

THE BANKER-CUSTOMER RELATIONSHIP: NEGLIGENCE IN THE PAYMENT AND COLLECTION OF CHEQUES

McCarthy Ltd v Absa Bank Ltd 2009 2 SA 398 (W)
McCarthy Ltd v Absa Bank Ltd [2009] ZASCA 118

1 Introduction

Much has been written on the legal nature of the banker-customer relationship (see eg the extensive discussion by Malan, Pretorius and Du Toit *Malan on bills of exchange, cheques and promissory notes in South African law* (2009) para 217 and sources cited there). However, the question whether, absent an express provision to this effect, the contract between a bank and its client possibly includes either a tacit or an implied term that the bank is under a duty to fulfil its collecting duty without negligence *vis-à-vis* its client, was described by Goldstein J as “a novel one” in *McCarthy Ltd v Absa Bank Ltd* 2009 2 SA 398 (W). The Supreme Court of Appeal eventually had to consider this matter (*McCarthy Ltd v Absa Bank Ltd* [2009] ZASCA 118), Goldstein J having granted leave to appeal against his decision to grant an order of absolution from the instance

In what follows the facts that gave rise to the above question and the decisions of both the court *a quo* and the Supreme Court of Appeal are discussed.

2 Court a quo

2.1 Facts (based on paras 3–7 of the judgment of Nugent JA)

McCarthy (M) established that between November 1994 and March 2003, a former employee (C) of M created fictitious debts in the accounts of M and caused cheques to be drawn and signed by M in purported payment of those debts.

The named payee on each of the cheques was a combination, in one way or another, of the name “Fourie” or “L Fourie” and the name “Leathertech” or “Leathertech CC”. The cheques were crossed and marked “not transferable”. C was acquainted with Mr and Mrs Fourie. Mr Fourie operated a cheque account at A’s Pretorius Street Branch and later its Pretoria Branch (see below). At some stage, C approached Mrs Fourie and asked her to deposit the first of the fraudulent cheques in the Fouries’ account with Absa (A). She told Mrs Fourie that the cheque was in payment of commissions that she had earned, and explained why she preferred not to collect the cheque through her own account.

Mrs Fourie approached the teller at the branch at which the Fourie account was held (at that stage the Pretorius Street branch) armed with the cheque, a deposit slip, and a bearer cheque drawn on the Fourie account for an equivalent amount (less a small amount that was to be left in the account to cover bank charges). The teller referred her to a supervisor to approve the transaction. The supervisor marked the documents to reflect her approval and Mrs Fourie returned to the teller, who accepted the deposit of M’s cheque, and paid over the amount of the cheque that had been drawn on the Fourie account in cash over the counter. There followed a series of similar transactions each of which followed the same pattern. Mrs Fourie would obtain the approval of a supervisor (in many cases the same supervisor) for the transaction, present the documents to the teller, and walk off with a substantial sum in cash, at times as much as R100 000 or more. She would generally receive a “little something” from C for her trouble. By the time the fraud was discovered 193 fraudulent cheques had been deposited amounting in all to R14 947 258.

Originally two branches of A were involved. M had a current account at the Pretoria Branch while Fourie held a similar account with the Pretorius Street branch (also in Pretoria). A’s Pretoria branch was therefore the drawee (paying) bank of each of M’s cheques, while its Pretorius Street branch acted as collecting bank. However, during 2001 the Pretorius Street branch was closed and incorporated in the Pretoria branch, resulting in the same branch acting as both paying and collecting bank in respect of the cheques in question.

In its particulars of claim, M pleaded a written agreement between it and A’s predecessor, Volkskas Ltd, and attached a copy thereof. M then pleaded “express alternatively implied alternatively tacit terms” as well as breaches of these terms relating to A’s alleged wrongdoing while acting as Fourie’s collecting bank. According to M, such wrongdoing consisted of A having failed to detect and prevent payment of the cheques into Fourie’s account (para 3 *a quo*).

After M had closed its case, A applied for absolution from the instance.

