

In the KwaZulu-Natal High Court, Pietermaritzburg  
Republic of South Africa

Case No : AR 610/11

In the matter between :

Union Shipping CC

Appellant

and

EIS Engineering and Industrial Supplies CC

First Respondent

Constantinos Dranias

Second Respondent

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Judgment

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Lopes J

[1] The first respondent in this appeal was the plaintiff in the court a quo and the present appellant was the first defendant. The second respondent was the second defendant. I shall refer to the parties as they were referred to in the court a quo.

[2] The plaintiff sued the first defendant for payment of the sum of R36 000 allegedly due, owing and payable to the plaintiff when it gave the first defendant

a cheque for that sum expecting to obtain services in return. As the services were never forthcoming, the plaintiff sued the first defendant for a declaratory order confirming the cancellation of the agreement and an order for return of the R36 000,00.

[3] The second defendant was joined later in the proceedings. He was joined because the plaintiff alleged that he had acted as the agent of the second defendant. As the first defendant denied his authority, he was joined in the action.

[4] In her judgment the learned magistrate found that the second defendant had indeed acted on behalf of the first defendant in concluding the alleged agreement and that the plaintiff was entitled to be repaid the sum of R36 000. The learned magistrate then gave the following order :-

‘Judgment for the plaintiff as claimed in the amended Particulars of Claim together with interest thereon as claimed. Cost of suit are awarded to the plaintiff. Such costs to include costs of preparation for trial and all reserved costs.’

[5] Unfortunately the order is not a model of clarity because the amended particulars of claim seek the following relief :-

**‘WHEREFORE** the Plaintiff prays for judgment against the First Defendant alternatively the Second Defendant alternatively the First and Second

Defendants jointly and severally, the one paying the other to be absolved for :-

- 1) an order confirming cancellation of the agreements (sic);
  - 2) Payment of the sum of R36 000;
  - 3) Interest on the said sum at the rate of 15,5% per annum calculated from the 7<sup>th</sup> June 2006 to date of final payment; and
  - 4) Costs of suit on a party and party scale;
- ....'

[6] Only the first defendant appeals against the judgment of the learned magistrate. Both sets of attorneys accept that the judgment was against both defendants. I accordingly do not deal with the judgment against the second defendant.

[7] The first defendant denies having concluded any contract with the plaintiff and avers that the second defendant had no authority to act as its agent in concluding any agreement with the plaintiff.

[8] As a determination of the authority issue is determinative of the action against the first defendant, I deal with it firstly. In her judgment, the learned magistrate, in dealing with the question of agency, stated :-

'I agree with Mr *Prior*'s submission that there is indeed a strong inference and probability that the second defendant was provided with a vehicle for his exclusive use whilst he was contracted to the first defendant in providing security

services. He was therefore in a position to represent the first defendant.'

[9] In my view this finding by the magistrate is a misdirection. In assessing the evidence in the record, the following extracts are relevant :-

(a) in a request for further particulars dated the 31<sup>st</sup> October 2006, the first defendant asked the plaintiff :-

'1.1 On what basis does the Plaintiff allege that the Plaintiff (sic) was represented by Costa Drainias (sic)?'

That request obviously intended to enquire on what basis the plaintiff alleged that the first defendant was represented by Dranias (who was later joined as the second defendant).

(b) The plaintiff replied in further particulars dated the 14<sup>th</sup> March 2007 :-

'At all material times Costa Drainas (sic) represented to the Plaintiff that he acted for and on behalf of the Defendant'.

(c) In the plaintiff's request for further particulars dated the 16<sup>th</sup> March 2011 the defendants were requested to state :-

'(a)On what basis in law or fact did the Defendant's (sic) rely to support their assertion that despite the Wesbank account being in the name of the First Defendant, that the Second Defendant was liable for the Hire Purchase Agreement?

(b)The Defendants are requested to stipulate what the relationship between the Defendants were *inter se*?'

