

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-CIV-ACT-OTH-2016/02857

In the matter between:

REGINALD PAUL HERCULES

PLAINTIFF

and

BAZIL BROWN

DEFENDANT

Neutral Citation: *Hercules vs Brown* (HC-MD-CIV-ACT-OTH-2016/02857) [2019] NAHCMD 359 (20 September 2019)

CORAM: **UEITELE, J**

Heard: 23-25 January 2018, 08, 16 February 2018, 20 March 2018, 24 September 2018 & 12 October 2018

Delivered: 20 September 2019

Flynote: *Practice* – Amendment of pleadings – Defendant applying to have papers amended during trial to indicate that he had the authority to conclude a contract on behalf of third party - When granted - Principles restated.

Principal and agent - Principal justifiably repudiating a contract with a third party on ground that ostensible agent had no authority to contract in its name - Third party suing ostensible agent for damages - What third party must establish - True juridical nature of its claim discussed – plaintiff failed to discharge the onus resting on him to prove that the defendant did not have the necessary authority to conclude the agreement between them.

Costs - No order as to costs.

Summary: The plaintiff instituted action against the defendant, claiming an amount of N\$ 230 000 from the defendant, being the legal costs that he alleges he incurred as a result of an abortive urgent application that he instituted against three respondent companies namely Aloe Fishing Company (Pty) Ltd, Novanam Ltd and Lalandi Holdings (Pty) Ltd to enforce an agreement that he allegedly concluded with Aloe Fishing Company on the defendant's misrepresentation that he had authority to act on behalf of Aloe Fishing Company (Pty) Ltd.

The defendant entered appearance to defend, parties exchanged pleadings and matter was set down for trial. On 23 January 2018, date on which the trial of the matter was set to commence, the defendant filed a notice of his intention to amend his plea which he had filed during November 2016. The plaintiff objected to the intended amendment and in light of the plaintiff's objections, the defendant abandoned its intention to amend his plea.

The matter then proceeded to trial with the plaintiff testifying in support of his claim. When the plaintiff closed his case, the defendant applied to be absolved from the instance. This application was refused. Thereafter, the defendant filed an application to

amend his plea of 09 November 2016. The plaintiff again objected to the intention to amend, the matter was put down for hearing and the ruling was deferred to the end of the trial.

Held that the court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet. Moreover, the Court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.

Held further that no matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a *bona fide* mistake.

Held further that an amendment cannot, however, be had for the mere asking. A party seeking an amendment must provide an explanation as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay.

Held further that a person who contracts on behalf of another may expressly or impliedly undertake to be liable should his act not bind his principal. This, a party may do without representing that he has authority or by both representing and warranting that he has it. Where there is a lingering warranty of authority there is a *quasi*-contract between the agent and the third party.

Held further that a third person who seeks to hold an agent liable for breach of the *quasi* contract, that third party must allege and proof that: (a) the agent represented that he or she had authority; (b) the representation induced him or her to contract with the agent's principle; (c) that the agent did not in fact have the authority which he represented he had; and (d) that he (the third person) has suffered loss as a result of the fact that the principal is not bound.

Held further that the mere fact that the apparent principal repudiates a contract or agreement, does not in itself give rise to an action against the agent. The third party must allege and prove the agent's absence of authority.

ORDER

- a) The defendant's application to amend his plea dated 09 November 2016 is dismissed.
- b) The defendant must pay the plaintiff's costs in respect of the application to amend, such costs to include the costs of one instructing and one instructed counsel.
- c) The plaintiff's claim, is dismissed.
- d) Subject to the order made in paragraph (b) above, each party must pay its own costs.
- e) The matter is removed from the roll and considered as finalized.

JUDGMENT

UEITELE, J:

Introduction and Background.

[1] The plaintiff, Reginal Paul Hercules and the defendant, Basil Brown were long standing family and business friends, but during August 2016, the plaintiff issued summons against the defendant. In the summons, plaintiff claims an amount of N\$ 230

000 from the defendant, being the legal costs that he alleges he incurred as a result of an abortive urgent application that he instituted against three respondent companies namely; Aloe Fishing Company (Pty) Ltd, Novanam Ltd and Lalandi Holdings (Pty) Ltd to enforce an agreement that he alleged he concluded with Aloe Fishing Company (Pty) Ltd.

