REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 3888/06

Case No: I 3909/06

In the matter between:

THE OFFSHORE DEVELOPMENT COMPANY (PROPRIETARY) LIMITED **PLAINTIFF**

and

FIRST NATIONAL BANK OF NAMIBIA LIMITED **DEFENDANT**

Neutral citation: *The Offshore Development Company (Pty) Ltd v First National Bank of Namibia Ltd* (I 3888-06; I 3909-06)) [2013] NAHCMD 269 (2 October 2013)

Coram: VAN NIEKERK J

Heard: 31 March 2008

Delivered: 2 October 2013

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ORDER

In each of the cases the exception is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

VAN NIEKERK J:

[1] In both cases the plaintiff instituted action against the defendant in its capacity as the plaintiff's banker. In the two cases the defendant made a total of four transfers from certain of the plaintiff's bank accounts to an entity known as Great Triangle Investments. These transfers allegedly resulted in a loss to the plaintiff in the two sums claimed in the actions, viz N$16.4 million and N$6.2 million respectively.

[2] Initially the actions each comprised a main claim, based in contract, and an alternative claim, based in delict. After exception was raised against the main claims and the alternative claims, the plaintiff withdrew the two alternative claims, tendering the defendant's costs. Before me are, therefore, the exceptions on the contractual claims. Both claims are stated in the same terms as follows, except for certain dates and amounts, which I omit:

> '3. (a) In 1995 and at Windhoek, the plaintiff appointed the defendant as its banker and the defendant accepted this appointment.
>
> (b) The said appointment and acceptance were in writing, alternatively orally or tacitly effected; the plaintiff is not at present able to specify who acted on behalf of the parties in entering the agreement so arising.
>
> 4. Upon the defendant's appointment as banker, the plaintiff opened and has since then and at all material times operated a current banking account and a call account with the defendant.
>
> 5. The following are material express, alternatively implied, alternatively tacit terms of the agreement between the plaintiff and the defendant:
>
> (a) Defendant would act in accordance with generally accepted banking practice and procedure and customs;
>
> (b) Defendant would perform its mandate as the plaintiff's commercial banker with the due professional care and diligence of a reasonable banker and would not act negligently;
>
> (c) In acting as its banker, the defendant would only make payment upon or affect transfers from the plaintiff's current and call banking account on behalf of the plaintiff upon authorized and original written instructions to that effect, as is required by generally accepted banking custom and practice.
>
> 6. In breach of the defendant's obligations aforesaid, the defendant accepted and executed unauthorized instructions, during the period ..... and furthermore the defendant accepted and executed instructions given by telefax.
>
> 7. The total amount of these aforesaid transfers and transactions is in the sum of ..... .
>
> 8. As a consequence, the plaintiff's current and/or call banking account was debited with these amounts.
>
> 9. Had the defendant complied with its obligations under the agreement, these payments would not have been authorized or made.

10. As a consequence of the defendant's breach, the plaintiff has suffered loss in the sum of ..... .

11. In the premises the defendant is indebted to the plaintiff in damages in the sum of ..... and which amount is due and payable.'

[3] Upon request by the defendant, the plaintiff provided certain further particulars of the agreement between the parties, *inter alia* Annexure 'A', which is a 'List of signing officers for a company' dated 4 June 1999 which is addressed to the defendant and states, *inter alia*: 'With reference to Bank Form 25 dated 1995 July 12 we give below the signing arrangements and the names of the persons at present authorised to sign under the resolution contained in that form and enclose specimens of their respective signatures and ..... All documents will be signed by signatories 1, 3, and 4 to sign alone up to N$5000-00 ..... or any two signatories to sign for any amount.' Then follow the full names of the various signing officers and their signing capacity. The capacities listed are (1) the chief executive officer, (2) the chairman, (3) a certain director, and (4) the general manager and secretary to the board.

