IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.34/99

In the matter between:

ELLIOT CHICCO KUNENE		**APPELLANT**
VS		
NEDBANK (SWAZILAND) LIMITED		**RESPONDENT**
CORAM	**:**	**LEON JP**
	:	**STEYN JA**
	:	**TEBBUTT JA**

JUDGMENT

Leon JP:

The appellant was the unsuccessful applicant in the ***court a quo.*** He sought an order in the following terms:

> "1. Directing the respondent to credit the applicant's account no.002/02/8095/21 with the sum of E50, 000.00 (fifty thousand Emalangeni) being in respect of a cheque deposited on the 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.
> 3. Awarding costs against the respondent.
> 4. Further alternative relief."

The application was dismissed, with costs, by Sapire CJ and it is against that judgment that the appellant has appealed.

It is common cause that:

(a) The respondent is a financial institution duly registered in terms of the Financial Institution Order with its principal place of business at Mbabane

(b) The appellant is the holder of account no.002/02/80395/21 which is held with the respondent's Manzini branch.

(c) On 30th April 1998 the appellant cashed a cheque for the sum of E50, 000.00 drawn on the Central Bank in Mbabane to be deposited into his account in Manzini for collection.

(d) On 5th May 1998 the respondent allowed the appellant to withdraw the sum of E9, 160.00 against the cheque.

(e) On 7th May 1998 the respondent allowed the appellant to withdraw E10, 000.00 against the cheque.

(f) On 15th May 1998 the respondent caused the appellant's account to be debited with the sum of E50, 000.00.

(g) The appellant was informed that the cheque was "unpaid".

(h) The cheque was not returned to the appellant.

In support of his case the appellant annexed a copy of the respondent's deposit slip marked "A". That deposit slip has three columns. The first is headed "SAME BRANCH CHEQUES" and under that appears the words "SAME DAY VALUE". The second column is headed "LOCAL CITY CHEQUES" and underneath that appears the words "FOUR DAYS VALUE". The third column is headed "COUNTRY CHEQUES" while underneath that appears "10 DAYS VALUE".

The appellant alleged that in terms of normal banking practice the cheque in question as "A LOCAL CITY CHEQUE" was cleared and funds were available after four days. However, at the right-hand bottom of Annexure "A" appear the words "CHEQUES ETC HANDED IN FOR COLLECTION WILL BE AVAILABLE AS CASH WHEN PAID". Furthermore, one Leonard Dlamini on behalf of the respondent stated in this answering affidavit that in terms of normal banking practice in Swaziland a cheque drawn on a bank in Mbabane but deposited in Manzini takes approximately seven days to clear. He alleges further that annexure "A" is not the actual deposit slip in terms of which the appellant deposited the cheque for E50, 000.00. He denies further that the cheque was cleared within four days and that in any even the "LOCAL CITY CHEQUES" referred to in annexure "A" refers specifically to Nedbank

cheques drawn in a different branch of Nedbank (Swaziland) in Swaziland and not another bank as was the case here. I pause to observe that it was the view of the learned Chief Justice that the wording of the pro forma deposit slip permits, and favours, a third interpretation. Local cheques should be understood to be cheques drawn on other banks (or even a different branch of the collecting bank) situated in the same town. The use of the word "LOCAL" connotes a place.

This contention is supported by the relevant meanings given in the Shorter Oxford Dictionary namely "*relating to place or situation:… "belonging to a town or other limited region"…"pertaining to or concerned with place or position in space"…"belonging to, or existing in, or peculiar to a particular place or places".*

The cheque in question was deposited at the respondent's Manzini branch but the bank on which the cheque was drawn was the Central Bank at Mbabane. The ***court a quo*** held, therefore, that the cheque was a "COUNTRY CHEQUE" which, according to annexure "A" had "*10 days value"*.