[2] The brief background facts (I have discerned the facts from the pleadings of the parties and the facts are to a great extent not in dispute) that tore the friendship between plaintiff and defendant apart and gave rise to plaintiff's claim are these: Some time during the year 2013, Aloe Fishing Company (Pty) Ltd (I will, for ease of reference, refer to this company as Aloe Fishing in this judgment) was allocated a fishing right/quota by the Ministry of Fisheries and Marine Resources to exploit fishing rights in respect of rock lobster for the 2013/2014 rock lobster fishing year. The rock lobster fishing season for the year 2013/2014 commenced on 01 November 2013 and ended on 30 April 2014.

[3] On 12 February 2014 and at Lüderitz, the defendant and a certain Pastor Sam Herero paid a visit to the plaintiff at his residence. During that visit, both the defendant and Pastor Sam introduced themselves as directors and representatives of Aloe Fishing and explained the purpose of their visit as being to solicit an operator to assist Aloe Fishing to operate and finance the rock lobster fishing operations for the 2013/2014 rock lobster fishing season because Aloe Fishing had, since 01 November 2013, been unable to find an operator to assist it to exploit its fishing quota.

[4] The defendant furthermore shared with the plaintiff, his (defendant's) fear that the Ministry of Fisheries might withdraw the fishing quota/rights allocated to Aloe Fishing because of Aloe Fishing's inability to exploit the rock lobster fishing quota/rights over a period of three months (that is, from November 2013 to February 2014) since it was allocated that right or quota.

[5] The defendant further shared with the plaintiff that the reason for his (defendant) and Pastor Herero's visit to Lüderitz was to attend a meeting of Aloe Fishing's board of directors scheduled for 12 February 2014 and at which meeting the board of directors were expected to take a decision with respect to Aloe Fishing's rock lobster operations for the remainder of the 2013/2014 rock lobster fishing season. On the same day, that is on 12 February 2014 the plaintiff, made a written offer to Aloe Fishing with respect to the exploitation of that company's fishing rights for the rock lobster fishing for the 2013/2014 fishing season.

[6] Later on the same day, that is 12 February 2014, the defendant and Pastor Herero paid a second visit to plaintiff, during the second visit the defendant and Pastor Herero informed the plaintiff that Aloe Fishing's board of directors accepted the plaintiff's offer to exploit the fishing right/quota for the remainder of the 2013/2014 rock lobster fishing season. They furthermore informed the plaintiff that the offer was forwarded to Aloe Fishing's legal practitioners so that they could prepare a written agreement.

[7] On 26 February 2014, the defendant forwarded a bareboat charter agreement to plaintiff. That agreement was signed by the defendant 'for and on behalf of Aloe Fishing Company (Pty) Ltd duly authorised thereto'. The plaintiff signed the agreement and returned it to the defendant. On the following day, that is on 27 February 2014 the plaintiff made contact with a certain Magdalena (a shareholder and an employee of Lalandi Pty (Ltd)) with the aim of making arrangements for him to take possession of the boat /vessel, which was at that stage in the possession of Lalandi (Pty) Ltd. Magdalena refused to give the plaintiff access to the boat and informed him that the defendant did not have the necessary authority to sign the bareboat charter agreement and on that basis the bareboat charter agreement purportedly signed between plaintiff and Aloe Fishing was invalid.

[8] On 3 March 2014 the plaintiff consulted his legal practitioners and after those consultations he instructed them to address a letter of demand to Aloe Fishing, to

demand compliance with the agreement that he had purportedly signed with Aloe Fishing. When he did not receive a reply to his letter of demand the plaintiff instructed his legal practitioner's to launch, and they so launched, an urgent application to compel Aloe Fishing, Novanam Limited and Lalandi Holding Company (I will, for the sake of convenience, refer to these three companies as the respondent companies) to honour and perform in accordance with the bareboat charter agreement that plaintiff alleges he had signed with Aloe Fishing.

[9] The respondent companies opposed the application launched by the plaintiff. In their opposing affidavit, the respondent companies amongst other contentions contended that the defendant did not have the required authority or mandate to represent and bind Aloe Fishing. Upon perusal and studying of the respondents' answering affidavits, the plaintiff's instructed counsel advised him to withdraw his urgent application because the application according to counsel did not have prospects of success.