2.2 *Express term not established*

M led no evidence regarding the written agreement and therefore failed to establish any express term regarding A’s alleged breach of contract. Goldstein J therefore agreed with the submission by A’s counsel that as far as tacit and implied terms were concerned, “these cannot be held to have been established because they may well notionally be excluded by the agreement’s express terms” (para 4). On that ground alone, the judge found that A was entitled to an order of absolution (*ibid*).

2.3 *Tacit term not established*

M's counsel contended that on a proper construction of the pleadings and the pre-trial procedure, M had in fact pleaded a tacit contract between it and A in terms of which A became M's banker. Although Goldstein J disagreed with this contention he nevertheless proceeded to deal with the application for absolution on the above contention by M's counsel (para 5). (An application by M's counsel to amend their particulars of claim to exclude all references in the pleading to an express contract regarding an express contractual relationship between the parties was not considered by the judge as he held that absolution had to follow even if the amendment was granted (*ibid*)).

Goldstein J considered the legal position where the drawee bank is also the collecting bank, stating that the question which arose for his decision is whether in such a case the parties "can be found to have included in their contract the term that [the bank] would fulfil the collection function without negligence *vis-à-vis* [the drawer]" (para 6). Referring to *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A) 292B, Goldstein J held that M had led no evidence of any conduct or circumstances which indicated that the parties probably intended such a term, and therefore no tacit term was established, there being "no basis at all for finding the tacit term contended for" (para 7).

2.4 *Implied term not established*

The judge mentioned that M's counsel were unable to find a single case in support of finding the implied term relied on and then posed the following question: "Is there any reason now to conclude that the law recognises such a term, following the reasoning laid down in such cases as *Schoeman v Constantia Insurance Co Ltd* 2003 6 SA 313 (SCA) at 322–3, paras [21] to [26] and [28]?" (para 8). He gave the following reasons for refusing to recognise such term:

Firstly, referring to *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A), Goldstein J held that the drawer of a cheque is protected against a collecting bank's negligence by our law of delict and that there is, therefore, no pressing need for the implied term contended for (para 9). (Of course, the protection offered by our law of delict is not limited to the drawer but extends to the so-called true owner of a cheque).

Secondly, the judge held that recognising such an implied term would deprive a defendant the advantage of apportionment of damages and lead to the result arrived at in *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) (para 10). (This is probably why M's counsel withdrew its alternative claim based in delict at the commencement of the trial). Goldstein J referred to the sentiments of, *inter alia*, Olivier and Nienaber JJA that it may sometimes be unfair not to allow apportionment in cases based on contract, but held as follows:

"Be that as it may, nearly seven years after the decision in *Thoroughbred*, the legislature has still not provided for apportionment in the kind of contractual setting I am confronted with. And so I certainly ought not, in the interests of justness and fairness, to find the implied term contended for, unless there are very strong reasons to do so. Clearly, there are none. It follows that the implied term contended for was not established at all".

2.5 Decision

In view of the foregoing, the order for absolution was granted. As was mentioned at the beginning, M's application for leave to appeal was granted and the Supreme Court of Appeal's approach to the matter will now be considered.

3 Supreme Court of Appeal

3.1 Tacit or implied term

Nugent JA considered (para 15) the court *a quo*'s approach to the question whether an agreement between a bank and a customer as regards a cheque account could be said to include an implied or tacit term to the effect that the bank would fulfil the collecting function regarding cheques drawn by its customer without negligence *vis-à-vis* the latter (see para 2.3 above). The judge held (para 16) that, given the terms in which the question was framed the finding by the court *a quo* could not be faulted. Referring to Malan *et al* para 217, the judge explained the banker-customer relationship in case of a current account as a contract of mandate that imposes, as *naturalia* of the agreement, *inter alia* two main obligations on the bank. First, the bank undertakes, on behalf of its customer, to pay from the account cheques properly drawn by the customer, according to their tenor (provided funds are available in the account). Secondly, it undertakes, on behalf of the customer, to collect cheques properly deposited for collection. The judge concluded that the bank has no obligation to collect, on behalf of someone else, cheques that are drawn by the customer (and to do so without negligence).

However, Nugent JA did "not think that is where the matter ends" (para 17).

