THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 275/09

In the matter between:

NORTHVIEW SHOPPING CENTRE (PTY) LTD **Appellant**

and

REVELAS PROPERTIES JOHANNESBURG CC **First Respondent**

NICK CHRISTELIS **Second Respondent**

Neutral citation: ***Northview Shopping Centre v Revelas Properties*** **(275/09) [2010] ZASCA 16 (18 March 2010)**

Coram: LEWIS, HEHER, MLAMBO and MALAN JJA and THERON AJA

Heard: **22 February 2010**

Delivered **18 March 2010**

Summary: Where an agent of a close corporation, who is not a member, concludes on its behalf a contract for the sale of land, authorization must be in writing in order to comply with s 2(1) of the Alienation of Land Act 68 of 1981.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Brett AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

LEWIS JA (HEHER, MLAMBO and MALAN JJA and THERON AJA concurring)

[1] The appellant, Northview Shopping Centre (Pty) Ltd (Northview), claimed specific performance of a contract for the sale of immovable property that it alleges it purchased from the first respondent, Revelas Properties Johannesburg CC (Revelas). The second respondent, Mr Christelis, is the husband of the sole member of Northview, a close corporation. He signed the contract on behalf of Revelas. The issue before us is whether he was authorized to sign the contract, as required by s 2(1) of the Alienation of Land Act 68 of 1981. Revelas contends that he was not, as he had no written authority from it, and that the sale is thus invalid for want of formalities.

Northview contends, on the other hand, that written authority is not required when a close corporation is the principal.

[2] Northview, in its particulars of claim, alleged that Christelis was duly authorized to sign the contract, which is enforceable against Revelas. It excepted to the claim on two bases (and raised several other exceptions, none of which was adjudicated by the high court and that are not before us). First it asserted that the claim was vague and embarrassing since it did not expressly aver that Christelis was authorized in writing (the pleading exception); and second, in the alternative, Revelas asserted that the claim lacked averments necessary to sustain an action (the substantive exception).

[3] Brett AJ in the high court upheld the substantive exception, saying that he agreed that 'if a person other than the member acted on its [the close corporation's] behalf that person would constitute an agent properly so called within the meaning of the Act [s 2(1) of the Alienation of Land Act]. Moreover, in concluding the agreement relied upon by the plaintiff [Northview] the second defendant [Christelis] purported to "act on behalf of the close corporation ie as an agent and not as its functionary."' The high court also upheld the pleading exception on the basis that there was no allegation that Christelis was authorized in writing, and that the written authority should have been annexed to the particulars of claim together with the contract of sale. The appeal to this court is with Brett AJ's leave.

The requirement of written authority under s 2(1) of the Alienation of Land Act

[4] I shall deal first with the finding on the substantive exception. Section 2(1) of the Alienation of Land Act provides:

'No alienation of land after the commencement of this section shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

The provision is not new. It was first included in s 30 of the Transvaal Transfer Duty Proclamation 8 of 1902; was carried into s 1(1) of the General Law Amendment Act 68 of 1957; repeated in s 1(1) of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969 and repeated again in the Alienation of Land Act. Cases dealing with the provision span more than a century. Of particular importance in this matter are the decisions dealing with the application of the provision where a party to the sale is a juristic person, which date back at least to 1913 with the landmark judgments in *Potchefstroom Dairies and Industries Co Ltd v Standard Fresh Milk Supply Co*.[1]

The *Potchefstroom Dairies* principle

[5] The question before the court in this case was whether a contract for the sale of land signed by a partner, on behalf of a partnership, was subject to the requirement of s 30 of the Proclamation. De Villiers JP held that the requirement of written authority did not apply where a partner signed for a partnership because a partner is not an agent of the partnership within the meaning of s 30 of the Proclamation. Partners, he said, were more than agents: a partner 'sustains the double character of agent and principal in one and the same transaction'.[2]

[6] Bristowe J agreed with this conclusion, but elaborated also on the application of the written authority requirement in respect of other juristic entities, such as companies. It is his judgment that has been the foundation of the principle that corporate entities, being unable to act other than through natural persons, cannot give written authority to their representatives, and that therefore the written authority requirement does not apply when a functionary of a company signs a contract for the sale of land. It is largely on the interpretation of the following passage that this appeal turns.

