CASES / VONNISSE

SARS LIABLE FOR CHEQUES LOST OR STOLEN IN THE POST

Stabilpave v SARS (615/12) [2013] ZASCA 128

1 Introduction

The Supreme Court of Appeal (SCA) in *Stabilpave v SARS* (615/12) [2013] ZASCA 128 was asked to decide on the assumption of risk where a cheque issued by the South African Revenue Services (hereinafter "SARS") was intercepted through the post and subsequently misappropriated by thieves. The judgment of the court is significant as it stated clearly that any agreement "about the particular mode of performance" or "as to the manner of payment" will only be reached if the creditor stipulates (or requests or authorizes) a particular mode of payment and the debtor accedes to the request. According to the court, due to the fact that the appellant had not requested the refund by cheque, SARS carried the risk of theft or loss of the cheque.

2 Facts

This case was an appeal from the Full Court of the North Gauteng High Court, Pretoria. The facts were not disputed by the parties. The respondent, SARS, owed the appellant, Stabilpave (Pty) Ltd (hereinafter "Stabilpave"), a tax refund of R724 494.29. This amount was reflected as the amount due to Stabilpave on the tax assessment form (IB34) dated 16 October 2006 which was issued to Stabilpave (par [2]). The dispute between the parties arose with regard to the interpretation of the following phrase included the tax assessment form:

> "Die kredietbedrag wat nou op u belastingrekening reflekteer word eersdaags aan u betaal. Hierdie betaling sal geskied deur middel van 'n tjek wat by u naaste Poskantoor afgehaal kan word OF indien geldige bankbesonderhede beskikbaar is sal 'n elektroniese oorbetaling gemaak word deur gebruik te maak van die bankbesonderhede soos per u belastingrekord.
>
> Nota: Die kredietbedrag aan u terugbetaalbaar verteenwoordig die kredietbedrag soos gereflekteer op u belastingrekening op datum waarop die tjek of elektroniese oorbetalingstransaksie gegenereer is. As gevolg van finansiele transaksies wat moontlik mag plaasvind op u belastingrekening tydens die datum van uitreiking van hierdie aanslag en die datum waarop die terugbetaling gegenereer is, mag die bedrag derhalwe terugbetaal verskil van die bedrag getoon as VERSKULDIG AAN U op hierdie aanslag.
>
> U huidige bankbesonderhede soos per u belastingrekord is soos volg:

> Naam van bank en tak
> Taknommer
> Tipe rekening
> Rekeningnommer
> Geliewe kennis te neem dat indien hierdie besonderhede nie geldig is tydens die prosessering van die kredietbedrag op u rekening, sal die terugbetaling van die kredietbedrag geskied deur middel van 'n tjek wat aan u naaste Poskantoor gestuur sal word vir kollektering."

This was a notice to the appellant that essentially informed the appellant that payment of the refund "will be made by cheque which can be collected at your nearest post office, or if the valid information is available, the payment will be made electronically by using the information on your tax record" (par [4] of the High Court judgment; for the translation see Nagel and Pretorius "Taxpayers Beware the SARS Cheque Refund: *Stabilpave (Pty) Ltd v The South African Revenue Services* [2009] ZAGPPHC 159 (11 December 2009)" 2010 73 *THRHR* 482–486).

Stabilpave's banking details were not available to SARS and therefore the payment was made by issuing a cheque. The cheque was crossed, marked "not transferable", sealed and posted with Securemail, a division of the South African Post Office. The letter was addressed to Stabilpave's postbox number at the Menlyn Retail Post Office. Securemail caused a delivery notification to be issued (par [3]). Neither Stabilpave nor any person representing Stabilpave received the delivery notice. The envelope containing the cheque was retrieved from the Menlyn Retail Post Office by a person Mbukuman Wellington Mtima ("Mtima") when he presented the delivery notice together with a letter of authorization purportedly issued by a firm of accountants Prinsloo & Du Plessis Inc (there is no evidence as to how Mtima had actually managed to intercept the delivery notice (par [3]). The letter purportedly written by Prinsloo & Du Plessis Inc was falsified as no such firm exists and even it did, it had no connection with the appellant. Mtima had no authority from the appellant to collect the cheque from the post office and was totally unknown to both parties in this matter (par [3]).

