IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A. And LUBUVA, J.A.)

CIVIL APPEAL NO. 73 OF 1999

BETWEEN

G. K. ISHENGOMA T/A TANZANIA INSURANCE AGENCY.....APPELLANT

AND

NATIONAL INSURANCE CORPORATION LTD...RESPONDENT

(An appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mapigano, J.)

dated 16th February, 1999

in

Civil Appeal No. 26 of 1998

JUDGMENT

RAMADHANI, J.A.:

The appellant, G. K. Ishengoma, trading as Tanzania Insurance Agency, was an agent of the respondent, the National Insurance Corporation, up to 30 January, 1991, when he was suspended. He

complained about the suspension and, as the matter was being investigated, the agency was terminated on 03 September, 1992.

However, during the suspension the appellant conducted business for the respondent worth shs.52,994,161/25. He, without success, claimed a commission of shs.9,079,628/45. So, he filed a suit to recover that amount in the Resident Magistrate`s Court of Dar es Salaam at Kisutu and won. That aggrieved the respondent corporation and they successfully appealed to the High Court. Hence this second appeal.

After the submissions of both learned advocates, Mr. Kashumbugu, for the appellant, and Mrs. Tenga, for the respondent corporation, we are of the considered opinion that the following are established facts: First, the appellant is claiming commission for transactions made after 14 February, 1999, that is, fourteen days after the suspension of the agency, the date documents belonging to the respondent corporation were taken away from him. That is why he is relying on Photostat-copies of receipts issued by the respondent.

We are also satisfied that clients of the appellant and also employees of the respondent corporation at the counter of Branch Unit 1, were ignorant of that suspension. Consequently, some clients continued to pay premiums to the appellant and others went to him to renew their policies. Since the appellant had neither receipt books nor a bank account number, he took the proceeds to Branch Unit 1 where the employees, innocently, accepted the money and issued receipts. The Dar es Salaam Regional Manager of the respondent corporation admitted, in his memorandum, NIC/DSM.I/S.0361/50 of 8th July, 1992 (Exh. P. 7), that his Branch had issued those receipts.

Thirdly, the respondent corporation does not dispute that during the period of suspension the appellant transacted for them business worth the amount stated. They only contend, in paragraph 3 of their written statement of defence that he had done so "illegally" and so, he is not entitled to any commission. Now, let us see how these facts interact with the submissions of both sides.

Mr. Kashumbugu argued that the respondent impliedly revoked the suspension when it accepted the proceeds of the business conducted by the appellant during the period of suspension. He submitted further that that implied revocation formed a new agreement that entitled the appellant to a commission.

Mrs. Tenga, in effect, advanced two alternative contentions: First, she was emphatic that no new mode of agency was created. She pointed out Mr. Kashumbugu`s failure to spell out the terms of the so-called new agreement and how much commission was due to the appellant. Second, she argued that even assuming that there was a new agreement, because on the ignorance of some of the respondent corporation`s employees, the respondent corporation did not willfully profit from the illegal transactions of the appellant. In any case, Mrs. Tenga argued, owing to lack of facilities, the appellant did not conduct the entire operation by himself but that he used the services of the employees of the respondent corporation and so, he cannot be entitled to the same amount of commission.

There is a general rule that remuneration is not payable for work done during a period of termination of an agency. That was decided in Nayler v. Yearsley (1860) 2F & F 41, and Tribe v. Taylor (1876) 1 CPD 505.

According to Nordman v. Rayner & Sturges (1916) 33 TLR 87, remuneration is also not ordinarily payable in the case of temporary suspension.

However, the rule is subject to some exceptions: One, commission is payable where business conducted during suspension is in fact part of a transaction in which an agent was employed. Thus, in Christie, Owen and Davies t/a Christie & Co. v. Jones (1966) 198 Estate Gazette 1093, an estate agent introduced a purchaser to the principal but the sale took place after the termination of the agency. It was held that the ex-agent was entitled to a commission.

