IN THE KWAZULU-NATAL HIGH COURT, DURBAN **REPORTABLE**

REPUBLIC OF SOUTH AFRICA

CASE NO. 9235/2008

In the matter between:

MOHAMED ZUBAIR HASSIM RAHMAN **PLAINTIFF**

and

MR FAZEL KARODIA **DEFENDANT**

J U D G M E N T

NDLOVU J

[1] The plaintiff sued the defendant for provisional sentence on a cheque for R200 000 drawn by the defendant in favour of "KZN Petroleum or bearer". The cheque was subsequently negotiated to the plaintiff. However, on presentment the cheque was dishonoured by non-payment on account of the defendant having countermanded payment.

[2] The defendant opposed the granting of provisional sentence and delivered an affidavit in terms of rule 8(5). The grounds set out as the defendant's defence were basically that the plaintiff was not a holder in due course in respect of the cheque in question as envisaged in section 27 of the Bills of Exchange Act 33 of 1964 ("the Act") in that (1) the plaintiff did not take the cheque in good faith and for value and without notice of the defects in title of the person who negotiated the cheque to the plaintiff and that (2) the defendant disputed that the cheque was complete and regular on the face of it. The factual background which culminated in this litigation can be broadly summarised as follows.

[3] On or about 15 May 2008 and at Durban, Farzeen Property Investments 21356 CC, a close corporation of which the defendant was the sole member, concluded a written purchase and sale agreement with KZN Petroleum Products and Distribution CC ("KZN Petroleum") whereby the defendant represented Farzeen Property Investments and KZN Petroleum was duly represented by its sole member Zaheeda Banu Ahmed ("Zaheeda Ahmed"). However, it was not in dispute that the defendant dealt mostly, if not mainly, with Zaheeda Ahmed's husband, Farouk Ahmed, also known as Nafis Ahmed. In terms of the said agreement ("the agreement") KZN Petroleum sold to Farzeen Property Investments a set of features and fittings listed in annexure "A" to the agreement ("the items") for a sum of R1 million payable as follows: the first payment being the deposit of R200 000 payable on or before 30 May 2008 followed by four equal monthly instalments of R200 000 each due and payable on or before 30 June 2008, 30 July 2008, 30 August 2008 and 30 September 2008 respectively. The seller (KZN Petroleum) further warranted that it was the legal owner of the items and that it was therefore entitled to sell the same.

[4] Indeed, the deposit of R200 000 was duly paid in terms of the agreement. Payment of the balance of R800 000 was made by way of four post-dated cheques of R200 000 each, duly dated in accordance with the agreement. It was the first of the four aforementioned post-dated cheques (that is, the one dated 30 June 2008) whose payment was countermanded by the defendant and which constituted the subject matter of this litigation (hereinafter interchangeably referred to as "the cheque" or "the cheque in question").

[5] As indicated already, the defendant alleged that the plaintiff was not the holder in due course and for value in respect of the cheque in question on the basis that the cheque was dishonestly and fraudulently negotiated to the plaintiff by either Zaheeda Ahmed or the attorneys Shaukat Karim & Co (to whom the cheque was allegedly endorsed by Zaheeda Ahmed). The detail of the

defendant's allegations seeking to found his defence appeared predominantly in the defendant's opposing affidavit and will be referred to in due course.

[6] At the outset *Mr Voormolen*, for the defendant, acknowledged that if the Court found that the plaintiff was a holder in due course in respect of the cheque then the plaintiff was protected in terms of the Act, as he put it, "from any fight about the underlying transaction" between the defendant and KZN Petroleum. Hence the crucial question for the Court to determine was whether the plaintiff was indeed the holder in due course.

[7] *Mr Voormolen* submitted that the facts of this case indicated that the plaintiff did not satisfy the requirements referred to in section 27(1) of the Act in that the plaintiff did not take the cheque in good faith and for value and that at the time the cheque was taken the plaintiff was aware of the defect in title on the part of the person who gave the cheque to the plaintiff. Counsel submitted that in order to prove bad faith on the part of the plaintiff, the defendant needed only to show that the plaintiff knew that something was amiss with the cheque or, if he suspected as much, deliberately refrained from making enquiries. In this regard he referred to *Sharroch and Kidd : Understanding Cheque Law*, 1993 ed, from page 139 in which the learned authors referred with approval to the decision of *Fairthorn (Pty) Ltd v Zacharopulos* 1974 (4) SA 262 (N). Counsel argued that the plaintiff in this case ought to have been suspicious of the cheques which represented payment in respect of the sale of the KZN Petroleum's assets on 15 May 2008.

[8] On the other hand, *Mr Tobias* for the plaintiff, submitted that the plaintiff, in his replying affidavit, contended that he had no inkling of the nature of the underlying transaction or transactions between KZN Petroleum and the defendant (on behalf of Farzeen Property Investments). The plaintiff averred that he received the four cheques on 21 May 2008 for R200 000 each and which were then all post-dated 30 June 2008, 30 July 2008, 30 August 2008 and 30

September 2008 respectively. He received the cheque in question from Farouk Ahmed (aka Nafis Ahmed), and then gave it to his attorney as his agent for deposit. In fact, according to the plaintiff, the endorsement on the cheque was in blank and the plaintiff caused to be added the words "Pay Shaukat Karim & Company or bearer" before causing the cheque to be deposited in his attorneys' trust account. Indeed, Farouk Ahmed confirmed (more than once) in his own affidavit that his endorsement was in blank at the time of signing the cheques. *(Paragraphs 16, 21 and 31 of the Nafis Ahmed's affidavit).*

[9] The plaintiff went on to explain that the reason for such arrangement was the fact that he (the plaintiff) was at the time engaged in a property transaction and thus he felt it convenient that the funds reflected on the cheque be held by his attorneys who only acted as collecting agents on his behalf. At the time the plaintiff had no reason to have suspected any impropriety with the cheques. He did not only know the defendant but, as he stated, knew him as "a person of substance". This was confirmed by the fact that the name of the account or branch on the cheque was reflected as "FNB Private Clients" which, the plaintiff was advised, denoted a favoured customer of First National Bank. To the plaintiff this was indicative of solvency on the part of the drawee, in this case the defendant. In any event, none of the cheques on their face, reflected any defect in title. If such defect existed the plaintiff was certainly not aware of it. In this regard the plaintiff questioned what the defendant meant by "defect in title" since on the defendant's own version the cheques were validly given in negotiable form to KZN Petroleum, hence at the time there was no defect in title, nor any apparent defect in title. The cheque was duly deposited on 2 July 2008 as shown on the face thereof. Therefore, 2 July 2008, the plaintiff reiterated, was the date of deposit and not the date when the cheque was negotiated to the plaintiff which was, as indicated earlier, 21 May 2008.

