Case No 426/1992 and 427/1992

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

NAVIDAS (PTY) LTD ..... Appellant

and

M H ESSOP Respondent

AND

A K METHA..... Appellant

and

M H ESSOP .....Respondent

CORAM : CORBETT CJ, HEFER, KUMLEBEN JJA, et
NICHOLAS, MAHOMED AJJA.

HEARD : 25 FEBRUARY 1994.

DELIVERED : 1 JUNE 1994.

J U D G M E N T

HEFER JA/...

HEFER JA:

These appeals were heard together and may conveniently be dealt with in one judgment.

The appellants, to whom I shall refer as "Navidas" in the one case and "Metha" in the other, were the plaintiffs in the court a quo where their claims for provisional sentence were dismissed with costs. The summonses were substantially identical: in each it was alleged that the plaintiff was the holder in due course, alternatively the holder, of a cheque drawn by the respondent which was duly presented for payment but dishonoured after the respondent had countermanded payment. In each case the respondent denied that the cheque had been properly presented and in the Navidas matter he also denied that the plaintiff was the holder or the holder in due course. The trial court found that the cheques had not been properly presented and dismissed

the claims but granted the plaintiffs leave to appeal to this court.

As appears from the report of the trial court's judgment in Navidas (Pty) Ltd v Essop 1992(3) SA 797 (D) the dispute about the presentment of the cheques arose from a system ("the clearing house system") followed by some of the commercial banks with a view to the rapid processing and collection of cheques. It is common cause that the system is correctly described as follows in Malan et al: Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes at 105:

> "In some areas, certain cheques deposited for collection are sent via the clearing house to a central processing office of the drawee. This processing office is computer linked with the branches on which the cheques are drawn . The implementation of this process makes it unnecessary to physically present cheques at the drawee branch for payment. Whether sufficient funds are available for payment and whether payment has been countermanded are matters that can be determined at the processing

> office through the computer link. If it is discovered that there is a ground on which payment should be refused, the cheque is then returned directly to the collecting bank. It follows that these cheques are never physically presented for payment at the bank branch on which they are drawn."

It is also common cause that the cheques with which we are presently concerned, were never physically presented at the Westville Mall, Durban, branch of Nedbank on which they were drawn; they were merely sent via the clearing house to Nedbank's central processing office and returned to the collecting bank marked "Payment stopped".

What we have to decide first is whether the court a quo's finding that this did not constitute due presentment is correct.

In terms of sec 45(1) (a) read with sec 71 of the Bills of Exchange Act 34 of 1964, as amended, ("the Act") a cheque is dishonoured by non-payment if it is duly presented for payment and payment is

refused or cannot be obtained. In order to discover what due presentment is one has to turn to sec 43 (bearing in mind that a cheque is defined in sec 1 as a bill drawn on a banker payable on demand). This section commences with a direction that, subject to the provisions of the Act, a bill must be duly presented for payment in accordance with the provisions of sub-sec (2). Sub-sec (2) contains a number of rules relating to

(1) the time when,

(2) the place where,

(3) the person by whom and

(4) the person to whom

presentment is to be made. The relevant provisions read as follows:

> "(2) A bill is duly presented for payment if it is presented in accordance with the following rules, namely -
>
> (a) .....

(b) . . . .

(c) presentment must, subject to the provisions of sub-section (5), be made by the holder, or by some person authorized to receive payment on his behalf, at a reasonable hour on a business day, at the proper place within the meaning of sub-section (4), either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can be found there;

(d) . . . . . .

(e) . . . .

Sub-sec (4) provides that

" [a] bill is presented at the proper place if -

(a) when a place of payment is specified in the bill, the bill is presented there;".

Apart from these requirements reference should be made to sec 50(4) which reads as follows:

Act which plainly envisage the physical exhibition of a cheque to the staff of the drawee bank at its place of business. In effect the system involves no more than an electronic communication to the processing office that a particular cheque will or will not be met if and when presented. Seeking and obtaining that information, whether it be by electronic or by any other means, does not constitute presentment in terms of the Act.

Faced with this difficulty appellants' counsel argued that sec 43 must be construed in accordance with what he called the established usage and practice of bankers, not only in this country, but in many others as well. "Presentment" in sec 43, he submitted, must mean presentment according to mercantile usage. This is indeed a bold submission because it requires in effect that important provisions of the Act be ignored for no better reason

than that they do not conform to what is said to be an established trade usage. This is not a case like the one postulated in Lonrho Ltd v Salisbury Municipality 1970(4) SA 1 (R A D) at 4 A-D where the legislature uses a term which has acquired a recognised technical meaning in a particular trade. (Even in such a case the technical meaning will only prevail if it is clear that the term was used in that sense by the legislature; Kommissaris van Doeane en Aksyns v Mincer Motors Bpk 1959(1) SA 114 (A) at 119 C-E.) As I understand the position, the practice with which we are presently concerned, developed (at least in this country) after the passing of the Act as a result of the advance of modern technology (cf F R Malan: The Liberation of the Cheque 1978 T S A R 107 at 109). The line of reasoning in the cases just referred to can accordingly not apply. Moreover, the legislature did not leave the word "presentment"

undefined. On the contrary it provided an elaborate set of mandatory rules for the due presentment of a bill. These rules cannot simply be ignored and the court cannot, under the guise of interpretation or in any other manner, negate their effect by recognising another form of presentment which does not comply with the legislature's explicit directives. I accept that modern technology has revolutionised the banking industry and that there may be an urgent commercial need for giving legal effect to practices that have developed as a result thereof. However, this does not call for the abrogation by the courts of the existing statutory provisions (Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n Ander 1991(3) SA 605 (A) at 611 I-J). It is after all not the function of a court to legislate; the remedy obviously lies elsewhere.

To this I wish to add that I am by no means

2 alternative that presentment of the cheques was in any event not required. Before the validity of the submission is considered it is necessary to deal with an application to amend the summons and the grounds of appeal in each case.

The grounds listed in the notices of appeal are directed at the court a quo's finding that the cheques were not properly presented. This is understandable since the possibility that presentment for payment might have been dispensed with was not mooted in that court. After the appeals had been noted judgment was delivered in another case in the Durban and Coast Local Division which has since been reported sub nom Commercial Union Trade Finance v Republic Bottlers of SA (Pty) Ltd t/a Booth's Bottle Store 1992(4) SA 728 (D). Only when they became aware of this judgment did it occur to the appellants' legal representatives that payment of the

present cheques might not have been necessary. The result was that notices of motion were filed with the registrar of this court before the hearing of the appeals in which the respondent was informed that application would be made at the hearing to amend the grounds of appeal by adding an alternative ground to the effect that

> "[the] Court erred in law in not finding that presentment had been dispensed with in terms of the provisions of sec 44(2) (c) of the Bills of Exchange Act 34 of 1964 as the Respondent had countermanded payment of the cheque."

At the hearing of the appeals appellants' counsel moved for the amendment of the grounds of appeal as well as an amendment of the summons in each case to include an alternative allegation that presentment for payment of the cheque was dispensed with in terms of sec 44(2)(c). Respondent's counsel opposed the application on the ground that his

client

would be prejudiced if the amendments were to be granted. One of the essential elements of sec 44(2)(c), he explained, (as will emerge from the discussion of the section later in this judgment) is that the drawer has no reason to believe that the cheque will be paid if presented; and whether the respondent did or did not have reason to entertain such a belief is essentially a question of fact on which evidence might be presented. But, pressed to reveal the nature of the evidence that he had in mind, respondent's counsel eventually in effect conceded the point by indicating that, in the event of the amendments being granted, he would place no further evidence before the court, and would argue the proposed new ground of appeal on the papers presently before us.

It is clear that the respondent would suffer no real prejudice should the amendments be

granted with a suitable order of costs. The new ground of appeal only involves the construction of sec 44(2)(c) and the question of its application in a case where the fact of the countermand of a cheque is the only available evidence of the drawer's belief that it would not be paid if presented. In the absence of any conceivable prejudice to the respondent there is no reason why the appellants should not be allowed to advance the new ground, (cf BP Southern Africa (Pty) Ltd and Others v Secretary for Customs and Excise and Another 1985(1) SA 725 (A) at 733 G-H.) I may add that, had an amendment to the summons been sought in the court a quo, the position would have been exactly the same: the respondent might at best have been entitled to a postponement to enable him to present the court with further evidence; but had the court been informed that he did not wish to do so, there would have been no

reason to refuse the amendment.

I am accordingly of the view that the amendments should be granted. A formal order will be made at the end of the judgment.

In terms of sec 44(2) (c) presentment for payment is dispensed with

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

It will be noticed that two requirements must be met before presentment is dispensed with: in a simple drawer/drawee relationship the first is that the drawee is not bound, as between himself and the drawer, to pay the bill. The second is that the drawer has no reason to believe that the bill would be met if presented.

In the present case payment of the cheques was countermanded which, not only logically, but also

in terms of sec 73(a) of the Act, terminated the drawee's duty and authority to pay them (Malan & de Beer: Bills of Exchange, Cheques and Promissory Notes in South African Law 289). This inevitably entails that the drawee was not bound, as between himself and the drawer, to pay the cheques.