[10] The plaintiff after receiving advice from his instructed counsel withdrew his urgent application and tendered the wasted cost to the respondent companies. The respondent companies' taxed costs amounted to N\$ 143 221-85 and his legal practitioner charged him N\$ 45 625-90.

[11] Alleging that the defendant misrepresented to him that he had the authority to conclude the bareboat charter agreement whilst he did not have such authority and as a consequence of that misrepresentation, he suffered damages in the amount of N\$ 230 000 for the aborted urgent application, the plaintiff instituted these proceedings.

The pleadings.

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[12] As I indicated earlier in this judgement, the plaintiff during August 2016, caused summons to be issued out of this court against the defendant. In his particulars of claim the plaintiff amongst others makes the following allegations:

‘3. Over the period 12 to 26 February 2014 and at Lüderitz the defendant orally represented to the plaintiff that he was duly authorized to conclude a bareboat charter agreement on behalf of Aloe Fishing Company (Pty) Ltd (hereinafter referred to as "the company”).

4 The plaintiff acting upon the truthfulness of the representation by the defendant concluded a written bareboat charter agreement signed by the defendant on 26 February 2014 purportedly on behalf of the company.

5 The defendant, by such representation, impliedly warranted to the plaintiff that he was authorized by the company to enter into the bareboat charter agreement as agent on behalf of the company.

6 The defendant was in fact not authorized by the company to enter into a bareboat charter agreement.

7 The company on 27 February 2014 repudiated the agreement.

8 The plaintiff instituted legal action against the company to enforce the agreement which legal action was unsuccessful. The plaintiff became liable to the company for its legal costs occasioned by the legal action and incurred legal costs itself as follows:

8.1 Legal costs of the company - N\$ 195 000;

8.2 Own legal costs - N\$ 35 000.

9 As a consequence of the misrepresentation by the defendant the plaintiff thus suffered damages in the amount of N\$ 230 000.

10. Despite demand the defendant has failed and/or refused to make payment.’

[13] The defendant entered notice to defend the action and pleaded to the plaintiff’s particulars of claim. In his plea, the defendant raised a preliminary objection of non-

joinder, but this preliminary objection was later, and correctly so in my view, abandoned. In his plea on the merits, the defendant denied that he informed the plaintiff that he had the requisite authority to act on behalf of Aloe Fishing. The relevant part of the plea reads as follows:

'AD PARAGRAPHS 3, 4 AND 5 THEREOF:

The contents hereof are denied, same is not admitted and the Plaintiff is accordingly put to the proof thereof.

In amplification of the above denial, the Defendant denies having represented to the Plaintiff that he was duly authorized to conclude a Bareboat Charter Agreement on behalf of Aloe Fishing Company (Pty) Ltd. A decision was taken by the directors and communicated to the Plaintiff not to conclude a Bareboat Charter Agreement but merely to confirm that the boat could be leased by the Plaintiff, subject to approval by NOVANAM, with whom Aloe Fishing Company (Pty) Ltd had a contractual relationship. The said approval remained tasking.

Save for the abovementioned, the remainders of the allegations are denied as if specifically traversed and Plaintiff is accordingly put to the proof thereof.'

[14] On 04 July 2017, the managing judge after the pleadings closed held a pre-trial conference in terms of Rule 26 of this court's rules, issued a pre-trial order and postponed the matter to the week commencing 22 January 2018 for trial. In the pre-trial order, the facts which the Court is required to resolve, the points of law which the Court is required to determine and the facts which are not in dispute or which are admitted by the parties are set out. With respect to the facts which the Court is required to resolve the order reads as follows:

1.1 Whether the Defendant made representations to the Plaintiff regarding authority to conclude a Charter agreement on behalf of Aloe Fishing Company (Pty) Ltd.

1.2. What the exact nature of representations allegedly made by the Defendant were, if any.

1.3. Whether the Board of Directors of Aloe Fishing Company (Pty) Ltd communicated to the Plaintiff not to conclude a bareboat agreement, but merely to confirm that the boat is available subject to approval by Novanam.

1.4. Whether costs and/or damages, if any, incurred by the Plaintiff, were occasioned by the alleged representation by the Defendant.

