

SOUTH AFRICA / JUDGMENT

Nine Hundred Umgeni Road (Pty) Ltd v Bali (92/85) [1985] ZASCA 76; [1986] 1 All SA 289 (A) (12 September 1985) [1985] ZASCA 76

COURT

Supreme Court of Appeal

BEFORE

Jansen, Kotzé, Viljoen, Grosskopf, Nicholas

CASE / FILE NUMBER

92/85

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IN THE

SUPREME COURT OF SOUTH AFRICA

(APPELLATE

DIVISION)

In the

matter between

NINE

HUNDRED UMGENI ROAD (PTY) LTD APPELLANT

and

K B A

BALI RESPONDENT

CORAM:

JANSEN, KOTZÉ VILJOEN, GROSSKOPF, JJA et NICHOLAS, AJA

HEARD: 15

MAY 1985 DELIVERED: 12 SEPTEMBER 1985

JUDGMENT

VILJOEN, JA

In the magistrate's court, Durban, the

appellant, as the plaintiff, succeeded in an action

in which/

2.

in which it sued the respondent for payment of the sum of R1 590, interest a tempore morae and costs on the attorney and client scale, as provided for by the agreement to be referred to in more detail presently. The amount of R1 590 was alleged to be due to the appellant in respect of arrear rental for the month July, 1979, in terms of a written agreement of lease which existed between the parties. An appeal to the Natal Provincial Division of the Supreme Court succeeded with costs, and the judgment of the magistrate was altered to read: "The plaintiff's claim is dismissed with costs." Against the latter judgment the appellant now appeals, leave having been granted.

In/

3.

In terms of the lease referred to the appellant, as the lessor, let to the respondent, "in his capacity as trustee for a company to be formed ('the lessee') certain premises in Durban "for the purpose of (a) workshop and (b) motor showroom." The lease was to commence on 1 July 1978. The rental for the first year, ie from 1 July 1978 to 30 June 1979, was R1 500 per month and that for the second year, 1 July 1979, to 30 June 1980, was R1 590 per month.

The lease was signed by the respondent "for and on behalf of the lessee" on 5 June 1978 and by a director of the appellant, one Sweeney, on behalf of the appellant, on 6 July 1978. The company/

4. company contemplated by the respondent. Optima Motors (Proprietary) Limited, (hereinafter referred to as the company), was incorporated on 27 June 1978. It is common cause that the premises were made available and that the lease commenced on 1 July 1978.

The agreement sued upon is a contract for the benefit of a third party. Three issues were debated in this Court (as in the Court a quo). They were, firstly, whether, as a matter of fact, there was an acceptance by the company of the benefit stipulated in its favour; secondly, whether, as a matter of law and, thirdly, as a matter of construction of the contract, the respondent was personally liable. As a first step towards success it was/

5. it was crucial to the appellant's case to persuade this Court (as it endeavoured to convince the Court a quo) that the company had not accepted because, as was conceded by counsel for the appellant, if the company had accepted the respondent fell out of the contract completely. The evidence on the point is not harmonious. I shall, however, assume without deciding that the company did not accept the benefit of the stipulation.

It was submitted on behalf of the appellant that the respondent contracted with the appellant as "principal" and that consequently he was, prima facie, unless as a matter of interpretation of the contract the parties intended otherwise, personally/

6. personally liable for the performance of the obligations and entitled to the rights of the

lessee flowing from the contract. For this proposition counsel relied upon certain dicta in a number of decided cases. The first case he relied upon is *McCullogh v Fernwood Estate Ltd* 1920 AD 204. In that case Innes CJ pointed out that the trustee who contracts for a company to be formed acts not as agent but in his own name and on his own responsibility for the benefit of another. The contract in question contained a clause holding the trustee personally liable to the contract if the company did not adopt on a certain date. There was nothing said in that case which

supports/

7. supports the proposition submitted on behalf of the appellant.

Reliance was also placed on the decision in the matter of *Ackermann, N 0 v Burland and Milunsky* 1944 WLD 172. It was there decided that the consequence of making a contract for a company to be formed, is that the so-called trustee is acting as principal and that, therefore, if he wishes to bring an action on the contract or to set it aside before the company is formed he must sue in his personal capacity and not in his capacity as trustee for the company.

What the plaintiff claimed in that case

was the return of certain documents which comprised

a banker's guarantee and certain bills and

promissory/....

8.

promissory notes which he had delivered in terms

of a clause in the contract. He also claimed that the contract be set aside and for damages for fraudulent misrepresentation. He alleged in his declaration that he (personally) had parted with the documents and (personally) suffered damages by reason of a fraud which had induced him to enter into the contract and deliver the documents. On these facts the Court found that he should plainly be suing in his personal capacity. This case,

likewise, does not assist the appellant.

In *Semer v Retief and Berman* 1948(1) SA

182 (C), another case to which we were referred,

Ogilvie Thomson AJ said at 194:

"Once/

9.

"Once it be conceded that to contract as trustee in circumstances like these is to contract qua principal, it, in my

view, follows that subject always to the particular terms of the contract in question the trustee will in his personal capacity have rights and be subject to obligations in regard to that contract."

This, clearly, cannot be construed to

mean that the trustee acquires the rights and incurs the obligations of the third party under the contract.

