Case No 61/93

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter of:

B & H ENGINEERING Appellant

and

FIRST NATIONAL BANK OF SA LTD Respondent

CORAM: BOTHA, E M GROSSKOPF, SMALBERGER, F H GROSSKOPF, VAN DEN HEEVER, JJA

HEARD : 22 September 1994

DELIVERED: 11 November 1994

J U D G M E N T

E M GROSSKOPF, JA

This judgment concerns the rights of a banker who mistakenly pays a cheque after the drawer has countermanded payment. The matter comes to us on appeal from a judgment of Preiss J in the Transvaal Provincial Division, reported as First National Bank of SA Ltd v B & H Engineering 1993 (2) SA 41 (T). For convenience I shall refer to the appellant as B & H or the payee, to the respondent as the Bank, and to Sapco (Pty) Ltd (the drawer of the cheque in issue) as Sapco or the drawer.

At this stage the facts are common cause. B & H and Sapco entered into a contract in terms of which B & H would manufacture certain goods for Sapco. B & H duly complied with its obligations and delivered the goods to Sapco. Sapco drew a cheque for R16 048 in favour of B & H on the Bank, with which it had an account. This cheque was delivered to B & H, and accepted by the latter, in payment of the contract price. It is conceded that Sapco owed the amount of the

cheque to B & H. Sapco countermanded payment of the cheque before it was presented for payment. It is common cause that the countermand was unjustified. Unaware of the countermand B & H presented the cheque through a collecting bank. The Bank, overlooking the countermand, paid the cheque. In doing so it acted bona fide but negligently. In terms of the banker/customer relationship the Bank was not entitled to debit the account of its customer, Sapco, because, as a result of the countermand, there was no proper authority from Sapco to make payment. The Bank accordingly suffered a loss of R16 048 which it sought to recover from B & H. Its action succeeded in the court a quo. The appeal is now before us, leave having been granted by the trial judge.

The Bank's claim is based on unjustified enrichment. In Natal Bank, Ltd v Roorda 1903 TH 298 the court suggested, in a similar case, that the appropriate common law remedy was the condictio

indebiti (at p 303). This was disapproved in Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C) at p 398 D-E and 400 C-D for the following reasons. A condictio indebiti lies to recover a payment made in the mistaken belief that there is a debt owing. However, a bank paying a cheque knows that it owes no debt to the payee. Its mistake lies, not in a belief that it owes money to the payee, but in a belief that it has a mandate from the drawer to make payment. In these circumstances the appropriate remedy is not the condictio indebiti but the condictio sine causa. This analysis of the two condictiones was followed in the court a quo (p 44 G-H). It also accords with views expressed by academic writers (see the articles quoted by the court a quo, ubi sup) and was accepted as well-founded (correctly, in my view) by both parties before us.

In Roman and Roman-Dutch law the expression condictio sine causa was apparently used in two senses.

In the first place it connoted an action which covered the same ground as three specialized condictiones, viz, the condictio indebiti, the condictio ob turpem vel iniustam causam and the condictio causa data causa non secuta. Later commentators called this the condictio sine causa generalis. Then the term condictio sine causa was used also for an action which was available in certain circumstances where none of the other condictiones could be instituted. This is the condictio sine causa specialis. See, generally, De Vos, Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg, 3rd ed, pp 29, 71; LAWSA vol 9, para 75.

It is not necessary to attempt a definition of the ambit covered by the condictio sine causa specialis. On the basis that this condictio applied in the present case, both parties rightly agreed that the Bank's claim against B & H was well-founded if:

1. B & H was enriched by receiving payment of the cheque, and,

2. Such enrichment was unjustified (i e, sine causa).

The first question then is whether B & H was enriched. The factual situation was that Sapco owed B & H R16 048 and handed it a cheque for that amount. The cheque was paid by the Bank. If this payment served to discharge Sapco's debt, B & H would have received payment of R16 048 but would have lost its claim for that amount against Sapco . B & H's net position would accordingly have remained the same. There would have been no enrichment. This was all common cause in argument. On the other hand, if the payment of the cheque did not serve to discharge the debt, B &H would have received payment of R16 048 while still retaining its claim against Sapco. Prima facie (subject to an argument advanced on behalf of B & H) it would then have been enriched.

