THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 710/19

In the matter between:

SYBRAND SMIT	**FIRST APPELLANT**
SOLJE SUSAN SMIT NO	**SECOND APPELLANT**
ENID ELIZABETH MULDER NO	**THIRD APPELLANT**
SYBRAND SMIT NO	**FOURTH APPELLANT**
(SECOND TO FOURTH APPELLANTS AS TRUSTEES OF THE SYBRAND SMIT FAMILIE TRUST)	

and

ORIGIZE 166 STRAND REAL ESTATE (PTY) LTD	**FIRST RESPONDENT**
O'NEIL BRENDAL JACOBS	**SECOND RESPONDENT**
HANRO ERASMUS STEFFEN	**THIRD RESPONDENT**

Neutral citation: *Smit and Others v Origize 166 Strand Real Estate (Pty) Ltd and Others* (Case no 710/19) [2020] ZASCA 132 (19 October 2020)

Coram: PETSE DP, MAKGOKA and NICHOLLS JJA and LEDWABA and EKSTEEN AJJA

Heard: 25 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 19 October 2020.

Summary: Principal and agent – power of attorney granted by company to secure a debt owed to the grantee – Power of attorney given as security for a debt owed is irrevocable for as long as the debt remains unpaid – purported revocation of power of attorney invalid.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Bridgman AJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

‘1 It is declared that the first applicant may, in terms of the resolution adopted by the first respondent on 21 July 2016:

1.1 Accept and sign on behalf of the first respondent any written offer from an offeror; and

1.2 Sign on behalf of the first respondent all documents required to give effect to the abovementioned written offer and to transfer to the offeror:

The real right of extension in respect of 33 units of the scheme known as Ocean View Villas, held under certificate of real right number SK1206/2017 (the real rights).

1.3 The first and second respondents shall pay the costs of the application, jointly and severally.'

JUDGMENT

Eksteen AJA (Petse DP, Makgoka and Nicholls JJA and Ledwaba AJA concurring)

[1] The issue in this appeal relates to the interpretation, enforcement and revocability of two powers of attorney granted to Mr Sybrand Smit, the first appellant, by Origize 166 Strand Real Estate (Pty) Limited (Origize), the first respondent, pursuant to two company resolutions marked 'irrevocable'. Relying on these resolutions the appellants sought an order authorising Mr Smit to sign any written offer from any offeror and all documents required to give effect to the offer, on behalf of Origize, and to transfer to the offeror the real right of extension in respect of 33 units in the scheme known as Ocean View Villas (the sectional scheme), held under certificate of real right number SK1206/217 (the real rights). The application was dismissed in the Western Cape Division of the High Court, Cape Town (the high court). The appeal to this court is with the leave of the high court.

[2] In order to understand the dispute it is necessary to set out briefly the material history thereof. Mr Smit, an attorney, and Mr Jacobs, an estate agent, had been business associates. During 2016, Mr Jacobs purchased the real rights in the sectional scheme, which is situated in Port Edward, KwaZulu-Natal, from the liquidators of CLA Projects (Pty) Ltd for R4.1 million in the name of Origize. Mr Jacobs was the sole shareholder and director in Origize and he paid the deposit of R410 000 immediately upon signature of the agreement. Origize was required to provide guarantees for the remainder of the purchase price within a stipulated period. When it was unable to do so the liquidators threatened to cancel the contract. This prompted Mr Jacobs to approach Mr Smit for assistance. He advised Mr Smit that he had purchased 33 sectional title units and that he had already secured a buyer who would purchase the units from him immediately for R9.5 million. It was accordingly imperative to ward off the threatened cancellation.

[3] They agreed that Mr Smit would engage with the liquidators to stave off the cancellation and, if necessary, to arrange that the remainder of the purchase price be paid by a further R1 million in cash, payable immediately, in exchange for an extension of time to provide guarantees in respect of the outstanding balance. They further agreed that Mr Smit would advance the R1 million to Origize and in exchange he would be entitled to share equally with Origize in the profits upon the sale of the units.

[4] Mr Smit duly engaged with the liquidators and secured the agreement as set out earlier on condition that the further R1 million would be non-refundable in the event of the contract not proceeding.