[10] He further averred that he had no dealings whatsoever with Zaheeda Ahmed and in fact did not even know her. The plaintiff pointed out that the

defendant was not present when the cheque was negotiated to the plaintiff and, on this basis alone, the defendant did not have the capacity to state under oath about what happened at the time. The plaintiff submitted that the allegations of fraud, dishonesty and collusion leveled against Zaheeda Ahmed and the plaintiff were therefore without any substance and worse so that they were made by someone (the defendant) who had no direct knowledge of what happened and could not possibly have had such knowledge. Since the plaintiff never had any dealings with Zaheeda Ahmed he (the plaintiff) therefore did not have any knowledge about any undertakings made by Zaheeda Ahmed in her agreement with the defendant, nor was the plaintiff aware of any breach of any such agreement by Zaheeda Ahmed. The plaintiff submitted that at all times he acted in good faith and for value and that he certainly had no knowledge of the so-called "voidable and undue preference" of any creditor by KZN Petroleum, as alleged by the defendant.

[11] In his affidavit in support of the plaintiff's replying affidavit Nafis Ahmed (aka Farouk Ahmed) who was, at the time, the manager and duly authorized official of KZN Petroleum, made the following averments, in part:

> "3. At all material times in the course of the transactions the subject matter of this case, I personally acted on behalf of KZN (Petroleum) as its duly authorized official. My wife played no role in the specific negotiations of the cheques referred to below whatsoever.
> 4. The transactions discussed by me with the Defendant was the sale of the business in KZN.
> 5. I should mention that despite his allegations to the contrary, the Defendant was fully aware that certain of the assets were subject to a credit agreement, and I annex hereto marked 'NA1' a letter from First City Finance addressed to the landlord company, Farzeen Property Investments [21356 CC] controlled, I may mention, by the Defendant himself, dated 25 April 2008 confirming precisely this and counter-signed by the Defendant himself with the date 24 April 2008 acknowledging receipt thereof.
> 6. This was the debt ceded by First City Finance to ABSA Bank Asset Finance and referred to by the Defendant in paragraph 6.7, which allegedly is part of the so-called fraud allegedly unknown to the Defendant when the business was bought.
> 7. The signature as 'seller' is NOT that of my wife as falsely alleged in paragraph 6.6. It is my signature and witnessed by Farhdeen Mohamed, whose signature appears as 'Witness'.

8. I had on behalf of KZN entered into negotiations with my landlord, represented by the Defendant, for the sale of the Wyebank Service Station ('the W. Service Station'), an asset of KZN and situate at 84 Circle Drive, Wyebank.
9. It was agreed that the W. Service Station be sold at its net asset value of R1 316 776,41. This appears as an annexure of Annexure 'A'.
10. Karodia, the Defendant, knew that some of the assets were freehold and others subject to credit agreements. This is obvious from Annexure 'NA1'.
11. Substantial sums had been paid towards those credit agreements and it was therefore agreed that the purchase price would be reduced to R1 million exactly and not R1,316 million and the purchaser would assume liability for the balances under the credit agreements.
12. I draw attention to the second item on Annexure 'A' which features as 'FK2' to Defendant's affidavit.
13. The Defendant arranged a separate deal with regard to the CCTV Cameras with the sellers of those cameras.
14. The Defendant insisted that his Attorneys prepare the agreements. The agreement was prepared without mentioning the credit agreements in force and notwithstanding Defendant's own personal knowledge of the contents of Annexure 'NA1' dated 24 or 25 April 2008, i.e. nearly one month **before** the Sale Agreement.
15. Defendant was fully aware of the said credit agreements in force at the time.
16. I insisted on the cheques being in negotiable form since I made it quite clear to the Defendant that I intended to negotiate the same, which I did. It is my signature which appears as endorser. My endorsement was in blank at the time of signing the cheques.
17. The absurd suggestion that the Defendant would give fully negotiable cheques which were bearer instruments, but that it was agreed that there would be no negotiation thereof is simply not true. What is also not true is that my wife played the key role or indeed any role in all this.
18. The first cheque being that to be dated 30 May 2008 – referred to in paragraph 3 of Annexure 'FK1' was deposited into the bank account of KZN.
19. The other four post-dated cheques were all negotiated to the Plaintiff on or about 21 May 2008, by me acting on behalf of KZN.
20. The Plaintiff has and had no knowledge of the underlying transaction. He merely appeared to know of the Defendant as a man of substance. I certainly did not discuss anything with him concerning the transactions with the Defendant or his CC.
21. Each of these four (4) cheques was endorsed by me in blank so that I personally am liable as an endorser of each of them.
22. As at 21 May 2008 it was not envisaged that KZN would go into liquidation."

