Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case numbers: 18299/13 and
12562/15

Before: The Hon. Mr Justice Binns-Ward
Hearing: 23 March and 5 May 2016
Judgment delivered: 28 July 2016

In the matters between:

AFRASIA SPECIAL OPPORTUNITIES FUND (PTY) LTD Applicant

And

ROYAL ANTHEM INVESTMENTS 130 (PTY) LTD Sixth Respondent

JUDGMENT

BINNS-WARD J:

[1] AfrAsia Special Opportunities Fund (Pty) Ltd ('AfrAsia') proceeded on motion in case no. 18299/2013 against seven respondents for payment of the sum of R17,889,191 (made up of a principal debt of R16,474,780 plus a raising fee and interest). The debt was alleged to have arisen from a loan by AfrAsia to Craigan (Pty) Ltd ('Craigan'). Default judgment was granted against all of the respondents on 21 January 2014. The sixth respondent, Royal Anthem Investments 130 (Pty) Ltd ('Royal Anthem'), subsequently obtained an order rescinding that judgment. This judgment is concerned only with the claim that was thereafter pursued against Royal Anthem.

[2] The alleged basis for Royal Anthem's liability in respect of the debt incurred by Craigan was a 'limited guarantee' apparently executed by it in favour of AfrAsia, whereby it guaranteed the performance by Craigan of the latter's obligations to

AfrAsia in terms of the loan agreement and bound itself to provide security for the performance of its obligation by hypothecating two immovable properties in favour of AfrAsia. The mortgage bonds concerned were registered in the deeds registry as so-called 'surety bonds'.

[3] Royal Anthem raised a number of defences to the claim against it in case no. 18299/2013. It also counter-applied for a declaration that the mortgage bonds are null and void.[1] In response to the counter-application, AfrAsia applied in separate proceedings, in case no. 12562/2015, for the rectification of the mortgage bonds. Both cases were heard together. The nature of the rectification sought is the replacement in each of the mortgage bonds of the name of the principal debtor therein identified as Scarab Investment Holdings (Pty) Ltd with that of Craigan and the substitution of the expression 'Deed of Suretyship' therein with 'Limited Guarantee'.

The rectification application (case no. 12562/2015) and the counter-application in case no. 18299/2013

[4] It is convenient to treat first of the application for the rectification of the mortgage bonds because in the first of the three sets of answering affidavits eventually delivered by Royal Anthem the approach was adopted that it was not necessary to engage with the other defences, including one premised on a lack of authority by the person purporting to represent the company, by reason of the fact that the claim was inconsistent with the cause of debt reflected in the bonds. As will be explained presently,[2] the wording of the bonds is also a crucial consideration in this matter affecting AfrAsia's ability to enforce the limited guarantee agreement. Obviously, the discussion on this aspect will proceed on the basis of a prima facie acceptance of the validity of the limited guarantee agreement.

[5] The rectification application was initially framed as one purportedly made in terms of s 4 of the Deeds Registries Act 47 of 1937. That provision invests the registrars of deeds with the power to rectify errors in deeds or documents in the name or the description of any person or property mentioned therein, or in the conditions affecting any such property if the registrar considers it necessary or desirable to do so. The registrar must obtain the written consent of every party who might have an

[1] The same relief had been sought in action proceedings instituted by Royal Anthem under case no. 7520/2014. The action was withdrawn before the counter-application came up for hearing.
[2] See paragraph [9], below.

interest in the rectification, and, in the event of any such person refusing to provide consent, may apply to court for authority to effect the rectification. It is plain therefore that an application for rectification in terms of s 4 would be brought only by the registrar, and only in circumstances in which *the registrar* considered it necessary to amend a deed or document.

[6] The rectification sought by AfrAsia in the current matter moreover does not concern the misdescription of a name or property, which is something of a merely clerical character. It goes rather to a correction of the recordal of the obligations to which the acts of hypothecation related and the identity of the parties to the underlying contract.

[7] Section 4 of the Deeds Registries Act is therefore not applicable to an application for rectification of the nature currently under consideration. AfrAsia advisedly excised the reference to the provision in its amended notice of motion.[3]

[8] The object of registration in the context currently in issue is to provide a public record of real rights in immovable property. The mortgage bonds record the hypothecation of the properties in question in favour of a particular creditor.[4] Their registration constitutes the act that gives effect to the hypothecation by vesting the real rights in the mortgagee that constitute its security. There is, strictly speaking, no need for the nature of the underlying obligation to be recorded in the bond, but it is customarily done.[5] Thus, provided that there is in fact an underlying obligation, a mistake in its recordal does not defeat the effectiveness of the hypothecation. Where, as in the current case, the mortgage bonds do record the terms of the underlying obligationary contract, the bonds are, just like any written agreement, susceptible to rectification to correct any error and to record the true position.

[9] In the peculiar circumstances of the current case rectification of the mortgage bonds is, exceptionally, a necessary prerequisite to AfrAsia's ability to pursue its principal claim against Royal Anthem. This is because an express provision in the limited guarantee agreement entered into by Royal Anthem defines the extent of its

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[3] In view of these findings it is unnecessary to consider the admissibility of an affidavit by a former deeds office official, now employed by a firm of attorneys as a 'property law advisor', that was tendered by Royal Anthem in support of the contention that rectification of the mortgage bonds in terms of s 4 of the Deeds Registries Act was not competent.
[4] See *Thienhaus v Metje & Ziegler Ltd* 1965 3 SA 25 (A), at 31H.
[5] Cf. *Thienhaus v Metje & Ziegler Ltd* supra, at 31H-34D and 39A.

obligations to AfrAsia as being 'limited to the exercise of [AfrAsia's] rights *in terms of the Mortgage Bond*'. Discordance between the terms of the mortgage bonds and the character of AfrAsia's claim in terms of the limited guarantee agreement would in these circumstances obviously be problematic.[6]

[10] The term '*Mortgage Bond*' was defined in the limited guarantee agreement to mean the mortgage bond(s) to be registered by Royal Anthem in favour of AfrAsia over certain of Royal Anthem's immovable property for a maximum capital sum of R22 million as security for Craigan's obligations in terms of the loan agreement between AfrAsia and Craigan that was entered into in circumstances to be touched on presently.

[11] It is not necessary to engage with the evidence in detail at this stage. Suffice it to say that at the material time Craigan and Royal Anthem were represented by one Stuart Paget in their dealings with AfrAsia. Paget also controlled Scarab Investment Holdings (Pty) Ltd. These three companies, along with three others, which were also respondents in case no. 18299/2013, constituted a group of companies; apparently called the 'Scarab Group'. The essential purpose of the relevant transactions was to obtain working capital for a cement business. (Craigan's trading name was Trojan Cement.) Paget involved a multiplicity of companies in the transactions for the purpose of providing the security that AfrAsia required in respect of the loan that it was, in principle, willing to advance. In regard to the latter aspect, part of the funds to be advanced to the group was to be used to settle Royal Anthem's then existing mortgage debt to a third party, Chesterfin. This was necessary if AfrAsia were to be afforded the contemplated security in respect of the repayment of the loan by means of a first mortgage over certain immovable property owned by Royal Anthem.

[12] It is evident from an email, dated 19 June 2013, from one Paul Dixon (variously described in the papers as Paget's spokesperson and intermediary or the 'introducer' of the transactions) to one Peter John Van Zyl, representing AfrAsia, that it had been requested that the loan be advanced to Craigan, rather than any other company in the group. It was represented that that was in order to produce a tax advantage. It was contemplated that various fixed properties owned by separate property-owning companies would be provided as security for the repayment of the

[6] Cf. *Thienhaus , NO v Metje & Ziegler Ltd and Another* supra, at 33 *fin*.

loan. The documentation subsequently executed for the purpose of the implementation of the contemplated transaction included an agreement of loan in terms of which Craigan was identified as 'the borrower' and AfrAsia as 'the lender'. Royal Anthem was a party to that agreement. Its role as party to the loan agreement was as a 'property owner', as defined in the agreement. The agreement provided that the property owners would 'enter into the Limited Guarantees, Mortgage Bond Powers of Attorney and Mortgage Bonds' to furnish security for the satisfaction of the borrower's obligations to the lender.

[13] Royal Anthem, purportedly represented by Paget, executed a deed of 'limited guarantee' in favour of AfrAsia on 29 July 2013 – the same day as the company subscribed as a party to the aforementioned loan agreement between Craigan and AfrAsia. According to its tenor, the limited guarantee agreement bound Royal Anthem in favour of AfrAsia in respect of the performance by Craigan of its obligations to AfrAsia under the loan agreement - to which it was expressly cross-referenced. As mentioned, the limited guarantee agreement limited the extent of Royal Anthem's liability thereunder to its obligations as recorded in the mortgage bonds that were to be registered against its properties.

