

LOM Business Solutions t/a Set LK Transcribers/

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 6736/05

2009-06-09

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- (1) NOT REPORTABLE.
- (2) NOT OF INTEREST TO OTHER JUDGES.
- (3) REVISED.

pp FHD VAN OOSTEN

15 October 2009

In the matter between

BCE FOODSERVICE EQUIPMENT (PTY) LTD

PLAINTIFF

and

MICHAEL CONSTANTARAS

DEFENDANT

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J U D G M E N T

VAN OOSTEN, J: There are two applications before me, firstly, an exception raised by the plaintiff against the defendant's amended plea and secondly, by the defendant to amend his amended plea. Both applications are opposed and were heard together.

The background facts relevant to the applications are these:
The plaintiff sues the defendant for payment on three claims in the amount of R65 229,25 each, being the face value of three cheques dated 3 December 2004, 3 January 2005 and 3 February 2005

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respectively, drawn in its favour by Cater-Mart (Pty) Ltd and dishonoured by non-payment. Each cheque bears the printed description of the drawer as follows: Cater-Mart (Pty) Ltd 2000/001852/07 (S/HILL) 001533134 as well as the signature of the defendant without an indication that he did so in a representative capacity. The three claims are identical. At the heart of the claims lie two corporate entities with similar names: Cater-Mart (Pty) Ltd and Cater-Mart CC. The plaintiff relies on a number of alternative causes of action, only one of which is relevant for present purposes, which is the defendant's alleged personal
10 liability in terms of s 23(2) of the Close Corporations Act 69 of 1984. The basis for the defendant's alleged liability under this section is that he signed the cheques without ensuring that the registered full name and registration number of Cater-Mart CC on whose behalf he in fact signed the cheques, appeared on the cheques.

The defendant has raised a number of defences in his plea. The plaintiff noted an exception to the defendant's plea in response to which the defendant amended his plea. The plaintiff again noted an exception to the defendant's amended plea which is the exception we are now concerned with. The defendant in response filed a notice of
20 intention to amend his amended plea to which the plaintiff objected. The proposed amendment in effect seeks to introduce a further alternative defence as a separate new defence. The new defence reads as follows:

1. The defendant signed the cheque in his capacity as the authorised signatory of the corporation (*ie* Cater- Mart CC). The defendant admits that the cheques reflected the drawer as the company (*ie* Cater-Mart (Pty) Ltd).

2. The defendant signed the cheques as a duly authorised signatory on behalf of the corporation unaware and without knowledge that the company appears, *ex facie*, as the drawer.
3. When the defendant signed the cheques, he was unaware of the fact that the cheques did not comply with Section 23(1)(b) (of the Close Corporations Act).
4. In the premises, the defendant denies that he is personally liable in terms of section 23(2)(8) (sic) of the Act.

The plaintiff objects to the proposed amendment contending
10 that the amendment, if allowed, will render the defendant's plea excipiable.

The parties to this action were previously involved in another action where the plaintiff sued the defendant on two cheques for the similar amounts as the cheques in the present matter. The issues in that action were similar to those in the present action. There the defendant raised a plea of rectification to which the plaintiff raised an exception. The exception was upheld by this court. An appeal to the Supreme Court of Appeal was unsuccessful (see *Constantaras v BCE Foodservice Equipment (Pty) Limited*, 2007 (6) SA 338 (SCA)). In consequence the
20 defendant in the present action abandoned a similar plea of prescription.

I turn now to the defendant's application to amend. Counsel for the defendant sought to rely on the judgment in *Stafford t/a Natal Agricultural Co v Lions River Saw Mills (Pty) Limited*, 1999 (2) SA 1077 (N) as authority for the basis of the proposed amendment. The reliance in my view is clearly misplaced. In *Stafford* the defendant authorised a third person, a certain Ms Thomas, to sign an order form on behalf of a close corporation. The order form contained no reference at all to the

close corporation or its registration number. The order form according to the defendant formed part of “the old stationery” which did not reflect the particulars of the close corporation and which “had been put away”. The court (*per* McLaren J, Kondile J concurring) held (at 1083C-D) that where the member of a close corporation is unaware of the fact that the order does not comply with s 23(1)(b), it cannot be said that he authorised the signature thereof within the meaning of that expression in s 23(2)(a). The present matter is clearly distinguishable. Here we are concerned with a party who himself signed and issued the cheques. His
10 lack of knowledge which the proposed amendment seeks to introduce, in my view, therefore does not avail him. I find support for this conclusion in *Constantaras*, where Heher JA dealt with this aspect as follows (para [13]):

The state of mind of the holder, his knowledge or intention does not suddenly become relevant; the mere fact of authorising or issuing a defective document in a specified category creates the liability.

