# POST-DATED CHEQUES, "IRREGULAR" INDORSEMENTS AND HOLDERSHIP IN DUE COURSE

## African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoo 2008 6 SA 46 (D)

## 1 Introduction

This judgment of Moosa AJ concerns two separate but related applications (9238/2005 and 10785/2005) which were heard together. A substantial part of the judgment deals with questions of civil procedure and falls outside the scope of this note. As will become apparent below, the focus is on certain aspects of the law of negotiable instruments that formed the crux of Moosa AJ's judgment.

## 2 Facts

Covmark drew three post-dated cheques payable to Wilmington or bearer. Wilmington negotiated these cheques by way of special indorsement to African Bank before the post date on the cheques had arrived. For reasons that need not be repeated here, African Bank's success in the case depended on the question whether it qualified as a holder in due course of the cheques. The first prong of attack against the bank's assertion that it did indeed so qualify, was that the documents in question were not valid cheques at the time they were negotiated to it. The second argument was that a special indorsement on a bearer document renders it irregular and that the bank did not comply with the requirement in section 27(1) of the Bills of Exchange Act 34 of 1964 (hereinafter "BEA") that, for purposes of holdership in due course, the document must be regular on the face of it. These arguments are considered below.

### 3 Holdership in due course of a post-dated cheque

The respondents argued that it is a misnomer to refer to the cheques in issue as cheques since they do not meet the definition of a cheque in section 1 of the BEA which defines a cheque as a bill drawn on a bank payable on demand (55F–G). The applicant's answer to this was that the respondents admitted in their papers that the bills in question were indeed cheques (55H). Moosa AJ considered this argument to be without merit (55I/J). Referring to some well-known textbooks he held that all the texts dealing with bills of exchange describe the instrument in question as a post-dated cheque, although there are suggestions that a post-dated cheque is not a cheque (at least not until the post date arrives) (55I–J). This is, of course, reminiscent of a remark in *Standard Bank of South Africa Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) 505E to the effect that a post-dated cheque becomes valid as a cheque on or after the period of the post date. Moosa AJ concluded that the fact that these documents are commonly called cheques is not for that reason "indeed a cheque as countenanced by the Act" and that the question of whether a post-dated cheque is indeed a cheque under the BEA is a question of law (56B–C).

Moosa AJ then dealt with the argument that a post-dated cheque is not payable on demand and that it is therefore not a cheque. He also dealt with the contention that a post-dated cheque, although not a cheque when issued, becomes a cheque on the post date (see Malan and Pretorius *Malan on bills of exchange, cheques and promissory notes in South Africa* (2002) para 199 who rely on the above remark in *Sham*). According to the judge this argument is without force or substance (56I). Referring to the definitions of the different instruments in the BEA he held that in effect a cheque is a type of bill which, in view of the definition in section 2(1), "is a demand instrument which is addressed to a bank" (57B). According to him, doubt would arise as to the status of post-dated cheques in the absence of a provision in the BEA providing for the "altogether frequent and daily occurrence" of post-dating of cheques. The judge held that it is for this very reason that section 11(2) of the BEA provides that a bill will not be invalid by reason only of the fact that it is post-dated (57B–C).

Moosa AJ also considered as erroneous the applicant's argument (supported by Cowen and Gering *The law of negotiable instruments in South Africa, general principles* Vol 1 (1985) 190) that a post-dated cheque is one which is payable on a fixed future date (57G). He indorsed the position explained by Malan and Pretorius para 191 that a date on which a cheque is payable is seldom expressed in it and in terms of section 8(1)(b) of the BEA such an instrument is payable on demand (57H).

He also referred with apparent approval (57H–I) to a statement by Cowen (*The law of negotiable instruments in South Africa* (1966) 60) that in practice a post-dated cheque is treated as payable on demand on or after the post date, before briefly considering (57I–58A) section 43(2)(b) of the BEA which provides that if a bill is payable on demand it must be presented within a reasonable time after its issue. He held that in determining a reasonable time in case of a post-dated cheque regard will be had to the fact that it was post-dated and was only payable on demand effective from the date of its post date (58B). He concluded:

> "It is clear that without Section 11(2) of the Act, the status of a post-dated cheque would remain doubtful as aforesaid. Not only does Section 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 Section 2(1) of the

> Act and the definition of a cheque in Section 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" (58B–D).

