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(1) REPORTABLE YES/NO
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DATE 2010-03-18

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

CASE NUMBER: 53224/09
DATE: 19/3/2010

BRICK ON BRICK PROPERTY INVESTMENTS 23 (PTY) LTD
PLAINTIFF

V

CAWOOD: JOHANNA PETRONELLA
DEFENDANT

JUDGMENT

MABUSE AJ

(1) On 20 January 2010 I made the following order in the above matter:

- (1) The defendant is hereby granted leave to defend; and
- (2) Costs reserved;

I promised then to furnish reasons later for the said order. These are therefore the reasons for the order made then.

This is an application by the plaintiff for summary judgment. According to the plaintiff's summons, its action against the defendant is based on, firstly, an Acknowledgement of Debt and secondly, a cheque issued by the defendant in favour of the plaintiff payable on 13 May 2009 and was subsequently stopped by the defendant.

- (2) The plaintiff is a company with limited liability duly registered in accordance with the company statutes of this country with its principal place of business

situated at 104 5th Avenue, Highlands North, Johannesburg. The defendant is an adult female who resides at 875 Besembiesie Street, Montana, Pretoria.

- (3) As at 13 May 2009 the defendant's husband, one Josia Joseph Cawood, was truly and lawfully indebted to the plaintiff in the sum of R300 000, 00 in respect of money loaned and advanced to him by the plaintiff and for which he had on 12 May 2005 signed and written Acknowledgement of Debt in which he acknowledged his indebtedness to the plaintiff in the sum of R300 000.00 and which he undertook to refund on or before 13 May 2009. According to the Acknowledgement of Debt, annexed to the plaintiff's summons as annexure "A" repayment of the said amount of R300 000.00 would be secured by way of a post dated cheque for the same amount.
- (4) As undertaken in the said acknowledgement of Debt on 13 May 2009, the defendant delivered a cheque to the plaintiff as security for such refund. The cheque was dated 13 May 2009 and was issued by Cranes Crest Investments 101 for R300 000, 00 in favour of the plaintiff. According to the pleadings, Crane Crest Investments 101 (Pty) Ltd is a company duly registered in terms of the company laws of the Republic of South Africa and has its registered office at 875 Besembiesie Street, Montana, Pretoria.
- (5) On 3 June 2009 the plaintiff presented the cheque at the bank for payment but the cheque was dishonoured by non-payment. Payment of the cheque had been stopped. In terms of the provisions of section 48(2) (C) of the Bills of Exchange Act 34 of 1964 notice of dishonour of the said cheque is, under these circumstances, dispensed with.
- (6) The plaintiff's case is that the defendant is personally liable to the plaintiff for the amount of the cheque by reason of the fact that when she signed the cheque she did not indicate that she was doing so on behalf of any legal entity or in any representative capacity. In the alternative, and if this court should find that the defendant was acting on behalf of Cranes Crest Investments 101, the defendant is indebted to the plaintiff under the following circumstances:

6.1 Crane Crest Investments 101 (Pty) Ltd is a company duly registered in terms of the company laws of the Republic of South Africa and has its registered office at 875 Besembiesie Street Montanapark, Pretoria. The defendant is the sole director of the said company.

6.2 The defendant has failed to have the name of the company mentioned on the said cheque as prescribed by the provisions of section 50 (1) (c) of the Companies Act NO. 61 of 1973 in that the abbreviations, "(Pty) Ltd. and the company's registration number have been omitted. The provisions of section 50 (3) make the defendant liable to the plaintiff. For those reasons the defendant is liable to the plaintiff for payment of a sum of R300 000, 00.

(7) Section 50(1) (C) of the said Act provides that:

"Every company shall have its name and registration number mentioned in legible characters in all notices and after official applications of the company and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company and in all letters, delivery notes, invoices, receipts and letters of credit of the company".

(8) The application for summary judgment was opposed by the defendant. In the first place the defendant denied that she had no defence to the plaintiffs claim and that she had entered appearance solely for the purpose of delay.

