HIGH COURT OF SWAZILAND

H P Enterprises (Pty.) Ltd.

T/a Heather's Fashions Applicant

Vs

Nedbank (Swaziland) Ltd. Respondent

Civ Case No. 788/99

Coram S.W. SAPIRE, CJ

For Plaintiff Mr, Shilubane

For Defendant Mr. Flynn

JUDGMENT

(30/07/99) The Respondent is a commercial bank. Applicant is its customer.

The Applicant instituted motion proceedings against the Respondent seeking the following relief

"An order

1. dispensing with the forms of service and the time limits prescribed by the rules of court and "hearing the matter urgently" (sic)
2. That a rule nisi be and is hereby issued calling upon the respondent to show cause if any, why,

2.1 the respondent should not be ordered to forthwith the debit of E 120 000 made on 25th March 1999 to applicant's account No.001075307431 held by applicant at respondent's Manzini branch

2.2 the Applicant should not be entitled to use any monies standing to the credit of Applicant's aforesaid account after the reversal of the debit referred to in paragraph 2.1 hereof

2.3 the respondent should not pay the costs of this application
3. That paragraphs 2.1 and 2.1 operate with immediate effect as an interim order pending the return date

4. Further and/or alternative relief."

The Notice of Motion and supporting affidavits were served, but the period of notice gave the Respondent completely inadequate time within which to answer the allegations in the founding affidavit. The notice was little better than no notice at all

When the matter was called on 31st March 1999 attorneys appeared for both the Applicant and the respondent. Respondent's attorney could do little more than ask for time within which to prepare the Respondent's answer and brief counsel to argue the matter. Mr Shilubane who appeared for the applicant pressed for interim relief as claimed in the Notice of Motion, The matter stood down until 2pm on the following day. The note on the court file in the presiding judge's handwriting, records that an order was made in terms of prayers (1) (2.1) (2.2) and (3) of the notice of motion while the relief claimed in prayer (3) was reserved. The return day of the rule was 16th April 1999 and the Respondent was put on terms to file its replying affidavits by Friday 9th April 1999.

Normally a claim for payment of money is not a matter, which is attended by such urgency, entitling

the claimant to ask that the forms and times of service and the time limits prescribed by the rules of court be dispensed with. Many if not all claimants who seek money judgments are inconvenienced to a greater or lesser degree by having to wait for adjudication of their claims. Such inconvenience is not a ground of urgency as contemplated in Rule 6 (8). The facts alleged by the applicant in this case have to be viewed most benevolently, to see in them grounds for urgent treatment of the application. Litigants must guard against abuse of the urgency procedure more especially where it is

calculated to produce an unfair result. If practitioners, (whether they be attorneys or advocates) issue certificates of urgency without regard to the objective urgency of the matter, the certification becomes meaningless and no credence can be given to such documents. Such practitioners owe a duty to the court in certifying matters as urgent, to have satisfied themselves on objective assessment that the matter is indeed urgent. A litigant seeking to invoke the urgency procedure, must make specific allegations of fact which demonstrate that observance of the normal procedures and time limits prescribed by the rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts so alleged must not be contrived or fanciful, but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow.

The form of the relief sought and granted in the present instance gave rise to greater potential prejudice to the respondent, than the refusal to grant such relief could have occasioned the Applicant. The substance of the Applicant's claim for relief was a money judgment. It was however presented originally as a clam ad factum praestandum. The order called upon the Respondent to show cause why the debit passed should not be reversed and why the applicant should not be entitled to use any monies standing to the Applicant's credit after the credit had been passed. In this way the Applicant sought to convert what would otherwise have been a judgment ad pecuniam solvendum into a judgment ad factum praestandum. The former is of course enforceable by the usual process of the issue of a writ, while disobedience to the latter gives rise to contempt proceedings.

The potential prejudice was compounded by the order that the rule operate as an "interim order pending the return date". This meant that before the merits of the matter could be determined the Respondent under pain of contempt proceedings was obliged to afford the applicant access to the balance of the credit passed on deposit of the cheque. Having regard to the allegations in the founding affidavit as to the Applicant's urgent need for money, there is substantial doubt as to its ability to repay any amounts withdrawn, should the applicant eventually lose its case.