It is also not in dispute that the appellant's attorneys wrote to the respondent in October 1998 and that the respondent responded to that letter on 19th November 1998. In the letter from the appellant's attorneys they demanded that:

(ii) the amount of E50, 000.00 be credited to the appellant's account, that the account be closed and that the appellant's attorneys be handed a cheque for the amount standing to the credit of the appellant's account, or

(iii) that the respondent returns the original cheque together with a full explanation as to why the credit was reversed long after the cheque was to be cleared.

In reply to that letter Mr. Dlamini, on behalf of the respondent, stated that the respondent was unable to provide the cheque as it was in the hands of the police for investigation. He added "*Your client is currently indebted to us and the debt is as a result of the cheque in question which was returned unpaid by the drawee bank. The cheque was returned to us within a reasonable time. We are therefore unable to acceed (sic) to your demand"*.

Finally the appellant submits that the respondent is indebted to him in the amount of E50, 000.00 less the E19, 160.00 drawn.

In limine Mr. Dlamini contended in his answering affidavit that there had been a misjoinder as the drawer of cheque, who had a direct and substantial interest in the proceedings, had not been joined. This point was not persisted in.

Mr. Dlamini alleged that on 30th April 1998, after having deposited Swaziland Government cheque no.G906558 into his account, the appellant requested to withdraw against such cheque which the respondent refused as the cheque had not been cleared. On 5th May 1998 the appellant repeated that request which was again refused. The appellant persisted in that request and the respondent allowed the appellant to withdraw E9, 000.00 on that day and a further E10, 000.00 on 7th May 1998, i.e. less than seven days after the deposit of the cheque and upon which date the cheque had not yet been cleared.

On 5th May 1998, according to Mr. Dlamini, the respondent was notified by the Central Bank of Swaziland that payment on the cheque had been stopped. That information should have been directed to the respondent's Manzini branch (where the cheque was deposited) but it was wrongly sent to the Mbabane branch only reaching Manzini branch on 7th May 1998.

Mr. Dlamini further states that it is standard banking practice that whenever a cheque has been returned unpaid by the drawee banker, the bank which accepted the cheque must, of necessity, pass an entry which has the effect of debiting the account into which the cheque had originally been deposited. The cheque in question was unpaid in that the drawee banker, Central Bank of Swaziland, returned it marked *"Payment stopped"*.

Mr. Dlamini adds that the cheque was confiscated by the Royal Swaziland Police for investigation into a car theft.

From the investigations made by one of its officials Michael Motsa, the respondent ascertained that a loan was given to one Absalom Dlamini by the Swaziland Government for E50, 000.00 to purchase a vehicle from the appellant. When it was discovered that the vehicle was stolen payment on the cheque drawn by the Swaziland Government in favour of the appellant was stopped.

Mr. Dlamini denies that the respondent ever reported to the appellant that the cheque had been cleared. On the contrary the appellant was advised that the cheque had not been cleared

and that the two withdrawals which were made were *"simply as a result of the respondent's relenting to the appellant's repeated and desperate requests for funds"*. He denies further that the respondent failed to exercise its duty to inform the appellant timeously that payment of the cheque had been stopped. Payment was stopped within that seven day period before the cheque had been cleared.

Finally, Mr. Dlamini avers that it is standard banking practice that, whenever a cheque which has been deposited into an account is returned unpaid for whatever reason, the collecting banker has not only a right but a duty to debit the account into which the cheque was originally deposited. This topic is not addressed in the replying affidavit save to repeat that the respondent acted unlawfully.

In his replying affidavit the appellant reiterates that a cheque deposited in Manzini and drawn in Mbabane "*takes four days in terms of annexure "A"'*. He also draws attention to the fact that his account was only reversed after ten working days. In any event he claims that it is the duty of a banker either to return the cheque *"or to pay the money"*.

