DISTRUBUTABLE (12)

INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE
v
ENGEN PETROLEUM ZIMBABWE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & ZIYAMBI AJA
HARARE, MAY 23, 2017 & FEBRUARY 6, 2020

T. R. Mafukidze & *A. Moyo*, for the appellant

R. M. Fitches, for the respondent

GUVAVA JA

INTRODUCTION

1. This is an appeal against the decision of the High Court handed down under HH 253/16 wherein the court *a quo* found the appellant liable to pay to the respondent the sum of US$847 847.65 together with costs of suit and interest at the prescribed rate from the date of the granting of the judgment to the date of payment in full. The appellant is a statutory corporation set up in terms of the Infrastructure Development Bank of Zimbabwe Act [*Chapter 24:14*] ("the IDBZ Act"). The respondent is an oil company registered in accordance with the Companies Act [*Chapter 24:03]*. The background to the matter may be summarized as follows:

BACKGROUND FACTS

2. A company known as Wedzera Petroleum (Private) Limited ("Wedzera") entered into a verbal agreement with the respondent, wherein the respondent would sell bulk petroleum fuels to it from time to time. The respondent would supply the petroleum products on credit and raise invoices to be settled by Wedzera. Wedzera would in turn settle the invoices within ten days from the date on which the invoices would be raised.

3. In November 2010, the respondent sold to Wedzera, petroleum products worth US$847 847.65. The sale of the petroleum products was made on the basis of two guarantees made by the appellant binding itself to pay in the event that Wedzera failed to honour the debt. The two guarantees were drafted on 5 November 2010 and 19 November 2010 for the sums of US$500 000 and US$450 000 respectively.

4. The guarantees issued by the appellant were in the form of a letter, which bore the letter head of the Infrastructural Development Bank of Zimbabwe. It was addressed to the respondent and signed by one Francis Mugwara ("Mugwara") the Head of the Short Term Loans Unit. Part of the first guarantee dated 5 November 2010 read as follows:

> "In consideration of Wedzera Petroleum (Pvt) Ltd …., agreeing to the submission of a guarantee for the supply of fuel products by Engen Petroleum Zimbabwe (Pvt) Ltd. We, Infrastructure Development Bank of Zimbabwe- IDBZ …., do hereby guarantee full payment of USD500 000.00... being the total amount of the Bank Guarantee to Engen Petroleum Zimbabwe (Pvt) Limited. The payment of the USD500 000.00 will be after a period of 10 (ten) days from the date of fuel drawdown and is on revolving basis…"

The second guarantee dated 19 November 2010 read as follows:

> "In consideration of Wedzera Petroleum (Pvt) Ltd …., agreeing to the submission of a guarantee for the supply of fuel products by Engen Petroleum Zimbabwe (Pvt) Ltd. We, Infrastructure Development Bank of Zimbabwe- IDBZ …., do hereby guarantee

full payment of USD450 000.00 ... being the total amount of the Bank Guarantee to Engen Petroleum Zimbabwe (Pvt) Limited. The payment of the USD450 000.00 will be after a period of 10 (ten) days from the date of fuel drawdown and is on revolving basis …"

5. After the guarantees had been issued, Wedzera failed to pay the debts arising from the petroleum products which were sold to it on credit by the respondent. On 8 March 2011 Wedzera wrote to the respondent informing that it (Wedzera) was experiencing negative cash flows due to the unavailability of fuel during the months of December 2010 and January 2011 and that it was aware of its indebtedness to the respondent. Wedzera further informed the respondent that it would pay its entire indebtedness within 14 days. Wedzera failed to honour its indebtedness as promised. The respondent wrote to the appellant on 15 March 2011 informing it to liquidate Wedzera's debt in accordance with the two guarantees.

6. The appellant through a letter dated 31 of March 2011, informed the respondent that upon checking its records it found that it had not issued the guarantees in favour of the respondent against any debts incurred by Wedzera. The appellant further informed the respondent that it was unsure of the circumstances under which the purported guarantees had been drafted and issued to the respondent on behalf of Wedzera.

