REPORTABLE

CASE NO. SA 40/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WALTER HORST KAESE **APPELLANT**

and

KLAUS DIETER SCHACHT **FIRST RESPONDENT**

GAMIKAUB (PTY) LTD **SECOND RESPONDENT**

Coram: Shivute, CJ, Maritz, JA *et* Chomba, AJA

Heard on: 02/11/2009

Delivered on: 09/04/2010

APPEAL JUDGMENT

CHOMBA, AJA:

[1] The sole issue which this appeal raises revolves on when a trial court may properly determine and grant to a party in trial proceedings before it an absolution from the instance. The facts from which such determination was made in the present case lie in short compass, but before recounting these I propose to start by identifying the parties in the court below and later in this appeal. The appellant, Mr Walter Horst Kaese (Kaese), was a 50% shareholder in Gamikaub (Pty) Ltd, a private company limited by shares, which is the second respondent herein. In the court below he was the plaintiff. The first respondent, Mr. Klaus Dieter Schacht

(Schacht), was the other 50% shareholder in that company and happened to be its sole director at the material time. In the court *a quo* Schacht and Gamikaub (Pty) Ltd (the company) were the first and second defendants, respectively.

The Facts

[2] The facts constituting this matter are that Kaese purchased 50% of the shareholding in the company at a sale held by the Deputy Sheriff of the High Court on April 24, 2004. The company was engaged in two aspects of business, namely cattle farming and running a guest lodge with game hunting facilities. Its clientele was drawn mainly from Germany. Believing that there was something remiss in the management of the guest and game hunting side of the business of the company, Kaese, by written request, demanded of Schacht, *qua* director and shareholder who also had sole control and management of the company, information regarding the financial affairs of the company. In response to that demand he received a letter dated 15th July 2004 authored by a Mr. Basil Bloch, Schacht's attorney at the time. Because of the pivotal role which that letter had in the proceedings in the trial court, I reproduce it hereunder:

"15th July 2004

W. Kaese

Fax No. 22- 7953

Gamikaub (Pty) Ltd

Take notice that as Mr. Schweiger is no longer a Director of the company Gamikaub (Pty) Ltd and he is prohibited from entering the farm premises without permission of Mr. Schacht or Mr. Massanek.

Take further notice that you as a shareholder have no rights to interfere with the management of the farm. You are thus called upon to refrain from addressing any letters to my client, the sole Director of the company, dealing with management of the company and in fact trying to give instructions and lay down the law. A shareholder DOES NOT HAVE THESE RIGHTS.

Should you have any complaints about management these matters can be addressed at the next Annual General Meeting on notice and with exact detail being provided of such complaint.

Take further notice that should Schweiger try to interfere with the management of the company or try to exercise any rights as a Director – which he is not – application will be made to court to restrain him and to declare that Schweiger is no longer a Director of the company.

It is necessary to record that by agreement with Mr Schweiger and over the last 10 years, my client has been in charge of the company's management and its general affairs including the payment and employment of the staff. In fact the appointment of Mr Massanek was cheerfully approved by Mr Schweiger and this you well know.

On the other hand Schweiger was in charge of the management of the cattle and sheep.

If there has been any mismanagement of the accounts this arises purely from the failure of Schweiger to provide the bookkeepers with all the necessary information.

I suggest you approach SWATRUST who will confirm to you that Schweiger has failed to supply the necessary documents to them.

Finally, and for the last time, Schweiger is called upon to return the Landcruiser to the company together with a signed transfer form to enable the vehicle to be transferred to the company as Schweiger illegally and fraudulently transferred the licence from the company to himself.

(signed) BASIL BLOCH."

[3] Faced by the Schacht's attitude as reflected in the foregoing letter, Kaese commenced a court action by combined summons which contained the following basic averments and reliefs:

"1. Plaintiff is Walter Horst Kaese**,** an adult male person, acting herein as 50% shareholder, on his own behalf and on behalf of the company, Gamikaub (Pty) Ltd, in a derivative action.

2. …

3. …

4. …

5. On inspecting the books and accounting documents Plaintiff became aware that:

(1) Second Defendant was not only operating as a cattle farm but also

as a guest and hunting farm over the past six years, mainly catering for customers from Germany.

