DURITY ALPHA (PROPRIETARY) LIMTED Appellant

and

W A VAGG Respondent

Case No 498/89

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

DURITY ALPHA (PROPRIETARY) LIMITED Appellant

and

W A VAGG Respondent

CORAM: HOEXTER, SMALBERGER, MILNE, STEYN et KUMLEBEN, JJA

HEARD: 26 February 1991

DELIVERED: 21 March 1991

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA,

In the magistrate's court for the district of Durban the appellant company ("Durity") issued a summons against the respondent, Mr William Armour Vagg ("Vagg"), for payment of R1 883,99 together with interest thereon and costs. Vagg resisted the action and the magistrate gave judgment for Vagg with costs. Against the judgment of the magistrate Durity appealed unsuccessfully to the Natal Provincial Division ("the court **a quo**"). Subject to the condition that Durity should bear the costs of a further appeal irrespective of the result, the court **a quo** granted Durity leave to appeal to this court.

On the 23rd December 1985 a company called Natal Ironmongers (Pty) Limited ("the seller") was incorporated. The seller began trading on the 7th January 1986. Vagg was the sole director of a company known as Tongaat Builders (Pty) Limited

("the debtor"). During March 1986 the debtor bought goods from the seller and thereby became indebted to the seller in the sum of R1 883,99.

Durity carries on business as "builders merchants". On the 15th November 1982 Vagg signed a deed of suretyship ("the suretyship"). In terms of the suretyship Vagg bound himself in favour of each of a number of companies ("the creditors") as surety for and co-principal debtor **in solidum** with the debtor for the payment of any sum of money which might then or thereafter become owing by the debtor to the creditors. The creditors were listed in a schedule incorporated in the suretyship, and Durity was one of them.

On the 2nd July 1986 the Durban and Coast Local Division granted an order provisionally winding up the debtor. In due course the order was made final. In December 1986 Durity instituted its action against Vagg. In its summons Durity relied upon the suretyship signed by Vagg. From the further

pleadings filed it appeared that Durity averred that when the debtor incurred its indebtedness of R1 883,99 to the seller the latter was acting as the agent for an undisclosed principal in the person of Durity; and that, in suing Vagg, Durity -

> ".....has elected to make itself known as it is in law entitled to do."

At the trial Vagg appeared in person. The plea to Durity's summons was also drawn up by Vagg. The plea is not ideally clear but it makes plain that Vagg challenged Durity's contention that when the debtor bought goods from the seller the latter was acting as the agent of Durity as the undisclosed principal. Durity was represented by an attorney at the trial. Three witnesses were called on Durity's behalf: Mr B C Warner, Durity's financial manager; Mr A M Latter, the seller's managing director; and Mr H F W Hirsch, Durity's credit manager. Vagg was the sole witness for the defendant. A full exposition of the pleadings in the action together with an analysis of the evidence given by Durity's witnesses is to be found in the

judgment of the court **a quo**, delivered by BROOME, J and concurred in by ALEXANDER, J, which has been reported: **Durity Alpha (Pty) Ltd v Vagg 1989(4)** SA 1066 (N). In passing I point out a typographical error in the reported judgment: the date on which the document, exh F, was signed (see the report at 1067C-D) was the 27th May 1987. The fact that the judgment of the court **a quo** has been reported renders here unnecessary, save in the respects later to be indicated, any recapitulation of the facts.

Following upon his review of the facts BROOME, J (see 1069 H-I) proceeded to consider whether Durity had succeeded in establishing a case -

> "....within the ambit of the two agreements it relied upon, suretyship and agency."

The learned judge dealt at once with an argument by counsel who appeared for Vagg in the court **a quo** to the effect (see 1070A) that Durity's reliance upon the suretyship was precluded by the provisions of sec 6 of the General Law Amendment Act 50 of 1956

as amended. BROOME, J upheld the argument (see 1070A/1072B); and this conclusion, so observed the learned judge at 1072B-C, made it unnecessary for him -

> "....to examine the somewhat curious arrangement whereby Ironmongers are said to carry on a retail business as agents for plaintiff."