7. Following the failure by Wedzera to make due payment of the debt and the repudiation of the guarantees by the appellant, the respondent issued summons against Wedzera and the appellant for the payment of the sum of US$847 847.65.

PROCEEDINGS BEFORE THE COURT *A QUO*

8. In the court *a quo*, Wedzera in its plea, admitted its indebtedness to the respondent but denied liability as it argued that liability had passed to the appellant who undertook to settle the debt due in terms of the two guarantees. The appellant in its plea denied being indebted to the respondent at all. It indicated that according to their records there was no indication that Wedzera had applied for, or had been granted any guarantees. It further alleged that the guarantees had been generated through fraud.

9. At the pre-trial conference the main issue which was referred to trial was: whether or not the appellant was liable to pay Wedzera's debt on the basis of the two guarantees.

10. At the trial, Wedzera was in default. The court *a quo* upon application from the respondent, granted default judgment against Wedzera in favour of the respondent for the sum of US$847 847.65 together with costs of suit and interest at the prescribed rate. The trial proceeded against the appellant.

11. In analysing closing submissions made by counsel, the court *a quo* noted that the appellant's counsel sought to introduce a new argument which had not been pleaded. The argument was based on the fact that the appellant was a statutory corporation which derived its powers from the IDBZ Act and that the provisions of the Companies Act [*Chapter 24:03*] ("the Companies Act") which codified the turquand rule could not be applied against the appellant in terms of s 30 of the IDBZ Act.

12. The court held that in spite of the provisions of s 30 of the IDBZ Act which made the appellant immune to the provisions of the Companies Act, the actions of Mugwara

fell squarely within the scope of the presumptions of ostensible authority. The court found that Mugwara held a senior position in the Bank, that he had subordinate staff under him, he had access to and used the appellant's stationery. He was the Head of the Short Term Loans Unit which Unit had amongst others a mandate to issue guarantees. The court further found that Mugwara's job description empowered him:

"…to generate, manage and control the bank's short term lending portfolio as well as [to] supervis[e] … Regional Offices"

Further, that his key duties included decision making authority, authority to approve departmental expenses and the budgets for the Unit and the Regional Offices. The court found that the onus was on the appellant to prove that Mugwara did not have any form of authority to facilitate guarantees and to prove any form of fraud and bribery on his part.

13. The court found the appellant liable to the respondent for the guarantees which were issued by Mugwara in respect of Wedzera's indebtedness. The appellant was thus ordered to pay the respondent the sum of US$847 847.65, or the remaining amount after payment was made by Wedzera, together with costs of suit and interest at the prescribed rate from the date of the granting of the judgment to the date of payment.

PROCEEDINGS ON APPEAL

14. Aggrieved by the findings of the court *a quo* the appellant noted this appeal on the basis of the following grounds of appeal:

(i) Having found as it did that there was no conclusive evidence to establish that one Francis Mugwara had authority to issue the two guarantees relied upon by the

respondent on his single signature, the court *a quo* erred in law in placing a further negative onus of proof on the appellant to establish that one Francis Mugwara had no such authority.

(ii) Having found as it did that there was no conclusive evidence to establish that one Francis Mugwara had authority to issue the two guarantees relied upon by the respondent on his single signature, the court *a quo* erred and misdirected itself on the facts and in law in finding as it did that Francis Mugwara had actual and/or implied authority to issue the two guarantees relied upon by the respondent in its cause of action.

(iii) The court *a quo* erred and misdirected itself in law in finding the appellant liable to the respondent on the basis of ostensible authority when such was not pleaded by the respondent in the Summons and Declaration.

(iv) The court *a quo* grossly erred and misdirected itself on the facts in finding as it did or must be taken to have done that appellant represented to third parties in particular to the respondent that one Francis Mugwara had authority to issue the guarantees relied upon by the respondent in its cause of action.

(v) The court *a quo* erred in law in failing to find that the two guarantees relied upon by the respondent were fraudulently procured and thereafter tendered to the respondent by Wedzera Petroleum (Private) Limited and as such no liability could flow from such fraudulent instruments.

