Case No 21095 IH

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SAPPI MANUFACTURING (PROPRIETARY) LIMITED Appellant

v

STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

CORAM: HEFER, EKSTEEN, HOWIE, SCHUTZ et ZULMAN JJA

HEARD: 17 SEPTEMBER 1996

DELIVERED: 1 OCTOBER 1996

J U D G M E N T

HEFER JA:

The sole issue in this appeal is whether Syfrets Income Fund ("the Fund") is the holder in due course of two bills drawn by the appellant on 26 April 1994. The respondent is the trustee of a trust which controls the Fund. Alleging that the bills had been negotiated to the Fund and subsequently dishonoured by non-payment, the respondent sought and obtained an order in the Witwatersrand Local Division against the appellant for payment of a total amount of R10m with interest a tempore morae and costs. (The Court a quo's judgment has been reported as Standard Bank of SA Ltd v Sappi Manufacturing (Pty) Ltd 1995 (4) SA 392 (W).) The appeal is directed at this order.

The appellant has challenged the Court a quo's finding that the Fund is the holder in due course on two grounds. Firstly, it is said that the bills were not indorsed by the appellant as claimed by the respondent and found by the Court a quo; and, secondly, that they were not complete and regular on the face of it as s 27(1) of the Bills of Exchange Act 34 of 1964 ("the Act") requires for

holding in due course. I will deal with each ground in turn but before I do so,

let me say that the bills are identical in form and substance. Each is for R5m,

payable to "ourselves or order" and signed by Messrs De Villiers and Vlok on

appellant's behalf as drawer in the following way:

> "Vir en namens
> For and on behalf of SAPPI Manufacturing (Pty) Ltd Rep No 51/03180/07 (signed)
> Vlok (signed) De Villiers Gemagtigde ondertekenaars/Authorised signatories."

The drawee is Prima Bank Ltd ("Prima Bank") whose acceptance dated

26 April 1994 appears on the face of each bill. On the reverse side, each bill

reads:

The indorsement

It will be observed that there appears on the right hand reverse side of each bill what purports to be a special indorsement by Prima Bank in favour of the Fund. Since the bills were payable to order, the validity of the special indorsement is dependant upon an earlier indorsement by the appellant (payee). Respondent's case is that what appears on the left hand reverse side of each bill and consisting of De Villiers and Vlok's signatures and the qualification attached thereto, constitutes an indorsement by the appellant. (For ease of reference I will refer to this portion as "the first indorsement".) Appellant argues that this is not the case. Sec 30(1) of the Act requires an indorsement, in order to effect a negotiation, to be signed by the indorser and what the dispute boils down to, is whether the first indorsement is to be construed as the appellant's signature. If so, the signature would, in terms of sec 30(2) be sufficient. Bearing in mind further that the Act contains no definition of "sign" or "signature" and that

according to the judgment of this Court in Navidas (Pty) Ltd v Essop 1994 (4) SA 141 (A) at 156 E-F the signature of an indorser "may include any mark whereby the indorser signifies his willingness to be bound" (see also Malan, Pretorius & De Beer: Malan on Bills of Exchange, Cheques & Promissory Notes 2 ed 99), the question really is whether the first indorsement is to be regarded as the appellant's mark of assent as indorser.

The appellant is a company. Being a legal entity, it is unable to sign a document and requires a natural person to do so on its behalf (Malan ef oZ 106-107). Sec 95(1) of the Act provides that

> "[i]f by this Act, any instrument or writing is required to be signed by any person it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person, by or under his authority..."

It is not part of appellant's case that either De Villiers or Vlok lacked authority to draw or indorse bills on its behalf; its case rests entirely on the

inchoateness of the qualification attached to their signatures. In this regard appellant's counsel suggested two possibilities. One is that the signatories actually intended no qualification but overlooked the qualifying words and the need for their deletion. The other is that they intended to sign on behalf of some other company (possibly another company in the appellant's group) and merely failed to enter its name. (I may explain that the lines on which De Villiers and Vlok signed, and the words "Vir en namens/For and on behalf of underneath the lines, were stamped on the documents. All that the signatories were required to do was to append their signatures and enter the name of the company which they intended to bind.)

