

IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA - GHANA

CIVIL APPEAL
NO. 7/2003
10TH DECEMBER, 2004

CORAM - TWUMASI, JA [PRESIDING]
OWUSU ANSAH, JA
ANIM, JA

JOE ANAGBO & ANOR.	PLAINTIFF/RESPONDENT
V E R S U S		
EDNA POORT & ANOR.	DEFENDANT/APPELLANT

J U D G M E N T

TWUMASI, JA - This is an appeal from a judgment of the High Court Accra, delivered on the 11th January 1999. The Plaintiffs/Respondents sued the 1st Defendant/Appellant and one other who has abandoned his appeal for the following reliefs:-

- (a) US\$14,363.68 being the balance of the purchase price of 80 drums of Ethyl Alcohol sold and delivered by Plaintiffs to the Defendants.
- (b) Interest on the said amount at the current bank rate.

The Plaintiffs/Respondents claimed that the two Defendants, owed them the amount of money stated in the writ jointly and severally on the basis of an agreement entered into between the respondents as suppliers of certain items of alcohol from Germany to Ghana which goods the Defendants took delivery and disposed of to their customers for gain but had defaulted in paying for the goods despite repeated demands. The contention of the 1st Defendant/Appellant, however, was that the respondents agreed with him alone to serve them as commission agent in the marketing of the said goods and that it was in performance of that duty that he was able to win the 2nd Defendant as a business party, ready and capable of receiving and paying for goods that the respondents might ship to Ghana. But there was incontrovertible evidence even from the pleadings of the defendants that the 1st defendant got himself deeply involved in the appropriation of the 80 drums of Ethyl Alcohol supplied, thus casting a shadow of doubt upon the 1st defendant/appellant's claim that he was just an appointed commission agent for the

respondents. I wish to refer to paragraphs 2, 3 & 4 of the respondents Statement of Claim:-

- (2) Plaintiff aver that when they came to Ghana 1st defendant Ordered them to purchase 80 drums of Ethyl Alcohol for him and 2nd defendant on their return to Germany.
- (3) It was further agreed between Plaintiffs and 1st defendant that the said Ethyl Alcohol when purchased by the plaintiffs should be shipped to Ghana to 2nd defendant and would be paid for in dollars within 60 days to plaintiffs in Germany.
- (4) By virtue of the said agreement plaintiffs on their return to Germany, took a loan from the Bank in Germany and purchased and shipped one container containing 80 drums of the said Ethyl Alcohol to defendants at a total cost of US\$27,000.
- (5) Plaintiffs aver that Defendants took delivery of the said 80 drums of the Ethyl Alcohol which plaintiffs shipped to defendants (Vide Bill of Lading, exhibited and marked "Exhibit A)."

Two interpretations stand out clearly from the pleadings. From one standpoint, the plaintiffs say they entered into the agreement with the 1st defendant (now appellant) not with the two defendants, yet from another angle of the equation, the plaintiffs aver that when it came to the shipping of the goods, their clearance and possession thereof from the harbour, they shipped to the two defendants who took delivery of same. The plaintiffs' pleadings therefore gave rise to some ambivalence and I should have been more relieved if they had been more specific on the issue of the person with whom they entered into an agreement. Was it with the 1st defendant alone or with the latter and the second? Let us examine the case of the 1st defendant.

The 1st defendant/appellant pleaded that the agreement was between the plaintiffs and himself. He averred that the plaintiffs appointed him as an agent to look for companies or businessmen interested in the purchase of goods from Europe, such as Ethyl Alcohol. Paragraph 6 of the Statement of Defence filed on behalf of the 1st defendant was as follows:-

- (6) Subsequently the plaintiffs shipped 80 drums of Ethyl Alcohol

to the 2nd defendant doing business under the name Mahakas Enterprise while they sent to the 1st defendant as their agent in Ghana the Bill of Lading, S.G.S. report and an invoice “Edna Poort Co.” for onward transmission to the 2nd defendant.

Thereafter in an affidavit filed by the plaintiffs on 8 April 1994 in respect of a motion filed by the 2nd defendant who had entered a conditional appearance because he contended that the goods were not shipped to him in his personal name, neither was it in the name of his company, the 1st plaintiff averred that the 1st defendant ordered the goods in the name of himself and the 2nd defendant as the Statement of Claim has indicated. The central issue as clearly stated in the submission of counsel for the appellant which I think is right is: Who ordered and imported the 80 drums of Ethyl Alcohol from the plaintiffs in Germany? In his evidence-in-chief the plaintiff’s representative testified that the plaintiffs appointed the 1st defendant as their commission agent. The evidence of the plaintiffs that appears on page 82 of the record of appeal was that in actual fact when the plaintiffs came to Ghana, the 1st defendant introduced the 2nd defendant to them and also his business. The evidence further adduced was that the two defendants ordered the goods and took delivery of same at the harbour. The plaintiffs contend that the 1st defendant/appellant got himself deeply involved in the distribution and disposal of the goods. The plaintiffs therefore urged the court not to overturn the finding by the learned trial Judge against the two defendants. The kernel of the 1st defendant/appellant’s case could be found in paragraph 5 of his Amended Statement of Defence as follows:-