1.5. Further to 1.4 above, what were the exact costs and/or damages the Plaintiff has incurred?'

[15] On 23 January 2018, that is the date on which the trial of the matter was supposed to have commenced, the defendant served on the plaintiff a notice of his intention to amend his plea which he had filed on 09 November 2016. The plaintiff objected to the intended amendment and in the face of the plaintiff's objections, the defendant abandoned its intention to amend his plea. The matter then proceeded to trial with the plaintiff testifying in support of his claim. When the plaintiff closed his case, the defendant applied to be absolved from the instance. I refused the application for absolution at that stage.

[16] After I refused to absolve the defendant from the instance, he revived his application to amend his plea of 09 November 2016. The plaintiff again objected to the intention to amend and I put the matter down to hear the application for amendment. After hearing arguments from both counsel for the plaintiff and the defendant, I deferred the ruling to the end of the trial. I will in the next paragraphs deal with the application for amendment.

The defendant's application to amend.

[17] Rule 52 of this Court's rules governs the procedures to be followed in the event where a party to proceedings that are pending before Court desires to amend a pleading or document, except an affidavit, filed in connection with those proceedings. The procedure is as follows: The party who desire to amend the pleading or document

must give notice to all other parties to the proceeding and the managing judge of his or her intention so to amend. The notice to amend must state that unless objection in writing to the proposed amendment is made within 10 days the party giving the notice will amend the pleading or document¹.

[18] Where a party who has been served with a notice of intention to amend does not signify his or her intention to object to the intended amendment then and in that event, the party receiving the notice is considered to have agreed to the amendment². If the party receiving the notice of intention to amend does within the period prescribed in the rule signify his or her intention to object to the intended amendment, then and in that event the party giving notice of his or her intention to amend a pleading or document must within 10 days after receipt of the objection apply to the managing judge for leave to amend³.

[19] Once an application for leave to amend is filed, the managing judge must set the matter down for hearing and thereafter the managing judge *may* make such order thereon as he or she considers suitable or proper.

[20] Rule 65 of this Court's rules amongst others provides that every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief. I am therefore of the view that every application for leave to amend a pleading or document must be on notice and the notice must be supported by an affidavit in which the applicant sets out the facts on which he or she relies for leave to amend the pleading or document in question.

[21] The principles that guide this Court in the determination of whether or not it will grant leave to amend a document or pleading have been spelled out in a number of cases such as *I A Bell Equipment Namibia (Pty) Ltd v Roadstone Quarries CC*⁴, *Billy v*

¹ Rule 52(1)&(2).

² Rule 52(3),& (4)

³ Rule 52(5).

⁴ *IA Bell Equipement Namibia (Pty) Ltd v Roadstone Quarries CC*, Case No. I 602/2013 and I 4084/2010.

Mendonca,⁵ and *Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture*⁶ and I will not repeat them here but will simply highlight some of those principles -

(a) The Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.

(b) With its large powers of allowing amendments, the Court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.

(c) No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a *bona fide* mistake. This principle underscores the approach of the courts that;

‘a court cannot compel a party to stick to a version of fact or law that it says no longer represents its stance and this is because litigants must be allowed in the adversarial system, to ventilate what they believe are the real issues between them.’⁷

[22] The above principles must, however be read with the caution that an amendment cannot, be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is *mala fide* or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted⁸.

⁵ *Billy v Mendonca* (I 3945-2013) [2016] NAHCMD 391 (16 December 2016).

⁶ *Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture* (I 1216/2015) [2018] NAHCMD 2 (17 January 2018).

⁷ *Teichmann Plant Hire (Pty) Ltd v RCC MCC Joint Venture*, *supra*.

⁸ Per Henochsberg J in the matter of *Parvathie NO, v Zarug* 1962 (3) SA 872 (N) at 876.

