Countermanding an Electronic Funds Transfer: The Supreme Court of Appeal Takes a Second Bite at the Cherry

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1 Introduction

Payment can be effected in various ways. There are at least five main categories of instruments or methods of payment: *(a)* payment may be made by the physical delivery of conventional money (coins and bank notes) from the payer to the payee; *(b)* payment may be made by way of a negotiable instrument, such as a cheque, bill of exchange, or promissory note;[1] *(c)* payment may be made by way of paper-based instruments other than negotiable instruments, such as travellers' cheques; *(d)* payment may be made through tangible paying methods other than negotiable instruments or other paper-based paying instruments, such as by credit, debit, or cheque card;[2] or *(e)* payment may be made through an intangible method of payment, such as electronic funds transfers.[3]

The proliferation of different forms of payment is the result of a revolution in banking, generally, and payment methods, specifically. Three main forces underlie this 'revolution': changes in information technology, changes in communications technology, and globalization (commonly, internationalization).[4] These forces also have a huge impact on the concept 'money' as humankind has came to know it over the last 3 000 years. During the last three millennia the objects used as money or legal tender changed from whale teeth, precious stones, maize, wheat, and cattle (the first working capital asset) to pre-coinage metallic money.[5] The earliest known object used as money was the cowrie — the ovoid shell of a mollusc found in shallower stretches of the Indian and Pacific oceans. Cowries were ideally suited to

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1 Strictly speaking, payment by way of a negotiable instrument, like an electronic funds transfer, involves a transfer of funds, but the order by the payer (drawer) to the payee to transfer the funds embodied in the negotiable instrument is paper based, not electronic.

2 On payment cards, generally, see EP Ellinger, Eva Lomnicka & Richard Hooley *Modern Banking Law* 3 ed (2002) 529ff; Ross Cranston *Principles of Banking Law* 2 ed (2002) 266ff.

3 In the United Kingdom and Europe, the electronic transfer of funds is commonly referred to as a 'giro' transfer. 'Giro' derives from the Greek 'gyros', meaning ring, revolve, circular, or cyclical: see *Law of Bank Payments* 3 ed by Michael Brindle & Raymond Cox (eds) (2004) 49n1. On the giro system and electronic funds transfer, generally, see Ellinger et al op cit note 3 at 460ff.

4 Melanie L Fein *Law of Electronic Banking* (2000) xxv.

5 For examples of pre- or non-metallic money used in the past (such as whale teeth by the Fijians0, see Glyn Davies *A History of Money: From Ancient Times to the Present Day* (2002) 34ff.

serve as currency.[6] Coinage and printed money came much later.[7] Presently, the concept 'money' is undergoing yet another change with the advent of e-money. It, too, comes in different forms. One type of e-money is electronically transferred funds from one bank account to another.[8]

There are two categories of electronic funds transfer systems: non-consumer-activated and consumer-activated systems.[9] The rest of this article turns on transfers effected by consumer-activated systems.

Over the last few years there has been a steady increase in the number of electronic funds transfers in South Africa. At the same time there has been a steady decrease in the number of cheques processed by the Automated Clearing Bureau (ACB). The following statistics will illustrate this phenomenon: during 1999 there were 306 963 million electronic magnetic tape transactions in South Africa with a total value of R2 088 479 billion. In 2000, there were 325 383 million electronic funds transfers with a total value of R2 936 100 billion. In 2001, these figures had increased to 358 740 million and R3 484 208 billion, respectively. In 2002, there were 387 576 million electronic funds transfers with a total value of R1 889 455 billion. In 2003, the figures reached 428 230 million electronic transactions with a total value of R2 144 739 billion. The decrease in the use of cheques, in turn, is illustrated by the following statistics: in 1999, a total of 280 644 million cheques (with a face value of R5 358 351 billion) were processed by the ACB. In 2000, the number of processed cheques dropped to 270 565 million (with a total face value of R4 933 171 billion). In 2001, the number of processed cheques further decreased to 237 781 million (with a total face value of R3 839 540 billion). In 2002, the number of processed cheques dropped to 187 442 million (with a total face value of R1 708 618 billion). In 2003, the number of processed cheques hit 143 848 million (with a total face value of R1 472 067 billion).[10]

The development of e-money products and electronic funds transfer systems was the direct result of the many disadvantages that conventional coins and notes ('cash') and cheques have. The disadvantages of cash are obvious: handling costs, counterfeiting, and, particularly in South Africa, a high security risk.[11] The disadvantages of cheques are many: they can be counterfeited, high bank costs, and theft, to name but a few. These and other factors, such as technological development and the advent of the computer age, all contributed to the need for and the possibility of an anonymous form of payment where the parties who want to effect and accept payment no longer physically had to exchange money.

[6] Idem at 36.
[7] Idem at 45ff
[8] Electronic funds transfers can be divided into credit and debit transfers, according to the way in which the payment instruction is communicated to the payer's bank. For a discussion of the difference between a credit transfer and a debit transfer, see Brindle & Cox op cit note 3 at 51ff. The electronic transfer of funds should be contrasted with paper-based funds transfers. For a discussion of paper-based funds transfers, see Brindle & Cox op cit note 3 at 68ff.
[9] Brindle & Cox op cit note 3 at 75ff.
[10] See South African Reserve Bank *Quarterly Bulletin* (no 231) March 2004 at S-13. See further Heinrich Schulze 'Countermanding an Electronic Transfer' (2004) 12 *Juta's Business Law* 84.
[11] See Brindle & Cox op cit note 3 at 49.

Where the creditor and the debtor are not in each other's presence and both have bank accounts that are linked to a computer, or have access to an online computer facility such as an automated teller machine, payment can take place by way of electronic funds transfer. A direct or immediate payment (such as cash) must be contrasted with an indirect payment (where a third party, usually a bank, acts as a payment intermediary, as is the case with an electronic funds transfer, to mention but one example).

