Reportable

THE SUPREME COURT OF APPEAL OF

SOUTH AFRICA

Case no: 601/95 In the

matter between

A Ramsukh

and

Diesel-Electric (NATAL) Pty Ltd

Coram: Van Heerden, Smalberger, Vivier) Howie and Plewman JJA

Heard: 13 May 1997 Delivered:

28 May 1997

JUDGMENT

VAN HEERDEN JA:

This matter arises from judgments of Howard JP in die Durban and Coast Local Division and, on appeal to it, of a full bench of the Natal Provincial Division (per Booysen J). Those judgments, to which I shall refer as the first and the second judgment, have been reported: Diesel-Electric (Natal) (Pty) Ltd v Ramsukh 1994(1) SA 382 (D), and Ramsukh v Diesel-Electric (Natal) (Pty) Ltd 1996(1) SA 876 (N). In setting out the factual background to the appeal before us, I can do no better than quoting the following passages from the judgment of Howard JP (at p 384):

> "The plaintiff [the present respondent] claims provisional sentence for payment of R22 484 on a dishonoured cheque. The relevant allegations in the summons are that the defendant [the present appellant] drew a cheque for amount on the United Bank Ltd, Amanzimtoti, in favour of the plaintiff, that the plaintiff is the legal holder of the cheque for value and that the cheque was duly presented for payment and dishonoured on 19 August 1992. The cheque sued upon bears the defendant's signature as drawer, is dated 2 August 1992, and is made payable to 'Diesel Electric (the plaintiff) or bearer'. In his opposing affidavit the defendant states that he has never had any dealings with, or incurred liability to make any payment to, the plaintiff.

He explains that the cheque sued upon is one of five which he signed in blank and handed to one Pillay on 29 June 1992. It had been agreed that Pillay would make certain payments on his behalf, and would complete and hold the cheques as security for repayment of the moneys disbursed. When he received the summons in this action he realised that Pillay had fraudulently completed and delivered the cheque to the plaintiff.

It appears from the replying affidavits filed on behalf of the plaintiff that it accepted the cheque in payment of the price of 7 000 spark plugs which it sold and delivered to a person who gave his name as Tony Naidoo. The sale was concluded telephonically and the goods were sent to an address supplied by Naidoo, after the plaintiff had ascertained that the amount of the purchase price had been deposited in its bank account. The deposit had been made by means of the cheque which is in issue in these proceedings. It was subsequently dishonoured and the plaintiff has not been paid for the spark plugs.

It is not possible to determine on the evidence whether it was Pillay or Naidoo who dated and completed the cheque with the plaintiffs name as payee and the amount of R22 484, or indeed whether Pillay and Naidoo are the same or different persons. This plaintiff admits that he has never had any dealings directly with the defendant, but he is unable to admit or deny his remaining averments concerning the circumstances under which he signed and parted with possession of the cheque."

In the court of first instance the present respondent (to whom I shall refer as the plaintiff) contended that as the holder in due course of the cheque it was entitled to succeed. This contention the present appellant (to whom

I shall refer as the defendant) sought to meet on two grounds; first, that in the summons the plaintiff did not allege that it was a holder in due course and, second, that in any event the payee of a cheque cannot be such a holder.

Both arguments were rejected by Howard JP who consequently granted provisional sentence against the defendant.

On appeal to it the full bench endorsed the view of Howard JP that the payee of a bearer cheque can be a holder in clue course. Booysen J, however, advanced a further reason for holding that the plaintiff had indeed become a holder in due course. It was this (at p 886 C-E):

> "Indeed it seems to me that when Pillay took the cheque he did so not as appellant's agent. It seems that the objective was that Pillay would complete the cheque in accordance with the amount he expended and presumably cash it if not recompensed in a different way. There was therefore nothing in the agreement between Pillay and appellant in terms of which Pillay would not eventually become a holder of the cheque. That was at least one of the intended results. If Pillay had acted in terms of the agreement and filled in the document in his own name as payee and presented it at the bank, there could be no doubt that he would have been the holder albeit not the holder in due course. When Pillay filled in respondent's name or bearer, he became a holder

who could negotiate the cheque by mere delivery. He could of course not be a holder in due course because he took a bill not complete and regular on the face of it nor was it ever negotiated to him. When however he handed the bill to respondent, he had, it seems to me, become a holder and therefore respondent became a holder in due course."

