IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 22/08

In the matter between:

QALO HIGH SCHOOL **APPELLANT**

And

SCHOOL GENERAL SERVICES (PTY) LTD **RESPONDENT**

CORAM:

SMALBERGER JA

MELUNSKY JA

GAUNTLETT JA

Heard : 7 October 2009

Delivered : 23 October 2009

SUMMARY

Action by respondent for payment of money in respect of school books sold and delivered to appellant – appellant's defence that it acted as respondent's agent to sell the books to pupils – respondent succeeding in establishing its version on a balance of probabilities – respondent's claim reduced on appeal from M118 559.65 to M97 447.40 – respondent entitled to two – thirds of its costs on appeal.

Failure to call available witness – inference to be drawn depends on circumstances of each case.

Heads of argument – appellant's written heads of argument deficient – no references to evidence or to respects in which it alleges that court a quo allegedly erred. Future lapses may result in appeals being struck off with appropriate punitive orders as to costs.

JUDGMENT

MELUNSKY JA:

[1] The appellant, Qalo High School, is a registered educational institution which carries on its activities at Qalo in the district of Butha-Buthe. The respondent, School General Services (Pty) Ltd, is a registered company having its

principal place of business at Mazenod in the Maseru district. The respondent carries on business as a seller of school books which it purchases from publishers in Lesotho and elsewhere. The respondent sued the appellant in the High Court for payment of M118 599.65 together with interest a tempore morae and costs. The amount claimed was alleged to be the balance of the purchase price of school books sold and delivered to the appellant pursuant to an agreement entered into between the parties on or about 12 November 2003. In its plea, which is remarkably terse, the appellant denied that the parties entered into an agreement of sale, averred that the appellant was to sell the books "*on behalf of plaintiff i.e. as an agent*" and pleaded that

> "*as a result of the said agreement to sell books on behalf of plaintiff, defendant has made payment for the books sold, which is far more than what is alleged to have been paid by defendant*."

[2] The respondent's declaration, too, is not without blemish. The purchase price was said to amount to M122 447.40 and M25 000 was alleged to have been paid. What is lacking is any allegation as to how the amount claimed is arrived at. Although the respondent's director, Mr Benjamin Orjiy, admitted in evidence that the respondent increased the price due to the appellant's failure to make certain payments on due date, there was no explanation in his evidence which established

how the sum of M118 599.65 was fixed, nor whether the appellant ever agreed to the increases. It is somewhat surprising, therefore, that the trial Judge (Nomngcongo J), after finding in the respondent's favour, entered judgment for the respondent with costs "*as prayed for in the summons*".

[3] It is against that order that the appellant now appeals. Before dealing with the merits, however, it is necessary to express our concern at the appalling deficiencies in the appellant's written heads of argument. These consisted of three pages of trite principles of law, followed by two facile and stereotyped submissions: first, that the learned judge a quo erred in finding for the respondent and second, that there was no evidence, on a balance of probabilities, which favoured the respondent's case. There was no reference at all to the evidence and nothing was said about the respects in which it was alleged that the learned judge had erred. It is only necessary to add that the misnamed heads of argument fall woefully short of what is required both as a matter of practice and in terms of the rules of this Court. Future lapses in this regard may well result in the appeals being struck off the roll with appropriate punitive orders as to costs.

[4] It is not necessary for me to set out the evidence that was led at the trial in great detail. I commence by referring to what is not in dispute, namely that the respondent and the appellant, represented by Messers Orjiy and Thato Sekhochoa, the school principal, respectively met in November 2003 to arrange for the supply of school books for the following year. A list of books and the quantities required was prepared by Sekhochoa after he had established the needs of the pupils. From this list Orjiy draw up what he called a "*pro-forma invoice*" that contained a description of the books, the unit price and the full amount of the order. Sekhochoa affixed the school stamp to this document and on the strength of this the respondent purchased the books and delivered them to the school during January 2004.

[5] It appears from the school's date stamps on the delivery notes that delivery was effected on different days during January. On at least one of these occasions, according to Orijiy, Sekhochoa introduced him to the new principal, a certain Mr Senekane, who was due to replace Sekhochoa at the beginning of the year. According to Orjiy, he, Sekhochoa and Senekane had a discussion on at least one of the occasions when the books were delivered and Sekhochoa handed the respondent's documents (presumably the pro forma invoice and delivery notes) to

his successor. After this Sekhochoa dropped out of the picture and Orjiy dealt exclusively with Senekane.

[6] Towards the end of January Orjiy requested payment of the full amount due to the respondent. Senekane, on behalf of the school, asked for time to pay and this was acceded to. Subsequently payments were made by the appellant in varying amounts during March and April 2004. These payments totalled the M25000 referred to in the declaration. In the months that followed Orjiy persistently asked Senekane for payment of the balance of the purchase price. He explained that the respondent's financial position was precarious and that it needed the money from the appellant to pay its suppliers. Senekane did not deny that the school was liable to pay. In fact he criticized his predecessor for having entered into the agreement which had committed the appellant to pay a substantial sum of money. The appellant, as I understand the evidence, was itself cash-strapped and was unable meet the respondent's claim. It eventually offered a settlement of M2 in M20 to the respondent but this was rejected. In an attempt to compensate his company for the appellant's failure to satisfy the claim in full, Orjiy claimed interest and also inflated certain amounts but it was not established that Senekane ever agreed thereto. Nothing further needs to be said in this regard, however, as it was agreed between the parties on appeal that should the respondent succeed on

the merits of the dispute, it would be entitled to no more than M97 447.40 apart from interest and that to this extent the order of the High Court would have to be altered.