(vi) The court *a quo* erred on the facts and in law in finding as it did that the respondent had acted diligently in accepting the two guarantees tendered to it by Wedzera Petroleum (Private) Limited in the absence, inter alia, of any facility between the appellant and Wedzera Petroleum (Pvt) Ltd.

(vii) The court *a quo* erred on the facts and in law in failing to find that the conduct of Francis Mugwara in purporting to issue the two guarantees in the absence, inter alia, of any facility agreement between the appellant and Wedzera Petroleum (Pvt) Ltd and/or the respondent not only offended the internal processes of the appellant but also the procedure set out in the Infrastructure Development Bank of Zimbabwe Act [*Chapter 24:14*]. Consequently, the court *a quo* ought to have found that his conduct was a legal nullity and no liability attached to the appellant.

(viii) The court *a quo* erred in law in effectively finding the appellant liable on the two guarantees on the basis of the Turquand Rule when the application of such rule is specifically ousted by the provisions of s 30 of the Infrastructure Development Bank of Zimbabwe Act.

In my view it is apparent from the appellant's grounds of appeal that three issues arise for determination. These are the following:

A. Whether or not the court *a quo* erred in finding that Mugwara had authority to issue the two guarantees relied upon by the respondent.
B. Whether or not the court *a quo* erred in finding the appellant liable to pay the respondent on the basis of ostensible authority.
C. Whether or not the appellant was liable to pay the respondent on the basis of the Turquand Rule when such was never pleaded by the respondent in its summons and declaration.

I will proceed to deal with each of these issues.

Whether or not the court *a quo* erred in finding that Mugwara had authority to issue the two guarantees relied upon by the respondent.

15. The appellant argued that Mugwara's contract of employment did not give him authority to act on behalf of the Bank. It also submitted, that the court *a quo* erred in its factual findings to the effect that he had implied authority to act on behalf of the appellant.

16. In order to fully understand the authority Mugwara possessed there is need to make reference to his key duties in the Bank. Mugwara held the title of the 'Head of Short Term Loans'. Under this title he was the second in charge after the office of the Director of Private Sector Projects as shown from the organogram of the Short Term Loans Unit. A summary of Magwara's job was stated as:

"To generate, manage and control the bank's short term lending portfolio as well as supervision of Regional Offices."

Among his key tasks was, 'marketing of bank products to achieve bankable portfolio of clients, disbursements of funds on approved facilities and making presentations to the Private Sector Projects Committee (PSPC) on projects for approval'.

17. In addition Mugwara's job description had an incidental clause on error of judgment and the consequences which would affect the Bank if the Head of Short Term Loans made a wrong decision. The clause stated as follows:

"Catastrophic as bad decisions can lead to the insolvency of the bank through the creation of a bad Loan portfolio. Reputation of the bank can be on the line if prompt and correct decisions are not made."

The court made factual findings that Mugwara had authority to act on behalf of the appellant. The court *a quo* noted the following:

> "…, notwithstanding the Bank's argument that Mugwara's power might have been limited, I find that as much as between himself and the Bank Mugwara had actual or implied authority to issue those guarantees. I find that as between Engen and the Bank, Mugwara had ostensible authority to issue the guarantee and to bind the Bank to third party recipients."

18. A clear reading of Mugwara's key tasks shows that he worked under a Unit which controlled the manner in which guarantees were issued. He was the senior personnel in the Bank as he was second in command from the Director of the Unit. He had access and control of the appellant's stationery to an extent that he had business cards to identify himself. He had the task of marketing bank products and disbursements of funds on approved loan facilities. The court *a quo* found that on these factual findings the key tasks done by Mugwara were enough evidence to show that he had authority to act on behalf of the appellant.

19. The court *a quo* also took into account that although criminal proceedings were instituted against Mugwara by the appellant on the basis of fraud and bribery, the office of the Prosecutor General refused to prosecute the matter on the basis that it was a labour matter. That in any event the appellant had failed to provide adequate evidence to sustain a conviction.

