LL Case No 647/1992

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ANDRE WATSON Appellant

and

AMIR SACHS First Respondent

JOHN MARCUS Second Respondent

COURT: VAN HEERDEN, E M GROSSKOPF, F H GROSSKOPF

VAN DEN HEEVER AND HARMS JJA

HEARD: 17 MAY 1994

DELIVERED: 27 MAY 1994

JUDGMENT

VAN HEERDEN JA:

During July 1992 the respondents initiated motion proceedings against the appellant in the Cape Provincial Division. The main relief sought by them was an order directing the appellant to pay to the first respondent the amount received by the former pursuant to the sale of a BMW motor vehicle ("the BMW"). In substance the court a quo (Conradie J) granted this relief by ordering the appellant to pay to the first respondent the sum of R41 500, interest and costs. Hence this appeal with the leave of that court.

The salient allegations in the respondents' affidavits may be summarised as follows:

(1) The first respondent wanted to sell the BMW which belonged to him. In consequence he instructed the second respondent, who traded under the name of John Marcus Motor Auction Centre, to sell the vehicle by public auction. The highest bid at

the auction was, however, less than the reserve price.

(2) The second respondent then instructed the appellant, a motor vehicle salesman, to sell the BMW on behalf of the first respondent at a minimum price of R45 000.

(3) Subsequently the second respondent told the appellant that the first respondent was agreeable to the BMW being sold for R43 000. The first respondent was to receive R40 000 and the commission of R3 000 was to be split between the second respondent and the appellant.

(4) After the BMW had been sold the second respondent instructed the appellant to draw a cheque in favour of the first respondent. The appellant agreed to do so but subsequently relied on setoff because of liquidated amounts allegedly owing to him by the second respondent.

(5) The second respondent was, however, not indebted to the appellant. The latter was in fact a creditor of a close corporation of which the second respondent was a member and which had been liquidated during April 1992.

(6) Prior to the sale of the BMW the appellant told the second respondent that the prospective purchaser would not conclude a sale unless

| he was satisfied that the BMW had been fully paid

for. In consequence the second respondent gave the appellant a document provided by Pride Car Hire which proved that the first respondent had paid for the BMW in full. Only then was the sale concluded.

In his opposing affidavit the appellant alleged that he was asked by the second respondent to sell the BMW on his behalf, and denied that at any stage prior to the sale of the BMW he had been informed that the vehicle belonged to the first

respondent or to any person other than the second respondent. The latter indeed requested him to forward the proceeds of any sale to the second respondent. The BMW was sold by the appellant at the beginning of July 1992 for R43 000 entitling him to a commission of Rl 500. At that stage the second respondent (and not any close corporation) owed the appellant the amounts of R30 500 and R10 000, a total of R40 500. He then informed the second respondent that he was invoking set-off leaving a balance of R2 000 owing by him to the second respondent. Payment of this amount had been tendered to the second respondent prior to the institution of the proceedings and the tender was repeated in the opposing affidavit.

A letter written by the appellant's attorneys to the second respondent's attorneys casts some doubt on the appellant's averment that the amount of

R30 500 was owing to him by the second respondent personally. However, the letter is ambiguous and one cannot on the strength of it conclude that the aver-ment is so implausible that it must be rejected on the papers as they stand.

Because of the factual conflicts emerging from the papers Conradie J assumed in favour of the appellant that:

(7) the second respondent owed the appellant the amount of R39 500;

(8) before he invoked set-off the appellant had not been instructed that the proceeds of the sale were due to the first respondent and not to the second respondent;

(9) when the appellant was given his mandate by the second respondent he did not know that the BMW belonged to any one other than the second respondent.

went on to find, however, that before he sold the BMW the appellant knew that the vehicle belonged to the first respondent. This finding was based mainly on the appellant's failure to deny the allegations set out in (6) above, his only answer being that he had no knowledge of the first respondent's ownership of the BMW. Conradie J also pointed out that there was nothing to indicate that when the mandate ("the main mandate") was given to the second respondent the first respondent authorised him to appoint a subagent, and that the terms of the mandate ("the second mandate") given by the second respondent to the appellant did not appear from the papers. In particular it did not appear whether in terms of the second mandate the appellant was obliged to account to the first or second respondent. Since, however, in his view the first respondent had clearly ratified the second respondent's

acts, he approached the matter on the footing that the second respondent all along had authority to appoint the appellant as his subagent.

