CAUTIONARY ASPECTS REGARDING AN ATTORNEY'S TRUST ACCOUNT

Wypkema v Lubbe [2007] SCA 36 (RSA)

1 Introduction

This decision may have important consequences for practising attorneys as far as their trust accounts are concerned. Not only did the Supreme Court of Appeal correct the court *a quo*'s misconceptions regarding the nature of an attorney's liability as drawer on a cheque drawn by him on his trust account, but it also held that the "conduct and the propriety of issuing . . . a post-dated cheque on a trust account, should be investigated" (para 21).

2 Facts

The relevant facts can be summarised as follows: The respondent, a practising attorney, approached the appellant on behalf of a client for the purpose of obtaining a loan as bridging finance pending registration of a mortgage bond over immovable property. The appellant agreed to the loan, which, together with his fee, amounted to R2 200 000. Prior to the appellant advancing any money in terms of the loan agreement, the respondent, under cover of a letter dated 13 September 2004, furnished the appellant with a cheque dated 14 September 2004 drawn by the respondent on his trust account for the above amount. The respondent apparently anticipated that funds resulting from the registration of the mortgage bond in question would become available on 28 September 2004, and in his covering letter he requested the appellant not to present the cheque for payment before 29 September 2004. The relevant part of the letter read as follows:

> "Soos u bewus is sien ons toe tot die registrasie van 'n eerste verband ten gunste van Standard Bank oor die eiendom en is ons in besit van die brief van onderneming vir betaling van die gemelde bedrag teen registrasie van die gemelde verband.

> Ons onderneem onherroeplik dat registrasie van die verband sal plaasvind en dat registrasie sal plaasvind nie later nie as 28 September 2004, ten einde u terug te betaal nie later nie as 29 September 2004.
>
> Vind dan hierby aangeheg die volgende:
>
> 1. Afskrif van waarborg van Standard Bank vir betaling van R2 200 000.00;
> 2. Ons trusttjek in die bedrag van R2 200 000.00 met die uitdruklike verstandhouding dat u die tjek slegs sal aanbied vir betaling op 29 September 2004 en verlang weer u onderneming in die verband.
>
> Ons vertrou dat u voormelde in orde vind en bevestig dat u met ontvangs van die dokumentasie ons sal voorsien van u tjek in die bedrag R1 850 000 alternatiewelik elektroniese oorplasing na ons rekening" (para 10).

Snyders AJA interpreted the letter as follows (para 18):

> "The appellant was assured, in language which was clear in its intent, in the letter . . . that registration of the mortgage bond that was to provide the proceeds from which the cheque was to be paid, was to have been registered no later than 28 September 2004. He was also told that the respondent was mandated to register the mortgage bond and was in possession of a letter of undertaking from the prospective mortgagee, a bank, to pay the money into the respondent's trust account upon registration of the mortgage bond."

The appellant presented the cheque for payment on 30 September 2004, that is, clearly within the terms of paragraph 2 of the aforesaid covering letter. However, the cheque was dishonoured and returned to the appellant marked "effects not cleared". (The reason for this is that the "transaction, in terms whereof the funds would have been received to be paid from the trust account was cancelled/ alternatively did not proceed" (para 20 fn 7).) The appellant subsequently applied for provisional sentence against the respondent in the court *a quo*.

3 Court *a quo*

Van Rooyen AJ refused provisional sentence, upholding all the defences raised by the respondent. He held that

> "in terms of the nature of an attorney's trust account, the attorney at all times acts as agent on behalf of other entities in respect of such trust account and the funds in a trust account of an attorney never vests in the attorney" (para 3).

Flowing from this premise, the judge held that the respondent issued the cheque in a representative capacity as agent of its client and was therefore not personally liable as drawer on the cheque itself. He also found that, on the facts, the respondent had not bound himself or his firm as surety and co-principal debtor for the obligations of his client, and that the agreement to repay the loan with the respondent's cheque was subject to a suspensive condition, namely the registration of a mortgage bond on or before 29 September 2004 (para 3). The appellant contested all these findings on appeal. As will appear below, none of the grounds on which provisional sentence was refused, was upheld on appeal (para 12).

4 Supreme Court of Appeal

4 1 General legal aspects regarding an attorney's trust account

The court quoted section 78(1) of the Attorneys Act 53 of 1979 that compels any practising practitioner (ie an attorney, notary or conveyancer – s 1) to keep a separate banking account and to deposit therein any money held or received by him on account of any person (para 4). The court then reiterated that money thus

deposited generally does not form part of the assets of the attorney concerned, quoting section 78(7) of the Act in this regard.

