COMPANY SIGNATURES ON CHEQUES – THE SAGA CONTINUES

BCE Foodservice Equipment (Pty) Ltd v Constantaras unreported case no 6736/05 (GSJ)

1 Facts and decision

The parties to this action were previously involved in a similar action that ended in the Supreme Court of Appeal (see *Constantaras v BCE Foodservice Equipment (Pty) Limited*, 2007 6 SA 338 (SCA)) and turned mainly on the question of rectification. The present authors commented on that decision in 2008 *De Jure* 469–472.

In the present case, the plaintiff sued the defendant on three dishonoured cheques drawn in its favour by Cater-Mart (Pty) Ltd. In each case the drawer was described as "Cater-Mart (Pty) Ltd 2000/001852/07 (S/HILL) 001533134" and the cheques were signed by the defendant without indicating that he did so in a representative capacity. The company called "Cater-Mart (Pty) Ltd" had in fact been converted to a close corporation called "Cater-Mart CC" (see *Constantaras* para 8) but the new name did not appear on the cheques in question. For present purposes the only relevant cause of action relied on by plaintiff is the defendant's alleged personal liability in terms of section 23(2) of the Close Corporations Act 69 of 1984, in that he signed the cheques without ensuring that the registered full name and registration number of Cater-Mart CC on whose behalf he in reality signed the cheques, appeared on the cheques (as formulated by Van Oosten J in *BCE* 2; all references are to the typed manuscript).

Section 23(2) provides as follows:

> "If any member of, or any other person on behalf of, a corporation–
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> (a) issues or authorises 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
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> (b) issues or authorises the issue of any such letter, delivery note, invoice, receipt or letter of credit of the corporation,
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> 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 or she 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."

The defendant raised a number of defences in his plea. The plaintiff excepted to the defendant's plea and the defendant amended his plea. The plaintiff excepted to the amended plea which fell to be considered by Van Oosten J. The defendant responded by filing a notice of intention to amend his amended plea and the plaintiff objected. The proposed amendment sought to introduce a further alternative defence as a separate new defence (per van Oosten J) (2). The latter defence was 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)" (*BCE* 2–3).
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 objected to the proposed amendment arguing that the amendment would render the defendant's plea excipiable.

In its application to amend the defendant sought to rely on *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. In *Stafford* the defendant authorised a third person to sign an order form that contained no reference at all to the close corporation or its registration number. The order form formed part of unused "old stationery". The court held that where the member of a close corporation was unaware of the fact that the order form signed by him did not comply with section 23(1)(b), it could not be said that he authorised the signature thereof as contemplated in section 23(2)(a). Van Oosten J considered the defendant's reliance on *Stafford* to be clearly misplaced as the present matter was clearly distinguishable: "Here we are concerned with a party who himself signed and issued the cheques. His lack of knowledge which the proposed amendment seeks to introduce . . . therefore does not avail him" (4). Having referred to *Constantaras* para 13 in support, Van Oosten J ruled that the proposed amendment would render the defendant's plea on this aspect excipiable and refused the application for amendment.

Van Oosten J then considered the plaintiff's exception to the defendant's amended plea. First, he quoted the plaintiff's cause of action as stated in their particulars of claim:

"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') . . .

8.4 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" (4–5).

The relevant part of the defendant's responding plea was as follows:

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

8.3 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" (5).

The grounds on which the plaintiff based his exception to the plea were quoted as follows by Van Oosten J:

"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" (6).

Somewhat surprisingly, Van Oosten J held that the exception was short-lived as it was based on a wrong understanding of the true nature of the plaintiff's claim. According to the judge, the claim "as rightly pointed out" by the defendant's counsel was not based on section 23(2) of the Close Corporations Act (CCA) but on section 24 of the Bills of Exchange Act 34 of 1964 (BEA) (6). (This is in all probability based on confusion between the claim as expressly stated by the plaintiff to be based on section 23(2) CCA in paragraph 1 of the above quotation, and the possibility of the defendant escaping liability despite his failure to qualify his signature as mentioned in paragraph 3 of the above quotation. More about this is said in the discussion below.)

In restating the matter, Van Oosten said that the "nub" of the claim was the defendant's failure to indicate that he was signing the cheques in a representative capacity on behalf of the company "which in terms of . . . section [24 BEA] would render him liable".

