



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case no: 208/06

In the matter between

MICHAEL CONSTANTARAS

APPELLANT

and

BCE FOODSERVICE EQUIPMENT (PTY) LTD

RESPONDENT

Coram: FARLAM, BRAND, HEHER, JAFTA JJA and HANCKE AJA

Heard: 23 MAY 2007

Delivered: 1 JUNE 2007

Summary: Close Corporations Act 69 of 1984 s 23 – purpose of – cheque signed on behalf of corporation not containing prescribed information – personal liability of signatory on non-payment by corporation – defence of rectification not available to meet claim under the Act.

Practice – exception – striking out of plea – defendant entitled to opportunity to amend before granting of judgment.

Neutral citation: This case may be cited as *Constantaras v BCE Foodservice Equipment* [2007] SCA 86 (RSA).

HEHER JA

HEHER JA:

[1] This judgment concerns the personal liability of the representative of a close corporation who signed and issued a cheque on its behalf at a time when the correct particulars of the corporation did not appear on the cheque. Such liability arises by reason of the provisions of s 23(2)¹ of the Close Corporations Act 69 of 1984 ('the Act').

[2] The plaintiff sued the defendant for payment of two amounts of R65 229,25 being the face value of two cheques dated 3 October 2004 and 3 November 2004 respectively drawn in its favour and dishonoured by non-payment. Each cheque reflected the printed description of the drawer as 'Cater-Mart (Pty) Ltd 2000/001852/07' and was signed by the defendant without an indication that he did so in a representative capacity.

[3] The plaintiff alleged that the defendant was personally liable because he failed to indicate that he was signing for and on behalf of the corporation. In the alternative, and in the event that court should find that he did act in a representative capacity on behalf of the corporation, the plaintiff averred that he was nevertheless personally

¹ S 23 provides as follows:

- ' (1) Every corporation-
- (a) shall display its registered full name (or a registered literal translation thereof into any one other official language of the Republic) and registration number in a conspicuous position and in characters easily legible on the outside of its registered office and every office or place in which its business is carried on;
 - (b) shall have that name (or such translation thereof) and registration number mentioned in legible characters in all notices and other official publications of the corporation, including notices or other official publications in electronic format, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money, goods or services purporting to be signed by or on behalf of the corporation, and all letters, delivery notes, invoices, receipts and letters of credit of the corporation; and
 - (c) shall use a registered shortened form of that name only in conjunction with that name or such literal translation thereof.

- (2) If any member of, or any other person on behalf of, a corporation-
- (a) issues or authorizes the issue of any such notice or official publication of the corporation, or signs or authorizes to be signed on behalf of the corporation any such bill of exchange, promissory note, endorsement, cheque or order for money, goods or services; or
 - (b) issues or authorises the issue of any such letter, delivery note, invoice, receipt or letter of credit of the corporation,

without the name of the corporation, or such registered literal translation thereof, and its registration number being mentioned therein in accordance with subsection (1) (b), he shall be guilty of an offence, and shall further be liable to the holder of the bill of exchange, promissory note, cheque or order for money, goods or services for the amount thereof, unless the amount is duly paid by the corporation.

- (3) Any corporation which fails to comply with any provision of subsection (1) shall be guilty of an offence.'

liable in terms of s 23(2) for the amount of the cheque because in signing the cheque the defendant did so without ensuring that the registered full name and registration number of Cater-Mart appeared on the face of the cheque.

[4] The defendant pleaded that he signed the cheque in his capacity as the authorized signatory of Cater-Mart CC registration number 2002/020821/23 and therefore did not incur personal liability on the cheque. Alternatively the defendant pleaded rectification in the following terms:

‘[I]t was the common continuing intention of the parties to the cheque, that, by signing the cheque as the duly authorized signatory of the corporation, the defendant was merely completing the signature of the corporation and was not binding himself to be personally liable thereon, and that, accordingly, should it be held by reason of his signature of the cheque that the defendant thereby incurred personal liability, this was a mistake common to the parties which justifies rectification of the cheque:

8.3.1 to reflect the words “for and on behalf of” before the words Cater-Mart” and/or

8.3.2 to substitute the words “CC 2002/020821/23” for the words “(Pty) Ltd 2000/001852/07”.

