THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 511/08

In the matter between :

McCARTHY LIMITED Appellant

and

ABSA BANK LIMITED Respondent

Neutral citation:	*McCarthy v ABSA* (511/08) [2009] ZASCA 118 (25 September 2009)
Coram:	NUGENT, LEWIS, VAN HEERDEN JJA, LEACH and TSHIQI AJJA
Heard:	31 AUGUST 2009
Delivered:	25 SEPTEMBER 2009
Summary:	Banker – claim against by drawer for negligent payment of cheques – knowledge acquired in course of collecting the cheques for another customer – court might find that such knowledge should have put bank on enquiry – absolution at end of plaintiff's case should have been refused.

ORDER

On appeal from: South Gauteng High Court (Goldstein J sitting as court of first instance)

The appeal is upheld with costs that include the costs of two counsel. The order of the court below is set aside and the following order is substituted:

> 'The application for absolution from the instance is refused. The costs occasioned by the application are costs in the cause.'

JUDGMENT

NUGENT JA (LEWIS, VAN HEERDEN JJA, LEACH and TSHIQI AJJA concurring)

[1] This appeal arises from an action brought by the appellant (McCarthy) against the respondent (Absa) in the South Gauteng High Court. At the close of McCarthy's case the court below (Goldstein J) absolved Absa from the instance.[1] McCarthy appeals against that order with the leave of that court.

[2] The identities of both parties have altered over the years but that is not material for present purposes and I will refer to them as they were known at the time of the action. McCarthy is a trader in motor vehicles and Absa is a

[1] Reported as *McCarthy Ltd v Absa Bank Ltd* 2009 (2) SA 398 (W).

commercial bank. For some years McCarthy operated a cheque account at the Pretoria branch of Absa.

[3] Absa's customers also included Mr Fourie, who operated a cheque account, initially at its Pretorius Street branch, and later, when that branch closed in 2001, at the Pretoria branch. Mr Fourie was a man of modest means, and that was reflected in the ordinary transactions on his account. They were largely confined, while he was in employment, to the monthly deposit of his salary to the account, and the withdrawal in cash of an equivalent amount. Once he retired it was confined to the monthly deposit, and the withdrawal in cash, of his pension.

[4] Between November 1994 and March 2003, however, the account of Mr Fourie was used repeatedly for the perpetration of fraud. The person responsible for the fraud was Ms Cordier, a former employee of McCarthy, who now resides in Kroonstad prison. Ms Cordier was employed as a creditors' reconciliation clerk. From time to time over the period I have mentioned she created fictitious debts in the accounts of McCarthy and caused cheques to be drawn and signed by authorised signatories of McCarthy in purported payment of those fictitious debts. The named payee on each of the cheques was a combination, in one way or another, of the name 'Fourie' or 'L Fourie' and the name 'Leathertech' or 'Leathertech CC'[2] (Leathertek was the name of a firm with which McCarthy conducted business). The cheques were crossed and marked 'not transferable'.

[2] One some occasions it is spelt 'Leathertek' or 'Leathertek CC'.

[5] Ms Cordier was acquainted with Mr and Mrs Fourie. On an occasion in about November 1994 she approached Mrs Fourie and asked her to deposit to the Fourie's bank account the first of the cheques that I have referred to. According to Mrs Fourie she was told by Ms Cordier that the cheque was in payment of commissions that Ms Cordier had earned, and she was given an explanation by Ms Cordier for why she preferred not to collect the cheque through her own account.

[6] Mrs Fourie obliged. She approached the teller at the branch at which the Fourie account was held (at that stage the Pretorius Street branch) armed with the cheque, a deposit slip, and a bearer cheque drawn on the Fourie account for an equivalent amount (less a small amount that was to be left in the account to cover bank charges). The teller referred her to a supervisor to approve the transaction. The supervisor marked the documents to reflect her approval and Mrs Fourie returned to the teller, who accepted the deposit of the McCarthy cheque, and paid over the amount of the cheque that had been drawn on the Fourie account.

