60/96

Case no: 614/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ABSA BANK LIMITED : Appellant

AND

NATASHA INVESTMENT COMPANY

(PTY) LIMITED : Respondent

Coram: BOTHA, HEFER, FH GROSSKOPF,

HARMS JJA et ZULMAN AJA

Date of Hearing: 9 May 1996

Date of Judgment: 29 May 1996

JUDGMENT

ZU MAN, AJA:

This is an appeal against a judgment granted in the Witwatersrand Local Division against the appellant in favour of the respondent for payment of damages in the sum of R600 000,00 with interest and costs. An application to the trial Judge (Myburgh J) for leave to appeal was refused with costs. Thereafter, on petition to the Chief Justice, leave was granted to the appellant to appeal to this Court and the costs of both applications for leave were ordered to be costs in the appeal.

The judgment under appeal was based in essence on the court a quo's finding that the appellant had breached its duty of care to the respondent arising out of the appellant's acting as the collecting banker in respect of a cheque for R600 000,00 of which the respondent was the drawer and the true owner. The following facts are common cause:-

1. On 22 March 1993 the appellant's Troyeville/Bertrams

agency received a cheque in an amount of R600 000,00 dated 20 March 1993 drawn by the respondent represented by one Kitallides on the Standard Bank of South Africa Limited ("Standard Bank") in favour of Chemsteel Mineral Developments (Pty) Limited ("Chemsteel").

2. The cheque was received for collection on behalf of Marilor Properties and Investments CC ("Marilor"), which conducted a current account at the branch. The cheque did not bear any endorsement at the time. The cheque was generally crossed without containing words such as "not negotiable" or "not transferable" or any other words with a similar meaning or effect. However, the printed words "of Toonder" "or Bearer" appearing on the face of the cheque were crossed out and the word "order" written in after the name of the

payee.

3. Consequent upon the deposit of the cheque and on 22 March 1993 the appellant's branch allowed Marilor to withdraw the sum of R120 000,00 and thereafter to withdraw further sums. By 26 March 1993 the full amount of the cheque had been withdrawn.

4. The appellant caused the cheque to be presented for payment to Standard Bank, which paid the proceeds of the cheque to the appellant. The appellant in turn credited the account of Marilor.

5. In effecting payment to the appellant, Standard Bank acted in good faith and without negligence, and debited the account of the respondent with the amount of the cheque, which it was entitled to do.

In argument before this Court counsel for the appellant did not challenge the court a quo's finding that the appellant had breached its duty of care to the true owner of the cheque. The argument for the appellant was confined to an attack on two specific findings of the court a quo:

(a) that the respondent had proved that it was the true owner of the cheque, and

(b) that the respondent had proved that it had sustained a loss of R600 000.00 or at all.

The respondent called as its main witness one Levisohn, a chartered accountant who was the local managing agent or officer of Chemsteel, the named payee of the cheque. His evidence can be summarised as follows. Chemsteel was incorporated in late 1989 and acquired two sets of mining claims. Chemsteel was wholly owned by a company based in the United Kingdom which used Chemsteel as a vehicle for the purchase-of-mineral claims for a price of between R8 million and R9 million. It was Levisohn's function to administer the South African affairs of Chemsteel. Levisohn received all his instructions in regard thereto from one Sherry in London. On 10 February 1993 Levisohn was instructed by Sherry to release information to one White in connection with the possibility of White "or his interests" buying Chemsteel's mining claims. On 5 March 1993 Levisohn met one Du Toit with White, with a view to providing them with whatever information they thought would be necessary in connection with the purchase of the mining claims in question. Subsequent to the meeting, Du Toit made several trips to London and was in direct contact with Sherry and his delegate, one King, regarding negotiations for the sale of the assets of Chemsteel.