In order to avoid what thus appears to be a foregone conclusion on the first requirement of sec 44(2)(c) respondent's counsel referred us to sec 48(2) where the circumstances are described in which notice of dishonour is dispensed with. In terms of sub-sec (2)(c) it is dispensed with inter alia

> "(i) ....
> (ii) ....
> (iii)....
> (iv) where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill; (v) where the drawer has countermanded payment."

It will be noticed that para (iv) is identical to the

first part of sec 44(2)(c). Literally construed para (iv) includes the case of a countermanded bill which is mentioned eo nomine in para (v). Respondent's counsel argued that,

(1) in view of the separate reference in para (v) to a countermanded bill, para (iv) must be interpreted in such a manner that a countermand is excluded and,

(2) by reason of its similarity to para (iv), sec 44(2)(c) must be construed accordingly.

The effect of his argument is that presentment of a countermanded cheque for payment is required despite the provisions of sec 44(2) (c) but notice of dishonour is dispensed with under sec 48(2)(c)(v).

Although the argument is supported by the judgment in Industrial Machinery Supplies (Pty) Ltd v Pretorius 1960(4) SA 675 (0) at 676 F-H it cannot, in my judgment, be upheld. The conclusion at 676 H of

the judgment in the Industrial Machinery Supplies case that the similarly worded sec 44(2).(c) of Ord 28 of 1902 (0) did not include the case of a countermanded cheque was based (entirely it would seem) on Hill v Heap (1823) D & R NPC 57 which was decided before the codification of the law relating to bills of exchange in England. In the Commercial Union case supra at 732 I-733 G BROOME J expressed doubt whether the judgment in Hill v Heap correctly reflected the state of the common law immediately before its codification in 1882. Be that as it may I would certainly hesitate to interpret a South African statute passed many years later in the light of a single pre-codification judgment.

An enquiry into the correct interpretation of sec 44 (2) (c) may be commenced in the usual way with a reminder that the intention of the legislature is to be sought in the wording of the statute by

according to each word its ordinary meaning unless "a contrary legislative intent is clear and indubitable" (per CORBETT JA (as he then was) in Summit Industrial Corporation v Claimants against the fund comprising the proceeds of the sale of the MV Jade Transporter 1987(2) SA 583 (A) at 597 A-B). I say this because, although sec 44(2)(c) is couched in terms which admit of no doubt that the case of a countermanded cheque is included, we have been asked to restrict it by excluding such a case from its operation. This we cannot do unless it can be said with certainty that the legislature intended it to be so restricted. The question therefore simply is: are there sufficiently cogent indications of a contrary legislative intent either in the rest of the Act or in the results to which an unrestricted interpretation would lead?

In my view there are none. Respondent's

counsel's only justification for his argument in favour of a restricted interpretation is the separate reference in para (v) of sec 48(2) (c) to a countermand despite the fact that it would be included in a literal construction of para (iv). But para (v) can only be of significance if it can be said with confidence that it was deliberately inserted in order to provide for a case not covered by para (iv). This I am not prepared to say because I cannot accept that the legislature could have been oblivious of sec 73(a) and the obvious ambit of para (iv). Moreover, it makes not the slightest difference whether notice of dishonour is dispensed with in terms of para (v) rather than para (iv). It would accordingly be entirely irrational to deliberately omit the case of a countermanded bill from the one paragraph and yet provide specifically for that very case in the other. And this is

precisely what the argument implies. I do not profess to know why para (v) was inserted; but tautology is something to which the legislature is not unaccustomed and unnecessary provisions are more often than not inserted ex abundanti cautela.

In any event, even if sec 48(2)(c)(iv) must be construed restrictively, there is no reason why sec 44(2)(c) must be construed accordingly. Admittedly there is a distinct resemblance between the two provisions but there are also obvious differences. Sec 44(2)(c) is a general, inclusive provision plainly designed to cater for a variety of cases viz all those in which the drawee is not bound (as between himself and the drawer) to pay the bill and the latter has no reason to believe that the bill would be paid if presented. Sec 48(2)(c), on the other hand, is more precisely worded with specific provisions for specific cases. Moreover, there is a

significant absence in this section of any reference to the drawer's belief about the payment of the bill. The legislature was clearly intent in sec 48(2)(c)(iv) and (v) on dispensing with the need of a notice of dishonour irrespective of the drawer's belief. It must be assumed therefore that the two provisions were motivated by different considerations. That being the case it would be dangerous to depart from the clear language used in sec 44(2)(c) by forcing it into the mould of sec 48(2)(c)(iv). In my judgment we should not do so.

I turn now to consider whether the mere fact of a countermand is sufficient per se to establish the second requirement of sec 44(2(c). The point is dealt with as follows in the judgment in the Commercial Union case supra at 734 I-735 A:

> "In the present case, payment was countermanded and that situation in itself, in my judgment, fullfills both the requirements of s 44(2) (c). If the drawer

> had stopped payment, then it is obvious that the drawee bank is not bound to pay the cheque and it is equally obvious that the drawer can have no reason to believe that the bill would be paid if presented."

