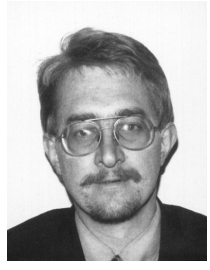
VOL 12 PART 2

Heinrich Schulze



Countermanding an electronic fund transfer

Some comments flowing from a recent judgment

Introduction

It has been said that we are 'in the midst of one of the greatest revolutions in banking and finance in all of history' (Melanie L Fein *Law of Electronic Banking* (2000) xxv). Three main forces underlie this 'revolution':

- changes in information technology,
- changes in communications technology, and
- globalization (sometimes referred to as internationalization).

These forces also have a huge impact on the concept 'money' as we have 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 (our first working-capital asset) to pre-coinage metallic money. Later came coinage and printed money. Currently, the concept 'money' is undergoing yet another change with the advent of electronic money, or e-money.

We can also accept that we are by no means at the end of the development of new e-money products and electronic fund transfer options.

Over the last few years there has been a steady increase in the number of electronic-transfer transactions in South Africa. The following statistics will illustrate this: 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 transfers with a total value of R2 936,100 billion. In 2001, these figures increased to 358 740 million and R3 484 208 billion, respectively. During 2002, there were 387 576 million electronic transfers with a total value of R1 889,455 billion. In 2003, there were 428 230 million electronic transactions with a total value of R2 144,739 billion.

At the same time, there has been a steady decrease in the number of cheques processed by the Automated Clearing Bureau ('ACB'). This is illustrated by the following statistics: in 1999, 280 644 million cheques (with a face value of R5 358 351 billion) were processed by the ACB. In 2000, the number of cheques processed dropped to 270 565 million (with a total value of R4 933 171 billion). In 2001, the number of cheques processed further decreased to 237 781 million (with a total value of R3 839 540 billion). In 2002, the number of cheques processed dropped to 187 442 million (with a total value of R1 708 618 billion), and, in 2003, to 143 848 million (with a total value of R1 472 067 billion) (South African Reserve Bank *Quarterly Bulletin* no 231, March 2004, S-13).

ISSN 1021-7061

The development of e-money products and electronic fund transfer systems were the direct results of the many disadvantages that attach to coins and notes (cash). These disadvantages are obvious:

- handling costs,
- counterfeiting, and
- particularly in South Africa, a high security risk.

These and other factors, such as technological developments and the advent of the computer, contributed to the need for, and possibility of, an anonymous form of payment where the parties who want to effect payment no longer physically have to exchange money.

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 (like an automated teller machine), payment can take place by way of electronic fund 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 transfer of funds, to mention but one example.

The nature of an electronic fund transfer

An electronic fund transfer may be defined as an instruction by a client to his or her bank to transfer funds from the client's account to a beneficiary's. The client (or payer) and the beneficiary can be one and the same person (such as where the client instructs the bank to transfer funds from his or her savings account to his or her cheque account). Where the payer (the party who gives the instruction to the bank to transfer the funds) and the beneficiary (the party to whose account the money is transferred) are clients of the same bank, there is only one bank involved. But where the beneficiary's account is held at a different bank, two banks are required to complete the electronic fund transfer. The paying bank will pay the beneficiary's bank, which will then transfer the funds to the beneficiary's account. Usually the instruction by the client (the originator) is given electronically, from an automated teller machine, a point-of-sale facility, or a personal computer (provided that the client is registered to use Internet banking services).

It is trite that an electronic fund transfer is not an *instrument* of payment (as is, for example, a cheque). With an electronic fund transfer there is no physical instrument that embodies certain rights and can be transferred from one person to another. So an electronic fund transfer may best be described as a *method* of payment, a medium through which a third party (the payer's bank) is given an instruction by the payer to effect payment through an electronic medium (a computer system) to the beneficiary's bank account.

One of the advantages of an electronic fund transfer is the speed with which the transfer of the money, and hence payment, is effected. Say, A transfers money from his account to B's account. As soon as A confirms the mandate on the computer and gives his bank the mandate to 'send' the transaction (to transfer the money), the transaction is effected. As soon as A sends the electronic message to transfer the money to B's account and the electronic 'book entry' is completed in terms of which A's account is debited and B's credited, the transaction is completed. This usually takes no more than a few seconds. As soon as the transaction is completed the money becomes available for B to withdraw it, should she so wish.

But one of the main advantages of an electronic fund transfer as a method of payment — the fact that payment is speedy and immediate — is at the same time one of its biggest disadvantages.

It is generally accepted that once an authorization for an electronic fund transfer has been given by a client of a bank to the bank itself, or where it has been communicated to the terminal, the transfer cannot be countermanded. It appears that this applies with equal force to many, if not all, types of electronic fund transfer. But is this necessarily fair?

In South Africa, there is no specific legislation in point. Although the Electronic Communications and Transactions Act 25 of 2002 (the 'ECT Act') provides a wide and general framework for the facilitation and regulation of electronic communications and transactions, including electronic transactions for financial services, it does not deal exclusively with electronic banking services. I believe that a number of aspects of the use of electronic banking products are not necessarily covered by the ECT Act. I also believe that the rapid development of electronic banking will reveal further holes in the ECT Act as far as its viability as an all-encompassing legislative instrument is concerned.