The other exception is where there is an express term in the contract authorizing payment of remuneration even after termination

of agency. Thus in Crocker Horlock, Ltd. v. Lang & Co., Ltd. [1949] 1 All E.R. 526 at 530 it was said:

> ... that remuneration was the remuneration payable during the contract period and ... the parties have not provided by this contract for any payment after that period came to an end.

So, in that case remuneration was denied because it was not provided for in the contract.

However, in Sellers v. London Counties Newspapers [1951] 1 KB 784; [1951] 1 All ER 544, the majority judgment was that the contract should specifically provide for cessation of payment in case of termination. The dissenting judgment, like the one above, was that the contract should specifically provide for continuation of payment in case of termination.

In that case the plaintiff had an oral contract with the defendants for obtaining orders for advertising space in the

defendant`s newspapers. He was paid a salary and also a commission for every customer`s advertisement published in the newspapers. His employment was terminated. Some of the orders he had solicited were published after the termination of the employment. He claimed commission for those orders. The County Court dismissed his claim but on appeal, the Court of Appeal, two to one, decided that he was entitled to a commission.

SIR RAYMOND EVERSHED, M. R., held:

> ... in the case of a contract of service between a master and a servant, all right on the servant`s part to a remuneration by commission or otherwise will cease with the termination of his service unless the terms of his contract provision to the contrary is clearly made.

The majority held:

> ... in the absence of an express term in the contract of employment that the plaintiff`s right to a commission

should end with the termination of his employment, he was entitled to a commission on any orders he obtained while he was employed by the defendants, even though the advertisements to which those orders related were not published until after the termination of his employment.

The third exception is where the construction of the agency contract provides a clear intention to continue paying remuneration even after termination. It was said in Marshall v. Glanvill [1917] 2 K.B. 93:

> Prima facie the liability to pay commission in cases of this kind cases as to future trade with the cessation of the employment in the absence of a reasonable clear intention to the contrary.

Such intention is readily found where an agent is an independent contractor and not an employee, Croker Horlock Ltd. v. Lang & Co. Ltd.

Lastly, in the case of repeat orders, the agent is entitled to a commission even after the termination of the agency. Repeat orders, according to Sellers v. London Counties Newspapers (at page 546 letter C) are "orders placed by advertisers originally introduced to the defendants by the plaintiff, but placed without any further solicitation in his part". In Levy v. Goldhill [1917] 2Ch. 300, the plaintiff contracted with the defendant to procure orders for the defendant and he was to get a commission even for 'repeats on any accounts introduced by you". The defendant later terminated the contract and the plaintiff sued for commission in respect of repeat orders continued after and notwithstanding the termination of the agreement". The issue was decided positively following Bilbee v. Hasse & Co. (1889) 5 Times L. R. 677 which was affirmed by the Court of Appeal (see Times newspaper, January 16, 1890) where BOWEN, L.J. said:

> The measure of [plaintiff's] payment was to be calculated not by the work done by him, but by the fruits of that work, and those fruits might very well accrue to the defendant after the determination of the

agency.

In this appeal had introduced clients to the respondent corporation who took insurance policies and continued to pay premiums and to renew them, in effect, without further solicitation of the appellant. This is akin to repeat orders. However, we are of the decided opinion that the rule in Bilbee v. Hasse & Co. is extremely wide. Would the appellant continue to recover commissions in relation to all the clients he had introduced to the respondent corporation every time they pay premiums or renew their policies? In other words, would commission cease only when these clients stop dealings with the respondent corporation? We shudder to subscribe to that proposition. But we are willing to say that the appellant is entitled to a commission from these repeated orders, which without his solicitation, passed through his hands during his suspension.

Of paramount concern to us is that these exceptions prove that the rule that commission is not payable during suspension or termination is not absolute. We ask ourselves: are exceptions restricted to these four categories only? We think not. Definitely new

situations give rise to new exceptions. The next question then is: do the facts of this appeal provide a new situation necessitating a new category of exception?