The proposed amendment accordingly, if allowed, will render the defendant’s plea on this aspect excipiable. It follows that the defendant’s
20 application for amendment cannot succeed.

Next, the plaintiff’s exception to the defendant’s amended plea. The exception concerns two portions of the amended plea. In its particulars of claim, under claim A, the plaintiff pleads the cause of action as follows:

- 8.1 The plaintiff is the holder of a cheque dated 3 December 2004, drawn in the amount of R65 229,25 on the bank by “Cater-Mart (Pty)

Limited 2000/001852/07” and signed by the defendant. Copies of the front and reverse sides of the cheque are annexed hereto marked “A1” and “A2” (“the cheque”).

8.2 The plaintiff duly presented the cheque for payment on 3 December 2004 and it was dishonoured by non payment, payment thereof having being countermanded.

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8.3 Notice of dishonour is dispensed with in terms of section 48(2)(c) of the Bills of Exchange Act, 34 of 1964 (as amended), payment thereof having being countermanded.

8.4 The defendant is personally liable to the plaintiff for the amount of the cheque by virtue of the fact that, in signing it, he did not indicate that he was doing so for and on behalf of “Cater-Mart (Pty) Limited 2000/001852/07” or in a representative capacity.

In response hereto, the defendant pleads as follows:

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8.1 The payee on the cheque is “*BCE Foodservice Equipment*” and not BCE Foodservice Equipment (Pty) Limited.

8.2 The defendant signed the cheque on behalf of the corporation.

8.3 Defendant admits that the company appears *ex facie* the cheque, as the drawer.

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8.4 Defendant admits that his signature on the cheque is not qualified by the words “for and on behalf of” the corporation, but contends that on a proper construction of the cheque, it is apparent that he signed the cheque in a representative capacity.

The plaintiff exception to the plea is based on the following grounds:

1. The plaintiff's claim is based upon the peremptory provisions of section 23(2) of the Close Corporations Act, 69 of 1984 which provides that the defendant shall be personally liable for the amounts stated on the cheques in circumstances where:
 - 1.1 The defendant signs the cheques on behalf of a corporation;
 - 1.2 without the name of the corporation and its registration number being mentioned on the cheque, in accordance with section 23(1)(b); and
 - 1.3 The amount is not paid by the corporation.
2. It is common cause on the pleadings that the above three requirements have all been met.
3. In paragraph 8.4 of his plea the defendant relies on the contention that "*on a proper construction of the cheque it is apparent that he signed in a representative capacity*". This does not constitute a defence but merely an admission of one of the jurisdictional facts relied upon by the plaintiff.

The exception is short lived: it is premised on a wrong understanding of the true nature of the plaintiff's claim. The claim as rightly pointed out by counsel for the defendant, is not based on the provisions of s 23(2) of the Close Corporations Act but on s 24 of the Bills of Exchange Act 34 of 1964. The nub of the plaintiff's claim is the defendant's failure to indicate that he was signing the cheque on behalf of the company which in terms of the section would render him liable.

The cheques upon which the plaintiff relies, bear the printed company name and underneath it there is a space for signature. The defendant contends that the company's name, supplemented by the defendant's

signature constitutes the composite signature of the company. Reliance was placed on the judgment in *Schmidt and Another v Jack Brillard Printing Services* CC 2000 (3) SA 824 (W) where I concurred in the judgment of Joffe J holding that the signature above the company's printed name without qualifying words, was sufficient for the reasonable man to construe the cheque as having been signed on behalf of the company.

Applied to the facts of the present matter, the mere fact of the defendant's signature appearing below the printed name of the company
10 without qualification is sufficient to show that he signed the cheque on behalf of the company. The defendant's contention is unassailable and the exception on this ground accordingly must fail.

