

Bearer, order, negotiation, crossings and holdership in due course: Back to basics

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OPSOMMING

Toonder, order, verhandeling, kruisings en reëlmatige houerskap: Terug na die basiese beginsels

Hierdie artikel toon, teen die agtergrond van 'n onlangse beslissing waarin die onderhawige aspekte van die tjekreg aan die orde was, waarom 'n grondige kennis van die tersaaklike, basiese beginsels in hierdie verband steeds broodnodig is.

1 INTRODUCTION AND BACKGROUND

The late Denis Cowen posed the following seminal questions regarding the law of negotiable instruments (especially cheque law) thirty six years ago:¹

“Laymen, and – let it be whispered – many experienced lawyers, ask: (i) why try to make a cheque ‘not transferable’; (ii) why make it payable ‘to bearer’ or ‘to order’; (iii) when should these latter words be omitted or struck out; (iv) why cross a cheque generally or specially, indeed why cross it at all; (v) why mark it ‘not negotiable’, and in any event, what is the difference between ‘not negotiable’ and ‘not transferable’; (vi) why ‘a/c payee only’? What purpose is served by these markings? And, above all, who stands to benefit from their use?”

He commented:

“Probably not more than one in a thousand persons having a bank account could answer these practical questions fully and accurately. And it is certain that not more than one in a hundred has any clear and accurate knowledge how best to protect himself when writing out a cheque. *Yet this knowledge is greatly needed.*”²

The fact that this knowledge today is still “greatly needed” is reflected by the recent decision in *Grainco (Pty) Ltd v Broodryk*.³ There were four defendants in

1 “Two cheers (or maybe only one) for negotiability” 1977 *THRHR* 19 35.

2 *Ibid*; our emphasis.

3 2012 4 SA 517 (FB). Whilst it is true that the use of cheques as an instrument of payment has greatly diminished, the Reserve Bank statistics nevertheless indicate that some 42 million cheques representing a value of more than R942 billion were presented for collection during 2010 (South African Reserve Bank *Quarterly Bulletin* December 2011 S-13). These figures do not include the vast number of promissory notes and other bills of exchange used in the financial sector by financial and other institutions. During the same year there were some 294 million credit card transactions representing a value of R149 billion. In 2010 there were 737 million credit transfers representing a value of R5 395 billion.

the case. Provisional sentence⁴ was sought against first and second defendants as trustees, based on a written acknowledgement of debt signed by first defendant on behalf of the trust; against third defendant as surety for first and second defendants' obligations in terms of the acknowledgment; and against fourth defendant based on a cheque drawn by him in favour of plaintiff. The application against the first three defendants also concerned aspects of the National Credit Act.⁵

The application for provisional sentence against the fourth respondent based on a cheque is relevant for the present purposes. A brief examination of the circumstances under which the cheque was drawn and issued⁶ reveals the difficulties caused by a less-than-proper understanding of the basic principles of the difference between bearer and order instruments, negotiation, crossings and holder-ship in due course, and is indicative of why a solid knowledge of this part of the law remains important today.

During a meeting between the first defendant and a representative of the plaintiff, the latter demanded, in addition to the document signed by the first defendant, a post-dated cheque⁷ for the amount of the debt between the trust and plaintiff. The first defendant was caught by surprise by this demand and explained that he did not have the trust's cheque book with him. The plaintiff insisted on getting a post-dated cheque as security. Fortunately (or perhaps unfortunately)

4 See in general Malan *et al* *Provisional sentence on bills of exchange, cheques and promissory notes* (1986) (hereafter Malan *et al*) *passim*.

5 34 of 2005. This aspect of the judgment is not pursued further in this contribution.

