THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

CASE NO 359/2001

In the matter between

THE STANDARD BANK OF SOUTH AFRICA LIMITED
Appellant

and

GLEN WILLIAM HARRIS NO **First**
Respondent

HARRY KAPLAN NO **Second**
Respondent

JA DU TOIT INCORPORATED **Intervening**
Party

CORAM: **NIENABER, CAMERON, BRAND, CONRADIE JJA et LEWIS AJA**

Date Heard: 22 Augustus 2002

Delivered: 13 September 2002

Delictual liability of collecting bank - cheque drawn on same bank - not in itself ground for bank's immunity - cheque crossed 'not transferable' collected for attorney's trust account - not unlawful if authorised by payee.

J U D G M E N T

BRAND JA

BRAND JA

[1] This appeal concerns the *Aquilian* liability of a collecting bank. The respondents are the joint liquidators ('the liquidators') of a company in liquidation, Demodig Plant (Pty) Ltd ('Demodig'). The appellant is a commercial bank ('the bank'). Prior to the liquidation of Demodig, the bank collected payment of a cheque drawn in the sum of R397 657,82 in favour of the company as payee. The liquidators contended that the proceeds of the cheque had never reached the payee. They therefore brought an action in the Transvaal Provincial Division in which they sought to recover the proceeds of the cheque from the bank.

[2] The mould of the liquidators' action is readily identifiable from their particulars of claim. It is the one recognised by this Court in the following *dictum* of Vivier JA in *Indac Electronics (Pty) Ltd v Volkskas Bank* 1992 (1) SA 783 (A) at 797A-D:

> 'There can now be no reason in principle why a collecting bank should not be held liable under the extended *lex Aquilia* for negligence to the true owner of a cheque, provided all the elements or requirements of Aquilian liability have been met .... In a situation such as the present a delictual action for damages would accordingly be available to a true owner of a cheque who can establish (i) that the collecting

> banker received payment of the cheque on behalf of someone who was not entitled thereto; (ii) that in receiving such payment the collecting banker acted (a) negligently and (b) unlawfully; (iii) that the conduct of the collecting banker caused the true owner to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss.'

[3] As will presently appear in more detail, the bank, upon collection of the cheque, credited the proceeds thereof to an account in the name of 'JA du Toit Inc Trust - Demodig Plant (Pty) Ltd'. The 'JA du Toit Inc' referred to is an incorporated company of attorneys with Mr JA du Toit ('Du Toit') as its only member. When the liquidators brought their action against the bank the latter instituted third party proceedings against JA du Toit for an order declaring the third party to be liable to indemnify the bank against any amount of damages awarded in favour of the liquidators. In his plea Du Toit denied not only that the bank was liable to the liquidators, but also, and in any event, that he was obliged to indemnify the bank. Pursuant to an agreement between Du Toit and the bank prior to the hearing of the matter before the trial Court, the third party proceedings were postponed *sine die* pending the finalisation of the action between the liquidators and the bank.

[4] Upon consideration of the evidence the trial Court (De Klerk J) held that all the requirements for the liability of a collecting bank, as formulated in the *Indac* case, had been established. Accordingly it found for the liquidators. With the leave of this Court the bank now appeals against that judgment.

[5] Shortly before the hearing of the appeal, Du Toit brought an

application for leave to intervene in the proceedings before this Court. In support of his application Du Toit explained that he has since been advised that in the event of the bank's appeal being unsuccessful, he would be liable to indemnify the bank and consequently, he contended, that both his denial of such liability on the pleadings and his agreement to postpone the third party proceedings until after the finalisation of the main action were ill-considered. He sought no substantive relief or any order as to costs. All he asked for was that his counsel should be allowed to file heads of argument and to present oral argument in support of the bank's case at the hearing of the appeal. Rule of Court 11(1)(b) affords this Court a discretion to grant the relief sought. The Court decided to exercise this discretion in Du Toit's favour for the following reasons: First, the application was not opposed by any party involved in the appeal. Secondly, the relief sought would not in any way prejudice any party or inconvenience the Court. Thirdly, it was apparent that Du Toit's fate was bound to that of the bank and that he therefore had a substantial interest in the outcome of the appeal. Consequently the application to intervene was granted.