[5] The defendant also pleaded an estoppel which plea was set aside on exception and with which it is unnecessary to deal further.

[6] The plaintiff excepted to the defendant’s plea on the grounds that s 23(2) is peremptory in its terms and that rectification would circumvent the statutory provision and defeat the legislative intention and was therefore not a remedy upon which the defendant was entitled to rely. The court *a quo* (Tshiqi J) agreed. Following *Epstein v Bell and Another*² the learned judge held the defendant’s liability arose from the

² 1997 (1) SA 483 (D)

punitive provisions of the statute and was not contractual in origin and that rectification could therefore not assist the defendant. She accordingly upheld the exception and granted judgment in favour of the plaintiff. With her leave the defendant appealed to this Court.

[7] Counsel for the defendant submitted in support of the appeal that once rectified to reflect a signature in a representative capacity, the close corporation would stand alone as the drawer. Rectification, he contended, would not defeat the purpose of s 23(2). Therefore it furnished a permissible remedy. *Epstein v Bell* was, he submitted, wrongly decided in so far as Magid J had followed distinguishable English authority.

[8] Alternatively, so counsel argued, the description of the drawer on the cheque was merely out-dated. The company bearing that name and number had been converted to a close corporation. That was an alteration in legal status without the creation of a new or separate corporate identity and was, in his submission, irrelevant to s 23(2) of the Act (or to 50(3) of the Companies Act 61 of 1973 which contains equivalent provisions in relation to officers and agents of companies). Counsel referred to the terms of s 27(5)³ of the Act to emphasise his submission that s 23(2) was complied with in substance if not strictly in form. He maintained that ‘a simple search’ in the office of the Registrar of Companies would have revealed (if the respondent did not already know of the fact) that the company had converted to a close corporation.

[9] The plaintiff’s claim arose *ex lege* as a remedy created by s 23(2) of the Act. The defendant relied on the defence of rectification to provide himself with an answer

³ (5) (a) On the registration of a corporation converted from a company, the assets, rights, liabilities and obligations of the company shall vest in the corporation.

(b) Any legal proceedings instituted by or against the company before the registration may be continued by or against the corporation, and any other thing done by or in respect of the company shall be deemed to have been done by or in respect of the corporation.

(c) The conversion of a company into a corporation shall in particular not affect-

(i) any liability of a director or officer of the company to the company on the ground of breach of trust or negligence, or to any other person pursuant to any provision of the Companies Act; or

(ii) any liability of the company, or of any other person, as surety.

(d) The juristic person which prior to the conversion of a company into a corporation existed as a company, shall

to the statute: the cheque duly rectified would *ex tunc* be regarded as complying with its terms. If the statute does not permit of reliance on such a defence rectification will serve no purpose. The question is accordingly one of interpretation.

[10] The whole of s 23 of the Act is relevant. According to its plain wording the principal purpose of ss (1) is to ensure that in its contact and dealings with the public a close corporation discloses in unmistakable terms

- (i) its corporate status;
- (ii) the fact of its registration as a close corporation;
- (iii) the full name under which it is registered;
- (iv) the number allotted to it on registration.

The purpose is achieved, in the first instance, by requiring such disclosure by the corporation

- (a) on the outside of its registered office and every office in which the business of the corporation is carried on; and
- (b) on all notices and official publications of the corporation and in all bills of exchange, promissory notes, endorsements, cheques and orders for money, goods or services purporting to be signed by or on behalf of the corporation, and on all letters, delivery notes, invoices, receipts and letters of credit of the corporation.

[11] The language is peremptory. A failure to comply constitutes an offence. It is clear that the offence is committed irrespective of whether any member of the public has actually seen a relevant document or whether such a person has been misled by any such document or been aware of the absence of the required particulars or their inaccuracy. The section protects the public by ensuring that it is not exposed to the risk of being misinformed or misled by requiring objective compliance in the documents themselves. It follows that where a member of the public is involved it is irrelevant that he does or does not know the true facts relating to the company.