Reported court decisions dealing with electronic funds transfers are few and far between. This phenomenon can be attributed to a number of factors. In the first instance, as this method of payment is electronically based and requires little human intervention, there are, generally, few disputes between banks and their clients as to its use. Secondly, because the amount usually involved in most electronic funds transfers is relatively small, it is not worth his or her while for the payer (the transferor of the funds, in the case of an electronic funds transfer) to litigate if he or she does not agree with the bank's records of such a transaction. Thirdly, and most importantly, is the fact that banks are the sole scribes of the rules and conditions under which electronic funds transfer facilities are offered to potential (or existing) clients. It goes without saying that in terms of these rules, which the bank drafted, that the client has to assume the lion's share of the risk involved in using electronic funds transfers. Clients who want to make use of electronic funds transfer facilities, to mention but one of the many facilities offered by the banks, simply have to abide by the rules and conditions as drafted by the banks if they want to use them.[12]

There is a dearth of South African legal material on electronic funds transfers. A number of issues relating to such transfers of funds are clouded in uncertainty.[13] For this reason alone one has to welcome two recent decisions of the Supreme Court of Appeal. In the first, *Take & Save Trading CC v The Standard Bank of SA Ltd*,[14] the court made a number of obiter comments concerning electronic funds transfers. In the second, *Nissan South Africa (Pty) Ltd v Marnitz & others*,[15] an electronic funds transfer was at the heart of the issue at stake, and the ratio decidendi of the court constitutes an important contribution to our current knowledge and understanding of this important topic in banking law.

My aim here is, first, briefly to explain the concept and legal nature of electronic funds transfers, and, secondly, to canvass these two decisions of the Supreme Court of Appeal in which the court explained the legal ramifications of payment by way of an electronic funds transfer.

[12] See WG Schulze 'e-Money and Electronic Fund Transfers. A Shortlist of Some of the Unresolved Issues' (2004) 16 *SA Merc LJ* 50 at 59–60.
[13] See further 2.2–2.4 below.
[14] 2004 (4) SA 1 (SCA).
[15] SCA 1 October 2004 (case no 27/2004) unreported.

2 Legal Implications of Payment by Electronic Funds Transfers

2.1 The Sources of Law

The primary sources of law relating to payment by electronic funds transfers are the law of mandate and the law of contract. There is no legislation in South Africa dealing directly and exclusively with electronic funds transfers. Although the Electronic Communications and Transactions Act[16] provides a wide and general framework for the facilitation and regulation of electronic communications and transactions, including electronic transactions for financial services,[17] it does not deal exclusively with electronic banking services. I believe that a number of aspects surrounding the use of electronic banking products are not necessarily covered by the Act. I also believe that the rapid development of electronic banking will open further holes in the Act in so far as its viability as an all-encompassing legislative instrument is concerned. This is in stark contrast to the position in the United States of America where consumer transactions are regulated by the federal Electronic Funds Transfer Act of 1978, as well as article 4A of the Uniform Commercial Code, where the latter has been adopted as state law.[18]

So South African lawyers have to rely to a large extent on common-law principles of the law of contract to solve the many potential legal problems posed by electronic funds transfers.

The electronic transfer of funds raises a number of legal issues. Aspects such as by and to whom payment is made, the legal nature of the relationship between the payer and the payee, the legal nature of the relationships between the different banks that are involved in effecting payment,[19] the exact time of payment, the legal nature of payment by way of an electronic funds transfer, and whether an electronic funds transfer is an absolute or a conditional payment, are just some of the questions that still need to be answered.[20] Here I shall restrict myself to some of these.

2.2 The General Nature of Payment by Electronic Funds Transfer

It is trite that an electronic funds transfer is not an instrument of payment (unlike a cheque, for example). In the case of an electronic funds transfer, there is no physical instrument that embodies certain rights and that can be transferred from one person to another. So an electronic funds transfer may best be described as a method of payment, a medium through which a third party (the payer's

[16] Act 25 of 2002 ('ECTA'). The Regulation of Interception of Communications and Provisions of Communication-Regulated Information Act 70 of 2002 is another example of a statute that may be relevant to electronic banking.

[17] See, for example, s 42 of the ECTA.

[18] See Brindle & Cox op cit note 3 at 107.

[19] See Ellinger et al op cit note 2 at 497ff for a discussion of the position of the payer's bank, at 507ff for a discussion of the position of the payee's bank, and at 504ff for a discussion of the position of the intermediary bank.

[20] For a list of the legal implications of payment by funds transfer in English law, see Brindle & Cox op cit note 3 at 107ff.

bank) is given an instruction by the payer to effect payment through an electronic medium (a computer system) to the beneficiary's bank account.[21]

It has been said that an electronic funds transfer 'involves the movement of a credit balance from one bank account to another, which is brought about by the adjustment of the balances of the payer's and payee's accounts, whether at the same or separate banks'.[22] The payer and the payee can be one and the same person (such as where the payer (client) instructs the bank to transfer funds from his or her savings account to his or her current account). Where the payer and the payee have accounts at the same branch of the same bank (an 'intra-branch' transfer), or at different branches of the same bank (an 'inter-bank' transfer) the same bank acts as both the payer's and the payee's bank. As a result, the transfer of funds between the clients' (where the payer and payee are clients of the same bank) takes place through the adjustment of their account balances at that bank.[23]

Where the payee's account is held at a different bank, two banks are required to complete the electronic funds transfer (an 'inter-bank' transfer). The paying bank will pay the payee's bank and the latter will then transfer the funds to the payee's account. Usually, the instruction by the payer is given electronically, either from an automated teller machine, a point-of-sale facility, or a personal computer, provided that the payer is registered to use Internet banking services.