[5] Further discussions followed between Mr Smit and Mr Jacobs through an exchange of text messages. When Mr Smit was satisfied that an agreement had been concluded, he prepared a written document which reflected his understanding of the agreement. The material terms of the agreement were recorded as follows:

'1. Smit will lend an advance in the amount of R1 million to the purchaser, to be paid by Smit to the transfer attorneys on 14 July 2016 as part of payment to the purchase price;

2. The parties will be liable in equal shares for the purchase price, interest thereon, transfer costs and all other costs and charges incurred to acquire the property;

3. The parties will endeavour to nominate a VAT registered enterprise to acquire transfer of the property in the purchaser's stead;

4. The parties agree that the property will be sold with the intention of realising a profit from the sale thereon and that the nett proceeds will be divided equally between the parties;

5. The parties will be liable in equal shares for capital gains tax levied on the results on sale of the property.'

[6] Mr Smit signed the agreement on 14 July 2016 and paid the R1 million to the conveyancing attorneys on the same date. The agreement was forwarded to Mr Jacobs who signed it on the following day. However, he unilaterally deleted clause 2 thereof and in its stead wrote in by hand at the foot of the agreement the following:

'Please find amendment to clause 2 of page 1.

The parties agree that I, Yan (Sybrand Smit) will arrange finance at a financial institute or a business partner of him. Both parties, Sybrand Smit and O'Neil Jacobs will be liable for the repayment of all costs and charges.' (sic)

[7] The legal implications of the alteration to the document are not material for present purposes. Suffice it to record that Mr Smit was unpleasantly

surprised by the change in the financial arrangement. Not only had the R1 million already been paid over to the conveyancing attorneys but he was now required to raise the remainder of the purchase price.

[8] On 21 July 2016, Mr Smit was provided with a power of attorney from Origize as reflected in a resolution of its board of directors, being Mr Jacobs as sole director. The material portions thereof record:

'Resolved irrevocably that:

1. Sybrand Smit

Identity number . . .

is hereby nominated, constituted and appointed with Power of Substitution to be the lawful Attorney and Agent in the name, place and stead of this Company –

1.1 To prosecute and/or negotiate and/or settle on behalf of LCA Projects Development Company and/or its Liquidators and/or legal representatives, in respect of block 1 in Ocean View Villas:

. . .

1.9 To act on behalf of the company for the completion of the purchase of Block 1, Ocean View Villas, Port Edward as per the signed Purchase and Sale agreement entered into with LCA Projects Development, which shall include any and all activities relating to, but not limited to, obtaining finance for the remainder of the purchase price, registration of the property in the name of the Purchaser, to do any maintenance and improvements to the said property to get it to a sellable condition, any activities to market the units and transfer the units to the new owners;

1.10 To be my Attorney and Agent for managing and transacting my business in THE REPUBLIC OF SOUTH AFRICA AND IN EVERY TERRITORY OR COUNTRY ANYWHERE IN THE WORLD;

1.11 With full power and authority for me and in my name and for my account and benefit;

1.12 And to deal with my immovable property belonging to me with which I am entitled to deal;

1.13 And to sell my immovable property and in connection with any sale to make the necessary Declaration as to the truth of the amount of the purchase price;

1.14 And to receive and to make and give, as the case may be, the necessary contracts or acts and deeds of transfer or leases of and relating to my immovable or leasehold property in due and customary form according to the local laws an usages;

1.15 And to sign or execute any Deed or Instrument in writing as effectually as I might or could do if personally present.'

Notwithstanding the change in terminology from clause 1.10 onwards it was common cause during argument before us that these clauses related to the property of Origize.

[9] Mr Smit alleged that the power of attorney was provided to him as security for the non-refundable R1 million which he had already advanced and the remainder of the purchase price which he was required to obtain. This allegation was met by a bald denial but, there was no attempt to explain what other purpose was intended to be served by the power of attorney.

[10] Mr Smit proceeded to raise the outstanding balance of the purchase price in the form of a loan from Business Partners, South Africa, (Business Partners) in the name of the Sybrand Smit Familie Trust. As a condition for the loan to the trust, Business Partners insisted on a power of attorney by Origize in favour of Mr Smit. Accordingly, on 29 July 2016, a further resolution was taken by the board of directors of Origize that repeated the wording set out in clause 1.9 of the earlier resolution. This was the second resolution that the appellants relied on. However, by virtue of the conclusion to which I have come it is not necessary to have further regard to this resolution. I shall therefor confine myself to the first resolution.

[11] With the finances in place the transfer of the real rights to Origize was secured. However, the alleged buyer referred to earlier did not materialize and the endeavours of the parties to find a willing and able buyer at a similar price were unsuccessful. In due course Mr Smit secured a buyer willing to purchase at a price of R5.4 million. Mr Jacobs refused this offer. In the interim the partially completed units were vandalised causing substantial damage to the structures with a concomitant reduction in their market value. In the damaged state the best offer that they were able to secure was R3.95 million. This too Mr Jacobs declined.

