IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

A406/13

CASE NO: ~~56638/13~~

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

12/09/2014 .....

DATE SIGNATURE

12/09/2014

In the matter between:

BOSAL AFRICA (PTY) LTD Appellant

and

PETER LINDENBERG WATERSPORTS (PTY) LTD Respondent

JUDGMENT

MUSHASHA AJ

[1] This is an appeal against the decision of His Lordship Mr Justice Preller of the High Court of South Africa, North Gauteng Division, Pretoria granting judgment in favour of the Plaintiff (Respondent).

[2] The facts of the case are briefly as follows:

[3] The Respondent; Peter Lindenberg of Watersports (Pty) Ltd, is a company dealing with motor racing.

[4] The appellant, Bosal Africa (Pty) Ltd is a company manufacturing *inter alia* exhaust systems for motor vehicles including a high performance version.

COMMON CAUSE FACTS

[5] A long standing business relationship existed between the appellant and the respondent save for a break of two years in 2002 and 2003. Since 1987, the appellant had sponsored the Respondent. The evidence is that the sponsorship agreements concluded were also very informal based on the long standing relationship..

[6] In these agreements the appellant was always represented by its marketing director Mr Jaco Jordaan (Jordaan) and the Respondent was represented by Peter Lindenberg (Lindenberg).

[7] The dispute arose from an agreement concluded between the appellant and the respondent on or about 3 August 2006 in respect of the years 2007 and 2008.

[8] The appellant refused to honour the sponsorship agreement contending that such agreement was not concluded because Jordaan was not expressly authorised by the Board of Directors to conclude the agreement. The appellant relied on lack of express authorization of Jordaan to conclude the agreement alternatively on lack of the implied authority.

[9] According to the letter handed in as exhibit "A" the respondent had agreed to sponsor the appellant in a total amount of R1344000 excluding valued added Tax for the year 2007 and that the said amount would be increased by 10% for the year 2008.

[10] Jordaan was the marketing director of the appellant and he was the person with whom the Respondent had negotiated his sponsorship agreement for a couple of years.

[11] During the trial in the court *a quo* the respondent raised estoppel and ostensible authority to hold the appellant liable to the contract.

[12] It is common cause that documents in the trial bundle were accepted and used as evidence.

[13] I take the view that the legal position is not in dispute. What clearly appears to be in dispute is the application of the legal principles to the facts.

[14] In the application of the legal principles regard should be had to the case of *South Africa Broadcasting corporation vs Co-operators* 2006(2) SA 217 (SCA) where the test applied was " the requirements for establishing ostensible authority or estoppel are that the party relying on estoppel will have to show that he or she was misled by the person who it is sought to hold liable as principal to believe that the person who acted on the latter's behalf had authority to conclude the act, that the belief was reasonable and that the representee acted in the belief to his or her prejudice ____".

[15] In some authorities it was held that in establishing ostensible authority and or estoppel the inference is to be drawn from surrounding circumstances and the plaintiff who bears the onus of proof will only discharge that onus if it can be shown that the inferences which it seeks to draw is the most readily acceptable to be drawn from a number of possible inferences.

See *New Zealand construction (Pty) Ltd v Carpet Craft* 1976(1) SA 345 (N) at 347 D and *Inter-continental Finance and Leasing Corporation (Pty) Ltd V Stands 56 and 57 Industrial Limited and Another* 1979(3) SA 740 (W) at 748 H.

[16] In denying liability the appellant argued that there was no resolution from the board of directors authorising Jordaan to conclude the contract.

[17] It was further argued on behalf of the appellant that it was paramount that before the end of each year a contract was concluded for the following year so that the appellant had to engage a process of branding everything for the following year so that he may be ready and that has always been the practice.

[18] It is remarkable that the appellant had led no evidence at all in the court a quo on any lack of authority on the part of its sales and marketing manager or on what the limitations were on Jordan's authority notwithstanding that such evidence was peculiarly within its knowledge to lead such evidence. It is trite that a court in such a situation is entitled, in the absence of evidence from the appellant to draw adverse inference from the

non-calling of available witnesses. Notably during the cross-examination of Respondent's witnesses it was foreshadowed that Captain Laity would be called to testify.