[23] In this matter the defendant, after his application to be absolved from the instance was dismissed, on 20 March 2018, filed a notice of his intention to amend his plea and when the plaintiff objected to the intended amendment, he simply filed a notice of motion which reads as follows:

'BE PLEASED TO TAKE NOTICE that the application will be made on behalf of the Defendant on a date to be allocated by the Honourable Managing Judge for an order in the following terms:

1. That the Defendant be granted leave to amend its plea in accordance with its notice of intention to amend filed on 20 March 2018 as follows:
2. Ad paragraph 2 thereof to read as follows:

"Ad Paragraph 3, 4, and 5 thereof:

The contents thereof pertaining to the authorization of the company are admitted"

In amplification of the above, the Defendant at all times represented that he had authorization to enter into the agreement on behalf of the Directors of the company, but that the validity of the agreement was subject to the approval of Novanam.

3. Ad paragraph 3 thereof to read as follows:

"Ad paragraph 6 thereof

The contents thereof are denied".

Further take notice that the Defendant intends to substitute the said denial with an admission in all other documents and/or pleadings wherein it may occur.'

[24] As I have indicated above, the defendant only filed a notice of motion, he did not file any affidavit to set out to the facts on which he relies for leave to amend his plea nor

did he proffer any explanation why the amendment was sought so late. In his heads of arguments the defendant says:

'2. In these heads, I will first provide the Court with a brief background of the fact, synopsis of the legal principles that relate to where a party seeks to amend its pleadings, after which I will apply the legal principles to the salient facts.

BACKGROUND

3. The need for the applicant to amend its plea has arisen as a result of the following facts:

3.1 A discrepancy exists between the defendant's version, the witness statement filed on 23 January 2018, the defendant's plea dated 9 November 2016 and the witness statement dated 26 June 2017 in that the Defendant's version is and has always been that he had the requisite authority from the Directors of Aloe Fishing to enter into the agreement with Mr Hercules as depicted in the witness statement dated 23 January 2018.

3.2 The error was only realized during trial preparations when the trial was set to commence in the beginning of the year at which juncture the applicant also brought a similar application.

3.3 The applicant therefore wishes to amend its plea and all other documents on which the error occurs for the simple reason of bringing the contents thereof in line with its version. With respect to the main case, the defendant testified that he at all times had and still has the requisite authority to act on behalf of the company and that such authority has never been withdrawn and/or challenged, save for in these current proceedings.'

[25] The plaintiff objected to the intended amendment on the grounds that:

'(a) The intended amendment seeks to completely alter the defence of the defendant;

(b) The defendant has made statements under oath to the contrary and his witness statement also contradicts the intended amendment;

(c) The plaintiff has closed his case and an amendment of the nature which the defendant seeks to effect at this late stage of the proceedings would necessarily result in the hearing to commence *de novo*.'

[26] I have indicated earlier that the defendant did not file an affidavit in which he sets out the facts which will entitle him to obtain leave to amend his plea. I read from his papers that his attitude is that by merely asking or applying for leave to amend he must get it. That cannot be.

[27] His application for leave to amend is obfuscated by the explanation he attempts to give in his heads of arguments which, I have quoted above, where he states that a discrepancy exists between the defendants version, the witness statement filed on 23 January 2018, the defendant's plea dated 9 November 2016 and the witness statement dated 26 June 2017 in that the defendants version *is and has always been* that he had the requisite authority from the Directors of Aloe Fishing to enter into the agreement with Mr Hercules.

[28] What the defendant overlooks is the fact that his '*version*' is articulated in the pleadings that he filed. In his plea he unequivocally denies (I have quoted the part where he makes the denial earlier in this judgment) that he has made a representation to the plaintiff that he was authorised to conclude the bareboat charter agreement on behalf of Aloe Fishing. This denial he repeated in his witness statement that he filed on 26 June 2017. In paragraph 1.3 of that witness statement he says:

'1.3 He at no stage represented to the Plaintiff that he was authorised as to conclude a Bareboat Charter Agreement on behalf of Aloe Fishing Company;'

[29] What is telling is the fact that as soon as the defendant had filed his notice of intention to defend the plaintiff's claim, the plaintiff moved an application for summary judgment. The defendant resisted the application for summary judgment and on 3 November 2016, filed an affidavit in support of his opposition to the summary judgment application. In paragraphs 5-8 of that affidavit he states the following:

'5 Plaintiff's claim as per its particulars of claim is based on an alleged oral representation by myself to the Plaintiff that I was duly authorized to conclude a Bareboat Charter Agreement on behalf of Aloe Fishing Co. Pty Ltd, and upon which representation he eventually incurred legal cost pursuant to an unsuccessful legal action instituted by himself.