It should be borne in mind that the cheques in question bore the printed company name mentioned above together with the defendant's unqualified signature. The defendant therefore contended that the company's name supplemented by the defendant's unqualified signature constituted the composite signature of the company (7). In this regard the defendant relied on *Schmidt v Jack Brillard Printing Services CC* 2000 3 SA 824 (W) where Van Oosten J "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" (7). He concluded that "the mere fact of the defendant's signature appearing below the printed name of the company without qualification is sufficient to show that he signed the cheque on behalf of the company". The judge held that the defendant's contention was unassailable and that the exception on this ground had to fail. (See Cassim "The perplexing problem of company signatures on cheques – Too little, too late" 2000 *SALJ* 676 for a discussion of *Schmidt*. See also Pretorius 2000 *Annual Survey of South African Law* 609ff; the plaintiff's second ground of exception based on estoppel is not pursued further in this note.)

2 Discussion

2 1 The plaintiff's true cause of action

It is a matter of concern that the presiding judge, assisted as it were by counsel for the defendant, had to reformulate the plaintiff's cause of action so as to reveal the true nature thereof. The plaintiff expressly stated his claim to be based on non-compliance with section 23 CCA, yet the court rather based it on section 24 BEA. As is indicated below the legal position regarding these two statutory provisions is markedly different. Furthermore, an aspect that was never considered

is the fact that the company on behalf of which the defendant purported to sign no longer existed at the time the cheques were drawn by it. It is trite law that agency gives rise to a tripartite relationship, the three parties being the principal, his agent and the third party with whom the agent interacts on his principal's behalf. Therefore, bar certain exceptions such as pre-incorporation contracts concluded in terms of section 35 of the Companies Act of 1973 which are not pursued here, there cannot be an agent of a non-existing principal (*Kelner v Baxter* (1866) LP 2 CP 174, as confirmed in *Natal Land and Colonisation Co v Pauline Colliery Syndicate Ltd* 1904 AC 120. See also *McCullogh v Fernwood Estate Ltd* 1920 AD 204 207; *Peak Lode Gold Mining Co Ltd v Union Government* 1932 TPD 48 50–51; and *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 3 SA 367 (A) 396). (In *Mösner v Len* 1992 3 SA 626 (SCA) the then Appellate Division pointed out that a company is a type of corporate entity different from a close corporation.) This gives rise to a number of questions: Can it really be said that it is possible for a defendant to escape liability despite failing to indicate his representative capacity when there was no principal to represent? Or that appending his signature to a document bearing the name of a non-existent drawer constituted the composite signature of such drawer, something which Van Oosten J did not find necessary to comment on? Did the defendant really appreciate the nature of a so-called composite signature? (See in this regard *GATX-Fuller (Pty) Ltd v Trade and Project Management Services (Pty) Ltd t/a TPMS (Projects) (Pty) Ltd* 1984 3 SA 38 (W) 45 and the discussion by Malan, Pretorius and Du Toit *Malan on bills of exchange, cheques and promissory notes in South African law* (2009) (Malan *et al*) para 85.)

2 2 Section 50 of the Companies Act and section 23 CCA

Nagel and Pretorius 2008 *De Jure* 469 summarised the import of the above provisions as follows:

> "Both section 50 of the Companies Act 61 of 1963 and section 23 of the Close Corporations Act 69 of 1984 contain provisions regulating the display and use of the full name of the corporate entity concerned on negotiable instruments. However, there is an important difference between the two provisions: In terms of section 50(3) of the Companies Act a director or an officer or a person acting on behalf of a company can be personally liable on certain documents (all bills of exchange, promissory notes, cheques or orders for money or goods) where the name of the company is not mentioned in the manner referred to in section 50(1) of the Companies Act. Section 50(1)(c) (as substituted by s 1 of the Companies Amendment Act 29 of 1985) requires the company's name and registration number on all notices and other documents (including bills, cheques and promissory notes) of the company. Section 50(3), which creates the personal liability of the director, officer or other person acting on behalf of the company, makes no mention of the registration number of the company. The comparable section 23(1) and (2) of the Close Corporations Act, on the other hand, both refer to the registration number of the close corporation. (There has been an oversight in drafting the 1985 amendment to the Companies Act . . .) The purpose of these provisions is to ensure that persons dealing with it should know that in fact they are dealing with a limited liability company or a corporation and not with a particular individual, firm or partnership."

