

IN THE FEDERAL COURT OF APPEAL  
HOLDEN AT LAGOS  
23RD MARCH, 1979. FCA/L/181/77  
CORAM:- S.A. OGUNKEYE, D.O. COKER, R.O. OKAGBUE, JJCA  
ESENKAY (NIGERIA) LIMITED ..... PLAINTIFF/APPELLANT  
AND  
LEVENTIS STORES LIMITED ..... DEFENDANT/RESPONDENT

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**AGENCY** - *Agent's authority - Onus is on the buyer to show that the agent has actual or ostensible authority - The onus was not discharged in this case.*

**CONTRACTS** - *Agency relationship - Limited authority - Mere canvasser whose ostensible authority is to collect L.P.O. - Has no authority to take back goods delivered directly by the principal.*

**EVIDENCE** - *Cross examination - Witness's evidence that goods were returned - When found to be rendered illusory by the cross examination - The trial court's assumption that the goods were in fact delivered - Was erroneous.*

**SALE OF GOODS** - *Return of goods to seller - Where the goods were supplied on the condition that they cannot be taken back - A mere canvasser has no ostensible authority to take back such goods.*

**FACTS**

Before the High Court Lagos, the plaintiff/appellant claimed from the defendant/respondent the sum of ₦2,082.1. 6d i.e. N4,164.15k being price of goods sold and delivered to the respondent for which they refused to pay despite repeated demands. The L.P.O. was issued by the respondent in the appellant's company name. The goods were personally delivered by the appellant's general manager to the respondent's depo and he personally accepted part of the consigned goods said to be dam-

aged. The respondent's defence was that the goods had been returned to the appellant through one Amos, who collected the L.P.O. from the respondent for delivery to the appellant. The appellant contended that Amos was a mere canvasser, who was remunerated on commission basis and had no authority to accept the goods on its behalf from the respondent.

The learned trial Judge said that the only question in issue is whether the respondent could properly deal with Mr. Amos in the way it did. He found that the respondent ought not to have been put on inquiry, that the return of the goods to Amos was for the appellant. He held that the appellant's claim failed but entered judgment for the sum of N862.50k which the respondent admitted owing. The appellant being dissatisfied, appealed to the Court of Appeal.

**ISSUES FOR DETERMINATION**

*1. Whether there was any proof that the goods were in fact returned to Amos.*

*2. Whether the learned trial Judge erred in law in holding that Amos had authority, actual or ostensible, to accept the return of the goods on the appellant's behalf.*

**HELD** (Unanimously allowing the appeal per judgment of **COKER JCA**)  
***Cross examination - Witness's evidence***

1. The learned trial judge did not advert his mind to the first point which was actually raised by the learned counsel for the plaintiffs in his address. While it is correct that Mr. Habibis did say in his evidence in Chief that the goods were returned to Amos, it became clear from the cross examination of the witness that all he knew was that he instructed the store-keeper to return the remaining goods to the man after receiving the purported credit note Exh .F. Whether the goods were actually returned to him was another matter, for he never said he saw them delivered as he instructed. No person who saw the delivery of the goods to Amos gave evidence. Amos himself was nowhere to be found. It appears therefore that the learned trial Judge assumed that they were in fact delivered but there was no evidence to that effect. (p. 1371 A)

***Return of goods to seller***

2. We are of the view that the learned trial judge was in error when he held that Mr. Kinpalani's evidence on how Amos operated did not apply to the transactions. There was no evidence whatsoever that Mr. Habibis acted on any representation made by the plaintiffs that Amos had authority to take back the goods which had been sold and delivered, and no such inference could be drawn on the evidence from the only one previous transaction with plaintiffs through Amos. It was Mr. Habibis himself who requested if Amos could take back the goods. It would be unreasonable to assume that a mere canvasser has ostensible authority to take back such goods which the principal had sold and delivered directly by the sellers on the stated condition that goods sold cannot be taken back. See Kreditbank Cassel G. M. b. H. v. Schenkers Ltd (1972) All E.R. Re. 421 where it was held that it would be wrong in the absence of evidence, to assume that a manager of a branch business is a person who has ostensible authority to sign bills on behalf of his company. (p. 1373 G)

***Agency relationship - Limited authority***

3. And to borrow the language of the same judge, how can we on the face of these statements say that in the circumstances of the present case, the learned trial judge of the High Court of Lagos State should have held that a mere canvasser whose ostensible authority is to collect L.P.Os on behalf of his principal has authority to take back goods sold and delivered directly by the principal? We cannot on the evidence so find in the present case. We would conclude this judgment by reference to the statement of Lord Atkinson in Russio -Chinese Bank v. Lin Yau Sam (1910) A.C. 174 p. 184.