[6] This brings me to the facts. The only witness called to testify on behalf of the liquidators was Mr GW Harris, who himself is one of the joint liquidators. From his evidence it is apparent that he knew very little about the facts germane to the issues. Ultimately his contribution amounted to little more than the identification of certain relevant documents and the confirmation of certain facts that were not in dispute. Most prominent among the relevant documents was the cheque itself. As indicated, it was drawn in favour of Demodig as payee for the sum of R397 697,82. It was dated 17 September 1998 and drawn on the bank itself, at its Isando branch, by Barlow Tractor Co (Pty) Ltd ('the drawer'). It was also crossed and marked 'not transferable'. A further document identified by Harris was an invoice addressed by Demodig to the drawer which appears to indicate that the cheque was issued in part payment for certain plant and machinery purchased by the drawer from Demodig. Included among the undisputed facts confirmed by Harris were (a) that the two directors of Demodig were Messrs Cross and Hutchinson and (b) that the cheque was collected by the bank's Randburg branch on 18 September 1998 for an account held at that branch in the name of 'JA du Toit Inc Trust - Demodig Plant (Pty) Ltd'.

[7] Two witnesses were called to testify on behalf of the bank. First, Ms N Lavagne who was employed by the bank at the time as an assistant to the manager of its Randburg branch and, secondly, Du Toit. The essential part of their version, which remained largely uncontroverted, appears from

what follows.

[8] Du Toit testified that prior to the liquidation of Demodig, he occasionally acted as attorney for the company. On 18 September 1998 one of Demodig's directors, Cross, brought the cheque to Du Toit's offices with the direction that the proceeds thereof be deposited in Du Toit's trust account pending further instructions from his co-director, Hutchinson. Since Du Toit did not know for what period the money was to remain in his trust account, so he testified, he decided not to deposit the cheque in his general trust account where the client would earn no interest, but in a separate trust savings account, as authorised by s 78 (2A) of the Attorneys Act, 53 of 1979, where the interest earned on the proceeds would enure for the benefit of Demodig. He therefore sent the cheque to the bank's Randburg branch, along with the following written request:

> 'Investment account in terms of Section 78 (2A). Please open the following Investment Account in terms of Section 78 (2A) ...
>
> Account name: JA du Toit Inc Trust - Demodig Plant (Pty) Ltd. ...
> Please deposit the attached cheque in the amount of R397 657,82 into the account.'

Some days later, Du Toit testified, he received an instruction from Hutchinson to transfer the proceeds of the cheque to an entity known as Botzamo. Since Botzamo was also one of his clients, Du Toit kept the money in the same trust savings account until it was eventually disbursed in accordance with directions he received from Botzamo. According to Du Toit the proceeds of the cheque were transferred to Botzamo in settlement of a genuine debt owing to it by Demodig. As to the cause of this debt, Du Toit's testimony became inordinately vague. Ultimately he contended that he was prevented from divulging the nature of the debt by Botzamo's claim of privilege.

[9] Lavagne confirmed that she received the cheque from Du Toit,

together with his written request that the proceeds thereof be deposited in a separate trust savings account, to be opened for that purpose in the name of 'JA du Toit Inc Trust - Demodig Plant (Pty) Ltd', and that she complied with this request. She had no reason to believe that it would be irregular to do so since Du Toit was known to her as an attorney who held similar separate trust accounts on behalf of other clients at the same branch. Moreover, she testified, Du Toit's request was in accordance with the practice prevailing among other attorneys who were clients of the bank. For the same reasons she also found it unnecessary to make enquiries from Demodig about Du Toit's authority to act on its behalf or, for that matter, from the drawer about the crossing.

[10] In this Court a defence was raised by counsel appearing for Du Toit which had not been raised in the Court *a quo*. In fact, when it was raised in this Court, it was expressly disavowed on behalf of the bank. The gravamen of this defence was that since the cheque was drawn on the bank itself, albeit at a different branch from the one collecting it, the bank cannot be held liable as a collecting bank on the basis recognised in the *Indac* case. The argument in support of this defence went as follows. Different branches of the same bank are not different banks. They are all part of the same entity. Consequently, the paying bank cannot be said to collect from itself. When it debits the account of the drawer and credits the account of another client with the proceeds of the cheque, as happened in this case, the bank is *paying* the cheque, not *collecting* it. If the bank was negligent it could therefore only be negligent as *paying* bank in which event it would be liable in that capacity, since it would forfeit its protection under s 79 of the Bills of Exchange Act 34 of 1964. Once it was common cause, as it was in this case, that the bank was not negligent in its capacity as *paying* bank, so the argument concluded, there was no room for the further contention that it could nevertheless be negligent in its capacity as collecting bank since the

same entity cannot at one and the same time and during the course of the same transaction be both negligent and not negligent.

