IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller JJA & Simpson Ag JA)

CIVIL APPEAL NO. 6 OF 1981

BETWEEN

CONSOLIDATED CHEMICALS LTD.....APPELLANT

AND

KEL CHEMICALS LTD.....RESPONDENT

JUDGMENT

SIMPSON JA The respondent in this appeal KEL Chemicals Ltd. Obtained judgment in default of appearance against a company called Consolidated Chemicals Ltd. For the sum of Kshs 178,346. This was on February 13, 1979.

In execution of the decree a warrant of attachment was issued on March 15 and attachment was levied by the court-broker on March 16 and March 19, 1979, upon property which is claimed by the appellant, Consolidated Chemicals (1979) Ltd. This company was incorporated on January 30, 1979 and with the consent of the judgment-debtor it took over the lease of the judgment-debtor's premises in Nanyuki Road, Nairobi, with effect from February 1, 1979. A notice of objection was filed by the appellant and proceedings having been taken by the appellant to establish its claim. Harris J dismissed the application with costs. A second objector, Diamond Trust of Kenya Ltd, although notified of the application, did not appear.

The appellant/objector, represented by Mr Kassam, now seeks to have this order set aside. Mr Da Gama Rose appears for the respondent. The goods in question comprised four motor vehicles and stock-in-trade, machinery, furniture, fittings and other goods lying in the former premises of the judgment-debtor in Nanyuki Road, Nairobi. The appellant company relies on an agreement in writing dated January 17, 1979, entered into between the judgment/ debtor as vendor and Sultanali Hasham Lalji on behalf of the appellant (then in process of formation) as purchaser. This agreement the appellant claims to have adopted upon its incorporation. The learned judge found that there was no evidence of any resolution for such adoption by the directors of the appellant company or, since no copy of the memorandum and articles of association was before the court, of any power to pass such a resolution. It was not suggested by the appellant, he said, that a new contract had been entered into by the appellant and the judgment-debtor either expressly or by implication after the incorporation of the appellant company nor would the facts as disclosed in the application support such a suggestion.

The Memorandum of Appeal contains four grounds, namely —

“1) The learned judge erred in law in that he did not consider or consider fully the principle that a company may be bound by an agreement entered into before its incorporation provided that after its incorporation it adopts the said agreement as its own contract and that such adoption may be inferred from the company’s acts after its incorporation.

2) The learned judge erred in holding, without considering or considering fully the principle aforesaid, that the facts of the case would not support a suggestion that the appellant had after its incorporation adopted as its own contract an agreement entered into by Sultan Hasham Lalji on its behalf and as a trustee for its prior or its incorporation with Consolidated Chemicals Ltd.

3) The learned judge erred in not holding that the appellant had adopted the aforesaid agreement as its own contract by its acts after incorporation.

4) The learned judge erred in failing to hold that the goods the subject-matter of the attachment were in the ownership of the appellant at the time of their attachment; or alternatively that the failure to make such a finding was unsupported by the evidence or alternatively against the weight of the evidence.”

Mr Kassam, admitting that to render the company liable there must be a new contract between the vendor and the appellant company, submitted that there was sufficient evidence of acts of the company from which a valid adoption of the pre-incorporation contract in the sense of such a new contract could and should be inferred.

Mr Da Gama Rose contended that a valid adoption in this sense could not be inferred from the acts relied upon by Mr Kassam and that Mr Kassam had departed from his grounds of appeal without the leave of the court in contravention of rule 101 of the Court of Appeal Rules in that the grounds of appeal as framed imply unilateral adoption. Mr Satish Gautama who had appeared with Mr Kassam in the lower court had also used the word “adoption” in a unilateral sense.

Mr Kassam in my opinion did indeed depart from his grounds of appeal but no objection having been taken until after he had finished his submissions I think we must be taken to have impliedly granted leave.

The requirement of a new contract between the appellant and the judgment-debtor is apparent from the authorities and is not disputed.

In *Kenler v Baxter* [1866] LR 2 CP 174 the defendants agreed on behalf of a proposed company to purchase the premises and stock of the plaintiff. The company collapsed before payment was made and the defendants were held personally liable.

Willis J said (at p 184) —

“That brings one to consider whether the company could be legally liable. I apprehend the company could only become liable upon a new contract. It would require the assent of the plaintiff to discharge the defendants. Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done - by a person in existence either actually or in contemplation of law; as in the case of assignees of bankrupts and administrators, whose title, for the protection of the estate, vests by relation.”

In re *Northumberland Avenue Hotel Co* [1886] 33 Ch D 16 a written agreement was entered into between a trustee for an intended company and another party W. The company was registered the following day. The articles of association adopted the agreement and provided that the company should carry it into effect. No fresh agreement was executed but the company acted on the agreement which they considered to be binding on them. It was held that the acts of the company having evidently been done under the erroneous belief that the pre-incorporation agreement was binding on them were not evidence of a fresh agreement between W and the company on the same terms as the written agreement. There was therefore no agreement between W and the company.