Suffice to say here that there can be little doubt that the electronic payment system and e-money products offered by banks will have to be regulated by their own special legislation.

Until such regulation is put in place by Parliament, the relationship between the providers of electronic payment facilities (banks) and the users of such facilities (the clients of banks) will be regulated by those few provisions of the ECT Act that apply to electronic financial services, read with the common-law principles of the law of contract. At this stage only banks provide electronic fund transfer facilities. As the relationship between a bank and its client is, generally, in the nature of a contract of mandate, I believe that the rights and obligations flowing from the contract of mandate apply to the relationship between a bank that provides electronic fund transfer services and its client who uses them.

Recently, the Supreme Court of Appeal made in passing a number of comments on reversing electronic fund transfers. I shall now canvass the decision in *Take & Save Trading CC & others v The Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA), as well as the court's comments about the countermanding of an electronic fund transfer of funds.

Take & Save Trading CC v The Standard Bank of SA Ltd

These were the relevant facts: Standard Bank claimed R10 million 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 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 could pay third parties by way of electronic fund transfers. M, as sole member, ran the corporation and he was the designated operator of its electronic banking facility. He was also in control of an account at Nedbank, which was purportedly being held by 'A Mohammed' trading as Highway Distributors. (There was a strong suspicion that Mansoor and Mohammed were one and the same person, but this had no bearing on the case.)

> The inter-bank agreement apparently prohibits reversing an electronic transfer unless the beneficiary consents to it

M drew a number of cheques with a total value of R9 970 947 against the account of Highway Distributors and deposited them on 9 August 2001, a public holiday, at an automated teller machine to the account of the corporation. Almost immediately he electronically transferred R9 983 952,93 from this account to the banking accounts of a creditor ('Metro'). These payments were 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 to its account did it release the cigarettes to M.

The cheques of Highway Distributors that M deposited into Metro's account were dishonoured for a lack of funds soon after delivery of the cigarettes. Rather brazenly M, upon being informed that the cheques had been

ISSN 1021-7061

dishonoured, instructed the bank to 'reverse' the electronic payments that he had made to Metro and to credit the account of the CC. Surprisingly, the bank began to comply with M's 'arrogant' instruction. Less surprisingly, Metro, now without R10 million's worth of cigarettes, objected to the bank reversing the electronic transfer. The bank, not surprisingly, then refused to comply with M's instruction to 'reverse' the electronic transfer.

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

In the trial court, an employee of the bank was called to explain electronic banking. She testified about an inter-bank agreement under the auspices of the Automated Clearing Bureau, which agreement provides that, without the beneficiary's consent, an electronic transfer cannot be reversed.

On appeal, the following questions were put to the court:

- Did M give the instruction to the bank to reverse the transfer?
- If he did, could the instruction have been carried out?

These were factual questions. The answer to the second question depended on whether there was an inter-bank agreement on reversing electronic transfers.

In deciding in favour of the bank, Harms JA reasoned as follows:

> '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' (at 9).

A number of potentially contentious statements are made in this quote. I shall restrict myself to two of them (my comments are offered on the basis that the judge intended his comments made in passing to be understood as general comments and not as comments restricted to the particular facts of the case before him):

- The court's implied acquiescence in the term of the inter-bank agreement that a bank cannot retransfer an amount transferred by A into B's bank account without B's concurrence is alarming, to say the least. There is a strong suspicion that in a large number 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 actually 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 practical examples). Can the law honestly expect A (or A's bank) first to obtain B's consent before the transfer of funds can be reversed? Surely not. I would have appreciated the comment of the Supreme Court of Appeal, albeit in passing, on the potential unfairness of this term in the inter-bank agreement.
- The court observes that there are no grounds for reversing an electronic fund transfer. Not to flog a dead horse, I shall merely mention that where B was never entitled to receive the money in the first place, his (B's) consent should surely not be a prerequisite for reversing the transfer.

Conclusion

The inter-bank agreement is confidential and so not open to public scrutiny. In the absence of proof to the contrary one has to accept the evidence of the expert witness in *Take and Safe Trading* that the inter-bank agreement actually prohibits reversing an electronic transfer unless the beneficiary consents to it. But whether that should be the only instance where the payer could instruct his or her bank to reverse an electronic transfer is a different question altogether. I have indicated here that there are many practical examples where a reversal of an electronic transfer would not only be fair but also

in line with public policy. Where the beneficiary cajoled the payer to believe that he or she (the beneficiary) was entitled to payment when he or she actually was not, and the payer discovers his or her mistake after the electronic transfer has been made and while the money is still in the beneficiary's account, the law surely cannot expect the payer, or his or her bank, first to obtain the fraudulent beneficiary's consent before the electronic transfer can be reversed.

Heinrich Schulze: University of South Africa

ISSN 1021-7061