

SOUTH AFRICA / JUDGMENT

Bothma v Chalmar Beef (Pty) Ltd (2145/2017) [2018] ZAFSHC 132 (14 September 2018)

[2018] ZAFSHC 132

COURT

Free State High Court, Bloemfontein

BEFORE

Musi

CASE / FILE NUMBER

2145/2017

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No.: 2145/2017

In the matter between:-

C. A.

BOTHMA Plaintiff

and

CHALMAR BEEF (PTY)

LTD Defendant

CORAM:

MUSI, AJP

HEARD ON: 28 & 29 AUGUST

2018

JUDGMENT

BY: MUSI, AJP

DELIVERED ON: 14 SEPTEMBER 2018

[1] The plaintiff, a cattle farmer in Tweespruit, sued the defendant, a private company with limited liability, duly registered and incorporated in terms of the laws of this Country, for payment of R 647 884. 80 plus 10.25% interest thereon from 7 March 2017 until date of payment.

[2] The plaintiff alleged that he sold 79 head of cattle to the defendant, via the latter's agent, Mr Oelrich. The defendant disputed

this and alleged that Oelrich did not have a mandate to act on its behalf because a condition precedent was not met by Oelrich. It alleged that its Chief Executive Officer (CEO), Mr Wethmar, did not authorise the purchase in terms of the defendant's policy.

[3] The undisputed or common cause facts are as follows. On 17 January 2017, Oelrich, who was a buyer for and backgrounder[1] of the defendant, was requested by its CEO to purchase two truckloads of cattle at an auction in Bloemfontein. Whilst the former was at the auction, the plaintiff sent him a message via his Short Message System (SMS) informing him that he had 80 calves for sale at R24 per kilogram. They agreed on the price and that Oelrich would fetch the calves the following day.

[4] At the auction, Oelrich could only buy cattle that filled one truck. The CEO requested him to buy other cattle, from farmers in the vicinity, to fill the second truck. Oelrich called him and informed him that Morabe Trading (Morabe) has cattle. He gave the price at which he must buy the cattle. Oelrich confirmed that the price had been accepted.

[5] On 18 January 2017, Oelrich went to the plaintiff's farm where he inspected and loaded 79 calves onto a yellow truck. The plaintiff

asked him why he is using a yellow truck because Karan Beef also uses a yellow truck. Oelrich informed him that it was Frankor Transport's truck and that the defendant is Francor's client.

[6] They agreed that Oelrich would send an invoice to the defendant on his behalf. The plaintiff gave his email address to a lady (Ansie) who accompanied Oelrich. The cattle were taken to the weighbridge where they were weighed.

[7] On 19 January 2017, Oelrich issued a tax invoice from Morabe to the defendant in terms of which Morabe sold 79 calves weighing 23 680 kg at R22.76 per kg, which according to the invoice amounted to R509 120.00[2] minus a R447.95 levy payable to the Red Meat Producers Organisation. The total amount payable amounted to R579 886.15 after 14% of VAT was added to the subtotal.

- [8] On 19 January 2017, the defendant paid Morabe an amount of R579 886.15. Oelrich invoiced the defendant R2 772.90 as commission due to him for the transaction. The commission was paid on 26 January 2017. The plaintiff was not paid anything.
- [9] The plaintiff issued an invoice, dated 1 March 2017, to the defendant for an amount of R647 884.80; this amount represents 23 680kg at R24 per kg plus 14% VAT.
- [10] Oelrich was sequestrated and Morabe was liquidated.
- [11] The plaintiff testified that it is common practice for farmers to ask an agent to issue an invoice on their behalf. He has done this with many other agents without any problems. It was the first time that he had any business dealings with Oelrich, although he knew him well. One week after the transaction he called Oelrich and informed him that he must arrange that he gets his money on 1 March 2017, which would be the following tax year. He heard that Oelrich was accused of cattle theft and decided to call the CEO. He was not aware of the existence of Morabe.
- [12] The CEO informed him that Oelrich stole his (the CEO's) calves and that he did not know that Morabe was Oelrich's company. The plaintiff informed the CEO that he sold his calves to the defendant and that the defendant should pay him. The CEO then indicated that the defendant will pay him.
- [13] The CEO testified on behalf of the defendant. He denied the telephonic conversation that the plaintiff testified about. (During cross-examination he was confronted with a previous inconsistent statement wherein he stated that he spoke to the plaintiff. His denial is implausible but nothing turns on this issue.) He admitted that Oelrich was one of the defendant's buyers but testified that Oelrich did not have a mandate to buy cattle without consulting him. The procedure was that the agent would phone him and inform him that there are cattle available for sale. The agent would give him all the necessary information with regard to the cattle. The information would include type, male or female and estimated weight of the cattle. He would then give the agent a prize to offer to the seller. The price would normally be available within 24 hours. After the parties have reached an agreement in respect of the price the agent would phone him and he would then arrange for the cattle to be picked up, weighed and taken to the defendant.
- [14] Oelrich followed the above procedure when he informed him that he had sourced 79 cattle from Morabe. The defendant has done business with Morabe in the past. According to him the defendant had an agreement with Morabe and it paid the latter everything that was due to it.