[7] There followed a series of like transactions, once or twice a month, each of which followed the same pattern. Mrs Fourie would arrive at the bank, obtain the approval of a supervisor (in many cases the same supervisor) for the transaction, present the documents to the teller, and walk off with a substantial sum in cash, at times as much as R100 000 or more. She would generally receive a 'little something' from Ms Cordier for her trouble. By the time the fraud was discovered 193 fraudulent cheques had been deposited amounting in all to R14 947 258.

[8] McCarthy sued Absa in contract for recovery of the moneys it had lost. An alternative claim was framed in delict but that claim was subsequently abandoned.

[9] In its particulars of claim McCarthy alleged that an agreement – either express or tacit – existed between it and Absa for the conduct of the account, which included, amongst others, the following terms:

'The defendant was obliged to exercise the standard of care reasonably expected of a banker when disbursing amounts on the authority of the plaintiff, including taking reasonable steps:

i. to ensure that the recipient of the proceeds of the cheques purportedly drawn by the plaintiff was entitled thereto;

ii. to institute enquiries into the title of any person claiming the proceeds ("the claimant") whenever a prudent banker would do so having regard to:

- the identity of the claimant;
- other facts known to the defendant in regard to the claimant;
- the amount of the cheque;
- or any other fact which could reasonably raise suspicion.'

[10] It went on to allege the following:

'8. The defendant breached the account agreements when it collected each of the McCarthy cheques and debited its amount to the McCarthy account, in one or more of the following respects:

8.1 it failed to take reasonable care to ensure that Fourie was entitled to receipt of the payment;

8.2 it collected the McCarthy cheques on behalf of Fourie notwithstanding that he was not the named payee and notwithstanding the "not transferable" crossing upon them;

8.3 it collected the McCarthy cheques on behalf of Fourie notwithstanding that he did not carry on business under the name Leather Tek and had no association with that entity or another entity bearing that name;

8.4 it failed to react to the following suspicious features of the scheme, and to enquire further into Fourie's entitlement to the McCarthy cheques:

8.4.1 the amounts of the McCarthy cheques vastly exceeded Fourie's own income as a pensioner;

8.4.2 the amounts of the cheques were disproportionate to Fourie's previous account history and the manner in which he otherwise conducted his account;

8.4.3 each cheque identified the payee in terms … which coupled Fourie's name with that of a trading entity with which he had no known association;

8.4.4. each cheque was always followed by a withdrawal of an amount nearly equal to it in cash using the relevant Fourie cheque.'

[11] McCarthy alleged that but for the breaches the fraudulent scheme would have been detected and payment prevented. It claimed damages for breach of the agreement in the sum of R14 947 258.

[12] McCarthy led the evidence of three witnesses. One of those witnesses was Mr Bentley, who gave expert evidence concerning banking practice, and in particular, as to why the transactions ought to have raised suspicion. Much of the cross-examination of Mr Bentley was directed towards eliciting concessions that the teller who accepted the cheques for collection (and the supervisor who authorised the transactions) was carrying out a 'collecting function' (on behalf of Fourie) and not a 'paying function' (on behalf of McCarthy).

[13] The basis of the application for absolution was a submission on behalf of Absa that the claim was dependent for its success upon it being found that it was an implied term of any agreement that might have existed between Absa and McCarthy that Absa would not act negligently in collecting cheques that it had drawn, and the court below dealt with it on that basis.

[14] The court below considered first whether the evidence established an agreement between the parties at all. Observing that 'in its particulars of claim [McCarthy] pleads a written agreement … between it and the defendant's predecessor' it found that '[McCarthy] led no evidence on the agreement pleaded, and thus failed to establish any of the express terms relied upon.' It then went on as follows:

'The plaintiff's counsel contended, however, that on a proper construction of the pleadings and pre-trial procedure, the plaintiff has in fact pleaded a tacit contract between it and the defendant in terms of which the defendant became the plaintiff's bank. I disagree with this contention, but in case I err in this regard, I proceed to deal with the application for absolution on the interpretation contended for by plaintiff's counsel. There is another reason why it is proper that I do so. This morning counsel for the plaintiff, after argument had been concluded, placed before me an application for the amendment of the particulars of claim, to exclude, if I understand correctly, all references in the pleadings to an express contract regarding the banking relationship between the parties. I find it unnecessary to consider the application, because of my view that even if it were granted, absolution must follow, for the following reasons.'

[15] On that basis the court proceeded to consider whether an agreement between a bank and a customer for the conduct of a cheque account could be said to include an implied or tacit term to the effect that the bank 'would fulfil the collecting function [in relation to cheques drawn by its customer]

without negligence vis-à-vis [the drawer customer].' It found that a term to that effect was not implied in such an agreement and on that ground it granted absolution.

[16] Given the terms in which the question was framed that finding by the court below cannot be faulted. An agreement between a bank and its customer for the operation of a cheque account is an agreement of mandate that imposes, as naturalia of the agreement, two obligations on the bank (there may be other terms that are expressly agreed but that is not now material). First, it undertakes, on behalf of its customer, to pay from the account cheques properly drawn by the customer, according to their tenor (provided funds are available in the account). And secondly, it undertakes, on behalf of the customer, to collect cheques properly deposited for collection.[3] It clearly has no obligation to collect, on behalf of someone else, cheques that are drawn by the customer (and to do so without negligence).

[17] But I do not think that is where the matter ends. At the outset it needs to be borne in mind that the collection and the payment of a cheque are two sides of one coin and the transactions occur simultaneously. (I am not referring to the acceptance of the cheque for collection, which occurs when the cheque is deposited, but to the collection of the proceeds of the cheque, which occurs when the cheque is paid.) In this case Absa both collected the cheque on behalf of Fourie, and simultaneously paid it on behalf of McCarthy. Considerable confusion has been introduced into this case by the use of those terms, in the particulars of claim and in the heads of argument

[3] *Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law* 5 ed by F R Malan, J T Pretorius and S F du Toit para 217.

filed on behalf of McCarthy, as if they are interchangeable, which they are not. But once that is cleared up I do not think that it is correct that the claim, properly construed, was founded upon an implied term to the effect that I have mentioned.

[18] As appears from the extract from the particulars of claim that I have recited, McCarthy's case on the pleadings was that Absa was contractually obliged to exercise the care to be expected of a reasonable banker '*when disbursing amounts'* on the authority of its customer. The 'disbursement of amounts' from a cheque account occurs when the bank pays a cheque that is drawn on the account. (That the bank simultaneously collects the proceeds to the account of another customer is coincidental.) The remainder of that paragraph does no more than allege what is to be expected of a reasonable banker when performing its mandate to pay its customer's cheques.

[19] The formulation of the alleged breaches in paragraph 8, particularly in paragraphs 8.2 and 8.3, reflect some of the confusion I have referred to, but I do not see that they alter the foundation of the claim. What that paragraph was meant to convey seems to me to have been clarified when counsel for McCarthy opened its case, in the course of which he said, variously, the following:

- 'The contractual claim is based on the allegations that the defendant breached the bank and client contract … by negligently paying the proceeds of the cheques.
- 'The proceeds were collected for Mr Fourie and the negligence in collecting forms part of the negligence in paying the cheques.'
- 'As is explained in some more detail below, the contractual claim is based on the bank and client contract that existed between the plaintiff and the defendant. The thrust of the bank and customer relationship, insofar as cheques are concerned, is

that a bank may, in terms of common law, debit its customer's account with the amount of a cheque paid only if the bank made payment without negligence and bona fide.'

