

THE TURQUAND RULE IN SOUTH AFRICAN COMPANY LAW: A(NOTHER) SUGGESTED SOLUTION

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ABSTRACT

The common-law Turquand rule in South African law protects persons from being affected by a company's non-compliance with an internal formality pertaining to the authority of its representatives. The Turquand rule should not be regarded as an independent rule of South African company law, but as part of the law of agency, particularly the principles of agency by estoppel. Section 20(7) of the Companies Act 71 of 2008 attempts to protect bona fide third parties dealing with companies. However, this section is likely to create uncertainty as it fails to clarify its impact on other provisions in the Act that prescribe requirements for company decisions. It is argued that s 20(7) of the Act is unnecessary and potentially dangerous, and should be repealed.

Keywords: company; agency; authority; contract; Turquand rule; third party

I INTRODUCTION

Authority and representation rules are important components of any corporate law framework.¹ The law should clearly outline the circumstances under which a corporate agent's conclusion of a juristic act is binding between his principal and third parties.² Unfortunately, the task of identifying and regulating those circumstances may be complicated by the fact that the existence of a company representative's authority is often conferred subject to compliance with some internal formality.³

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¹ P Delpont 'Companies Act 71 of 2008 and the "Turquand" rule' (2011) 4 *THRHR* 132 at 132.

² D H Bester 'The scope of an agent's power of representation' (1972) 89 *SALJ* 49 at 49.

³ M J Oosthuizen 'Aanpassing van die verteenwoordigingsreg in maatskappyverband' (1979) *Journal of South African Law* 1 6. Locke remarks that the law on authority of company representatives has been complicated further by the

This article addresses South African law pertaining to contracts purportedly entered into by a company's representative in the absence of compliance with an internal formality to which his authority is subject. The common-law Turquand rule is an important part of that legal framework.⁴

Section 20(7) of the Companies Act 71 of 2008 (the Act) introduces into South African company law what appears to be a third-party protection mechanism similar to the common-law Turquand rule. However, s 20(8) of the Act confirms that the common-law Turquand rule remains applicable.⁵

The Turquand rule is targeted at a situation where a company fails to fulfil one of its internal requirements regarding the authority of its agents to contract.⁶ In terms of the rule, third parties dealing with the company are entitled to presume regularity, or at least, are not to be affected by the company's non-compliance with its own internal formalities. In other words, the Turquand rule prevents a company from avoiding liability on an unauthorised contract due to non-compliance with an internal requirement. The operation of the rule will be excluded if the third party knew that the internal requirement had not been complied with.⁷ In addition, the Turquand rule cannot be used by a third party that had failed to make further enquiries in circumstances that are so suspicious that they should have prompted him to confirm the agent's authority by making further enquiries.⁸

The nature and scope of the common-law Turquand rule in South African company law has often been addressed by academics.⁹ The

provisions of the Companies Act 71 of 2008 (the Act). N Locke 'The legislative framework determining capacity and representation of a company in South African law and its implications for the structuring of special purpose companies' (2016) 133 *SALJ* 160 at 169.

⁴ The Turquand rule was established in *Royal British Bank v Turquand* (1856) 6 E&B 327.

⁵ Locke op cit note 3 at 181.

⁶ The Turquand rule does not apply to contracts between natural persons acting in their personal capacities. See *Wolpert v Uitzigt Properties (Pty) Ltd & others* 1961 (2) SA 257 (W) at 23.

⁷ *The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1948 (3) SA 831 (A) at 845; JJ Du Plessis 'Maatskappygebondenheid vir die optrede van ongemagtigte maatskappy-funksionarisse' (1991) 3 *SAMLJ* 281 at 301; Delpert op cit note 1 at 135.

⁸ *Houghton and Co v Northard, Lowe and Wills* 1927 (1) K.B. 246 at 266-7; *Wolpert* supra note 6 at 20; Delpert op cit note 1 at 135; Du Plessis op cit note 7 at 301-2; Locke op cit note 3 at 169.

⁹ R Jooste 'Observations on the impact of the 2008 Companies Act on the doctrine of constructive notice and the Turquand rule' (2013) 130 *SALJ* 464 at 465; Oosthuizen op cit note 3 at 1; M J Oosthuizen 'Die Turquand-reel as reel van die verenigingsreg' (1977) *Journal of South African Law* 210 at 219; J S McLennan 'The ultra vires doctrine and the Turquand rule in company law – a suggested solution' (1979) 96 *SALJ* 329 at 344-57; Du Plessis op cit note 7 at 290-305; F H I Cassim & M F Cassim 'The authority of company representatives and the Turquand rule

judgment handed down by the Western Cape High Court (WCHC) in *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) Ltd & another*¹⁰ has reignited the debate as to the true legal nature of the Turquand rule.¹¹ The question is whether the Turquand rule is an independent rule of company law or merely a component of the doctrine of agency by estoppel. The court in *One Step* preferred the latter view.¹² In this article, these opposing positions will be referred to as ‘the independent rule view’ and ‘the estoppel view’. The independent rule view holds that an outsider may enforce an unauthorised contract against a company on the basis either of the Turquand rule or of the doctrine of estoppel.¹³ The estoppel view holds that the Turquand rule is inextricably linked to agency by estoppel, in that the former can assist in proving the latter.

Several South African court judgments have supported the estoppel view.¹⁴ However, the independent rule view has also received some judicial favour.¹⁵ Inconsistent judgments and academic criticism thereof may result in legal uncertainty. Uncertainty regarding the validity of corporate contracts cannot be beneficial to the South African economy. It is submitted that finalising the question of the scope of the Turquand rule can play an important role in adequately balancing the interests of companies and outsiders, and can strengthen investor confidence in the South African legal framework.

This article will commence by briefly setting out the common-law position regarding the validity of unauthorised contracts. Thereafter, the article will critically analyse the two sides of the Turquand rule debate with reference to South African case law and academic writings on the topic. A brief discussion on s 20(7) of the Act will follow. Finally, a conclusion will be presented wherein solutions will be suggested to resolve the issue of the Turquand rule’s application in South African law.

revisited’ (2017) 3 *SALJ* 639 at 656–63; M Lombard & C Swart ‘Vonnisbespreking: Turquand en estoppel: voëls van eenderse vere? *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) (The CRL Trust as Intervening Creditor)* 2015 4 SA 623 (WKK)’ (2016) 13(2) *LitNet Akademies (Regte)* 658 at 659.

¹⁰ *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) Ltd & another* 2015 (4) SA 623 (WCC).

¹¹ See, for example, Cassim & Cassim op cit note 9 at 656–63 and Lombard & Swart op cit note 9 at 659.

¹² *One Stop* supra note 10 at para 25.

¹³ Du Plessis op cit note 7 at 289, 299 & 305; Oosthuizen op cit note 9 at 215.

¹⁴ *One Stop* supra note 10 at para 25; *Insurance Trust and Investments (Pty) Ltd v Mudaliar* 1943 NPD 45 at 50–4; *Wolpert* supra note 6 at 23; *Service Motor Supplies (1956) (Pty) Ltd v Hyper Investments (Pty) Ltd* 1961 (4) SA 842 (A) at 467; *Tuckers Land and Development Corporation (Pty) Ltd v Perpelliëf* 1978 (2) SA 11 (T) at 15.

¹⁵ *The Mine Workers’ Union* supra note 7 at 847–9; *Mahomed v Ravat Bombay House (Pty) Ltd* 1958 (4) SA 704 (T) at 311–12.

II FIRST PRINCIPLES OF (UNAUTHORISED) AGENCY IN SOUTH AFRICAN LAW

In order for a person to validly conclude a contract on behalf of another person, he must have the necessary authority to do so.¹⁶

There is only one type of authority in South African law: actual authority. The term ‘actual authority’ properly describes a situation in which a particular act of an agent falls within the ambit of the principal’s manifestations of assent to him.¹⁷ The Supreme Court of Appeal (SCA) has confirmed Lord Denning’s exposition of the two distinct forms of actual authority.¹⁸ Actual authority can manifest in one of two ways: express authority or implied authority.¹⁹ Express authority is that authority explicitly given by the principal to the agent, communicated either verbally or in writing. The conferring of authority may also be implied from the conduct of the parties (particularly the principal) and other surrounding circumstances.²⁰ In conjunction with his express authority, an agent may have the implied authority to do whatever is reasonably necessary for, or incidental to, the performance of the obligation/s with which the express authority is coupled.²¹ All acts that would form part of the usual authority of a particular functionary may also form part of that functionary’s implied authority.²² Importantly, an agent cannot have implied authority to do something which is clearly beyond an express authority restriction.²³

No person may validly contract on behalf of another person without actual authority to do so.²⁴ However, the unauthorised contract may be rendered valid and enforceable through application of the principles of ratification, agency by estoppel, or apparent authority.²⁵

¹⁶ M Dendy ‘Agency and representation’ in *The Law of South Africa* vol 1 3 ed (2014) at para 137.

