



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2971/2012

In the matter between:

CONGO TRADING CC**PLAINTIFF**

and

E & JAY TRADING ENTERPRISES CC**DEFENDANT**

Neutral citation: *Congo Trading CC v E & Jay Trading Enterprises CC* (I 2971/2012) [2014] NAHCMD 136 (14 April 2014)

Coram: PARKER AJ

Heard: 31 March 2014; 1 – 4 April 2014; 7 April 2014

Delivered: 14 April 2014

Flynote: Principal and agent – Authority of agent – Authority of agent must be established unless a party is able to rely on ostensible authority – Court held that such authority may be evidenced by direct proof of an express authorization or by way of inference – Court found that in instant case at the close of the plaintiff's case the plaintiff has failed to establish the authority of alleged agent of the defendant.

Summary: Principal and agent – Authority of agent – Authority of agent must be established unless a party is able to rely on ostensible authority – Court found that in instant case at the close of the plaintiff's case the plaintiff has failed to establish the authority of alleged agent of the defendant Martha Manasse – The plaintiff allegedly entered into oral agreement with Martha Manasse for the sale of cement to Martha to

be exported to a customer in Angola – Court found that at the close of the plaintiff's case, plaintiff had failed to establish an express authorization or by way of inference that Martha was the defendant's agent in the alleged transaction – Consequently, court granted absolution from the instance in the interest of justice.

ORDER

An order granting absolution from the instance with costs on the scale as between party and party is made.

JUDGMENT

PARKER AJ:

[1] The plaintiff instituted a claim against E & Jay Trading Enterprises CC as set out in the amended declaration filed on 25 March 2014, that is a few days before the commencement of the trial. The plaintiff's case is briefly this. On or about November 2011, the plaintiff, represented by Volker Lohmeir, and the defendant, represented by Martha Manasse (Setunyenga), entered into an oral agreement in terms of which the plaintiff agreed to supply and sell cement to the defendant and deliver same to the defendant's client CRBC at Ondjiva in Angola. The plaintiff is represented by Mr Swanepoel in these proceedings. The defendant, represented in these proceedings by Mr Tjombe, denies that the defendant entered into any agreement with the plaintiff and denies that Martha Manasse (Setunyenga) at any time relevant to the matter represented the defendant.

[2] Accordingly, it is recorded in the pre-trial conference order that the issue in dispute that the court must resolve is 'whether or not the plaintiff and the defendant did enter into an agreement as alleged by the plaintiff'. It is worth noting that the

position of the defendant that Martha did not act as a representative or agent of the defendant was at issue in the defendant's affidavit opposing the plaintiff's application for summary judgment which was unsuccessful.

[3] On the evidence, I find that the defendant is a close corporation ('the CC') and that a Mr Moses Tuhafeni Leonard has 100 per cent membership of E & Jay Trading Enterprises, the defendant.

[4] The essence of the case is the issue as to whether at all material times relevant to this matter Martha acted as an agent of the defendant. Thus, the determination of the action turns on a very short and very narrow compass, that is, is the defendant *qua* principal responsible for the actions and conduct of Martha *qua* agent of the defendant. The onus, therefore, rests on the plaintiff to prove all the allegations set out in the plaintiff's declaration, including the existence of the alleged oral agreement, and more important, the allegation that in the conclusion of the agreement Martha acted as agent of the defendant. In this regard, I accept Mr Tjombe's submission that the defendant bears no such burden.

[5] At the close of the plaintiff's case, Mr Tjombe applied for an order granting absolution from the instance. The plaintiff moved to reject the application. It was agreed that the application should be decided on the strength of the written submissions filed with the court, and there was no need for oral submissions. I am grateful to both counsel for their industry.

[6] The primary ground for an order for absolution from the instance put forth by Mr Tjombe is, in words of one syllable, that at the close of the plaintiff's case the evidence placed before the court indicated that there was an oral agreement between the plaintiff and Martha but not with the defendant, and the evidence does not establish that Martha was an agent of the defendant in the conclusion of the oral agreement.

[7] As to the test for absolution from the instance, I stated in *Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* (I 1084/2011) [2013] NAHCMD 214 (24 July 2013), para [18] thus:

‘The test for absolution from the instance has been settled by the authorities in a line of cases. I refer particularly to the approach laid down by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (A) at 92E-F; and it is this:

[2] The test for absolution to be applied by a trial court at the end of a plaintiff’s case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

“... (W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T))” ’

[8] Additionally, in *Etienne Erasmus*, para [19], relying on authority, I stated that ‘... it must be remembered that at this stage it is referred that the court has heard all the evidence available against the defendant’.

[9] Keeping these principles in my mind’s eye, I proceed to determine the single most question mentioned previously, that is, on the evidence, can it be said that the plaintiff has established that Martha was the agent of the defendant whom she could, as a matter of law, bind in any contractual relationship with the plaintiff in any transaction relevant to the present proceedings? Mr Tjombe’s submission is that the plaintiff has failed to establish any such principal-agent relationship. Mr Swanepoel argues the opposite position. In this regard this crucial point should be made. The plaintiff bears the onus of establishing as a matter of actual fact the authority of Martha as an agent of the defendant when, according to Mr Volker Lohmeir, he (on behalf of the plaintiff) entered into the oral agreement with Martha. In this regard, on

the totality of the evidence placed before the court at this stage, I make the following factual findings.