The court *a quo* in determining the impact of the criminal charges laid against Mugwara found that the *onus* to prove fraud and bribery was on the appellant and that the prosecutor had failed to prove that Mugwara had been fraudulent or had received any bribe. The proof to be proffered by the appellant for fraud and bribery *in casu,*

would be proof on a balance of probabilities as the fraud and bribery were being alleged in a civil trial after the criminal charges had failed to materialise.

20. Proof in civil proceedings is always on a balance of probabilities. In the case of Zimbabwe *Electricity Supply Authority* v *Dera* 1998 (1) ZLR 500 (SC)**,** the court stated the following:

> "… in a civil case the standard of proof is never anything other than proof on the balance of probabilities. The reason for the difference in onus between civil and criminal cases is that in the former the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. In a criminal matter, on the other hand, the trial is an attack by the State, representing society, on the integrity of an individual. The main concern is to do justice to the accused. If the prosecution fails, the State does not lose".

Mugwara having admitted that he issued the guarantees and having alleged that he did so lawfully, it was for the appellant to prove all the allegations laid against him of fraud and bribery. The appellant did not adduce any proof to the contrary but rather stood on the argument that he had no authority to individually sign a guarantee.

21. The appellant produced sample guarantees which it alleged were lawfully facilitated for other parties. These sample guarantees were juxtaposed with the guarantees which Mugwara had facilitated and affixed a single signature instead of two signatures as appeared on the sample guarantees. The appellant argued that the fact that the guarantees issued on behalf of Wedzera were not counter-signed meant that the guarantees were fake and invalid.

22. Sample guarantees produced before the court *a quo* showed that Mugwara would countersign a guarantee with other personnel of the Bank. It is of importance to note however, that such other personnel would be junior personnel and Mugwara would

countersign to give effect to the validity of the guarantee facilitated by his subordinates. It thus could not have been extensively irregular that on the two guarantees made in favour of the respondent Mugwara signed the guarantees with no other counter signature as he was the head of the Unit from which such guarantees originated.

23. The arguments raised by the appellant that absence of a second signature rendered the guarantees ineffective thus lacks merit. The appellant did not adduce any evidence to show that the facilitation of the guarantee was not carried out in-house. The appellant's witnesses could have brought the register for credit facilities issued by the Bank to show that no entry was ever made in favour of Wedzera to the respondent. Mugwara vehemently denied that he had not followed proper procedures in processing the guarantees and stated that records of the guarantees were with the appellant.

24. In examination in chief Mugwara admitted to having recorded the guarantees in the Bank's register. The court *a quo* in assessing these facts found that:

> "The evidence on whether or not Mugwara could issue guarantees on his single signature was inconclusive. Mugwara said he could. The Bank said he could not. The onus was on the Bank to prove that he could not. It did not refute satisfactorily Mugwara's claim that it was only guarantees initiated by subordinates that required to be counter-signed for validity. I find that the bank failed to discharge the onus on such a key aspect of defence."

25. In finding that Mugwara had authority to act on behalf of the appellant, the court *a quo* made reference to the incidental clause in his job description document. A reading of the clause shows that Mugwara as the Head of Short Term Loans, had to take due diligence and not make an error of judgment as such error in creating a bad loan portfolio would have catastrophic consequences which could lead the appellant to

insolvency. This clause in itself crystalizes the point that he had authority to act on behalf of the appellant in a manner which could extend to issuing guarantees. Only a senior officer of the Bank could possess authority to act on its behalf to an extent where an error of judgment would lead to catastrophic results.

26. It is a settled principle that this Court will not easily interfere with factual findings made by a lower court unless the findings are grossly unreasonable. (See *ZINWA v Mwoyounotsva* 2015 (1) ZLR 935 (S), *Hama v NRZ* 1996(1) ZLR 664 (S), *Reserve Bank of Zimbabwe v Corrine Granger and Another* SC 34/01) The lower court enjoys the opportunity to see the witnesses on the stand, assess their demeanour and credibility. Such findings of fact cannot easily be interfered with by an appellate court as it is limited to the record of proceedings. See *Mtimukulu v Nkiwane and Another* SC 136/01.