¹⁷ Bester op cit note 2 at 54.

¹⁸ See, for example, *NBS Bank Ltd v Cape Produce Co (Pty) Ltd & others* 2002 (1) SA 396 (SCA) at para 24 and *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd & others* 2012 (5) SA 323 (SCA) at para 24.

¹⁹ *Hely-Hutchinson v Brayhead Ltd & another* [1967] 3 All ER 98 at 102.

²⁰ *Ibid.*

²¹ Bester op cit note 2 at 54; Cassim & Cassim op cit note 9 at 644–5.

²² F H I Cassim ‘Corporate capacity, agency and the Turquand rule’ in F H I Cassim (ed) et al *Contemporary Company Law* 2 ed (2012) at 191–2; *Hely-Hutchinson* supra note 19 at 102.

²³ Dendy op cit note 16 at para 142; Bester op cit note 2 at 54.

²⁴ Locke op cit note 3 at 177; A J Kerr *The Law of Agency* (2006) 4–5.

²⁵ Dendy op cit note 16 at para 137. On apparent authority as a source of liability for unauthorised contracts, see *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 46–58.

Ratification is a professed principal's subsequent validation and acceptance of an unauthorised contract.²⁶ The effect of ratification is to have the unauthorised contract be regarded as if it had been authorised at the time of its conclusion.²⁷

Agency by estoppel is a form of estoppel by representation.²⁸ The doctrine of estoppel by representation is a flexible one that covers a wide variety of situations, including contractual liability.²⁹ If a person is induced into contracting with an unauthorised agent by the professed principal's representation that the agent had the necessary authority, the first person may rely on the equitable remedy of agency by estoppel to hold the professed principal to the contract, if certain requirements are met.³⁰ If the requirements of agency by estoppel have been proven, the professed principal will be prevented from denying the existence of the purported agent's authority.³¹ Consequently, the professed principal will be bound to the unauthorised contract as if the purported agent had been duly authorised to conclude it.³² Despite successful reliance on agency by estoppel effectively resulting in a contract as if the agent had had actual authority, it is almost universally acknowledged that agency by estoppel in South African law is not a form of actual authority.³³

South African courts and academics have traditionally agreed that the terms 'ostensible authority' and 'apparent authority' referred to the same set of rules.³⁴ However, the Constitutional Court (CC) in *Makate* has recently declared that apparent authority is a distinct concept to agency by estoppel.³⁵ Therefore, it seems that there is an additional remedy available to a third party that deals with an unauthorised agent: apparent authority as described by the majority in *Makate*. This judgment and the new remedy created by the CC have

²⁶ Dendy op cit note 16 at paras 150–1.

²⁷ Ibid. See also *Jagersfontein Garage & Transport Co. v Secretary, State Advances Recoveries Office* 1939 OPD 37 at 46 and *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at paras 9 & 12.

²⁸ Bester op cit note 2 at 56; Kerr op cit note 24 at 109–113. See also *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA) 641.

²⁹ C J Pretorius '*MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2008 6 SA 264 (Ck) *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 4 SA 122 (SCA)' (2011) *De Jure* 13 at 13.

³⁰ *NBS Bank* supra note 18 at para 26; *Glofinco v Absa Bank t/a United Bank* [2002] ZASCA 91 at para 12; *South African Broadcasting Corporation v Coop & others* [2005] ZASCA 118 at para 66; *Northern Metropolitan* supra note 18 at para 28.

³¹ *Glofinco* supra note 30 at para 11.

³² See *NBS Bank* supra note 18 at para 37.

³³ Bester op cit note 2 at 56; M S Blackman 'Directors' duty to exercise their powers for an authorised business purpose' (1990) 2 SA *Merc LJ* 1 at 12; Cassim & Cassim op cit note 9 at 647. See also *Tuckers Land* supra note 14 at 14.

³⁴ Bester op cit note 2 at 51 note 10; *Reed, NO v Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (RA) at 524; Kerr op cit note 24 at 25–6; Cassim & Cassim op cit note 9 at 647.

³⁵ *Makate* supra note 25 at paras 46–58.

been sharply criticised.³⁶ However, the effect of the *Makate* judgment will not be addressed here. This discussion will be restricted to the difference between the Turquand rule and agency by estoppel.

III THE TURQUAND RULE IN ENGLISH COMMON LAW

South African company law is largely based on the principles originally established in English law.³⁷ An investigation into the proper scope of the Turquand rule in South African law should start with an analysis of the context wherein the rule was established.

The Joint Stock Companies Act 1844 established the concept of companies incorporated by registration.³⁸ Thus, joint stock companies (effectively partnerships) were brought into the fold of organised corporate law in England through the option of registration as body corporates.³⁹

The contracts of registered joint stock companies would come to be regulated in the same way as those of statutory and chartered companies.⁴⁰ At that stage, the common law adopted a formalistic approach to identifying corporate contractual consent.⁴¹ The common seal of a company was particularly important as it effectively symbolised the consent of a company.⁴² With limited exceptions, the appearance of a company's common seal signified an act of the company.⁴³ Several cases held that where a company's common seal appeared on a contract with a bona fide outsider, the company's consent was proven and the contract was binding.⁴⁴ In essence, a

³⁶ R D Sharrock 'Authority by representation – a new form of authority?' (2016) 19 *PELJ* 1 at 14–5; Cassim op cit note 9 at 650.

³⁷ H S Cilliers et al *Cilliers & Benade Corporate Law* 3 ed (2000) at 21 & 23; R C Williams 'Companies' in *The Law of South Africa* vol 4(1) Second Reissue (2012) at para 3; P N Levenberg 'Directors' liability and shareholder remedies in South African companies – evaluating foreign investor risk' (2017) 26 *Tulane Journal of International and Comparative Law* 1 at 12; T H Mongalo *Corporate Law and Corporate Governance: A Global Picture of Business Undertakings in South Africa* (2003) at 1–3.

³⁸ Cilliers op cit note 37 at 21; H Rajak 'Judicial control: Corporations and the decline of ultra vires' (1995) 26 *Cambrian Law Review* 9 at 13.

³⁹ K E Lindgren 'History of the rule in *Royal British Bank v. Turquand*' (1975) 2 *Monash University LR* at 13, 14 & 16.

⁴⁰ *Ibid* at 14.

⁴¹ K E Lindgren 'The positive corporate seal rule and exceptions thereto and the rule in *Turquand's case*' (1973) 9 *Melbourne University LR* 192 at 195.

⁴² Lindgren op cit note 39 at 15.

⁴³ Lindgren op cit note 41 at 194 & 200–18. See also K E Lindgren 'The negative corporate seal rule and exceptions thereto' (1974) 9(3) *Melbourne University Law Review* 4 11.

⁴⁴ Lindgren op cit note 41 at 197. See the cases cited by the author at 198 notes 24 & 25.

company's common seal was a prima facie representation of the company's will to be bound thereunder.

In *Turquand*, a company's directors had borrowed money from a bank under the seal of the company without obtaining prior shareholder approval as required by the company's deed of settlement.⁴⁵ The bank guided itself by the company's common seal.⁴⁶ The court a quo made no reference to apparent authority because reliance was placed on the common seal as the expression of the company's consent.⁴⁷ On appeal, Jervis CJ made the following often-quoted statement:

[T]he 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 the right to infer the fact of a resolution authorizing that which on the face of the document appears to be legitimately done.⁴⁸

The contract was held to be valid despite non-compliance with the internal formality.⁴⁹ It is notable that Jervis CJ placed emphasis on the lack of authority and the third party's ignorance of whether internal formalities were complied with to complete the relevant agent's authority. It would seem that the *Turquand* rule was originally aimed at preventing a claim of lack of authority on the basis of unfulfilled internal formalities.