The main point for decision in regard to the payee's enrichment is accordingly whether the payment

by the Bank discharged the drawer's debt. To decide this question one must have regard to the effect which the giving of the cheque had on the contractual relationship between the drawer and the payee.

It is trite law that a creditor, to whom a money debt is owing, may insist on strict compliance with his contract and demand payment in cash. However, payment by means of cheques and other negotiable instruments has became common in commercial practice and creditors normally agree to accept such payment. A number of legal rules have evolved to govern this development. In what follows I shall refer only to cheques, although most of the rules apply also to other instruments. In the first place a cheque may be intended to replace or novate the original debt. In such a case the original debt would fall away. The creditor would be limited to any claim which he may have on the instrument. This result would, however, seldom accord with the requirements of commercial practice or the expectations

of businessmen, and the law requires clear evidence of an intention to novate in such cases. The giving of a cheque is normally intended, not to novate the debt for which it was given, but to discharge it by payment. Since the creditor only receives his money under the cheque when the drawee bank pays it, commercial sense requires that the underlying debt should continue in existence until the creditor actually receives the money. On the other hand, the creditor, having accepted a cheque, must normally defer action on his antecedent debt to allow the cheque to be met. (See, generally, Gordon v Tarnow 1947 (3) SA 525 (A) at 540-1, Adams v SA Motor Industry Employers Association 1981 (3) SA 1189 (A) at 1199H-1200A.) If the cheque is dishonoured the creditor can take action against his debtor. In practice he would normally sue on the cheque, which would provide him with procedural and other advantages.

When a cheque is given, receipt of the money by the creditor is accordingly deferred until the cheque

is met. However, and again for practical reasons, it is not the payment of the cheque by the bank which is regarded as payment of the original debt, but the giving of the cheque, conditional on its being met in due course. This has the result that, when the cheque is met, payment of the original debt is regarded as having been made when the cheque was delivered. This is of course important where payment has to be made at a certain time.

The acceptance of cheques in payment of money debts is a relatively recent practice and our courts have followed the English law (see Wessels, Law of Contract, 2nd ed, vol 2, para 2227; Adams v S A Motor Industry Employers Association ubi sup). The basic rule was stated as follows in Cohen v Hale [1878] 3 QB 371 at p 373:

> "It is very true that a man who takes a cheque may be estopped from proceeding to enforce payment of the debt until presentment of the cheque, and if the cheque is ultimately paid the debt is extinguished."

Cohen v Hale was approved by Hathorn AJA in Gordon v Tarnow, ubi sup. See also Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A) at 693 G where Holmes JA said:

> "In general, payment by cheque is prima facie regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on presentation."

As will be noted from these two passages, the condition to which payment is subject, is stated as being that the cheque is "paid" or "honoured". There was some argument before us on whether these expressions are, in the context, synonymous. In my view this is a barren enquiry. Nothing can be gained from a linguistic analysis of dicta in judgments which did not deal with a dispute in which a possible distinction between honouring a cheque and paying one was relevant. In particular, none of these cases dealt with the effect of payment by a bank of a cheque in spite of a countermand. In my view this is a matter which falls to

be decided on principle.

The fundamental point is that we are dealing with a contractual relationship between the debtor and the creditor. In law the creditor is entitled to payment in cash but he agrees to accept a cheque. Of necessity this entails that there will be some delay (and, indeed, some uncertainty) in the creditor's receipt of the money, and the law regulates the respective rights of the parties to make provision for this. Once the creditor has received his money from the bank, however, the purpose of the agreement to accept a cheque has been achieved. The creditor has been paid. Why should it matter, as between debtor and creditor, what the arrangements were between the bank and the debtor, and whether the bank, has complied with these arrangements? Mr Serrurier, who appeared before us for the Bank, accepted that the answer to this question must be found in the agreement between the creditor and debtor when payment by cheque is agreed upon. This agreement, which

may be called a debt-extinguishing agreement, should, he contended, be construed as providing that payment by cheque would be conditional, not upon payment of the cheque per se, but upon the bank's honouring the drawer's order to pay the cheque, which order must exist at the time of payment. In other words, payment by the bank would only satisfy the condition if such payment was, at the time of payment, authorised by the debtor (drawer). If, as in the present case, there was a countermand before payment, the condition could accordingly not be satisfied, and payment by the bank could not extinguish the original debt.

