193/94

Case No 380/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ESKOM — Appellant

and

FIRST NATIONAL BANK OF SOUTHERN AFRICA LIMITED — Respondent

CORAM: CORBETT, CJ, E M GROSSKOPF, NESTADT EKSTEEN, HARMS, JJA

HEARD: 11 NOVEMBER 1994

DELIVERED: 30 NOVEMBER 1994

J U D G M E N T

E M GROSSKOPF, JA

This judgment concerns the protection granted to bankers by sec 79 of the Bills of Exchange Act, no 34 of 1964 ("the Act").

The appellant is a juristic person created by statute. It issued summons in the Witwatersrand Local Division against the respondent ("the Bank"). The appellant's main claim was one for breach of contract. There was also an alternative claim based on delict which, as will be seen, plays no part in the present appeal. The allegations in the particulars of claim relating to the main claim may be summarised as follows.

The appellant was a long standing customer of the Bank at its North City Branch, Johannesburg. In terms of the contract between the parties, the Bank undertook to honour all cheques properly drawn on the appellant's account and to pay, and only to pay, such cheques according to their tenor.

In order to pay for services rendered to it by a

third party, the appellant drew a cheque dated 14 December 1990 on the Bank in the sum of R375 653,16. This cheque is described as follows in the Particulars of Claim:

> "5.1 the payee was described as 'Construction Equipment Services';
> 5.2 the cheque was expressed to be payable 'only to' Construction Equipment Services;
> 5.3 the words 'or order' did not appear after the name of the payee;
> 5.4 the cheque was crossed and marked 'not transferable'."

Construction Equipment Services was the name under which a company called Rodan Machines (Proprietary) Limited conducted its business. The cheque was posted to Construction Equipment Services but was stolen. A certain Madalo opened an account at the Bank's Life Centre Branch, Johannesburg, in the name of a non-existent close corporation called Construction Equipment Services CC. He then deposited the cheque at the Bank's Market Street Branch, Johannesburg. The Bank honoured the cheque, debited the appellant's account

and credited the account of the non-existent close corporation. The appellant alleged that these actions were in breach of the Bank's mandate in terms of the banker-client relationship "to pay only the named payee, Construction Equipment Services, and not to transfer the cheque". Before the fraud was discovered all but R176 561,07 had been withdrawn from the close corporation's account. In March 1991 the Bank credited the appellant's account with this amount. In the result the appellant suffered a loss of R199 092,09, being the difference between the amount of the cheque and the amount recovered. The appellant claimed this amount, with interest and costs, from the Bank.

The Bank excepted to the appellant's claims on a number of grounds. The exception to the claim based on delict was dismissed. As regards the main claim based on breach of contract, the exception was that the claim lacked averments necessary to sustain a cause of action. This exception was based on two grounds. One

was dismissed by the court **a quo**. The other was the only ground of exception which was upheld by the court **a quo**. This ground of exception was that sec 79 of the Act was an implied term of the mandate given by the appellant to the Bank; that the appellant did not plead averments to the effect that the Bank was not protected from liability to the appellant by the provisions of sec 79; and that without such averments, the appellant's claim against the Bank could not be sustained.

With the leave of the court **a quo** (Botha J) the appellant now appeals against the order upholding the exception.

To appreciate the parties' arguments it is necessary to have regard to some of the provisions of the Act dealing with crossed cheques. Sec 75 deals with the manner in which a cheque is crossed, and distinguishes between general crossings and special crossings. In the present case the cheque was crossed

generally.

The effect of a crossing is set out in sec 78 which provides **inter alia** (in subsection (1)):

> "If a cheque is crossed generally, the banker on whom it is drawn shall not pay it to any person other than a banker."

Sec 79, in so far as it is relevant, then reads as follows:

> "If the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker ...the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

As already stated this case concerns the interpretation of sec 79, and in this respect three questions were raised and argued before us, **viz**,

1. Who bears the **onus** in regard to sec 79? Must a person claiming from a bank show that the bank is not protected by the section, or must the bank invoke the

section and prove its applicability? The court **a quo** found in favour of the Bank that the appellant was burdened with the **onus**.

