CIV/T/315/89

IN THE HIGH COURT OF LESOTHO

In the matter between:-

TRIO CLOTHING MANUFACTURERS (PTY) LTD — PLAINTIFF

and

LESOTHO HAPS ROYAL DEVELOPMENT (PTY) LTD — 1st Defendant
HAPPY SHIE — 2nd Defendant

RULING ON AN EXCEPTION

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 15th day of May, 1990.

This is an exception taken by the first and second defendants against the plaintiff's claim in terms of Rules 29 (2) (b) of the High Court Rules 1980 on the ground that it is vague and embarrassing; and in terms of Rule 29 (3) (b) on the ground that the plaintiff's claim does not comply with the Rules of Court.

I shall deal first with the grounds upon which it is alleged that the plaintiff's declaration is vague and embarrassing. It is alleged that the allegation in paragraph 4 of the declaration that both defendants are liable and the prayer for judgment against both defendants, conflict with the allegation in paragraph 2 of the declaration that the agreement was between the plaintiff and the first defendant.

Paragraph 2 reads as follows:-

"On or about the 10th July, 1987 at Maputsoe Plaintiff and the 2nd Defendant acting on behalf of the 1st Defendant entered into a Verbal Contract, which Contract was contained in an agreement signed by the Plaintiff and the 2nd Defendant styled the minutes of the meeting held at New Industrial Division on Trio Clothing Manufacturers (Pty) Ltd, on the 10th July, 1987."

Paragraph 4 reads as follows:-

"Since the agreement was made by the 2nd Defendant for the benefit of 1st Defendant, both Defendants are liable one paying the other being absolved for the breach of Contract, Defendants have failed to comply with any of the aforementioned condition and as a result thereof the Plaintiff has suffered damages in the total amount of M319,530-00 made up as follows."

Mr. Edeling, Counsel for the defendants, submitted that the words "acting on behalf of the first defendants," which appear in paragraph 2 mean that the second defendant was the agent of the first defendant and as such he (second defendant) was not a party to the contract.

I agree with the above submission that where an agent has disclosed the name of his principal he cannot be held to be personally liable for damages for breach of contract. In Blower v. Van Noorden, 1909 T.P.D. 890 it was held that an agent who exceeds his authority in contracting for a named principal, and whose contract is

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repudiated by the latter, is liable in damages to the other contracting party on the ground that from his representation of authority a personal undertaking on his part is to be implied that his principal will be bound, and that, if not bound, the other party will be placed in as good a position as if he were."

It has not been alleged by the plaintiff that the second defendant exceeded his authority and that as a result the first defendant has repudiated the contract. Innes, C.J. in Blower v. Van Noorden, supra, at p. 905 said:

> "The position thus taken up amounts in my humble judgment to this: that while adhering to the old rule that the agent is liable on the contract itself, the Court will award damages on the basis that he is only liable on a breach of warranty of authority. But the calculation of damages must be radically different in the two cases, and I venture to think that it is desirable to adopt that basis of liability which corresponds to the measure of damages to which we feel we must adhere. In any event there can be little doubt that in spite of its affirmation of the old rule, the decision of the Cape Supreme Court in Langford v. Moore and Others, does in essence materially modify the principles laid down in Wright v. Williams."

It seems to me that there has been a misjoinder in the present case because the second defendant can only be liable on a breach of warranty of authority. Having not exceeded his authority he cannot be held liable for breach of contract. It is interesting to note that during the negotiations the plaintiff was represented

by one Mr. Osman Rajie while the first defendant was represented by the second defendant. Why does Mr. Rajie not appear as the second plaintiff? The reason is that he was acting on behalf of the plaintiff and cannot be a party to a contract between his principal and the first defendant. In the same way the second defendant cannot be a party to a contract between his principal and the plaintiff.

Having come to the conclusion that there is a clear misjoinder in the present case, the next question is whether or not exception is the proper remedy to set aside a misjoinder. In Anderson v. Gordik Organisation, 1960 (4) S.A. 244 (N.P.D.) at p. 247 Caney, J. said:

> "I consider it to be clear beyond question that the usual procedure by which to raise a question of joinder, whether it be misjoinder or non-joinder, is by way of plea in abatement. In an appropriate case, however, it is competent to raise the question by an exception to the declaration: Collin v. Toffie, 1944 A.D. 456 at pp. 466, 467."

In paragraph 4 of the declaration the plaintiff alleges that both defendants are liable because the second defendant made the contract for the benefit of the first defendant. I think a contract for the benefit of a third person is a valid contract provided the third party has accepted the stipulation made in his favour. There is no allegation in paragraph 4 that the first defendant did accept the stipulation in its favour. In Gayather and another v. Rajkali 1947 (4) S.A. 76 it was held that where an agreement is made for the

benefit of a third party, the agreement operates as an offer to the third party, and the third party's acceptance of the offer creates a vinculum juris between him and the parties to the agreement. (See Ex parte Orchison, 1952 (3) S.A. 66 T.P.D.).