The effect of Mr Serrurier's contention is that the agreement between the debtor (drawer) and the bank is superimposed on the debt-extinguishing agreement between the debtor and the creditor. The debtor is held to have paid the creditor only when the bank is entitled, as against the debtor, to pay the cheque for the debtor's account. No convincing reason is suggested

why the debt-extinguishing agreement should be so limited. The purpose of the law, as I have illustrated above, is to provide in a practical way for the problems which arise where payment is made by cheque rather than by cash. Looked at from the creditor's point of view, he has sacrificed the certainty of cash for the uncertainty and delay of a cheque. The main risk that he takes is that the bank, for some reason or other, fails to pay the cheque. This risk is unavoidable, since the bank is under no contractual duty towards the payee. The risk is to some degree ameliorated by the payee obtaining the advantages which attach to the possession of a liquid document. He can, if necessary, enforce the document against the drawer.

However, on the Bank's argument, the payee's risk would be further increased. He would also run the risk that, even if the bank were to pay the cheque, this payment might for some reason or another turn out not to have been authorised by the drawer. I have said that

the risk of the bank failing to pay is unavoidable. Payment by the bank without authority, on the other hand, need not be a risk for the payee at all. An effective debt-extinguishing agreement achieves its purpose when the creditor receives the money owing to him. For this purpose it does not matter whether the payment was, as in the present case, attended by breach of the contract between the Bank and its customer, the drawer. And, indeed, it seems highly undesirable that the payee should be drawn into these matters. He does not normally know what the arrangements are between the bank and the drawer. In particular, he would not usually know whether his payment was authorised by the drawer or not. Indeed, this might be a matter of dispute between the drawer and the bank. Why, for instance, should the, payee, who was duly paid, be saddled with the uncertainty and delay of a dispute between the bank and the drawer as to whether a proper countermand had been given? (In fact, this was in

dispute in the present case until a fairly late stage.)

Moreover, when the payee presents the cheque and receives payment, he parts with the document. If this payment does not serve to extinguish his debt, and the bank is entitled to reclaim the payment, the payee is accordingly in a worse position than he would have been in if the cheque had been dishonoured. In the latter case he could immediately have sued the drawer for provisional sentence on the cheque. See secs 53(1)(a) and 45 (2), read with sec 71, of the Bills of Exchange Act, no 34 of 1964 ("the Act").

But the matter goes further. It was argued on behalf of B & H that in the present case the payee lost more than physical possession of the document. It was contended that payment of a cheque, even where payment has been countermanded, serves to discharge the cheque, so that the payee no longer enjoys any rights under it. In terms of sec 57(1) of the Act a bill of exchange (which of course includes a cheque) is discharged "by

payment in due course". The expression "payment in due course" is defined in sec 1 of the Act (in so far as relevant) as "payment made at or after maturity of a bill to the holder thereof in good faith ...". In the present case, counsel for B & H contended, the Bank paid the cheque in good faith to the holder, B & H (maturity is not in issue). The cheque was accordingly discharged. If this payment did not serve to extinguish the antecedent debt, the debt-extinguishing agreement would have failed entirely. The debt would still be unpaid and B & H would not even enjoy the comfort of a liquid document. It would have to fall back on its original claim in respect of goods supplied to Sapco.

This was disputed on behalf of the Bank, whose counsel contended that sec 57 (1) of the Act does not apply to cheques which have been countermanded. A bill of exchange is defined in sec 2(1) (in so far as relevant) as "an unconditional order in writing ... requiring the person to whom it is addressed to pay . . .

