

SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal between:

DANTEX INVESTMENT HOLDINGS (PROPRIETARY) LIMITED Appellant

and

NATIONAL EXPLOSIVES (PROPRIETARY) LIMITED
(In Liquidation) Respondent

Date of Hearing: 7 November 1989

Date of Judgment: 24 November 1989

CORAM: BOTHA, VIVIER, MILNE, EKSTEEN et F H GROSSKOPF JJA

J U D G M E N T

MILNE JA/.....

MILNE JA:

The respondent, to which I shall refer as "Natex", manufactured and sold explosives. Most of its customers seem to have been mining companies. On 18 September 1985 it entered into a factoring agreement with Dania Holdings (Pty) Limited ("Dania"). I shall refer to this as "the agreement". The agreement dealt with the sale by Natex to Dania of the claims of Natex against its customers resulting from the sale of explosives. The terms of the agreement (omitting immaterial provisions) are as follows:

"1. INTRODUCTION

- 1.1 The SELLER carries on a business in the course of which it sells goods to various customers.
- 1.2 The SELLER intends offering for sale to the PURCHASER its claims against its customers, resulting from all such sales of goods.
- 1.3 The parties wish to lay down the terms

which are to govern such sales of claims by the SELLER to the PURCHASER.

2. INTERPRETATION

2.1 In this agreement and in every offer which will be made by the SELLER to the PURCHASER for the sale of claims:-

2.1.1. 'claim' means a claim in favour of the SELLER resulting from a sale of goods in the ordinary course of the SELLER's business;

2.1.2 'ceded claim' means a claim acquired by the PURCHASER from the SELLER as contemplated in this agreement;

2.1.3 'debtor' means the purchaser of goods against whom a claim lies;

2.1.4 'due date' means the date upon which payment is to be made by the debtor for the goods to which the relevant offer relates;

2.1.5 'effective amount' means the amount arrived at in terms of the following formula (then follows a description of the formula).

2.1.6 'goods' means corporeal movable property of any kind;

2.1.7 'purchase date' means the date of issue of a purchase note;

2.1.8 'purchase note' means a notice in writing by the PURCHASER to the SELLER identifying the

claims purchased by the PURCHASER pursuant to an offer made by the SELLER in terms of clause 3.1;

2.1.9 'relevant offer' in relation to a ceded claim means the SELLER's offer pursuant to which the PURCHASER will have acquired such claim;

2.1.10 unless the context clearly indicates otherwise, words importing the singular include the plural and vice versa, ...

2.2 The clause headings in this agreement are for convenience and shall not affect interpretation.

3. OFFER PROCEDURE

3.1 The SELLER shall offer claims for sale to the PURCHASER for the purchase price specified in 3.2 and in the form set out in Annexure "A" and shall deliver such offer to the PURCHASER together with:-

3.1.1 True copies of all invoices covering the transactions from which such claims arise and signed delivery notes evidencing delivery of the goods; and

3.1.2 all negotiable instruments, if any, held by the SELLER in respect of such claim or any portions thereof.

3.2 The purchase price of each claim purchased by the PURCHASER from the

SELLER in terms of this agreement shall be an amount equivalent to the purchase price of the goods to which the claim relates less the effective amount.

- 3.3 The SELLER's offer shall be open for acceptance by the PURCHASER for seven (7) days after receipt and, if accepted, shall be accepted by the PURCHASER issuing to the SELLER a purchase note.
- 3.4 In the absence of any contrary indication, the PURCHASER shall be entitled to assume that any offer of claims for sale to the PURCHASER emanating or apparently emanating from the SELLER has indeed been made by the SELLER, and that the signature appearing thereon is the true signature of a person authorised by the SELLER to make such offer, and the SELLER hereby warrants the authority of every director, officer or employee for the time being of the SELLER to make and sign any such offer on its behalf.
- 3.5 The PURCHASER may purchase any one or some or all of several claims mentioned in the same offer. The purchase note shall indicate the claim or claims to which the acceptance relates and the PURCHASER shall be deemed to have declined to purchase the other claims offered, if any.
- 3.6 Before issuing a purchase note, the PURCHASER may require that any

negotiable instrument delivered to it with the SELLER's offer be so endorsed as to render the PURCHASER or its order the lawful holder thereof.

3.7 The PURCHASER shall under no circumstances be obliged to accept any offer made by the SELLER for the sale of a claim ...