*"If an agent is held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it can be an act of that particular class, because the authority being thus expressed to be limited, the party prejudiced has notice and should ascertain whether or not the act is authorized."*

The above statement of the law was cited with approval in the

Privy Council case of Attorney General for Ceylon v. A.D. Silva (1953) A.C. 461 p. 480. We are in accord with the said statement and hold that the learned trial judge erred when he said the defendants ought not to be put on enquiry whether Amos had authority to take back the goods from the Respondents. (p. 1374 G)

***Agent's authority***

4. Clearly, the authorities establish that the onus is on the buyer to show that the agent has authority actual or ostensible. The Defendants Company did not discharge that onus, and their plea therefore failed and plaintiffs were entitled to judgment. In the result, the appeal succeeds on all grounds. (p. 1375 D)

**D REPRESENTATION**

Bisi Adegunle for the Appellant  
Fayokun for the Respondents

**E CASES REFERRED TO**

Uxbridge Parmanent/Benefit Building Society v. Pickard (1939) 2 K. B. 248, 249 - 250  
Saul Raccah v. Standard Company Nigeria Ltd. (1922) N.L.R. 48  
F Mahoney v. East Holyford Mining Co. (1875) L.R. H.L. 869  
Kreditbank Cassel G. M. b. H. v. Schenkers Ltd (1972) All E.R. Re. 421  
Russio -Chinese Bank v. Lin Yau Sam (1910) A.C. 174 p. 184  
Attorney General for Ceylon v. A.D. Silva (1953) A.C. 461 p. 480

**G JUDGMENT BY COKER JCA**

In the High Court of Lagos State the plaintiffs company, the Appellants, claimed from the Defendants Company, Respondents, the sum of N2,082. 1. 6d, i.e. N4,164.5k, being price of goods sold and delivered to the Respondents and for which they refused to pay in spite of repeated demands. The defence was that the goods had been returned to the Appellants through one Amos, who was said to be representative of the Appellant. The sale transaction was negotiated between the two

parties through the said Amos, who collected the L.P.O. from the Respondents for delivery to the Appellants. The Appellants contended that Amos was a mere canvasser, who was remunerated on commission basis, had no authority to accept the goods on their behalf from the Respondents and in consequence whereof the Respondents were not discharged from payment of the price. B

Two witnesses gave evidence, one each on each side. The appellant's only witness was their general Manager, Sham Kirpalani, who said:

*"Exhibit A the L.P.O. was brought to us by Mr. Amos who collects L.P.O.s from various people and tries to find suppliers for the goods on them. We would pay him a commission as usual and he took no further part in the transaction."* C

The undisputed facts in the case are that the L.P.O was issued by the Respondents in the Appellant's company name. The goods were actually delivered personally by the said general Manager to the Respondent's depot, and he personally accepted part of the consigned goods said to be damaged and personally gave a credit note which he signed and with the company's rubber stamp affixed thereto. Prior to this particular sale transaction, the Respondents had one similar sale business with the Appellants, negotiated through the same Amos. There was no evidence on that occasion that Amos collected the price of the goods on behalf of the Appellants from the respondents. There was also no suggestion either that Appellants or Amos ever represented to the Respondents that Amos had authority to take back goods sold and delivered to the Respondent. As to the circumstances when the goods were alleged returned to Amos, Mr. Habibis the group food controller of the defendants, said in his evidence: D E F G

*"When the goods were found not to satisfy us, I instructed the stores to stop payment of the invoice pending my further instructions. I tried to get plaintiffs but I could not find their address in the telephone directory. Towards the end of January the Salesman called on me and asked me about payment. I took him to the depot to see the soups. I tried to see if the soup could accepted back. The salesman came back latter H*

*and after checking quantity left in the store he brought me a credit note to cover those left and the goods were returned to him ..... If the man did not agree to take the goods back we would have had to pay in full for the goods."*

B In his judgment, the learned trial judge said the only question in issue is: "could the defendants have properly dealt with Mr. Amos in the way they did?".

