THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 83/03

In the matter between:

FJS PAINTING CC Appellant

and

ABSA BANK LIMITED Respondent

Coram : HARMS, SCOTT, NUGENT, CLOETE *et* HEHER JJA
Date of Hearing : 18 MAY 2004
Date of Delivery : 28 MAY 2004

Summary: Liability of a collecting banker for negligence – ownership of cheque presented for collection – requirements – order in para 16

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The appellant sued the respondent ('the bank') for damages in the magistrates' court, Springs, alleging that it was the true owner of four cheques which the bank had negligently collected for the account of another. It founded its claim both in delict and contract. Its reliance on contract was based on the fact that it operated a current account at the same branch of the bank at which the cheques had been deposited. The claim succeeded in the magistrates' court but the judgment of the latter was reversed on appeal to the Pretoria High Court. The present appeal is with the leave of this court.

[2] Only the appellant adduced evidence at the trial. The facts are not in dispute. The appellant, a close corporation, was established in April 1993. Its sole member was Mr Frederick Beytell. It carried on business as a contractor doing mainly painting work. For this purpose it operated a current account at the bank's Springs branch. The account was in the name of 'FJS Painting CC' which is the registered name of the appellant. One of its main clients was Sappi Manufacturing (Pty) Ltd ('Sappi'). During 1993 and early 1994 cheques drawn by Sappi on first National Bank, Springs, ('FNB') for payment of work executed by the appellant

were made out in favour of 'FJS Painting Contractor CC'. Later they were made out in favour of 'FJS Painting Sheeting & Labour Hire Contractor CC'. The appellant's invoices produced at the trial reflect the latter description of the appellant and it is likely that the change in the name of the payee stated on the cheques reflected a change in the wording of the appellant's invoices. The cheques were all crossed and marked 'Not Transferable for Account Payee Only'. This notwithstanding, the cheques were collected by the bank and credited to the account of the appellant.

[3] Sometime prior to October 1994, Ms Nicky Craythorne and Beytell began living together as husband and wife. Beytell was in the process of divorcing his wife to whom he was apparently married in community of property. Craythorne, while living with Beytell, attended to the bookkeeping of the appellant and on occasions collected or delivered items such as paint for Beytell.

[4] This was the situation when, on 22 October 1994, Beytell died in or as a result of an accident. He had previously executed a will in terms of which Craythorne, who was described as his fiancée, was made residual heir subject to a bequest of R100 000 to the deceased's children. Whether Craythorne would have inherited Beytell's member's interest is unclear. This would have

depended on the size of the estate of which one half would in any event have accrued to his spouse.

[5] What then happened is as follows. On 1 November 1994, ie some 10 days after Beytell's death, Craythorne opened an account in the name of 'The Sole Owner FJS Painting Sheeting' at the bank's Springs branch, being the same branch at which the appellant had its account. At about the same time, probably a day or two earlier, she wrote to Ms Deborah Farnaby, Sappi's commercial manager of the division concerned, advising of Beytell's death and stating that she and Beytell had been partners and that she would be continuing with the business. She also had a meeting with Farnaby at which she reiterated that 'she was a 50% shareholder in the business and was authorised to continue operating [it]'. On the strength of what Craythorne told her, Farnaby on 2 November 1994 drafted an internal memorandum advising the staff of Beytell's death and that the appellant had been authorised by Sappi to complete three orders then in progress and to execute 14 outstanding orders. Because Sappi had a policy which required every contractor to go through an approval process, Farnaby directed that no new orders were to be placed until the standard of work performed by the person whom

Craythorne said the appellant would be employing, had been monitored.

[6] The first of the four cheques forming the subject matter of the appellant's claim was dated 4 November 1994. It was in respect of a progress payment and was for an amount of R31 381.92 drawn on FNB. The payee, as before, was stated to be 'FJS Painting Sheeting & Labour Hire Contractor CC'. Presumably it was issued on the strength of what Farnaby had been told. Craythorne took delivery of the cheque and on 7 November 1994 deposited it in the account she had opened seven days earlier. The second cheque was dated 2 December 1994 and was for R40 287.60. The third was dated 12 January 1995 and was for R24 808.68. The latter two were similarly payable to 'FJS Painting Sheeting & Labour Hire Contractor CC' and both were received by Craythorne and deposited to the credit of the account she had opened.