Booysen J also rejected an argument based on an alleged absence of valuable consideration. In the result the appeal to the full bench was dismissed with costs. Subsequently special leave was granted to the defendant to appeal to this court. The plaintiff did not actively oppose the further appeal but filed a notice in which it stated that in order to avoid the incurrence of further costs it did not intend to appear at the hearing and would abide the judgment of this court.

It is convenient at this stage to refer to a number of the provisions of the Bills of Exchange Act 34 of 1964 ("the SA Act"). The most important section for present purposes is s 18 which reads:

"18 (1) If a person places his signature upon, and affixes a stamp to, a blank paper and delivers such paper to any other person in order that

it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount such a stamp will cover, using the said signature for that of the drawer, the acceptor, or an indorser.

(2) If a bill is wanting in any material particular, the person in possession of it has in like manner a prima facie authority to fill up the omission in question in any way he thinks fit.

(3) In order that any instrument referred to in sub-section (1) or (2) may, when completed, be enforceable against any person who became a party thereto prior to its completion, it must be filled up within the time agreed on, or, if no time is agreed on, within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument after completion thereof is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within the time allowed and strictly in accordance with the authority given."

In terms of s 1 "bearer" means the person in possession of a bill which

is payable to bearer; "holder" means the payee or endorsee of a bill who is

in possession of it, or the bearer thereof, and "issue" means the first delivery

of a bill, complete in form, to a person who takes it as a holder.

S 27(1) reads:

"(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances, namely—

(4) he must have become the holder of it before it was overdue, and if it had previously been dishonoured, without notice thereof; and

(5) he must have taken the bill in good faith and for value, and at the time the bill was negotiated to him, he must have had no notice of any defect in the title of the person who negotiated it."

Finally, s 29(1) to (3) provides:

"(1) 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.

(6) A bill payable to bearer is negotiated by delivery.

(7) A bill payable to order is negotiated by the indorsement of the holder completed by delivery."

In his heads of argument counsel for the defendant submitted, as he did in the courts below, that the plaintiff was precluded from relying upon s 18(3) because of its failure to allege in the summons that it was a holder in due course of the cheque. This argument was rightly jettisoned at the hearing before us. For, subject to a proviso which is not material for present purposes, s 28 (2) provides that every holder of a bill is prima facie deemed to be a holder in due course.

Counsel's main submission was that under no circumstances can the payee of a bill, whether an order or bearer bill, be a holder in due course thereof. In support of this submission counsel sought to rely mainly on Moti and Co v Cassim's Trustee.[1]

In Moti this court held that the payee of an order instrument could not qualify as a holder in due course under the Transvaal Bills of Exchange Proclamation.[2] The reasoning appears from the following passage in the judgment of Innes CJ (at p 731):

> "Though sec 31(1) [s 29 of the SA Act] does say that a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder, yet it provides (3) that a bill payable to order is negotiated by the endorsement of the holder completed by delivery. Negotiated may not be 'merely equivalent' to endorsed, but it implies endorsement which must be the endorsement of a holder. Moreover, as was pointed out in Herdman v Wheeler, the issue of a note by delivery to the payee is a very different thing from its transfer thereafter from hand to hand. In the one case the parties are simply bound by their own contract; in the other the transferee may

(8) 1924 AD 720.

(9) Proclamation 11 of 1902.

acquire a better title than the transferor possessed; and that is the result of negotiation, not of issue."

This reasoning has been criticised[3] and is at variance with a decision of the Alberta Supreme Court*; the majority of decisions in the United States prior to the enactment of section 3-302(2) of the Uniform Commercial Code* and with that section which simply provides that a payee may be a holder in due course.[6] It is, however, in harmony with previous South African decisions[7]; has consistently been applied*, and has the weighty support of the

(10) See, eg Van der Merwe, Enkele Probleme wat uit ons Wisselwetsewing voortspruit 1959 THRHR 275, 277-8, and De Wet and Yeats, Die Suid-Afrikaanse Kontraktereg en Handelsreg. 4de uitg., pp 778-9.

(11) Johnson v Johnson [1928] 2 DLR 531.

(12) Beutel's Brannan, Negotiable Instruments Law. 7th ed., pp 675 et seq.

(13) Tager, The Payee as Holder in Due Course. 1980 SALJ 24,27.

(14) See, eg, Ullman Bros and Davidson v Railton. 1903 TPD 596, 599, and Thal v Cleveland Oil Co. 1922 CPD 7,12.

(15) See eg. Karabus Motors (1959) Ltd v Van Eck. 1962 (1) SA 451 (C) 453; Viljoen v SIK Investment Corporation (Pty) Ltd, 1969 (3) SA 582 (T) 585. and Saambou Nasionale Bouvereniging v Friedman, 1979 (3) SA 978 (A) 988.

House of Lords[9]. Be all that as it may, since the authority of Moti has not

been questioned in either court below or in this court, I shall assume that it was correctly decided.

I have already emphasized that Moti was concerned with an order instrument and as appears from the above quoted passage there is nothing in it to support the view that the payee of a bearer instrument is precluded from being a holder in due course. Nor is there any South African, or, for that matter any common law case of which I am aware, which can be invoked as authority for such a proposition. Indeed, such forensic views as have been voiced are opposed to the defendant's contention[10].

(16) RE Jones. Limited v Waring and Pillow Limited. (1926) AC 670.

(17) See, eg, Cowen, The Law of Negotiable Instruments in South Africa. 4th ed,p 114; Tager, 1980 SALJ 24,25; LAWSA vol 1,p53,nl5; Malan, Bills of Exchange, Cheques and Promissory Notes in South African Law. 2nd ed, p 181; Penn, Shea and Arora, The Law Relating to Domestic Banking, vol 1, p 231; Holden. The Law and Practice of Banking, 5th ed, vol 1,p 184; Crawford and Falconbridge. Banking and Bills of Exchange. 8th ed, p 1474; Baxter, The Law of Banking. 4th ed p 25-6, and Johnson v Johnson [1928] 2 DLR 531 (postscript).

As will have been observed, in Moti Innes CJ stressed the fact that a bill payable to order is negotiated by the endorsement of a holder plus delivery, which is to be distinguished from the issue of a bill by the drawer to the payee. By contrast, s 29(2) provides that a bill payable to bearer is negotiated by delivery. It would therefore seem clear that the payee of a bearer instrument may qualify to be the holder in due course thereof. Hence Tager" rightly says:

> "The submission that the decision of Moti & Co should be limited to instruments payable to order is justified on the ground that the manner of negotiating an order instrument differs from the manner of negotiating a bearer instrument. Section 29(2) provides that [a] bill payable to bearer is negotiated by delivery'. Thus when the drawer issues a bearer instrument, that is, delivers it to the first holder, that delivery could also constitute a negotiation for the purposes of s 27(l)(b), since in the case of a bearer instrument a signature is loot required for negotiation. Moreover, it is submitted by Cowen op cit 114 that there would be a negotiation in terms of s 29(1), which speaks of the instrument being 'transferred from one person [italics added] to another in such a manner as to constitute the transferee the holder of the bill'. It will be seen that s 29(1), which defines 'negotiation', does

11 Tager, op. cit., p 25.

not prescribe that the transferor should be a holder, and therefore any person who can constitute the transferee the holder of the bill, such as the drawer, has the capacity to effect a negotiation of the instrument."

Counsel submitted, however, that a "delivery" of an instrument should be construed as a transfer of rights therein, and that the handing over of an instrument to a payee is thus merely an issue and not a delivery thereof. There is no real merit in this submission. For in s 1 "delivery" is defined as actual or constructive transfer of possession - not rights to the instrument from one person to another.

I may say en passant that even if my above view were wrong, I would have agreed with the court a quo that the cheque in question was indeed negotiated to the plaintiff. When Pillay or Naidoo filled in the plaintiff's name and the amount he did not do so as agent for the drawer (i.e. the defendant). On the contrary, he acted on his own behalf and for his own purposes, and since he was in possession of a bearer cheque he became the holder thereof. The later delivery of the cheque to the plaintiff was therefore

clearly a negotiation of that instrument[12].