6 See *Grainco* para 8.3.

7 S 1 of the Bills of Exchange Act 34 of 1964 (hereafter the BEA) defines a "cheque" as a bill drawn on a bank payable on demand. A "bill" is defined in s 2(1) as an "unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to a specified person or his order, or to bearer". S 71(1) states that the provisions of the Act applicable to a bill payable on demand apply to a cheque except as otherwise provided for in Chapter 2 (ss 71–86). Thus, a cheque must comply with the formal requirements of a bill, and, in addition, be drawn on a bank and payable on demand. In everyday life it often happens that the drawer of a cheque makes it payable on a post-date. The drawer may make use of post-dating for variety of reasons. For example, it may be that he does not have the immediate funds available and the intention is then to deliver the post-dated cheque in the meantime to secure payment at a future date. In *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoo* 2008 6 SA 46 (D) Moosa AJ dealt with the legal status of a post-dated cheque. The judge referred specifically to the provisions of s 11(2) that provides that a bill 'is not invalid by reason only that it is antedated or post-dated' and said: "[W]ithout s 11(2) of the Act the status of a post-dated cheque would remain doubtful . . . Not only does s 11(2) of the Act make it plain that a post-dated cheque is not invalid by reason only of such post-dating but, when read together with the definition of a bill of exchange in s 2(1) of the Act and the definition of a cheque in s 1 of the Act, it has the effect of rendering such an instrument a demand instrument notwithstanding that the effective date of demand may be sometime in the future. In this context 'demand' must be contrasted with a 'fixed' or 'determinable' future time" (57G–I). See Nagel and Pretorius "Post-dated cheques, 'irregular' indorsements and holdership in due course" 2009 *THRHR* 677 for a discussion of the validity of post-dated cheques. The validity of the post-dating of the cheque in *Grainco* was not even considered or raised. See also Tobias "The myth of the post-dated cheque" 2005 *SA Merc LJ* 70 and "The myth of the post-dated cheque revisited and the holder in due course" 2007 *SA Merc LJ* 186.

the fourth defendant, the first respondent's son who was with them at the time, had his cheque book with him. He agreed to draw a cheque in favour of the plaintiff, but insisted that the cheque only be held as security until such time as the plaintiff could be provided with a cheque drawn by the trust itself. The cheque was made out to plaintiff or order and was crossed. According to the drawer, there was an express agreement between him and the representative of the plaintiff that his cheque would not be presented for payment. However, the cheque was subsequently presented in breach of this agreement and dishonoured. Although the plaintiff denied the existence of the aforesaid agreement the court nevertheless held that the probabilities for the existence of the agreement favoured the fourth defendant.

The drawer's defence, confirmed by the first defendant, was that there was no underlying *causa*⁸ for drawing the cheque and that he had at no time undertaken liability for the trust's indebtedness towards the plaintiff. The plaintiff (payee) countered by alleging that it was the holder in due course of the cheque and that the defence raised by the drawer was a mere relative defence unavailable against a holder in due course.⁹

The crisp question for the decision by Cillió J therefore was whether the plaintiff, in its capacity as payee of an order cheque, could qualify as a holder in due course of the cheque in question. In this regard the judge referred briefly to the provisions of section 27(1)(b) of the Bills of Exchange Act in terms of which the holder in due course "must have taken the bill in good faith and for value, and at the time the bill was negotiated to him" before stating that it is generally accepted that holdership in due course can only be acquired through negotiation.¹⁰ Counsel for the plaintiff, however, argued¹¹ that the judgment in *Ramsukh v Diesel-Electric (Natal) (Pty) Ltd*¹² provides authority that the payee, upon issue, can in certain circumstances be a holder in due course, namely, when the underlying transaction ("agterliggende transaksie"), as in the present case, took place between other, removed parties. Cillió J was not convinced that this is what Van Heerden JA was attempting to convey in *Ramsukh*. In the latter case, Van Heerden JA, having dealt with the long-accepted principle explained in *Moti v Cassim's Trustee*¹³ that the payee of an order bill cannot be a holder in due

8 *Causa* or *iusta causa* is the expression used to indicate the underlying obligation for which the cheque was drawn. The liability of the drawer on a cheque cannot be seen in isolation nor judged solely on the cheque itself. The underlying obligation for which the cheque is given constitutes the underlying contract on the cheque. See Viljoen "'Waarde' in die Suid-Afrikaanse wisselreg" in Joubert (ed) *EM Hamman-gedenkbundel* (1984) 1 8–9. See also Malan *et al* 130 and Malan para 116 and authorities cited.

