**A.C.B. LTD.**

**v.**

**BABAYEMI**

HIGH COURT OF LAGOS

3RD NOVEMBER, 1969

SUIT NO. LD (130/68)

**LEX (1969) - LD (130/68)**

OTHER CITATIONS

3PLR/1969/1 (HC-L)

(1969) NCLE 363

**BEFORE:** DOSUMU, J.

**BETWEEN**

A.C.B. LTD. V BABAYEMI

AFRICAN CONTINENTAL BANK LIMITED

AND

S.A. BABAYEMI

MADAM R.I. OGUNLENDE

**ISSUES FROM THE CAUSE(S) OF ACTION**

BANKING AND FINANCE:- Banking practices – Overdraft – Nature of - Recovery of – Interest payable – How determined

COMMERCIAL LAW- CONTRACT:- Contract of loan by way of overdraft – Effect of legal nature of business on liabilities arising therefrom - Inherent powers of a partner to bind the firm – Limits of – Relevant considerations

COMPANY AND CORPORATE LAW - PARTNERSHIP:- Borrowing of money by partners - Implied power of a partner to borrow money at the credit of the firm –When evidence of actual authority or ratification is required –Relevant considerations – Where actual authority or ratification was subsequently countermanded before the procurement of loan – Legal effect

COMPANY AND CORPORATE LAW - PARTNERSHIP:- Liability of a firm arising from the conduct of one partner – Resignation of that partner – Relevance of

COMPANY AND CORPORATE LAW - PARTNERSHIP:- Nature of – Power of a partner to bind the firm with regard to a loan –

COMPANY AND CORPORATE LAW - PARTNERSHIP:- Resignation of a member of a firm – Effectiveness of – What does not constitute proper notice to third parties - Implication of for accrued liabilities of the firm

DEBTOR AND CREDITOR:- Bank Overdraft – Nature of – When interest is recoverable – Period applicable – How determined

DEBTOR AND CREDITOR:- Borrowing of money by partners - Implied power of a partner to borrow money at the credit of the firm – Need for same to be recognized only where the business is of such a kind that it cannot be carried on in the usual way without such a power – Duty of court to ascertain the nature of the business of the firm before deciding whether a partner has an implied authority to bind the firm or actual authority or ratification has to be proved – What constitutes same

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE:- Onus of proof required under Section 136 (1) – Whether can be satisfied by unchallenged evidence that a state of affairs was well known to the party objecting

**MAIN JUDGEMENT**

**DOSUNMU J.:-**

The two defendants trading under the name and style of MERCURY BUILDERS have been sued by the Plaintiff/Bank for the payment of the sum of £5,134.16s.9d. representing the balance owing by them in respect of bank overdraft granted to them by the plaintiff together with interest accruing thereon. The defendants denied liability but filed different defences.

In proof of its claim the plaintiff called two witnesses namely, Messrs Christian Okocha and J.V. Williams. Both are officers of the bank and the latter is the Accounts’ Supervisor. The 2nd plaintiff’s witness, Mr. Williams gave evidence that sometime in the year 1964, the firm of the defendants applied to open a current account at their Idunmota Branch in an application form dated 17th August, 1964 admitted as exhibit ‘B’. Part ‘A’ of the said form which is intended to be completed by all customers shows the names of Messrs Mercury Builders as the customer. Part B of this same form which is intended for FIRMS, SOCIETIES, COMPANIES ONLY, requires the following additional information to be filled in.

(a) The date on which the Business/Society was established and registered and the Registration.

(b) The full names of all Directors/Partners including and stating those who will not be operating on the account.