The reasoning of Conradie J which led to his conclusion that the appellant was accountable to the first respondent ran along these lines. When a subagent is appointed with power to establish legal relationships between the principal and another, a contract is at the same time created between the subagent and the principal. The subagent may then be contractually bound to both the principal and the agent, and the extent of his obligations to each will depend upon a construction of the main and second mandates. Each agent would then incur a fiduciary duty towards the principal. Dependent upon the circumstances it may be unfair for the principal to ignore the agent in demanding a direct accounting from the subagent since the agent may be vitally

interested in payment to him by the subagent. In such a case the subagent would not be under a fidu-ciary duty to account to the principal. In casu the appellant did not act in good faith and in accordance with his fiduciary duty towards the first respondent by insisting on an accounting to the second respondent who disavowed such an accounting. Nor did the appellant take the required care of the principal's (the first respondent's) affairs by seeking to have his claim against the financially unstable agent (the second respondent) discharged by set-off at the cost of the principal (the first respondent) who would be unlikely to recover from the agent. In sum, the appellant was in breach of the fiduciary duty owed by him to the first respondent to account to the latter. Hence he was only entitled to retain his agreed commission of Rl 500.

In passing I should mention that there is

nothing in the papers to indicate that the second respondent was in fact financially unstable. The circumstance that a close corporation, of which he was a member, was liquidated scarcely gives rise to an inference that his own financial position was precarious.

On appeal the judgment of the court a quo was assailed on various grounds. For reasons which follow I shall deal with only one of them, i e that the appellant was not obliged to account to the first respondent, and shall do so on the assumption, in favour of the respondents, that the second respondent was authorised to appoint the appellant as subagent.

The question whether full privity of con-tract is created between a principal and a subagent has been discussed in a number of cases. (For con-venience, albeit somewhat inaccurately, I use the phrase "full privity of contract" to denote a con-

tractual relationship in terms of which the subagent

is inter alia obliged to account to the principal.)

In the main the courts have relied upon Voet 17.1.5

and 8. The second passage reads as follows:

> "If the mandatary has in turn entrusted the business entrusted to himself to some other person, no action is available to the first mandator against the second mandatary, but the first mandator ought to sue the first mandatary, and the latter in turn to sue the second mandatary."

(Voet 17.1.5 and Huber 3.12.37 are to the same effect.)

It is not at all clear to me that these passages relate to a mandate to create a contractual relationship between a principal and a fourth party. But even if they do, Voet and Huber do not profess to deal with the situation where a principal has ex-pressly or impliedly authorised an agent to appoint a subagent. It was no doubt for this reason that in Gertenbach and Bellew v Mosenthal and Others 1876 B

88, 91, De Villiers CJ said:

> "I do not think that Voet meant to lay down that an agent is in all cases liable for the default of his sub-agent, even when in the ordinary course of business it becomes necessary to employ such sub-agent, and there is no negligence on the part of the agent. I apprehend that where the ordinary custom is to employ a sub-agent for a particular purpose, the agent would be justified in employing one."

And in Kennedy v Loynes 26 SC 271, 280, he said, with reference to the above passage:

> "I still consider, as I then did, that this principle [enunciated by Voet] was not intended to apply to cases where in the ordinary course of business it becomes necessary for the agent to employ a sub-agent. If the custom is established and well known, it would be no violation of that principle to hold that a privity is thus created between the principal and the subagent."

It would appear that De Villiers CJ thought that if a subagent is appointed by an agent having implied authority to do so, full privity of contract is created between the principal and the subagent.

13 In Murray v Cammack 1884 HCG 12, an agent was held not liable to the principal for monies received by a "subagent" on behalf of the principal. However, it seems clear that in this case the "sub-agent" was substituted for the agent so that the former became the principal's agent.

Some authority for the view that full privity of contract exists between a principal and a subagent appointed by an empowered agent can, however, be derived from Willson v Tatham, and Tatham v Willson 1898 NLR 35, and Steenkamp v Du Toit 1910 TS 171. Contra, possibly, Campbell v The London and South African Bank 1 Roscoe 419.

