REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO. 495/96

In the matter between

EDUARDO FERNANDES BRAZ APPELLANT

AND

REFINO DA SILVA AFONSO FIRST RESPONDENT

AND

MANUEL JOSE PONTE PEREIRA SECOND RESPONDENT

BEFORE: SMALBERGER, NIENABER, SCHUTZ, SCOTT

and ZULMAN JJA

HEARD: 16 SEPTEMBER 1997

DELIVERED: 26 SEPTEMBER 1997

SCHUTZ JA

# J U D G M E N T

SCHUTZ JA:

On 3 February, 1993 the two respondents - Afonso (first defendant below) and Pereira (second defendant below) - jointly with two others drew a cheque for R 318 155,00 on the Sauer Street branch of the Bank of Lisbon in favour of the appellant Braz or bearer. He was the unsuccessful plaintiff in the provisional sentence action below, based on the cheque.

On 2 June 1994 the plaintiff presented the cheque for payment at that branch by handing it to a teller together with a deposit slip requiring

the proceeds to be credited to his account. The cheque was returned to him marked "stale". The bank did not pay. No notice of dishonour was given subsequently. At the time both defendants had accounts at the Sauer Street branch.

On appeal the parties are agreed that the only issue is whether notice of dishonour was dispensed with. Yet integrated in the defendants' case is a contention akin to a denial of proper presentation for payment (although it is not put that way). I shall explain this contention later. In the meantime I return to the central issue, dispensing with notice of dishonour.

S 46 of the Bills of Exchange Act 34 of 1964 ("the Act") provides in that part of it which is relevant to this case, that if notice of dishonour

is not given to a drawer after dishonour by non-payment, the drawer is discharged.

For his contention that such notice is dispensed with the plaintiff relies on s 48 (2) (c) (iv), which reads:

> "(2) Notice of dishonour is dispensed with -(a) . . . (b) . . .
>
> (c) as regards the drawer in the following cases, namely -
>
> (i) . . . (ii) . . . (iii) . . . (iv) where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill. (v) . . ."

The drawee here is the Bank of Lisbon. The defendants are joint drawers. The plaintiff is the payee and the holder of the cheque.

The plaintiff advanced two distinct grounds why the bank was not bound to the defendants to pay the cheque, thus bringing s 48 (2) (c) (iv) into play. They were, as stated in his amended provisional sentence summons:

> "(i) [T]he Bank of Lisbon has an express, alternatively tacit agreement with its customers in terms of which the Bank is not obliged to make payment on a cheque which is presented for payment more than six months after the date appearing thereon has expired and the said cheque, being presented for payment more than six months after the date appearing thereon had passed, was dishonoured by non-payment and returned to payee marked 'stale' in accordance with the aforementioned agreement; and/or
>
> (ii) there were insufficient funds in the account to meet payment on the cheque and there was no overdraft

facility on the account held with the Bank, alternatively such overdraft facility as there was had been exceeded, further alternatively was insufficient to meet payment on the cheque."

The onus of proving that notice of dishonour was dispensed with rests on the plaintiff: Factory Investments (Pty) Ltd v Record Industries Ltd 1957 (2) SA 306 (T) at 308 A - B. I propose to deal with the second ground first as I think that it is decisive of the appeal. Lack of funds or adequate overdraft arrangements

The defendants' contention, spelled out at length, may be stated quite shortly. It is that, despite the fact that the cheque was handed over the counter in order to obtain payment and was returned without payment, there was no proper presentation, because the cheque was not

