CIV. CASE NO. 199/98

In the matter between

BUDGET SPARES CENTRE (PTY) LTD	**APPLICANT**
And	
STANDARD BANK SWAZILAND LTD	**RESPONDENT**
Coram	S.B. MAPHALALA – J
For the Applicant	MR. P. SHILUBANE
For the Respondent	MR. T. MASUKU

JUDGEMENT
(20/04/99)

Maphalala J:

The matter first appeared before me on the 3rd February 1999 with a certificate of urgency, where a consent order was entered that the respondent be directed to deliver to the applicant the original alleged unpaid cheque no. 022077 for the sum of E785, 552-00 not later than the 8th February 1999, failing which the respondent were to file its opposing papers by 8th February 1999, and thereafter, if necessary the applicant to file a reply and the matter argued on the 10th February 1999 at 2.15pm. On the return date the matter for some reason did not take off. The matter was again enrolled for the 18th February 1999, where the court heard submissions on the merits of the application after the parties have joined issue by an exchange of the relevant affidavits. The ***lis*** before court then was for the return of the original cheque failing which the respondent was to pay the said sum. During the course of submissions by Mr. Masuku who attempted to introduce a certain letter from the bar Mr. Shilubane registered an objection to the reception of the letter. However, the court ruled in favour of the respondent and ordered the respondent to file a supplementary affidavit to allow for the reception of the letter. Respondent tendered wasted costs for the day. Respondent subsequently filed an affidavit of an officer from ABSA. When the matter came for arguments applicant took a point that a certain paragraph in that affidavit and a potion of a letter annexed thereto should be struck out as applicant was of the view that they were hearsay.

The court then heard submissions for and against the objection to strike out and handed down its ruling on that aspect on the 3rd March 1999, and sustained the objection and thus finding that those paragraphs should be struck out, as they constituted hearsay.

The matter came again before me on the 22nd March 1999 for arguments on the merits. The historical background of the matter is that applicant is a customer in the respondent bank where it operates a current account at its Manzini branch. On the 23rd December 1998, the applicant deposited a cheque in an amount of E788, 552-00. The said cheque was duly endorsed by the payee in favour of the applicant as payment for goods sold and delivered by the applicant. According to the applicant's papers the said cheque was duly credited to applicant's current account on the 23rd December 1998. However, on the 28th December 1998, the respondent according to the applicant wrongfully and unlawfully reversed the entry. On or about the 15th January 1999, applicant was approached by one Mr. Eksteen, a representative of the purchaser of the goods, Union Carriage & Wagon (Pty) Ltd with a request to deliver the goods which had been sold to it by the applicant. He informed him that respondent had told him that the cheque was being returned because payment thereof had been stopped. Mr. Eksteen then informed applicant that the said cheque had already been debited to the drawer's account on the 4th January 1999, as had not been returned. On the 18th January 1999, Mr. Eksteen returned and handed to the applicant a copy of the said cheque. Applicant was satisfied that the amount had been paid and it released the goods to Mr. Eksteen who removed them from the applicant's premises. Applicant contacted the respondent's branch manager, Mr. Adams on the 20th January 1999, who according to applicant showed no interest on the document it obtained from Mr. Eksteen. Mr. Adams then showed the applicant a document from what appeared to be a clearing agency instruction to the effect that the cheque was being returned marked "payment stopped". Mr. Adams refused to let applicant have a copy of the document. Applicant informed Mr. Adams that it had already released the goods in question and needed the cheque in order to take the matter up with the purchaser of the goods. Mr. Adams informed applicant that he would let it have the cheque as soon as he received it.

The affidavit of Mr. Dean Anthony Adams, which is answer to applicant's founding affidavit, denies most of the allegations made by the applicant. The applicant subsequently filed a replying affidavit of one Leslie Anthony John to counteract the allegations raised in respondent'' answering affidavit.