[7] In about the middle of January 1995, Farnaby ascertained from the executor of Beytell's estate that at all times Beytell had been the sole registered member of the appellant. On her instructions a letter dated 17 January 1995 was addressed to the appellant cancelling with immediate effect all orders placed with the appellant. The letter concluded with the explanation:

'The decision has been taken by Sappi based on the information provided by Syfrets that Mr F Beytell was the sole registered member of FJS Contractors CC, and as such the concern forms part of the deceased estate.' Nonetheless, a fourth cheque, dated 30 January 1995 and for an amount of R36 386.06, was issued by Sappi for work done. As before, the payee was stated to be 'FJS Painting Sheeting & Labour Hire Contractor CC'. As before, Craythorne took delivery of the cheque and deposited it in the same account.

[8] All four cheques were crossed and marked 'Not Transferable For Account Payee Only'. This notwithstanding, they were all collected by the bank for the credit of the account 'The Sole Owner FJS Painting Sheeting'. Craythorne died subsequently in 1995 or 1996. There was no credit balance in the account she had opened, nor were there assets in her estate.

[9] In its particulars of claim the appellant alleged in respect of each of the four cheques that it was the true owner, that in breach of a legal duty owed to it by the bank, or in breach of its contract with the bank, the latter had negligently collected the cheques for the credit of the account opened by Craythorne and that as a result the appellant had suffered a loss in the amount of each cheque. Each of these allegations was denied by the bank. The first and

main ground upon which the appellant sought to rely was that recognised in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A), namely the liability under the lex Aquilia of a banker, who negligently collects payment of a cheque on behalf of a customer who has no title thereto, for pure economic loss suffered by the owner of the cheque. To succeed on this ground the appellant was obliged to establish that it was the owner of the cheques concerned. The court *a quo* found that it had failed to do so. The debate in this court centred largely around the correctness or otherwise of this finding.

[10] Although the expression 'true owner' was used in the pleadings (and in s 81 of the Bills of Exchange Act 34 of 1964), it is common cause that in the context of the present case nothing turns on the adjective 'true'. The first owner of each cheque was, of course, the drawer, Sappi. The question is whether the evidence establishes a valid transfer of ownership from Sappi to the appellant. The answer involves the application of the ordinary rules of common law relating to the transfer of movable property.These, in the context of a cheque, were stated as follows by Botha JA in *First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd* 1995 (3) SA 556 (A) at 568F-H:

'The ownership of a cheque, viewed as a piece of corporeal movable property, can be transferred only in accordance with the general requirements of the law regarding the transfer of ownership of corporeal movables. There must be a delivery of the thing, ie 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 ….'

On the same page at I-J the learned judge added:

'On the facts of this case there is no need to consider the transfer of the rights flowing from the cheque, viewed as a contractual document; having regard to the definitions of "delivery" and "issue" in s 1 of the [Bills of Exchange Act 34 of 1964], the transfer of the rights is inextricably tied up with the transfer of the ownership of the cheque.'

The same is true of the facts in the present case.

[11] Counsel for the appellant sought to invoke the assistance of s 19(4) of the Bills of Exchange Act. He argued that because Sappi was no longer in possession of the cheques it had to be presumed in terms of the section that ownership had passed to the appellant. The section reads in part:

'If a bill is no longer in possession of a party who has signed it as drawer … a valid and unconditional delivery by him is presumed until the contrary is proved.'

The same argument was raised but rejected in *Absa Bank Bpk v Coetzee* [1998] 1 All SA 1 (A) at 4j where Eksteen JA said:

> 'Hierdie betoog kan egter nie opgaan nie. Artikel 19(4) gaan nie oor die oordrag van die eiendomsreg in 'n tjek nie maar slegs oor die besit daarvan. Dit skep ook nie die vermoede dat die trekker die besit aan die begunstigde oorgedra het nie, maar slegs dat hy die besit oorgedra het aan die persoon aan wie hy dit oorhandig het.'

In the present case it is not in dispute that Sappi delivered all four cheques to Craythorne and that it did so with the intention of transferring ownership therein to the appellant. What is in issue is whether the appellant, through an agent or otherwise, took delivery of the cheques with the intention of acquiring ownership. This is what the appellant was obliged to establish on a balance of probabilities.