27. It is my view that the court *a quo's* factual findings cannot be impugned. Mugwara was a senior employee who could carry out credit facilitation and represent the appellant. All the above findings lead to the inescapable conclusion that the court *a quo's* factual findings were correct.

28. The next inquiry that arises from this finding is the extent of the authority Mugwara had in issuing the guarantees to the respondent, that is, whether or not it was implied or express authority.

Whether or not the court *a quo* erred in finding the appellant liable to pay the respondent on the basis of ostensible authority.

29. The court *a quo* found that the authority exercised by Mugwara in issuing the guarantees was implied (apparent or ostensible) authority. The respondent based its arguments for the claim of payment of the guarantees on the ostensible authority which had been exercised by Mugwara. Counsel for the respondent submitted that it was on the basis of this apparent authority exercised in the issuing of the guarantees that the respondent agreed to issue Wedzera fuel.

30. It was the appellant's argument that no such implied authority existed and that on the basis of Mugwara's job description such authority was not given to him. The appellant also argued that in terms of the Bank's Lending Policy, Mugwara did not have authority to single-handedly facilitate a credit facility, sign it and issue it without proper procedure being followed.

31. Ostensible authority or apparent authority exists where an agent's words or conduct lead a reasonable person in a third party's position to believe that the agent is authorized to act, even if the principal and the purported agent have never discussed such a relationship. The effect and meaning of ostensible authority was discussed in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paragraph 45, in which the case of *Hely-Hutchinson CA v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583 A-G was referred to with approval. The court stated the following:

> "Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of the principal, the agent requires authority to do so, for the act to bind its principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority."

The court went on to state the importance of ostensible authority and made the following remarks at paragraph 65:

"The concept of apparent authority as it appears from the statement by Lord Denning, was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent has authority to act on its behalf. If this appears to be the position to others and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement. It cannot be gainsaid that on present facts, there is a yearning for justice and equity."

In *Rama Corporation Ltd v Proved Tin and General Investments* Ltd [1952] 2 QB 147 (SLADE J) noted as follows:

"Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance."

See also *Freeman and Lockyer v Buckhurst Park Properties (Mangal)* Ltd [1964] 2 QB 480.

Ostensible authority thus binds a principal over actions done by its agent with relation to third parties. Such principal can thus be estopped from denying liability of the actions of the agent.

32. In *casu*, Mugwara was an agent of the appellant, he was the head of the Short Term Loans Unit and had subordinates under him. His key duties included a mandate to approach companies and commercial institutions in a bid to facilitate that these companies and institutions acquired loan facilities from the appellant. It was not in dispute that at the time the two guarantees were issued to the respondent on behalf of Wedzera, the appellant was running off balance sheet facilities due to the economic

situation which was prevailing in the country at that time. On the basis of such off balance sheet facilities the appellant would issue credit facilities to finance different business ventures.

33. It is important to note that the first encounter under which Mugwara and the respondent met was not on the issuance of the guarantees. Mugwara had previously made presentations before Mr Mudzengerere who was the respondent's Managing Director. Mugwara approached the respondent to issue the guarantees on fuel procurement and disbursement. The intended business venture between Mugwara and the respondent did not materialise at that time but a relationship had been formed. It thus cannot be taken as being irregular that upon being presented with the guarantees in favour of Wedzera for fuel allocation, Mr Mudzengerere on behalf of the respondent accepted these guarantees. The respondent duly accepted the guarantees on the basis of the conduct and representations which had been made by Mugwara even before Wedzera sought a credit facility from the appellant.

34. The respondent's cause of action against the appellant for payment was on the basis of ostensible authority which had been exercised by Mugwara. The court *a quo* duly made factual findings on the exercise of this authority. Clearly there is nothing illogical or unreasonable from the court *a quo's* findings. Mugwara confirmed that he had authority to carry out his duties and the respondent could not be faulted for honouring the guarantees which were issued on behalf of the appellant by its Head of Short Term Loans. The court *a quo* found Mugwara to be a reliable witness.