2. Does sec 79 apply where (as happened in the present case) a cheque is drawn on one branch of a bank which pays the cheque to another branch of the same bank? The court **a quo** answered this question also in favour of the Bank, holding that the section does apply in such circumstances.

3. Does sec 79 apply to a crossed cheque which is marked "not transferable"? This point was not dealt with by the learned judge **a quo** and was apparently not argued before him.

I propose dealing with these three questions in turn.

First question: Which party is burdened by the onus of proof?

Although this question was argued before us in general terms, it seems to me that there is a

possible ground of distinction between some of the requirements of sec 79. The section operates where payment was made in good faith and without negligence to a banker. The requirement that payment be made to a banker merely repeats, in effect, the general obligation laid down by sec 78(1). Failure to comply with it may give rise to a claim by the true owner of the cheque in terms of sec 78(4). The further requirements of sec 79, viz, that payment be made in good faith and without negligence, are different. They pertain specifically to the protection granted by sec 79. There may accordingly be a difference in the incidence of the **onus** in respect of these different issues. It is only in regard to the last mentioned requirements that the incidence of the **onus** has to be determined in the present matter. The facts bearing on the question whether payment was made to a banker are set out in the particulars of claim and must for present purposes be accepted as correct. If the **onus** is

on the appellant it has made all the necessary averments. The only issue which remains concerning payment to a banker is the legal one which is reflected in the second question to be answered in this judgment. The pertinent point raised by the exception in respect of **onus** is accordingly whether it was incumbent on the appellant to allege and prove that payment was not made in good faith and without negligence. What follows is directed only at that question.

We are here dealing with **onus** in its "true and original sense... namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be ..." (**Pillay v Krishna and Another** 1946 AD 946 at 952-3). **Onus** in this sense is a matter of substantive law. See **Pillay's** case, **supra**, at 951; **Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others** 1994 (1) SA 708 (A) at 761C.

It will be recalled that the Bank contended in its exception that sec 79 of the Act "is an implied term of the mandate" given by the appellant to the Bank. In the court **a quo** the appellant, according to the judgment, "did not deny that the provisions of sec 79 formed part of the contract between the parties" and the case was decided on that basis. The court attached importance to the agreed contractual nature of the section in finding that it was the plaintiff (appellant) which bore the **onus** of proof. The argument before us did not display the same unanimity. Counsel for the appellant questioned whether sec 79 was necessarily incorporated in the contract between a bank and its customer, and contended that, even if it were, the bank bore the **onus** of proving that it was protected by the section. On behalf of the Bank it was contended that the approach of the court **a quo** was correct. The status of sec 79 as a part of the contract, the contention proceeded, meant that it was the customer who had to exclude the

application of sec 79 when suing a bank in connection with a crossed cheque.

In my view much of this debate was misconceived. Sec 79 provides a statutory protection for bankers in certain circumstances. It is true that sec 79 affects the rights and obligations of parties to a crossed cheque and thus, in a sense, modifies the parties' contract. A banker who is, in terms of sec 79, "entitled to the same rights and ... placed in the same position as if payment of the cheque had been made to the true owner thereof" may debit his customer's account with the amount of the cheque even although payment may have been made to somebody who was not the holder. This does not, however, arise from **consensus** between the parties. It arises from a legislative act. If the statutory origin of sec 79 were kept firmly in mind, no great harm would be done by regarding it as creating an implied term in the banker-customer relationship. Nothing is gained, however, by so

regarding it, and it may tend to mislead, as happened in the present case. Whether or not sec 79 is deemed to form a part of the contract between the parties, its nature and effect must be ascertained by the ordinary processes of statutory interpretation. The section cannot have a different effect depending on whether it is regarded, on the one hand, as a statute applying to the contract, or, on the other hand, as a contractual term imposed by statute.

