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CASE NUMBER: 59/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

S SILVER'S MOTOR SPARES

AND ACCESSORIES (PTY) LIMITED

Appellant

and

FOURSOME BEARING CC

Respondent

CORAM: VAN HEERDEN, GOLDSTONE et VAN DEN HEEVER JJA

HEARD ON: 16 FEBRUARY 1994

DELIVERED ON: 10 MARCH 1994

J U D G M E N T

VAN DEN HEEVER JA

Respondent is a close corporation, the only two members of which are two brothers, Raathakrishman and Vangopal Naidoo. Only the first of these features actively in these proceedings. I refer to him in what follows as Naidoo. The business of respondent ("Foursome") was managed by a Mr Opperman. Appellant is a limited liability company doing business as a wholesaler and retailer of bearings and other spare parts. Foursome obtained judgment against appellant ("the company") in the Witwatersrand Local Division in the sum of R216 657.00 in respect of a claim for goods sold and delivered, with interest *a tempore morae* and costs. The company had defended the action on the ground that it had not contracted with Foursome. Its managing director, Nel, testified that he had had no intention of dealing with Foursome at all. A firm called R & V Bearings CC ("R & V") had both sold goods to and bought goods from the company for some time. Goods which R & V bought from the company were at first

paid for. Then cheques tendered in respect of R184 000 still outstanding on the account of R & V were dishonoured. On the advice of the company's attorneys, Nel decided in turn to buy goods from R & V. The idea was that the company would then set off what was owing to it by R & V against the purchase price of the goods it was to buy from R & V. With this object in mind Nel went to the premises of R & V on the 5th August 1991 with a list of some goods for which the company already had inquiries from customers. Nel found Naidoo there and spoke to him. Naidoo (who along with his brother and three others was a member also of this close corporation) handed Nel over to a clerk who took an order for such of the listed parts as R & V had in stock. From the premises of R & V, Nel telephoned the company's purchasing manager, Abdul Domingo, and asked him to speak to Govender, a sales representative in the employ of the company. Govender was to canvas orders for additional bearings so that an order could be placed

with R & V large enough to enable the company to effectively extinguish its R184 000 claim against the latter. Over the telephone Domingo gave Nel an order number, namely 04948. Nel in turn gave this number to the R & V clerk and told him that the company would be ordering further goods on that same order number in due course. The clerk said that this would not be a problem. It is clear that it was understood that R & V would obtain what it did not have available, in order to be able to fulfil this order by the company.

What Nel did not know at that stage, was that the company's claim of R184 000 against R & V, had come about as the result of a shady arrangement between Govender and Naidoo. The aim of the scheme was to benefit the pair of them, not Govender's employer. The gist of the agreement between these two was as follows. Spark plugs bought in the name of R & V from the company were to be resold in Zimbabwe at more favourable prices than those obtainable here, Govender taking the profit

which he should in honesty and good faith have ensured for his employer. Govender apparently undertook to reward Naidoo with commission and R & V by seeing to it that the company would buy bearings from it. According to Naidoo's testimony, he at some stage withdrew from this scheme when Govender's resales did not come up to expectation and Govender was not providing the money with which to pay for the purchases made in the name of R & V. Naidoo said that, despite his having told Govender that he wanted no further part in the scheme, Govender again bought from the Company, using the name of R & V, to the value of R 184 000. This was the amount still owing to the company - according to Naidoo, by Govender and not by R & V. The cheques which were tendered in payment of this amount and dishonoured, were drawn by persons unknown to Nel and not by R & V.

Another and more important fact, of which Nel initially had no knowledge, was that three further orders numbered 08742, 03154 and 08834 were issued by

the company shortly after Nel had arranged for order 04948 to be placed, in favour not of R & V, but of Foursome. The three, taken together, duplicated the list of goods set out in that earlier order, no 04948, in favour of R & V.

Goods as listed were delivered to the company. Whether it was Foursome or R & V that delivered them, or Foursome on behalf of R & V, was in dispute.

What the court a quo in effect had to decide, was which of the two schemes had succeeded: that of Nel to achieve a set-off and so also satisfaction of the debt of R & V to the company without the need to litigate, or of Naidoo to divert the company's order in favour of R & V to the other close corporation in which he had an interest.

The trial judge had difficulty in believing anything Naidoo said in the witness box. His description of Naidoo as "a mendacious witness" is probably flattering. He was also, and understandably,

not favourably impressed by Opperman who had parted company with Foursome when it was liquidated. (The liquidator continued the action which had already been instituted against the company without being formally substituted on the record, the company raising no objection.) The trial judge found Nel on the other hand to be a patently honest witness and this finding, too, is fully justified. On appeal counsel for Foursome wisely did not attack these credibility findings. His argument was that on the evidence led on behalf of the company, the appeal could not succeed.