It has been pointed out that there is no transfer of property under an electronic funds transfer. It simply involves the adjustment of the separate property rights of the payer and the payee as against their own banks.[24] Put differently, an electronic funds transfer involves an electronic book entry in terms of which the payer's account is debited with the amount of the transfer, and the payee's account is credited with the same amount. So it is a misnomer to speak of the transfer of funds, as there is no actual transfer of bank notes and coins from one person to another.[25]

2.3 The Legal Nature of Payment by Electronic Funds Transfer

The next question that needs to be answered concerns the legal nature of an electronic funds transfer. In *Libyan Arab Foreign Bank v Bankers Trust Co*,[26] the court held that '[an electronic fund] transfer may be a somewhat misleading word, since the original obligation is not assigned … ; a new obligation by a new debtor is created'.

[21] See further 2.3.3 below.

[22] See Brindle & Cox op cit note 3 at 49.

[23] Idem at 53.

[24] Ibid. See further Ellinger et al op cit note 2 at 497.

[25] For a discussion of the operation of the clearing system of electronic funds transfers, see Brindle & Cox op cit note 3 at 53-4. For a discussion of the main United Kingdom, European, and American clearing systems, see idem at 54ff. See further Joan Wadsley & Graham Penn *The Law Relating to Domestic Banking* 2 ed (2000) 366ff; Cranston op cit note 2 at 277ff.

[26] [1989] QB 728 at 750.

2.3.1 Novation

I believe that *Libyan Arab Foreign Bank* was correct in holding that a payment through an electronic funds transfer constitutes a novation of the original debt. The payee (creditor) accepts that the money will, in terms of the transaction underlying the electronic funds transfer, be paid to him or her by the bank that acted as mandatary of the payer (the mandator).

Novation is an agreement in terms of which one obligation or more is extinguished and replaced by a new obligatory relationship.[27] Novation is usually intended merely to substitute a new obligation for the original obligation.[28] Novation may also take the form of a delegation, in that it is intended to substitute a new party (delegatus) for one of the original parties to the obligation (delegans).[29] But I doubt that the parties to an electronic funds transfer intend that the bank is substituted for the original debtor.

2.3.2 Assignment

In *Libyan Arab Foreign Bank*, the court held that under English law an electronic funds transfer does not constitute an assignment of the debt.[30]

Assignment involves a transfer of the duty to perform by the debtor to a third party, with the consent of the creditor.[31] Assignment of an obligation should be contrasted with its novation. It has been argued that '[a]ssignment effects on the passive side of the obligation what a cession accomplishes on the active side, and requires a transfer agreement instead of an animus novandi'.[32] Through assignment the third party replaces the debtor and steps into his or her shoes.

If an electronic funds transfer constitutes an assignment, it would have a considerable impact on whether such a transfer can be countermanded or revoked. (For the purposes of the assignment, the payer would be the 'assignor', the payee the 'assignee', and the payer's bank the 'debtor'.[33]) It has been noted that once an unconditional assignment is complete, it cannot be revoked. Also, the assignee (the payee) would, through the assignment, acquire rights against the payer's bank, something which surely is not contemplated or agreed to by the bank.[34] I shall later return to whether and under what circumstances an electronic funds transfer can be countermanded.[35]

[27] See Schalk van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 2 ed (2003) 500.
[28] Idem at 501.
[29] Ibid.
[30] English law distinguishes between an equitable assignment and a statutory assignment in terms of s 136 of the Law of Property Act 1989. This distinction is not important for present purposes. See further Ellinger et al op cit note 2 at 494–495.
[31] South African law initially did not allow debts to be ceded. Traditionally, a debtor could transfer his duties to another only by means of a delegation involving a novation of the existing obligation. But, in *Botha v Van Niekerk* 1983 (3) SA 513 (W), it was recognized that, with the consent of the creditor, a debtor may transfer the duty to perform to a third party, without the need of a novation, by way of a so-called assignment of the debt (Van der Merwe et al op cit note 27 at 504–505).
[32] Vander Merwe et al op cit note 27 at 505.
[33] See Ellinger et al op cit note 2 at 494.
[34] See Brindle & Cox op cit note 3 at 112.
[35] See 2.4, 3, and 4 below.

2.3.3 Is an Electronic Funds Transfer a Negotiable Instrument?

It is trite that a payment instruction for an electronic funds transfer does not qualify as a negotiable instrument. Suffice it to say that an instruction by a client to his or her bank to effect an electronic funds transfer does not comply with the definitions of a bill of exchange and a promissory note in the Bills of Exchange Act.[36] (A bill of exchange is defined 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'.[37]) The first distinction between a negotiable instrument and an electronic funds transfer is that the transfer is not payable at a determinable future time or on demand.[38] The second is that the electronic funds transfer is not payable to the order of a specified person or to bearer.[39] The third, that an electronic funds transfer does not include any words that can be construed as a formal instruction given by the payee to his or her bank.[40]

Payment by electronic funds transfer differs further in a number of ways from payment by cheque.[41] Payment by cheque does not usually give rise to a novation of the underlying agreement.[42] Whether a new obligation (novation) is created, is determined by the intention of the parties.[43] The acceptance of a cheque in payment of a debt amounts to payment of the debt subject to the condition that the instrument is paid by the drawee bank on presentation.[44] But payment by way of an electronic funds transfer is not subject to any such condition and so is an absolute, not a conditional, form of payment.