The plaintiff's second ground of exception is raised against the defendant's plea of estoppel. Estoppel is pleaded as follows in the defendant's plea:

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- 8.8 The plaintiff conducted business with the company with effect from its formation in the year 2000 and continued to do so at all material times thereafter.
 - 8.9 The company to the knowledge of the plaintiff, converted to the corporation in December 2002.
 - 8.10 The plaintiff was at all material times aware that the corporation continued to use the same bank account as the company had used prior to the conversion.
 - 8.11 The plaintiff was at all material times after the conversion aware of the fact that the account

on which the cheques were drawn was an account conducted by the corporation.

8.12 Since the conversion the plaintiff has accepted payment from the corporation by way of cheques, which reflected the company as the drawer, in the knowledge that the true of the drawer of the cheques was always the corporation.

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8.13 The plaintiff expressly, alternatively impliedly, further alternatively tacitly, alternatively by its conduct as aforesaid, represented to the defendant that:

8.13.1 Cheques drawn by the corporation and tendered to the plaintiff, which reflected the company as the drawer and which bore the defendant's unqualified signature, were acceptable to the plaintiff in that form;

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8.13.2 The plaintiff would not rely on any failure by the defendant to qualify his signature to reflect the representative capacity in which he signed the cheques in order found personal liability on the part of the defendant;

8.13.3 The plaintiff would not rely on the failure to reflect the corporation as the drawer, in order to hold the defendant personally liable on the cheque, whether in terms of section 23 of the Close Corporations Act, or otherwise.

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8.14 Acting on the correctness of the aforesaid representations, the defendant continued to make use of the cheques, which reflected the company as the drawer, duly signed the cheque in question without qualifying his signature and delivered same to the plaintiff.

8.15 But for the aforesaid representations, the defendant would have caused the corporation to procure cheques accurately reflecting the

corporation as the drawer and accurately reflecting the representative capacity in which he signed the cheques and he would not have signed the cheque in question in the manner and form in which he did.

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8.16 In signing the cheque as aforesaid, the defendant acted to his detriment in that he rendered himself potentially liable for the amount of the cheque, in the event that the corporation failed to honour the cheque.

8.17 The plaintiff made the aforesaid representations negligently, alternatively intentionally.

8.18 The aforesaid representations were made on behalf of the plaintiff by Mr Grant Henegan, alternative Mr Seelan Naidoo, alternatively duly authorised representative of the defendant.

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8.19 In the premises, the plaintiff is estopped from relying on the defendant's unqualified signature and/or the failure accurately to reflect the details of the corporation as the drawer of the cheque, in order to found personal liability on the cheque.

The grounds of exception are stated as follows:

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5.1 In paragraph 8.8 to 8.19 of the plea the defendant relies upon estoppel as a defence.

5.2 The defendant pleads in paragraph 8.13 that three representations were made by virtue of the allegations contained in paragraphs 8.8 to 8.12.

5.3 The representation contended for in paragraph 8.13.1 of the plea does not assist the defendant in establishing a defence of estoppel, as the alleged representation does

not imply that the plaintiff would not rely on the statutory provision in the event of the amount not being paid by the corporation.

10 5.4 The representation contended for in paragraph 8.13.2 of the plea, cannot be inferred from the allegations of fact upon which the defendant relies. Furthermore, a defence of estoppel based on this alleged representation is not available to the defendant, as the plaintiff, in order to rely on the statutory provision, specifically relies on the fact that the defendant signed in a representative capacity. For this claim the plaintiff is thus not relying on the failure by the defendant to qualify his signature.

 5.5 The representation contended for in paragraph 8.13.3 of the plea cannot be inferred from the allegations of fact upon which the defendant relies.

20 5.6 In the premises the defendant's reliance upon estoppel must fail.

 I must confess to having considerable difficulty in understanding the grounds of exception. The representations pleaded by the defendant in para 8.13.2 and 8.13.3 quoted above, clearly imply that the plaintiff would not rely on the statutory provision, in the event of the amount not being paid by the corporation. I agree with counsel for the defendant that the representations pleaded clearly establish the defence of estoppel. Whether the defendant will be able to prove those allegations at the trial of course is another consideration with which I am not concerned with
30 now. It follows that there is no merit in the exception and that it falls to

be dismissed. As to the costs of the applications, I propose to apply the normal rule of costs following the result.

In the result I make the following order:

1. The plaintiff's exception to the defendant's amended plea is dismissed with costs.
2. The defendant's application to amend is dismissed with costs.

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10 *Counsel for the plaintiff*

Adv A Bester

Counsel for the defendant

Adv SS Cohen