THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 194/05

In the matter between :

FELDMAN, DAVID CHARLES Appellant

and

MIGDIN, JACK NO Respondent

Before:	**SCOTT, STREICHER, NAVSA, MTHIYANE & VAN HEERDEN JJA**
Heard:	**16 MAY 2006**
Delivered:	**26 MAY 2006**
Summary:	Administration of Estates – s 46 of the Administration of Estates Act 66 of 1965 – 'money' does not include cheques – s 28 only requires that moneys received 'for the estate' be paid into estate's bank account.
Neutral citation:	**This judgment may be referred to as Feldman v Migdin NO [2006] SCA 62 (RSA)**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] Two issues have to be decided in this appeal. The one is whether 'money', within the meaning of that word in s 46 of the Administration of Estates Act 66 of 1965, includes cheques and the other one is whether an amount of R150 000, being the purchase price of immovable property, which had been paid to the appellant, at a time when he was the executor in the estate of the late Siegfried Migdin, was received by him 'for the estate' within the meaning of that phrase in s 28 of the Act.

[2] The appellant is an attorney. During the life of the late Siegfried Migdin he acted as Migdin's attorney. In Migdin's will, which was drafted by the appellant, Migdin not only appointed the appellant as executor but also bequeathed a sum of money to him. Unfortunately Migdin's faith in the appellant was misplaced. After Migdin's demise the appellant was, on 4 September 1992, appointed as executor in his estate. However, in November 1997 the Master removed the appellant as executor for having failed to perform his duties concerning the administration of the estate. An application by the appellant to the Transvaal Provincial Division to have the removal set aside was unsuccessful.

[3] After removal of the appellant as executor the respondent was, on 26 February 1998, appointed as executor in the estate. As executor the respondent had to apply to court for an order directing the appellant to hand over to him all the documents and records pertaining to the administration of the estate. Amongst the documents contained in a file handed to the respondent pursuant to the court order were a number of cheques which had not been presented for payment. The file also contained correspondence in regard to the sale of an immovable property by Hanfried Investments CC ('Hanfried'), a close corporation of which the deceased

had been the only member. Further enquiries revealed that the immovable property had been sold on 23 February 1993 for a purchase price of R150 000 payable upon registration of transfer into the name of the purchaser. The deed of sale had been signed by the appellant on behalf of Hanfried. Transfer took place on 28 May 1993. In a first liquidation and distribution account dated 20 February 1994, prepared by the appellant during his tenure as executor, the appellant stated that the value of Migdin's interest in Hanfried would be recorded in the second and final liquidation and distribution account. In a subsequent amended 'first liquidation and distribution account' dated 3 December 1994 a '100% interest in Hanfried Investment CC' valued at R120 000 is included in the liquidation account. In yet a further amended 'first liquidation and distribution account' dated 17 January 1997 it is once again stated that the value of Migdin's interest in Hanfried would be recorded in the second and final liquidation and distribution account. No final liquidation and distribution account was prepared by the appellant.

[4] Letters written by the respondent's attorney to the appellant requesting that all documents relating to the sale of the immovable property be handed over to the respondent and calling upon the appellant to account in respect of the purchase price were not responded to by the appellant. As a result the respondent launched an application as first applicant together with Hanfried as second applicant against the respondent for payment of the sum of R150 000. The respondent alleged in the founding affidavit that the amount was due to Hanfried and fell 'to be distributed to the heirs and beneficiaries in terms of the last will and testament of (his) late father'. The appellant responded to the application by way of a letter dated 22 May 2000 addressed to the respondent's attorneys in terms of which he stated that he had investigated the matter and that Hanfried had indeed not been paid the amount received for the selling of the property. He attached a

cheque for the sum of R150 000 made out in favour of Hanfried and tendered to pay party and party costs and interest on the capital amount from the date of demand, being 25 November 1999.

[5] The tender was not acceptable to the respondent. He proceeded with the application in order to recover interest on the sum of R150 000 from 29 May 1993 until 22 May 2000 and costs of the application on the attorney and own client scale. The appellant did not file an answering affidavit but did oppose the application. He submitted that the respondent had no *locus standi in judicio*, being not himself entitled to payment of the proceeds of the sale of Hanfried's property and that Hanfried 'was not properly before the court since the respondent had no right to represent it'. Lewis J rejected these submissions and held: 'It is clear from the application as a whole that the first applicant claims only as the representative of the CC, on behalf of the CC, which he was entitled and indeed obliged to do.'

[6] Having alleged and having succeeded on the basis that the sum of R150 000 was due to Hanfried and Hanfried having been paid the R150 000, the respondent, surprisingly, instituted the action which is the subject matter of this appeal. In his particulars of claim he alleges that not only the cheques referred to above but also the sum of R150 000 should have been paid by the appellant to the Master or should have been deposited into a bank account opened in the name of the estate. Relying on the provisions of s 46 of the Act the respondent claims that the appellant is liable to pay the estate an amount of R428 317,72 being an amount equal to double the amount which the appellant allegedly failed to pay into the estate's bank account.[1]

[1] The amount is made up as follows: 2 x (R150 000 + R60 112,32 + R4 046,54).

