Civil Appeal Case No.4/2000

In the matter between:

NEDBANK (SWAZILAND) LIMITED Appellant

VS

NTIWANE, MAMBA & PARTNERS Respondent

CORAM : BROWDE J.A.

STEYN J.A.

ZIETSMAN J.A.
JUDGMENT

ZIETSMAN J.A.

The respondent, a firm of attorneys practising as such in Mbabane, has a trust account at the Mbabane Branch of the appellant bank.

On 5th October 2001 a certain Mr William Van Toit approached Mr Mamba, a partner in the respondent firm. Van Toit had with him a cheque for E480 650.23 apparently drawn by Leites Motors Limited on the appellant's Mbabane Branch and made out in his favour. This cheque was handed to Mamba who deposited the cheque into the said trust account.

It is common cause that Leites Motors Ltd. is a client of the appellant bank and has its account also at the Mbabane branch of the bank.

The cheque was deposited into the respondent's trust account on 5th October 2001. The deposit slip used by the respondent for this transaction had printed on the slip "same branch cheques have same day value".

The said sum of E480 650.23 was credited to the respondent's trust account on 5th October 2001. Mamba personally ascertained on 12th October 2001 that the trust account had been so credited.

On 12th October 2001, on Van Toit's instructions, a cheque drawn on the trust account was made out by the respondent in favour of Van Toit's companion, a certain Matshidiso Mokai, for the sum of E180 000.00, and a further trust cheque was issued on Van Toit's instruction in favour of the Swaziland Sugar Association for the sum of E242 000.00.

It is now common cause that the signature on the cheque for E480 650.23 had been forged and the cheque fraudulently issued. The number on the said cheque was number 733. A correct cheque No.733 was issued by Leites Motors Ltd. for the sum of E750.00 in favour of a different person. Leites Motors Ltd., as they were entitled to do, disclaimed all liability in respect of the E480 650.23 cheque and the appellant was obliged to reverse the debit that had been entered for this sum against Leites Motors account.

On 14th December 2001 Mamba was advised by the appellant's managing director that the forgery had been discovered the day before (i.e. on 13th December 2001). The appellant bank then reversed the credit of E480 650.23 in the respondent's trust account by debiting the account with the said sum. At the time when this was done the respondent's trust account showed a credit of E441 720.08. The effect of the reversal was to give the account a debit balance.

In view of the serious consequences which could result from an attorney's trust account showing a debit balance the respondent launched an urgent application to the High Court for an order directing the appellant to reverse the said debit. The application was apparently dismissed on the ground that insufficient time had been given to the appellant (as respondent in the application) to reply thereto. A fresh application was thereafter launched by the present respondent. This application was granted in the High Court and it is against this High Court order that the appellant now appeals.

3

Various points are raised in the papers which do not seem to us to require final determination. It is alleged by the appellant that the respondent should have exercised more caution in his dealings with Van Toit. The respondent's reply is that Van Toit had already been a regular client of the respondent firm for a period of a year and that nothing had been done by him to cause the respondent to regard his actions with any suspicion. A further rather strange fact is that the fraudulent cheque has entirely disappeared. It disappeared while it was in the possession of the appellant bank, and the bank has given no explanation other than to suggest that the disappearance might have been orchestrated by the fraudsters (Van Toit and Mokai). The respondent's counsel rejected a suggestion that the matter be referred for oral evidence in order to try to establish whether any person employed by the bank could have been involved in the fraudulent act.

The appellant's counsel, Mr Wise, in argument before us raised what he referred to as two procedural issues. The first issue was the fact that the respondents' application was brought as a matter of urgency with the result that limited time was given to the appellant to reply to the respondents' allegations. The second issue raised the question whether in view of the fact that the matter involves the commission of a fraudulent act the giving of oral evidence, the discovery of documents and the cross-examination of witnesses should be ordered. Mr Wise was prepared to argue the matter on the papers, but submitted that we should order the matter to go to trial if we were inclined to hold, on the papers, that there had been a negligent misrepresentation on the part of the bank which could result in the appeal being dismissed. For the reasons which follow we came to the conclusion that oral evidence would not be required. The same procedural points were argued before the Chief Justice when the matter was heard in the High Court and were dismissed by him.

In dealing with the merits of the application the Chief Justice referred to the case of Absa Bank Ltd vs de Klerk 1999 (1) S.A. 861 (W) and came to the conclusion that any action by the bank against the respondent would have to be based on the condictio indebiti and that the bank could not simply debit the respondent's account with the amount of the cheque when the fraud was discovered. The Chief Justice went on to deal with the fact that the account in question is a trust account.

