

CASE SUMMARY - CASE NO: 2010/14665

CHEVRON SOUTH AFRICA (PTY) LTD

Plaintiff

and

UFUDU TRANSPORT (PTY) LTD AND OTHERS

Defendants

The plaintiff claimed payment from two sureties for the outstanding balance in respect of petroleum products sold to a distributor of the plaintiff's products, the principal debtor from January 2008 to December 2008. In October 2006, the principal debtor had entered into an agreement with a third party in terms whereof the third party was authorised to purchase from the plaintiff on behalf of the principal debtor and was positioned effectively to conduct its own petroleum resale business in the principal debtor's name. During February 2008, the principal debtor unlawfully repudiated its agreement with the third party and informed the plaintiff in writing that it revoked the third party's authority to purchase products from the plaintiff in the principal debtor's name. At the end of February 2008, the principal debtor's account with the plaintiff was in credit and the plaintiff's claim was in respect of products sold after the revocation of the third party's authority.

The principal question dealt with by the court was whether or not, the revocation was effective notwithstanding that the act of revocation was a breach of the principal debtor's contract with the third party in terms whereof it gave the third party authority to purchase in its name, and in particular whether or not, this was a power or authority "coupled with an interest" and thus not revocable.

The Court identified the general power to enter into contractual relationships and perform juristic acts is an incident of, and derives from, the exercise of a competency of personality or status as a person in law; it is an exercise of free will that attaches to personality referred to as "personal competency". The power of a person to deal validly and competently with property requires personal competency and a power that is an incident of, and derives from, a competency arising from that person's status in relation to the property in question referred to as a "real competency".

What constitutes a power or authority "coupled with an interest" and whether or not authority is irrevocable is a matter in which there is uncertainty. The Court undertook a review of the Roman Dutch common law, the South African authorities dealing with the issue together with the US and English authorities.

English law and US law have diverged with regard to what is meant by "coupled with an interest". Both English and US law of the early 19th century recognised that in the absence of a cession or an assignment of property, a power to deal with a principal's property was automatically revoked on the death of the principal. The English formulation of what is meant by "coupled with an interest" is broader and an authority is irrevocable when given for the purpose of securing some benefit to the donee of the authority. In the US, a distinction is drawn between an interest in the

subject on which the power is to be exercised and an interest in that which is produced by the exercise of the power. Only the former is considered as “coupled with an interest” and not revocable even on the death of the grantor of the power.

The South African cases can be divided into two lines. One line applied a modified formulation of the English rule that where the authority is given for the purpose of being a security was part of the security it was “coupled with an interest” and irrevocable. This line treats the power as something capable of being possessed by or pledged to another when given as security. The other line refers to the distinction drawn in the US law.

The Court came to the conclusion that a power is irrevocable when the power was in fact the so-called “agent” exercising his or her own real competency, from a right held in property independently from the grantor of the power and not as a substitute for the grantor of the power. In this respect, it was not truly a relationship of agency or the exercise of an agency power but that of property and the transfer of real rights in property.

A personal competency and any accompanying real competency is something personal and attached to the will of the person. As an incident of a person’s will, a power is not property that can be owned or possessed by another. Where an agent has an interest in that which is produced by the exercise of the authority, there is an implied promise underlying the grant of the authority. Where there is a revocation of authority which is in breach of a promise underlying the grant of the authority, the aggrieved agent’s remedy lies in a cause of action on the underlying promise – neither the agent nor a third party can simply ignore the revocation as a nullity.

The authority given in the instant case was not given as security and thus it was not necessary to consider the correctness of the South African decisions treating authority as irrevocable when it is given for security. Although there was an interest in the broader English formulation, it was not of the type recognised in US law and was not an interest in the subject matter of the power nor was it a property right.

In the circumstances, the power was held to be revocable and the plaintiff’s claim failed.