

IN THE HIGH COURT OF LESOTHO

In the matter between:

TRIPLE M. GALLERY (PTY) LTD.

PLAINTIFF

AND

UNITARIAN SERVICE COMMITTEE OF CANADA
MALESA MOHALE

1ST DEFENDANT
2ND DEFENDANT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 28th day of August. 1995.

On the 9th September, 1990, Plaintiff issued summons
against Defendants in which Plaintiff claims:

"(a) Judgment in the sum of M11,300.00 being the
balance owing and due to plaintiff;

(b) Cost of suit;

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(c) Interest at the rate of 25% per month from the time of breach of contract until the time of judgment;

(d) Such further and or alternative relief."

The matter was defended by First Defendant. Second Defendant did not defend the action. Both sides filed pleadings and the matter was ultimately first set-down for the 18th October, 1991 but it was postponed by consent of both sides.

The trial began on the 2nd February 1994 and Plaintiff closed its case on the 3rd February, 1994. First Defendant applied for a postponement to 8th March, 1994 because its director was overseas. The matter was finally heard on the 9th August, 1995 when First Defendant closed its case without offering any evidence.

Plaintiff's case is that First Defendant, acting through its employee (the Second Defendant), entered into an oral agreement in terms of which First Defendant ordered from Plaintiff 1400 T-shirts, 500 scarves and 200 caps on which Plaintiff was to stamp a logo of Dr. Lotta Hitschmanova CC, 15 Egg circles in Lesotho. This logo,

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according to Plaintiff was supplied by first Defendant through Second Defendant. First Defendant denies liability in the following terms:

"First Defendant denies an oral agreement was concluded between the plaintiff and the First Defendant in respect of the alleged items or at all and the Plaintiff is put to the proof thereof.

In the Alternative. In the event of the above-mentioned Honourable Court finding that an oral agreement was concluded by and/or on behalf of the First Defendant, which is expressly denied by First Defendant, then, and only in that event, the First Defendant pleads that such agreement was neither authorised nor subsequently ratified by the First Defendant."

I think there is no doubt on the unrebutted evidence that an agreement seems to have been made between Plaintiff and Second Defendant who gave Plaintiff to understand that such an agreement was between Plaintiff and First Defendant.

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It is not denied that Second Defendant was at the time an employee of First Defendant. Plaintiff at paragraph 5 of its Declaration alleges that Second Defendant, in ordering the goods, was "duly acting within the scope of her duties and whilst in the employment of First Defendant". This allegation was not specifically denied by First Defendant.

First Defendant pleads that "such an agreement was neither authorised nor subsequently ratified by the First Defendant". The crisp question for determination is whether in the circumstances of this case Second Defendant had to be specifically and directly authorised to order these goods if what Second Defendant was doing in entering into that agreement was "within the scope of her duties" as First Defendant's employee.

Mr. *Mahlakeng* argues that this is a case of procurement or agency. He has cited a passage in *Gibson South African Mercantile and Company Law* 4th Edition at page 465. Basically what he argues is that for the principal to be personally liable, the agent must be duly authorised to act and sign for the principal. He argues that for Second Defendant to sign the order for the goods disclosing that she was doing so as First Defendant's

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projects officer is not enough. He cites a passage in *Hersh v Nel* 1948 (3) SA 686 at 703 where it was said that when an agent discloses he is acting *per procuracionem* he means:

"I am an agent, not acting on any authority of my own in the case, but authorised by my principal to enter into this contract."

I am not sure that Second Defendant ought to say more than stating that she was ordering the goods as First Defendant's projects officer.

In a case such as this one, the distinction between a servant and an employee is partially blurred. To put in context what Wille & Millin *Mercantile Law of South Africa* 17th Edition, page 265:

"a servant is a person who subjects himself to the supervision and direction of his employer, the master, and is engaged to obey the employer's orders from time to time not only as to things he has to do, but as to time and manner he has to do them; whereas the employee who is not a servant is an independent contractor who is his own master, engaged to do certain work but free to exercise his own discretion as to mode and time of doing it."

Second Defendant, Mrs. E.M. Mohale, was the First

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Defendant's project officer. From her title, it is not difficult to infer that she held a semi-managerial post. Indeed, according to P.W.2 Samuel Sefefo the driver, Second Defendant was also acting director of First Defendant at the time she made the orders. If a manageress of a shop or cafe is not regarded as a servant (*R v. de Beer* 1931 CPD 99) then Second Defendant, in her semi-managerial post, cannot be regarded as a mere servant. The reason being that she is expected to exercise a great deal of discretion in her day-to-day duties.

It is trite law that ordinarily a person deals with a company if he deals with a Board of directors, a Managing Director, Branch Manager or any person who has express or implied authority or ostensible authority to act for the company. See *Wolpert v Clitzigr Properties (Pty) Ltd and Others* 1961 (2) SA 257. It seems in the ordinary course of business Second Defendant could act for First Defendant. There has to be clear evidence on record to show the exact limits of the authority of Second Defendant. Such evidence would be evaluated along with other evidence. I have already stated that Second Defendant was not an ordinary employee but was in a sectional managerial position. The term manager takes its meaning from the circumstances of a particular case. Applicant was

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entrusted "with management of...at least with such portion of the principal's business as involves direct personal control...."-*Ex parte Dreyer* 1942 TPD 25 per Malan J at page 26.