Moosa AJ was also not convinced by the respondent's reliance on the decision of the High Court of Australia in *Brien v Dwyer* [1978] 141 Commonwealth LR 378 and pointed out that according to Chalmers and Guest *On bills of exchange, cheques and promissory notes* (1998) para 240 the preferred view was that expressed by the Court of Appeal of New South Wales in *Hodgson and Lee (Pty) Ltd v Mardonius (Pty) Ltd* (1986) 5 NSWLR 496, that since a post-dated cheque is not payable at a fixed or determinable future time, it was payable on demand and was therefore a cheque (58D–H).

The judge also held that the above remark of the Appellate Division in *Sham* 505E, that a post-dated cheque becomes a cheque on the future date, does not avail the respondents:

> "With all due deference to the status of the Court in question, it is clear that the then Appellate Division was not called upon to decide the issue which is before me. Nor do I think that what was said by the Appellate Division is necessarily even *obiter*. All that the Court was recording, for the sake of completeness, was that it was not disputed that the post-dated cheque became valid as a cheque on or after the period of the post date. Firstly, the then Appellate Division could never have intended to suggest that the post-dated cheque was invalid as an instrument prior to the post date having regard to the express provisions of Section 11(2) of the Act. Secondly, to read into the words of the Appellate Division a necessary inference or implication that the Court intended to say that the post-dated cheque was invalid as a cheque prior to the post date thereof is simply unwarranted" (59B/C–E).

Moosa AJ concluded that there is no merit in the respondents' contention that post-dated cheques are not cheques as contemplated by the BEA. He held that a post-dated cheque "is a bill as countenanced under the Act", and that it therefore follows that a party such as African Bank may become a holder in due course even if the instrument is negotiated to him before the post date (59E–F).

Finally, referring to *Sham* 505E, Chalmers and Guest para 239 and Malan and Pretorius para 191, the judge held that even if he was wrong in finding that a post-dated cheque is a cheque for purposes of the BEA, he could find no impediment to a party becoming a holder in due course of such an instrument (59G). He added that there is nothing to suggest that such an instrument is not complete and regular on the face of it (59H). Having referred to foreign judgments in point (60B–I), he concluded this part of his judgment by finding that the applicant was entitled to become a holder in due course of the cheques which were post-dated at the time of his acquisition thereof (60J).

### 4 The effect of the special endorsements on the cheques

The cheques drawn by Covmark were payable to "Wilmington" and the printed words "or Bearer/of Toonder" were not deleted (55A–B). The reverse of the first cheque carried the following special endorsement:

> "Endorsed as a special endorsement in full and without restrictions or conditions to the order of African Bank Ltd t/a AB Commerce by Wilmington Personal CC" (53C).

The other two cheques were specially endorsed in almost the same terms:

> "Endorsed as a special endorsement in full and without restrictions or conditions to the order of African Bank t/a AB Commerce by Wilmington Personal Care CC" (55D).

Moosa AJ noted that the respondents made no issue of the fact that whilst the payee was described as "Wilmington", the endorser of the cheques is either Wilmington Personal CC or Wilmington Personal Care CC (55D–E).

At the outset, Moosa AJ pointed out (61A) that counsel for both parties were *ad idem* that "regularity" is distinct from "validity" under the BEA and quoted the following well-known statement by Denning LJ in *Arab Bank Ltd v Ross* [1951] 1 All ER 709 (CA) 715F (approved of by the Supreme Court of Appeal in *A Melamed Finance (Pty) Ltd v VOC Investments Ltd* [2006] SCA 75 (RSA) para 9):

> "Now, regularity is a different thing from validity. The Act itself makes a careful distinction between them. On the one hand, an endorsement which is quite invalid may be regular on the face of it . . . Conversely, an endorsement which is quite irregular may, nevertheless, be valid . . . Regularity is also different from liability. The Act makes a distinction between these two also."

