THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case number: **447/06**

In the matter between:

D B BOTHA Appellant

and

GIYOSE t/a PARAGON FISHERIES Respondent

CORAM: **FARLAM, COMBRINCK and CACHALIA JJA**

HEARD: **11 MAY 2007**

DELIVERED: **31 MAY 2007**

Summary: Contract – undisclosed principal – when agent may sue in own name

Neutral citation: This judgment may be cited as *Botha v Giyose t/a Paragon Fisheries* [2007] SCA 73 (RSA)

COMBRINCK JA:

[1] This appeal has its origin in a disputed sale of a fast-food business conducted in Queenstown in the Eastern Cape. Mr Botha, the appellant (the plaintiff in the magistrates' court), claimed he had sold the business to Mr Giyose (the respondent/defendant) for R90 000 in February 2003. The latter denied the existence of such an agreement.

[2] The appellant instituted action against the respondent in the Queenstown magistrates' court claiming payment of R90 000. The respondent, in his plea, alleged he had taken over the premises from which the business had been conducted after the appellant had abandoned the business. He had, he averred, not entered into any agreement with the appellant. I shall return later to deal more fully with the pleadings.

[3] The appellant was the only witness to testify at the trial. The respondent closed his case without leading any evidence. The magistrate accepted the appellant's evidence and her findings of fact were not challenged by the respondent in his subsequent appeal to the Full Bench of the High Court, Eastern Cape Division. The respondent in this court filed a notice advising he abides the decision. There was therefore no appearance for him before us.

[4] The undisputed facts found were that the appellant had indeed sold the business, formerly known as 'Skippers' but at the date of sale known as 'Food for Africa', to the respondent. The agreement was orally concluded on 31 January 2003, the terms being:

(i) the merx was the business as a going concern together with all fixtures, fittings and equipment;

(ii) the purchase price was R90 000;

(iii) the price was payable by way of an initial amount of R45 000 payable immediately;

(iv) the balance in 24 equal monthly instalments of R1 875 payable on the first day of each and every succeeding month, the first payment to be made on 3 February 2003;

(v) interest at 5% per annum payable on the amount of R45 000 over 24 months.

At the instance of the respondent it was subsequently agreed that he pay the initial amount on or before 12 March 2003. The appellant handed over possession of the business to respondent at the beginning of February 2003. The respondent concluded an agreement of lease with the owner of the building in which the business was conducted and commenced trading. He failed to make any payment.

[5] The magistrate found in favour of the appellant and made the following order:

'1. That the Contract of Sale between the parties is considered to be validly cancelled.

2. That judgment is granted in favour of the Plaintiff in the amount of R90 000,00 same representing the damages suffered by the Plaintiff as a result of the defendant's breach of contract.

3. That interest at the rate of 15,5% p.a. shall run with effect from 19/03/2003 same being the date that the defendant fell into mora.

4. That the Defendant is ordered to pay all costs on an attorney and client scale upon presentation of a taxed bill of costs.'

[6] The respondent, as mentioned earlier, appealed against the judgment. He noted a number of grounds in his notice of appeal but restricted his argument in the court *a quo* to a single ground and that is that the appellant had failed to prove that he had *locus standi in iudicio*. The issue arose as a consequence of questions put to the appellant by his attorney (Mr Malan) at the end of the examination in chief. The following exchange took place:

'MR MALAN: Your Worship, I only need two minutes more. Mr Botha, you, your wife and your one son also have a closed corporation which you run?

PLAINTIFF: That's correct, Your Worship.

MR MALAN: Can you tell the court what the name of the cc is?

PLAINTIFF: The name of the closed corporation is Dacawi Investments.

MR MALAN: Your Worship, that is Dacawi Investments CC. Who are the members?

PLAINTIFF: The members are myself, my wife and my son.

MR MALAN: Name of your son?

PLAINTIFF: Willem Cornelius Botha.

MR MALAN: Mr Botha, the business you sold to Mr Giyose, did it belong to you or to the cc?

PLAINTIFF: The business was under the cc's name, Dacawi Investments.

MR MALAN: Were you fully authorised to act on behalf of the cc by the members?

(Answer inaudible)'

Despite lengthy cross-examination, no questions were asked concerning this aspect. At

a stage the appellant handed in a written resolution passed by Dacawi Investments CC to the effect that the appellant's authority to sell the business on behalf of the close corporation was confirmed. The document is dated 1March 2004.