2.3.4 Absolute Payment

The fact that payment by way of an electronic funds transfer constitutes a novation of the original debt answers in part the next question — is an electronic funds transfer an absolute or a conditional form of payment? In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton*,[45] the court held that

> 'payment by cheque is prima facie regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on presentation. When the cheque is so honoured, the date of payment of the debt is the date of the giving of the cheque. Conversely, if the cheque is dishonoured there has been no payment.'

[36] Act 34 of 1964.
[37] Section 2 of the Bills of Exchange Act.
[38] See Ellinger et al op cit note 2 at 493.
[39] Ibid.
[40] Ibid.
[41] For a discussion of why a payment instruction under an electronic funds transfer does not qualify as a negotiable instrument under English law, see Brindle & Cox op cit note 3 at 115. For the attributes of negotiable instruments, see *Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law* 4 ed by FR Malan & JT Pretorius (2002) 11.
[42] See Malan op cit note 41 at 287.
[43] Idem at 19.
[44] Idem at 323.
[45] 1973 (3) SA 685 (A) at 693.

I believe that a creditor, by prescribing or consenting to an electronic funds transfer as a method of payment by his or her debtor, accepts such transfer as an absolute payment. Once the debtor's (payer's) account has been debited with the amount of the transfer, the creditor would not be able to rely on the underlying debt in the unlikely event of the insolvency of the debtor's (payer's) bank and hence its inability to pay.

The fact that a payment by way of an electronic funds transfer is an absolute, and not merely a conditional, form of payment means that an electronic funds transfer satisfies one of the important characteristics that money should have — it should not be linked to the credit of the payer. Put differently, to qualify as a form of money, the instrument (or method of payment, in the case of an electronic funds transfer) should be given and accepted as final payment of a debt.[46]

2.4 The Countermand of an Electronic Funds Transfer

When is the exact time of payment under an electronic funds transfer? This question is deceptively simple.[47] For purposes of the rest of this discussion, I shall concentrate on one aspect of this question — whether an electronic funds transfer can be countermanded by the payer.[48]

One of the advantages of an electronic funds transfer is the speed with which the transfer of the money and hence payment is effected. Say, A wants to transfer money from his account to B's account. As soon as A sends the electronic message to transfer the money to B's account and the 'money' is transferred (an electronic 'book entry' is made in terms of which A's account is debited with the amount and B's account is credited) the transaction is complete. This usually takes no more than a few seconds. As soon as the transaction is complete, the money becomes available for B to withdraw it, should she so wish.

But the speed with which an electronic funds transfer takes place has its own drawbacks. In most money transfer orders it is assumed by the parties that the instruction may be revoked at least until it reaches the recipient bank.[49]

[46] See Bradley Crawford 'Is Electronic Money Really Money?' (1997) 12 *Banking and Finance LR* 399 at 402–403. He lists the basic characteristics that new forms of money should have. Other characteristics include that it must be commonly accepted as a medium of exchange, and not considered as goods, wares, or merchandise; it should pass freely by mere delivery; it should be self-contained, require no collection, clearing, or settlement, and leave no record; and the transferee or payee should be able to take it free of the claims of prior owners or holders. But whether an electronic funds transfer satisfies all these characteristics is an open question. I doubt that it can be argued that an electronic funds transfer is 'self-contained' and leaves no record. It is also not settled whether an electronic transfer of funds qualifies as legal tender (Schulze op cit note 12 at 51).

[47] For a detailed discussion of the complexity of the problems underlying the time of payment and the countermand of an electronic funds transfer, see Ellinger et al op cit note 2 at 512.

[48] For a discussion of at which moment in the payment process the electronic payment becomes irrevocable, see Wadsley & Penn op cit note 25 at 376. In English law, the Jack Committee reasoned that problems with countermand should be dealt with pragmatically. It recommended that as long as the moment at which the payment becomes irrevocable is made clear, the actual time allowed to the payer for stopping payment is not particularly important. It concluded that the English Code of Banking Practice should require banks to make customers aware of the different countermand rules that apply to payment systems (idem at 377).

[49] See Ellinger et al op cit note 2 at 495.

This usually emerges from the wording of the standard forms used by banks and the language used in marketing brochures issued by the banks.[50] It is also generally accepted that once an authorization for an electronic funds transfer has been given by a client of a bank, either to the bank itself, or where it has been communicated to the terminal, the electronic funds transfer cannot be countermanded. It would appear that this comment applies with equal force to many, if not all, types of electronic funds transfer. But is this necessarily fair? And do the same rules apply where the payer and the payee are clients of the same bank?

In two recent Supreme Court of Appeal decisions the court found it necessary to comment on the reversal, or countermand, of electronic funds transfers.

3 *Take & Save Trading v Standard Bank*

These were the crisp facts of *Take & Save Trading*: Standard Bank ('the bank') claimed payment of some ten million rand from Take and Safe Trading CC and two further defendants who were cited as sureties of the corporation. One of them was Mansoor ('M'), who was, apart from being a surety for the debts of the corporation, also its sole member. Both the corporation and M were valued clients of the bank and had special privileges. The corporation was entitled to draw against uncleared effects, and it could pay third parties by way of an electronic funds transfer. M, as sole member, ran the corporation and was the designated operator of its electronic banking facility. M was also in control of an account at Nedbank that was purportedly being held by one A Mohammed trading as Highway Distributors.[51] (There was a strong suspicion that Mansoor and Mohammed were one and the same person, but this aspect had no bearing on the case.)

