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N v H

EMERGENCY TRUCK AND CAR HIRE

JAGATHESAN JOHN CHETTY

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED

SMALBERGER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

EMERGENCY TRUCK AND CAR HIRE

First Appellant

JAGATHESAN JOHN CHETTY

Second Appellant

and

THE STANDARD BANK OF SOUTH AFRICA
LIMITED

Respondent

CORAM: JOUBERT, SMALBERGER, JJA,
et BOSHOFF, AJA

HEARD: 16 MAY 1986

DELIVERED: 26 MAY 1986

J U D G M E N T

SMALBERGER, JA :-

The respondent (as plaintiff) successfully
sued the appellants (as defendants) in the Natal Provincial

Division /

Division for payment of the sum of R5 921-00, plus costs.

The appellants now appeal to this Court against the judgment of the trial judge (KUMLEBEN, J).

The present appeal concerns a question of agency.

The only issue on appeal is whether the second appellant's son, D K Chetty, in purchasing apples from a certain

C J Johnston, acted as the second appellant's agent, and

with his authority. There were certain other issues that

fell to be decided in the court a quo, but these were

decided in favour of the appellants. The respondent

initially cross-appealed in respect of one of these issues,

but subsequently abandoned its cross-appeal.

The following facts are either common cause or not in dispute. The second appellant is the sole proprietor

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of the first appellant. As such they may be regarded as a single legal entity. The first appellant, despite its name, is engaged in the fruit trade. It operates a current banking account with the respondent at one of the latter's Pietermaritzburg branches. The cheque forms issued in respect of this account bear the printed name of the first appellant as drawer. The second appellant and his wife, Mrs S Chetty, were authorised to sign cheques drawn on the first appellant's account. The account was operated upon regularly. The second appellant's son, D K Chetty, was the sole proprietor of a business known as "The King of Fruit and Vegetables". This business conducted a current banking account with the same branch of the respondent as the first appellant. D K Chetty died on

31 December 1980 in insolvent circumstances.

The main witness for the respondent was

Mr C J Johnston, an apple farmer in the Uniondale district.

He testified that he first met D K Chetty at the commence=

ment of the 1977 apple season when D K Chetty came to his

farm to purchase apples. From then until 1979 D K Chetty

was a fairly regular visitor to his farm to make apple

purchases. At times he purported to purchase apples on

behalf of the second appellant; at other times he purchased

them on his own behalf. The initial purchases were paid for

in cash. Subsequently the purchases made on behalf of the

second appellant were paid for by means of cheques

bearing the name of the first appellant and signed by the

second appellant (or his wife). D K Chetty paid for his

own /

own purchases with different cheques signed by him

personally. Certain of D K Chetty's visits were preceded

by telephone calls from someone who identified himself as

"J J Chetty" enquiring as to the availability of apples.

Johnston was unable positively to identify the person who

so called as the second appellant. The truck in which

D K Chetty travelled, and in which the fruit purchased

was loaded, had the name of the first appellant painted on

it. On the back of the truck there was an advertise=

ment for "The King of Fruit and Vegetables". In his

records, in respect of purchases made by D K Chetty,

Johnston reflected the name of the purchaser on each

occasion as either "J J Chetty" or "D K Chetty" depending

upon whether payment was tendered by D K Chetty personally

or on behalf of the second appellant. Johnston's invariable

practice /

practice was to regard the person who paid for the fruit purchased, or on whose behalf payment was made, as the purchaser thereof. On this basis, according to Johnston, most of the purchases made by D K Chetty during 1977 were made on behalf of the second appellant. In 1978, with one exception, all the purchases were made by D K Chetty personally.

I come now to Johnston's evidence concerning the transactions giving rise to the amount in dispute. He testified that D K Chetty purchased apples on 31 January 1979 to the value of R3 143-00; on 9 February 1979 to the value of R544-00; and on 13 February 1979 to the value of R2 234-00, i.e., for an amount of R5 921-00 in all. The three purchases were reflected in a single invoice,

No 34, and paid for by D K Chetty on 13 February 1979 by means of a signed cheque bearing the printed name of the first appellant as well as the name "J J Chetty" - a cheque apparently similar in appearance to those tendered previously in respect of purchases purportedly made on behalf of the second appellant. It appears from Johnston's evidence under cross-examination, however, that when acquiring the apples for R3 143-00 on 31 January 1979 (which were not paid for at the time) D K Chetty indicated that he would be purchasing them for his own account. Johnston duly made out an invoice to D K Chetty reflecting the transaction. However, when D K Chetty eventually paid for all three purchases on 13 February 1979 he indicated that they were all to be for the account of the second appellant. This resulted in the effective /

effective cancellation of the previous invoice. It is common cause that D K Chetty took delivery of the apples purchased on the aforementioned three dates. In due course Johnston took the cheque which had been tendered to him as payment to the respondents' Uniondale branch and deposited it there for collection.

The evidence establishes that the cheque was subsequently lost and therefore never presented for payment. Consequently Johnston never received payment for the apples sold by him to D K Chetty in the circumstances outlined above. Johnston eventually ceded his rights for the recovery of the purchase price of the apples so sold to the respondent, hence the respondents' claim.