3.8 The terms set out in this agreement shall be deemed to be incorporated in every offer made by the SELLER for the sale of claims to the PURCHASER.

4. CESSION AND PAYMENT

4.1 Upon the issue of a purchase note in respect of any claim the SELLER shall, ipso facto and without any further act or deed, be deemed to have ceded such claim to the PURCHASER, who shall:-

4.1.1 thereupon become vested as its own absolute property with such claim and all the SELLER's right, title and interest in and to all relative negotiable instruments, if any; and

4.1.2 have the right at any time thereafter to notify the debtor of the respective cession in its favour and to take such steps as it, the PURCHASER, may deem fit in order to enforce the ceded claim against such debtor for the PURCHASER's own benefit and account.

4.2 Payment of the purchase price of a ceded claim shall be made as to:-

4.2.1 an amount equivalent to 80% of the purchase price of the goods to which the ceded claim relates upon the issue of the purchase note in respect of such ceded claim;

4.2.2 the balance on receipt by the PURCHASER of payment in full in respect of the ceded claim.

5. COLLECTION MANDATE

5.1 Without derogation from the PURCHASER's rights in terms of clause 4 above, the SELLER shall - until such time as the PURCHASER will have notified the debtor of the relevant cession in its favour or have given written notice to the SELLER terminating the mandate - attend to the collection on due date of each and every debt relative to a ceded claim, as agent for and on behalf of the PURCHASER but at the SELLER's own expense and without charge to the PURCHASER. All such payments shall be deposited by the SELLER into a banking account nominated by the PURCHASER.

5.2 While so acting, the SELLER shall:-

5.2.1 take all reasonable steps to collect such debts expeditiously, ...

5.2.2 refrain, except as may be directed by the PURCHASER, from

bringing or causing to be brought any legal proceedings whatsoever, from giving any extension of time, making any allowances or granting any other indulgence to a debtor, from compounding or compromising any debt or obligation, ...

5.2.3 immediately on receipt pay over to the PURCHASER without deduction, all amounts collected by the SELLER as agent of the PURCHASER upon receipt thereof by the SELLER;

5.2.4 with each such payment by the SELLER to the PURCHASER (which shall include payments referred to in 5.1) -

5.2.4.1 deliver to the PURCHASER an accounting of the collection to which the payment refers; and

5.2.4.2 pay to the PURCHASER interest on the amount of such payment reckoned from the due date to the date of such payment by the SELLER to the PURCHASER ... at the prevailing overdraft rate charged by

Nedbank Limited to its
most favoured custom-
ers from time to
time ...

- 5.2.5 report promptly to the PURCHASER any default on the part of a debtor;
 - 5.2.6 furnish the PURCHASER, as and when required by the PURCHASER, with any material report or information; and
 - 5.2.7 negotiate and deliver to the PURCHASER, on receipt thereof, any negotiable instrument other than a cheque currently dated, for any relevant debt or any part of such debt, in such form and manner as to render the PURCHASER or its order and (sic) lawful holder thereof, provided that no such instrument shall be accepted by the SELLER without the PURCHASER's prior authority.
- 5.3 Notwithstanding anything hereinbefore contained, the SELLER irrevocably authorises the PURCHASER to endorse the name of the SELLER on any cheque or other negotiable instrument received by the PURCHASER from any debtor in respect of a ceded claim.
- 5.4 Should any debtor make to the SELLER a general payment on account both of a ceded claim and any other claim of the

SELLER against such debtor and make no appropriation between such debts, the SELLER shall treat such payment as having been made on account of the ceded claim.

6. WARRANTIES

With every offer by the SELLER for the sale of claims to the PURCHASER, THE SELLER shall be deemed to give the PURCHASER the following warranties in regard to each such claim:-

6.1 That such claim arises from a bona fide sale of goods in the ordinary course of the SELLER's business...

7. SURETYSHIP

7.1. The SELLER hereby binds itself to the PURCHASER as surety for due payment to the PURCHASER of the amount of every ceded claim, ...