[12] The provisional sentence proceedings are governed by rule 8 of the uniform rules. It is said that provisional sentence "*is an extraordinary remedy designed to enable a creditor who has liquid proof of his claim to obtain a speedy judgment therefor without resorting to the more expensive and dilatory*

machinery of an illiquid action". (*Barclays National Bank Ltd v Serfontein* 1981 (3) SA 244 (W) at 249H – citing with approval from the learned authors *Nathan, Barnett and Brink's "Uniform Rules of Court,* 2nd Edition, at p. 66). Further, that provisional sentence *"is granted on the presumption of the genuineness and the legal validity of the documents produced to the court. The court is provisionally satisfied that the creditor will succeed in the principal suit. The debt disclosed in the document must therefore be unconditional and liquid".* (*Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 728C-D.) Where there was no balance of probabilities in favour of either party, that is, where the probability of success in the principal case was evenly balanced, the Court ought to grant provisional sentence. In *Allied Holdings Ltd v Myerson* 1948 (2) SA 961 (W) the Court stated as follows:

> "It is important to note that there are two kinds of *onus* in a provisional sentence case. There is first of all the *onus* in the provisional sentence proceedings themselves and then there is the *onus* in the principal case. The rule is that provisional sentence will be granted unless the Court is satisfied that the probabilities are that the defendant will succeed in the principal case. If, in the provisional sentence case the Court considers that there is no balance of probabilities in favour of either party in any principal case that may eventuate, then the law, as I understand it, requires the Court to grant provisional sentence. In this enquiry, however, the question as to where the *onus* lies in the principal case is relevant, because it is one of the circumstances which will go to decide the probabilities in the principal case. There may be cases in which in the principal case the *onus* is on the plaintiff and in other cases the *onus* may be on the defendant, and where the *onus* lies may have a considerable bearing on the question as to what are the probabilities of success in such ultimate principal case. If the Court considers that in the principal case the probabilities of success are equally balanced, then I think the authorities concur in laying down that provisional sentence must be granted. These principals emerge from an examination of the cases of *Golub v Rachaelson* (1925, WLD 188); *Inglestone v Pereira* (1939, WLD 55); *Batten & Co Ltd v Levinson* (1939, WLD 364); *Morris & Berman v Cowan* (2) (1940, WLD 33) and *Coetzer v Krause* (1924, OPD 122)." (at 966-7)

(See also *Sonfred (Pty) Ltd v Papert* 1962 (2) SA 140 (W) at 143H.)

[13] Where the claim for provisional sentence is founded on a bill of exchange payable on demand, such as a cheque, the provisions of the Act apply. In terms of section 1 of the Act a cheque is defined as *"a bill (of exchange) drawn on a*

bank payable on demand". Section 2 defines a bill of exchange as *"an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to a specified person or his order, or to bearer".*

[14] The defendant admitted his signature on the cheque. The plaintiff alleged in the summons that he was the holder in due course in respect of the cheque and that the defendant was liable to the plaintiff on the cheque. I think that was sufficient to constitute the plaintiff's cause of action and to discharge the plaintiff's *onus* in terms of the provisional sentence procedure. On the other hand, by admitting his signature on the cheque the defendant thereby admitted his unconditional indebtedness to the plaintiff to the extent of the amount reflected therein, namely, the sum of R200 000,00. (See section 28(1) of the Act.) In the circumstances, the defendant bore the *onus* to satisfy the Court that the probabilities in the principal case were in the defendant's favour as against the plaintiff. In *Sonfred's case (supra)* the Court stated:

> "In the great majority of the applications for provisional sentence which come before our Courts, when the matter of defence is raised, *van der Linden's* rule comes into operation, and provisional sentence is granted unless the defendant shows by his affidavits that on a preponderance of probabilities he is likely to succeed in the principal case." (at 143G).

[15] It has been held that the *onus* on the defendant must be a 'substantial' one. In *Jones v .John Barr & Co (Pty) Ltd and Another* 1967 (3) SA 292 (WLD) the Court stated:

> "The *onus* of proof here rests upon the defendants to show, in a preponderance of probability, that they will succeed in the principal case. Mr *Nestadt* submitted that, since this is a provisional sentence case, the preponderance of probability must be substantial. That submission is correct on what is required to tip the scales of probability, but I do not understand the *onus* in provisional sentence cases to be any different in principle from that in other civil cases. In all civil cases the preponderance of probability required to shift the *onus* must be substantial, and must not depend merely on conjecture or on a slight probability. See *Morris and Berman v Cowan* (2), 1940 SLD 33, and the authorities cited at pp. 35-36. In provisional sentence cases, where the plaintiff is armed with a

> written admission of liability signed by or on behalf of the defendant, he has a strong case in his favour, and correspondingly stronger evidence is therefore required by the defendant to discharge the *onus* of proof. *Ibid loc cit,* and *Ternant v Lamb* 1947 (2) SA 659 (W) at pp. 660-1. These principles are not affected, in actions for provisional sentence on a bill of exchange, by sec. 28 (2) of the Bills of Exchange Act, 34 of 1964. If the defendant in such a case wishes to raise fraud or illegality as an answer to his liability on such bill, he must prove it on the balance of probability, to the same extent as in any other civil case. *Nelson v Marich* 1952 (3) SA 140 (AD)." (at 298A-E)

[16] The defendant would be entitled to take an objection *in limine* on the ground of non-compliance with the rules or the law even if his opposing affidavit had set out a defence based exclusively on the merits of the matter because the filing of an affidavit on the merits did not constitute a waiver of the defendant's right to take a technical objection. (*Bowfam Leasing Pty) Ltd t/a Metropole Finance Pty Ltd v Muller* 1982 (2) SA759 (C) at 761F-G). In my view, however, sheer speculation, suspicion or unsubstantiated allegations (however strong and serious these may appear) shall not tip the scale in favour of the defendant in terms of discharging the *onus* on the defendant.