The situation in this appeal, as already explained, was caused by the fact that both clients of the appellant and the employees of the respondent corporation at Branch Unit 1 were ignorant of the suspension of the appellant. The pertinent issue to us is what is the effect of this communication breakdown. Who had the duty to inform these people? What are the consequences of the breach of that duty?

Section 160 of the Law of Contract Ordinance, 1961, provides as follows:

> The termination of the authority of an agent does not ... take effect ... so far as regards third persons, before it becomes known to them.

So, the clients of the appellant, who were ignorant of the suspension, were perfectly right to continue transacting business with him. Likewise, had the members of staff of the respondent corporation been aware, they would not have accepted monies from the appellant and to issue him with receipts. However, we shall deal with these later because they are, strictly speaking, not third persons.

It is unfortunate that that section 160 quoted above does not say who has the duty of informing third parties. Mrs. Tenga submitted that the duty was on the appellant. Was that so?

It is trite law that a principal is liable to third parties who, in good faith, deal with an agent on the assumption that he still has authority. The exception is where authority has been terminated by the death of the principal. That was settled by Drew v. Nunn 91879) 4 661 and Debenham v. Mellon (1880) 6 App. Cas. 24. It is, therefore, obvious to us that the duty to make this communication is on the principal. Otherwise if the duty were on the agent, we ask: why is notice exempted where termination is due to the death of the principal? The only answer we can come up with is that upon the death of the

principal, notice is dispensed with because the duty bearer is no more.

So, the respondent corporation failed to discharge that duty in this case. However, the non-disclosure of the termination makes the principal liable to claims by third parties who have not been cautioned. Here it is the agent who makes claims against the principal for the work he had done during the period of suspension.

It baffles us that the respondent corporation did not inform even its own employees about the suspension of the agency. The appellant could not have been expected to inform those employees. As a rule the actions of the employees are take to be those of the employer. There has been a nagging thought that despite the suspension of the agency, there was a vicarious performance of the agency contract by the employees. However, since the appellant was fully aware of the suspension then that cannot be the case. We may as well add that we reject the submission of Mr. Kashumbugu that there was a new contract of agency formed by the so-called implied revocation of the suspension. There was nothing like that.

There was only the liability on the part of the respondent corporation caused by the actions of their employees.

Mrs. Tenga said that the respondent corporation did not willfully profit from the illegal transactions of the appellant. We are satisfied that the breach of the duty of the respondent corporation to inform even its own employees brought about the situation in this appeal. It is certain that their laxity caused this mess and enriched them and, if we may borrow the words of LORD BOWEN in Bilbee, "the measure of [plaintiff's] payment was to be calculated not by the work done by him, but by the fruits of that work" to the respondent corporation, which they do not deny.

So, how much commission is due to the appellant? Where there is no express contract provision, then a contract to pay reasonable remuneration is implied by court – Bryant v. Flight 91839) S.M. & W. 114 and Way v. Latilla [1937] 3 All E.R. 759. Courts in making such decision are guided by previous negotiation between the parties, and trade custom – Bower v. Jones (18310 8 Bing. 65.

(Some of these authorities are quoted in Halsbury`s Laws of England, 4th Edition, Vol. 1(2) paragraph 115 on page 79.)

Here we do not have evidence on any of the two. The contract is silent as to the rate of commission payable. Possibly what the appellant claimed reflects the rate they had agreed on. What he claimed is 17.31%. We agree with Mrs. Tenga that the appellant should not get full commission because he did not do the whole work himself. What the appellant did was to collect monies, send them to the respondent corporation, obtain receipts and hand them to clients. All the paper work was done by the respondent corporation. But the measure according to LORD BOWEN is not the work done but the fruits of that work. So, we grant the appellant what he has claimed.

It may not be out of place to observe that we did not have the benefit of the submissions of the learned advocates on the authorities discussed in this judgment simply because they did not refer us to any authority.

The appeal is allowed with costs.

DATED at DAR ES SALAAM this 25th day of October, 2001.

R. H. KISANGA
JUSTICE OF APPEAL

A. S. L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUVUBA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

N. M. MWAIKUGILE
REGISTRAR.