[15] The parties agreed on the following facts:

15.1 Oelrich was an agent of the defendant for eight years.

15.2 The 79 head of cattle bought on 17 January 2017 were the same cattle that were delivered to the defendant.

15.3 The transporter was instructed and paid by the defendant to load the cattle;

15.4 Morabe received payment for the cattle.

15.5 The defendant paid Oelrich commission for the transaction.

15.6 The plaintiff received no payment whatsoever.

[16] The issues to be decided are:

16.1 whether Oelrich was the plaintiff's agent;

16.2 whether Oelrich had express authority to bind the defendant;

16.3 if not, whether he had ostensible authority to do so.

[17] Agency is the phenomena of representation where one person, duly authorised to do so, performs a juristic act on behalf of another, which act then confers rights and duties directly on the person on whose behalf it is done.[3] The agent's actual authority to act on behalf of and bind his or her principal can be express or implied.[4]

[18] Mr Van Tonder, for the defendant, contended that Oelrich was also the plaintiff's agent. He based his submission on the fact that the plaintiff testified that he authorised Oelrich to issue a tax invoice for the sale of the calves on his behalf.

[19] The submission, as I understand it, would put Oelrich in the mould of a broker. In *Benoni Produce & Coal Co Ltd v Gundelfinger*[5] a broker was described as follows:

'Now a broker according to our law is a middleman or intermediary whose office is to negotiate between two parties until they are at ad idem as regards the terms upon which they are prepared to buy and sell... "He is as it were agent for both one and the other to negotiate the commerce and affair in which he concerns himself."' [6]

It was further stated that:

'It is no doubt true that a broker who approaches a buyer or seller acts in the first instance as the agent of the person who employs him but directly the other party is aware of the fact that he is a broker, he becomes the agent of both parties not with a plenary power to bind both parties as he chooses but to communicate between them until they are ad idem.' [7]

[20] The plaintiff did not ask or instruct Oelrich to sell his (plaintiff's) cattle on his behalf. He requested Oelrich to

perform an incidental act after the conditional sale agreement was concluded. The plaintiff's undisputed testimony is that agents normally issue invoices on behalf of sellers. It is clear that the business of marketing cattle is done on a trust basis. The fact that the buyer's transport loads the cattle, take them to the weighbridge and then to the buyer is indicative of this fact. The agent would know the weight of the cattle as well as the price per kilogram. It would therefore be easier for the agent to issue the invoice on behalf of the seller.

[21] He did not ask Oelrich to enter into any agreement with the defendant on his behalf. There is no evidence or suggestion that the plaintiff was going to give Oelrich a consideration, in whatever form, for his services. The parties already agreed on the number of cattle to be sold and the price to be paid for them. The cattle was transported to the

defendant. The only outstanding things were the weighing of the cattle and the payment of the agreed price.

[22] Generally, in a cash sale ownership passes when the price is paid even if delivery has been given.[8] Ownership of the cattle was conditionally granted. The condition being that the purchase price would be paid after the cattle were weighed so that their true value could be determined. This is not unusual. In Silberberg and Schoeman[9] the following is said:

"The intention of the owner to transfer ownership need not be absolute, but may be conditional upon the happening of an uncertain future event. In other words, the transferor may deliver the thing to the transferee, on the understanding that the latter will acquire ownership in it if a certain condition is fulfilled, that is, the delivery is made subject to a suspensive condition."[10]

[23] The tax invoice is not an essentialia of a sale agreement. It is something that is needed for tax and accounting purposes. The submission that Oelrich also acted as the plaintiff's agent is without merit.

[24] The plaintiff seeks to bind the defendant for the representation of its agent. The plaintiff therefore bears the onus not only to prove that Oelrich was the defendant's agent but also that Oelrich had the necessary authority to act on behalf of the defendant in this transaction. [11] It must prove that Oelrich had express, implied or apparent authority to bind the defendant.

[25] It is clear that the plaintiff could not prove that Oelrich had express or implied authority to bind the defendant. When the

defendant disputed that Oelrich had the necessarily authority to act on its behalf, the plaintiff pleaded estoppel and ostensible

authority in the replication.

[26] The inter-relatedness and difference between estoppel and ostensible authority was definitively discussed and decided by the majority in Makate.[12] The Court held as follows:

[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority.

[46] The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct.

[47] A closer examination of the original statement on apparent authority by Lord Denning, quoted below, reveals that the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority. The statement indicates the absence of the elements of estoppel. It does not mention prejudice at all. That statement of English law was imported as it is into our law in NBS Bank and other cases that followed it.[13]

[27] Oelrich was the defendant's agent for a period of eight years preceding this controversial transaction. This fact was known in the Tweespruit area. Contracts entered into by Oelrich on behalf of the defendant were honoured by it. It is not in dispute in this matter to that the defendant gave Oelrich the necessary authority to procure or buy cattle on its behalf. Oelrich, however, had to comply with certain contractual arrangements or work methods between him and the defendant which were not known to the plaintiff or other farmers who sold cattle to the defendant.