[11] The proposition that two branches of the same bank are part of a single entity, is selfevident (see for example *Netherlands Bank of South Africa v Stern NO and Another* 1955 (1) SA 667 (W) 669G-H). Nevertheless, it was held by this Court in *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) SA 386 (A) 394E-397D (per EM Grosskopf JA) that a bank, in its capacity as paying bank, may invoke the protection of s 79 of the Bills of Exchange Act despite the fact that it also acted as the collecting bank of the same cheque. The contention by counsel for Du Toit was, however, that the authority of the *Eskom* case should be restricted to the issue that was pertinently decided; more specifically, that it cannot be regarded as authority for the broader proposition that a bank which had already been absolved from liability as paying bank under s 79, may still be held liable as a collecting bank in respect of the same transaction. I do not agree that the authority of the *Eskom* case can be limited in this way. Grosskopf JA expressly acknowledged that s 79, on a literal construction, envisages a transaction involving two different banks while two branches of the same bank cannot be regarded as two entities (at 394D-G). Nonetheless and despite these linguistic difficulties, he found s 79 to be applicable. The rationale for this finding he explained as follows (at 395A-D):

> 'The reason is a practical one. If the drawer of a crossed cheque and the holder are both customers of the same bank what is the bank to do? In terms of s 78 of our Act ... "the drawee banker shall not pay it to any person other than a banker". If he cannot in effect act both as collecting banker and as paying banker, he would have to insist that his customer, the holder, open an account with another bank to enable that bank to act as collecting banker ... . Since banking business in England, as in this country, is concentrated in the hands of relatively few institutions, and it frequently occurs that the drawer and the holder are customers of the same bank, a literal interpretation of s 78(1) and its English counterpart would render the use of crossed cheques impractical. And the purpose of the rules concerning crossed cheques is served as well where the collecting bank and the paying bank constitute one entity as where they are separate ones. In both cases the holder collects the payment through a bank, which can be expected to ensure that payment is made to the right person.'

And (at 396B):

> ‘Moreover it is clear that the sections of the Act dealing with crossed cheques form a coherent whole. Section 78 prescribes the duty of a banker regarding the payment of crossed cheques. Section 79 grants protection to a banker who complies with this duty in good faith and without negligence. It would be a strange anomaly if the two sections dealt with different types of payment.'

[12] From these statements by Grosskopf JA it is apparent that for practical reasons the same bank must in a case such as the present, where it is instructed to collect a crossed cheque drawn on itself, be regarded as acting in both the capacities of paying- and collecting bank. Furthermore, it seems to me that 'the rules concerning crossed cheques' referred to by Grosskopf JA as forming a coherent whole must include the 'rules' relating to the delictual liability of a collecting bank. So, for example, when he states that even where the collecting bank and the paying bank constitute one and the same entity, it can be expected to ensure - in the exercise of its collecting function - that payment is made to the right person, he must be saying also that the bank is subject to delictual liability if it negligently fails to do so. The contention by Du Toit's counsel that one entity cannot simultaneously be both negligent and not negligent is true but inapposite. The transaction of collecting and paying a cheque involves a number of steps and different

legal acts. Where all these steps are performed by the same entity, I can see no conceptual difficulty in accepting that the entity is not negligent in performing some of these steps but negligent in performing others. This being so, and once it is recognised that one bank can fulfil the functions of both collecting bank and paying bank with regard to the same cheque, there seems to be no difficulty in accepting that the bank can be negligent in the performance of its collecting functions though it acts without negligence in the performance of its functions as a paying bank. In such circumstances it would be most unfortunate if the bank were to derive absolute immunity from liability in its capacity as a collecting bank solely by virtue of it being exonerated from liability as a paying bank by the provisions of s 79. In fact, I believe that the acceptance of such immunity would fly in the face of the reasoning which underlies the decision in the *Eskom* case. It follows that in my view the 'special defence' which is exclusively based on the fact that the cheque under consideration was drawn on and paid by the bank itself, cannot be upheld.