8. SET-OFF

As security for the due payment of all sums of money which will from time to time be and become owing by the SELLER to the PURCHASER from whatever cause or causes of indebtedness arising, the SELLER hereby pledges and cedes to the PURCHASER all the SELLER's right, title and interest in and to so much of the purchase price of all and any ceded claims as will for the time being be owing by the PURCHASER to the SELLER, and the PURCHASER shall accordingly be entitled, but not obliged, to set off against any such amount falling due by it to the SELLER the whole or any part of any amount for the time being

owing by the SELLER to the PURCHASER, whether then due for payment or not, without prejudice to its right to recover from the SELLER any balance of indebtedness owed by the SELLER to the PURCHASER. ...

10. DURATION OF AGREEMENT

This agreement shall come into operation immediately and shall remain in force until the 30th day of November 1985 or the date on which the offer of compromise to be proposed by Danahan Industries (Pty) Limited between the SELLER and its creditors is rejected by the creditors or is not sanctioned by the Court, whichever is the earlier. Notwithstanding the foregoing, the parties may by mutual agreement extend the duration of this agreement to such later date as may be so agreed. The termination of this agreement at any time and for any reason shall not affect the continuity of rights and obligations resulting from the acceptance by the PURCHASER of offers made by the SELLER in terms of clause 3.1 above during the subsistence of this agreement. ...

12. SPECIAL REMEDY

In the event of the SELLER being in breach of any of its obligations to the PURCHASER (including any warranty), whether such obligation arises out of this agreement or the sale and purchase of any claim or otherwise howsoever, or being wound up, whether provisionally or otherwise, or in the event of any judgment being entered against

the SELLER in any competent court and remaining unsatisfied for fourteen (14) days after the entry thereof (unless within that time such judgment is rescinded or appealed against), the PURCHASER shall be entitled, but not obliged, notwithstanding any prior waiver or anything else herein contained and as an alternative to enforcing specific performance of such obligation or any other right of action for damages or other relief which may in the circumstances be available to the PURCHASER, to cancel by written notice to the SELLER the sale and purchase of any one or more or all of the ceded claims which are for the time being outstanding ...

16. The PURCHASER shall be entitled at any time to cede and assign its rights and obligations in and to this agreement to any company associated with the PURCHASER or in which the PURCHASER has any shareholding direct or indirect."

On 9 October 1985 Dania ceded and assigned all its rights and obligations under the agreement to the appellant ("Dantex"). During the period September 1985 to the end of June 1986 Dania, and, after the cession to it, the appellant, bought claims from Natex under the factoring agreement totalling some R12 000 000. Although it was initially in issue, it was common cause by the time the matter came before the

court a quo, that the period during which the agreement was to run had been extended by tacit agreement and was still operative at all times material to these proceedings. It was also common cause that the "collection mandate" in clause 5 was operative at all material times until the date of the provisional liquidation.

It is clear that clause 5.1 of the agreement empowered and obliged Natex, as the agent of Dantex, to collect each debt which had been ceded to Dantex, and to deposit such payment into a banking account nominated by Dantex. Clause 5.2.3 obliged Natex "immediately on receipt" to pay to Dantex all amounts collected by it as agent of Dantex. Furthermore, clause 5.2.7 obliged Natex to negotiate and deliver to Dantex on receipt thereof "any negotiable instrument other than a cheque currently dated" for any debt which had been ceded to Dantex. What actually happened,

however, was the following: Dantex did not, it seems, nominate a banking account. There is certainly no allegation that it did. Where payments from debtors were by way of cheques which were marked "not transferable", they were deposited in the banking account of Natex and immediately thereafter Natex made an equivalent payment to Dantex (presumably together with interest calculated in terms of clause 5.2.4.2 read with the definition of "due date" in clause 2.1.4). Although, in terms of clause 5.2.7, Natex was not obliged to negotiate and deliver currently dated cheques, all cheques which were not marked "not transferable" were, until 27 May 1986, endorsed by Natex in favour of Dantex and delivered to Dantex which deposited such cheques in its own bank account. The bank account of Natex into which "not transferable" cheques were deposited was an account conducted by

Natex in its own name at the Florida Branch of the Standard Bank. There is nothing in the record which indicates when this account was opened, what monies other than the "not transferable" cheques already referred to were deposited in it, nor even whether there was a credit balance in the account when the proceedings commenced in the court a quo. It was submitted on behalf of Natex that there is

"... no suggestion in the appellant's papers that the account at the Florida Branch of the Standard Bank was operated by the respondent as the appellant's agent, or that the appellant had any rights in respect of such account. On the contrary, the appellant's own papers reflect a consistent view of that account as being a general banking account operated by the respondent in its own name and on its own behalf."