That case was distinguished in *Howard v Patent Ivory Manufacturing Co* [1888] 38 Ch D 156, a case which was considered by Harris J. In that case a Mr Jordan had entered into an agreement with Mr Wyber, who purported to act for a company about to be formed, to sell certain property to the company. The memorandum and articles of association of the company which was formed shortly afterwards contained provisions for the adoption of this agreement with or without modification. In the presence of Mr Jordan a resolution was passed by the directors adopting the agreement and accepting the offer of Mr Jordan. An assignment by Mr Jordan to the company of leasehold property comprised in the agreement was executed by him and sealed by the company, and the company took possession of the property and carried on its business thereon. It was held that there was evidence that a contract was entered into by the company with Mr Jordan to the effect of the previous agreement. The company, Kay J said in his judgment was "clearly and obviously carrying out the contract between Mr Jordan and the company which the company by that adoption seem to me distinctly to have made. There were no such facts as these in the case of in re Northumberland Avenue Hotel Company."

The principle to be derived from these and other authorities cited to us is succinctly stated in Halsbury's Laws of England, 4th Edition, Vol 7, para 728 —

"In order that the company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement, although this new contract may be inferred from the company's acts when incorporated, except when such acts are done in the mistaken belief that the agreement is binding."

Mr Kassam, citing *Touche v Metropolitan Railway Warehousing Co* [1871] 6 Ch App 671 in which notification to the plaintiffs of an intention to pay a sum agreed to be paid by one of the promoters prior to incorporation was held to be an act of adoption, submitted that one act by the company which on a reasonable construction may amount to adoption of the pre-incorporation contract is sufficient. In the instant case, he said, there were several such acts including payment by the appellant company of the purchase price of the goods to the vendor's advocates, delivery of the goods to the appellant company after incorporation and payment by the appellant in accordance with the agreement of repair charges due in respect of two vehicles included among the items purchased under the agreement.

The pre-incorporation agreement dated January 17, 1979, takes the form of a letter from the chairman and Managing Director of Consolidated Chemicals Ltd. To Sultanali Hasham Lalji confirmed and signed by Mr Lalji. This agreement states "you have agreed to purchase" the stocks and assets of Consolidated Chemicals Ltd." on behalf of Consolidated Chemicals (1979) Limited (in formation) or in any other manner you may think fit."

Included in these assets are the four vehicles subsequently attached in regard to which it is provided that the purchasers will be "responsible to arrange vehicle transfers and to pay outstanding that may be due on the vehicles." The latter after setting out full details of the stock and assets purchased provides that the purchaser will immediately on signing the agreement give a deposit of Kshs 1,100,000 to Messrs Shretta & Rao, Advocates, to be used to pay the First National Bank of Chicago. Any balance remaining due after calculation of the total value of the goods would be paid by installments commencing February 1, 1979. The sellers undertook to deliver the goods and vehicles to the purchasers free from encumbrances or lien in favour of that Bank. They also confirmed that they had clear and lawful title to the vehicles "some of which are on hire purchase with finance organizations." The clear and lawful title seems doubtful and it was in respect of some of these vehicles that diamond Trust filed an objection.

Mr Lalji's confirmation at the end of the letter reads —

"I confirm the agreement outlined above. I will send my payment of Kshs 1,100,000 to Shretta & Rao towards purchase of the goods and vehicles stated above."

There is no undertaking by the purchaser to form the company within a specified time and none by the seller to release the purchaser from his obligation if the company after its formation adopts the contract.

Mr Lalji did not pay Kshs 1,100,000 immediately on signing the agreement. He forwarded a cheque for Kshs 500,000 to Shretta & Rao on February 1, 1979, not to be released until they had received confirmation" that the goods have been delivered to us or our nominee." On February 9, he requested them to release the sum to Mr Pinto an agent of the vendor "against the goods which we have received." The balance of Kshs 600,000 was sent by cheque on February 14, to be released to Mr. Pinto he having given his assurance that the goods agreed upon would be delivered. These three letters are typed on paper bearing the letterhead Sultan Lalji. Typed at the top of the text however are the words "Re Consolidated Chemicals (1979) Limited" and they are signed by Mr Lalji as "Director". In an affidavit sworn on May 21, 1979, Mr Lalji says he made payment from his own resources through another company of his known as Greenfield Investments Ltd. He said a bank account had not yet been opened by the appellant company and appropriately headed writing-paper was not yet available. There is no evidence if any transfer of funds from the appellant company to Greenfield Investment Ltd. In the same affidavit he said the payment of Kshs 100,000 was to be utilized to discharge a debenture held by the First National Bank of Chicago and "give me a clear title to the said stocks and assets."

The manager of the appellant company took delivery of four of the vehicles listed in the agreement and paid Ryce Motors Ltd. The charges due on two of them. He also during the period 6th to 12th February took delivery of several consignments of goods and chattels from Mr. Pinto and insured them in the name of the appellant company.

