REPORTABLE

CASE NO 257/98

IN THE SUPREME COURT
OF APPEAL OF SOUTH AFRICA

In the matter between:

NEDCOR BANK LTD t/a NEDBANK
APPELLANT

v

LLOYD-GRAY LITHOGRAPHERS (PTY) LTD RESPONDENT

CORAM : SMALBERGER, VIVIER, HARMS, SCOTT *et* ZULMAN JJA
HEARD : 24 AUGUST 2000
DELIVERED: 8 SEPTEMBER 2000

Delictual action for damages against collecting bank - computation of damages - bank and thief for whom amount of cheque collected concurrent wrongdoers at common law - full amount of loss recoverable from bank.

J U D G M E N T

SCOTT JA/.....

SCOTT JA:

[1] The respondent instituted action for damages in the Witwatersrand Local Division against the appellant ("Nedbank"). In its particulars of claim the respondent alleged that it was the true owner of four crossed and restrictively marked cheques drawn in its favour for which payment had been collected by Nedbank for the benefit of the latter's client, one S, notwithstanding the absence of any endorsement. The action was founded in delict and based on Nedbank's alleged wrongful and negligent conduct in collecting payment for the account of S in such circumstances. (*Cf Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992(1) SA 783 (A).) The parties reached agreement on certain facts which were recorded in a written statement. The question which in terms of Rule 33(4) the Court *a quo* was called upon to decide was in essence whether the respondent's claim against Nedbank fell to be reduced by the amount which the respondent

could recover from S. Boruchowitz J held that the existence of the claim against S did not preclude the respondent from proceeding against Nedbank for the full amount. The judgment is reported *sub nom Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* 1998(2) SA 667 (W). The present appeal is with the leave of the Court *a quo.*

[2] Although the statement of agreed facts is quoted in the judgment of the Court *a quo*, it is convenient to quote it again.

> "1. 1.1 A company, Ogilvy-Mather Direct (Pty) Limited, and the First National Bank of SA Limited, were indebted to pay certain amounts to the [respondent].
>
> 1.2 In settlement of these debts they drew cheques which were delivered to the [respondent].
>
> 1.3 The particulars of these cheques are as follows:
>
> 1.3.1 They were all made out in favour of the [respondent] as payee.
>
> 1.3.2 They were all crossed and marked restrictively.
>
> 1.3.3 They were not endorsed.
>
> 1.4 The [respondent] thus became the true owner of the cheques and no-one but the [respondent] had the right to claim payment of the cheques.

1.5 One S obtained possession of the cheques and unlawfully caused them to be deposited into his account with [Nedbank].

1.6 [Nedbank], as collecting bank, owed the [respondent], as true owner of the cheques, a duty to take care that it, [Nedbank], did not collect payment of the cheques for the benefit of anyone but the [respondent].

1.7 [Nedbank], however, collected payment thereof for S in circumstances which render [Nedbank] liable in delict to the [respondent].

1.8 The banks on which they were drawn honoured the cheques in circumstances which do not render these banks liable [to] the [respondent] and consequently the cheques and the underlying debts which they represented, were discharged.

1.9 The aforesaid depositing for collection of the cheques by or on behalf of S and the unlawful appropriation by him of the proceeds thereof were delicts committed by S.

1.10 The [respondent] thus has claims in delict against both S and [Nedbank].

1.11 Both S and [Nedbank] have the financial means to satisfy the claims aforesaid.

1.12 The *prima facie* quantum of the [respondent's] loss suffered as a result of the aforementioned delicts, is the aggregate total of the face value of the cheques.

1.13 The [respondent] has instituted action against [Nedbank], S is not a party to these proceedings."

[3] The questions of law were formulated by the parties as follows:

"2.1 Is the [respondent's] claim against S, at this point, a relevant asset in the [respondent's] estate?