[14] AfrAsia was provided with a document that purported to be a resolution by the board of Royal Anthem, dated 29 July 2013, authorising the company to become party to the transactions and to register 'a mortgage bond over certain immovable assets of the Company' in favour of AfrAsia. It is plain from the context of the resolution that the contemplated mortgage of the company's property was intended to serve as security for its performance in terms of the 'limited guarantee agreement' with AfrAsia that was also authorised by the directors' resolution.

[15] The aforementioned resolution by the board of Royal Anthem appeared to bear the signatures, qua directors, of Paget and one Harold Murray Muller. Paget had acquired the shares in Royal Anthem from Muller through the vehicle of another company, Market Demand Trading 620 (Pty) Ltd, for R25,5 million, payable by way of a deposit of R1,5 million and 48 monthly instalments of R500 000. The shares acquired by Market Demand Trading in Royal Anthem had, however, been pledged back to Muller pending settlement of the outstanding purchase consideration. Muller had also remained a member of Royal Anthem's board pending full payment for the

shares. (Market Demand Trading was in default in respect of payment of the monthly instalments in July 2013.) Muller avers that what purports to be his signature on the resolution is a forgery. I shall come back to address the effect of Muller's averment when I deal later with the validity or effectiveness of the transactions.

[16] The uncontroverted evidence is that the mortgage bonds subsequently registered against two immovable properties of Royal Anthem - Erf 2742 Franschhoek and portion 3 (a portion of Portion 1) of the Farm Klein Deel 668 - were executed and registered in performance of the obligations of Royal Anthem recorded in terms of the aforementioned loan and limited guarantee agreements.

[17] As mentioned, the mortgage bonds reflect the name of the principal debtor as Scarab Investment Holdings (Pty) Ltd, not Craigan. That this was erroneous is evident from the context, described above, in which the mortgage bonds were registered. There is nothing to suggest that AfrAsia had advanced, or ever intended to advance, a loan to Scarab Investment Holdings. All the other documentation executed by the parties supports the fact that it had been the common understanding that Craigan, not Scarab Investment Holdings, should be identified in the mortgage bonds as the principal debtor, consistently with the loan agreement.

[18] The bonds also reflect that Royal Anthem is bound in favour of AfrAsia as surety for the principal debtor in respect of the latter's obligations to AfrAsia in terms of a loan in the amount of R22 million. The mortgage bonds record that the obligation as surety was undertaken because AfrAsia had required 'additional security for the said loan' and that Royal Anthem had agreed to provide such additional security, which it had 'done by way of a Deed of Suretyship in favour of' AfrAsia. There was no evidence, however, to support the notion that Royal Anthem had executed a deed of suretyship, or that it had ever been intended that it should do so. As described above, the loan agreement obliged Royal Anthem instead to enter into a 'limited guarantee' agreement and to mortgage its properties in favour of AfrAsia as security. Indeed, the primary deponent to Royal Anthem's answering papers in the principal proceedings (Muller) admitted 'that the limited guarantee is the only possible *causa*' for the mortgage bonds.[7]

[7] Affidavit of Harold Murray Muller *jurat* 18 June 2015, at para 11.

[19] It was argued on behalf of Royal Anthem that merely correcting the description of the principal debtor in the mortgage bonds, as originally sought by AfrAsia in its rectification application, would not render the mortgages effective because there was in point of fact no deed of suretyship in existence. It was this argument that prompted AfrAsia to apply to amend the relief it sought to include a substitution of the expression 'Deed of Suretyship' in the mortgage bonds with 'limited guarantee agreement'. In my view a rectification on this basis would be unexceptionable in the factual context described above. But, strictly speaking, it would be unnecessary. Evidence *dehors* the bonds to identify the 'deed of suretyship' would not offend against the parol evidence rule. I consider that it is quite obvious on the incontestable facts that were Paget to have been asked to identify the 'Deed of Suretyship' when he executed the power of attorney to authorise the registration of the mortgage bonds, he would have pointed out the limited guarantee agreement. Whether a so-called guarantee that consists of an undertaking to pay a debt owed by another in the event of the debtor failing to do so is anything other than a contract of suretyship is a matter of legal technicality, and apparently unresolved academic debate.[8] The guarantee agreement entered into by Royal Anthem being only arguably distinguishable from a suretyship, it is hardly surprising that neither Paget, nor the registering attorneys were astute to the difference - if difference there was.

[20] It was also argued that a rectification of the mortgage bond to replace the expression 'Deed of Suretyship' with 'limited guarantee agreement' would require a fundamental re-characterisation of the mortgage bonds. As mentioned, the bonds are labelled as 'Surety Bonds'. It was submitted that the rectification sought by the applicant would entail changing the character of the mortgage bonds into 'covering bonds'. The argument is a red herring in my view. The label is irrelevant. Rectification would not detract from the efficacy of the registration of the mortgage bonds as acts of hypothecation vesting real rights in Royal Anthem's immovable

[8] See C. Forsyth and J.T. Pretorius, *Caney's The Law of Suretyship in South Africa* (Juta) 6th ed. chap. 2.3, at pp. 32-33, s.v. 'Suretyship and the contract of guarantee'. Indeed, in its particulars of claim in the action under case no. 7520/2014, referred to in note 1, above, Royal Anthem's legal representatives referred to the obligations undertaken by the company in terms of the limited guarantee agreement as 'binding Royal Anthem as surety and co-principal debtor…'. (The deponent to the supporting affidavit sought to explain the pleaded allegation by stating that he had been misled by the reference to a deed of suretyship in the registered mortgage bond.)

properties in AfrAsia. The *causa* for the hypothecation is AfrAsia's rights against Royal Anthem in terms of the limited guarantee agreement.

[21] The absence of a deed of suretyship in the form of a contractual document professing itself to be such was the only ground upon which Royal Anthem's aforementioned counter-application was based. For the reasons just given, that ground cannot be upheld. (The position remains, however, that if there is no valid underlying *causa* for the mortgages, Royal Anthem would be entitled to obtain their cancellation for '[t]he settlement of a security divorced from an obligation which it secures [is] meaningless'; cf. *Kilburn v Estate Kilburn* 1931 AD 501, at 505 fin – 506.)

[22] It was further argued on Royal Anthem's behalf that a rectification of the mortgage bonds as sought by AfrAsia would afford the latter a cause of action that had not existed when proceedings had been instituted under case no. 18299/2013 in respect of the principal claim. It was not made altogether clear whether the argument was advanced in opposition to the application for the rectification of the mortgage bonds, or to the applicant's claim to execution against the properties in the principal case. In either context, there is no merit in it. Firstly, as explained above, the recordal of the underlying obligation upon which the hypothecation of immovable property is premised is not a legal requirement for the validity or efficacy of the hypothecation. Secondly, and in any event, rectification is directed at achieving a declaration of the wording of a jural document as it was originally intended to be, and initially should have been; cf. *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA), at para 13. It therefore operates *ex tunc*; not *ex nunc*. It is to be distinguished from an amendment, which is something that changes the content of a document.

[23] In any event, I think it should be borne in mind that the 'rectification' of the mortgage bonds is in the nature of a correction of the deeds to accurately reflect the *causa* of the hypothecation. The acts of hypothecation were in fulfilment of the underlying agreements that AfrAsia seeks to enforce, which are not in need of rectification. The Full Court judgment in this Division in *Taylor v Cape Importers* 1938 CPD 362 appears to afford authority for the proposition that a party is entitled to rectification of a mortgage bond to accord with the underlying agreement in terms of

which it came to be registered, even if the bond had been registered in terms of a power of attorney that had misstated the *causa*. The effect is to make the bond read as it always should have read. In *Cape Importers*, the court refused to grant provisional sentence on a mortgage bond in circumstances in which the terms of the bond conflicted with those of the underlying agreement, notwithstanding that the bond had been executed consistently with a power of attorney signed by a party in the mistaken belief that it did faithfully record the cause for the hypothecation; see also *Grobler v Scholtz* 1953 (3) SA 175 (T) and compare *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA), [1999] 4 All SA 396, especially at para 16.

[24] There is nothing in the evidence to suggest that the rectification of the registered mortgage bonds would prejudice the position of any third party; cf. *Durmalingam v Bruce* 1964 (1) SA 807 (D), at 811 *fin*-812.

[25] There would be no point in acceding to the application to rectify the bonds, however, if the validity of the underlying *causa* is not established. It is to that question that I turn next.

The validity of the contracts

[26] Royal Anthem has resisted liability in terms of the limited guarantee agreement on a number of grounds.

[27] Firstly, and most fundamentally it seems to me - although one might be forgiven for thinking otherwise having regard to the manner in which the point was almost buried under a plethora of other rather technical defences in Royal Anthem's papers - it was contended that Paget had not been authorised to represent it in concluding the agreement and that consequently it was not bound thereby.