C The learned trial judge found answer to the question in a passage in the judgment for Diplock L.J. in Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd (1964) 2 Q.B. 480 at p. 503. The passage reads:

D *"In ordinary business dealing the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the*  
 E *"actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In*  
 F *the ultimate analysis he relied either upon the representation of the principal that is, apparent authority, or upon the representation of the agent, that is, warranty of authority."* (underlining ours) *Be it noted that this is not a claim against Amos for breach of warranty of Authority.*

F The learned trial judge then came to a conclusion saying:

*"I do not see that the defendants ought to have been put on inquiry by that situation and I am of the opinion that the return of the goods to Amos was for the plaintiff."*

G He therefore held that the plaintiffs case failed but entered judgment for the sum of N862.50k which the defendants admitted owing.

The plaintiffs have appealed against the judgment. The main points argued on their behalf are:

H (a) There was no proof that the goods were in fact returned to Amos and

(b) The learned trial judge erred in law in holding that Amos had authority, actual or ostensible, to accept the return of the goods on their behalf from the defendants, and in the circumstances that defendants,

were negligent by delivering the goods to him.

We are of the view that both points are well taken.

**The learned trial judge did not advert his mind to the first point which was actually raised by the learned counsel for the plaintiffs in his address. While it is correct that Mr. Habibis did say in his evidence in Chief that the goods were returned to Amos, it became clear from the cross examination of the witness that all he knew was that he instructed the store-keeper to return the remaining goods to the man after receiving the purported credit note Exh .F. Whether the goods were actually returned to him was another matter, for he never said he saw them delivered as he instructed. No person who saw the delivery of the goods to Amos gave evidence. Amos himself was nowhere to be found. It appears therefore that the learned trial Judge assumed that they were in fact delivered but there was no evidence to that effect.**

The next point raises a question of mixed law and fact. There can be no doubt that on the evidence no actual authority was given to Amos to take back the goods after the plaintiffs had delivered them to the Defendants. In the first place, it is to be noted that the delivery invoice (Exh.E) issued by the plaintiffs clearly stated.

*"Goods once sold cannot be taken back i.e. no claim whatsoever relating to quality, quantity, price etc, etc. would be considered after acceptance."*

The evidence reveals that when the plaintiffs took the goods to the Defendant's depot, some of them were found damaged and immediately returned to the sellers' general manager. This was shown on the invoice, Exh. E and a credit note was issued by the general manager, Kirpalani, which he duly signed and with the company's rubber stamp affixed thereon.

Before the trial court and before us learned counsel for the Respondents contended that Amos has ostensibly authority to collect the goods on behalf of the seller, and cited two cases in support, namely: Uxbridge Permanent /Benefit Building Society v. Pickard (1939) 2 K.B. 248, 249-250 and

Saul Raccah v. Standard Company Nigeria Ltd. (1922) N.L.R. 48.

We are of the view that the principle established in the two cases are inapplicable to the present case. Ostensible or implied authority is partly a question of fact and partly one of law.

B In Uxbridge's case, the managing clerk of the firm of solicitors was a party to a fraud for which the principal was held liable. It was held that a managing clerk put in charge of the office, as he was, unquestionably in fact having full authority to conduct the business of the solicitors' office on behalf of and in the name of the Principal. The authority would cover not merely acting for clients, but carrying through all transactions which would normally be carried through a Solicitor namely, completion of conveyancing business with third parties having dealings with clients and obtaining from such third parties upon completion of the transactions such sums of money and giving receipts therefore.

In Raccah's case, It was found on the evidence that the defendants company permitted W. to go into the markets as representative of the company and entered into contracts to purchase produce to be delivered to the company's premises and had induced the plaintiff and other dealers in produce to believe that they could safely deal with W. as authorized agent of the company in transactions in produce. It was therefore held that the company must pay for the produce delivered under the contract with W. and that it was immaterial that the company had previously instructed W. not to enter into further contracts to purchase produce.

