IN THE HIGH COURT OF SWAZILAND

a: Lynds

LYNDS DISTRIBUTORS(PTY) LIMITED

vs

APPLIANCE MANUFACTURES SWAZILAND (PTY) LIMITED

Case No. 1018/98

Coram S.W. SAPIRE, A C J

For Applicant MR. FLYNN

For Respondent MR. SMITH

JUDGMENT

(19/06/98)

This is an application which was brought as a matter of urgency and in which the applicant sought an order for specific performance by the respondent of its obligations to give transfer of immovable property in terms of a contract entered into between the parties.

The grounds of urgency advanced by the applicant to justify special treatment of this application are arguably insufficient. When the matter came before me however, both sides had prepared affidavits in which their respective cases were set forth and the question of urgency became academic except perhaps in so far as costs are concerned.

The applicant's case is a simple one. It says that in terms of a written deed of sale a copy of which is attached to the founding affidavit it purchased immovable property from the respondent. Allegations were made that the purchase price had been tendered and a guarantee established as contemplated in the agreement. It is also alleged that the respondent had delayed in giving transfer of the property. The local conveyancers were unable to explain the delay except by saying they were unable to obtain proper instructions from their correspondents and that the respondent's directors were not available.

When the respondent filed its reply the reasons for not proceeding with the transfer were explained.



a: Lynds

In short, the respondent's case is that the agreement relied on by the applicant was not concluded by someone having the authority so to do. The respondent's opposing affidavit is attested to by one Francois Johannes Du Toit. He described himself as an adult businessman and director of companies residing at Pelgrimrus No. 4, Centurion, Gauteng Province, Republic of South Africa.

He states in paragraph 3, probably having in mind what he was to say in the succeeding paragraphs of the affidavit, that he has been properly authorised to act on behalf of the respondent and to depose to the affidavit on behalf of the respondent in these proceedings.

It has been often drawn to the attention of litigants and their attorneys that no one requires the authority of

a party to the litigation to attest to an affidavit to be used therein. The act of giving evidence under oath whether orally or by way of affidavit is personal to the person giving the testimony. He requires no authority so to do.

The deponent stated Respondent's case bluntly 'paragraph 4 of the affidavit. The outcome of this application the respondent says depends on the question as to whether the agreement of sale executed on the 31st December 1997 by the applicant and on behalf of the Respondent by the deponent is void or enforceable.

The first argument in support of this submission of invalidity was that as the sale of the property amounted to the disposal of the whole or substantially the whole of undertaking of the company or the whole or the greater part of the assets of the company, such transaction was invalid because the approval of the general meeting of the company had not been obtained. This argument was advanced on the basis that the Swaziland Companies Act contained a provision similar to that found in Section 228 of the South African Companies Act. As this belief held by the deponent is mistaken and as there is no provision of the Swaziland Companies Act to the effect of the provisions of Section 228 of the South African Act this, argument for the invalidity of the agreement could not be maintained.

The argument was then advanced that the articles of the company require, (and this accords with the minimum number of directors prescribed by the provisions of the Companies Act), that there be a minimum of two directors to enable the company to carry on business. As the authority to conduct the business of the company is vested in the board of directors, any transaction entered into by an individual who was a sole director of the company would be invalid . In other words if the number of directors of the company for any reason fall below the statutory minimum which was also adopted in the articles the business of the company could not validly be carried on until a second director was appointed.



a: Lynds

The applicant answered this argument and attempted to meet the point by relying on what was said to be the rule in the Royal British Bank vs Turquand(1856)6E.&B327, 119E.R886.

The effect of this rule has at times been misunderstood. As a rule a contract or other transaction entered into by a director outside his authority is not binding on the company, A third party, however, acting in good faith is protected if the contract or other transaction was intra vires the company and falls within the ostensible authority of the director or is covered by the rule.

A director, qua director, has no ostensible authority to enter into transactions on behalf of the company.

See WOLPERT v UITZIGT PROPERTIES (PTY) LTD AND OTHERS* 1961 (2) SA 257 (W) in which Claasen J observed

" A single director has ordinarily no authority to bind his company,

and as SERGEANT, L.J., said at p. 267 of Houghton & Co v Northard Lowe and Wills, 1927 (1) K.B. 246:

'I know of no case in which an ordinaiy director, acting without authority in fact, has been held capable of binding a company by a contract with a third party, merely on the ground that that third party assumed that the director had been given authority by the board to make the contract.'

The respondent in this matter like many other companies vests its management in the board of directors and it is only the Board of directors acting as a board which has the power to inter alia enter into the deed of sale disposing of the company's property.. It is of course possible for the board to delegate an individual to act on its behalf but such delegation must be clear, and presupposes that a board which may delegate its functions exists. In this case, on the available evidence the deponent to the affidavit was at

the relevant time the only person appointed. There could therefor have been no board in view of the requirement of a minimum number.'