Paget's authority to represent Royal Anthem

[28] The relevant factual context in this regard may be accepted to have been the following: When Market Demand Trading acquired the entire shareholding in Royal Anthem from Muller, the shares and attendant rights therein were pledged and ceded to Muller pending payment of the full purchase price. There is no evidence to suggest that anyone representing AfrAsia in entering into the relevant transactions was, or reasonably should have been, aware of the cession and pledge arrangement. Paget was appointed to the board of Royal Anthem, but Muller remained a director. As

mentioned earlier, the idea was that Muller would remain on the board until he had been paid in full for his shares. Insofar as Royal Anthem, as a land holding company, required executive management, Paget took over that function from Muller. He exercised hands-on control over the company's properties. Paget was apparently thought by AfrAsia to be Royal Anthem's managing director. But there is no evidence that he had been appointed as such, or that the company expressly represented him to be the managing director. An allegation by AfrAsia on the pleadings in case no. 7520/2014[9] that Paget was Royal Anthem's managing director was not denied, but I do not consider that suffices as evidence in the matters before me that he was. It is generally accepted, however, that a person permitted by a company to conduct himself as its *de facto* managing director may be regarded by outsiders as if he had been formally appointed as such; cf. *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd. and Another* [1964] 2 Q.B. 480, at 509 (per Diplock LJ), following *Biggerstaff v Rowatt's Wharf Ltd.* [1896] 2 Ch. 93 and *British Thomson-Houston Co. v Federated European Bank Ltd.* [1932] 2 K.B. 176; see also *Legg & Co v Premier Tobacco Co* 1926 AD 132 at 139, *Wolpert v Uitzigt Properties (Pty) Ltd and Others* 1961 (2) SA 257 (W) at 265H-266B and *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC), at para 26.

[29] The conclusion of the limited guarantee agreement constituted the provision by Royal Anthem of 'financial assistance' to a related company in the sense contemplated by s 45 of the Companies Act 71 of 2008 ('the Companies Act'). Accordingly, the company could not properly enter into the agreement without complying with the requirements prescribed in s 45(3) and (4). These requirements included a special resolution of the shareholders, adopted within the previous two years, which approved such assistance, and the board having satisfied itself that the transaction would not imperil the company's solvency and liquidity and also that the assistance was to be furnished on terms that would be fair and reasonable to the company. By virtue of certain provisions in the aforementioned cession and pledge agreement, Market Demand Trading, qua sole shareholder of Royal Anthem, was not able to competently approve the transaction without Muller's consent. Muller denies

[9] See note 1, above.

having had any knowledge that the transaction was proposed and says he was never approached to give his consent.

[30] Paget provided AfrAsia with documentation that purported to show due compliance by Royal Anthem with the requirements of s 45 of the Companies Act and authorising the conclusion of the limited guarantee agreement. The documentation purported to be a relevant resolution apparently signed by both of the directors of the company and a resolution by Market Demand Trading, signed by Paget, approving the transaction in its capacity as the sole shareholder in Royal Anthem. For the purpose of the determination of AfrAsia's claim in the principal case it may be accepted that what purported to be Muller's signature on the board resolution was a forgery.[10] There is, however, nothing in the evidence to suggest that any of AfrAsia's representatives should have appreciated or suspected as much before Muller made the allegation in the course of the litigation.

[31] AfrAsia contends that in the circumstances just described its position is protected by the rule in Turquand's case[11] and/or the provisions of s 20(7) and (8) of the 2008 Companies Act, which provide -

> (7) A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.
>
> (8) Subsection (7) must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers.

[32] The expression 'the rule in Turquand's case' is often used loosely to cover a wide field, including matters that are relevant to the establishment of the ostensible authority of persons contracting on behalf of companies,[12] but the effect of the Turquand rule in its true and narrower sense is limited. It provides no more than that

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[10] The principal deponent to the affidavits delivered by Afrasia called into question whether Muller's signature was in fact a forgery, but Muller's averment that it was prevails for present purposes on the Plascon-Evans rule. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634E-635C.

[11] *Royal British Bank v Turquand* (1856) 6 E&B 327; 119 ER 886.

[12] *Palmer's Company Law* at 3.331 [Palmer R123: November 2009] observes that '*The whole area of agency rules as applied to companies is sometimes referred to … as the rule in Turquand's case*'.

an outsider treating with a company is entitled to assume, in the absence of good reason to suspect otherwise, that any internal rule of management to which the company's representative's authority to act on its behalf in the transaction in issue is subject has been complied with. The incorporation of the rule as part of our common law was confirmed in *The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1948 (3) SA 831 (A). The history and ambit of the operation of the rule has been described in a number of judgments of the South African courts, the more illuminating of which include *Wolpert v Uitzigt Properties (Pty) Ltd and Others* supra, *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) and *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* supra. It would be superfluous for me to repeat here what has been comprehensively traversed in those authorities. Suffice it to say that it is clear that the rule is of no assistance to a party seeking to enforce a transaction with a company who is not able to prove that the person with whom it transacted as the company's representative was authorised to represent the company (cf. *Nieuwoudt NO and another v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA), at para 22). The character of the authority might be express, implied, or ostensible (sometimes also referred to as 'apparent').

[33] Ostensible authority – a concept that generally arises for consideration only when, as in the current case, a principal disputes the authority of its agent to have represented it - is established when a company (or indeed any principal), by its conduct, leads third parties reasonably to believe that the person purporting to represent it is in fact authorised to do so. Such conduct results in the company being estopped from denying that the person lacked authority. So, in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA), at para 26, it was held that the requirements for holding a principal liable on the basis of the ostensible authority of its acknowledged agent are:

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]

[34] The fundamental issue between the parties in the current case is whether Paget's conduct resulted in Royal Anthem being bound by the pertinent agreements and the consequent hypothecation of its immovable property. The company, represented by Muller, who, after the cancellation of the sale of shares agreement with Market Demand Trading, is now once again its sole director and shareholder, alleges that it is not because Paget lacked authority and the directors' resolution upon which he purported to act was a forgery. Rules of internal management are not germane to the question that is in dispute. AfrAsia's invocation of the Turquand rule does not meet the allegation that Paget fraudulently misrepresented that Royal Anthem's directors had resolved to approve the transactions.

[35] It might be that s 20(7) of the Companies Act could afford AfrAsia an effective answer to some or all of the defences that Royal Anthem has sought raise based on alleged non-compliance with certain provisions of the Act.[13] But one only has to engage with that proposition if it is established that Paget was indeed actually, impliedly, or ostensibly authorised to represent Royal Anthem in concluding the transactions, or perhaps that the company had given out that he was authorised to represent to outsiders that the relevant organs of the company that did have authority to commit it to the transactions had given the requisite go ahead.

[36] In the face of the evidence of Muller that AfrAsia has been unable to refute on the papers, it has to be accepted that Paget did not have actual authority from the board to represent the company. In the context of its shares in Royal Anthem having been pledged to Muller in terms of an agreement that limited the pledgor's rights to use the shares without Muller's consent, I also do not consider that any reliance can be placed on the resolution by Market Demand Trading, qua shareholder, as having effectively vested Paget with actual authority to bind the company.

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[13] Section 20(7), had it been in operation at the time, might arguably have led to a different determination in *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd v Göbel NO and Others* 2011 (5) SA 1 (SCA), because it expressly includes a presumption in favour of outsiders dealing with a company in good faith that the company has complied with all formal and procedural requirements of the Act.

[37] Had it been established that Paget had been appointed as managing director of Royal Anthem, that might have afforded an effective basis to contend that he had implied authority to represent the company (cf. e.g. *Wolpert* supra, at 262E-H, citing *Robinson v Randfontein Estates Gold Mining Co. Ltd.*, 1921 AD 168 at pp. 216 - 7,[14] and *One Stop Financial Services* supra, at para 26); but I have already found that it was not. I am willing to accept, however, that AfrAsia was entitled to treat with Paget as the *de facto* managing director of Royal Anthem. His implied authority to represent the company in that capacity would, however, have been limited to dealings that would fall within the authority usually vested in a managing director. That would cover concluding contracts within the ordinary scope of the company's day-to-day business.[15] In my view binding the company as guarantor of a third party's debt repayment and giving a substantial part of the company's assets as security for that obligation did not fall within the ordinary scope of Royal Anthem's ordinary business, as far as it may be discerned on the papers. These were not what might be termed 'normal' contracts.