"presented to the account" of either defendant. The reason for that was that the bank returned the cheque because it was "stale" (more than six months old) without reaching the point of enquiring whether there was money available in the accounts to meet it. This might seem to be a challenge to the adequacy of the presentment for payment, but that case is not developed. (If it had been it would have been met by contrary authority in this Court). Instead it is said that the sufficiency or insufficiency of funds played no part in the bank's decision to dishonour the cheque, so that evidence as to the actual state of the accounts is irrelevant. That is the argument. In other words what the section requires is not only the absence of funds but also that the rearon for dishonour must be such absence. I think I have summarised its effect

fairly, but in case I have not, I shall set out its factual basis more fully. Affidavits were made by the defendants and a manager of the Bank of Lisbon, one Peixinho, which contain the following averments. In the normal course, banking practice prescribes that if a cheque more than six months old is presented, the teller returns it to the depositor then and there, in order that he may refer it to the drawer so as to allow him to make arrangements to have available funds to meet the cheque. The fact that no teller's stamp appeared on the cheque, indicated that it had been taken to the ledger department where someone had endorsed it as stale. The further "cheque returns" stamp would also have been imposed in the ledger department. It indicated that the bank took no further steps to collect payment from the drawer - in the banker's language used in the

affidavit "it could not have been presented for payment." Broadly speaking this means that no enquiry would have been made as to the sufficiency of funds in any of the relevant accounts and no steps would have been taken to debit them in favour of the plaintiff. As to the stage at which the cheque was returned, there were two possibilities. Either the teller took it through to the ledger department where it was endorsed as described. Or if the staleness escaped his attention it would have been picked up later in that department, suitably endorsed, and returned to the depositor. The plaintiff says that the cheque and deposit slip were returned to him by the teller. Furthermore, he accepts as a fact that the bank did this because the cheque was stale.

Not only was the relevance of the state of funds challenged, but as

an alternative it was contended that the plaintiff had failed to establish anything in that regard. This was done, in a rather indirect way for the first time on appeal. The defendants' original answering affidavit, whilst displaying a full hand of defences (all but one of which have fallen away), had no more to say than what I have described above in answer to the simple averment in the amended summons that there were insufficient funds in the account and no sufficient overdraft arrangements. Not even in the alternative was there a denial. The defence was the irrelevance of the averment.

The absence of an ounce of fact was sought to be made up for before us with a pound of legal argument. It was contended that the averment as to the state of funds was not a "simple condition or event"

necessary to complete the plaintiffs cause of action, so that its inclusion in a provisional sentence summons was impermissible. Our reports are replete with examples of such averments, which were described in Rich and Others v Lagerwey 1974 (4) SA 748 (A) at 755 G as being "a condition or event of a kind unlikely, in the nature of things, to give rise to a dispute, or, where it is disputed, is inherently capable of speedy proof by means of affidavit evidence" (per Wessels JA). An averment of this kind is taken as established if the defendant does not dispute it: Allied Holdings Ltd v Myerson 1948 (2) SA 961 (W) at 967-8: Malan Bill of Exchange, Cheque and Promissory Notes 2 ed 263-4 and cases there cited. I find it unnecessary to enter into a debate, sometimes a difficult one, as to what does and what does not fall into the category of

a simple condition or event. Suffice it to say that in my opinion an allegation that notice of dishonour has been given, or has been dispensed with because there are insufficient funds or arrangements, falls into this class. See also Malan et al Provisional Sentence on Bill of Exchange, Cheques and Promissory Notes 109 footnote 139.

Accordingly the fact that there were insufficient funds is established. Does that end the matter, or is it irrelevant, as the defendants contend? The Judge a quo (Roos J) appears to have accepted the defendants' argument when he said that the cheque had been "intercepted" (because of staleness) before ever it was "presented to the accounts." In this oblique fashion he treated the factual position as being of no account.