Counsel were agreed that the question under consideration has to be decided on the proper construction of the bills. This entails that we take into account, not only what appears on the reverse sides, but also what appears on their faces. Approaching the matter in this way we find that De Villiers and

Vlok signed the bills on appellant's behalf as drawer. The same signatories then signed the reverse sides on the lines above the words "Vir en namens/For and on behalf of". Their failure to delete the qualification effectively rules out the possibility that they intended to sign in their personal capacities. They must have done so deliberately for, had it been an oversight as appellant's counsel suggested, it must be inferred that they intended to bind themselves personally as avals for payment of R5m in each case. A proper reading of the bills as a whole demonstrates that it is much more likely, and has to be accepted as a matter of overwhelming probability, that they intended to sign in a representative capacity but failed to insert the name of their mandator. The question then is who the mandator was. I find the suggestion that it might have been some other company entirely unrealistic. Such a company could only be bound as an aval and, taking into account the important consequences of the intervention of such a party, it is again highly unlikely that the need for the

completion of the qualification would have been overlooked. Moreover: the bills were plainly intended for negotiation and destined for the money market; they could only be negotiated by way of the drawer's indorsement as the initial step. What was required therefore, was an indorsement - indeed an indorsement by the appellant - and not the signature of an aval. The inference is irresistible that De Villiers and Vlok signed the reverse sides as authorised signatories for the appellant. That being so, this is not a case, as appellant's counsel submitted, of an agent signing on behalf of an undisclosed principal. It is apparent to any observant reader that the appellant was the principal.

The Court a quo's finding at 401D-E that the appellant indorsed the bills in blank must accordingly stand. Were the bills complete and regular on the face of it?

In terms of s 27(1) of the Act a holder in due course

> "is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances..." (The

circumstances referred to and the other requirements of s 27 are irrelevant and need not be quoted.)

Although it is not clear (as Malan et al point out at 193) whether the expression "complete and regular on the face of it" sets one or two requirements for holding in due course, it is probably correct to say that the requirements of completeness and regularity are separate (Cowen & Gering: Cowen on the Law of Negotiable Instrument in South Africa 4 ed 278-279; cf Mobeni Supersave v Suleman 1992 (3) SA 660 (N) at 663B-C). As to completeness I accept the view (loc cit) of the textbook writers that it refers to the essential elements of form of a bill of exchange. (Chalmers & Guest on Bills of Exchange, Cheques and Promissory Notes 14 ed at 270-271 is to the same effect.)

As to regularity the leading English case is Arab Bank Ltd v Ross [1952] 1 All ER 709 (CA) in which the requirement of regularity in the context of the expression "complete and regular on the face of it" in sec 29(1) of the Bills of Exchange Act, 1882 was considered. What emerges from the judgments of

Somervell LJ at 713F-G, Denning LJ at 715E-F and Romer LJ at 718C-D, is that in England the question of regularity falls to be decided by reference to the contents of the bill only. (This approach was followed, correctly in my view, in Silcan Estate and Finance Co (Pty) Ltd v Astra Cafe 1973 (3) SA 7 (N) at the top of 9. Cf also Dependable Aluminium Window and Doors CC v Antoniades 1993 (2) SA 49 (N) at 52E-F.) Dealing in the Arob Bank case with the meaning of regularity Denning LJ remarked at 715F-716B:

> "Now, regularity is a different thing from validity. The Act itself makes a careful distinction between them. On the one hand, an indorsement which is quite invalid may be regular on the face of it ... Conversely, an indorsement which is quite irregular may, nevertheless, be valid ... Regularity is also different from liability. The Act makes a distinction between these two also ... Once regularity is seen to differ both from validity and from liability, the question is : When is an indorsement irregular? The answer is, I think, that it is irregular whenever it is such as to give rise to doubt whether it is the indorsement of the named payee. A bill of exchange is like currency. It should be above suspicion. But if it is asked: When does an indorsement give rise to doubt?, then I would say that that is a practical question which is, as a rule, better answered by a banker than a lawyer."

Based on the Arab Bank case the view is expressed in Byles on Bills of Exchange 26 ed by Ryder and Bueno at 220 that

> "it may safely be said that if there is anything on the instrument, or any omission, which should put a transferee on inquiry, there can be no compliance with the condition of the section."

Chalmers & Guest (op cit 271) hold essentially the same view.

The recognised South African writers are remarkably cursory on the question of regularity. Cowen & Gering (op cit 279-280) refer by way of example to some of the decisions but do not discuss the subject; in Lawsa (Vol 19 at p 52 para 78) it is merely said that "[a]n instrument is irregular if there is doubt that the endorsement is the endorsement of the named payee or endorsee"; and, but for the remark that "[n]ot every irregularity on a bill constitutes an irregularity for the purposes of section 27(1)", no statement of principle is to be found in Malan et als work either. Of importance to the decision of the present case is the observation at 191 that

> "in deciding whether the indorsement of the payee is irregular the

question must be asked whether it is of such a nature that a reasonable doubt exists as to the single identity of the payee and the indorser."