(2) While the books and financial documents of the company show substantial expenses exceeding hundreds of thousands of Namibian Dollars over the six years allegedly incurred in connection with the guest and hunting farm side of the business, hardly any income from the same business is reflected in the books.

(3) The management and income from the guest and hunting farm side of the business was exclusively under the supervision and control of the First Defendant.

(4) First Defendant has admitted that the income from the guest and hunting farm line of the business has not all been recorded in the company books of the Second Defendant.

6. …

7. …

8. As a 50% shareholder of the company, Plaintiff acting on his own behalf and on behalf of Gamikaub (Pty) Ltd as aforesaid, is entitled to an accurate statement of account of the income and expenditure, which the company has out of its activities in the guest and hunting line of its business.

9. Despite demand, First Defendant have (*sic*) failed to render an account in respect of the income and expenditure of the Second Defendant in respect of its guest and hunting activities.

WHEREFORE Plaintiff prays for an order in the following terms:

1. That First Defendant be ordered to render a full account relating to all the income and expenditure of the Second Defendant in respect of its guest and hunting farm business for the years 1998 – 2004.

2. A debatement of such account.

3. Costs of the action

4. …

DATED at WINDHOEK this day of JULY 2004."

[4] After an exchange of requests for further (and later for further and better) particulars, and responses thereto, Schacht filed a plea containing both disputations and admissions. He made the following admissions: that he was indeed the sole Director of the company; that the company was operating both as a cattle farm and a guest and hunting enterprise over the period specified in the particulars of claim; and that the management and income from the guest and hunting side of the company was largely, but not exclusively, under his supervision and control. He, however, denied the allegation that the books and financial documents of the company showed substantial expenses exceeding hundreds of thousands of Namibian Dollars alleged to have been incurred in connection with the guest and hunting side of the company's business, or that hardly any income from the same business was reflected in the accounting books. In regard to the admittedly unaccounted for financial statements relating to income and expenditure from the guest and hunting

> line of the company's business, Schacht averred that Heinrich Schweiger (named in the letter earlier quoted herein) had on numerous occasions been involved in the management and supervision of the guest and hunting side of the company's business, including the receipt of payments from the guests and hunters, and that such income was never paid over to Schacht or the company. Lastly a denial was pleaded that Kaese as a 50% shareholder was entitled to inspect the statement of financial affairs relating to the income and expenditure of the company. As a consequence of the last mentioned denial, it was further denied that the defendants had failed to render an account in

respect of the income and expenditure of the company.

Proceedings and Trial Court's Judgment

> [5] In the court below only the plaintiff, Kaese, presented his case. At the close of the plaintiff's case the first defendant applied for absolution from the instance and it was thereafter successfully submitted on his behalf that the evidence presented against him was inadequate to make out a *prima facie* case. So it was that the trial court granted to the defendants the absolution from the instance.

[6] In the course of giving his testimony, Kaese introduced but did not formally produce as exhibits, documents 3, 4, 5, 12 and 13. These documents are contained in volume 2 of the record of appeal. Document 3 was intended to reflect some of the alleged excessive expenses incurred during the period from 1999 to 2003 in the guest and game hunting side of the business of the company. Document 4 was designed to show income on the same side of the company's business received during that period. Kaese testified that the figures shown in the two documents were

> compiled at his request by the company's bookkeepers, Swatrust. However, the maker of the two documents was not called as a witness on behalf of the plaintiff. As regards document 5, Kaese testified that he himself prepared it as a summary based on the figures in documents 3 and 4. Document 5 was intended to show the limits by which the expenses exceeded the income. Lastly, documents 12 and 13 were prepared by Kaese himself based on information given to him by the company's bookkeepers. That information was extracted from guest books and was intended to establish the number of such guests who patronised the guest lodge during the same period.

[7] Under cross-examination it was put to Kaese that the above-mentioned documents could not advance his case as they were drawn up by persons who were not available as witnesses (i.e. 3 and 4,). As such they amounted to hearsay evidence. Similarly, in as much as the information in document 5 was based on

inadmissible documentary evidence, that, too, was equally inadmissible, it was put to him. In similar vein documents 12 and 13 were discredited because the information they contained was obtained from persons who never featured as witnesses in the proceedings. In the result Kaese was pressured into conceding that his cause of action was based on nothing more than mere speculation.