The matter then came for arguments on the 22nd March 1999, where Mr. Shilubane submitted that the crux of the matter is simple that once a cheque was paid it cannot be reversed. The cheque was paid on the 28th January 1999, and this appears from the affidavit from ABSA. Mr. Shilubane drew the court attention to numerous authorities to buttress applicant's case. He referred the court to ***A.B. Fourie on The Banker and the Law (1993 publication)*** at page 24 where the case of ***Rosen vs Barclays National Bank Limited 1984 (3) S.A. 974 (w)*** was considered. The principle discussed in that case is that when a cheque is presented to a teller for cashment the cheque will be regarded as being paid the moment the teller pays the amount in cash to the presenter. The cheque can thereafter no longer be dishonoured by the bank. The same principle applies where a cheque is presented for special clearance by another bank. As soon as the drawee banker had issued the clearance voucher the cheque should be regarded as having been paid. If the drawer in both cases asks the bank to stop payment of the cheque, the bank must refuse to accept the stop payment as the cheque have been paid. In both these cases the cheques have been presented and the banker has decided to pay the cheques. After payment has been made the decision cannot be reversed. Mr. Shilubane further directed the court's attention to the cases of ***Freeman vs Standard Bank of S.A. 1904 T.P.D. 26*** and that of ***Volkskas Bank BPK vs Bankorp BPK (H/A) Trust Bank 1991 (3) S.A. 605*** where the same principle was followed.

Mr. Shilubane is also of the view that payment was not stopped in the case in ***casu***. He referred to ***Sharrock et al in their Understanding Cheque Law (1st Ed)*** where the learned authors stated that it was important to determine the movement of payment once the bank has paid the instrument. Secondly, should the drawer be declared insolvent before payment has occurred, the creditor merely has a concurrent claim against the insolvent (see ***Rosen (supra)***. Mr. Shilubane argued that paragraph 2 of the letter from ABSA bank dated the 11th February 1999, by the Manager/Control and Security Department S. Van Rensburg was totally useless. The countermand should be communicated to the branch timeously. It must be sent by the customer or a person who claim to represent the customer. He further contended that ***ex facie*** the copy of the cheque it is clear that the cheque was paid.

Mr. Masuku for the respondent argued ***in contra.*** He submitted that paragraph 6 of the applicant's founding affidavit only show by the stamp thereon embossed that the cheque was received by the respondent. He further referred to paragraph 13, 14, 15 and 17 to drive his point home. Mr. Masuku then traced the path of the cheque from the drawer being South African Rail Commuter Corporation Ltd who were paying Union Carriage & Wagon (Pty) Ltd then the latter endorsed the cheque to the applicant. Applicant then deposited the cheque with the respondent.

Mr. Masuku contends that a cause of action has not been established in view of the aforegoing backdrop. The respondent in this case is a collecting agent/banker and thus as a collecting banker of such a cheque is protected in as much as he is not regarded as giving a consideration therefore because he has in his own books credited his customer's account with the amount of the cheque before receiving payment thereof. The collecting banker is regarded as a mere "conduit pipe" and is accordingly accorded this protection (see ***The Law of South Africa (Vol. I) page 453).*** It is not alleged in the papers that the respondent is liable. They should show ***mala fides*** on the part of the respondent. He further referred the court to ***Louise Tager on Negotiable Instruments (1984 publication) at page 106*** to illustrate the protection afforded to collecting banks. The clearing was done by ABSA bank in Johannesburg and that is where the action should lie. ABSA says the cheque was lost yet respondent is expected to produce the lost cheque. He further referred the court to ***Sections 46 (2)*** and ***Section 68 (1)*** of the ***Bills of Exchange Act.***

On points of law Mr. Shilubane reiterated his earlier submissions and further pointed out annexure "DNF" is in contempt of the court in that respondent is using the debit note to show that the entry has been reversed when they knew that the matter was before court. It was quite improper for the bank to have documents to show that the money was not there when the matter was still pending.

