IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.

In the matter between:

STANDARD BANK SWAZILAND LTD APPELLANT

VS

NTIWANE MAMBA AND PARTNERS RESPONDENT

CORAM BROWDE JA

STEYN JA

ZIETSMAN JA

JUDGMENT

Steyn JA:

This appeal and the appeal in the matter of Nedbank versus Ntiwane Mamba and Partners, Court of Appeal No.4/2002, were heard by this Court together because, fundamentally, the same or similar issues arise for decision in both appeals. Both matters concern the entitlement of a bank to reverse credit entries passed on a trust account held by the respondent firm after a lapse of a certain time period. In the above matter the lapse of time was some six weeks. This judgment is confined to dealing only with the Standard Bank appeal, although many of the legal principles which arise are common to both appeals.

The facts are the following. The respondent is a firm of attorneys practising as such in Mbabane, Swaziland. The partner of

the firm who was the principal actor in concluding the transactions that are the subject matter of this appeal, is Mr. Lindifa Mamba. Mr. Mamba has been in private practice as an attorney for some ten years. Respondent had two trust accounts, one with Nedbank and one with the appellant. The respondent's "main trust account" was held with Nedbank. The trust account held with appellant was "related in the main to respondent's conveyancing matters". Both these accounts were used as trust accounts as required by Section 24 of the Legal Practitioners Act.

Mr. Mamba explained his firm's practice in this regard as follows. In an affidavit he filed in founding an application brought by the respondent on Notice of Motion before the High Court he says:.

"An attorney is obliged to pay monies received on behalf of a client into that attorney's trust account. The practice in our firm is to pay all monies received into the trust account. We then transfer monies from this account on a weekly basis to (our) business account. This latter account was also held with Nedbank and operates on an overdraft."

Some time during August 2001, Mr. Mamba was approached by a woman one Motshidiso Mokai

(Mokai). He described her as a client of his firm. Appellant placed the issue of an alleged attorney and client relationship between Mr. Mamba and Mokai in issue. In response to this challenge Mr. Mamba failed to give any details of having done any legal work for Mokai. His only averment in response to appellant's challenge to give details of such legal work as he had done for her, was to say that she was introduced to him by an existing client one van Toit "in July/August 2001". He had acted in a matter in which he had collected money on behalf of van Toit. (It later became apparent that van Toit and Mokai were both parties to frauds perpetrated on the respondent). The only other relevant information concerning Mokai is that she resides in Johannesburg.

Mokai informed Mr. Mamba that she was the holder of a bill of exchange in an amount of US$88,870.00. The bill represented a part payment of monies due to her from the Government of the United

States of America for an Art/Cultural tour which she had undertaken in that country over a period of about four years. She asked Mr. Mamba whether he could arrange for the bill to be negotiated via his bank. Upon being asked by him why she did not deposit the bill in South Africa, she said that she was married in community of property and her marriage was "in the process of being dissolved". It would therefore be unwise for her to deposit the funds in South Africa.

It is clear that Mr. Mamba agreed to allow his firm's account to be used to facilitate the negotiation of the bill. It is also clear that he was remunerated for permitting the transaction to be channelled through his firm's account with the bank. There is a dispute as to the quantum of his commission. On the appellant's version it could have been as much as E50 000.00; on Mr. Mamba's version "around E20 000.00".

Be that as it may, on the 17th of August 2001, so Mr. Mamba alleges, he telephoned an employee of the Bank, one Veli Dlamini, to enquire whether it was possible to comply with Mokai's request. He says he was informed that it would be in order for the bill to be endorsed and deposited into respondent's account provided it was not marked "not transferable". The bank would however accept it for collection only. Respondent's account would only be credited once the monies had been collected. Such a process would take about six weeks. There is some challenge by the appellant concerning the correctness of all the allegations. In broad terms however and for present purposes I accept that it is probable that -

1. Mr. Veli Dlamini on behalf of the bank agreed to allow the bank to act as requested, provided the bill was not marked not transferable and was duly endorsed.

