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LL Case No 592/1987

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MANUEL DA COSTA DE ATOUGUIA Appellant

and

EDUARDO FERNANDES BRAZ Respondent

CORAM: VAN HEERDEN, E.M. GROSSKOPF, NESTADT, VIVIER JJA et NICHOLAS AJA

HEARD: 2 MARCH 1989

DELIVERED: 9 MARCH 1989

JUDGMENT

VAN HEERDEN JA:

The respondent ("the plaintiff") instituted provisional sentence proceedings against the appellant in the Witwatersrand Local Divison. The plaintiff preferred nine claims, only seven of which are material to this appeal. Those claims were based on seven cheques. On its face, each cheque was drawn by the defendant in favour of the plaintiff as payee for an amount of R12 000. The first was dated 1 April 1986 and the dates of the remaining six cheques were the first day of the succeeding six months. On presentment the cheques were dishonoured, the defendant having countermanded payment.

In his answering affidavit the defendant alleged that during 1981 he was indebted to the plaintiff in an amount of R270 000. In June of that year he signed an acknowledgment of debt reflecting this indebtedness ("the first document"). The material part thereof provided as follows:

"I, the undersigned,

MANUEL DA COSTA DE ATOUGUIA

do hereby acknowledge that I am lawfully and legally indebted to

EDUARDO FERNANDES BRAZ

in the amount of R270 000-00 being monies lent to me on my special instance and request.

I herewith acknowledge receipt of the said amount and renounce the legal exceptions known as **non causa debiti** and **non numeratae pecuniae** which I herewith acknowledge that I understand.

I herewith acknowledge that the said amount bears interest at the rate of 12 per annum, calculated annually in advance on the reducing balance as from year to year.

The said amount is to be paid in monthly instalments of R12 000 per month, the first instalment being due and payable on the 1st day of 1/7/83 and thereafter monthly on the 1st day of each and every succeeding month."

Of particular importance is para 5 of the answering affidavit. It reads as follows:

"Pursuant thereto and in repayment of the monthly instalments due in terms of the acknowledgement of debt, I handed to the Plaintiff a cheque book containing 40 cheques. Each of the cheques contained

> therein was signed by me in blank and the Plaintiff undertook to complete same by inserting the dates and the amounts of the instalments."

Further salient allegations in the answering affidavit may be thus summarised:

1) Thirty three cheques, each for the amount of R12 000 and completed by the plaintiff, were met during the period 1 July 1983 to 1 March 1986.

2) Towards the end of March 1986 a dispute arose between the parties. The defendant contended that the amount of R270 000 plus interest at the rate of 12% per annum had been paid in full. The plaintiff, however, denied that the applicable rate of interest was 12% per annum. He relied upon an acknowledgement of debt ("the second document"), signed by the defendant which was in all respects identical to the first document save that where the figure "12" appeared in the latter document immediately before the words "per annum" the word "bank" was inserted.

3) When the defendant signed the first document the figure "12" appeared on it. This was intended as 12%. However, the plaintiff asked the defendant to sign an identical document in which the rate of interest was to be left blank. He explained that he needed the second document "to show to the Receiver of Revenue". The defendant did not understand this explanation but since he had a "very great respect" for the plaintiff he complied therewith.

4) During the course of the discussion which took place towards the end of March 1986 the defendant accused the plaintiff of having inserted the word "bank" in the second document after it had been signed by the former and without authority to do so. The plaintiff insisted, however, that he was entitled to interest at bank rate.

5) Because he believed that the full indebtedness had been extinguished the defendant stopped payment of the seven cheques in issue, but

subsequent to the service of the provisional sentence summons he recalculated the amount owing in terms of the first document and ascertained that a balance of R10 702,08 remained owing. Even if the plaintiff were entitled to compound interest (which was denied) the amount would be R22 865,86. (The former amount was paid into Court.)