The potential prejudice to the respondent was averted by discharge of the rule at the instance of the Respondent. The matter was referred to evidence on the disputes of fact, which emerged once the Respondent had filed its replying affidavits and the applicant had replied thereto. The disputes related in general to the terms of the contract governing the parties' relationship as banker and customer, and in particular as to whether such terms permitted the Applicant as of right to draw against uncleared effects. The matter was referred to evidence on the issues identified in a draft order appearing at page 46 of the record.

At the commencement of the hearing the Applicant moved an amendment to his notice of motion to substitute a prayer for a declariter for the prayers which I have quoted earlier in this judgment. In so doing the applicant impliedly acknowledged the inappropriateness of the relief originally claimed

Both parties led evidence of witnesses who expanded on the statements appearing in the affidavits On the basis of such evidence, and the contents of the affidavits my finding of fact is as follows

a) The parties were customer and banker respectively

b) The Applicant from time to time in the past had been allowed to draw against uncleared effects, (i.e. cheques deposited for collection before the drawee bank had signified through the clearing procedures that it was honouring the instrument.) This does not mean that the term normally incident to the underlying contract of a banker and customer relationship, entitling the banker to reverse credits in respect of dishonoured cheques deposited for

collection by the customer was excluded. An inference may be drawn in some circumstances that the customer and the banker had agreed that the banker would allow the customer as of right to draw against uncleared effects. The practice in the present case alleged by the applicant is equivocal. It may be evidence of an agreement. On the other hand, it may equally be that the bank manager in allowing the withdrawals against uncleared effects was exercising discretion. There is no direct evidence of an agreement as contended for by the applicant.

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c) The general rule was that cheques handed in for collection would be available as cash, when paid. This term was to be found printed on the deposit slip used by the Applicant when the cheque for "120 000,00" was delivered to the Respondent for collection.

d) Further written indications on the document indicated that cheques of different domicile, (i.e. location of the drawee bank) would "have value" after different periods. In the case of a cheque drawn on the same branch of the bank at which the deposit was made, it would have "same day value". Country cheques, of which the instrument in question was one, had value after 10 days. It was a matter of considerable dispute as to what was meant by the "value date" the respondent contending that the words on the deposit slip were no more than a guide as to when the cheque could be expected to be cleared. Applicant contended that if no notice of dishonour was communicated to the customer prior to such date, the customer could as of right draw against the credit made when the cheque was deposited. I think it would be useful to repeat here what I said in this connection in the recent judgement in the matter, Chicco Kunene v Nedbank Case No. 137/99, where a deposit slip identical in its printed form was used

"What is meant by the words "Same Day Value", "4 Days Value", and "10 Days 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 was affected. One of these terms is that if a cheque deposited for collection by the customer were 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 I W Blumberg and Wilkinson1, Absa Bank Ltd v de Klerk""

1 1997(3) SA 669 (SCA) A 1 1999 (1) SA 861 (W)

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f) The Respondent met cheques drawn on it by the Applicant in amounts

totalling E70 000, Although Applicant has alleged in the founding affidavit that this took place on 10th March 1999 it is Respondents reply that the day in question was 10th February 1999. Little turns on this and I assume the Respondent is correct. If the value period appropriate to the cheque was 10 days, both days are after the conclusion of the period. The Applicant was therefor in terms of the deposit slip, entitled to assume, in the absence of notification to the contrary; that the cheque deposited for collection had been met. But a distinction must be drawn between an agreement entitling the customer to withdraw against uncleared funds and an agreement that the bank is to treat a cheque deposited for collection as cash even when that cheque is subsequently dishnoured and the customer had withdrawn funds in anticipation of the bank receiving the proceeds of payment of the cheque. This would mean that the bank takes the cheque "sans recours" .The Applicant, by definition on deposit thereof became the holder of the cheque being the endorsee thereof, in possession (See Bills of Exchange Act, 3 section 2.) On deposit of the cheque for collection the Respondent became vested with such rights as he would have had, if the Applicant as holder had endorsed it in blank (see Section 84) even if Applicant did not if fact so endorse the cheque. In other words the Respondent,

became the holder, or became vested with all the rights of a holder of the cheque. Bloems Timber Kilns (Pty) Ltd v Volkskas Bpk