Counsel also agreed (61D) that there was an attempt to convert the cheques from bearer instruments to order instruments by means of the special indorsements thereon. The judge then reiterated (61D–E) what is by now trite law, namely, that while section 6(2) of the BEA provides that an order instrument may be converted into a bearer instrument by means of an indorsement in blank, there is no provision in the BEA to convert a bearer instrument into an order instrument by means of a special indorsement, referring to *Interlease Ltd v Massyn* 1979 3 SA 801 (O) and *Pienaar v Maritz* 1985 1 SA 547 (T) as authority. (See further the discussions of these decisions by Reinecke 1979 *TSAR* 260, Dijkman 1985 *TSAR* 105 and Labuschagne 1985 *TSAR* 96 who support their correctness. See also Malan and Pretorius para 99ff who canvass all the arguments in this regard. It should be noted that Sinclair "Special and restrictive indorsement on bearer instruments" 1985 *SALJ* 231 doubts the correctness of the decisions in *Pienaar* and *Interlease*. She finds herself in splendid isolation in this regard. See further Pretorius's rebuttal of Sinclair's arguments in 1985 *Annual Survey* 348ff.)

Because of the respondents' argument in this regard (see below) Moosa AJ then (61E/F) introduced section 62(1) of the BEA which provides, *inter alia*, that if a bill is materially altered, the liability of parties who are parties to the bill at the date of alteration and who did not assent to it must be regarded as if the alteration had not been made. The respondents argued (61F–G) that while the alteration, and assuming it to be material, of the instruments from bearer cheques to order cheques would not necessarily result in the invalidity of the cheques, "the jurisdictional requirement for becoming a holder in due course under Section 27(1) of the Act is regularity and not validity". They also argued that the alteration in question rendered the cheques irregular, regard being had to the test for regularity in law (61G/H).

The applicant countered (61H–I) by arguing that, since as a matter of law (following *Interlease* and *Pienaar*) it is not possible to change bearer instruments into order instruments by means of a special indorsement, a banker would not be suspicious about an indorsement purporting to do so and would simply regard it as superfluous. The applicant relied on *Sappi Manufacturing (Pty) Ltd v Standard Bank of South Africa Ltd* 1997 1 SA 457 (A) 465D where the court stated:

> "Admittedly the Appellant's name was not inserted in the qualification, but such a banker would, in my view, construe the bills in the same way that I have; and he would have no doubt about the singularity of the payee and the indorser."

Moosa AJ considered the applicant's point of view, namely, that the special indorsements were not irregular, in that they would not give rise to suspicion, as misconceived (62A/B). According to him, the applicant had made the same error as the court did in *Mobeni Supersave v Suleman* 1992 3 SA 660 (N) when it confused the test for irregular indorsements with that for material alterations as pointed out by the Supreme Court of Appeal in *Melamed Finance* para 11 (62B). He continued by quoting the following from *Melamed Finance* paras 8 and 9:

> "Two types of irregularity occur in bills: Irregular endorsements and material alterations. They are not treated by the law in the same way. An endorsement is considered to be irregular when its form is such as to reasonably put the holder on enquiry . . . An alteration need not give rise to suspicion before it leads to the irregularity of a bill. It need only be apparent and material . . . The alterations to the cheques were patent and were immediately noticed by the person who took them on behalf of the Appellant. The validity of the cheques was unaffected by the alterations to the dates, but that is irrelevant. Validity and regularity are different concepts, as Denning LJ explains in *Arab Bank v Ross*. A bill could be valid but irregular or invalid but nevertheless regular" (62C–D).

