

AGRA CO-OP LTD -vs- AUSSENKEHR FARMS (PTY) LTD

Strydom,

J.P.

PRACTICE

Summary Judgment - Claim based on cheque
-Applicability of Section 23 and 28(1)
of the Bills of Exchange Act, Act 34 of
1964.

1246/95 IN THE HIGH COURT OF NAMIBIA
PLAINTIFF

In the matter, between

AGRA CO-OP LTD
DEFENDANT

versus

AUSSENKEHR FARMS (PTY) LTD

CORAM: STRYDOM, J.P.

Heard on: 1996.02.09

Delivered on: 1996.04.25

JUDGMENT

STRYDOM, J.P. : By Combined Summons the
Plaintiff

claimed payment of an amount of N\$19 140.00, interest and costs from the Defendant. The causa was a cheque drawn by the Defendant in favour of the Plaintiff on the Karasburg branch of Bank Windhoek Ltd. However when the cheque was presented it was dishonoured by non-payment and sent back to Plaintiff marked "Refer to Drawer" .

Defendant entered appearance to defend to which the Plaintiff promptly replied with an application for Summary Judgment which was also defended.

In an affidavit, deposed to by one Sheila George, the Administration Manager and the deputy to the Managing Director of the Defendant, it seems that the cheque, on which Plaintiff's claim was based, was signed by one Coetzee, at the time Defendant's Chief Estates Manager.

The said Coet-zee had authority to sign cheques on behalf of the Defendant and drawn on its Karasburg bank account. The deponent further stated that, from time to time, rations were bought at the Plaintiff's Keetmanshoop branch, which purchases were paid for by cheque, presumably signed by Coetzee on behalf of the Defendant. It is further stated that no prior credit agreement or arrangement was made with the Plaintiff. Items bought were collected and at the same time paid for by cheque. This happened against handing over of an invoice by one of Plaintiff's representatives.

Ms George further stated that after the cheque was dishonoured no documentation could be found verifying the purchases. By that time the said Coetzee was already dismissed from the Defendant's services because he was involved in the making of various unauthorised expenditures in regard to funds of the Defendant as well as other irregularities. Various attempts were made to obtain invoices from the Plaintiff concerning the transaction of N\$19 140.00 but to no avail. As a result thereof the Respondent now finds itself in a position where it seems that because of this lack of documentation, that no consideration or value was received by Defendant in regard to the amount claimed.

The defences raised by the Defendant on the above facts are twofold, namely:

(1) That on the facts stated by it, it would be possible by it to raise the defence that no value was given for the cheque; • and

(2) that although the said Coetzee had authority to sign cheques on behalf of the defendant, that authority was a limited one and that the said Coetzee acted outside the scope of his authority in that the cheque is unrelated to any purchases made or expenses incurred on behalf of the Respondent.

In regard to the first defence it was pointed out by Mr Grobler on behalf of the Plaintiff that section 28(1) of the Bills of Exchange Act, Act no. 34 of 1964 creates a rebuttable presumption that value was given for the cheque. The section provides as follows:

"28(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value."

This section must then be read with section 28(2), 27 and the definition of "holder" . There can therefore be no doubt that the Plaintiff will, in the main action, be assisted by this presumption and that the onus will be on the defendant to rebut the presumption on a balance of probabilities. Although in Summary Judgment proceedings, other than is the case in provisional sentence proceedings, the fact that one party is saddled with an onus may not play any role to determine whether a bona fide defence was proved this may, in the circumstances in which this defence was raised by the

defendant, well play a role.

Defendant does not state that no value was given in this instance. Relying on certain factors the Defendant asked the Court to infer that no value was given for Ms George stated "that it therefore appears that no purchase was made by the Respondent from applicant in such amount or that any other consideration or value was received by the Respondent from applicant in respect of such amount."

The factors on which the Defendant relied for this inference are:

(3) that no documentary proof for such a transaction could be found;

(4) that Plaintiff, although requested did not or could not provide any such documentary proof;

(5) that Coetzee should have known that the funds available in the Karasburg banking account would not cover a cheque of over N\$19 000.00;

(6) that it was unlikely that purchases for rations, especially during January, would be as high as

N\$19 140.00;

(e) that Coetzee was later dismissed because of irregularities committed by him and the spending of money for which he was not authorised.

Points (a) and (b) can be dealt with together. The fact that no documentary proof could be found by Defendant is in my opinion not really significant. For one thing it does not mean that there was not documentary proof in some or other form which may have been mislaid. It was further pointed out by Mr Grobler that one normally does not find an invoice accompanying a cash sale. At most one can expect a cash slip. That may have been the reason why Plaintiff could not produce any documentary proof when asked. However there was no fiduciary relationship between Plaintiff and Defendant and Plaintiff was under no legal duty to provide such documentation to the Defendant.

Mr Totemeyer argued that there was an agreement between the parties that payment would only be effected on the handing over of an invoice once purchases were made. This argument is based on what was said by Ms George in her affidavit namely that the driver of the Defendant was usually sent to collect the purchases and to hand over a cheque therefore against receipt of an invoice. To elevate what took place between the driver of the Defendant and a representative of the Plaintiff to an agreement seems to me to be stretching the point. If there was such an agreement then the Defendant failed to give any detail thereof. By whom, where and when this agreement was concluded was not stated. The driver who could have thrown more light on this agreement and who could possibly say whether the amount of N\$19 140.00 was in respect of purchases or not and if so, whether an invoice was handed over, was not required to make an affidavit.