As regards the nature of an attorney's trust account and the relationships between the drawee bank, the attorney and his clients, Snyders AJA quoted at length (para 5) the principles laid down by Hefer J in *Fuhri v Geyser NO* 1979 1 SA 747 (N) 749C–E (approved on appeal by the full court in *Fuhri v Geyser NO* 1980 1 SA 598 (N)):

> "[D]espite the separation of trust moneys from an attorney's assets thus affected by s 33(3) [of the previous Attorneys Act 23 of 1934 which had essentially the same wording as s 78(7) of the present Act], it is clear that trust creditors have no control over the trust account: ownership in the money in the account vests in the bank or other institution in which it has been deposited (*S v Kotze* 1965 (1) SA 118 (A) at 124), and it is the attorney who is entitled to operate on the account and to make withdrawals from it (*De Villiers NO v Kaplan* 1960 (4) SA 476 (C)). The only right that trust creditors have, is the right to payment by the attorney of whatever is due to them, and it is to that extent that they are the attorney's creditors. This right to payment plainly arises from the relationship between the parties and has nothing whatsoever to do with the way in which the attorney handles the money in his trust account."

Regarding an attorney's right to dispose of the money in his trust account and his right to instruct the bank to do so, Snyders AJA quoted (para 6) the explanation by Van Winsen J in *De Villiers NO v Kaplan* 1960 4 SA 476 (C) 479A–C to the effect that the previous section 33(3) (corresponding to the present s 78(7))

> "left unimpaired the right of the attorney to direct the bank at which the trust account is kept to dispose of the amount standing to the credit of that trust account in a manner as directed by him. Katz [the attorney] retained the right to direct the bank to pay the money in his trust account to his trust creditors or to persons to whom such creditors had instructed him to make payment. He similarly retained the right if there was a sum in such account in excess of that required to meet his trust obligations, to direct the bank to pay such excess to his personal creditors or to him personally. Indeed as between himself and the bank, unaware of the fact that he was acting in conflict with his trust obligations, he could direct the bank to pay the amount standing to the credit of his trust account to his personal creditors or to himself. Should the bank, acting on any such directions, pay out the amount standing to the credit on his trust account, such amount would, as indicated above, cease to be amenable to the terms of sec. 33(3). In effect, therefore, even although the amount in the trust account was not, while it was still in such account, an asset belonging to Katz, he had a right of disposal over such amount".

4 1 1 Decision

Snyders AJA held that the court *a quo* failed to have regard to the above principles and that it therefore erred in its finding that the respondent was merely acting as an agent when he drew the cheque in question. He held (para 7):

> "When an attorney draws a cheque on his trust account, he exercises his right to dispose of the amount standing to the credit of that account and does so as principal and not in a representative capacity."

4 1 2 Comment

The extracts from the judgments referred to by the court merely confirm some of the general principles regarding the banker/customer relationship (for a detailed discussion, see Malan and Pretorius (assisted by Du Toit) *Malan on bills of exchange, cheques and promissory notes* (2002) para 203ff and authorities cited there).

However, Snyders AJA must be commended for correctly pointing out that the respondent, when drawing the cheque by, *inter alia*, signing it, acted as principal. In other words, he signed a cheque drawn by himself on his own trust account – he did not sign the cheque on behalf of a client, although broadly speaking he was at the time acting on behalf of a client. However, the judge then proceeded to involve section 24(1) of the Bills of Exchange Act 34 of 1964 (BEA).

4 2 Section 24(1) BEA

Snyders AJA correctly pointed out that the decision of the court *a quo* flowed from the incorrect premise that the respondent *issued* the cheque (perhaps *drew* the cheque would have been a more fortunate wording) on behalf of its client (para 8). According to the judge that conclusion was contrary to section 24(1) BEA, which *inter alia* provides that

> "[i]f a person signs a bill as drawer . . . and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative capacity, or if he signs as drawer and the name of the principal appears with his signature, he is not personally liable thereon."

4 2 1 Decision

Snyders AJA held as follows:

> "The respondent's signature on the cheque is unqualified and appears below the printed words 'TOBIAS LUBBE ATTORNEY TRUST ACCOUNT ACT 53/1979 SECTION 78(1)' in the space provided for the drawer to sign. These words do not qualify the signature of the drawer but merely identify the bank account on which the cheque is drawn. There are no facts that bring the respondent's signature as drawer within the ambit of s 24(1): thus the conclusion follows that he signed the cheque in his personal capacity."

4 2 2 Comment

It is difficult to understand why Snyders AJA (see para 4 2 1 *in fine*) even attempted to bring the matter within the ambit of section 24(1), since this section finds no application in the circumstances. This section presupposes the existence of an agency situation, where there is both a principal and an agent present and the latter signs on behalf of the principal as drawer, indorser or acceptor, and provides for the circumstances under which the agent will escape personal liability on the document despite his signature. As Snyders AJA himself correctly pointed out: there were no facts to bring the respondent's signature within the ambit of section 24(1). His initial conclusion (see para 4 1 2) was correct: The respondent signed as drawer on a cheque drawn by himself on his own firm's trust account. Therefore, there was no agency and no room for section 24(1) to apply! (See in general Malan *et al* para 83ff and authorities cited there, esp *Schmidt v Jack Brillard Printing Services CC* [2000] 4 All SA 113 (W).)

4 3 Surety and co-principal debtor

In view of what was said above, Snyders AJA correctly dismissed the court *a quo*'s finding as follows:

> "The finding that the respondent did not undertake liability as surety and co-principal debtor does not relate to any of the facts and issues in the case and is inconsequential in view of the conclusions reached" (para 9; see also 4 5 below).

