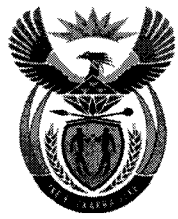

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number 4740/2010

In the matter of:

SLALEY CELLARS (PTY) LIMITED	Plaintiff
and	
TOM EDWARD WITTENBERG t/a	
CONFLUENCE WINE IMPORTERS	Defendant

JUDGMENT BY	:	OLIVIER, AJ
For the Plaintiff	:	Adv. E De Villiers
Instructed by	:	Spamer Triebel Inc. Tel. No. 021 – 913 7392
For the Defendant	:	Adv. A Heunis
Instructed by	:	Heunis Law Group Tel. No. 021 – 851 1555
Date(s) of hearing	:	8/13/14/ AUGUST 2012
Judgment delivered	:	24 AUGUST 2012

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

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Case Number 4740/2010

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SLALEY CELLARS (PTY) LIMITED Plaintiff

and

TOM EDWARD WITTENBERG t/a

CONFLUENCE WINE IMPORTERS Defendant.

Judgment: 24 AUGUST 2012

OLIVIER, AJ:

[1] Plaintiff claims the balance of the purchase price of wine sold and delivered being an agreed amount of € 17 971, 20.

[2] On 17 September 2007 Confluence Wine Importers issued purchase order SL-9 to Plaintiff for wine in the amount of € 2736, 00. This purchase order is reflected on an invoice issued by Plaintiff which records the sale of the ordered wine (the "first invoice") on 19 September 2007.

[3] On 21 November 2007 Confluence Wine Importers issued purchase

order SL-10 to Plaintiff for wine in the amount of €15 247, 20. Although this purchase order number does not appear on the invoice issued by Plaintiff on 17 December 2007, which records the sale of the ordered wine (the "second invoice") it is common cause that these two sales and deliveries took place pursuant to the two purchase orders placed by Wittenberg. Plaintiff is in possession of the two purchase orders and the agreed amount outstanding due and payable is the aggregate of these purchase orders.

[4] Plaintiff alleged that on or about 19 September 2007 and at Stellenbosch, Plaintiff and Defendant entered into an oral agreement in terms of which Plaintiff sold to Defendant the wine reflected in the first invoice.

[5] Defendant pleaded that he acted in a representative capacity on behalf of Confluence Wine Importers being Confluence Wine Importers LLC ("CWI"), which is alleged to be a company duly registered in terms of the Company Laws of the USA. Save that Plaintiff sued the incorrect party and that CWI has admittedly not paid the invoiced amounts the contents of paragraph 3.4 of the Declaration is admitted.

[6] Identical averments are made in respect of the second invoice which were met by the same plea set out above.

[7] Defendant pleaded that the respective agreements were "not solely of an oral nature as the purchases were made by way of written order form". These written order forms are *inter alia* the purchase orders referred to above.

[8] Plaintiff averred that Mr T E Wittenberg ("Wittenberg") trading as Confluence Wine Importers of Somerset West is the Defendant and purchaser of the wine. Defendant denies that he traded as such and pleads that CWI wherein he is a "partner" and "Chief Executive Officer" of is the purchaser and debtor of Plaintiff.

[9] As defendant pleaded that the purchase agreements were concluded with a company incorporated in the USA the court referred the parties to the provisions of Section 331 of the Companies Act 61 of 1973, ("the Act"), being the Act applicable at the time that the transactions were concluded.

[10] This led to an amendment by Plaintiff who in the alternative alleged that should the court find that the purchase agreements were concluded between Plaintiff and CWI then Defendant would in any event be liable for payment by virtue of the provisions of Sections 331 (2) and 50 (3) of the Act. In his plea thereto Defendant, in general, denied liability under the aforesaid provisions and specifically pleaded that CWI is not registered as an external company in terms of the Act and that CWI did not need to comply with Sections 50 (3) (b) and 331 of the Act.

