

IN THE COURT OF APPEAL FOR BOTSWANA
HELD AT LOBATSE

Civil Appeal No. 21/96
High Court Civil Case No. 667/96

In the matter of:

NICHOLAS I. ZAKHEM

Appellant

and

ZAKHEM CONSTRUCTION BOTSWANA (PTY) LTD

Respondent

Mr Advocate Prendini for the Appellant

Mr Advocate B.S. Spilg, SC for the Respondent

J U D G M E N T

CORAM: A.N.E. AMISSAH JP
P.H. TEBBUTT JA
G.G. HOEXTER JA

HOEXTER JA:

The Respondent is a private limited liability company registered in terms of the Company Laws of Botswana. Its Managing director is Mr Ibrahim Zakhem who lives in Nairobi, Kenya. The appellant was employed in Botswana as the respondent's area manager.

During April 1996 the respondent instituted action against the appellant in the High Court at Lobatse of an amount of P784 884,84 together with interest thereon and costs. The amount thus claimed was based on three separate causes of action. The first

cause of action was pleaded in paragraphs 4 and 5 of the respondent's declaration. It related to the appellant's alleged misconduct in dealing with 25 separate cheques issued in favour of the respondent, totalling P726 884,84, which cheques were not paid into the respondent's bank account. The second cause of action, pleaded in paragraph 6 of the declaration, alleged the misappropriation by the appellant of a sum of P13000,00 belonging to the respondent. The third cause of action, pleaded in paragraph 7 of the declaration, alleged the misappropriation of a sum of P45 000 belonging to the respondent.

The appellant entered appearance to defend the respondent's action, whereupon the respondent made application for summary judgement. The appellant resisted this application which was argued before Mr Acting Justice Levy. Levy AJ ruled that the respondent was not entitled to summary judgment in regard to the second cause of action (the claim for payment of P13 000,00) and in regard to the third cause of action (the claim for payment of P45000,00). However, the learned Judge granted summary judgment for P726 884,84 (in respect of the first cause of action) with costs. In regard to costs Levy AJ ordered that they would include neither the costs of twenty-four documents, respectively marked "A1" to "A24" ("the annexures") improperly appended to the founding affidavit to the application for summary judgment, nor

the costs of an affidavit in response to the appellant's opposing affidavit which had been unsuccessfully tendered on behalf of the respondent as part of its case in the summary judgment application. The appellant appeals against the summary judgment granted by the court a quo in favour of the respondent.

I turn to the allegations set forth in paragraphs 4 and 5 of the declaration in support of the respondent's first cause of action. Paragraph 4 contains two sub-paragraphs respectively numbered (i) and (ii). Sub-paragraph 4(ii) consists of four vertical columns. The first column lists the cheque-numbers of twenty-five cheques (each of which was issued in favour of the respondent as the payee). The second column indicates the date on which each cheque was drawn. The third column indicates the amount of each cheque. In the fourth column is stated the name of the drawer of each such cheque. The total of the amounts detailed in the third column is reflected as P726 884,84. Sub-paragraph 4(i) recites that each of the twenty-five cheques listed in sub-paragraph 4(ii) was, unlawfully and/or without authorisation from the respondent, endorsed by the appellant to pay the appellant; and thereafter deposited in appellant's personal account at a branch in Gaborone of the Standard Chartered Bank (Botswana) Limited "and/or other accounts" maintained by the appellant. Paragraph 5 of the declaration

contains the following averments:-

"The aforesaid sum of P726 884,88 ... belongs to the Plaintiff and should not have been deposited by the Defendant in his personal account."

In applying for summary judgment the respondent lodged in support thereof the appropriate founding affidavit required by Order 34 of the Rules of the High Court [Cap 04:02]. The founding affidavit was sworn to at Nairobi by the respondent's aforementioned managing director.

In a long and rambling opposing affidavit the appellant denied that he had entered appearance for the purpose of delay and he contended that, for various reasons advanced in his affidavit, he had a bona fide defence to the respondent's action.