I am of the view that the word "for the benefit of the first defendant" read with the words "acting on behalf of the first defendant are embarrassing because the defendants do not know exactly who are the parties to the contract.

Mr. Mphalane, attorney for the plaintiff, submitted that whatever clarification the defendants wanted they ought to have done so by asking for further particulars and not by an exception which is a remedy which must go to the root of the opponent's claim or defence.

It seems to me that a joinder, whether it be a misjoinder or non-joinder, goes to the root of the claim or defence. In the present case the whole declaration must be set aside because of the misjoinder and the plaintiff must clearly elect the party to its contract. An agent is not a party to a contract made on behalf of a disclosed principal. If the agent had no authority he shall be personally liable. In the present case there is no allegation that the second defendant either had no authority or exceeded his authority.

In my view the exception taken against paragraph 3 (a), (b), (c), (d), and (e) follows from the fact that in paragraph 2 the plaintiff alleges that the contract is between the plaintiff and the first defendant but all the obligations are on the second defendant who is not a party to the contract.

In paragraph 3 (a) the plaintiff refers to its lease with the Corporation and the said premises. The Corporation and the lease as well as the premises have not been identified. I think as far as the identity of these things are concerned the defendants would have asked for further particulars.

It is alleged that the amounts claimed in paragraph 4 are not set out in such a manner as will enable the defendants reasonably to assess the quantum thereof. I think this defect could be cured by asking for further particulars.

It was alleged that the plaintiff has not alleged whether it elected to cancel the agreements or not. In the circumstances, defendants do not know what case they have to meet, furthermore, in the absence of the exercise of an election by the plaintiff, the present status of the contracts is unclear, and it is not possible to determine what relief or measure of damages the plaintiff may be entitled to.

'The termination of a contract has important consequences upon the reciprocal rights and duties of the parties thereto, and this would seem to provide further justification for holding that

if aparty decides to exercise a right to declare a contract cancel he should intimate his election to the defaulting party effectivel to terminate the contract, unless that contract itself provided expressly or by necessary implication, that termination may be effected in some manner other than communication to the defaulting party. (Swart v. Vosloo, 1965 (1) S.A. 100 (A.D.).

In Jowell v. Behr, 1940 W.L.D. 144 it was held that the issue of summons claiming damages for breach of contract is in its a binding announcement of an election to repudiate the contract on the ground of a breach going to the root thereof, and there is no need for a specific allegation in the declaration that the contract has been repudiated.

As was pointed out in Swart's case - supra - the mere issue of the summons without service upon the defendant cannot constitute "intimation" to the defendant of the intention to cancel the contract. There must be service on the defaulter of the summons. In the present case the defendants were served with the summons in which it is alleged that they are in breach of contract and damages are claimed. The plaintiff has not claime any specific performance for any part of the contract and it is very clear that after obtaining judgment in its favour the contrac shall have come to an end. This ground for the exception must fai

The exception was also based on Rule 29 (3) (b) on the ground that the plaintiff's claim does not comply with the Rules o Court. Reference was made to the following rules:

(a) Rule 20 (4) in that the declaration does not contain a clear and concise statement of the facts upon which plaintiff relies with sufficient particularity to enable the defendants to reply thereto. I think the confusion is caused by misjoinder.

(b) Rule 20 (6), in that the plaintiff, who relies upon a contract, states in paragraph 2 that it was a verbal contract, contained in signed agreement, which allegations are contradictory and not in compliance with the requirements of the Rule. I agree that the paragraph was drafted in a somewhat inelegant language because it seems to me that the agreement was verbal but its terms appear in the minutes of a meeting and were signed by the parties. To say that the agreement was verbal and at the same time say it was an agreement signed by the parties, is confusing and the exception was properly taken.

(d) Rule 21 (6) (a), in that plaintiff has failed to set out its damages and the particulars thereof in such a manner as will enable the defendants reasonably to assess the quantum thereof. I entirely agree with this objection because the amount of M240,000-. is claimed as damages but there is no explanation how it is arrived at. However, I am of the opinion that this lack of particularity could have been cured by asking for further particulars.

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In the result, the exception is upheld and the plaintiff's declaration is set aside with costs and the plaintiff is given thirty (30) days within which to amend its summons and declaration.

J.L. KHEOLA
JUDGE

15th May, 1990.

For Plaintiff - Mr. Mphalane
For Defendants - Mr. Edeling.