[4] Annexure 'A' provides that it may be signed by two persons: the 'Chairman/Director' and the 'Secretary'. In this case it would seem that the first signature was provided by Mr Aboobakar, but he did not indicate whether he signed as 'Chairman' or 'Director'. The second signature cannot be made out.

[5] In the further particulars the plaintiff further states that it was the plaintiff's chief executive officer who gave the unauthorised transfer instructions to the defendant. This occurred when he wrote letters to the defendant which he alone signed and in which he gave instructions to make the aforesaid transfers far in excess of the N$5 000 limit.

[6] The exception is to the effect that the amended particulars of claim as supplemented by the further particulars is bad in law and does not disclose a cause of action because of the following reasons:

'3.1 The plaintiff is a private company with limited liability registered in terms of the laws of the Republic of Namibia.

3.2 The plaintiff claims damages against the defendant based on an instruction given by plaintiff to defendant, with which instruction defendant complied. The official who act[ed] on behalf of the plaintiff

(and who gave the instructions), Mr ..... [Aboobakar] was the Chief Executive Officer of the plaintiff.

3.3 A Chief Executive Officer, as such, has authority to act on behalf of a company and the company is bound by the actions by the Chief Executive Officer on its behalf towards third parties whether the Chief Executive Officer was *"authorized"* to so act or not.

3.4 Plaintiff as a company is bound by the actions of its Chief Executive Officer towards the defendant, i.e. the giving of instructions to make transfers from the plaintiff's banking account as set out in the particulars of claim.

3.5 Plaintiff relies on an agreement which was entered into between the parties prior to the aforesaid instructions were given. No allegation is made that plaintiff's CEO did not have the authority to amend the previous agreement (by giving new instructions to defendant) or that, by virtue of agreed formalities, such instructions should have been ignored by defendant.'

[7] Mr *Heathcote*, who appeared for the defendant with Mr *Barnard*, summed up the essence of the exception as follows: In law the plaintiff as company is bound by the actions of its chief executive officer and the plaintiff makes no allegations to substantiate an alternative conclusion. He relied on the following statement in LAWSA, First Reissue, Vol 4, Part 2, par. 104:

> 'Where the articles [of association] do not restrict the powers of the directors to delegate their powers to a managing director, anyone dealing with a managing director may assume that the directors have conferred on him all the powers usually conferred on a managing director. Therefore, if a managing director, acting within those ostensible powers, enters into a contract with a stranger who believes that the managing director is duly authorized, the contract will be binding on the company even if it turns out that the managing director had no actual authority to enter into the contract on behalf of the company.'

[8] He submitted that the defendant was entitled to assume that the plaintiff's managing director had all those powers which ordinarily fall within the scope of such an office; that on the plaintiff's own allegations, its managing director gave instructions contrary to the existing mandate; that in law the defendant was entitled to accept that he knew about the existing mandate, but despite that, instructed the defendant to act on new instructions; that this amounted to an amendment of the

mandate, which the defendant was in law entitled to assume the managing director was authorised to amend. He further submitted that to allege that the chief executive officer had no authority without also alleging that the defendant knew, or should have known about such lack of authority, would not disclose a cause of action against the defendant, being a *bona fide* third party.

[9] In *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* 2002 NR 155 (HC) this Court stated (at p. 158H-159A) with reference to several authorities that:

> ' ..... having taken the exception, the defendant must satisfy the Court that, on all reasonable constructions of the plaintiff's particulars of claim as amplified and amended ..... and on all possible evidence that may be led on the pleadings ..... no cause of action is or can be disclosed.'

