Van Ryn Wine and Spirit Co. v Chandos Bar
1928 TPD 417

Transvaal Provincial Division

1928. March 14, 15, 16; April 5.

GREENBERG and GEY VAN PITTIUS, JJ.

Flynote

Contract. --- Sale. --- Consensus ad idem. --- Quasi-mutual assent. --- Assent by estoppel. --- Whether circumstances excluding operation of rule of estoppel must be within knowledge of offeror. --- Principal and agent. --- Adoption of portion of agent's contract, and repudiation of authority as to portion. --- Approbation and reprobation. --- Appeal. --- Amendment of pleadings introducing new cause of action. --- When permissible.

Headnote

A court of appeal (assuming it has power to do so) will allow an amendment of the pleadings in the court of first instance so as to introduce an entirely new cause of action, and will give judgment thereon, only when the Court is satisfied that the evidence before it fully proves the new cause of action, and that no other evidence would have been led in the court of first instance, had the issue been raised there, which might have led to a different conclusion on such issue.

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Appellant's agent solicited orders for liquor from respondent firm, promising a special reduction in price if cash payments were made to such agent before delivery, the agent explaining that appellant needed money. The agent further explained that, later, invoices for the full unreduced price would be, forwarded to respondent in respect of liquor purchased at the reduced price on the above terms of prepayment, but that these invoices should be disregarded, the object of forwarding them being to avoid detection of a breach by appellant of a liquor trade "ring" agreement fixing a standard price. Respondent gave orders to the agent on this understanding, honestly believing that the agent was entitled to enter into such agreement, and received the liquor, after payment in advance to the agent by bearer cheques; and subsequently received invoices at the unreduced prices, which invoices respondent received without comment. Appellant claimed that the agent had no authority to negotiate sales on the terms set out above, or to receive payments as he did, and that respondent was liable on contracts of sale at the prices reflected in the invoices.

Held, on appeal, that the conduct of respondent firm in receiving the invoices without comment was not, in the circumstances, such as to estop respondent from denying that it had agreed to buy at the prices set out in the invoices; the test being whether a reasonable man, knowing all the facts within the knowledge of the respondent, would necessarily have inferred from respondent's conduct that it was assenting to the terms of the invoices.

The scope and application of the doctrine of quasi-mutual assent, or assent by estoppel, discussed.

Semble: In the above circumstances, it would not have been open to appellant to adopt and sue on the contract made by the agent and at the same time to repudiate such agent's authority to receive payment.

International Sponge Importers, Ltd. v Watt 1911 AC 279, distinguished.

Case Information

Appeal against a decision by a magistrate.

The facts appear from the judgment.

J.C. Brink, K.C. (with him *F.B. Adler*), for the appellant, after stating the facts: Frankle had no authority to sell the goods. The tacit acceptance of the invoices was the contract. There was no authority to sell at under trade prices, or to receive money on that footing. The power to sell does not include the power to receive the money. See *Tank v Jacobs* (1 SC 289); *Mangold Bros. v de Klerk* (19 EDC 255, at p. 265). As to the *onus* of proving a custom of trade, see *Halsbury* (vol. I, sec. 364); van *Breda v Jacobs* 1921 AD 330. As to authority to receive payment in advance, see *Peark's Stores, Ltd. v Watt* 1907 TS 755. Further on the facts.

Blakeway, for respondents: As to authority to sell, see *Campbell v Blue Lime Association, Ltd*. 1918 TPD 309; Bowstead on *Agency* (6th ed., sec. 80); *International Sponge Importers, Ltd. v Watt* 1911 AC 279;

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Bradford & Sons v Price Bros. (92 LJKB 271).

Brink, in reply: As to the existence of a contract, see Chitty on *Contracts* (15th ed., p. 39); *Ex parte Ford* (16 Q.B.D at 305); *Halsbury* (vol. 7, sec. 944). On quasi-mutual assent by estoppel, see Benjamin on *Sale* (5th ed., p. 106). See further *African Society v Mostert* 1923 CPD 26.

Cur. adv. vult.

Postea (April 5th).