35. On the basis of the above finding it is therefore my view that the appellant is liable to pay the respondent the sums of money arising from the guarantees.

36. In view of the 7th and 8th grounds of appeal the Court has been called upon to determine the applicability of the Turquand Rule *vis-a-vis* the provisions of the IDBZ Act and the effect of such on the present appeal. I therefore, for the sake of completeness propose to deal with this issue.

Whether or not the appellant was liable to pay the respondent on the basis of the Turquand Rule.

37. The appellant in its closing submissions, sought to plead that the Turquand Rule did not apply as the IDBZ Act specifically ousted it under s 30. The court *a quo* in dealing with the submission made by counsel noted the following:

> "In his closing submissions Mr *Moyo* sprang a new argument. It had not been pleaded. It had never referred to it before. It was that the Bank was a statutory corporation the powers of which were set out in the enabling Act. In summary, Mr *Moyo's* new argument was that anyone could check what the Bank could or could not do… Mugwara's conduct had been in contravention of the law."

The court *a quo* held that regardless of the provisions of the IDBZ Act and in spite of s 30 of the Act which makes the appellant immune to the provisions of the Companies Act, the actions of Mugwara fell squarely within the scope of the presumptions of ostensible authority as depicted in s 12 of the Companies Act.

38. The importance of the Turquand Rule was stated in *Arinaitwe v Africana Clays Ltd [2017] UGCOMMC* 93 wherein the court stated that:

The rule in **Turquand's case** also known as the indoor management rule is premised not on logic but on business convenience because a 3rd party dealing with a company has no access to the company's indoor activities.

It would be very unfair to the company's creditors if their company could escape liability on the ground that its officials acted irregularly when it was unaware of the internal proceedures.

The Turquand Rule flows from the celebrated case of *Royal British Bank v Turquand* [1943-60] ALL ER Rep. 435 at page 437 H- 438 A where the court held the following:

> "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

The Turquand Rule thus provides that when there are persons conducting the affairs of a company in a manner which appears to be perfectly consonant with the articles of association, those so dealing with them externally are not to be affected by irregularities which may take place in the internal management of the company. See *Mahony v East Holyford Mining Co.* (1874- 75 LR 7 HL 869. The exceptions to this rule are, firstly, if the outsider was aware of the fact that the internal requirements and procedures have not been complied with, (in other words, he acted in bad faith) and secondly, if the circumstances under which the contract was concluded on behalf of the company were suspicious, then the Turquand Rule cannot be raised as a defence.

39. The Turquand Rule is similar to the principle of ostensible authority in that both tenets seek to protect a third party against a principal or company which refutes actions done by agents or representatives without express authority. A difference between the two

appears to be based on the point that the Turquand Rule functions as a defence for the principal. Where the principal argues that the third party was aware that internal procedures were not followed by the agent and that the contract was concluded on behalf of the company under suspicious means, such third party cannot be heard to claim that the principal is liable for the actions of the agent. The third party should take due diligence in contracting with the principal through the agent. Ostensible authority on the other hand acts as a defence for the third party who claims that on the basis of the conduct and presentations of the agent on behalf of the principal, such conduct amounts to apparent authority justifying the third party's belief to contract. In *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC); [2015] 4 All SA 88 (WCC) the court at paragraph 25 stated the following in a bid to explain the difference between the Turquand Rule and ostensible authority:

> "I think it will be found, from an analysis of these and other leading authorities, that the **Turquand rule is simply an adjunct, in the context of companies and other entities with constitutions available to the public, of the law on ostensible authority, which is in turn a particular form of estoppel by representation**. (In *Northside 10 Developments* supra Brennan J said that Diplock LJ's lucid exposition in Freeman of the general principles of estoppel 'provides the framework within which the specifically "indoor management" cases are to be placed'.)"(emphasis added)

40. Section 12 of the Companies Act codifies the common law principle of the Turquand Rule. (See *Govero v Ordeco (Private) Limited and Another* SC 25/14, *Andrew Mills v Tanganda Tea Company Limited* HH 12/13). The section provides for the presumption of regularity to an extent that any person who deals with a representative of a company is taken to presume that all procedures are regular. Section 12 is further reinforced by s 13 of the same Act which provides that such liability is not affected even where the company alleges that the representative acted in a fraudulent way.

