IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Civil Case No. 2289/2003

In the matter between

Manzini Bolts & Nuts (Pty) Ltd Plaintiff

And

Industria Autocare (Pty) Ltd 1st Defendant

Gideon Pieter Ceronio 2nd Defendant

Coram: J.P. Annandale, ACJ

For the Plaintiff: Advocate M. van der Walt, Instructed by Cloete Corporate attorneys, Mbabane

For both Defendants: Mr. L.M. Simelane of L.M. Simelane & Associates, Manzini

JUDGMENT

9 December, 2005

[1] The plaintiff company sues the two defendants for goods sold and delivered (but not paid for) to the first defendant company, with the second defendant being held liable as surety and co-principal debtor. An appearance to defend the action was entered whereafter the plaintiff moved the present application. In this application for summary judgment, the defendants resist on the basis that the person who placed an order with plaintiff company was not acting within the course and scope of his former employee relationship with the first defendant company, wherefore the latter should not be held liable for the goods sold and delivered.

[2] In its particulars of claim, the plaintiff sets out its cause of action, which is to the greater extent common cause between the parties.

[3] The first defendant company (referred to as "Industria" below) obtained credit facilities from a regular supplier, the plaintiff company ("Bolts & Nuts"). The facilities were subject to various terms and conditions, based on information supplied, and also subject to the second defendant being a surety and co-principal debtor. He is a director of Bolts & Nuts.

[4] On strength of three different orders, prima facie issued by Industria in mid May 2003, Bolts & Nuts supplied various items at a total price of El 1 228-85 and invoiced the 1st defendant. Bolts and Nuts failed to effect payment and was therefore sued for the capital

amount, interest and costs, costs being on the ordinary scale and not the attorney-client scale as provided for in the credit agreement. The second defendant is sued as surety of the first defendant.

[5] Following an appearance to defend, the plaintiff applied for summary judgment on the same terms as set out in the summons. It annexed the affidavit of its director in support of the application, in compliance with the Rules. He verifies the cause of action and amount claimed, also stating his belief that there is no bona fide defence to the claim and that it was entered solely for purposes of delay.

[6] It is against the aforegoing that the defendants enter the stage, having as objective to have summary judgment refused, with costs, and to be granted leave to file their plea.

[7] In the resisting affidavit, the second defendant confirms his position with Bolts & Nuts. He then sets out his reasons as to why it should be found that indeed there is a bona fide and triable defence that should ultimately be decided at a trial of the matter.

[8] Should it be found that there is such triable defence, the court will be loathe to grant summary judgment, which effectively closes the doors in the face of the defendants before their matter is fully ventilated at a trial. Summary judgment is notoriously sought in order to avoid the determination of a weak defence but one that could carry the day for a defendant, if it

proves to be meritorious. On the other hand, a defence that is doomed from the onset should not be allowed to debar a proper and unassailed claim to be delayed from being summarily ordered, to get bogged down in the intricacies and time consuming grinding wheels of justice, running the gauntlet of a trial, to be found utterly wanting at the end of the day.

[9] In this regard, the dictum in Dowson & Dobson Industrial Limited v Van der Werf 1981(4) SA 417(C) at 419 is instructive: "An ever increasing reluctance to grant summary judgment in the face of opposition is evident from the more recent decisions in the South African Courts". In Swaziland, the same applies, in that triable defences should be heard. It still remains so that only where the court has no reasonable doubt that the plaintiff is entitled to judgment as prayed and that the plaintiff has an unanswerable case, that judgment will be granted. The defendant remains with the duty to show that he has a defence which, assuming the alleged facts to be true, is good in law. See Edwards v Menzies 1973(1) SA 299 (NC) at 304-5, per van den Heever, J.

[10] In order for the court to exercise its discretion as to whether to grant summary judgment or not, which discretion cannot be capricious but has to be properly and judiciously exercised, the guiding principles are as follows: (See Erasmus: Superior Court Practice, Juta loose leaf publication, Service 7, 1997 at B1-230 and the authorities at footnotes 1-6).

"1. Summary judgment is an extra-ordinary remedy, and a very stringent one, in that it permits

a judgment to he given without trial. It closes the doors of the court to the defendant. That can only be done if it is clear that the plaintiff has an unanswerable case. If it is reasonably possible that the plaintiffs application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant.