3.2 Confusion between payment and collection of cheques

The judge proceeded to point out that a great deal of confusion had been introduced into the case by the use of the above terms in M's particulars of claim and heads of argument as if they are interchangeable, "which they are not" (*ibid*). The judge explained as follows:

"At the outset it needs to be borne in mind that the collection and the payment of a cheque are two sides of one coin and the transactions occur simultaneously. (I am not referring to the acceptance of the cheque for collection, which occurs when the cheque is deposited, but to the collection of the proceeds of the cheque, which occurs when the cheque is paid). In this case [A] both collected the cheque on behalf of Fourie, and simultaneously paid it on behalf of [M]" (*ibid*).

With the above confusion cleared up, the judge held that M's claim, correctly construed, was not founded on an implied term as explained above (see paras 3.2 and 3.1 above).

3.3 True nature of M's claim

Referring to M's particulars of claim (quoted at length in the judgment, eg paras 9, 10 and 19), Nugent JA held (para 18) that M's case on the pleadings was that A was contractually obliged to exercise the care expected of a reasonable banker "when disbursing amounts" on behalf of the drawer and explained:

"The 'disbursement of amounts' from a cheque account occurs when the bank pays a cheque that is drawn on the account. (That the bank simultaneously collects the proceeds to the account of another customer is coincidental)" (*ibid*).

The apparent confusion referred to by the judge did not, according to him, alter the foundation of the claim. In support of this view, the judge quoted at length

from M's opening arguments, which, according to him, clarified the true basis of the claim.

Nugent JA held (para 20) that upon a fair reading of the particulars of claim, the claim advanced by M was that A breached its mandate to exercise reasonable care when paying McCarthy's cheques. According to the judge, the references to collection only conveyed that M's counsel failed to distinguish the two sides of the coin.

In the circumstances Nugent JA found that the application for absolution and the judgment of the court *a quo* were misdirected. However, the judge added that to the extent that A might have been misled in the conduct of its case by the above confusion, the exercise by the court *a quo* of its discretion to allow the evidence to be revisited could avoid injustice (*ibid*).

3.4 Did A have a case to answer?

Nugent JA stated (para 21) that it is trite that the test to be applied by a court when absolution is sought at the end of the plaintiff's case is whether there is evidence upon which a reasonable person might (not should) find for the plaintiff.

The judge then explained (para 22) that the fact that M had a cheque account justified the inference that there was an express agreement (not necessarily reduced to writing) between M and A that a current account should be operated. He quoted Malan *et al* para 217 regarding the bank's duties in this respect:

"It is the duty of the bank to pay cheques drawn by the customer that are in all respects genuine and complete, on demand, provided sufficient funds or credit for their payment are available in the customer's account . . . In paying cheques, the bank must adhere strictly to the customer's instructions, and must perform its duties with the required degree of care, generally, in good faith and without negligence".

In the above context, paragraph 23 of the judgment contains some startling information that reflects a complete misunderstanding of some of the basic principles of the law of bills of exchange. M did not allege that A paid the cheques contrary to their terms. Rather, M's counsel submitted that the named payee was fictitious, and that A was thus entitled to pay the bearer (fn 6 contains a reference to s 5(3) of the Bills of Exchange Act 34 of 1964 (BEA)). This is of course wrong, as section 5(3) applies to order cheques, while the cheques in question were marked "not transferable" and thus they were neither bearer nor order cheques but only valid *inter partes*. (See Malan *et al* para 46 for a discussion of the fictitious payee). However, the thrust of M's argument was that Absa paid the cheques negligently, in that it ought at least to have suspected that *the bearer* (*Fourie*) (our emphasis) was not entitled to them, and should therefore have made enquiry before paying the cheques. There is perhaps some force in this argument when one imagines the elderly Mrs Fourie sometimes leaving the bank with as much as R100 000 in cash (see facts above).

In view of the above, A's counsel conceded (para 24), only for purposes of the appeal, that A's employees ought to have suspected that Fourie was not entitled to the cheques, and thus that they were negligent in having accepted them for collection (our emphasis). As pointed out by Nugent JA (fn 8) this would have exposed A to a delictual action recognised in *Indac* (see para 2.4 above), but as was pointed out earlier, M had abandoned such a claim at the start of proceedings in the court *a quo* (*ibid*). A's counsel therefore quite understandably argued that any such negligence was in its collecting capacity on behalf of Fourie and

not in its paying capacity on behalf of M (“hence the misdirected enquiry as to whether the bank was contractually bound to exercise reasonable care when performing that collecting function” per Nugent JA *ibid*)).