That brings me to the pleadings.

Foursome in its particulars of claim alleged that:

(1) on 6 August 1991 the company in writing ordered certain bearings to the value of R63 000 from Foursome, and that they were delivered the same day under cover of a Foursome delivery note, copies of both the documents being annexed;

(2) on 12 August the company ordered further goods from Foursome to the value of R144 000, delivered by Foursome the following day in two instalments, copies of the order and the two delivery notes being annexed;

(3) on 23 August more goods were ordered, telephonically, by a duly authorised employee of the company, to the value of R109 657, as set out in the Foursome delivery note under cover of which the goods were delivered the same day, the note again being annexed.

The company in its plea alleged that an agreement was concluded between the company and R & V on the 5th August whereby bearings selected by the company, and as listed in the relevant annexures to Foursome's particulars of claim, were to be delivered to it by R & V as and when delivery was called for by the company. Those bearings were delivered to the company by R & V, the company becoming indebted to R & V in the sum of R216 657, which had been reduced to R32 657 - which had

been tendered,, (less an amount in respect of which there was a dispute which need not concern us) to R & V - by virtue of set-off of the R184 000 which R & V owed to the company.

The plea went on to deny that the company had concluded any agreement with Foursome. The detail relevant to each of the three episodes set out by Foursome in its particulars of claim as summarized above and the annexures in support of those, were dealt with as follows:

Re (1) and (2) the company admitted that the order was issued in each instance but denied that Foursome reacted to or acted upon those orders. Foursome at all times knew that the order was mistakenly made out in favour of Foursome instead of R & V.

Re (3) the goods were not ordered from Foursome, but bought from R & V pursuant to the agreement of 5 August between the company and that firm. Though the delivery note purported to be one from Foursome, "delivery was in

fact effected by and for and on behalf of R & V". The company admitted that its employee placed the order, but with R & V which acted on the order in terms of the agreement of 5 August.

Foursome would not be drawn, by a request for further particulars for purposes of trial, into admitting any knowledge whatsoever of either the composition of R & V or of any dealings between R & V and the company. Foursome also (shrewdly, from a tactical point of view; regrettably, from the point of view of the company) had not asked for further particulars to try to discover on what basis it was alleged that orders admittedly issued by the company to one firm were alleged to have been intended for and acted upon by another; or on what grounds it was alleged that Foursome knew that the first two orders were issued to it by mistake; or to clear up the confusion in regard to both the alleged content and effect of the third order placed.

The first of the company's problems on these pleadings became apparent at the commencement of the trial. The company asked for an amendment which would replace its admission that three orders had been issued in favour of Foursome, with the allegation that such orders had been written out. Foursome objected: in view of allegations in the affidavit accompanying the application for amendment, the retraction of the admission would seem to seek to bring in by the back door what the company should have expressly alleged: that even though the orders may have been communicated to Foursome in some way, this was done without proper authorization by the company. That portion of the application for amendment was then withdrawn. As a result, the authority of the person who issued the three later orders was not contested at the trial.

According to the evidence tendered on behalf of Foursome, it was the company's own salesman, Govender, who had placed the three orders with Foursome,

and Foursome had delivered the goods ordered. Naidoo gave highly unsatisfactory evidence in which he admitted, as already intimated, to being party to misrepresentations by Govender to his employer in regard to dealings between the company and R & V. However, counsel for the company did not succeed in extracting any admission from him or any other witness testifying on behalf of Foursome, either that Foursome was an alter ego of R & V; or that there had been any dealings between Foursome and R & V from which one could infer that, in fulfilling any of the three orders placed by Govender on behalf of the company, Foursome had acted on behalf of R & V. Govender came to Foursome's premises, said what the company wanted, and obtained order numbers telephonically from Julian Bennett who was responsible for all the "buy outs". That is the jargon for acquiring goods ordered from the company by a customer, which the company itself does not have in stock.