2. The discretion should not be exercised on the basis of mere conjecture or speculation; it should be exercised on the basis of the material before the court. The court should have regard to the nature of the cause of action and of the defence as disclosed in the documents before it, and to the peculiar nature of the facts involved in the case.

3. If on the material before it, the court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant."

[11] From this premise, which I respectfully fully agree with, it being an accurate statement of the law in this regard, I now turn to the defence which the defendants raise and also to the response thereto, as set out in a replying affidavit by the plaintiff.

[12] The defence against the claim is that the defendants did not issue the orders for the purchase of the goods in issue. They say that one Freddy Mafu, a former employee, fraudulently issued it, using a rubber stamp to endorse it with the defendant's particulars, which

stamp he had made for himself. It is stated that Mafu forged signatures of the defendant's staff, further that he had been dismissed from the employ of Industria Autocare some two months before the event.

[13] Prima facie, and for purposes of the application for summary judgment, this is accepted to be the true position. The defendants support this position by enclosing a document to indicate that Freddy Mafu received his final salary on the 20th March 2003, sustaining the contention that he had left their business two months prior to the submission of the orders to the plaintiff.

[14] Also, to show that the orders presented to the plaintiff, passed off as being issued by Industria Autocare, they attached copies of their genuine orders, bearing the same three serial numbers but issued to different suppliers and for different items.

[15] Furthermore, by way of affidavit, the purported signatories of the orders given to Bolts & Nuts disavow that they signed for the defendant company.

[16] Clearly, for present purposes, it must be assumed that indeed the order forms presented to the plaintiff were not legitimately issued by the defendant and that unless the contrary is shown, it must further be assumed that prima facie the orders were fraudulently presented by the defendant's former dismissed employee, Freddy Mafu.

[17] It is common cause that the plaintiff acted upon these orders and supplied the listed goods to the value of the claimed amount. It is presumed that the defendant company did not receive the goods either, but that it went to the fraudster.

[18] In an effort to bolster its defence and to absolve itself, the defendant submits that "the plaintiff was advised by the 1st defendant's attorneys that the purchase orders were fraudulently issued by Freddy Mafu who was no longer an employee of 1st defendant...The plaintiff was advised to file its claim against Freddy Mafu who received the goods."

[19] From the annexed letter referring to this position, it is clear that the supplier was so advised ex post facto, only after the plaintiff unsuccessfully tried to have the defendant pay its invoiced amounts. This letter is dated the 1st August 2003, two and a half months after the transaction and before summons was issued. Clearly the plaintiff knew about the defence now raised at the time it issued summons and it chose to sue the defendants, not their former employee.

[20] It did so on the application of the principle of estoppel. In the replying affidavit of Bots & Nuts, it is stated that the defendants are "...estopped from denying (that) the orders were regularly issued (by Industria Autocare)... on the basis that same were issued 'fraudulently" as the defendants at no stage whatsoever informed the plaintiff (timeously)... that Freddy Mafu was no longer in (their employ) and that (he) had no right to issue purchase orders for and on

behalf of the 1st defendant as he had done in the past".

[21] The only issue now to decide, in order to determine the direction of the court's discretion in the present application, is whether this constitutes a good defence or not. The bona fides of the defendant is a given factor. The situation that it describes is also taken to be true at this stage, as if proven at a trial.

[22] Is the defendant estopped or not? If not, it may well succeed at a trial and its contention that instead of suing the present defendants it should have called upon Mafu to pay their account could then well be correct. If estopped from raising the true position as a defence, the defendants will be liable for the claim. This matter is a classic example of the usefulness of summary judgment applications, which could prevent a long delay and costly trial if determinable from the onset.

Advocate van der Walt argues that Bolts & Nuts can properly rely on the doctrine of estoppel in that Industria Autocare did not advise it that their former authorised employee, Mafu, was no longer representing them, until it was far too late and by which stage they had long ago supplied him with goods, in the belief that he legitimately represented the defendant. It was thus "business as usual", receiving orders from a known employee of Autocare and supplying him with the goods required. At that time, by all accounts, the orders were regularly issued and authentic. They had no knowledge of the true position, that Mafu was dismissed almost two

months earlier, only to so be told a further two and a half months later by the defendant's attorneys.