Judgment

GREENBERG, J.: Appellant sued respondent in the magistrate's court, Johannesburg, for the sum of £200, on a claim for goods sold and delivered at a price of £285 1s. 4d. less the sum of £39 19s. 4d. amount paid on account. Appellant abandoned £45 2s. in order to bring the claim within the jurisdiction of the magistrate's court. Respondent requested appellant to furnish further and better particulars showing in detail the dates and items in respect of which it was alleged in the summons that goods for the sum of £281 16s. 4d. had been supplied. There was, apparently, no query about an item of £3 5s. In reply to this request appellant rendered a detailed account, showing the dates, the particular items and the prices. From this account it appears that appellant claimed that goods were supplied at prices totalling £281 16s. 4d. in addition to the amount of £3 5s. Respondent's plea admitted being supplied with goods as alleged but said that the total price of such goods was not £285 1s. 4d. but £250 0s. 4d.; respondent further pleaded payment of the amount of £250 0s. 4d. The evidence shows how the difference in the two sets of prices arose. Mrs. Hurley, who is one of the partners in the respondent firm, says that during October, 1926, she was approached by one Frankle, who was a commercial traveller in the employ of appellant; he came to solicit orders for liquor on behalf of appellant, and in October she gave him an order or orders for liquor which was delivered to her and for which she paid by cheque in favour of appellant. Towards the end of November he informed her that if she would take four or five cases of liquor at a time, she could have them at reduced rates, but she would have to pay cash before the delivery of the goods; the reason he gave her for this was that the appellant needed money, and he told her she would get invoices for the goods at a later date, but was not to take any

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notice of them, and these goods would not be brought up in the accounts against her. The invoices would show the full prices (which are the prices shown on the particulars supplied by appellant) without allowing the reductions he had granted her, but this procedure was being adopted because of the liquor "ring" which had fixed a standard price; the false invoices were sent so that the other members of the ring would not know of the reduction, which was in breach of the "ring" agreement. Acting on this information she ordered the goods shown on the account sued upon and paid Frankle by bearer cheques in his favour or by cash cheques. She received the invoices from time to time showing the full prices, but in accordance with her arrangement with Frankle took no notice of them. The magistrate found that "the defendant acted *bona fide* in purchasing from Frankle at the special terms quoted by him and in paying him in cash" and it was not suggested on appeal that Mrs. Hurley did not make the arrangement testified to or did not *bona fide* believe Frankle or did not pay him the prices agreed upon between them. The magistrate gave judgment for respondent and the grounds of appeal are: (1) The magistrate erred in holding that Frankle in receiving the payments referred to in the plea had authority express or implied or any authority at all to receive such payments on behalf of the plaintiff and the payments referred to in the plea in the circumstances thereof according to the evidence did not constitute according to law payment to plaintiff, and the magistrate erred in finding to the contrary. (2) The magistrate erred in holding that the payments made by Mrs. Hurley to Frankle were made by her in respect of the goods claimed for in the summons. The second ground of appeal was not argued before us.

In the magistrate's court, the respondent led evidence first, from which it would appear that the only issue was the question of payment. But on the pleadings I do not think this is the right view. Appellant sued on a series of contracts of sale, the dates and particulars of which appear from the reply to respondent's request for further particulars. Respondent admitted that it was supplied with the goods, but denied that the price was the price claimed by appellant. It seems to me that this is a denial of the contracts alleged by appellant, and even if this was not clear from the rather bald pleadings, there is no doubt on the evidence that respondent denied that it had entered into the contracts on which appellant sues. The *onus* was therefore on appellant in

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the first place to prove the contract. When this difficulty was put to Mr. *Brink,* appellant's counsel, in order to meet the contingency that the Court might find that appellant had not proved its contract, he asked for leave to amend the summons by adding "alternatively plaintiff's claim is for payment of £200, being the fair and reasonable value of the goods supplied and delivered which defendant received and accepted." He contended that the evidence showed that respondent could not possibly buy the goods in Johannesburg for less than the prices claimed by him and that this Court would be entitled to hold that this was the value and give judgment for appellant for the amount claimed. Several serious objections were raised to this amendment. It was argued by Mr. *Blakeway*, for respondent, that appellant's alternative claim must be for the return of the goods or their value, that the respondent might wish to tender back the goods, that on the evidence there was reason to suppose that the goods were obtainable elsewhere at a reduced price in spite of the ring, and that the value recoverable was the value to the appellant and not to respondent, of which value there was no evidence. Moreover, it may be that in a case such as the present the date when the value is to be taken is the date when the goods are demanded by the owner and not the date when he lost possession, and there is no evidence of the value on the former date, or of such date. It may be assumed that this Court has power on appeal to grant an amendment which introduces an entirely new cause of action and to give judgment on such new cause of action; but this power will only be exercised when the Court is satisfied firstly, that the evidence before it fully proves the new cause of action, and secondly, that no other evidence would have been led in the Court of first instance, had the new issue been raised there, which might have led to a different conclusion on such new issue. In the present case I am satisfied on neither of these points; I do not think that appellant has proved the value or that respondent is unable to return the goods, and even if this was proved, respondent might have led evidence on these points which would have rebutted appellant's case. It was not suggested on appellant's behalf that we should grant the amendment and

then send the matter back to the magistrate, but I would not be in favour of doing this as this would mean an entirely fresh case and would save little in the way of expense. I have therefore come to the conclusion that the amendment should not be allowed. It is therefore necessary for appellant to prove

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a contract of sale between it and respondent in respect of the goods which it alleges were sold and delivered to respondent.

