IN THE HIGH COURT OF SWAZILAND

Elliot Chicco Kunene

Applicant

V

Nedbank (Swaziland) Limited

Respondent

Case No. 137/99

Coram S.W. Sapire, CJ

For Plaintiff Mr. L. Mamba

For Defendant Mr. J. Henwood

JUDGMENT

(14/07/99)

The Applicant, on motion claims an order

1. "Directing the Respondent to credit the applicant's account No,002/02/80395/21 with the sum of E50 000 in respect of a cheque deposited on 30th April 1998.

2. Directing the Respondent to pay to the Applicant all sum (sic) that may be standing to the credit of the Applicant's said account." with costs and further or alternative relief

Before considering the founding affidavit on which this claim for relief if made, a word as to the formation of the claim,



The usual and proper way, when claiming in amount sounding in money is to pray for Judgment in that amount. The entry the alleged debtor makes in its books of account is quite irrelevant, and a matter over which neither the creditor nor the court has any control. The intention behind the framing of the claim in the manner the Applicant has chosen, in prayers one and two of the notice of motion, seems to be to convert the judgment sought from one ad pecuniam solvendam to one ad factum praestandum. The significant difference is that the plaintiff would seek to enforce the former by the ordinary process of execution, whereas there is authority for the enforcement of the latter by contempt proceedings. It is in respect only of the latter category of order that contempt of Court proceedings are competent.

See Metropolitan Industrial Corporation (Pty) Ltd v Hughes1.

This stratagem is not permissible and is to be discouraged. While the court may give Judgment for the payment of money, the court has no power to require a party to make entries in its books of account and on the basis thereof enforce payment of a balance by penal sanctions of contempt.

A party bringing a claim by way of application, knowing a dispute of fact exists, exposes himself to the risk that the application will be dismissed if the dispute cannot be resolved on the affidavits.

See Room Hire Co. (Pty.) Ltd. v Jeppe Street Mansions (Pty.) Ltd.,2

In this case, the Applicant should have foreseen possibility of such a dispute. The dispute is whether or not the cheque deposited by Applicant with the Respondent was paid. It is a crucial, if not the only issue in the case. Applicant knew of this dispute from the correspondence which, before the institution

of the proceedings, passed between the parties
In the founding affidavit, the Applicant has not directly asserted that the drawee bank honoured the cheque upon presentation.

1 1969 (1)SA 224 (T)

2 1949 (3) SA 1155 (T) at p 1161.



After citing the parties and alleging that he was a customer of the Respondent, the Applicant recites that he deposited a cheque in an amount of E50 000 drawn by the Central Bank, with the Respondent for collection. This allegation establishes the relationship of the parties to the transaction. They were customer and collecting bank respectively. The Applicant was the owner of the cheque, the Respondent the agent for collection. I will examine the rights and duties of the customer and collecting bank as considered in decisions of the High Courts of South Africa

In paragraph 5 of the founding affidavit the applicant has stated

"In terms of normal banking practice the cheque as a "local city cheque" was cleared and funds were available after four days. In support whereof I annex a copy of the respondent's deposit slip marked "A" which clearly states that Manzini, Matsapha and Mbabane cheques are cleared after four days."

This is not an allegation that the cheque deposited was in fact paid on presentation. The Applicant is seeking to draw an inference that the cheque was in fact honoured on presentation. This is not possible because it is a matter of ascertainable fact whether or not the cheque deposited was paid by the drawee bank. The papers in this case make it clear that the drawee bank declined to make payment. What the Applicant is in fact attempting to allege is that the respondent was under a contractual obligation to make payment of cheques drawn by the Applicant against the uncleared funds.
The premises on which the applicant relies are to be found in the deposit slip under cover of which the cheque was deposited for collection. They are, firstly, that the cheque deposited was a "local city cheque". The second premise is that a cheque of this description is, in the pro forma deposit slip, said to have "4 Days Value".