[1] 1913 TPD 506.
[2] At 511.

[7] Bristowe J said:[3]

'Under that section [s 30 of the Proclamation of 1902] a contract of sale, if not signed by the principal, must be signed by his agent "duly authorised in writing". That must, I think, mean "authorised in writing by the principal". The principal must therefore be capable of giving the agent the power which he is appointed to exercise. And for this purpose he must be capable of exercising those powers himself. Moreover the use of the word "authorised" points I think to an express authorisation as distinct from one arising by implication of law. So that it seems to me that the agency contemplated by the section is one expressly created by a person who could himself have exercised the delegated power had he chosen to do so.

In this view tutors, curators, corporations and partnerships are all excluded. Tutors and curators are excluded because the acts which they are appointed to perform are *ex hypothesi* acts which their wards cannot perform. Corporations are excluded because having neither minds nor hands of their own they cannot themselves do what their agents do for them. And partnerships are excluded because the agency of a partner for his co-partner is not expressly created but arises by implication of law as soon as the partnership relation is constituted. Not only is this in my opinion the effect of the section properly construed, but it seems to me to be a reasonable interpretation and one which accords with the true facts of the case. Tutors and curators are really not agents at all. They are principals, though with limited powers. And if they enter into a contract of sale they do so by virtue of a faculty incidental to their office and not of any power derived from the ward. So although the seal of a corporation is affixed by an agent, the seal once affixed is the signature of the corporation. And quite apart from the special provisions of the Companies Act it would not be true to say that a document properly sealed with the corporation's seal is executed by an agent. Similarly in the case of a partnership. By the partnership contract a relation is established between the parties which persists during the continuance of the partnership and for all partnership purposes by virtue of which each partner becomes *prima facie* capable of signing the firm's name. The name so signed is really the signature of the firm, though written by one partner; just as the seal of a company is the signature of the company though affixed by an agent.'

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[3] At 512-513.

[8] The principle expressed in this passage has been applied consistently since then to companies, partnerships and co-operative societies. And as counsel for Northview points out, it has been viewed against all the different provisions enacted from time to time that require an agent to have written authorization in order to bind a principal to a contract for the sale of land.

[9] In *Suid Afrikaanse Sentrale Koöperatiewe Graanmaatskappy Bpk v Thanasaris*[4] Murray J, having set out the reasoning of De Villiers JP in *Potchefstroom Dairies* said:

'The concurring judgment of Bristowe J is to the same effect, and goes further by expressing the view that the reasoning for the exclusion of partners from the operation of the section is equally applicable to exclude corporations as well: the agency contemplated by the section is one expressly created by a person who could himself if so minded have exercised the power which he has elected to delegate. Tutors, curators, corporations and partners are excluded from the section; tutors and curators because the acts they are appointed to perform are acts which *ex hypothesi* their wards cannot perform; partnerships because the agency of a partner for his co-partner is not expressly created but arises by implication of the law on the constitution of the partnership relation. "Corporations are excluded because having neither minds nor hands of their own they cannot do what their agents do for them."'

[10] Trusts are treated differently, however. In *Thorpe v Trittenwein*[5] this court held that a trustee who did not have the written authority of co-trustees to sign a contract for the sale of land did not bind the trust. Scott JA said that the position was different from that of a partnership. Trustees, unlike partners, are required to act jointly. He said:[6]

'As previously indicated the very object of s 2(1) of the Act [the Alienation of Land Act] is on grounds of public policy to facilitate that proof by requiring the authority to be in writing and so avoid needless litigation. Whether one regards Thorpe [the

[4] 1953 (2) SA 314 (W) at 317B-E. See also the judgments of this court in *Muller v Pienaar* 1968 (3) SA 195 (A) at 200H-201D and *Trever v Friedhelm Investments* 1982 (1) SA 7 (A) at 18G-H. There are a number of decisions of the high courts too. They need not be enumerated.

[5] 2007 (2) SA 172 (SCA).