[7] The trial court found for the respondent and ordered the appellant to pay an amount of R218 205,40 plus interest and costs on the scale as between attorney and client to the respondent. The amount of R218 205,40 was arrived at on the basis that the Master, in terms of s 46 had a discretion to allow a discount on good cause shown. The trial court assumed that discretion without stating on what basis it was entitled to do so and, in the light of the fact that the estate had received payment of the amount of R150 000 as well as the amount of R60 112,32 in respect of the cheques that had not been deposited, reduced the claim of R428 317,72 by an amount of R210 112,32. The appeal is against the whole of this judgment.

[8] Section 28(1)(a) provides that an executor 'shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of R1 000, open a cheque account in the name of the estate with a bank in the Republic and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate'.

[9] Section 46 provides:

'Any executor who fails to pay over any money to the Master or to any other person or to deposit it in any banking account under section twenty-eight when required by or under this Act to do so, or who uses or knowingly permits any co-executor to use any property in the estate except for the benefit of the estate, shall pay into the estate an amount equal to double the amount which he has so failed to pay over or to deposit or to double the value of the property so used: Provided that the Master may , on good cause shown, exempt any executor, in whole or in part, from any liability which he may have incurred under this section.'

LIABILITY IN RESPECT OF THE R150 000

[10] In terms of the provisions of s 28(1)(a) the respondent, in order to succeed, had to prove not only that the sum of R150 000 was received by the appellant but also that it was received 'for the estate'. In my view he failed to do so. The appellant, in his capacity as executor in the estate, acted on behalf of Hanfried in respect of the sale of the immovable property and the purchase price was payable to Hanfried. There is, therefore, no reason to believe that the amount was paid to the respondent and received by him in any capacity other than as representative of Hanfried. The respondent himself alleged in the application referred to above that the appellant received the amount that was due to Hanfried and Hanfried recovered the amount from the appellant on that basis.

[11] In terms of s 51 of the Close Corporations Act 69 of 1984 payment could have been made by Hanfried to the estate only –

'(a) if, after such payment [was] made, the corporation's assets, fairly valued, (exceeded) all its liabilities;

(b) if the corporation [was] able to pay its debts as they (became) due in the ordinary course of its business; and

(c) if such payment [would] in the particular circumstances not in fact [have rendered] the corporation unable to pay its debts as they [became] due in the ordinary course of its business.'

Had such a payment been made to the appellant the amount would have been received by the appellant 'for the estate' as required by s 28. However, there is no evidence on the basis of which it can be found that such a payment was made.

[12] The trial court held:

'It is clear that the defendant acted on behalf of the deceased in his representative capacity as executor when he sold the property and received the proceeds. He accordingly held the money as executor and was obliged to deposit it into

the estate account, whether directly or via the corporation's account, and when he failed to do so and pocketed the money instead he fell foul of section 46.'

[13] However, s 46 relates to a failure by an executor to deposit money into a bank account under s 28 when required by or under the Act to do so. Section 28 does not require that an executor should deposit all moneys received by him into a cheque account opened in the name of the estate. The section only requires an executor to do so in respect of moneys received 'for the estate'. The fact that the appellant represented Hanfried in his capacity as executor does not make the payment to him a payment 'for the estate', it remained a payment to Hanfried. For these reasons the appeal should succeed insofar as it relates to the receipt by the appellant of the R150 000.

LIABILITY IN RESPECT OF THE CHEQUES

[14] The cheques which had not been deposited into a bank account opened in the name of the estate, consisted of the following:

(a) A cheque dated 18 April 1997 in the amount of R60 112,32 drawn by Sanlam in favour of the estate.The amount represented an amount payable in terms of an insurance policy plus interest.

(b) A cheque dated 9 January 1998 for the same amount drawn by Sanlam in favour of the estate in respect of the same policy. The cheque was probably issued to replace the first cheque which had become stale.

(c) Ten cheques drawn by Sanlam and Trust Bank during the period 26 October 1994 to 2 February 1998 in favour of the estate for dividends and interest in respect of investments by Migdin. The total amount of these cheques is R4 046,54.

All these cheques became stale as a result of them not having been collected. However, apart from interest on these amounts the estate did not

suffer any loss as a result of the cheques not having been deposited as the respondent was able to obtain payment of the amounts from the drawers of the cheques. (In the case of the ten Sanlam and Trust Bank cheques payment was only obtained after the judgment by the trial court.)

[15] The trial court held that 'money' in s 46 should be interpreted to include cheques, for the following reasons:

(a) If the legislature intended to restrict the provisions of s 46 to cash as opposed to other forms of payment such as cheques it would have used the word 'cash' as opposed to money.

(b) There is no reason why the legislature would want to penalise defaults in respect of cash received which is likely to be a rare occurrence but not penalise the non-payment over of cheques received.

(c) Section 28 clearly requires a banking account to be opened into which all money received (in whatever form) is to be deposited.

[16] In *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another* 1962 (1) SA 458 (A) at 476E-G Wessels AJA formulated the approach to be followed by a court when interpreting a statutory provision as follows:

'In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the

"matter of the statute, its apparent scope and purpose, and, within limits, its background".

