UNDISCLOSED PRINCIPAL – *LOCUS STANDI* OF AGENT TO SUE IN HIS OWN NAME – REMEDIES FOR BREACH OF CONTRACT

Botha v Giyose t/a Paragon Fisheries [2007] SCA 73 (RSA)

1 Introduction

Although this judgment of Combrinck JA was marked "not reportable", it is nevertheless important for both the law of agency and of civil procedure as well as for the law of contract generally. As will appear below, it cleared up misunderstandings regarding the *locus standi* of an intermediary (agent) in an undisclosed principal situation, that is, the intermediary's right to sue the third party in his own name on the contract entered into on behalf of an undisclosed principal. The court also corrected a matter that was overlooked by both the magistrate in the court of first instance and the court *a quo* regarding a plaintiff's choice of common law remedies for breach of contract.

2 Facts

The undisputed facts were that the appellant had sold a business to the respondent. The terms of their oral agreement entered into on 31 January 2003 were as follows: (i) the *merx* was the business as a going concern together with all fixtures, fittings and equipment; (ii) the purchase price was R90 000; (iii) the price was payable by way of an initial amount of R45 000 payable immediately; (iv) the balance was payable in 24 equal monthly instalments of R1 875 payable on the first day of each and every succeeding month, the first payment to be made on 3 February 2003; and (v) interest at 5% per annum was payable on the amount of R45 000 over 24 months (para 4). The respondent took possession of

the business at the beginning of February 2003 and commenced trading. Despite an agreement that the respondent would pay the initial R45 000 on or before 12 March 2003, he failed to make any payment to the appellant.

The appellant instituted action in the magistrate's court, claiming, *inter alia*, cancellation of the contract, damages and interest. The magistrate made the following order in favour of the appellant:

> "1. That the Contract of Sale between the parties is considered to be validly cancelled.
> 2. That judgment is granted in favour of the Plaintiff in the amount of R90 000,00 same representing the damages suffered by the Plaintiff as a result of the defendant's breach of contract.
> 3. That interest at the rate of 15,5% p.a. shall run with effect from 19/03/2003 same being the date that the defendant fell into mora" (para 5).

In an appeal on various grounds to a full bench of the Eastern Cape Division, the respondent, however, restricted his argument to a single ground, namely that the appellant had failed to prove that he had *locus standi*. It appeared from the appellant's examination in chief that the appellant, his wife and son, were members of a close corporation (Dacawi Investments CC) and that the business in question "was under the cc's name". At some stage the appellant also handed in a resolution passed by the close corporation (dated 1 March 2004) that confirmed the appellant's authority to sell the business on its behalf. The question before the court *a quo* was therefore whether the appellant, acting as agent for an undisclosed principal (the close corporation) was entitled to sue the respondent (third party) in his own name on the contract of sale.

3 Application of undisclosed principal doctrine and *locus standi*

3 1 The court a quo

The judge's point of departure was the *locus classicus*, *Cullinan v Noord-Kaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 1 SA 761 (A) in terms of which an agreement concluded between an intermediary acting for an undisclosed principal and a third party was valid and enforceable by the intermediary in his own name. However, he went on to make the following statement (quoted by Combrinck JA para 7):

> "To the extent that the evidence reads that the respondent was at all material times relevant to the conclusion of the sale agreement and the bringing of the action acting on behalf of the close corporation cannot be interpreted otherwise than that he was an agent."

The judge then quoted the statement by Booysen J in *Gravett NO v Van der Merwe* 1996 1 SA 531 (D) 537G–J that

> "[i]t is trite law that a plaintiff cannot sue in his name on behalf of another. One cannot sue on behalf of either a disclosed or an undisclosed principal. (*Waikiki Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd and Another* 1978 (1) SA 671 (A) at 680D; *Sentrakoop Handelaars Bpk v Lourens and Another* 1991 (3) SA 540 (W) at 544H)"

and concluded (quoted by Combrinck JA para 7):

> "Applying the case of *Gravett* . . . to the present matter shows that the respondent was not entitled to act in his personal capacity on behalf of the close corporation. Further, my view is that as in *Gravett's* case the fact that respondent brought the action on behalf of an undisclosed principal was an afterthought; hence the argument was only raised at appeal stage. According to the summons as well as evidence led in the court *a quo* plaintiff did not consider himself as an agent of an undisclosed principal. The conclusion must inevitably be that the respondent failed

> to prove that he had the necessary *locus standi* at the time when he initiated the action against the appellant. Therefore, the court *a quo* erred in this regard."