41. It was counsel for the appellant's argument that as the Bank is a statutory corporation founded under an enabling Act it cannot be subjected to the provisions of the Companies Act. Counsel made reference to s 30 (2) of the IDBZ Act which provides that the provisions of the Companies Act or any other law do not apply to the Bank.

42. The appellant however did not plead this defence at the beginning of the proceedings before the court *a quo* but sought to introduce it in closing submissions. The appellant did not make an application for amendment of its plea. The court *a quo*, after acknowledging that the point had not been pleaded by the appellant, went on to make a determination on it.

43. It seems to me that the argument raised by the appellant amounted to an amendment of its plea to include a defence on a point of law, that, on the basis of s 30 of the IDBZ Act the implied authority exercised by Mugwara could not be a basis on which the respondent could make its claim. It is trite that a court ought to be guided and to determine issues which are raised by the parties in the pleadings. In *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94(A), 108, the court cited with approval the case of *Robinson v Randfontein Estates GM Co. Ltd* 1925 AD 173 where at page 198 the court emphasised the importance of pleadings. The court stated as follows:

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

See also *Jowell v Bramwell-Jones* 1998 (1) SA 836 at 898, *Farrell v Secretary of State for Defence* (1980) 1 All ER 166 at page 173

44. Where a party seeks to have the court determine an issue or defence which was never pleaded, that party may only do so by way of application before the court. In terms of Order 20 of the High Court Rules, 1964 such application will be for an amendment of the pleadings. The appellant sought to introduce a new defence in closing submissions. This was irregular. The appellant ought to have made an application to re-open its case and thereafter applied to amend its plea and introduce the defence. The respondent would then have had an opportunity to address the defence raised. It was thus improper for the appellant to raise a new point of law at the eleventh hour, which point the respondent had not been privy to and which would obviously prejudice it.

45. In any event, it must not be forgotten that the respondent made its claim on the basis of the ostensible authority exercised by Mugwara. The matter before the court *a quo* was thus determined on the basis of that ostensible authority. The appellant in its closing submissions filed of record, and in raising the defence on a new point of law, showed that it was aware that the matter was to be resolved on the point of whether or not Mugwara had ostensible authority. The appellant at para 18-22 stated the following:

> "20. Consequently, this matter thus solely turns on whether Mr F. Mugwara was authorized to issue the guarantees or whether, in the absence of the said authority, the Second Defendant may be liable to the Plaintiff on the basis of the doctrine of ostensible authority as submitted in the Plaintiff's closing submissions."

The court *a quo* though erroneously giving regard to an argument which had not been properly pleaded, still arrived at the correct finding as it noted as follows:

> "However, in spite of the ousting by s 30 of the IDBZ Act of the provisions of the Companies Act, and any other law relating to companies; …, I find that as between himself and the Bank Mugwara had actual or implied authority to issue those guarantees. I find that as between Engen and the Bank, Mugwara had ostensible authority to issue the guarantees and to bind the Bank to third party recipients."

46. The appellant was thus aware that the respondent's claim was made on the basis of the ostensible authority which had been exercised by Mugwara as a representative of the Bank.

The matter before the court *a quo* was correctly disposed of on whether or not Mugwara had ostensible authority to act on behalf of the appellant. Having found that he had ostensible authority to act on behalf of the appellant it thus follows that the arguments raised by the appellant on the effect of the IDBZ Act on the Turquand Rule fall away.

DISPOSITION

47. The court *a quo* correctly made factual findings which cannot be interfered with by this Court. The appeal must therefore fail. Costs are to follow the cause.

It is accordingly ordered as follows:-

The appeal be and is hereby dismissed with costs.

MAVANGIRA JA **:** I agree

ZIYAMBI AJA **:** I agree

Kantor & Immerman, appellant's legal practitioner

Wintertons, respondent's legal practitioner