[10] Mr *Heathcote* submitted that the 'reasonable construction' test applies only to facts alleged in the pleadings, and not to legal or factual conclusions. He further drew attention thereto that the purpose of pleadings is to define the issues between the parties (*Sprangers v FGI Namibia Ltd* 2002 NR 128 (HC) and that rule 18(4) of this Court's rules requires that every pleading shall contain a clear and precise statement of the material facts upon which the pleader relies for the claim with sufficient particularity to enable the opposite party to reply thereto. He referred to Daniels, *Beck's Theory and Principles of Pleading in Civil Actions*, (6th ed), p125, where it is said that 'Every pleading must set out the complete chain of relevant facts relied on by way of action or defence, and the omission of any linking fact must break the sequence and will obviously render the conclusion false. In such a case an exception will be sustained.' Bearing these aspects in mind, he submitted that the allegation of being unauthorised is a conclusion to be drawn based on facts; and that the necessary 'linking facts' are missing because the plaintiff alleged insufficient, if any, facts on which one may conclude that the defendant knew or should have known that the plaintiff's chief executive officer acted without the necessary authority.

[11] Defendant's counsel did not provide any authority specifically relating to the pleading of authority or the lack of it and I am not persuaded of merit of his submissions. In *Beck's* at p.125 the author states in relation to the requirement that necessary averments must be pleaded that in certain cases greater precision is

required than in others and that this is always the case whenever any charge is made against an opponent, e.g. where fraud is alleged. (Another example which springs to mind is the requirement set by rule 18(9) that a party to matrimonial proceedings relying on constructive desertion must set out the particulars thereof.) The degree of precision required obviously depends on the circumstances of each case (*Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at p107E).

[12] In *Durbach v Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) at p1082 the following was stated:

> 'If it was intended to deny that the directors had authority to conclude an agreement, this should have been specifically stated in the plea. The denial of the authority of an agent is a special defence and must be specifically and unambiguously pleaded, and not left to be inferred from a general traverse of the allegations in the declaration. Odgers on *Pleading* (3rd ed., pp. 137 - 138 and 144 - 145) and the cases there cited, especially *Byrd v Nunn* (1876 (5), Ch.D. 781), and on appeal (1877 (7), Ch.D. 284).'

(See also *Tuckers Land* at p16G-H; *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D).)

[13] Apart from the above statements concerning the pleading of lack of or a denial of authority I do not think it can be said as a general rule that the underlying facts for such an averment must in all cases be pleaded to sustain a cause of action or a defence.

[14] As to counsel's submission about the specific allegations which he suggested are fatally lacking in the particulars of claim, it is useful to refer to a passage in Meskin, *Henochsberg on the Companies Act*, Vol 2, p1039 where the author conveniently summarises the legal position as follows (the underlining is mine):

> 'Where a managing director concludes a contract on behalf of the company with a third party the company is bound if the managing director is authorised accordingly by the directors whether expressly or impliedly or, if he lacks authority, the directors ratify the contract; the managing director is impliedly authorised where the conclusion of the contract is an act within the scope of his powers which, as against the third party, is defined by reference to his

> position as managing director: the third party may assume that he has all those powers which ordinarily pertain or are incidental to the position of a managing director of a company carrying on the kind of business which the company in fact carries on; but this is subject to two qualifications: firstly, the articles must permit of delegation of powers to a managing director, and, secondly, where the true position is that the managing director lacks actual authority (eg the conclusion of the particular contract is an act requiring the holding of a power which the directors have withheld from him or he in fact concludes the contract not for the company's purposes but for his own), the third party must be *bona fide* unaware of such position: and the third party cannot maintain such unawareness if in the circumstances he is put upon enquiry, ie if he ought reasonably to appreciate that such position may exist. (*Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93 (CA) at 102, 103-104, 106; *Paddon & Brock Ltd v Nathan* 1906 TS 158 at 162-164; *Acutt v Seta Prospecting & Developing Co Ltd* 1907 TS 799 at 813-819; *SA Securities v Nicholas* 1911 TPD 450 at 457-460, 462; *Wolpert v Uitzicht Properties (Pty) Ltd* 1961 (2) SA 257 (W) at 265-266; *Contemporary Refrigeration (Pty) Ltd v Leites* 1967 (2) SA 388 (D) at 391-393; *Tuckers Land & Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) at 14-15; *Gordon v Swan Stabilo SA (Pty) Ltd* 1979 (3) SA 163 (T) at 168-169; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W) at 280).'