[8] As already stated, at the close of the evidence of plaintiff Kaese, it was submitted on behalf of the defendants, pursuant to the rules of court, that the plaintiff had failed to adduce sufficient evidence upon which the trial court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the

> plaintiff. In making that submission, counsel appearing for the defendants relied on the following arguments, namely, *viz:*

1. That the plaintiff had failed to plead on what basis he sought the relief of rendering to him an account of the income and expenditure of the company in that there was no particularity in his pleadings as to whether the action was based on a fiduciary relationship between the parties, on contract or on statute;

2. That the plaintiff had failed to present any facts that would support his allegations or suspicions of wrong doing on the part of the first defendant.

3. That instead the plaintiff had sought to rely on documents which amounted to nothing more than hearsay evidence.

4. Consequently, that his action was based on speculation.

The defendants' counsel also pointed out a number of deficiencies in the plaintiff's pleadings by way of consolidating his intent to apply for the absolution from the instance.

[9] The preceding arguments found favour with the learned judge in the court *a quo,* and in accepting the application for an absolution from the instance, he applied the test encapsulated in the South African case of *Gascoyne v Paul and Hunter 1917 TPD 170.* In that case De Villiers, JP, laid down the applicable test as follows:

> The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant ...; in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against Hunter?"

The foregoing statement of the law on this principle has been endorsed in at least two Namibian cases, namely *Bidoli v Ellistron t/a Ellistron Truck & Plant 2002 NR 451* at 453D – F; and *Absolut Corporate Services (Pty) Ltd v Tsumeb Municipal Council & Another 2008 (1) NR 372* at 377E – G.

In casu the judge held that there was indeed a deficiency in the plaintiff's pleadings, but his basic *ratio decidendi* was that the plaintiff had patently failed to adduce sufficient evidence, particularising in this vein, evidence of wrongdoing on the part of the first defendant.

Evaluation of the Trial Court's Determination in the Parties' Submissions and Arguments.

[10] The gravamen of the judgment of the court below is set out in paragraph [28] thereof in which the learned judge stated, *inter alia,* that ".....the issue in this case is not the application of the reasonable man test (as Mr. Vaatz emphasizes), but the sufficiency of the evidence and on this score the plaintiff has patently failed." Indeed even the main thrust of the arguments and submissions of the first respondent's counsel in this Court was directed towards the same end, namely that the appellant's case failed in the court below on account of insufficiency of the evidence he adduced. Therefore, the main aspect the present judgment will be preoccupied with will be to ascertain whether truly there was inadequate evidence which thereby failed to make out a *prima facie case.*

[11] Earlier in this judgment, I have referred to the letter dated 15th July, 2004 written to Kaese by Schacht's attorney, Mr. Basil Bloch. Although that letter was not formally produced as an exhibit, the examination-in-chief of Kaese was in no mean measure focused on it as a result of which substantial portions of it were incorporated into his evidence. When that was being done, no objection to it was raised by his advocate, Mr. Corbett, as was the case when the plaintiff was giving evidence relating to documents 3, 4 and 5, 12 and 13,*supra.* In any case that letter was the first respondent's own document; it was written on his behalf. Therefore, there was legally no basis for objecting to it, especially if discovery of it was done according to the usual practice. That letter contained important aspects pivotal to the plaintiff's case. To that end, I quote the following paragraphs in particular:

> "Take further notice that you as a shareholder have no rights to interfere with the management of the farm. You are thus called upon to refrain from addressing any letters to my client, the sole Director of the company dealing with management of the company

> and in fact trying to give instructions and laying down the law. A shareholder DOES NOT HAVE THESE RIGHTS."

....."It is necessary to record that by agreement with Mr. Schweiger and over the last 10 years my client has been in charge of the company's management and general affairs including the payment of the staff. ....." (the underlining is mine)."

It is worth observing also that in his plea the first respondent expressly averred that he was the sole director of the company.

[12] Two vital aspects are discernible from the preceding extracts of the letter, *viz:*

a) the first respondent was during the material period a director of the company; and

b) up to the date of that letter the first respondent had been in charge of the management and general affairs of the company for over ten years.