9 *Grainco* para 8.6.

10 *Idem* para 8.7: "Dit word aldus deurgaans aanvaar dat reëlmatige houerskap alleen verkry kan word deur verhandelings." Despite the wealth of authority on this point (see para 3 below) the judge, somewhat surprisingly, referred only to a rather dated work, namely that of Malan and De Beer *Wisselreg en tjekreg* (1981, and not 2001, as indicated by the court) 173ff, as authority. The latest edition of this work is Malan, Pretorius and Du Toit *Malan on bills of exchange, cheques and promissory notes* (2009) (hereafter Malan).

11 *Grainco* para 8.8.

12 1997 4 SA 242 (SCA) esp 247F–249A.

13 1924 AD 720. This celebrated judgment is discussed at length by Malan *Die reëlmatige houer in die wisselreg* (1975) 418 ff.

course simply because he did not receive the bill through negotiation,¹⁴ remarked as follows:¹⁵

“As will have been observed, in *Moti Innes* CJ stressed the fact that a bill payable to order is negotiated by the endorsement of a holder plus delivery, which is to be distinguished from the issue of a bill by the drawer to the payee. By contrast, s 29(2) provides that a bill payable to bearer is negotiated by delivery. It would therefore seem clear that the payee of a bearer instrument may qualify to be the holder in due course thereof.”

According to Cillié J, all that Van Heerden JA wanted to convey was that the payee of a bearer bill may qualify as a holder in due course. The judge stated that, in the present case, the cheque in question was not payable to bearer, but was made payable to the plaintiff and the transfer thereof was qualified by a crossing¹⁶ which meant that it did not fall into the same category as that dealt with by Van Heerden JA. This meant that the fourth defendant was not barred from raising his personal defence against the plaintiff’s claim on the cheque.¹⁷ This finding is in accordance with section 36(b) of the Bills of Exchange Act in terms of which a holder in due course holds a cheque “free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable” and the following explanation by Conradie JA in *Melamed Finance (Pty) Ltd v VOC Investments Ltd*:¹⁸

“The obligations of a debtor liable on a bill to an immediate party arise also from the transaction pursuant to which the bill was delivered. All disagreements arising from such a transaction may be aired when the debtor is sued by the holder of the bill. The holder in due course is above and beyond all such disputes. He may be met only by the so-called absolute defences, those that go to the root of the bill’s validity.”

Finally, Cillié J held that the probabilities of success in the principal case favoured the drawer and provisional sentence against him was correctly refused.¹⁹ However, several matters touched upon in this judgment, including counsel for the plaintiff’s argument, are worthy of comment.

2 DIFFERENT TYPES OF CHEQUES

The best starting point would be to say that there are, broadly speaking, three classes of cheques: cheques that are made payable to order, cheques that are made payable to bearer and “not transferable” cheques that are neither payable to order nor to bearer but are valid as between the parties only.²⁰ For a cheque to be “negotiable” it must be payable either to bearer or to order.²¹ “Negotiable” in this sense means when the cheque is “transferred from one person to another in such

14 “[D]oodeenvoudig omdat hy [dit] nie deur verhandeling verkry het nie”: Cillié J in *Grainco* para 8.8.

15 *Ramsukh* 248F.

16 “[D]ie oordrag daarvan is deur ’n kruising gekwalifiseer”: Cillié J in *Grainco* para 8.8 *in fine*.

17 *Idem* para 8.9.

18 2008 6 SA 506 (SCA) para 6. See also para 3 below.

19 *Grainco* para 8.10. See in this regard Malan *et al* 193ff.

