BARLOW v. THE FRIEND P. & P. CO., LTD.

1909. *December* 1. MAASDORP, C.J.

Appeal.—Libel.—Director's liability for co-director's tort.

Where a circular had been issued by W & Co., of which firm B was a director and a large shareholder, advertising a revived publication entitled *De Express Boerenvriend*, and F Co., who had for some years published *De Boerenvriend*, issued a circular referring to B, which contained the innuendo that he and his co-director had acted dishonourably, and the magistrate had found that the statements contained in F & Co.'s circular were true and had been published for the public benefit, *Held*, on appeal, that the director of a company is liable in tort for the act of his co-director done in the ordinary course of business.

This was an appeal against a decision of the Resident Magistrate of Bloemfontein. The summons issued at the instance of the appellant (plaintiff in the court below) read as follows: "(1) Plaintiff was formerly engaged in the service of the defendant company in the capacity of general manager, and left the employ of the said defendant company some three years ago; (2) in or about the month of September, 1909, the defendant company falsely and maliciously wrote and caused to be printed and published in a circular widely circulated in Bloemfontein and elsewhere the following libellous and defamatory words: 'Warning.—It has come to our notice that two of our late employés (meaning the plaintiff and one A. C. White) have issued circulars from which it is made to appear that *De Boerenvriend*, which has been circulating throughout the Orange River Colony since 1904, is their production. We wish to emphasise the fact that the Annual, which is the household friend in every home in this colony, has been published by us for the past five years,' meaning thereby that the plaintiff had been guilty of dishonest and dishonourable conduct by falsely representing in published statements for pecuniary gain that a certain publication, the property of a limited liability

company in which he (plaintiff) is a shareholder, was identical with and in fact was a production known as *De Boerenvriend*, of which the defendant company have for some years past been and still are the publishers and proprietors; that in consequence of the said false, malicious and slanderous statement, plaintiff has suffered damages to the extent of £20. Wherefore the plaintiff claims judgment against the defendant company for the sum of £20, as compensation for damages sustained by him by reason thereof, and for costs of this suit, and for such other or further relief as to this honourable Court may seem meet."

The defendants pleaded the general issue, and pleaded specially that the words had been printed and published *bonâ fide* and without malice and on a privileged occasion, in that in or about August and September, 1909, certain circulars were being distributed amongst the general public of South Africa, which the defendant company honestly considered might lead the public into the belief that an annual bearing the same or a similar title to that of *De Boerenvriend*, which had been a publication of the defendant company for the past six years, was being printed and published by some other firm. Thereupon the defendant company, with a reasonable hope of protecting their own interests, printed a circular containing the words complained of, and published it amongst firms acting as agents for the defendant company in the sale and distribution of *De Boerenvriend*, and as a further special plea defendants said that the words were true in substance and in fact, and that the publication was for the public benefit.

In giving judgment for the defendants the magistrate had found as a fact that the circular complained of by the defendant company in the alleged defamatory statement had been published by A. White & Co., of which the plaintiff and one White were almost the sole shareholders (there being five other holders of one share each), and were sole directors, and that if the statement made by the defendant company were libellous, it was justified as being true and was published for the public benefit.

Blaine, K.C., for the appellant: The statement made by the

respondents was found by the magistrate to be libellous and to have been made of the appellant. Appellant never published a circular about the *Boerenvriend;* the circular referred to was published by a company, which had a *persona* distinct from the appellant. The appellant knew nothing of the circular, which had, in fact, been published by White & Co., and he could not therefore be held responsible for the tort of White, even though he was a co-director. See *Salomons* v. *Salomons & Co., Ltd.* ([1897] App. Cas. 22).

P. U. Fischer, for the respondents: The evidence shows that Barlow had something to do with the publication of White & Co.'s second circular. As a director Barlow was directly responsible for the business management of the firm, unless circumstances prevented him from participating, as in the case of *Weir* v. *Bell and Others* (3 Ex. D. 238).

MAASDORP, C.J.: There is, of course, a great deal in what Mr. *Blaine* has said on the general principles laid down in the case of *Salomons* v. *Salomons & Co., Ltd.*, that cannot be disputed. In civil matters it is quite true that a company and its constituent shareholders are separate *personae*, and what a company does cannot affect the rights of the shareholders. In the case before the Court, however, a tort has been committed by the company, and the company would be liable in the first place, and so would the directors who had committed the wrong. Consequently if both directors had issued the circulars, there would be no doubt as to their liability. But the appellant says he knew nothing of that circular. It clearly was his duty to have known. If he takes the responsibility of leaving the management entirely in White's hands, he must take the consequences. When White acts, he acts for himself and the appellant. If the circular issued was a wrongful circular, the appellant was liable as much as White. The case of *Weir* v. *Bell and Others*, quoted by Mr. *Fischer*, can easily be distinguished. In that case the director sued for fraud was far away—or at any rate he was a sort of sleeping director. In the case before the Court the appellant was on the spot, and it cannot be said that the respondents must have known he

had nothing to do with the publication of the circular and that they showed malice by dragging him in in their circular. He was here, and there is nothing to show that he knew nothing about the circular issued by White & Co., and he cannot throw the responsibility on to White, as he tries to do. Without in any way doubting or differing from the principles laid down in the case of *Salomons* v. *Salomons & Co., Ltd.*, I must hold that the appeal should be dismissed with costs.

Appellant's Attorney: *G. A. Hill;* Respondents' Attorney: *C. J. Reitz.*