[12] Section 23(2) reinforces ss (1) by imposing criminal and civil sanctions on members of the corporation and its representatives who issue or authorise the issue of the said documents and who sign on its behalf the bills, notes, endorsements, cheques and orders specified therein. The purpose is achieved by requiring compliance before or at the time the document in question is issued or signed. Here also it is apparent that the criminal offence which ss (2) creates is committed by the objective failure to comply without the need for communication to a third party.

[13] The personal liability to holders which ss (2) imposes on members and representatives of the corporation who contravene its terms depends upon the same default as does the offence. The only additional *factum probandum* is that the corporation has not duly paid the amount of the bill, note, cheque or order. 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 liability⁴. In these circumstances, according to its terms the section creates a statutory civil penalty for non-compliance which arises independently of any contractual relationship which may exist between the holder of any document in the specified categories, the authoriser or signatory and the company.

[14] Counsel for the appellant conceded that s 23(2) does not expressly render the state of mind of the holder of the instruments to which it relates relevant to the imposition of personal liability on the person who issues, authorises or signs the document. But, he submitted, there must be read into the section the qualification that in order for personal liability to arise the holder must be unaware of the true facts

⁴ It is not necessary to consider the possibility of raising an estoppel against the holder.

relating to the status, registration, name and number of the corporation at the time of receiving the defective instrument. (He did not explain why rectification should be necessary to establish such awareness.) He submitted that the consequences of an interpretation which excluded such a qualification would be arbitrary, bear no relation to the degree of fault on the part of the holder and may result in an obligation to pay very great amounts of money. He did not, however, contend that the result would be absurd.

[15] The structure of s 23 suggests that the legislature had in mind that the relatively light criminal sanctions of themselves would not be sufficient to procure compliance with the obligations of a corporation. It therefore added the weight of personal liability as a penalty likely to increase the effectiveness of the protection afforded to the public. There is an obvious correlation between the amount of the instrument, the degree of responsibility of the person authorising, signing, or issuing it and the loss suffered by the holder who must rely in the first instance on the corporation to pay the amount. Moreover the responsible member or representative can be expected to have an insight into the ability of the corporation to meet its debt which the holder will usually not possess. Thus, although the section may bear hard and even at times unfairly upon the responsible persons I do not agree that an implication of awareness on the part of the holder is necessary in order to give proper effect to the legislative purpose.

[16] It follows that rectification of a document, which is an equitable remedy which requires proof of the common intention of all parties to a contractual instrument in order to place them in the relationship to each other that they intended, cannot and does not provide a defence against the claim of a holder who relies on the liability created by s 23(2).

[17] That really is an end of the matter. But reference to the decided cases dealing with companies bears out the interpretation.

[18] In *Cotona Oil & Cake Ltd v Gangut and Another*⁵ Hefer J said of s 50(3)(b) of the Companies Act, in his usual incisive manner,

‘The Legislature has seen fit to impose personal liability upon directors of companies who sign cheques in the form in which the present one was signed, and, in my view, the fact that the receiver of such a cheque is aware of the fact that it was intended to be signed on behalf of a company is irrelevant. The defendant’s defence is accordingly completely untenable.’

[19] In *Abro v Softex Mattress (Pty) Ltd*⁶ a promissory note and written orders were signed by the excipient in which the name of his principal was furnished as ‘Henwoods’. In fact Henwoods was a trading name of a company Libertas (Andries Street) (Pty) Ltd which name was not disclosed in the order. When the company failed to pay the respondent sued the recipient personally relying on s 58 of the Companies Act 46 of 1926 (a predecessor of s 50 of the 1973 Act). An exception on the ground that the note and orders did not purport to be signed by or on behalf of the company was dismissed. Henning J construed the statute. He recognised that its terms were imperative and found the language neither obscure nor ambiguous. He concluded that any misdescription of a company’s name or any omission therefrom was intended to render the section operative.

[20] In *Sadler v Nebraska (Pty) Ltd and Another*⁷ the name of the drawer printed on the cheque was that of the respondent in the citation whereas the registered name of the company was Nebraska Manufacturing Co (Pty) Ltd. Goldstone AJ following *Abro v Softex Mattress* accepted the law to be that the section is to be strictly and literally interpreted and that any misdescription of the name of a company would render the signatory guilty of a criminal offence and personally liable to pay the holder in the event of non-payment by the company (at 722 F-H).