In addition, the particulars of the directors of Stabilpave (JM Geyser, JE Raubenheimer and F Kenney) were fraudulently changed in the Register of Companies to reflect one Petros Mandla Radebe (Radebe) as its sole director. Radebe subsequently and without Stabilpave's authority opened a bank account in Stabilpave's name with First National Bank. The cheque was deposited and the bank subsequently presented it for payment to SARS's bankers, Absa Bank. Over a period of time Radebe withdrew the full amount of the deposit while purporting to act as director of Stabilpave (par [4]).

When Stabilpave discovered the fraud, it requested that the Register of Companies rectify its information based on the proper identity of the directors. It then issued a summons against SARS for not having received the refund which became due and payable to it on 16 October 2006, plus interest and costs (par [5]).

2 1 Proceedings in the High Court

The question that needed to be determined by the court *a quo* (North Gauteng High Court) ("High Court") was summarized by the judge Ismail AJ (sitting in the court of first instance) as follows:

> "which of the parties stipulated or requested that payment should be effected through the post. Is the situation as described by [the plaintiff], namely that the defendant chose the method of payment through the post or is the position as described by [the defendant]. In my view the answer to this question would determine the outcome of the case, in view of the parties agreeing that the cheque was posted and that it was honoured" (par [8] of the High Court Judgment).

SARS admitted the debt but raised the defence of payment. SARS's defence was essentially that Stabilpave had elected that payment could be made by cheque as opposed to electronic payment and that the cheque would be collected at Stabilpave's nearest post office. Stabilpave was obliged to and did provide SARS with its postal and registered address. SARS did not know the details of Stabilpave's bank account (par [6]). The respondent (defendant in the court *a quo*) argued further that an express term stipulated that payment would be made by post in the absence of banking details being provided. To support this argument the respondent relied on *HK Outfitters (Ply) Ltd v General Assurance Society* Ltd (1975 (1) SA 55 (T) 61), where Botha J referred to the following *dictum* by Rumpff J in *Dadoo & Sons Ltd v Administrator, Transvaal* (1954 (2) SA 442 (TPD) 445F–G):

> "The legal position appears to be that if a creditor requests a debtor to settle his debt by sending a cheque through the post he agrees to run the risk of loss in the transit. By making this request he does not appoint the post office his agent but he authorises the manner of payment. It would depend upon the facts of each case whether or not the request was actually made by the creditor" (see also *Barclays National Bank Ltd v Wall* 1983 (1) SA 149 157).

The argument by Stabilpave in the High Court was that SARS had chosen to pay the refund by cheque and thus had accepted the risk of the cheque being stolen. The argument was based on the principle that, if a debtor tenders payment by cheque, the payment remains conditional until the cheque has been honoured (par [8] of the High Court judgment).

The judge, Ismail AJ, was of the view that the assessment form was a notification to the taxpayer that it either owed monies to SARS, or, alternatively, that monies were due to it (par [9] of the High Court judgment). The notice according to Ismail AJ clearly had the Stabilpave's postal address which it had furnished to SARS. The assessment form further gave Stabilpave a choice whether to receive payment through the post to the address provided; or, alternatively, Stabilpave could provide its banking details so that the monies owed could be transferred directly into that bank account (par [9] of the High Court judgment).

Ismail AJ concluded that Stabilpave had chosen not to give its banking details on the tax forms (IB14) which it submitted for previous years and that it had similarly failed to provide its banking details when it received the

assessment form (par [10] of the High Court judgment). The court ruled that the assessment received by Stabilpave provided it with the option to receive payment by post or to provide its bank details so that the monies could be directly transferred into its nominated bank account. The court thus concluded that Stabilpave had chosen the method of payment and had accepted the associated risk. The claim of Stabilpave was accordingly dismissed with costs (par [11] of the High Court judgment).

The matter was taken on appeal to the Full Court of the North Gauteng High Court, which also dismissed the appeal against the decision of the court of first instance. The majority of the Full Court held (Mavundla J and Mothle J concurring) that "the only plausible inference to be made was that there was a tacit agreement that remittance of payment should be done through registered post". The court went on to add that Ismail AJ correctly found that the appellant made a choice as to how the cheque was to be remitted per post, and that the risk lied with the appellant (par [8]).

Fabricius J did express a dissenting view to the effect that the existence of any agreement relating to the mode of payment was not established. The Judge held that the relevant notification did not contain any indication to the appellant that it was entitled to express its approval or disapproval with the intended mode of payment. According to Fabricius J, the assessment read as a whole, simply and clearly indicated that, because the respondent did not have the banking details of the appellant, payment would be made by cheque posted to the nearest post office (par [8]).

3 Issues

The SCA had to decide as a matter of law and based upon proper interpretation of the notice contained in the tax-assessment form mentioned above, whether the notice gave the appellant a choice to select a mode of payment. And, if this was the case, whether the appellant exercised the choice, whether expressly or by necessary implication, that SARS should effect payment by way of a cheque sent through the post. The parties were *ad idem* that only the tax-assessment form had to be looked at in order to determine the first question (par [2]).

4 Judgment

In the SCA, the court concluded that any agreement about the particular mode of payment would be reached only if the creditor stipulated requests or authorize a particular method of payment and the debtor accepted the decision (par [11]).

It was held that the risk of loss of the cheque was not assumed by Stabilpave but remained with SARS. The learned Meyer AJA in the SCA (Brand, Lewis, Bosielo and Theron JJA concurring) held that, upon a plain reading of the notice in the tax-assessment form, the notice did not give the appellant an option to select a mode of payment to be followed by SARS. The notice simply informed the appellant of the manner of payment, namely,

that payment would be effected by way of a cheque if valid banking details were not made available to SARS (par [11]).

The SCA accordingly held that the notice issued to the appellant in the tax assessment form was merely for information purposes and clearly did not provide the appellant with any options for effecting method of payment. Instead, the method of payment was dictated to Stabilpave by SARS (par [12]–[13]). The court concluded that the risk of loss of the cheque was not assumed by Stabilpave and remained with SARS and that SARS did not discharge its indebtedness by posting a cheque for the amount of the refund that is due to Stabilpave (par [14]). The appeal was therefore upheld with costs. The SCA ordered that the respondent pay the appellant a sum of R724 494.29 together with interest *a tempore morae* at the rate of 15.5 percent per annum from 17 October 2006 until date of payment (par [15]).

5 Analysis and discussion

5 1 Payments by cheque

In general, the payment of a monetary debt must be made in legal tender (Joubert *General Principles of the Law of Contract* (1987) 280; and see also s 17(2) of the South African Reserve Bank Act 90 of 1989). Payment by cheque is not a legal tender and accordingly a creditor is not obliged to accept payment by cheque and may insist on being paid in cash (Joubert *General Principles of the Law of Contract* 280). A creditor may, however, be obliged to accept payment by cheque if there is an express or tacit agreement to this effect (Malan *et al Malan on Bills of Exchange, Cheques and Promissory Notes* (2009) 5ed 268–269). In light of the fact that cheques are frequently used in commercial transactions only some slight indication in the contract or evidence would generally suffice for the court to infer that payment of the creditor can be made by cheque (*Esterhuyse v Selection Cartage (Pty) Ltd* 1965 (1) SA (W)). However, there are factors that have been enumerated by the courts that may indicate that payment by cheque may be acceptable in the circumstances (see *Schneider and London v Chapman* 1917 TPD 497; Christie *The Law of Contract in South Africa* 5ed (2006) 415; and *Van Loggenberg v Sachs* 1940 WLD 253).