- 'The defendant acted as both collecting and paying bank. What he did and knew when performing its collection function, it knew when it paid the cheques. When its representative at the Pretorius Street branch looked at the cheques, she learnt certain facts – these facts became part of the defendant's corporate knowledge and was part of what it knew when it "paid" the cheques. … Negligence in collection, is negligence in paying in this matter.'
- 'When a bank pays its client's cheques it performs its obligations in terms of an overall mandate that the client gave the bank to do so. One of the naturalia of a contract of mandate is that the mandatory (the bank) may only claim his expenses if he performed the mandate without negligence. Malan puts the matter thus:

  > "The obligations of bank and customer concerning the drawing and payment of cheques can be express but are mostly implied terms of the contract ... In paying cheques the bank must adhere strictly to the customer's instructions, and must perform its duties with the required degree of care, generally, in good faith and without negligence."

- 'On the other hand, the bank may not pay cheques negligently. ... The duty not to act negligently and the duty to act bona fide to entitle a bank to debit a customer's account with the amount of a cheque are incorporated into each bank and customer contract.'
- 'The plaintiff contends ... that the agreement between the parties contains the provision that the bank may not act negligently when it makes payment against the plaintiff's account.'
- 'The unquestionable negligence that occurred when the defendant collected the cheques must be taken into account when the defendant's conduct in paying each cheque is concerned. The plaintiff's argument in this respect is this:

  > What the defendant learned of the circumstances when it collected the cheques, it knew when it paid the cheques.

> The defendant knew that ... in all probability [a fraud was being] committed and that its client, the plaintiff, was the probable victim of the fraud and the fraud would be completed once the cheques were paid.
>
> It is wholly artificial and wrong in fact and law to distinguish between the collection and payment of cheques in the circumstances.
>
> The defendant would consequently not be not negligent when it paid the cheques.'

- 'We submit that in the present case the circumstances were such that any reasonable cashier would not have paid out the cheques. It must be remembered that the defendant bank converted the cheques into cash for Mrs Fourie and that it was tantamount to the defendant paying the plaintiff's cheque out in cash. It is submitted that the payment of the cheques was clearly effected negligently and not bona fide. There is thus no answer to the contractual claim.'

[20] Upon a fair reading of the particulars of claim, stripped of the terminological inaccuracies, as elaborated upon in counsel's opening, the claim that was advanced by McCarthy was that Absa breached its mandate to exercise reasonable care when paying McCarthy's cheques. The references to collection seem to me to convey only that counsel failed to distinguish the two sides of the coin. In the circumstances I think that the application for absolution and the judgment of the court were misdirected. I might add that to the extent that Absa might have been misled in the conduct of its case by the confusion that was introduced (although it is not evident that that has occurred) the exercise by the trial court of its discretion to allow the evidence to be revisited is capable of avoiding injustice.

[21] It is trite that the test to be applied by a court when absolution is sought at the end of the plaintiff's case is whether there is evidence upon which a reasonable person might (not should) find for the plaintiff.[4]

[22] The fact alone that McCarthy had a cheque account justifies the inference that an express agreement (not necessarily reduced to writing) was concluded between McCarthy and Absa (or their predecessors) at some time in the past that such an account should be operated (it is difficult to see how a bank account might otherwise come into existence). Where such an agreement exists, as pointed out by the authors of *Malan on Bills of Exchange etc*:[5]

'It is the duty of the bank to pay cheques drawn by the customer that are in all respects genuine and complete, on demand, provided sufficient funds or credit for their payment are available in the customer's account. … In paying cheques, the bank must adhere strictly to the customer's instructions, and must perform its duties with the required degree of care, generally, in good faith and without negligence.'

[23] It is not alleged by McCarthy that Absa paid the cheques contrary to their terms. On the contrary, its counsel submitted before us that the named payee was fictitious, and that Absa was thus entitled to pay the bearer.[6] The thrust of McCarthy's case was that Absa paid the cheques negligently, in that it ought at least to have suspected that the bearer (Fourie) was not entitled to the cheques, and should thus have made enquiry before they were paid.