[17] Indeed, some very serious allegations were made by the defendant against the plaintiff, the plaintiff's attorneys (Shaukut Karim & Company), Zaheeda Ahmed and Farouk Ahmed in an attempt to establish that the probabilities in the principal case were against the plaintiff. It is apposite, in my view, to refer comprehensively to the defendant's opposing affidavit on this point:

> "6.7 After taking possession of the items purchased in terms of the agreement, I was informed by ABSA Bank Asset Finance that some of the items listed in the agreement are subject to an instalment sale agreement where ABSA Bank was the credit provider and that amounts were still outstanding in respect thereof;
>
> 6.8 Annexed hereto, marked "FK2", is a list of the items in respect of which ownership vests in ABSA Bank and not KZN Petroleum;

6.9 KZN Petroleum (acting through Farouk Ahmed and his wife) did not disclose the existence of the instalment sale agreements and ABSA Bank's entitlement to the purchaser or myself;

6.10 After some investigation, I also established that fixtures and fittings purchased by KZN Petroleum from an entity known as Shelving Master, also still belong to Shelving Master and not KZN Petroleum. Apparently, KZN Petroleum still owed approximately R250 000,00 to Shelving Master;

6.11 It became apparent that KZN Petroleum misrepresented material facts to me, acting on behalf of the purchaser. I immediately informed my bank, First National Bank, to stop payment of the cheque, being the second payment due in terms of the agreement;

6.12 In addition, I also contacted Farouk Ahmed and confronted him with the title of ABSA Bank and Shelving Master and that KZN Petroleum could never have passed ownership of certain items to the purchaser as a result thereof;

6.13 I clearly informed Farouk Ahmed that I instructed my bank to stop payment of the cheque and told him not to present the cheque for payment or have any dealings with the cheque and the remaining cheques in his possession, pending a mutually acceptable resolution of the ownership issue of the items purchased;

6.14 On the same occasion, I also spoke to Zaheeda Banu Ahmed and informed her that payment of the cheque had been stopped and that there should be no dealings of any nature with any of the post-dated cheques provided in terms of the agreement. Naturally, I also expressed my concern regarding the ownership issue to Zaheeda Banu Ahmed;

6.15 Both Mr and Mrs Ahmed agreed to and assured me that they would have no dealings at all with any of the cheques presented in terms of the agreement.

7. KZN Petroleum was placed in voluntary liquidation on 1 July 2008. At this point in time I am not in possession of the documents submitted on behalf of KZN Petroleum to secure its winding-up.

8. My attorneys established that the Plaintiff's attorneys in this matter, Shaukut Karim & Company acted as attorneys of record for KZN Petroleum to secure its winding-up. As proof thereof, I annex hereto the confirmatory affidavit of Mrs Thea Kilian of Stan Fanaroff & Associates, marked as "FK3".

9. I annex hereto a CIPRO company search marked as "FK4" evidencing, *inter alia*, that:
   9.1 Zaheeda Banu Ahmed is the sole member of KZN Petroleum;
   9.2 KZN Petroleum was wound up on 1 July 2008.

10. Zaheeda Banu Ahmed must have taken steps to secure the voluntary liquidation of KZN Petroleum some time prior to 1 July 2008.

THE CHEQUE

11. On the face of it, the cheque became due on Monday, 30 June 2008 and became overdue on Tuesday, 1 July 2008 in terms of section 12 of the Bills Act.

12. On 2 July 2008, Zaheeda Banu Ahmed endorsed and negotiated the cheque. This much is evident from the reverse of the cheque where the date "02 July 2008" appears in manuscript in the left top hand corner thereof.

13. As the sole member of KZN Petroleum, Zaheeda Banu Ahmed negotiated the cheque *after* the liquidation of KZN Petroleum on 1 July 2008. Upon liquidation of KZN Petroleum, its sole member ceased to be its member, functionally, officially and nominally, her powers and duties terminated and she was deprived of all control of KZN Petroleum's property.

14. In the event of Zaheeda Banu Ahmed negotiating the cheque prior to 2 July 2008, then and in such an event, she knew that KZN Petroleum would be wound up and the negotiation of the cheque was done in a dishonest manner with the intent of divesting KZN Petroleum of its property.

15. As the cheque was overdue at the time when it was negotiated by Zaheeda Banu Ahmed, it could only be negotiated subject to her defect in title.

16. Zaheeda Banu Ahmed negotiated the cheque in favour of the Plaintiff's attorneys, Shaukut Karim & Company or bearer. As stated above, attorneys Shaukut Karim & Company assisted Zaheeda Banu Ahmed in securing the voluntary winding-up of KZN Petroleum.

17. At the time when the cheque was negotiated, as aforesaid:

    17.1 It was already overdue;

    17.2 KZN Petroleum was already in liquidation and Zaheeda Banu Ahmed was divested of her powers as member of KZN Petroleum;

    17.3 Zaheeda Banu Ahmed knew that payment of the cheque was stopped by me;

    17.4 Shaukut Karim & Company knew that KZN Petroleum was wound up and, as such, that Zaheeda Banu Ahmed had no title to negotiate the cheque;

    17.5 Shaukut Karim & Company could never have become the holder of the cheque for value. Should the cheque have been negotiated

> to the said attorneys as a result of a claim which they may have for legal costs against KZN Petroleum, then the negotiation of the cheque amounted to the disposition of property, alternatively a voidable and undue preference as envisaged by the Insolvency Act.
>
> 18. The Plaintiff has failed to make any allegation of how he became the alleged holder in due course. He failed to deal with the fact that his attorneys, Shaukut Karim & Company, apparently became the holder of the cheque prior to him. He failed to allege that he took the cheque for value.
>
> 19. The endorsement recorded on the reverse of the cheque seeks to negotiate the cheque to either Shaukut Karim & Company or bearer. Thus, the Plaintiff obtained the cheque from either Zaheeda Banu Ahmed or attorneys Shaukut Karim & Company. Should the Plaintiff have obtained the cheque from Zaheeda Banu Ahmed for value, I respectfully say that the negotiation to the Plaintiff in those circumstances amounts to a disposition of property of KZN Petroleum or a voidable and undue preference. ….
>
> 23. I respectfully say that the aforesaid history and chronology evidences the fact that:
>
> 23.1 Zaheeda Banu Ahmed dishonestly and illegally negotiated the cheque to the Plaintiff's attorneys or to the Plaintiff at a time when she was no longer vested with any powers, as member of KZN Petroleum, to do so;
>
> 23.2 Zaheeda Banu Ahmed attempted to prefer one creditor of the insolvent KZN Petroleum above others. I assume that the Plaintiff's attorneys and/or the Plaintiff is a creditor of KZN Petroleum;
>
> 23.3 *Prima facie,* there seems to be dishonest collusion between Zaheeda Banu Ahmed and the Plaintiff. The fact that attorneys Shaukut Karim & Company secured the liquidation of KZN Petroleum, appears as the indorsee of the reverse of the cheque and now acts for the Plaintiff in this action, also raises more questions than answers;
>
> 23.4 The negotiation of the cheque, after liquidation, amounts to the disposition of the property of KZN Petroleum and is void. After negotiation of the cheque, KZN Petroleum had clearly already been unable to pay its debts".