[38] In arguing in support of a finding that Paget had ostensible authority to represent Royal Anthem, AfrAsia's counsel pointed out that Muller had placed Paget or Market Demand Trading in possession of the immovable properties owned by Royal Anthem and had handed over the original title deeds for the properties. Muller had also agreed, when Market Demand Trading had fallen into default in its payments for the shares in Royal Anthem, that a mortgage loan might be raised by the company to put Market Demand Trading in funds to settle the outstanding balance on the purchase price of the shares and that Paget should attend to the necessary arrangements. They argued that against that background it was apparent that had AfrAsia or any of its representatives approached Muller for approval for the registration of the mortgage bonds in respect of Royal Anthem's properties, he would have furnished it. I do not find that argument helpful. It postulates a hypothetical context and invites a speculative answer. Muller would no doubt have been agreeable to giving approval for the registration of a mortgage bond to secure a loan to be obtained to achieve payment of the amount due to him. There is nothing, however, to suggest that he would have agreed to the bonding of the properties for the purpose of

[14] I would respectfully suggest that the citation of the passage from Solomon JA's judgment in *Robinson v Randfontein Estates* should have extended to p. 218.
[15] What Diplock LJ in *Freeman & Lockyer* supra, at 509, described as 'normal' contracts.

securing a loan to a business in the Scarab Group. In the context of Market Demand Trading's default on its monthly payments for its shares in Royal Anthem, the probabilities are actually to the contrary.

[39] In point of fact AfrAsia had established that Paget was but one of two directors of Royal Anthem and had insisted, in the context of that discovery, on being provided with both a shareholder's resolution and a directors' resolution signed by both Muller and Paget. This indicates that AfrAsia did not treat with Paget on the basis of assuming that he had implied authority to represent Royal Anthem, but insisted instead on being provided with direct evidence of express authority by the company for him to enter into the transactions. AfrAsia's requirement in this regard is also inconsistent with the notion that it treated with Paget on the basis of any conduct by Royal Anthem amounting to a tacit representation by the company that he had authority to represent it in concluding the transactions. Indeed, in its final set of replying affidavits, in the passage in which it contended for Paget's ostensible authority,[16] AfrAsia did not identify any conduct of *Royal Anthem*, rather than of Paget himself, on which it had relied in assuming Paget's apparent, as distinct from purportedly actual, authority to bind Royal Anthem.

[40] In providing the shareholder's resolution, Paget failed to disclose the pledge agreement, which rendered it ineffectual, and, as already noted, for present purposes it has to be accepted that Muller's signature was a forgery. If the resolutions were valid and effectual they would have clothed Paget with actual authority, and there would consequently be no occasion for a debate on his ostensible authority.

[41] Royal Anthem's counsel argued, with reliance on the decision of the House of Lords in *Ruben v Great Fingall Consolidated* [1906] AC 439, 'that being a forgery, the [directors'] resolution is a pure nullity and cannot found ostensible authority'. Subsequent authority illustrates, however, that that proposition is probably too bluntly stated. The issue of which party should be burdened with the consequences of Paget's fraud could be affected by whether or not the fraud was perpetrated in the course of conduct by Paget acting within the scope of his apparent authority. In the circumstances of the current case that would include not only any apparent authority he might be said to have had to conclude the agreements on behalf of Royal Anthem,

[16] Van Zyl affidavit, *jurat* 15 February 2016, para 13-27, at record pp. 1298-1304.

but also, as I shall discuss presently, his apparent authority to convey Royal Anthem's board's authorisation of the transactions. If his actions were clothed with such authority, then, on the approach adopted in more recent English judgments such as those in *Lloyd v Grace Smith & Co* [1912] UKHL 1, *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyds Rep 194, [1993] BCLC 1409,[17] *Lovert & Anor v Carson Country Homes Ltd & Ors* [2009] EWHC 1143 (Ch), [2009] 2 BCLC 196, [2011] BCC 789 and *Kelly & Ors v Fraser (Jamaicas)* [2012] UKPC 25, [2013] 1 AC 450], [2012] 3 WLR 1008, Royal Anthem might have to bear the consequences of the fraud and consequently be bound by the limited guarantee agreement. For South African authority to the same effect see *Chappell v Gohl* 1928 CPD 47, especially at p. 52; *Price NO v Allied-JBS Building Society* 1979 (2) SA 262 (E), at 268 (referring with approval to, amongst others, *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 All ER 344 (CA) at 349 – a case which involved fraud by an agent using a forged document) and cf. *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) - which although premised on mistake, not fraud, is indistinguishable in principle – and *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA), at para 13.

[42] In *Kelly & Ors v Fraser* supra, at para 11 – 15, Lord Sumption eloquently highlighted the basis for validly distinguishing between ostensible authority to conclude a transaction and ostensible authority to represent that authority had been given for the conclusion of a transaction, taking care to explain why this did not amount to a departure from the judgments in the House of Lords and Court of Appeal in *Armagas Ltd v Mundogas SA*,[18] which might easily be misread to have held to the contrary:

> 11. The Board [of the Judicial Committee of the Privy Council] approaches the question whether the trustees [of a pension fund] were bound by these statements on the footing that neither Mr Masters [an official in the employ of the pension fund] or any one else in the Employee Benefits Division had authority of any kind to approve the transfer [of the accrued pension benefits of a certain Mr Fraser in a different pension fund] into the Plan. Nor did they purport to have done so. Equally, none of them had any actual authority to tell Mr Fraser that

[17] The facts in *First Energy* are summarised in para 14 in the extract from the judgment in *Kelly & Ors v Fraser* quoted in paragraph [42], below.

[18] *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1986] AC 717 and *Lloyd v Grace Smith & Co* supra, were referred to in passing by Howie JA in *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) at para 20-22 in the context of the effect of ostensible authority in respect of vicarious liability for fraud in South African law.

everything was in order if it was not. The question, therefore, is whether they had ostensible authority to tell Mr Fraser that whatever steps needed to be taken to carry out his transaction regularly had been duly performed, if they had no authority to perform those steps themselves.

12. The question could hardly have arisen in this form but for certain observations of Goff LJ in the Court of Appeal in *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1986] AC 717, and of Lord Keith of Kinkel, delivering the leading speech in the House of Lords in the same case. The *Ocean Frost* was a decision on complex and extraordinary facts. Armagas was a vehicle company formed by two Danish shipowners to buy a ship from Mundogas, on the basis that Mundogas would then charter it back from them for three years. Negotiations for the deal were conducted between Armagas's broker, who had been promised a substantial interest in Armagas if the deal went through, and a Mr Magelssen, who was a Vice-President and the chartering manager of Mundogas. The broker bribed Mr Magelssen to sign a spurious three year charter, purportedly on behalf of Mundogas. Mundogas had not authorised Mr Magelssen to do this, and indeed were unaware that he done it until much later. For their part, neither Armagas nor its two principals had any contact with any representative of Mundogas other than Mr Magelssen. They knew that Mr Magelssen had no authority to enter into the charterparty on behalf of Mundogas without the specific and express approval of his superiors, but they believed that he had obtained it because their own broker told them so. Armagas sought to hold Mundogas to the three-year charterparty, on the footing that although Mr Magelssen had neither actual nor ostensible authority to enter into it, they were entitled to rely on his execution of the agreement and his expression of Mundogas's satisfaction that it had been concluded as constituting implied representations that he had obtained express authority from the top management of Mundogas. The trial judge had upheld that submission. He had held that by appointing Mr Magelssen as Vice-President and chartering manager, Mundogas had ostensibly clothed him with authority to make representations about his own authority to sign such agreements. The Court of Appeal did not agree. Goff LJ, delivering the leading judgment, considered that there was no basis for concluding on the facts of that case that, by appointing him as Vice-President and chartering manager, Mundogas had held him out as having power to make the particular representations relied upon: see pp 730-732. This was because the only authority of Mr Magelssen that would serve Armagas's purposes was authority to enter into the charterparty, as he had purported to do. The principals of Armagas knew that Mr Magelssen was not authorised to do that without the specific and express authority of his superiors. He cannot therefore have had any ostensible authority to do it simply by virtue of the appointments that he held in Mundogas. To say that he had ostensible authority by virtue of those appointments to communicate that he had express authority to contract, was only another of saying he had ostensible authority to contract. Every agent who enters into a contract thereby asserts that he has authority, but that alone cannot be enough to bind his principal. The House of Lords affirmed the decision of the Court of Appeal and endorsed Goff LJ's analysis. Lord Keith, who delivered the sole reasoned speech, declared (p 779) that he was not willing to accept "the general proposition that ostensible authority of

an agent to communicate agreement by his principal to a particular transaction is conceptually different from ostensible authority to enter into that particular transaction." Like Goff LJ, Lord Keith thought that while it was conceptually possible to have a case of "ostensible specific authority to enter into a particular transaction", such cases were bound to be rare (p 777). It is clear that the whole of this analysis is dependent on the fact that in the *Ocean Frost* the agent was in reality holding out himself as having authority to do a specific thing that the third party knew that he had no general authority to do. Such cases are necessarily fact-sensitive. The *Ocean Frost* is not authority for the broader proposition that a person without authority of any kind to enter into a transaction cannot as a matter of law occupy a position in which he has ostensible authority to tell a third party that the proper person has authorised it.