Lindgren argues that the decision in *Turquand* should be understood in light of its historical context as merely an application of the corporate seal rule.⁵⁰ In turn, the corporate seal rule could just as easily be considered as a form of estoppel.⁵¹ The corporate seal rule was comparable to estoppel because the common seal was effectively regarded as the company's representation that those affixing the seal were authorised to so express the company's mind.

Lindgren summarises the scope of the *Turquand* decision as follows:

Turquand means that where the seal or a statutory alternative symbolizing a corporate act appears, then by virtue of both the common law and section 44 [of the Joint Stock Companies Act 1844], the company is not permitted to repudiate it on the ground of a

⁴⁵ Lindgren op cit note 39 at 32; Cassim op cit note 22 at 182.

⁴⁶ Lindgren op cit note 39 at 32.

⁴⁷ Ibid.

⁴⁸ *Turquand* supra note 4 at 332.

⁴⁹ Ibid at 331.

⁵⁰ Lindgren op cit note 41 at 198 & 208.

⁵¹ Lindgren op cit note 41 at 198.

constitutional irregularity which would not be evident to the outsider. The decision says nothing directly as to the principles to be applied in non-form cases.⁵²

According to this view, the Turquand rule was not originally intended to be a general rule pertaining to unauthorised company contracts, but merely an expression of estoppel principles.⁵³

The Turquand rule could also be regarded as an expression of what can be called ‘the agency secret restriction and limitation rule’.⁵⁴ However, even if one regards the Turquand rule as the agency secret restriction and limitation rule, it would still only have relevance in the context of estoppel. This is so because there *are* situations where an internal authority restriction can definitely have an effect on third parties. For example, when a company’s internal authority restrictions expressly limit the authority of an agent, that agent cannot have implied authority to contract beyond the restriction if the internal formality has not been completed — an agent cannot have the implied authority to do something that is beyond an express limitation placed on his authority.⁵⁵ The inability to rely on implied authority will have an effect on the third party’s chances of enforcing the contract. The agency secret restriction and limitation rule would not be able to establish express authority or implied authority in the face of an uncompleted authority requirement. The rule would merely enable that third party to prove agency by estoppel despite the company’s non-compliance with the internal formality. This is precisely how proponents of the estoppel view regard the Turquand rule.

The Joint Stock Companies Act 1856⁵⁶ relaxed the corporate seal rule by allowing companies to conclude contracts (through agents) in the same way as individuals.⁵⁷ Regardless of how appropriate it may have been, the English courts started to apply the Turquand rule to non-seal cases and agency cases.⁵⁸ However, the Court of Appeal

⁵² Lindgren op cit note 39 at 33–4. Lindgren remarks that this understanding of the Turquand rule was confirmed in *Prince of Wales etc Assurance Co. v. Harding* (1858) E1. B1. & E1. 183 at 218–9. See Lindgren op cit note 39 at 38.

⁵³ Lindgren op cit note 39 at 38.

⁵⁴ *Ibid* at 17 note 20. In *Glofinco*, the SCA, per Nienaber JA, captured the substance of this simple but vital rule by remarking that ‘[i]nternal limitations of which outsiders ... are unaware will not bind them. This is a principle as old as the law of agency itself.’ *Glofinco* supra note 30 at para 17.

⁵⁵ Dendy op cit note 16 at para 142; Bester op cit note 2 at 54.

⁵⁶ (19 & 20 Vict. c.47).

⁵⁷ Lindgren op cit note 39 at 47.

⁵⁸ Lindgren writes that ‘the courts seemed ready to apply *Turquand* indiscriminately as a reason for holding the company liable for the acts of humans’. Lindgren op cit note 39 at 47–8.

in *Freeman*⁵⁹ put an end to this judicial tendency by confirming an approach that had gradually developed in English law, viz that the Turquand rule only has value in the context of agency by estoppel.⁶⁰ Therefore, it seems that the distinction between the Turquand rule and agency principles has fallen away in English law.⁶¹

IV THE TURQUAND RULE IN SOUTH AFRICAN COMMON LAW

The Appellate Division (AD) first reflected on the Turquand rule in *Legg & Co v Premier Tobacco Co.*⁶² In *Legg*, a single director purported to bind a company where the articles of association declared that two directors were required to pass a resolution authorising the contract.⁶³ On the facts, the AD held that the contract had been ratified by the company.⁶⁴ Although *Turquand* was referred to and implicitly accepted as part of South African common law, the AD did not suggest that the Turquand rule should apply to the case at hand.⁶⁵

*Insurance Trust and Investments (Pty) Ltd v Mudaliar*⁶⁶ seems to be the first direct judicial consideration of the Turquand rule in South African law. In casu, the Natal Provincial Division decided the enforceability of a promissory note purportedly signed on behalf of a company. The company's articles of association stipulated that the directors were empowered to determine who may sign on the company's behalf.⁶⁷ A resolution was passed to the effect that promissory notes made by the company may be signed by any two of its directors.⁶⁸ The promissory note at issue was signed by a single director.⁶⁹ Litigation ensued when the company refused to be bound to the note; the third party's claim relied on both estoppel and an argument resembling the Turquand rule.⁷⁰ The court held that since the promissory note was not signed in accordance with the resolution, the lone signatory lacked actual

⁵⁹ [1964] 2 QB 480 (CA).

⁶⁰ *Freeman* supra note 28 at 638–40. See also *Rama Corporation Ltd v Proved Tin & General Investments Ltd* 1952 1 All ER 554 at 556 & 558–71.

⁶¹ Oosthuizen op cit note 3 at 10; Cassim op cit note 22 at 184; L S Sealy 'Agency principles and the rule in Turquand's case (1990) 49(3) *Cambridge LJ* 406 at 406–8; McLennan op cit note 9 at 347–8.

⁶² *Legg & Co v Premier Tobacco Co.* 1926 AD 132.

⁶³ *Ibid* at 139.

⁶⁴ *Ibid* at 140–2.

⁶⁵ *Ibid* at 144.

⁶⁶ *Mudaliar* supra note 14.

⁶⁷ *Ibid* at 47.

⁶⁸ *Ibid* at 47.

⁶⁹ *Ibid* at 46.

⁷⁰ *Ibid* at 46.

authority to bind the company to the promissory note in question.⁷¹ Broome J's statement that in such an instance, and failing ratification or enrichment liability, 'the only remaining question is whether the company is nevertheless liable on the ground of estoppel',⁷² flies in the face of the independent rule view. The judge proceeded to state that English law on this point was at the time 'in a state of confusion owing to the failure of the Courts to recognise as a pure question of estoppel what is in essence nothing else'.⁷³ According to Broome J, the *Turquand* case and those that applied the *Turquand* rule to unauthorised contracts were actually estoppel cases.⁷⁴ On the facts, the court held that estoppel had not been proven.⁷⁵ Hawthorn JP concurred, and added:

The law [of agency] in England seems to be in a state of confusion, especially as applied to companies. There are signs that the same confusion, borrowed from England, is finding its way into our law. Unless precision of thought and expression are insisted upon in South Africa in this branch of the law, principles which are simple and plain will become clouded.⁷⁶

At issue in *The Mine Workers' Union v JJ Prinsloo* *The Mine Workers' Union v JP Prinsloo*; *The Mine Workers' Union v Greyling*⁷⁷ was the validity of contracts purportedly entered into by two agents of a trade union.⁷⁸ The two purported agents were described as 'President' and 'General Secretary'.⁷⁹ During the course of negotiations, the agents had provided to the third party a document that appeared to authorise the agents to conclude the contracts on the trade union's behalf.⁸⁰ The trade union took the position that the contract should be void because the persons that had attempted to represent it had lacked the authority to do so as a result of a failure to acquire approval by the trade union's General Council (effectively the shareholders) as required by the constitution.⁸¹ It was common cause that the relevant authority was granted pursuant to an Executive Committee (effectively the board) resolution only.⁸²

⁷¹ Ibid at 50 & 53.

⁷² Ibid at 53–4.

⁷³ Ibid at 54.

⁷⁴ Ibid at 57.

⁷⁵ Ibid at 60.