This finding is correct. Since the respondent was the only party who had signed the cheque as drawer, he cannot qualify as aval or surety on the cheque because

the aval or surety can only be liable in that capacity for another party liable on the document (Oelofse and Pretorius "Of suretyships, avals and accommodation parties" 1991 *SA Merc LJ* 260 262). One cannot be surety for oneself. Furthermore, if the contract was a contract of suretyship, such contract must comply with the provisions of section 6 of the General Laws Amendment Act 50 of 1956. This section requires that "the identity of the creditor, of the surety, and of the principal debtor *and* the nature and amount of the principal debt" (per Trengove AJA in *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 333 (A) 345A–C) must be capable of ascertainment by reference to the written contract of suretyship.

4 4 Suspensive condition

The relevant part of the respondent's covering letter and the interpretation thereof by Snyders JA were quoted above (para 2). He considered the court *a quo*'s finding that the agreement underlying the drawing of the cheque was subject to the registration of a mortgage bond in view of the covering letter and correctly held that nothing in the letter suggested the suspensive condition found by the court *a quo*. "The only term apparent from the letter is that the cheque was delivered subject to it not being presented for payment before 29 September 2004" (para 11). It is submitted that this finding is indeed correct.

4 5 Matter arising during appeal

During the hearing of the appeal, a question arose as to whether the agreement to take the respondent's "trust cheque as security for repayment of a loan when the funds from which that cheque was meant to be paid were not yet in the trust account was not *contra bonos mores* and therefore unenforceable" (para 12). The court considered various possibilities in this regard (see paras 13–18; a full discussion falls outside the scope of this note) and held that

> "there is no reason why the appellant was not entitled to accept that the respondent was issuing and delivering the cheque with no risk to any of his trust creditors or the Fidelity Fund. In fact, as a general proposition one would be entitled to accept, in the absence of knowledge to the contrary, that when an attorney issues a trust cheque, he acts lawfully and in accordance with the rules of his profession. To be given a trust cheque by an attorney is therefore an added assurance that the cheque is likely to be met" (para 19).

4 6 Post-dated cheque

The final aspect of the judgment was that the respondent had issued a cheque that was dishonoured and gave an undertaking of the imminent availability of funds flowing from the registration of a mortgage bond that had never taken place. As mentioned above (para 1) Snyders AJA held that this conduct and the issuing of a post-dated cheque on a trust account should be investigated (para 21). He even ordered that the Registrar refer this judgment to the Law Society of the Northern Provinces (para 22).

Adjudicating on the propriety of the respondent's undertaking as mentioned above, falls outside the scope of this note. However, some remarks on drawing a post-dated cheque on an attorney's trust account are called for.

Malan *et al* para 191 provide the following brief summary of the legal position regarding a post-dated cheque:

> "The fact that a cheque is . . . post-dated does not render it invalid. A post-dated cheque is a bill payable on a future date and becomes a cheque on that future date.

> It can be negotiated before the date, and, if he acquired it in good faith and for value, its purchaser will be a holder in due course. However, the drawee bank paying a post-dated cheque before its due date does so at its own risk and will generally be unable to debit the account of its customer with the amount paid. It will be entitled to do so only on the date of the cheque, unless payment has been countermanded before then. The drawee bank paying a post-dated cheque before its due date . . . may have a claim based on unjustified enrichment against its customer" (see also Oelofse "Die aard van 'n vooruitgedateerde tjek" 1981 *Modern Business Law* 51).

One's first reaction is therefore that the nature of a post-dated cheque itself is not sufficient reason to consider the drawing thereof on an attorney's trust account as improper conduct. However, the underlying reason for using such an instrument will usually be that the attorney has not yet received the funds in trust to cover the cheque from its client. This conduct may certainly be regarded as improper as the funds are not yet "in trust" to cover the particular payment. In *Wypkema* para 15, Snyders AJA mentioned two possibilities regarding the question whether the underlying agreement based on which the cheque was drawn, had been entered with an unlawful aim.

Adapted to the question of the propriety of an attorney drawing a post-dated cheque on his trust account, the first *scenario* would be where the attorney in fact has sufficient funds held on account, but for other clients. Should the bank honour the post-dated cheque by using the funds destined for these parties and the attorney cannot make good such amount, the Fidelity Fund would ultimately have to finance the shortfall. It may even amount to the possible theft of another customer's trust money. In the second instance, there could be insufficient funds in the trust account, irrespective of on whose behalf they were being held, resulting in the bank dishonouring the cheque (as happened in *Wypkema*) "with no real disturbance to the funds in the trust account because it would not have been possible to execute against the trust account". Again, the Fidelity Fund may be called upon to make good the losses caused by the attorney who attempted to use funds that he did not have. Both of the above *scenarios* provide sufficient reason to suggest that an attorney may not draw a cheque on a trust account, whether or not it is post-dated is not so much the real issue, unless he had in fact received the funds to cover it from the client in question. The matter is ultimately serious enough to call for an investigation by the Law Society.

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