[15] If I understand the defendant's argument correctly, it is, in effect, that the plaintiff should allege the existence of any of the qualifications mentioned in the underlined part of the extract above. Translated to the facts of this case, it means that the plaintiff should allege that the defendant was not *bona fide* unaware of the fact that the chief executive officer had no power to give the instructions; or that the defendant cannot maintain that it was *bona fide* unaware as it was in the circumstances put upon enquiry by the terms of the existing mandate, i.e. it ought reasonably have appreciated that the chief executive officer may not be authorised to give the transfer instructions; or that the defendant was aware of the existing mandate restricting the powers of the chief executive officer and therefore put upon enquiry. I do not agree. If the defendant wishes to rely thereon that it was *bona fide* unaware, it should plead this fact. It is not required of the plaintiff to make its claim by pleading the opposite or a negation of a defence which the defendant might or might not raise.

[16] During the course of the argument Mr *Heathcote* also relied on the *Turquand* rule when he made a submission which I render here as framed in the defendant's heads of argument:

> 'The only way in which the Chief Executive Officer could not have been authorized by plaintiff's Board to given instructions to transfer the money contrary to the previous terms of the mandate, is if he had to be, first authorized by means of an internal procedure within the plaintiff. If the officials of the defendant did not know (and nothing to the contrary is alleged) that such procedure was not followed, they could safely have assumed that the internal procedure had in fact been followed, and that the Chief Executive Officer had been duly authorized to give specific instructions on which the defendant acted.'

[17] In this regard counsel referred to the following passage in *Tuckers Land And Development Corporation (Pty) Ltd V Perpellief* 1978 2 SA 11 (T) at p15C-D (the insertions are mine):

> 'Where someone contracts with a company through the medium of the persons referred to in paras 4 *(a)* [the board of directors] and *(b)* [the managing director or the chairman of the board of directors] above, the company will usually be bound because these persons or bodies will, unless the articles of association decree otherwise, be taken to have authority in one form or another to bind the company in all matters affecting it. Moreover all acts of internal management or organisation on which the exercise of such authority is dependent may, in terms of the *Turquand* rule, be assumed, by a *bona fide* third party, to have been properly and duly performed. Indeed unless some such principle was accepted no one would be safe in contracting with companies.'

[18] Counsel further relied on passages to the same effect in *Mine Workers' Union v Prinsloo and others* 1948 3 SA 831 (A) at 845 and *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 2 SA 257 (WLD) at 264G.

[19] On this point Mr *Heathcote* finally submitted that, in light of the principles set out above, the plaintiff cannot simply say that the acts of the chief executive officer were unauthorized and therefore not binding upon the company because it would amount to a 'legal *non sequitur vis-à-vis* the defendant'. What the plaintiff should say to avoid

the exception is also 'that he defendant was aware of this state of affairs, or that certain facts were within the defendant's knowledge which should have placed it on its guard'.

[20] In my view these submissions should not be upheld. As far as the submission on the *Turquand* rule is concerned, it is stated in LAWSA, First Reissue, Vol 4(2), p333:

> 'Because the rule in *Turquand's* case is not an absolute and unqualified rule of law, but applies only in favour of persons dealing with the company in good faith, it is not a mere plea of law which does not have to be pleaded. Rather, it is a plea of mixed fact and law. Therefore, it is at the very least incumbent on the person invoking it to plead that he did not know of the irregularity and was entitled to assume that the relevant provision of the company's constitution had been properly and duly complied with.'