In principle I respectfully agree with this reasoning. It is said in Malan & De Beer op cit at 289 that

> "[countermand] of payment is the most important way in which a bank's duty to pay a cheque is terminated. In an old judgment it was said: 'It must always be remembered that a bank can be sued just as much for failing to honour a cheque as for cashing a cheque that had been stopped.' When a cheque has been countermanded the duty to pay is replaced by a duty to refuse payment."

(The old judgment referred to is Westminster Bank Ltd v Hilton (1926) 43 TLR 124.) Having countermanded payment the drawer obviously knows that he has terminated the bank's mandate; that is after all the very purpose of the exercise. What reason then can he possibly have to believe that the cheque would

nevertheless be paid if presented? Respondent's counsel suggested that the circumstances may be such that the drawer may suspect that his instruction not to pay might not be heeded. But this is a far cry from saying that he has reason to believe that it will be disregarded. In any event, the fact of the countermand constitutes, at the very least, prima facie evidence of the absence of any reason to believe that the cheque would be paid if presented. Therefore, should he wish to destroy the obvious impression, it would plainly be for the drawer to present the court with countervailing evidence. Failing that (as in the present case) the prima facie evidence must prevail.

A further submission made by respondent's counsel is to the effect that the second requirement of sec 44(2)(c) is not met by proof of a countermand because that requirement has to be

related in time to the drawing of the cheque. He submitted that the question whether the drawee has no reason to believe that the cheque would be paid if presented must be considered at the stage when it was drawn; if at that stage he had reason to believe that it would be paid, the cheque must be presented even though payment may have been countermanded later. What this argument does not take into account is that the possibility that presentment for payment may in any given case be dispensed with becomes relevant only at the stage when the time for presentment has arrived. A cheque, being a bill payable on demand, may be presented on any date within a reasonable time after its issue (sec 43(2) (b)) and even thereafter (sec 72). It may be negotiated and it may be in circulation for quite a considerable time after issue until a holder finally decides to present it for payment. Only at that

stage does the possibility arise of presentment being dispensed with and it is at that stage that it must be decided whether the drawee is bound to pay and whether the drawer has reason to believe that the cheque would be paid if presented. This is why all the verbs in sec 44(2)(c) are in the present tense: "presentment for payment is dispensed with ... if the drawee ... is not bound and the drawer has no reason to believe... ".

I am accordingly of the view that presentment for payment was dispensed with in both the present cases. As will be explained later the result of this finding is that Metha's appeal must succeed. In the Navidas case there is yet a further point to be considered.

The cheque was drawn in favour of "CONTEMPO" (the words "or bearer" usually appearing after the name of the payee were deleted). Stamped

8 on the back of it there is an endorsement

"CONTEMPO cc

P 0 Box [illegible]

Durban."

It will be recalled that Navidas is alleged in the summons to be the holder in due course, alternatively the holder, of the cheque in question and that this allegation is denied in the respondent's opposing affidavit. The actual allegations in the summons are the following.

"(a) The Plaintiff is the holder in due course, alternatively the holder for value, alternatively the holder of a certain cheque:-

(i) Drawn by the Defendant ;

(ii) On the Westville Mall, Durban Branch of Nedbank.

(iii) <u>in favour of Contempo cc</u>

(iv) for the said sum of R22,730.00 (Twenty Two Thousand Seven Hundred and Thirty Rand)

(v) Dated 5 November, 1991.

(b) <u>The cheque was negotiated by a certain Contempo cc to the Plaintiff who took it</u> :-

(i) in good faith ; and

(ii) for value ; and

(iii) without notice that it was overdue or had been dishonoured or of any defence against or claim to it on the part of any person. "

(I have emphasized the relevant parts.) Respondent's response appears from the following extract from his opposing affidavit:

"2.

I deny that the Plaintiff is either a holder or a holder in due course.

3. In amplification of the denial, I aver that the payee on the instrument was 'CONTEMPO'.

4.

> In terms of section 30(5) of Act 34 of 1964 ("the Act') if the designated payee is wrongly designated he must, in order to effect a negotiation, indorse the bill as therein described, adding his proper signature.
>
> 5.
>
> Inasmuch as the indorsement purporting to effect the negotiation to the Plaintiff is that of 'CONTEMPO C.C.', such indorsement does not comply with the requirements of section 30(5) of the Act, and no negotiation has, in fact, been effected."

In para 8 of the affidavit it is further denied that the cheque was drawn "in favour of CONTEMPO cc and the instrument clearly indicates that it was drawn in favour of 'CONTEMPO' ".

