TAXPAYERS AND CHEQUE REFUNDS: SANITY PREVAILS

Stabilpave (Pty) Limited v South African Revenue Services
2014 1 SA 350 (SCA)

1 Introduction

This decision deals with the theft of a cheque that was sent through the post. We originally commented on the decision of the court of first instance (see *Stabilpave (Pty) Ltd v The South African Revenue Services* [2009] ZASCA 159 (11 December 2009) and Nagel and Pretorius "Taxpayers beware the SARS cheque refund" 2010 *THRHR* 482.). We were of the opinion that the decision of the court of first instance was wrong. The matter subsequently went on appeal to the full bench of the North Gauteng High Court where the majority of the court upheld the decision of the court of first instance. The matter then went on appeal to the Supreme Court of Appeal.

2 Facts

SARS owed a tax refund to the plaintiff of some R728 000. The tax assessment form (IB 34) dated 16 October 2006 contained a notice to the plaintiff that payment of the credit "will be made by cheque which can be collected at your nearest Post Office, or if the valid information is available, the payment will be made electronically by using the information on your tax record" (para 3; our translation).

SARS did not have the plaintiff's information (banking details) available and thus drew a "not transferable" cheque in favour of the plaintiff. The report does not indicate whether the cheque was crossed. SARS sent the cheque to Securemail, a division of the South African Post Office. Securemail sent a delivery notification to the address that appeared on the plaintiff's tax record. This was a post box at Menlyn Retail Post Office. Neither Stabilpave nor anyone representing it received the delivery notice.

A person by the name of Mtima collected the envelope with the cheque from the Post Office. He presented the delivery notice as well as a falsified letter from a purported firm of accountants, Prinsloo & Du Plessis Inc, authorising the collection. No such firm existed and even if it did exist, it had no connection with the plaintiff. There is also no evidence as to how Mtima intercepted the delivery notice.

The thief (fraudster) managed to open a bank account with First National Bank in the name of the plaintiff. The cheque was deposited for collection and it was later paid and the proceeds were subsequently withdrawn.

In order to open the account the crook managed to fraudulently change the particulars of the plaintiff's directors with the Registrar of Companies to reflect one of the co-conspirators (one Radebe) as the only director of the company.

Stabilpave sued SARS for payment of the refund.

3 Court of first instance

The judge took the view that the assessment 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, monies were due to the plaintiff. The notice clearly had the plaintiff's postal address which he furnished to the defendant. The assessment form furthermore gave the plaintiff an election whereby he could receive payment through the post to the address provided; alternatively the plaintiff could provide its banking details so that the monies owed could be directly transferred into the bank account nominated by the plaintiff.

Ismail AJ stated (para 10) that the plaintiff chose 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. He held that by not furnishing its banking details the plaintiff chose that any monies due to it should be posted to its address rather than be paid into its account. The judge held that the plaintiff bore the risk of the loss of the cheque. Since the cheque was met the debt was extinguished (para 11).

4 Judgment of Full Bench

4 1 Minority judgment

In considering the arguments of both the appellant and respondent, Fabricius J reviewed the positive law position regarding the sending of post by mail with reference to judgments such as *HK Outfitters v General Assurance Society Ltd* 1975 1 SA 55 (T); *Dadoo & Sons v Administrator, Transvaal* 1954 2 SA 442 (T); *Mannesmann Demag (Pty) Ltd v Romatex Ltd* 1988 4 SA 383 (D); *First National Bank of SA Limited v Quality Tyres (1970) (Pty) Ltd* 1995 3 SA 556 (A); *Goldfields Confectionary and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 2 SA 763 (T); and *Barclays National Bank Ltd v Wall* 1983 1 SA 149 (A) (see paras 3–10 of his separately typed judgment in *Stabilpave (Pty) Ltd v The South African Revenue Services* unreported case no 946/2008, appeal no A280/2010 (GNP)) of 16 March 2012). As regards express and tacit contractual terms, the judge considered decisions such as *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A); *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A); *Plum v Mazista* 1981 3 SA 152 (A); *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 3 SA 155 (A); *Reid Brothers SA Ltd v Fischer Bearings Co Ltd* 1943 AD 232; *Transman (Pty) Ltd v Dick* 2009 4 SA 22 (SCA); *City of Cape Town (CMC Administration) v Bourbon-Leftley* 2006 3 SA 488 (SCA); and *Gordon Lloyd Page Associates v Rivera* 2001 SA 88 (SCA) (see paras 11–15 of the typed judgment).

His conclusion was (para 17) that the assessment and notification provided for payment options which were elected by the respondent, in other words, by SARS – the debtor. He held (*ibid*) that the appellant's argument, namely, that the notification did not contain any indication to the appellant that it was entitled to express its approval or disapproval with the intended mode of payment, was justifiable on the facts. According to Fabricius J, the assessment read as a whole simply and clearly indicated that payment of the tax refund would by made by cheque posted to the nearest post office since SARS did not have Stabilpave's banking details. He held that there was no merit in the contention that an agreement, either "express, tacit or by silence" had been reached in this regard and concluded (*ibid*):

> "The respondent herein did not prove on a balance of probabilities that appellant had in this context instructed the respondent to send the cheque by post, thereby accepting any risk. Appellant did not respond to the notice at all, and I agree with

> the appellant's contention that it would be patently wrong to construe its silence in the proper context as tantamount to an instruction or request to send the cheque by post. The most probable inference to be drawn is simply that appellant took note of respondent's intention to send the cheque by post. In my view the *Dadoo* and *Mannesmann* decisions are particularly apposite herein."