[6] Para 15.

trustee who had signed the contract for the trust] as having acted as a functionary of the trust and in that sense a principal or as both a principal (as co-trustee) and agent of the other co-trustees, the result in my view must be the same. Given the object of the section, it must be construed, I think, as being applicable on either basis. In other words, the reference in the section to "agents" must be understood as including a trustee who may in a sense be said to sign as a principal (ie as the trust), but whose power to bind the trust is nonetheless dependent upon the authority of the co-trustees. To do otherwise would be to thwart the clear object of the section. It follows that in my view the agreement of sale (as supplemented by the addenda) is void *ab initio* and of no force and effect.'

[11] There is nothing to suggest that the *Potchefstroom Dairies* principle is incorrect in so far as juristic persons generally are concerned. And, as already pointed out, it has been applied for nearly a century. The only question is whether it applies to an agent of a close corporation who is not a member. Before dealing with the differences between provisions governing companies and those governing close corporations, I should make it clear that there is in my view no difference in principle between a person authorized by virtue of his or her position within a company, on the one hand, and one who is a member of a close corporation on the other, to sign a contract for the sale of land. A member of a close corporation, authorized as such to sign, is in the same position as a functionary of a company authorized to sign (both without requiring written authority). For the sake of convenience I refer to a person authorized by law (or the internal rules of a juristic entity) as a 'functionary', so as to distinguish his or her position from that of an agent authorized by expression of will (sometimes referred to as an 'outside agent'). Thus at issue in this appeal is whether an agent, as opposed to a functionary, can bind a close corporation to a contract for the sale of immovable property where there is no written authority to do so.

Section 69 of the Companies Act

[12] The question of written authority in so far as companies is concerned is regulated by the provisions of the Companies Act 61 of 1973. Section 69 reads:

'Contracts by companies. – (1) Contracts on behalf of a company may be made as follows:

(a) Any contract which if made between individual persons would by law be required to be in writing signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority, expressed or implied, and may in the same manner be varied or discharged;

(b) any contract which if made between individual persons would by law be valid though made orally only and not reduced to writing, may be made orally on behalf of the company by any person acting under its authority, expressed or implied, and may in the same manner be varied or discharged.

(2) All contracts made in accordance with this section shall be effectual in law and shall bind the company and its successors and all other parties thereto.'

[13] Section 69 was preceded by s 72(1)(a) of the Companies Act 46 of 1926, which itself replaced s 74(1) of the Companies Act 31 of 1909. Thus for a long period any agent of a company, whether or not a functionary of the company, has, it is argued, been able to bind the company to a contract for the sale of land without written authority by virtue of the provisions of s 69 and without reference to the *Potchefstroom Dairies* principle.

[14] Northview's argument is thus that had Christelis been representing a company, he would have been able to bind it on his signature. I have some doubt about whether s 69 was ever intended to apply to a person who is not a functionary of a company and who does not have authority by virtue of his or her position within the company, in terms of the company's articles of association or in terms of a resolution of the company. It is so, however, that the decisions based on *Potchefstroom Dairies* do not deal with that situation: all deal with functionaries of a juristic person such as company secretaries,

and partners. See, for example, *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* [7] where Trollip JA, referring to *Potchefstroom Dairies* and cases applying it, said that parol evidence was admissible to prove that the signatory to a contract for the sale of land had 'the necessary *implied* authority' (my emphasis). He continued: 'After all, in most cases that is the only way in which "implied authority", permitted by [s 69] of the Companies Act, could be established.' The signatory was a director of the company concerned.

[15] However, the meaning of s 69 and its ambit were not debated before us: it was assumed that any agent for a company, whether authorized by law or by mandate, does not require written authority to bind a company to a contract for the sale of land.[8] No finding in this regard is made.

Contracts concluded on behalf of close corporations

[16] There is no provision equivalent to s 69 in the Close Corporations Act 69 of 1984. Is there any reason to treat close corporations differently? The Close Corporations Act confers on members the power to bind the close corporation. Section 54 provides:[9]

'(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

(2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and

[7] 1982 (1) SA 7 (A) at 18F-19C.