In respect of the 25 cheques detailed in paragraph 4(ii) of the declaration the appellant in his opposing affidavit denies that two of the said cheques were paid into his private account. To these cheques reference will be made in this judgment as "the missing cheques". To the matter of the missing cheques brief reference will be made later in this judgment.

With reference to the remaining 23 cheques listed in paragraph 4(ii) of the declaration the appellant does not deny that he caused them to be paid into his own account. The appellant says that after he was appointed area manager of the respondent in Botswana instructions regarding the "administrative

and financial policies" of the respondent were given to him by the managing director; and that "on most if not all occasions" such instructions were given orally. In his affidavit the appellant further states that the managing director instructed him "as the man in charge" of the respondent in Botswana to do "whatever was essential in the interests" of the respondent. What this involved, according to the appellant, is described in the following words in paragraph 11 of his opposing affidavit:-

"This as I shall show included but was not limited to the use of my personal account on various occasions for various reasons e.g. payment by the Plaintiff/Applicant company to me of monies owed by the company to a company called Zac Construction (Proprietary) Limited of which I am a Director, the payment of salaries of employees of the Plaintiff/Applicant, the payment of bribes and money for the Managing Director's own personal use and the avoidance of payment of tax by the Plaintiff/Applicant and the payment to me of monies owed by the Plaintiff/Applicant to me."

What the appellant had to do in order to defeat the application for summary judgment appears from Order 34 Rule 3(b), the part whereof relevant for present purposes reads as follows:-

"Upon the hearing of an application for summary judgment, the defendant may -

- [b] satisfy the Court by affidavit that he has a bona fide defence to the action, such affidavit... shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

What is required of a defendant by Order 34 was discussed

by this court in Du Setto [Sunnyside II] (Pty) Ltd v. Financial Services Company of Botswana Ltd [Botswana Civil Appeal No. 19/94 14 July 1994]. In the course of his judgment in that case Tebbutt JA observed:-

"The defendant must satisfy the court that he has a defence which, if proved, would constitute an answer to the claim and that he is advancing it honestly.... The allegations in the affidavit must not be bald, vague or sketchy."

The appellant's opposing affidavit was subjected to careful scrutiny by the learned Judge in the Court below. A full re-examination of the entire contents of the opposing affidavit is not necessary for purposes of this judgment. In dealing with paragraph 11 of the opposing affidavit Levy AJ correctly pointed out that the allegations contained in it are "inexact, obscure and vague", and that elsewhere in the affidavit no details of these alleged dealings were given by the deponent.

I agree with the view expressed by the court a quo in its judgment that paragraph 11 of the opposing affidavit represents "the main thrust" of what the appellant sought to set up as his defence. Paragraph 11 is marred, however, by two obvious and fatal defects. Fundamental to the statutory concept of corporate limited liability is the fiduciary duty of a director of a company to that company. The position of trust occupied by a director gives him authority to act for the company's benefit,

not for his own benefit or the benefit of others. This is trite.

As pointed out by Centlivres CJ in Rex v. Milne and Erleigh (7)

1951 (1) SA 791 (A) at 817F:-

".... it is difficult to imagine that any person of ordinary intelligence would believe that he had a power to despoil a company in relation to which he stood in a fiduciary capacity."

The first flaw in paragraph 11 is this. The fact that improper abstraction of a company's funds by a servant takes place pursuant to an illegal instruction to the servant by the company's managing director cannot constitute a valid defence to a civil claim by the company against the servant. The second flaw in paragraph 11 resides in the inherent improbability that the appellant (himself a company director) could have entertained any honest belief that the averments set forth in paragraph 11 constitute a valid defence to that part of the respondent's claim based on the appellant's conversion of cheques payable to the respondent. Suffice it to say that I agree, with respect, with the following summary of the position by the learned Judge in his judgment:-

"Defendant was not entitled to pay monies received by and for Plaintiff into his personal account. The fact that Ibrahim Zakhem 'instructed him' is of no assistance to defendant and does not constitute a defence. Ibrahim Zakhem would have no right in law to tell Defendant to misuse company funds".

