the opportunity. In the result he initially was, as the witness termed it, an interested party in the development. Van den Bergh at his own initiative attended at the site and was sometimes present at site meetings. He was a minor shareholder and nominally a director, although all decisions were taken by the late Mr De Ruyter. As the development progressed the plaintiff appointed sales agents to market the units. At the later stages Van den

Bergh approached the late Mr De Ruyter and obtained permission also to become involved as a sales agent and thereby to earn sales commissions. In the result he created an agency called Belgium Land & Estates, which was permitted to act as a sales agent for the plaintiff's units.

25. The witness explained the control structuring of the plaintiff at the time. The sales agents, later including Van den Bergh, operated out of an office on the site of the development. Plaintiff's office, including initially its registered office, was situated at the residence of the late Mr De Ruyter in Umhlanga. The registered office was later changed to that of its auditors, also in Umhlanga. The witness himself, who professionally operated an accounting and tax service, also prepared the plaintiff's trial balances and supporting documents before passing these to the auditors for finalisation.

26. All sales agreements in respect of the development were to be signed only by attorney Johnson of the plaintiff's appointed conveyancers. This was because the late Mr de Ruyter wanted a legally qualified person to sign, Mr Johnson's firm had prepared the form of the sales agreements and were also the conveyancers who would attend to the registration of transfer for the entire scheme. The authority of Mr Johnson so to sign the sales agreements on behalf of the plaintiff was conferred upon him by virtue of a special resolution of the board of directors of the plaintiff and passed during or about 2003.

27. The witness was asked whether he was able to produce a copy of this resolution, but was unable to do so. However, he explained that during 2009 he caused the plaintiffs records to be transferred for storage at the home of the late Mr De Ruyter in Belgium. These documents were therefore inaccessible. This was because the house was now unattended and the witness himself had left South Africa and resides in Sweden. He would have had to travel to Belgium to gain access to the former residence of the late Mr De Ruyter, in order to search for and retrieve the resolution document. Instead he had travelled directly from Sweden to give evidence.

28. Of importance, however, was his evidence that the witness himself had been present during 2003 when the resolution was passed, conferring sole authority upon Mr Johnson to sign the sales agreements on behalf of the plaintiff for the entire project. This also corresponded with the fact that Mr Johnson's firm had been appointed as conveyancers for the entire project. He was thus able to give direct and first hand evidence relevant to the authority conferred upon Mr Johnson.

29. The witness was also able to comment upon the fact that Van den Bergh had taken it upon himself to sign a number of the sales agreements apparently negotiated by his sales agency. This had come to the notice of Mr Johnson as early as during or about July 2007 and presented a difficulty. Plaintiff was faced, according to the witness, with

a choice of repudiating these sales agreements on the basis that Van den Bergh had no authority to sign them, in which event the units would have had to be marketed all over again, or giving effect to such agreements, despite Van den Bergh's lack of authority. As a practical solution they resolved simply to give effect to these sales agreements because they all conformed to the standard form of agreement. Neither the difficulty relating to the lack of Van den Bergh's authority, nor the decision to give effect to these agreements, referred to in evidence as ratifying them, were ever conveyed to any of the affected purchasers.

30. The factual issue arising for decision is whether the oral agreement contended for by the defendants was actually concluded between them and Van den Bergh. The evidence in this regard by the first defendant and broadly supported by the second defendant was not particularly impressive. Their accounts of the arrangements have at times been inaccurate, inconsistent and contradictory.

31. However, given the lapse of time that had passed since the events which they sought to describe and before they gave their evidence in court and the fact that the defendants' interaction with Van den Bergh was intertwined with social contact and informal business discussions and arrangements, it appears probable that they have had to resort to reconstructing these events from memory. In R v Gumede 1949 (3) SA 749 (AD), Van den Heever JA remarked at page 759 that "*…we interpret our perceptions and store in our memory what we regard as the facts so*

*gathered rather than the exact media of perception.*" The inconsistencies and defects apparent from the evidence of the defendants may thus be more apparent than real.

