IN THE HIGH COURT OF SOUTH AFRICA

(TRANSV AAL PROVINCIAL DIVISION)

UNREPORTABLE

Date argued: 13 June 2005

Judgment delivered: 13 June 2005

CASE NO: 3919/2005

In the matter between:

FREDERIK WILLEM WYPKEMA PLAINTIFF

and

TOBIAS JOHANNES LUBBE DEFENDANT

Provisional sentence _ attorney's trust account cheque not honoured - payee of cheque not entitled to hold attorney responsible personally

Van Rooyen AJ

[1] This is an application for a provisional sentence based on a cheque which had been dishonoured. Plaintiff alleges that he is the lawful holder of the cheque drawn by the Defendant, an attorney, on his trust account in favour of the Plaintiff and that the defendant attorney is liable to pay the amount stipulated on the cheque.

[2]Defendant opposes the provisional sentence application and *inter alia* advances the following defenses: (1) The Defendant throughout acted as agent on behalf of an entity by the name of Rooihak Eiendomme (Pty) Ltd ("Rooihak"). As such he never bound himself or his firm as surety or co-principal debtor in respect of the transaction for the obligations of Rooihak. (2) Payment of the cheque, which was post-dated, was dependent on a transaction to be registered before 29 September 2004. The transaction was cancelled alternatively did not proceed and the Defendant was never provided with funds to make payment to the Plaintiff. (3) The underlying cause of the cheque was the agreement between Rooihak and the Plaintiff, which was in essence a loan for bridging finance for Rooihak. The transaction was however dependent on the registration of a bond from which Rooihak would make payment in the amount of the cheque, which constituted a suspensive condition which had not been complied with. As a consequence that amount is not payable or payable yet.

[2] *Mr Vermeulen,* for the plaintiff, argued that the defendant had personally undertaken to pay the amount to the Plaintiff. However as argued by *Mr Stone,* for the Defendant, from the documentation attached to the Opposing Affidavit it appears clearly that the Defendant throughout acted on behalf of a company by the name of Rooihak .. It is also clear that Plaintiff was aware of the fact that Rooihak was represented by the Defendant and that the moneylending transaction was entered into between Rooihak and the Plaintiff and that the Defendant was not a party to such agreement. Plaintiff also does not deny that the money-lending transaction was entered into between himself and Rooihak.

[3] It is trite that the relationship between an attorney and his client is based on a contract of mandate and an attorney acts as agent on behalf of his client. See for example *Mort N.* O. v *Chiat* 2001 (1) SA 464(C). It is clear from the Attorneys Act 53 of 1979 that in terms of the

nature of an attorney's trust account, the attorney at all times acts as agent on behalf of other entities in respect of such trust account and the funds in a trust account of an attorney never vests in the attorney. An attorney can only deal with those funds on behalf of clients. Before an attorney is entitled to these funds, the funds must be transferred from the trust account to his business account first. Section 79 of Act 53 of 1979 specifically provides:

> "Notwithstanding anything to the contrary in any law or the common law contained, trust property which is expressly registered in the name of a practitioner, or jointly in the name of a practitioner and any other person in his or their capacity as administrator, trustee, curator, or agent, as the case may be, shall not form part of the assets of that practitioner or other person."

[4] Furthermore section 78(7) of Act 53 of 1979 also provides *inter alia* that no amount standing to the credit of any practitioner's trust account shall be regarded as forming part of the assets of the practitioner or may be attached on behalf of any creditor of such practitioner (apart from any excess amount remaining after the payment of all claims against the trust account). Accordingly, by the very nature of such account, anything done by an attorney in respect of his trust account, inclusive of cheques drawn on the trust account, is done by him in his capacity as agent only.

[5]Therefore, in issuing the cheque on behalf of Rooihak, on which the Plaintiff presently claims, he also acted in his capacity as agent for the company. The mere fact that he was appointed by means of the power of attorney to raise money and that he was to that extent involved, on behalf of the company, with the money-lending transaction entered into between the Plaintiff and the company, does not make the attorney a party to the agreement. In *Joel Melamed & Hurwitz* v *Cleveland Estates (Pty) Ltd* 1984(3) SA 155(A) it was held that the fact that an attorney has been appointed in a deed of sale to attend to the

conveyancing, does not make him a party to that agreement nor can that attorney become a party to it by accepting the so-called benefit. An attorney acting as conveyancer acts as agent on behalf of a party to the agreement (normally a seller). If in such instance an attorney is not regarded as a party to an agreement, it follows that the Defendant could equally, *in casu*, not be regarded as a party to the underlying agreement.