The appellant raised certain disputes of fact in his replying affidavit. Firstly, he denies that he was paid the sum of E9, 000.00 on 5th May 1998 because he was "*persisting"* adding that *"It is inconceivable that a financial institution would allow a customer [to] withdraw against an uncleared cheque simply because the customer persists"*. He also denies, at least by implication, that all transactions on his account were stopped on 7th May 1998 pointing out that if the notification that the cheque was unpaid was received on 7th May 1998 one would expect the credit in his account to be reversed on that day and not on 15th May 1998. He goes on to say that *"In my submission the balance of probabilities does not favour the respondent's version of the facts"*.

Disputes of fact are not decided on the probabilities. (See e.g. **SEWMUNGAL & ANOTHER VS REGENT CINEMA 1977(1) SA814 (N)** at 820-1; **HILLEKE VS LEVY AD 214).** In such a case, it is the respondent's version which must be accepted unless it is incredible. **(PLASCON-EVANS PAINTS VS VAN RIEBEECK PAINTS 1984(3) SA623 (A)** at 635B-D).

In his judgment the learned Chief Justice criticised the appellant for the order which was sought holding the court had no power to require a party to make entries in its books of account; what he can do is to order payment of a sum of money. He held further that the appellant should have foreseen the possibility that a dispute of fact would rise on the papers and should not therefore have proceeded by way of motion proceedings. **(ROOM HIRE CO. (PTY) LTD VS JEPPE STREET MANSIONS (PTY) LTD 1949(3) SA115 (T)** at 1161).

In referring to the words appearing in the bottom right-hand corner of the pro forma deposit slip to which I have referred, the ***court a quo*** held that they meant that the customer depositing cheques may not draw against them until they have been paid in due course. Until the funds are actually received the credit is provisional and may be reversed if the instrument deposited for collection is dishonoured. Mention is also made in the judgment of there being no evidence of any stipulation between the banks limiting the time within which the drawee bank must inform the collecting bank of dishonour.

With regard to the words *"SAME DAY VALUE"*, *"4 DAYS VALUE"* and *"10 DAYS VALUE"* it was held that cheques drawn by the customer and presented for payment, after the lapsing of the period appropriate to the category of cheque deposited would, it would be assumed, in the absence of actual notice of dishonour, be paid in due course or had been paid.

However, so held the ***court a quo***, *"this does not mean that the normally incident terms, express or implied, in the agency relationship between collecting bank and customer were affected. One of those terms is that if a cheque deposited for collection by the customer is dishonoured, the collecting bank would be entitled to reverse any credit on the customer's account reflecting the deposit of the cheque"*.

The grounds of appeal are as follows:

"1. The learned Judge erred in law in finding the cheque in question was "*COUNTRY CHEQUE"* and had value after ten days. This point was not argued at the hearing of the appeal by Mr. Mamba on behalf of the appellant.
2. The learned Judge erred in law in finding that no agreement was concluded in creating an obligation on the respondent to meet withdrawals against the cheque in question.

3. The learned Judge erred in law in holding that the respondent was entitled to reverse the credit in applicant's accounts, considering that:
    3.1. The respondent had given value for the cheque and had become holder thereof;
    3.2. The respondent had failed to return the dishonoured cheque to the applicant, as was its legal duty;
    3.3. The respondent had failed to give "*notice of dishonour timeously or at all"*.

The ***court a quo*** relied upon the case of **ABSA BANK LTD VS I.W. BLUMBERG AND WILKINSON 1997(3) SA669 (SCA).** At first blush there would appear to be a point of distinction between that case and the present case. In that case, it was common cause that there was in existence a contract in terms of which the appellant banker was entitled to debit the value of the uncleared effects against the customer respondent's account. In this case, there is no such express contract admitted. However, the appellant does not in terms deny the existence of the words on the pro forma deposit slip. In that case, like this, the banker had honoured two cheques totalling R85, 000.0 0 before the effects had been cleared. The customer's claim against the bank was dismissed by the Supreme Court of Appeal of South Africa.