20 S 6(5) BEA, read with ss 6(1) and 6(3); Malan para 269; *National Bank v Silke* [1891] QB 435 439.

21 S 6(1).

a manner as to constitute the transferee the holder of the [cheque]”.²² An order cheque is payable to order “if it is expressed to be so payable, or if it is expressed to be payable to a particular person *and* does not contain words prohibiting transfer or indicating an intention that it should not be transferable”.²³ A cheque is payable to bearer “if it is expressed to be so payable, or if the only or the last indorsement on it is an indorsement in blank”.²⁴ A “non transferable cheque, that is one that is payable neither to order nor to bearer is one that contains words prohibiting transfer, or indicating an intention that it should not be transferable.”²⁵ Malan submits that the legislation intended such an instrument not to be negotiable in the sense that no person other than the named payee can become the holder thereof.²⁶

Here one should also bear in mind the special status that is afforded to the words “not negotiable” when used on a *crossed* cheque. Although one could argue that the use of the words “not negotiable” on a crossed cheque are indeed words indicating an intention to prohibit transfer and that such a cheque should qualify as a “not transferable” cheque, section 80 of the Bills of Exchange Act provides that if a person takes a bill that is crossed and marked “not negotiable” such person shall “not be capable of giving a better title to the cheque than that which the person from whom he took it had”. This section intends to exclude the normal consequences flowing from the negotiation of a cheque to a holder in due

²² S 29(1).

²³ S 6(3), emphasis added. Such a cheque can therefore be made payable, for example, to “C or Order”, to “The Order of C” or simply to “C”, provided, of course, that the bill does not contain words indicating an intention to prohibit transfer.

²⁴ S 6(2). In terms of this section, a cheque is also a bearer cheque if it is expressed to be payable to the order of “cash” or to “cash or order”. Also, an order cheque may be treated as payable to bearer if the payee is a fictitious or non-existing person: s 5(1) read with s 5(3).

²⁵ S 6(5). S 75A of the BEA deals with a specific type of non-transferable cheque. Malan para 277 calls this the “institutional” non-transferable cheque. S 75A(1) provides that where “a cheque bears boldly across its face the words ‘not transferable’ or ‘non transferable’, either with or without the word ‘only’ after the payee’s name” the cheque will not be transferable but will be valid as between the parties to it. The subsection provides that such a cheque will be deemed to be crossed generally, unless it is crossed specially, and that the words “not transferable” or “non transferable” may not be cancelled and that any purported cancellation will be of no effect. This section does not exclude the possibility that there may be other cheques that cannot be transferred. If, for example, a crossed cheque is made payable to a named payee “only”, such a cheque would without doubt be a cheque that is not transferable because it contains words indicating an intention to prohibit transfer within the meaning of s 6(5). S 75A does not alter the provisions of s 6(5). The fact that the words “not transferable” or “non transferable” are not written “boldly” across its face does not alter the fact that the cheque contains words that indicate an intention to prohibit transfer within the meaning of s 6(5). The words “transfer prohibited” may indeed be words indicating an intention that the cheque should not be negotiable within the meaning of s 6(5). See Malan para 277 for a discussion of this type of non-transferable cheque.

²⁶ Malan para 44. That does not, however, mean that the payee of a non-transferable cheque cannot transfer ownership of the cheque itself. Malan 129 para 102 explains: “‘Holder’ is . . . a neutral concept. The holder may, but need not necessarily, be the owner of the bill. He may be an unlawful possessor, such as a thief. Or he may be a lawful possessor holding on behalf of another, such as a mandatary collecting for his principal. Being holder is thus not synonymous with being owner, true owner or creditor: it merely gives one the power to sue on the bill without implying that one is entitled to the rights embodied in it.” See *ABS Bank Ltd v Greyvenstein* 2003 4 SA 537 (SCA).

course.²⁷ To “negotiate” means to transfer an instrument in such a manner that the transferee is constituted holder of it.²⁸ A crossed cheque marked “not negotiable” is negotiable in this sense and such a cheque is thus not a “not transferable” cheque.²⁹ A crossed cheque that is marked “not negotiable” can thus be payable either to the order of the named payee or to bearer.