The deponent to the replying affidavit in dealing with these paragraphs said:

> "4.1 The payee, that is CONTEMPO CC also carries on business under the name and style 'CONTEMPO CO' and is known as ' CONTEMPO'
>
> 4.2 I have been involved in

> business for some 25 years. In my experience it is common for the letters 'C.C.' to be omitted by both the members of close corporations and the public generally, when referring to close corporations."

In his argument in this court respondent's counsel accepted the allegations in paragraph 4 of the replying affidavit as correct. He submitted, however, that, although CONTEMPO is merely a trade name used by CONTEMPO cc, the difference between the two names is a material one which cannot be ignored because, ex facie, the instrument sued upon, the indorsement was not signed by the payee and therefore the cheque was not negotiated in terms of sec 29(3) read with sec 30(1) of the Act.

I am inclined to agree that the difference is indeed a material one bearing in mind that a close corporation is a juristic person in terms of sec 2(2) of the Close Corporations Act 69 of 1984 and that the

letters cc are, in terms of sec 22(1), required to be subjoined to the name of any such corporation. The impression gained ex facie the cheque is that it was drawn in favour of a firm or a partnership and indorsed by a close corporation. (Cf Joseph Bond & Jeans Ltd v National Implement Co (Pty) Ltd 1949(2) SA 659 (W) at 661; F J Mitrie (Pty) Ltd v Silver Hardware & Timber Co and Others 1975(4) SA 913 (D & CL) at 915 F-G.) Accordingly, had it not been for the allegations in the summons and replying affidavit explaining the relationship between CONTEMPO and CONTEMPO cc, provisional sentences could not have been granted.

However, in a claim for provisional sentence the document sued upon must be read in conjunction with the summons (Coetzee & Solomon Real Estate (Pty) Ltd v Texeira 1970(1) SA 94 (D & CL) at 95 G-H) . In the present case it was alleged in the

summons that the cheque was drawn in favour of CONTEMPO cc. This clearly implied that CONTEMPO and CONTEMPO cc were in fact one and the same; and when the allegation was denied in the opposing affidavit, it was explained in the replying affidavit that CONTEMPO was a trade name used by CONTEMPO cc.

There can be no doubt that, in provisional sentence proceedings between immediate parties, the payee may be identified by suitable allegations in the summons and, if need be and otherwise permissible, in a replying affidavit despite the rule against the admission of extrinsic evidence in proceedings of that kind. In Chamani v St Ives Trading Co (Pty) Ltd 1982(2) SA 638 (D & CL) in dealing with a situation not unlike the present one KUMLEBEN J (as he then was) said at 641 A-B:

> "It is customary and in order to conclude a contract using a firm's name, or to acknowledge liability in favour of a firm

> in a liquid document. The nominal beneficiary referred to in the instrument is not a legal persona. The rights conferred vest in the proprietor, or in the case of a partnership in the partners. This is to my mind the justification for the generally accepted practice of permitting in a provisional sentence summons the appropriate averment identifying the plaintiff which, if denied, may then be proved."

A similar situation again arose in Barlow Rand Ltd T/A Barlow Noordelike Masjinerie Maatskappy v Self-Arc (Pty) Ltd 1986(4) SA 488 (T). In that case ELOFF DJP who prepared the judgment of the full court said at 492 G-I :

> "In my view a plaintiff in a case such as the present, who has to make use of the fact that he conducts business under a trade name differing from his own in order to link himself with the description of the payee in the instrument sued upon, may rely thereon that the appropriate averment is made in the summons and that it is not disputed. The circumstance under discussion can, I think, be likened to the simple condition or event referred to in the Union Share Agency & Investment case supra and Rich's case supra. it is a matter which, in the nature of things, is

> hardly likely to be disputed or, where it is, is inherently capable of speedy proof. That, I think, is the position even where there is a significant difference between the plaintiff' s real name and its trade name. I accordingly hold that the plaintiff was entitled to rely on the established fact that it trades as Barlow Noordelike Masjinerie Maatskappy."

(See also Amalgamated Beverage Industries Ltd v Pillay 1992(2) SA 163 (D). I am not unmindful of the decision in Morgenster Development and Finance v Metelerkamp and Others 1986(2) SA 453 (C) and the other decisions referred to therein at 455 F-I and 456 B-C. The legalistic approach adopted in those cases should in my view not be followed. At 456 C-D of the judgment in the Morgenster case BERMAN J referred to the need for a "practical and common sensical" approach "satisfying on the one hand the standard of particularity required in pursuing a highly technical procedure and at the same time recognising that negotiable instruments are meant to

facilitate the carrying on of business". For this very reason there can be no valid objection to the identification of the payee in the manner described earlier.