M drew a number of cheques for a total of R9 970 947 against the account of Highway Distributors and deposited them on 9 August 2001, a public holiday, at an autobank to the account of the corporation. Almost immediately he electronically transferred R9 983 952,93 from that account into the banking accounts of a creditor ('Metro'). These payments were made as consideration for cigarettes bought from 'Metro' by the corporation, allegedly as broker on behalf of Highway Distributors. Metro required cash before delivery. Only after the amounts had been deposited in its account, did it release the cigarettes to M.[52]

The cheques of Highway Distributors that M deposited into the corporation's account were dishonoured because of a lack of funds soon after delivery of the cigarettes. Somewhat brazenly M, upon being informed that the cheques had been dishonoured, instructed the bank to 'reverse' the electronic payments that he had made to Metro. Surprisingly, the bank began to comply with this 'arrogant' instruction by M. Less surprisingly, Metro, done out of ten million

[50] Ibid.

[51] *Take & Save Trading v Standard Bank* supra note 14 at 6–7.

[52] At 7C–D.

rand's worth of cigarettes, objected to the bank reversing the electronic funds transfer that M had made to Metro's account. The bank, not surprisingly, then refused to comply with M's instruction to 'reverse' the transfer.[53]

The corporation and M's main defence against the bank's claim was that the bank was instructed by M to reverse the electronic funds transfer and that it had failed to do so.[54]

In the trial court, an employee of the bank was called to explain how electronic banking works. She testified about an inter-bank agreement under the auspices of the Automated Clearing Bureau that provided that without the beneficiary's consent an electronic funds transfer could not be reversed.[55]

On appeal, the following questions were put to the court: Did M give the instruction to the bank to reverse the transfer? If so, could the instruction have been carried out?[56]

These were factual questions. The answer to the second question depended on whether there was an inter-bank agreement as regards the reversal of electronic funds transfers. Deciding in favour of the bank, Harms JA reasoned:[57]

> 'One may assume in the [clients'] favour that the instruction [to transfer the money electronically] had been given. One may even assume in their favour that there is no inter-bank agreement preventing the reversal of electronic transfers. All that being assumed, how can a bank retransfer an amount transferred by A into the account of B back into the account of A without the concurrence of B? [Counsel] could not suggest any ground on which this can be done; there simply is none.'

The judge made at least three contentious statements. My comments are offered on the basis that Harms JA intended his obiter comments to be understood as general comments and not as comments restricted to the particular facts of the case before him.[58]

In the first instance, his statement that '[o]ne may even assume ... that there is no inter-bank agreement preventing the reversal of electronic transfers' flies in the face of the uncontested evidence presented by the bank's expert witness in the court below. There it was testified that there is 'an inter-bank agreement under the auspices of the Automatic (sic) Clearing Bureau which provides that without the beneficiary's consent an electronic transfer cannot be reversed'.[59] One may justifiably question the logic of assuming that a certain situation does not exist if there is uncontested evidence to the contrary. It is unsolicited and unsubstantiated obiter comments such as these that may easily mislead a lower court in future.

Secondly, the judge's implied acquiescence in the term in the inter-bank agreement that a bank cannot retransfer an amount transferred by A into B's account without B's concurrence is alarming, to put it mildly. There is a strong

[53] At 7D–E.
[54] At 7F.
[55] At 7–8
[56] At 8.
[57] At 9A–B.
[58] See further Schulze op cit note 12 at 65–66; Schulze op cit note 10 at 87; and Heinrich Schulze September 2004 *De Rebus* 49.
[59] *Take & Save Trading v Standard Bank* supra note 14 at 8A.

suspicion that in a large proportion of cases where the transferor of the funds (A) wishes to reverse the transfer, the reason for the reversal is that the transferee (B) was not entitled to receive the money (for example, where A has made a mistake about B's identity, or about B's banking details, to mention but two of many practical examples). Can the law honestly expect A (or A's bank) first to obtain B's consent before the transfer of the funds can be reversed? Surely not. One would have appreciated a comment, even obiter, of the Supreme Court of Appeal on the unfairness of this term in the inter-bank agreement.

Thirdly, the judge observed that there were no grounds on which a reversal of an electronic funds transfer could be done.[60] For fear of flogging a dead horse, I shall merely mention that where B was never entitled to receive the money in the first place, his consent should surely not be a prerequisite before the transfer could be reversed.

The inter-bank agreement is confidential. It is not open to public scrutiny. In the absence of proof to the contrary one has to accept the evidence of the expert witness in the *Take and Safe Trading* case to the effect that the inter-bank agreement indeed prohibits the reversal of an electronic funds transfer unless the beneficiary consents to it. But whether this should be the only instance where the payer can instruct his or her bank to reverse an electronic funds transfer is a different question altogether. I have indicated that there are many practical examples of situations in which a reversal of an electronic funds transfer would not only be fair, but often also in line with public policy. Where the beneficiary cajoled the payer to believe that she (the beneficiary) was entitled to payment when she actually was not and the payer discovers his mistake while the money is still in the beneficiary's account, the law surely cannot expect from the payer or his bank first to obtain the fraudulent beneficiary's consent before the transfer can be reversed.

I believe this aspect to be of major importance in the day-to-day dealings between a bank and its clients who perform electronic funds transfers. It may indeed have far-reaching consequences for many bank clients who use the electronic funds transfer facilities offered by banks.[61] I earlier expressed the need for this aspect of our banking law to be clarified, if not by our courts, then by the Ombudsman for the Banking Industry.[62]

Clarification came much sooner than expected. The judgment in *Take and Safe Trading* was handed down on 27 February 2004. Seven months later, on 1 October 2004, the Supreme Court of Appeal handed down its decision in *Nissan South Africa (Pty) Ltd v Marnitz & others*, in which it took a second bite at the cherry.

[60] At 9B.
[61] See the article that recently appeared under a rather sensationalist heading in a South African daily newspaper: Philip de Bruin 'Appèlhof [sic] los bom oor elektroniese oordrag. Oorplasers van geld kan in uitgerekte gedinge beland' 13 September 2004 *Sake-Beeld* at 6.
[62] See Schulze op cit note 10 at 87–88.