[7] The issue argued in the court *a quo* was whether the appellant acting as agent for an undisclosed principal (Dacawi Investments CC) was entitled to sue the third party (the respondent) in his own name. The learned acting judge referred in his judgment to the leading case of *Cullinan v Noord-Kaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 (1) SA 761 (A) and accepted that it laid down that a sale agreement concluded between an agent acting for an undisclosed principal and a third party was valid and enforceable by the agent in his own name. Later in his judgment he, however, said the following:

'To the extent that the evidence reads that the respondent was at all material times relevant to the conclusion of the sale agreement and the bringing of the action acting on behalf of the close corporation cannot be interpreted otherwise than that he was an agent.'

He then referred to the case of *Gravett NO v van der Merwe* 1996 (1) SA 531 (D) and quoted the passage at p 537 G-J. He concluded:

'Applying the case of *Gravett*, supra, to the present matter shows that the respondent was not entitled to act in his personal capacity on behalf of the close corporation. Further, in my view is that as in *Gravett's* case the fact that respondent brought the action on behalf of an undisclosed principal was an afterthought; hence the argument was only raised at appeal stage. According to the summons as well as evidence led in the court *a quo* plaintiff did not consider himself as an agent of an undisclosed principal. The conclusion must inevitably be that the respondent failed to prove that he had the necessary *locus standi* at the time when he initiated the action against the appellant. Therefore, the court *a quo* erred in this regard.'

The appeal was therefore allowed and the order in the magistrates' court set aside and an order of absolution from the instance substituted.

[8] It would appear that the doctrine of the undisclosed principal was not fully understood. The rights of the agent as against the third party are succinctly summarised by Joubert, LAWSA 2ed paras 228 and 231 as follows:

Par 228: 'In a standard situation of representation the representative acquires no rights and incurs no liabilities from the contract concluded by him or her on behalf of his or her principal. The rights and obligations come into being between the principal and the third person. In an undisclosed principal situation the intermediary and the third person create *vincula iuris* between themselves by the contract

concluded in their own names, but also so it is said, alternative *vincula iuris* between the undisclosed principal and the third person.'

Par 231: 'The contract is concluded between the third person and the intermediary acting in his or her own name. The third person is in terms of the contract liable to the intermediary. He or she cannot avoid liability to the intermediary on the ground that he or she is liable to the undisclosed principal, unless and until the undisclosed principal elects to hold him or her liable.'

The reliance on *Gravett NO v Van der Merwe,* supra, was misplaced. What Booysen J meant in the passage quoted is better stated in *Sentrakoop Handelaars Bpk v Lourens* 1991 (3) SA 540 (W) (a case relied upon by Booysen J as authority for his proposition) where Marais J said the following (at 545D):

'I am therefore of the view that both on principle and on the authorities it is not proper for an agent to sue as representing his principal by suing in his own (that is the agent's own) name, where the claim being enforced is that of the principal and the principal is the true plaintiff. This does not, of course, apply where the agent has the right to sue in his own name, as is the case where he has contracted on behalf of an undisclosed principal and sues on the relevant contract.'

The appellant throughout the negotiations and conclusion of the agreement acted in his personal capacity. No mention was made of the close corporation. It seems clear that what happened, (as so often does with lay persons), is that the appellant did not see the close corporation as a separate legal entity and considered that he and the close corporation were one and that he was entitled personally to sell the business. The appellant's attorney raised the question of authority in passing and only when he became aware of the existence of the close corporation, it appears, did the question of authority arise and the resolution was prepared to regularise the transaction. The question of *locus standi* was in any event not properly raised on the pleadings, contrary to the finding of the court *a quo*. The resolution was clearly an attempt at ratification. As stated in *Durity Alpha (Pty) Ltd v Vagg* 1991 (2) SA 840 (A) at 843A authority to act on behalf of an undisclosed principal must exist at the time of conclusion of the agreement. There can be no ratification.

[9] The appeal in so far as the single issue of *locus standi* is concerned should not have succeeded. That however, is not the end of the matter. There is another aspect which was overlooked by the magistrate and the court *a quo*.

[10] In his particulars of claim, after pleading the existence of the contract, its terms and the failure to pay, the appellant continued with the following allegations:

'7. Despite demand Plaintiff has persisted in his failure or refusal to pay.