⁷⁶ Ibid at 61.

⁷⁷ *The Mine Workers' Union* supra note 7.

⁷⁸ Ibid at 840.

⁷⁹ Ibid at 840.

⁸⁰ Ibid at 840.

⁸¹ Ibid at 843.

⁸² Ibid at 842 & 844.

Relying on the development of English law on this point, counsel for the appellant argued that the Turquand rule 'is really based on ostensible authority and does not extend to bind a corporation to a contract made on its behalf merely because under its Constitution power to make the contract might have been validly conferred on the person who made it'.⁸³ The AD, per Greenberg JA, held that the case could indeed be decided purely on the basis of the Turquand rule.⁸⁴ The Judge of Appeal reasoned that 'the true position is that the necessary acts of internal management are presumed to have been performed'.⁸⁵ The AD declared the contracts binding without any discussion of a representation or of the third party's reliance thereon, thereby implicitly rejecting the appellant's argument that the Turquand rule forms part of ostensible authority.⁸⁶

In *Mahomed*, the Transvaal Provincial Division (TPD) decided on the enforceability of promissory notes signed by a single director of a company whose articles of association required a prior board resolution to authorise a single director to contract, and where no such resolution had been passed.⁸⁷ Marais J, in accordance with the principle of *stare decisis*, applied the rule as explained in *The Mine Workers' Union* to come to the conclusion that the promissory notes should be enforceable against the company.⁸⁸ The court remarked that the AD in *The Mine Workers' Union* implied that the Turquand rule is not based on estoppel, but on business convenience.⁸⁹

In *Wolpert*,⁹⁰ the Witwatersrand Local Division decided on the validity of four promissory notes signed by a single director of a company.⁹¹ A clause in the company's articles of association stipulated that the company's board of directors may determine who may sign promissory notes on the company's behalf.⁹² The plaintiff argued that the Turquand rule should apply to render the promissory notes enforceable against the company.⁹³ The court accepted that the effect of the articles was that any person could have been given authority to sign on the company's behalf, but expressed doubt regarding the propositions that a third party should be allowed to assume that any particular person has in fact been authorised to

⁸³ Ibid at 833.

⁸⁴ Ibid at 847–8.

⁸⁵ Ibid at 849.

⁸⁶ See Cassim & Cassim op cit note 9 at 659.

⁸⁷ *Mahomed* supra note 15.

⁸⁸ Ibid at 311–2.

⁸⁹ Ibid at 311.

⁹⁰ *Wolpert* supra note 6.

⁹¹ Ibid at 16–7.

⁹² Ibid at 21–2.

⁹³ Ibid at 20–1.

bind the company, and that the company should be bound despite evidence that the relevant authority had not been properly given.⁹⁴ The court held that the Turquand rule merely allowed a third party, in order to prove actual authority or agency by estoppel, to assume that acts of internal management had been properly completed.⁹⁵ On the facts, the court held that the plaintiff had failed to prove that the director had had express or implied authority.⁹⁶ Unfortunately for the plaintiff, agency by estoppel had not been pleaded.⁹⁷ Therefore, the court held that the promissory notes were not enforceable against the company. Claassen J acknowledged that his judgment was in conflict with *Mahomed* (and by implication, with *The Mine Workers' Union*) but reasoned that the full bench decision in *Mudaliar* reflected the true position.⁹⁸

In *Service Motor Supplies (1956) (Pty) Ltd v Hyper Investments (Pty) Ltd*,⁹⁹ an unauthorised contract in a typical Turquand situation was dealt with solely on the basis of estoppel.¹⁰⁰ In casu, a company's Articles of Association contained a clause that required unanimous support from all the directors of the company to approve any resolution.¹⁰¹ No such resolution was passed in respect of the authority of the single director that had purported to represent the company in concluding a lease agreement.¹⁰² In this case, the unanimous resolution requirement was surely an internal formality as envisioned by the *Turquand* case. Yet, Hoexter ACJ failed to even mention the Turquand rule in delivering the AD's decision that the company was bound to the agreement. The AD dealt with the matter solely on the basis of estoppel.¹⁰³ According to McLennan, the Turquand rule was referred to and argued before the court.¹⁰⁴ If that is the case, this case is strong support for the estoppel view.¹⁰⁵

The TPD again had opportunity to consider the Turquand rule in *Tuckers Land*. In casu, the litigants disputed the validity of a consent to jurisdiction agreement signed by a company secretary of a company that subsequently denied that the signatory had had the authority

⁹⁴ Ibid at 22.

⁹⁵ Ibid at 23.

⁹⁶ Ibid at 26–7.

⁹⁷ Ibid at 26.

⁹⁸ Ibid at 27–8.

⁹⁹ *Service Motor Supplies* supra note 14.

¹⁰⁰ Ibid at 468. See J S McLennan 'Contracting with business trusts' (2006) 18 *SA Merc LJ* 329 at 331.

¹⁰¹ *Service Motor Supplies* supra note 14 at 465.

¹⁰² Ibid at 467.

¹⁰³ Ibid.

¹⁰⁴ J S McLennan 'Contract and agency law and the 2008 Companies Bill' (2009) 30(1) *Obiter* 144 at 148.

¹⁰⁵ Ibid at 148–9.

to bind the company to the agreement.¹⁰⁶ The third party alleged that the company was bound on the basis of agency by estoppel.¹⁰⁷ On the facts, the court rejected the estoppel argument and held the consent agreement to be invalid.¹⁰⁸ During the course of an analysis of the authority of company representatives, and referring to *Wolpert*, Nestadt J stated the following about contracts between a third party and an ordinary director or other agent of a company:

Here a third party is not automatically to assume that such person has authority and the company is not precluded from repudiating liability on the ground that he had no authority to bind it... . The application of the *Turquand* rule in this sphere is limited. It only comes into operation once the third party has surmounted the initial hurdle ... and proves that the director or other person purporting to represent the company had authority. Once this is proved then, if the actual exercise of such authority is dependent upon some act of internal organisation, such can, by a *bona fide* third party, be assumed to have been completed. But in dealing with the type of person in question the other contracting party cannot use the *Turquand* rule to help him surmount the hurdle.¹⁰⁹

With respect, this statement is inconsistent with logic and law. If the third party has proved that the agent had authority, there would be no need to discuss the *Turquand* rule. The presence of uncompleted authority requirements would have precluded the agent's authority. Nestadt J's explanation could only be reconciled with established views on the *Turquand* rule by interpreting it as saying that the *Turquand* rule allows a *bona fide* third party to prove an agent's authority despite the company's non-compliance with an internal authority requirement.

In *Nieuwoudt & another NNO v Vrystaat Mielies (Edms) Bpk*¹¹⁰ the SCA, per Harms JA, said that where an entity's constitution authorises the delegation of authority, 'the *Turquand* rule could without more be of no assistance to third parties'.¹¹¹ This statement implies that the *Turquand* rule only becomes relevant when proving actual authority or agency by estoppel.¹¹²

¹⁰⁶ *Tuckers Land* supra note 14 at 12–3.

¹⁰⁷ *Ibid* at 16.

¹⁰⁸ *Ibid* at 19–20.

¹⁰⁹ *Ibid* at 15.

¹¹⁰ *Nieuwoudt & another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA).

¹¹¹ *Ibid* at 494.

¹¹² McLennan op cit note 105 at 148.

In *One Stop*, the WCHC decided on the validity of three contracts (two loan agreements and a suretyship) purportedly entered into on behalf of a company, and signed by two of the company's three directors.¹¹³ The company disputed liability on the grounds that the two directors had lacked the necessary authority because the company's share subscription agreement (a) required board resolutions to be signed by *all* the directors, and (b) prohibited the directors and shareholders from concluding certain contracts without the prior written approval of all the shareholders.¹¹⁴ The two directors had attempted to pass resolutions authorising the conclusion of at least one of the loan agreements.¹¹⁵ The third director claimed no knowledge of the relevant contracts, nor of any resolution to authorise their conclusion.¹¹⁶ Likewise, no shareholder resolution was passed to approve the transactions.¹¹⁷ These facts were not disputed.¹¹⁸

Rogers J held that the directors had lacked the authority to conclude the relevant transactions on the company's behalf.¹¹⁹ The applicant argued that the company should be barred from relying on the directors' lack of authority, on the basis of the common-law Turquand rule and s 20(7) of the Act.¹²⁰ The applicant did not allege facts establishing an estoppel against the company.¹²¹ In effect, the applicant wanted to achieve the effect of agency by estoppel without having to prove its requirements.