[18] During argument *Mr Voormolen* withdrew the defendant's contention that the cheque was "overdue" at the time the plaintiff became the holder thereof. Therefore, no further reference to this particular issue will be made hereafter.

[19] In terms of section 27 of the Act a "holder in due course" is defined as follows:

> "**27. Holder in due course.** – (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances, namely –
> (a) he must have become the holder of it before it was overdue, and if it had previously been dishonoured, without notice thereof; and
> (b) he must have taken the bill in good faith and for value, and at the time the bill was negotiated to him, he must have had no notice of any defect in the title of the person who negotiated it.
> (2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act if he obtained the bill, or the acceptance thereof, by fraud or other unlawful means, or for an illegal consideration, and is deemed to have been so defective if he negotiates the bill in breach of faith, or under such circumstances as amount to fraud.
> (3) A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder".

Section 28 provides:

> ***"*Presumption as to value and good faith.** – (1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.
> (2) Every holder of a bill is prima facie deemed to be a holder in due course: Provided that if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation, of the bill is affected with fraud or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill."

And section 62:

> "**Effect of alteration of bill or acceprance** (1) If a bill or an acceptance is materially altered the liability of all parties who were parties to the bill at the date of alteration and who did not assent to it, must be regarded as if the alteration had not been made, but any party who has himself made, authorized or assented to the alteration, and all subsequent indorsers are liable on the bill as altered.
>
> (2) For the purpose of subsection (1) material alterations include any alteration of the date, the sum payable, the time of payment and the place of payment, and, if a bill has been accepted generally, the addition of a place of payment without the acceptor' assent".

[20] The meaning of the phrase *"taking the cheque in good faith and without notice of any defects in the transferor's title"* was articulated by the learned authors *Sharrock and Kidd* in *Understanding Cheque Law*, First Edition (1993) at 138-139 in part as follows:

> "A thing is deemed to be done in good faith, within the meaning of the Act, if it is in fact done honestly, whether or not it is done negligently. The inquiry, therefore, relates to the state of mind of the person taking the instrument, not that of a reasonable man in his position. The transferee is in bad faith if he knew that something was amiss, or if he suspected as much and deliberately refrained from making inquiries, ie chose to remain ignorant. On the other hand, he is in good faith if he neither knew nor suspected that there was something wrong, even if his suspicions ought reasonably to have been aroused. <u>The doctrine of constructive notice, according to which a person is deemed to have knowledge of facts if a reasonable man would have made inquiries and ascertained them, does not apply.</u> In each case the question of what the transferee's state of mind was when he took the instrument is one of fact, to be determined by considering the circumstances known to him at the time.
> The transferee must be without notice of any defect in title both at the time the cheque is negotiated to him, ie when he becomes holder, and at the time he gives value for the cheque." (underlined for emphasis)

[21] It was evident that most of what the defendant alleged in relation to his attack on the cheque was not within his own personal knowledge. For instance, the defendant was not present when the cheque was negotiated to the plaintiff. Therefore, it was not within the defendant's personal capacity to make any assertion as to when, where, how and by whom the cheque was negotiated to the plaintiff. This was probably the reason why, at some point, the defendant alleged that "*the Plaintiff obtained the cheque from either Zaheeda Banu Ahmed or attorneys Shaukut Karim & Company*" *(paragraph 19 of defendant's opposing affidavit).* This was obviously sheer guesswork on the defendant's part.

[22] The defendant also alleged that the cheque was not *"complete and regular on the face of it"* as required under the Act. In *Melamed Finance v VOC Investments* [2006] SCA 75 (RSA), yet unreported, the Supreme Court of Appeal stated, in part:

"6. The obligations of a debtor liable on a bill to an immediate part arise also from the transaction pursuant to which the bill was delivered. All disagreements arising from such a transaction may be aired when the debtor is sued by the holder of the bill. The holder in due course is above and beyond all such disputes. He may be met only by the so-called absolute defences, those that go to the root of the bill's validity. But since an earlier party to the bill may be deprived of a defence, the immunity of a holder in due course comes at a price. For one thing, the bill must be 'complete an regular on the face of it'. The expression 'on the face of it' means 'as far as one can tell by looking at the front and back of it'.

7. ….

8. Two types of irregularity occur in bills: irregular endorsements and material alterations. They are not treated by the law in the same way. An endorsement is considered to be irregular when its form is such as to reasonably put the holder on enquiry. In *Estate Ismail v Barclays Bank (DC & O)* 1957 (4) SA 17 (T) Ramsbottom J explained that it was for assessing the regularity of an endorsement (and not of a material alteration) that Denning LJ in *Arab Bank Ltd v Ross* (1952) 1 All ER 709 (CA) 716A-B put forward the following test:

'When is an indorsement irregular? The answer is, I think, that it is irregular whenever it is such as to give rise to doubt whether it is the indorsement of the named payee. A bill of exchange is like currency. It should be above suspicion. But if it is asked: When does an indorsement give rise to doubt?, then I would say that is a practical question which is, as a rule, better answered by a banker than a lawyer.'