4

In terms of section 24 of the Legal Practitioners Act attorneys are required to open and keep trust accounts into which all monies held or received by them on account of other persons in connection with their practices, must be deposited. Section 24 (3) provides that no amount

standing to the credit of such a trust account forms part of the assets of the attorney and cannot be attached at the instance of any creditor of the attorney. Section 24 (6) provides that the bank shall not, in respect of any liability of the attorney to the bank, have recourse against monies standing to the credit of the trust account. This provision however does not apply in respect of a liability "arising out of or in connection with that account". The Chief Justice came to the conclusion that this exception to the general provision did not apply in this case because "the claim which the bank has in this case is one for enrichment and not one arising out of the operation of the account". The Chief Justice states in his judgment that the words "not being a liability arising out of or in connection with that account" in subsection 24 (6) must be constructed "very narrowly" otherwise subsection 24 (3) will have no effect at all. The Chief Justice accordingly came to the conclusion that the appellant (the bank) was not lawfully entitled to reverse the credit in the trust account and he ordered that the subsequent debit to the account be reversed.

The appellant appeals against the order granted by the Chief Justice on several grounds and he questions inter alia the interpretation placed upon section 24 (6) of the Legal Practitioners Act by the Chief Justice.

The money paid by an attorney into his trust account is money held by an attorney on account of his clients. It is not money belonging to the attorney, and subsection 24 (3) prevents the attachment of such money at the instance of the attorney's creditors. Subsection 24 (6) provides that the bank also cannot lay claim to the trust account in respect of a personal liability of the attorney. An exception to this is if the liability arises out of or in connection with that trust account. The effect of this exception is that the bank can have recourse to monies standing to the credit of the trust account only in respect of a liability incurred by the attorney arising out of or in connection with that trust account. The bank cannot look to the trust account for any other liability incurred by the attorney. The exception presumably would cover such matters as normal bank charges payable by the attorney in connection with the trust account. Subsection 24 (6) applies only to an attorney's liability to the bank, and then only if the liability arises directly out of or in

connection with the trust account, and I cannot see how this provision, so interpreted, can detract from, or render ineffective, the provisions of subsection 24 (3).

Mr Wise, on behalf of the appellant has advanced two further submissions in connection with section 24. He submits firstly that section 24 applies only to "monies" paid into a trust account and he submits that a fraudulent cheque deposited into a trust account does not constitute money paid into that account. His other submission is that the money was not received by the respondent in connection with his practice as an attorney. The money was not paid over as a result of work done by the respondent as a practising attorney. It is not an attorney's work to engage in activities more akin to the business of a banker, and the money (if it was money) received by the respondent was thus not money received "in connection with his practice (as an attorney)" and is thus not money protected by section 24 of the aforementioned Act. I find it unnecessary to deal with these two points raised by Mr Wise as it is my conclusion that the exception set out in subsection 24 (6) of the Act referred to above is applicable in this case. We are dealing here with a liability "arising out of or in connection with" the trust account, and the fact that the account in question happens to be a trust account and not an ordinary bank account does not affect the matter.

The question to be considered is when, and under what circumstances, a banker who has credited an account at his bank with a cheque deposited into that account can reverse the credit when it is discovered that the cheque is a forgery or is for any other reason not a valid cheque. A further question is whether there are in the present case facts or circumstances which would render the normal situation not applicable.

It is clear from the authorities that in the normal course of events if a customer deposits a cheque into his account at the bank the credit passed to his account is conditional upon the cheque being paid. If it subsequently turns out that the signature to the cheque is forged the bank is entitled to reverse the credit. See in this connection Standard Bank of South Africa Ltd vs Oneanate Investments (Pty) Ltd (in liquidation) 1998 (1) S.A. 811 (SCA) at 823 B.

Mr Joubert for the respondent, submitted that what is important in such matters is the time factor. In the present case the cheque was deposited into the trust account, and the account credited, on 5th October 2001. On 12th October 2001, on Van Toit's instructions payment

was made from the account of E180 000.00 and on 17th October 2001 a further payment of E242 000.00 was made. The credit of E480 650.23 was not reversed until 13th December 2001. The question arises whether there is a time limit within which the bank can cancel or reverse a credit entered against a customer's account with the bank. Mr Joubert submits that there is such a limited time, which time lapses when the cheque is deemed to have been paid. His submission is that once a cheque is deemed to have been paid the credit resulting from that cheque can no longer be reversed by the bank.