(d) In reply the defendants stated :-

'(a) The Agreement between the First and Second Defendant was that the First Defendant would purchase a vehicle for the exclusive use of the Second Defendant whilst the Second Defendant was contracted to the First Defendant. The Second Defendant exercised his option to purchase the vehicle once his contract with the First Defendant expired.

b) The Second Defendant was contracted to the First Defendant to provide Security Consulting Services.'

(e) In the plaintiff's replication it states at paragraph 3 :-

'In the event that the Honourable Court finds that Dranias was not so authorized the Plaintiff replies that the Defendant is estopped from denying Dranias' authority due to the fact that :-

- a) The factual position is evidenced by the Wesbank contract;
- b) At all material times Dranias represented to the Plaintiff that he was duly authorized to act for and on behalf of the Defendant;
- c) Dranias has represented the Defendant in other business transactions requiring transport to be provided to the latter by the Defendant;
- d) The Wesbank account into which the R30 000 was deposited is in the name of the Defendant;
- e) That the Plaintiff relying on the correctness of those representations was induced to enter into the agreement with Dranias to its detriment

ostensibly as the agent of the Defendant.'

[10] The above extracts set out the basis upon which the plaintiff intended to establish its case. Only one witness was led of behalf of the plaintiff, Mr H J da Silva who, in relation to the question of agency, or the ability of the second defendant to represent the first defendant, stated in cross-examination :-

'Did you ever have any document issued by Union Shipping stating that he was an agent or a representative of Union Shipping ? --- No.

Have you ever discussed it with any other representatives of Union Shipping to say that the second defendant was in fact the owner of Union Shipping? --- No.

In fact the only thing you have to say that he has any connection to Union Shipping is what you say is his own version? --- That is correct.

...

The evidence of the defendants will be Mr da Silva, that Mr Dranias the second defendant was not an agent or an employee or a representative or a member or director of any entity trading under the name of Union Shipping. You can't deny that can you? --- Well, can I answer why, basically speaking I knew his cousin very well and I trusted him and I had met and I trusted him as well. And I had no reason to not believe that he in fact did own Union Shipping which he told me. If I hadn't known him from a bar of soap I would have in fact done further investigation. So I did believe that he was in fact the owner of Union Shipping as he had told me.

...

But if I were to tell you now that the evidence of the first defendant, that is Union Shipping will be to the effect that he was not an employee, agent or a representative or a member or director of any entity trading as Union Shipping, you can't deny that can you? --- No, I can't deny that.'

[11] Thus, on the evidence of the plaintiff's only witness, it accepted that the second defendant was not an agent of the first defendant, nor was he entitled to represent the first defendant.

[12] The second defendant's evidence makes it clear that he had no authority to represent the first defendant and that is confirmed by Paul Kotras who was a director of the first defendant at the time. It emerges from the evidence of the defendants' witnesses that the relationship between the first defendant and the second defendant was that Kotras and Dranias had known each other for a long time. Dranias wished to purchase a motor vehicle, and as a favour to him Kotras concluded an instalment sale agreement with Wesbank in the name of the first defendant to enable the second defendant to get the contractual benefits which would inure to the first defendant because of its position as a creditworthy company. Kotras did not view this as being potentially prejudicial to the first defendant because he trusted Dranias and because Dranias had put down approximately 70% of the cost of the motor vehicle when it was purchased. It was agreed between Kotras and Dranias would continue to maintain and pay off the motor vehicle account.

[13] The learned magistrate has assumed from the further particulars provided by the plaintiff that the second defendant was employed by the first defendant. The learned magistrate, however, then makes the quantum leap from that fact to find that the second defendant was entitled to represent the first defendant in the agreement claimed by the plaintiff. That is a non-sequitur because it does not follow from the fact that the second defendant may have at some stage been employed by the first defendant, that he had the authority to represent the first defendant in contractual dealings. No evidence was led by the plaintiff to substantiate the allegation in its replication that the second defendant had represented the first defendant in other business transactions requiring transport to be provided by the first defendant. Indeed, it is the clear evidence of Mr da Silva that the only source of his belief that the second defendant was authorized to represent the first defendant came from statements made by the second defendant himself. Any representation could have been made by Dranias to entice the plaintiff to pay the cheque into the account of the first defendant but it would not, without authority, bind the first defendant.