As far as point (c) is concerned the fact whether Coetzee knew or did not know whether the said cheque would be covered by funds in Defendant's banking account is of no consequence to the Plaintiff and Defendant could not take this point any further

than to state that Coetzee should have known this. However this aspect does not bring the Defendant any closer to the question of whether value was given for the cheque or not.

In regard to point (d) only the barest of information was given. Why purchases for rations during January would be markedly lower than during other months was not explained. The Court is furthermore also not informed of what the normal monthly purchases in regard to rations were. I am sure if it were significantly lower than N\$19 140.00 the Defendant would have said so if only thereby to illustrate that the amount is so far out that it was not likely to have been utilized for that purpose. The bare allegations made by the Defendant did therefore not assist its case.

Point (e) raises the possibility of fraud perpetrated by Coetzee. However there is no allegation that the Plaintiff was a party to this fraud or even knew about it. It is clear that Coetzee, when he signed the cheque, acted as the authorised agent of the Defendant. If he thereby

perpetrated a fraud, which, on the documents, is by no means clear, the Defendant, in the absence of allegations that the Plaintiff was a party thereto or had notice thereof, will in my opinion not be able to recuperate its loss from the Plaintiff.

See in this regard Campbell v Blue Line

Association, 1918 TPD 309 and De Villiers and Macintosh, The Law of Agency in South Africa, 3rd ed. , prepared by J M Silke. See

further Rand Advance (Pty) Ltd v Scala Cafe, 1974(1) SA (D & CLD) on p. 791 G - H.

Bearing in mind the speculative nature of the allegations made by the Defendant and the lack of detail I am not satisfied that the Defendant showed that it has a bona fide defence on this first leg.

The second possible defence, namely that Coetzee exceeded his authority, was not directly raised on the documents. It can however be inferred from the allegations of a possible fraud perpetrated by Coetzee. Again there is a lack of particularity to substantiate this possible defence. If this defence was properly taken one would have expected the Defendant to have stated what the authority of Coetzee was. In the absence of such allegations the Court must accept that Coetzee's authority was not limited to sign cheques only in regard to the purchase of rations or to any amount for that purpose. This conclusion seems to be correct because Ms George declared the Defendant still willing to pay if Plaintiff could prove that the cheque was given for the purchase of goods or that Defendant received other consideration to the value of the cheque. Furthermore the cheque was signed by Coetzee without any indication that his signature was put on the cheque in terms of a specific authority. (See De Villiers and Macintosh: gp_ cit, 3rd ed. by J M Silke, p. 497). The Defendant is therefore also not assisted by the provisions of section 23 of Act 34 of 1964 whereby it is enacted that a signature by procuracy operates as notice that the agent has but a limited authority to sign. (De Villiers and Macintosh, gp_ cit, p. 496 .

On the allegations made by the Defendant I am not satisfied that it has shown to have a bona fide defence on this issue. Again the defence, if it was taken, is speculative in nature and lacks particularity.

It was lastly submitted by Mr Totemeyer that the Court, in the exercise of its discretion, will allow the Defendant to defend the action as it was shown that the Plaintiff has not got an unanswerable claim against the Defendant.

There is no doubt that the Court, even where it came to the conclusion that a Defendant had not proven a bona fide defence to a Plaintiff's claim, can exercise its discretion in favour of such a Defendant and allow it to defend the action. However before a Court will exercise its discretion in favour of a Defendant there must be some factual basis, or belief, set out which will enable a Court to say that there was some reasonable possibility that something will emerge at the trial, that the Defendant would still be able at the trial to establish its defences. (See Nedoerm Bank Ltd v Verbri Projects CC. 1993(3) SA 214 at 224 C - F; see also Breitenbach v Fiat (S A) (Edms) Bpk, 1976(2) SA 226 at 229 F).

The problem which the Defendant faces is that it thinks that it has been deceived by its Estate Manager, Coetzee. However Defendant is not even sure of this. It is in this regard that "the question of the onus is in my opinion relevant and in terms of the provisions of Act no. 34 of 1964 the onus will be on Defendant to rebut the presumption of value given as provided in the Act. Bearing in mind the speculative nature of Defendant's allegations in this regard it seems to me highly unlikely that

anything can emerge at a trial which will establish this defence.

In regard to Defendant's second defence it seems to me that this defence can only succeed if it is proven that the said Coetzee perpetrated a fraud and that the Plaintiff was a party thereto or had notice thereof. However there are no allegations to substantiate this defence. In fact it would seem that Coetzee's authority to sign cheques was unlimited. There is furthermore also no indication on the cheque itself that would have alerted the Plaintiff to the fact that Coetzee was signing as agent with a specific, and consequently a limited, authority.

In the circumstances I am satisfied that it will serve no useful purpose to allow the Defendant nevertheless to defend the action.

In the result the following order is made:

There shall be Summary Judgment for the Plaintiff in the amount of N\$19 140.00 together with interest at 20% per annum as well as costs.

STRYDOM, JUDGE PRESIDENT

ON BEHALF OF THE

PLAINTIFF:

ADV Z GROBLER

Instructed by:

R Olivier & Co

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