Reportable
Case No 145/02

In the matter between:

BURG TRAILERS SA (PTY) LIMITED **1st Appellant**
MORGAN BROTHERS CC **2nd Appellant**

and

ABSA BANK LIMITED **1st Respondent**
REDELINGHUYS, D J V **2nd Respondent**
POTGIETER, J P T **3rd Respondent**

Coram: HARMS, MTHIYANE, CLOETE, LEWIS JJA and JONES AJA
Heard: 12 MAY 2003
Delivered: 30 MAY 2003

Subject: Banker; payment of cheque by banker; provisional bank entries

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JUDGMENT

HARMS JA/

HARMS JA:

[1] The issue in this appeal concerns the liability of a collecting banker towards a client, and also to a judgment creditor of the client who wished to execute a judgment by an attempted attachment of money said to have been standing to the credit of the client in the books of the bank. The bank's liability, in turn, depends on whether in the special circumstances of this case the bank entries concerned were provisional or final. The bank is Absa Bank Ltd ('Absa', the first respondent); Morgan Brothers CC ('Morgan', the second appellant) was the client of its Rosebank (Johannesburg) branch, and the judgment creditor is Burg Trailers (Pty) Ltd ('Burg', the first appellant). To complicate matters, the money in contention came from a cheque drawn on the trust account of an attorney, one Potgieter (the third respondent), who held the money for one Redelinghuys, the second respondent. Potgieter was

a client of Absa's Brooklyn (Pretoria) branch and Redelinghuys of its Tzaneen branch.

[2] Since the sequence of the events is of the essence of the appeal it is necessary to begin with a chronology of the material events, all of which occurred during 2001. On 28 June, on the instructions of Redelinghuys, Absa's Tzaneen branch transmitted about R5,9m to its Brooklyn branch for the credit of the trust account of Potgieter. On 2 July, Potgieter deposited a cheque at an Absa branch in Cape Town for about R5,7m, drawn on his trust account, for the credit of Morgan. Absa immediately entered a provisional credit electronically in favour of Morgan and a provisional debit against Potgieter's account. The credit was provisional because it was subject to a ten-day hold, an aspect to which I shall revert. Potgieter was acting on the instructions of Redelinghuys who had some kind of dealings with Morgan,

the nature of which, somewhat suspiciously, neither Redelinghuys nor Morgan was prepared to divulge.

[3] On the same day Redelinghuys had second thoughts and in consequence of a discussion with Potgieter, the latter decided to countermand payment of the cheque. To this end Potgieter phoned one Rawlins, an asset adviser employed at the Tzaneen branch and the person responsible for Redelinghuys's business. Rawlins advised him to complete a stop order instruction. This Potgieter did on 3 July but the bank official at the Cape Town branch informed him, incorrectly, that it was too late to do so. After a further discussion with Rawlins the latter, on the same day, instructed the Rosebank branch not to release the amount provisionally credited to Morgan's account in its books, which instruction the Rosebank branch accepted by making a computer note to the effect that the hold was not to be lifted before the matter had been cleared with Rawlins.

[4] The sheriff served Burg's writ of attachment for some R1,65m on Absa (Rosebank) early on July 6 but, because of the hold indicated on the computer system, Absa informed the sheriff that the provisional credit balance was not available for attachment because the effects had not been cleared. Nevertheless, so-called 'block account' and 'court order' holds were entered against Morgan's account. Later that day Rawlins, overrode the holds and by means of a bank cheque drawn on the Morgan account, transferred the R5,7m to the account of Redelinghuys with, it would appear, his concurrence and that of Potgieter.

[5] Goldstein J, in the Court below, formulated the issue to be whether Absa was indebted to Morgan in the amount of R5,7m on 6 July when the sheriff sought to execute Burg's money judgment. Put differently, it is whether the amount of the cheque, by that time, had been unconditionally

allocated to Morgan's account.[1] (The date of 6 July is chosen because it is not suggested that Absa after that date did anything that would have created an indebtedness towards Morgan that had not already existed.) If the answer is in the affirmative, Absa has to pay Burg the amount of its judgment against Morgan, and pay Morgan the balance. The liability of the respondents amongst themselves does not concern us. And Burg's entitlement to payment, obviously, is dependent upon Morgan's rights against Absa.