3.5 *The true enquiry*

The court held as follows in this regard:

“But the true enquiry is not whether the bank is liable for negligence in collecting the cheques, but instead whether, in view of the knowledge of its employees (albeit that it was acquired in the course of accepting the cheques for collection), the bank was negligent in paying them (at least without further enquiry)” (*ibid*).

Nugent JA remarked (para 25) that where the paying bank is not also the collecting bank, the above difficulties do not arise since the paying bank usually does not know to whom a cheque is being paid and therefore the bank is protected by section 79 of the BEA. However, the court held (para 26) that where the paying bank is also the collecting bank (A in this case), “the bank will indeed know (or at least be capable of knowing) whom it is paying, because the drawer and the holder of the account to which the cheque is paid are both its customers”.

Nugent JA examined at length (paras 27ff) the implications of the operation of section 79, as explained in *Eskom v First National Bank of Southern Africa Ltd* 1995 2 SA 386 (A) 397D–E and *Standard Bank of SA Ltd v Harris* 2003 2 SA 23 (SCA) para 12, namely, that a bank may be negligent in respect of one function but not in respect of another, for A’s submission that its negligence in collecting the cheques is to be isolated from its conduct in the payment thereof.

The judge held (para 30) that while it might be conceptually possible for a bank to be negligent when collecting a cheque, but not negligent when paying it, he had some difficulty envisaging how that might happen. To him it was a question of the same bank wearing different hats:

“For the question whether a bank is negligent will generally depend on what was known to the bank when it performed the particular transaction, and that would suggest that a bank might have knowledge while wearing one hat, but cease to have that knowledge when it dons the other hat. It seems to me that once knowledge is acquired then it is known whatever hat the person is wearing”.

The court also refrained (para 32) from expressing any view on the correctness of the Australian decision *Nemur Varsity Pty Ltd v National Australia Bank Limited* [1999] VSC 342 referred to by M, in which the bank’s conduct in accepting a cheque for collection was attributed to the bank when considering whether it acted negligently when paying the cheque. The judge remarked that he mentioned the case only to indicate that it cannot be taken for granted that the conduct of a bank in collecting a cheque should be ignored when considering whether the bank paid the cheque negligently.

In the end, Nugent JA was very cautious (para 33) in deciding that it would be undesirable to express any firm view on the issues raised in this appeal and found that the court was not on this occasion called upon to answer any of the questions posed in the course of his judgment. According to him, whether or not A was negligent is a question to be decided with reference to the facts of the particular case. He decided that the court had to accept, for purposes of the appeal, that A’s employees had knowledge that should have caused them to suspect that Fourie might not be entitled to the cheques; and that they knew that the cheques had been drawn by their customer M who would have to pay them. He further held that other facts that emerged from the evidence, for example, that M did not

raise any query once the first cheques had been paid, need to be brought into the picture; and that there might also be generally accepted practices of which the court was not yet aware that would explain why the employee's knowledge ought not to be attributed to A when it paid the cheques. However, he found it sufficient to say that on the evidence placed before the court, a court might indeed find that A ought to have made further enquiry before it paid the cheques, and that its failure to do so was negligent.

Before finding that absolution should not have been granted, Nugent JA made the following remark (para 34):

“Whether any such negligence was causally connected to the loss, and whether any causally connected loss extended to all of the cheques, were not matters raised in this appeal, and I express no view in that regard, beyond saying that a court might find that at least some loss was caused”.

Perhaps this remark should at best be taken as *obiter* since causation, an element of a delict, seems to have been mentioned here in the context of breach of contract.

4 Discussion

4.1 *No contractual duty to collect without negligence*

The Supreme Court of Appeal's judgment brought clarity on at least one aspect of this case, namely, that there is no *contractual* duty, either express, tacit or implied, on a bank not to collect cheques in a negligent manner. On the facts of this case, M's argument based on a contractual claim is in essence that A is under a contractual duty to take notice that one of A's other customers (Fourie) is withdrawing money from its (Fourie's) own account which does not belong to Fourie but to M. Surely no contractual duty on A can be that far-reaching.