5 2 Cheques sent by post

The principles to be applied in cases where cheques have been intercepted in the post and misappropriated by a thief have been concisely summarized by Nienaber J in *Mannesmann Demag (Pty) Ltd v Romatex* (1988 (4) SA 383 (D)), where the court held (389F–390D) that:

> "When a debtor tenders payment by cheque, and the creditor accepts it, the payment remains conditional and is only finalised once the cheque is honoured (see also *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton,* 1973 (3) SA 685 (A) 693; and Christie *The Law of Contract in South Africa* 413). Until that happens a real danger exists that the cheque may be misappropriated or mislaid and that someone other than the payee may, by fraudulent means, convert it into cash or credit, for instance, by forging an

> endorsement or by impersonating the true payee. That risk is the debtor's since it is the debtor's duty to seek out his creditor.
>
> But when the creditor stipulates (or requests) a particular mode of payment and the debtor complies with it, any risk inherent in the stipulated method is for the creditor's account. That is said to be 'the legal position' (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) 908B–E), 'the principle', or 'the law' (*Barclays National Bank Ltd v Wall supra* 156H–157C)), at least when the post is to be employed for that purpose. And of necessity that must mean that, if the worst comes to the worst and the cheque is intercepted and misappropriated by a thief, the obligation to pay is deemed to be fulfilled even though the amount of the cheque was never credited to the creditor (*Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 (2) SA 763 (T) 769). A stipulation of this sort may of course form part of the agreement creating the debt which is due to be paid but it does not have to be so. More often than not the request only reaches the debtor thereafter. In that event, if the debtor accedes to the request, the parties have reached agreement about the particular mode of performance to be employed in that particular instance. It is a term of this subsequent agreement that the creditor assumes the risks of any inadequacies in the method selected by him. And to the extent that it is presented, as it invariably is, as a proposition of law, the term becomes one that is implied by law."

In *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* (*supra*) Ramsbottom J stated (770) the general principle regarding the method of establishing payment as follows:

> "A debtor may choose the post or any other means convenient to him to convey money to his creditor; as long as the money reaches him, it is no concern of the creditor what method the debtor uses, and it cannot be said that because the creditor raises no objection to the means of communication used that he requests or invites the debtor to use that means of effecting payment."

The judge in *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* (*supra*) went to state (769) that:

> "The principle is that if a debtor is asked by his creditor to make payment in a particular way, e.g., by drawing a cheque and putting it in the post, then, when he has done what he was asked to do and has posted the cheque, he has, subject to the cheque being honoured, made due payment, and the risk of loss thereafter is on the creditor."

This principle has subsequently been approved and applied in several cases (see *Dadoo & Sons Ltd v Administrator Transvaal supra*; *National Housing Commission v Cape of Good Hope Savings Society* 1963 (1) SA 230 (C); *HK Outfitters (Pty) Ltd v Legal & General Assurance Society Ltd supra* ; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd supra*; *Mannesmann Demag (Pty) Ltd v Romatex (Pty) Ltd supra*; *Fedgen Insurance Ltd v Bankorp Ltd* 1994 (2) SA 399 (W); and accepted as reflecting the correct legal position by Gal-gut AJA in *Barclays National Bank Ltd v Wall supra* 157C).

As pointed out above, if a creditor requests the debtor to pay him by posting a cheque, then the debtor is regarded as having discharged the debt as soon as he deposits a valid cheque in the post. However, where the agreement to pay by post was subject to an express or tacit term that certain