9. An alteration need not give rise to suspicion before it leads to the irregularity of a bill. It need only be apparent and material. An apparent alteration is one that appears from such an inspection of the bill as might be expected from one who is accustomed to handling bills but that is not an issue in this case: The alterations to the cheques were patent and were in fact immediately noticed by the person who took them on behalf of the appellant. The validity of the cheques was unaffected by the alterations to the dates, but that is irrelevant. Validity and regularity are different concepts, as Denning LJ explains in *Arab Bank v Ross*. A bill could be valid but irregular, or invalid but nevertheless regular."

[23] In his heads of argument *Mr Voormolen* referred to the reverse side of the cheque and pointed out the following:

"(a) In the left hand top corner, contains an illegible manuscript impression (partly obscured by printed numbers);

(b) Has the date '2 July 2008' entered twice in the top left hand corner in manuscript;

(c) Has, below the above, the words 'impressed cancelled … (illegible)' (apparently as part of an impression made by a bank with an endorsement thereunder);

(d) On the right hand side has the words 'Shaukut Karim & Company or bearer' in manuscript;
(e) Is endorsed below the above inscription.

[24] Mr Voormolen argued that the manuscript insertion of the date "02 July 2008" on the reverse side of the cheque was not explained. In this regard he suggested that this insertion was an apparent alteration of the date and that in the decision of *Estate Ismail v Barclays Bank (DC & O)* 1957 (4) SA 17 (T) an apparent alteration of the date of the cheque was a material alteration which prevented the cheque from being regular on the face of it and that accordingly the holder thereof could not qualify as a holder in due course as envisaged under the Act.

[25] In *Estate Ismail, supra,* the Court was dealing with section 62 of the Transvaal Proclamation 11 of 1902 but the wording whereof differed very slightly with the provisions of section 62 of the Act. Ramsbottom J, in a *dictum*, stated:

> "It is true that section 62(2) does not give a general definition of the words 'material alteration', but it specifies certain alterations which are material, including 'any alteration of the date', and I am unable to understand how an alteration which is material for the purpose of sec 62(1) can be non-material for the purposes of sec 27(1)".

[26] However, in my view, the facts in *Estate Ismail* are distinguished. In that case there was actual alteration of the date from 23 November to 28 November, the alteration having been effected by changing the figure 3 to 8 without signing the alteration. In the present case there was no alteration of any date at all, apparent or patent. On its face the cheque was dated 30 June 2008 and, according to the plaintiff's incontrovertible contention, the cheque was negotiated to the plaintiff on 21 May 2008. The contention was incontrovertible because it was common cause that the defendant was not present when the cheque was negotiated to the plaintiff nor could the defendant produce proof to support his

allegation that the negotiation of the cheque to the plaintiff took place on 2 July 2008. Therefore the plaintiff's assertion in this regard remained unassailed.

[27] It was also noted that the date "*2 July 2008*" on the reverse side of the cheque was preceded by the words (also in manuscript): "*For stamp dated ….*". These words tend to give me the impression that this particular inscription was made by some person (whether a bank official or not) who possibly sought to be affixed on the cheque a certain stamp with the date 2 July 2008, for whatever reason that was the case. The position is both unclear and uncertain. However, what appeared clear and certain to me was that the inscriptions and impressions on the reverse side of the cheque which *Mr Voormolen* took issue with did not constitute a material alteration of the cheque, nor did they render the cheque not "*complete and regular on the face of it*". Hence, the plaintiff's assumption of the status of a holder in due course and for value in respect of the cheque was not affected thereby.

[28] The fact that there were some discrepancies in the plaintiff's version (in a provisional sentence matter) did not necessarily strengthen the defendant's case or serve to discharge the *onus* on the defendant. In *Abraham v Du Plessis* 1962 (3) SA 162 (T) the Court stated, in part:

> "On the other hand there are some unsatisfactory features in the plaintiff's version too. For example, it is not clear why, according to the plaintiff's story, the uncle would have given him the note for R1,100 when he merely owed about R900 and the plaintiff was apparently not pressing him for payment. Moreover, the account between the plaintiff and the uncle, annexure A, was disputed by the latter, but the plaintiff did not support it in any way by vouchers. The whole issue resolves itself into the relative credibility of the plaintiff and the uncle. On the affidavits the defendant has, in my opinion, not shown a substantial probability that the uncle's evidence will be believed and the plaintiff's version will be rejected; on the contrary, there would seem to be some probability that the plaintiff's version will be preferred, but at best for the defendant it can be said that the probabilities of success appear to be equally balanced. In the latter event, provisional sentence must nevertheless be granted, especially as the onus of proving his defence at the trial will rest upon the defendant. (*Allied Holdings Ltd v Myerson* 1948 (2) SA 961 (W)". (at 169C-F)

[29] On the face of it there may as well have been some discrepancy in the plaintiff's version. The plaintiff alleged that he gave value for the four cheques aforesaid in that there were pre-existing debts due to him by KZN Petroleum arising from three cheques drawn by the plaintiff on 23 April 2008, 5 May 2008 and 26 June 2008 for the amounts of R50 000, R196 000 and R500 000 respectively, in favour of Reunion Cash & Carry. According to the plaintiff, Reunion Cash & Carry was the payee designated by KZN Petroleum. Copies of the three cheques were attached to the plaintiff's replying affidavit. Indeed, it was obvious that the total amount was R746 000 in respect of the three cheques drawn by the plaintiff in favour of Reunion Cash & Carry as opposed to the total amount of R800 000 in respect of the four cheques which the plaintiff in turn received to discharge the aforesaid alleged pre-existing debt. In explaining this discrepancy the plaintiff stated: *"The difference, of course, constitutes the discounting charges" (paragraph 9.2 of the plaintiff's replying affidavit).* In his heads of argument *Mr Voormolen* took issue with this explanation, raising some concerns that there was a question mark over the need to 'discount' the cheques, including annexure "A" (the cheque in question), given regard to the following observations:

> "(a) The dates of the cheques;
> (b) The date of the underlying transaction (the sale by KZN Petroleum of its assets);
> (c) The date KZN Petroleum was wound up (1 July 2008)".