A further serious criticism of paragraph 11 of the opposing

affidavit is the palpable commercial absurdity of a number of the statements made in it. This aspect of the matter is also conveniently summarised in the following passage of the judgment of the court a quo:-

"His [the appellant's] explanation for deviating from the normal commercial practice is unconvincing. He did so he says firstly to pay salaries. The normal practice is that a company pays its own salaries. He says that from these personal funds, he paid certain debts of the company. The normal practice is for the company to pay its own debts. The company cannot draw its annual balance sheet where its salaries and creditors are not paid by the company itself."

For the reasons aforegoing I conclude that the argument that the appellant should have been given leave to defend because he was "authorised" by the respondent's managing director to divert the company's funds from the company's coffers has no merit. It is necessary, however, to deal briefly with a number of ancillary submissions urged on behalf of the appellant in order to persuade us that the court below exercised an improper discretion in granting summary judgment; or, alternatively, that, at worst for the appellant, summary judgment should have been granted in a lesser amount.

Having admitted that he endorsed all the cheques listed in paragraph 4(ii) of the declaration the appellant in his opposing affidavit denied liability in respect of the missing cheques. These were respectively a cheque for P3781.00 drawn in favour of

the respondent by the Kgatleng District Council and a cheque for P235 701,84 drawn in favour of the respondent by Eagle Properties (Pty) Ltd. He denied liability on the grounds that a perusal of his bank statement reflected that these two cheques were never deposited in his personal banking account. There are two answers to this argument. The first is that the appellant appears to have more than one banking account. The second and more compelling answer is this. Counsel for the appellant correctly pointed out that the appellant could only endorse the missing cheques after they had come into his possession as the servant of the respondent. The appellant's liability in respect of the missing cheques stems from his illegal channelling them away from the respondent. Such liability does not depend upon the identity of the ultimate recipient of the proceeds of the cheques. All monies of the Respondent received by the appellant had to be deposited to respondent's account.

Mention has already been made of the annexures improperly appended to the respondent's founding affidavit, the costs whereof were disallowed by Levy AJ when he granted summary judgment. Having alleged in paragraph 3 of the founding affidavit that he believed that the appellant had no defence to the respondent's action the deponent proceeded to state:-

"Attached hereto marked annexure 'A1' to 'A24' to support the Plaintiff's claim."

Counsel for the appellant placed considerable reliance on the circumstance that the annexures reflect a total sum of money substantially less than the total of the 25 cheques [P726 884,88] listed in paragraph 4(ii) of the declaration in support of the respondent's first cause of action. It was contended that this discrepancy was destructive of the verification of the amount of the respondent's claim in the founding affidavit. This contention was, I consider, properly rejected by the learned Judge in the court a quo. In this connection Levy AJ remarked:-

"I certainly do not read the Plaintiff's affidavit as saying that this [the annexures] is the only evidence available to Plaintiff. What was annexed was only some of the evidence to prove support for Plaintiff's claim."

Lastly counsel for the appellant sought to rely on the manner of authentication of the signature of the deponent to the respondent's founding affidavit. It was suggested that the authentication of the deponent's signature by a notary in Nairobi was not in accordance with the provisions of section 12 of the Authentication of Documents Act [Cap 14:02]. I mention in passing that this objection was not one of the appellant's grounds of appeal. It is unnecessary to repeat the nature of the alleged non-compliance for which counsel contended. Section 3(4) of the Act in question specifically provides that nothing in the Act shall prevent acceptance by any court of other

evidence that a document was in fact signed by the person by whom it purports to have been signed. In the instant case there was acceptance by the court below of the authenticity of the deponent's signature; and there was cogent evidence warranting such acceptance. In paragraph 4 of his opposing affidavit the appellant himself stated that he had read the founding affidavit and that the deponent thereto was Ibrahim Zakhem, the managing director of the respondent.

The appeal is dismissed with costs.

Delivered in open court at Lobatse on ^{25th} July 1997.

G.G. Hoexter

G.G. HOEXTER
[JUDGE OF APPEAL]

A.N.E. Amissah

A.N.E. AMISSAH
[JUDGE PRESIDENT]

I agree:

P.H. Tebbutt

P.H. TEBBUTT
[JUDGE OF APPEAL]

I agree: