

11/12/2009

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

REPORTABLE

DELETE WHEREVER NOT APPLICABLE
CASE NUMBER: 946/2008
(1) REPORTABLE: YES/NO. *Yes*
(2) OF INTEREST TO OTHER JUDGES: YES/N
(3) REVISED
11 DEC 2009
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In the matter between:

STABILPAVE (PTY) LTD

Plaintiff

and

THE SOUTH AFRICAN REVENUE

SERVICES

Defendant

JUDGMENT

Ismail AJ:

[1] The plaintiff and defendant in this matter agreed upon a stated case in order to assist the court in determining the issue in dispute between them.

Stated Case:

The parties record that the facts set out hereinafter are common cause between them apart from admissions already made by either one of the parties in the pleadings and the responses to the pre-trial questionnaires and as embodied in the Rule 37 Minute.

Reference to page numbers is to the numbers of documents contained in the trial bundle.

1.1 On 16 October 2006 the defendant issued an income tax assessment (IB 34) to the plaintiff. This document was received by the plaintiff's secretary being MDP Secretarial Service (Pty) Ltd on the 25 October 2009.

1.2 The post box number on the assessment is the post box number of the secretary of the company the aforesaid MDP Secretarial Services (Pty) Ltd as well as of the plaintiff's accountants being Malan Du Preez Inc at P.O Box 2006, Menlyn, 0063.

2. The defendant drew a "not transferable" cheque in favour of plaintiff, which cheque was dated 12th November 2006, for payment of an amount of **R728 474.74** which was intended to pay to plaintiff the amount due in terms of the aforesaid assessment and interest which have accrued on the said amount.

3. The defendant, on or about 14th November 2006 handed the cheque in a sealed envelope to Securemail, a division of the South African Post Office. The envelope containing the cheque herein issued was addressed to Stabilpave (Pty) Ltd, PO Box 2006, Menlyn, 0063

4. Securemail caused a "delivery notification" to be issued, a copy of which is at page 37 of the trial bundle.

5.1 The envelope containing the cheque was retrieved from the Menlyn Retail Post Office by a person Mbukuman Wellington Mtima on 23 November 2006 when he presented the delivery notice (p. 37) together with a letter of authorisation (p. 38) purportedly issued by Prinsloo & Du Plessis Inc. Mtima had no authority from the plaintiff to collect the cheque from the post office and is totally unknown to both parties to this action.

5.2 The letter purportedly written by Prinsloo & Du Plessis (p. 38) is a fake as no such firm, to the best of the knowledge of the parties exists and even if it does exist, it is in no way connected to or associated with the plaintiff.

5.3 The said Mtima and/or other persons unknown to the parties, therefore, on or about 23 November 2006 stole the cheque.

6.1. At all material times to this action the sole directors of the plaintiff company were J M Geyser, JE Raubenheimer and F Kenney.

6.2 Without the authority of either of the directors or the plaintiff the record in the office of the Registrar of Companies were fraudulently changed so as to reflect one Pretros Mandla Radebe as the sole director of the plaintiff company purportedly appointed as such on 14 December 2006.

6.3 The said Radebe is unknown to plaintiff or any of its directors and had no authority to have the records in the office in the Registrar of Companies changed.

The address "Postal 401 Soekmekeer Street, Faerie Glen, Extension 2, 0042", appearing on p. 45 and 63 is an address unknown to and not ever having been used by the plaintiff.

7.1 On 2 January 2007 the said Radebe again acting fraudulently and without the authority of the plaintiff, opened, in the name of Stabilpave (Pty) Ltd, registration number 1986/002268/007 a banking account with the Hatfield Branch of First National Bank. With account number. 62124808801. **P. 46 to 56**

7.2 The plaintiff was unaware of and did not authorise the opening of this account.

8. At all material times and in particular in the period 20 December 2006 to 27 January 2007 plaintiff operated on one bank account being at the Bloemfontein Branch of Nedbank under the number. 1102439770

P. 41 – 44

9.1 On 3 January 2007 a person unknown to the parties and unauthorised by the plaintiff deposited the cheque at the Menlyn Branch of First National Bank to the credit of the account opened fraudulently by Radebe at the Hatfield Branch of that bank.

CHEQUE, p. 36; DEPOSIT SLIP, P. 60 AND 61

9.2 The cheque was presented by First National Bank for payment by the defendant's bankers Absa Capital; on 3 January 2007. Absa paid the amount to First National Bank and debited the defendant's account with the amount of R728 474.74 on that date.