Although a lengthy quote, the salient legal position of this type of scenario is so well and authoritatively set out in the Supreme Court of Appeal judgment of Stellenbosch Farmers Winery Limited v Vlachos t/a The Liquor

Den, 2001(3) SA 597 (SCA) at 609 - 610, paras 17 to 22, that I refer to it in extenso:-

"Thus it was declared by Corbett J in OK Bazaars (1929) Ltd v Universal Stores Limited 1973(2) SA 281 (C) at287H-288B:

'As in the present instance, cases of estoppel by negligence often involve the fraudulent conduct of a third party and the complaint against the person sought to be estopped is that his negligence permitted or facilitated the fraud. In this situation our Courts have rejected, as being too broadly stated, the so-called "facilitation theory", viz that wherever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it (see Grosvenor Motors' case supra at 425: see also Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964(2) SA 47(T) at 48). It has, on the contrary, been held that such cases must be adjudged by the ordinary general principles relating to estoppel by negligence; and, of course, the fraudulent intervention of a third party is an important factor in determining whether the conduct of the person sought to be estopped proximately caused the other's mistaken belief and resultant loss; and whether this result was

reasonably foreseeable (see, for example, National Bank case supraj.' (Compare Universal Stores Ltd v OK Bazaars (1929) Ltd 1973(4) SA 747(A)). In the second place, the basis for holding liable someone for holding out something is the image he conjured up which prompted the other party to react to his prejudice (cf Southern Life Association Ltd v Beyleveld NO 1989(1) SA 496(A) at 505F - G); if, due to some new circumstance (here, the fraud of Da Silva), a new image is superimposed on the old one and it is the new image to which the other party responds and on which he relies, the original party can no longer be held to it, even if he would otherwise have remained liable (Rabie and Sonnekus (op cit at 56)).

Finally, there is the related and parallel matter of causation. Instances of this kind are typified by Rabie and Sonnekus (op cit at 19, 122) as 'cases of assisted misrepresentation'. In a passage cited at 18 from Cross on Evidence 6th ed (1993) this phenomenon is described as 'a type of estoppel... in which the party in whose favour it operates is the victim of a fraud of some third person facilitated by the careless breach of duty of the other party'. Rabie and Sonnekus (op cit at 122) continue:

'In cases of this kind difficult questions can arise as to whether the fraud of the intervening party, or the negligence of the owner which facilitated the commission of the fraud, should be regarded as having caused the representee to act to his prejudice.' In such situations our courts have chiefly but not exclusively employed the so-called 'proximate cause' test (cf Grosvernor Motors (Potchefstroom) Ltd v Douglas (supra); Standard Bank of South Africa Ltd v Stama (Pty) Ltd 1975(1) SA 730(A)) or the 'real cause test (Saambou-Nasionale Bouvereniging v Friedman 1979(3) SA 978(A) at 1005E - H) or even the test of foreseeability (Union

Government v National Bank of South Africa Ltd (supra at 129, 138); Monzali v Smith J 1929 AD 382 at 387; Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk 1996 (3) SA 273(A) at 288F - G) in order to resolve the problem of whether one party's misrepresentation caused another party to act thereon to his prejudice.

Latterly this Court has on more than one occasion favoured a more flexible test to determine issues of legal (as opposed to factual) causation within the fields of the criminal law (cf B S v Mokgethi en Andere 1990(1) SA 32(A) at 391 - 41 A), the law of delict (International Shipping Co (Pty) Ltd v Bentley 1990(1) SA 680(A) at 700H - 70IF; Smit v Abrahams 1994(4) SA 1(A) at 15B - 18H) and the law of insurance (Napier v Collett and Another 1995(3) SA 140(A) at 143E - 144F, 146E - J). In Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994(4) SA 747(A) at 765A - B it was said that 'the test to be applied is a flexible one in which factors such as reasonable foreseeabilitu, directness, the absence or presence o f a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part.'

Quite plainly this does not mean that the tests previously employed in matters of this kind are to be disregarded. It simply means that they should be viewed not in isolation as before but in the context of a broader overall picture which would also include matters of policy and fairness.

There can be little doubt that if the plaintiff had chosen to sue the defendant in delict for the losses it suffered in not being able to recover payment from

BPCC, the modern flexible test would have been applicable to determine the issue of legal causation. It is difficult to appreciate why a different test is to be applied when the same

liability is to be determined on the same facts by dint of delictual action rather than of estoppel.