- (7) The 1st defendant as commission agent contacted the 2nd defendant who operating under the name Mahakas Enterprise was interested in ordering Ethyl Alcohol from the plaintiffs and therefore gave his particulars to the 1st defendant for onward transmission to the plaintiffs who on receipt of same sent to the 2nd defendant through the 1st defendant a Pro-Forma Invoice which the 2nd defendant used to place an order for 80 drums of Ethyl Alcohol from the plaintiffs.

The plaintiffs accordingly shipped the 80 drums to the 2nd defendant through Mahakas Enterprise while they sent the bill of lading and other documents to the 1st

defendant for onward transmission to the 2nd defendant. The 1st defendant/appellant contended that he acted throughout as agent for the plaintiffs; that he paid the plaintiffs all monies 2nd defendant gave him to be sent to the plaintiffs; and that at the Police Station where the 2nd defendant/appellant made a statement upon his arrest in connection with the transaction subject-matter of this appeal, he admitted that he owed to the plaintiffs the debt which the plaintiffs now claim against him jointly with the 2nd defendant. The statement was admitted in evidence as Exhibit C. The plaintiffs themselves tendered this Exhibit C in which the 2nd defendant admitted owing the plaintiffs.

The plaintiffs had earlier on tendered in evidence the police statement of the 1st defendant/appellant in which the latter had explained that he just acted as a commission agent for the plaintiffs to enable the 2nd defendant do business with the plaintiffs. At the trial the fact that the plaintiffs appointed the 1st defendant/appellant as their commission agent was not disputed by the plaintiffs, but it seems to me that it is important to examine the amplitude of the agreement in this regard: The question was: What was the scope of the duty envisaged by the parties when they spoke of 'commission agent'?

In his evidence-in-chief at page 83 of the record the plaintiffs' representative explained:-

“When the plaintiffs came to Ghana they appointed the 1st defendant, their agent and they were to pay him US\$1,000 upon completion of the work. According to 1st defendant, he took 21 drums of the alcohol which we shipped for indebtedness of the 2nd defendant for all the drums of alcohol shipped to him with the 1st defendant appellant acting as agent for each of them.”

He was to see to the completion of the transaction between the plaintiffs/respondents and the 2nd defendant operating under the business name MAHAKAS ENTERPRISE. This was based upon the contract of commission agency that existed between him and the respondents on the one part and the trade transaction between the respondents and the 2nd defendant on the other part. The undisputed facts found by the learned trial Judge were:-

- (1) that the respondents shipped the goods to MAHAKAS and through them to the 2nd defendant.
- (2) that both respondents and the 2nd defendant agreed to pay

commission to the 1st appellant.

- (3) that the 1st defendant/appellant borrowed money to assist the 2nd defendant to clear the goods.
- (4) that at the Police Station the 2nd defendant admitted liability to the plaintiffs while the 1st appellant denied – see the latter Police Station at page 23 of the record of appeal.

In his evidence-in-chief the representative of the respondents testified that they had received certain payments in respect of the goods supplied. Certainly they could not have received them from any other person than their own appointed agent, the 1st defendant/appellant thus confirming what the 2nd defendant according to the representative stated he had done. The 2nd defendant's police statement told the whole truth about the nature of the relationship between the 1st defendant/appellant and the 2nd defendant. My finding is that the person who ordered the goods was the 2nd defendant, not the commission agent, the 1st defendant/appellant. The active role the 1st defendant/appellant played in the whole transaction did not change his character or status as an appointed agent. If the agent had truly imported the goods for himself and the 2nd defendant, how could the demand for commission arise? On the legal relations between principals and agents we may be guided by certain well-settled principles which include: That their respective rights and obligations are based on contract: see *Love v. Mack* [1905] 93 L.J. 32 CA; that it is the legal duty of an agent to perform honestly the duty undertaken by him under the contract which governs the agency. See *Catlin v. Bell* [181] 4 Camp 183; where an agent receives payments and behalf of his principal, he must account for them and the principal has a right to sue him to account. See *Great Western Insurance Co. of New York v. Cunliffe* [1874] 9 Ch App. 525 at 541. See also local case *Agbemashior v. State Insurance Corporation* [1972] 2 GLR 65 Abban J, on accountability to principal for moneys received by agent.