On the question when a cheque is deemed to have been paid Mr Joubert referred us, inter alia, to the cases of Rosen vs Barclays National Bank Ltd. 1984 (3) S.A. 974 (W) and Volkskas Bank vs Bankorp Bpk (h/a Trust Bank) en'n Ander 1991 (3) SA 605 (A). In the Rosen case it was held that credit and debit entries in a bank's books are to be regarded as provisional until the drawee bank makes the decision to honour the cheque. In the Volkskas Bank case it was held that the moment of payment, when the cheque is drawn on a different bank, is when the normal clearing period has lapsed without notice of dishonour having been given. These cases deal with the time when a valid cheque is deemed to have been paid. They do not deal with the case where a cheque is later found to be fraudulent, and the question whether despite the fact that the cheque will in the normal course of events be deemed to have been paid, the banker can still reverse the credit on subsequently discovering that the signature to the cheque is forged or that the cheque is a fraudulent cheque.

Mr Joubert referred us to the case of First National Bank of Southern Africa Ltd vs. Perry NO and Others 2001 (3) S.A. 960 (SCA). In this case a customer (referred to as FPV) deposited a cheque with First National Bank (FNB) which resulted in FNB crediting FPV's account with the value of the cheque. FPV, who acted bona fide in respect of the transaction, was told by a certain Dambha that he was entitled to the funds, and on Dambha's instructions FPV issued three cheques in favour of three different parties. These cheques were deposited into accounts with Nedbank, Standard Bank and the New Republic Bank. It was then discovered that the cheque was a fraudulent cheque and that stolen money had been laundered through FPV's account. FNB then debited FPV's account with the value of the cheque and, after obtaining a cession of action from FPV claimed from Nedbank, Standard Bank and the New Republic Bank the stolen money standing to the credit in the said banks of the parties in whose favour the cheques had been issued. An

exception was taken to the particulars of claim but the exception was dismissed, the Court holding that FNB had a valid claim for enrichment, based upon the condictio ob turpem vel iniustam causam, on the facts alleged in the particulars of claim.

Mr Joubert submitted to us that in the present case the bank may have had a claim based on one

of the condictiones against the parties to whom the money was paid, but was not entitled to debit the respondent's account with the amount of the cheque when it was found to be a fraudulent cheque. The Perry Case is no authority for this proposition. In the Perry Case the bank (FNB) did in fact debit FPV's account with the fraudulent cheque. The bank then obtained a cession of action from FPV and sought to recover the stolen money from the persons to whom it had been paid. It is specifically stated in the Perry Case (at page 967 A) that FPV could conveniently be regarded as the real claimant. The question whether FNB had been entitled to debit FPV's account with the amount of the cheque was not dealt with specifically but at P.972 B-C it is specifically stated that the act of crediting a customer in a bank's books does not in itself create a liability because the credit may be wrongly made and may be reversed.

Mr Joubert was not able to refer us to any authority in support of his submission that once a cheque is deemed to have been paid the credit entered against the account of the customer in respect of the cheque cannot be reversed if it is subsequently discovered that the cheque is a fraudulent and worthless cheque.

An alternative argument advanced by Mr Joubert is based upon an alleged negligent representation made by the appellant to the respondent and acted upon by the respondent to its detriment. The representation relied upon is the fact that the cheque in question was purported to have been signed by the appellant's own customer and after receiving the cheque the appellant credited the respondent's trust account with the amount of the cheque, thereby indicating that the cheque had been paid, or had at least been cleared.

It is clear on the authority of the Oneanate Case (supra) that a credit passed to an account by a banker in such circumstances is provisional only, and it cannot in this case be alleged that the appellant was negligent in crediting the trust account with the cheque. On the question whether the appellant was negligent in allowing the respondent to draw cheques against the said credit regard may be had to the cases of Absa Bank Ltd vs de Klerk 1999

(1) S.A. 861 (W) and Absa Bank Ltd vs I.W. Blumberg and Wilkinson 1997 (3) S.A. 669 (SCA). In the de Klerk case the bank manager, after making reasonable enquiries, incorrectly represented to his client that a certain cheque had been cleared and permitted his client to issue his own cheque against the credit. It was held that the bank manager had not been negligent. In the Blumberg and Wilkinson case the bank informed its customer that his account had been credited and allowed the customer to draw against the credit. It was held that this did not constitute a representation by the bank to its customer that it would not reverse the credit if the "effects" so created were not paid. In the present case the crediting of the respondent's account by the appellant was done in the normal course of the appellant's business and it did not amount to a representation which precluded the appellant from reversing the credit when it discovered that the cheque was a fraudulent cheque. Mr Joubert's alternative argument based on a negligent misrepresentation must therefore also fail.

It is my conclusion that the respondent in the present case failed to prove that the appellant's act in debiting the respondent's trust account with the amount of the cheque when the fraud was discovered was unlawful, and the appeal must accordingly succeed.

I would allow the appeal with costs, and substitute for the order granted by the Court a quo an order that the application is dismissed with costs.

N.W. ZIETSMAN J.A.

I agree

J.BROWDE J.A.

I agree

J.H. STEYN J.A.

Delivered in this 7th day of June 2002