On 22 March 1993 Du Toit and White visited Levisohn at his office. They showed Levisohn the ~~cheque~~. They wanted Levisohn to deposit the cheque into the account of Chemsteel and then to make certain disbursements from those funds which would not exceed the amount of the cheque. The money had then to be paid out on behalf of Du Toit and White. The disbursements to be made on the instructions of Du Toit would not be disbursements for or on behalf of Chemsteel but for the expense directed by Du Toit. Levisohn had certain concerns about the request. According to Levisohn, his first problem was that he would have to wait for the cheque to be cleared before he could deal with it. Thereafter he would have to retain the funds pending instructions from Sherry in London as to whether Sherry was aware of the transaction and as to whether Levisohn was authorised to receive the cheque and pay out the money. Levisohn would further have to establish with Sherry the reason why the cheque was drawn and the nature of the transaction which existed between the drawer of the cheque and Chemsteel. Levisohn also needed to know, from an accounting point of view, what the nature of the transaction would be, whether it would be a loan or part of a purchase consideration "or whatever". Levisohn was led to understand that there was some urgency in regard to the disbursing of the funds. After Levisohn had managed to consult with his partners in Johannesburg he indicated to Du Toit and White that he could not accept the cheque without instructions from Sherry. Thereupon Du Toit and White advised Levisohn that they could probably make other arrangements and they left with the cheque. The time period within which Levisohn would be able to eventually determine whether he could make the disbursements was unacceptably lengthy. Levisohn advised Du Toit that should he not be able to make any alternative arrangements he could again approach him and Levisohn would see what he could do. Levisohn indicated in his evidence that he did not know whether or not Sherry would have instructed him to deal with the cheque as requested by Levisohn.

Of some significance is the fact that during the course of Levisohn's evidence it appeared that he at no stage thought that he needed to consult with the drawer of the cheque, the respondent, as to whether he was entitled to comply with the request made to him by Du Toit, notwithstanding the fact that the cheque was not made payable to Du Toit but to Chemsteel. Indeed during the course of cross-examination by counsel for the appellant Levisohn agreed with the suggestion that it must have been apparent to him that the proceeds of the cheque, as far as Du Toit was concerned, were not for Chemsteel, but for expenses as directed by Du Toit. This did not seem, upon the face of Levisohn's evidence, to trouble him in any way. In his evidence in chief there was some indication that had his principal said "look, we do not know about this cheque, but you can take it" he would have made the disbursement requested if he had received instructions from his principals to do so.

The respondent also called as witnesses four bank officials employed by the appellant who concerned themselves with certain investigations which took place subsequent to the presentation of the cheque and the debiting of the appellant's account with Standard Bank. Their evidence is of no material assistance in resolving the issues in the appeal raised by the argument of the appellants' counsel.

Apart from the evidence of Levisohn, the respondent offered no evidence to chart the course of events from the time that the cheque was drawn on 20 March 1993 until it was received by the appellant as collecting banker on 22 March 1993. Of particular significance is the fact that the respondent declined to call as a witness Kitallides, the respondent's officer who had drawn the cheque on its behalf, it being common cause that he was present in court during the trial and available to give evidence. Nor was any other evidence tendered to explain how or why Du Toit came to be in possession of the cheque.

The appellant closed its case without leading any evidence.

It was correctly accepted by counsel for the respondent that the onus rested throughout upon the respondent to establish that it was the owner of the cheque at the time when Du Toit dealt with it. In order to discharge the onus in the circumstances of this case, it was incumbent on the respondent to prove that when it delivered the cheque to Du Toit its intention was not that the ownership would thereby be transferred to Du Toit but that it intended to retain the ownership until the cheque was delivered by Du Toit to Chemsteel, who would then become owner of it.

In concluding that the respondent had established that it was the owner of the cheque at the relevant time, Myburgh J found as follows:-

> "The plaintiff's intention at the time it gave Du Toit the cheque can be gleaned from the cheque itself. The payee was Chemsteel or order. In the express terms of the cheque, the plaintiff intended ownership in the cheque to pass to Chemsteel or order and it intended Chemsteel or order to obtain payment of the sum of R600 000,00."

If the learned judge was intending by the aforesaid remarks to formulate a general principle that one can infer, in all cases, an intention to pass ownership in a cheque to the payee thereof, merely from the express terms of the cheque, that would be erroneous. Although some probability may arise as to the intended ownership of the cheque from the tenor of the instrument, such a probability may well be counterbalanced or neutralised by the facts of a particular case. In this case the evidence of Levisohn which I have outlined above, clearly neutralised such a probability. This is plainly so if regard is had to the fact that Levisohn did not even know of the existence of the cheque until

Du Toit showed it to him; he had no reason for expecting any payment to be made by the respondent to Chemsteel; he had no knowledge of the causa of the cheque or why Chemsteel was the named payee. The respondent led no evidence to explain these important facts.