The appellant's counsel conceded that this was a correct description of the position and, in the light of what appears in the affidavits, it was a concession which he was obliged to make.

During the period 27 May 1986 to 17 June 1986, the practice previously followed by Natex with regard to the depositing of cheques in respect of ceded debts altered, and it is common cause that, during this period, cheques in respect of ceded debts totalling approximately R750 000 were collected from debtors by Natex, paid into its bank account and not paid over to Dantex. The reason why the funds were retained in the bank account of Natex and not paid over to Dantex is the subject of a factual dispute in the affidavits, but, for the purposes of this appeal, nothing turns on this. It is common cause that the monies so collected were used to fund the continued operations of Natex. When it came to the notice of Dantex that Natex was not paying over monies collected on its behalf as Natex had previously done, it instituted proceedings under notice of motion dated 14 July against Natex and two individuals who were the

second and third respondents in the court below (but who are not parties to this appeal).

The substantive relief sought by Dantex was the following:

- "2. Directing the 1st Respondent to render an account to the Applicant of all amounts collected and/or received by the 1st Respondent from debtors in respect of claims which have been ceded by the 1st Respondent to the Applicant pursuant to the Factoring Agreement dated the 18th September, 1985;
3. Directing the 1st Respondent immediately to pay over to the Applicant all monies already received by the 1st Respondent from its debtors, the claims against which have been ceded by the 1st Respondent to the Applicant, and which monies have been deposited by the 1st Respondent and have not already been paid by it to the Applicant.
- 4.1 Save as provided in paragraph 3, interdicting the Respondents from depositing any monies or cheques or other bills of exchange which 1st Respondent may receive or have received from its debtors, the claims against which have been ceded by the 1st Respondent to the Applicant.
- 4.2 Directing the Respondents to pay over to the

Applicant all such monies and to deliver all such cheques or other bills of exchange referred to in paragraph 2 (duly endorsed in favour of the Applicant insofar as needs be) immediately on receipt thereof to enable the Applicant to procure payment of the amount concerned to itself."

An interim interdict was sought in the alternative.

The application was opposed by the second and third respondents in those proceedings, but on 15 July 1986 an order was made by consent postponing the application until 24 July 1986 and granting Dantex certain relief.

On 23 July 1986 Natex was placed in provisional liquidation and this subsequently became final. After a considerable delay the joint provisional liquidators of Natex were appointed joint liquidators. Thereafter, Dantex gave the liquidators notice in terms of s 359 of the Companies Act, 1973

(the Act) of its intention to continue the interdict proceedings and thereafter a notice in terms of Rule 15(2) of the Rules of Court was served, substituting "National Explosives (Proprietary) Limited (In Liquidation)" as first respondent. The liquidators eventually filed affidavits. In these affidavits they agreed to render an account of monies collected and/or received by them in respect of the claims referred to in paragraph 2 of the order prayed set out above, and consented to proof by Dantex of a concurrent claim in respect of the monies referred to in para. 3 of the order prayed, subject "to proper quantification", and to the proof by Dantex of a concurrent claim for its taxed costs. The matter eventually came before Kriegler J on 18 November 1987. He made an order in limine authorizing the liquidators to oppose the application in terms of s 386(5) of the Act. An order was also

made that certain monies which had been placed in a special bank account in terms of the interim interdict granted on 15 July 1986, be paid to the appellant.

It is common cause that the only outstanding issue in the court a quo between Dantex and Natex was whether or not the appellant was entitled to an order in terms of prayer 3 of the notice of motion set out above.

Kriegler J held, following Ex Parte Estate Kelly 1942 O.P.D. 265, that Dantex had no ius in rem in relation to the funds in the bank account of Natex, but only a personal right which did not entitle it to anything more than to prove a concurrent claim. He accordingly refused to grant the relief sought in para. 3 of the order prayed, but granted leave to

appeal to this Court. He also made certain orders as to costs, but there was no appeal or cross-appeal in respect of the orders for costs, and the sole remaining issue between Dantex and Natex in the court a quo is the sole issue in this appeal.

I agree with the conclusion reached by the learned judge a quo and, to a substantial extent, with his reasons for that conclusion. I say to a substantial extent because certain contentions advanced on behalf of Dantex in the court below were either abandoned or not pursued before us.

