# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 578/95

In the matter between

ABSA BANK LIMITED

Appellant

and

STANDARD BANK OF SA LIMITED

Respondent

COURT: MAHOMED CJ, VAN HEERDEN DCJ, EKSTEEN,

NIENABER JJA and VAN COLLER AJA

HEARD: 11 September 1997

DELIVERED: 14 September 1997

## JUDGMENT

VAN HEERDEN DCJ

In terms of the provisions of s 54 of the Deposit-taking Institutions Act (now the Banks Act) 94 of 1990 the appellant during 1991 became the legal successor to Volkskas Bank Limited ("Volkskas") . The cause of action upon which the respondent relied in the court a quo arose subsequent to that date but in the pleadings and the evidence there are any number of references to Volkskas. In order to obviate confusion I shall treat those as references to the appellant.

Before and during October and November 1991 one Horn and Unitrans Bulk (Pty) Ltd ("Unitrans") were holders of current banking accounts at respectively the appellant's Pretoria branch and the respondent's Steeldale branch. On 24 October 1991 a cheque for R150 000, which purported to be drawn by Unitrans on the respondent in favour of Horn, was deposited into the letter's account. The cheque was then presented by the appellant to the respondent's Steeldale branch and on the same day the respondent caused payment of the sum of R150 000 to be effected to the appellant for the credit of Horn's account. At that stage the account was overdrawn to the tune of R81 843,94 and a book entry made by

the appellant therefore transformed the debit into a credit of R68 156,06.

Towards the end of October it transpired that the signatures on behalf of Unitrans as drawer of the cheque had been forged, and on 1 November the respondent notified the appellant by telefax that the cheque "bears forged signatures". By then the respondent had already debited the account of Unitrans with the sum of R150 000 in the mistaken belief that the signatures were genuine. However, subsequent to 1 November the respondent, as it was obliged to do, reversed the debit and consequently found itself out of pocket in that amount. For this reason it obtained a court order in terms of which the sum of R 66 643,84, reflected in the appellant's books as standing to the credit of Horn's account, was attached by the deputy sheriff. For some unexplained reason, however, only R64 149,09 was eventually paid to the respondent.

In ensuing correspondence the respondent sought payment from the appellant of the difference between R150 000 and R66 643,84. When the latter refused to comply with the demand the respondent instituted action in the Transvaal Provincial Division against the appellant, as first defendant, and Horn as second defendant. In that action the respondent claimed payment of R85 850,91, interest and costs from the appellant, alternatively from

Horn, on the ground that either the one or the other had been enriched at the respondent's expense. It was later agreed, however, that at most the sum of R81 843,94 - which, as said, was the amount by which Horn's account was overdrawn on 24 October 1991 - could be recovered from the appellant.

The summons could not be served on Horn and the matter therefore proceeded against the appellant only. The latter denied that it had been enriched but Moseneke AJ held for the respondent and awarded it the sum of R81 843,94, interest and costs: Standard Bank of SA Ltd v Absa Bank Ltd 1995(2) SA 740 (T). Subsequently he granted the appellant leave to appeal to this court.

It was common cause in the court a quo that because the cheque was for present purposes a nullity and the respondent therefore had no mandate from Unitrans to pay the amount thereof, payment to the appellant had been made sine causa. Hence the only question debated before Moseneke AJ was whether the appellant had been enriched by that payment to the extent of the amount owing on Horn's overdrawn account. It would appear that the main argument advanced on behalf of the appellant was that since payment had been made to the appellant as agent for Horn it was the latter who was enriched by the full

amount of the cheque. This argument was rightly rejected by Moseneke AJ (at 745H - 747 E). It is true that a collecting bank presents a cheque to the drawee bank on behalf of the former's customer, the payee, but once the amount in question is effectively credited to the payee's account there is no longer any question of an agency relationship. The collecting bank then holds the proceeds in its own right. If the account was in credit, the collecting bank becomes the debtor of the payee to the extent of the increased credit. And if the account was overdrawn, the payee's indebtedness to the collecting bank is extinguished or reduced.

It was also argued in the court a quo that Horn's debit balance had been extinguished by set-off. In my view set-off did not enter the picture at all. When a customer pays a cash amount equal to the debit balance of his overdrawn account into that account, there is no question of set-off operating. He simply pays the amount owing to the bank. The position is no different if the customer deposits a cheque drawn on another bank into his account. If his bank collects payment and effectively credits his account, the debt is likewise paid (or partially paid). As will appear, the decisive question in casu is whether Horn's debt was in fact extinguished by such payment.

no means a model of clarity, it can be gathered that in terms of that agreement the proceeds of the cheque were only provisionally credited to Horn's account on 24 October 1991. The condition attaching to the entry was that it would become final only if it did not transpire within the clearing period that payment had been irregularly made by the respondent. That is why a few days after 24 October 1991 Theron refused to accede to Horn's request that he be allowed to draw on his account. And that is why Theron testified:

"Wel, toe ek die kennis gekry het dat daar 'n vermoede is van 'n ongerymdheid, het ek die . rekening in totaliteit gevries en ek het my klient in kennis gestel dat ek die vermoede het dat daar fout is met die inbetaling." (My emphasis)

Theron did not say that anything happened thereafter which caused the account to become unfrozen, and we know that it did transpire during the clearing period that the signatures on the cheque had been forged. It would therefore appear that the provisional credit never became a final one.

It was rightly common cause that the appellant bore the onus of proving that it had not been enriched by the respondent's payment. In my view the appellant failed to prove that had it sued Horn he could have been heard to say that his overdraft had been

extinguished as a result of that payment.

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

HJO VAN HEERDEN DCJ

CONCUR:

MAHOMED CJ

EKSTEEN JA

NIENABER JA

VAN COLLER

AJA