Most of the above cases seem to have proceeded from the premise that where an agent ("an empowered agent") is authorised to appoint a subagent and does so, there is full privity of contract between the principal and the subagent. That, in my

view, is a wrong premise. It is necessary to draw a distinction between the relationship created by a subagent between the principal and a fourth party, and the relationship between the principal and the subagent. When the subagent concludes an authorised agreement with the fourth party he binds the princi-pal. This is so because he was authorised to enter into such an agreement by the agent who in turn was authorised by the principal to appoint a subagent. Because of the latter authority an agreement also came into being between the principal and the sub-agent. Put differently, when appointing the subagent the empowered agent on behalf of the principal clothed the subagent with authority to bind the principal. Hence the subagent was vis-à-vis the principal contractually authorised to conclude an agreement between the principal and the fourth party. But whether full privity of contract was created

between the principal and the subagent is another

matter.

Having referred to the above cases Steyn J

in Turkstra v Kaplan 1953 (2) SA 300 (T) said (at p

304B-F):

> "Nou kan wel aangeneem word dat 'n lasgewer wat weet dat die uitvoering van sy opdrag die aanstelling van 'n tweede gelastigde vereis, of dat dit handelsgebruik is om een aan te stel, stilswyend toestem dat die eerste gelastigde 'n tweede mag aanstel, maar daar volg nog nie dat hy toegestem het tot 'n aanstelling waardeur hy die lasgewer van die tweede gelastigde word nie. Sy bedoeling, afhangende van die omstandig-hede kan net so wel wees dat die aanstel-ling so moet geskied dat die tweede lasnemer slegs die gelastigde van die eerste is. Sy toestemming is nie vir net 'n enkele betekenis vatbaar nie. En al sou hy ook 'n kontraktuele verhouding tussen homself en die tweede lasnemer beoog, dan moet nog blyk, uit die kontrak tussen sy gemagtigde en die tweede lasnemer dat laasgenoemde horn teenoor die eerste las-gewer verbind, en nie net teenoor sy gemag-tigde nie. Eers as dit wel blyk sou daar die nodige regsverhouding ("privity") tussen die prinsipaal en die sub-agent wees."

 Steyn J went on to say that in Kennedy De Villiers CJ failed to give recognition to the requirements formulated by him in the above quoted passage.

This passage was referred to with approval in Karaolias v Sulam t/a Jack's Garage 1975 (3) SA 873 (R) 875G and Denys v Elvy 1965 (2) SA 410 (SR) 411E-F), and in my view correctly reflects the legal position. See also De Villiers and Macintosh, The Law of Agency in South Africa, third ed, pp 312-315.

English law appears to be to the same effect. See Bowstead, Agency, 15th ed, pp 130-131, and Halsbury, The Laws of England, 4th ed, vol 1(2), pp 52-3. Indeed, the views expressed in Turkstra are echoed in the following passage from Calico Printers' Association v Barclays Bank 145 LT 51,55 (CA):

> "... English law ... has in general applied the rule that even where the sub-agent is properly employed, there is still no privity between him and the principal;

> the latter is entitled to hold the agent liable for breach of the mandate, which he has accepted, and cannot, in general, claim against the sub-agent for negligence or breach of duty. I know of no English case in which a principal has recovered against a sub-agent for negligence. The agent does not as a rule escape liability to the principal merely because employment of the sub-agent is contemplated. To create privity it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof."

It is therefore clear that in English law there is no privity of contract, or at least not full privity of contract, between the principal and the subagent merely because the principal authorised the employment of a subagent. In this respect English law apparently differs from American law: American Jurisprudence, 2nd ed, vol 3, pp 670-1, and Corpus Juris Secundum, vol 3, pp 111-2.

From what has been said above it follows that in order to determine the relationship, if any, between a principal and a subagent one must look at both the main and the second mandate. As has been pointed out, these may clothe the subagent with authority to bind the principal to a fourth party. Whether they also create full privity of contract between the subagent and the principal, with inter alia the result that the principal may claim monies received by the subagent from the fourth party as a result of an agreement concluded between the latter and the subagent, acting on behalf of the principal, depends upon the terms of the mandates. So, for instance, the main mandate agreement may provide, expressly or impliedly, that once a second mandate agreement has been concluded the principal will have no cause of action against the agent and will have to recover whatever is due from the subagent. But even

if the main agreement does so provide, the subagent appointed in terms of the second agreement may not be liable to account to the principal. That will depend upon the terms of the second agreement. Hence, if that agreement provides that the subagent must ac-count to the agent, the principal cannot recover from the subagent.