(9) The plaintiff's representative or agent and the defendant's husband are business partners in the same business. In the past the said agent or representative concluded several business transactions with her husband. The plaintiff's representative was aware at all material times that any transaction, in which her husband was involved, should be concluded through a company or close corporation, including the transaction involving the loan of R300 000.00 which is the subject of the plaintiff's action against the defendant.

(10) The plaintiff's representative demanded, at the time of the loan of the said amount, that as security for the refund of the said sum of R300 000, 00, Cranes Crest Investments (101) (Pty) Ltd, a company with limited liability and duly registered as such in terms of the company statutes of this country, should issue the plaintiff with a post dated cheque payable on 13 May 2009.

(11) The said plaintiff's representative was at all times aware that Cranes Crest Investments (101) (Pty) Ltd was a shareholder in Adpoint Trading 77 (Pty) Ltd which in turn was the registered owner of the development known as Tanglewood at Roodeplaat Dam in Pretoria.

(12) The defendant duly issued the cheque and made it payable on 13 May 2009 on condition that the Tanglewood development would be sold successfully. The said condition had by 13 May 2009 not been fulfilled as the aforementioned development had not been sold by the said date.

(13) At the time the plaintiff's representative received the cheque, he was fully aware that Crane's Crest Investments (101) (Pty) Ltd was a registered company and therefore that he was dealing with a registered company. As a consequence of an administrative mistake by the issuing bank, namely First National Bank, the words "(Pty) Limited" and the company's registration number do not appear on the cheque. The defendant's attitude is that she should not be held liable for the mistake committed by her bank and furthermore that instead of holding her alone liable on the cheque, the bank that committed the error should be held liable.

(14) According to the defendant the condition under which the cheque for R300 000, 00 was issued has not been fulfilled; the plaintiff was aware during all material times that, notwithstanding the fact that the relevant cheque did not have all the relevant details as prescribed by the provisions of section 50(1)(C) of the Act, it was however dealing with a company and furthermore that the plaintiff could not, under those circumstances, hold her personally liable for the cheque.

- (15) It is clear therefore, and so it was submitted by the plaintiff's counsel, that the only reason the plaintiff holds the defendant personally liable for the amount of the cheque is that she issued a cheque that did not comply with the requirements of section 50 (1)(C) of the Act. Section 50(1) (c) of the said Act provides that:

"Every company shall have its name and registration number mentioned in legible characters in all notices and other official publications of the company and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company and in all letters, delivery notes, invoices, receipts, and letters of credit of the company."

- (16) In the pleadings the plaintiff seeks to hold the defendant personally liable for the amount of the cheque in terms of the provisions of section 50 (3) (c) of the Act. The said section states that:

"Any director or officer of the company or any person on its behalf –

- (c) issues or authorizes the issue of any notice or other official publication of the company or signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, wherever its name is not mentioned in manner aforesaid, he shall be guilty of an offence and shall furthermore be liable to the holder of the cheque for the amount thereof unless it is duly paid by the company."*

- (17) In order to avoid the court granting the application for summary judgment, the defendant must raise an issue that is justiciable. One of the defences that the defendant has raised is that, notwithstanding the provisions of section 50 (1)(c) of the Act, the plaintiff was aware at all material times that he was dealing with a company. In the circumstances, plaintiff should have issued the summons against the company and not against her personally. The defendant found support for this contention in C & C Construction v. De Beer en 'n Ander 2000 (2) SA 378 TPD at 378. Where a party is aware that he is dealing with a company it is that company that he must sue.

(18) In the circumstances it would appear that the fact that a party knew that he was dealing with the company overrides the fact that the party that is been sued has failed to comply with the provisions of section 50(1)(c) of the Act. In my view, the defendant has raised a good defence against the plaintiff's application for summary judgment. The plaintiff's summary judgment could not, for that reason, succeed and was accordingly dismissed.



P.M. MABUSE

ACTING JUDGE OF THE HIGH COURT

Appearances:

Plaintiff's Attorneys: *Finkelstein & Associates Attorneys*

Plaintiff's Counsel: *Adv. DJ van Heerden*

Defendant's Attorneys: *PJ Kleynhans Ingelyf*

Defendant's Counsel: *Adv. G van den Berg*

Date Heard: *18 January 2010*

Date of Judgment: *20 January 2010*