[13] This leads to the application of the requirements for the liability of a collecting bank as formulated in the *Indac* case. In accordance with these requirements the first issue for consideration, then, is whether it was established by the liquidators that Demodig became the 'true owner' of the cheque. In a similar context it was held in *First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd* 1995 (3) SA 556(A) 568A-F that the term 'true owner' bears no specialised or technical meaning and that, more specifically, the reference to 'true' is not intended to qualify the ordinary

meaning of 'owner'. In the result the enquiry in a matter such as this is whether the claimant for damages has shown that he became the owner of the cheque in accordance with the ordinary requirements of property law. These requirements were succinctly formulated as follows by Botha JA in the *Quality Tyres* case (at 568G-H):

> 'There must be a delivery of the thing, i e transfer of possession, either actual or constructive, by the transferor to the transferee, and there must be a real agreement (in the sense of 'saaklike ooreenkoms') between the transferor and the transferee, constituted by the intention of the former to transfer ownership and the intention of the latter to receive it. ... Either party can, of course, act through someone duly authorised to act on his behalf.'

[14] In applying these requirements to the facts under consideration, I agree with the finding by the Court *a quo* that the liquidators had succeeded in proving, on a balance of probabilities, that Demodig did in fact become the owner of the cheque. Of course, there was no direct evidence either of physical delivery or that the constituent elements of a 'saaklike ooreenkoms' were present. None the less, the undisputed evidence appears to indicate, first, that the cheque was delivered to Demodig by the drawer in payment of a debt owing by the latter and therefore with the requisite intention to make Demodig the owner thereof and, secondly, that Demodig took delivery of the cheque through one of its directors, Cross. As to the mental attitude of Cross when he accepted delivery of the cheque, the proceedings in the Court *a quo* were conducted throughout by both parties on the supposition that Cross was acting on behalf of Demodig when he received the cheque and

handed it over to Du Toit. In these circumstances the inference is in my view justified that ownership of the cheque had been duly transferred to Demodig.

[15] Despite the bank's attitude to the contrary in the Court *a quo,* it was contended on its behalf in this Court that Demodig was not the owner of the cheque. From an analysis of the bank's argument in support of this contention it is apparent, however, that it was presented on the alternative basis that a further factual finding by the Court *a quo* might be adopted by this Court. This further factual finding was made with reference to the next requirement for the liability of a collecting bank stipulated in the *Indac* case, namely, that the proceeds of the cheque were received by the bank on behalf of someone not entitled thereto. The Court *a quo* concluded that this requirement had also been satisfied. The rationale for this conclusion appears to have been based on the Court's finding that Botzamo was a fictional entity and that the channelling of the proceeds of the cheque to this fictional entity through Du Toit's trust account was part of an exercise by the two directors of Demodig, with the assistance of Du Toit, to 'strip the company of its assets'. It follows, so the Court found, that the cheque was collected for Du Toit's trust account, instead of an account in the name of Demodig, as part of a dishonest scheme to deprive Demodig of these funds. In the circumstances, so the Court found, neither the directors nor Du Toit were acting in the interest of or on behalf of Demodig when they instructed the bank to collect the cheque in the way it did. According to the bank's argument in this Court, this finding of fact cannot be reconciled with the notion that Cross intended to render Demodig the owner of the cheque when he accepted delivery thereof from the drawer. An endorsement of this finding, so the bank argued, would therefore inevitably lead to the conclusion that Demodig never became the owner of the cheque.

[16] At face value the bank's argument is attractive in logic and seems to be supported by the authority of *First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd (supra)* 568G-I upon which it relies. However, I do not find it necessary to come to any final conclusion on its validity since I cannot agree with the trial Court's factual finding that forms its basis. Both parties conducted their cases throughout on the basis that Du Toit was duly authorised by Cross, who acted on behalf of Demodig, to receive the proceeds of the cheque into his trust account. Though Du Toit's evidence leaves one with some suspicion with regard to the management of

Demodig's affairs, the trial Court's finding to the effect that the manner in which the cheque was collected formed part of an 'asset stripping exercise' by the directors of Demodig with the assistance of Du Toit, was never part of the liquidators' case and it was never put to Du Toit when he testified for the bank. Ultimately it was not supported by the evidence. On the contrary, the only finding supported by the evidence was that Du Toit received a mandate from the directors of Demodig, acting on behalf of the company, to collect the proceeds of the cheque into his trust account pending their further instructions.