What happens with an employers and employees in the work situation is an internal matter. Outsiders are normally expected not to know. This does not however authorise third parties to conduct their business relationship with the employer in a careless and unreasonable manner. There is such a thing as agency by estoppel. Stratford JA in *Monzali v Smith* 1929 AD 382 at 386 puts the limit to this principle as follows:

"A court of law would not hold a person bound by consequences which he could not reasonably expect and are not the natural result of his conduct."

In this case First Defendant gave Second Defendant the title of Projects Officer and as P.W.2 shows, gave her a motor vehicle on which the names of First Defendant are written to go about in order to carry out First Defendant's project. It seems to me that any reasonable person, including First Defendant, realised that on the face of things, Second Defendant had bound First Defendant

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in a contract with Plaintiff. Second Respondent was therefore obliged to write Exhibit "C" and state:

"I, the undersigned facilitated the printing and distribution of T.shirts, scarves and caps and will be solely responsible for collection of money owed to you by farmers.

This letter therefore serves to exonerate USC Canada Lesotho from any responsibility whatsoever connected with the account under discussion.

Yours sincerely

Malesa Mohale
Projects Officer
USC Lesotho"

This letter was written when a statement account was sent by Plaintiff to First Defendant for payment. The written order Exhibit "A" did not specify that First Defendant when entering into this contract through Second Defendant was only acting as a facilitator or agent for poultry farmers whose names or even organisation is not specified. What remains obvious is that Second Defendant as First Defendant's projects officers facilitated what poultry farmers were going to do by ordering goods that were required in the First Defendant's name.

Could it not be that the following statement from Classen Butterworths *Dictionary of Legal Words and*

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Phrases Volume I 1st Edition at page 68 applies to this case i.e.:

"Agency Estoppel arises where one person has so acted as to lead another to believe that he has authorised a third person to act on his behalf, and the other in such belief enters into a transaction with the third person within the scope of such ostensible authority."

Surely First Defendant created a situation in which all and sundry were entitled to work with confidence with Second Defendant and contract with her on behalf of First Defendant. Consequently, First Defendant is estopped from repudiating the contract at the stage when he ought to perform its part of the bargain by paying for the ordered goods.

It is not even pleaded by the First Defendant that Second Defendant was not generally empowered to order goods on credit on behalf of the First Defendant. *Qui facit per alium facit per se*—(he who does a thing through another does it himself). This maxim is usually applied in cases of delict. Yet in the case of contract through employees where an element of agency exist negligence of the principal who just signs what is put before him might sometimes bind him to what he signed. The reason being

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that as R.H. Christie in *The Law of Contract in South Africa* 2nd Edition at page 395 says a contract cannot always be avoided because:-

"There is more than meets the eye. For we would nowadays add to the rescript "provided you signed without negligence... for the other party might enforce the sale against him on the basis of quasi-mutual assent."

It seems to me this aspect of First Respondent negligence in employing bad employees who do not do their job properly was better put in the case of *Feldman (Pty) Ltd v Mall* 1945 AD 733. Tindall JA at page 754 applied the principles of the law of agency to the law of delict, thus showing how sometimes acts of employees cut across both the law contract and delict. Watermeyer CJ in the same case of *Feldman (Pty) Ltd. v Mall* at page 741 said:-

"It appears from them that a master who does his work through the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; ...the mere giving by him of directions or orders to his servant is not sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm."

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In other words, the master is liable if he selects unfit and improper persons who display incompetence or negligence in the performance of work for which they are employed.

It is on this basis that First Defendant cannot be heard to say it cannot pay for the goods that were ordered in its name by Second Defendant. First Defendant is estopped from setting up Second Defendant's negligence in not ordering the goods in the name of the poultry farmers, but ordered them in First Defendant's name.

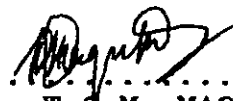
Indeed being a facilitator if that was what was expected of Second Defendant by First Defendant would not have exonerated First Defendant. The First Defendant through Second Defendant caused the Plaintiff to have the goods manufactured for poultry farmers in the hope that the farmers would reimburse him, which they partially did. First Defendant is consequently liable for the balance owing.

I will order interest at 18.5% as this Court has been doing over the years, although interest is now usually over 20%.

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It is therefore ordered that judgment be entered against the Defendants as follows:

- (a) Defendants are ordered to pay to Plaintiff the sum of M11300.00 (Eleven Thousand Three Hundred Maloti) being the balance owing and due to Plaintiff.
- (b) Interest of 18-5% from 6th Day of August, 1990.
- (c) Defendants are directed to pay Plaintiff's costs of suit.


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W.C.M. MAQUTU
JUDGE

For the Plaintiff : Mr. T. Hlaoli
For the Defendants: Mr. Mahlakeng