32. What has appeared is that the defendants, at the time, had access to sufficient funds to have advanced the money which they claim to have done. And the documentary records lend support for the fact that the second defendant withdrew cash amounts from her banking accounts which *prima facie* corroborate their evidence that they obtained the money to pass on to Van den Bergh.

33. But assuming that I accept on a balance of probabilities that the defendants had advanced the total sum of R600 000-00 to Van den Bergh, as they claim to have done and that they did so in the circumstances to which they have attested, then the question remains whether such a finding would bind the plaintiff in any way.

34. Although the defendants pleaded that Van den Bergh had been authorised by a resolution of the plaintiff to represent it, the evidence of Mr Roelofsen established that no such resolution was ever passed and that the only authority conferred upon Van den Bergh by the plaintiff was that of a sales agent to market units in the La Palma Terraces development, but without the power to bind the plaintiff to any agreement. There is no evidence which would establish the contrary and I have no reason to disbelieve Mr Roelofsen, who presented as an

honest and reliable witness. The defendants' belief that Van den Bergh had been duly authorised by resolution appears to have been based upon no more than an assumption to this effect.

35. If, therefore, it has not been established that Van den Bergh at any stage had actual authority, formally conferred upon him by the plaintiff, to bind it to the loan agreement contended for by the defendants, then the next question which arises for decision is whether it can be said that Van den Bergh had ostensible authority to do so.

36. It is common cause that Van den Bergh was at the relevant time a director of the plaintiff. However, there is a distinction to be drawn between the position of the board of directors of a company acting as such, or a managing director acting in an executive capacity, or even a chairman of the board on the one hand and an ordinary director of a company on the other. (Wolpert v Uitzicht Properties (Pty) Ltd & Ors 1961 (2) SA 257 (WLD) at 265D to 266H; TuckersLand and Development Corporation (Pty) Ltd v Perpellief 19878 (2) SA 11 (TPD) at page 15 E-F; Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA) at page 494G-H in para 22).

37. A *bona fide* third party may therefore in certain circumstances reasonably assume that the former are able to bind the company. But the same does not apply to an ordinary director of a company, acting on his own. In the latter situation the third party bears the onus of

proving that the director, like any other agent of the company, had the necessary authority, either actual or implied, to bind the company. That situation clearly does not apply in the present matter before me.

38. It remains possible to bind the company where the alleged agent, though lacking actual or implied authority, can be shown to have acted with ostensible authority and the company is estopped from denying such authority, that being the basis of the defendants' contentions in the present matter.

39. The onus of establishing an estoppel rests upon the party raising it. Thus in ABSA Bank Ltd v I W Blumberg and Wilkinson 1997 (3) SA 669 (SCA), Zulman JA at page 667H stated that –

> "*Plainly, a party wishing to rely on estoppel must plead and prove its essentials*."

40. The essentials of an estoppel comprise, firstly a representation whether by words or by conduct of a factual nature. Secondly that the party to whom such representations were made must have acted, or must have refrained from acting, upon a belief in the accuracy thereof. Thirdly, that the party so acted or refrained from acting to his or her detriment. Finally, that the response of the person to whom the representation was made, was reasonable in all the circumstances.

41. In Glofinco v Absa Bank Ltd t/a United Bank 2002 (6) SA 470 (SCA), Nienaber JA at page 479 H-J stated that -

> "*[12] The requirements for holding a principal liable on the basis of the ostensible authority of its acknowledged agent were recently articulated in NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others (supra in para [26] at 412C - E) by Schutz JA to be:*
> *'1. A representation by words or conduct.*
> *2. Made by [the principal] and not merely by [the agent], that he had the authority to act as he did.*
> *3. A representation in a form such that [the principal] should reasonably have expected that outsiders would act on the strength of it.*
> *4. Reliance by [the third party] on the representation.*
> *5. The reasonableness of such reliance.*
> *6. Consequent prejudice to [the third party].*"