The evidence shows that the arrangement made by Mrs. Hurley with Frankle was carried out and that in each instance she received the invoices a day or two after delivery of the goods, and retained the goods and the invoices without communicating with appellant except in one instance, about the 15th December, when she had paid for goods of which she wanted immediate delivery. As she did not get delivery she telephoned appellant's office and asked where were the goods for which she had paid Frankle. She got the goods later. Robertson, appellant's manager, says he asked Frankle why he had been paid cash and received an explanation, other than the true explanation, which satisfied him. There was some conflict between Mrs. Hurley and the typist who received her telephone message about this message, but we were invited by appellant's counsel to accept Mrs. Hurley's version, which I have already given.

At a later stage of the argument it was contended on appellant's behalf that the amendment was unnecessary, for two reasons. In the first place it was argued that the respondent was bound to pay the prices shown on the invoices (which are the prices claimed in the particulars) because even if Mrs. Hurley never actually intended to buy at those prices, her conduct in retaining the goods without comment after receiving the invoices, precludes respondent from denying that it had agreed to buy at those prices. Alternatively, appellant contended that it could adopt the contract made by Frankle with Mrs. Hurley and sue on that contract, but repudiate Frankle's authority to receive payment.

On the first point it is of course clear that mutual assent is essential to a contract of purchase and sale, and there is no doubt that Mrs. Hurley never intended to buy the goods at the prices contained in the invoices. But Mr. *Brink* invoked the doctrine of "quasi-mutual assent," which is referred to in a passage in Benjamin on *Sale* (5th ed., p. 106). The passage, which is a quotation from a judgment of BLACKBURN, J., in *Smith v Hughes* (L.R., 6 QB 597, at page 607) reads: "Cases arise in which, although there is in fact no mutual assent, and accordingly no contract, one of the parties may be estopped by his statements or conduct from setting this up. In such cases there may be said to be a quasi-mutual assent." The rule of law is that declared in *Freeman v Cooke* 1848 2 Ex. 654) and has been thus stated

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by BLACKBURN, J.: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." I think it may be accepted that if A, a dealer, sends goods to B accompanied by an invoice showing the price, and B receives the goods and invoices and retains them, then if this is all that has happened between the parties B will be held to have assented to buy the goods at the price. But if B on receipt of the invoice and goods or within a reasonable time thereafter posts a letter to A stating that he is prepared to pay a smaller price and will keep the goods at a smaller price, unless he hears to the contrary, and this letter miscarries in the post, then (assuming that a letter is a reasonable means of communication between the parties) I do not think that B's assent to A's terms should be inferred. The cases of *Phillips v Bistolli* (2 B. & C. 511) and *The Hartford and New Haven Railroad Co. v Jackson* (24 Conn. 514 (Amer.) quoted in *Benjamin* (*supra*) at pp. 103 and 104) shows that the "reasonable man" must not look merely at such circumstances as are known to the offeror. I think that what is meant by BLACKBURN J., is that all the circumstances must be regarded and if as a result a reasonable man would believe that the offeree was assenting to the terms proposed by the offeror, then the rest of the rule would apply. If the offeree's conduct in the circumstances is not such as one would expect from a reasonable person who did not intend to assent to the offeror's terms, then the rule will apply. This was the test applied in *Cornish v Abington* (28 L.J. Exch. 262) where the Court came to the conclusion that although the defendant had never intended to enter into a contract on which he was sued, his conduct was not what would have been expected of a reasonable man in that position, and he was held bound to the contract. It is for the Court in each case to have regard to all the circumstances and to decide whether the person sought to be bound has rendered himself liable by his unreasonable conduct. And I think that in order to hold him liable on the contract, the inference that he was assenting to the terms proposed by the other party must not only be reasonable, but must also be a necessary inference. If there are a number of reasonable inferences which may be drawn, including one of assent, then the hypothetical

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reasonable man is not entitled to select the inference of assent and to disregard the others. In the example which I first quoted, viz., where A, a dealer, sends goods to B with an invoice and B receives the goods and invoice and retains them, the inference of assent is reasonable and necessary. In such a case B can have no ground for retaining possession other than on the terms proposed by A; he would have no right to take possession unless he was assenting to those terms. But the position would not necessarily be the same if B had come into possession under a prior contract which was invalid but which he reasonably believed to be valid.