2.2 If so, should the [respondent's] claim against [Nedbank] be reduced by the value of its claim against S?

2.3 On the premise that the value of the [respondent's] claim against S is equal to the amount of the [respondent's] claim against [Nedbank] and, if it be held that

(a) The [respondent's] claim against S is an asset in the [respondent's] estate; and

(b) the [respondent's] claim against [Nedbank] should be reduced by the value of its claim against S.

does the [respondent's] claim against [Nedbank] fall to be dismissed?

2.4 What should the appropriate costs order be in respect of the adjudication of the aforesaid questions of law?"

[4] In answer to these questions the Court *a quo* ruled:

"(1) The [respondent's] claim against S is not, at this point, a relevant asset in the [respondent's] estate.

(2) The [respondent's] claim against [Nedbank] does not fall to be reduced by the value of the claim against S.

(3) The [respondent's] claim against [Nedbank] does not fall to be dismissed.

(4) The costs in respect of the adjudication of the aforesaid questions of law should be paid by [Nedbank]."

[5] Before dealing with counsels' submissions it is necessary to make certain preliminary observations regarding the agreed facts. First, although S is not expressly stated to have been guilty of intentional wrongdoing, *viz* to have stolen the cheques, this was accepted by both counsel in the Court below which decided the matter on that basis. I shall do the same. Second, it is accepted that the damage suffered by the respondent was the loss of its rights against the drawers of the cheques. Those rights would be in respect of the cheques themselves as well as the underlying debts for which they were given. (See *Volkskas Bank Bpk v Bonitas Medical Aid Fund* 1993(3) SA 779 (A) at 794 C - F.) The *prima facie* quantum of the loss so suffered by the respondent is in turn accepted as being the aggregate of the face value of the cheques. Third, it is accepted that the loss was

caused by the independent wrongful acts of S and Nedbank; in other words, the independent wrongful conduct of each caused the same indivisible damage. Furthermore, there was clearly an intact causal chain between the loss and Nedbank's negligence. It is perhaps also worth recording at this stage that whatever differences may have existed previously between the *acto furti* and the *actio legis Aquiliae* with regard to what was recoverable, by the time De Groot wrote his *Inleidinge* there was no difference of any consequence between them; they were both actions for damages. (*Smit v Saipem* 1974(4) SA 918 (A) at 929 H.)

[6] The argument advanced on behalf of Nedbank was in essence the following. In determining the loss suffered by the respondent in consequence of Nedbank's wrongful conduct, the right of the respondent to recover damages from S was an asset in the respondent's estate. Accordingly, so it was contended, the respondent's claim against Nedbank fell to be reduced by the value of that right and as it was accepted that S had the financial means to satisfy the claim in full,

Nedbank was not indebted to the respondent. This seemingly ingenious argument was based on the judgment of Van Dijkhorst J in *Holscher v Absa Bank en 'n Ander* 1994(2) SA 667 (T). The facts of that case relevant to the issue of damages may be stated shortly. The plaintiff was the true owner of a cheque which was stolen by the managing director ("H") of the plaintiff's brokers ("Duerka") who deposited it in Duerka's account with the defendant bank. Although the cheque was crossed and marked "not transferable" the defendant bank nonetheless collected the amount from the drawee bank and credited the account of Duerka which thereafter went into liquidation. The defendant bank was held to be liable, but in determining the plaintiff's damages the Court deducted from the amount claimed, being the face value of the cheque, the sum which the plaintiff would have received as a dividend had he proved a claim against Duerka in liquidation. The Court's reasoning in short was the following. (a) When determining the difference in the value of the *universitas* of the plaintiff before and after the delict in question, being

the true measure of his damage, any right of action which the plaintiff acquired against any other person was an asset in the former's estate and had to be taken into account (673 H - J). (b) While the onus was on the plaintiff to prove its damage, proof of the theft and the amount stolen would constitute *prima facie* proof of the amount by which the plaintiff's estate had been reduced. Accordingly, it was up to the defendant to put facts before the Court to rebut this inference (675 F - H). (c) No evidence was adduced to indicate what had become of H or whether the plaintiff's right of action against him had any value (675H). (d) There was, however, evidence as to the value of the plaintiff's right to recover from Duerka and this had to be deducted when determining the extent of the plaintiff's loss (675 I - J).