See *Osborne Panama v Shell BP and Others* 1982 (4) SA (AD) at 899 F-H.

[19] On the other hand the respondent led evidence that:

19.1 each time an oral agreement was concluded those agreements were honoured without any difficulty.

19.2 there was a pattern of conduct by both parties regarding the conclusion of sponsorship agreements which existed for a period of more than two (2) decades and

19.3 after the agreement for 2007 and 2008 Bosal participated actively in the sponsorship programmes amongst other things:

19.3.1 Jordaan was involved in the official launch of the Subaru hot on Tar Racing Team in January 2007.

19.3.2 Jordaan was involved in approving all brandings and sponsorship artwork.

19.3.3 Jordaan was actively involved in the decisions relating to the extent of the sponsorship and exposure to be enjoyed by the respondent such as in Subaru races.

[20] The trial court found that according to the arrangement that existed between the parties for two (2) decades there was never any information conveyed to the respondent that Jordaan lacked any authority, actual or implied.

[21] In *S Monyane & Others* 2008 (1) SACR 543 (SCA) para 15 court stated:

> "This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".
>
> See also *S v Hadebe and Others* 1997(2) SACR 641 SCA at 645 e –f.
>
> *S v Kekana* 2013 (1) SACR 101 (SCA) at p.105.

[22] Accordingly, having considered the overall circumstances of this case I can find no misdirection on the part of the trial court regarding its factual findings.

[23] It is clear from the evidence that:

23.1 Jordaan had concluded sponsorship agreements as marketing manager in the preceding years 2004, 2005 and 2006 all of which were honoured.

23.2 that was done by Jordan without the involvement of the board of directors of Bosal and the directors did not repudiate such agreements.

23.3 Jordaan participated actively and extensively in the marketing of sponsorship.

23.4 Lindenberg reasonably relied upon the representation that Jordaan had authority and accordingly concluded the sponsorship agreement for the 2007 and 2008 years in August 2006 based upon that representation.

23.5 That Jordaan had authority and that accordingly the agreement was properly authorized.

[24] In the result, I make the following order:

24.1 The appeal is dismissed with costs.

TLHAPI J

[1] I have read the judgment of my brother Mushasha AJ and I am in agreement that the appeal be dismissed. The parties were referred to trial as a result of disputes of fact in application proceedings. For convenience the parties shall be referred to as they were at trial.

[2] The application by the defendant to amend the notice of appeal was not opposed. The amendment entailed an alternative, that, should the appeal fail, the amount of the judgment be reduced because the plaintiff had not complied with its obligation for the full period of 2007 and 2008.

[3] It was common cause that the plaintiff relied in its declaration on an express authorization by the defendant to conclude the sponsorship agreement on its behalf alternatively, an implied authority and, in replication, ostensible authority. The defendant denied that any agreement had been concluded and also denied that Jordaan had the necessary authority to conclude any sponsorship agreement on its behalf.

[4] In this appeal the crisp issue to be determined was whether plaintiff had on any of the basis relied upon, proved that Jordaan, the sales and marketing manager / director, had authority to conclude a sponsorship agreement on behalf of the defendant and whether the court *a quo* was correct in arriving at its factual findings by relying on inferences drawn from the evidence to find in favour of the plaintiff.

[5] Peculiar to the relationship between the parties was the informal manner in which the sponsorship agreements were concluded commencing 1987 excluding the years 2003 and 2004 and as determined by the court *a quo,* the lack of any formal documents evidencing the sponsorship budget and or any limitation placed on Jordaan or his predecessors to conclude sponsorship agreements on behalf of the defendant.

[6] There was no evidence under oath to contradict Lindenberg's evidence. It was argued for the defendant that where the plaintiff sought to rely on an implied authority the defendant would only be obliged to place evidence before the court once the plaintiff had established a *prima facie* case. The problem I have with this argument is that implied authority was not the only basis relied upon by the plaintiff and there was always a possibility that the plaintiff would succeed that there was a *prima facie* case in respect of any of the other grounds pleaded.