[6] At the outset it should be pointed out that Burg could not attach money; it could only attach Morgan's claim or right of action against Absa for payment. As Caney J once explained:[2]

'The legal relationship between a banking institution and its customer whose account with it is in credit is that of debtor and creditor; although the customer "deposits" money to the credit of his account with the bank, the transaction is not one of *depositum*, but of

[1] *Absa Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA) 252A-B.
[2] *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D) 673C-H.

loan without interest.[3] . . . The customer is a creditor who has a claim against the bank in the sense that he has a right to have it make payments to him, or to his order, on cheques drawn by him up to the amount by which his account is in credit. . . . In so far as his account may not be what is commonly called a current account, but a fixed deposit or upon special terms, such that he has not the right to have the bank make any such payment until after the expiry of a stated time or after a stated period of notice or some other condition, he nevertheless has a claim, a right against the bank, deferred though it may be in operation. The question for determination is by what process a judgment creditor may resort to execution upon any such claim or right on the part of his judgment debtor.

It follows that in the present instance there is no question of attaching money; what the applicant wishes is to attach and sell the claims, that is to say the rights of action, which the judgment debtors have against the banks. These are movable incorporeal property.'

[3] This is no longer always true since banks do pay, at least sometimes, interest on these accounts.

[7] Payment, including by cheque,[4] remains a bilateral juristic act, requiring the meeting of two minds.[5] Absa had to act in two capacities: as drawee bank and agent of Potgieter on the one hand, and, on the other, as collecting bank and agent of Morgan. It had to pay the cheque on behalf of Potgieter and it had to accept payment on behalf of Morgan (who seemingly was blithely unaware of the cheque at the time). Although different branches and different employees were involved, Absa, as a single juristic entity, could only have had one intention and this intention would have affected both its clients. It was not possible for it to intend to accept payment on behalf of Morgan while, simultaneously, intending on behalf of Potgieter not to pay. Once it intended to pay unconditionally on behalf of Potgieter it could not intend not to accept payment on behalf of Morgan. And an unconditional acceptance of payment on behalf of Morgan necessarily would

[4] We have been referred to the rules relating to the time when, between parties, delivery of a cheque is regarded as payment but these rules have no relevance in the circumstances of this case. See, e g, *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A).
[5] *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* 1991 (3) SA 605 (A) 612C-D.

have bound it unconditionally to Morgan to pay that amount. All of this is in accordance with the following statement of Hefer JA:[6]

‘Wanneer 'n bank beide as betrokkene en as invorderaar fungeer moet hy noodwendig as gemagtigde van die nemer bewus wees van sy optrede as gemagtigde van die trekker en, in soverre die kreditering en debitering van die onderskeie rekenings gelyk gestel kan word aan betaling, in beide hoedanighede kennis dra van die betaling.’

[8] Before applying these principles to the facts of the case it is necessary to determine the respective rights and obligations of Absa and Morgan in the light of the contract (as amplified by banking custom) between them. In opening the account Morgan agreed that instruments delivered for collection would be made available by Absa as cash only after they had been paid. A similar statement appears on all deposit slips, which provide additionally that Absa is entitled, in its discretion, to debit a customer’s account with dishonoured instruments.

[6] *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) supra* 611E-F.

[9] According to standard banking practice, cheques are accepted subject to a hold period, in this case of ten days. It is common cause that the client may not during that period insist upon payment of the amount even if it otherwise had been 'paid'. This means that the bank is not unconditionally liable for the amount standing to the credit of the client and that the credit may be reversed during that period.[7] Morgan submitted that this banking practice is in direct conflict with the contract between it and Absa and that a banking practice cannot override the express terms of an agreement. The statement of law is probably correct but I do not agree that there is a conflict. I understand the contract to mean no more than that it gives the right to Absa to withhold payment until a cheque has been cleared; it does not detract from its right to make provisional payment and it does not oblige it to pay unconditionally upon clearance. One can test the submission by way of an example: if it should transpire that a cheque, after having been cleared, was