6 With regard to the above, I deny that I represented to the Plaintiff that I was duly authorized to conclude a Bareboat Charter Agreement as alleged by the Plaintiff.

7 In amplification of my above denial, the background to this matter is that the Plaintiff during or about 2014 in writing requested from me the utilization of vessel Kanaan which is an asset of Aloe Fishing Co. Pty Ltd. Upon receipt of his request, I communicated such to all other co-directors of the company including NOVANAM a company with whom we had a contracted relationship.

8 Following agreement in principle by all the Directors, an initial lease agreement was concluded with the Plaintiff and it was indicated that the boat would be rented to him, but I clearly pointed out that such still remained subject to approval by another company NOVANAM with whom we had an agreement. I clearly recall that the Plaintiff at the time indicated that he understood that based on the aforementioned that the agreement was not binding.

He also undertook to secure approval from NOVANAM. It emerged subsequently however that NOVANAM indicated that they will not rectify the agreement and communicated accordingly to the Plaintiff.'

[30] The defendant equally overlooks the effect of rule 26. That rule requires of the parties to file a draft pre-trial order in which they must amongst other matters set out the factual dispute which the court is required to adjudicate on at the trial. The parties agreed that the question as to whether or not the defendant made representations to the plaintiff regarding authority to conclude a bareboat charter agreement on behalf of Aloe Fishing Company (Pty) Ltd is one of the factual issues that must be determined at the trial.

[31] In my view the denial by the defendant that he did not make representations to the plaintiff regarding authority to conclude a bareboat charter agreement on behalf of Aloe Fishing Company (Pty) Ltd is not simply 'an error which was only realized during trial preparations' the defendant needs to do more than just stating that it was an 'error' which he realized during the preparation of trial.

[32] The defendant needs to explain why at the commencement of the trial, he abandoned the application for leave to amend, why he identified the factual issues that the court will be required to adjudicate and why he under oath denied that he made representations to plaintiff as regards his authority.

[33] In my view, this case and in particular the application for leave to amend demonstrate a lack of diligence from the part of the defendant's legal practitioner in prosecuting the defendant's case. The defendant's cursory and lackadaisical approach is laid bare by the defendant's application 'to substitute the denial that he made representation to the plaintiff with an admission in all other documents and/or pleadings wherein it may occur'. The cursory and lackadaisical approach by the defendant's legal practitioner borders on a contemptuous approach and points to a strategy to adjust the defendant's case as the matter progresses and this in my view is tantamount to *mala fides* by the defendant. For these reasons I will dismiss the application to amend the plea and the application is so dismissed with costs. I now proceed to consider the plaintiff's claim on the merits.

Did the defendant breach the warranty of authority?

[34] I have indicated in the introductory part of this judgment that there is not much dispute as regards the facts of this matter. I therefore find it unnecessary to recount the evidence of the parties at the trial. In the present case, the plaintiff's claim for damages is based on an alleged breach of an implied warranty of authority.

[35] Professor Kerr⁹ opines that a person who contracts on behalf of another may expressly or impliedly undertake to be liable should his act not bind his principal. This, argues the learned author, he may do without representing that he has authority or by both representing and warranting that he has it. The learned author continues to opine that where there is a residual warranty of authority there is a quasi-contract between the agent and the third party.

[36] In the matter of *Blower v. Van Noorden*¹⁰, Innes, C.J., described 'the true nature of the transaction' when the ostensible agent contracts in the name of his 'principal' with a third party, in these terms:

'What takes place is this: the agent in effect represents to the other contracting party that he has authority to bind his principal; and within the limits of that authority he consents to the terms of the agreement on his principal's behalf. There is a representation by the agent personally, and a contract by him in his capacity as agent. The representation is in respect of a matter which is peculiarly within his knowledge, and of which the other party knows nothing at all. But the latter enters into the contract on the faith of the representation, and the agent intends that he shall do so; it forms the basis of the whole agreement.'

[37] From the above authorities the position in our law can be stated to be that a third person who seeks to hold an agent liable for breach of the *quasi* contract, that third party must allege and proof that:

- (a) the agent represented that he or she had authority;
- (b) the representation induced him or her to contract with the agent's principle;
- (c) that the agent did not in fact have the authority which he represented he had; and

⁹ A J Kerr. *The law of Agency*.4th Ed LexisNexis Butterworths at 245.