2. It did so as a "collecting bank" only; and

3. The bill would take approximately six weeks to clear.

The required forms were then completed, the bill endorsed by Mokai and was accepted by the bank for collection on the 17th August 2001. Mr. Mamba gave no value for the bill.

Mr. Mamba says that on or about the 25th or 26th of September 2001 he was advised by a Mrs. Mashinini of his firm's bookkeeping department that the proceeds of the bill had been credited to their trust account. To the best of Mr. Mamba's recollection a day later he was telephoned by Mokai and asked whether the amount (of the bill) had been collected, which he confirmed.

It is common cause that the credit entry is dated the 24th of September 2001 and was for an amount of E765,580.38 representing the local currency value of the bill as at that date.

About two days later Mokai called on Mr. Mamba and asked him to issue certain cheques including one for E180 000.00 which she wanted paid in cash and in South African Rands. He furnished her with a letter to facilitate the cashing of such a cheque. With the exception of this transaction, the Court was not informed how many other cheques were issued and for what purposes. Suffice it to say that by the end of October Mokai had withdrawn all the monies generated by the negotiation of the bill of exchange from respondent's trust account, less his commission.

On the 7th of November the appellant passed a debit entry to the respondent's trust account thus reversing the credit that had been passed on the 24th of September 2001. This was 44 days after the posting of the credit entry. It is common cause that the reason for the passing of the debit entry was that it had been discovered that the bill had been fraudulently altered. The bill was good for US$870 and had been made out accordingly. It had been altered so that the amount to be paid on the face of the bill was reflected as US$88,870.00.

It is also a matter of record that Mokai induced Mr. Mamba to facilitate a further transaction for her in respect of a bill with a face value of US dollars 271,870. It was subsequently discovered that this bill was also tainted with fraud. Fortunately no loss was sustained as a result of its attempted negotiation.

Mr. Mamba requested the appellant to set out for the record the sequence of events that culminated in the debit passed against

respondent's trust account on the 7th November 2001. On the 20th of November 2001 it did so in a letter under signature of one D.J. Budge, appellant's Manager, Treasury. The letter reads as follows:

"Messrs. Shilubane, Ntiwane & Partners Treasury Division

c/o Standard Bank Swaziland Head Office

Mbabane Branch P.O. Box A294

Attn. Mr. Mamba Mbabane

20/11/2001

Dear Sir,

FRAUDENTLY DRAWN US$ CHEQUE FOR $88.870-00 DATED 3RD APRIL 2001

As requested by you I wish to set out for the record, the sequence of events leading ultimately to the debit of your account for this, and a subsequently deposited cheque.

The above cheque was deposited by you for collection on the 17th August and subsequently sent by us, to our clearing bankers, Standard Chartered Bank New York, for that purpose.

Our account in New York was credited with the proceeds of the cheques and we converted the

funds to Emalangeni by credit to you on the 24th September. On the 24th October, our account in New York was debited in reversal of funds. Following our queries, which resulted in advice from New York that the cheque had been unpaid, we debited your account on the 8th November with the local currency equivalent.

Standard Chartered Bank has subsequently told us that the cheque had been drawn in the amount of $870-00, and fraudulently altered to read $88,870-00. We are endeavouring to have the cheque returned to us for your records, but in the meantime we enclose a copy.

We further protested Standard Chartered Bank New York's action in debiting us 30 days after having paid the cheque, and we were informed that under US law, a cheque can be reclaimed within a period of seven years if it is fraudulent. We understand this to apply only to US Treasury cheques.

We had in the interim, on the 8th November, credited you with the proceeds of another cheque, this time for $211,870-00 dated 3rd July 2001, which you had lodged for collection on the 15th October.