safeguards had to be adopted in the manner in which the cheque was to be drawn and the manner in which the parties were to be described to reduce the possibility of it being paid to an unauthorized person, then the debtor would not have discharged the debt upon merely posting the cheque if he failed to adopt the necessary safeguards (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd supra* 908E). In *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* (*supra*) the defendant (NKR Construction (Pty) Ltd) owed the plaintiff (Greenfield Engineering Works (Pty) Ltd) R1 969, 72 in respect of certain materials supplied and work done by the plaintiff on one of the defendant's contracts ([903F–G] of the judgment). The plaintiff wrote a letter to the defendant requesting the latter to forward a cheque for the outstanding amount "by return of post" ([903G–H] of the judgment). The defendant drew a crossed bearer cheque for the outstanding amount in favour of "Greenfield Engineering Works" (instead of "Greenfield Engineering Works (Pty) Ltd"). However, the cheque never reached the plaintiff as it was intercepted by a thief who eventually managed to obtain payment of an amount of R1 800 ([903 H] of the judgment). The plaintiff sued the defendant for R1 800 (the bank having agreed to reimburse the plaintiff the balance remaining in the thief's account), and in its alternative claim the plaintiff claimed delictual damages from the defendant as a result of the latter's negligence in drawing the cheque in the form mentioned above. In response to the plaintiff's main claim, the defendant pleaded payment on the basis that it had posted the cheque to the plaintiff and accordingly discharged the debt ([905A–C] of the judgment). Hoexter J eventually concluded (911A) that, based on the evidence in the agreement of the parties that the cheque be sent by post, it was a tacit term (1) that the cheque should be crossed, (2) that the cheque should name the payee as "Greenfield Engineering Works (Pty) Ltd" and (3) that the cheque should be drawn payable to order.

The court concluded that the defendant did not comply with its legal obligation to draw the cheque in the form indicated above, and judgment was accordingly granted in the plaintiff's favour in the amount of R1 800 (917E of the judgment). In addition, the court pointed out that even if it had dismissed the plaintiff's main claim it would nevertheless have granted the plaintiff's alternative claim for delictual damages.

The Judge held in *Stabilpave v SARS* (*supra*) that there was no invitation, expressly or by necessary implication, to the taxpayer to furnish banking details should the taxpayer wish for payment to be effected by means of an electronic transfer. If there was such invitation one would have expected the taxpayer to be informed that payment would be effected by means of an electronic transfer, if valid banking particulars were available or furnished by the taxpayer (par [12]). The court held that further and clear indication that the notice did not afford a choice as to the manner of payment was the absence of a cut-off date on or before which the taxpayer might furnish its banking particulars to SARS. Instead, the taxpayer was informed that payment would be made soon. The notice, according to the court, was merely for the information of the taxpayer (par [12]). The court added that the mere fact that a creditor knew or expected to receive payment by cheque through the post and did not raise an objection thereto, did not give rise to

an implied request or election by the creditor to be paid in such a manner. Meyer AJA held that the notice in this case simply served to advise the appellant that banking particulars had not been presented to SARS and therefore payment would be effected by means of a cheque through the post (par [13]).

6 Conclusion

This decision is significant for taxpayers because if the decision of the High Court was not overturned, the life for the ordinary taxpayer would be rather precarious as it would have meant that the taxpayer would have to accept the risk of a cheque issued by SARS being stolen or fraudulently dealt with. This decision is important because if SARS pays a taxpayer a refund by posting a cheque to the taxpayer and if the check is lost or stolen and then fraudulently presented to the bank for payment, liability on the part of SARS will not be discharged. The notice to taxpayers that refunds can either be paid by cheque or electronic fund transfer does not constitute a formal request to taxpayers to indicate a preference. SARS has a responsibility to check with the taxpayer whether the taxpayer preferred payment *via* a cheque or electronic transfer. If SARS does issue a refund to a taxpayer by posting a cheque it is imperative that SARS at the very least should have informed the taxpayer of the risks involved in sending a cheque through the post. However, it is important for taxpayers to note that to receive refunds from SARS *via* post remains inherently risky. Collecting banks must also be aware and vigilant in these circumstances as they also may be liable for a claim in delict, especially in cases such this one where the collecting bank paid a cheque into a newly opened account without taking consideration of the fact or making enquiries as to why a customer would need to open new account for the purposes of depositing a cheque from SARS (Nagel and Pretorius 2010 *THRHR* 485).

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