

NEGOTIABLE INSTRUMENTS; CASES

Standard bank v sham magazine

Standard bank case

Facts

- (i) The respondent, (sham magazine centre), had a banking account with standard bank, (the appellant in this case)
- (ii) The respondent drew a cheque on standard bank in favour of Transvaal Watch (Pty) Ltd (the payee), calling the bank to “pay to the order of” Transvaal Watch (Pty) Ltd the sum of R738,53 and delivered it to such payee.
- (iii) The cheque was crossed with two parallel transverse lines, and the words “not negotiable a/c payee only” were added.
- (iv) The payee was indebted to the applicant due to overdraft facilities, the payee therefore endorsed the cheque in favour of the applicant to pay such debts., and the later gave value to the cheque.
- (v) However the cheque was dishonoured due to insufficient funds.
- (vi) The appellant sued the respondent for R732.52 and claimed to be the legal holder of the dishonoured cheque

Question

The court had to decide whether the words “a/c payee only” excluded transferability of a cheque.

Judgment

The court had to interpret **section 6(5) of the Bills Exchange Act** which provide that; if a bill contains words prohibiting transfer, or indicating an intentions that the bill should not be transferable, it is valid as between the parties to the bill but not negotiable.

The court agreed with the appellant's contention that the cheque was crossed generally because it bore across its face the words "not negotiable" as provided by sections 75(1) of the Act, and that in terms of section 80, the statutory effect of the foregoing is that the cheque was nevertheless transferable, but subject to equities.

It was held, further that the words "a/c payee only" do not in any way affect the transferability of an otherwise transferable instrument, but serve merely as a direction to the collecting bank to collect the amount of the instrument for the payee's account.

Lessons from the standard case bank

- (i) The adding of the words "a/c payee" or "a/c payee only" amounts to a general crossing.
- (ii) The words have no effect on the transferability of the cheque.
- (iii) They may operate as some safeguard if the cheque should fall into the wrong hands.
- (iv) In effect, they are a direction to the collecting banker that only the specialised payee should receive the money.
- (v) However if the payee specified in the cheque transfers it (e.g. by special endorsement) he parts with his right to have the money and the words cease to have any operation.
- (vi) The view that in such circumstances regard must be given to the plain and ordinary grammatical meanings cannot be accepted because banking practice, banking law, English and South Africa courts provides a binding authority.

One last point of interest in regard to this case is the question posed to us at the bottom of page 153 of our study guide, namely **what is the meaning of the words "account payee only" when placed on an "order cheque" and when placed on a "non-transferable" cheque?**

According to my opinion the main difference between the two lies in the fact that the former can be paid to order of the holder while the latter cannot (this should be our point of departure).

As pointed out above, in an "order cheque" the words "a/c payee only" may only serve to give some direction or to serve as some protection to ensure that only the named payee receives the money, but that does not bar him from negotiating it further.

In the case of a non-transferable cheque however, it is submitted that the words ‘a/c payee only’ serves no purpose but simply to reiterate a fact which is already protected by statute. Why am I saying this, because in a ‘non-transferable’ cheque only the named payee can be the holder and he cannot further negotiate it (refer to s 75A (1) BEA)

Indac electronics v Volkskas bank

Indac electronics case

Facts

- (i) The respondent (Volkskas Bank) at its silver lakes branch, had drawn a cheque of R58 218 in favour of the appellant (Indac electronics) “or order”
- (ii) The cheque was crossed and marked “not negotiable”
- (iii) The cheque was presented for payment by a certain MJ le Roux at the respondents wonder boom South branch (without endorsement).
- (iv) MJ le Roux had an account with the respondent
- (v) The latter paid the proceeds of the cheque to him (MJ I Roux) despite the fact that he had no right to receive such payment.
- (vi) Indac electronics alleged that the respondent failed to exercise a duty of care and was, or should have been aware of the fact that Le Roux was not entitled to payments of the cheque

Question

Whether negligence on the part of the collecting bank is sufficient to make it liable after a cheque has been collected for the wrong person?

Judgment

In *Administrateur, Natal Case*, it was held that the *Aquilian* liability could in principle arise from negligence misstatements which caused pure financial loss. In view of this decision, the court held that the *Yorkshire Insurance* decision (which held a contrary view), can no longer be regarded as authority for the proposition that no delictual action lies against a collecting banker who has negligently caused loss to the true owner of the cheque.

It was further held that there is no reason to in principle why a collecting banker should not be held liable under the extended *lex Aquilian* for negligence to the true owner of a cheque, provided that all the elements or requirements of the *Aquilian* liability have been met.

On the question whether a legal duty existed on the respondent, the court applied the *boni mores* test, by evaluating the bank's interests on the one hand, with those of the plaintiff on the other, in consideration with other surrounding circumstances and all pertinent factors, the court found that there existed a legal duty upon the bank, by a failure to abide by such duty, the bank acted negligently.

Lessons from the Indac electronics case

The issue before this court has been subject to academic debate for a long time. According to some old authorities there existed no legal duty on the collecting banker based on negligence. We must however accept that banking practice has evolved, and so the laws in banking must keep up with the changes. I agree with **Vivier JA** that the formation of the Automated Clearing Bureau has mechanised the collecting process in South Africa. Collecting bankers accept the responsibility for collecting the correct amounts, further the collecting banker remains the only person in a position to know whether or not a cheque is being collected on behalf of a person who is entitled to receive payment. The drawee bank has to rely on the collecting banker to ascertain this fact,

In claiming damages from the collecting bank, the plaintiff must ascertain the following requirements which were quoted by Vivier JA from the minority judgment of Corbert JA in the case of *Simon and Co.*

- (i) That the collecting bank received payment of the cheque on behalf of someone who was not entitled thereto.