In the present case we are not concerned with the identity of the payee qua plaintiff but with his identity qua indorser. In principle there can be no difference and, since CONTEMPO has been proved to be a trade name used by CONTEMPO cc, it must be accepted that it was the payee who signed the indorsement.

In a further submission respondent's counsel invoked sec 30(5) of the Act which reads as follows:

> "(5) If in a bill payable to order, the payee or indorser is wrongly designated, or his name is mis-spelt, he must, in order to effect a negotiation of the bill, indorse the bill as he in therein described, adding his proper signature."

His contention is that, whereas it has now emerged that CONTEMPO cc is the real payee, this is a case where the payee has been wrongly designated with the result that the indorsement did not effect a negotiation of the cheque.

The obvious question that has to be answered in dealing with the submission is whether this is indeed a case of a "wrong" designation of the payee as contemplated in sec 30(5) in view of the fact that

(1) the designated payee is CONTEMPO,

(2) the real payee is a close corporation - CONTEMPO cc, and

(3) CONTEMPO cc uses the trade name CONTEMPO.

Legally speaking a close corporation has only one name (cf secs 22, 22 A and 23 of the Close Corporations Act) and any other name - whether it be

an abbreviation or a description omitting part of the registered name - would legally be wrong. But we must take cognisance of the commercial practice largely resorted to in this country of conducting business under an assumed name, and the legal recognition of this practice. We know that a trade name may be a valuable asset and that it is protected by law; and we know that special measures have been devised (eg Rule 14 of the Uniform Rules of Court and Rule 54(4) of the Magistrates' Courts Rules) in order to allow the users of such names access to the courts in their assumed names. Not surprisingly therefore provision is made in sec 21(a) of the Act itself for the signature of a bill in a trade or assumed name. What is of importance in this regard is that members of the public seldom know the identity of the owner of the concern; nor is the identity of the owner normally of any interest to them. A person buying a

spare part for his motor car from "A B C Spares" normally does not know, and is not interested to know, who the owner is and, when he comes to pay for it, he will almost certainly draw his cheque in favour of "A B C Spares" who will send it to the bank where it will be credited to an account bearing the same name. In this event no-one would suggest that the payee was wrongly designated.

Can it be said that the designation in the postulated case is nevertheless "wrong" in terms of sec 30(5)? In answering this question we must bear in mind that, where the cheque in the postulated case is indorsed in the name of "A B C Spares" only, the person using that name will, but for the provisions of sec 30(5), be personally liable in terms of sec 21(a). On the other hand, if in such a case the description of the payee were to be regarded as a wrong designation, sec 30(5) would apply and the

indorser would be released from personal liability to a subsequent holder. Sec 30(5) was clearly not designed to release an indorser from liability incurred by virtue of any other provision; it must be construed in conformity with the rest of the Act; and it seems to me that it can only be reconciled with sec 21(a) on the basis that the designation of the payee by a trade name is not a wrong designation within the ambit of sec 30(5).

Respondent's counsel argued that sec 30(5) is aimed at ensuring absolute accuracy in the indorsement of bills payable to order. He drew attention to the fact that the legislature, in couching the section in imperative terms, departed from the directory wording of its counterpart in the English Act which was slavishly adhered to in many other respects. The result is that, even where the name of the payee is misspelt, the indorsement must

be in the prescribed form, which is indicative of an insistence on absolute accuracy in the indorsement of bills payable to order. But what does sec 30(5) really achieve? An insistence cm accurate indorsement may stem from the fact that the payee need, in terms of sec 5(1), only be indicated with reasonable certainty and one can only assume that it was considered necessary to facilitate negotiation by ensuring that it appears from the bill itself (1) that the indorsement was signed by the payee and (2) precisely who the payee is. But, if this is what the legislature sought to achieve, sec 30(5) fails in its purpose: all that the payee has to do, is to indorse the bill as he is described therein and add his proper "signature". "Signature" is not defined and may include any mark whereby the indorser signifies his willingness to be bound (Malan & De Beer: op cit at 86-87; Cowen & Gering: Cowen on the Law of

Negotiable Instruments in South Africa (4th ed) at 130-131). An indorsement containing the name of the payee in the bill followed by a mark or, as often happens, an illegible signature, will accordingly be strictly in accordance with the requirements of sec 30(5); yet the real identity of the payee cannot be ascertained by looking at the indorsement. It would thus appear that the legislature either thwarted its own design (which is highly unlikely) or did not, after all, demand absolute accuracy (which is far more acceptable).

That being the case, and taking into account of what I said earlier about the use of trade names, it cannot in my view be said that a reference to a close corporation in its trade name constitutes a wrong designation within the meaning of sec 30(5).