The first witness for the company was its

managing director, Nel. He told the court of the difficulties experienced in trying to obtain payment of the R184 000 from R & V, and of the advice given to him by the company's attorney regarding set-off. His evidence concerning his visit to the premises of R & V and speaking to Naidoo, and how it came about that order number 04948 was issued in favour of R & V, has been summarised above. After the bearings had already been delivered, Domingo drew Nel's attention to the fact that Govender had instructed Bennett to issue three orders to Foursome which duplicated the order already given to R & V. Nel asked Domingo to cancel the later orders. Nel was advised to write a letter to R & V insisting that it replace Foursome invoices with invoices of its own. No letter was written to Foursome cancelling or withdrawing the three later orders, nor was there any tender to return goods which had been delivered. Nel explained in reply to a question by the court, that

"we were under the impression that R & V Bearings and Foursome operated from the same

premises. I was under the impression that the goods were supplied as a result of the order placed with R & V"

(and that the two firms "were doing their internal arrangements between one another")

"and Mr Bennett was ... under the impression that Mr Govender, that the order was, was in order because Mr Govender had instructed him to write out these subsequent orders. That is why we received them, my Lord"

(that is, the goods).

In the company's order book the word "cancelled" was merely written across all the copies of the three later orders, the top copies never having been sent to Foursome to replace the faxes it had received. R & V did not send the invoices requested, nor did it reply to the company's letter. Instead Opperman, who it will be remembered was the manager of Foursome, came to claim payment. He did not accept Nel's explanation that the company had dealt with R & V and not with Foursome, and would not take the cheque tendered as being the balance owing by the company to R & V after operation of set-

off. He also lied to Nel in claiming that Foursome was his, Opperman's, business.

Under cross-examination Nel without hesitation conceded the following:

"... (Y)ou say Mr Bennett, Julian Bennett he was responsible for buying in certain stuff? --- That is correct, my lord.

Now when you testified that Mr Govender would not normally order stock, you meant that he would ask somebody else, like Julian Bennett to order on his behalf? --- And it could well have happened that he could place the order, get an order number from Mr Bennett, he would give the details of the particular order and Mr Bennett would then write it out yes, and issue it on his behalf. That is correct, my lord.

.....

So it is not inconceivable that he would go to the premises of for instance Foursome Bearings, negotiate a deal and then get an order number from Julian Bennett? --- That could have happened, my lord.

In fact he would have had to get an order number from somewhere and it might as well have been from Julian Bennett? --- It would have been Julian Bennett because as I testified earlier, my lord, Julian Bennett did the buy-out orders.

.....

And as far as you are concerned, those orders should not have been placed --- As far as I am concerned yes my lord, that is so.

But they were placed? --- They were placed in

error, my lord.

.....

... Do you have any evidence to suggest that Foursome Bearings would have been aware of the fact that it was made out in error? --- No I, except that Mr Naidoo was, as far as I am concerned, involved in both companies and he knew exactly what was going on, so I assumed that Foursome was aware of the situation".

He however conceded that he did not know what Naidoo's involvement was with the day to day running of Foursome, and that Naidoo may in any event have missed noticing that the R & V order had been duplicated because the later one was subdivided into three parts. Apart from commenting that it was strange that R & V had not attempted to fulfil the original order, nothing further was offered as the foundation for the above quoted assumption. The difficulty confronting someone dealing with two legal personae and wishing to impute the knowledge of one to the other, was not properly addressed, let alone met. Cf LEVY v CENTRAL MINING & INVESTMENT CORPORATION LTD, 1955 (1) SA 141 (A), 149.

Domingo, the company's purchasing manager,

confirmed Nel's evidence about the issue of the first order, being that addressed to R & V. He came across the other three orders some time later, realized they constituted a duplication, and wrote "cancelled" across them.

Bennett told the court that it was he who had issued orders 08742, 03154 and 08834, as the result of telephonic requests by Govender. Asked to do so by "a guy by the name of Salim", he faxed copies of these orders to Foursome. He had nothing further to do with them, other than checking the items against each of the three orders (which had not yet then been "cancelled") when the goods came in.

The last witness called on behalf of the company was Govender, who had been elusive and reluctant to testify. This was hardly surprising, since he had been dismissed for dishonest dealings unrelated to events concerning the company's claim for R184 000 against R & V. It was only after his dismissal that the

alleged scheme between him and Naidoo leading to this unpaid debt had come to light. Govender confirmed Bennett's evidence that he had asked Bennett to issue the three orders to Foursome. Having canvassed orders on Nel's instructions, he urgently needed the goods which had been ordered from R & V. When he telephoned R & V

"the guy said he is too busy ...
Too busy for what? --- To supply the stuff.
They did not have stock as well".

So Govender telephoned Naidoo at "his bag factory", being the business where it became common cause Naidoo spent most of his time and energy. Govender told Naidoo of his problem. Naidoo undertook to contact Opperman. Opperman was happy to oblige, and from the premises of Foursome, Govender telephoned Bennett who "faxed these orders out to Foursome Bearings". Govender knew that Nel wanted to buy goods from R & V in order to effect a set-off, but was under the impression that both businesses belonged to the Naidoo brothers and that set-

off would not be thwarted.