As was to be expected, the plaintiff disputed the above version. In the replying affidavit he made the following material allegations:

(a) As at 31 May 1981 the defendant owed the plaintiff the sum of R470 000. It was then agreed that the said sum would be divided into the amounts of R200 000 and R270 000, that they would be payable in instalments and that the rate of interest payable by the defendant would be 12% per annum in respect of the first amount and, in regard to the second amount, the same rate of interest that the plaintiff was being charged by the Bank of Lisbon on his overdraft. (At

that time the applicable rate was 18% per annum on daily balances.) It was also agreed that the defendant would furnish the plaintiff with an acknowledgement of debt in respect of the amount of R270 000. (It is unnecessary to set out the plaintiff's version of the arrangements relating to the amount of R200 000.)

(b) On or about 1 June 1981 at his office the defendant handed to the plaintiff the second document signed by him. At that stage the rate of interest was left blank. Subsequently the plaintiff wrote in the word "bank" since this insertion accorded with the parties' prior agreement. At no stage did the plaintiff make mention of the Receiver of Revenue.

(c) The figure "12" was not inserted in any document which was given or shown to the plaintiff on that occasion. It was only after the first of the seven cheques had been dishonoured that the defendant

contended that the agreed rate of interest (in respect of the amount of R270 000) was 12% per annum. The defendant then for the first time produced the first document.

(d) Shortly after receipt of the second document the defendant handed to the plaintiff a book of forty cheques, each of which had been signed by him in blank; i e, the name of the payee, the date and the amount had not been filled in by him. It was agreed that the plaintiff would complete each cheque in his favour as payee for an amount of R12 000. In terms of the second document the first of these cheques was to be postdated to 1 July 1983 and the remaining cheques were to be made payable at monthly intervals. The plaintiff then completed the cheques in accordance with what had been agreed.

(e) It was not possible to calculate precisely how many cheques would be required to discharge the debt of R270 000 plus interest since it

was understood that the rate of interest charged by the Bank of Lisbon on the plaintiff's overdraft would fluctuate from time to time. It was therefore also agreed that after the last of the forty cheques had been met, further cheques would be furnished to the plaintiff by the defendant. But if the rate of interest had been fixed at 12%, it would have been possible to calculate in advance the total amount (inclusive of interest) to be paid by the defendant. And, if only simple interest was payable, a calculation made in advance would have shown that no more than 34 cheques, if duly paid, would extinguish the total indebtedness.

(f) On the basis that the rate of interest was to be the bank rate, as explained above, the sum still owing to the plaintiff by the defendant at 31 March 1987 was R217 132,21.

The first question considered by the court a quo concerned the incidence of the onus of proof.

That question was thus formulated by the court:

> "... who bears the onus, in these provisional sentence proceedings, of establishing, as between the plaintiff and the defendant, who are immediate parties to the cheques, that the cheques were completed in accordance with the true underlying agreement between the parties."

Having discussed conflicting authorities, the court held that if provisional sentence is claimed by inter alia the payee of a negotiable instrument and it is common cause that the instrument was not completed prior to its delivery to the payee, the onus rests on the drawer to show that the instrument was completed at variance with the true agreement between the parties. In support of this finding the court relied upon s 18 (2) of the Bills of Exchange Act (34 of 1964) which provides that if a bill of exchange is wanting in any material particular the person in possession of it has a prima facie authority to fill up the omission in question in any way he thinks fit.

The court then went on to consider the

further question whether the defendant had discharged the onus resting upon him. Its conclusion was that at best for the defendant the probabilities were evenly balanced. Hence provisional sentence was granted on inter alia the seven cheques in issue in this appeal.