4 *Nissan South Africa v Marnitz*

Nissan was a client of the third respondent ('FNB'). On 31 December 2002, Nissan instructed FNB to make certain payments to its creditors. One of them was TSW. In so far as TSW was concerned, FNB was instructed by Nissan to pay an amount in excess of R12,7 million to an account held with Standard Bank. Because of a clerical error the wrong bank account details had been furnished. It is not clear from the judgment whether the clerical error was that of one of Nissan's clerks, or one of FNB's clerks. Fact of the matter is that the money was not paid into TSW's account but into another account held with Standard Bank. The account into which the money was paid belonged to a close corporation that traded under the name of Maple. One Stanley was the sole member of Maple.[63]

As a result of the erroneous instruction an amount of R12 767 468,22 was transferred on 31 December 2002 by FNB from Nissan's account to Maple's account at Standard Bank. When Maple became aware of the deposit into its account, it obtained legal advice as to what to do with the money. Quite astonishingly it was advised that the amount should be transferred to a call account, that it was entitled to the interest earned on the funds, and that the amount transferred would only have to be repaid on demand.[64]

Although Stanley instructed Maple's accountant to arrange for a call account to be opened, the money was never transferred to it. In the meantime, unbeknownst to Stanley, or so he alleged, the funds were being used in conducting the day-to-day business of Maple.[65]

On 20 January 2003, Nissan became aware of the erroneous payment. It demanded return of the funds from Maple. Maple replied that it was prepared to comply with the demand subject to its retaining the interest earned on it as well as a lavish 'administration' fee of four per cent for 'holding' the money on Nissan's behalf.[66]

Stanley argued that on 23 January 2003 Maple was in a position to pay the monies over to Nissan, but because of the fact that the money was never transferred to the call account, he had to draw three cheques (on another bank account) to pay Nissan. Before he could deposit these cheques, Nissan obtained a court order freezing Maple's banking facilities. This step, so Stanley alleged, put Maple under considerable financial strain and resulted in him resolving that Maple be wound up voluntarily. The first and second respondents were appointed as liquidators.[67]

When Maple's payments account was frozen, there a balance of R10 558 818,05 on it. So Maple was actually not in a position to pay the monies over to Nissan as alleged by Stanley.[68] Maple's two liquidators contended that

[63] *Nissan v Marnitz* supra note 15 in paras [4] and [5]
[64] In para [3].
[65] In paras 5 and [6].
[66] In para [7].
[67] In para [8].
[68] In para [9].

the total amount in the payments account formed part of its insolvent estate and was subject to a concursus creditorum.[69]

In the court below it was held that Maple, and not FNB, was enriched by the transfer of the funds, and that Nissan did not have a claim against FNB, but only a concurrent claim against the insolvent estate of Maple.[70] Not surprisingly, Nissan decided to appeal against the judgment in the court below.

On appeal, Nissan argued, first, that there was no intention on its part to pay Maple; secondly, that Maple had no entitlement as against Standard Bank to the funds transferred to the latter; and, thirdly, since Maple had no entitlement to the funds as against Standard Bank, it could not acquire a greater title as against FNB by transferring the funds to another account with FNB.[71]

The liquidators, in turn, argued that when Standard Bank unconditionally credited the funds received to Maple's account, it became obliged to pay the amount so credited to Maple. They also argued that this was the case even if Maple had acquired the funds by way of theft or fraud. In this regard it relied, inter alia, on *Take and Save Trading*.[72]

The question that arose for decision concerned the consequences of someone mistakenly transferring money to an incorrect bank account.[73] Put differently, did Nissan remain the owner of the money after it had mistakenly been transferred to Mable's account?

By way of a general introduction, Streicher JA referred to *Commissioner of Customs and Excise v Bank of Lisbon International Ltd & another*.[74] There, money was fraudulently obtained by one R from the Commissioner of Customs and Excise by way of cheques that were deposited into R's bank account with the Bank of Lisbon. The court held that 'the circumstances under which [R] obtained the moneys … were such as to deprive delivery to [R] of any legal effect'.[75] It also held that the remedies available to the Commissioner to claim the money back from the Bank of Lisbon were the actio Pauliana and the condictio sine causa.[76] Streicher JA reasoned that, because the court in *Bank of Lisbon* found that delivery of the money did not have any legal effect, it was not necessary for that court to resort to the actio Pauliana. For the same reason, and also because Nissan did not rely on the actio Pauliana, Streicher JA reasoned that it was unnecessary to deal with whether there was any room for the actio Pauliana in *Bank of Lisbon*.[77]

In passing, Streicher JA referred to the practice that courts often grant interim interdicts against persons in respect of allegedly stolen money paid into a bank account of the alleged thief and against the bank concerned, pending an action

[69] Ibid.
[70] In para [11].
[71] In para [12].
[72] Ibid.
[73] In para [1].
[74] 1994 (1) SA 205 (N).
[75] At 208G.
[76] At 213–215.
[77] *Nissan v Marnitz* supra note 15 in para [17].

to determine whether the money had been stolen.[78] Banks usually do not oppose the applications for such interdicts, but adopt the stance of a stakeholder, and await the decision of the court as to the rightful owner of the money.[79]