As the letter was written in 2004, the previous period of over ten years meant that Mr. Schacht had been in charge of the company's management and general affairs since about 1994. The period under review thus falls within that span.

[13] Cilliers and Benade on **Company Law**, 4th edition, states at paragraph 20.10 on page 271 that:

> "(t)he directors must ensure that the annual financial statements are laid before the annual

> general meeting. (sect. 286 of the Companies Act No. 61 of 1973, South Africa). In addition to the balance sheet and the income statement the annual financial statements, by definition, also consist of a statement of source and application of funds, a directors' report and an auditor's report. The directors' report must provide that information which, in addition to what appears in the balance sheet and income statement, is material to an appreciation of the state of affairs of the company and its subsidiaries……"

The Companies Act, 1973 (Act No. 61 of 1973) applies in Namibia by virtue of Article 140 of the Namibian Constitution since it was one of the laws in existence in Namibia at the time of independence.

[14] In his sworn evidence, Kaese testified that during the period under review there was no advertising done of the guest lodge and hunting facilities of the company. Instead, that aspect "was operated by Mr. Klaus Dieter Schacht , who was the agent sending the guests from Germany and most of the time he was accompanying the guests in Namibia," adding that "sometimes it was enquired *(sic)* that the previous director and shareholder (Schweiger) had also the duty to maintain the guests at the farm." I think that this evidence should be considered in the light of what the first respondent elicited from the appellant when he, the first respondent, requested for further particulars of the Particulars of Claim. In providing the further particulars the appellant stated, *inter alia,* that the first respondent "also made financial deals with such persons (meaning the guests from Germany) and collected the money, fees and charges in respect thereof."

[15] Rule 21 of the rules of the High Court deals with further particulars provided by one party at the request of the other party to civil proceedings. Sub-rule (2)(a) thereof is pertinent. It provides –

> "Particulars so required shall be delivered within 15 days of the receipt of the request which, together with the reply thereto, shall form part of the pleadings." (emphasis supplied)

In this case it is pertinent to refer also to sub-rule (3) of rule 22, *ibid.,* which reads:

> "Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted, and if any explanation or qualification of any denial is necessary, it shall be stated in the plea."

The combined effect of the two sub-rules is that since further particulars are part of the pleadings, it must follow, in my view, that they should either be expressly denied or, if they cannot be admitted, should be expressly so pleaded in the succeeding pleading of the requesting party. In the instant case the pertinent particulars cited in the preceding paragraph were not expressly denied, nor were they expressly stated to have been admitted. As a consequence of the latter quoted sub-rule, they are deemed to be admitted. Equally the adverse evidence cited in the preceding paragraph stood unchallenged as it was not discredited in cross-examination.

[16] It has been submitted on the first defendant's behalf that "(a)t some stage during the pleadings, the appellant sought to amend his particulars of claim to state that he was '*acting herein as 50% shareholder, on his own behalf and on behalf of the company, Gamikaub (Pty) Ltd.'*" That so-called amendment was referred to as a "red-herring" brought in to establish the plaintiff's *locus standi* by reason of which, according to the first respondent, the plaintiff had intended to justify the action as a derivative action. The first respondent proceeded to argue in his heads of argument

that the appellant's counsel had failed in his oral argument to enlighten the court below whether the appellant's reliance upon the derivative action was based on the common law, or alternatively, upon section 266 of the Companies Act, *supra.*

[17] Regarding the alleged failure to expressly argue whether the derivative basis of the plaintiff's action was the common law, or statute, *id est,* section 266 of the Companies Act, *supra,* I am satisfied that by necessary implication the evidence offered did establish the legal basis on which the appellant's counsel relied in making his submission. As for the submission that the amendment which declared the action as derivative was a red herring brought in to bolster the plaintiff's *locus standi,* nothing could be further from reality. The particulars of claim in substance carried the hallmark of a derivative action by virtue of the joinder of the first respondent, the company's director as first defendant, and the company as second defendant when no relief was claimed against it, whilst reliefs were claimed against the first defendant. The amendment was, therefore, no more than an authentication of the true nature of the action. A perusal of the principle underlying derivative actions will vindicate that indeed the appellant's evidence, in tandem with the particulars of claim, adumbrated a derivative cause of action.