Counsel for the plaintiff submitted that the first question, as formulated by the court a quo, does not arise in casu. In my view the submission is well-founded. The defendant did not allege that the cheques were completed at variance with what had been agreed upon by the parties. In particular he did not allege that the plaintiff had to wait until the due date of an instalment, or shortly before that date, to complete each cheque. Indeed, his only relevant assertion was that "the plaintiff undertook to complete same [i e each of the forty cheques contained in the book] by inserting the dates and the amounts of the instalments". This is precisely what the plaintiff did. He filled in each cheque for the agreed amount

of R12 000 and inserted the first day of July 1983 on the first cheque and the first day of each succeeding month on each of the remaining 39 cheques. He also inserted his name as payee, which he was plainly entitled to do.

The defendant did not rely on an express term that the cheques were only to be completed as instalments fell due. Nor can such a term be implied. It would indeed have been surprising had the parties contemplated that for a period of years blank cheques signed by the defendant would remain in possession of the plaintiff. Had the instruments been stolen, and had the thief, after completion of the cheques for amounts in excess of R12 000, negotiated them to a holder in due course, the defendant could clearly have been in an unenviable position.

Counsel for the defendant contended, however, that on the plaintiff's version the parties might have intended a completion of the instruments immediately

after the plaintiff obtained possession thereof. The plaintiff would then have been authorised, so the submission continued, to fill in as many cheques as would be required to extinguish the debt of R270 000 plus interest at 12% per year. Put differently, the plaintiff had to make a calculation of the total amount, inclusive of interest, payable if each instalment was paid on due date according to the first document, and to complete the number of cheques, each for an amount of R12 000 (or, in the case of the last cheque, for a lesser amount), which on presentment on due date would discharge the defendant's total indebtedness.

The first answer to this submission is that the defendant did not allege that the parties' agreement encompassed the rather involved term contended for by counsel. Here again there is no room for the implication of such a term. The parties could hardly have intended that a number of uncompleted

cheques (5 or 6, on the plaintiff's version, as it turned out) signed by the defendant would remain in the possession of the plaintiff for a number of years. On the other hand, the plaintiff could not have been expected to make the required calculation and tear up such instruments as would, according to the calculation, be redundant. After all, if the remaining cheques, or some of them, were not to be paid on due date, further mora interest would be payable.

In passing I may point out that when dealing with the probabilities in his heads of argument, counsel for the defendant submitted that it could not have been expected of the defendant to make involved calculations prior to handing over the incomplete instruments to the plaintiff. Yet, if the term under consideration is to be implied, the plaintiff would have had to make those very calculations shortly thereafter.

I may add that on the plaintiff's version it was anticipated that more than forty cheques would be required, and that the parties expressly agreed that further cheques would in due course be handed over to the plaintiff.

In the result this is not a case, even on the defendant's own version, of completion of inchoate instruments in conflict with the parties' underlying agreement. It appears to me that at best for the defendant the following is the true nature of the defence raised by him: although the plaintiff was authorised to complete each cheque for an amount of R12 000 and to make each payable at dates ranging from 1 July 1983 to 1 October 1986, it was impliedly agreed that should the defendant's indebtedness be extinguished prior to the latter date (39 months after 1 July 1983), no further cheques would be presented for payment. In the result there is no question of an unauthorised completion of inchoate instruments by the

plaintiff. Hence, when instituting the proceedings, he was armed with seven cheques regular and complete on the face of them and filled in according to the parties' underlying agreement. In order to avoid liability the defendant relied upon a condition dehors the instruments and the onus therefore clearly rested upon him to show that the plaintiff's presentment of the cheques for payment was at variance with their underlying agreement. (See e g Inglestone v Pereira 1939 WLD 55, 71.)

On the assumption that the plaintiff's completion of the cheques was not unauthorised, counsel for the defendant readily conceded that the onus rested upon the defendant. He also conceded, rightly in my view, that the defendant failed to discharge that onus.

The appeal is dismissed with costs.

H.J.O. VAN HEERDEN JA

E.M. GROSSKOPF JA
NESTADT JA
VIVIER JA
NICHOLAS AJA

CONCUR