Before us the finding of the court **a quo** that Durity was not entitled to invoke the suretyship was vigorously attacked by Mr **Gordon** who appeared for Durity; while from Mr **Magid**, who had not appeared in the court **a quo** but who argued the case for Vagg before us, there was but faint support for it. It seems to me, with respect, that the court **a quo** erred in its conclusion that the provisions of sec 6 of Act 50 of 1956 precluded Durity's reliance upon the suretyship. I prefer to say nothing further in this regard because in my view it is clear, in any case, that Durity failed to discharge the onus of proving that at the time when the debtor incurred its indebtedness of R1 883,99 Durity had authorised the seller to act as its agent. The sufficiency or

otherwise of the meagre and imprecise evidence adduced on behalf of Durity in regard to this critical issue in the case was the matter chiefly debated during argument in this court.

The cornerstone of Durity's claim against Vagg was the agreement embodied in exh G, and more particularly the fact that clause 3 thereof "recorded" the appointment of the seller as Durity's agent "from the effective date". As the author of exh G seems to have appreciated, this was an essential ingredient of Durity's cause of action: where at the time when he contracts with the third party the "agent" does not have authority from the "undisclosed principal" to contract on the latter's behalf, there is no room for any subsequent ratification by the "undisclosed principal". See: **Keighley, Maxsted & Co v Durant** 1901 A C 240 (HL); **Louwrens v Clulee** 1911 TPD 192 at 195; **Dawson v I M & J F van Rooyen** 1914 NPD 481 at 484/5.

Under cross-examination Warner was asked whether there could be found any documentary evidence that the contract

reflected in exh G had existed before the 15th July 1986. Warner responded by saying:-

> "....the basis on which the Durity Alpha Group works is that all operations conducted by the group are under agency and undisclosed principal agreements, and there are numerous other companies with prior agency agreements. So it is natural for us to continue in the way we have in the past, **and it was always the intention of the management of the company that Natal Ironmongers would operate on the agency basis,** but that the agreement was not recorded in writing until July 1986." (Emphasis provided.)

The witness Latter, was asked whether the agency agreement was evidenced in the minutes of meetings of the seller's board of directors. His answer was:-

> "Not as far as I know."

Exh G was signed twice by the same person. According to Warner the signatory in question was one Trusler, who was not only the managing director of Durity but also a director of the seller. **Ex facie** exh G Trusler signed first on behalf of Durity and then again on behalf of the seller. In each case the following words appear beneath his signature:-

"....who warrants that he is duly authorised hereby (sic)".

Trusler was not called as a witness.

In regard to exh G and its probative value in the case the following questions suggest themselves: (1) Was there proper proof of its contents? If so: (2) Did it constitute a valid contract despite the fact that its signatory purported to represent both contracting parties? And if so: (3) Does exh G in the contextual setting of the evidence as a whole establish that at the effective date Durity appointed the seller as its agent and that the seller accepted such appointment?

Exh G is a private document. That it was duly executed requires proof that it was signed by the person by whom it purports to have been signed. Although Trusler himself was not called as a witness, I shall assume that the evidence of Warner provided acceptable proof that exh G was in fact signed by Trusler.

The question whether a person may, as the representative of another, contract with himself, either in his personal capacity or as the representative of a third party, is discussed by Professor J C de Wet in Joubert, **LAWSA**, vol 1 paras 107 and 108. I quote hereunder the introductory words of each paragraph:-

> "107. **Contracts concluded by a representative with himself**
> As a contract is a juristic act for which expressions of a common intention by at least two persons are required, one person cannot as representative of another conclude a contract with himself. Where a representative purports to conclude a contract with himself the purported contract is simply a nullity. In our case law there is however no clear authority for this obvious proposition.....
>
> 108. **Double representation**
> As pointed out in the preceding paragraph a person cannot as representative of another conclude a contract with himself. For the same reason he cannot conclude a contract on behalf of one person with himself as representative of another person....."

In **Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd** 1984(3) SA 155(A), and despite the views thus expressed by Professor De Wet, it was for purposes of that appeal assumed by this court (per CORBETT, JA at 164E-F) -

> ".....that it was legally competent for Melamed, in his capacity as managing director of TMC, to make a contract with himself, in his other capacity as partner in the firm of Melamed and Hurwitz, in terms whereof the latter was appointed as conveyancer for all the erven in the townships."

For purposes of the present appeal I am likewise prepared to assume, without deciding the issue, that it was legally competent for Trusler to have represented both Durity and the seller when exh G was concluded.

Upon that supposition I proceed to consider whether Durity discharged the onus of proving that at the effective date (whether it be regarded as the 1st December 1985 (see exh G) or the 7th January 1986 (see exh F)) the seller was the agent of Durity.