[7] *Holscher*'s case has been the subject of trenchant criticism. (See for *eg* Dendy 1994 *Annual Survey of South African Law* 264 - 266; Van der Linde *"The Liability of a Collecting Bank for Negligence"* 1995 Juta's Business Law

10.) Assuming the bank and the thief to have been jointly and severally liable, the plaintiff would have been entitled to sue either wrongdoer for the full amount. On this assumption the obvious flaw in the learned judge's reasoning would have been that if for the purpose of determining the plaintiff's loss his right of recovery against the other wrongdoer had to be taken into account, it would follow that if both had financial means, each when sued could point to the plaintiff's right to recover from the other so that the plaintiff could recover from neither. Quite clearly, once it is accepted that the full amount is recoverable from any one wrongdoer the plaintiff's right to sue any other wrongdoer must be disregarded when determining his loss.

Although not entirely clear from the judgment, Van Dijkhorst J appears to have proceeded on the basis that the bank and the thief were not liable *in solidum* by reason of what was said to be a distinction between the *actio furti* against the thief and the *actio legis Aquiliae* against the bank with regard to what was recoverable (at 673 G - H). As pointed out above, however, there is today no real difference

between them; they are both actions for damages.

[8] Counsel for the appellant acknowledged that if S and Nedbank were "joint wrongdoers" within the meaning of the Apportionment of Damages Act 34 of 1956 ("the Act") his argument could not be upheld. He submitted that they were not "joint wrongdoers" as defined, as the Act had no application in a situation where damage was caused by two or more wrongdoers acting wilfully or by one wrongdoer's negligence and the other's wilfulness. In support of this contention he pointed to the use of the word "fault" in sections 1 and 2 of the Act and strongly criticised decisions such as *Randbond Investments (Pty) Ltd v F P S (Northern Region) (Pty) Ltd* 1992(2) SA 608 (W) and *Greater Johannesburg Transitional Metropolitan Council v Absa Bank Ltd t/a Volkskas Bank* 1997(2) SA 591 (W) in which respectively a contribution and an apportionment of damages between wilful wrongdoers causing the same damage had been awarded in terms of the Act. Academic writers commenting on the judgment of the Court *a quo* are divided on

the issue. Dendy ("*The Negligent Collection of Cheques: Is Anything Claimable from the Collecting Banker*? 1998 (61) THRHR 512) and Neethling ("*Deliktuele Mededaderskap: Toepaslikheid op Persone wat Opsetlik of Nalatig Dieselfde Skade Veroorsaak*" 1998 (61) THRHR 518) support the view that the Act is applicable. Potgieter ("*Is 'n Dief van Tjeks en die Nalatige Invorderingsbank Mededaders ingevolge Die Wet op Verdeling van Skadevergoeding* 34 van 1956?" 1998 (61) THRHR 731) takes the opposite view.

[9] I find it, however, unnecessary to decide whether the Act is applicable in a case such as the present, although I must confess to baulking at the notion of a thief such as S being entitled to recover a contribution from a collecting bank for negligently failing to prevent him from achieving his objective, which according to some of the views expressed would be the consequence of the Act being applicable. Nonetheless, I shall assume without deciding that the Act is not applicable.

[10] At common law a distinction is drawn between joint wrongdoers and concurrent wrongdoers. (The latter are sometimes referred to as "several" wrongdoers; see for *eg* Glanville Williams *Joint Torts and Contributory Negligence* at 1.) Joint wrongdoers are persons who, acting in concert or in furtherance of a common design, jointly commit a delict. They are jointly and severally liable. Concurrent wrongdoers , on the other hand, are persons whose independent or "several" delictual acts (or omissions) combine to produce the same damage. (See generally Van der Walt *Delict* para 60; McKerron *The Law of Delict* 7ed at 107 - 108.) It was accepted by this Court in *Union Government (Minister of Railways) v Lee* 1927 AD 202 that, subject always to there being an intact chain of causation, one concurrent wrongdoer may be sued for the full amount of the plaintiff's loss, ie that concurrent wrongdoers are liable *in solidum*. (See also *Botes v Hartogh* 1946 WLD 157 at 160; *Hughes v Transvaal Associated Hide and Skin Merchants (Pty) Ltd and Another* 1955 (2) SA 176 (T) at 180 F -