The appeal therefore succeeded and the order in the magistrate's court was set aside.

3 2 Supreme Court of Appeal

According to Combrinck JA, it was apparent that the doctrine of the undisclosed principal was not fully understood by the court *a quo*. He started his judgment by quoting Wanda "Agency and representation" 1 *LAWSA* paragraphs 228 and 231 where the rights of the intermediary against the third party "are succinctly summarised" (para 8):

> "In a standard situation of representation the representative acquires no rights and incurs no liabilities from the contract concluded by him or her on behalf of his or her principal. The rights and obligations come into being between the principal and the third person. In an undisclosed principal situation the intermediary and the third person create *vincula iuris* between themselves by the contract concluded in their own names, but also so it is said, alternative *vincula iuris* between the undisclosed principal and the third person . . . The contract is concluded between the third person and the intermediary acting in his or her own name. The third person is in terms of the contract liable to the intermediary. He or she cannot avoid liability to the intermediary on the ground that he or she is liable to the undisclosed principal, unless and until the undisclosed principal elects to hold him or her liable."

According to Combrinck JA, the reliance on *Gravett* was misplaced. According to him, what Booysen J actually meant in *Gravett* was better stated by Marais J in *Sentrakoop* 545(D–E):

> "I am therefore of the view that both on principle and on the authorities it is not proper for an agent to sue as representing his principal by suing in his own (that is the agent's own) name, where the claim being enforced is that of the principal and the principal is the true plaintiff. This does not, of course, apply where the agent has the right to sue in his own name, as is the case where he has contracted on behalf of an undisclosed principal and sues on the relevant contract."

In summing up (para 8 *in fine*), Combrinck JA said that throughout the negotiations and conclusion of the sale, the appellant acted in his personal capacity and that the close corporation was not mentioned. As is often the case with laymen, the appellant did not think of the close corporation as a separate legal *persona* but saw him and the corporation as one and believed that he was entitled personally to sell the business. Also, the matter of the appellant's authority to sell the business was only raised in passing when the appellant's attorney became aware of the existence of the close corporation. The resolution by the close corporation was prepared in an attempt to regularise the transaction. Combrinck JA finally held, contrary to the finding of the court *a quo*, that the question of *locus standi* was in any event not properly raised in the pleadings. In the process, he made a very important point regarding the attempt by the undisclosed principal (the close corporation) to ratify the appellant's conduct. Referring to *Durity Alpha (Pty) Ltd v Vagg* 1991 2 SA 840 (A) 843, he confirmed that in case of an undisclosed principal, the agent's authority must exist at the time of conclusion of the contract and that ratification is impossible. In the end he held that the appeal should not have been allowed on the issue of *locus standi* (para 9).

3 3 Comment

As appears from the exposition above, the doctrine of the undisclosed principal is controversial and often confusing, both in substance and its application (see eg

Don Shoe Co (Pty) OFS v Goodman Bros 1931 OPD 26; *Cullinan supra*; *Karstein v Moribe* 1982 2 SA 282 (T); De Wet and Van Wyk *SA kontraktereg en handelsreg* Vol 1 (1992) 123). Therefore, it is not strange that it has been described by writers as "anomalous", "unsound", "odd", et cetera. The general and basic principle of agency is that a *vinculum iuris* is created between the principal and the third party, thus entitling them alone to the rights and obligations flowing from the contract concluded between the third party and the agent on behalf of his disclosed principal. The doctrine, however, is anomalous and odd in principle because the third party can be liable to and entitled against someone (the undisclosed principal) of whom he had no knowledge as the contract is concluded between the third party and the intermediary ("agent") acting in his own name. Professor de Wet was severe in his criticism of the doctrine after the Appellate Division in *Cullinan*, decided in 1972, that it should be accepted as part of the South African law of agency when he stated: "As regverdiging vir die houding word die gewone ou gesang aangehef, en wel dat dit nou te laat is om die ding (*sic*) te verwerp. Aan die ander kant word darem toegegee dat die trefgebied van die ding nie uitgebrei moet word nie" (*idem* 124).

