Reportable

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 506/1999

In the matter between

VAN HULSTEYNS ATTORNEYS **APPELLANT**

and

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA **FIRST RESPONDENT**
FIRST NATIONAL BANK OF SOUTHERN AFRICA LTD **SECOND RESPONDENT**

CORAM: ***HEFER ACJ, NIENABER, SCHUTZ, CAMERON JJA, BRAND AJA***

HEARD: **8 November 2001**

DELIVERED: **19 November 2001**

Stolen cheque - posssession through a collecting bank for purposes of liability in terms of sec 81 of the Bills of Exchange Act.

JUDGMENT

HEFER ACJ

[1] Section 81 of the Bills of Exchange Act 34 of 1964 entitles the true owner of a crossed cheque marked "not negotiable" which is stolen or lost and subsequently paid by the bank upon which it is drawn to recover any loss he may have suffered from any person who possessed the cheque after the theft or loss and either gave consideration for it or took it as a donee.

[2] The present case relates to a cheque drawn on 11 October 1994 by the Department of Customs and Excise in favour of OTK (Kooperatief) Beperk ("OTK") or order. It was crossed and marked "not negotiable" and posted to OTK but stolen *en route*. The appellant is a firm of attorneys practising in Johannesburg. On 28 October 1994, in a manner that will presently be described, the stolen cheque found its way into the appellant's trust bank account at the second respondent's Sandton City branch. The account was credited with the amount in question and the cheque was subsequently presented for payment and paid by the drawee bank.

[3] After discovering what had happened the first respondent instituted action in the Transvaal Provincial Division of the High Court for the recovery of the loss it had allegedly suffered. Its main claim was against the appellant and based on the provisions of s 81. To this was added an alternative delictual claim against the second respondent as collecting bank. Eventually, in a judgment reported as *Government of the Republic of South Africa v Van Hulsteyns Attorneys & Another* [1999] 2 All SA 29 (T), Le Roux J upheld the claim against the appellant and dismissed the claim against the second respondent . With the necessary leave the

appellant has now appealed to this court.

[4] There is no need to examine the requirements for a successful invocation of s 81 because the appellant has made a number of admissions so that the single question remaining for decision is whether the appellant possessed the stolen cheque as envisaged in s 81. Since counsel are largely agreed on the applicable law and the facts are also common cause the dispute is about the application of the law to the facts.

[5] On 14 October 1994 Mr Carl Boden, a partner in the appellant firm, received a telephone call from a person who introduced himself as Roy Laasen. (I will refer to this person as Laasen although it is not known whether that was indeed his name). Laasen professed to be a Zimbabwean businessman who intended investing in South Africa and wished to engage the appellant as his attorneys. He intimated that the firm would *inter alia* be required to channel funds through its trust account to certain nominated recipients. Boden agreed but told Laasen that he would require written instructions and that nothing would be paid from the trust account until the incoming funds had been cleared.

Thereafter Boden had several further telephone discussions with Laasen. On 20 October 1994, when the latter informed him that funds would soon become available to be deposited, he gave Laasen the number of the firm's trust bank account. Later the same day Laasen sent him a fax containing particulars of an account with a bank in Durban into which he was required to pay the funds.

On a date, probably between 28 October and 2 November 1994, Laasen informed Boden that a deposit had been made and gave him the amount thereof. Upon checking with the second respondent Boden learnt that a cheque issued by Customs and Excise had indeed been deposited.

He telephoned Laasen, confirmed the deposit and promised to make payment into the designated Durban account once the cheque had been cleared. On 8 November 1994, having allowed what he regarded as a reasonable time for clearance, Boden paid the full amount deposited less his fee into the designated account. During December 1994 he was informed that the Customs and Excise cheque had been stolen. He tried to telephone Laasen but found that the Zimbabwean number he had used in the past was no longer functioning.

Investigations after the discovery of the theft revealed that the stolen cheque was not deposited in the conventional manner. The second respondent did discover a deposit slip purporting to reflect the deposit of the cheque to the appellant's account on 28 October 1994; but what purported to be bank stamps on the slip were forgeries and it became clear that the slip could not have passed through a teller's hands. There is only one feasible explanation: cheques and deposit slips received by the tellers after passing scrutiny were collected in courier bags and conveyed in batches to the bank's Centralized Bookkeeping Centre (the "CBC") for processing. The stolen cheque and deposit slip must have been placed surreptitiously into one of these bags and conveyed to the CBC where the cheque was credited to the appellant's account.