In this case Part B of the said application form was duly completed, and the full names of the two defendants were written thereon. The form was, undoubtedly, signed by 1st defendant alone and the rubber stamp of the firm was affixed. There can be no question therefore that the plaintiff knew who its customers were and whether the 1st defendant was acting in his own behalf or a firm when he applied to open a current account. The witness, continuing his evidence, said an account was duly opened for the firm, and the signature card which was also opened contained only the specimen signature of the 1st defendant as the person to sign. This card which was admitted as exhibit ‘C’ is obviously meant to be completed in the case of Companies and Partnerships only. The same witness also produced a certified true copy of the registration certificate of the firm of MERCURY BUILDERS which shows the general nature of the business of the Company as Building and Civil Engineering Contractors. The two defendants are shown as partners in the business. The certificate was admitted and marked exhibit ‘D’. It carries a jurat which apparently refers to the 2nd defendant who is a woman.

However, the firm commenced to operate their account by making an initial deposit of £50 on 17th August, 1964. By the 22nd August, 1964 an amount of £21.10s.0d. has been withdrawn leaving a credit balance of £28.10s.0d. On the 24th August, 1964 the defendant Company drew a cheque for £1,200 which the bank honoured and paid. This resulted in an overdraft of £1,171.10s.0d. It is this sum of £1,200 that the 1st defendant referred to in paragraph 8 (iii) of his own defence when he stated: “That there was no interest attached to the said overdraft facilities granted to the Company on the initial amount of £1,200 granted on the 22nd August, 1964. The witness further stated that the plaintiff/bank charges interest on overdraft granted to customers at the rate of 9% per month. The interest is calculated on the amount overdrawn at the end of every month and statement of account is forwarded to the customer. These facts are known to the defendants. Further he stated that the overdraft limit of the Defendant/Company was £2,000 and in a letter dated 6th June, 1965, exhibit `M’ under the hand of the 1st defendant as the Managing Director, a request was made to exceed this amount by £500 and the request was granted. As at 30th August, 1965 the debit balance of the defendant/company in the bank’s ledger stood at £3,862.10s.8d. as shown in exhibit `G’ which shows the defendant’s account up to November, 1965. In a letter dated 30th August, 1965 written by the 1st defendant as the Managing Director of the said MERCURY BUILDERS and addressed to the plaintiff/bank, the defendants admitted the liability of the said sum of £3,862.10s.8d. The letter was admitted as exhibit `F’, and it is hereon reproduced.

The Manager, A.C.B. Limited,

Idumota Branch. Lagos.

Dear Sir,

OUR OUTSTANDING OVERDRAFT ACCOUNT - £3,862.10s.8d.

We thank you for your letter dated 13th August, 1965, in connection with the above outstanding account. We regret to note that the amount has been outstanding for a considerable length of time and, in fact, this was due to the sickness of our Managing Director.

We are today confirming to you that all our outstanding contracts are now in progress and our overdraft will be liquidated on or before the 15th September, 1965.

Our Managing Director will interview you on the 31st of August, at 10 a.m.

Thanking you for your co-operation in this connection.

We are,

Yours faithfully,

for MERCURY BUILDERS, Sgd.

Managing Director.

The 2nd witness also produced in evidence the ledgers of the defendants’ account showing the state of their account at various intervals. As at 30th December, 1965 the defendant’s debit balance was £4,010.9s.8d. as per exhibit ‘H’. As at 29th December, 1966 the balance stood at £4,393.19s.6d. as per exhibit ‘J’. Also as at 29th December, 1967 the amount owing by the defendants are stated as £4,766.18s.6d.as in exhibit ‘R’. And by the time action was instituted against the defendants the debit account of the defendants at 29th October, 1968 was £5,134.16s.9d. as in exhibit ‘L’. The differences are the monthly interest which range between £30 to £40 and all these are clearly stated in the exhibits as ‘IT’ meaning interest.

The witness gave evidence that monthly statement of the accounts were regularly forwarded to the defendants and that the plaintiff did not receive any queries whatsoever from them. Yet the amount of £5,134.16s.9d. remained unpaid in spite of demands. The evidence of this witness was practically the same as the one given by the other officer of the bank, Mr. Okocha. Both witnesses denied ever receiving notification from the 1st defendant that he resigned from the business of the firm with effect from 17th June, 1966.