When using the word "account" in what has been said above, I had in mind an obligation of the agent or subagent to pay over or deliver to the principal the money or goods received from the fourth party in terms of an agreement concluded between him and the empowered subagent on behalf of the principal. In English law, however, a subagent may even in the absence of full privity of contract be held liable to the principal as a fiduciary. Thus, should an empowered subagent receive a secret commission from the third party, the principal may recover the

amount from him on the ground of breach of a fidu-ciary duty owed by him to the principal. (See, e g, Powell and Thomas v Evan Jones and Co (1905) 1 KB 11 (CA)) . It was apparently this rule that was applied in casu by Conradie J. However, the existence of such a duty is something different from the duty to account in the sense indicated above. At the risk of repetition it must again be emphasised that even in the absence of full privity of contract a contractual relationship exists between the principal and an empowered subagent. This is created by the authorised appointment of the subagent by the agent. It is this relationship which empowers the subagent to bind the principal to a fourth party and it may well be that in our law it also gives rise to the fiduciary duty recognised by English law. Its existence does not, however, in itself create a further duty for the subagent to account to the

principal in regard to the contractual prestation received from the fourth party. That, as I have been at pains to stress, depends upon the terms of both mandates.

For the purposes of this appeal it suffices to deal with the second mandate agreement. In the respondents' affidavits no more was said than that the second respondent gave a mandate to the appellant to sell the BMW on behalf of the first respondent. In the opposing affidavit it was averred that the appellant was instructed to sell the vehicle on behalf of the second respondent and was requested to forward the proceeds to him. If these averments are correct, the second mandate agreement did not create a duty upon the appellant to account to the first respondent for those proceeds. On the contrary, on this assumption that agreement provided for an accounting by the appellant to the first respondent.

In this regard it is of some interest to note that, in a letter written by the second respondent's attorneys to the appellant prior to the bringing of the application, payment of the sum of R43 000 was demanded on the second respondent's behalf, and that no explanation for this demand was given in the respondents' affidavits.

Counsel for the respondents submitted that when the appellant received the proceeds of the sale of the BMW they became the property of the first respondent; that the appellant could not rely on set-off because he owed the proceeds in a capacity other than the one in which he was a creditor of the second respondent, and that in any event the first respondent had a delictual claim against the appellant in respect of those proceeds. It suffices to say that these submissions are devoid of merit.

The respondents did not file a replying

affidavit. Nor did they apply for the referral of any factual dispute for the hearing of oral evidence. It follows that on the appellant's averments which he did not reject, and could not have rejected, Conradie J should not have granted the application. It is therefore unnecessary to consider whether, on the respondents' version, they established full privity of contract between the appellant and the first respondent.

In this court, however, counsel for the appellant submitted in the alternative that the matter should be referred back to the court a quo for the hearing of oral evidence. Assuming that this court may make such an order when the respondents failed to apply for the hearing of oral evidence in the court a quo, I do not think that this is a case where it should be made, especially since the respondents' affidavits were silent as to the terms

of the mandate, if any, granted by the first respondent to the second respondent. On the other hand, and as already pointed out, the appellant's version that the amount of R30 500 was owing to him by the second respondent, and not by a close corporation, is at least open to some doubt. I am therefore of the view that justice will be served, and some costs be saved, by the order formulated below.

In conclusion I should mention that the appellant applied for leave to adduce further evidence. Because of the outcome of this appeal that application, which was defective in some respects, has in any event become academic.

The appeal succeeds with costs and the following is substituted for the order made by the court a quo:

"The matter is referred to trial. The notice of motion shall stand as a summons

and the answering affidavit as notice of intention to defend. The date of such notice shall be deemed to be 27 May 1994. The costs of the application will be costs in the action."

H J O VAN HEERDEN

E M GROSSKOPF JA
F H GROSSKOPF JA
VAN DEN HEEVER JA
HARMS JA

CONCUR