a sum certain in money ...". Once there is a countermand, counsel contended, the cheque no longer contains an order on the Bank, to pay. Indeed, the drawer's order to the Bank, as expressed in his countermand of payment, is not to pay. The only disadvantage suffered by the payee by his loss of the cheque accordingly is, so it was contended, that he would not have the evidential benefit of the original document when suing the drawer. The contents of the cheque could, however, be proved by secondary evidence. The fallacy in the Bank's argument, in my view, is that it treats a countermand as amending or altering the cheque as a document. As a matter of language, a document still contains "an unconditional order ... to pay" even if its effect has been nullified by some other document or transaction. And this is borne out by the manner in which countermand of payment is dealt with in the Act. Countermand terminates the duty and authority of a banker to pay a cheque drawn on him by

his customer (sec 73(a) of the Act). This has certain effects on the rights of the parties to the bill. Thus sec 44 (2) provides that presentment for payment is dispensed with -

> "(c) as regards the drawer, if the drawee ... is not bound, as between himself and the drawer, to ... pay the bill, and the drawer has no reason to believe that the bill would be paid if presented".

Hence, if payment is countermanded, the drawee (in the case of a cheque, the bank) is not bound as between himself and the drawer to pay the bill (and clearly the drawer has no reason to believe that the bill would be paid if presented). The order on the bank, as contained in the cheque, is a futile one, and will in the ordinary course not be complied with. The result is that presentment for payment is dispensed with (save possibly in exceptional circumstances). (See Navidas (Pty) Ltd v Essop; Metha v Essop 1994 (4) SA 140 (A) at pp 149 G - 152 B). But, nevertheless, the document is still described in the section as a bill. And this is

taken a step further by sec 45 (1) which reads, in so far as relevant:

> "A bill is dishonoured by non-payment -
>
> (b) if presentment is excused and the bill is overdue and unpaid".

Thus, if payment is countermanded, there need be no presentment for payment, and the bill is dishonoured if it remains unpaid.

Sec 45 (2) provides inter alia that, "if a bill is dishonoured by non-payment, a right of recourse against the drawer ... immediately accrues to the holder."

Normally, where a bill has been dishonoured by non-payment, notice of dishonour must be given to the drawer, and if not given, he is discharged (sec 46). However, notice of dishonour is dispensed with where the drawer has countermanded payment (sec 48 (2) (c) (v)) . This is an important provision for present purposes. It clearly indicates that, in the scheme of the Act, countermand of payment does not destroy the

character of an instrument as a bill. It merely changes the rights inter se of the parties thereto.

To summarise: if payment of a cheque is countermanded, presentment for payment is dispensed with. If the cheque remains unpaid, the cheque is dishonoured and the holder is entitled immediately to sue the drawer without giving notice of dishonour. On the other hand, the cheque remains a bill in terms of the Act, with the consequence, it seems to me, that if it is paid according to its tenor, payment is in due course and the cheque is discharged.

The main authority quoted to us on this aspect is an article by Prof R M Goode, entitled 'The Bank's Right to Recover Money Paid on a Stopped Cheque', (1981) 97 LQR 254 at p 263 footnote 41, which supports the above conclusion. This article is a commentary on the judgment in Barclays Bank Ltd v w J Simms Son & Cooke (Southern) Ltd and Another [1979] 3 All ER 522 (QB). Counsel for B & H very properly referred us to a

passage in the Simms case at p 542a which seems to be to the contrary effect. The Simms case was a decision of a single judge, Robert Goff J. In essence the dispute in that case was the same as in the present - a cheque had been given in satisfaction of a debt, payment had been stopped, the bank, nevertheless paid in error and sought to recover the payment from the payee. The context in which the relevant passage appears is the following. In a series of English cases commencing with Cocks v Masterman (1829) 9 B & c 902, [1824-34] All ER Rep 431 (KB), it was held that if payment is mistakenly made on a negotiable instrument, and the payer fails to give notice on the day of payment that the money is to be claimed back, the receiver is deprived of the opportunity of giving notice of dishonour on the day when the bill falls due, and so is deemed to have changed his position and has a good defence to a claim for restitution on that ground. Robert Goff J held in the Simms case (at p 542 b-c)

that it is a prerequisite to the application of this principle that the defendant should be under a duty to give notice of dishonour. Since notice of dishonour is not required in an action against a drawer who has countermanded payment, the payee in the Simms case could not invoke this defence (ibid). While dealing with this issue Robert Goff J considered the question when dishonour takes place in cases where a bill is paid but the money later reclaimed. Since the defence was in any event not available to the defendant it did not matter when or whether dishonour took place, and this whole discussion was therefore obiter. It is in this context that Robert Goff J said in the passage referred to us (at p 542a):

> "If the money is recovered, then the bill will not have been paid on the due date or at all, for the payment will not have discharged the debt due on the bill. It follows that, in such a case, the bill is in fact dishonoured on the day it falls due ...".