At the end of the plaintiff’s case the two defendants called no evidence. It is, therefore, hardly necessary to consider the CONFLICTING allegations made in their respective statements of defence as against one another. On behalf of the 1st defendant, it was submitted that the plaintiff has not discharged the onus of proof by virtue of 136 (1) of the Evidence Act, and by this, the Counsel said he meant that it was not proved that the rate of interest has been transmitted to his client. I do not see any substance in this submission as there was the unchallenged evidence that the rate of interest at 9% charged on overdrafts was well known to the defendants. Again the 1st defendant’s Counsel contended that although he would submit to judgment in respect of the sum of £3,862.1 Os. 8d. as admitted in exhibit ‘F’ but he would contend that no interest should be charged as from the date of the exhibit `F’ as there was no agreement to charge interest. Again, I can see no merit in this argument if the very amount of £3,862.1Os.8d. which the 1st defendant admitted was inclusive of interest as it is shown in the ledgers of the plaintiff. The statement of account exhibit `A’ rendered to the defendants shows interest charges. The Counsel failed to convince me why interest should suddenly stop after the sum of £3,862.10s.8d. which was admitted owing on as at 30th August, 1966. The last point made by the counsel was that his client was not liable to pay interest as from 17th June, 1966 when he purported to resign from the partnership. In the first place there was no evidence that the 1st defendant informed the plaintiff of his resignation from the Company from 17th June, 1966 or at any time. He did not give evidence or produce any of the letters which he pleaded in his statement of claim as notification to the plaintiff. He sought however to rely on a newspaper publication in the Daily Times of 18th July, 26th September 1966 respectively admitted as exhibits `P’ & `Q’ containing notice by one Mr. GBAJABIAMILA that he (the 1st defendant) has ceased to be a member of the firm of the MERCURY BUILDERS. How can the plaintiff/bank take such notification purporting to show that the 1st defendant has been sacked, so to say, as a notice by him that he has resigned his membership of the firm? But all this aside, the liability in this case accrued before the purported resignation, and, therefore, the 1st defendant cannot claim to be absolved. On the whole I have no difficulty in finding the 1st defendant liable.

What has given me some difficulty is the question of the liability of the 2nd defendant. It was contended on her behalf that because the opening of firm’s account including the overdraft was done without her authority and also because 1st defendant was the only one operating the bank account, she was not liable. This was her main defence to this action as can be seen from the Statement of Defence filed on her behalf Paragraph 4 of her statement of Defence reads thus “This defendant will contend that the loan was applied for and obtained by the 1st defendant without her knowledge and consent and it was utilized by the 1st defendant for himself only and not for the joint venture and that he should be liable alone for the repayment there-of.” But she gave no evidence.