In consultation with yourselves we converted this back to dollars, to limit any loss of exchange, and on the basis that Standard Chartered Bank New York expressed their strong suspicion that the second cheque has also been altered, we debited your account on the 16th November.

As a gesture of good will to you as the victim of fraud, we shall refund the commission earned on the collections, amounting to E4,120-46 and E10,679-84.

We shall assist you as far as possible in your endeavours to recover funds, and are attempting to obtain advice of fate of the second cheque. As mentioned to you, we accepted the cheques for collection in good faith as your agent, and are not liable in any way for losses incurred. Copies of the cheques are enclosed.

Yours sincerely,

D J BUDGE Manager Treasury"

This letter fairly summarises the circumstances which led to the proceeds of the bill first to be credited and then debited to the respondent's trust accounts. It was on this evidence that the High Court granted an Order directing the appellant to reverse the debit it posted against the trust account of the respondent on the 8th November 2001 with the local currency equivalent of 88,870 US$.

It is against this Order that the appellant has appealed to this Court. It is not necessary to refer to the grounds of appeal because they have been consolidated and synthesised in appellant's heads of argument with which I now deal.

The Chief Justice in a short ex tempore judgment held in effect that Section 24 of the Legal Practitioners Act (the Act) precluded the appellant from acting as it did; i.e. reversing the credit entry it had previously posted. His judgment in this respect was supported by counsel for the respondent.

The relevant sections of the Act read as follows:-

" Trust accounts

24(1) Every practising attorney, notary or conveyancer having an office within Swaziland shall open and keep a separate trust account, at a bank lawfully established within Swaziland, in which he shall deposit all monies held or received by him in connexion with his practice within Swaziland, on account of any person; and he shall further keep proper books of account containing particulars and information as to monies received, held or paid by him for or on account of any person.

(3) No amount standing to the credit of such a trust account in the bank shall form part of the assets of the attorney, notary or conveyancer concerned and no such amount is liable to attachment at the instance of any creditor of the attorney, notary or conveyancer:

Provided that any excess remaining after payment of the claims of all persons whose moneys have, or should have, been deposited in the trust account, shall be deemed to form part of the assets of that attorney, notary or conveyancer.

7

(4) Any bank at which an attorney, notary or conveyancer, having an office within Swaziland, keeps the trust account shall not, by reasons only of the name or style by which the account is distinguished, be deemed to have knowledge that the attorney, notary or conveyancer is not entitled absolutely to all monies paid or credited to the trust account - provided that nothing in this sub-section shall relieve a bank from any liability or obligation under which it would be apart from this act.

(5) Notwithstanding anything in sub-section (5), a bank at which the attorney, notary or conveyancer keeps the trust account shall not, in respect of any liability of the attorney, notary or conveyancer to the bank, (not being a liability arising out of or in connection with that account) have obtained any recourse or right, whether by way of set-off counter-claim, charge or otherwise, against monies standing to the credit of the trust account".

Counsel for the appellant contended that for Section 24 to apply "the jurisdictional facts prescribed by sub-section 1 thereof had to exist". There are he contended two such jurisdictional facts prescribed by this sub-section. The first, so he submitted, was that the attorney must hold or have received monies. That, so he said, did not happen on the facts that are common cause in this case.

The Bank had posted an entry to the credit of the respondent's account. Ordinarily such a credit entry would represent money in the sense that the account holder would have a claim against the bank for the payment of money in that amount. In the circumstances of this case, so counsel submitted, it did not. A genuine cheque or bill of exchange is an instrument which obliges the drawee or acceptor thereof to pay a sum of money. The position is different when the instrument is tainted by fraud as was the case here. Such fraudulent instrument does not give rise to an obligation to pay any money, except the amount of 870 dollars, being the sum due by the United States Treasury,

It follows, so counsel submitted, that the entry was nothing more than a "numerical notation" and did not represent "money", or a claim to money in a legal sense.

8

In view of the finding set out below, it is not necessary to decide whether this contention is sound or not.