Apart from being obiter this passage is unsupported by any reference to the bills of exchange

legislation.

Of course the rule laid down in Cocks v Masterman and subsequent cases does imply that, despite having been paid, a bill may be regarded as dishonoured if the payment is subsequently recovered. This notion was criticized in the ninth edition (1982) of Paget's Law of Banking at p 312 in the following terms:

> "If a bill is paid it is discharged and there is no means of bringing it to life again. The fact that the payer may be able to claim the return of the money is a separate issue. This may well be unjust to the holder who has been paid, but the theory that the bill should be resuscitated, as it were, in order to protect the holder is artificial." In the tenth edition of Paget (1989) the chapter

in which this passage appeared was in large part rewritten and this specific comment was not repeated. This does not, however, mean that the ratio of the rule in Cocks v Masterman was approved. On the contrary, the new editor of the relevant chapter considered (at p 414) that "no convincing reason is given for the rule" and (at p 415) that although the rule survives, "it is

now strictly limited to cases where notice of dishonour is required to be given to preserve the rights of the holder."

It would be going beyond the compass of this judgment to consider the general question whether the cases commencing with Cocks v Masterman should be followed in our law. For present purposes it is enough to say the following. The rule laid down in those cases clearly could not apply in the instant matter since, payment having been countermanded, notice of dishonour was not required. Where the rule itself does not apply there would not appear to be any reason to give effect to its underlying assumptions, particularly where they are not justified in principle. Moreover, in so far as the rule may have been introduced to assist the holder of a bill who has to return money paid to him under the bill, no such assistance is required in our law in a matter like the present. The general equitable principles of the condictio sine causa provide

sufficient protection to the defendant. I consider therefore that the rule in Cocks v Masterman, and the comments on it in the Simms case, do not provide convincing authority for the proposition that a cheque which has been paid according to its tenor in a case like the present was not discharged if the payment is subsequently recovered. I prefer the views expressed by Goode and the editors of the ninth edition of Paget, supported as they are by an analysis of the bills of exchange legislation. In short, in my view the cheque in the present case was discharged when the Bank paid it.

After this long discussion of incidental matters it might be convenient to repeat briefly why they are relevant. The immediate question is whether the payment by the Bank had the effect of extinguishing the debt owed by Sapco to B & H. The answer to this question depends on the exact nature of the debt-extinguishing agreement between Sapco and B & H, and, in particular,

whether the debt was to be extinguished only where payment by the Bank was authorized by Sapco.

The finding that the payment of the cheque by the Bank, even if unauthorized, discharged the cheque, is relevant to this issue.

The receipt of a liquid document is one of the few compensations which a creditor derives from his agreement to accept payment by cheque instead of in cash. It would be contrary to the very essence of such a debt-extinguishing agreement if circumstances could arise in which the payee loses the benefit of his liquid document before his debt has been paid.

Moreover, the payee who receives payment is normally entitled to assume that the cheque has been duly met and that the antecedent debt has been extinguished. It would be inequitable if this assumption were wrong and the debt still unpaid, with the consequence that the bank may at some later stage reclaim the payment. The payee would then be thrown

back on the underlying agreement. By that stage time would have passed, evidence may have been lost or discarded and in an extreme case the underlying claim might have become prescribed. This inequity could possibly be lessened by allowing the payee in certain circumstances to raise an estoppel against the bank's claim for restitution. It would indubitably be eliminated were the debt-extinguishing agreement between drawer and payee to be held to have achieved its purpose on fulfilment of the condition: payment by the bank pursuant to the cheque.

To sum up, for all the above reasons it is highly desirable from the payee's point of view that his debt be regarded as paid when he receives the money from the bank, whether payment was authorised by the drawer or not.