There are passages in the judgment of Zulman JA, who gave the judgment of the court, which support the conclusion arrived at by the learned Chief Justice. At page 682(H) of the judgment reference is made to **WILLIS IN SOUTH AFRICAN LAW** where the following passage is quoted with approval:

> *"Current practice in banking operations is for a bank to credit a customer's account immediately upon the deposit of funds, even though the payment of cheques in the deposit (has) not yet (been) collected. The bank will then debit the account in the event of any cheques being dishonoured when sent for collection"*.

That is what happened in the present case.

In dealing with the fact that the bank had allowed the customer to withdraw R85, 000.00 against uncleared effects, the learned Judge of Appeal said this at page 675(H) –676(A).

> *"The fact that the appellant might have permitted the respondent to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the respondent in law from liability to make payment to the appellant. The*

appellant was perfectly entitled to choose to honour such cheques, notwithstanding the fact that the effects earlier deposited had not been cleared, and to waive any benefit afforded to it in this regard by its agreement with the respondent. It would be strange indeed if it were permissible for a customer of a bank to draw a cheque on the bank, requesting the bank to honour the cheque, and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to then plead that this would have resulted in an overdraft facility which had not been agreed upon. In essence this is precisely what the respondent is contending for. It hardly lies in the mouth of the respondent, who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account. Put differently, it is the appellant, so it is suggested, who must bear the loss if the uncleared effects were not met. This can not be so".

However, it is contended on behalf of the appellant that the respondent was not merely an agent for collection but a holder in due course. Reliance is placed upon **STANDARD BANK OF SOUTH AFRICA LTD VS DE VILLIERS 1935 CPD 382; DANKA VS BARCLAYS BANK DCO 1967(4) SA291 (T)** and **BLOEMS TIMBER KILNS (PTY) LTD VS VOLKSKAS BANK 1976(4) SA677 (A).**

In the Standard Bank, case it was held (at page 387) that if a cheque is paid to a bank on the footing that the account may at once be drawn upon and it is drawn upon accordingly the bank is a holder for value in due course. That is not the position in the present case. The court went on to hold (at page 387 ***in fine*** to 388 that whether the bank is a holder for value depends on whether there was an agreement express or implied between banker and customer that the latter might draw against the cheque before it is cleared. There was no such agreement in the present case because there is no evidence that on 5th May the respondent thought that the effects had not been cleared. The only evidence is that on 7th May after it had paid out a further amount to the appellant the respondent received notice that the effects had not been cleared and acted accordingly.

In the Bloems Timber case the court had occasion to consider the significance of the words which appear on the pro forma deposit slip in this case, i.e. *"cheques etc handed in for*

collection will be available as cash when paid". In dealing with these words van Winsen JA said this at page 688A-C:

> *"The mere presence of those words on the deposit slip clearly cannot serve conclusively to exclude such a binding agreement. The words were inserted to afford protection to the bank if it wished to avail itself of it. If it did not, it could expressly or by implication waive such protection. It is a question of fact in any particular case whether or not it had done so. If in any such case it were to be found to have done so, then the presence of such words on the deposit slip would not constitute a bar to the coming into being an agreement of the nature under discussion".*

The court went on to hold that the evidence disclosed a fixed practice of allowing the customer to draw against cheques deposited into his account but as yet uncleared. It concluded that it had been established that arising out of course of dealing between the parties the bank had by implication agreed to allow the customer to draw against cheques deposited by him despite the fact that they were not yet cleared and that it was in terms of that agreement that the customer became entitled to and did draw against the cheque in question (see page 688 *in fine).* In the present case there was no such fixed practice or course of dealing. All that happened, on the respondent's version, was that it allowed the appellant to withdraw about E19, 000.00 on two occasions by reason of the latter's persistence and desperate entreaties without knowing, at that stage, whether or not the effects had been cleared.