13. To take an obvious example, the company secretary does not have the actual authority which the board of directors has, but he is likely to have its ostensible authority by virtue of his functions to communicate what the board has decided or to authenticate documents which record what it has decided. The ordinary authority to communicate a company's authorisation of a transaction will generally be more widely distributed than that, especially in a bureaucratically complex organisation and in the case of routine transactions. It is not at all uncommon for the authority to approve transactions to be limited to a handful of very senior officers, but for their approval to be communicated in the ordinary course of the company's administration by others whose function it is to do that. Browne-Wilkinson LJ was referring to situations of that kind when he said in *Egyptian International Foreign Trade Co) v Soplex Wholesale Supplies Ltd* [1985] 2 Lloyd's Rep 36, 42-43:

> "It is obviously correct that an agent who has no actual or apparent authority either (a) to enter into a transaction or (b) to make representations as to the transaction cannot hold himself out as having authority to enter into the transaction so as to effect the principal's position. But, suppose a company confers actual or apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction; why should not such a representation be relied upon as part of the holding out of Y by the company? By parity of reasoning, if a company confers actual or apparent authority on A to make representations on the company's behalf but no actual authority on A to enter into the specific transaction, why should a representation made by A as to his authority not be capable of being relied on as one of the acts of holding out?"

14. In *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 the Plaintiff's representative negotiated a credit agreement with the regional manager of a bank, who had authority to negotiate the terms but told him that he had no authority to sanction the final deal, which was a matter for the bank's head office. The regional manager eventually wrote a letter amounting to an offer which was capable of immediate acceptance and was in fact accepted by the Plaintiff. The Court of Appeal held that that was an implicit statement that head office had sanctioned the deal, which the regional manager had ostensible authority by virtue of his position to communicate. There is, as Evans LJ said in that case

> (p 206) "no requirement that the authority to communicate decisions should be commensurate with the authority to enter into a transaction of the kind in question on behalf of the principal."
>
> 15. It is clear from the judgments in *First Energy* that the Court of Appeal regarded their approach in that case as being wholly consistent with the law stated by Lord Keith in *Armagas v Mundogas*. In the Board's opinion, they were right to regard them as consistent. Lord Keith's speech remains the classic statement of the relevant legal principles. An agent cannot be said to have authority *solely* on the basis that he has held himself out as having it. It is, however, perfectly possible for the proper authorities of a company (or, for that matter, any other principal) to organise its affairs in such a way that subordinates who would not have authority to approve a transaction are nevertheless held out by those authorities as the persons who are to communicate to outsiders the fact that it has been approved by those who are authorised to approve it or that some particular agent has been duly authorised to approve it. These are representations which, if made by some one held out by the company to make representations of that kind, may give rise to an estoppel. Every case calls for a careful examination of its particular facts.

[43] AfrAsia did not expressly plead an estoppel predicated on the sort of representation or holding out identified in *Kelly* and *First Energy* supra, but it is clear on the evidence that it was induced by Paget's representation that the board and shareholders of Royal Anthem had authorised the transactions to act to its prejudice and advance funds to Craigan. It was implicit in AfrAsia's case, especially its invocation of s 20(7) of the 2008 Companies Act, that it was entitled to rely on Paget's representation that the board and shareholders of Royal Anthem had authorised the transactions to hold Royal Anthem to the contract. Whether or not Royal Anthem had held Paget out as being a person with authority to convey such decisions to outsiders on its behalf falls to be determined on the facts as they appear from the papers. Ostensible authority, even if its particular ambit was not as carefully defined as it might have been, was squarely raised by AfrAsia – at least conceptually - as an answer to Royal Anthem's allegations concerning Paget's lack of authority to bind the company. I therefore consider that this court is not precluded from considering the issue of authority on the basis that the Privy Council did in *Kelly* and the Court of Appeal in *First Energy*. (Indeed, in *First Energy* the issue also does not appear to have been clearly articulated on the pleadings, but the Court of Appeal decided that the court of first instance was justified in deciding the case on that basis as the evidence permitted it. The court of first instance in *Armagas* (Staughton J) would appear to have proceeded on a similar basis.)

[44] The difficulty is that AfrAsia did not adduce any evidence in support of the contention that Paget was clothed with apparent authority *by Royal Anthem* either to bind it in the transactions, or to convey a decision by its board to commit to the transactions; or that it relied on any such representation in entering into the transactions. The arguments that its counsel sought to advance to that effect, relying on Paget having been given the title deeds and financial records, were based on evidence adduced by Royal Anthem as part of the narrative of Muller's dealings with Paget in regard to the sale of his shares to Market Demand Trading. Muller and Royal Anthem's attorney, Eloff, testified to the fact that Paget had been given the original title deeds to the properties and the financial records of the company when the shares were purchased. Van Zyl and Deetleefs, who represented AfrAsia in dealing with Paget and Dixon, purportedly on behalf of Royal Anthem, did not relate in any detail how AfrAsia came to treat with Paget. As far as can be discerned, the dealings were predicated on Paget's need to finance the operations of another company, and Royal Anthem was brought into the picture purely as a consequence of AfrAsia's requirement that security be provided for any loan that it might be willing to advance. Van Zyl and Deetleefs did not explain how Paget's possession of the title deeds or financial records was relied upon by them as a representation by Royal Anthem that Paget was authorised to represent it, and thus causal of the conclusion of the limited guarantee agreement. It was not sufficient for AfrAsia merely to point to facts that could notionally have been relied upon by it as representations by Royal Anthem of Paget's authority to represent it; it had to establish representations upon which it *actually* did rely. It is significant, as stressed by Royal Anthem's counsel, that the limited guarantee agreement was actually executed before what purported to be a resolution signed by both the company's directors was produced. Van Zyl and Deetleefs also did not describe any conduct representing that Paget had authority to act on the company's behalf that could be ascribable to Royal Anthem, rather than just to Paget himself. On the contrary, it is clear that AfrAsia undertook its own investigations, for it was in that context that it discovered that Muller was a director and thereupon insisted on a resolution being produced signed by both directors. As noted above, that was inconsistent with any acceptance by AfrAsia that the transactions were of a nature that it could treat with Paget as actual or *de facto*

managing director, or that he was possessed of authority, by himself, to bind the company.

[45] The knowledge that Paget was not the only director of the company would also have alerted AfrAsia to the fact that only limited reliance could be placed on the fact that he apparently controlled Royal Anthem's sole shareholder. It would have appreciated that the management of the business and affairs of the company resorted in the board, not the shareholder; see s 66(1) of the Companies Act 71 of 2008. Indeed, the documentation presented by AfrAsia to Paget and Dixon for completion on behalf of Royal Anthem demonstrates that the shareholder's resolution was required because of the specific requirements of other provisions of the Act – ss 45(3) and 65(11).

[46] I am also of the view that there is nothing in the evidence that would justify a finding that Royal Anthem had held out Paget to be a person authorised on its behalf to communicate to outsiders the decisions of its board of directors,[19] or that AfrAsia relied on any such representation. The facts do not support any finding that while Paget did not have had authority to bind Royal Anthem to the transactions, the company had put him in a position in which the outside world might reasonably accept that he was authorised to communicate the decisions of its organs that did have such authority. Paget was not a company secretary or a branch manager in a 'bureaucratically complex organisation', or a company official holding an appointment in which the communication of decisions from above would ordinarily be accepted by outsiders as being part of his everyday functions. More fundamentally, AfrAsia did not adduce any evidence to indicate that it dealt with Paget on the basis that he had been held out by Royal Anthem to have authority to convey the board's decision. It did not really seek, evidentially, to do that. As described, it sought rather to prosecute its claim on the basis of his alleged actual authority, and in the alternative to rely on s 20(7) of the 2008 Companies Act.

[47] The notion that AfrAsia should have to confirm with Muller that the directors' resolution apparently signed by him was genuine might seem a tall order in the real world of commerce, but it finds support in the remarks of Lord James of Hereford in

[19] If its articles of association or to use the language of the 2008 Act, 'memorandum of incorporation' did so, no evidence of the content thereof was adduced.

Ruben v Great Fingall Consolidated supra, at p. 447[20] and in the out of the ordinary character of the transaction. The issue is whether Royal Anthem, rather than AfrAsia, both of them being innocent parties, should bear the consequences of Paget's fraud on AfrAsia. Established principle indicates that it should do so only if its conduct held Paget out to be its apparently authorised representative in the dealing in which the fraud was perpetrated. AfrAsia has, however, failed to establish that the fraud was committed by Paget acting within the scope of his apparent authority. The hardship with which the common law approach can confront outsiders dealing in good faith with companies has been considerably ameliorated by statutory intervention in some jurisdictions. The statutory intervention was no doubt motivated by the perceived need to bring the law concerning dealings with companies into better alignment with commercial realities.