Even so, it is not necessary in this case to decide finally whether the traditional tests of proximate cause, real cause or foreseeability, hitherto applied, have in the context of estoppel been superceded by the more flexible test. It is not necessary to do so for two reasons. In the first place the matter was not properly argued and in the second place I am satisfied that whichever approach is adopted the end result would be the same. On the facts of this case, and for the reasons stated in particular in para [15] above, I am of the firm view that the plaintiff was ultimately induced to act bu the lies told to it bu Da Silva; that the defendant could not reasonably have anticipated or foreseen that Da Silva would impersonate him in order to capitalise on his credit; and that there are no considerations o f policy and fairness,on the broader flexible test, that dictate a different conclusion. In the final analysis the plaintiff relied on and acted to its detriment on the faith o f Da Silver's deceit rather than on the defendant's default, (emphasis added). I arrive at that conclusion irrespective of the onus. But if the onus is to be considered it would a fortiori be decisive against the plaintiff "

[25] I cannot but agree with the pragmatic and practical approach adopted by the SCA to arrive at a logically fair result.

[26] In casu the plaintiff was deceived by an ex employee of the defendant, acted in good faith as it used to in the past and supplied further goods to the account of Autocare, blissfully unaware that he did not anymore hold his previously known position. The defendant, knowing that it had dismissed an employee who used to be known to its creditors and purchased on its

behalf by way of order documents, dismally failed to notify its regular suppliers of the change in circumstances, until well after the event. It was by then far too late to do so.

[27] Previously, Mafu would legitimately present similar looking orders to Bolts & Nuts, receive the goods and Autocare would be invoiced, paying for it as pre-arranged in the Credit Agreement, bolstered by the suretyship of the second defendant. When they terminated the service of their employee, the dictates of policy and fairness required of them to timeously notify suppliers like the plaintiff of the altered position, if they wanted to avoid liability for acts such as the present issue.

[28] The creditors of the defendant cannot be presumed to have knowledge of the internal affairs of it, unless so informed. There is no hint whatsoever that by any extension of imagination, the plaintiff could have known that it acted at its own peril when it continued to supply the defendant, as it thought it did, whereas in fact it now supplied an individual dismissed former employee of the defendant. It was to be expected of the defendant to inform suppliers like the plaintiff that its usual representative no longer represented it, if it were to absolve itself from liabilities such as the present. It did so, but only much later than the events that give rise to the cause of action. By then, it was too late. Had it been done so timeously, and only then, it would have been correct to have the claim dismissed and requiring the plaintiff to sue Mafu.

[29] The authorities referred to by the defendant's attorney are clearly distinguishable from the present situation.

[30] Mafu was not an unknown person to the plaintiff, trying to pass off an order of the defendant as being valid and regularly issued. The defendant company was a creditworthy purchaser from this supplier, using known formatted purchase orders, presented by its employee, Freddy Mafu. This authority to represent the defendant emanated from principal of the agent, Autocare. The consequences of the defendant's usual conduct were that it made good for its purchases. The plaintiff reasonably expected the established pattern to remain as it was and the defendant unreasonably failed to appraise it otherwise.

It would have been a totally different matter if neither Mafu nor Bolts & Nuts were known to the plaintiff and it then supplied the goods described in fraudulent purchase orders. Prior to the defendant incurring liability in such a scenario, it would have been the duty of the supplier to verify the authenticity of the orders. If it did not then do so, it would have had to seek recourse from Mafu and not the defendants.

It is therefore that it is in my judgment so that the defendants cannot be absolved from liability. Should the matter have been dealt with on trial, the same defence would have been the issue to decide and the same result would be ordered. It is for these reasons that summary judgment is ordered against the defendants, as prayed for in the application.

The defendants have indicated that criminal charges have already been instituted against their former employee and representative. Should they be so inclined and in order to offset the liability incurred through this matter, they might well seek advice whether legal proceedings should be instituted by them against their dismissed former employee to remedy their loss.

Judgment is entered against the first and second defendants, jointly and severally, the one to pay, the other absolved, in the following terms:

Payment in the amount of El 1 228.86, with mora interest at the rate of 9% per annum from the 17th September 2003 to date of final payment, plus costs of suit, which is to include costs of counsel, in accordance with Rule 68(2).

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE