Case No 568/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

ALEXANDER TALACCHI — First Appellant

PAUL HEGTER — Second Appellant

and

MASTER OF THE SUPREME COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) — First Respondent

NEIL BOWMAN NO — Second Respondent

PHILIP D HERMAN NO — Third Respondent

CORAM: VIVIER, NIENABER, HOWIE, PLEWMAN, JJA et MELUNSKY AJA.

DATE OF HEARING: 9 November 1998

DATE OF DELIVERY: 20 November 1998

JUDGMENT

/HOWIE JA:...

the Italian suppliers ceded their respective claims - said in the cession documents to be claims against Litesell - to first appellant, who is an attorney practising in Johannesburg. On 29 October 1992 he in turn ceded the claims to second appellant who, on the same day, instituted two actions against Litesell, each based on one of the ceded claims. In that litigation first appellant acted as second appellant's attorney. On 15 December 1992 default judgment was granted against Litesell in each instance. The judgments were not satisfied.

For ease of reference second appellant's claims will be referred to as "the goods claims".

During 1991, first appellant, instructed by Litesell, represented that company in an action instituted against it by another supplier. When his fees were not paid in full he sued Litesell and obtained default judgment against it on 15 December 1992. That judgment was also not satisfied. I shall refer to first appellant's claim as

'the fee claim".

Having failed to exact payment from Litesell, appellants lodged their respective claims against the liquidated estate of Lite Magic. Despite opposition from second and third respondents (the joint liquidators) all three claims were admitted at a creditors' meeting. At the liquidators' instance they were subsequently expunged by the Master of the Transvaal Provincial Division acting in terms of s 45(3) of the Insolvency Act, 24 of 1936. Appellants' response was to apply to the court of that Division for an order reviewing and setting aside the Master's decision and directing him to confirm the claims. The Master was cited as the first respondent but he abided by the decision of the Court. The application, which was opposed by the second and third respondents, was dismissed by Vorster AJ, hence the present appeal, which is brought with the leave of this Court. The Master is not a party to the appeal but I shall continue to refer to the individual respondents,

where necessary, as cited on the record.

As regards the fee claim, first appellant, as I have mentioned, received his instructions from Litesell. His claim accordingly arose from a contract with Litesell and the record shows that it was admitted by that company. It is unnecessary to say more than that no possible basis exists on which the claim can now be brought against the estate of Lite Magic and counsel for appellants was understandably unable to suggest one. First respondent was right in expunging this claim.

Turning to the goods claims, appellants' counsel contended, on the footing that Litesell bought the goods as principal, that the take-over constituted or embodied a stipulatio alteri. In terms of such contract, so it was argued, Lite Magic undertook, as against the suppliers, to be liable to pay them direct without their having to claim payment from Litesell. This benefit having been created for the suppliers' acceptance, they, or appellants, as cessionaries, accepted it. Although such

acceptance occurred subsequent to Lite Magic's liquidation, second appellant was nevertheless contractually entitled, on the aforegoing basis, to claim against the insolvent company. In the alternative, and on the footing that, unbeknown to the suppliers, the real purchaser was Lite Magic, counsel urged that Litesell had contracted on behalf of Lite Magic, the latter being an undisclosed principal. That being so, second appellant was entitled in law to look to the estate of Lite Magic as such principal. Finding the answer to the question which company was the purchaser, is clouded by conflicting allegations and the absence of pertinent evidence from persons best placed to know the true position. In addition, the papers are freely laced with conjecture and argument. Fortunately it is unnecessary for the decision of the appeal to resolve that question for the matter can be disposed of on an alternative basis conforming to the alternative grounds on which appellants' case was argued.