8.1 In the premises Plaintiff is entitled to cancel the sale agreement and hereby cancels the said sale agreement.

8.2 *Alternatively*, Plaintiff is entitled to cancel the sale agreement by virtue of Defendant's breach of material terms thereof, and hereby cancels the said sale agreement.

9. As a result of Defendant's aforesaid breach of the sale agreement Plaintiff has suffered damages in the amount of R90'000.00, plus interest thereon *a temporae morae*.

Wherefore Plaintiff prays for judgment against the Defendant in the following terms:

a. an order declaring the sale agreement to have been validly cancelled;

b. Payment of the sum of R90'000.'

c. interest on R90'000.00 *a temporae morae*;

d. costs of suit;

e. further or alternative relief.'

When asked in a request for further particulars how the damages were computed the reply was:

'The amount of R90 000 constitutes the purchase price agreed to by the parties.'

[11] It is trite that once there is a breach of a contract the innocent party has an election to claim enforcement or cancellation and damages. The two are inconsistent with each other and mutually exclusive. The innocent party cannot approbate and reprobate the contract. (Christie, *The Law of Contract in South Africa* 5ed p 540.) In the present case appellant claimed cancellation and payment of the purchase price which is impermissible. On cancellation his remedy was restitution (return of the business) and damages. He could not claim that the purchase price represented his damages. Unfortunately the magistrate was not alive to the problem. The court *a quo*, so it appears from the judgment, was under the impression that appellant had elected to enforce the contract and was claiming the purchase price.

[12] The next question is whether the appellant was entitled to any relief, and if so what form of relief he was entitled to. The appellant in his particulars of claim alleged that he had by letter dated 9 May 2003 placed the respondent in *mora* and when the latter failed to heed the demand within the stipulated 22 days, he was entitled to cancel the agreement. In evidence, however, he testified that the letter which was sent by registered post was returned unclaimed. His attorney then formally withdrew the allegation that demand had been made. In doing so he in effect conceded that the

cancellation was invalid. What remains is appellant's claim for payment of the purchase price and his prayer for alternative relief. The parties did not agree on an acceleration clause. Consequently the full purchase price could not be claimed. What the appellant's evidence did establish was that the initial payment of R45 000 and the instalments payable in February, March, April, May and June were not paid (summons was issued on 2 June 2003). In my view the appellant is entitled to judgment for these amounts together with the agreed interest of 5%. The appellant's evidence in regard to interest was terse in the extreme. All he said was that he had stipulated for 5% interest on the balance (of R45 000) over 24 months. Implicit in that is that the interest was payable monthly on the reducing balance. What also must follow is that the payment of 5% interest ceased after two years. Thereafter it seems the appellant is entitled to interest at the statutory rate of 15,5%.

[13] The final issue is that of costs. The magistrate granted the appellant costs on the scale as between attorney and client. In the light of respondent's conduct in contesting the action when he had no real defence this order was justified. I consider that, having regard to the fact that the respondent was entitled to a measure of success in the court *a quo*, (to the extent afforded him in this judgment) a fair order should be that each party bear his own costs in that court.

[14] 1. The appeal is upheld with costs.

2. The order in the court *a quo* is set aside and each party shall pay his own costs in that appeal.

3. The magistrates' court order is set aside and substituted by the following:

'(a) there will be judgment for the plaintiff as follows:

(i) payment of the amount of R45 000;

(ii) interest thereon at the rate of 15,5% per annum from the 13th March 2003 to date of payment;

(iii) payment of the amount of R1 875 being the February 2003 instalment;

(iv) interest thereon at the rate of 5% per annum from 4 February 2003 to 1 January 2005;

(v) payment of the amount of R1 875 being the March 2003

instalment;

(vi) interest thereon at the rate of 5% per annum from 2 March 2003 to 1 January 2005;

(vii) payment of the amount of R1 875 being the April 2003 instalment;

(viii) interest thereon at the rate of 5% per annum from 2 April 2003 to 1 January 2005;

(ix) payment of the amount of R1 875 being the May 2003 instalment;

(x) interest thereon at the rate of 5% per annum from 2 May 2003 to 1 January 2005;

(xi) payment of the amount of R1 875 being the June 2003 instalment;

(xii) interest thereon at the rate of 5% per annum from 2 June 2003 to 1 January 2005;

(xiii) interest at 15.5% per annum on R9 375 from the 2 January 2005 to date of payment;

(xiv) costs of suit on the scale as between attorney and client.'

COMBRINCK JA

CONCUR:

FARLAM JA)

CACHALIA JA)