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[4] *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* 4 ed by The Late Louis de Villiers van Winsen, Andries Charl Cilliers and Cheryl Loots ed by Mervyn Dendy pp. 681-3.
[5] Cited above, para 217.
[6] Section 5(3) of the Bills of Exchange Act 34 of 1964.

[24] Counsel for Absa conceded for purposes of this appeal[7] that Absa's employees – the tellers and supervisors I have referred to – ought to have suspected that Fourie was not entitled to the cheques, and thus that they were negligent in having accepted them for collection.[8] But it argues that such negligence was in its 'collecting capacity' on behalf of Fourie and not in its 'paying capacity' on behalf of McCarthy (hence the misdirected enquiry as to whether the bank was contractually bound to exercise reasonable care when performing that collecting function). But the true enquiry is not whether the bank is liable for negligence in collecting the cheques, but instead whether, in view of the knowledge of its employees (albeit that it was acquired in the course of accepting the cheques for collection), the bank was negligent in paying them (at least without further enquiry).

[25] Where the paying bank is not the collecting bank difficulties of that kind do not arise, because the paying bank will generally not be capable of knowing to whom the cheque is being paid. Hence the protection that is afforded to a paying bank against the risk of paying a cheque in conflict with its terms – so far as crossed cheques are concerned – by s 79 of the Bills of Exchange Act. That section provides as follows:

'If the bank on which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a bank ... the bank paying the cheque ... shall ... be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.'

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[7] I stress that the concession was made only for the purpose of argument and does not bind Absa in further proceedings.

[8] Thus exposing Absa to a claim for damages at the hands of the true owner in accordance with the decision of this court in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).

[26] But where the bank that is collecting a crossed cheque is also the paying bank, as Absa was in this case, the bank will indeed know (or at least be capable of knowing) whom it is paying, because the drawer and the holder of the account to which the cheque is paid are both its customers.

[27] However it has been suggested by this court in the context of s 79 – resonating with some of the submissions that were made in this case – that a bank might be negligent in one capacity (its collecting capacity) while not being negligent in another capacity (its paying capacity). While s 79 is not now directly material, nonetheless, if that is correct, it might lend weight to Absa's submission that its negligence in collecting the cheques is to be isolated from its conduct in paying them.

[28] That suggestion followed upon the finding by this court, in *Eskom v First National Bank of Southern Africa Ltd*,[9] that s 79 is applicable as much when the collecting bank is also the paying bank, as when they are different banks. But the protection that is afforded to a bank by s 79 against the consequences of paying a cheque otherwise than in accordance with its terms is conditional upon the payment being paid in good faith and without negligence. It was in the course of considering how that might apply when one bank was both the collector and the payer that Brand JA said the following in *Standard Bank of SA Ltd v Harris:*[10]

'The contention by Du Toit's counsel that one entity cannot simultaneously be both negligent and not negligent is true but inapposite. The transaction of collecting and paying a cheque involves a number of steps and legal acts. Where all the steps were performed by the same entity, I can see no conceptual difficulty in accepting that the

[9] 1995 (2) SA 386 (A) at 397D-E.
[10] 2003 (2) SA 23 (SCA) para 12.

entity is not negligent in performing some of the steps but negligent in performing others. This being so, and once it is recognised that one bank can fulfill the functions of both collecting bank and paying bank with regard to the same cheque, there seems to be no difficulty in accepting that the bank can be negligent in the performance of its collecting functions but act without negligence in the performance of its functions as a paying bank.'

[29] *Eskom* was decided on exception and the court was not called upon to consider how s 79 might find application in practice. Nor was the court called upon to do so in *Standard Bank.*

[30] While it might indeed be conceptually possible for a bank to be negligent when it collects a cheque, but not negligent when it pays the cheque, I confess that I have some difficulty envisaging how that might occur. For the question whether a bank is negligent will generally depend on what was known to the bank when it performed the particular transaction, and that would suggest that a bank might have knowledge while wearing one hat, but cease to have that knowledge when it dons the other hat. It seems to me that once knowledge is acquired then it is known whatever hat the person is wearing. But in any event there is certainly no suggestion in *Standard Bank* that the two functions will always be kept apart when considering whether a bank was negligent.