It is important to note that non-compliance with these provisions gives rise to a unique type of statutory liability. The signatory will be liable upon non-compliance with their provisions (provided all the requirements are met, eg that the company does not pay the document) and no rectification of the document is possible (see eg *Constantaras* and cases cited) whereby the signatory can escape

liability. Rectification, after all, is a contractual remedy to be used where the written document does not reflect the true intention of the parties (*Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 SA 1045 (A) 1051H–I; *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 3 SA 107 (SCA)). Therefore, upon non-compliance with these statutory requirements the knowledge of the holder of the document as regards the true intention of the signatory or the correct and full name of the juristic person is irrelevant, as is evidenced by the following statement by Heher JA in *Constantaras* para 13 (also referred to in part by Van Oosten J in *BCE* 4; see also Nagel and Pretorius 2008 *De Jure* 471):

> "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 liability. 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."

In view of the above, it is difficult to comprehend, firstly, how the plaintiff thought it possible to hold the defendant liable on a cheque *ex facie* signed for a non-existent private company in respect a debt owed by a completely different entity, a close corporation. (Para 1.1 of the particulars of claim quoted above stated that "[t]he defendant [signed] the cheques on behalf of a corporation".) *Ex facie* the cheques he purported to sign for a company, not a corporation. Secondly, can it really be said that the cheques in question were the close corporation's cheques, seeing that no mention of the latter as drawers is made on them? Can one really contravene section 23 CCA by signing and issuing a cheque in the name of a previously-existing but now defunct entity unless it is clear from the surrounding facts or circumstances that the plaintiff was in fact dealing with a close corporation and not a company? The answers to the above questions are not to be found in the judgment under discussion.

2 3 Section 24 BEA

This section of the BEA has attracted a wealth of judicial attention and academic comment (see eg Malan *et al* para 76ff and sources cited). In contrast to the statutory liability of the signatory of a cheque *etcetera* as provided for in the provisions of the Companies Act and the CCA, section 24 BEA rather regulates the contractual liability of the signatory to a juristic person's cheques although, as is indicated below, it is not as simple a matter as that.

Section 24, and for present purposes especially section 24(1) BEA, provides as follows after its amendment in 2005 by the Bills of Exchange Amendment Act 56 of 2000:

> "If a person signs a bill as drawer, acceptor or indorser and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative capacity, *or if he signs as drawer and the name of the principal appears with his signature*, he is not personally liable thereon: Provided that if such person had in fact no authority to sign for or on behalf of the person indicated as principal, or in a representative capacity, he shall be personally liable on the said bill." (The words in italics were inserted by s 8 of the Amendment Act.)

In the context of the case at hand, it should be noted that Van Oosten J was very vague in his reference to section 24 and that he limited his judgment on the topic to his concurrence with Joffe J in *Jack Brillard* referred to above. In fact, the latter decision had been overhauled by the above amendment Act even before it could be judicially considered. Reference thereto is therefore neither here nor there. (See also *Scania South Africa (Pty) Ltd v Smit* 2003 1 SA 457 (T) where the judge in an *obiter dictum* sought to distinguish *Jack Brillard* on the basis that the court in that case was dealing with cheques drawn on behalf of a private limited company (471F–G). In *Scania* the court seems to have been unaware that s 24 of the Bills of Exchange Act had been amended and the decision should therefore be approached with some circumspection; see Pretorius 2003 *Annual Survey of South African Law* 657ff.)

What should be noted about section 24(1) BEA in the present context, however, is the way in which it deals with the possible liability of the signatory of, for example, a company cheque. Rather than stating when such signatory will be liable, it explains when he or she would not be liable. Apart from requirements such as the fact that the signatory must in fact be authorised by the relevant juristic person to act on its behalf, two possibilities arise:

In terms of section 24(1) before its amendment, apart from other requirements, a person signing as drawer, indorser or acceptor could only escape personal liability if words indicating his or her representative capacity were added to his or her signature. Section 24(1) of the Act and the *dictum* of Lord Ellenborough in *Leadbitter v Farrow* (1816) 5 M&S 345 (105 ER 1077) have played a central role in the development of the South African case law in this regard (see Malan *et al* para 85; Malan, Oelofse, De Vos, Pretorius and Nagel *Provisional sentence on bills of exchange, cheques and promissory notes* (1986) 72ff; Gering *Handbook on the law of negotiable instruments* (1997) 158ff; Meiring "Handtekeninge namens maatskappye op verhandelbare dokumente" 1986 *Modern Business Law* 48; Meiring "Company signatures in modern banking practice" 1994 *SA Merc LJ* 352; and Malan "Composite signatures, personal liability and rectification" 1985 *TSAR* 347 for a discussion of the relevant case law). Lord Ellenborough's *dictum* reads:

> "Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am a mere scribe', he becomes liable" (349).