Now look at the matter from the debtor's point of view. The debtor owes a debt which he pays by cheque. The debtor (drawer) is not entitled, as against the

creditor (payee) to renege on the debt-extinguishing agreement (this whole discussion is posited on the premise that the antecedent debt is a valid and due one). Although the debtor's contract with the bank entitles him to countermand payment of a cheque, this would amount to a breach of the debt-extinguishing contract between him and the creditor (payee). If he does countermand and the bank nevertheless pays, the debt-extinguishing agreement between him and the payee would have been performed - the payee would have received payment in terms of the cheque. No reason exists why the countermand by the drawer should disturb this result. By countermanding the drawer attempted, unlawfully and unilaterally (i e, without the consent of the payee), to frustrate the debt-extinguishing agreement. In the result he failed. The debt-extinguishing agreement achieved its purpose. The creditor (payee) received his money. There is no need or justification in my view for the law to

discountenance this result.

As far as the bank is concerned, it was not entitled, as against its customer, the drawer, to pay the cheque. It could accordingly not claim to be reimbursed ex contractu by the drawer, or, for that matter, anybody else. This results from its own default and does not seem unfair. The bank is not, however, remediless. It would usually have a claim based on unjustified enrichment against either the drawer or the payee. I deal with this matter in greater detail later.

I have emphasized from the outset that we are here dealing with a matter of commercial practice. The relevant rules of law are designed to regulate, in a fair and practical way, the reciprocal rights and duties of creditors and debtors who agree on payment by cheque instead of cash. This purpose is achieved, as far as the subject matter permits, by the rule as traditionally formulated, namely that payment is conditional on the cheque being paid or honoured

(assuming that honoured means no more than paid) by the bank. On the other hand, the further qualification suggested on behalf of the Bank, namely that payment must be authorized by the drawer, is not only unnecessary for the purposes of the debt-extinguishing agreement, but leads to anomalous and inequitable results. In my view the Bank's contention should be rejected.

My conclusion accordingly is that, where parties agree to make and accept payment of a debt by cheque, the debt is extinguished when the bank pays the cheque to the payee (creditor), whether or not payment was at that stage authorised by the drawer (debtor). I have reached this conclusion by analysis of the nature and purpose of the debt-extinguishing agreement which is created when parties agree to such payment. Before I consider authority in this regard it is desirable to deal with an argument to the contrary in the judgment of the court a quo.

For convenience I shall call it the Pothier argument. Pothier wrote in Obligations 111.1.1 (Evans's translation at 330):

> "It is not essential to the validity of the payment that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will."

Although this passage from Pothier is often quoted (see, for instance, Froman v Robertson 1971 (1) SA 115 (A) at p 124 G-H and Commissioner for Inland Revenue v Visser 1959 (1) SA 452 (A) at p 458A), it does not stand alone. Other authorities are to the same effect. See Froman's case at p 124H - 125A and Visser's case loc cit\

As was pointed out by a member of the court during argument in this matter, the passage in Grotius, 3.39.10, referred to in Visser's case, loc cit, was mistranslated by Herbert (quoted in the Bank's heads of argument). The original reads as follows:

> "...Alwaer 't dat den schuldenaer daer van gheen kennisse en hadde: maer dede een ander de opbrenging uit sijn eigen naem, zulcs en soude gheen betaling strecken, ten waer de zaecke den opbrengher aenging by gevolg, als ghenomen hy waer borghe, in welcken ghevalle de verbintenisse door zodanig middel krachteloos zoude werden gemaeckt." (emphasis added)

The emphasized clause in the above quotation was rendered in Herbert's translation as "unless the act of the party delivering were a matter of course". This is clearly wrong. Maasdorp translates it as "unless the party making delivery is interested in the matter through its accessories". This is not much better. Lee's translation is preferable. It reads: "unless he had a consequential interest in the thing".

The Pothier argument is as follows. Where a bank pays a cheque in the face of a countermand it acts without the authority of the drawer. If it pays a creditor of the drawer's it consequently does not do so as the drawer's agent. Neither does the bank purport to pay the specific debt in the name of the debtor (the drawer). The bank is a neutral payment functionary. It does not even know for what reason the cheque was given to the payee. In accordance with the passage from Pothier, the payment by the bank can therefore not serve to discharge the underlying debt. The Pothier argument was advanced by D V Cowen ('A Bank's Right to Recover Payments made by Mistake', 1983 CILSA 1 at p 37) and by June D Sinclair and Coenraad Visser (1984 Annual Survey of South African Law at p 385) and was accepted by the court a quo (p 47J to 48C).