[21] In *Epstein v Bell*⁸ two directors of South African Unlisted Securities Market Exchange (Pty) Ltd signed five cheques drawn on that company’s account. Each

⁵ 1977 (1) PH A26 (N)

⁶ 1973 (2) SA 346 (D)

⁷ 1980 (4) SA 718 (W)

⁸ 1997 (1) SA 483 (D)

reflected the drawer as ‘SA Unlisted Sec Market Exchange (Pty) Ltd T/A USM Investments’. It was common cause that the directors were not responsible for the printed description and were unaware of the legal effects of signing a cheque bearing an abbreviated name of the drawer company. The company was identified by its registered number on the cheque. In an application for summary judgment against them, the directors relied on a right to rectification. Magid J granted judgment. He held that they were not sued as drawers of the cheques and their liability was not contractual but statutory. Accordingly rectification was not open to them. The learned judge did not rely on *Blum v OCP Repartition SA*⁹ (as submitted by counsel for the appellant) but found that the conclusion arrived at in that case coincided with his view¹⁰. He referred to the *dictum* of Hefer J in *Cotona* quoted above. In relation to a defence that *mens rea* was an element of the offence Magid J found that (i) the language of the prohibition was peremptory; (ii) the intention of the section was both strict and penal in its effect (referring in this regard¹¹ to *Scottish and Newcastle Breweries Ltd v Blair and Others*¹²); the low penalty provided for the offence was an indication that *mens rea* was excluded; absence of *mens rea* would provide too easy and obvious an escape route and frustrate the statutory objective; even if *mens rea* were an element of the criminal offence, it did not follow that lack of the necessary mental element would entitle a director to escape civil liability, a consequence which the learned judge found to be at odds with the legislative intention. In my view all these findings are borne out by an analysis of s 23. Although Magid J did not say so, his conclusion regarding the exclusion of *mens rea* as an element in the offence must of itself have rendered rectification (which depends on proof of the subjective

⁹ 1988 Palmer’s Company Cases 416 ([1988] BCLC 170 CA)

¹⁰ at 487C

¹¹ at 489F

¹² 1967 SLT 72 at 73

intention of the parties) inapplicable.

[22] In *Van Lochen v Associated Office Contracts (Pty) Ltd and Another*¹³ Malan J noted the cases which had required strict compliance with the section (or its equivalent in other legislation). He cited *Atkins & Co v Wardle*¹⁴ in which it was said that the provisions were enacted ‘with the intention of ensuring the strictest accuracy in this respect for the protection of the public’. The learned judge also referred to the history of the provision as set out by J T Pretorius ‘Die Aanspreeklikheid van Maatskappye in die Wisselreg’ in (1983) 100 *SALJ* 240 at 256-7.

[23] Of the considerable number of English cases dealing with equivalent legislative provisions I propose to refer only to three. Counsel submitted that *Blum v OCP Repartition SA*¹⁵ was distinguishable. It seems to me, however, that, far from being so on grounds of differences between South African and English principles of rectification, the judgment serves to identify the essence of the weaknesses in the appellant’s argument.

[24] In *Blum* the signatory to the cheque was a director of a company, Bomore Medical Supplies Ltd. The word ‘Limited’ was omitted from the drawer’s name on the instrument. The Court of Appeal (May and Balcombe LJJ) accepted that the intention of all concerned (the plaintiff payee, the defendant director, the bank joined as a third party by the defendants and the company itself) was that the cheques should be limited company cheques, paid by the company to the plaintiff on the company’s account with the bank in part settlement of the company’s liability to the defendant. May LJ pointed out that the claim based on the personal liability of the defendant was a claim on the statute and not a claim arising on the cheque¹⁶. (The defendant was not sued as a party to the cheque or the contract for which it was given.) The consequence was twofold: the liability of the defendant had to be determined in accordance with

¹³ 2004 (3) SA 247 (W)

¹⁴ (1889) 58 LJQB 377 at 381

¹⁵ *supra*, fn 8

¹⁶ at 175e-g

the statutory provisions; rectification was inapposite because the parties to the cheque, the company and the plaintiff had no need of rectification to give effect to their common intention¹⁷ and the only purpose of applying for rectification was the (forlorn) attempt to relieve the director of his statutory liability¹⁸.