In his affidavit sworn June 18, 1979, Mr Lalji said (para 11) —

"The company upon its incorporation has duly honoured the Sale Agreement dated the January 17, 1979, which I entered into as its trustee with the judgment-debtor as the company was intended to do. The company has paid the purchase price thereunder and has received delivery of the goods and chattels and vehicles thereunder, and the company claims to be the lawful owner thereof."

Nothing is said about a new agreement and Mr Lalji who made the statement in his capacity as director of the appellant company as purchaser. The purchaser in the mind of the writer is Mr Lalji.

"You took over the factory in Nanyuki Road from February 1, 1979," he wrote "even though I suggested to you, to avoid confusion, not to move into the same premises. Stocks and assets … were handed to you. Other stocks … were delivered to your Eldoret depot."

There is no evidence that the appellant company had already acquired an Eldoret depot.

The following passages are also relevant —

"The stocks are now our property as you have paid for the goods. You have taken possession of the goods, machinery, furniture and other assets. It is up to you to protect your interest and retain possession of all the assets that you have acquired and paid for."

"It was your responsibility to have paid the outstandings due to lease-hire organizations and secured the appropriate vehicle transfers. In this respect, please refer to our agreement that was handed to you on or about January 17, 1979." "As you are aware, I am not involved in the management and operation of your new Company. However, I confirm having advised you that I am prepared to be associated with it and assist in whatever way possible …"

"I will be pleased to receive a cheque from you for the value of the excess assets supplied to you …"

Nowhere in this letter is there any suggestion of a contract between Consolidated Chemicals Ltd, and the appellant company. The writer refers throughout to his company's agreement with Mr Lalji whom he is still holding liable. A new agreement between the judgmentdebtor and the appellant company on which the judgment-debtor could sue the appellant for the balance remaining due cannot in my opinion be inferred from the acts of the appellant company on which Mr Kassam relies. The only reasonable inference to be drawn is that these acts were done under the erroneous belief that the company was bound

by the pre-incorporation contract. I respectfully agree with the learned judge that the facts is disclosed in the proceedings before him do not support any suggestion of a new contract having been entered into by the appellant's company after incorporation. It follows that the goods attached by the court broker do not belong to the appellant/objector. I would dismiss the appeal with costs to the respondent.

Law JA. I have had the advantage of reading in draft the judgment prepared by Simpson Ag JA with which I agree in every respect. It seems to me clear that the appellant company thought that by honouring the pre-incorporation contract or sale agreement entered into between Mr Lalji on behalf of the appellant company, which was then in process of formation, and the vendor, the contract would thereby be validly adopted. That this is what the company believed is clear —

a) from the record of the proceedings in the High Court

b) from Mr Lalji's affidavit of June 18, 1979, in which he deponed that the company had duly honoured the sale agreement which he had entered into as its trustee; and

c) the memorandum of appeal, from which it is apparent that the appellant company was relying on its own unilateral acts as constituting adoption of the pre-incoportation agreement.

The learned judge in the High Court (Harris J) ruled that a company could not ratify or adopt a pre-incorporation contract, and that to be binding on the company there must be a new contract between the company and the vendor, and he commented that it was never suggested that a contract of that nature had been entered into either expressly or by implication after the incorporation, nor did the facts as disclosed to him support such a suggestion. I entirely and respectfully agree, and I would dismiss this appeal. As Miller JA agrees, it is ordered that this appeal be dismissed with costs.

Miller JA. I have had the privilege of reading in draft the judgment of Simpson Ag JA in this appeal. I agree with it and will only observe as follows:

On a general view of the background, events and facts of the entire case, one may hastily get the impression that the setting up of the appellant company, almost a facsimile of the vendor company, may well have been a makeshift or a device to evade some impending crisis. Even if that were so, the authorities and decided cases recognize resort to such practices as permissible in the interest of commerce and the continued existence of trading companies. The courts do not deeply intercede; and where possible, incline to liberal constructions of such commercial arrangements and would even imply powers for effecting the same. In this case however, it turned out that in the course of the undertaken arrangement, the latent question of the transitional identities, powers and the acts of parties mainly outside the company to be created, arose; and the contract of sale of the vendor company's known assets and liabilities came to the fore. It is clear that at the material time the appellant company was unincorporated and therefore not as yet a legal entity capable perse, of defraying liabilities which had to go hand in hand with any attending benefits a matter of vital importance of the entire case.

On the evidence, it can fairly be concluded that Mr Lalji was the financier promoter and one of the intending or anticipated directors of the company to be. The appellant company qua company was not and could not have been a legally recognized and consensual party to the contract of sale. Intentions of arrangement apart, I think that the crucial point of the matter and as it turned out, stands face to face with the age-old legendary judicial observation - "shall we hand their common seals?" Advocate for the appellant company most ably, could have done no more than to ask this Court to infer adoption of the contract of sale by it, upon its coming into being; but on my own study of the evidence and submissions on both sides, I have come to the same conclusion as did Harris J.

I therefore agree that this appeal be dismissed.

Dated and Delivered at Nairobi this 23rd day of July 1981.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

A.H.SIMPSON

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR