Constantaras v BCE Foodservice Equipment (Pty) Ltd 2007 6 SA 338 (SCA)

Name of close corporation on a cheque

1 Introduction

In *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* ([1968] 2 QB 839), Donaldson J dealt with the many pitfalls in respect of the proper use of company names on negotiable instruments. Here the court was dealing with the interpretation of section 108 of the Companies Act, 1948 (11 & 12 Geo C 38) in the United Kingdom (UK) that required every company to have "its name mentioned in legible characters" in all bills of exchange signed on behalf of the company. Failure to do so resulted in a criminal fine and personal liability to the holder of the bill of exchange in the event of the non-payment of the bill by the company. A similar provision was enacted by section 349 of the Companies Act of 1985 in the UK. (The Companies Act of 2006 (UK) does not have the provision relating to the personal liability of the signatory of a bill of exchange that contains an incorrect description of the company name.)

The judge observed that it deals with "a cautionary tale which should, perhaps, be required reading for all directors of companies" (*Durham* 844). The decision in *Constantaras* should likewise be compulsory reading for all members of close corporations.

2 Background

Both section 50 of the Companies Act (61 of 1973) 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, 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, refers to the registration number of the close corporation. (There has been an oversight in drafting the 1985 amendment to the Companies Act. See also Malan and Pretorius (assisted by Du Toit) *Malan on Bills of Exchange, Cheques and Promissory Notes* (2002) 124 par 86 (hereafter "Malan").)

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. The concept of limited liability simply entails that the individual members of the corporation are not liable for the debts of the corporation. It has been said, rather tongue in cheek, that it is one of the greatest inventions by the British people. (See Rickett and Grantham *Corporate Personality in the 20th Century* (1998) for a full discussion of the history of limited liability; see Malan 12ff par 86 for a discussion of the impact of these provisions.) The provisions relating to companies have a "respectable pedigree" (per Donaldson J in *Durham* 845) and go back to 1855. (See Pretorius "Die aanspreeklikheid van maatskappye in die wisselreg" 1983 *SALJ* 240 257ff for a discussion of the history of this provision. See also Kelling "Die regverdiging vir die gelding van artikel 50(3) van die Maatskappywet, 1973" 1979 *TRW* 72 80–81 for a critical discussion of the provisions.)

3 Facts

The facts in *Constantaras* were straightforward and the court was in essence concerned with the interpretation of section 23(2) of the Close Corporations Act.

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 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,
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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 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 was sued on two cheques that were dishonoured by non-payment. Each cheque reflected the printed description of the drawer as "Carter-Mart (Pty) Ltd 2000/001852/07". These cheques were signed by the defendant without indicating that he did so in a representative capacity. The company "Carter-Mart (Pty) Ltd" had in fact been converted to a close corporation under the name "Carter-Mart CC", but the new name did not appear on the cheques.

4 Decision

Heher JA held that the language of section 23 is peremptory (par 11). A failure to comply constitutes an offence. The offence is committed irrespective of whether any member of the public has actually seen the relevant document or whether such a person has been misled by any such document or has been aware of the absence of the required particulars or their inaccuracy. The judge said that 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 or she does or does not know the true facts relating to the corporation (*ibid*). The court continued:

> "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" (par 13; footnote omitted).

The court also dealt with the question of rectification. Rectification is a well established common-law right that provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract (*Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 SA 1045 (SCA) 1051G–H par 11). With rectification, the party seeking to have the contract rectified, claims that the document does not reflect what the parties agreed and seeks to have the matter put right. However, because the state of mind of the holder of the instrument to which it relates is irrelevant to the imposition of personal liability in terms of section 23(2) (par 14), it follows that rectification cannot be a defence for a claim under that section (par 16). Rectification is an equitable remedy which requires proof of the common intention of all parties to a contractual instrument. (See also Malan 125 who argued that any reliance on rectification to show on whose behalf the instrument was truly signed is out of place and contrary to the peremptory provisions of the section.)

The final result was that the signatory of the cheques was held personally liable on the cheques in terms of section 23(2) of the Close Corporations Act. The court justified this result as follows:

> "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" (par 15).

(The judgment also contains a very extensive survey of most of the previous decisions of the lower courts and English courts dealing with the liability of signatories under the Companies Act (pars 18–28). See also Malan 122ff par 86.)

5 Comment

There is one final aspect that needs to be considered. In the English law there were quite a number of decisions that dealt with the use of abbreviations in the names of companies. (See *Stacy & Co Ltd v Wallis* (1912) 106 LT 544 on the use of the abbreviation "Ltd"; *Durham* on the use of the abbreviation "M" instead of "Michael" (but see May LJ in *Blum v OCP Repartition SA* [1988] BCLC 170 (CA) 175a) and *Banque de l'Indochine et de Suez SA v Euroseas Group Finance Co Ltd* [1981] 3 All ER 198 on the use of the abbreviation "Co".) One judgment even considered the imposition of liability where the symbol "&" was used instead of "and" (*Hendon v Adelman* (1973) 117 SJ 631 as quoted by Markson "Company cheques: Personal liability litigation" 1982 *New LJ* 467). It would be fair to say that the English courts have had their fair share of problems with the interpretation of these provisions.

The judgment in *Constantaras* gives very few guidelines in this regard, apart from the fact that the court observed that 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" (par 28).

There is also no indication what the situation would be if the name used on the cheque in fact differs either slightly or quite substantially from the corporation's registered name. Would that impose liability on the signatory in the event of non-payment? What would be the position where the name of the corporation is abbreviated and there is no such abbreviation in the registered name? Perhaps this judgment may open a different can of worms altogether. Should we perhaps prepare ourselves for interesting times ahead? Or, is it perhaps not time to reconsider the provisions altogether?

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