[11] Mrs S Rowe ("Rowe") testified on behalf of Plaintiff. She is the General Manager in charge of the operations of Plaintiff. She said that Plaintiff had previously encountered problems in the recovery of monies pursuant to sales to a USA corporation and that Plaintiff would never have entered into sales agreements and extended credit to CWI. She was never informed that the counter party or purchaser was CWI and was at all

material times convinced that Wittenberg personally, who may have been trading as Confluence Wine Importers, was the purchaser. As Wittenberg and his wife had immovable property in RSA she, in her capacity as representative of Plaintiff, was prepared to extend credit to Wittenberg. When referred to the correspondence, none whereof was solely in the name of Wittenberg, she testified that she believed that Wittenberg traded as Confluence Wine Importers and she paid no heed to the reference to "partners" and "company" referred to at various times therein.

[11] According to Wittenberg he did not inform Rowe that the purchaser was CWI. He had from the outset referred to himself and his partners, CWI is expressly referred to in particulars that he supplied in respect of the consignee required for purposes of export certificates and numerous references to a company and partners were made in correspondence with Plaintiff and especially Rowe. Payments were made to Plaintiff by CWI. He therefore found it difficult if not impossible to believe that Rowe did not know that Plaintiff entered into the agreements with CWI which did business as Confluence Wine Importers whereas he did not. Much emphasis was placed on the draft agreement wherefrom it appears that the importer was described as CWI. Rowe had never raised any objection or made any comment in respect of the identity of the defined importer, which would have been expected, according to Wittenberg, had Rowe had any doubts in this regard. Wittenberg further testified that had Rowe conducted a credit check or a google search it would have been apparent that CWI and not he was in fact the purchaser/importer. He knew that Plaintiff was, due to previous unrecovered debt, unwilling to do business with a USA company. It was standard practice in the USA for a company to do business under a

name without disclosure of the identity of the company behind the trading name as CWI had done in this instance.

Who was the purchaser?

[12] In most if not all the correspondence sent by Wittenberg, the words "Confluence Wine Importers" appear below his name. The purchase orders were in the name of "Confluence Wine Importers" and not in Wittenberg's name. The invoices were similarly addressed to "Confluence Wine Importers" and not to Wittenberg personally.

[13] As stated above Plaintiff contends that Defendant personally traded as "Confluence Wine Importers" whereas Defendant contends that CWI did business as such.

[14] An intermediary who contracts in his or her own name is liable to the third person in terms of the contract. He or she cannot avoid liability by referring the third person to an undisclosed principal.[1]

[15] Where a contract is entered into with an agent in the belief and upon the faith of his or her being the principal the agent is personally liable on that contract[2]. "Whatever a man's real intention may be if he so conducts himself that a reasonable person would think that he was buying as a principal, then you must take it that he did buy as a principal"[3].

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[1] LAWSA 2nd Ed Vol. 1 paragraph 233.

[2] De Villiers & Macintosh ("D&M"): The law of agency in South Africa 3rd Ed page 568, Clarck v Van Rensburg 1964 (4) SA 153 (O) at 159 A-B. Constructive Notice is insufficient because the doctrine of constructive notice does not extend to commercial contracts, Halsbury 5 Ed Vol. 1 paragraph 125 no. 10

[3] Per Davis, J in Abrahams v Williston Municipality 1939 (1) PH A14. See further Snyman v Brecker 1904 TS 745 at 747 and at 750 where Wessels J (as he then was) remarked that "the agent who did not disclose his principal was estopped from saying that he was not acting as a principal". Estoppel was however not

[16] In Stafford t/a Natal Agricultural Co. v Lions River Saw Mills 1999 (2) SA 1077 (N) Respondent sold and delivered goods upon a written order which reflected the name "Natal Agricultural Co." being the name where under Appellant had previously and a close corporation had subsequently, and prior to the order, traded. At all relevant time Respondent believed that Appellant traded as "Natal Agricultural Co." and had not known that Appellant was acting as an agent for the close corporation. The court found Appellant to be liable on the basis that he had acted as an agent for an undisclosed principal and that Respondent's lack of knowledge of the existence of the principal was caused by Appellant's failure to disclose that he was acting as an agent for the close corporation.[4]