There is the principle that an agent has a fiduciary obligation to his principal on the agency work that he does. Upon an agent's breach of his fiduciary or other duty to his principal, the latter has a remedy in an action for damages: See *North American Land and Timber Co. Vrs. Watkins* [1904] 1 Ch. 242. In my humble opinion, having regard to the facts of this case, including the pleadings of the 1st defendant/appellant about how the

80 drums of Ethyl Alcohol was disposed off, including the fact that 212 out of the lot went to him, the proper action which the plaintiffs should have brought against the 1st defendant was one for account: In that regard, he would have felt free to give full account of his stewardship. I am a bit skeptical about an action for recovery of the balance of debt owed on the 80 drums against both defendants.

Such actions could not be legally effective as one might wish, because I wonder whether it is proper for a principal to sue his appointed commission agent on payment of goods the principal has with the assistance of the agent supplied to a known consignee who has admitted receipt of the goods and liability for payment of their agreed price. The learned trial judge unfortunately failed to apply his mind to the law on the subject and misdirected himself on the issue before him. The learned trial judge was a bit troubled by the case as borne out by the following passages in his judgment at pages 206-207:-

“From the evidence before the court it is not easy to really appreciate at any stage the state of accounts between the 1st defendant and the 2nd defendant relating to the 80 drums of Ethyl Alcohol shipped to Ghana. The plaintiffs stand is that they dealt with both the 1st defendant and the 2nd defendant. According to the bill of lading Exhibit B the 80 drums of Ethyl Alcohol were consigned to the order of Mahakus Enterprise....”

Then at page 209 the judge states:-

“The various accounts tendered in evidence do not reflect what is due to the plaintiffs although there is an indication as to what has been paid to the plaintiffs.....what is not disputed is the amount that has been paid to the plaintiffs.”

Much earlier but still at the same page 209 the learned trial judge had stated the following:-

“In my view there is lack of clarity in the various statement of account between the two defendants and that is brought about by the desire on their part to pursue their personal interests rather than take into account the plaintiffs’ entitlement to be paid for the

80 drums of Ethyl Alcohol.”

It can be seen that the learned trial judge found himself faced with a serious problem of how to resolve the issues before him but then he had himself to blame because his difficulty had been created, needlessly, by himself by failing to apply his mind to the law on the subject and the clear evidence before him including, in particular, the plaintiffs’ evidence that the 1st defendant/appellant was their appointed commission agent and the police station made by the 2nd defendant. The following is the full police statement of the 2nd defendant which tells the whole truth:-

“Sometime last year I was informed by a friend of a couple who would like to trade in alcohol. I therefore being a blender accepted to take delivery. After an IDR (Importation Declaration Form) has been sent I waited for about two months or more for the alcohol which was not coming. Now when the alcohol finally came duty on it had been increased to an alarming rate. I have to organise funds from other sources to pay the difference in duty which at the end of production, I realised I have incurred huge debt to pay to the supplier. I have made necessary arrangements for two containers of alcohol out of which I would pay the supplier and in the light of these I hope to remit whatever money I owe the supplier latest by the end of August,”

The friend being referred to in this statement is obviously the 1st defendant/appellant as far as I can gather from the record of the appeal. This police statement speaks the real truth because the evidence shows clearly that the 1st defendant/appellant was the one who got the 2nd defendant as a client for the plaintiffs and he it was who arranged for the involvement of “MAHAKAS ENTREPRISE” in the Ethyl Alcohol transaction. The police statement by the 2nd defendant incidentally tendered by the plaintiffs themselves rather gives credence to the case of the 1st defendant/appellant and diminishes the weight of the case put forward by the plaintiffs against the 1st defendant/appellant. The cases cited by Counsel for the 1st defendant/appellant, namely, *Reindorf v. Amadu & Braimah* [1962] 1 GLR 08; *Nii Abossey Okai II v. Nii Ayikai* [1946] 12 WACA 37; *Asante v. Bogyabi* [1966] GLR 232 SC and *Banahene v. Adinkra* [1976] 1GLR 346 CA all of

which state the principle enunciated in the case of Trifo v. Dua VIII [1959] GLR 63 are inapplicable to the situation in the instant case despite the view I have expressed on the police statement of the 2nd defendant. The rule in Tsrifo v. Dua VIII [supra] applies to corroboration of the evidence adduced by a party on the opposite side of the litigation, not to the evidence of parties in the same camp, like the 1st and 2nd defendants in the instant case.

In the light of the evidence as I have endeavored to highlight, I am driven to the firm conclusion that the judgment of the court below cannot be right. The appeal by the 1st defendant/appellant therefore succeeds and it is hereby allowed.

In lieu thereof there shall be judgment against the 2nd defendant alone for the claim indorsed on the Writ.

**P.K. TWUMASI
COURT OF APPEAL**

I agree.

**P.K. OWUSU ANSAH
COURT OF APPEAL**

I also agree.

**S.Y. ANIM
COURT OF APPEAL**

**COUNSEL – MR. TSEGAH FOR RESPONDENT.
MR. AWADZI FOR 1ST DEFENDANT/APPELLANT.**

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