[17] As a consequence of this finding it is to be accepted that when Du Toit instructed the bank to collect the cheque for his trust account, he acted as the agent of Demodig, duly authorised by a director. It follows that when the bank collected the proceeds of the cheque for the credit of an account nominated by the agent of the payee, it did so in compliance with the payee's instructions which were conveyed to it through the payee's duly authorised agent. Against the background of the requirements for the collecting bank's liability, as set out in the *Indac* case, the question arises whether it can be said that in these circumstances the bank 'received payment of the cheque on behalf of someone who was not entitled thereto'. And the further closely related question - can it be said that in these circumstances the bank acted *unlawfully* vis-a-vis the payee in receiving such payment? The Court *a quo* held that when a bank collects a cheque crossed and marked 'not transferable' for the credit of an account in the name of someone other than the payee, the inference is justified that the proceeds were received for someone 'not entitled thereto' and that such receipt was therefore unlawful. As a matter of *prima facie* inference, I have no quarrel with this view. On the contrary, there is good authority for the proposition that the collection of a cheque crossed 'not transferable' for an account in the name of someone other than the payee, justifies the *prima facie* inference not only that the bank acted unlawfully, but also that it was negligent in doing so. (See eg *Volkskas Bank Bpk v Bonitas Medical Aid Fund* 1993 (3) SA 779 (A) 791H-J and *Holscher v ABSA Bank en 'n Ander* 1994 (2) SA 667 (T) 672E.) The question remains, however - does evidence that the bank acted on the instructions of the payee rebuts the *prima facie* inference of unlawfulness? I think it does. It is true that a cheque marked 'not transferable' is 'not negotiable' in terms of s 6(5) of the Bills of Exchange Act 34 of 1964. This means that the payee's *rights* derived from the cheque cannot be transferred to anyone else. Consequently no-one but the payee can enforce payment thereof. This does not mean, however, that the payee cannot authorise someone else to receive the *proceeds* of the cheque. As was

pointed out in *African Life Assurance Co Ltd v NBS Bank Ltd* 2001 (1) SA 432 (W) 441C in similar context:

> 'ordinarily the payee of the cheque is free to deal with the proceeds thereof as it chooses' -

It follows in my view that the payee can authorise the bank to collect the proceeds of the cheque for any account of the payee's choice and as long as the bank follows the instruction of the payee, it cannot be said to act unlawfully. Nor can it be said, where the payment of the proceeds of a cheque were received in an account nominated by the payee, that such payment was received 'on behalf of someone who was not entitled thereto'. It was after all received into an account of the payee's choice and for no-one other than the payee.

[18] My conclusion is, therefore, that since the bank's conduct was not unlawful, vis-a-vis the payee it should not have been held liable to it and, consequently, that the appeal must succeed. That is really the end of the matter. We were, however invited, on behalf of the bank, to find, as a matter of general principle that, in view of the provisions of s 78 of the Attorneys Act 53 of 1979, it is neither unlawful nor negligent for a bank to collect a cheque drawn in favour of a client for the credit of an attorney's trust account which is 'earmarked' for the client, even where such collection was not specifically authorised by the client as payee of the cheque.

During the course of argument it became apparent that such a finding of general principle would also apply to collections for the trust accounts of estate agents and sheriffs, which are governed by provisions similar to those of s 78 of the Attorneys Act. (See s 32 of the Estate Agents Affairs Act 112 of 1976 and s 22 of the Sheriff's Act 90 of 1986.) In my view this invitation should be declined. Questions of unlawfulness and negligence are to be determined on the particular facts of the cases in which they arise. It has been repeatedly said by this C1ourt that it is not prepared to answer questions of an academic nature which are not necessary for the decision of the case before it. Particularly where, as in this case, such decisions will be based on argument heard only from one side. As was stated in *Western Cape Education Department and Another v George* 1998 (3) SA 77 (SCA) 84E:

> '(I)t is desirable that any judgment of this Court be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that are necessary for the decision of the case.'

[19] For these reasons the following order is made:

(1) The appeal is allowed with costs, including the costs occasioned by the employment of two counsel.

(2) The order of the Court *a quo* is set aside and for it is substituted the following:

'Plaintiffs' claims are dismissed with costs'

_____

FDJ BRAND
JUDGE OF APPEAL
CONCUR:

NIENABER JA
CAMERON JA
CONRADIE JA
LEWIS AJA