REPORTABLE ZLR only (46)

Judgment No. S.C. 96/86 Civil Appeal No 446/85

ANDREW PHILLIPS (PRIVATE) LIMITED V G.D.R. PNEUMATICS (PVT) LTD

SUPREME COURT OP ZIMBABWE,
DUMBUTSHENA, CJ, GUBBAY, JA & McNALLY, JA,
HARARE, JULY 15 & AUGUST 1, 1986.

M.T. O'Meara, for the appellant
J.B. Colegrave, for the respondent

GUBBAY, JA: On 11 July 1984 a person purporting to go by the name of Mandinagi presented himself at the premises of the respondent company, which carries on business as a supplier and repairer of heavy vehicle air brake equipment. He was in possession of a partly printed purchase order form, No. 4/8784, to which had been applied, somewhat indistinctly, the name stamp of the appellant company. Hand-written on the order form were the date, the appellant's sales tax number and "6 x 24/30 Air Brakes", being the nature of the goods to be supplied. Below was the signature "H. Clive". The order form was handed to the respondent's counter sales assistant, Andrew Mavangira. In the knowledge that the appellant was an acceptable credit customer with which his company had enjoyed some dealings in the past, Mavingira issued an invoice for six double diaphragm spring-brake chambers - which properly described the goods referred to in the order - at a price of $1 050. That done he obtained Mandinagi's signature to the invoice and effected delivery to him.

Thereupon Mandinagi disappeared without trace. The goods never reached the appellant.

The transaction was fraudulent, for Mandinagi was unknown to the appellant. He was neither its servant nor agent. By some means or other, probably through an accomplice in the employ of the appellant, Mandinagi must have obtained access to the rubber stamp bearing the appellant's name. He must also have acquired its correct sales tax number and information that a salesman known as Clive (his full names being Clive Hein) was authorised to sign purchase order forms. Although order form No. 4-/8784 was not stolen from the appellant, Mandinagi would have had little difficulty in procuring it, for such prototype forms are commonly in use by businesses throughout the country.

The fraud came to light at the end of July 1984 when the appellant queried the respondent's statement reflecting a debit of $1 050, It refused to pay on the ground that it had not authorised the purchase made by an unidentified trickster. The respondent was equally adamant that having clothed Mandinagi with ostensible authority to present the order form and obtain delivery of the goods, the appellant was estopped from denying that he had acted as its agent.

At the trial which followed the magistrate resolved the dispute in favour of the respondent. He held that the practice in the trade of accepting such order forms, taken in conjunction with the prior commercial dealings between the parties, sufficiently established that Mandinagi had ostensible authority to make the disputed purchase. That decision is now the subject of this appeal.

It was not in contention that the onus lay on the respondent to prove that the essential requisites of estoppel were present. See Strachan v Blackbeard 1910 AD 282 at 288 in fine-289.These are: (a) a representation,

by words or conduct, which might reasonably be expected to mislead; (b) the misleading of the

represented; (c) inducing him to alter his position on the faith of such representation. See Monzali v Smith 1929 AD 382 at 385; Henney v Annesley 1960 (4) SA 462 (SR) at 486G; De Villiers and Mackintosh, The Law of Agency in South Africa, 3 ed at pp 443-444,

The first point taken by Mr 0'Meara on behalf of the appellant was that it emerged clearly from the mouth of the respondent's managing director, Gordon Reade, that the order had been executed solely in reliance upon what was regarded as standard business practice. The respondent had not relied on the pattern of its past dealing with the -appellant as being capable of misleading a reasonable person into believing that Mandinagi had authority to present the order and take delivery. Certainly, the submission appears to be borne out by the following passage in Reader's cross-examination:-

> "Q. Are you saying that receiving an order like this he (Mavangira) remembered, 'oh! two years ago we received a similar order form it must be alright'? ---------- A. No.
>
> Q. He would not remember that? ---------- A. Well he may or he may not but what the point I am making here is that it is standard practice to receive an order whether it is from Andrew Phillips, or Clan Transport or Swift Transport or anybody it is standard practice to receive an order supply the goods give them an invoice and follow it up the statement.
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> Q. So really you are basing your claim of ostensible authority on what you regard as the standard practice in this town? ---------- A. Yes,
>
> Q. And not on the fact that two years prior to this a similar order form is received by your firm? ' A. No."

But I do not consider that this piece of evidence, damaging though it is, is

necessarily conclusive of the issue. For if Reade's testimony is read as a whole it would seem that what in effect was relied upon as giving rise to an estoppel was the prior course of conduct or dealings between the parties, as a consequence of which the appellant represented that anyone, whether a member of the appellant's organisation or a complete outsider, presenting the respondent with a stamped order for goods was authorised to receive delivery. However that may be, I am prepared to assume in the respondent's favour that this was the true basis of its case.