[12] These events contributed to a deteriorating relationship between the parties and eventually, on 15 March 2018, Mr Jacobs passed a further resolution of Origize which purported to revoke the resolution of 21 July 2016.

[13] In response the appellants launched the application seeking the relief set out earlier. The appellants relied primarily on clauses 1.12-1.15 of the resolution. On their behalf it was contended that because the resolution was taken, and the power of attorney given, as security for the loan to Origize, and Smit was appointed *procurator in rem suam* as its agent, the resolution was irrevocable in law.

[14] The dispute relating to security is more apparent than real. As recorded earlier, Mr Jacobs offered no contrary explanation for the provision of the power of attorney. On behalf of the respondents it was argued that it was not linked to security as neither the written agreement nor the resolution itself refers to security. The argument is unconvincing. The powers conferred on

Mr Smit are far-reaching. In view of the timing thereof and the circumstances under which it was given, and in the absence of any other explanation from Mr Jacobs, the high court correctly found that it was given as security for the money already advanced, and still to be advanced.

[15] That brings me to the central issue in the appeal, whether the resolution was revocable and, if not, whether the relief sought was justified by virtue of the terms thereof. In respect of the former, the high court concluded that a power of attorney authorising another to act on one's behalf can, in law, never be irrevocable. It relied on a passage in *Lawsa*.[1] The essence thereof is summarised in the final paragraph, quoted by the high court:

'The position then can be summed up as follows: according to Roman-Dutch law, an authority to another person to conclude juristic acts in one's name or on one's behalf could not be irrevocable; the exception mentioned by Voet[2] is apparent and not real, as Voet refers to a cessionary and not to a representative who acts on behalf of another person; the so-called authority coupled with an interest or forming part of a security is nothing but a cession; cases in which it is suggested that an authority can be irrevocable so as to render valid a juristic act concluded by a person purporting to act on behalf of another person after the other person had revoked his or her authority cannot be regarded as authoritative.'

[16] The view expressed in *Lawsa* is not universally held. Thus, *The Law of Agency in South Africa*[3] (Silke) records the current position in South Africa as follows:

'A principal may at any time terminate the authority he has conferred on his agent, whether the agent has commenced to act on it or not, and whether or not it has been expressly or impliedly agreed that the authority will be irrevocable, unless

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[1] *Lawsa* 3 ed Agency and representation – termination of authority.
[2] 17.1.17.
[3] J M Silke *De Villiers and McIntosh: The Law of Agency in South Africa* 3 ed at 614.

(a) it was granted for the purpose of protecting or securing some interest of the agent;

(b) it forms one of the terms of a contract between the parties;

(c) it was given to secure the performance of the promise made by the principal to the agent.'

[17] *The Law of Agency*[4] (Kerr) recognises the general rule that authority given to another may be revoked at any time and that the mere agreement by the parties that a power granted by the one to the other or a mandate given by the one to the other shall be 'irrevocable' or '*in rem suam*' does not deprive the grantor or the mandator of his power to revoke. The author then proceeds to opine:

'However, grants of power and mandates which are given to enable the grantee or mandatary to obtain security are not revocable by the grantor or mandator while the debt sought to be secured is unpaid.'[5]

[18] *Lawsa* argues that the statement by Voet (17.1.17) has long been misunderstood and misapplied. Indeed, it would appear as if, and I accept for purposes of this judgement that the exception to the general rule (the exception), alluded to by Kerr, was not part of the Roman-Dutch law and that it has its origin in English law.[6] However, the exception, which lies at the heart of the contentions by Silke and Kerr, has a long history in reported case law in South Africa.

[19] The first reference thereto was in *Koch v Mair* (1894) 11 SC 71 at 83, wherein De Villiers CJ stated:

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[4] Kerr *The Law of Agency* 4 ed (2006) at 196-197.
[5] See also Harms *Amlers Precedence of Pleadings* 9 ed at 28.
[6] See *Lawsa*.

'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.'

De Villiers CJ did not cite any authority for his assertion.

[20] It arose again in *Marcus' Executor v Mackie Dunn & Co* (1896-1897) 11 EDC 29 where Solomon J, after analysing a number of English decisions concluded:

'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. The same rule prevails in our law; it is laid down in Burge's "Colonial Law" in words identical with those quoted above, "(A mandate) terminates when the mandant himself revokes the authority. But this rule admits of an exception when the mandate forms part of a security for a debt" (Burge's Comment,' Juta's edition, p. 282, and Voet 17.1.17, there quoted).'