The position pertaining to both appeals may now be summarized. In both cases the respondent

relied on what may conveniently be called preliminary points of law. On one of these (that the cheques were not properly presented for payment) the court a quo found in his favour and dismissed the claims without considering a defence raised on the merits in respondent's opposing affidavits. That finding formed the basis of the appeals to this court but, as I have indicated, it must be sustained and, had matters rested there, the appeals would have been dismissed. However, the appellants applied for the amendment of the summons and the grounds of appeal in order to raise (for the first time) an argument that presentment for payment was dispensed with. I have indicated that the amendments ought to be granted and that presentment was indeed dispensed with. In the Navidas matter a further point (that the indorsement did not effect a negotiation) then had to be considered. I have indicated that it must fail. The

result is that all the preliminary points of law have now been disposed of. We have not been asked to consider the defence on the merits presumably because it is clear that it cannot possibly succeed. It follows therefore that both appeals are to be upheld and what now remains, is the question of costs.

I indicated in the previous paragraph that, had the appellants not raised the point that presentment for payment was dispensed with, the appeals would have been dismissed because the trial court's finding that the cheques were not properly presented must be sustained. The trial court acted correctly in refusing provisional sentence on the papers before it and there is accordingly no reason why the appellants should be awarded their costs in the court a quo. The fact that they have succeeded on a point raised for the first time on appeal may also have an effect on the costs of appeal. As

appears from the judgment in Argus Printing and Publishing Co Ltd v Die Perskorporasie van Suid-Afrika Bpk; Argus Printing and Publishing Co Ltd v Rapport Uitgewers (Edms) Bpk 1975(4) SA 814 (A) at 823 E-H the court has a discretion to deprive a successful appellant of his costs or part thereof where a point which could have been taken in the trial court is first taken in the court of appeal. A relevant consideration in exercising this discretion is the course the matter would have taken had the point been raised earlier. Another relevant consideration is the reason for the delay. In the present case the possibility that presentment for payment was dispensed with only occurred to the appellants' legal advisers after the publication of the judgment in the Commercial Union case supra. The judgment in that case broke new ground and opened an avenue that had hitherto not been explored.

Appellants' advisers cannot be blamed for not taking the point earlier. Nor can it be said that the respondent's attitude would have been different had it been taken in the court a quo; even in this court his counsel resisted it to the bitter end arguing that the judgment in the Commercial Union case is wrong. In these circumstances it would in my view not be fair to deprive the appellants of any part of their costs of appeal although they are obviously liable for the costs relating to their applications for amendment. (I wish to record here that the appellants also applied for the condonation of their failure to file the records and powers of attorney timeously. In the absence of objection their applications were granted at the hearing of the appeals and the appellants were ordered to pay the costs relating thereto.)

The following order is accordingly made:

1 (a) The summonses in cases Nos 8870/91 and 9651/91 (Durban and Coast Local Division) are amended by inserting in each of them after the existing paragraph (c) the following:

> "Alternatively payment of the cheque was dispensed with in terms of sec 44(2)(c) of Act 34 of 1964 the defendant having countermanded payment."

(b) The notice of appeal in each appeal is amended in terms of the notice of motion filed in each case on 2 April 1993.

(c) Each appellant is ordered to pay the respondent's costs relating to the amendments referred to in paragraphs (b) and (c).

2. The appeals are upheld with costs.

3.(a) In case No 6870/91 (appeal No 427/92) the

order of the court a quo is set aside. Substituted for it is an order in the following terms:

(i) "Provisional sentence is granted against the defendant in an amount of R22 730,00 together with interest thereon at the rate of 18,5% per annum from 5 November 1991 to date of payment. (ii) No order of costs is made."

(b) In case No 9651/91 (appeal No 426/92) the order of the court a quo is set aside. Substituted for it is an order in the following terms:

"(i) Provisional sentence is granted against the defendant in an amount of

Rll 000,00 together with interest thereon at the rate of 18,5% per annum from 25 November 1991 to date of payment. (ii) No order of costs is made."

J J F HEFER JA

CORBETT CJ) KUMLEBEN JA) CONCUR MAHOMED AJA)

NICHOLAS AJA

NICHOLAS AJA:

I am in respectful agreement with that part of the judgment of HEFER JA in which he deals with the appeal in the case of Metha v Essop, but take a different view in regard to the appeal in the case of Navidas (Pty) Ltd v Essop. In the latter case I would, for the reasons which follow, dismiss the appeal with costs.