[10] On day one of the plaintiff instituting action in this matter, the summons issued from the registrar's office in October 2012 indicates that the defendant is E & Jay Trading Company CC t/a Jay-Jay's Body Repairs in October 2012. Indeed, it was against E & Jay Trading Company CC t/a Jay Jay's Body Repairs that the plaintiff brought on 8 October 2012 an application for summary judgment. It is clear that it is not the defendant in the present proceeding who was cited as such. And if Martha presented herself as representing the defendant, as the plaintiff avers, why was the defendant *qua* principal not cited as the defendant in the summary judgment application?

[11] Furthermore, I find that the first time Lohmeir met Moses was when in a fleeting manner on Independence Avenue, Windhoek, Moses delivered a sealed envelope on behalf of Martha, his mother, to Lohmeir while Moses was seated in his motor vehicle and Lohmeir was standing outside the motor vehicle. The subsequent time was when Lohmeir went to Moses in his 'body repairs' shop in Windhoek. I find that the sole purpose for Lohmeir going to Moses' office was to solicit Moses' good offices to request Martha (and her two daughters, Cecilia and Milka) to pay Lohmeir for an amount of money Martha owed the plaintiff. At no point did Lohmeir, while in the presence of Moses, demand payment of any amount from Moses, if all along from the time of the issuance of summons in October 2012 and thereafter before these proceedings, it was the position of the plaintiff that the defendant owed moneys to the plaintiff. I find that it is clear from Lohmeir's testimony that at all material times he dealt with Martha (and at times with Cecilia and Milka) and not with the defendant.

[12] Furthermore, I find that the provenance of the transaction concerning the present proceeding was testified to by Henry Katokele, the plaintiff's witness, who at all material times was an employee of TransNamib. Katokele testified that 'the three ladies' approached him at TransNamib in Windhoek in November 2011. The three ladies were Martha Manasse, Cecilia Manasse and Milka Manasse. He came to

know that the three ladies had a contract to supply cement to a client in Ondjiva, Angola, and they needed to establish transport arrangements that TransNamib could offer. He advised the three ladies to apply for credit facilities to open a transportation account with TransNamib, and directed them to the Finance Department of TransNamib, or to pay cash for the services of TransNamib. Katokele was clear in his testimony that TransNamib wanted to empower women, and it is in pursuit of that policy that he decided to assist them. Katokele did not know whether or not they succeeded to obtain credit facilities with TransNamib, as he did not work with that department responsible for such contracts, which is the Finance Department of TransNamib. He then introduced the three ladies to Lohmeir at a second meeting, which was held at Thüringer Hof Hotel in Windhoek after Katokele's working hours. This was also in November 2011. The reason for introducing the three ladies and Lohmeir was that he knew Lohmeir had access to credit facilities at Ohorongo Cement, and the ladies had a customer in Angola to whom they intended to sell cement.

[13] From Katokele's evidence, I find that what emerges clearly is that Katokele did know about any entity called E & J Trading Enterprises CC (the defendant); and, more important, the name of the defendant was never mentioned to him at the meeting. Thus, Katokele introduced Lohmeir to the three ladies and not E & Jay Trading Enterprises CC (the defendant); and, indeed, his testimony is consistent squarely with the implementation of the aforementioned TransNamib policy of empowering women. Moses, the owner of the defendant is a man.

[14] Accordingly, the defendant can only be liable if the plaintiff succeeded in establishing the authority of Martha as an agent, as a matter of factual fact. Authority may be evidenced by direct proof of an express authorisation or by way of inference. See *Inter-Continental Finance & Leasing Corp (Pty) Ltd v Stands 56 and 57 Industria Ltd* 1979 (3) SA 740 (W). I hold that at the close of the plaintiff's case, the plaintiff had failed to establish Martha's authority as an agent of the defendant by direct proof of an express authorization or by way of inference. And it must be remembered that at this stage it is inferred that the court has heard all the evidence available against

the defendant. Thus, the conclusion is unavoidable that the plaintiff has not made any case, prima facie or otherwise, against the defendant.

[15] I keep it firmly in my mental spectacle the judicial advice that a court ought to be slow in granting an order of absolution from the instance at the close of the plaintiff's case unless the occasion arises. In that event the court order would be in the interest of justice. In the present proceeding, considering the foregoing factual findings and reasoning and conclusions, I think the occasion has arisen to grant the order in the interest of justice. I, accordingly, exercise my discretion in favour of making an order granting absolution from the instance.

[16] As respects costs; Mr Tjombe argues that looking at the unreasonableness of the plaintiff in persisting with the claim against the defendant even though Lohmeir, the sole member of the plaintiff, and the plaintiff witnesses confirmed that the agreement was entered into with Martha and not the defendant, the court should order costs on the scale as between legal practitioner and his or her own client. I respectfully decline Mr Tjombe's invitation. The plaintiff might have been misadvised in instituting and proceeding with the action, but I do not think the plaintiff's conduct in the proceedings has reached the mark set by the high authority of Strydom CJ in *Namibia Grape Growers and Exporters v Ministry of Mines and Energy* 2004 NR 194 (SC) to persuade the court to grant such costs order.

[17] In the result –

I make an order granting absolution from the instance with costs on the scale as between party and party.

C Parker
Acting Judge

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APPEARANCES

PLAINTIFF : P J Swanepoel
Of Philip Swanepoel Legal Practitioners, Windhoek

DEFENDANT: N Tjombe
Of Tjombe-Elago Law Firm Inc., Windhoek