[8] But see P Wulfsohn *Formalities in Respect of Contracts of Sale of Land Act* pp 150-153. He points to the anomaly that arises if s 69 is interpreted to mean that an outside agent – not authorized by law – can bind a company without written authority. He argues that this is not what is intended. The argument was referred to by Davis J in *Myflor Investments (Pty) Ltd v Everett NO & others* 2001 (2) SA 1083 (C) at 1093H-1094E but rejected. The different views on this issue are also set out in *De Villiers and Macintosh The Law of Agency in South Africa* 3 ed by J Silke (1981) pp102-103. See also P M Meskin *Henochsberg on the Companies Act* 127-128.

[9] The section was amended in 1997 to simplify it and to provide greater protection for third parties: see H S Cilliers, M L Benade, J J Henning, J J du Plessis and P A Delport *Close Corporations Law* 3 ed (1998) p 64.

the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.'

[17] Section 54(2) does no more than express the usual rules relating to ostensible authority. And s 54(1) simply confers on a member authority to act for a close corporation, as the common law confers on a partner the power to bind the partnership. The section does not regulate the question of written authority for the purpose of s 2(1) of the Alienation of Land Act, as it is assumed s 69 of the Companies Act does. It is clear, however, that on the reasoning in *Potchefstroom Dairies* a member, who by law can represent a close corporation, need not have written authority. But why should that be true of an agent of the close corporation who is not a member, as is the case with Christelis?

[18] Assuming that Christelis did not have written authority to sign the deed of sale, did he bind Revelas? Counsel for Revelas argues that only Mrs Christelis, the member, had the power to bind the corporation. The basis of the argument is that *Potchefstroom Dairies* deals with situations where the juristic person can act only through a natural person, who has authority by virtue of his or her position to bind the entity – that is where the principal cannot itself act, as in the case of companies that have no 'minds nor hands of their own'. So too, tutors and curators act for persons who have no, or limited, legal capacity. In this case, Revelas could act through Mrs Christelis. And she could have given Christelis written authority to sign the agreement of sale. The *Potchefstroom Dairies* principle does not, therefore, apply.

[19] The argument is thus that where there is no implication of authority by law (as with a company director or secretary, or a close corporation member – who would all fall in the class of functionaries of the juristic entity) written authority, as required for an agent under s 2(1) of the Alienation of Land Act is necessary. In the first class there is a primary attribution of authority – by

statute or other instrument. In the second class there is a secondary rule of attribution – authority conferred by the expression of will. In the latter class there must be written authority to comply with s 2(1).

The rules of attribution

[20] Counsel for Revelas cites in this regard a decision of the Privy Council: *Meridian Global Funds Management Asia Ltd v Securities Commission*.[10] Lord Hoffman, delivering the judgment of the Council, explained that a company exists as a legal fiction because of certain rules. And a company runs in accordance with rules which tell one which acts are those of the company. He said:[11]

'It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called the "rules of attribution".'

Lord Hoffman continued:[12]

'The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as "for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company" or "the decisions of the board in managing the company's business shall be the decisions of the company" There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as

"the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company": see *Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258.

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally

[10] [1995] 2 AC 500 (PC).
[11] At 506B-D.
[12] At 506C-507F.

available to natural person, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

It is worth pausing at this stage to make what may seem an obvious point. Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company 'as such' cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course the meaning is usually perfectly clear. But a reference to a company "as such" might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution count as an act of the company.

The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself", as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?

One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, ie if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the

shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.'

[21] Counsel for Northview argues that the rules of attribution expressed in *Meridian* are not part of South African law. It seems to me, however, that they are simply rules of logic. And in any event, I consider that they are expressed (although more concisely) by Bristowe J in *Potchefstroom Dairies* where he said:

'Moreover the use of the word "authorised" points I think to an *express authorisation as distinct from one arising by implication of law.* So that it seems to me that *the agency contemplated by the section is one expressly created by a person who could himself have exercised the delegated power had he chosen to do so*' (my emphasis).

[22] Authority arising by implication of law in this context is that conferred by statute, by the rules of the juristic entity (in articles of association, for example) or by the common law in relation to partners. An express authorization is one given to an agent by a principal who can act for him or herself. In the case of a close corporation the logical principle should in my view prevail: a member who is given authority by statute to bind it needs no written authority.[13] But if a member authorizes an agent to enter into a contract for the sale of land on behalf of the close corporation he or she must do so in writing.

