

## Study Units 11-15

### Section 58

Section 58 protects the bank when it has paid the cheque to a nonholder, provided the following requirements are met:

- 1) Must be an order cheque;
- 2) Must be a forged or unauthorised endorsement on the cheque;
- 3) Person whose endorsement was forged must not be a client of the branch of the bank on which the cheque was drawn;
- 4) Bank must pay the cheque in **good faith** and in the **ordinary course of business**;
- 5) Cheque may either be crossed or uncrossed.

### Section 79

If the drawee bank does pay to a bank in accordance with the **crossing**, and payment takes place in **good faith** and **without negligence**, then in terms of section 79 the **drawee bank will be deemed to have paid in due course**, although in actual fact it has not. The **drawer's liability is also discharged**, if the cheque came into the hands of the payee.

### Differences between S58 & S79

Section 58 applies to crossed and uncrossed cheques and may overlap with section 79. This overlap is relevant if the drawee bank pays in accordance with the crossing, but negligently, section 58 requires good faith and ordinary course of business, section 79 requires good faith without negligence.

Section 58 does not afford protection if the forged endorsement purports to be that of a customer of the particular bank branch on which the cheque was drawn and section 79 does not contain this limitation.

Section 79 protects not only the drawee bank, as section 58, but also the drawer of a crossed cheque.

**Crossing + words "not negotiable" brings sections 80 & 81 into operation.**

### Section 80

If a person takes a **crossed** cheque which bears the words "**not negotiable**", he shall not have and shall **not be capable of giving a better title** to the cheque than that which the **person from whom he took it** had.

A person who takes a crossed cheque which bears the words "not negotiable" will bear the risk that the transferor may have had an invalid title to the cheque.

Where a drawer adds the words "not negotiable" **no subsequent holder can become a holder in due course.**

**NB!!!! Requirements for section 81**

- 1) Cheque was **crossed**
- 2) Words "**not negotiable**"
- 3) Cheque was **stolen or lost**
- 4) **Drawee bank** must have paid it under circumstances which do **not render such bank liable** (s58 & s79)
- 5) Plaintiff must prove that he is the **true owner**
- 6) True owner must prove that he **suffered loss**
- 7) Possessor against whom claim is brought must have been in **possession of the cheque after the theft or loss**
- 8) Possessor must have **given consideration** or taken cheque as **done**

**Section 81: True owners of stolen or lost crossed cheque marked "not negotiable" entitled to compensation from certain possessors:**

- (1) True owner, if requirements are met, is entitled to recover from any person who was a possessor after theft or loss and either gave consideration or took as done;
- (2) A person has after the theft or loss paid any such cheque into his account with a bank after having paid, or for the purpose of paying, the amount of the cheque or part thereof to the person from whom he received the cheque, or, on his direction, to any other person = possessor;
- (3) A person took any such cheque into his possession or custody after the theft or loss, and fails to furnish the true owner, at his request, with any information at his disposal in connection with the cheque;
- (4) Every possessor of any such cheque shall, for the purposes of this section, and until the contrary is proved, be deemed either to have given a consideration therefor or to have taken it as a donee;
- (5) A bank which receives payment of any such cheque for a customer shall, subject to (3), not be regarded as having given a consideration therefor, merely because it has in its own books credited it customer's account with the amount of the cheque before receiving payment thereof, or because any such payment is applied towards the reduction or settlement of any debt owed by the customer to the bank;
- (6) If defendant proves that when he became the possessor of the cheque it did not appear to be crossed or bear on it the words "not negotiable", he shall not be held liable under this section;

(7) A person who has discharged his liability under (1) and who took the cheque in good faith and without notice of any defect in the title of the transferor, shall as against any prior possessor of the cheque, who became possessor thereof after the theft or loss and either gave a consideration therefor or took it as a donee, have the rights conferred upon the true owner by (1);

(8) For the purpose of this section the giving of consideration includes the receiving of any such cheque in reduction or settlement of any debt or liability;

### Section 83

If a drawee bank on whom a cheque is drawn pays that cheque in good faith and in the ordinary course of business, the cheque is discharged and the drawee bank incurs no liability merely on the grounds that there is no endorsement on it or that the endorsement is irregular.

The commercial banks in SA have agreed that if a cheque is negotiated and is not deposited in the payee's account, both the payee's and the depositor's endorsements must be placed on the cheque, unless the cheque has been endorsed specially to the depositor, in which case the latter's endorsement is not necessary.