In considering the question whether the drawer of a cheque intended ownership of the cheque to be transferred to the named payee one must be careful not to confuse the proceeds of the cheque which the drawer might or might not have wished the payee to receive, with the cheque itself and the ownership of it (cf First National Bank of S A Limited v Quality Tyres (1970) (Pty) Limited 1995(3) SA 556(A) at 569D)

In my view the reasoning of the court a quo, which led it to conclude that the respondent had discharged the onus which rested upon it, was based upon unwarranted speculation, as opposed to justifiable inference from the proved facts.

Upon the basis of the evidence led, it became ~~necessary~~ necessary to speculate what the intention of the drawer of the cheque was when it was handed to Du Toit. The facts cried out for evidence from the respondent as to the causa for the issue of the cheque, why and for what purpose Chemsteel had been named as payee, how or why Du Toit was in possession of the cheque, whether Du Toit was lawfully entitled to be in possession of the cheque and to bargain with the payee as to the utilisation of its proceeds or not, whether on 22 March 1993 and thereafter the respondent or Du Toit was the true owner of the cheque, and whether receipt of the proceeds of the cheque by Marilor at the apparent instance of Du Toit and the consequent debit to the respondent's account occasioned the respondent any loss. The respondent was easily able to supply the answers to these questions and eliminate the need for any speculation by calling Kitallides (and possibly other witnesses) to give evidence to elucidate these matters. It declined to do so. In these circumstances, and particularly having regard to the fact that it was the respondent itself which tendered the evidence of Levisohn the inference falls to be drawn that had Kitallides been called to give evidence, his evidence would have been adverse to the respondents case (cf *Elgin Fireclays Limited v Webb* 1947 (4) SA 744(A) at 749-750, *Galante v Dickinson* 1950 (2) SA 460(A) at 465). There was no duty upon the appellant on the other hand, which bore no onus in the matter, to call Du Toit to give evidence.

In the particular circumstances of this case it is equally reasonable to postulate that the true explanation for the drawing of the cheque lay in a private arrangement made between the respondent and Du Toit without reference to Chemsteel. It was therefore unsafe to assume that the writing on the cheque was, without more, definitive of the respondent's intention to transfer the ownership of the cheque to Chemsteel, either on the date of its drawing, or at any date thereafter.

In the course of his judgment the trial Judge remarked that Du Toit's conduct was highly suggestive of a person who was acting dishonestly. But I agree with the argument advanced by counsel for the appellant that it was improbable that Du Toit would take the cheque to Levisohn and show him that it was drawn in favour of Chemsteel and yet ask him to deposit it and then disburse some or all of the proceeds to him, if Du Toit believed that he had no claim to the cheque and if he was in the process of stealing the cheque or its proceeds from the respondent or Chemsteel. The trial Judge's further observation that Du Toit would have asked Levisohn to endorse the cheque in his favour if Du Toit really supposed he was the owner of it ignores the fact that

Levisohn had told Du Toit and White that he had no authority to receive the cheque or to deal with it. Levisohn was only prepared to hold the cheque in trust whilst he made various enquiries and investigations. The time lapse which would be involved was not acceptable to Du Toit and White who told Levisohn that in those circumstances they would make other arrangements.

A proper consideration of the evidence led, including that of Peters, one of the appellants' officials called by the respondent, on whose evidence counsel for the respondent sought to rely, does not establish upon a balance of probabilities that Du Toit was behaving dishonestly. There is nothing in the evidence which was inconsistent with a probability that the cheque and the proceeds thereof were intended by the respondent to go to Du Toit. In addition, there was nothing to gainsay the probability, which was put in cross-examination to Peters by counsel for the appellant, that Du Toit was the owner of a beneficial interest in Marilor and had its agreement to deal with the cheque after it had been paid into the account of Marilor.

There being nothing in the evidence which was inconsistent with a probability that the cheque and its proceeds were intended by the respondent to go to Du Toit and that Du Toit nominated Chemsteel as an account of convenience believing that he could arrange with Chemsteel to encash the cheque and disburse the proceeds to him, the inference was not warranted that the respondent remained the owner of the cheque and intended to pass ownership of it to Chemsteel by delivery through Du Toit.

In all the circumstances the court *a quo* should have found that the respondent had failed to discharge the onus of proving that it was the owner of the cheque at the material time.

It accordingly becomes unnecessary to consider the second issue namely whether the respondent established that it had suffered a loss or the quantum of such loss.

The order of this court is as follows:-

1. The appeal is allowed with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and there is substituted for it the following order:

"Absolution from the instance is granted with costs."

R H ZULMAN AJA

BOTHA JA
HEFER JA CONCUR
FH GROSSKOPF JA
HARMS JA