Case no: 8697

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

BASIL READ SUN HOMES (PTY) LTD Appellant

and

NEDPERM BANK LIMITED Respondent

COURT: Van Heerden DCJ, Vivier, Harms, Scott JJA and Farlam AJA

Heard: 2 November 1998

Delivered: 20 November 1998

JUDGMENT

In December 1989 the appellant instituted action against four defendants in the Witwatersrand Local Division. They were respectively Sun Homes CC ("the CC"), its only two members, Mrs PM de Beer and Mr WH Jeffrey, and the present respondent.

Claim A was brought against the CC; claim B (and in the alternative claim C) against the CC and its members, and claim D against the respondent. After a lengthy trial Mahomed J (as he then was) dismissed claim D but granted judgment in the sum of R439 706,71 against the CC (on claim A), and in the amount of R292 496,31 against the CC and its members (on claim C). As regards claim A, the trial judge found that during the period December 1986 to January 1987 the CC collected 16 cheques from their drawers; that in breach of a contractual obligation the CC failed to hand over the cheques to the appellant and that the CC wrongfully appropriated the proceeds for its own purposes, the total amount involved being R436 706,71.

Twelve of the above cheques were drawn by the United Building Society ("the UBS") in favour of the appellant as payee. Before reverting to claims C and D it is necessary for me to mention briefly why the 12 cheques were so drawn. As from July 1986 the appellant,

which had been a dormant company in the Basil Read group of companies, caused housing units to be constructed on erven in Ennerdale extensions 5 10,11,12, and 14. Prior thereto an agreement had been concluded between the appellant and the CC. In terms of that agreement the CC, which carried on the business of an estate agent, undertook to sell on behalf of the appellant the housing units which the latter would construct. The CC also undertook to cause applications for loans to be completed by purchasers and to submit such documents to building societies. The purpose of the applications was to procure funds for the payment, or part payment, of the purchase prices of housing units. The loans would obviously be secured by the registration of mortgage bounds in favour of the building societies.

Pursuant to the above agreement the CC sold a number of housing units on behalf of the appellant and submitted completed loan applications to inter alia the UBS. In respect of each successful application the UBS issued a guarantee for the payment of the amount owing to the appellant against registration of transfer of the housing unit (and, of course, registration of a mortgage bond). When a transfer was registered the UBS drew a cheque for the appropriate amount in favour of the appellant as payee.

The appellant's bookkeeping was attended to by Mrs van Vuuren, an employee of

Basil Read (Pty) Ltd. On 23 October 1986 she wrote a letter to the UBS in which she specified the names and identity numbers of drivers who were authorised to collect cheques on the appellant's behalf. The CC was apparently advised by the UBS of the registration of transfer of a housing unit. The CC in turn passed on the information to Mrs van Vuuren. She then sent a driver to the UBS to collect the cheque drawn by the UBS. All cheques so collected were paid into an account which had been opened for the purposes of the appellant's business activities.

Mrs van Vuuren was on leave from about 15 December 1986 to 7 January 1987. Soon thereafter she learned that 12 cheques drawn by the UBS in favour of the appellant in respect of sales of housing units had not reached her office. It later transpired that the CC had caused the 12 cheques to be collected from the UBS and had eventually deposited them in six accounts opened at the SA Permanent Building Society ("the SA Perm"), the total amount being R292 496,31. Those accounts were ostensibly opened in the name of the appellant but were effectively controlled by the CC which thereafter utilised the credits on the accounts for its own purposes.

As regards claim C Mahomed J found that subsequent to the collection of the 12

cheques the UBS remained the true owner of the instruments; that the CC and its members wrongfully obtained possession of the cheques and appropriated their proceeds; that hence the UBS suffered a loss of R292 496,31, and that by virtue of a cession effected by the UBS to the appellant the latter was entitled to recover that amount from the CC and its members. The trial judge ordered, however, that any payment made by the CC in respect of the judgment on claim A should be deducted from its liability in terms of the judgment on claim C.