H; *Windrum v Neunborn* 1968 (4) SA 286 (T) at 287 H - 288 A.) A contrary view, *viz* that each concurrent wrongdoer should be answerable to the plaintiff in proportion to the degree at which the former was at fault, is advanced by Kotzé in his doctoral thesis *Die Aanspreeklikheid van Mededaders en Afsonderlike Daders* (1953) at 124 *et seq.* Such an approach would require a plaintiff to sue each and every concurrent wrongdoer in order to recoup his loss. This strikes me as being likely to cause undue hardship for a plaintiff. The correctness of *Lee*'s case was, however, not challenged in argument and despite Kotzé's criticism I am unpersuaded that it was wrongly decided. The distinction between joint and concurrent wrongdoers is of course now largely academic in view of the provisions of the Act which recognise and regulate a right of contribution between "joint wrongdoers" who are so defined as to include both joint and concurrent wrongdoers at common law.

[11] Counsel for the appellant conceded that Nedbank and S were

concurrent wrongdoers at common law. The concession was correctly made. However, he disputed that they were liable *in solidum*, in other words that the respondent could sue Nedbank for the full amount of its loss. The argument, as I understood it, was that *Lee*'s case was distinguishable on the ground that in the present case the fault of the concurrent wrongdoers took different forms. Accordingly, so it was contended, the one could not claim a contribution from the other and this in turn precluded them from being liable *in solidum*. In my view the argument is unsound. Joint wrongdoers are undoubtedly jointly and severally liable at common law. This has always been so even when the one paying was not entitled to recover a contribution from another. The absence of a right to a contribution *inter partes* has no effect on their joint and several liability to the plaintiff. In the case of concurrent wrongdoers a right to a contribution has generally been recognised. (See *Hughes v Transvaal Associated Hide and Skin Merchants (Pty) Ltd and Another supra*.) But even if in a particular case such a right were not to be

afforded, that would not affect the nature of their liability to the plaintiff. In any event, it is difficult to appreciate why a concurrent wrongdoer guilty of *culpa* who pays a plaintiff in full should be precluded from having recourse against a concurrent debtor guilty of *dolus.* At common law a defendant guilty of *dolus* could not raise a defence of contributory negligence on the part of the plaintiff (*Pierce v Hau Mon* 1944 AD 175 at 197 - 198) and this rule and the denial of a right of recourse against a joint wrongdoer were probably founded on the principle embodied in maxims such as *ex dolo malo non oritur actio* and *ex turpi causa non oritur actio*. (See Broom's *Legal Maxims* 10 ed at 497 - 498; *Hughes*'s case *supra* at 178F - 179F.) Joint wrongdoers, having committed the delict acting in concert or in furtherance of a common design, would usually have acted wilfully. But if a concurrent wrongdoer guilty of *culpa* has recourse against another concurrent wrongdoer similarly guilty of *culpa* it follows *a fortiori* that he would have such right against a concurrent wrongdoer whose fault took the form of *dolus.*

[12] It follows that even if the Act is not applicable, Nedbank would be liable to the respondent *in solidum* at common law. The respondent is therefore entitled to recover the full amount of its loss from Nedbank and for the purpose of calculating that loss the respondent's right of action against S must be disregarded. It follows, too, that in my view *Holscher*'s case in so far as the calculation of damages is concerned was wrongly decided.

The ruling of the Court *a quo* was therefore correct and the appeal is dismissed with costs.

D G SCOTT

Concur:
SMALBERGER JA
VIVIER JA
HARMS JA
ZULMAN JA