Next, the court referred to the decision in *First National Bank of Southern Africa Ltd v Perry NO & others*.[80] There, a stolen and forged cheque was paid into the account of FPV, a firm of stockbrokers, with FNB. One Dambha had a managed account with FPV. He represented to FPV that he was entitled to the proceeds of the cheque. Dambha's account was credited with the proceeds. He then instructed FPV to make out and hand him three cheques. Two of these cheques were made out to himself; the third one was made payable to a trust. He deposited the three cheques with Nedbank to the credit of himself and the trust, respectively. The question was whether FNB (alternatively, FNB as cessionary of FPV's claim) could recover from Nedbank the stolen money that had been deposited with Nedbank.[81] The court held that the funds deposited with Nedbank were stolen money. But because of the rule that once money is mixed with other money without the owner's consent, ownership in it passes by operation of law, ownership of the money (as embodied in the three stolen and fraudulently obtained cheques) in *Perry* passed to Nedbank.[82] It was accordingly held that the rei vindicatio was not available to FNB, but that FNB could recover the money from Nedbank by way of an enrichment action. The court also made short shrift of the notion that Nedbank was obliged to account to its client, Dambha. The court pointed out that a thief, who deposited the stolen money into his account with his bank, had no claim against his bank for the payment of the amount which the bank had (provisionally) credited to his account. In this regard the court in *Perry* referred with approval to the dictum in *Absa Bank Ltd v Standard Bank of SA Ltd*.[83]

Allow me to digress for a moment. The court in *Nissan* referred in passing to commixtio as a method to acquire ownership in money.[84] Commixtio, like confusio, arises when the solids or fuels of different owners are mixed in such a way that they cannot be separated, but not so as to form a new product.[85] Commixtio, in the case of money, is the acquisition of ownership by money being mixed in a manner that renders it impossible to determine in whom the separate notes and coins vest. This will be the case irrespective of whether money is acquired in good or in bad faith, and regardless of whether value was

[78] See, for example, *Lockie Bros Ltd v Pezaro* 1918 WLD 69; *First National Bank of Southern Africa Ltd v Perry NO & others* 2001 (3) SA 960 (SCA).
[79] *Nissan v Marnitz* supra note 15 in para [18].
[80] Supra note 78.
[81] *Nissan v Marnitz* supra note 15 in para [20].
[82] Ibid.
[83] 1998 (1) SA 242 (SCA) at 252.
[84] *Nissan v Marnitz* supra note 15 in para [20].
[85] See *AFC Maasdorps' The Institutes of South African Law* Book II *The Law of Things* 5 ed by CA Beck & OH Hoexter (eds) 47–48; JAC Thomas *Textbook of Roman Law* (1981) 169 and 323.

given for it.[86] But the nemo plus iuris rule[87] is qualified in questions relating to the recovery of money. Where someone received money in good faith and for value, it cannot be recovered from him or her. The reason for this is that the recipient has become the owner of the money, and not because this principle constitutes a limitation of the owner of the money's rei vindicatio.[88] The remedy of the person dispossessed of the money against a mala fide possessor would lie in either the rei vindicatio or a condictio.[89]

The court then responded to the reliance placed by the liquidators on the obiter dictum by Harms JA in *Take and Save Trading*. Streicher JA in *Nissan* summarized the gist of Harms JA's obiter dictum: '... once an amount is transferred by A to the credit of B's bank account the credit belongs to B and the bank cannot *on the instructions of A* retransfer it without the concurrence of B' (emphasis added).[90] Streicher JA cautioned that this dictum must be read in context. At this stage, I have to digress for a moment and point out that the very essence of my earlier criticism of Harms JA's obiter dictum in *Take and Save Trading* turned on the fact that Harms JA did not provide any context to his obiter comments, and that there were indeed no indications in the reported judgment that these comments should not have a wide and general application.[91] Had Harms JA explained the context of his obiter comments, Streicher JA would not have found it necessary to clarify these aspects of Harms JA's judgment in *Take and Save Trading*.

Be that as it may, Streicher JA in *Nissan* explained that the court in *Take and Save Trading* 'was dealing with a *valid transfer of funds* from A's account to B's account in payment of cigarettes to be delivered and actually delivered after such transfer' (emphasis added).[92] So it was obvious that the transfer in *Take and Save Trading* could not have been reversed without B's consent.[93]

Streicher JA concluded that the respondents' submission that once a bank had unconditionally credited a customer's account with an amount received, the bank was required to pay the amount to the customer on demand, even where the customer came by such money by way of fraud or theft, was not correct. The judge correctly noted that if stolen money were paid into a bank account to the credit of the thief, the thief had as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account.[94]

In comparing the position of Dambha in *Perry* with that of Maple in *Nissan*, Streicher JA held, first, that payment was a bilateral juristic act that required

[86] See Malan op cit note 41 at 51.
[87] The basic rule of the law of property and obligations is stated in the maxim 'nemo plus iuris ad alium transferre potest quam ipse habet' (English: no-one can transfer more rights to another than he or she has him- or herself).
[88] See Malan op cit note 41 at 51.
[89] Whether the rei vindicatio or a condictio would apply depends on whether the possessor has acquired ownership in the notes or coins. This will be the case because a condictio, except in the case of the condictio furtiva, presupposes a transfer of ownership (Malan op cit note 41 at 52).
[90] *Nissan v Marnitz* supra note 15 in para [22].
[91] See 3.2 and 3.3 above.
[92] Ibid.
[93] Ibid.
[94] *Nissan v Marnitz* supra note 15 in para [23].

the meeting of two minds. For example, where A handed over money to B under the mistaken believe that it was due to B, B, if he was aware of the mistake, was not entitled to appropriate the money, and ownership of the money did not pass from A to B. Should B in these circumstances appropriate the money, such appropriation would constitute theft.[95] The same argument applies to the scenario where B takes a cheque from A and deposits it knowing that he (B) is not entitled to the cheque. Although this construction may not be strictly in accordance with Roman-Dutch law, it is still in accordance with the principle that the Roman-Dutch law is a living system adaptable to modern conditions.[96]