I now turn to a matter not adverted to in either the first or the second judgment and also not pertinently raised by counsel in this court. It is this. S 18(1), it will be recalled, provides for the case in which a person has signed and affixed a stamp to a blank piece of paper, and has delivered it to another person in order that it may be converted into a bill. After the abolition of stamp duty on cheques in 1964[13] a controversy erupted. On the one hand it was contended that s 18 no longer applies to an unstamped cheque, and, on the other, that the reference in s 18(1) to the stamping of an instrument no longer applies to cheques[14]. In my view the controversy is misconceived.

(18) Cf Golden-Prism v But-Shor Investment and Distributors (Pty) Ltd 1978 (1) SA 512 (I)).

(19) By the Revenue Laws Amendment Act 118 of 1984.

14 See,eg, De Beer, Aansnreeklikheid ingevolge 'n Onvoltooide Tjek. 1986 TSAR 381; Hugo. Thompson v Voges: Onvoltooide Tjeks - Estoppel. 1988 De Jure 390 and Die Toepassingsgebied van Artikel 18 van (lie Wisselwet, 1990 SLR 105; Ackermann, The Inchoate Document (unpublished 1993 LLM thesis), 57 ff and Oelofse, Die Onvoltooide Wissel in die Duitse Reg. 1988 Modern Business Law 92, 99.

It will be remembered that in terms of s 18 (2) the person in possession of a bill lacking in any material particular has a prima facie authority to fill up the omission in any way he thinks fit. Sec 18(1) and (2) therefore provide for two dissimilar situations. But what is the difference between a stamped, signed blank piece of paper and an otherwise inchoate instrument?

Although the use of the phrase "a bill . . . . wanting in any material particular" involves somewhat of a misnomer, the intention of the legislature is tolerably clear. There appears to be little doubt that, for instance, a bill in which the amount or the name of the payee has been left blank, is a bill within the meaning of the phrase[15]. The distinction therefore seems to be this: a blank piece of paper bearing a signature, though stamped, does not by itself proclaim an intention that it should be converted into a bill, while "a bill... wanting in any material respect" does. I say so because the blank paper may

15 See Chalmers and Guest, Bills of Exchange. Cheques and Promissory Notes. 14th ed, 95 et seq and examples from the case law there given.

have been signed for a number of purposes, e.g. that it may be converted into a receipt. By contrast a bill merely lacking in a material particular on the face of it does proclaim an intention that it be utilised as a bill. The distinction is important because the prerequisite of s 18(1), viz delivery in order that a paper be converted into a bill, is not repeated in s 18(2). The latter subsection moreover confers the authority concerned without qualification on the person in possession of the inchoate instrument.

Now, the usual cheque form, such as the present one, in vogue in this country contains the name of the drawee bank and is payable to bearer unless the words "or bearer" are deleted and the name of a payee filled in. Hence, if signed by the drawer the only essential particular lacking is the amount. It follows that the vicissitudes of the cheque form signed by the defendant and completed by Pillay or Naidoo were governed by the provisions of s 18(2) and, of course, s 18(3)**.

16 This appears to coincide with the views of Hugo 1990 SLR 106 et seg.

In parenthesis I may point out that s 20(1) of the English Act has been

amended so as to delete any reference to the affixing of a stamp by the

signer"[17].

"Willi reliance upon an article by Kidd[18] counsel for the respondent,

however, advanced a further contention. In that article the author dealt with

the first judgement and the passage upon which counsel relied reads thus

[at pp 604-5]:

> "On the alleged facts, however, the defendant would almost certainly have been successful had he raised an alternative defence. A person who signed an incomplete instrument will be liable to a holder in due course only where the instrument was delivered to another with the intention that it be completed as a bill and negotiated (Smith v Prosser [1907] 2 KB 735 (CA) at 748-9, 754; Silver v Shapiro 1926 TPD 141 at 146; Cowan op cit 186-8; FR Malan Malan on Bills of Exchange. Cheques and Promissory Notes in South Africa Law 2 ed (1994) § 132 p 206). The defence is thus that the defendant did not intend the bill to be negotiated or intended that it be negotiated only in defined

(20) See eg Hugo, op.cit, p 108.