In Moosa AJ's view, *Melamed Finance* (paras 10–11) also rejected the contention that *Sappi Manufacturing* had effectively made the reasonable suspicion test one which applied to endorsements as well as to material alterations (62E). Referring to *Melamed Finance* para 9 he held that an alteration need not give rise to suspicion before it leads to the irregularity of a bill and that it need only be apparent and material (62E–F). Following on *Arab Bank* 716A–B, cited with approval in *Melamed Finance* para 8, Moosa AJ said, without deciding the issue, that it appeared to him, *prima facie*, that an irregular indorsement is one that is confined to the question of whether there is doubt as to whether an indorsement is that of the named payee (62F–G). On the other hand, he held that the test for an alteration is much wider (61G), as formulated by Brett LJ in *Suffell v The Bank of England* 1882 9 QB 555 568 (accepted in *Mobeni Supersave* 667H and *Melamed Finance* para 12): "Any alteration of any instrument seems to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such instrument or any part of it is used." (The decision in *Melamed* is discussed by Nagel and Pretorius "Holdership in due course, material alterations and the regularity of a bill of exchange" 2007 *THRHR* 344.)

Moosa AJ held (62I) that there can be no doubt that an attempt to convert a bearer instrument into an order one meets the above test for a material alteration because converting a bearer bill into an order one would increase the liabilities of the drawer. After quoting (62J) from *Hallmark Motor Group (Pty) Ltd v Phillip Motors CC* [1997] 4 All SA 707 (W) 710–711 he held that if a drawer makes out a bearer instrument which is later converted into an order instrument, he might well not be discharged if he pays the holder of the instrument if the holder was not entitled thereto (63C–D). On the other hand, if the instrument remains a bearer one, the drawer is clearly discharged if he pays the party in possession of the instrument. Relying on *Melamed Finance* para 17, Moosa AJ then made the following crucial statement: "Any alteration to the liability of parties to a bill would amount to a material alteration" (63D/E).

With reference to Britton *Handbook of the law of bills and notes* (1961) 286 (cited with approval in *Mobeni Supersave* 667A–C) Moosa AJ remarked (63E) that less evidence is required to establish irregularity under section 27(1) of the BEA than is required to establish a material alteration under section 62, because

not all apparent changes on the face of an instrument are material alterations for purposes of section 62. As examples, he mentioned (63F) changes made by the drawer prior to issuance that would not amount to an alteration within the context of section 62(1) (relying on *Melamed Finance* para 16, but quoting (63G) for some reason the court *ibid*: "That, however, does not mean that a material alteration made before the issue of a bill does not affect the position of a holder in due course"). Referring to *Mobeni Supersave* 666E–F the judge mentioned that, in addition, for purposes of regularity under section 27(1) the document must be "immaculate and orthodox in point of law" 63G/H).

Central to Moosa AJ's eventual decision is the following statement:

> "In the present matter I have already found that the purported conversion of the bearer cheques into order instruments meets the test of a material irregularity because it alters the liability of the parties to the bill. In the circumstances, it is clear that the Applicant cannot be a holder in due course of the post dated cheques in question" (63H–I).

Finally, Moosa AJ declined to follow (63I–64A) the judgment of Richings AJ in *Cutfin (Pty) Ltd v Sangio Pipe CC* [2002] 2 All SA 186 (D) (heard in the same local division) who held that an alteration converting a bearer instrument into an order instrument was not material but that even if it was the liability on the instrument remained unaltered because of the provisions of section 62(1) of the BEA:

> "This appears to have led him to conclude that such an alteration did not preclude the negotiability of the cheque to a holder in due course. If I understand the Judgment of Richings AJ correctly, then I am bound to follow that Judgment unless I am convinced that the Learned Judge was clearly wrong. I am so convinced. It is quite apparent that the Learned Judge conflated the test for irregularity under Section 27(1) of the Act with the test for a material alteration, and its impact upon the liability of the parties to the instrument, under the provisions of Section 62(1) of the Act" (64A–B).