Claim D was based upon the provisions of s 81(1) of the Bills of Exchange Act 34 of 1964 ("the Act") which read as follows:

> "If a cheque was stolen or lost while it was crossed as authorized by this Act and while it bore on it the words 'not negotiable', and it was paid by the banker upon whom it was drawn, under circumstances which do not render such banker liable in terms of this Act to the true owner of the cheque for any loss he may sustain owing to the cheque having been paid, the true owner shall, if he suffered any loss as a result of the theft or loss of the cheque, be entitled to recover from any person who was a possessor thereof after the theft or loss, and either gave a consideration therefor or took it as a donee, an amount equal to the true owner's said loss or the amount of the cheque, whichever is the lesser."

During argument in the trial court it was common cause between the present appellant and respondent that for the purposes of claim D the following had been either proved or

admitted:

(1) that immediately prior to the collection of each of the 12 cheques the UBS was the true owner thereof;

(2) that the cheques were crossed as authorised by the Act and bore on them the words "not negotiable";

(3) that after the cheques had been collected and appropriated by the CC the SA Perm became a possessor of the instruments and gave value therefor;

(4) that the drawee banker, which paid the cheques, did not incur any liability to the true owner of the instruments;

(5) that if the UBS did acquire a claim against the SA Perm under s 81(1) of the Act the amount thereof was R292 496,31.

(6) that such claim was ceded by the UBS to the appellant, and

(7) that prior to the institution of action all the assets and liabilities of the SA Perm had been taken over by the present respondent in terms of s 55 of the Mutual Building Societies Act 24 of 1965.

What remained in dispute was whether the cheques were stolen and whether

subsequent to the collection of the cheques the UBS was still the true owner thereof.

For reasons which are not material to this appeal the trial judge held that although the first three defendants unlawfully obtained possession of the 12 cheques and appropriated their proceeds, it was not proved that they had acted with theftuous intent, i.e. an intention to commit either simple theft or theft by false pretences. In particular Mahomed J found that the appellant failed to prove that the members of the CC had not honestly believed that the CC was entitled to the cheques and their proceeds, and consequently failed to establish that the cheques had been stolen. For this reason he dismissed claim D.

With the leave of the trial court the appellant appealed to a full court of the Witwatersrand Local Division against the dismissal of claim D. That court held that the members of the CC knew that the CC was not entitled to the cheques and their proceeds, and that hence the cheques were collected and appropriated with a theftuous intent in the sense in which the phrase was used by the trial judge. (The judgment has been reported: Basil Read Sun Homes (Pty) Ltd v Nedperm Bank Ltd. 1997(2) SA 610 (W).) The appeal was nevertheless dismissed for reasons which may be thus summarised (at 6T7E-619D):

(1) There was no evidence as to what induced the UBS to part with possession of

the 12 cheques. It was probable, however, that the UBS would have handed over the cheques only if it had been represented to the UBS that the CC was entitled to the cheques either on its own behalf or on behalf of the appellant.

(8) Whichever representation was made, a theft by false pretences was committed when the UBS was induced to deliver the cheques to the representor.

(9) However, had the representation been that the CC was in its own right entitled to the cheques, ownership in the instruments would on delivery have vested in the CC. The UBS would then no longer have been the true owner of the cheques.

(4) The appellant failed to prove that such a representation had not been made.

With special leave the appellant appealed to this court. Counsel for the respondent rightly did not challenge the finding of the full court that the 12 cheques were collected with intent to commit theft, but supported the findings which led to the dismissal of the appeal to that court. Counsel furthermore contended that the cheques were not stolen within the meaning of s 81 (1) of the Act.

It is not possible to determine with certainty who took delivery of the 12 cheques.

However, the probabilities are that the cheques were collected by either the second defendant

or an employee of the CC, one Heyneman, acting on her instructions. That much was conceded by counsel for the respondent.

