IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.: 48 OF 2017**
(CCT: 98/10)

In the matter between:

RORISANG ENGLISH MEDIUM SCHOOL **1st APPELLANT**
THE PRINCIPAL –RORISANG
ENGLISH MEDIUM SCHOOL **2ND APPELLANT**

AND

NAZARETH FURNITURE
& HARDWARE **1ST RESPONDENT**
LEFA KAHLOLO **2ND RESPONDENT**

CORAM: MAHASE ACJ
DAMASEB AJA
CHINHENGO AJA

HEARD: 21 JANUARY 2019
DELIVERED: 01 FEBRUARY 2019

SUMMARY

Where a claim is based on goods sold and delivered, the plaintiff must prove its case on a balance of probabilities – In addition to the citation and description of the parties in the declaration being unclear, the plaintiff has not set out the necessary allegations to sustain the case – Court therefore not satisfied that there is evidence upon which the court can give judgment in favour of the respondents because the onus

has not been discharged – Order of court a quo set aside and claim dismissed on appeal, with costs.

JUDGEMENT

DAMASEB AJA:

Damaseb AJA (Mahase ACJ and Chinhengo AJA concurring):

[1] This appeal falls to be decided on a narrow issue: whether the plaintiff proved its case on balance of probabilities to justify the High Court granting it judgment against the defendants in a liquidated amount of M 56 822, for building materials allegedly delivered to a third party under a guarantee provided by the defendants.

Poor state of pleadings

[2] Although in the description of the plaintiff the declaration states that it is a limited liability company, the citation in the summons makes no such reference.

[3] The plaintiff sued a private school without setting out what it's status is in law. It is not apparent from the pleadings if the school is a firm[1], an unincorporated association or a body corporate. This is important because it emerged during the evidence that the governing

[1] See High Court Rule 13 for manner of citation of partnerships, firms and associations.

body of the school is a 'School Board' which clearly was to be joined but was not.

[4] The capacity in which the second defendant, the principal of the school, is cited is also not clear: that is whether he is cited in his personal capacity or as an agent of the school.

[5] Although the plaintiff's claim is for goods sold and delivered the declaration does not spell out how the amount claimed is made up - especially in light of the fact that it is alleged that part payment was made by the defendants which reduced the alleged total indebtedness from M 87 767 46 to M 56 822 and that, included in the claim, are amounts received by the third party (contractor) as loans and the value of the stove.

[6] The declaration was excipiable on many grounds but was not excepted to and the case proceeded to trial with those deficiencies. At least once exception was filed but it was not decided by the court. The additional deficiencies will become apparent below.

The particulars of claim

[7] The declaration alleges that the second respondent, 'acting in his capacity and scope of his work as Principal' of first defendant, entered into a 'credit agreement' with the plaintiff. Without specifying

which defendant - considering that two defendants are cited - the declaration alleges that:

> *'5. The Defendant requested the Plaintiff to supply him with building materials on credit for the purpose of building a school. The Plaintiff supplied the defendants with materials on several occasions. The total amount of materials supplied was …M 87 767 46.*
>
> *6. The Defendant paid part payment of …M30 945 46. The defendant left the balance of M56 822 unpaid since 2009.'*

[8] Nowhere does the plaintiff state in the declaration that its cause of action is a surety in terms of which the defendants bound themselves as surety and co-principal debtor for the liabilities of a third party; yet that is what emerged as its case in the evidence.

Further particulars

[9] In answer to the defendants' request for further particulars, the plaintiff alleged that the name of the second defendant is Mr Isaac Moletsane Khetsi (the Principal); and that it was he who, in writing, and as 'representative' of the first respondent, requested the plaintiff's managing director, Dr Abdalla Shouman (the MD), to supply materials for the first respondent. No reason is given for suing him in his personal capacity when he acted as agent of the school.