From the above it is clear that if a cheque is made payable to a particular person, such a cheque will be payable to the order of that person provided that it does not contain words indicating an intention to prohibit transfer. If such a cheque does contain words to prohibit transfer it would *a fortiori* not be an order cheque but rather a non transferable one because of the words indicating an intention that it should not be negotiable.³⁰ If a cheque is expressly payable to the order of the named payee and it contains words indicating an intention to prohibit transfer, the question arises which of these two expressions should take preference. In *Aboobaker v Gableite Distributors (Pty) Ltd*³¹ the court had to decide the effect of the words “not transferable” between the parallel lines of a crossed cheque payable to a named payee or *order*. The court said that

“upon a proper construction of s 6, once the cheque contains clearly legible words clearly ‘prohibiting transfer’ within the meaning of s 6(5), then, in terms of that subsection, ‘it is not negotiable’. It is perhaps not without significance that s 6(1) does not say that if a bill is payable either to bearer or to order it is negotiable, but that it must be payable either to bearer or to order ‘to be negotiable’.”³²

The judge pointed out: “Here there is no difficulty about the legibility of the words nor the clarity of their meaning, and the words ‘not transferable’ override the words which are otherwise indicative of transferability, namely ‘order’.”³³ It follows from this judgment that where a bill or cheque is drawn payable to order and in addition contains words prohibiting transfer it is in fact not transferable and only the named payee can be the holder of it. To be holder of such instrument, parties subsequent to the payee must acquire by negotiation (that is by indorsement of the payee and delivery), but the payee is, by virtue of section 6(5), unable to indorse and thus to negotiate the instrument further.

In view of the above, it is not clear what Cillie J had in mind when he stated that in *Grainco* the transfer of the cheque was qualified by a crossing.³⁴ A crossing as such has no influence on the transferability or negotiability of a cheque. Rather, a crossing is an instruction to the drawee bank to pay another bank (not over the counter): to any bank in case of a general crossing or to a specific bank

27 Since the payee of an order document cannot be a holder in due course (see para 3 below), it follows that if the drawer crosses and marks a cheque “not negotiable” before issue, no one can become a holder in due course of that cheque. This is simply an application of the well-known *nemo plus iuris* rule.

28 S 29(1).

29 *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) 493; *Dungarvin Trust (Pty) Ltd v Import Refrigeration Co (Pty) Ltd* 1971 4 SA 300 (W) 301–302. See also Gering “Crossed cheques inscribed ‘a/c payee’ or ‘not transferable’” 1977 *SALJ* 152, Cowen 1977 *THRHR* 19 and Sinclair “Beware of the ‘not negotiable’ crossing” 1974 *SALJ* 157.

30 S 29(1) read with ss 6(3) and (5).

31 1978 4 SA 615 (D).

32 618.

33 618D–E.

34 *Grainco* para 8.8.

in case of a special crossing.³⁵ As pointed out above, only the addition of the words “not negotiable” on a crossed cheque can have an influence on holdership in due course, while the words “not transferable” would have prevented any further transfer of the cheque. It is not clear from the report whether any of these markings did occur on the cheque in question.

3 NEGOTIATION AND HOLDERSHIP IN DUE COURSE

The privileged position of a holder in due course, especially because of what is known as the non-availability of defences, is perhaps best explained by Malan:³⁶

“The holder in due course occupies a central place in the law of negotiable instruments: he acquires ownership in the instrument even where he acquires it from a non dominus and takes it free from defects of title and mere personal defences available to prior parties among themselves. His protected status is the result of centuries of development but is today based on the provisions of the Bills of Exchange Act, 1964 . . . In terms of section 36(b) he holds the bill ‘free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves’. According to section 36(c) (i), he acquires ‘a good and complete title to the bill’ when it is negotiated to him, even if the title of his transferor is defective.”