If the respondent *in casu* was serious with his objection relating to the jurisdiction of the court, he could have relied on the following limitations (restrictions) existing in respect of the application of the doctrine, namely:

(a) where the doctrine of estoppel operates (see *Symon v Brecker* 1904 TS 245; *Karstein v Moribe supra*);

(b) the identity of the intermediary or the undisclosed principal is material and of great importance to the third person or, as it was also stated, "in die hoogste mate relevant vir die ontstaan van 'n bindende kontrak" (*Lambinion v Du Toit* 1952 4 SA 431 (T); see also *Karstein v Moribe supra*);

(c) the lack of authority from the undisclosed principal at the time of the conclusion of the contract between the third person and the "agent" (intermediary); (see *Durity Alpha (Pty) Ltd v Vagg supra*; *Botha v Giyose*). The factual situation *in casu* in this regard is unclear. A written resolution passed by Dacawi Investments dated 1 March 2004, that is, approximately 13 months after the conclusion of the sale, was handed up as evidence stating that Botha's (appellant's) authority to conclude the sale on behalf of Dacawi is confirmed. This could mean one of two things, namely that Dacawi is confirming on 1 March 2004 that the sale had been concluded during February 2003 with its authority, or that Dacawi's resolution of 1 March 2004 is granting authority to Botha on a retrospective basis to conclude the contract. These possibilities were not raised in argument although the court found that the resolution was an attempt at ratification.

However, with this decision the Supreme Court of Appeal again confirmed the legal position laid down by the very first decisions of the supreme court regarding the acceptance and application of the doctrine of the undisclosed principal. The early courts were strongly influenced by English law, especially by the authors Story and Bowstead who wrote on the law of agency, as is evidenced by the following statement by Hopley J in *Lazarus v Ndimangele* 1913 CPD 732 734:

> "When an agent enters into a contract openly and notoriously for a principal, and it is known that he is acting for a known principal, that principal is the person, if any objection is taken, who should be the plaintiff when anything has to be recovered from his side of the contract. There are exceptions, however, to this rule; one of

> them is the exception which Story puts, where the agent is the only known or ostensible principal, and therefore in the contemplation of the law is the real contracting party. He elaborates that statement in section 396 of his work on Agency, in which he says, 'the second class of cases would seem scarcely to require any illustration, for, as the agent acts in his own name, without disclosing any other principal, it follows, as an irresistible inference, that the other contracting party binds himself personally to the agent'."

Lazarus was followed in *Gadlela v Mountjoy* 1921 EDL 151 153 where Hutton AJP also referred to Story:

> "But it is not universally true that an agent cannot sue in his own name. Story (on Agency) sec. 393 and following sections sets forth with his usual clearness the classes of cases in which an agent is permitted to sue in his own name. Among these is the case 'where the agent is the only known or ostensible principal, and therefore is in contemplation of law, the real contracting party'."

In *Scholz v Sieff* 1928 OPD 131 133 De Villiers JP confirmed the above position and referred to Bowstead:

> "Now it seems to me to be clear on the elementary principles of the law of contract that an agent, though contracting as agent for a disclosed or undisclosed principal, may validly acquire for himself the right of bringing action on such contract in his own name. At the same time that right of action, though exercisable by the agent in his own name, is really acquired by him for the purposes of the agency and must therefore necessarily be at the disposal of the principal, and may therefore be revoked by the principal . . . If the principal has the right of revocation, he may revoke impliedly as well as expressly, and it seems to me that, when the principal intervenes and claims on the contract in his own name, he impliedly revokes the agent's right of suing on the contract in his (the agent's) name, for the two rights of action are in the alternative. That seems to me to follow from the general Roman-Dutch law of agency, and that is also the law of England. Thus Bowstead lays down (Agency, Art. 129) the general rule that the right of an agent to sue on a contract made by him on behalf of his principal ceases on the intervention of the principal, except where the agent has, as against the principal, a right of lien on the subject-matter of the contract, in which case the agent's right of suing on the contract has priority of the principal's right."

The above cases form the basis of 1 *LAWSA* para 231 quoted above (and with approval by Combrinck JA *in casu*). The point of view expressed above as regards the intermediary's *locus standi* in cases such as the present, is also reflected by leading authors on the law of civil procedure (see eg Van Winsen *et al* Herbstein and Van Winsen *The civil practice of the Supreme Court of South Africa* (1997) 131; Farlam *et al Erasmus Superior court practice* (service 25, 2006) B1–126C para (f); Erasmus and Van Loggerenberg *Jones and Buckle Civil procedure of the magistrates' courts in South Africa* Vol II (loose-leaf rev service 18 (2006)) sv "agents" and the authorities cited by them).