These are the issues before me. It appears to me from the reading of the papers before me and considering the submissions by both counsels that Mr. Shilubane is correct. The crisp issue to be determined here is whether once a cheque was paid can it be reversed? The law on the subject seem to answer the question on the negative. The law is succinctly outlined in the case of ***Rosen vs Barclays National Bank Ltd 1984 (3) S.A. 974*** where its head note reads as follows:

> "The enquiry facing the court was whether or not a bank guaranteed cheque had been paid by the drawee bank prior to the grant on an interdict forbidding it to do so. The court thus has to deal with the crucial question as to when payment of the cheque had been effected and, in so doing, the court favoured the following approach: The moment of payment fail to determined by the moment the

> drawee bank made the decision to honour the cheque. Should any credit or debit entries have been made in the bank's books prior to such decision, those entries had to be regarded as provisional, and they remain provisional until such time as the decision to honour the cheque had been taken, whereupon they become final as if they had been made after the decision to pay the cheque had been taken.
>
> On the above principles, the court concluded that, if the decision to pay the cheque had been made prior to the granting of the interdict, any subsequent reversal of the credit to the payee's account would have been unjustified. However, on the affidavits before it, the court was unable to determine when the decision to effect payment had taken place, and it referred the matter for the hearing of oral evidence on this point".

In the case in ***casu*** it appears that the decision to pay the cheque was made on the 28th December 1998 as evidenced by the replying affidavit from ABSA in Johannesburg by Ms S. Van Rensburg – the manager control and security department more particularly her letter dated the 11th February 1999, directed to the manager of the respondent which reads in part at paragraph 2:

> "We debited the client with the cheque on the 28th December 1998".

It appears further that according to the law in this area any decision taken thereafter is ineffective in law. To this proposition I was referred to Mr. Shilubane to the cases of ***Freeman vs Standard Bank of South Africa 1904 T.P.D. 26*** and that of ***Volkskas Bank BPK vs Bankorp BPK (H/A Trust Bank 1991 (3) S.A. 605.***

According to Mr. Shilubane payment was not stopped in this case. He contends that paragraph 2 of the letter from ABSA, which I have already mentioned was totally useless. The countermand should be communicated to the branch concerned timeously. Further that it must be sent by the customer or a person who claims to represent the customer authorities on this subject seems to agree with Mr. Shilubane. ***Leonard Gering on his hand book on The Law of Negotiable Instruments (2ndED) at page 269*** states that a banker's duty and authority to pay a cheque drawn on him by his customer are terminated if the drawer countermands (or "stop") payment of the cheque (see ***Navidas vs Essop 1994 (4) S.A. 141 (AD)***. The countermand in order to be effective must comply with the following requirements:

i) it must be made by or on behalf of the drawer
ii) it must be communicated timeously to the branch of the drawee bank on which the cheque was drawn
iii) it must refer unequivocal to particular cheque which the customer wishes to countermand (see ***Cowen (1996) 416; Paget (1989) 226)***. I agree with Mr. Shilubane's view on this point taking into account the above-mentioned legal backdrop.

On the point on whether or not the respondent should be treated as a collecting bank in the circumstances I agree with Mr. Shilubane that this cannot be so in that respondent treated the bank cheque and placed it in their account (see ***page 61 of Robert Sharrock et el in their Understanding Cheque Law (1st ED).*** I have considered the submissions made by Mr. Masuku that the respondent cannot be held liable as it was acting as a "conduit" between the applicant and the drawee bank and whatever action which might be taken by applicant should be against the drawee bank viz, ABSA in Johannesburg. However, after the submissions by Mr. Shilubane I am persuaded to hold otherwise. It also does not appear to me that the

provisions cited by Mr. Masuku of the ***Bills of Exchange Act (supra)*** do afford the respondent any protection from liability in the present circumstances.

In the result I grant the applicant an order in terms of prayers 2 and 4 of its notice of motion.

S.B. MAPHALALA
JUDGE