The applicant seems to suggest that the effect of using the pro forma deposit slip, and subscribing to the terms appearing thereon, is that an agreement is concluded. This agreement is that if the bank does not inform the customer of the dishonour of the instrument within the time stated, payment in due course is deemed to have been made. It would follow, on this line of reasoning, that if dishonour took



place after the four days the collecting bank could not reverse the provisional credit made when the deposit of the cheque was recorded

The expression "normal banking practice" is inappropriate in the context. What the applicant is alleging, in referring to the pro forma deposit slip (Annexure A), is that it is evidence of the terms governing the contractual relationship between the parties. The document does not appear to reflect any normal baking practice. There is in the founding affidavit, no evidence of any practice, which is part of the parties' contractual relationship. There is to no evidence of the agreements between the banks relating to the clearing procedures.

In the bottom right hand corner of the pro forma deposit slip appear the words

"CHEQUES, etc., handed in for collection will be available as cash when paid"
This means that the customer depositing the effects may not draw against them until they have been paid in due course. Funds represented by the credits made on deposit are not available for withdrawal until the proceeds of cheques or like instruments have been received by the collecting bank. Until the funds are received the credit is provisional and may be reversed if the instrument deposited for

collection is dishonoured. One must read the allegations in paragraph five of the founding affidavit in conjunction with this overriding stipulation. There is however no evidence of any stipulation between the banks limiting the time within which the drawee bank must inform the collecting bank of dishonour.

The pro forma deposit slip distinguishes three categories of cheque by domicile. A separate column is provided for each. The first column is for listing "Same Branch Cheques" which have "same day value", so that the customer may draw against such cheques immediately. This obviously refers to cheques drawn on the same branch of the drawee where the customer deposits the cheque for collection.

There is a second column for listing of "Local City Cheques" In it without any explanatory words, the centres Manzini Matsapha and Mbabane are mentioned alongside the words "Local City Cheques. The applicant has argued that cheques

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drawn on any branch, of any bank, in any of the places mentioned, irrespective of where the deposit is made fall within this category. The respondent alleges that "Local" refers to cheques drawn on a branch of the respondent, Nedbank, other than the same branch at which the cheque is deposited for collection.

The wording of the pro forma deposit slip permits, and favours, a third interpretation. Local cheques could be understood to be cheques drawn on other banks, (or even a different branch of the collecting bank), situate in the same town, being one of the three mentioned. This in my view is what the document means. The use of the word "local" connoting a place is important in this connection.

The wording of the deposit slip requires change, if it is to serve as a document clearly and unambiguously expressing the contractual relationship between the banker and customer. The present wording of the deposit slip could give rise to misunderstanding.

The applicant somewhat indirectly, but positively, alleges that the instrument deposited was a "local city cheque". The facts do not support this. Applicant deposited the cheque at the Respondent's Manzini branch. The domicile of the cheque was Mbabane. The drawee was the Central Bank, which the contents of paragraph 4 show to be in Mbabane, It was accordingly a "country cheque" It follows that the appropriate period was ten days before the cheque "had value".

What is meant by the words "Same Day Value", "4 Days Value", and "10Days Value", as used in the pro forma deposit slip is not clear. Reading the document as a whole the proper interpretation appears to be that the parties would act upon the assumption that cheques of the three specified categories would be cleared after the respective periods mentioned. Cheques drawn by the customer and presented for payment, after the expiry of the period appropriate to the category of cheque deposited, in the absence of actual advice of dishonour, would be paid on the assumption that the cheque deposited had been, or would be, paid in due course, whether or not this was in fact so. This does not mean that the normally incident terms, express or implied in the agency relationship of collecting bank and customer were affected. One of these terms is that if a cheque deposited for collection by the

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customer is dishonoured, the collecting bank would be entitled to reverse any credit on the customer's account reflecting the deposit of the cheque. See Absa Bank Ltd v / W Blumberg and Wilkinson3 Absa Bank Ltd v de Klerk

Within the ten-day period, on fourth, fifth, and seventh May, (that is before the cheque "had value") the Applicant drew amounts totalling El9 160,00. But for the credit made to reflect the deposit of the cheque, the customer would not have had funds in the account to meet these withdrawals. In these circumstances there was no obligation on the Respondent as collecting bank, in the absence of agreement to the contrary, to honour the customer's cheques drawn on it.

The applicant in the founding affidavit does not describe the circumstances in which these withdrawals were made. The applicant does not say that any agreement was concluded creating an

obligation on the Respondent to meet cheques drawn against uncleared funds. The Respondent in dealing with the matter in its "Answering Affidavits" has stated that after initial refusals to allow withdrawals by the applicant against the uncleared effects, the Respondent acceded to the Applicant's persistent requests. There was nothing to prevent the Respondent exercising its discretion and allowing a departure from the provision expressed, at least on the deposit slip, that funds would only become available once the cheque deposited for collection had been paid. I find it difficult to appreciate that by doing so it could have acted to its prejudice, and become in fact a guarantor for the cheque. This would be the effect of holding that the Respondent was not entitled to reverse the credit to the Applicant's account when the cheque was dishonoured.

This I understand to be one of the Applicant's contentions. The Applicant has not adduced any evidence that the Respondent in fact received any funds on Applicants account from the proceeds of the cheque. On the contrary the Respondent has shown quite clearly that the cheque was dishonoured. This means that the respondent was entitled to reverse the credit when the cheque deposited was dishonoured

3 1997 (3) SA 669 (SCA) A

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It is a second leg of the applicant's case however that whether or not the cheque was dishonoured the Respondent is not entitled to reverse the entry because the respondent allowed the Applicant to draw against the uncleared effects. In advancing this argument, Applicant relied on Bloems Timber Kilns (Pty) Ltd v Volkskas Bpk s. This case decided that the collecting Banker could become a holder of a cheque deposited with it for collection without endorsement.. The headnote reads as follows,

"Assigning to the words used in section 84 of the Bills of Exchange Act, 34 of 1964, their plain meaning, it is difficult to escape the conclusion that it was the intention of the Legislature to put a banker to whom a holder had delivered an unindorsed cheque payable to order in the same position as that in which the banker would have been had such cheque been indorsed. There can be little doubt that, in that event, barring such consensual limitations as may have been placed upon the right of the banker to deal with such cheque, the latter would have become the holder thereof and would have enjoyed the advantage conferred upon a holder under section 28 (2) of being deemed to be a holder in due course.

According to our law it is necessary for a banker, in order to claim that it took a cheque from its customer for value, to establish that it had extended the quid pro quo to its customer in pursuance of an express or implied agreement with that customer to do so.

The answer to the question as to whether the banker took and gave value for a cheque in good faith is to be sought in the state of the banker's mind when he gave value for the cheque. The enquiry is subjective in nature. It is concerned with what his state of mind was, not with what it ought to have been. The subjective nature of the enquiry is also enjoined by the terms F of section 94 of Act 34 of 1964."

In the course of his judgment (which was the judgment of the court), Van Winsen A J A (as he then was) said,

"It is true that the capacity in which a banker holds a cheque delivered to him by his customer, i.e., whether he is given possession of it as a mere agent for the purpose of collection or whether he is to hold the cheque in his own right, e.g. as a pledgee or holder, is a matter which can be consensually regulated between banker and customer. But the fact that a banker's capacity can be so restricted to that of an agent for collection affords no support for the view that the Legislature intended to limit the operation of sec. 84 to cases where a banker was so acting. Sec. 84 was not

4 1999 (1) SA 861 (W)

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intended to define the status of a banker who takes delivery of a cheque in the circumstances outlined

in the section. It deals purely with his rights."

This passage indicates the fallacy in the Applicants contentions. The decision does not support the Aplicant's case. The case deals with the collecting banker's rights against third parties, and does not have any relevance to the question of the banker's right to debit his customer on dishonour of a cheque deposited with him for collection.. The passage quoted is applicable in Swaziland as the provisions of the relevant section of the South African legislation is repeated in section 84 of The Bills of Exchange Act6. Section 84 reads

'"Rights of bankers if unindorsed or irregularly indorsed cheques or certain other documents are delivered to them for collection:

If a cheque, or draft or other document referred to in sec. 83, which is payable to order, is delivered by the holder thereof to a banker for collection, and such cheque, draft or document is not indorsed or was irregularly indorsed by such holder, such banker shall have such rights, if any, as he would have had if, upon such delivery, the holder had indorsed it in blank."
It also follows that, the Respondent as holder of the cheque, on dishonour by the drawee bank had a claim in the amount of the cheque against the Applicant, who in terms of the section quoted was a prior endorser of the instrument. Such claim in itself would entitle the Respondent to debit the account.

In the circumstances the applicant has not made out a case for the relief claimed.

The application is accordingly dismissed with costs

S. W. SAPIRE, CJ

5 1976 (4) SA 677 (A) 6 Act 11/1902