

THE HIGH COURT OF SWAZILAND

Buzzby Services (Pty) Ltd.

Plaintiff

V

Attorney General

Defendant

Case No

Coram

Sapire CJ

For Plaintiff

Mr. Dunseith

For Defendant

Mr. P Simelane

An instruction to an auctioneer to sell property on a particular day and to advertise the sale according to particulars supplied by the principal, which instruction is acted upon by publishing the necessary advertisement, does not give rise to a contract binding the principal not to revoke the authority. He is, therefore, not liable in respect of commission lost by the auctioneer, although he may have to make good the expenses incurred

Judgment

16/11/99

The plaintiff is a company which provides agency services including auctioning

The Defendant is nominally the Attorney General who represents the Central Transport Administration an organ of government. The word Defendant refers to the Central Transport Administration.

Plaintiff's claim is for damages arising in circumstances, which are largely common cause.

When the case was called in view of the unprepared state of both parties to respectively prove and contest the amount of damages, if any, to which the plaintiff would be entitled should it succeed, it was agreed that the question of liability should first be addressed, and this issue determined before the question of the amount of damages was dealt with.

The parties adduced such evidence, on the topic of liability as they wished, and argument on this aspect of the case followed. In view of the issues defined in the pleadings, I ruled that the Defendant should lead its evidence first. The following emerged.

On 26th August 1994, the defendant by letter addressed to the defendant, and signed on behalf of the General Transport Manager, requested the defendant to auction items, comprising vehicles of which it had been decided were to be disposed, appearing on a list attached to the letter. The letter also referred to the procedure, previously discussed, the Plaintiff was to adopt in the conduct of the sale. The plaintiff accepted these instructions and advertised the forthcoming sale, which it was to conduct in accordance therewith.

It was common cause that the Plaintiff had, on previous occasions, conducted auction sales for the Defendant. The evidence for the Defendant was that in the past in accordance with standing government regulations or procedures followed, the Defendant would call for tenders to be submitted by interested persons who wished to be appointed auctioneer for the Defendant on an annual basis. The Defendant appointed the successful tenderer to have the exclusive right to conduct auction sales for the defendant when the defendant required such services, from time to time. The Plaintiff had been the successful tenderer in previous years, but its latest contract had expired some months

before the 26th August, when the instructions in the instant case had been issued and accepted.

When E N Khumalo, the General Transport Manager, saw the advertisement of the sale, he realised that the Plaintiff's contract of appointment as exclusive auctioneer had expired, and took the view that Defendant's appointment as auctioneer was an error having regard to the having regard to the standing regulations and procedures to which government departments were expected to adhere. He accordingly wrote to the Defendant on the 12th September 1994 that

"This letter serves to draw your attention to the fact that your company ceased to be a Government Auctioneer on the 30th June 1994.

Having noticed that you have placed an advertisement for a Public Auction to be held on the 27th and 28th September 1994 we wish to advise as follows:

1. That you immediately suspend the advertisement and the auction sale.
2. You await the advertisement for the new tender for Government auctioneer, which is to be advertised shortly.

Grateful if you adhere to this advice"

Letters in the same vein were addressed to the Defendant, by the Accountant General, and the Secretary to the Tender Board. The thinking which prompted these letters is the basis of the Defendant's defence to the Plaintiff's claim for damages for what the Plaintiff considers to be a breach of contract. It is on this basis that the Defendant while admitting the authorised issue of the instructions for the conduct of the auction sale and the acceptance of those instructions by the Plaintiff, has pleaded that there was no contract. The validity of the mandate given to the Plaintiff is however not affected by the Defendant's failure to comply with its own internal regulations and procedures. The fact that the Plaintiff's contract as sole and exclusive auctioneer for the Defendant had lapsed in no way precluded the defendant from appointing the Plaintiff, or any one else for that matter, to conduct an auction sale of the vehicles. Plaintiff like any other third party was not bound by the Defendant's internal regulations and procedures, and was free to accept a mandate from the Defendant whether or not its contract as sole agent had terminated.

It is not relevant to the central issue, but it is also common cause that the Defendant did not subsequently call for tenders for the office of auctioneer. The items which the Plaintiff was mandated to sell on the auction were later sold on an auction conducted by an employee of the government, to who a commission was not payable.

The crucial question, which was not directly raised on the pleadings, is whether the Defendant retained the right to withdraw the Plaintiff's mandate, before Plaintiff had completed its performance, without being obliged to compensate the Plaintiff for the profit it would have made had the auctioneer been allowed to complete performance of his mandate.

The authors of Wille and Millin, Mercantile Law of South Africa seventeenth edition at page 407 deal with the question and state

"An instruction to an auctioneer to sell property on a particular day and to advertise the sale according to particulars supplied by the principal, which instruction is acted upon by publishing the necessary advertisement, does not give rise to a contract binding the principal not to revoke the authority. He is, therefore, not liable in respect of commission lost by the auctioneer, although he may have to make good the expenses incurred"

They cite Price Bros & Barnes Ltd v Snyman and Cape Dairy & General Livestock Auctioneers v Badenhorst 2, as authority for this proposition. The proposition seems to me to be correctly stated and apposite to the facts of the present case. I have found nothing in later cases, to some of which counsel referred in argument, to detract therefrom. On the contrary, the dicta of Tindall J in Price Bros & Barnes Ltd v Snyman have on a number of occasions been referred to with approval. The judgments in Watson v Fintrust Properties (Pty) Ltd³ and The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd⁴ emphasise that each contract must be interpreted on its own terms. If there is no provision specifically depriving the principal of the right to withdraw the mandate at any time before completed

performance, he, the principal may do so without incurring a liability to compensate the agent for the loss of opportunity of earning his commission. The agent may however recover his actual disbursements or expenses made or incurred before the withdrawal of the mandate.

Whether a claim for reimbursement of the advertising expenses has been correctly formulated as damages consequent on a wrongful termination of the mandate is doubtful. No award of damages can be made as the Defendant is not in breach.

The Plaintiff may wish to consider amending its particulars of claim on consideration of the concluding paragraphs of the judgment of Tindall J., and this judgment. Because of this possibility I make no order as to costs at this point, and will deal with this, if and when the trial proceeds.

S W Sapire CJ

1 1936 TPD 332 at 338,339 2 1937 TPB 282 3 1987 (2) SA 739 (c) 4 1984 (2) SA 881 (A)