[30] One needed to be mindful about the fact that this case was only about annexure "A" to the provisional sentence summons, namely the cheque dated 30 June 2008 for the sum of R200 000. I am not dealing here with the other three post-dated cheques for the total sum of R600 000. Hence, my focus and consideration should and is given only to the cheque in question, separate and independent from the other three. On this basis I am unable to find any

substance in the abovementioned concerns raised on behalf of the defendant. In provisional sentence proceedings the plaintiff did not have to go to the extent of furnishing the fine details of his case against the defendant. As stated earlier, the fact that there may appear on the papers to be some discrepancies in the plaintiff's version did not *per se* entitle the defendant to the refusal of the provisional sentence. In other words, such discrepancy alone did not help to discharge the *onus* on the defendant. After all, this was only a credibility issue which could possibly have the effect of evenly balancing the probabilities of success in the principal case as between the parties. As pointed out earlier, such a scenario would still entitle the plaintiff to the provisional sentence. (*Allied Holdings Ltd v Myerson, supra,* at 966-7*).* The granting of provisional sentence was only a provisional remedy for the plaintiff and not the end of the matter for the defendant, subject of course to the provisional sentence *ipso facto* becoming a final judgment in the circumstances indicated under subrule (11) of rule 8. Indeed. where it was not possible for a defendant to establish on affidavit that the probabilities in the principal case were in his or her favour such defendant needed only to wait until after the provisional sentence was granted and then enter the principal case as provided for in subrules (10) and (11). (*Allied Building Society v Wolmarans* 1976 (2) SA 782 (O) at 783E-F).

[31] The defendant's allegation that "*[p]rima facie, there seems to be dishonest collusion between Zaheeda Banu Ahmed and the Plaintiff*" was also not supported by evidence but only by suspicion and speculation on the part of the defendant. When the plaintiff received the four cheques from Farouk Ahmed it was some time before KZN Petroleum was placed under voluntary liquidation on 1 July 2008. The fact (1) that the pre-existing debt aforesaid totaled R746 000 as against R800 000 being the total amount of the four cheques and (2) that the plaintiff's attorney was also involved in the processing of the application for the voluntary liquidation of KZN Petroleum did not, in my view, affect the genuineness and the legality of the negotiation of the cheques, in particular the

cheque in question, by Farouk Ahmed to the plaintiff on 21 May 2008. There was no evidence that the plaintiff's attorney's involvement with the said liquidation process preceded the negotiation of the cheques to the plaintiff, or that the plaintiff was aware of the impending liquidation of KZN Petroleum. In my view, the "substantial" *onus* contemplated in *Jones v John Barr (supra)* meant, in the present case, that the defendant would have to show, on a balance of probabilities, among other things, that the plaintiff was or became aware, as at the time when he received the cheque, of the liquidation process aforesaid in order to exclude the plaintiff's *bona fides* in relation to his status as a holder in due course in terms of section 27 of the Act. To my mind, the defendant has not produced such evidence. Particularly significant, the defendant did not allege, specifically or otherwise, in what way the plaintiff was involved in any of the alleged or suspected fraudulent or dishonest activities involving the movement of the cheque. (*See paragraph 23 of the defendant's opposing affidavit, referred to above.*)

[32] In paragraphs 6.7 and 6.8 of his opposing affidavit the defendant alleged that after taking possession of the items he "*was informed by ABSA Bank Asset Finance that some of the items listed in the agreement are subject to an instalment sale agreement where ABSA Bank was the credit provider and the amounts were still outstanding in respect thereof*". The defendant proceeded and attached to his opposing affidavit (as Annexure "FK2") the list of the items in respect of which ownership allegedly still vested in ABSA Bank and not to KZN Petroleum.

[33] It appeared that Annexure "FK2" was an undated invoice issued by an entity known as *Italian Jobs Electronics* being in respect of the "CCTV Installation" at Wyebank Service Station. The invoice set out the various CCTV cameras and associated accessories which were installed on the premises. The total invoice amount was apparently R184 795 (the figure was not quite legible

but this was not relevant). The following observations could be made of Annexure "FK2" on which the defendant relied in this regard.

33.1 The involvement of ABSA Bank as a financier for the installation aforesaid was simply hearsay in the absence of any confirmation from ABSA Bank in this regard. It could not be said that the defendant's allegation in this regard was confirmed by Annexure "NA1" to Nafis Ahmed's affidavit (the letter dated 25 April 2008 from First City Finance (Pty) Ltd) which was filed only afterwards and, in any event, Annexure "NA1" appeared to deal with items not entirely the same as those listed in Annexure "FK2" to the defendant's opposing affidavit.

33.2 The mere production of this invoice was no proof that the installation was undertaken on credit or, if it was, that the debt owing was not subsequently paid.

33.3 Absent the reflection of any date in the invoice it was unknown (*ex facie* the invoice) both when the installation was done and when the invoice was issued.

33.4 In any event, of some 34 items listed in Annexure "A" to the underlying transaction between KZN Petroleum and Farzeen Property Investments (the agreement) the "CCTV cameras" (*per* Annexure "FK2") were only one item.

[34] Besides, Farouk Ahmed, in his affidavit (referred to above) stated that the defendant was aware of certain items which had been held subject to a credit agreement and explained how it was arranged between the parties (himself and the defendant) the manner the outstanding debt would be paid, which included the reduction of the purchase price of the items (*per* Annexure "A" to the agreement) from R1 316 776,41 to only R1 million, for which the defendant was liable for the difference.