- (ii) That in receiving such payment the collecting banker acted (a) negligently and (b) unlawfully
- (iii) That the conduct of the collecting banker caused the true owner to sustain loss; and
- (iv) That the damages claimed represent proper compensation for such loss.

Columbus Joint venture v ABSA Bank Ltd

Columbus case

Facts

- (i) Bertolis was an employee of Columbus joint venture (the appellant)
- (ii) He had a personal account with the defendant (ABSA bank)
- (iii) He fabricated a fraudulent franchise agreement between himself and Stanbrook & Hooper (a firm of solicitors specialising in European community law in Brussels)
- (iv) The defendant granted him a business account under the name of Stanbrook & Hooper on grounds of the fraudulent franchise agreement.
- (v) He caused the appellant to draw several cheques in favour of Stanbrook & Hooper which he presented for payment at the respondent; subsequently the respondent gave value to the cheques. This led to the appellant suffering severe financial losses
- (vi) The latter sued the respondent for the losses it suffered.

Question

Whether ABSA Bank negligently opened an additional account for an existing client (Bertolis) without checking all the necessary particulars provided by that client?

Judgment

The plaintiff alleged negligence on the part of the Bank on the grounds that it erred;

- (i) In not establishing whether the “franchise agreement” was authentic and the information in it correct
- (ii) In not satisfying itself that “ Stanbrook Hopper” existed and had authorised Bertolis to open and control an account in its name; and
- (iii) In not establishing whether the information in Bertolis’s application form was correct.

The court held that except for the information relating to the “franchise agreement”, the information Bertolis furnished was in fact correct.

Cameron JA distinguished between two instances, (i) firstly when an existing client of a bank applies to open another account (*as in casu*) and (ii) secondly when a new client wants to open a bank account for the first time (*as was the case in the case of **Energy measurements***)

It was Further held that in the first instance, the bank already has all the important facts to be able to identify the client and trace him if necessary, on the other hand in the second instance the bank is dealing with a total stranger and must exercise allot of scrutiny.

The supreme court of appeal, accordingly held that Columbas joint ventures was unable to prove that ABSA Bank had acted negligently by opening an additional account for its client without an in depth investigation.

INTELLECTUAL PROPERTY AND COMPETITION LAW; CASES

Blue lion manufacturing (Pty) Ltd v National brands Ltd

Blue lion manufacturing case

First things first, this is an appeal case which appeared at the Supreme Court appeal, in the court of first instance National Brands was the Plaintiff and Blue lion manufacturing the Defendant. National brands is the manufacture of the famous tennis biscuits while Blue lion manufacturing owns the controversial trade mark of tea lovers biscuits, which am sure most of you have bought in the mistaken belief that its tennis biscuits.



Facts

- (i) The respondent has been manufacturing biscuits under the name tennis biscuits for a long time. In 1990 it changed its packaging style, but in July 1998 it reverted back to its original packaging style.
- (ii) The appellant manufactures biscuits under the name tea lovers; in June 1998 it changed its packaging style.
- (iii) The style which the appellant adopted bore considerable similarities to the one the respondent used until 1990 i.e. (white background, a baker logo on the top left corner, a scatter of biscuits, same colour on the right hand side and similar lettering in both the two marks used on the packaging.
- (iv) The respondent had applied for, and obtained an interdict in a provincial division restraining the appellant from using the packing it was using

Question

Whether the appellants' conduct did or did not amount to passing off?

Judgment

Held- having regard to the whole set up, the court found that the two rival packaging's had a lot of similarities, and the same could be said if they were displayed in quantity on a supermarket shelf.

Held, further- the respondent's witness fell into a trap which most careful persons would have.

Held, further- the appellants believed and had confirmation of its belief that imitation conferred on it some advantage. This inference was strengthened by the appellant's explanation or lack of explanation for the manner in which it changed the wrapping of its biscuits.

Held, further- that there had been an attempt to confuse the two marks

Held, accordingly- that the like hood of deception and confusion had been established

The appeal was dismissed.

National brands v Blue lion manufacturing

National brands case

Facts

- (i) The appellant (National brands) is a chocolate biscuits manufacture trading under the name Romany creams
- (ii) The respondent (Blue lion manufacturing) commenced manufacturing a similar biscuit under the name of Romantic Dreams
- (iii) The appellant had approached a Provincial Division for a restraining order which was unsuccessful.



Question

Whether the trade mark Romantic dreams was so similar to that of Romany creams to constitute an infringement of a trade mark?

Judgment

Held- that in such circumstances, the deception or confusion had to be attributable to the resemblance (or otherwise) of the marks themselves and not to extraneous matter.

Held, further- that the marks in this case were not likely to deceive or confuse by their sound. Whilst the first word of each mark had three syllables, they were pronounced quite differently, even allowing for the usage.

Held, further- that factors which reduced the scope for deception or confusion in this case include *inter alia*, that Romantic dreams is a well-known trade mark, the work mark of Romany creams describe the product sold and is ordinary language, furthermore the sense of the sense of the work marks differ from one another markedly.

Held, further- that **section 34(1) (c) of the Trade Marks Act** protected the proprietor of a registered trade mark which was identical or similar to the registered trade mark. The word 'similar' as it was used in the section had its ordinary meaning, which was 'a marked resemblance or likenesses. Romantic dreams was not easily recognisable likeness of Romany creams for the same reasons that it did not fall foul.

The appeal court confirmed the decision in the Transvaal Provincial Division.

Schultz v Butt

According to my opinion, it is enough if you study this case as appearing on page 273 of the study guide since it was not available on the UNISA library when this notes were drafted (September 2013). If however for some or other reasons you want an in depth knowledge you may download the full case on www.salfii.org/za/cases/ZASCA/1986/47.html .