[10] The further particulars further state that the materials were delivered to one Mr Lefa Kahlolo and Mr Emmanuel Makhanya who were introduced to the plaintiff 'as people in charge of building the school'.

The plea

[11] The defendants excepted that the plaintiff failed to allege that the second defendant in allegedly requesting materials from the plaintiff was acting as an agent of the first respondent 'and was so appointed in terms of a written authority signed by the first defendant's board.'

[12] The plea also alleged that the plaintiff failed to join Lefa Kahlolo who 'has a vested interest in the matter'. These issues were not dealt with or determined by the court.

[13] The defendants denied that they 'approached' the plaintiff for materials. It is alleged that the plaintiff was approached by Mr Lefa Kahlolo who operated a construction business called MK Business Solution. The latter was engaged by the first defendant to build classrooms.

[14] It is further stated in the plea that upon Mr Kahlolo requesting 'credit' from the plaintiff, who needed assurance that Kahlolo would meet his obligations, the second defendant, at Kahlolo's request,

executed a letter of guarantee in favour of the plaintiff confirming that the first defendant 'will pay for the goods supplied'.

[15] The defendants also denied that they made any part payment to the plaintiff as alleged by the plaintiff.

[16] The defendants denied any liability to the plaintiff.

Events after the plea

[17] After the plea was filed, rather curious developments occurred. First, as one would expect, in light of the allegation in the plea concerning Kahlolo, the plaintiff brought an application to join Kahlolo. Although Kahlolo is cited in that application for joinder, the application is not addressed to him (and not surprisingly) not served on him.

[18] The joinder application was not opposed by the first and second respondents. From the record, it is clear that the court never granted the application so one must assume that it was never moved by the plaintiff; yet in the court's judgment granted at the end of the trial Mr Kahlolo appears as the third defendant against whom judgment is also granted.

[19] The other development, as I have already stated, is that the exception raised by the defendants appears not to have been moved

or considered by the Court. It is not apparent from the record why not.

The trial

[20] Without those preliminary matters being resolved, the matter proceeded to trial before Molete J. Only two witnesses testified at the trial; the plaintiff's managing director Mr Abdalla Shoumn (MD), and the Principal on behalf of the defence.

[21] In my view, the case falls to be determined on facts that are either common cause or have been admitted by the parties in either the pleadings or in evidence. I will briefly summarise that evidence in so far as it is relevant to the resolution of the dispute.

Common cause facts

[22] There is common ground that in 2009 the first defendant, Rorisang English Medium School (REMS), intended to build classrooms (the building works). The second defendant was then the Principal of REMS. REMS contracted a building contractor, Lefa Kahlolo, to undertake the building works. Mr Kahlolo approached plaintiff's MD to obtain building material on credit in order to undertake the building works. The MD was reluctant to provide the building material to Kahlolo without some guarantee of payment. Kahlolo then requested REMs' Principal to assist.

[23] The Principal then wrote a letter on behalf of REMS to the MD in the following terms:

> '*The Manager*
> *Nazareth Hardware* *21 July 2009*
> *Etc..*
>
> *Re: ORDER*
> *This is to certify that we shall pay all goods supplied by you direct to your account. The money will be transferred to you as per the Invoice provided. The total cost of the job is M 272 000. We shall pay your company within thirty days. Please forward us your bank details.*
> *Signed: Principal*

[24] In his testimony at the trial, the MD testified that the material was delivered on the strength of this letter to Kahlolo and that without this guarantee by REMS he would not have delivered the material. The MD conceded that he had, amongst others, provided cash loans to Kahlolo to pay workers; and also, a stove.

[25] The MD did not say how much he gave to Kahlolo in cash loans and what the cost of the stove was. Neither did he specify when what materials were delivered, except to say the materials were delivered and received by REMS. When payment became a problem, he went to repossess some of the material which came to the value of the amount reflected as part-payment in the declaration.