And ROSEBANK TELEVISION & APPLIANCE CO (PTY) LTD v ORBIT SALES CORPORATION (PTY) LTD 1969 (1) SA 300 (T) Nichilas in the course of his judgment said

'But even if it be assumed that Ginsberg was a director of the defendant during the months of My and August, 1966, when the purchases were made from the plaintiff, it would not, of course, follow from that fact alone that he was authorised to act on behalf of the defendant company. A director is not as such an agent of his company. (See Robinson v Randfontein Estates Gold Mining Co. Ltd., 1921 AD 168 at A pp. 217 - 218, and Wolpert v Uitzigt Properties (Pty.) Ltd. and Others, 1961 (2) SA 257 (W) at pp. 267 - 268). It must be



a: Lynds

proved that he was authorised to act as the agent. Such authority to bind his company may be inferred from a course of dealing inside the company itself. See Robinson's case, supra at pp. 181. 217, and Dickson v Acrow Engineers (Pty.) Ltd., 1954 (2) SA 63 (W). In the case of a private B company with, say, two shareholders, both of whom are directors and both of whom devote their full time and attention to the company's affairs, and who are in fact carrying on a partnership by means of the machinery of a limited company, it would not be difficult to draw the inference that each of the directors was authorised to bind the company. There is, however, no evidence which would justify an inference in the present case that Ginsberg had authority to bind the defendant.

I think that it was proved that Mr. and Mrs. Tame believed that Ginsberg was an agent of the defendant company, and that he was in effect the defendant company. It is clear, however, that that belief was induced in Mr. and Mrs. Tame by the declarations and statements of Ginsberg himself, and not in any way by the declarations or statements of any other person connected with the defendant company. It is, of course, clear that the fact of an agency cannot be established from the declarations of the alleged agent. See R v Koro, 1950 (3) SA 797 (O) E at p. 802; Strathsomars Estate Co. Ltd v Nel, 1953 (2) SA 254 (E) at p. 257.'

In the case of companies a third party contracting with a company is entitled to assume that certain classes of company officials have implied authority to do what is usually associated with the duties exercised by that class (Wolpert v Uitzigt Properties (Pty) Ltd and Others 1961 (2) SA 257 (W) at 265E-267E; Tuckers Land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T) at 14C-15H). In the case of the board of directors, the managing director, or the chairman of the board of directors, it is usually assumed, in terms of the Turquand rule, that all acts of internal management or organisation relating to the exercise of such powers have been properly and duly executed (of Tucker's case supra at 15C-D).

In the present instance the rule in. Turquand's case may have assisted the applicant had a board of directors actually existed. If so it might have been possible for the applicant to have shown that despite there not having been any formal resolution taken the directors, (and I bear in mind that the term director is so defined in the act, to include individuals who may not formally have been appointed but acted as such in fact), were nevertheless in accord in an intent to sell the property and to appoint one of their number as the organ of the company through which the deed of sale would be signed. The uncontroverted evidence in these proceedings is that the deponent was the only director, even if the wide definition of director is applied.

Applying the Turquand rule the applicant is deemed to have been aware that the business of the company could only be effected by a board comprising a minimum of two individuals acting as directors.

It is true that the deponent to the affidavit relied upon by the respondent has acted in a deceitful and

irresponsible manner. His own reservations as to his authority which emerged clearly from the affidavit should have been revealed by him both to the attorney who drew the deed of sale and to the applicant. His liability to the applicant for the obvious and admitted breach of warrant of authority does not fall to be considered in this application.

5

a:Lynds

The part played by the attorneys who drew the deed of sale ostensibly on the respondent's behalf and who prepared what is referred to as an extract of the minutes of the meeting of the board of directors must be commented on.

The costs of drawing the agreement and the conveyancing which had to be done pursuant thereto were in terms of the agreement to be paid by the purchaser. The applicant as purchaser was entitled to assume that if the attorney purported to act on behalf of the seller the attorney had authority to do so. The applicant was also entitled if the attorney drew an extract from what was said to be a resolution of the directors held at Mbabane, that such a meeting of directors had taken place and that there was indeed a minute from which the extract could be taken.

It is the duty of an attorney preparing an agreement on behalf of a company where the authority of the signatory is always important to make enquiries as to the authority of the individual from whom instructions are taken. This duty is not fulfilled when the attorney prepares a document styled "an extract from the minutes of a meeting of the board of directors" when it was known or should have been known that no board existed and that no meeting had taken place. According to the allegations in the respondent's affidavit both the deponent and the attorney were well aware that no such meeting had taken place.

Whatever criticism can be levelled at the behaviour of the respondent and of its attorney in the failure to ensure that the signatory to the agreement was authorised thereto, the applicant's case is not advanced thereby. On the papers before me I have to come to the conclusion that the applicant has not proved that the deed of sale was properly executed and signed on behalf of the respondent by someone authorised so to do, with the result that the application must fail.

This judgment is not necessarily the final word on the matter. There may be other facts which the applicant can in other proceedings produce to indicate that the deponent was in fact authorised and that there were in fact two or more directors of the company the relevant time. A director is not necessarily a person who appears in the records of the company as such or whose name has been filed with the Registrar. The definition of a director includes any person who acts as such. This judgment is to be regarded as one akin to absolution from the instance rather than a judgment in the respondent's favour decisive on the issue as to whether the signatory was authorised.

6

a:Lynds

In view of the conduct of the deponent to the affidavit on which the respondent relies, in view of its failure to bring to the attention of the applicant at an early date the fact that the signatory to the agreement was not authorised thereto and in view of its attorney's failure in its duty to the applicant the disapproval of the court will be marked by there being no order as to costs. It seems only fair that the respondent should look to parties other than the applicant for payment of the costs.

Accordingly the application will be dismissed and there will be no order as to costs.

S W Sapire

Acting Chief Justice