[7] Having determined that the evidence of Lindenberg was credible and truthful, the court *a quo* found it appropriate to deal with Jordaan's denial of the conclusion of the sponsorship agreement and the implications of the defendant's conduct from August 2006 to May 2007. Of relevance were, the conduct of Jordaan and the defendant in the light of Lindenberg's written confirmation of the conclusion of the sponsorship agreement in a letter dated 3 August 2006; the agreement and payment of the signage at the drag strip; the sms messages by Jordaan to Liebenberg of the 28 February and 2 March 2007 relating to payment that fell due; the monthly invoices sent to the defendant; the conduct of staff in Jordaan's office, regarding the processing of invoices for payment; the attendance by Jordaan of the meeting of sponsors at Subaru and his active participation in the discussions and other engagements with Wesbank regarding advertising space in The Saturday Star for the plaintiff.

As a result of the above it was found that, Jordaans denial of the existence of a sponsorship agreement was false.

[8] In addition it was correctly found at paragraph 21 – 23 of the judgment that the management minutes dated 18 September 2006 (BOS1) were not related to any limitation on Jordaan to conclude sponsorship agreements on behalf of the defendant and, that BOS 2 did not relate to any application for sponsorship by Lindenberg which was considered by the defendants.

Given the history of their relationship, and for the above reasons I find no reason to interfere with the factual findings by the court *a quo.*

[9] When dealing with ostensible authority Lindenberg was expected to satisfy the court that as reasonable person he understood that Jordaan had authority to act. The act should be such that it was interpreted by Lindenberg to be that of the defendant. In this instance the defendant is estopped from reneging from the agreement because the representation by conduct was seen in allowing Jordaan to negotiate agreements on its behalf. This conduct was displayed over a period of time. It was submitted for the plaintiff that the requirements to establish ostensible authority as outlined in *NBS Bank v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) at 412 C – D were satisfied and I agree.

1. 'Representations by words or conduct by the principal and not merely by the agent are representations made to the world that such person has the usual authority to conclude agreements of the kind that the agent would conclude for the principal'. In 2003 the managing director Bodenstein referred Lindenberg to Jordaan, the marketing manager and as acknowledged by the defendant he was the public face of the defendant who concluded the 2004, 2005 and 2006 with Lindenberg without a problem. The agreements of 2007 and 2008 were again concluded with Jordaan. The court *a quo* found that there was no evidence of any limitation to Jordaan's authority and no evidence was adduced to that effect. The totality of the evidence shows that the plaintiff *prima facie established* that 'a facade of regularity' existed that there was necessary authority, *South African Broadcasting Corporation v Coop and Others* 2006 (2) SA 217 (SCA) at 237 A; *Glonfinco v Absa Bank t/a United Bank* 2002 (6) SA 470 (SCA) at 480 D-E.

2. The defendant had honoured previous agreements and must have expected that Lindenberg would continue to act on the representations of Jordaan.

3 Lindenberg had discussions and he formally confirmed the contents of the agreement, there was no dispute or objection raised by the defendant from August 2006 to May 2007. His reliance on the representation, having regard to the evidence in its totality was reasonable. As a result Lindenberg acted to his prejudice.

[10] It was conceded for the plaintiff that the payment claimed was in respect of those races he had competed in and as outlined in annexure B plus interest. The order of the court *a quo* has to be amended accordingly.

I am not inclined to deal with the issue of costs in respect of the previous application in that this was not properly ventilated in the appeal.

[11] In the result the following order is given,

1. The appeal is dismissed with costs;
2. The order of the court *a quo* is substituted with the following:

   The defendant is ordered to pay:

   2.1 R2 625 648 in respect of capital;

   2.2 R961 061.91 for interest until 28 February 2011;

   2.3 Further interest on R2 625 648 at the prescribed rate of 15.5% per annum as from 1 March 2011 to date of final payment.

TLHAPI J

MUSHASHA M J

ACTING JUDGE OF THE HIGH COURT

I agree

KHUMALO N V

JUDGE OF THE HIGH COURT

I agree

TLHAPI V V

JUDGE OF THE HIGH COURT