4 2 Majority judgment

In the majority judgment, Mavundla J (with Mothle J concurring) referred to only two decisions directly concerning the sending of cheques by post, namely, *Mannesmann supra* and *Goldfields supra* (see paras 6–7 of the separately typed judgment). Great emphasis was placed on the possibility of a tacit agreement regarding the sending of the refund cheque by post and in this regard reference was made to *Plum supra*; *Kriegler v Minitzer* 1949 4 SA 821 (A); *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 3 SA 470 (A); *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A); *Greenfield supra* (also dealing with sending of cheques by post); *Joel Hurwitz supra*; *Ocean Commodities supra*; *Van den Berg v Tenner* 1975 2 SA 268 (A); and *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 419 (A) (see paras 8–11).

The judge pointed out (para 12) that the assessment notification form made the appellant aware of the data at the disposal of the respondent and that there were no banking details on this form. He also seemed to attach considerable weight to the respondent's allegation that in the past it remitted cheques to the appellant in similar fashion, that the cheques were received and that the appellant at no stage complained of this method of payment (*ibid*) before finding that "the only plausible inference to be made was that there was a tacit agreement that remittance of payments should be done through registered post" (para 18). He therefore endorsed the finding of the court of first instance that the appellant had made a choice as to how the cheque was to be remitted by post and that the risk lay with the appellant (*ibid*).

5 Judgment of Supreme Court of Appeal

In the Supreme Court of Appeal, Meyer AJA referred to the decision in *Mannesmann Demag (Pty) Ltd v Romatex Ltd* 1988 4 SA 383 (D) 389 where Nienaber J (as he then was) 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 . . . 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.
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> But when the creditor stipulates (or requests) a particular mode of payment and the debtor complies with it, any risk inherent in the stipulated method is for the creditor's account. That is said to be 'the legal position' (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 908B-E), 'the principle', or 'the law' (*Barclays National Bank Ltd v Wall* ([1983 (1) SA 149 (A)] at 156H-157C)), at least when the post is to be employed for that purpose. And of necessity that must mean that, if the worst comes to the worst and the cheque is intercepted and misappropriated by a thief, the obligation to pay is deemed to be fulfilled even though the amount of the cheque was never credited to

> the creditor. (Cf *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* . . . [1950 (2) SA 763 (T)] at 769).)"

The judge also referred with approval to our criticism of the judgment of the court of the first instance and held that the notice of SARS to the taxpayer did not constitute an invitation, expressly or by implication to the taxpayer to furnish banking particulars should the taxpayer wish to be paid by means of electronic transfer (para 12). The court found that the method of payment was dictated by SARS and the "mere fact that a creditor knows or expects to be paid by cheque through the post or that it does not raise an objection does not in itself give rise to an implied request or election by the creditor to be paid in such manner" (para 13).

Meyer AJA (with Brand, Lewis, Bosielo and Theron JJA concurring) thus held that the risk of the loss of the cheque was not assumed by Stabilpave and remained with SARS. SARS thus did not discharge its indebtedness by posting the cheque for the amount of the refund that was due to Stabilpave (para 14). SARS will thus have to pay the refund that was due to Stabilpave, plus interest.

6 Comments

(a) It is submitted that the decision of the Supreme Court of Appeal is correct and that sanity prevailed. The court succeeded to spell out the law clearly and correctly. The notification by SARS cannot be construed as an "agreement" (see Malan, Pretorius and Du Toit *Malan on bills of exchange, cheques and promissory notes in South African Law* (2009) 368 para 264) between the parties let alone a "request" by the creditor that the payment be made by cheque and be posted to the creditor. "Agreement" at its very least implies an offer and an acceptance.

(b) The decision of the court of first instance, endorsed by the majority judgment on appeal to a full bench, would have made life rather difficult for the ordinary taxpayer. Having been convincingly overruled by the Supreme Court of Appeal, the question inevitably arises as to whether any weight and credibility should be attached to the following remarks made by Mavundla J (with Mothle J concurring) (see paras 15 and 17 of the majority judgment):

> "Besides, the appellant, cannot be said [to be] . . . a naïve illiterate. It is a business, a legal persona, obviously assisted by auditors in preparing its yearly financials to be compliant with its obligations to the respondent. If it wanted to have refunds from the respondent not paid by cheque, it certainly would have provided its bank details, without any invitation from the respondent . . . Every tax payer is obligated to furnish his details to the respondent. The respondent need not go back to the tax payer and inquire how the refund should be done. The respondent must make use of the data the tax payer has provided, as *in casu*."

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