[14] Mr *McIntosh* who appeared for the plaintiff, submitted that by allowing the second defendant to operate the Wesbank account in the name of the first defendant, the first defendant made a representation to the public at large. But the evidence does not substantiate this – it was an account dealing only with the repayment of the instalments owed on the motor vehicle to Wesbank, in the first



instance, by the first defendant, but ultimately by and for the benefit of the second defendant.

[15] With regard to the estoppel alleged in the plaintiff's replication there is no evidence produced of any representation made by the first defendant. Insofar as the postulated employment of the second defendant by the first defendant at some stage (which was not proved on the evidence), Schutz JA said in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and others* 2002(1) SA 396 (SCA) at paragraph 28 :-

‘... Where an estoppel is sought to be derived from the appointment of an agent to a particular position, the principal is considered to represent no more than that the agent has the authority *usually* associated with this position ... The extent of such authority has to be proved by evidence or established by custom ...’

[16] With regard to any representation by the first defendant arising from the second defendant's employment with it, there are no allegations in the pleadings nor any statements in the evidence which set out the time period during which the second defendant was employed by the first defendant or that it coincides with the period when the plaintiff allegedly concluded a contract with the second defendant acting on behalf of the first defendant.

[17] In all the circumstances there was no valid basis for the learned magistrate to have found that the second defendant acted as the agent of the

first defendant in concluding the contract with the plaintiff. In those circumstances the plaintiff's action against the first defendant could not succeed..

[18] The only other cause of action alleged by the plaintiff against the first respondent was based on unjust enrichment. The learned magistrate correctly found that that alternative claim had to fail because there is no law of general enrichment, and the plaintiff was obliged to plead the unjust enrichment category into which its claim against the first defendant fell. This it did not do.

See *Nortje en 'n andere v Pool* NO 1966(3) SA 96 (A) at 140 A – B.

[19] In an enrichment case the plaintiff bears the onus in respect of every element of the cause of action relied upon.

See *Senwes Ltd and others v Jan van Heerden & Sons CC and others* [2007] 3 All SA 24 (SCA)

[20] Even were it to be arguable that enrichment in the circumstances alleged by the plaintiff could properly be considered under the heading of a general enrichment action (see *Komissaris van Binnelande Inkomste v Willers* 1994(3) SA 283 (A) and *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001(3) SA 482 (SCA) paras 8 – 10) what the plaintiff has not established is that the first defendant was enriched as a result of the conduct of the second defendant. Mr *McIntosh* submitted that because the first defendant owed a debt to Wesbank, Paying off that indebtedness enriched the first defendant. But that is to ignore

the involvement of the second defendant. The evidence is clear that the ultimate liability for the debts owing to Wesbank were those of the second defendant and not the first defendant. This was not disputed by the plaintiff and in the circumstances of the transaction alleged by the plaintiff, the second defendant was the person who was enriched and not the first defendant. Once Wesbank was paid, the second defendant's obligations to the first defendant were extinguished, and the second defendant obtained the motor vehicle free of encumbrance. No benefits accrued to the first defendant.

[21] That accordingly disposes of the action against the first defendant. I would accordingly make the following order :-

- a) the appeal succeeds;
- b) the order of the court a quo is amended to read :-  
    'With regard to the first defendant, it is absolved from the instance with costs.'
- (c) the first respondent is to pay the appellant's costs of the appeal.

Swain J : I agree.

Date of hearing : 26<sup>th</sup> March 2012

Date of judgment : 29<sup>th</sup> March 2012

Counsel for the Appellant : M Stewart (instructed by S R Maharaj Attorneys)

Counsel for the Respondent : K C McIntosh (instructed by Prior & Prior)