The second jurisdictional fact referred to by counsel for the appellant is that if the credit entry did constitute money, it was not money so received or held by him in connection with his practice within Swaziland.

The question is whether on the facts which are common cause it has been established by the respondent that the bill which he deposited into his trust account, and when cleared by the collecting bank, constituted monies held or, received by him in connection with his practice in Swaziland.

I think that we can safely assume that the transactions with Mokai in the course of which Mr. Mamba allowed his trust account to be used to facilitate the negotiation of the bill in casu and the later equally fraud - tainted bill, were the only transactions in which she was his client. But was she his client in respect of these two transactions in his capacity as her attorney?

I am inclined to think not. I do not believe that an attorney practising in Swaziland would have considered that in making his conveyancing trust account available to facilitate the negotiation of a cheque or a bill for some E800 000, he was performing an obligation in connection with his practice as an attorney. It is my view that the legislature cannot be held to have contemplated that the use of trust accounts of attorneys for the sole purpose of facilitating the negotiation of a bill or cheque without any attendant professional service being rendered was to receive the protection contemplated by the Act. The risks involved as well as the capacity for abuse, are pitfalls which place the funds of clients of such an attorney in jeopardy should his venture as an accommodating "banker" prove to be unsuccessful because of fraud or any other cause.

The decision in PARAMOUNT SUPPLIERS VS ATTORNEYS FIDELITY CONTROL BOARD 1976(4) SA 618(W) lends some support for this view. An attorney, one Mundell, had paid the sum of 3,125

pounds into his trust account pursuant to a mandate to exercise such influence as he alleged he had with one B. the Import Controller, in order to receive import permits to the value of 25,000 pounds. The money would become repayable to the company making the payment (Paramount) in the event of Mundell failing to secure the import permits sought. The court (Kuper J) held that, "...it is clear that the money was not entrusted to Mundell in the course of his practice as an attorney.."

The court goes on to say at 625E, "Mr. Hanson sought to obtain support for his contention by reason of the fact that the money was paid into Mundell's trust account. He referred particularly to the provisions of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, which obliges every practising attorney to keep a separate trust account, and to the fact that the failure to do so is a criminal offence as well as unprofessional conduct. It does not follow however from the fact that an attorney pays a sum of money into his trust account that that sum of money is in fact either trust account money held by that attorney or money paid to that attorney in the course of his practice as an attorney." (my own emphasis)

Mr. Joubert sought to distinguish this case on the basis that what Mundell had been asked to do appeared to have an illegal connotation. However, the court did not make such a finding. Neither did it base its decision on the possible unsavoury nature of the conduct of the attorney concerned, but on the nature of the transaction. The court's view was, looking at the mandate given the attorney, that the money was not entrusted to him "in the course of his practice as an attorney".

Each case must depend on its own facts. I can readily understand that attorneys - especially in smaller towns and villages -perform many functions which would not normally be regarded as attorneys work. However, I am satisfied that the facilitation of the negotiation of this bill for US$88,870, for a person who had never been the attorney's client and channelling those funds through his

10

conveyancing trust account, was not the deposit of money in connection with his practice as an attorney.

It would be most unwise for attorneys to embark on financial transactions of this kind via their trust account. The instant case demonstrates the risk at which they place their clients money genuinely paid to them in trust and the inviolability of which funds they have a primary and overriding responsibility to protect. Any other approach to the use of attorney's trust accounts for purposes not strictly relating to their practices as attorneys would certainly open the door to possible abuse such as money-laundering or frauds which could be perpetrated at no risk to the attorney but to the jeopardy of his clients genuine trust funds.

Having come to this conclusion it is not necessary to consider appellant's counsel's third ground upon which he challenged the Chief Justice's judgment. This was that the transaction in casu was one which created a liability "arising out of or in connection with that account".

I proceed next to deal with the other grounds upon which we were asked by respondent's counsel to hold that the reversal of the credit was unlawful.