Under the Bills of Exchange Act 34 of 1964 ("the Act"), a bill is negotiated if it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill (s 29(1)). In terms of s 1, "holder" includes the payee of a bill who is in possession of it. A bill payable to order is negotiated by the indorsement of the holder completed by delivery (s 29(3)). The manner of endorsing a bill is prescribed in s 30. In order to

effect a negotiation of a bill, an indorsement must be written on the bill itself and be signed by the indorser (ss (1)). It is provided in ss (5) that -

> "(5) If in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he must, in order to effect a negotiation of the bill, indorse the bill as he is therein described, adding his proper signature."

S 30(5) is mandatory in its terms. The word "must" is imperative, and the sub-section makes it clear that indorsement in the manner prescribed is a sine qua non for negotiation.

The English Bills of Exchange Act 1882 provides in s 32(4) that

> "(4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit,

his proper signature."

Differing from s 30(5) of the Act, this sub-section is not obligatory in its terms. It permits the payee or indorsee, if his name is wrongly designated or his name is mis-spelt, to indorse the bill as therein described and to add his proper signature if he thinks fit. In such a case s 32(4) does not in terms authorise an indorsement by the proper signature alone.

In the colonial statutes, which were in force before Union and continued to apply thereafter until the enactment of the Act, there was a difference between the relevant provisions of the laws of the Cape and Natal on the one hand and those of the laws of the Transvaal and the Orange Free State on the other. Cape Act No 19 of 1883 and Natal Law 8 of 1887 both followed the English statute in providing that where in a bill payable to order the payee or indorsee is wrongly

designated or his name is mis-spelt, he may indorse the bill as therein described, adding, if he thinks fit, his proper signature. S 30(4) of Transvaal Proclamation 11 of 1902, and s 30(4) of Orange Free State Ordinance 28 of 1902 on the other hand both provided that -

> "Where in a bill payable to order the payee or endorser is wrongly designated or his name is mis-spelt, he shall endorse the bill as there described, adding his proper signature."

It was the latter, mandatory formulation which the South African legislature adopted when it dame to consolidate the bills of exchange legislation in the 1964 Act.

There is no dispute in the present matter that Contempo CC was contemplated as the payee of the cheque. This is a close corporation. Provision for the name of a close corporation is made in s 22(1) of

the Close Corporations Act 69 of 1984:

> "22. (1) The abbreviation CC or BK, in capital letters, shall be subjoined to the English or Afrikaans name, as the case may be, of a corporation which it uses."

This provision is mandatory. S 23(1)(b) provides that every corporation shall have its registered full name (or a registered literal translation thereof into the other official language of the Republic) mentioned in legible characters inter alia in all bills of exchange and endorsements purporting to be signed by or on behalf of the corporation. Having regard to these provisions, it is not open to question that the abbreviation CC or BK is an essential part of the name of a close corporation.

There are similar provisions in the Companies Act 61 of 1973. In terms of s 49(1) -

"49. (1) Subject to the provisions of this section -

(a) the name of a public company having a share capital shall include, as its last word, the word 'Limited';

(b) the name of a private company having a share capital shall include as its last two words, the words '(Proprietary) Limited';

(c) the name of a company limited by guarantee shall include -

(i) the word 'Limited' as its last word; and

(ii) the statement '(Limited by Guarantee)' subjoined to the said name."

This sub-section too is mandatory.

The purpose of the respective provisions is manifest. It is to provide the important information

to those concerned that the person with whom they are dealing is a company with limited liability incorporated under the Companies Act, or a juristic person formed under the Close Corporations Act 69 of 1984, as the case may be.

The question whether the payee or indorsee is wrongly designated in a bill, involves a comparison between "his proper signature" and the designation in the bill. It does not seem to me that there can be any other relevant material. Thus the fact that a company carries on its business under a trade name does not mean that the trade name is the name of the company. If there is a substantial difference between the correct name of the payee or indorser and the way in which he is designated in the bill, then the conclusion must be that he is wrongly designated in the bill.

In the present case, the payee was designated as Contempo, whereas its correct name is Contempo CC.

The difference is by no means technical or insubstantial. Contempo CC signifies a close corporation. Contempo might be a partnership or the trade name of a firm or business. Cf Joseph Bond and Jeans Ltd v National Implement Co (Pty) Ltd 1949(2) SA 659(W) at 661.

HEFER JA refers in his judgment to decided cases which have held that in provisional sentence proceedings between immediate parties, the payee may be identified by a suitable allegation in the summons or, possibly, by evidence in a replying affidavit. In my respectful opinion such cases have no bearing on the present matter where the issue relates not to the identification of a party to the proceedings but to the question whether a bill was negotiated by the payee. That is something to be determined according to the provisions of the Act and not with reference to allegations in the summons or evidence aliunde.

In my opinion the subject cheque was not endorsed as required by s 30(5) of the Act. In consequence it was not negotiated to Navidas, and Navidas did not become the holder.

H C NICHOLAS AJA.