¹⁰ *Blower v Van Noorden* 1909 TS 890 at 900-901.

(d) that he (the third person) has suffered loss as a result of the fact that the principal is not bound.

[38] The question that needs to be answered in this case is therefore whether the plaintiff has discharged the *onus* resting on him. In order to answer the question I will consider each of the requirements that I have referred to in the preceding paragraph in the light of the facts of this case.

Representation of authority.

[39] On the pleadings in this matter, the defendant denies that he represented to the plaintiff that he was duly authorized to conclude a bareboat charter agreement on behalf of Aloe Fishing. When investigating whether or not a party made representation of authority, cases that have been decided in our courts are of great assistance. But one must always keep in mind that the question of whether or not, in a particular case, there has been representation of authority is a factual question and not a legal one. That factual says Voss AJ¹¹ must be established, either by direct proof or by deduction from other proved facts. In this matter the direct evidence which was placed before Court is that of Hercules and Brown. The versions of Hercules and Brown, at the least on the pleading are contradictory. I therefore turn to the deduction that can be made from the facts that are not in dispute. As regards deduction Voss AJ said:

‘Ordinarily, when a person signs a contract as agent it is reasonable to infer from his conduct a representation that he is duly authorized to make the contract. But when a deduction is made all the circumstances must be taken in to consideration.’

[40] The facts in this matter that are common cause between the parties are that the defendant signed the bareboat charter agreement ‘for and on behalf of Aloe Fishing Company (Pty) Ltd duly authorised thereto’. The circumstances under which the

¹¹ *Nebendahl v Schroeder*, 1937 S.W.A. 48 at p 57. Also see *Blower v Van Noorden* (*supra* footnote 10) where Innes CJ said: ‘I quite agree that under ordinary circumstances the mere fact that a man contracts as agent amounts to representation that he is an agent and has authority to bind his principal.’

defendant signed the bareboat charter agreement are that during the negotiations, the defendant at all times represented that he was a director of Aloe Fishing and even when the plaintiff instituted proceedings to compel Aloe Fishing to keep to the agreement, the defendant under oath (in a confirmatory affidavit) confirmed that he made the representations to the plaintiff. I am therefore satisfied that on a balance of probabilities the defendant did represent to the plaintiff that he was authorised to conclude the bareboat charter agreement on behalf of Aloe Fishing.

Did the representation induce the plaintiff to conclude the contract?

[41] In the case of *Claude Neon Lights (Sa) Ltd V Daniel*¹² Miller AJA said that 'whatever the true juridical *niche* of an action such as this [that is, which is based 'on an implied warranty of authority'] might be, what is clear is that a causal relationship between the ostensible agent's representation of authority and the conclusion of the contract would necessarily have to be established'. In the matter of *Blower v Van Noorden*¹³ it was held that if a third party was induced to enter into the contract by an agent's representation that he had authority to conclude such contract on behalf of a principal, the third party would be entitled to such damages, attributable to the breach of the warranty of authority, as might be established by the evidence.

[42] In this matter the plaintiff testified, and the defendant did not contradict or deny that evidence, that he was induced to enter into the bareboat charter agreement by the representation by the defendant, that he had the authority to conclude that agreement on behalf of Aloe Fishing. I thus accept that the plaintiff, when he entered in to the bareboat charter agreement, was induced by the defendant's representation of his authority to enter in to that agreement.

Absence of Authority.

¹² *Claude Neon Lights (SA) Ltd V Daniel* 1976 (4) SA 403 (A).

¹³ *Supra* footnote 10 at 906.

[43] Professor Kerr¹⁴ opines that the mere fact that the ostensible principal repudiates that contract, does not in itself give rise to an action against the agent. The third party (in this case the plaintiff) must allege and prove the agent's absence of authority. In the matter of *Knox v Davis*¹⁵ the plaintiff, [Davis], brought an action against the defendant, [Knox], claiming damages in respect of the breach of a contract of lease, which the defendant entered into with the plaintiff on behalf of B, [Boardman], but which B thereafter repudiated denying that she had given the defendant authority to act for her. Pittman J said:

'The action was instituted admittedly on the principle of liability embodied in the matter of *Blower v van Noorden* ([1909 TS 890), and it is clear consequently that in order to succeed in his claim it was necessary for the plaintiff to establish such absence of authority as would in the circumstances render the defendant liable ... As has already been indicated the question of *onus* is important. It was for the plaintiff to prove that Ms Boardman had not authorised Knox to enter into this contract on her behalf.'

