



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1534/2013

In the matter between:

STANDARD BANK NAMIBIA LIMITED

PLAINTIFF

and

EDISON KAPUUNO

1ST DEFENDANT

EDISON BUILDING ENTERPRISE CC

2ND DEFENDANT

DIEDERICKS INCORPORATED

3RD DEFENDANT

Neutral citation: *Standard Bank Namibia Ltd v Kapuun* (I 1534/2013) [2014]
NAHCMD 128 (07 April 2014)

Coram: HOFF J

Heard: 18 March 2014

Delivered: 07 April 2014

ORDER

- (a) The exception is upheld.
- (b) The first and second defendants are ordered to pay the amount of N\$321,000, jointly and severally the one paying the other to be absolved, to the plaintiff plus interest at the rate of 20% per annum calculated from 5 October 2011 plus costs of suit.

JUDGMENT

HOFF J:

[1] This is exception against the plea of first and second defendants on the basis that it does not disclose a defence.

Background

[2] It is common cause that on 1 October 2011 a Mr Diedericks acting on behalf of the third defendant presented a cheque for the amount of N\$371,000 to plaintiff for collection. The cheque was drawn by second defendant on First National Bank Limited and payable to third defendant and the cheque was not crossed or endorsed.

[3] On 4 October 2011 the plaintiff cleared the cheque at the special request of Mr Diedericks before the proceeds in respect of the cheque was available. On 6 October 2011 the cheque was dishonoured by First National Bank due to insufficient funds in first or second defendant's account and the cheque was returned to plaintiff.

Main claim against first defendant

[4] The main claim is based on the fact that first defendant signed a cheque in a trade name (Edison Building Enterprise) as contemplated in s 20(2)(a) of the Bills of Exchange Act 22 of 2003 (the Act) and as a result he is liable as if he had signed the cheque in his own name.

[5] On 15 October 2011 the first defendant paid an amount of N\$50 000 to plaintiff in reduction of the indebtedness to plaintiff. On 21 October 2011 the first defendant provided the plaintiff with an acknowledgement of his indebtedness for the amount of N\$321,000. Demand notwithstanding the first defendant has failed or refused to pay the amount of N\$321,000 plus interest at the rate of 20% calculated from 5 October 2011.

First alternative claim against first alternatively second defendant

[6] The first alternative claim is based on the fact that the plaintiff in good faith gave value to third defendant in the amount of N\$371.000 and that plaintiff is the holder as well as the holder in due course of the cheque as contemplated by amongst others ss 25(1), 26(2), 28, 34, 52 and 82 of the Act and by virtue of its agreement with the third defendant that plaintiff would clear the cheque before receipt of the proceeds in respect of the cheque from First National Bank. Thus first defendant or second defendant is liable to the plaintiff on the cheque depending on which of the defendant's current account the cheque was drawn.

[7] In the alternative that the first defendant or second defendant is unjustifiably enriched at the expense of the plaintiff in the amount of N\$321,000 ie (N\$371,000 – N\$50,000 paid by first defendant). There also a second alternative claim against the third defendant.

The plea of first and second defendants

[8] It was confirmed that the cheque was drawn on the second defendants account but pleaded that they had no knowledge that the cheque was dishonoured due to lack of funds.

[9] The first defendant pleaded that he is unable to confirm or deny the allegation that he is personally liable on the cheque because he signed the cheque in a trade name. The first defendant denied having made a payment in the amount of N\$50 000 in respect of the debt on the cheque. The first defendant pleads that he has mistakenly signed the acknowledgement of debt. A subsequent request for further particulars to clarify this aspect of the plea was declined. The first and second defendants pleaded that they have no knowledge of the alleged agreement between the plaintiff and third defendant and the related allegations.

[10] Rule 22(3) of the Rules of this Court provides as follows:

‘Every allegation of fact in a combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea.’

[11] The following facts should be taken to be admitted by the first and second defendants that:

- (a) the second defendant is a close corporation and the cheque in question was drawn on an account it holds at First National Bank;
- (b) the first defendant signed the cheque in person;
- (c) the cheque was presented to plaintiff by third defendant for collection and that plaintiff cleared the cheque;
- (d) the cheque was not crossed (a copy marked A is annexed to plaintiff’s particulars of claim).
- (e) plaintiff in good faith gave value in the amount of N\$371,000 in respect of the cheque and became the holder as well as the holder in due course of the cheque;

- (f) that first defendant signed an acknowledgement of debt;
- (g) plaintiff's allegation of the agreement with the third defendant that payment be made on the cheque before it is cleared

[12] Section 20(2)(a) of the Bills of Exchange Act 22 of 2003 reads as follows:

'If a person signs a bill in a trade or assumed name – he or she is liable on the bill as if he or she had signed it in his or her own name.'

[13] The first defendant pleaded that the cheque was a post-dated cheque meant to be presented when funds became available and pleaded that he did not instruct the third defendant to present the cheque before the funds became available.

[14] In terms of the provisions of s 34(b) of the Act the holder of a bill who is a holder in due course –

- '(i) holds the bill free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves; and
- (ii) may enforce payment against all parties liable on the bill.'

[15] Section 52 of the Act provides as follows:

'The drawer of a bill, by drawing it –

- (a) engages that, on due presentment –
 - (i) it must be accepted and paid according to its tenor; and
 - (ii) if it is dishonoured he or she will compensate the holder, or an endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken; and
- (b) is precluded from denying to a holder in due course the existence of the payee and the payee's then capacity to endorse.'

[16] It was admitted by first and second defendant that second defendant was the drawer of the cheque. In view of the provisions of the Act referred to (supra) both the first and the second defendants are liable on the cheque.

[17] In respect of the acknowledgement of debt the first defendant pleaded that he signed the cheque mistakenly. Plaintiff in its request for further particulars stated that the first defendant's plea in this regard was vague and embarrassing and first defendant was given an opportunity to cure the vagueness but declined to do so.

[18] In *National and Overseas Distributors v Patoto Board* 1958 (2) SA 473 (AD) at 479 Schreiner JA stated the following in respect of a unilateral error:

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (*justus*) and would have to be pleaded.'

[19] The first defendant when given the opportunity to clarify the alleged mistake in the first instance refused to do so. It is thus not clear what the nature of this alleged mistake was. Secondly, the first defendant did not allege that the alleged mistake was a *justus* error. An error is *justus* if it was caused by the misrepresentation of the other party.

[20] In my view the plea filed by first and second defendants does not disclose a defence and judgment should therefore be granted in favour of the plaintiff.

[21] In the result the following orders are made:

(a) The exception is upheld.

(b) The first and second defendants are ordered to pay the amount of N\$321,000, jointly and severally the one paying the other to be absolved, to the plaintiff plus interest at the rate of 20% per annum calculated from 5 October 2011 plus costs of suit.

E P B HOFF
Judge

APPEARANCES

PLAINTIFF : G B Coleman
Instructed by Angula Coleman, Windhoek

1ST – 2ND DEFENDANTS: T Mbaeva
of Mbaeva & Associates, Windhoek