[48] So, for example, s 44 of the UK Companies Act 2006 (c 46) provides in subsection (2) that '*A document is validly executed by a company if it is signed on behalf of the company – (a) by two authorised signatories, or (b) by a director of the company in the presence of a witness who attests the signature*' and goes on in subsection (5): '*In favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2). A "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property*'. (My underlining.) In *Lovert & Anor v Carson Country Homes Ltd* supra, it was held (at para 80) that these provisions of s 44 were 'capable of validating also a document where there has been fraud or forgery if the document purports to be signed in accordance with subsection (2)'. An argument to the contrary was rejected (at paras. 81-97).

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[20] Lord James stated '… [the outsider] *has a safeguard which a company has not. A company cannot protect itself against the frauds of its secretary, and if the company has to bear the burden of this loss, of course the loss placed upon companies will be very great, and they must guard against it, but certainly theoretically – I do not know whether it is quite the case practically – the* [outsider] *has a safeguard, he can always apply to the two directors whose names appear on the certificate and inquire from them whether those signatures are valid and genuine signatures or not. If the answer is that they are genuine, the certificate of course is valid; if the answer is "No, I have not signed that certificate," then he is aware that it is invalid. I do not know whether in commercial life* [outsiders] *will take the trouble to inquire of directors whose signatures appear on certificates whether those signatures are genuine or not, but at any rate there is that power if they choose to exercise it.*'

[49] Section 127(1)(a) of the Australian Corporations Act 2001 provides '*A company may execute a document without using a common seal if the document is signed by: (a) 2 directors of the company…*'. A note to the provision points out that '*If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(5) for dealings in relation to the company*'. Section 129(5) provides, insofar as pertinent, '*A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). …*'.[21] (My underlining.)

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[21] A statutory predecessor of ss 128 and 129 of the Corporations Act 2001 was to be found in s 68A and 68D of the Companies (New South Wales) Code. Section 68D expressly addressed the effect of forgeries as follows:

68D. Section 68A operates –

(a) to entitle a person to make the assumptions referred to in sub-section (3) of that section in relation to dealings with a company, or

(b) to entitle a person to make the assumptions referred to in sub-section (3) of that section in relation to an acquisition or purported acquisition (whether direct or indirect) of title to property from a company,

notwithstanding that a person referred to in paragraph 68A(3)(b), (c) or (e) or an officer, agent or employee of the company referred to in paragraph 68A(3)(d) or (f)-

(c) has acted or is acting fraudulently in relation to the dealings, or in relation to the acquisition or purported acquisition of title to property from the company, as the case may be; or

(d) *has forged a document that appears to have been sealed on behalf of the company,*

unless the person referred to in paragraph (a) or (b) of this section has actual knowledge that the person referred to in paragraph 68A(3)(b), (c) or (e), or the officer, agent or employee of the company referred to in paragraph 68A(3)(d) or (f), has acted or is acting fraudulently, or has forged a document, as mentioned in paragraph (c) or (d) of this section.

The provision falls to be read with s 68A(1) and (3):

68A.(1) A person having dealings with a company is, subject to sub-section (4), entitled to make, in relation to those dealings, the assumptions referred to in sub-section (3) and, in any proceedings in relation to those dealings, any assertion by the company that the matters that the person is so entitled to assume were not correct shall be disregarded.

(3) The assumptions that a person is, by virtue of sub-section (1) … entitled to make in relation to dealings with a company, or in relation to an acquisition or purported acquisition from a company of title to property, as the case may be, are –

(a) that, at all relevant times, the memorandum and articles of the company have been complied with;

(b) that a person who appears, from returns lodged with the Commission under section 238 or 263 or with a prescribed State authority under a corresponding provision of a previous law of the State to be a director, the principal executive officer or a secretary of the company has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a director, by the principal executive officer or by a secretary, as the case may be, of a company carrying on a business of the kind carried on by the company;

(c) that a person who is held out by the company to be an officer or agent of the company has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by an officer or agent of the kind concerned;

(d) that an officer or agent of the company who has authority to issue a document on behalf of the company has authority to warrant that the document is genuine and that an officer or agent of the company who has authority to issue a certified copy of a

[50] Subsections 20(7) and 20(8) of our own Companies Act 71 of 2008[22] do not go that far.[23] If they did, Royal Anthem would on the facts of this case be bound by the contracts. The question whether Paget had ostensible authority would be irrelevant. The outcome would be determined instead by the effect of a statutory presumption. The statutory presumption afforded in s 20(7) amounts to little, if anything, more than a codification of the common law rule in Turquand's case in modified form.[24] It does not provide the wider presumptions in favour of outsiders that are manifest in s 44(2) and (5) of the UK Companies Act of 2006, or in s 127(1)(a) read with s 129(5) of the Australian 2001 Corporations Act.

[51] Section 20(7) therefore did not relieve AfrAsia of the burden of having to establish at least the ostensible authority of Paget to have concluded the contracts or

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document on behalf of the company has authority to warrant that the copy is a true copy;

(e) *that a document has been duly sealed by the company if –*

(i) *it bears what appears to be an impression of the seal of the company and*

(ii) *the sealing of the document appears to be attested by 2 persons, being persons one of whom, by virtue of paragraph (b) and (c), may be assumed to be a director of the company and the other of whom, by virtue of paragraph (b) and (c), may be assumed to be a director or to be a secretary of the company; and*

(f) *that the directors, the principal executive officer, the secretaries, the employees and the agents of the company properly perform or performed their duties to the company.*

In *Story v. Advance Bank Australia Limited* (1993) 31 NSWLR 722 (a case that bears relevant similarities to the current matter), at 732, Gleeson CJ noted that the Explanatory Memorandum that had attended the introduction of the legislation recorded that it was intended, in part, to 'do away with' the effect of the judgment in *Ruben v Great Fingall Consolidated* supra.

[22] Quoted in paragraph [31] above.

[23] Cf. *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* supra, at para 50-56. I do not think s 5(2) of the Companies Act, which provides that '*To the extent appropriate, a court interpreting or applying this Act may consider foreign company law*', permits stretching the language of s 20(7) to impliedly address the matters expressly provided for in the English and Australian statutes, but notably omitted in our own.

[24] In Davis et al, *Companies and other Business Structures in South Africa* 3rd ed. 2013 (OUP) at p. 59, it is opined that '*The Companies Act, 2008 abolishes the doctrine of constructive notice, but preserves the Turquand rule for the benefit of outsiders only. Corporate insiders, such as directors, company officers and shareholders, derive no protection from the rule*'. See also the note by Professor P. Deport, '*Companies Act 71 of 2008 and the "Turquand Rule"*', (2011) 74 THRHR 132 in which the modifications to the Turquand rule in s 20(7) are highlighted and the resultant uncertainty created by the juxtaposed s 20(8), which appears to be intended to retain the operation of the common law concurrently with the statutory provision, is described as 'disconcerting'. Delport also observes, quite pertinently in my view, at p. 138, '*The position is complicated even further due to the fact that the common-law rules regulating representation of the company were, for some inexplicable reason, also retained, which increases the present uncertainty and risks for the company and third party alike in the application of the Turquand rule. Apart from examples in foreign jurisdictions where the issues regarding representation and Turquand were successfully and efficiently solved (see s40 of the British Companies Act 2006 (C 46) and ss 15(1) and 18(a) of the Canada Business Corporation Act RSC 1985 (C 44), sections 17 and 54 of the Close Corporations Act 69 of 1984 could also have served a good basis to do the same in South African company law …*'.

conveyed the authority apparently given by the board of Royal Anthem for their conclusion. As discussed, AfrAsia failed to discharge that burden.

[52] In short, I am not satisfied that the requirements set out in *NBS Bank Ltd v Cape Produce Co* supra, listed in paragraph [33] above, have been met on the evidence. In the result, AfrAsia has failed to establish that Royal Anthem is bound by the limited guarantee agreement, and the application in case no. 18299/2013 therefore falls to be dismissed. That conclusion makes it strictly unnecessary to consider the other defences raised by Royal Anthem, but I shall nevertheless do so, albeit as briefly as possible, in case the matter be taken on appeal and another court persuaded to a different conclusion on the issue of authority or the ambit of s 20(7). The other defences fall for that purpose to be approached on the assumption, against my finding, that Paget's conduct purportedly on behalf of Royal Anthem had been clothed with the requisite authority.

Royal Anthem's other defences in the application in case no. 18299/2013

[53] Had it established Paget's authority to represent Royal Anthem, I consider that AfrAsia's invocation of s 20(7) of the 2008 Companies Act to meet Royal Anthem's reliance on alleged non-compliance with various provisions of the Act[25] would have been justified. The resolutions by the shareholder and purportedly by the directors of Royal Anthem presented to AfrAsia gave the latter every reason to believe that the pertinent requirements of the Act had been satisfied.[26]

[54] The limited guarantee agreement was subject to the fulfilment of a number of conditions precedent recorded in the loan agreement between AfrAsia and Craigan. These were expressed to have been included exclusively for the benefit of AfrAsia, which was entitled by written notice to waive or defer compliance with them. Royal Anthem alleged that the agreement had lapsed by reason of the non-fulfilment of certain of these 'advance conditions' before the defined 'cut-off date' of 17h00 on 6 August 2013.

[55] The 'Advance Conditions', which were set out in Annexure 1 to the loan agreement, went as follows:

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[25] Royal Anthem alleged non-compliance with section 66, read with section 73 and item 7(5) of Schedule 5; (ii) section 45, alternatively section 218(1) and (iii) section 75, alternatively section 218(1) of the 2008 Companies Act.
[26] See note 13 above.

1 The Lender delivering to the Borrower written confirmation that the Lender is satisfied with the due diligence investigation into the affairs of the Borrower group.

2 The approval of the transactions contemplated in the Finance Documents by the Lender's Investment Committee.

3 The Borrower Shareholder Cession is entered into and becomes unconditional (except for any condition which requires that this Agreement must be entered into and must become unconditional).

4 Each Guarantee is entered into and becomes unconditional (except for any condition which requires that this Agreement must be entered into and must become unconditional).

5 Each Limited Guarantee is entered into and becomes unconditional (except for any condition which requires that this Agreement must be entered into and must become unconditional).

6 The Lender has received each Mortgage Bond Power of Attorney, and any other documents which it may, in its sole discretion, require in order to attend to the registration of the relevant Mortgage Bond.

7 The Subordination Agreement is entered into and becomes unconditional (except for any condition/s which require that this Agreement must be entered into and must become unconditional).

8 The board of directors of the Borrower passes a resolution resolving that the Borrower concludes each Finance Document to which it is a party and appointing a named person to execute such Finance Document on behalf of the Borrower, and that copies of such resolutions have been delivered by the Borrower to the Lender.

9 The board of directors of the Borrower Shareholder and Property Owner –

9.1 passes a resolution resolving that that the Borrower Shareholder and Property Owner concludes each Finance Document to which it is a party and appointing a named person to execute such Finance Document on behalf of the Borrower Shareholder and Property Owner;

9.2 confirming, in accordance with the provisions of sections 45(3)(b)(ii) of the Companies Act, that the respective boards of directors of the Borrower Shareholder and Property Owner are satisfied that the terms under which any direct or indirect financial assistance pursuant to any of the Finance Documents to which it is a party proposed to be given by the Borrower Shareholder and Property Owner are fair and reasonable to the Borrower Shareholder and Property Owner;

9.3 in relation to the making of any proposed "distribution" (as defined in the Companies Act) pursuant to the Finance Documents to which the Borrower Shareholder and Property Owner is a party that takes the form of the incurrence of a debt or other obligation by that Guarantor, as contemplated in paragraph (b) of the definition of "distribution" in section 1 of the Companies Act-

9.3.1 confirming, in accordance with section 46(1)(b) of the Companies Act (as read with section 46(4)(a) of the Companies Act), that it reasonably appears that the Borrower Shareholder and Property Owner will satisfy the "solvency and

liquidity test" (as defined in the Companies Act) immediately after completing such proposed "distributions", and

9.3.2 resolving, in accordance with section 46(1)(c) of the Companies Act, that the board of directors of, respectively, the Borrower Shareholder and each Property Owner has acknowledged that it had applied the 'solvency and liquidity test" (as defined in the Companies Act) and reasonably concluded that that Guarantor will satisfy the "solvency and liquidity test" immediately after completing such proposed "distribution",

and that a (*sic*) copies of such confirmations and resolutions have been delivered by the Borrower to the Lender.

10 The shareholders of the Borrower Shareholder and Property Owner approving in accordance with section 45(3)(a)(ii) of the Companies Act, any financial assistance to be granted by the Borrower Shareholder and Property Owner pursuant to section 45(2) of the Companies Act under the Finance Documents to which it is a party, and that a copy of such resolution has been delivered by the Borrower to the Lender.

11 The Borrower has delivered to the Lender a certificate dated not more that 5 (five) business days prior to the Advance Date, under the hand of the managing or financial director of the Borrower in which the aforesaid person certifies that as at the date of that certificate –

11.1 to the best of his/her knowledge and belief and after making reasonable internal enquiries, no fact or circumstances has occurred since the Signature Date which constitutes a Material Adverse Event;

11.2 there is no existing or pending industrial action against the Borrower which, if resolved against the Borrower, could reasonably be expected to give rise to a Material Adverse Event;

11.3 to the best of his/her knowledge and belief and after making reasonable internal enquiries, there is no current or pending material litigation, investigation or proceeding against the Borrower, which could reasonably be expected to give rise to a material Adverse Event; and

11.4 to the best of his/her knowledge and belief and after making reasonable internal enquiries, no Default has occurred or is occurring.

12 The fulfilment of any other condition as the Lender may, after the Signature Date but before the Cut-off Date, determine is reasonably required on written notice to the other Parties.

13 The Lender is satisfied with the form and content of all documents to be delivered to it in terms of this Annexure "1".

14 The Lender delivers written notice (a "**CP Confirmation Notice"**) to the Borrower confirming that they are satisfied that the Advance Conditions have been duly fulfilled.

[56] Royal Anthem contended that advance conditions 1 and 2 had not been met because (i) written confirmation as required in terms of condition 1 had not been given and (ii) the lender's investment committee had not approved the transactions.

There is no merit in either contention. The Investment Committee of AfrAsia Special Opportunities Fund Limited (the holding company of AfrAsia) approved the transactions on 25 July 2013.[27] This was conveyed to Paget through his intermediary Dixon by an associate director of AfrAsia, Deetleefs, by email on 5 August 2013.[28] Royal Anthem was in no position to gainsay that the holding company's investment committee served as AfrAsia's investment committee in terms of the relevant group arrangements.

[57] It was contended that conditions 3 and 4 were not fulfilled because Paget did not have the authority to act on behalf of Royal Anthem in concluding the limited guarantee agreement. I have already found that AfrAsia has failed on the papers to establish that Paget had at least ostensible authority to represent Royal Anthem, but I agree with the submission in AfrAsia's counsel's heads of argument that the purported conclusion of the limited guarantee agreement would have sufficed, as a matter of fact, to satisfy the conditions precedent.

[58] Royal Anthem's contention that condition 8 had not been fulfilled was advanced only faintly. It was adequately rebutted, I think, by the content of Dixon's email to Deetleefs of 29 July 2013 to the effect that all the required resolutions, barring that which had to be co-signed by Muller, had been signed,[29] and the averment in AfrAsia's replying affidavit (deposed to by Van Zyl), *jurat* 15 February 2016, that all the required resolutions were received by email on 31 July 2013 and in hard copy the following day.[30]

[59] The fulfilment of condition 9 was contested on the basis of the invalidity of the directors' resolution ostensibly adopted by Royal Anthem on the basis that Muller knew nothing of it and his signature on the document had been forged. Of course, if the agreement was never effectively concluded for the reasons found in connection with the lack of authority point, one does not reach the question of the fulfilment of the condition. If, however, one accepts, as I consider must be done for present purposes, that the agreement had been validly concluded, then it would follow that the

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[27] The minutes of the committee meeting were annexed as annexure K2 to the affidavit of Van Zyl, *jurat* 2 July 2015, at record p. 661.
[28] The email is annexure K2 to the affidavit of Van Zyl, *jurat* 2 July 2015, at record p. 660.
[29] Annexure R10, at record p. 975
[30] Van Zyl's affidavit *jurat* 15 February 2016, para 65, at record p. 1322.

condition had been fulfilled when AfrAsia was presented with resolutions that appeared to satisfy its requirements.

[60] The most hotly contested questions in respect of the fulfilment of the advance conditions were whether conditions 6 and 14 had been fulfilled, waived or deferred. That the powers of attorney to register the two Royal Anthem surety bonds were received before the cut-off date is borne out by the correspondence vouched in the papers,[31] culminating in an email to David Deetleefs from AfrAsia's Cape Town attorneys on 31 July 2013,[32] which attached '*the resolutions, power of attorney and bond application documents signed today*'. That there was a delay in the power of attorney in respect of one of the bonds to be registered thereafter being passed on to the conveyancing attorneys, Gunstons, is beside the point.

