CORONSEL INVESTMENTS (PVT) LTD
versus
SPAR HARARE (PVT) LTD T/A ARUNDEL VILLAGE SPAR

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE 20 January 2006 and 20 April 2006

Ms Hove for applicant
Mr Tsivame for respondent

CHATUKUTA J: Applicant is claiming from respondent payment of $255 689 400 for goods delivered to respondent. Applicant has averred that on 30 August 2005 respondent ordered 200 rolls of thermal shelf talkers and 1000 rolls of thermal computer labels which were duly delivered to respondent on 5 September 2005. The items were received by the respondent's employees. On 6 September 2005, a Mr Alan Pirie, the general manager of respondent company, refused to pay for the goods alleging that the orders were supposed to have been for 50 shelf talkers labels and 100 thermal labels. He alleged that the order forms prepared by respondent had been tempered with by his employee, one Bernard. Respondent has alleged that Bernard acted in connivance with the applicant's employees in order to prejudice the respondent. The respondent made a report to the police and Bernard was arrested.

The issues for determination are therefore whether:-

(a) there is a valid contract between applicant and respondent considering the alleged fraudulent actions of both applicant and respondent's employees;
(b) the applicant is entitled to payment of the sum of $255 689 400 plus interest at the rate of 160% per annum; and
(c) the applicant is entitled to costs of suit at an attorney and client scale.

Validity of contract

Respondent has submitted that the General Manager and Assistant Finance Manager approved the purchase of 50 shelf talkers labels and 100 thermal labels. Bernard is alleged to have tampered with the order forms to reflect 200 rolls of thermal shelf talkers and 1000 rolls of thermal computer labels and did not seek the approval of the General Manager and Assistant Finance Manager to alter the orders. This, he is said to have done in connivance with the applicant's employees. Apart from that bold allegation, the respondent has not proffered any proof of such connivance. In fact, whilst the Bernard is said to have been arrested and was placed on remand, none of applicant's employees were arrested let alone interviewed by the police. Respondent did not dispute this. Therefore nothing turns on respondent's submissions that the applicant was, through its employees, equally to blame for the alleged fraudulent alteration of the orders. This leaves Bernard as the only suspect for the fraudulent altering the orders.

Bernard was at the relevant time in the employment of the respondent. He was indeed authorized, from the evidence before me, to raise orders for the purchase of items for the respondent. In the event that Bernard did indeed fraudulently altered the orders, the question is then whether or not the respondent can rely on Bernard's alleged fraudulent acts to avoid being contractually bound. In other words, can the Bernard's acts be said to be respondent's acts?

The respondent, in its Heads of Arguments quoted WATERMEYER J'S observations in *Karabus Motors (Pvt) v Van Eck* 1962 (1) SA 451 at 453C-E that:

> "It is a general rule of our law that if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have

> no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of one of the parties."

I do not see in what way this authority assists the respondent. It is my view that WATERMEYER J'S observations, in fact, favour the applicant. It is not disputed that Bernard was an employee of the respondent. He cannot therefore be classified as an independent third party. The respondent has not placed before me any evidence of the connivance of the applicant's employees. In fact, respondent has not challenged applicant's submissions that the employees have not been interviewed or arrested by the police. The alleged fraud was committed by respondent's own employee. Bernard, being the respondent's employee, had apparent ostensible or apparent authority to make the orders, as he did in this instance. The respondent did not dispute the existence of such authority, I believe wisely so. As submitted by the applicant, Bernard conducted the negotiations for the orders. The orders were made on respondent's order forms and approved by respondent's officials.

The test to be applied in deciding whether the master is contractually liable for the unauthorized acts of his servants has been discussed in *Rhodes Motors (Pvt) Ltd v Pringle Wood* No 1965 ZLR 395. At 405B-E, citing various authorities, MACDONALD, AJA states the test as follows:

> "The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. ..... "It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes-although improper modes-of doing them. In other words, a master is responsible not merely for what he has authorizes his servant to do, but also for the way in which he

> does it……On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorized act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it.”"

At 404 A-C MACDONALD AJA cites WILLIES J in *Barwick v English Joint Stock Bank* at p 266 L. R. 2 Ex 259 as follows

> “In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which it was the act of his master to place him in.”