[17] The problem in regard to representation does not readily arise in written contracts. Where the contract is a verbal one, the fact that the third party made no inquiries regarding the unnamed principal is a strong factor to be taken into consideration in determining the intention of the parties[5] in regard to the liability of an agent to the third party. The general rule that on a contract on behalf of an undisclosed principal may bind such principal does

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pleaded in the present case and the court cannot on its own and without reliance by Plaintiff on estoppel decide that the application of estoppel is warranted under the circumstances. See JC Sonnekus The Law of Estoppel in South Africa page 25. In my view the same result could be achieved by the application of the reliance theory and there is no need to rely on estoppel. See Sonop Petroleum (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A).

[4] c/f American Jurisprudence 2nd Ed Vol. 3 paragraph 327 according whereto the agent must not only disclose that he is acting as an agent but also the identity of his principal to avoid personal liability. In Marais v Perks 1963 (4) SA 802 (E) at 807F Jennett JP commenting on the presumption that such an agent for an unnamed principal is liable, said "if an agent contracts as agent for an unnamed principal there may be a presumption that he is undertaking personal liability. ... [and] if that is so then the presumption can obviously be rebutted by proof that the agent acted as agent only. "See further D & M page 199 and page 561 n 88 and LAWSA (op cit) at paragraph 224 for comment and criticism on the personal liability of an agent for an unnamed principal. De Wet & Van Wyk Kontrakte en Handels reg 5de uitgawe Vol. 1 bladsy 100-101.

[5] D & M 596 note 25.

not apply in American Jurisprudence if it clearly appears that the contracting party intended to give exclusive credit to the agent.[6]

[18] It is not upon the party with whom the agent deals to discover the principal. The agent is able to relieve himself from personal liability by disclosing the existence of a principal, if he does not, the agent must be presumed to intend to be liable.[7]

[19] In the present matter Wittenberg did not disclose to Rowe that he was acting as an agent. He conducted himself in such a manner that a reasonable person would think he was buying as a principal. He contracted as a principal albeit under a trade name. It does not assist him to say that plaintiff could by means of reasonable enquiry have discovered the fact of representation as well as the identity of the principal.

[20] It was not disputed that Rowe was prepared to extend credit to Wittenberg and to Wittenberg only. It was put to her that plaintiff was prepared to extend credit to a USA company. Rowe was emphatic in her denial and stated that to recover money owed by a USA company would necessitate litigation abroad which plaintiff would never have consented to. Credit was extended to Wittenberg after some of the wine had to be discarded. No credit enquiries were made by Rowe as she relied on her belief that plaintiff had contracted with Wittenberg. On this basis Wittenberg would also have incurred personal liability.

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[6] American Jurisprudence (op cit) paragraph 321.
[7] American Jurisprudence 2nd Ed Vol. 3 paragraph 325.

[21] It matters not whether Wittenberg did act as principal or as agent for an undisclosed principal as on both grounds he would be personally liable. There is and was no duty upon plaintiff to attempt to unearth facts that would show Wittenberg to be only an agent.

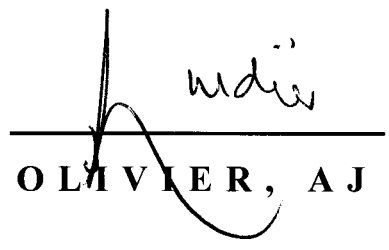
[22] In the circumstances it is unnecessary to deal with the provisions of Section 331 of the Act. The wine in respect of the 1st and 2nd invoices was delivered by no later than 22 December 2007 as appears from Exhibit "B" page 34. Payment was due 60 days after delivery being by 22 February 2008.

[23] It is ordered that:

1. Defendant pay the amount of €17 971, 20 to Plaintiff.

2. Defendant pay Plaintiff interest on the outstanding amount at a rate of 15,5% per year calculated from 22 February 2008 to date of payment.

3. Defendant pay Plaintiff's costs of suit.



OLIVIER, AJ