[6] In order to decide whether the appellant, on these facts, possessed the cheque as contemplated in s 81, two observations are called for.

(a) The liability for the true owner's loss attaches in terms of s 81(1) to persons who were in actual possession of the cheque after its theft or loss and is extended in ss (2) to persons who are deemed in certain circumstances to have been in possession thereof. Because it is trite that a statute must as far as possible be construed in accordance with the common law and there is no indication in the provision or any other relevant

part of the Act that this is not how ss (1) should be construed, it may safely be accepted that the possessor envisaged therein is the possessor in terms of the common law concept of possession.

(b) From this it follows that full effect must be given in the application of ss (1) to the recognition at common law of mediate possession. The appellant's counsel was accordingly quite correct in accepting that a bank holding a cheque for collection only, does not possess it for purposes of s 81 (since the mental element of common law possession is lacking); but that the customer on whose behalf it is to be collected, does. (*Barlow Motors Investments Ltd v Smart* 1993(1) SA 347 (W); *Malan and Pretorius*: "Holders, Collecting Banks and Payment" 1993 TSAR 456).

[7] The only ground advanced by the appellant's counsel for submitting that his client did not possess the cheque as envisaged in s 81(1) is the irregular manner in which it was introduced into the second respondent's system. The deviation from the normal procedure was so gross, he argued, that the second respondent's officials cannot be said to have intended to hold the cheque for the appellant.

[8] I do not agree. The second respondent's officials at the CBC must have seen the deposit slip for it was plainly on the strength of it that the appellant's account was credited. And, having seen the deposit slip and having been unaware of any irregularity or of any other person who might have been involved, the intention could only have been to hold the cheque for the person reflected in the slip as the depositee. Moreover, the second respondent's officials presented the cheque for payment. Since the appellant's account had already been credited with the proceeds the

intention could only have been to present it on the latter's behalf. The conclusion is unavoidable that second respondent held the cheque for the appellant and that the latter was accordingly in mediate possession thereof.

[9] The appeal must accordingly be dismissed. But before I make an order to that effect two further matters have to be mentioned. Both relate to costs.

(a) The first respondent was represented in the appeal by senior and junior counsel but the appellant's counsel submitted that the fees of two counsel should not be allowed. In my judgment the employment of two counsel was perfectly reasonable bearing in mind the amount involved and the importance of the matter to all the parties.

(b) (i) After receipt of the summons the second respondent served a third party notice on the appellant claiming a declaration that the latter was liable to indemnify the second respondent against any amount that it might be ordered to pay to the first respondent. When the first respondent's claim against the second respondent was dismissed the entire third party procedure became redundant and the only order that the trial judge made in that regard was to direct the second respondent to pay the costs of the third party notice.

(ii) After the appellant had obtained leave to appeal the respondents by agreement obtained an order granting the first respondent leave to appeal against the dismissal of its claim against the second respondent, and granting the latter leave to appeal against "that portion of the judgment whereby judgment in favour of [the second respondent] against the third party is refused with costs."

The second respondent soon had second thoughts and abandoned its appeal. The first respondent on its part failed to file a notice of appeal and was compelled to submit an application for condonation. This placed the second respondent in an invidious position in view of the possibility that the appellant's appeal might succeed. It accordingly (1) decided to oppose the appellant's appeal; (2) filed papers opposing first respondent's application for condonation and requesting (as a conditional counter-application) that the matter be remitted to the trial court in the event of the application for condonation and the appellant's appeal both succeeding and (3) eventually appeared through counsel at the hearing of the appeal. The second respondent's counsel addressed us on the allocation of costs between the respondents *inter se* but declined to present argument on the merits of the appellant's appeal.

(iii) Since the appellant's appeal must fail no order is required on the application for condonation and the counter-application. But there remains the costs relating to both applications and to the second respondent's costs of appeal.

(iv) It is perfectly clear that the second respondent's actions were brought about by the first respondent's application for condonation. It will only be reasonable to direct the latter to pay the attendant costs.

[10] For these reasons the following order is made:

1. The appeal is dismissed with costs including the costs of two counsel.
2. The first respondent is directed to the pay the appellant's and the second respondent's costs relating to the application for condonation and the second respondent's costs of appeal including the costs of the counter-application.

JJF HEFER

Concur:
Nienaber JA
Schutz JA
Cameron JA
Brand AJA