In the instant case exh G purports to constitute an express contract. And although it was only signed on the 15th July 1986 it records (see clauses 3.1 and 3.2 quoted in the reported judgment of the court **a quo** at 1069E-F) the appointment of the seller as Durity's agent from a much earlier date. That, however, is not the end of the matter. The situation is complicated by two important attendant features. The first factor arises from the evidence of Warner and Latter. The fact that the seller was a subsidiary of Durity cannot alter the fact that the seller was a **persona legis** which could only act through its directors or through a manager duly appointed by its directors to act on its behalf. In response to the allegation contained in Vagg's plea (see 1067 I-J) that exh G -

> "....was backdated to 15 December 1985."

Durity replicated (see 1068C-D) as follows:-

> "1.1 The plaintiff denies that the agreement appointing Natal Ironmongers (Pty) Ltd ('the company') as agent for the plaintiff was entered into on 15 July 1986.

1.2 The agreement referred to was concluded at the time the company was registered.

1.3 The plaintiff only formalised the agreement in writing on 15 July 1986."

At the trial, however, Durity led no evidence in support of the above-quoted averments in its replication. There is not a tittle of evidence to establish that at the date of registration of the seller there existed an express contract embodying the terms set forth in clauses 3.1 and 3.2 of exh G. The effect of the testimony of Latter, who was the seller's managing director, was that the seller had in its possession no minute or other documentary evidence to show that prior to the execution of exh G the seller had accepted an appointment as Durity's agent. And Warner's evidence points to the conclusion that, although at the time when the seller commenced trading the management of Durity might have intended that the seller should act as Durity's agent, untii the signature of exh G such intention was never manifested in words. In the result, Durity's

assertion that in March 1986 the seller was its agent, must hinge on some or other proof that at that time there existed between Durity and the seller a tacit contract in terms whereof the seller was Durity's agent.

Now in order to determine whether a tacit contract has come into existence the court must examine the conduct of the parties concerned and the relevant surrounding circumstances. It is in this connection that the second complicating factor in the present case emerges. For the reasons which follow I consider that there is here no evidence of the conduct of the parties from which the existence of a tacit contract may safely be inferred.

When Latter was pointedly questioned by the magistrate in regard to the relationship between the seller and Durity, his non-committal response (see 1069B) was:-

> "They (i e Durity) are our holding company.
> I don't know the technicalities."

Furthermore, although exh G reflects a bilateral contract,

Trusler signed it on behalf of both parties. Acting in two different representative capacities, Trusler in effect concluded a contract with himself. In the **Joel Melamed and Hurwitz** case (**supra**) the cause of action on the main claim (see 162G-H) was based on an allegation that an individual, acting in two different representative capacities, had concluded a contract with himself. In favour of the appellant in that case this court was prepared to assume that where but a single individual was involved a tacit contract might be inferred from the conduct of that one person alone. This court stressed, however, that in such a situation the evidence of the single person concerned required close examination. The following remarks of CORBETT, JA (at 165 G-I) are pertinent to the facts of the instant case:-

> "In the cases concerning tacit contracts which have hitherto come before our Courts, there have always been at least two persons involved; and in order to decide whether a tacit contract arose the Court has had regard to the conduct of both parties and the circumstances of the case generally. The general approach is an objective one. The subjective views of one or other of the persons involved as to the effect of his actions

> would not normally be relevant (cf **Spes Bona Bank** case **supra** at 985B-H). I shall assume, in appellant's favour, that where there is only one person involved (as in this case) a tacit contract may be inferred from **his** conduct and the general circumstances, but in such a case the Court should, in my view, carefully scrutinize his evidence in order to distinguish between statements of fact capable of objective assessment and subjective views as to the matter in issue."

For purposes of the present appeal there may be assumed, in favour of Durity, the propriety of inferring the existence of a tacit contract from the evidence of Trusler alone. His evidence however, indispensable on this crucial issue, was not adduced. It follows that the failure to call him as a witness was fatal to Durity's claim against Vagg; and that the magistrate achieved the correct result in giving judgment for Vagg.

The appeal is dismissed with costs, including the costs of the application for leave to appeal.

G G HOEXTER, JA

SMALBERGER, JA)
MILNE, JA)
STEYN, JA) Concur
KUMLEBEN, JA)