Whilst this may appear to be an application of the doctrine of vicarious liability in contract law, it is clearly stated in *Reed, N.o. v Sagers Motors* 1969 (2) RLR 519 that what is in issue is whether or not there was ostensible or apparent authority binding the party seeking to resile from the contract. BEADLE CJ had this to say at 523H-:

> “Mr *Tett*, who appeared for the defendant, appreciated his difficulties in regard to the *Rhodes Motor Company* case (supra), and argued that it was wrongly decided. As I understand his contention, he argued that the decision in that case confused the principles of vicarious responsibility applicable to the master and servant relationship in the law of delict with the principles applicable to the principal and agent relationship in the law of contract. I express no opinion as to whether, on the facts of the *Rhodes Motor Company* case or, on the facts of the instant case, the plaintiff would have recovered had he based his cause of action on delict……the decision of the *Rhodes Motor Company* case (*supra*), was not founded on delict. The basis of the decision in that case was that on the facts the court held that though Winson had no express or implied authority to direct payments in the manner which he did, what he did was, nonetheless, within the scope of his ostensible authority. The word “ostensible” in the *Rhodes Motor Company* case is used in the sense of “apparent”, and in the language of the law of agency these two terms are synonymous.”

Whilst the above authorities refer to employees/agents who exceeded their authority, the espoused principles are equally applicable where the unauthorized acts are fraudulent. Reference is made to *Karabus Motors (Pvt) v Van Eck (supra*), which, as I have already observed, does not support the respondent. Bernard conducted the negotiations for the orders. The orders were made on respondent's order forms and approved by respondent's officials. The respondent is therefore answerable for the alteration of the order forms to reflect the increased quantities. Accordingly, Bernard's fraudulent acts do not render the contract between applicant and respondent invalid.

In any event, as rightly submitted by the applicant, the respondent is precluded from denying such liability under the Companies Act [*Chapter 24:03*]. The respondent submitted that Bernard did not follow the internal procedures of the company when he altered the order forms. The General Manager and the Assistant Finance Manager were supposed to have authorized the alterations. Section 12 (a) of the Companies Act provides that any person dealing with a company is entitled to assume that the internal regulations of that company have been duly complied with. The company is estopped from denying that the company's internal regulations were complied with. Of more importance is section 13 of the Act which provides that liability arising from section 12 is not affected by fraud. The section provides that:

> "A company shall be bound in terms of section *twelve*, notwithstanding that the officer or agent concerned acted fraudulently or forged a document purporting to be sealed or signed on behalf of the company"

It is therefore concluded that there was a valid contract between the applicant and the respondent for the purchase of 200 rolls of thermal shelf talkers and 1000 rolls of thermal computer labels valued at $255 760 000. It therefore follows that the applicant is entitled to the amount claimed. The respondent abandoned, in its heads of

arguments, its submissions that delivery was not timeous and again I believe wisely so. There is no proof that time was of the essence.

Interest

The applicant claims that it is entitled to interest at the rate of 160% calculated as from 5 September 2005, being the date of delivery and presentation of the invoice to respondent. The applicant submits that the high interest is based on the quotation from the applicant dated 30 August which forms part of the agreement between the parties. The relevant part of the quotation states that:

> Interest on all overdue accounts is charged at the minimum bank lending rate specified by the supplier's bankers as at the date of delivery, on the daily balance, presently **290%** per annum.

Apart from the statement in the Supporting Affidavit of T. Magwaliba, the applicant has not presented any proof that the minimum bank lending rate was 160% per annum. In the absence of such proof, the applicant has not proved its claim for interest at the higher rate and therefore would be entitled to interest at the prescribed rate.

Costs

Applicant submits that it is entitled to costs on a higher scale because respondent's defence was frivolous and vexatious, intended at frustrating the applicant. In view of the alleged tempering of the order forms, and the fact that the respondent caused the arrest of its own employee, I am of the view that respondent's defence was not frivolous and vexatious.

In the result it is ordered that:

1. Judgment is hereby entered in favour of the applicant against the respondent for the sum of $255 689 400;

2. Respondent to pay interest at the prescribed rate of 30% per annum with effect from 5 September 2005;

3. Respondent to bear the costs of this application.

Hove & Associate, applicant's legal practitioners
Sawyer and Mkushi, respondent's legal practitioners