[35] The decision in *Fairthorn's case (supra)* ,referred to by *Mr Voormolen*, was in my view, distinguished from this case. In the first place, *Fairthorn's case* involved a trial and not provisional sentence. The two proceedings were vastly different, both substantively and procedurally. Provisional sentence offered a provisional remedy (subject to it *ipso facto* becoming a final judgment in terms of subrule (11) as discussed above) whereas a trial contemplated final relief at the outset. Provisional sentence was, generally, dealt with on paper as in a motion application, whereas a trial generally involved oral evidence throughout the proceedings. Provisional sentence was, so to speak, a precursor to a trial – referred to in rule 8 as "*the principal case*". As indicated elsewhere in this judgment the incidence of *onus* on the parties also did not operate in precisely the same way. Indeed, the ultimate relief sought (by the plaintiff) was the same in either instance but the proceedings and procedure were still not the same.

[36] In *Fairthorn's case* the facts were summarised as follows: The appellant was the plaintiff in an action for payment of two cheques of which it alleged that it was the holder in due course. The cheques were for R200 and R500 respectively; each was drawn by the respondent on the South African Bank of Athens Ltd, was dated 8 May 1972 and was payable to "cash or bearer". They were presented for payment at the named bank but were dishonoured, the respondent having stopped payment. The cheques were used to buy tokens or "chips" which were in turn used for gambling purposes at a club. The Court referred, with approval, to the decision in *Joffe v Goldstein* 1942 WLD 183 in relation to the meaning of the word "*illegality*" as envisaged in the predecessor to the current section 28(2) of the Act, and stated:

> "In *Joffe v Goldstein* 1942 WLD 183, it was held by Murray J that the word "illegality" in sec. 28(2) of Proc. 11 of 1902 (T) covers the case of a bill given in payment of a gambling debt, although such a debt arises from a transaction which is not illegal in the sense of being forbidden by law but is, by common law, merely unenforceable *inter partes*.
> "Some years later, in *Geysdorp Trading Co v Nathym (Pty) Ltd* 1954 (2) SA 575 (T) at p. 577, Murray J (with whom Hill AJ concurred) said, after his attention had been drawn in argument to the judgments in *Estate Wege v Strauss* 1932 AD 76 and *Gibson v Van der Walt* 1952 (1) SA 262 (AD):

> 'I have no reason at the moment for altering the opinion expressed by me in *Joffe v Goldstein* … that, although gambling may not be criminal and the most that can be said of gambling debts is that they are unenforceable at law, there is illegality in its issue within the meaning of sec. 28 (2).'
>
> It has on more than one occasion been unsuccessfully contended that the decision in *Joffe v Goldstein* on that point was wrong."

The Court proceeded:

> "In this appeal, it was not contended, nor even remotely suggested, that the decision in *Joffe v Goldstein* was wrong and should not be followed."

[37] In conclusion, the Court found (in *Fairthorn's case*) that the appellant/plaintiff had failed to prove that it received the two cheques in good faith and without notice of their illegality, hence the appeal was dismissed with costs. In the present case there was no suggestion that the underlying transaction (the sale of the items between KZN Petroleum and Fazeen Property Investments) was affected by any illegality. Hence, in my view, *Fairthorn's* decision was distinguished.

[38] On the papers I am "provisionally satisfied" (*Harrowsmith v Ceres Flats, supra*) that the plaintiff has made out a case that he received the cheque from Farouk Ahmed on 21 May 2008 and for value in the manner the plaintiff explained, namely being in respect of a pre-existing debt owed by KZN Petroleum to the plaintiff, and that when he received the cheques he was not aware of any defect in title, if there was any, in the person who gave the cheque to him. As was stated by the learned authors *Sharrock and Kidd (supra),* the doctrine of constructive notice did not apply. There was no evidentiary challenge to the plaintiff's averment in this regard, save only speculative suggestions and unfounded, unsubstantiated and, indeed sometimes, somewhat derogatory allegations made by the defendant against the plaintiff and other persons who were involved with the cheque prior to its negotiation to the plaintiff, some of whom were only in the opinion or guesswork of the defendant so involved.

[39] In my judgment I find that the plaintiff was the holder in due course as envisaged in section 27(1) and was thus protected by the presumption in section 28(2) of the Act which the defendant failed to rebut. In the light of this finding it becomes unnecessary for me to deal with the defendant's allegation that KZN Petroleum's conduct amounted to a disposition of property, alternatively, avoidable and/or undue preference of one creditor above the others (as envisaged in section 8(c) of the Insolvency Act 24 of 1936).

[40] On the issue of costs, *Mr Tobias* submitted that these should be awarded against the defendant on an attorney and client scale, on the basis of the scandalous allegations of fraud, dishonesty and collusion the defendant levelled against the plaintiff and his attorney, as well as Zaheed Ahmed who actually played no role whatsoever in the whole affair. However, it seems to me that these allegations were only made by the defendant in his attempt to satisfy the Court (as was required of him) that the plaintiff did not take the cheque in good faith and for value and that at the time the plaintiff took the cheque he was aware of the defect in title on the part of the person who gave the cheque to him. The allegations, it seems to me, were only intended to serve as part of the defendant's motivation in that regard. In any event, it would appear that *Mr Voormolen* did not persist with some of these allegations during argument. The award of costs on party and party tariff would therefore be appropriate. On the issue of interest, I note that there was no challenge to the plaintiff's claim in this regard. However, in fairness to the defendant, the award of interest ought to be reckoned as from the date of judgment to the date of payment.

[41] Accordingly, provisional sentence is granted in terms of paragraphs (a), (b) and (c) of the provisional sentence summons, save that the interest at 15.5% per annum shall be calculated as from the date of judgment to the date of payment.

Application heard on :	24 October 2008
Counsel for the plaintiff :	Mr D G Tobias
Instructed by :	Shaukat Karim & Company
Counsel for the defendant :	Mr A V Voormolen
Instructed by :	Stan Fanaroff & Associates
Judgment handed down on :	17 July 2009