The Author of Lindley on Partnership, 12th Edition, at page 177 has this to say on Borrowing Money by partners. “One of the most important of the implied power of a partner is that of borrowing money at the credit of the firm .... At the same time, the implied power of borrowing money like every other implied power of a partner, only exists where the business is of such a kind that it cannot be carried on in the usual way without such a power. If money is borrowed by one partner for the declared purpose of increasing the partnership capital or of raising the whole or part of the capital agreed to be subscribed in order to start the firm or if the business is such as is customarily carried on ready-money principles, e.g., mining on the stock cost-book principle, or without borrowing, as in the case of Solicitors or Cinematograph theatre proprietors, the firm will not be bound unless some actual authority or ratification can be proved.” It is necessary, therefore, to ascertain the nature of the business of the firm before deciding whether a partner has an implied authority to bind the firm or actual authority or ratification has to be proved. It has been held in a number of authorities that overdrawing a banking account is borrowing money, see Re Wrexham, Molds (1899) 1, Ch., 205, 440. In the case of Levy v. Pyne 174 E.R. 586 it was held that if a bill of exchange or promissory note be drawn, accepted, or endorsed by one of two persons who are partners in a business which is not a trade, e.g., attorneys, in the name of the firm, and the partner who did not write the names of the firm denies the drawing, acceptance or endorsement respectively, the plaintiff must give evidence of the authority of the other partner to draw accept or endorse in the name of the firm: but in the case of a commercial firm, this is not necessary, as there is a general authority. See also Bank of Australasia v. Breillat 13 E.R. 642. Exhibit `D’ which is the certificate of registration of the defendant/company sets out the nature of the business of the firm as follows: “Building & Civil Engineering Contractors, Plumbing, Sanitary, Hot Water and Heating Engineering, Valuation & Estate Agents, Quantity & Land Surveyors, Shop Fitters, & Electrical Engineers & Estimators.” Obviously this is not a trading partnership. A trading business has been defined as one which consists of buying and selling goods (Higgins v. Beauchamp (1914) 3 KB 1192, at page 1195 per Lush, J., where it was held that the business of a cinematograph theatre proprietors was not a trading partnership. In this case it becomes necessary, therefore, to look for the actual authority or ratification of the second defendant to bind the firm since their business is a non-trading one. First exhibit ‘C’ shows that it was the 1st defendant only who opened the account, howbeit in the name of the firm. He signed as the only person whose signature is to be recognised. In addition, the evidence of the 1st witness for the plaintiff was to the effect that where a partner is to operate a banking account on behalf of a firm, there must be authority from the other partners for him to do so. In this case, there is no evidence of any such authority. This witness further stated under cross-examination by the 2nd defendant’s counsel that all cheques drawn on the bank on behalf of the firm were drawn by the 1st defendant only. That this is true is borne out by all the cheques tendered in evidence as exhibits ‘N =‘N8’ and ‘0’-’016'. What is more striking is that a good number of these cheques were drawn out by the 1st defendant in his own favour. The evidence of the 2nd plaintiff’s witness who claims to be senior in rank to the 1st witness and more knowledgeable is more revealing. He stated that exhibit ‘B’ which was the application to open a current account was signed by the 1st defendant only. The letter dated 6th November, 1965 and admitted as exhibit ‘M’, asking for an increase in the overdraft limit by £500 was signed alone by the 1st defendant. He further stated that the bank forwarded monthly statement of account to the 1st defendant because he was the only person known to the Bank. Having considered the plaintiff’s evidence and the exhibits tendered, I do not find the express authority of the 2nd defendant to bind the firm. And it is not sufficient to say she is a partner. In Yates v. Dalton (1858) 28 L. Ex. 69 the facts are as follows:-

Two partners carried on business together as brokers, under an agreement that they were to get orders on commission and divide the expenses. One of them travelled for orders and having incurred expenses, drew a bill, for the first time, in the partnerships name, to raise funds to execute the order. The other accepted it but before it was issued, countermanded the authority to negotiate and it was negotiated without his knowledge:-

Held: The mere partnership did not render him liable upon it.

The matter does not, however, rest there. Can I, on the evidence of the plaintiff, find ratification on the part of the 2nd defendant. Before such a finding can be made, evidence must be given to prove that at the time of the alleged ratification she knew of these acts, in the case, the acts of overdrawing the bank account. As I said earlier all the evidence points one way, and that is that the business is entirely one man’s and that of the 1st defendant. The opening of the account and its operation including the overdrawing have not been proved to be known to the 2nd defendant. I cannot hold that the mere sending of monthly statement of account to the firm as given in evidence by the first plaintiff’s witness is evidence of such ratification on the part of the 2nd defendant.

In the result I hold that the 1st defendant cannot bind the firm with the repayment of overdraft as claimed, and there will, therefore, be judgment for the plaintiff against the 1st defendant only in the sum of £5,134.16s.9d. with costs fixed at 100 guineas. The plaintiff will pay to the 2nd defendant her costs fixed at 30 guineas.

Judgment for the Plaintiff against 1st Defendant only.