As was mentioned above, it is often said that the payee of a bill or note drawn or made payable to order cannot be a holder in due course. The reason for this is section 27(1)(b) of the Bills of Exchange Act which provides that a holder in due course must have no notice of certain facts at the time *the bill was negotiated to him*. The words in italics have been construed in a way that requires the holder in due course to have obtained the instrument by *negotiation*. In a submission to the House of Lords in *Jones Limited v Waring and Gillow Limited*,³⁷ it was unequivocally stated that

“a ‘holder in due course’ is a person to whom a bill has been ‘negotiated’, and from section 31 [it appears] that a bill is negotiated by being transferred from one person to another and (if payable to order) by indorsement and delivery. In view of these definitions it is difficult to see how the original payee of a cheque can be a ‘holder in due course’ within the meaning of the Act”.

This case was followed in England³⁸ and in South Africa.³⁹

Although the payee of a cheque which is payable to order cannot qualify as a holder in due course, it has been argued cogently that there is no reason why the payee should not so qualify, particularly where dealings between more than two parties are concerned.⁴⁰ There is also no reason to distinguish between the

³⁵ See Malan para 261.

³⁶ *Idem* para 114, footnotes omitted. See also Hugo “Aspekte van eiendomsverkryging deur ‘n reëlmatige houër” 1989 *SA Merc LJ* 1.

³⁷ [1926] AC 670 (HL) 680.

³⁸ *Ayres v Moore* [1940] 1 KB 278 (KBD) and *Arab Bank Limited v Ross* [1952] 2 QB 216 (CA) and see also *Lewis v Clay* (1898) 67 LJQB 224 and the judgment of the court of appeal in *Jones* [1925] 2 KB 612 (CA).

³⁹ *Moti and Co v Cassim’s Trustee* 1924 AD 720; *Karabus Motors (1959) Ltd v Van Eck* 1962 1 SA 451 (C); *Viljoen v SIK Investment Corporation (Pty) Ltd* 1969 3 SA 582 (T); *De Clerq v Steyn* 1930 TPD 747; *Golden Prism v But-Shor Investments & Distributors (Pty) Ltd* 1978 1 SA 512 (D); *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A).

⁴⁰ Malan para 118; Malan “Die nemer as reëlmatige houër” 1973 *THRHR* 1; Tager “The payee as a holder in due course?” 1980 *SALJ* 24; Van der Merwe “Enkele probleme wat uit
continued on next page

protection given a special indorsee and that afforded the payee since both rely on the appearance created by the drawing or making of the instrument. Allowing the payee to become a holder in due course does not, of course, mean that he takes the instrument free from defences based on his relationship with the drawer or maker: he remains liable to be met by defences based on this relationship, the causa of the undertaking on the instrument. Nothing is gained by calling the payee a holder in due course in such circumstances.⁴¹

The cheque in *Diesel-Electric (Natal) (Pty) Ltd v Ramsukh*,⁴² however, was a *bearer* instrument. As pointed out above, bearer instruments are negotiated by mere delivery.⁴³ Howard JP pointed out that according to the plain meaning of section 29(1) and (2), read with the definition of “holder”, the cheque was indeed “negotiated” to the plaintiff: as a bill payable to bearer it was transferred (that is, delivered) from one person (Naidoo or Pillay) to another (the plaintiff) in such a manner as to constitute the transferee its holder.⁴⁴ The judge concluded:

“As the plaintiff took the cheque in good faith and for value, and without notice of any defect in the title of the person who negotiated it, I conclude that it is a holder in due course. It may be that this would not have afforded the plaintiff any immunity against the defence which has been advanced if it as payee and the defendant as drawer of the cheque were immediate parties. Drawer and payee of a bill are normally immediate parties, but not if their legal relations as parties to the instrument do not arise out of their direct dealings with each other . . . It being common cause that the plaintiff and the defendant had no direct dealings with each other, I conclude that they are not immediate parties and that the plaintiff may rely on the proviso to s 18(3)