As authority for this proposition the writers refer to the Arab Bank case, to

Mourgelas v Maidanos 1973 (4) SA 297 (T) at 298F-G and to the Astra Cafe

case which I have already mentioned . The relevant passage from the judgment

in Mourgelas reads as follows:

"It is not every discrepancy between the payee's name and the endorsing signature which would render a cheque irregular within the terms of the section. As long as there is no reasonable doubt as to the single identity of the payeee and the endorser, differences between the description and the signature would not constitute an 'irregularity'."

In his judgment in Astra Cafe Leon J referred inter alia to Byles's remark

quoted above and to Arab Bank and concluded at 9G-H:

" DENNING LJ, in that case observed (at p 716) that an indorsement is irregular

'whenever it is such as to give rise to doubt whether it is the indorsement of the named payee.'

It seems to me to follow that where it gives rise to such

doubt it should put a transferee on enquiry."

Two further cases which I have also mentioned, may be added to the list.

The first is Mobeni Supersave v Suleman. In that case the court was concerned

with the possibility of an irregularity in the form of an alteration in a cheque.

The judgment is primarily directed at the effect of the alteration in question (the

deletion of a crossing) but in order to determine whether the cheque was regular

on the face of it, the learned judge referred infer alia to the Arab Bank case and

concluded as follows at 671D-F:

> "In all the circumstances I am of the view that a transferee of the cheque could not, merely by examining the cheque, be able to come to the conclusion, with complete confidence, that the crossing was in fact deleted prior to the issue of the cheque and for the purpose of correcting an error in the drawing of the cheque. He could also not be certain that the effect of the deletion was that the cheque was no longer a crossed cheque. He would, therefore, not know whether or not the deletion was a material alteration. The result of that is, in my opinion, that the cheque is not regular on the face of it."

The other case is Dependable Aluminium Windows and Doors CC v

Antoniades. Dealing with what was suggested to him as an irregularity in the

form of a discrepancy between the amount written in figures and the amount

written in words in a cheque, Didcott J said at 52F-G:

> "I may now look, it follows, at nothing but the cheque. That I have to view as a whole. And it must be viewed through the eyes of your average person who is accustomed to handling cheques."

Having examined the cheque in that manner and having found no discrepancy

because the amount in words was illegible, the learned judge, reasoning along

lines similar to those in the Arab Bank case, continued at 53D-F:

> "When the cheque was subsequently negotiated to the plaintiff, it took such in good faith, in reduction of a debt owed already to it, and thus for value ... As a result it was a holder in due course ... The cheque was regular on its face, in my view, once it lent itself to the construction which I have placed on it. No such irregularity, I therefore believe, disqualified the plaintiff from becoming a holder in due course."

Denning LJ'S judgment in the Arab Bank case was cited with apparent

approval in Ganie v Parekn Another 1962 (4) SA 618 (N) at 623D-E and

Lion Mill Manufacturing Co (Pty) Ltd and Another v New York Shipping Co (Pty)Ltd 1974 (4) SA 984 (T) at 989C-D. Although it was found to be inapposite on the facts of the case in Estate Ismail v Barclays Bank (DC & O) 1957 (4) SA 17 (T) at 25C-E, the provincial courts in this country have adopted it and I think that this Court should follow their example.

Reverting then to the facts of the present case, appellant's counsel submitted that the bills are incomplete for lack of the insertion of a name in the qualification to De Villiers and Vlok's signatures. I do not agree. No essential element of form is lacking; and as to regularity I need hardly say more than what I said in dealing with the indorsement because I believe that no reasonable banker would, reading each bill as a whole, view the first indorsement differently. Admittedly the appellant's name was not inserted in the qualification but such a banker would, in my view, construe the bills in the same way that I have; and he would have no doubt about the singularity of the payee and the

indorser.

In my judgment the Court a quo's conclusion that the Fund was the holder in due course of the bills was the correct one.

The appeal is accordingly dismissed with costs including the costs of two counsel.

JJ F HEFER JA

AGREED : EKSTEEN JA
HOWIE JA
SCHUTZ JA
ZULMAN JA