There was, as pointed out by the court a quo and stressed by counsel for the respondent, no direct evidence of the representations which induced the UBS to part with possession of the cheques. Neither Heyneman nor any employee of the UBS was called as a witness. However, it was clearly the case of the CC and its members that the cheques had been collected on behalf of the appellant. This appears inter alia from an affidavit filed in opposition to an application for summary judgment and from the plea of the CC and its members. And when giving evidence at the trial the second defendant never suggested that she represented to the UBS that the CC was in its own right entitled to the cheques, or that she instructed Heyneman to make such a representation. Indeed, when she was asked whether the cheques had been collected on behalf of the CC she emphatically rejected the proposition.

It is in any event unlikely that the UBS would have handed over the cheques with the intention of transferring ownership therein to the CC. The cheques were drawn in favour of the appellant as payee and marked not negotiable: a third party could acquire but limited rights

in the instruments only after they had been delivered to the appellant and endorsed by it. It is accordingly impropable that the second defendant or Heyneman would have represented to the UBS that the CC was in its own right and without more entitled to the cheques.

On the other hand a representation that the representor, as a member or employee of the CC, was authorised to collect the cheques on behalf of the appellant may well have persuaded the UBS to hand over the cheques to the representor. The employee or employees of the UBS who delivered the cheques probably knew that the loan applications had been processed by the CC for the ultimate benefit of the appellant, and that the CC was informed by the UBS when a cheque was ready for collection. The postulated representation would therefore hardly have given rise to misgivings.

It follows that the probabilities support the inference that when the UBS parted with possession of the cheques it intended to transfer ownership therein to the appellant. Of course, because the appellant had not authorised the collection of the cheques by the second respondent or Heyneman it did not become the owner of the instruments. Ownership therefore remained vested in the UBS. Unquestionably the UBS also remained the true owner of the cheques.

In his heads of argument counsel for the respondent submitted that since the 12 cheques were obtained by false pretences they were not "stolen" within the meaning of s 81(1) of the Act. At the hearing of the appeal he conceded, however, that if ownership in the cheques did not pass to the CC they were so stolen. The concession was rightly made. It is unnecessary to decide whether s 81(1) of the Act is applicable to all cases in which a cheque is stolen by false pretences. We are concerned with a situation where only possession - as distinguished from ownership - of the cheques was obtained by means of the false pretences. Subsequently the CC appropriated the cheques for its own purposes. In doing so it committed simple theft, albeit that it may have been charged with theft by false pretences. The cheques were therefore stolen within the framework of s 81(1) of the Act. (Cf S v Haarhoff 1970(1) SA 253 (A) 258 C-D.)

Although the appeal must succeed, the appellant is not entitled to all the costs relating to the appeal record. This is so because the record included transcripts of the opening address and of counsel's arguments in the trial court, as well as the papers filed in connection with the appellant's application for leave to appeal to this court. As readily conceded by counsel for the appellant that material - comprising more that 800 pages - was clearly unnecessary for the

decision of the appeal and hence should not have formed part of the appeal record.

In conclusion I should mention that counsel were ad idem that, in the event of the appeal being upheld, the orders set out in para 2(b)(i) and (ii) below should be substituted for par 4 of the order of the trial court.

The following orders are made :

(1) The appeal succeeds with costs, including the costs of two counsel, save that such costs shall not include those relating to pp 65 to 249,1378 to 1984 and 2095 to 2145 of the appeal record.

(2) The order made by the court a quo is set aside and the following order is substituted therefor:

"(a) The appeal is upheld with costs.

(b) The following is substituted for par 4 of the order of the trial court:

(i) On claim D judgment with costs, including the costs of two counsel, is granted against the fourth defendant in the amount of R292 496,31, which is to bear interest at the rate of 12% per annum from the date of service of the combined summons on

the fourth defendant.

(ii) Any sum recovered from the first, second or third defendant in respect of the judgment on claim C shall be deducted from the capital amount of the judgment debt payable by the fourth defendant."

HJO VAN HEERDEN
DEPUTY CHIEF JUSTICE

Concur: VIVIER
JA HARMS JA
SCOTT JA
FARLAM AJA