In considering the question whether a person can be held to have assented to a contract when he had not any actual intention of assenting, I have referred only to decisions in the English Courts. But the principles on which

these decisions are based are not founded on any doctrine peculiar to English law, and are portions of the Roman-Dutch law. The doctrine is one of estoppel, which, as was pointed out by SOLOMON, J.A., in *Baumann v Thomas* (1920, A.D., at page 434) "is as much a part of our law as it is of that of England." And Gluck, in his *Commentary on the Pandects* (Bk 11, Title 14, s. 290) says: "To put it shortly, one deduces a person's meaning and his intention in accordance with commonsense. If therefore one cannot reasonably infer anything else from a person's conduct in a particular case than that he conducted himself in a certain manner because he accepted and agreed to what had happened, then one is entitled to accept such conduct as a tacit declaration of his consent. Nobody can escape the result of such an interpretation of his conduct being given against him. Because should he desire this, then he really must claim to be judged according to different principles than those upon which all reasonable beings act, and he cannot do so as long as he is a unit of human society." Mackeldey (*Lehrbuch des Romischen Rechts*, s. 163) is to the same effect.

In the present case Mrs. Hurley received the goods under the honest belief that Frankle was entitled to enter into the agreement which had been concluded between them, and the question to be decided is whether her conduct in retaining the goods and receiving the invoices without comment was reasonable. If she believed the story told her by Frankle, then it was natural that she should act as she did with regard to the invoices. It must be accepted that she did believe the story and the only question is then

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whether she was unreasonable in believing Frankle. He was the only person connected with appellant with whom she had come into contact in the transactions which took place before the end of November, and although it may well be that his authority was limited to soliciting orders and receiving payment by cheque in favour of appellant of amounts actually due, I cannot say that she was unreasonable in crediting him with larger powers. It may be a rule of law that authority is not to be presumed, but it does not follow that conduct which is not in accordance with a full knowledge of law is necessarily unreasonable. I can give no reason for saying that no reasonable person would have believed Frankle; business firms have been known to be in need of ready cash and to quote liberal discounts in return for cash payments, and the evidence in this case shows that breaches of the "ring" agreement are not unknown. I am not prepared to hold that her conduct was unreasonable, or that a reasonable man, knowing all the facts within her knowledge, must have inferred that she was assenting to the terms of the invoices. And if my view of the doctrine of "quasi-mutual assent" or estoppel is correct, it follows that this is not a case for its successful application. In *Cornish v Abington* (*supra*) the Court came to a different conclusion, but not on principles in conflict with those I have ventured to enunciate; the only difference is that in that case the Court (or the jury) considered that the defendant's conduct was unreasonable and was such that a reasonable man would have believed he was assenting to plaintiff's terms. The reasons given by MARTIN, B., for this conclusion are stronger than in the present case, and the question of reasonableness depends on the circumstances of each individual case. I do not therefore think that this decision should affect my conclusion, and am of opinion that the point cannot be sustained.

The only remaining contention made on appellant's behalf is that it could adopt the contract made by Frankle with Mrs. Hurley and sue on that contract but repudiate Frankle's authority to receive payment. It was suggested that this involved both an approbation and reprobation by appellant of the same contract, but Mr. *Brink* contended that the decision in *International Sponge Importers Limited v Watt* 1911 AC 279, which had been cited on another point, justified this contention. But in the first place it was assumed by the House of Lords that the principal

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could sue on the agent's contract but repudiate his authority to receive payment; secondly, it is not clear from the facts that the stipulation for payment to the agent was a term of the contract of sale, indeed the contrary appears to be the case. In the present appeal, however, I think it is clear that the stipulation by Frankle for payment in advance was part and parcel of the contract between him and Mrs. Hurley. But it is unnecessary to base the decision on this point, because the contracts referred to in the summons on which the action is based are not the contracts entered into by Frankle and Mrs. Hurley, but contracts for sale at higher prices than those agreed upon between these two persons. I think therefore that this contention also fails.

I have therefore come to the conclusion that the appellant has not made out its case, and think therefore that the judgment should have been one of absolution from the instance with costs. The magistrate gave judgment for the respondent with costs but the appeal was not directed towards this point. The magistrate's judgment will therefore be altered into one of absolution from the instance with costs, but subject to this alteration the appeal is dismissed with costs.

GEY VAN PITTIUS, J., concurred.

Appellant's Attorneys: *Roux & Jacobsz*; Respondent's Attorneys: *Stegmann, Oosthuizen & Jackson*.