In this regard it must be borne in mind that the respondent initiated these proceedings by way of Notice of Motion, and that it was launched as a matter of great urgency. As a consequence it was not readily determinable what the true cause of action was - save in regard to a reliance on Section 24 of the Act.

Upon being questioned by the Court to define the cause of action underpinning the claim for the relief sought, Mr. Joubert advanced three grounds. The first was that the reversal of the credit was in all the circumstances an unlawful contrectatio. Secondly, that, viewing the matrix of the evidence as a whole the appellant had acted negligently. Thirdly that the collecting bank was estopped from reversing the entry because of their conduct viewed as a whole. I now deal with these contentions.

11

By an unlawful contractio I assume that counsel does not mean to allege that the bank stole Mr. Mamba's clients money. There certainly is no evidence to suggest that they were of a mind-set that could attribute to them the intentional, unlawful appropriation of the relevant funds. The unlawfulness of their conduct had therefore either to have a contractual or delictual basis. There was no evidence to which we were referred that there was any agreement entitling Mr. Mamba to draw cheques against the credit entry generated by the cleared bill. It is true that the Bank permitted cheques to be drawn on the account as credited. However, in doing so it did not act pursuant to any contractual obligation, but in the ordinary course of its business as a collecting bank and in accordance with its banker/client relationship in respect of an account which was at that time in credit. When, subsequently, it was advised by the drawee bank that the bill was tainted by fraud as set out above, it once again, in reversing the credit, did so in its capacity as collecting banker and not in breach of any contractual obligation or undertaking to its client. See in this regard the reasoning of Zulman JA, in ABSA BANK LIMITED VS I.W. BLUMBERG AND WILKINSON 1997(3) SA 669 (S.C.A). Whilst it is clear that the facts are not on all-fours with the

matter in casu, the approach to be adopted in determining whether there was a contractual basis on which liability could vest has persuasive significance also on the facts in casu. See in this regard also VOLKSKAS V BANKORP BPK 1991(3) SA 605 (S.C.A) at 607 and ABSA BANK VS DE KLERK 1999(1) SA 861 (W).

I come to deal with the issue of whether negligence on the part of the bank was established. The argument in this regard was twofold. Firstly, that the Bank by crediting Mr. Mamba's trust account after the bill had been cleared for collection and permitting cheques to be drawn against that account as credited, had negligently represented to him as their client that he could do so without any risk that the bill could still be dishonoured. Alternatively, that too long a period had been allowed to elapse between the clearing of the effects

and the reversal of credit on the 7th of November 2001. The Bank, so it was submitted should not in these circumstances have accepted any debit on their account from the United States bank four weeks after it had credited its (the appellant Bank's) account. This, despite their having been advised that:

1. The bill had been dishonoured for fraud;

2. that the United States Treasury was legislatively empowered for a period of 7 years to refuse to honour the instrument on good cause shown.

I deal with this latter contention first. As a matter of fact the appellant did protest the decision to reverse the credit. The fact however that the drawer of the bill had the legislative protection referred to under paragraph 2 above, effectively disposed of any right of recourse. In any event, appellant, certainly up to the end of October 2001 did nothing in my opinion which could be categorised as negligence, and, as we know, Mokai had already by then exhausted the credit generated by the fraudulent cheque.