As I have stated already, the defendants contend that a lack of funds is relevant only if that is the reason why the bank declines to pay. To my mind this argument involves reading into s 48 (2) (c) (iv) words that are not there, and ignoring the words that are there. On the face of it this subsection contemplates an objective fact - whether the drawee is not bound, as between himself and the drawer, to pay the bill. The same may be said of the other parts of s 48 (2) (c) - are the drawer and drawee the same person; is the drawee a fictitious person or one not having contractual capacity; is the drawer the person to whom the bill was presented for payment; has the drawer countermanded payment? Indeed, in relation to s 48 (2) (c) (iv) itself Miller J has held that the factual position is the very crux of the subsection: see Anglo-African Factors

(Pty) Ltd v Cuppusamy and Another 1974 (3) SA 399 (D). In that case the two defendants were drawers of three cheques jointly with a company. When the cheques were presented for payment the bank manager had regard only to the account of the company, notwithstanding that the first defendant also had an account at the branch. As there were insufficient funds in the company's account, he marked the cheques "refer to drawer" and declined payment. In the result his decision was correct as the first defendant's account also did not contain sufficient funds, and as the second defendant did not even have an account at the branch. Thus it was common cause that as a fact the bank was not bound to the two defendants to meet the cheques. But, presciently of the present case, it was argued that it was not the factual position that was decisive, but

the question whether the bank had correctly identified the drawers. It was argued, further, that even if correct identification would have revealed that the bank was under no obligation to pay, notice of dishonour was not dispensed with. Of this argument Miller J had the following to say (at 402 H - 403 A):

> "In my view, however, so far from the factual position being irrelevant, it is the very crux of this particular provision for dispensing with notice of dishonour. The question posed by sub-sec, (c) (iv) is this: as between the bank and the person who has drawn the cheque on it, was the bank bound to pay? If it was not, notice of dishonour of that cheque need not be given to the drawer. Whether the bank was or was not bound to pay must be decided objectively in the light of the actual facts of the case, not upon what the subjective opinion of the bank or anybody else was on the matter at the time when the cheque was presented for payment."

I agree with these statements. That really disposes of the appeal.

However, I would comment upon the apparent reliance by the Court a quo and by counsel for the defendants in argument before us on the following remarks by Gregorowski J in Burton v Roth 1915 TPD 76 at 82:

> "When the cheque on the face of it is a cheque bearing date a year earlier, it seems to me 'R D' most probably means that the bank refuses to pay because the cheque is a stale cheque and under such circumstances I do not think it can be argued for a moment that the cheque falls within the exemptions and that notice of dishonour is not necessary."

If it be suggested that this passage supports the proposition that there is dishonour by non-payment only if the bank says that its refusal is based on a lack of funds, but not where it returns a stale cheque for

the reason of its stateness notwithstanding that in fact funds are lacking,

then I cannot agree with the suggestion. In the passage immediately

preceding, Gregorowski J had said:

> "If the cheque had been in perfect order [as opposed to one bearing a date a year earlier] the presumption would be when the : bank refused to pay it that there was no funds or that there had been certain instructions given with regard to it [ie a countermand of payment]."

The context of these remarks is this. A cheque bearing a date more than a year earlier had been

presented for payment and returned "R D". In his summons the plaintiff failed to allege either that notice of

dishonour had been given or that he was excused from doing so. One of the arguments advanced by

him on appeal (as appears from the

judgment of Wessels J at 80 i f - 81) was that the letters "R D" appearing on the cheque annexed to his summons amounted to an allegation that the bank had stated that there were insufficient funds in the account, so that he was excused from giving notice by virtue of the then equivalent of s 48 (2) (c) (iv). The argument was rejected, on the basis that this was too casual a way to make an essential allegation, and on the further basis that the letters "R D" were in any event ambiguous. They might indicate a lack of funds or they might indicate some other reason for refusing to pay. It is in this context that Gregorowski J made the first remark. What he was saying was that "R D", rather than indicating a lack of funds, probably indicated that payment had been declined because the cheque was stale. The passage therefore gives no

support to the defendants' case. On the contrary, it supports the

plaintiffs case, that the holder can rely on an actual lack of funds even

though the bank's reason for non-payment is the staleness of the cheque.

Wessels J said as much (at 81):

> "A valid excuse for not giving the notice of dishonour is not because, as pointed out by the magistrate, a banker says there are no funds, but because in fact the banker has no funds of the drawer, and, therefore, there ought to be an allegation in the summons that no notice of dishonour was given because there were no funds."