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The only other witness whose evidence needs specific mention is Mr V C Edwards, the manager of the respondent's Pietermaritzburg branch at which the first appellant has its account. He testified to a discussion he had with the second appellant in connection with the lost cheque. The second appellant told him that it was the usual practice "to issue out cheques signed in blank to enable them to make their purchases down in the Cape, usually signed by his wife". In the context of the discussion the cheques in question were cheques drawn on the first appellant's account. He was also told that "(t)hey had a son or sons who were drivers of their motor vehicles and these sons used to go down to the Cape or wherever it was to buy their produce and tender those cheques in payment of that /

that produce, they were filled in at that stage, at the time of sale, for the exact amount". It is apparent from this evidence, and indeed it is not in dispute, that the second appellant provided D K Chetty with signed, blank cheques drawn on the first appellant's account for the purpose of purchasing and paying for fruit acquired in the Cape. According to Edwards the second appellant refused to provide a duplicate cheque to replace the missing one. He denied liability in respect of the cheque, his attitude being "produce the evidence and I am prepared to pay". Significantly, the second appellant at no stage specifically denied that D K Chetty had authority to act on his behalf. No evidence was led on behalf of the appellants although the second appellant was present at court and available to give evidence.

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The question arises whether, on the evidence, the respondent established, on the requisite balance of probabilities, that D K Chetty purchased the apples reflected on invoice no 34 on behalf of the second appellant, and that he had the necessary authority to do so. Counsel for the appellants found himself unable to contend that this had not been established in respect of the purchases made on 9 and 13 February 1979 for an amount of R2 778-00. This is hardly surprising if one takes cognizance of the undisputed evidence - the relationship of father and son between the second appellant and D K Chetty which facilitates an inference of agency in a case such as the present; the telephone enquiries made by someone calling himself J J Chetty followed some time later by the arrival of D K Chetty driving a truck /

a truck bearing the first appellant's name; the fact that the first appellant's cheques, tendered in respect of previous purchases which D K Chetty purported to make on behalf of the second appellant, were met without demur; the modus operandi that evolved over a period of time whereby D K Chetty personally paid for his own purchases and tendered first appellant's cheques in respect of purchases claimed to be on behalf of the second appellant; and the fact that D K Chetty was authorised to purchase fruit on the second appellant's behalf and had been furnished with blank, signed cheques drawn on the first appellant for the payment of such purchases. As the facts relating to D K Chetty's agency and authority (or lack of it) were peculiarly within the second appellant's knowledge,

less evidence would be required to establish a prima facie case than would otherwise be necessary. But this apart, the considerations I have mentioned established a strong prima facie case which the second appellant did not, and probably could not, meet, leaving the inevitable conclusion that D K Chetty acted as the second appellant's agent and was duly authorised to make the purchases in question.

The appellants' counsel, however, sought to distinguish the purchase made on 31 January 1979 from the other two purchases. His submission amounted to the following: the apples purchased on 31 January 1979 were purchased by D K Chetty personally; the transaction was complete on that date; and the respondent failed to prove that the cheque drawn on the first appellant which was

tendered /

tendered as payment for this purchase was for the discharge of a debt of the second appellant rather than D K Chetty's own personal debt. Put another way, it was contended that the sale on 31 January 1979 was one between Johnston and D K Chetty personally, and one in respect of which no indebtedness arose on the part of the second appellant towards the respondent. It is of course trite law that one person can discharge the debt of another. But counsel's submission runs counter to the facts. If one has regard to Johnston's evidence it is clear that D K Chetty always paid for his own purchases with his own cheque, and for purchases on behalf of the second appellant with a cheque drawn on the first appellant's account. While D K Chetty initially stated that the apples purchased on 31 January 1979 were

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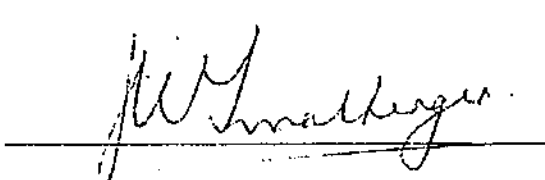
being purchased on his own behalf, when the time came for payment he indicated that they were to be paid for by the second appellant. In this lies the clear implication, in the light of his previous dealings with Johnston, that the second appellant was meant to be, or to become, the purchaser of the apples. Johnston accepted that this was to be so. Whether one regards this as an agreed rectification of the previous agreement or an agreed substitution (delegation) of the second appellant as purchaser in the place of D K Chetty is of no consequence. In either instance D K Chetty's authority to bind the second appellant, if it existed, would prima facie have permitted such rectification or substitution. If he did not have such authority one would have expected the second appellant to deny its existence

under /

under oath. This he failed to do, rendering it more probable than not that the necessary authority existed.

In this regard it is not without significance that it was never specifically pleaded that the sale on 31 January 1979 was, and remained, one to D K Chetty personally, nor did the second appellant ever suggest this to be the case to Edwards. It follows that the submission made is without merit, and the appeal cannot succeed.

The appeal is dismissed, with costs. The cross-appeal is dismissed, with costs, if any.



J W SMALBERGER

JUDGE OF APPEAL

JOUBERT, JA)
BOSHOFF, AJA) CONCUR