### Section 84

Section 84 provides further that at present the collecting bank acquires such rights as it would have had if the depositor of the cheque had endorsed the cheque in blank – in other words, the bank acquires the rights of a holder of the cheque were a holder.

## **Non-transferable cheques**

### Section 75A(1)

**Section 75A(1)** provides that where a cheque bears **boldly across its face the words “not transferable”** or “non-transferable” either **with or without the word “only” after the payee's name:**

- The cheque shall **not be transferable** but shall be valid between the parties thereto;
- The cheque shall be **deemed to be crossed generally**, unless it is crossed specially;
- The **words “not transferable” may not be cancelled.**
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### Traditional non-transferable cheques: Section 6(5)

**Section 6(5)** provides that if a **bill contains words prohibiting transfer, or indicating an intention** that it should not be transferable, it is **valid as between the parties** to the bill, but it is **not negotiable**.

### Non-transferable cheques and the drawee banks liability:

Section 79: The drawee bank will enjoy protection of S79 if a crossed cheque is paid to another bank collecting it for the wrong person. (good faith & without negligence)

Section 83: Applies to transferable cheques only.

Section 58: Applies to cheques made payable to order only, and which are thus transferable. A drawee bank paying a non-transferable cheque to another bank, which collected it for the wrong person, will not be able to rely on the protection of S58.

### Standard bank v Sham magazine

Appellate Division had to **decide whether the words “a/c payee only” excluded transferability** of a cheque. **If the words “a/c payee only” prohibited the transfer** of the cheque, **Standard Bank could not have been the holder of the cheque.**

To decide this question the court had to interpret S6(5) as well as the words “a/c payee only” on the cheque.

**Section 6(5)** reads: If a **bill contains words prohibiting transfer**, or **indicating an intention** that it should not be transferable, it is **valid as between the parties** to the bill, but it is **not negotiable**.

The AD came to the conclusion that Standard Bank, as endorsee, did qualify as the holder of the cheque and was entitled to institute action on the cheque against Sham magazine as drawer.

Holmes JA said that the words “account payee only” might operate as some safeguard if the cheque were to fall into wrong hands. They are, in effect, a direction to the collecting bank that the specified payee should receive the money.

What is the difference in meaning between the words “pay C only” and “account payee only”? An order cheque is in principle transferable unless words restricting its transferability are printed on the cheque. An order cheque becomes non-transferable when the words “pay C only” appears on it.

In contrast, the words “account payee only” are nothing more than an instruction to the collecting bank to collect payment of the cheque for a specific payee. In Standard Bank v Sham Magazine the AD said that the words “a/c payee only” does not exclude transferability of a cheque. Holmes JA, came to the conclusion that the words “not negotiable” in conjunction with the words “a/c payee only” do not exclude transferability of a cheque.

## **The collecting bank's responsibility to the true owner:**

For a long time there was controversy as to whether a **collecting bank acquired delictual liability** towards the true owner of a cheque if the bank **negligently collected payment** of the cheque on behalf of the **wrong person**.

### **Indac electronics v Volkskas Bank**

The appeal court found as follows on the question of **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**:

“There can now be no reason in principle why a **collecting banker should not be held liable under the extended lex Aquiliae for negligence to the true owner of a cheque, provided all the elements** or requirements of Aquilian liability **have been met.**” Collecting bank may be held delictually liable.

A collecting bank which collects the amount of a cheque for the wrong person is indeed liable to the true owners for compensation. A collecting bank is **negligent if it fails to take reasonable steps to determine whether its client is ex facie entitled to payment of the cheque.**

In the Indac electronics case the facts point prima facie clearly to negligence. The bank accepted an order cheque (unendorsed) for the account of someone other than the payee of the cheque.

### **Columbus Joint Ventures v Absa**

SCA had to decide **whether Absa negligently, as alleged by Columbus, opened an additional account for an existing client** without checking all the particulars provided by the client. The court concluded that **Columbus could not prove that Absa was negligent** in opening another account for its client without conducting an in-depth investigation.

- Court **confirmed that a collecting bank is legally obliged to use caution when opening new accounts** in order to prevent possible loss to the true owners of a stolen cheque;
- **Negligence** could only be determined after **careful consideration of all the facts and circumstances** of the matter.