In my opinion the plaintiff must establish an objective fact - the lack of funds. He is not concerned with what goes on in the ledger department of the defendants' bank or the state of mind of its officials. The plaintiff has established that fact, which brings him within the terms

of the exemption in the statute so that he is excused from giving notice of dishonour. That means that the plaintiff was entitled to judgment. Unduly heavy weather has been made of this case. It is a perfectly simple one. A cheque was presented for payment at the proper place. No payment was forthcoming. There were no funds in the account. Therefore there was no need to give notice of dishonour. That is where the case should have begun and ended.

So much for the case itself. However, I would add two comments. Although it has to be decided in accordance with the words of the statute, it does help understanding to know why, in general, notice of dishonour is required, and why, in some instances (here one in particular) it is dispensed with. The reason for the general rule is explained in

Byles on Bills 26 ed [1988] 177-8 as follows:

> "The law presumes that, if the drawer has not had due notice, he is injured because otherwise he might have immediately withdrawn his effects from the hands of the drawee and that, if the indorser has not had timely notice, the remedy against the parties liable to him is rendered more precarious."

After lamenting that the pre-codification English law on dispensing with notice was not in a very satisfactory condition, Bramwell B expressed the rationale behind the exception with which we are concerned as follows:

> "The true rule should be, that no notice of dishonour is required where it would convey no information, that is, when the party sued knew beforehand that the bill would not be paid; but that where he did not know, it is right that he should be informed of the non-payment" (Carew v Duckworth [1869] 4 Exchequer 313

at 316).

So the reason why the law does not afford the defendants the right to notice of dishonour is that they do not need it.

The other observation that I would make is that it may seem odd that the defendants should not have had an opportunity to place their accounts in funds in order to meet a cheque drawn some 16 months before. The answer is that the Act is not silent as far as late presentation for payment is concerned. But s 72 gives the drawer of a cheque (by contrast with parties to bills generally) only a limited remedy in such a case - see Cowen The Law of Negotiable Instrument in SA 4 ed 307-8. The defendants raised the point of late presentation in their second answering affidavit. They have not persisted with it. No doubt they

have their reasons. Tacit

agreement

The Court a quo found against the plaintiff on the other reason that he advanced why the bank was not bound to meet the cheque - namely that there was a tacit agreement between the bank and the drawers that it would not pay stale cheques. In the light of my finding with regard to the plaintiffs second ground it is not necessary to pursue this point further. Costs of postponement

Prior to the hearing before Roos J the case was postponed by Mynhardt J because there were no papers in the court file. The wasted costs of the postponement were reserved. Subsequently Roos J dismissed

the provisional sentence action with costs, which were to include these wasted costs. The defendants contend that even if the appeal succeeds they should be awarded these costs, alternatively that there should be no order as to them.

The plaintiffs attorney explains how the papers were returned to the Registrar well before the hearing before Mynhardt J but, as later emerged, were then misfiled by the Registrar. He asks that the wasted costs be made costs in the cause. The defendants contend that notwithstanding the remissness of the Registrar's staff it was the duty of the plaintiffs attorney to ensure that the papers were in the court file, that they were in order and that the matter was ripe for hearing.

Knowing conditions in the onetime Witwatersrand Local Division

it seems to require an attorney of perfection to always check every detail of a file produced by the Registrar's office in a crowded opposed motion court, particularly when there has been no warning that an empty file has been brought to court. The negligence of the Registrar has caused loss to both parties equally, and the fair solution is to make no order as to costs.

Order

The appeal is upheld with costs and the following is to be substituted for the order below:

"Provisional sentence is granted against the defendants jointly and severally for R 318 155,00 with interest thereon at 15.5 per cent per annum from 2 June 1994, with costs. No order is

made as to the wasted costs of 3 April 1996."

WP SCHUTZ
JUDGE OF APPEAL

SMALBERGER JA)
NIENABER JA)
SCOTT JA) CONCUR
ZULMAN JA)