The judge remarked that the Turquand rule arose as a response to the constructive notice doctrine's prejudicial effect on a third party's attempts to bind a company to a contract.¹²² After citing the position in England and Australia, Rogers J held that the true Turquand rule is simply a part of agency by estoppel rendered necessary because of the company law doctrine of constructive notice.¹²³ Since no evidence had been presented to establish a claim of agency by estoppel, the application was dismissed.¹²⁴

Rogers J's interpretation of the Turquand rule was referred to in passing by Wallis J in the dissenting judgment in *Makate*.¹²⁵ However,

¹¹³ *One Stop* supra note 10 at paras 1 & 2.

¹¹⁴ *Ibid* at para 8.

¹¹⁵ *Ibid* at para 10.

¹¹⁶ *Ibid* at para 13.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid* at paras 15–17.

¹¹⁹ *Ibid* at para 18.

¹²⁰ *Ibid* at para 19.

¹²¹ *Ibid* at para 44.

¹²² *Ibid* at para 21.

¹²³ *Ibid* at para 25.

¹²⁴ *Ibid* at paras 60–1.

¹²⁵ *Makate* supra note 25 at para 110.

despite the reference taking place in the context of a discussion on estoppel, Wallis J did not expressly endorse the estoppel view of the Turquand rule, as argued by some.¹²⁶ At most, one could say that Wallis J mentioned in passing that *One Stop* represented a popular interpretation of the Turquand rule.

After a reading of South African case law on this topic, the only conclusion seems to be that there is no settled and uniform approach to the Turquand rule. There has been no express statement of law on this point by an appellate level court or by the CC. The various High Courts have often considered the Turquand rule, but there have been clear divergences in approach, and several decisions have completely ignored the supposed precedent set in the *Mine Workers' Union* case. In addition, no court has addressed whether the Turquand rule should apply to non-seal cases at all.¹²⁷

With respect, there does not seem to be any undisputable 'weight of authority' in favour of either view of the Turquand rule, let alone the independent rule view.¹²⁸ Even if there were, the recent *One Stop* decision shows that the scope of the Turquand rule is far from settled in South African law.

V SOUTH AFRICAN LITERATURE ON THE TURQUAND RULE

Most South African company law commentators prefer the independent rule view.¹²⁹ McLennan's is the lone voice that argues that South African case law does not support the independent rule view.¹³⁰ He writes:

[T]he so-called *Turquand* rule has no positive operation at all. Only when X has established the basic requirements of ostensible authority, may the non-compliance with internal formalities have any relevance. The indoor management rule is no substitute for any of the basic principles of the common law of agency[.]¹³¹

[i]t is not that anyone has a positive right to assume that certain things have been done; the rule ... operates merely to recognize the rather

¹²⁶ Cassim & Cassim op cit note 9 at 659.

¹²⁷ The fact that *Turquand* was decided under the corporate seal rule received only a brief mention by the AD in *The Mine Workers' Union* supra note 7 at 849.

¹²⁸ Cf Cassim & Cassim op cit note 9 at 659; Jooste op cit note 9 at 465.

¹²⁹ See, for example, Oosthuizen op cit note 3 at 10, Cilliers op cit note 37 at 192–4, Du Plessis op cit note 7 at 301–2, Cassim & Cassim op cit note 9 at 658–63, Jooste op cit note 9 at 465, and Lombard & Swart op cit note 9 at 667.

¹³⁰ McLennan op cit note 104 at 146.

¹³¹ *Ibid* at 147.

obvious proposition that third parties are not required to concern themselves with the internal workings of the companies they deal with.¹³²

McLennan cautions that the commonly used description of the Turquand rule is misleading, as saying that ‘third parties are entitled to assume that the internal regulations of a company have been complied with’ could imply that any situation of unauthorised agency where an agent *could* have had authority if an internal formality was complied with results in the company being bound to the contract.¹³³ The author insists that this cannot be the correct legal position.¹³⁴ According to McLennan, the only role of the Turquand rule is to temper the constructive notice doctrine and its effect on agency by estoppel.¹³⁵ He suggests that the doctrine of agency by estoppel should apply as far as possible to companies in the same way as it does to natural persons.¹³⁶

Oosthuizen acknowledges that there is a great deal of overlap between the Turquand rule and estoppel, but rejects the notion that the two rules are one and the same.¹³⁷ He argues that applying estoppel requirements to a Turquand rule situation prejudices persons dealing in good faith with companies.¹³⁸ According to Oosthuizen, there are circumstances where the Turquand rule can find application while estoppel cannot.¹³⁹ The author argues that an independent Turquand rule is beneficial to third parties because it can be used to validate a contract where no misrepresentation on the company’s part can be proven.¹⁴⁰ It must be said that this is a great deal of protection that third parties do not enjoy against natural principals and partnerships.

Oosthuizen acknowledges that an unrestricted independent Turquand rule could prejudice companies, and consequently argues that the rule should not allow a company to, without more, become bound to the transactions of any person that holds himself out as an agent of the company.¹⁴¹ According to Oosthuizen, the Turquand rule alone should never be cause for a company’s liability.¹⁴² The author suggests that the scope of the Turquand rule should be limited so as

¹³² McLennan op cit note 9 at 352.

¹³³ McLennan op cit note 9 at 342.

¹³⁴ McLennan op cit note 9 at 342.

¹³⁵ McLennan op cit note 9 at 349–50; McLennan op cit note 104 at 150. See also I D Campbell ‘Contracts with companies’ (1959) 75 LQR 469 at 480.

¹³⁶ McLennan op cit note 9 at 370.

¹³⁷ Oosthuizen op cit note 3 at 9; Oosthuizen op cit note 9 at 219.

¹³⁸ Oosthuizen op cit note 3 at 9.

¹³⁹ Ibid at 9.

¹⁴⁰ Ibid at 9 note 55. The author provides no authority for this assertion.

¹⁴¹ Ibid at 11.

¹⁴² Ibid.

to require a special relationship between the company and its agent, like the relationship between a company and its managing director or chairman of the board.¹⁴³ Oosthuizen argues that the Turquand rule should only apply where the relevant act is one which is usually within the power of an organ, officer or functionary, and once it appears to the third party that the relevant person or organ was in fact appointed to the relevant position.¹⁴⁴ According to Oosthuizen, any contract that is clearly beyond the usual authority of a particular functionary should be so suspicious that it should put the third party on enquiry, and that failure to enquire should negate the third party's reliance on the Turquand rule.¹⁴⁵

With respect, Oosthuizen's suggested qualification to the Turquand rule is not desirable, for the same reason that the TPD's explanation of estoppel and usual authority principles in respect of persons occupying various positions within a company in *Tuckers Land* is capable of criticism: it may not be appropriate or possible for the common law or for academics to set out with any detail the precise situations where a company will be bound to unauthorised contracts. In this regard, Broome J's remarks in *Mudaliar* are on point: 'The circumstances ... are too numerous to set out, and in any case they are not propositions of law but merely examples of the application to various sets of facts of a single legal principle.'¹⁴⁶ Unless the Legislature intervenes with greater force than that shown by s 66(1) of the Act, the existence of a company representative's authority will remain a question of fact.¹⁴⁷

Furthermore, requiring an appearance of authority resulting from appointment to a particular position could be considered as merely an application of estoppel principles. Oosthuizen's suggested qualifications to the Turquand rule are perfectly capable of being presented in a discussion about the reasonableness of a third party's reliance on a principal's representation in the form of an appointment of a person to a position that usually is capable of acting on the company's behalf; of course, this would be a discussion about estoppel. Stated differently, if circumstances exist that would raise the suspicions of a reasonable person, he must make further enquiries, and failure to do so means either that the company did not actually make the representation, or that the third party did

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid at 11–2.

¹⁴⁶ *Mudaliar* supra note 14 at 57.