[13] See contra *Lombaard v Dropprop CC* 2009 (6) SA 150 (N) para 55. The court held that even a member required written authority, which cannot be correct.

[23] The logic of the principle is made clear by an example dealing with a partnership. Assume a partnership of doctors. It owns immovable property from which the doctors practise. They decide to sell the property. Any one of the partners, by virtue of his or her position as a partner, may sign the deed of sale without any written authority from the others. But if they instruct their bookkeeper, or receptionist, to sign the deed that instruction must surely be in writing in order for the partnership to be bound. A close corporation must likewise, through a member, give its attorney or other agent written authority to sign the deed.

Anomalies arising from treating companies and close corporations differently

[24] Northview argues that such a conclusion is anomalous. Why should the position be different as between companies and close corporations? I consider that there is no anomaly. There may be a difference but there is no deviation from the norm. The argument begs the question as to whether there is a norm. The first reason for the difference lies in the very fact that the Close Corporations Act does not include the equivalent of s 69 (whatever its ambit is). We must assume that the omission of an equivalent provision is deliberate. And secondly, even if there is an anomalous difference, the anomaly is no more significant than that which arises if one treats people differently from close corporations. If A, a human being, authorizes B, an agent, to sign a contract for the sale of land, the authorization must be in writing. It would be extraordinary if A, the sole member of a close corporation, could orally (or perhaps even by conduct) authorize B, an agent, to sign such a contract.

[25] Moreover, a close corporation is intended to be a simple entity, akin to a partnership, but with limited liability.[14] The structure of a close corporation is designed for individual entrepeneurs or for a limited number of people (10) to conduct business. There is no board of directors and each member has the

[14] Cilliers et al above p15.

power to bind the close corporation, as discussed above. The complex requirements of company law are not intended to apply to them.[15] The fallacy in Northview's argument arises through comparing close corporations with companies rather than with partnerships or individuals. It is partnership principles rather than company law principles that govern the relationship between members.[16] It follows that a member, like a partner, need not have written authority to enter into a contract for the sale of land. But where a partner or a member authorizes a third person (an agent in the true sense) to enter into such a contract the authorization must be in writing.

Achieving the object of s 2(1) of the Alienation of Land Act

[26] The object of s 2(1) of the Alienation of Land Act is to ensure certainty in respect of contracts for the sale of land. That object is not defeated if a functionary of a company or a close corporation or any other juristic entity signs such a contract. There is no uncertainty about the functionary's authority. It derives from law. In Bristowe J's words,[17] the authority 'arises by implication of law'. But where the authority arises from the expression of will (an 'express authorization') it must be in writing. If it were not, the uncertainty as to the authority would defeat the object of the section.

[27] I conclude, thus, that in the absence of written authority given to Christelis by the member of Revelas, the contract for the sale of the property was invalid. The substantive exception was thus correctly upheld by the high court.

The pleading exception

[28] In so far as the pleading exception is concerned – that the written authority was not attached to the particulars of claim, and that the claim was

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[15] *Lawsa* 1st reissue, Vol 4, Part 3, para 414 and Cilliers et al above p 13.
[16] Cilliers et al above p 15 and J J Henning 'Die aanspreeklikheid van 'n beslote korporasie vir die handelinge van 'n lid en enkele ander aspekte van eksterne verhoudings' (1984) *Tydskrif vir Regwetenskap* p 155 esp pp 166ff.
[17] *Potchefstroom Dairies* at 513.

thus vague and embarrassing – my view is that it was sufficient for Northview to plead that Christelis was 'duly authorized'. Such an allegation implies proper compliance with the requirement of written authority and Revelas could have denied that in its plea. There is ample authority for the proposition that the denial of an agent's authority is a special defence and must be specifically pleaded.[18] The finding that that exception was correctly taken was thus not correct, and in any event would not be appealable given that it was not final in effect.

[29] The appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

[18] *Charugo Development Co (Pty) Ltd v Maree NO* 1973 (3) SA 759 (A) at 763F-764A.

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