[21] In support of his submissions about the amendment of the mandate Mr *Heathcote* referred to the following passage in *Di Giulio v First National Bank of South Africa Ltd* 2002 6 SA 281 (C) at p290A-C:

> 'The parties to a contract of mandate are free to amend or deviate from its authorisation requirements relating to the signing of cheques, provided such amendment or deviation is consensual. This may be done formally, in writing, orally, by word of mouth, or tacitly, by conduct in the form of acts or omissions. If there should be no such consensus, they may, with equal validity, subsequently ratify any deviation from the terms of the mandate. In any event the bank may, at its own risk, honour ostensibly unauthorised cheques in the expectation that their payment will be approved or ratified. This may, in essence, constitute a breach of the mandate, but it will not per se invalidate the payment of the cheques.'

[22] The plaintiff had no quarrel with this statement of the law, but its counsel, Mr *Smuts,* submitted that if the defendant believed that the chief executive officer was authorised to amend the plaintiff's mandate to the defendant and indeed, that the mandate was amended, it should plead these facts as part of its defence. I agree with this submission. In any event, such an amendment would be a tacit amendment, which must be alleged and proved by the party relying thereon, in this case, the defendant (*Roos v Engineering (Edms) Bpk* 1974 3 SA 545 (A); *Big*

Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd 1979 (3) SA 267 (W) at 281E).

[23] As part of his argument Mr *Heathcote* submitted in sweeping terms that there is nothing like an unauthorised managing director in law unless further allegations to the contrary are made e.g. that his powers are limited by the articles of association. However, this states the powers of a managing director in too wide terms. In *Gordon and Another v Swan Stabilo SA (Pty) Ltd* 1979 (3) SA 163 (T) a Full Bench stated (at 169G-H):

> 'The powers of a managing director to contract on behalf of his company are by no means unlimited. As the learned Judge *a quo* (on the authority of *Wolpert v Uitzigt Properties (Pty) Ltd and Others* 1961 (2) SA 257 (W) at 265 and by reference to an article entitled "A Managing Director's Contracts" by R J Rohan-Irwin in 1964 *SALJ* 382 at 386) held, for a company to be bound on the basis of the implied authority of its managing director, the act in question must be one within the ordinary ambit of his powers. In other words there will be implied authority to perform the ordinary duties incidental to his position as managing director. What these are will of course depend on the facts of each case. Of particular importance will be the nature of the company's business.'

[24] Mr *Smuts* placed particular emphasis on the fact that in this case, the plaintiff's mandate to the defendant limited the power of the chief executive officer to give instructions to the defendant when it provided the list of its signing officers. To this extent, he submitted, the general power of chief executive officer was limited by the specific mandate. Furthermore, counsel pointed to the nature of the plaintiff's business which is set out in sections 26, 29 and 30 of Act 9 of 1995 and submitted that this does not include the business of investing huge sums of money. As such, he submitted, the instructions given by the chief executive officer would not fall within the ordinary ambit of his powers. There is force in these submissions.

[25] Counsel for the plaintiff stated that the actual mandate given in this case was provided by the Board and that there is nothing on the pleaded facts which suggests that the mandate has in fact been changed or that the defendant could accept that the chief executive officer acting on his own could change the authority provided to him to sign on behalf of the plaintiff in circumstances where he was, under the

existing mandate, limited to signing instruments up to N$5 000. He relied further on the judgment by Philips AJ in the *Big Dutchman* case, *supra*, where the following was said (at p284G-H) (the underlining is mine):

> '*Biggerstaff's* case *supra* does not seem to me to be of assistance to the defendant where the mandate expressly requires a resolution of the board of the plaintiff in order to vary the terms of the mandate itself. The principle of *Biggerstaff's* case cannot apply in such a case; at the very least, the reference to a resolution of the board of directors of the plaintiff should have put the defendant on enquiry before it treated the mandate as tacitly varied. The principle applies only where a managing director purports to exercise the authority which a managing director would normally have, and he would not normally have the authority to alter the mandate to the bank in regard to the signatures required on bank documents. Where he is doing something beyond the authority which he would normally have, the other party is protected only where he can set up all the requisites of an estoppel.'