[28] It is common course that the limits to Oelrich's mandate were never communicated to the plaintiff or any of the cattle sellers at Tweespruit. It was known that Anderson and Oelrich were the defendant's agents. The defendant did not have a uniform policy or work method with regard to the purchase of cattle by its agents. In some cases its agent (Anderson) would buy cattle, albeit small numbers, without the requirement of phoning the CEO to apprise him of the type, size or sex of the cattle. The defendant would honour those agreements. The difference between the status of the various agents was not communicated to any cattle seller.

[29] The defendant put it out there for the farmers in the area to know that Anderson and Oelrich were its agents. It made a representation,

at least by its conduct, that Oelrich had authority to act on its behalf. The defendant should reasonably have expected that the

plaintiff and others would act on the strength of the representation. The plaintiff clearly relied on the representation that Oelrich had authority to act on the defendant's behalf. The plaintiff's testimony that he acted in accordance with the general practice of cattle sellers was not challenged. His testimony that he acted in accordance with how he dealt with other cattle buyers was also not questioned or contradicted. The plaintiff's conduct was reasonable and in line with the general practice of cattle sellers in that area. He was not paid for the cattle. He was prejudiced.

[30] Oelrich dishonestly and knowingly represented to the defendant that he received the cattle from Morabe. He dishonestly and knowingly represented to the plaintiff that he was buying the cattle on behalf of the defendant. Both the defendant and the plaintiff were victims of Oelrich's deception.

[31] Should the defendant be responsible for its agent's deception? This question has been answered in the affirmative in *Randbank BPK v Santam Versekeringsmaatskappy BPK*.^[14] The headnote to the case reads as follows:

'It is the principal, who also selects his agent and represents him as a trustworthy person, and not the other party to a contract who has no say in the selection, who bears the risk of his possible dishonest representations and concealments, as also where the dishonesty assumes such proportions that the agent, in the nature of things, will undoubtedly conceal it from the other party and the principal would have no knowledge thereof.'^[15]

I am satisfied that the plaintiff succeeded in proving that Oelrich had ostensible authority to act on behalf of the defendant. Oelrich's authority as it appeared to others was that he had unlimited authority to act on behalf of the defendant.

[32] The plaintiff claimed the amount of R647 884.80, which represents R 568 320.00 plus 14% VAT. The amount of R447.95, which

was payable to the RPO, was paid by the defendant. The last mentioned amount should be subtracted from the R 568 320.00. He has therefore proved that the defendant is liable to pay him R 567 872.05 plus 14% VAT = R 647 374.14.

[33] The parties were in agreement that the cost should follow the success.

[34] I therefore make the following order:

34.1 The defendant is ordered to pay the plaintiff the amount of R647 374.14 plus interest thereon at the rate of 10.25% pa from 7 March 2017 until the date of full payment.

34.2 Costs of suit.

C.J. MUSI, AJP

Appearances:

For the Plaintiff: Adv D.M. Grewar

Instructed by McIntyre & Van Der Post

Bloemfontein

For the Defendant: Adv L.V.R. van Tonder

Instructed by Lovius Block

[1] A backgrounder is a farmer who leases grazing land to the defendant.

[2] The correct calculation ought to be: $23\,680\text{kg} \times \text{R}22.76 = \text{R}538\,956.80 - \text{R}447.85 = \text{R}538\,508.85 + 14\% (\text{R}75\,391.24) = \text{R}613\,900.09$.

[3] Francois du Bois Editor : Wille's Principles of South African Law, 9th Ed 2007, Juta & Co, at page 1225.

[4] Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC) at para 45.

[5] 1918 TPD 453.

[6] Ibid 458.

[7] Ibid

459. See also Jacobs Levitatz and Braude v Kroonstad Roller Mills 1921 OPD 38 at 43.

[8] See Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A) at p694.

[9] Silberberg and Schoeman's: The Law of Property, 5th Ed 2006 , LexisNexis.

[10] See para 9.2.2.

[11] Ravene Plantations Ltd v Estate Abrey 1928 AD 143 at 154.

[12] Although the minority differed with regard to the applicability and traditional use of estoppel, they reached the same conclusion as the majority on the facts of that case.

[13] Ibid paras [45] to [47].

[14] 1965

(4) SA 363 (AD).

[15] Ibid

363. The judgment was delivered in Afrikaans. The ratio of the decision in Afrikaans at page 372 reads as follows: ‘Dit is redelik dat die prinsipaal wat sy verteenwoordiger

kies en hom voorhou as ‘n betroubare persoon, en nie die ander party wat geen seggenskap by die keuse het nie, die risiko van sy moontlike oneerlike voorstellings of verswygings sal dra, ook waar die oneerlikheid so ‘n gestalte aanneem dat die

verteenwoordiger dit uit die aard van die saak ongetwyfeld vir die ander party sal verberg.’

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