42. It is thus clear that more is required than merely the representation of the claimed agent alone, in order to render the ostensible principal liable. In Venter v Credit Guarantee Ins Corp of Africa Ltd 1996 (3) SA 966 (A), F H Grosskopf JA at page 978 D-E stated in this regard that –

> "*…, the first plaintiff cannot rely upon the extra-judicial statements, conduct and admissions of the 'agent' himself to establish his authority when that is the very fact in issue (New Zealand Construction case supra at 348E; Tuckers Land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T) at 15H). The fact that Myers represented to Wallace that he acted for the first defendant and that he was duly authorised to do so cannot therefore assist the first plaintiff.*"

43. Likewise in Glofinco supra at para 13 Nienaber JA remarked that "*A representation, it was emphasised in both the NBS cases supra, must be rooted in the words or conduct of the principal himself and not merely in that of his agent (NBS Ltd v Cape Produce Co (Pty) Ltd (supra at 411H - I)). Assurances by an agent as to the existence or extent of his authority are therefore of no consequence when it comes to the representation of the principal inducing a third party to act to his detriment.*".

44. In the present matter the defendants pleaded and in evidence made it clear that the representations relevant to the authority of Van den Bergh and upon which they relied, were those made by Van den Bergh himself. Save for contact with Van den Bergh, they claimed not to have had contact with any other representative acting for and on behalf of the plaintiff and which influenced their belief that Van den Bergh spoke with authority for and on behalf of the plaintiff.

45. In this regard it is of some significance that they advanced the money to Van den Bergh in cash, at his request, without seeking any form of written acknowledgment signifying that the plaintiff company was involved. Even the receipt document, initialled according to them at the time when the final payment was made on 27 September 2007, did not mention the plaintiff by name. Although the alleged agreement of loan was concluded at the time when the written agreement of sale was signed, there is no mention therein of the alleged loan, nor did the defendants seek to off-set the balance of the loan against the purchase price prior to the registration of transfer and at a stage when according to their own evidence, Van den Bergh had reneged on their agreement and falsely claimed that the loan formed part of the purchase price of the unit.

46. It was only after transfer was registered and when the conveyancers were dealing with the final accounting, including the payment of occupational interest, that the defendants raised the issue of the

alleged loan to the plaintiff. But even then it was raised tentatively. In their letter of 20 October 2008 the defendants raised the alleged cash advance to van den Bergh on the basis of an advance on occupational interest. Later, in their letter of 20 January 2009, the basis appears to have been a fraudulent increase in the purchase price of the unit and that, if the plaintiff denied liability, then the defendants would have been defrauded by Van den Bergh against whom they would then have to seek redress. In this letter the first defendant, *inter alia*, said at page 3 thereof that –

> "IF THIS IS NOT ACCEPTEDBY YOUR CLIENT (a reference to the plaintiff) THEN THIS CONTRACT SIGNED BY FREDIE VAN DEN BERGH AND THE MONIES RECEIVED BY HIM WAS DONE SO FRAUDULENTLY AND I INTEND OPENING A CASE OF FRAUD COMMITTED AGAINST ME AND SARS.
> THEREFORE BEARNG IN MIND THAT I WAS MISLEAD TO BELIEVE THAT THIS PURCHASE PRICE WAS 2870000, INSTEAD OF R2270000, FREDDIE VAN DEN BERGH HAD DEFRAUDED ME OF R600000.00. THEREFORE IF ZELPY 1780 (PTY) LTD HAS NO KNOWLEDGE OF THIS TRANSACTION, THEN I HAVE THE RIGHT TO CLAIM BACK MY MONEY FROM MR VAN DEN BERGH OR HIS PARTNERS."