¹⁴⁷ Section 66(1) of the Act provides that, *subject to the Act and a company's Memorandum of Incorporation*, a company's board has the authority to exercise all of the powers of a company.

not act reasonably in relying on it, or that there had been no actual reliance. Perhaps Oosthuizen was simply referring to usual authority as a component of a representation founding agency by estoppel.¹⁴⁸ If this interpretation of Oosthuizen's argument is correct, it seems that the spirit of estoppel can be found in the author's explanation of what the Turquand rule should be.

According to Du Plessis, the only way to maintain a healthy co-existence between the Turquand rule and agency by estoppel is to pay close attention to the qualifications imposed on the Turquand rule.¹⁴⁹ Du Plessis argues that a third party whose Turquand rule argument fails as a result of failing to make further enquiries where the circumstances would have demanded them, may nevertheless rely on estoppel to enforce the unauthorised contract.¹⁵⁰ However, this is a difficult proposition to accept in the context of the estoppel requirements laid out by the SCA.¹⁵¹ How could there have been a true representation of authority or reasonable reliance on that representation where the third party failed to enquire when put on enquiry?

Cassim and Cassim argue that *One Stop* is not supported by South African case law.¹⁵² In support of the independent rule view, the authors argue that the Turquand rule has been used to bind a company to unauthorised contracts that were unauthorised merely because of uncompleted internal formalities.¹⁵³ This is indisputable, but it alone does not mean that the Turquand rule is not part of estoppel requirements. It should be pointed out that the AD in *Service Motor Supplies* easily used agency by estoppel to impose liability on a company for an unauthorised contract that was unauthorised because of unfulfilled internal formalities.¹⁵⁴

Cassim and Cassim state that 'the doctrine of estoppel clearly requires the third party to have had actual knowledge of the particular clause (constituting a representation) in the company's constitution'.¹⁵⁵ Consequently, they argue that the Turquand rule is distinct from estoppel because an outsider can rely on the Turquand rule despite not having been aware of an unfulfilled internal requirement.¹⁵⁶ However, estoppel merely requires the third party to

¹⁴⁸ Oosthuizen op cit note 3 at 12–3.

¹⁴⁹ Du Plessis op cit note 7 at 307; Oosthuizen op cit note 3 at 10.

¹⁵⁰ Du Plessis op cit note 7 at 307–8.

¹⁵¹ See, for example, *Glofinco* supra note 30 at para 12 and *NBS Bank* supra note 18 at para 26.

¹⁵² Cassim & Cassim op cit note 9 at 663.

¹⁵³ *Ibid* at 658.

¹⁵⁴ *Service Motor Supplies* supra note 14 at 467.

¹⁵⁵ Cassim & Cassim op cit note 9 at 658.

¹⁵⁶ Cassim & Cassim op cit note 9 at 658.

be induced to contract by a company's representation of authority; the representation may or may not appear in the company's constitution.¹⁵⁷ An outsider could also rely on agency by estoppel despite not having been aware of an unfulfilled internal formality.

Cassim and Cassim argue that having two separate rules that regulate the validity of unauthorised company contracts is desirable because it will assist third parties, especially those that are unable to prove estoppel requirements.¹⁵⁸ They argue that treating the Turquand rule as part of estoppel will prejudice bona fide outsiders who would have to prove the requirements of estoppel.¹⁵⁹ This, say the authors, is contrary to business convenience.¹⁶⁰ However, if a company makes no representation of authority in respect of X, and X concludes an unauthorised contract, the fairness of holding the company to the contract is questionable. It is submitted that it would not be conducive to business for a company to be at risk of liability in circumstances where a partnership or natural principal would not be.¹⁶¹

Cassim and Cassim warn that abandoning the independent rule view 'would also have the result that in many situations where the company has failed to comply with an internal formality contained in its constitution, the third party would be unable to set up an estoppel and the company would escape liability on the contract'.¹⁶² The authors provide no examples of these situations, but if they refer to circumstances where a third party concludes a contract with a purported agent of a company who lacks authority only due to non-compliance with an internal formality that the third party is unaware of, I would argue that the company should only be bound to the transaction if the third party *can* prove the requirements of estoppel. There does not seem to be any serious prejudice in requiring this of the third party. If the third party cannot prove a representation by the company, his decision to apparently rely on a representation from another source should not be blamed on the company. If an agent acts without authority and no representation from the professed principal can be proven, the principal *should* not be liable on the unauthorised contract, unless the principal ratifies the contract. A third party that cannot prove actual authority or agency by estoppel was either mala fide, relying on the professed

¹⁵⁷ *Mudaliar* supra note 14 at 57; *Freeman* supra note 28 at 639.

¹⁵⁸ Cassim & Cassim op cit note 9 at 660.

¹⁵⁹ Cassim & Cassim op cit note 9 at 659–60.

¹⁶⁰ Cassim & Cassim op cit note 9 at 660.

¹⁶¹ An agent that acts without authority cannot bind his principal. See Locke op cit note 3 at 179.

¹⁶² Cassim & Cassim op cit note 9 at 660.

agent's representation of authority, or relying on some other source for information. In such a case, any potential claim he has should be against the agent for breach of the implied warranty of authority or delictual misrepresentation or against the person that had misled him into contracting, but not against the company to enforce the unauthorised contract.

Lombard and Swart also argue that the WCHC in *One Stop* erred by conflating the requirements of estoppel and the Turquand rule.¹⁶³ They argue that both estoppel and the Turquand rule can serve as the basis for a company's liability where the agent acted without authority due to non-compliance with an internal requirement.¹⁶⁴ The authors argue that the origin, goal and requirements of the two doctrines differ.¹⁶⁵ Lombard and Swart argue that the doctrine of estoppel is unsuitable to deal with all unauthorised contract situations, because it does not make provision for a situation where a third party is aware that a purported agent lacks authority due to an unfulfilled internal formality.¹⁶⁶ In such a case, the third party will not be able to rely on estoppel to enforce the contract.¹⁶⁷

Lombard and Swart do not motivate why a third party should be protected if he knows that the agent with whom he is dealing lacks the requisite authority. They merely point out that in such an instance, the third party can only call upon the Turquand rule to bind the company to the contract.¹⁶⁸ The authors do not explain how the third party would be able to succeed with the Turquand rule if he knows that the agent lacks authority. Should his knowledge of the agent's lack of authority not have put him on enquiry? With respect, this is a dangerous understanding of the Turquand rule because it would result in companies being at the mercy of mala fide outsiders conspiring with a director, agent, or indeed any other person. A third party could hold a company liable to an unauthorised contract merely because the person with whom he dealt *could* have had authority; such a position would give too much protection to third parties and may prejudice companies.

Finally, Lombard and Swart criticise Rogers J for apparently stating that a third party dealing with a company may always accept that the board is authorised to act on the company's behalf.¹⁶⁹ However, the judge simply stated that 'a company *may* ... represent that the

¹⁶³ Lombard & Swart op cit note 9 at 666–7.

¹⁶⁴ Lombard & Swart op cit note 9 at 667. See also Oosthuizen op cit note 3 at 9 and Du Plessis op cit note 7 at 290–2.

¹⁶⁵ Lombard & Swart op cit note 9 at 667.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ Lombard & Swart op cit note 9 at 668.

board of directors or the persons operating as the company's de facto directors have authority'¹⁷⁰ and that 'the board can *usually* be assumed to have full authority'.¹⁷¹ It is submitted that the court's cautious wording is appropriate because each case must be decided on its own merits.¹⁷² A company's Memorandum of Incorporation (MOI) can still restrict the authority of the board of directors.¹⁷³

With respect, it is submitted that for the reasons outlined above, the collective academic view presented in support of the independent rule view of the Turquand rule in South African law is cumbersome, unconvincing, ignores a large body of South African case law, and is apparently prepared to accept legal uncertainty and potential prejudice to companies.

VI THE TURQUAND RULE AND THE DOCTRINE OF CONSTRUCTIVE NOTICE

It has been argued that the Turquand rule was created specifically to lessen a bona fide third party's duty to investigate arising from the doctrine of constructive notice.¹⁷⁴ The view that the Turquand rule was established as a response to the doctrine of constructive notice may have been implied by the words used by Jervis CJ in *Turquand*.¹⁷⁵

There surely exists a common-sense principle that third parties, when trying to enforce a contract against a natural principal or partnership, should not be non-suited because the principal had secretly made the purported agent's authority subject to an internal restriction that had not been fulfilled.¹⁷⁶ The similarity between this principle and the estoppel view of the Turquand rule is striking. For natural principals, the agency secret restriction rule is a rule of

¹⁷⁰ *One Stop* supra note 10 at para 29. Italics added.