[25] The reasoning in *Blum* seems to me to be unexceptionable even in the context of South African law. Counsel submitted that it conflicted with established principles enunciated in, *inter alia*, *Dickinson v SA General Electric Co (Pty) Ltd*¹⁹ which afford the signatory of a cheque the right to apply for its rectification to reflect his representative capacity. But there is no conflict. Such a signatory is sued on the cheque because *ex facie* the cheque he is the drawer and the equitable defence of rectification permits him the opportunity to show that according to the common continuing intention of the parties he signed in a representative capacity. If however the signatory is sued on the statute the underlying assumption is that he indeed acted in a representative capacity but is not entitled by reason of non-compliance with its terms

to rely on that capacity. So rectification cannot assist him. And because, as I have pointed out earlier, the knowledge and intention of the holder is likewise irrelevant, both props necessary to maintain a rectification defence have no significance in the determination of his liability.

[26] In *Penrose v Martyr*²⁰ (a judgment delivered two years after the enactment of the Joint Stock Companies Act 1856 (19 & 20 Vic c 47) which, in s 31, first imposed personal liability on company signatories) Crompton J said,

‘I think that intention of the enactment plainly was to prevent persons from being deceived into the belief that they had a security with the unlimited liability of common law, when they had but the security of Company limited; and that, if they were so deceived, they should have the personal security of the officer.’ (My emphasis.)

¹⁷ at 173g-i

¹⁸ at 174a; see also *Rafsanjan Pistachio Producers Co-operative v Reiss* [1990] BCLC 352 (QBD) at 361a-363e particularly at 363c.

¹⁹ 1973 (2) SA 620 (A) at 629H-630A

²⁰ (1858) EB & E 499

The first part of this passage has often been quoted with approval. The portion I have italicized does not, for the reasons I have given earlier seem correctly to reflect the anticipatory purpose inherent in s 23(2) which penalizes the authorisation, issue or signing of the specified documents without regard to the actual effect of those acts on any person.

[27] In the *Scottish and Newcastle Breweries* case²¹, *supra*, Lord Hunter reached substantially the same conclusion. He said,

‘It was submitted by counsel for the compearing defenders that it was necessary to the operation of the statutory provisions in the present case that the pursuers should have been deceived or misled by the failure to mention the correct name of the Company in the said bill, and that, in the absence of any averment to that effect, the pursuers’ case was irrelevant. I can find nothing in the language of the statutory provisions which lends any support to such an argument, and the only shadow of support for it to be found in the authorities cited to me is one sentence in the judgment of Crompton, J., in *Penrose v. Martyr* (*supra*) at p. 503. I am far from clear that the sentence to which I have referred necessarily supports counsel’s submission, and in any event no trace of such a view is to be found in either of the other judgments in that case. The ration of the decision in *Penrose v. Martyr* appears to me to be that the defendant signed a bill on behalf of the Company without their name being mentioned on it. (See per L. Campbell, C.J., at p. 503.) I notice that the author of Gower on the *Principles of Modern Company Law*, 2nd edition, at p. 187, expresses the following opinion:–“It seems clear that it makes no difference that the third party concerned has not been misled by the misdescription”. With that opinion, having regard to the terms of the statutory provisions and to the authorities cited to me, I agree.’²²

²¹ *supra*, fn 12, at 74

²² cf *Gower’s Principles of Modern Company Law*, 6ed (1997) by Paul L Davies, at 158:

‘It might be a useful reform to amend the subsection [s 349 (4) of the United Kingdom Companies Act 1985] by affording the signatory a defence if he could establish that the holder had not been misled by the misdirection; the recent decisions display a marked disinclination to apply the provision when that is so.’
(citing *Lindholst & Co A/S v Fowler* [1998] BCLC 166 (CA) and *Rafsanjan*, *supra*, fn 18)

[28] I also do not accept the argument that there has, in the circumstances of this case, been compliance with the terms of the section. In the first place the terms of s 23(1) and (2) are peremptory in so far as they lay down the information which the company, its officers and agents are to furnish for the benefit of the public. The deviations from the requirements of the section were of such a nature as to deprive the public entirely of the prescribed details of the status and registration of the corporation. It is no answer to say that the defendant's obligation would have been met if the plaintiff had made reasonable enquiries.