Although there was no direct evidence on the point, I think it is safe to assume that when the proceedings commenced there was a substantial credit

balance in the bank account of Natex, to which I have already referred.

It was submitted for the appellant that the crucial issue is whether the funds in this account ever became an asset of Natex. In my view, the question for decision is whether Dantex has a better claim to such funds than Natex or the liquidators. (It is immaterial to the decision of this case whether the property of a company being wound up vests in the liquidator as it did under the 1926 Companies Act or whether, in the absence of an order in terms of s 361(3) of the Act, it remains vested in the company subject to the rights of the liquidator. See Soane v Lyle N.O. 1980(3) SA 183 (N) at 186B-F.) The question for decision must be formulated in this way for the simple reason that the bank is undoubtedly the owner of the

funds in the account. See S v Kearney 1964(2) SA 495 (A) at 502 in fine to 503A, S v Kotze 1965(1) SA 118 (A) at 124 in fine to 125A and McEwen N.O. v Hansa 1968(1) SA 465 (A) at 469 in fine to 470 and 472A. As the bank's customer, Natex had a personal claim to any credit balance in the account. If all that Dantex has, is a personal claim against Natex, it has no better right to the credit balance than Natex or the liquidators. See Kelly's case supra cit at p 272. What is more, as pointed out by the learned judge a quo, we are not concerned with whether the funds could have been interdicted whilst still in the hands of Natex. Once the cheques were deposited in the bank account of Natex, the amounts thereof "... het nie meer as afsonderlike bedrae voortbestaan nie" - per Steyn CJ in S v Verwey 1968(4) SA 682 (A) at 687F. In these circumstances I have difficulty in seeing how Dantex

can contend, as it does, "... that the agreement properly construed conferred upon it rights of ownership in respect of all monies collected by Natex pursuant to debts purchased by Dantex from Natex ...".

In this regard Dantex sought to rely upon the provisions of clause 4.1.1. This clause provides that upon the purchase of any claim Natex would be deemed to have ceded such claim to Dantex "... who shall thereupon become vested as its own absolute property with such claim ..." and all the rights of Natex "in all relative negotiable instruments, if any". Whatever the effect of these provisions may be as between the parties to the agreement they cannot, by themselves, turn what would otherwise be a personal right into a real right i.e. a right valid against the world and therefore against the liquidators or creditors of Natex. It cannot be supposed that the result in Harris

v Trustee of Buissinne Vol II Menz.105, would have been any different if the contract for the sale of Buissinne's house had provided that the house was to be regarded as Harris' property from the moment the contract was entered into despite the absence of transfer coram lege loci. That being so, it seems to me that Dantex has no case. It is only if it is the owner of the money or has some other right in rem in respect of the money that it is not obliged, in the words of Van den Heever J in Fred P Ackerman's Properties (Pty) Ltd and Others v Estate Agents Board 1980(3) SA 451 (C) at 460A, to "... queue in the concursum creditorum as regards payment of his claim." This is so, because in our law, money held by virtue of a fiduciary relationship in which the holder stands to another is, unlike the position in English law, not deemed to be earmarked and is not charged with the fiduciary obligation. Ex Parte Estate

Kelly supra cit at p 269 (and cf Kayser & De Beer v Estate Liebenberg 1926 A.D. 91 at 97 where the Court rejected the submission that monies paid to the sheriff in pursuance of a writ of execution for a litigant's costs were "impressed with a trust" in favour of the litigant's attorneys). It was in fact accepted on behalf of the appellant that the following passage in Ex Parte Estate Kelly supra at 271 was a correct statement of law:

"Joh. Voet (20.4.13) says that a person who has deposited money with another may vindicate it, if he has deposited it as a corpus, i.e., enclosed in a separate receptacle or sealed in some way. If he merely paid over the money, however, he has only a concurrent claim in case of the bailee's insolvency."

It was not submitted, nor could it have been, that Natex deposited the cheques referred to above "as a corpus". The appellant's counsel, however, sought to rely on the next sentence in the judgment of Van den Heever J which reads as follows:

"In the absence of some special covenant in respect of the deposit, this seems to me to be in accordance with principle."