¹⁷¹ *Ibid* at para 30. Italics added.

¹⁷² *Mudaliar* supra note 14 at 57.

¹⁷³ Section 66(1) of the Act.

¹⁷⁴ Lombard & Swart op cit note 9 at 667; Locke op cit note 3 at 169; McLennan op cit note 100 at 330. Cf Oosthuizen op cit note 9 at 216 and Delpert op cit note 1 at 138. Oosthuizen argues that the Turquand rule could still be used to validate unpublicised acts like defective appointment of directors, insufficient notice of meetings, or quorum requirements, despite no constructive notice being applicable to those requirements. Oosthuizen op cit note 9 at 215.

¹⁷⁵ '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.' *Turquand* supra note 4 at 332. Cf *Wolpert* supra note 6 at 21.

¹⁷⁶ *Glofinco* supra note 30 para 17. Lindgren provides a more detailed description: '[T]he rule of agency law that a person who deals with an agent within the scope of his apparent or ostensible authority and who does not know of and is not put on inquiry as to the agent's lack of actual authority, will not be affected by any restriction or limitation on the agent's actual authority operating as between the principal and the agent.' Lindgren op cit note 39 at 17 note 20.

fairness applicable to apparent agency situations where no rule deems third parties to have notice and knowledge of certain documents. Therefore, it is submitted that the role of the company law Turquand rule was not simply to respond to the doctrine of constructive notice. It is further submitted that the 'link' between the Turquand rule and the doctrine of constructive notice only exists because it would often have been necessary for a third party to apply the Turquand rule where the doctrine of constructive notice could potentially have negated an estoppel claim against a company. The doctrine of constructive notice would often have been the reason why the Turquand rule would have been called upon in the company law context, but the constructive notice doctrine should not be considered the *raison d'être* of the Turquand rule.

VII SECTION 20(7) OF THE ACT

Section 20 of the Act deals with a range of situations and provides rights and protections to different stakeholders within a company, all under the heading 'Validity of company actions'.¹⁷⁷ Section 20(7) of the Act states:

A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.

Section 20(7) of the Act seems to be a positive rule conferring on bona fide outsiders the right to presume a fact, namely that a company, when making any decision in the exercise of its powers, has complied with all formal and procedural requirements stipulated by the Act, the

¹⁷⁷ K Van der Linde 'The validity of company actions under section 20 of the Companies Act 71 of 2008' (2015) 4 *Journal of South African Law* 833 at 835. Sections 20(1), 20(2), and 20(5) regulates the consequences of ultra vires acts concluded on behalf of limited capacity companies, conferring rights to restrain and to ratify. Section 20(2) seems either to recognise the common-law right of shareholders to ratify unauthorised actions or creates an entirely new statutory right (and special resolution requirement) to ratify unauthorised contracts of directors. Section 20(4) empowers various parties to obtain an interdict to prevent a company from violating the Act. Section 20(6) contemplates a shareholder claim for damages against any person that causes a company to violate the Act or a restriction in its MOI. Section 20(9) is similar to the common-law remedy of piercing the corporate veil.

company's MOI, and the company's rules. However, s 20(7) does not specify the effect of the bona fide third party's presumption on the validity of the company's decision. It is not expressly stated that the decision will be valid despite the failure to comply with formal and procedural requirements. Therefore, the effect of the presumption in s 20(7) is questionable.

Locke makes the argument that s 20(7) will apply to Turquand situations, and expresses the hope that courts will consider the limitations of the common law-Turquand rule when interpreting s 20(7) of the Act.¹⁷⁸ However, as has previously been pointed out, s 20(7) is not a true reflection of the common-law Turquand rule.¹⁷⁹ One important difference is that s 20(7) excludes a company's insiders from its protection, which the common-law Turquand rule does not do.¹⁸⁰ Another difference is that the common-law rule is aimed to rectify unauthorised contracts; s 20(7) contemplates a decision of a company.¹⁸¹

If one subscribes to the view that the Turquand rule and the constructive notice doctrine are inseparable, one may conclude that the presumption in s 20(7) is aimed at protecting persons that deal with RF companies and personal liability companies, as a modified doctrine of constructive notice applies to those entities.¹⁸² However, the problem with that proposition is that the statutory doctrine of constructive notice does not deem third parties to know of *every* clause in the MOIs of such companies.¹⁸³ Persons dealing with personal liability companies are only deemed to have knowledge of the effect on the company of the joint and several liability of past and present directors for the contractual debts of the company that had accrued during their respective periods of office.¹⁸⁴ The deemed knowledge in respect of RF companies is limited to restrictive conditions, additional amendment requirements in respect of restrictive conditions, and MOI amendment prohibitions.¹⁸⁵ It is relatively clear that restrictive conditions are capacity restrictions.¹⁸⁶

¹⁷⁸ Locke op cit note 3 at 178.

¹⁷⁹ Delpont op cit note 1 at 136; McLennan op cit note 104 at 152.

¹⁸⁰ Locke op cit note 3 at 170–1; Jooste op cit note 9 at 464–5.

¹⁸¹ Delpont op cit note 1 at 137.

¹⁸² Section 19(5)(a) and (b) of the Act, respectively.

¹⁸³ E Olivier 'Section 19(5)(a) of the Companies Act 71 of 2008: Enter a positive doctrine of constructive notice?' (2017) 28(3) *Stellenbosch Law Review* 614 at 620.

¹⁸⁴ Section 19(3) of the Act. See J J Henning 'Aantekening: Opmerkings oor die inskappe van die maatskappy met persoonlike aanspreeklikheid' (2016) 3 *Litnet Akademies* 865 at 868.

¹⁸⁵ Olivier op cit note 183 at 620.

¹⁸⁶ The Companies and Intellectual Property Commission (CIPC) suggests that 'restrictive conditions' should be read against the backdrop of the objects clause, the *ultra vires* doctrine (which regulated the consequences of acts beyond a

It also seems clear that authority restrictions in an MOI should not be regarded as restrictive conditions.¹⁸⁷

The problem is that the *Turquand* rule in South African common law has always been about unfulfilled internal requirements pertaining to authority.¹⁸⁸ Restrictive conditions in respect of a limited capacity company have the effect of limiting a company's agents to acts *intra vires* the company, but s 20(1) of the Act emphasises that an *ultra vires* contract is not void merely because the agents had no authority because of the company's lack of capacity. Additional amendment requirements in respect of restrictive conditions and MOI amendment prohibitions do not directly impact on authority either. In addition, the deemed fact contemplated by s 19(5)(b) has nothing to do with authority. The MOI provisions that third parties must be regarded to have notice and knowledge of do not seem to be capable of directly prejudicing third parties in respect of the authority of a company's agents. Therefore, it does not seem necessary or appropriate to have a statutory *Turquand* rule-like solution aimed specifically at protecting third parties dealing with RF companies and personal liability companies against the effects of the statutory doctrine of constructive notice. It is submitted that the RF provisions and the statutory doctrine of constructive notice in s 19(5) of the Act are no justification for the existence of the presumption in s 20(7).

The fact that s 20(7) makes reference to a company's compliance with statutory requirements is worthy of attention. It is not immediately clear why a distinct provision in the Act should protect third parties dealing with a company against the company's non-compliance with other provisions in the Act. There is no section in the Act that expressly validates all irregular acts just because a bona fide third party may be adversely affected by it. Therefore, it is debatable whether s 20(7) can and should assist third parties where a company fails to fulfil a statutory requirement.

There are several provisions in the Act that impose requirements on decisions made within a company. For example, s 65(10) read with s 1 sets the required percentage of votes in favour to pass a special resolution. Section 65(11) proceeds to set out a range of decisions and actions that require approval by way of a special resolution. A special resolution is surely a decision of a company. Yet, neither s 65(10) nor s 65(11) mention the presumption that a third party can make

company's capacity) and the constructive notice doctrine. Item 3.1 of Practice Note 4 of 2012 in terms of s 188(2)(b) of the Companies Act, 2008, available at <http://www.cipc.co.za/files/9613/9565/1718/PracticeNote4of2012.pdf>, accessed on 6 April 2018. See also McLennan op cit note 104 at 151.