Visser subsequently changed his mind. In "Payment of a Stopped Cheque' (1993) 1 J8L 32-3 he wrote, in commenting on the judgment of the court a quo in the present matter:

> "... the court's view ... that the underlying obligation ... will be discharged only where the bank pays the cheque under an existing mandate from its customer (A) to do so, is mistaken: the effect of the bank's payment on the underlying obligation is determined exclusively by agreement between the drawer (A) and the payee (C). Where the agreement provices that the obligation will be discharged by payment by cheque, the countermand of payment is irrelevant: where the cheque is paid on presentment, the drawer's obligation to the payee is dischargee. So the bank's claim in B & H Engineering should have failed because C had not been enricheo by the bank's payment of the cheque."

The fallacy in the Pothier argument has, I consider, been exposed in articles by J C Stassen ('Die Regsaard van die Verhouding Tussen Bank en Kliënt' 1980 MBL 77 at 82, 'Countermanded Cheques and Enrichment - Some Clarity, Some Confusion' 1985 MBL 15 at 17) and an article by J C Stassen and A N Oelofse ('Terugvordering van Foutiewe Wisselbetalings: Geen Verrykingsaanspreeklikheid Sonder Verryking Nie' 1983 MBL 137 at 140). It is common cause on both sides of the controversy that the bank is not the drawer' s agent, but a neutral payment functionary. It is consequently correct that the acts and intent of the bank, by themselves, cannot result in the payment of the debt owed to the payee. However, the acts and intent of the bank form only a part of the picture. They must be seen in the light of the debt-extinguishing agreement between the debtor and creditor. It is that agreement which defines the purpose for which the cheque is given, and for which

payment is to be received from the bank. If that agreement provides that any payment by the bank, even an unauthorised one, would discharge the debt as between debtor and creditor, such an agreement would be valid inter partes. The fact that the bank does not know or care what the purpose of its payment is does not matter. Its function is neutral, almost mechanical. It performs the act which the parties have agreed would serve to complete the payment of the debt. It follows that the above passage from Pothier is not relevant in the present circumstances. We are not here dealing with a case where the bank pays somebody else's debt. In our case the debtor is paying his own debt through the instrumentality of the bank.

I now turn to judicial authority. The only case in our law which has considered whether the underlying debt is discharged by payment of a cheque which has been countermanded, is Govender's case (supra), a decision of a full bench of the Cape Provincial

Division. The court in that case reached the same conclusion as I have done. See, in particular, at pages 405 F to 406C. Roorda's case (supra), which also dealt with a claim against a payee for return of money paid by a bank in the face of a countermand, did not consider the question whether the payee had been enriched. It is consequently of no assistance for present purposes.

In English law there is also little authority on this point. There is the fairly recent case of Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd and Another [1979] 3 All ER 522 (QB) to which I have already referred above. One of the defneces raised by the payee in that case was that the money was irrecoverable because it was paid by the bank and received by the payee in discharge of the drawer's, antecedent obligation, or, alternatively, under the cheque (p 527c). This argument was dealt with very briefly. At p 542f the learned judge concluded:

> "... since the drawer had in fact countermanded payment, the bank were acting without mandate and so the payment, was not effective to discharge the drawer's obligation on the cheque...".

No reasoning or authority is advanced in support of this proposition. In fact there is authority in English law, not referred to by Robert Goff J, which apparently lays down that the unauthorized payment by a bank of a cheque can serve to extinguish a debt owing by the drawer to the payee. See B Liggett (Liverpool), Limited v Barclays Bank, Limited (1928) 1 KB 48 at pp 58 to 64 and Jackson v White and Midland Bank, Ltd [1967] 2 Lloyd's Rep 68 at 80 to 81.