[21] *Lawsa* argues, however, that Solomon J simply accepted, on the authority of Burge, that the exception forms part of our law. Burge, it is argued, relies on Voet, who deals with the *procuratio in rem suam*, or cession, and not with the power of attorney to sell things belonging to another person. This criticism may be accepted for purposes of the debate. The significance of the statement by Soloman J, as I shall show, lies in the acceptance of the exception and its consistent application in our courts.

[22] In *Van Niekerk v Van Noorden* (1900) 17 SC 63, the plaintiffs had conferred a wide authority on the defendant which was given 'specially,

irrevocably and *in rem suam*' as security for a loan advanced. De Villiers CJ, at 65, remarked:

'It appears to me an important point on the case that this power was given for the protection of the defendant. He was going to some risk in assisting the plaintiffs, and in consideration of that risk he wished to hold control of this business for so long as the debt was still owing to him, and it was for that purpose that the irrevocable power was given.'

He went on to conclude at 66:

'There has been a great deal of argument as to whether this power is revocable or not, but my idea is that it is revocable to this extent, that the plaintiffs could at any time by paying the whole amount of the debt due to the defendant claim that the power given should be revoked, but so long as the debt remains it is really irrevocable.'

[23] *Natal Bank Ltd v Natorp and Registrar of Deeds* 1908 TS 1016 followed. There, Natorp had given the bank an 'irrevocable' power of attorney which entitled it to pass a bond of £7 000 over certain property named therein. It was clear from the terms of the power of attorney that it was given in connection with a debt due by Natorp to the bank 'arising from and being for money lent and advanced or to be lent and advanced by the said bank to Natorp and Ireland, merchants, Pietersburg'. On 4 October 1908 Natorp purported to revoke the power by notice to the bank. A few days thereafter the bank proceeded to act on the power but the Registrar of Deeds, who had been notified of the purported revocation, rejected the bond. However, the court ordered that the power of attorney be treated as binding. Solomon J stated at 1019-1022:

'The object of the transaction was that Natorp should give security to the bank for this overdraft, or for any overdraft which might become due in the future from the firm of Natorp & Ireland. The transaction . . . is a comparatively common banking transaction between a customer and a bank, under which certain facilities are given to the customer,

and he in turn grants a power of this nature as security, to be retained by the bank and acted upon by it when it thinks necessary . . . [I]n the circumstances . . . the power cannot be revoked until the firm [Natorp and Ireland] have discharged their liabilities to the bank.'

[24] The position expounded by Voet (17.1.17), that there must be a cession of action before the authority can be deemed to be irrevocable, was advanced. The argument was considered and rejected,[7] whether rightly or wrongly. Natal Bank was followed in *Hunt, Leuchars and Hepburn Ltd: In Re Jeansson* (1911) 32 NPD 493. In *Hunt*, Jeansson had borrowed money from Hunt, Leuchars and Hepburn and given them an irrevocable power of attorney to let, sell, acquire, mortgage, manage, and generally to administer: a certain piece of land. After Jeansson's death Hunt Leuchars and Hepburn approached the court for leave to act upon the power of attorney. Leave was granted on the ground that the power, having been given as security, was irrevocable and did therefore not terminate at Jeansson's death.

[25] *Glover v Bothma* 1948 (1) SA 611 (WLD) was next. Roper J considered the argument based on Voet 17.1.17.[8] He concluded:

'The effect of the rule as stated by *Voet* appears to be substantially the same as that of the English rule that an agency cannot be revoked where it is coupled with an interest.

The following passage occurs in Wille and Millin's *Mercantile Law of S.A.* (11th Ed., p. 362):

"An authority coupled with an interest is one given for the purpose of protecting or securing any interest of the agent. Such an authority or power is usually styled 'irrevocable' in the instrument conferring it, and it often takes the form of what is called a procuratorship *in rem suam*, i.e., an agency in which the agent is given authority to sue in his own name and in which he transacts the business committed to him for his own benefit and not for the

[7] At 122-123.
[8] 625-626.

benefit of the principal. In a case of this sort, as well as in every other case where the power has been given by way of security, irrevocability will be implied, even if the power is not express on the point. On the other hand, merely to call a power 'irrevocable' is not to make it so. Subject to an action for damages an ordinary power styled irrevocable may be revoked . . . The test is whether it is intended for the protection or securing of an interest of the agent. If it is, it is irrevocable, until such time as the protection or security is no longer needed".'