¹⁸⁷ See Delpoit op cit note 1 at 73–4, but cf Locke op cit note 3 at 185–7.

¹⁸⁸ See the cases discussed at IV above.

in terms of s 20(7). Should a failed special resolution be regarded as valid in favour of bona fide third parties?¹⁸⁹

It is submitted that the consequences of non-compliance with statutory requirements should be determined with reference to the section that sets the particular requirement. Statutory interpretation is the reason why the Turquand rule-based claims in *Farren v Sun Service SA Photo Trip Management (Pty) Ltd*¹⁹⁰ and *Stand 242 Hendrik Potgietier Road Ruimsig (Pty) Ltd & another v Göbel NO & others*¹⁹¹ quite correctly failed.¹⁹² Furthermore, if all irregular acts should be regarded as valid, the purpose of imposing formal requirements at all becomes questionable. Indeed, Locke identifies several situations where it would either be complicated, redundant, or nonsensical to allow s 20(7) to apply to validate defective statutory requirements.¹⁹³ Therefore, it is submitted that this part of s 20(7) makes little sense, and may in fact conflict with other provisions in the Act.

If one has regard to the first words of s 20(7), it seems that the presumption is aimed at third party protection. However, it is not clear exactly how s 20(7) protects third parties. One of the most important areas where third parties require protection is in respect of the enforceability of contracts with the company. It is submitted that the Act's general abolition of the doctrines of constructive notice and ultra vires has already made great strides in that regard.¹⁹⁴

For the above reasons, it is submitted that s 20(7) should be abished in its entirety.¹⁹⁵

¹⁸⁹ Locke argues that s 20(7) should not apply to situations where the Act imposes a shareholders' special resolution requirement on a company. Locke op cit note 3 at 172.

¹⁹⁰ *Farren v Sun Service SA Photo Trip Management (Pty) Ltd* 2004 (2) SA 146 (C).

¹⁹¹ *Stand 242 Hendrik Potgietier Road Ruimsig (Pty) Ltd & another v Göbel NO & others* 2011 (5) SA 1 (SCA).

¹⁹² *Farren* supra note 190 at para 11 and *Stand 242* supra note 191 at paras 16–7 & 22, respectively.

¹⁹³ Locke op cit note 3 at 172-6.

¹⁹⁴ According to McLennan, s 20(7) is unnecessary as outsiders are sufficiently protected by other provisions in the Act, particularly the conferring of unlimited capacity on companies in s 19(1)(b) and the abolition of the constructive notice doctrine in s 19(4) of the Act. McLennan op cit note 104 at 153.

¹⁹⁵ McLennan argues that the Act should adopt the approach of the Close Corporations Act, whereby 'questions relating to the actual and ostensible authority of company agents would be resolved by the rules of our common law of agency — entirely untrammelled with misconceived and pernicious doctrines that should never have been imported into our law'. McLennan op cit note 104 at 153.

VIII CONCLUSION

The Turquand rule and agency by estoppel have similar goals. Agency by estoppel is primarily aimed at equity and third party protection, but this doctrine's requirements have gradually evolved to also protect principals; the requirement that the third party's reliance on the principal's misrepresentation should be reasonable is a pertinent example. Likewise, while the Turquand rule is primarily aimed at third party protection, the qualifications that have been developed also protect companies; the qualification that third parties should make further enquiries if suspicious circumstances exist is a pertinent example.

A strict independent rule view of the Turquand rule would regard all unauthorised corporate contracts that are unauthorised due to non-compliance with an internal formality as valid merely because the requirement *could* have been fulfilled and the agent *could* have been authorised. The absurdity of this proposition has been pointed out before.¹⁹⁶ The problem with regarding the Turquand rule as a magic formula of liability is that it places companies at the mercy of any person that merely could have been authorised to act on the company's behalf. It is submitted that third parties should not be able to sidestep established agency principles merely because the purported agent's lack of authority could have been rectified by an internal formality, the existence of which the third party may or may not have been aware of. The independent rule view should, therefore, be rejected.

The court in *One Stop* made the important observation that lack of authority issues are also capable of arising in respect of sole traders or voluntary associations, despite no Turquand rule being applicable to those situations.¹⁹⁷ The Turquand rule also does not apply to partnerships, despite the fact that a partnership agreement could also be used to impose internal requirements as a prerequisite for a partner's authority to bind the partnership. Should third parties not equally be protected against such situations? Oosthuizen agrees that the distinction is not defensible, and argues that third party protection requires that the Turquand rule should apply to partnerships in the same way that it applies to companies.¹⁹⁸ It is submitted that it always has, but by another name.

Fortunately for third parties, the common-law doctrine of constructive notice has largely been abolished as a result of s 19(4) of the Act. Third parties dealing with companies are now protected from the effects of internal authority limitations by the abolition

¹⁹⁶ McLennan op cit note 104 at 147.

¹⁹⁷ *One Stop* supra note 10 at para 23.

¹⁹⁸ Oosthuizen op cit note 9 at 218.

of the doctrine of constructive notice, which traditionally was a potential stumbling block to proving agency by estoppel against a company. In that framework, the Turquand rule was often applied and expressed. Without a doctrine of constructive notice, the Turquand rule will have to be called upon far less often. If, for example, a third party concludes a contract with a director of a company that lacks authority because of an unfulfilled authority requirement stipulated in the company's MOI, the company cannot rebut an estoppel claim by arguing that the third party should have learned from the MOI that the director's authority was subject to an internal requirement, and should therefore have made further enquiries. The only way that the internal authority requirement would be relevant is if the third party actually knew about it, or had reason to suspect that it existed; in such a case, the third party's actual knowledge and/or failure to make further enquiries may indeed hamper his estoppel argument.

Under the Act, if a dispute arises regarding the validity of a corporate contract that is unauthorised due to non-compliance with an internal formality that is not actually or constructively known to the third party, the third party can (and should) rely only on agency principles to enforce the contract. Since the third party will not be deemed to know about the internal requirement, his claim against the company should rightly be based only on whether the relevant agent had express or implied authority, and/or on whether the requirements of agency by estoppel are present. Any argument by the company that the third party 'should have been put on enquiry' would really be an argument either that no representation had been made by the company, or that the third party's reliance on any representation was unreasonable. That is how the law of agency works for natural persons, and it is submitted that that is how it should work for juristic persons. If a third party concludes an unauthorised contract with any purported agent of a principal, there is nothing unfair in requiring him to set up an estoppel to bind the principal; that is how the law of agency ensures business convenience for natural principals, and there does not seem to be a convincing reason to depart from that principle in respect of corporate principals.

It is submitted that the correct position is the following: a person whose authority to do X is subject to an internal formality that has not yet been fulfilled, lacks the authority to do X.¹⁹⁹ At most, all that can be said is that he has *potential* authority to do X.²⁰⁰ The Turquand rule is simply a rule that says that third parties, when proving agency by estoppel against a company, are not to be affected by the principal's

¹⁹⁹ *One Stop* supra note 10 at para 29.

²⁰⁰ *Turquand* supra note 4 at 332; Lindgren op cit note 39 at 41.

non-compliance with internal authority limitations in respect of which the third party has no knowledge. The rule can only assist a third party to prove agency by estoppel.²⁰¹ The Turquand rule should not be regarded as a rule that can impose liability independently of estoppel requirements. The result of viewing the common-law Turquand rule in this way is that if an unauthorised corporate contract is concluded and the company refuses to be bound, the third party's only recourse would be to prove agency by estoppel.

Finally, it is submitted that s 20(7) of the Act is vague, potentially dangerous, and serves no useful purpose. It is submitted that this section should be deleted. The common law of agency and s 66(1) of the Act should regulate authority and the validity of unauthorised contracts purportedly entered into on a company's behalf. The validity of company decisions that are inconsistent with requirements set by the Act should be determined with reference to the provisions that prescribe those requirements.

²⁰¹ If the third party can prove express authority, there would be no need to discuss anything else. If there is an express restriction on the agent's authority, the third party will not be able to prove implied authority. See Dendy *op cit* note 16 at para 142 and Bester *op cit* note 2 at 54.