G The Freeman & Lockyer case on which the learned trial judge found solution to the question posed in this case was based on facts and principle entirely different. The facts are as follows: The plaintiffs claimed from the defendants their fees for professional work done. They were instructed by the 2nd defendant who had all along acted, although not actually appointed, as Managing Director of the Company. This fact was H known to the other director of the Company. The Company was held liable because, 2nd Defendant acted as managing director to the knowledge of the Company as managing director, and the ostensible authority thus conferred could bind the company since the articles of associated in

fact provided for these being a managing director of the company, that 2nd defendants' act in employing the plaintiffs was within the ordinary ambit of the authority of such a managing director, that it was immaterial that plaintiffs have not examined the companies articles of association and had not inquired whether he was properly appointed managing director and consequently did not prevent them establishing their claim against the company based on his ostensible authority. B

Diplock L.J. in the Freeman and Lockyer case as reported in (1964) 1 All E.R. said at P.644:-

*"An "apparent" or "ostensible " authority on the other hand, is a legal relationship between the principal and the contractor Created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract, of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract. (underlining ours)"* D E F

It was established in the case that a person who seeks to set up an estoppel must show that he in fact relied on the representation that he alleges, be it representation in words or a representation by conduct, for a person who claims the benefit he must prove that he relied on the ostensible authority which he set up. See Mahoney v. East Holyford Mining Co. (1875) L.R. H.L. 869. G

**We are of the view that the learned trial judge was in error when he held that Mr. Kinpalani's evidence on how Amos operated did not apply to the transactions. There was no evidence whatsoever that Mr. Habibis acted on any representation made by the plaintiffs that Amos had authority to take back the goods which had been sold and delivered, and no such inference could be drawn on** H

the evidence from the only one previous transaction with plaintiffs through Amos.

It was Mr. Habibis himself who requested if Amos could take back the goods. It would be unreasonable to assume that a mere canvasser has ostensible authority to take back such goods which the principal had sold and delivered directly by the sellers on the stated condition that goods sold cannot be taken back. See Kreditbank Cassel G. M. B. H. v. Schenkers Ltd (1972) All E.R. Re. 421 where it was held that it would be wrong in the absence of evidence, to assume that a manager of a branch business is a person who has ostensible authority to sign bills on behalf of his company.

Sankey J., sitting in the Court of Appeal in England in Butwixk v. Grant (1924) 2 K.B. 385 at p. 489 said:-

*In an action by the seller of goods against the buyer for the price it would be open to the buyer who had paid the sellers' agent to shown and in the absence of any reason to the contrary, he would be entitled to succeed on showing either that the agent had actual authority to receive payment, or that he had customary authority by reason of that fact that the payment was made to him in the ordinary course of business of agencies of the kind in question.*

Horridge J, in the same case said at p. 489

*"The best statement of the law on this point is to be found in the judgment of Lush J., in that case (i.e. Diakeford v. Piercy, 7 B.& S. 515 p. 517) in the course of which he said:*

*"The facts stated in the plea may perhaps afford prima facie evidence to be submitted to the jury under the plea of judgment to justify a verdict for the defendant on it but that an agent authorized to sell has a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority."*

And to borrow the language of the same judge, how can we on the face of these statements say that in the circumstances of the present case, the learned trial judge of the High Court of Lagos State should have held that a mere canvasser whose ostensible authority is to collect L.P.Os on behalf of his principal has authority

to take back goods sold and delivered directly by the principal? We cannot on the evidence so find in the present case.

We would conclude this judgment by reference to the statement of Lord Atkinson in Russio - Chinese Bank v. LIN Yau Sam (1910) A.C. 174 p. 184.

*"If an agent is held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it can be an act of that particular class, because the authority being thus expressed to be limited, the party prejudiced has notice and should ascertain whether or not the act is authorized."*

The above statement of the law was cited with approval in the Privy Council case of Attorney General for Ceylon v. A.D. Silva (1953) A.C. 461 p. 480. We are in accord with the said statement and hold that the learned trial judge erred when he said the defendants ought not to be put on enquiry whether Amos had authority to take back the goods from the Respondents. Clearly, the authorities establish that the onus is on the buyer to show that the agent has authority actual or ostensible. The Defendants Company did not discharge that onus, and their plea therefore failed and plaintiffs were entitled to judgment.

**In the result, the appeal succeeds on all grounds.** The judgment of the trial Court is hereby set aside. Judgment will be entered in favour of the plaintiffs, Appellants for the sum of N4,164.15k (Four thousand one hundred and sixty four Naira, fifteen Kobo) being price of goods sold and delivered to the Defendants, Respondent. The Appellants are entitled to their costs in the Court below and in this Court.

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