[29] In the result it seems to me that the court *a quo* was correct in concluding that the defendant's plea of rectification raised no sustainable defence to the plaintiff's claim.

[30] I have treated the argument relating to the sufficiency of compliance as one bearing on the question of the plaintiff's knowledge of the true facts behind the corporation. In argument it was accepted by counsel that compliance with the statute in the absence of rectification was neither pleaded nor properly formed a component of the answer to the exception. Counsel then relied on in a different context. At the hearing the learned judge was asked, in the event that she upheld the exception and struck out the defence, to grant the defendant leave to amend his plea. She refused to do so remarking that no real basis had been made for the indulgence. The defendant appealed against her refusal. In argument counsel submitted that the rule is that a party whose pleading is struck down on exception is afforded such an opportunity as a matter of course.

[31] That is certainly true of a successful exception to a summons: *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs* 1993 (2) SA 593 (A) at 602I-603J. Such a rule is both understandable and necessary. Such an exception can never put an end to the dispute if a plaintiff has a viable alternative basis for its claim; even though the original claim

is struck down without leave to amend, the plaintiff can always issue a new summons in which the alternative is pleaded. So refusing an amendment is merely a waste of costs. But the plaintiff may be blocked by prescription. In such a case said Corbett CJ in *Group Five Building supra* at 603A ‘it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff’s pleading discloses no cause of action’. Neither of these considerations is relevant to the striking down of a plea in its entirety. *Prima facie* the defendant no longer has an answer to the claim and the plaintiff is entitled to judgment. Whether that consequence is the correct one is considered in what follows.

[32] In an *obiter dictum* in *Princeps (Edms) Bpk en ‘n Ander v Van Heerden NO en Andere* 1991 (3) SA 842 (T) at 845 Harms J said that in the Supreme Court an unsuccessful pleader is given the opportunity to amend his so-called plea, even when that plea has been set aside because it does not disclose a defence. The *rationale* seems to be that although the defence contained in the pleading may be bad the pleading as such continues to exist. In the *Group Five Building* case (at 603F-H) Corbett CJ quoted with approval from *Johannesburg Municipality v Kerr* 1915 WLD 35 at 37 in which Bristowe J said that although the quashing of an entire declaration on exception means that it is an absolute bar to any relief being obtained on it, that ‘does not take the declaration off the file or place the case in the same position as though no declaration had been delivered’. Despite the distinctions between the effects of the striking down of a particulars of claim and a plea to which I have earlier referred, it seems to me that, in principle, fundamentally defective pleadings emanating from a plaintiff and defendant should be dealt with on an equal footing. Since the rule referred to above is firmly established in relation to the defective pleading of claims we should therefore apply it *mutatis mutandis* to the flawed pleading of defences. That being so, Tshiqi J was wrong to treat the defendant’s application for time to consider an amendment of his plea as the seeking of a indulgence. In the absence of reason to believe the request was merely a ploy to delay the inevitable, such an opportunity should have been included in her order upholding

the exception as a matter of course (even if no application had been made). Para 2 of the order made by the learned judge in which she granted judgment in favour of the appellant requires amendment in consequence of this conclusion. The respondent has, however, achieved substantial success and is entitled to the costs of the appeal including the costs of the application for leave to appeal (which were reserved).

[33] The following order is made:

1. The appeal against paragraph 1 of the order of the court *a quo* is dismissed save as hereinafter set out.
2. Paragraph 2 of the order of the court *a quo* is set aside and replaced with the following:
 - ‘2. The defendant is given leave, if so advised, to file an amended plea.
 3. The costs of the proceedings on exception are to be paid by the defendant.’
3. The filing of the amended plea for which provision is made in paragraph 2 is to take place within one month of the making of this order failing which the plaintiff may set the matter down for judgment.
4. The costs of appeal are to be paid by the appellant.

J A HEHER
JUDGE OF APPEAL

FARLAM JA)**Concur**
BRAND JA)
JAFTA JA)
HANCKE AJA)