Howard JP further held that the payee of a *bearer* instrument may in certain circumstances become the holder in due course of it.⁴⁵ The decision of the court *a quo* was confirmed on appeal in *Ramsukh v Diesel-Electric (Natal) (Pty) Ltd*⁴⁶ and also by the Supreme Court of Appeal in *Ramsukh v Diesel-Electric (Natal) (Pty) Ltd*.⁴⁷

ons wisselwetgewing voortspruit” 1959 *THRHR* 275; Hugo “Onvoltooide tjeks – Estoppel” 1988 *De Jure* 390 393–394; Ackermann “The ‘issue’ of the blank cheque” 1990 *SALJ* 63 73ff; *The inchoate document* (LLM diss RAU (1993) 138–139). This debate has been ongoing for quite some time: see Aigler “Payees as holders in due course?” 1927 *Yale LJ* 608.

41 See Malan, Oelofse and Pretorius *Proposals for the reform of the Bills of Exchange Act, 1964* (1988) (hereafter *Malan Proposals*) 206ff where it is recommended that the law should be amended to allow the payee to qualify as a holder in due course in appropriate cases.

42 1994 1 SA 382 (D).

43 S 29(2).

44 386C–E.

45 This decision is discussed in the 1994 *Annual Survey* 450–452 and also by Malan and Pretorius “Payee as holder in due course” 1995 *SA Merc LJ* 249 who submit that it is correct in principle. See also Kidd “The payee in due course succeeds due to absent defence” 1995 *SALJ* 602.

46 1996 1 SA 876 (N).

47 1997 4 SA 242 (SCA). The Supreme Court of Appeal agreed (248F–249A) with the judgments of the lower courts to the effect that the payee of a bearer instrument may qualify to be the holder in due course thereof.

Finally, in view of the above, it should be noted that section 28(2) of the Bills of Exchange Act may cause the unwary plaintiff to fall into a trap. This section provides as follows:

“Every holder of a bill is *prima facie* deemed to be a holder in due course: Provided that if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation, of the bill is affected with fraud or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill.”

Since the payee of an order document, as pointed out above, cannot be a holder in due course the presumption in section 28(2) as to holdership in due course seems not to apply to him or her.⁴⁸ On the other hand, the payee of a bearer document may qualify as a holder in due course.⁴⁹

4 CONCLUSION

In *Grainco Cillié J* interpreted the judgment of Van Heerden JA in *Ramsukh* simply as an acknowledgement that the payee of a bearer instrument may in certain circumstances become a holder in due course. Since the cheque in *Grainco* was an order cheque it followed, so the judge held, that the payee (plaintiff) was not a holder in due course and was thus subject to mere personal defences.⁵⁰ A personal defence would indeed include the defence that the delivery of the bill has been “conditional or for a special purpose only”.⁵¹ It would thus follow that the application for provisional sentence could not succeed against the drawer of the cheque.⁵²

Although the court in *Grainco* came to the correct conclusion it is submitted that the judgment is perhaps not one of the best examples of judicial clarity in the law of negotiable instruments. What should have been a rather straightforward matter to decide was complicated by a lack of application of the general principles. Unfortunately the judgment also leaves a number of uncertainties regarding the nature and effect of a crossing. The crossing of a cheque *per se*, does not, as we have pointed out, affect the “negotiability” of the cheque.

48 See Malan para 127 for a comprehensive discussion.

49 See the discussion above and esp *Golden Prism v But-Shor Investments & Distributors (Pty) Ltd* 1978 1 SA 512 (D)

50 S 36 BEA.

51 S 19(2). See Itzikowitz and Visser “Holdership in due course: Abstractions in the Bills of Exchange Act 34 of 1964” 1985 *SALJ* 497 501.

52 See Malan *et al* 147.