It was scarcely necessary for Foursome's counsel to cross-examine this witness. Cross-examination was rather in the nature of dotting the i's and crossing the t's of Govender's tale, to make clear what he was trying to say. The person he spoke to at R & V said that

"he does not know where to locate the stuff, because the man that works there is a bearing, a ballbearing, what you call a needle bearing specialist. So then I phoned Mr Naidoo. ... (intervenes)

I am sorry, could I just interrupt you? So they said that they could not supply this because they were specialists in needle bearings? --- Yes.

And that they could in fact not supply these parts? --- Yes.

And therefore you had to look somewhere else because you needed it urgently? --- Yes.

And for that reason you then instructed Julian to make out the order ... (Intervenes) --- No, no, no, I phoned Mr Naidoo, not Julian. I phoned Mr Naidoo first, because Naidoo owns Foursome Bearings and he owns R & V. So he said okay buy from my other branch, my other branch. That is how we made the other order out.

So you bought it from a different place, from Foursome Bearings? --- From Foursome Bearings.

And that is why you instructed Julian to make out the order? --- Make out the order, In favour of Foursome Bearings because you needed it urgently? --- Yes.

And as far as you know, you were still there when they were faxed through, the orders were faxed through? --- Yes, I was at Foursome Bearings.

So you knew that the orders came through to Foursome Bearings? --- Yes."

He also confirmed that the company had received the goods.

At the trial counsel for the company contended that by reason of **error in persona** no contract had been concluded between the company and Foursome. The identity of the seller was material to the agreement of sale since the company was prepared to contract only with the party against which it had the claim of R184 000. The trial judge found it unnecessary to decide whether **error in persona** would have resulted in a void or voidable contract. If the latter, the company should have avoided the contract and tendered return of the goods purchased or their value, failing which it would

appear to have elected to abide by the agreement. However, on the evidence Bennett had made no mistake in issuing orders to Foursome as requested by Govender. The mistake was Govender's in believing that both concerns belonged to the Naidoos or that a debt incurred to the one could be set off against a debt owing by the other. Such errors on his part did not relate to the identity of the seller, but to the legal consequences which would flow from the creation of a debt to Foursome by the company. He consequently gave judgment as prayed, but granted leave to appeal. In doing so, he held it to be reasonably possible that another court may put a different interpretation on Govender's behaviour, and find that the company at all times believed that it was contracting as it intended with R & V, the orders annexed to the pleadings not being fresh orders but merely confirmation of the original one and setting out the manner in which the different components had to be delivered.

Before us the company's counsel abandoned the contention based on error in persona. He argued that the contract had been concluded between the company and R & V. The company had no animus contrahendi vis-a-vis Foursome, so that Foursome failed to establish the consensus ad idem requisite for the contract on which its claim was based.

It is unnecessary to set out the detail of appellant's argument fully. The basic flaw it contains, is in regarding the company as though it were a human being. It is an abstraction which has no mind of its own any more than it has a body of its own. Its "intention" is manifested only by the actions of those through whom it manifests its "will". It was not disputed that both Nel and Govender could instruct the company's employees in the buying department to issue orders, which on issue and acceptance would become binding contracts. Any error or misunderstanding that there was, related to the internal management of the

company itself. (NATIONAL AND OVERSEAS DISTRIBUTORS v POTATO BOARD, 1958 (2) SA 473 (A).)

A second flaw is the assumption that only one contract could have been intended (and concluded) by the company in respect of the goods ordered, and that the first of these had a prior right to be recognised, so that delivery of the goods by Foursome has to be accepted as having been delivery on behalf of R & V. Both Nel and Govender intended ordering particular goods and effectively did so. Bennett was unaware of the earlier order. There is accordingly no room for a finding that he regarded the orders he issued in the ordinary line of his duties as being merely confirmation of the original one.

Although Naidoo was a member of both of the two close corporations with which orders were placed, it was neither pleaded nor proved that either of them was merely a facade enabling Naidoo to play the pea and thimble game, as it were. Even Govender's evidence

which suggests that Naidoo may have been guilty of a deliberate misrepresentation in holding out that Foursome was merely a "branch" of R & V, affords grounds only for sympathy with the company. That that may have been a misrepresentation which, on the evidence adduced by the company itself, induced Govender to accept that R & V would not fulfil the first order and to place fresh orders with Foursome, would not per se vitiate the resulting, possibly voidable, contract.

The appeal is dismissed with costs.

L VAN DEN HEEVER JA

CONCUR:

VAN HEERDEN JA)

GOLDSTONE JA)