In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.'

[17] A cheque is not money. It is an order in writing, signed by the person giving it, to a banker requiring the banker to pay on demand a sum of money to a specified person or his order or to bearer.[2] The word 'money' may of course be used in a much wider sense so as to include cheques. In order to determine whether that is the case it is necessary to determine whether there are indications to be found in the Act that the word was intended to have such wider connotation. In this regard I shall deal with each of the reasons advanced by the trial court in turn:

(a) If money in its ordinary signification included cheques one could of course have reasoned, as was done by the trial court, that if the intention was to exclude cheques the legislature would have used another word such as 'cash' so as to exclude cheques. That not being the case there is no merit in the argument that the fact that the legislature did not use the word 'cash' constitutes an indication that the legislature intended to include cheques.

(b) I do not agree with the trial court that there is no good reason to distinguish between money, in the sense of coins and notes, and cheques. Should coins and notes received by an executor be mixed with the executor's other coins and notes in a manner that renders it impossible to determine in whom the ownership of the separate coins or notes vests, the executor becomes the owner of such coins and notes.[3] The result is that the money received by an executor may not subsequently be recoverable from him. The same does not apply to cheques handed to an executor. There is also a much greater risk that money belonging to the estate would be used for ulterior purposes than that cheques would be so used

[2] 19 *Lawsa* (first reissue) para 5; see also *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) at 876.
[3] Van der Merwe *Sakereg* 2 ed p263-265.

for the simple reason that it would generally be much more difficult to establish the misappropriation of coins and notes than of cheques. Furthermore, to interpret ‘money’ so as not to include cheques does not result in the misappropriation of cheques not being penalised. Section 46 provides that an executor who uses property in the estate other than for the benefit of the estate shall pay into the estate double the value of the property so used. The legislature may well have considered that this provision provided adequate protection for the estate in respect of cheques.

(c) The third ‘reason’ advanced by the trial court is not a reason at all. The trial court in effect states that ‘moneys’ in terms of s 28 clearly includes cheques without giving any reason for the statement.

[18] The respondent submitted that the purpose of the Act is to provide for the proper administration of estates and that it would be absurd to interpret ‘money’ so as not to include cheques. It would indeed have been strange if the effect of not interpreting ‘money’ so as to include cheques was that an executor was free to do with cheques whatever he wanted to do. That is however not the case. The purpose of the Act is in my view adequately served by the provision providing for the penalisation of an executor who uses cheques belonging to the estate for purposes other than the benefit of the estate.

[19] For these reasons I am not persuaded that there are indications to be found in the Act that the legislature intended ‘money’ in the context of s 46 to have the wider meaning contended for by the respondent. On the other hand, there are, in my view, indications to the contrary.

[20] Should ‘money’ be interpreted to include cheques an executor who fails to deposit the cheque into the estate’s bank account would be liable for double the amount of the cheque subject to the discretion of the Master, on good cause shown, to exempt him from such liability. Should the failure have related to coins and notes in the very same amount the executor would also have been liable for double the amount but having retained the amount the penalty would, unlike in the case of the cheque, only be equal to the amount received and not double the amount. It is unlikely that the legislature intended such an anomalous result.

[21] The mere failure to deposit a cheque would, apart from interest, generally not cause any loss to an estate, provided of course that the delay is not so long that the underlying debt has become prescribed and cannot be recovered. To impose a penalty equal to twice the amount of the cheque in these circumstances seems to me to be unduly harsh. I do not think that that was the intention of the legislature.

[22] Section 46 is punitive in nature and in the absence of indications to the contrary a more lenient interpretation should be favoured (see *R v Milne and Erleigh (7)* 1951 (1) SA 791 (A) at 823A-F). Being aware that that is the case the legislature would in my view have made it clear that it intended ‘money’ to include cheques, if that was its intention.

[23] It follows that by failing to deposit the cheques into the banking account of the estate the appellant did not in terms of s 46 fail to deposit ‘money’ into the banking account of the estate. It follows that the appeal should succeed also in respect of the respondent’s claim relating to the cheques.

[24] Apart from the inference to be drawn from the facts in respect of the R150 000 paid to the appellant, there is no real factual dispute in this matter. The appeal record nevertheless consists of some 857 pages. Many of the documents could and should have been omitted. Rule 8 of the rules of this court require the parties to attempt to confine the record to only such documents as are required to decide the appeal. It is the duty of the appellant as well as the respondent to ensure that costs and this court's time are not wasted by the inclusion of unnecessary documents. In this case the parties did agree on the documents that should form part of the record on appeal but it is clear that no real attempt was made to confine the record to only those documents that were required for a proper determination of the appeal. Had it not been for the agreement between the parties I would have been inclined to deprive the appellant of a substantial part of the costs relating to the preparation and perusal of the record. In the light of the agreement the respondent has only himself to blame for having to pay costs unnecessarily incurred.

[25] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the trial court is set aside and replaced with the following order:

'The plaintiff's action is dismissed with costs.'

P E STREICHER
JUDGE OF APPEL

SCOTT JA)
NAVSA JA)
MTHIYANE JA)
VAN HEERDEN JA)