Principle Underlying Derivative Actions

[18] The principle of derivative action is formulated in the following terms in Cilliers and Benade's **Company Law**, *supra*, at paragraph 32.13 on page 567:

> "If the company cannot or will not act against those who wronged it, a derivative action on behalf of the company may be instituted in certain circumstances. Such an action will have to be instituted against the wrongdoers by somebody acting on behalf of himself and all the

> other shareholders other than the wrongdoers. The company being unable to act as a plaintiff must be joined as a nominal defendant so that it is a party to the proceedings and any order of the court can be made applicable to it."

In the footnote to the foregoing formulation, it is stated that a variety of wrongdoers are conceivable and these are enumerated as including majority shareholders and board directors, among others.

[19] *In casu,* the essential elements of the foregoing principle are evident. The letter of 15th July, 2004, quite clearly shows: that Mr. Schacht, a director of the company, frowned upon the demand that he releases information relating to the accounts of the company; that on many occasions during the relevant period and while he was in Germany he was organising guests desiring to partake of the lodging and/or hunting facilities of the company; and that on such occasions he "also made deals with such persons and collected the money, fees and charges in respect thereof." Indeed in the letter of the 15th July it is conceded that "by agreement with Mr. Schweiger and over the last ten years my client (Schacht) has been in charge of the company's management and its general affairs...." The alleged wrongdoing is thus evident from the fact that the first respondent collected money, fees and other charges which, according to the cause of action, were not disclosed by way of normal corporate accountability. The tone of the letter of 15th July is quite clearly that Mr. Schacht did not want to be queried about what was perceived as wrongdoing. Lastly Mr Schacht was admittedly in charge of supervision of the management and the general affairs of the company for over ten years as at 15th July, 2004. As such

he can be said to have shouldered the responsibility to even account for income received by Schweiger during the period the latter allegedly superintended over the guest lodge and hunting side of the company's business, by presenting financial statements at the members' annual general meeting relevant to that period.

Existence of Fiduciary Relationship

[20] A submission was made on the first respondent's behalf that:

> "The appellant demonstrably failed to plead on what basis he claimed the relief sought, namely there was no particularity in the pleadings as to whether the cause of action was based on a fiduciary relationship between the parties, a contract or indeed a statutory basis; and
>
> In evidence, the appellant was at a loss to enlighten the court as to the basis upon which the cause of action was founded.
>
> Accordingly it is submitted that the court must simply speculate as to the real basis of the appellant's claim."

[21] To the contrary, the position on the ground is that in paragraph 5(3) of the Particulars of Claim the appellant pleaded that the management and income from the guest and hunting side of the business was exclusively under the supervision and control of the first respondent. In requesting for further particulars from the appellant, the first respondent made an admission that he was "largely (and not exclusively) in control of the management and supervision of the guest and hunting side of the business." Further, when providing the further particulars, the appellant stated, *inter alia,* that "as a 50% shareholder", he was "entitled also to bring this action as a derivative action for the benefit of the jointly owned company, Gamikaub (Pty) Ltd, <u>particularly where the wrongdoer is the First Defendant who is also in</u>

control of the company." Then as we have already seen, it is common cause that the first respondent was a director of the company during the relevant period. (the underlining is mine).

[22] Cilliers and Benade, state in their book, *supra,* that "a director stands in a fiduciary relationship to his company with the result that he has the duty to act in good faith towards his company, to exercise his powers as director for the benefit of the company and to avoid a conflict of interests between his own interests and those of the company." (para. 22.16 at p.327). Since that is the position in law, such relationship is implied simply, in my considered opinion, by establishing that a given person is a director who has the control and supervision of the management of the company at the centre of a justiciable dispute. *In casu,* the fact of the first respondent being a director of the company is common cause. In the preceding paragraph I have reproduced the averment of the appellant made by way of supplying further particulars at the behest of the first respondent. He stated that the first respondent was the wrongdoer *who was also in control of the company.* The first respondent in fact conceded that he was in control, "largely" though not "exclusively." The first respondent's admitted status therefore fell within the ambit of the statement of the law as captured in Cilliers and Benade's book. With all the foregoing factors established, there was, with due respect to Mr Corbett, who also represented the respondents before us, no cause for the court to speculate as submitted on the first respondent's behalf. Since the first respondent's position as director in the company was conceded, the fiduciary relationship between him and the company, which was a matter of law, did not have to be factually established. The legal position in such a situation is therefore, that the appellant, as a shareholder, was competent to bring a

derivative action on his own behalf against the director who was allegedly a wrongdoer.