(The decision in *Cutfin* attracted a fair amount of negative comment and criticism (Nagel "Omskepping van toonderdokument in orderdokument *Cutfin (Pty) Ltd v Sangio Pipe CC* [2002] 2 All SA 186 (D)" 2002 *THRHR* 317; Nengome "Conversion of an instrument originally payable to bearer into an order instrument" 2003 *SA Merc LJ* 722 and Cassim "Once a bearer bill, always a bearer bill or perhaps not?" 2002 *SALJ* 679, especially since it overlooked the decisions in *Interlease* and *Pienaar.* See further Pretorius 2002 *Annual Survey* 725–726 for a critical discussion of *Cutfin*.)

In the end, Moosa AJ held "that the indorsements on the cheques in dispute are not regular within the meaning of Section 27(1) of the Act and the Applicant is accordingly precluded from being a holder in due course of the cheques in question" (64C).

## 5 Comment

### *5 1 Post-dated cheques*

It is submitted that the court was correct in holding that a post-dated cheque is a valid cheque since section 1 makes 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 section 2(1) of the Act and the definition of a cheque in section 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 some time

in the future. It is then easy to explain the application of the provisions relating to crossed cheques to post-dated cheques, a post-dated cheque 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.

*5 2 Irregularity*

Moosa AJ pointed out that counsel agreed (61D) that there was an attempt to convert the cheques from bearer instruments to order instruments by means of the special indorsements thereon. It is submitted that this concession was indeed ill conceived.

The BEA specifically provides for the conversion into a bearer instrument of an instrument drawn payable to order (s 31(1)). The words "expressed to be so payable" must be given the same meaning in both subsections, but where express provision is made for the conversion of order bills into bearer bills that specific provision should be followed. No similar provision is made, it should be noted, for the conversion of a bill drawn payable to bearer into an order instrument. Thus, it is submitted that instruments drawn payable to bearer remain so payable by virtue of the provisions of section 6(2), despite the presence on them of special indorsements.

Section 34(1)(a) provides that a bill which is negotiable in its origin remains negotiable until it is "restrictively indorsed". But not all restrictive indorsements prevent further negotiation (s 32). If one gives "negotiable" in section 32 the meaning of "transferable", section 34(1)(a) cannot be given its literal meaning.

The interpretation of "indorsement" suggested above does not, however, apply to all provisions of the Act. Not all the sections of the Act dealing with "indorsement" and "indorser" are concerned with an indorsement effecting a negotiation. Some deal with the liability of the indorser and others with his right of recourse. An indorsement may not be necessary to effect a negotiation (transfer function) but may well found liability of the indorser (guarantee function). One of the effects of the rule that a special indorsement does not convert an instrument drawn payable to bearer into an order instrument is that the special indorser incurs liability only to the special indorsee and persons acquiring title through him. The instrument itself remains payable to bearer and may be negotiated by delivery alone. The special indorsement can thus be seen as comprising words limiting or restricting the liability of the special indorser (s 14(a)). If the rationale of this rule is taken to its logical conclusion, words prohibiting negotiation added to an indorsement on an instrument drawn payable to bearer merely limit the indorser's liability, so that he incurs liability only to his immediate transferee, and do not restrict further negotiation. (See Malan, Oelofse and Pretorius *Final report on the reform of the Bills of Exchange Act, 1964* (1994) 74ff where these arguments are canvassed in detail. See also Pretorius 1985 *Annual Survey* 350–351.)

In the final analysis one could congratulate Moosa AJ on a very thorough judgment. The court was perhaps pointed in the wrong direction by the unfortunate concession that there was indeed an attempt to convert the bill originally payable to bearer into an order bill by means of the special indorsement. Seen in this light, there appears to be some room to argue that the court should have perhaps considered the possibility that a special indorsement merely limited the indorser's liability without necessarily rendering the cheque irregular for the

purposes of section 27 (Malan, Pretorius and Du Toit *Malan on bills of exchange, cheques and promissory notes in South African law* (2009) para 123).

Perhaps the lesson to be learnt from this judgment is that counsel have a responsibility not to make concessions without further ado, especially when they have not consulted all the sources and read all the arguments on a particular point.

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