This decision was followed and applied in numerous cases in South Africa and in *De Beer v Diesel & Electrical Engineering Co* 1960 3 SA 89 (T) 93 it was regarded as "firmly entrenched" in the South African law. The signatory of a cheque was thus in most instances personally liable on the cheque unless the cheque itself clearly indicated that he had signed as a representative (Sharrock and Kidd *Understanding cheque law* (1993) 117 and authorities quoted there). There were some exceptions to this rule.

After its amendment, someone signing as drawer with the name of his principal does not need to qualify his or her signature in order to escape liability. It is now clear that it is no longer necessary for the drawer of a bill to indicate that he is signing in a representative capacity if the name of his principal appears "with" his signature. It should not matter if the name of the principal was printed (or even pre-printed) on the cheque before the representative signs the cheque as drawer (*Jack Brillard* 830) as long as the name of the principal appears "with"

the name of the drawer. However, it is important to note that the amendment applies only to instances where the signatory signs the cheque as *drawer* and not in cases where, for example, he signs as indorser or acceptor. Where the signatory in a representative capacity signs, for example, as indorser, he must still indicate that he is signing on behalf of a principal if he wants to avoid personal liability on the instrument.

In the present case it appears that Van Oosten J had in mind the case where someone signs as drawer, without qualifying his signature, and the name of his principal appears with his signature, in which case such person does *not* incur personal liability (provided the other requirements are met). Taken to its logical conclusion, it would mean that the defendant in this matter did *not* incur personal liability because he signed as drawer while the name of the company also appeared on the cheque. Only the company would therefore be liable on the cheque. The fallacy in the argument is borne out, firstly, by the fact that there is no company to hold liable – it had been converted into a close corporation; secondly, the name of the principal, being the close corporation, did not appear on the cheques in question but rather the name of a non-existing company. The defendant could thus not escape personal liability because he was not protected by section 24(1); he also incurred personal liability because of non-compliance with section 23 CCA – a fact which fell by the wayside because of the judge's interpretation in the present matter of what the true nature of the plaintiff's claim was.

2 4 Summary of legal position

The following brief summary of the legal position of the person signing company cheques (or those of close corporations) may be useful:

(a) Where he has no authority to sign on behalf of the company or close corporation, he will incur personal liability on the document. This liability is probably based on the common law breach of warranty of authority as explained in *Blower v Van Noorden* 1909 TS 890. (In *Claude Neon Lights (SA) Ltd v Daniel* 1976 4 SA 403 (A) the former appellate division questioned the correctness of *Blower*. See also Pretorius "Die aanspreeklikheid van maatskappye in die wisselreg" 1983 100 *SALJ* 240 242.)

(b) Whether authorised or not, he will incur personal liability if he fails to comply with section 50(3)(b) Companies Act and section 23(2) CCA and the document is not paid by the company or close corporation. As was noted above (para 2 2), in case of a company there is a *lacuna* in section 50(3) the Companies Act because of which failure to mention the company's registration number will probably not lead to personal liability, while in terms of section 23 of the CCA both the name and number of a close corporation must be provided in order to escape personal liability (see Malan *et al* para 86).

(c) An authorised agent who signs *as drawer* while the name of the principal appears with his signature is no longer required to qualify his signature in order to escape personal liability.

(d) An authorised agent who signs *as indorser or acceptor* must still qualify his signature and indicate that he is signing in a representative capacity in order to escape personal liability. The insertion into section 24 by the Amendment Act only applies to the signatures of *drawers*. This was clearly an oversight.

3 The new Companies Act 71 of 2008

The Companies Act of 2008 was passed by Parliament during 2008. In terms of section 225 of this Act it comes into operation on a date fixed by the President by proclamation in the *Gazette*, which may not be earlier than one year following the date on which the President assented to the Act. The Act was signed on 8 April 2009 and published on 9 April 2009 (*GG* 32121, Notice 421). Since the date of operation has not yet been fixed by the President it is still uncertain when the Act will come into operation.

The Companies Act of 2008 does not contain any provisions relating to the personal liability of the signer of a cheque or negotiable instrument on behalf of a company. Even though section 50 of the Companies Act of 1973 had quite a "respectable pedigree" (per Donaldson J in *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* 1968 2 QB 839 845), the legislature did not seem it fit to provide for the personal liability of the signatory of a negotiable instrument on behalf of a company again. In future the signer of a negotiable instrument only has to comply with the provisions of the Bills of Exchange Act. The irony is, of course, that the Close Corporations Act still has rather strict rules of compliance in the case of signatures on negotiable instruments on behalf of such entities.

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