BANK STATEMENT, p. 62

9.3 After 3 January 2007 and over a relatively short period of time the full amount deposited to the cheque account at the Hatfield Branch of First National Bank was withdrawn by the said Radebe purporting to act as a director of the plaintiff company and in fact overdrawing the said account.

P. 57 – 59

10. When the plaintiff discovered the unauthorised change in its directorship the Registrar of Companies was requested to rectify its registers which was done as appears from a letter, p. 68 of the trial bundle.

11.1 A case of fraud was reported to the SAPS at Bayswater Bloemfontein but no arrests have been made.

P 64

11.2 It is common cause that FNB repudiated the defendant's claim on the grounds contained in **page 91 read with page 92** of the bundle.

12. It is common cause between the parties that neither the plaintiff nor anyone representing the plaintiff and duly authorised thereto, received the delivery notice (p. 37) or the cheque.

13. The plaintiff's case is that it has not received payment and thereof claims the amount reflected on the assessment plus interest and costs.

PLEADING, p. 5 and 6

The defendant's main defence is that the defendant complied with its obligation for payment of the full amount of the cheque.

PLEADINGS, par. 6, p. 15 and 16

Defendant's alternative defence is based in the wording of the assessment which is quoted in paragraph 7.4 at p. 17 as follows:

"Henceforth the plaintiff elected, alternatively accepted that payment be effected by way of a cheque which would be collected at the nearest post office of the plaintiff."

No replication having been filed. The allegations in paragraphs 7.2 and 7.3 (pleadings, p. 17) are deemed to be denied.

However, plaintiff admits that as a taxpayer it was obliged to and did in fact provide the postal and registered address of the plaintiff to the defendant. Further that as at the day of the assessment the plaintiff had not provided any banking details to the defendant.

14. It is common cause that the plaintiff expected payment of the refund in accordance with the assessment notification.

See: P 41 of the pleadings and P 35 of the exhibit bundle.

15. It is agreed between the parties that the *onus* rests on the defendant to prove the defences put forward in the plea.

16. The stated case and the facts set out in 1.1 to 15 above was signed by attorney Pieter Schuurman on behalf of the plaintiff and by adv H Kooverjie on behalf of the defendant on the 16 November 2009.

Issue to be Determined:

[2] The legal issue to be determined is whether as a matter of law payment was made to the Plaintiff or not.

[3] No evidence was tendered and the issue to be determined was argued before me on behalf of counsel representing the respective parties.

Submissions in this Court:

[4] Mr De Bruin SC representing the plaintiff submitted that it was common cause that the plaintiff's banking details were not known to the defendant. The assessment form contained the following notice:

“ die kredit bedrag wat nou op u belastingrekening reflekteer word
eersdaags aan u betaal. Hierdie betaling sal; geskied deur middle
van 'n tjek wat by u naaste poskantoor afgehaal kan word of indien

geldige besonderhede beskikbaar is, sal 'n elektronies oorbetalings
gemaak word deur gebruik te maak van die besonderhede soos per
u belastingrekord.”

[5] According to Mr De Bruin it was the defendant who choose to
make payment of the amount due by means of a cheque and to send
the cheque to Menlyn Post Office where the cheque ought to be
collected.

[6] If the submission made by Mr de Bruin is correct then it would
be the end of the matter and the plaintiff would be entitled to succeed
in the action in the light of the authority of *Mannesmann Demag (Pty)
Ltd v Romatex Ltd and Another* 1988 (4) SA 383 (D) at 389 where
Nienaber J stated :

“ When a debtor tenders payment by cheque, and the creditor
accepts it, the payment remains conditional and is only finalised
once the cheque is honoured. (*Eriksen Motors (Welkom) Ltd
v Protea Motors, Warrenton & Another* , 1973 (3) SA 685 (A) at
693, Christie, the Law of Contract in South Africa at 413). Until
that happens a real danger exists that the cheque may be
misappropriated or misled and that someone other than the payee
may, by fraudulent means, convert it into cash or credit, for
instance, by forging and endorsement or by impersonating the
true payee. That risk is the debtor's since it is the debtors duty to

seek out his creditor.”

According to Mr De Bruin the present case fall squarely within the aforementioned dictum.