Importantly, Streicher JA held that the position is no different where A, instead of paying by cheque, deposits the amount (either in cash or by way of an electronic funds transfer) into the bank account of B.[97] Just as B is not entitled to claim to be credited with the proceeds of a cheque mistakenly handed to him, he cannot claim to be entitled to a credit because of an amount mistakenly transferred to his bank account. If B withdraws the money to use it for his own purposes, it would amount to appropriation and theft.[98]

In applying these principles to *Nissan*, Streicher JA held that FNB, as agent of Nissan, intended to effect payment to TSW, and Standard Bank, as agent of Maple, intended to receive payment on behalf of Maple.[99] There was no meeting of the minds between the payer (mandator, Nissan) and its representative (mandatary, FNB) and the payee (Maple) and its representative (Standard Bank). So Maple did not become entitled to the funds credited to its account. Any appropriation of the funds by Maple, with the knowledge that it was not entitled to deal with the funds, would have constituted theft. The fact that Maple transferred the funds from one account to another did not change Maple's position concerning those funds. So the liquidators had no claim against FNB in respect of the funds.[100]

Streicher JA, obiter, concluded that if a third party (like the liquidators in the present case) claimed to be entitled to the money deposited with the bank, the bank did not have to investigate the matter but could adopt the stance of a stakeholder. As a matter of fact, so the court reasoned, a bank would be well advised to adopt such a stance. Should the bank under these circumstances

95 In para [24]. In explaining these principles Streicher JA referred to *R v Oelsen* 1950 (2) PH at H198, and *S v Graham* 1975 (3) SA 569 (A) at 573E–H. In *Graham* it was held that if A gives B a cheque because he mistakenly believes that he owes B that amount, and B, knowing that the amount is not due, deposits the cheque, B commits theft of money although B has not appropriated the money in a corporeal sense.

96 *Nissan v Marnitz* supra note 15 in para [24].

97 But see Malan op cit note 41 at 52, where it is argued that there is sufficient common-law authority to justify the protection of the person who acquires money in good faith and for value. So there is no need for characterizing money (bank notes) as negotiable instruments.

98 *Nissan v Marnitz* supra note 15 in para [25].

99 In para [26].

100 Ibid.

decide unilaterally to reverse the credit to the customer's account, it would be doing so at its peril.[101]

The court accordingly upheld the appeal and ordered that the amount of R9 750 000 and any interest that accrued on it, both of which were subject to an attachment order pending the outcome of the present case, be released and paid to Nissan.

5 Conclusion

The decision in *Nissan* contains a number of instructive comments in explaining some of the questions that arose from the decision in *Take and Save Trading*. It is important for the distinction between the countermanding of a 'valid transfer of funds' and what one would presumably call an 'invalid transfer of funds'. So one can assume that *Nissan* somewhat tempered the robust approach followed in *Take and Save Trading* — that an electronic funds transfer cannot be reversed without the consent of the beneficiary.

But there are still a number of issues that beg for clarity. I shall refer to some of them here.

In the first instance, the obiter dicta in *Take and Save Trading* were based on the testimony of the bank's expert witness in the court below, and apparently on the inter-bank agreement. It is not clear from Harms JA's judgment whether he actually had access to this agreement. But one could assume that the relevant paragraph or clause of the agreement was either handed in in evidence, or the court merely accepted the expert's testimony as a true reflection of the content of the agreement. Streicher JA's reported judgment in *Nissan* makes no mention of the inter-bank agreement, or any viva voce evidence in this regard. One would have preferred the court to refer in its decision to the exact wording of this vexed clause in the inter-bank agreement.

Secondly, I have indicated[102] that there is a close link between whether an electronic funds transfer constitutes an assignment, and whether an electronic payment instruction can be revoked or countermanded. Because *Nissan* turned on the revocability, and hence the finality, of an electronic payment instruction, one would have appreciated the court's comments on the legal nature of an electronic funds transfer, and, particularly, its views on whether it constitutes a novation or an assignment.

Thirdly, the facts in *Nissan* did not raise the question as to the last possible moment at which an electronic funds transfer can be countermanded. So this important question remains unanswered.[103]

Fourthly, the court in *Nissan* rather hastily dismissed the possibility of countermanding a transfer of funds where such transfer had been valid. Streicher JA in *Nissan* explained that the court in *Take and Save Trading* 'was dealing

101 In para [28].

102 See again 2.3.2 above

103 See Ellinger et al op cit note 2 at 495.

with a valid transfer of funds from A's account to B's account in payment of cigarettes to be delivered and actually delivered after such transfer'. So the judge concluded that it was obvious that the transfer in *Take and Save Trading* could not have been reversed without the payee's (beneficiary's) consent. But he failed to provide any guidelines as to what would qualify as a valid transfer of funds, as opposed to an invalid transfer of funds.

Also, can this be accepted as a broad principle of general application to the countermanding of all (valid) electronic funds transfers? Are there not circumstances in which the initial valid transfer of funds later becomes 'invalid', such as where the payee later commits breach of contract, or even fraud? Will the payer in these circumstances also first need to obtain the consent of the guilty payee before the transfer can be countermanded? Or will the payer, or its bank, first have to obtain a court order to freeze the payee's banking facilities, and then litigate to reclaim the money from the payee? And will the bank(s) involved be allowed to shrug their commercial shoulders and argue, as they do with credit-card payments[104] and letters of credit,[105] for example, that they prefer not to get involved in any disputes between the payer and the payee?

These and other tantalizing questions regarding electronic funds transfers are, unfortunately, still open.

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[104] See Brindle & Cox op cit note 3 at 219.

[105] See AN Oelofse *The Law of Documentary Letters of Credit in Comparative Perspective* (1997) at 354 et seq for a discussion of the principle of independence underlying letters of credit. See also in this regard JP van Niekerk & WG Schulze *The South African Law of International Trade: Selected Topics* (2000) at 245 et seq.