For the reasons I have set out above, I do not think that Simms's case accords with our law on this point. Indeed, even in England it has been criticized - see the article by prof Goode to which I referred earlier. I consider therefore that the learned judge a quo in the present matter was mistaken to place reliance on Simms's case as he did at p 45J to 46F of

his judgment.

Counsel for B & H, in their thorough and able argument, referred us to further authority in Australia, New Zealand, Canada, the United States of America and Germany. Much of it was helpful and interesting in a general way as an illustration of how the problem of cheques which are paid despite countermand is dealt with in other jurisdictions. However, none of them was of sufficient relevance to justify consideration in this judgment.

To sum up, Govender's case is authority in our law for the proposition that a debt owing by a drawer to a payee is discharged if the bank, after payment has been countermanded, pays the cheque given in settlement of the debt. Simms's case in England is to the opposite effect. For the reasons set out above I consider that Govender's case was correctly decided on this point.

My conclusion on this part of the case accordingly is that B & H was not enriched by the payment of the

cheque in question since, as I explained at the beginning of this judgment, its receipt of the amount of the cheque was balanced by its loss of a claim against Sapco. Its net financial position was unchanged. It follows that the Bank's claim under the condictio sine causa specialis should not have succeeded in the court a quo. It is accordingly not necessary to consider the further matters argued before us, and, in particular, whether the payment was made sine causa.

The result is that the Bank was not entitled in this case to claim repayment from the payee. In principle the Bank would however, in my view, have had a claim in enrichment against the drawer. As a result of the Bank's payment to B & H Sapco has been released of its obligation towards B & H. In this way Sapco has been unjustifiably enriched at the expense of the Bank. Stassen and Oelofse (op cit at p 145) suggest that the remedy available to the Bank in such circumstances

arises from quasi negotiorum gestio. In this regard they refer to Odendaal v Van Oudtshoorn 1968 (3) SA 433 (T), Du Preez v Boetsap Stores (Pty) Ltd 1978 (2) SA 177 (NC) and Standard Bank Financial Services Ltd v Taylam (Pty) Ltd 1979 (2) SA 383 (C). See also Blesbok Eiendomsagentskap v Cantamessa 1991 (2) SA 712 (T) at 717J to 718F and Kirsten and Another v Bankorp Ltd and Others 1993 (4) SA 649 (C) at 659I. It is not necessary to consider whether the principles of quasi negotiorum gestio are strictly and literally applicable to facts like the present. Even if they are not, this case is so closely analogous, and the need for equitable relief so clamant, that an action on the grounds of unjustified enrichment should lie (cf Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere 1994 (3) SA 283 (A) at p 333C-E). Of course, this does not mean that a bank will, where its unauthorized payment has extinguished a debt owing by the drawer, invariably be entitled to claim the full amount of the payment from

the drawer. Enrichment is always a matter of fact. Thus the bank might have paid a debt which was on the point of being prescribed, or it might have paid while the parties were negotiating to reduce the debt, etc. Moreover, in exceptional circumstances the drawer might have an interest in not having the debt paid. In such cases a court might conceivably hold that, even if the drawer were enriched, the bank would not in equity be entitled to restitution. See in this regard, Odendaal v Van Oudtshoorn (supra) at p 442 B-F and the Standard Bank Financial Services case (supra) at p 392D to 393D.

In the present case there do not appear to be exceptional circumstances of the kind I have discussed immediately above, and the Bank would in my view, prima facie at any rate, have had a claim against the drawer because the payment to the payee has discharged the underlying debt. Had there been no valid underlying debt the position would of course have been different. A bank is consequently in the difficult position that

it might not know which of the drawer or payee has been enriched until it ascertains the facts concerning their circumstances and, in particular, their relationship. These facts may be obscure or disputed. It seems to me that in intractable cases this problem might be resolved by joining the drawer and the payee as defendants in a single action in terms of Rule 10 (3) of the Uniform Rules of Court.

For the reasons set out above, the appeal is allowed with costs, including the costs of two counsel. The order of the court a quo is set aside and replaced by:

The plaintiff's claim is dismissed with costs.

E M GROSSKOPF, JA

BOTHA, JA
SMALBERGER, JA F H GROSSKOPF, JA VAN DEN HEEVER, JA
Concur