[44] On this, the crucial point of the case, there were but two direct witnesses, on the one hand, Brown, the defendant who affirmed that he had such authority and Hercules, the plaintiff, who denied that Brown had such authority. In support of his assertion that Brown did not have the authority to represent Aloe Fishing, Hercules simply relied on an affidavit deposed to by a certain Juan Magdalena when the respondent companies, opposed the plaintiff's urgent application. In that affidavit Mr Magdalena denied that the defendant had the authority to represent Aloe Fishing.

[45] Mr Magdalena did not tender a witness statement nor was he called to testify and did not testify at the trial of this matter. Now does the fact that he made his statements under oath render that statement admissible and conclusive of the assertion made in that statement? In my view not. I say so for the following two reasons. First, at common law hearsay evidence is defined as 'evidence of statements made by persons not called as witnesses which is tendered for the purpose of proving the truth of what is contained

¹⁴ *Supra* footnote 9 at 248.

¹⁵ *Knox v Davis* 1933 EDL 109.

in the statement'.¹⁶ When commenting on the fundamental attributes of the hearsay rule and the *rationale* for excluding hearsay evidence, Paizes¹⁷ argued that this evidence is considered inadmissible because 'it contains intrinsic dangers and weaknesses that are not normally present in original testimony'. In my view, the evidence of Magdalena amounts to inadmissible hearsay evidence.

[46] The second reason why I consider Magdalena's evidence as inadmissible is grounded in Article 12 of our Constitution. That Article guarantees all persons both in criminal and civil trials a fair trial. Article 12(1)(d) guarantees to every person the right to call witnesses at their trial and to cross examine those called against them. In this case if the evidence of Magdalena was to be accepted without him having been cross examined this may have fair trial implications. In the South African case of *S v Balkwell and Another*¹⁸, Ponnar JA remarked that where extra curial statements are by their mere production admitted as evidence such a situation envisages that a person 'goes into legal battle without the sword of cross-examination or the shield of the cautionary rules of evidence. That can hardly conduce to a fair trial'.

[47] I am accordingly of the view that the plaintiff has failed to discharge the *onus* resting on him to prove that the defendant did not have the necessary authority to conclude the bareboat charter agreement on behalf of Aloe Fishing. Because of this conclusion I find it unnecessary to consider the question whether or not the plaintiff has suffered loss as a result of the fact that the principal is not bound by the contract. The plaintiff's claim must accordingly fail and I find that he has failed. What is left is the determination of the question of costs.

Costs.

¹⁶ *Estate De Wet v De Wet* 1924 CPD 341 at 343.

¹⁷ AP Paizes "The Concept of Hearsay with Particular Emphasis on Implied Hearsay Assertions" a thesis submitted in 1983 at the Witwatersrand University, at 20.

¹⁸ *S v Balkwell and Another* [2007] 3 All SA 465 (SCA) at para. 35.

[48] The general rule is that costs follow the course and that costs are in the discretion of the court. I have earlier in this judgment made reference to the cursory and lackadaisical manner in which the defendant approached this matter. I am of the view that if the defendant had approached the pleadings in this matter more diligently and purposefully, the matter may not have gone to the extent that it did. To demonstrate the displeasure of this court to the defendant's approach to the pleadings I find that this case is one where the court must exercise its discretion and deprive the successful party of the costs he would otherwise have been entitled to.

[49] I therefore make the following order:

- a) The defendant's application to amend his plea dated 09 November 2016 is dismissed.
- b) The defendant must pay the plaintiff's costs in respect of the application to amend such costs to include the costs of one instructing and one instructed counsel.
- c) The plaintiff's claim, is dismissed.
- d) Subject to the order made in paragraph (b) above each party must pay its own costs.
- e) The matter is removed from the roll and considered as finalized.

UEITELE S F I
Judge

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