In view of the above, Combrink JA's judgment should be welcomed as the highest court has now clearly laid down the legal position regarding the *locus standi* of the intermediary in cases of the undisclosed principal.

4 Remedies for breach of contract

It is trite that the common law provides the injured party with three remedies for breach of contract, namely, a claim for specific performance (enforcement of the contract) or for cancellation, either of which is usually combined with a claim for damages (or other relief).

In the case under discussion, Combrinck JA *mero motu* noted that in this regard certain aspects were overlooked by the magistrate, while the court *a quo* possibly laboured under a misconception (see paras 9 and 11).

As indicated earlier, the purchase price of the business was R90 000, payable in one initial payment of R45 000 and the remainder in instalments; and that the respondent failed to make any payments. In his particulars of claim, the appellant *inter alia* alleged that despite demand, the respondent persisted in his failure or refusal to pay; that the appellant was entitled to cancel the sale; and that he was entitled to damages in the amount of R90 000 plus interest thereon *a tempora morae*. His prayer also included an order for payment of R90 000. In a request for further particulars as to how the amount of damages was computed, the appellant replied that it constituted the purchase agreed to by the parties (para 10 *in fine*).

The magistrate awarded the relief claimed (quoted in para 2 *supra*), that is, cancellation as well as damages in the amount of R90 000 and interest. In other words, he allowed the cancellation of the contract, but at the same time gave an order that in fact ordered specific performance of the contract, namely payment of the purchase price of R90 000. It is trite that this cannot be done, for, as the popular saying goes, one cannot have one's cake and eat it. The two remedies are mutually exclusive and inconsistent with each other. The injured party has to make an election either to cancel the contract or to enforce it, or as Combrinck JA put it with reference to Christie *Law of contract in South Africa* (2001) 540, he cannot approbate and reprobate the contract. The latter phrase was used by Friedman JP in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 2 SA 537 (C) 542E–F in his succinct explanation of the principles involved:

> "When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party."

(See also as regards the finality of an election the discussion by Brand JA in *Merry Hill v Engelbrecht* [2007] SCA 60 (RSA) para 16ff.)

Combrinck JA pointed out tactfully that the magistrate, unfortunately, was not alive to the problem, while the court *a quo* "was under the impression the appellant had elected to enforce the contract and was claiming the purchase price" (para 11 *in fine*).

Turning to the evidence, Combrinck JA found that the demand made on the respondent was ineffective and that the cancellation of the contract was invalid. As regards the appellant's claim for R90 000, the court noted that there was no acceleration clause in the contract and that the only amounts that could be claimed at that stage was the initial R45 000, certain arrear instalments plus interest thereon (detail omitted).

The appeal was finally upheld with costs, the judgment of the court *a quo* was set aside and the order of the magistrate's court substituted by an order for the payment of the amounts and instalments mentioned above.

5 Conclusion

Combrinck JA should be commended for the concise yet clear manner in which he applied the appropriate legal principles in order to arrive at a just decision in a case that sadly smacks of incompetence in the courts *a quo*. In view of the relatively small amount in issue and the cost of legal representation, one is amazed by the fact that this case in fact ended up in the Supreme Court of Appeal.

CJ NAGEL
SR VAN JAARSVELD
University of Pretoria

> *The principle of legality lies at the centre of the appeal. It is a fundamental principle of the rule of law that the exercise of public power is only legitimate where it is lawful. It is central to our constitutional order that the legislature and the executive are in every sphere constrained by the principle that they may exercise no power and perform no function beyond those conferred on them by law . . . The MEC had no power to appoint a commission; this power vested in the Premier in terms of the applicable legislation. His appointment of [M] as a 'commission' was thus unlawful. Moreover, as the MEC also had no power to issue subpoenas, his purported delegation of that power to [M] or anyone else was likewise unlawful. That, it seems to me, is the short answer in this appeal.*
>
> *Van Heerden JA in* Minister of Local Government, Housing & Traditional Affairs (KwaZulu-Natal) v Umlambo Trading 29 CC *[2007] SCA 130 (RSA) paras 17–18.*