[26] Mr *Heathcote*, however, pointed out that the resolution on Bank Form 25 referred to in Annexure 'A' does not from part of the pleadings and that there is no allegation in the pleadings that the Board gave the existing mandate. In this respect counsel is correct. He also referred to the fact that the chief executive officer signed Annexure 'A' as 'Chairman/Director', thereby indicating, counsel seemed to suggest, that he was involved in the giving of the mandate and may also vary it. In my view this is a matter to be determined after evidence has been heard.

[27] Counsel for the defendant also submitted that the underlined words in the passage quoted above should not be interpreted as a general rule concerning the ordinary powers of a managing director, but should be read in the context of the facts in that case, which facts were that the mandate itself was entrenched, in that it expressly provided that it could only be changed by a resolution of the plaintiff's board. Counsel further submitted that if, on the other hand, Philips AJ intended to make the statement about the ordinary powers of a managing director even where the mandate was not entrenched, the learned judge would, with respect, be incorrect, because a managing director may transact the whole of the affairs of the company and do all acts and enter into all contracts necessary for that purpose.

[28] I agree with Mr *Heathcote* that Philips AJ probably made the statement that a managing director would normally not have the authority to alter the mandate to the bank in the context of the factual matrix of the case before him, namely that the very mandate determined that a resolution of the board of directors would be required to vary the terms of the mandate. However, I should not be taken to say that it would always be within the ordinary powers of a managing director to change the terms of a mandate to the bank. In my view it would depend on the terms of the mandate and by whom it was given, even if the mandate does not provide expressly for its variation.

[29] During the course of his argument about the purpose of giving a mandate counsel for the plaintiff emphasised the following passage from *Glofinco v Absa Bank Ltd (t/a United Bank) and Others* 2001 (2) SA 1048 (W) where Lewis J stated the following (at p1059I-1060A) with which I respectfully agree:

> '……. whether there is actual authority - express, tacit or implied - is dependent always on the circumstances. Accordingly, even if it could be said that bank managers ordinarily or usually have authority to bind banks in certain transactions, where an express limit has been placed on such authority it would be a contradiction to find that there was implied unlimited authority. Express limits imposed by a bank, or any employer or principal, on an employee or agent's authority would have no value at all if a 'usual' authority (not referring to the particular agent's usual authority but to the usual authority of a person in that position) could be inferred. And that is simply commercially untenable.'

[30] Mr *Heathcote* countered the import of this passage with the submission that the court in *Glofinco* was concerned with the authority of an ordinary manager and not with the authority of a managing director. This brings into play a further argument by plaintiff's counsel to the effect that the defendant's submissions are based on an assumption for which there is no basis in the pleadings. Mr *Smuts* pointed out that there is no allegation in the pleadings that the plaintiff's chief executive officer is its managing director. He further submitted that the two offices are sometimes identical and sometimes not. Very often in the case of parastatal bodies, or a corporate body in which the State is a shareholder, such as the plaintiff, the chief executive officer is not a managing director. He referred to section 26 of the statute in terms of which

the Minister of Trade and Industry appointed the plaintiff, namely the Export Processing Zones Act, 1995 (Act 9 of 1995), as the Offshore Development Company to promote, market, co-ordinate and monitor all approved activities, including export processing, in Namibia.

[31] Mr *Heathcote*, on the other hand, referred to section 27 of Act 9 of 1995 in which it is specified that the plaintiff shall be a company incorporated in terms of the Companies Act as a private company with limited liability. As such the plaintiff is bound under section 59(2)(b) of the Companies Act, 1973 (Act 61 of 1973), by the statutory articles of association as contained in Table B of Schedule 1, subject to any additions, omissions and modifications as are stated in the plaintiff's articles. I understood him to imply that there was no reason to think that the plaintiff was in any different position than a private company with limited liability.