Unfortunately, some aspects of Nugent JA's judgement seem no to be as clear.

4.2 *Simultaneous payment and collection of cheques*

It should be borne in mind that in this case there were two different sets of cheques, namely, the fraudulent cheques drawn by M at the instance of its former employee and the cheques drawn by Fourie. What transpired in the bank each time Mrs Fourie concluded one of the (fraudulent) transactions can be summarised as follows: Mrs Fourie, with the approval of one of A's employees, deposited one of M's cheques for collection and immediately presented one of Fourie's own cheques for payment in cash over the counter (s 78 BEA). When A paid Mrs Fourie, it paid a cheque drawn by Fourie, definitely not one of M's cheques. To hold, as Nugent JA apparently does, that it was in fact M's cheque that was paid at that moment holds startling consequences for A: all of M's cheques were crossed, which means that A was legally obliged not to pay them in cash over the counter. At best, one could say that A was in a sense granting credit to Mrs Fourie on the strength of M's cheque which still had to *collected and paid* through the normal cheque collection process.

Furthermore, it cannot be said that that each of the fraudulent cheques were cleared (collected and paid) by the bank once the supervisor gave permission for the transaction to proceed. Even in case of a cheque drawn on the same branch of a bank (as was the case with M's cheques), the bank still processes it through its own internal clearing department where the magnetic code is read and the bank's internal computer completes the clearing process before eventually returning the

paid cheque to the drawer. Because of the decrease in the number of cheques in circulation, some of the larger banks have decided to outsource even their internal clearing process to Bankserve (the former Automated Clearing Bureau) to do the clearing on their behalf. (See Malan *et al* para 189 for a discussion of the collection process). The payment of each the fraudulent cheques therefore took place in terms of the rules of the clearing system and was only completed once the cheque once again reached A through the system. (Payment of the cheque also had to be recorded in terms of the National Payment System). Nugent JA's statement that "[i]n this case [A] both collected the cheque on behalf of Fourie, and simultaneously paid it on behalf of [M]" does not seem to reflect current banking practice and it appears to be incorrect. (As regards the exact moment of payment of a cheque through the electronic clearing system see Malan *et al* para 215 and authorities cited).

4.3 Section 79 and negligence in the payment and collection of cheques

It is submitted that there is nothing wrong with the judgments in *Eskom* and *Harris* to which Nugent JA referred (see para 3.5 *supra*) in respect of the question as to whether the same bank can at the same time be negligent in collecting cheques but not negligent in paying them and it is not clear whether the judge actually doubts their correctness. (See also Malan *et al* para 262). Perhaps too little attention was given to the final part of the statement by Brand JA in *Harris* para 12 (which was not quoted by Nugent JA para 28):

"In such circumstances it would be most unfortunate if the bank were to derive absolute immunity from liability in its capacity as a collecting bank solely by virtue of it being exonerated from liability as a paying bank by the provisions of s 79. In fact, I believe that the acceptance of such immunity would fly in the face of the reasoning which underlies the decision in the *Eskom* case".

5 Conclusion

Many years ago Alistair Kerr wrote an interesting article on the persuasive force of an *obiter dictum* ("The persuasive force of *obiter dicta*" 1975 *SALJ* 136). In this article he made the point that courts should as far as possible refrain from making these statements for the simple reason that usually the law on that particular point was not properly argued before the court and the court thus did not have the benefit of proper legal argument before the court makes the obiter statement. In *McCarthy* we may again have some of these statements that may influence the further development of our law without there being a proper consideration of the consequences of the particular statement. Perhaps the best stance to take on the largest part of Nugent JA's judgment is that, as he himself said (para 33), it was undesirable for the court to express any firm views on the many questions raised. This is especially so where there are insufficient evidence placed before the court. The ill-conceived admissions of counsel also did not make matters easier for the court. Then, perhaps the decision not to proceed with the delictual action may be real cause of the M's problems. However, we fully agree with the finding regarding the absence of the contractual duty explained in paragraphs 1, 2, 3.1 and 4.1.

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