[7] *Absa Bank Ltd v Standard Bank of SA Ltd supra* 252C-D.

forged would the banker nevertheless be obliged to pay according to the credit entry raised by it? That cannot be so. The bank would be entitled to reverse the entry.[8]

[10] Another internal banking practice applied by Absa has its origin in the inter-bank clearance system (the Automatic Clearing Bureau). According to these so-called ACB rules, which apply only between banks and do not create rights for clients, a drawee bank may not stop payment of a cheque later than the close of business following the day upon which the cheque physically reached the organ of the drawee bank vested with the power to stop payment. In other words, once that period of time has elapsed, the collecting bank is entitled to insist that the cheque be paid; but that does not mean that the client can so insist. This, on the evidence, would have been before close of business on 5 July. Absa applies this rule also internally, in other words, in respect of the orders to stop payment between branches or

[8] Cf *Absa Bank Ltd v Standard Bank of SA Ltd supra* 252C-D; *Absa Bank Ltd v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA).

within any particular branch. As is the case with the ACB rules, this practice is confidential consequently was not intended to create enforceable rights for clients. By that I understand that banks may, inter se, decide not to enforce the rule and that the client will not have any recourse if that happens, and by extension the same applies internally within Absa.

[11] Did Absa then credit the account of Morgan unconditionally before 6 July when the Sheriff attempted to effect the attchment? I hold not. Rawlins, already on July 3 (when on all accounts the credit was still provisional), armed with a stop payment instruction by Potgieter, stopped payment of the cheque, albeit provisionally, and the Rosebank branch accepted this instruction. There was consequently no intention on the part of Absa to become unconditionally liable to Morgan by crediting it. It matters not that, within Absa, Rawlins may not have had the authority to act in the manner he did simply because the Rosebank branch, consequent upon his request, never

formed the intention to make the credit unconditional. If the decision not to pay unconditionally had been taken before 5 July, the ACB rules (as Goldstein J held) could not have taken effect because Absa, acting on behalf of Morgan and Potgieter in different capacities, had already agreed with itself not to pay the cheque unconditionally.

[12] A material fact, which has been alluded to, is that after the attachment Rawlins, by means of a bank cheque drawn on the Morgan account, transferred the R5,7 m to the account of Redelinghuys. He (or someone else on behalf of Absa) did not effect a simple reversal of entries, which would have been reflected as such a debit on Morgan's account and as a credit on Potgieter's, with a further retransfer to Redelinghuys. Rawlins, quite clearly, did not have the authority to draw cheques against the account of Morgan and the same applies to any other employee of Absa.

[13] These facts, Morgan argues, mean, first, that the withdrawal was unauthorised and, secondly, that Morgan's account had been credited unconditionally. Prima facie, these conclusions are justified but they must be tested against the incontrovertible facts of the case and against this statement:[9]

'Entries on bank accounts may reflect valid juristic acts, but that is not necessarily so. Whilst in general it may be said that entries in a bank's books constitute prima facie evidence of the transactions so recorded, this does not mean that in a particular case one is precluded, unless say by estoppel, from looking behind such entries to discover what the true state of affairs is.'

The evidence is that, because of Absa's systems, the use of a bank cheque was the only way in which the reversal of the provisional entry could take place at branch level. It was intended to be a reversal of entries, as the preceding events (especially the action of Rawlins on July 3) make clear. No

[9] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) 823B.

doubt, the direct transfer from Morgan to Redelinghuys was at the behest of the latter and Potgieter in order to short circuit the transfer of funds. These events do not in consequence affect the conclusion reached earlier.

[14] The appeal has to be dismissed. Since Burg and Morgan had made common cause in the appeal it would be fair to order them to pay the costs of the respondents jointly and severally.

[15] The appeal is dismissed with costs, including the costs of two counsel, and are to be borne by the appellants jointly and severally.

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L T C HARMS
JUDGE OF APPEAL

Agree:

MTHIYANE JA
CLOETE JA
LEWIS JA
JONES AJA