47. The defendants did not appear to have been influenced to any marked extent by the fact that Van den Bergh had signed their agreement of sale, which the plaintiff subsequently honoured by relying thereon to register transfer of the unit into their names. But even if this fact had influenced their subsequent views, it is clear that on their own version the oral agreement to advance the loan to Van den Bergh had already been concluded prior to the signature of the written sale agreement. It cannot therefore be said that the signature of the sale agreement by

Van den Bergh, ostensibly on behalf of the plaintiff, influenced the defendants to agree to extend the loan to Van den Bergh.

48. But even if it were to be assumed that the defendants were convinced by the fact that Van denBergh signed their written agreement to purchase the unit that he was duly authorised to do so, then the question remains whether they could reasonably thereby have been influenced in believing that Van den Bergh was also authorised to bind the plaintiff to cash loans informally negotiated by him on its behalf.

49. The implied authority of an agent, such as an ordinary director of a company, may be inferred in circumstances where he purports to exercise authority of the type which such a director usually has, even though he was exceeding his actual authority. But the company would escape liability if the director acted beyond his usual authority and the representee knew that he was doing so, or the circumstances were such as to put him on enquiry (Wolpert's case (supra) at page 266 E-G). In Glofinco (supra) at page 481 B-D in para 15, Nienaber JA, in relation to the position of a bank manager, remarked in this regard, as follows –

> "*The appointment by a bank of a branch manager implies a representation to the outside world. The representation, to the knowledge of the bank, is that the branch manager is empowered to represent the bank in the sort of business (and transactions) that a branch of the bank and its manager would ordinarily conduct. The notion of 'ordinary business' in turn implies a qualification in the form of a limitation: that the branch manager is not authorised to bind the bank to a transaction that is not of the ordinary kind. What the ordinary kind of business of the branch is remains a matter of fact and hence of evidence.*"

50. I am of the view that a director of the property development company, even if authorised to bind the company to standardised sales agreements of units in a property development, would not be authorised to bind the company to an informal cash loan, such being a transaction which is manifestly not one of the ordinary kind falling within his authority. Certainly, any suggestion by such a director to a third party should immediately put the latter upon enquiry. The defendants in the present matter would have been naïve not to have been alerted and put on enquiry, when Van den Bergh suggested the proposed informal loan to them.

51. In all the circumstances I am of the view that the defendants failed to establish on a balance of probabilities, even if the cash loan of R600 000-00 had been advanced to Van den Bergh by the defendants as they claimed, that Van den Bergh had any actual or implied authority to bind the plaintiff to such loan. Nor did the defendants satisfy the requirements for an estoppel to operate as against the plaintiff. It follows that the plaintiff is not bound by the alleged oral agreement of loan relied upon by the defendants.

52. Insofar as the defendants sought to rely upon an oral agreement with Van den Bergh to exempt them from their liability for occupational interest arising out of them taking occupation of the unit prior to the registration of transfer, there appears to be two obstacles in their way. In the first instance and for the reasons already discussed, it cannot be

said that Van den Bergh was authorised to bind the plaintiff to any such concession. Secondly, in terms of clause 21.1 of the sale agreement (annexure A to the plaintiff's particulars of claim) the parties had agreed that any variations to the terms and conditions thereof would only become enforceable if reduced to writing and signed by the parties thereto. No such agreement was concluded so that the sale agreement in its original form remains valid and binding.

53. In all the circumstances the defence and the claim in reconvention must fail. Plaintiff's counsel, as part of her written submissions, attached a draft order in terms of which the plaintiff seeks judgment against the defendants. The defendants' counsel, in her written reply, did not object to the form of this order in the event of the plaintiff being successful. Instead she contented herself with submissions in support of the defence and submitted that the claim in reconvention should succeed, with costs.

54. In the result I make an order in terms of paragraphs 1 and 2 of the draft order attached to the written argument of counsel for the plaintiff.

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**VAN ZÿL, J.**

CASE INFORMATION

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| Defendant's Counsel: | Adv Z Rasool (Ms) |
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| Date of Hearing: | 10 & 11 June 2013<br>Written argument submitted September 2013. |
| Date of Judgment: | 19 December 2014 |