[26] Caney J was called upon again to consider the revocability of a power of attorney in *Ward v Barrett, NO, and Another* 1962 (4) SA 732 (NPD). He opined at 737D-E:

'Generally, the authority of an agent is revocable by his principal and terminates on the death or insolvency of himself or of the principal. The question whether a power of attorney or the authority of an agent howsoever conferred is irrevocable depends, it seems to me, upon an interpretation of the transaction into which the principal has entered with the agent and an application of the general principles of law to that transaction. 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 was the transaction.'

[27] Caney J proceeded to refer to *Natal Bank* and stated (at 737G-H):

'[A] power of attorney (expressed to be irrevocable) to pass a mortgage bond was given, not for the purpose of then and there passing a bond, but for the bank to hold as security for overdraft facilities and to be acted upon by the bank when it thought necessary. The principal's attempt to revoke the power would have been, as INNES, C.J., said of a bond in similar circumstances, in *National Bank of SA Ltd v Hoffman's Trustee*, 1923 AD 247 at p. 249, "a fraudulent act which the law could not countenance".'

[28] These decisions, stretching back more than 125 years, set out the development of our law and the establishment of the principle that a power of

attorney given as security for a debt owing, is irrevocable, at least for as long as the debt remains unpaid. The courts have repeatedly considered the pronouncement by Voet and have consistently attributed to it their understanding. I accept that they may have misunderstood his teaching, however, as the law has developed in this country over an extended period the principle has been firmly laid down and the time has come to recognise that it is part of our contemporary law.[9]

[29] I have alluded earlier to the case law. Solomon J noted in *Natal Bank*, in 1908, that it was common banking practice for a bank to accept a power of attorney to register a bond if and when so advised, as security for a loan. There is no reason to believe that the practice has materially changed. Vested rights have accrued to parties reliant on the enduring principle affirmed in our courts and a ruling now that the exception has never been part of our law would have a ripple effect, with a concomitant impact on existing rights and obligations. For these reasons I conclude that the resolution of 21 July 2016 was irrevocable, at least until the debt secured was repaid, and its purported revocation is therefore invalid.

[30] The remaining question is whether the terms of the resolution entitled the appellants to the order sought. The high court said not. It reasoned that it would be wrong to permit Mr Smit to accept 'any offer' as an agent is in law obliged to act in the best interest of his principal and he could therefore not accept an offer of which Mr Jacobs did not approve. The reasoning does not do justice to the relationship between the parties. The history of the dispute

[9] *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöporasie Bpk* 1972 (1) SA 761 (A).

demonstrates that they were partners in a joint venture. Mr Smit has assumed a substantial financial risk to assist Mr Jacobs and the power to sell the property was specifically given to secure this risk .As a partner sharing in the profit, if any, he has as great an interest, if not greater, in securing the highest possible price as Mr Jacobs has.

[31] Clauses 1.12-1.15 of the resolution confer extensive powers on Mr Smit to sell the property, to receive or to make, as the case may be, contracts and deeds of transfer relating to the property and to sign any deed or instrument in writing as effectually as Mr Jacobs could. In my view the express terms of the power of attorney confer on Mr Smit the authority to accept an offer to purchase and to sign the deed of sale and all documents necessary to pass transfer to the purchaser.

[32] On behalf of the respondents it was argued that the power of attorney was time bound and once the transaction with the liquidators had been completed and transfer of the rights effected the power lapsed. The argument ignores the provisions of clause 1.9 which authorises Mr Smit to do maintenance and effect improvements to the property to get it to a sellable condition and to undertake any activities to market the units and transfer the units to new owners. Moreover, once it is accepted that the power of attorney was given as security for the loan, as I have, it is irrevocable for as long as the debt which it sought to secure remains unpaid. The argument can therefore not succeed.

[33] In the result:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

‘1 It is declared that the first applicant may, in terms of the resolution adopted by the first respondent on 21 July 2016:

1.1 Accept and sign on behalf of the first respondent any written offer from an offeror; and

1.2 Sign on behalf of the first respondent all documents required to give effect to the abovementioned written offer and to transfer to the offeror:

The real right of extension in respect of 33 units of the scheme known as Ocean View Villas, held under certificate of real right number SK1206/2017 (the real rights).

1.3 The first and second respondents shall pay the costs of the application, jointly and severally.’

J W EKSTEEN

ACTING JUDGE OF APPEAL

Appearances

For appellants:	M Seale SC (with him A Walters)
Instructed by:	Smit & CO Attorneys, Lamberts Bay
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For respondent:	A Montzinger
Instructed by:	Hanro Steffen Inc, Brackenfell
	Symington & De Kok, Bloemfontein