Duty to Render an account

[23] In the first respondent's 6th head of argument the following was stated:

> "6. The respondents relied upon two broad grounds in the application for the absolution, namely:
>
> 6.1 The appellant, as a shareholder of the second respondent, is not entitled in law to the relief sought, namely the rendering and debatement of an account; and
>
> 6.2 In any event, the appellant did not establish an evidentiary foundation for the relief sought in this matter

[24] The above arguments deserve only a brief comment. While it is indisputable that a shareholder is not entitled to inspect the accounts of a company of which he/she is a member, we have earlier seen that through a successful derivative action a shareholder can gain access to the company's books of account. As for the statement that the appellant *in casu* did not establish an evidentiary foundation for seeking the relief claimed herein, I am almost through with the process of negativing it.

[25] One last word is left to be said in regard to the request to render an account. The following was stated on behalf of the first respondent:

> "**No evidential basis for the relief sought**

18. In paragraph 5 of the particulars of claim the appellant pleads that:

> '5 On inspecting the books and accounting documents Plaintiff became Aware that:
>
> (1).....
>
> (2) While the books and financial documents of the company show substantial expenses exceeding hundreds of thousands of Namibian Dollars over the last six years allegedly incurred in connection with the guest and hunting farm side of the business, hardly any income from the same business is reflected in the books.'

19. However, under cross-examination, the appellant conceded that this contention on the part of the appellant was based purely on speculation."

[26] The appellant testified in no uncertain terms that the first respondent, as director and a person who had overall control of the management and supervision of the company, had not, for a number of years, placed the company's financial statements before any members' annual general meeting. One of the pertinent and telling pieces of evidence he gave was – ".....I became a shareholder on 24th April 2004 of a company which has never had any financial statements drawn up and officially signed by the directors and income statements officially handed to the Receiver of Revenue to establish if as income was generated."

[27] Under the Companies Act, 1973, and in particular its section 286, there is a clear duty laid on the shoulders of company directors to ensure that annual financial statements are laid before members' annual general meetings. The failure by the first respondent to comply with that statutory obligation was sufficient justification, under

the principle of derivative actions, for the appellant to institute the action for an account and debatement. Therefore the barrage of questions with which the appellant was bombarded, requiring him to give exact details of the money for which an account was allegedly not given were wide of the mark. That being so, the appellant's concession under such intensive questioning was totally irrelevant and did not detract from the efficacy of his action.

Conclusion.

[28] I am satisfied that the appellant did succeed in putting forward a *prima facie* case based on a derivative action. The person he sued, Mr. Schacht, was properly made a defendant by virtue of his position as a director who stood in a fiduciary relationship with the company and who allegedly received income from customers who travelled mainly from Germany, but which income, together with how it was expended, he had refused or failed to disclose. In terms of the principle underlying derivative actions, the second respondent was made a party simply because as a fictitious legal *persona,* it was incapable of suing on its own and so that any order made by the court could apply to it. Therefore a *prima facie* case was made out upon which a reasonable man could or might have given judgment against the respondents. In the circumstances, I have no doubt in coming to the conclusion that the learned judge in the court below fell into error by granting to the respondents an absolution from the instance.

[29] I accordingly uphold this appeal and order as follows:

(1) The order of the court *a quo* is set aside and quashed;

(2) The order of the court *a quo* is substituted with the following order:

"The application for absolution from the instance is dismissed with costs."

(3) This matter is hereby remitted to the court *a quo* for continuation;

(4) The appellant will have his costs of this appeal on a party and party

basis and to cover one instructing and one instructed counsel.

_____

CHOMBA, AJA

I concur.

_____

SHIVUTE, CJ

I concur.

_____

MARITZ, JA

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