DANKA VS BARCLAYS BANK (supra) is more in point. The headnote of the case reads as follows:

> *"In considering whether a bank became a holder for value of a cheque deposited by a customer in his banking account, regard should be, had not only to the existence or otherwise of any antecedent arrangements between the bank and its customer, but also to the very circumstances of the deposit and withdrawal under consideration. Thus, though it may not have been the practice for the bank to allow the customer to draw against uncleared effects, if the bank for once takes a chance and permits the customer to draw against an uncleared cheque and acquires title to the cheque, thereby rendering it the holder in due course with the right to sue the drawer of the cheque for the amount of the cheque, even though the drawer may have given the*

cheque merely in order to accommodate the party to whom it was made payable and who had given no value therefore".

I return to the **ABSA BANK** case. In that case, it was common cause that there was no agreement between the parties entitling the customer to draw against uncleared effects. In the present case, the appellant alleges no such agreement and the respondent's initial response and the appellant's conduct by his desperate entreaties to draw money as soon as possible, shoe that there was no such agreement. On an analysis of the facts of this case, I have come to the conclusion that what I suggested earlier as a possible distinction between this case the **ABSA BANK** case is not in fact so. There is no real distinction between the two cases. In that case it was regarded as significant that the respondent did not (like here) raise the defence of estoppel that the appellant was precluded from holding the respondent liable on the cheques which it drew against uncleared effects.

DANKA'S case was considered in the **ABSA BANK** case. It was referred to (at page 688G) as belonging to the category of cases where the bank is a holder for value of its cheque and seeks to hold its customer liable. Zulman JA went on to say the following at page 684B-G:

"*The Danka case is an example in the second category. In that case the plaintiff sued the defendant on a cheque drawn by the defendant payable to B who negotiated it to D, who in turn deposited it in his banking account with the plaintiff. The defence raised that the cheque was given merely to accommodate B, who gave no value therefore, and, on the strength of the denial that the plaintiff was the holder in due course of the cheque, the defendant claimed that he was absolved from liability thereon. The court, after referring to many of the authorities referred to by Cameron J, held that in considering whether a bank became a holder for value of a cheque deposited by a customer in his banking account, regard should be had not only to the existence or otherwise of any antecedent arrangements between the bank and its customer but also to the very circumstances of the deposit and withdrawal under consideration. Thus, though it may not have been the practice for the bank to allow the customer to draw against uncleared effects, if the bank for once takes a chance and permits the customer to draw against an uncleared cheque deposited in his banking account, then the bank has given value for the cheque and acquires title to the cheque, thereby rendering it the holder in due course of the cheque with the right to sue the drawer of the cheque for the amount of the cheque, even though the drawer may have given the cheque merely in order to accommodate the party to whom it was made payable and who had given no value therefore. In the instant matter no question of antecedent arrangements or special circumstances relating to the deposit by Frank and the drawing of cheques against uncleared effects was relied upon in the pleadings or emerged from the evidence of Blumberg".*

At page 681D-E the learned Judge of Appeal said this:

> "*I have set out the evidence of Blumberg in some detail since I cannot find any factual basis for holding that he had arrived at any special arrangements with the appellant whereby he could draw cheques against uncleared effects, and more importantly for finding that if such effects were subsequently dishonoured the appellant would not be entitled to debit his account with the amount of such dishonoured cheques*".

Those remarks apply to the facts of the present case. Moreover, it is clear from the **ABSA BANK** case that the fact that a banker allows his customer to draw against uncleared effects despite there being no agreement to that effect did not in law excuse the customer from liability to make payment to the banker.

In my view the evidence shows that there was no prior agreement entitling the customer (appellant) to draw cheques against uncleared effects and the **ABSA BANK** case applies. Nor, as in that case, has estoppel either been alleged or proved nor has waiver been alleged.