On dishonour the Respondent had, as holder, a claim not only against the drawer of the cheque, but against Applicant as endorser subject to notice of dishonour being given or excused. It is difficult to see in these circumstances how there could have been any agreement that the bank would assume risk in the cheque, either by accepting it for collection or by allowing the customer to draw against it before it had been paid or dishonoured. If the customer had endorsed the cheque when depositing it and added the word "sans recours" the position may have been otherwise

4 1976 (4) SA 677 (A)

g) The cheque was dishonoured by non-payment when presented to the drawee bank. Although there is some suggestion that the drawee bank had delayed too long in advising the Respondent of the dishonour in terms of some clearing procedures adhered to by commercial banks, there is no evidence of the consequence of this. On the papers as they stand he finding that the cheque was dishonoured is inescapable.

Having found that there was no agreement between the Applicant and the Respondent that the former would be entitled to draw against uncleared effects or that the Respondent would not be entitled to debit the applicant with the amounts credited to the current account on deposit of cheques for collection, which were dishonoured, the application is to be dismissed.
See Absa Bank Ltd v I W Blumberg and Wilkinson 5

This case was referred to by both sides, and cited in support of their opposing contentions. The case is authority for no more than that in the absence of allegations and proof of an agreement to the contrary a collecting banker, may debit the customer's account with the amounts of uncleared effects, notwithstanding that the banker has allowed the customer to draw against the credit passed on deposit of the effects. The case did not deal with a situation where the customer had deposited cheques of which the customer was the holder, for collection. The effects were cheques deposited by a client to the trust account of the Respondent who was an attorney.

Illustrative of the principles applicable in the present case is

Absa Bank Ltd V De Klerk6

A portion of the headnote to this case reads.

51997 (3) SA 669 (SCA) 6 1999 (1) SA 861 (W)

"Held, that the present was not a case where a customer simply drew a cheque in excess of available funds, hoping that it would be met. The defendant in casu had not requested a loan. He believed that there were adequate funds to his credit and he intended to draw against them. At the same time the plaintiff, in honouring the cheque, had no intention to lend money. Its purpose was to pay the funds out of the amount deposited by the defendant, which the plaintiff believed had resulted from the honouring of the foreign cheque. In determining the nature of the transaction it was vital to examine the state of mind of the parties. Plainly, both parties operated with the same intention, namely to draw upon funds believed to be available.

There had never been any intention to create a loan. Both parties acted under a mistaken belief. And as the moneys had been paid by the plaintiff under mistake of fact, the proper cause of action was the condictio indebiti. Held, further, as to the plaintiff's second cause of action, that as nothing had been done to rebut it, save for the defence of estoppel, the plaintiff's averment that it was entitled to debit the defendant's account with the amount withdrawn had to stand. The only question was whether the defence of estoppel defeated the claim. Held, that the present was not a case where a customer simply drew a cheque in excess of available funds, hoping that it would be met. The defendant in casu

had not requested a loan. He believed that there were adequate funds to his credit and he intended to draw against them. At the same time the plaintiff, in honouring the cheque, had no intention to lend money. Its purpose was to pay the funds out of the amount deposited by the defendant, which the plaintiff believed had resulted from the honouring of the foreign cheque. In determining the nature of the transaction it was vital to examine the state of mind of the parties. Plainly, both parties operated with the same intention, namely to draw upon funds believed to be available. There had never been any intention to create a loan. Both parties acted under a mistaken belief. And as the moneys had been paid by the plaintiff under mistake of fact, the proper cause of action was the condictio indebiti."

In the present instance too, evidence of the contract and the party's states of mind is to be found in the deposit slip. The monies were drawn against the cheque after the elapse of was stated to be the time within which the fate of the cheque would have become known. Neither party knew that the cheque would be dishonoured and both parties acted under a misapprehension.

The Applicant deposited the cheque for collection. In relation to this transaction the Respondent was the applicant's agent. The respondent's duty in

relation thereto was to present the cheque to the drawee bank and to account for the proceeds. If the cheque was dishonoured there were no proceed s for which to account. The fact that the Applicant was allowed to draw and did draw against the anticipated receipt of the funds by the Respondent on Applicant's behalf, does not detract from the basic rights and obligations of the parties as principal and agent. There is no reason why the Respondent should not be able to recover the amounts advanced to the extent that they exceeded the amount actually held by the Respondent on Applicant's current account.

The application accordingly fails and is dismissed with costs