[7] What has to be emphasized is that Orjiy steadfastly maintained that the contract between the parties was one of purchase and sale, that in terms thereof the books were sold and delivered to the appellant and that the appellant had to make payment therefore. Although payment was strictly due on delivery, the respondent, as I mentioned earlier, agreed to extend the time for settlement but on the assumption that payment would be made in full within a matter of months. Orjiy denied that the appellant was the respondent's agent or that it was to sell the books on the respondent's behalf.

[8] Sekhochoa was called as the only witness for the appellant. His evidence was, to say the least, equivocal. He told the learned trial judge that Orjiy requested him.

"*to assist [Orjiy] with selling books to the students*"

and that he agreed to do so. He added that after Orjiy had asked for payment of a deposit of R10 000 Sekhochoa responded that this could not be paid

> "*when there was no money because the pupils*
>
> *had not bought the books".*

In response to a direct question from the appellant's counsel, Sekhochoa said that he could not recall whether Orjiy ever said " *he is selling the books to the school*". Sekhochoa's evidence to the effect that the school was to sell the books on the respondent's behalf was elicited only in response to leading questions by appellant's counsel , which, surprisingly, were not objected to.

[9] The learned trial judge found for the respondent on various grounds, one of which was that in previous transactions between the same parties there was no question of the school selling books to students before the respondent was paid. In fact on these occasions Sekhochoa simply considered that what was owed to the respondent on books was a debt by the school. There are, however, also other compelling reasons for holding that the respondent established the terms of the contract on which it relied. The first is respondent's weak financial position at the time. It could not wait indefinitely for payment, leaving it to the appellant to sell

some of the books to pupils and to collect the purchase price from them. The respondent owed money to its own suppliers, one of which was the Mazenod Book Centre. The manageress of that firm, Ms Ramabolu, who was called by the respondent, testified that the respondent was normally "*a good payer*" and on the strength of its previous record the Mazenod Book Centre gave it credit to enable it to supply the appellant with the books relating to the transaction now in dispute. The respondent, however, was unable to settle that debt. It suffices to say that in these circumstances it is improbable that the respondent would have contracted on the terms alleged by the appellant.

[10] Moreover Ms Ramabolu told the trial court that she had been approached by Senekane, both telephonically and in person with the request that the Mazenod Book Centre accept return of the books supplied to the school by the respondent. She refused to agree to that proposal on the ground that the books had not been sold to the school by her firm. The trial court correctly held that the appellant's aforesaid conduct was quite inconsistent with it being *"a pure agent"* of the respondent.

[11] On the respondent's version Senekane knew that the respondent had sold books to the school. This emerges clearly from the evidence of both Orjiy and Ms Ramabolu. As a matter of probability Senekane was told about the sale by Sekhochoa when the books were delivered. Sekhochoa's evidence, that he did not hear any discussion relating to books on that day, was correctly rejected by Nomngcongo J. Senekane was not called to give evidence. The inference which can be drawn from the failure to call a witness depends on the circumstances of each case (**see Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A) at 624E – G)**. Although Senekane was available to both parties, there was no duty on the respondent to call him. The respondent was entitled to rely on the evidence which it considered sufficient to discharge the onus. Senekane, moreover, occupied the leading position in the school and he was present in court during the evidence as the appellant's representative and the instructing client. In all of these circumstances the appellant's failure to call Senekane justifies the inference that his evidence would not have supported the defence relied upon by the school. Indeed, Orjiy's evidence in relation to his discussions with Senekane is not only probable but it remains uncontradicted.

[12] I am satisfied that the respondent established the contract on which it relied and it follows that the appeal on the merits must be dismissed. It was however

agreed by the parties on appeal that if the respondent succeeded on the merits judgment should be entered in its favour for M122 447.40 less M25000, i.e. for M97 447.40 together with interest thereon at the rate of 18% per annum from 6 October 2004 to date of payment. It remains only to consider the costs of appeal. In this respect, and as the respondent's claim is to be reduced by some M20 000, it would be appropriate to award it only two-thirds of the costs on appeal.

[13] The order that is made is the following:

1. The order of the High Court is set aside and is replaced with the following:

   "(a) Judgment in favour of the plaintiff in the sum of M97 447.40;

   (b) Interest on the said sum at the rate of 18% per annum from 6 October 2004 to date of payment;

   (c) Costs."

2. Save for the aforegoing the appeal is dismissed.

3. The appellant is to pay the respondent two-thirds of the costs of appeal.

L S MELUNSKY

Justice of Appeal

I agree

J W SMALBERGER

Justice of Appeal

I agree

J J GAUNTLETT

Justice of Appeal

For the appellant : K T Khauoe

For the respondent : P S Nts'ene