Furthermore, I agree with the argument by counsel for the respondent that in order to prove that the respondent took the cheque for value, the appellant would have to prove that the respondent had afforded the appellant a ***quid pro quo*** in pursuance of an express or implied agreement to do so. (See the **BLOEMS TIMBER** case (**supra)** at pages 687E-688C and the cases cited there).

The respondent did not afford a ***quid pro quo*** in return for the cheque in terms of an express or implied agreement. Indeed the respondent's initial refusal to allow the two withdrawals on 5th May and 7th May respectively shows that it would not agree to afford a ***quid pro quo*** in return for the cheque. By subsequently allowing the two withdrawals the respondent did not change the agreement between the parties and did not become a holder in due course as contemplated in **DANKA**'s case. There mere fact that a bank chooses to honour cheques such as occurred on these two occasions and in the particular circumstances of this case does not constitute a waiver of its right which, in any even, has not been alleged. Nor is estoppel alleged. In these circumstances, I consider it to be clear, in the light of what was held to be the position in the **ABSA BANK** case, that the appellant customer has no claim against the respondent banker.

I have not overlooked Mr. Mamba's contention that once the respondent had possession of the cheque ii became the holder for value of the cheque. But it is clear from the first four lines of the **ABSA BANK** case that the banker had possession of the cheque. The judgment

in that case makes it clear that mere possession of the cheque does not make the banker a holder for value. What must be established is that there was an agreement express or implied that the banker would take the risk and that the banker and not the customer would be entitled to sue the drawer. That is the ***quid pro quo*** to which I have referred earlier herein.

It is significant that the appellant alleges that the respondent was under a "*legal duty"* to return the cheque to him. Its cause of action appears to be that "*the bank has failed in its duty of care towards me"*.

All doubt as to the appellant's case on the issue of who the *"holder"* of the cheque was and who had the right to sue on it, is, in my view removed by the following assertion made by the appellant. He says:

> *"I submit that he respondent has failed in the exercise of its duty of care towards me as its client in the following respects:*
>
> - *it represented to me that the cheque had been cleared;*
> - *it failed to exercise its duty to inform me timeously that the cheque was not good or had been countermanded and to return the cheque to me so that I could proceed against the drawer".*

To summarise:

1. There was no agreement explicit or by implication that appellant would acquire title to the cheque. Indeed appellant's case was that it was entitled to claim it back from appellant in order to sue on it.
2. The fact that the appellant was permitted by the respondent to draw against the uncleared effects did not – in the absence of an agreement – express or implied – give the respondent title to the cheque.
3. Moreover, unlike **DANKA**'s case (supra) appellant was not permitted to draw the full amount of the cheque. As indicated above only the sum of E19, 160.00 was debited against appellant's account. Appellant nowhere contends that by drawing these amounts he abandoned his rights to sue on the cheque or that the respondent, in permitting these withdrawals had acquired title to the cheque.
4. It is probable that the true nature of the transaction between the parties was the conventional one of the banker and customer. What the respondent did was to advance two sums of money to the appellant. Thus the appellant was granted an

overdraft facility which respondent could lawfully seek to recover when the cheque deposited by the appellant was dishonoured.

In the heads of argument, the appellant relied upon Section 48(2) of the **BILLS OF EXCHANGE ACT NO.11 OF 1991** claiming that the respondent, as holder of the cheque, should have given notice of dishonour on 6th May 1998 or 8th May 1998. That point, which is without relevance to this appeal, was not persisted in.

Reliance was also placed on the fact that the respondent did not return the cheque to the appellant in order for him to sue the drawer. The respondent did not have the cheque as it was in the hands of the police. If the appellant wished to sue the drawer there was nothing to prevent him from making an application to the High Court in order to obtain possession of the cheque.

In my judgment the ***court a quo*** was correct and the appeal must be dismissed with costs.

R.N. LEON JP

I AGREE : J.H. STEYN JA

I AGREE : P.H. TEBBUTT JA

Delivered on this day of December 1999