[31] Counsel for McCarthy referred us to a decision of the Supreme Court of Victoria – *Nemur Varity Pty Ltd v National Australia Bank Limited*[11] – in which the conduct of a bank in the course of accepting a cheque for collection was indeed attributed to the bank when deciding whether it had

[11] [1999] VSC 342.

been negligent in paying the cheque. On that issue Ashley J said the following (the plaintiff was the drawer of the cheques):

'141 In the present case I am well satisfied that in the case of each … cheque the bank was in breach of the duty [to exercise such care and skill as would be exercised by a reasonable banker]. It was not suggested by counsel for the [bank] that the circumstances known to the bank by reason of the fact that it was the collecting bank, or its conduct as collecting bank, should be excluded when considering whether it was in breach of the duty of care which it owed the plaintiff as its customer; although he did submit that it would go too far to say that in every case a paying bank should enquire of its customer as to the intended destination of a cheque. The qualification may readily be accepted, without impacting upon the significance of the circumstances of the bank's conduct in collecting the cheques in the present case.'

[32] I should not be understood to express any view on the correctness or otherwise of the approach that was taken in that case. It ought to be borne in mind that, as appears from the extract, the question with which we are now concerned was not the subject of argument. Moreover, the bank sought to revive the issue on appeal, but was not permitted to do so, and thus no opinion was expressed by the court of appeal.[12] I mention the case only to indicate that it cannot be taken to be self-evident that the conduct of a bank in the course of collecting a cheque is to be left out of account when deciding whether the bank paid the cheque negligently.

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[12] *National Australia Bank Ltd v Nemur Varity Pty Ltd* [2002] VSCA 18. Per Batt JA at para 14: 'The second submission [by the Bank] was that in considering whether there was a breach of duty by the Bank as paying bank it was necessary, where, as here, the same bank was both the paying bank and the collecting bank, to treat each branch as a separate entity. [Not] only had this not been put to the judge below, as para 141 of his Honour's reasons makes clear, but it was not stated, let alone specifically stated, in the grounds of appeal and the possibility that evidence, at least of an expert kind, could have been led on the question cannot be excluded.'

[33] Whether or not Absa was negligent is ultimately a question to be decided with reference to the facts of the particular case. We are not called upon in this case to answer any of the questions I have touched on and it would be undesirable to express any firm view on those issues. We must accept for present purposes that employees of the bank were possessed of knowledge that should have led them to suspect that Fourie might not be entitled to the cheques. We must also accept that they knew that the cheques had been drawn by their customer McCarthy who would have to pay them. Naturally, there are other facts that emerge from the evidence, not least of which is that no query was raised by McCarthy once the first cheques had been paid, that need to be placed in the matrix. No doubt there might also be generally accepted practices of which we are not yet aware that would demonstrate why that knowledge ought not to be attributed to the bank when it paid the cheques. At this stage of the proceedings I think it is sufficient to say, without elaboration, that on the evidence that has been presented thus far, in my view a court might indeed find that Absa ought to have made further enquiry before it paid the cheques, and that its failure to do so was negligent.

[34] Whether any such negligence was causally connected to the loss, and whether any causally connected loss extended to all of the cheques, were not matters raised in this appeal, and I express no view in that regard, beyond saying that a court might find that at least some loss was caused. In those circumstances absolution ought not to have been granted and the appeal must succeed.

[35] The appeal is upheld with costs that include the costs of two counsel. The order of the court below is set aside and the following order is substituted:

> 'The application for absolution from the instance is refused. The costs occasioned by the application are costs in the cause.'

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R W NUGENT
JUDGE OF APPEAL

Appearances:

For Appellant:	P F Louw SC D Turner Instructed by Knowles Husain Lindsay Inc, Sandton McIntyre & Van der Post, Bloemfontein
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