What then was the extent of the dealings between the two companies prior to 11 July 1984? In fact, comparatively little business was transacted. On six occasions from 23 November 1978 to 26 March 1982 signed purchase order forms, similar in format to that used by Mandinagi, identifying the goods to be supplied, were handed to the respondent by an employee of the appellant.
On each of these occasions the name of the appellant and its sales tax number had been stamped distinctly thereon. Prices of the goods sold ranged from $27,40 to $547,92, and the last purchase, having been made some twenty-seven months before the fraudulent one, was in an amount of $96,75.

It Is a sound principle, which I readily accept, that "strong evidence" is required to permit of an inference that a person who lacks direct authority for a particular transaction, nonetheless has ostensible authority in respect of it by virtue of the existence of a number of prior transactions. See Sathe v Kutubudien 1914 CPD 221 at 224; Gottschalk v Dreyfus and Co Ltd 1938 (1) PH A. 11.

In the present case I am not persuaded that the effect of the six prior dealings is such as to justify an inference that in respect of the fraudulent transaction the appellant must be found to have represented that anyone handing the respondent an order form upon which its name

had been stamped, was authorised to receive delivery. There are several factors which weigh heavily against such an inference:

In the first place, the course of dealings was spasmodic, consisting of a single order in 1978, no orders at all during 1979 and 1980, three orders in 1981, and two orders in 1982. I do not think it can be said that so few transactions, extending over a period of three-and-a-half years and not made on any regular or anticipated basis, were sufficient to lead the respondent to the reasonable belief that anyone who happened to present the appellant's official order form, even though not identified as an employee of the appellant, was nevertheless being represented as having authority.

Secondly, I would think that any significance attaching to the former series of transactions was considerably weakened, if not entirely destroyed, by the lapse of as long a period as twenty-seven months from the penultimate order to the fraudulent one. The substantial break in the course of dealings between the parties had the effect, in my view, of isolating the transaction of 11 July 1984 from the former orders. It implied a cessation of any representation arising from the previous course of dealings between the parties and ought to have put the respondent upon its enquiry.
See Monzali v Smith, supra, at 383-390.

Thirdly, it is obviously far more difficult to establish estoppel against a party with whom the person concerned has no connection whatsoever, for there is one material link less in the chain. This is the situation in casu. Mandinagi was not in the appellant's service but a total stranger. (Compare Cripps v Collins 1937 SR 161 at 164; Quinn and Co. Ltd. v Witwatersrand Military Institute 1953 (1) SA 155 (T) at 159F-160C). He acted fraudulently for his own illegal purposes.

Finally, and perhaps more importantly, one searches in vain in the evidence of Mavingira for any suggestion that he was influenced to accept and process the order handed to him

on account of his knowledge of the past course of dealings with the appellant. Indeed, this is not surprising, for it was not until 1981 that Mavingira commenced employment with the respondent and then in the capacity, not as a salesman, but as a "spares picker". When acting as a counter salesman the only order he ever saw bearing the appellant's name stamp was that of 11 July 1984. He accepted it on the faith that it appeared authentic and in the appreciation that the appellant's credit-worthiness was good.

It was not part of Mr Colegrave's argument, and wisely so, that the appellant was estopped from disputing liability by reason of its negligence in falling to keep the rubber stamp bearing its name under lock and key lest it might find its way into fraudulent hands. That omission can hardly be classed as imprudent let alone negligent, but even if it were the appellant was under no duty vis-a-vis the, respondent to use reasonable care to secure the rubber stamp in a safe place. See Union Government v National Bank 1921 AD 121 at 149; Guarantee Investments Corporation Ltd v Shaw 1953 (4) SA 479 (SR) at 483 E-H.

Unfortunately this is a case in which one of two innocent parties must suffer. The conclusion I have arrived at may cause those who receive order forms issued ex facie by a reputable and credit-worthy company to be anxious and shaken in their confidence in respect of the validity of those orders. But a company cannot adequately protect itself against this type of fraud. The safeguard rather lies with the recipient of the order. It is within his power to ascertain from the company's senior management whether the order is valid. If the answer is in the negative then the enquiry will have succeeded in preventing loss.

In the result I would allow the appeal with costs, and alter the judgment of the court a quo to read

"The plaintiff's claim is 'dismissed with costs".

DUMBUTSHENA, CJ: I agree.

McNALLY, JA: I agree.

Atherstone & Cook, appellant's legal representatives

D.W. Aitken & Co.. respondent's legal representatives