[7] Ms Kooverjie acting for the defendant on the other hand submitted that the assessment form gave the plaintiff an election to choose the mode of payment. He could elect for payment to be made by means of post to his postal address or alternatively by him providing his banking details, in which case the money would be deposited into the plaintiff's account. According to the defendant these were the only two methods of payments which the defendant would comply with. Counsel for the defendant submitted that it was an express term which stipulated that payment would be made by post if no banking details were provided. Ms Kooverjie relied upon the matter of *H K Outfitters (Pty) Ltd v General Assurance Society Ltd* 1975 (1) SA 55 at 61 where Botha , J. referred to *Dadoo & Sons Ltd v Administrator, Transvaal*, 1954 (2) S.A. 442 (T) at p.455 F-G, where Rumpff J., said:

“ The legal position appears to be that if a creditor request a debtor to settle his debt by sending a cheque through the post he agrees to run the risk of loss in the transit. By making this request he does not appoint the post office his agent but he authorises the manner of payment. It would depend upon the facts of each case

whether or not the request was actually made by the creditor.”

See also: *Barclays National Bank Ltd v Wall* 1983 (1) SA 149 at 157.

[8] What needs to be determined is which of the parties stipulated or requested that payment should be effected through the post. Is the situation as described by Mr De Bruin, namely that the defendant chose the method of payment through the post or is the position as described by Ms Kooverjie. In my view the answer to this question would determine the outcome of the case, in view of the parties agreeing that the cheque was posted and that it was honoured.

[9] I am of the view that the assesment form was a notification to the taxpayer that it either owed monies to the fiscus or alternatively that monies were due to the taxpayer. In this case that monies were due to the plaintiff. The notice clearly had the taxpayer's postal address which he obviously furnished to the defendant. The assesment form furthermore gave him an election whereby he could receive payment through the post to the address provided alternatively the taxpayer could provide its banking details so that the monies owed could be directly transferred into the bank account nominated by the taxpayer.

[10] The taxpayer choose not to give his banking details on the tax forms (IB14) which it submitted for the years 2005 and 2006 and also failed to provide the banking details when it received the assessment form. By not furnishing its banking details the taxpayer choose that any monies due to it should be posted to its address rather than be paid into its account. I am therefore of the view that I find myself in a situation where I respectfully disagree with the submission made by Mr De Bruin referred to in paragraph [4] above, that the defendant choose the method of payment. The contrary view as suggested by Ms Kooverjie during arguments before me has credence and substance, namely that the plaintiff expressly choose that payment should be made to it by post.

[11] Mr De Bruin also submitted that the defendant did not make payment as it was not shown that the notification from the post office was received by the plaintiff. The plaintiff followed the route chosen by the defendant by sending the cheque through the post to the defendant's postal address by securemail. We do not know whether this notification was intercepted after it had been placed in the plaintiff's postal box or before it was inserted in the box. This issue in my view is irrelevant by virtue of the parties agreeing that the cheque was posted by the defendant and that the cheque was met.- see *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adams (Pty)*

Ltd 1950 (2) SA 763 (T) at 769 and *Mannesmnn Demag* supra at p.388 B-F.

[12] Ms Kooverjie in her heads of argument also referred to the provisions of section 81 of the Bills of Exchange Act 34 of 1964 [the Act], relating to the issue of the true owner of the cheque. Section 81 states:

“ The true owner of stolen/lost crossed cheque marked ‘not negotiable’ entitled to compensation from certain subsequent possessors”

I was provided with two articles. The first of which was written by Matthew Moodley entitled *“Stolen Cheques-II The rights of the true owner”* and the second article written by P Q R Boberg entitled *“When the Postman Doesn’t Ring – the perils of paying by post.”* Dealing with the question of section 81 of the Act.

These articles were useful and informative, however, in my view I need not consider them in view of the issues in this matter being defined by virtue of the stated case. The liability that the plaintiff claims is that it did not receive payment whereas the defendant alledging that it made payment to the plaintiff. Section 81 deals with the question of liability of the true owner from possessors of the cheque after it was intercepted or stolen. This issue in the circumstances of this case is academic and irrelevant, in view of my finding that the plaintiff choose the post as a means of receiving payment.

Order:

[13] In the circumstances I make the following order:

1. That the defendant has discharged the onus that it made payment
2. The plaintiff's claim is dismissed with costs. Such costs consequent upon the employment of two counsels.



For the Plaintiff : Adv De Bruin SC instructed by Hill McHardy and
Herbst – Bloemfontein. ref: Mr Schuurmann

For the defendant: Adv Kooverjie and Adv M Dewrance instructed by
Rudman Attorneys, Pretoria. Ref: Mr P Rudman

Judgment: Delivered on 11 December 2009