[26] The Principal denied that the material was ever received by REMS. He denied REM's liability either on the letter of guarantee he authored or for goods delivered and insisted that until he retired from REMS he bore no knowledge of goods delivered by the plaintiff to REMS.

The High Court's approach

[27] Molete J concluded that the Principal duly bound REMS as a surety in favour of the plaintiff for Kahlolo's indebtedness and that the defendants could not be allowed to resile therefrom. The learned judge *a quo* also held that the letter of guarantee did not state to who delivery was to be made and that 'it was reasonable for the plaintiff to assume that delivery at the school and to the contractor was sufficient'. The court rejected the Principal's denial that the material was delivered to REMS. The court *a quo* found corroboration for the delivery in the fact that 'some of the items were repossessed by the plaintiff and the parties agreed on the value thereof at mediation.'

Analysis

The law

[28] At the end of the defendants' case, the trial court had to consider whether there was evidence upon which the court ought to give judgment in favour of the plaintiff.[2]

[29] The plaintiff bore the burden of proof to establish its claim on a balance of probabilities. That *onus* included the duty to adduce sufficient admissible evidence to support the claim. A defendant who denies delivery is entitled to proof by the plaintiff of actual delivery of the items it is being held liable for. That would be the case even where it had assumed the risk that the material could be delivered to a third party without its knowledge.

[30] In the present case, it was incumbent upon the plaintiff to prove actual delivery to Kahlolo. A party to litigation cannot be expected to prove or disprove a fact that is peculiarly within the knowledge of the opponent.[3] The opponent must establish such facts. It has been held that it is contrary to principle to cast an onus on or upon defendant in relation to the facts peculiarly within the knowledge of the plaintiff.[4]

Law to facts

[31] I will assume for present purposes in favour of the plaintiff that REMS assumed liability by means of the letter written by the

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[2] *Gascoyne v Paul& Hunter* 1917 170; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T) at 309E-F, and *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) at 334.
[3] Compare: *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277, para 27.
[4] *Yusaf v Bailey & Others* 1964 (4) SA 117 at 119D-H.

Principal for the debts incurred by their contractor, Kahlolo, for material delivered for the building works. By its plain meaning that letter is not capable of being construed that REMS assumed liability for the cash loans that the MD advanced to Kahlolo and the value of the stove. The declaration makes no such claim and the MD was not able to explain how cash loans constituted part of the material. The same goes for the stove although, in the view I take in respect of the cash loans, nothing turns on the stove.

[32] Considering that the cash loans constitute an indebtedness for which the defendants cannot in law be liable, it was important for the plaintiff to itemize, both in its pleadings and in evidence, the portion that cash loans represent. That would make it possible for the court to grant it judgment in respect of building material minus cash loans. Failing that, the plaintiff had failed to prove its case and was not entitled to a judgment on that basis.

[33] The defendants denied receiving the material. Since it is the plaintiff's case, as confirmed by the trial judge, that it mattered not because of the wording of letter of guarantee who received the building material, the *onus* remained on the plaintiff to prove the fact of delivery to Kahlolo and the nature of goods actually delivered. That the plaintiff singularly failed to do. On that basis too, the plaintiff was not entitled to a judgment against the defendants.

[34] The proper order the High Court should have made, therefore, was to dismiss the plaintiff's claim with costs.

Order

[35] It is therefore ordered that:

1. The appeal succeeds and the judgment and order of the High Court is set aside and substituted for the following order:

   "An order of Absolution is granted in favour of the defendant and against the plaintiff. The plaintiff shall pay the costs of suit".

2. The Appellants are awarded costs of the appeal against the respondents.

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P.T DAMASEB

ACTING JUSTICE OF APPEAL

I agree: _____

M MAHASE

ACTING CHIEF JUSTICE

I agree: _____

M CHINHENGO

ACTING JUSTICE OF APPEAL

For the Appellant: Adv. PT Nteso

For the 1st Respondent: Adv. J Thamae