[32] Counsel for the defendant further submitted that a managing director and a chief executive officer are one and the same. For this proposition he referred in general to the work of Blackman, Jooste *et al*, *Commentary on the Companies Act*. Having consulted this work, the only passage of relevance that I could find appears on p8-204 where the authors state: 'A managing director (or chief executive) is a director to whom the board of directors had delegated its powers of management of the company's business.' I think this passage should be read with another at p8-13 where the authors explain that 'An 'executive director' is a director who is also an officer employed by the company. They also refer to *Re Elgindata* Ltd [1991] BCLC 959 985 'where it was said that the expression 'non-executive director' is not a term of art, but in common parlance it connotes someone who devotes only part of his time to the affairs of the company.' They further state that a non-executive director does not participate in the day-to-day management of a company.

[33] In Pennington's *Company Law,* (6th ed), p581 the following helpful discussion appears:

> 'In some companies (particularly the smaller and medium-sized private companies) all the directors devote their whole time and attention to the company's affairs and often they divide the various sectors of management between themselves with or without a formal appointment of directors with a descriptive character being made (eg financial director, production director,

> marketing director). In other companies some members of the board of directors do not devote their full time to the company's business while others do, and the day-to-day management of the company's business then devolves on the full-time directors, who may divide the sectors of management functionally between themselves and are collectively known as executive directors, to distinguish them from the part-time directors, who are labelled non-executive.....Usually an arrangement by which day-to-day management is left in the hands of the full-time or executive directors is given formal effect by one or more of the full-time directors being appointed managing or executive director or directors (or if only one senior appointment is made, as chief executive) and by him or them being given powers of management which are exercisable without reference to the board. If the arrangement is to be legally effective, however, the articles must provide for the appointment to be made.'

[34] It seems to me that in the extract quoted from Blackman, Jooste, *supra,* p8-204 the authors are referring to a managing director or a chief executive who is also a director. I do not think that the intention was to convey that a chief executive officer and a managing director are always one and the same. There are several examples in our statutes in which provision is made for the appointment by a corporate body's board of directors of a chief executive officer who need not be a director of the body and in some cases 'shall not' be a director. (See, e.g. the National Fishing Corporation of Namibia Act, 1991 (Act 28 of 1991); the Meat Corporation of Namibia Act, 2001 (Act 1 of 2001); and the Roads Contractor Company, 1999 (Act 14 of 1999)).

[35] In any event, the directors of a company may appoint a chief executive officer as the principal manager of the company without appointing one or more of their body as managing director or chief executive director under the articles of association. (See the discussion in Meskin, *Henochsberg on the Companies Act, supra,* Vol 2 p1041-1043 in the commentary on Article 61 of Table A of Schedule 1 under the heading "Manager").

[36] In my view the issue of whether the chief executive officer of the plaintiff was also the managing director at the relevant time when the plaintiff's cause of action arose, is a question of fact. If he was not a managing director much, if not most, of

the defendant's argument falls away. The reason is that the question 'whether a third party can hold a company bound by a contract concluded with him on its behalf by one who is its manager for the purposes of the [Companies] Act but who has not been appointed as a manager by the directors *under the articles*¸ the principles applicable are ..... those of the law of principal and agent.' (Meskin, *supra*, at p1042-1043; LAWSA First Reissue, Vol 4(2), p143, p160). I do not understand the exception to be based on the law of principal and agent. The gist of the defendant's exception is based on the principle that the chief executive officer *qua* managing director exercises the company's powers as an organ, not an agent, of the company.

[37] Having dealt with the arguments it follows therefore that in each of the cases before me the exception is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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K van Niekerk

Judge

APPEARANCE

For the defendant/excipient — Adv R Heathcote,

with him Adv P Barnard,

Instr. by Van der Merwe-Greeff Inc

For the plaintiff/respondent — Adv D F Smuts SC

Instr. by H D Bossau & Co.