[6] As the cheque was clearly issued by Defendant in a representative capacity on behalf of Rooihak and not by the Defendant personally or on behalf of his firm and as the Defendant never bound himself or his firm as surety or co-principal debtor for the obligations of Rooihak, Plaintiff's claim against the Defendant must fail. If Plaintiff has a claim, it should have been instituted against Rooihak. As Plaintiff knew of the fact that the cheque was issued for Rooihak he cannot now rely on the cheque, disregarding the underlying agreement and underlying legal relationship of which he had knowledge. See *Froman* v *Robertson* 1971(1) SA 115A at 121H - 122C..

[7]Defendant is entitled to raise the aforesaid defence (as well as the defences set out below) as the Plaintiff and the Defendant are immediate parties to the cheque (Plaintiff is not a holder in due course in respect of the cheque).1

[8] The argument that the Plaintiff is entitled to institute proceedings against the Defendant personally is not well founded. When sued by the holder with whom he has concluded a contract on the bill, the drawer may raise a defence that the underlying obligation or *causa*

1 Compare s 36(b) of the Bills of Exchange Act 34 of 1964

is unenforceable. Malan et aI, in *Malan on Bills of Exchange, Cheques and Promissory Notes* (2nd Edition) explains at page 87: *"the liability of the debtor on a bill cannot be seen in isolation nor judged solely in terms of the instrument. The underlying obligation _ including the debt of a third party - for which a bill is given constitutes the causa of the contract on the instrument."* Also see *Froman* v *Robertson* 1971 (1) SA 115(A) at 121 H - *122C;Saambou-Nasionale Bouvereniging* v *Friedman* 1979(3) SA 978(A) at 992; *Van Rooyen* v *Du Plooy* 1985(1) SA 812(T).

[9] In *Van Rooyen* v *Du Plooy* (supra) as in the present matter, the Defendant in provisional sentence proceedings advanced a defence based on an oral agreement concluded, subjecting the obligation to pay to a suspensive condition. The Court held, on comparable facts, that evidence regarding the alleged oral agreement could be taken into account and provisional sentence was refused.

[10] Furthermore, provisional sentence is also not justified for the following reasons: (1)Defendant states that payment of funds by Rooihak was dependent on a transaction to be registered on or before 29 September 2004. That this was at least tacitly or by implication agreed is substantiated by the Opposing Affidavit. From an attached letter it is clear that the undertaking to pay was given *"teen registrasie van die gemelde verband". Although* it was undertaken that the registration of a bond would take place at the end of September 2004, the undertaking by the Defendant (clearly on behalf of his client) to pay the loan amount, was still made subject to the registration of a bond. This was confirmed in a letter of the Plaintiff. From the letter it is clear that the Plaintiff both knew that the bond had to be

registered to generate the funds from which payment would be made and also undertook to deposit the postdated cheque received from the Defendant only on 29 September 2004, *"am u in staat te stel die registrasie van die betrokke verband af te handel "*

(2)Even though the Defendant undertook to have the bond registered by 28 September 2004, such undertaking does not detract from the fact that it was clearly envisaged in the correspondence that payment was dependent on the registration of a bond. It is clear from the correspondence that Plaintiff knew that the bond had to be registered before he would receive payment and that the postdated cheque would be paid by the Defendant on behalf ofRooihak upon registration of the bond. The Defendant's liability in respect of the cheque could, accordingly, only arise if and when the bond was registered. Even if Rooihak remained liable to pay the amount of the cheque (or any other amount), it does to detract from the fact that Defendant's obligation in terms of the cheque would only arise if the bond was registered and the suspensive condition was complied with. Defendant can therefore not be held liable on the cheque.

(3)Accordingly there does not exist a *iusta causa vis a vis* the Defendant for the cheque and the Defendant is not contractually liable in respect of the cheque, as the aforesaid suspensive condition has not been complied with and the amount of the cheque has not yet became payable.

[11] In the light of the conclusions which I have reached I am satisfied that the Defendant has proved on a preponderance of probabilities that the Plaintiff will not be successful in the main application. Had the probabilities weighed evenly, I would have held in favour of the

Plaintiff. I am, however, convinced that this is not the case.

[12]The Plaintiff's application for provisional sentence is accordingly dismissed with costs.

JCW van Rooyen

Acting Judge of the High Court

For the Plaintiff: adv PJ Vermeulen

For the Defendant: adv JS Stone