(21) The Payee as Holder in Due Course Succeeds Due to Absent Defense. 1995 SAW 602.

circumstances which have not arisen (Smith v Prosser supra at 749, 752-3; Awde v Dixon (1851) 6 Ex 869, 155 ER 798). This defence may be invoked against both a holder and a holder in due course . . .

In the Diesel-Electric case, the defendant claimed to have handed the cheques to Pillay on the basis of an agreement that 'Pillay would make certain payments on [defendant's] behalf, and would complete and hold the cheques as security for repayment of the moneys disbursed' (at 384E-F). The defendant clearly intended that the completed cheques be held as security and did not intend that the cheques be issued. Thus the defence as outlined in Smith v Prosser would appear to be applicable in this case. It is indeed unfortunate for the defendant that it was not raised."

I need hardly say that the author clearly fails to distinguish the provisions of s 18(2) from that of s 18 (1). It remains to deal with the two relevant cases referred to by him. In Smith v Prosser[19] the defendant had signed blank cheque forms. Since these were not stamped it was apparently assumed by all concerned that s 20(1) of the English Bills of Exchange Act 1882, which corresponds to s 18(1) and (2) of the SA Act, did not find application. The case was accordingly decided under the common law. The

19 (1907) 2 KB 735 (CA).

reason for the assumption was presumably that a signed, but unstamped, cheque form was according to the then prevailing English Law, unlike South African law, of no force and effect[20].

Commenting on this decision Spencer Bower indeed emphasised that the cheque forms had not been stamped[21]. Hoewever, in Silver v Shapiro[22] the following was said concerning that emphasis (at p 145):

"The printing of the word unstamped in italics indicates that the author intended to emphasise the fact that the paper was unstamped. But that fact (did not influence the decision; the notes were left with an agent in the Cape Province and filled in there. Fletcher Moulton, LJ stated (p.751): 'Nor do I think that the question whether the notes were stamped or not at the time of execution has any bearing upon the case, even from the point of view of an estoppel being raised against the defendant; for it seems that the Cape law, though it directs that a bill or note shall be made on paper with an impressed or adhesive stamp, does not make that condition essential to its validity and a bill or note can in that country be stamped after its making. I think, therefore, that the absence of a stamp was not notice to the plaintiff of Telfer's want of authority.'"

(22) Cf Golub v Rachaelson 1925 WLD 188,193.

(23) The Law Relating to Estoppel by Representation at 301, n(g).

(24) 1926 TPD 141.

In dealing with the reason why a signer is not liable if an instrument has been delivered to a so-called custodian, Tindall J commented as follows atpp 146-7):

> "The decisions emphasise that, to make the signer liable, he must be shown to have authorised the person to whom he delivered the document to use it as a negotiable instrument. . . The probable explanation is that in such a case the signer as a reasonable man ought to have foreseen that the agent might not only use his signature for the purpose authorised, but might go further and use it for a fraudulent purpose to the prejudice of the person to whom the instrument might be negotiated. But in the case where the paper is delivered to the agent as custodian only and not with authority to issue it as a negotiable instrument, the signer cannot reasonably be expected to anticipate that the agent will use the signature at all. The fact that the defendant's carelessness facilitated the fraud is not, by itself, sufficient to render him liable."

If regard is had to the passages preceding the quoted one it is difficult to escape the impression that Tindall J did not feel comfortable with the reasons forwarded for the distinction between the two types of cases, and I must say that in my view they are singularly unconvincing. Be that as it may,

Silver was also decided under the common law and is therefore too not

directly in point.

A final remark is apposite. As said, s 20(1) of the English Act is the counterpart of s 18(1) and (2) of the SA Act. This means that the former subsection has been split into two subsections in the SA Act, signifying a clear intention that different considerations were intended to apply to the two sets of cases they were designed to regulate. In interpreting s 18(2) of the S A Act it would hence be unwise to seek to apply uncritically English cases dealing with the second part of s 20(1) of the English Act. The same holds good for South African cases decided prior to 1964.

I am not unmindful of the fact that as a consequence of the above findings a drawer who signs a cheque form does so at his own risk, even if it is stolen from him. That, however, I perceive to be in accordance with the manifest intention of the legislature.

The appeal is dismissed with costs.

HJO van Heerden Judge of Appeal Concur: Smalberger JA Vivier JA Howie JA Plewman JA