[61] As mentioned, it was necessary in order to register a first mortgage over Royal Anthem's Franschhoek property in favour of AfrAsia that the existing bond over the property registered in favour of Chesterfin be cancelled. There were also bonds over other properties owned by entities in the Scarab Group to be given in security registered in favour of Investec Bank, Pretoria Portland Cement Company Ltd ('PPC') and the South African Bank of Athens ('BoA'), respectively. The documentation necessary to achieve the cancellation of the existing bonds obviously formed part of that required in order to attend to the registration of the relevant mortgage bonds in favour of AfrAsia, and therefore fell within the ambit of condition 6. In point of fact it became apparent that part of the proceeds of the loan to Craigan would have to be applied to settle Chesterfin's claim against Royal Anthem to enable the cancellation of the bond in its favour simultaneously with the registration of the bond in favour of AfrAsia. I consider that it was apparent from the email correspondence traversed in paragraph 54.1-54.12 of the affidavit deposed to by Van Zyl on 2 July 2015,[33] that both parties accepted that a delay in the provision of the required documentation was unavoidable and that this would not result in the agreement lapsing. In my view it is therefore clear that both parties accepted that fulfilment of conditions 6 and 14 was being waived or deferred. I do not consider that

[31] Van Zyl's affidavit *jurat* 15 February 2016, para 64.5 and 64.6, record pp. 1318-1319, read with annexure R2(5) thereto at record pp. 1408-1412.
[32] Van Zyl's affidavit *jurat* 15 February 2016, para 64.7, record pp. 1319-1320, read with annexure R2(6) thereto at record p. 1418.
[33] Record pp. 583-586.

it is open to Royal Anthem in good faith to contend otherwise. The correspondence served adequately to give the contractually required 'written notice' of the waiver or deferment.

[62] I am also in agreement with the submission by AfrAsia's counsel, if I understood it correctly, that condition 14 was in any event ineffectual by reason of its potestative character. It was not purely potestative in a way that would invalidate the contract, but rather of a mixed potestative character; its fulfilment was not dependent on the whim of AfrAsia (*si volam*), but with reference to the fulfilment of the other conditions precedent. Thus, if the other conditions were fulfilled, AfrAsia could not avoid the contract by purporting to withhold the CP Confirmation Notice. Equally, non-fulfilment of the condition was not something that Royal Anthem would have been entitled to rely on to escape the contract in the face of AfrAsia's performance thereunder after the other conditions had been satisfied.

[63] Royal Anthem also contended that the advances that were made by AfrAsia were made inconsistently with the provisions of the loan agreement and therefore could not be characterised as advances in terms of the agreement. If the contention were good, it would follow that the loan actually made was not subject to the limited guarantee given by Royal Anthem. There is no merit in the contention in my judgment. It is based on an argument that it was inconsistent with the loan agreement for AfrAsia to have lent Craigan approximately R16,5 million in two tranches, rather than the entire R22 million provided for in the loan agreement as a single advance. The wording of the loan agreement does not support the argument. I do not find it necessary to illustrate the point exhaustively. It is sufficient in my view merely to refer to clause 7.2 of the loan agreement,[34] which makes it plain that it was contemplated that the loan amount would be advanced in a number of tranches, including amounts required for the settlement of the claims of the Bank of Athens ('BoA') and Chesterfin. I also agree with the submission by AfrAsia's counsel that the construction of the loan agreement upon which Royal Anthem's contention in this regard is founded is unbusinesslike. It is well established that courts should lean

[34] Clause 7.2 of the loan agreement provided:

> *Accordingly, pursuant to clause 7.1, the Lender shall only be obliged to transfer the Borrower* (sic) *the balance of the Loan Amount remaining after such payment to the Lender's Conveyancer (ie. the difference between (i) the Loan Amount and (ii) the aggregate of the BoA Loan Outstandings and the Chesterfin Loan Outstandings) in accordance with clause 6.4.*

against construing contracts to give unbusinesslike results, or to render the parties' evident business intentions ineffectual.[35]

[64] Finally, although not logically indicated in the context of the finding that has been made about AfrAsia's failure to establish Paget's authority to have represented Royal Anthem, something should perhaps be said about Royal Anthem's contention that the failure by AfrAsia to have ascertained Paget's lack of authority was as a consequence of its failure to have complied with s 21(1) of the Financial Intelligence Centre Act 38 of 2001 ('FICA')[36] and the associated regulations.[37] The obvious implication of the contention is that the applicant is an 'accountable institution' as defined in s 1 read with Schedule 1 of the Act. I do not think that Royal Anthem has adduced the evidence about the business of AfrAsia that would be necessary to characterise it as qualifying as an institution listed in Schedule 1. Furthermore, and in any event, I am not persuaded of the relevance of an accountable institution's duty of information gathering in terms of FICA to what might reasonably be expected of a person transacting with a company in respect of accepting the authority of a person held out by the company as having the requisite authority to represent it in the transaction. The information that an accountable institution is required to obtain in terms of FICA has to be collected for the purposes of combatting money laundering and the financing of terrorist activities. The legislation is not directed in any way that I am able to discern at raising the bar for the ability of any person dealing with a company to rely on ostensible authority.

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[35] See e.g. *DA Meyer Consultants CC v Allied Electronic Corporation Ltd & Others* 1996 (3) SA 370 (A) at 373I-374H and 383C; *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd* 1998 (4) SA 885 (SCA) at 888I-889F; *Lloyds of London Underwriting Syndicates 960, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* 2004 (2) SA 276 (SCA) at para 14; *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) at para 13 and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para 30-31.

[36] Section 21(1) of FICA provides:

Identification of clients and other persons

(1) An accountable institution may not establish a business relationship or conclude a single transaction with a client unless the accountable institution has taken the prescribed steps-

(a) to establish and verify the identity of the client;

(b) if the client is acting on behalf of another person, to establish and verify-

(i) the identity of that other person; and

(ii) the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and

(c) if another person is acting on behalf of the client, to establish and verify-

(i) the identity of that other person; and

(ii) that other person's authority to act on behalf of the client.

[37] The *Money Laundering and Terrorist Financing Control Regulations* published under GN R1595 in GG 24176 of 20 December 2002, as amended by GN R456 in GG 27580 of 20 May 2005, GN R867 in GG 33596 of 1 October 2010 and GN 1107 in GG 33781 of 26 November 2010.

Remedy

[65] By virtue of the conclusion reached in paragraph [52] above, the application by AfrAsia in case no. 18922/2013 falls to be dismissed. Costs ordinarily follow the result, but I do not think it would be fair for that to happen mechanically in the current case. A considerable amount of the voluminous papers generated in the matter, as well as time and space spent in oral and written argument was directed at dealing with defences raised by Royal Anthem that had no merit. In circumstances I consider that justice would be served if AfrAsia's liability in costs in the application were to be limited to 75 per cent of Royal Anthem's costs, such costs to include those incurred by the engagement of two counsel.

[66] It does not seem appropriate to uphold Royal Anthem's counter-application. I hold this view for two reasons. Firstly, the ground upon which it was founded has been rejected as unsound; [38] and secondly, it seems to me that it would be inappropriate to set aside the mortgage bonds in circumstances in which the mortgagee's attempt to enforce the contracts upon which they are predicated by way of motion proceedings has failed because of the effect of the Plascon-Evans rule. I understand that the dismissal of AfrAsia's application in case no. 18922/2013 on the basis that Paget's authority to have represented Royal Anthem in concluding the contracts was not established on the papers has an equivalent effect to an order of absolution from the instance in action proceedings. Thus AfrAsia is not prevented by the dismissal of its application from seeking to enforce the contracts in action proceedings. That there is a possibility it may seek to do so might be inferred from the passages in its replying papers that sought to question Muller's evidence that his signature on the directors' resolution had been forged.[39] If action proceedings do follow, it seems to me that issue estoppel might arise therein following on some of the findings in these proceedings. It seems to me therefore that an order for the setting aside or cancellation of the bonds should follow only once it is clear that AfrAsia will not seek to proceed further by way of action. I consider that it would be appropriate in the circumstances to invite counsel for the parties, in consultation with each other, to formulate a draft order for consideration in this respect. Arrangements can be

[38] See paragraph [21] above.
[39] See note 10, above.

made, if necessary, for me to receive any additional written or oral submissions that the parties might wish to make in that connection.

[67] Similar considerations would appear to apply in respect of AfrAsia's application for rectification of the mortgage bonds in case no. 12562/2015. AfrAsia succeeded in making out a case for the rectification, but its success will be of no practical import if it does not succeed in establishing that the underlying contracts were effectively concluded. My prima facie view is that it would therefore be appropriate to make the costs of that application stand over for determination as part of the costs of any future action that AfrAsia might institute or, that failing the institution of such an action within a stipulated time, the costs should be determined on the basis of there being no order as to costs. In this regard too, the indicated course appears to be to invite counsel to formulate a draft order for consideration, with the opportunity being granted to the parties to address argument on the point if they wish.

[68] The following order is made:

(a) The application in case no. 18299/2013 is dismissed.

(b) The applicant shall be liable for 75 per cent of the sixth respondent's costs of suit, such costs to include the costs of two counsel.

(c) The parties are invited to approach me in respect of the orders to be made in respect of the disposal of the counter-application in case no. 18299/2013 and the application in case no. 12562/2015 (including the costs reserved in terms of paragraph 4 of the order made in chambers, dated 24 March 2016), with reference to the views expressed in paragraphs [25], [66] and [67] of the judgment.

A.G. BINNS-WARD
Judge of the High Court

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