On the issue that negligence could be inferred because of a delay of 44 days, we were referred by counsel for the appellant to the decision in STANDARD BANK OF SOUTH AFRICA VS ONEANATE INVESTMENTS (IN LIQUIDATION) 1998(1) SA 811 (S.C.A) particularly at page 823 were the learned Judge of Appeal says the following:

"Entries on bank accounts may reflect valid juristic acts, but that is not necessarily so. Whilst in general it may be said that entries in a banker's books constitute prima facie evidence of the transactions so recorded, this does not mean that in a particular case one is precluded, unless say by estoppel, from looking behind such entries to discover what the true state of affairs is. So, for example, if a customer deposits a cheque into its bank account, the banker would upon receiving the deposit pass a credit entry to that customer's account. If it is established that the drawer's signature has been forged it cannot be suggested that the bank would be precluded from reversing the credit it had previously made. So, too, if a customer deposits banknotes into its account the bank would similarly pass a credit entry in respect thereof. If it subsequently transpires that the banknotes were forgeries it can

again not be successfully contended that the bank would be precluded from reversing the credit entry." (emphasis added)

It should be noted that the facts of the case disclosed that some 39 days elapsed between the passing of two entries (the one a credit to the account of its customer (Oneanate) and a

corresponding debit to the account of another customer) before the passing of two reversing entries. It is true that the challenge to the legitimacy of the transaction was based on the absence of the authority of the person giving the instruction to credit and debit the respective accounts. This does not, however, in my opinion affect the relevance of the reasoning for the purposes of deciding whether a delay of this length, viewed against the matrix of the evidence as a whole, justified the inference of unlawfulness on the part of the bank. It should also be borne in mind that by the 30th of October any funds credited to the account pursuant to the deposit of the bill had been exhausted by the drawings posted against the account by Mokai.
It seems to me that appellant's counsel is correct when he submitted that the appellant's sole obligation was to collect the proceeds of the bill. The tacit underlying assumption was that the bill was genuine and not tainted with fraud.

Was there a representation made by the appellant and did such representation found a cause of action?

Here again counsel referred to the evidence that Mr. Mamba had been informed that the bank estimated that the bill would take about 6 weeks to clear. Subsequently, and upon by their clearing bankers in New York crediting them with the proceeds of the bill, the appellant converted the funds to Emalangeni and credited Mr. Mamba's account accordingly on the 24th of September. As has already been recorded above, appellant subsequently honoured cheques drawn against this account, it being in credit at the time. Did these actions constitute a negligent representation/s on their part? On what basis could they have refused to credit Mr. Mamba's account when they had been advised of the credit that had been posted to their New York account

by their clearing bankers? Similarly, how could they have refused to honour cheques drawn upon Mr. Mamba's conveyancing trust account when it was in credit at all relevant times? The answers to both these questions are self-evident. On the papers before us respondent failed to establish any legal grounds on which appellant could be held liable for the loss that followed upon the fraudulent transaction initiated by his allowing his firm's trust account to be used to accommodate a bill, which in the event, was proved to have been fraudulently altered from US$870 to US$88,870.

There is in the circumstances set out above no factual basis for holding that the appellant was estopped from acting as it did when reversing the relevant entry. At no stage did the bank communicate any facts or make any representations to Mr. Mamba which were not in accordance with the facts known to them and in conformity with conventional banking practice. Viewing the facts established on the papers, I am unable to find that respondent established negligence on the part of the bank or that he made out a cause of action that entitled him to judgment in his favour.

Finally I must point to the fact that Mr. Mamba was the party who initiated the transaction by allowing Mokai to use his trust account for the purpose of negotiating a foreign bill for a very substantial sum of money. He was to receive a benefit in respect of a transaction that had no relevance to his conventional professional services as an attorney. He is the person who was duped by the fraudulent representations of Mokai. It seems to me to be just, therefore, that, despite the fact that he appears to have acted bona fide, and for the reasons set out above, he should bear the loss. Certainly there are no grounds on which on the evidence before us we can hold the appellant liable to make good the fraud perpetrated on Mr. Mamba's firm.

For these reasons the appeal succeeds with costs, including the costs of two counsel. The Order of the court a quo is set aside. In its

place is ordered as follows. The application is dismissed with costs including the costs of two counsel.

J.H STEYN JA

I AGREE

J. BROWDE JA

I AGREE

N.W. ZIETSMAN JA

Delivered in open court on .7th. day of June 2002