 Acceptance of the submission that there was a stipulatio

alteri depends on the terms of the take-over. In an affidavit made in earlier proceedings and annexed here in support of the founding affidavit, one Alan Goslar stated that at all times relevant to the purchases in question Litesell had no assets because "its entire business undertaking, including all liabilities" had been taken over by Lite Magic with effect from the take-over date. Goslar was an equal shareholder with one Osvaldo Perosino in Lite Magic prior to the take-over and as a result of the take-over became an equal shareholder with Perosino in Litesell. It must be assumed therefore that Goslar could speak with first-hand knowledge of what the take-over entailed. In the affidavit referred to he went on to add that he and Perosino had decided (presumably at the time of the take-over) that Litesell would no longer trade thereafter. He also made a brief confirmatory affidavit which second respondent annexed in support of the respondents' opposing affidavit. In neither of Goslar's

affidavits is there any indication that the take-over included provision for

a benefit capable of acceptance by any third party or that the fact of the

take-over was even to be communicated to any third party. No affidavit by Perosino forms part of the papers but in his reports as sole director of Litesell in that company's annual financial statements for the financial years ending 28 February 1989, 1990 and 1991 he said no more than that "(w)ith effect from 1 March 1988 the company disposed of its business undertaking as a going concern to an associated company at book value and ceased trading". Here, again, is evidence of rights and obligations pertaining to no party additional to the two companies themselves.

On the available evidence of what the take-over entailed, the liabilities assumed obviously referred to Litesell's existing liabilities. There is no reason to construe the agreement as also including future trade liabilities, such as the present goods claims. If the intention of Goslar and Persino was that Litesell would not trade after the take-over there

would have been no reason to contemplate any future trade liabilities of Litesell and no reason for Lite Magic to undertake to pay any such debts. It follows that there is no justification for the conclusion that Lite Magic gave such undertaking to Litesell, much less that it was prepared to give it to any third party. Moreover, if purchases were to be made after the take-over obviously the contemplation of the parties to the take-over would have been that Lite Magic would contract directly with the suppliers as and when necessary, whether as principal or through Litesell as disclosed agent. Alternatively, if the agency were undisclosed the contemplation would have been (had the parties thought that far) that Lite Magic would be liable as undisclosed principal. In none of these circumstances would it have been necessary, nor would the two companies have intended, that provision be made for the accession to the take-over agreement of a third party so that on that agreement such third party could sue Lite Magic.

10 Accordingly, on a proper construction of the take-over, such as the evidence presents that agreement, it encompassed no stipulatio

Before dealing with the appellants' argument based on the doctrine of the undisclosed principal it is appropriate, for the sake of completeness, to dispose of two other theoretically possible constructions of the companies' respective roles regarding the purchases in issue. One is that Litesell acted as disclosed agent for Lite Magic. That is not the evidence and neither appellants nor respondents contended for it. The other is that Lite Magic purchased as principal, without the agency of Litesell. In that situation, of course, if, as the evidence shows, the suppliers believed they were dealing, and intended to deal, with Litesell, there would have been no consensus necessary for the existence of a contract between them and Lite Magic, on winch the estate of the latter could now be held liable.

11 Turning, then, to the argument that Lite Magic was Litesell's undisclosed principal, the legal position is that when the existence of such principal is discovered, the party who has up to that stage dealt with the agent believing the latter to be the principal, has a choice to sue either the agent or the principal. If the choice is made to sue the agent, in the knowledge of the existence of the principal and of the availability of an action against the latter, then that choice is binding. In these respects the law was stated in Natal Trading and Milling Co Ltd v Inglis 1925 TPD 724 at 727 and confirmed by this Court in Cullman v Noordkaaplandse Aartappelkemmoerkwekers Koöperasie Bpk 1972 (1) SA 761 (A) at 771 H. The liability is alternative, not joint and several.

The evidence reveals the following. By early February 1992 first appellant, on instructions from Perosino and his wife, was acting for Litesell in proceedings aimed at establishing that it, and not Lite Magic, was purchaser and owner of the goods in question. Thereafter he

received a letter dated 23 January 1992 in which second respondent introduced himself as a joint provisional liquidator of Lite Magic. The letter went on:

> "I have been given to understand that there are certain creditors, including yourself, whose claims may be recorded in the name of Litesell Distributors (Pty) Limited. It would appear mat the company has been dormant for some time insofar as it has not actively traded. What appears to have transpired is that goods were imported by the liquidated company through Litesell Distributors (Pty) Limited as that company had an import permit.
>
> Creditors whose claims are in the name of Litesell Distributors (Pty) Limited could proceed against that company which in turn might then have a claim against the liquidated company arising out of the stock transactions. In view of the circumstances the Joint Liquidators would consider admitting the claims of Litesell Distributors (Pty) Limited creditors, as claims against the insolvent company and for this purpose I enclose claim documents and invite your comments."