In *Bagradi v Cavendish Transport Co (Pty)*

Ltd 1957

(1) SA 663 (D), another decision relied

upon by counsel, the headnote, which accurately

reflects the judgment, reads:

"As a person who contracts as trustee for a company to be formed contracts as a principal, he may at all times sue on the contract as such principal, unless and

until/

10.

until the company, after it has come into existence, creates a vinculum juris between itself and the promisor by notifying its acceptance of the benefits of the contract. When the company does that, then the person contracting as trustee falls out of the contract altogether. Therefore, unless and until he falls out of the contract altogether, he may accept a repudiation by the other party to the contract and cancel the contract as well as sue for damages. Where he sues as a principal his rights and liabilities are not contingent on the nonadoption of the contract by the company; accordingly it is not necessary for him to aver in his declaration either that the company has refused to accept the agreement or that it has failed to accept it within a reasonable time." (The words "on the contract" were italicised by me).

Here again the Court did not suggest that

the trustee acquired the rights or incurred the

obligations of the third party pending acceptance

of the/

11.

of the benefit.

In the matter of *Gardner v Richardt*

1974(3) SA 768(C) Friedman AJ said at 770E:

"It seems to me that the question whether and the circumstances under which a person contracting as trustee for a company in the course of formation has the right to sue for specific performance of the contract, must be answered by reference to the terms of the particular contract under consideration; it is essentially a question of contraction."

I respectfully agree.

For the reasons stated above I agree with the conclusion arrived at by the Court a quo that the trustee is not personally entitled to exact or obliged to render the performance which is stipulated for the third party unless the contract so provides.

This/

12. This brings me to the third issue. As an alternative to the second issue it was argued on behalf of the appellant that the contract does, if not expressly then at least by implication, provide for the respondent, pending the acceptance by the company of the benefit, to be personally liable. As I have stated above I shall, for the purposes of this branch of the argument, assume that the company did not accept the benefit. In support of his contention in this regard counsel sought to rely on certain clauses in the agreement. He pointed out that it was provided that the lease would take effect from 1 July 1978. In terms of clause 6, he pointed out further, the lessee/

13.

lessee took the premises as they stood and was obliged to notify the lessor of any defect within a period of fourteen days of taking occupation of the premises, failing which the premises would be deemed to be in a good state of repair. If, counsel

urged, the company failed to accept the benefit within fourteen days after the commencement of the lease, the person contemplated as the lessee, obliged to comply with clause 6, could only have been the respondent in his personal capacity. Another clause relied on was clause 11 read with clause 29. Clause 11 provided for the premises to be let only for the purposes specified in the agreement and clause 29 rendered the lease subject to and conditional upon the lessee obtaining the necessary trading licence in/

14.

in order to conduct its business from the said

premises. This clause also required the lessee to undertake to make such application to the relevant authorities immediately upon signature of the lease by the lessor. Regard being had to these two clauses, counsel argued, the only person who could have been contemplated to be the lessee, at least until such time as the company obtained a trading licence, was the respondent because it was unlikely that the company would have accepted the benefit unless a trading licence to conduct the business for which it was formed had been obtained. Reliance was finally placed on clause 23 which entitled the lessor to cancel the contract

upon failure to remedy any breach of the lease

within/

15.

within 14 days after despatch of a written notice calling upon the lessee to do so. As, it was ' contended, no one was indicated as the party obliged to comply with the terms of the agreement prior to acceptance of the benefit by the company, the parties could only have contemplated the respondent in his personal capacity to be the lessee.

I cannot accede to this argument. The contract is a perfectly straightforward one containing standard clauses. The description of the lessee as the trustee for a company to be formed is, per se, no indication, in my view, that prior to the acceptance by the company of the benefit' stipulated in its favour, the trustee would be

16.

personally liable on the contract. It cannot be said, in my view, that the parties necessarily contemplated the acceptance by the company of the benefit after the date of commencement of the lease and that they inserted these clauses to take care of such contingency.

A problem may arise if, pending the formation of the company and acceptance by it of the benefit, performance by the lessee of the terms of a/

17. of a contract which does not also provide for the personal liability of the trustee, falls due. In such a case, in order to stave off cancellation and preserve the benefit for the company, the trustee or somebody else would be compelled to perform but by doing so he would not personally incur any liability under the contract. If the benefit stipulated for arose from a synallagmatic contract the converse would of course, also apply. If, in terms of the contract, the promisor were obliged to perform from the date of its inception, he would have to render such performance either to the stipulator, or to some other person indicated by the latter who would accept/

18.

accept the performance for the benefit of the company to be formed. But that would be done under such agreement as might be concluded,

either tacitly or expressly, between the promisor

and the stipulator. Such agreement would be superimposed upon the written agreement constituting the benefit. Failing performance of the lessee's obligations pending acceptance by the company the promisor can, in my view, do nothing but, on account of such nonperformance, resile from the contract and would not even be able successfully to claim damages from anybody unless he had taken the precaution to provide, as was done in the present case, for the company's

directors/

19.

directors personally to guarantee all the obligations of the lessee in terms of the lease.

The appeal is dismissed, with costs.

JUDGE OF APPEAL

JANSEN JA)

KOTZÉ JA)

concur

GROSSKOPF JA) NICHOLAS AJA)

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