[12] Returning to the facts, it is clear that Craythorne represented to Farnaby, and falsely so, that she was a member of the appellant and that she was accordingly authorised to continue the appellant's business. She was no doubt aware that if the cheques received from Sappi were deposited in the appellant's current account she would be unable to withdraw the money. The probabilities are overwhelming that either having satisfied Farnaby that she was authorised to continue the appellant's business, or

possibility in anticipation of being able to do so, she opened the account on 1 November 1994 in the name of 'The Sole Owner FJS Painting Sheeting' with the express purpose of depositing in that account Sappi's cheques once she received them. The obvious inference (although not the only possible one) is that she intended to acquire the cheques for herself, whether simply to withdraw the funds from the account she had opened, or to run the business on her own behalf as opposed to on behalf of the appellant (the latter possibly being the more likely). If this had been the case, she would not, of course, have taken delivery with the intention of the appellant acquiring ownership.

[13] Counsel for the appellant submitted that Craythorne was merely a *nuntius* (messenger) and that her intention was therefore irrelevant. There is, of course, a clear distinction between a messenger who is no more than a conduit on the one hand and, on the other, a person who represents another in the sense of having a mandate to perform some or other juridical act binding on the person he or she represents. In the present case the evidence did not establish that Craythorne had been given such a mandate and it is unnecessary to consider what the position would have been had she had such a mandate. Nor do I wish to be understood

as accepting that such a mandate would have survived the death of the sole member of the appellant. No argument was addressed to us on the point. The difficulty with counsel's submission that Craythorne acted as a messenger is that until an executor was appointed (who in terms of the will was entitled 'om … enige besigheid voort te sit') the appellant would have had no controlling mind and therefore would have been incapable of forming the necessary intention. Once an executor was appointed only he (or she) would have been capable of forming an intention on behalf of the appellant to acquire ownership of the cheques. It was not established when the executor was appointed, but what is clear is that he (or she) had no knowledge of what Craythorne was doing. It follows that on the premise that the factual inference in question is correct, the appellant would have failed to establish that ownership of the cheques passed to the appellant.

[14] Another possible inference arising from the facts placed before the trial court is that Craythorne assumed the role of a 'caretaker' of the appellant's business until such time as an executor was appointed and in this role took delivery of the cheques with the intention of the appellant acquiring ownership. I shall assume without deciding that had this been the case,

ownership in the cheques would have passed to the appellant. Although not necessarily decisive, there are, however, factors which tend to gainsay such an inference. One is that Craythorne made no attempt to inform the executor, once he (or she) was appointed, of what she was doing. On the contrary, by mid January 1995 it would have been clear from the correspondence addressed by Sappi to her that Beytell's estate was being administered by Syfrets. Nonetheless, she took possession of a further cheque (dated 30 January 1995) and deposited it in the account she had opened on 1 November 1994.

[15] In the circumstances, it cannot be said, in my view, that the inference that Craythorne intended to act as a caretaker for the appellant is the more natural or acceptable of the two possible inferences considered above (*cf AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H-615C). It follows that the appellant failed to establish on a balance of probabilities that it ever acquired ownership of the four cheques in question.

[16] Arguing in the alternative, counsel submitted that the legal duty of a collecting banker not to act negligently ought to be extended to a named payee of a cheque even if the payee were

not the owner of it. A similar submission made in the *Quality Tyres* case at 570B was rejected as being 'manifestly without merit'. Nonetheless counsel referred to *Strydom NO v Absa Bank Bpk* 2001 (3) SA 185 (T) in which Du Plessis J, although holding that ownership of the cheque was an essential ingredient of the action, suggested at 194B-C that the requirement may well become the subject of debate in the future. The extension of a collecting banker's liability in this way could have far-reaching and possibly inappropriate consequences, none of which were debated before us. However, on the facts of the present case it is unnecessary to become embroiled in such a debate.

[17] Turning to the claim in contract, if the appellant did not acquire ownership of the cheques it may well be, depending on the circumstances, that Sappi would have remained liable to it for payment of the amounts in question. In that event, the appellant would have suffered no loss and the bank's liability, if any, would be to Sappi, the owners of the cheques, not to the appellant. However, the appellant's case was based throughout on the allegation that it was the owner of the cheques and no evidence was adduced to establish that it had suffered a loss on some other basis. It is accordingly unnecessary to consider the obligations of a

banker to its own client. It is also unnecessary to consider the issue of the respondent's negligence as a collecting banker.

[18] The appeal is dismissed with costs.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

HARMS JA
NUGENT JA
CLOETE JA
HEHER JA