Second respondent wrote to first appellant again on 5 February 1992. He said:

> "I have had discussions with both Mr and Mrs Perosino in connection with the affairs of the company and its relationship with Litesell Distributors (Pty) Limited. At no stage was I advised by either of your clients that any stocks were claimed to vest in Litesell Distributors (Pty) Limited. On the contrary, I was informed that all stocks belong to the liquidated company and that Litesell Distributors (Pty) Limited had been dormant for some years. I was advised that certain stocks were imported in the name of Litesell Distributors (Pty) Limited purely for convenience as that company had an import permit. I was also advised that certain creditors claims may be in the name of Litesell Distributors (Pty) Limited as that company, when it was trading in the wholesale division, had accounts with certain creditors, and purchases were continued after Litesell Distributors (Pty) Limited became dormant in the same name merely for convenience. All stocks were taken into the accounts of the liquidated company who made payment of the various creditors claims directly.

> I confirm that your clients may inspect the stock sheets, stock, invoices and available books of the liquidated company and you will arrange for them to communicate with me to make the necessary arrangements in this regard."

Second respondent went on to add that Goslar, too, had told him that all the stock belonged to Lite Magic.

First appellant answered the earlier letter on 19 February 1992, expressing his surprise at being invited to lodge the fee claim against Lite Magic and explaining such surprise on the following basis:

> "(Y)ou must be aware that Litesell imported goods after 1st March 1988 and that litigation followed which was settled on behalf of Litesell as a result of which Litesell retained ownership of the imported goods.
>
> Your invitation to lodge a claim against Lite Magic and thereby obtaining a dividend other than the full amount due to me is rather astonishing. Litesell is perfectly solvent and will in due course pay my frill

account."

The later of second respondent's letters was answered by first appellant on 18 February 1992 by way of a comprehensive denial, motivated in detail, that Lite Magic was purchaser or owner of the goods. In the course of the letter first appellant revealed his having full knowledge of the relevant invoices and stock sheets as well as the financial statements of Litesell for the years 1989 and 1990 which contained Perosino's report, mentioned above, that Litesell's business was taken over on 1 March 1988, after which date it ceased to trade.

Not only that. First appellant instructed a firm of accountants to investigate the allegation that Litesell did not trade beyond the take-over date. In March 1992 they wrote a letter to him reporting a discussion with the auditor of Litesell who confirmed the take-over and the fact that Litesell was dormant from the take-over date onwards. The letter enclosed income tax assessments consistent with that position.

16 In the knowledge of all this first appellant chose to pursue the goods claims against Litesell to judgment rather than to sue Lite Magic. What is significant is mat he did not do so on the ground that Lite Magic was not liable. He did so on the basis, expressed with regard to his fee claim, that he preferred (understandably enough) to obtain full payment from Litesell rather than a liquidation dividend from the estate of Lite Magic.

In his founding affidavit he endeavoured to explain his decision now to claim from the estate. He said:

> "21 Having regard to the aforegoing and the fact that the liquidators had undoubtedly examined the books of account of the insolvent company and Litesell and had consulted with Goslar, I was obliged to accept the joint liquidators' attitude as being correct and that Litesell had been a dormant company since 1st March 1988 and its liabilities were taken over by the insolvent company. In the result my claim and the (goods) claims ... factually were the liabilities of the insolvent company."

That cannot help him. As the aforegoing survey of the evidence shows, he knew those facts before the various judgments were taken against Litesell.

Second appellant is bound by first appellant's election. It was made either qua cedent before the cessions to second appellant or it was made thereafter quo second appellant's attorney.

It follows that after the election Lite Magic was not liable as undisclosed principal, that the goods claims were correctly expunged and that the appeal cannot succeed.

As to costs, respondents were represented by two counsel at the hearing of the appeal and in mat respect the costs of two counsel were requested. Counsel for appellants advanced no objection. It suffices to say no more than that, given the factual issues canvassed both in the affidavits and in argument, and having regard to the legal questions debated before us (albeit that decision on all of them has proved to be

unnecessary), respondents acted reasonably in briefing two counsel for the hearing.

The appeal is dismissed with costs, such costs to include the costs of two counsel where two counsel were employed.

CTHOWIE

VIVIER JA)
NIENABER JA)
PLEWMAN JA) CONCUR
MELUNSKY AJA)