This dictum, so it was submitted, assists Dantex because there was a "special covenant" in respect of the deposit. It is not clear from the judgment precisely what "special covenant" the learned judge had in mind. If there had been an agreement between Dantex, the Standard Bank and Natex, that monies deposited in this account in respect of debts ceded to Dantex could only be withdrawn by Dantex that would, of course, alter the position. That is not the case here. There is no evidence to suggest that the Bank agreed to hold the funds in respect of those cheques as agent for Dantex. In McEwen's case supra cit, it was held that where an agent had deposited his principal's money in a savings account with a building society, that money did not vest in the agent's trustee on the agent's

insolvency. Had Dantex nominated a bank account as provided for in the agreement, and had the cheques in question been paid into that account, the position might have been different. It might then have been said that the only right which Natex had in respect of the account was to use it to pay Dantex, and that since that right terminated upon the liquidation, there was no right remaining in either Natex or the liquidators. Cf McEwen's case supra cit at p 471B where it was held that the agent's mandate terminated upon his insolvency and thus could afford no basis for his trustee's claim to the balance in the building society's account. In that case, furthermore,

- (1) The account was opened in the name of "W E Bale & Mortimer, Account M C Hansa" (Mortimer being the agent who subsequently went insolvent and Hansa being the principal);

(2) Although it was expressly agreed between counsel that the agent alone had power to operate on the savings account in issue, that was the position only as between the agent and the building society (see the remarks of Ogilvie Thompson JA at p 471D); and

(3) The cheques deposited were the principal's cheques, none of which passed through the agent's books.

That case is clearly distinguishable from this since, as already mentioned, it is common cause that the cheques in issue were deposited in a general banking account operated by Natex in its own name and on its own behalf.

Some reliance was placed in the appellant's heads of argument on the fact that the monies in the bank account constituted "trust monies" and that Dantex

accordingly had a "special interest" in such monies. It was also submitted that upon the liquidation of Natex, Dantex was entitled to be paid these monies as a preferent claim. In developing the argument, however, Mr Levin abandoned the argument that Dantex had a preferent claim within the meaning of s 2 of the Insolvency Act, and said that he relied upon the fact that Dantex had a "special interest" in the monies only as providing a useful analogy. The concept of a "special property or interest" belongs to the criminal law and, what is more, to a particular branch of the criminal law. As Steyn CJ said in Verwey's case supra cit at p 687B

"By oorweging van hierdie geval is dit nodig om in gedagte te hou dat diefstal van geld wat vir besteding volgens opdrag ontvang is, sy beslag gekry het as 'n besondere soort diefstal waarby die beginsels wat gewone diefstal beheers, nie altyd te pas kom nie. So is dit bv. vir 'n skuldigbevinding ten aansien van 'n bepaalde klaer

se geld nie nodig nie dat die klaer eienaar van die geld was of dieselfde soort reg daarop gehad het wat by ander goed vereis word, of dat die identiteit van die bedrag nie reeds deur confusio verlore geraak het, toe die onregmatige aanwending daarvan plaasgevind het."

He then goes on to say with reference to various decisions of this Court

"... dat hulle nie aantoon dat confusio nie kan plaasvind ten aansien van geld wat in trust ontvang is nie, maar dat die waarde-ekwivalent van sulke geld deur die trustee gesteel kan word ten spyte van die feit dat confusio wel plaasgevind het. Hierdie en ander bevindings wat die eiesoortigheid van diefstal van toevertroude geld aantoon, word bevestig in S v Kotze 1965(1) SA 118 (A.A.)."

As the credit balance in the bank account of Natex (to the extent that it consisted of the proceeds of cheques in respect of debts ceded to Dantex) could only be used by Natex for the purpose of paying Dantex, such monies were indeed trust monies within the special meaning which those words have in the law of theft. As is

clear from the passage cited above, however, that does not mean that the monies were not the property of the bank or that Dantex had a ius in rem in respect of such monies.

The argument that there was an unauthorised mixing of the principal's money with the agent's money and that the money was therefore presumed to be the principal's money until the agent proved which funds were its own was, rightly in my judgment, abandoned. Assuming that this is a principle of our law, and assuming that it could apply as against a trustee or liquidator, it was not proved that the cheques deposited did not consist of cheques which were marked "not transferable" or currently dated cheques in which

case Natex was entitled to pay them into its bank account.

The appeal is accordingly dismissed with costs including the costs consequent upon the employment of two counsel.

A J Milne

A J MILNE

Judge of Appeal

BOTHA JA
VIVIER JA
EKSTEEN JA
F H GROSSKOPF JA