I turn now to an interpretation of the section in order to determine where the **onus** lies. Before analysing the wording itself it is convenient to set out the broader context in which the section operates. It is common cause that the prime obligation of a banker towards a customer who operates a cheque account is to pay a cheque drawn on him according to its tenor (I assume that the customer's account is sufficiently in credit, or that sufficient overdraft facilities have been granted). Included in this general obligation is

a duty to pay to the correct person designated by the cheque, ie, to the holder thereof (defined in sec 1 of the Act as "the payee or indorsee of a bill who is in possession of it, or the bearer thereof"). Where the cheque is crossed there is an additional obligation on the drawee banker to pay the amount of the cheque to a banker. The drawee banker would accordingly be obliged to pay to a banker (the collecting banker) acting on behalf of the holder. Sec 79 disturbs this situation by granting a drawee banker protection where he pays the wrong collecting banker, i e, a collecting banker acting for somebody other than the holder. In such a case, if the drawee banker made payment in good faith and without negligence, he is placed in the same position as if he had made payment to the true owner of the cheque.

It is against the above background that the section must be read. Now, firstly, as emphasized by Mr Thompson, who appeared for the appellant, the

requirements of the section are stated conjunctively - the payment must have been made "in good faith and without negligence". Good faith and absence of negligence are different concepts, and the legislature contemplated that both should be present before the banker is relieved from liability. However, the contemplation that both should be shown to be present presupposes that it is the banker who bears the burden of showing this. If the intention had been to burden the customer (drawer) with the **onus** the requirements would have been expressed disjunctively. The drawer would not have been required to disprove both requirements but only one. The drawee bank would not be entitled to the protection of the section if its payment had been either negligent or in bad faith. If the **onus** had been intended to be on the drawer one would therefore have expected the section to provide that the drawee bank would be relieved from liability unless it acted in bad faith or negligently. The

wording of the section therefore supports the view that the **onus** is on the banker to invoke the section and to prove its applicability.

A further feature which points in the same direction is that the facts which show that a banker did or did not act in good faith and without negligence are peculiarly within his own knowledge. It is consequently reasonable to suppose that the legislature would more readily impose on the banker the **onus** in this regard than on the customer, who would normally have no knowledge of the bank's internal workings. It has often been said that determining the incidence of the **onus** of proof "is merely a question of policy and fairness based on experience in the different situations". (**Wigmore** as quoted in **Mabaso v Felix** 1981 (3) SA 865 (A) at 873C and **During N O v Boesak and Another** 1990 (3) SA 661 (A) at 673A). As a matter of fairness and sound judicial policy it seems reasonable that, where one party has the means of establishing a

particular fact and his opponent not, the **onus** should rather be on the former than on the latter. Although this factor would not be conclusive it should, in my view, be accorded some weight. It was taken into consideration in **Mabaso's** case, **supra**, at 873E-F in determining the **onus** in civil cases where a defendant relies on self-defence as a justification for what would otherwise be an assault.

In this regard we were referred to **Gericke v Sack** 1978 (1) SA 821 (A) which, it was contended, was in conflict with what I have said above. This was a case in which a defendant raised a plea of prescription to a claim in delict. In terms of sec 12 (3) of the Prescription Act, 68 of 1969, such a debt is not deemed to be due, and prescription does not commence running, "until the *creditor* has knowledge of the identity of the debtor and of the facts from which the debt arises...". The defendant accepted that the general **onus** of establishing his defence of

prescription rested on him. He contended, however, that the facts relating to the commencement of prescription were peculiarly within the knowledge of the plaintiff, and that the plaintiff should bear the **onus** of proving those facts.

This court accepted (at 827 C-D) that it will at times be difficult for a debtor who pleads prescription to establish the date on which the creditor first learned his identity, or, for that matter, when he learned the date on which the delict had been committed. The judgment then proceeded as follows (827 D-G):

> "But that difficulty must not be exaggerated. It is a difficulty which faces litigants in a variety of cases and may cause hardship - but hard cases, notoriously, do not make good law. It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party. See R v Cohen, 1933 T.P.D. 128. However, the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive

knowledge of his opponent and they have in consequence held, as was pointed out by INNES, J., in Union Government (Minister of Railways) v Sykes, 1913 A.D. 156 at p. 173, that

> 'less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.'

But the fact that less evidence may suffice does not alter the onus which rests on the respondent in this case."

It will immediately be apparent that this was not a case where the court was called upon to determine de novo where the onus lay. All participants accepted that as a matter of law the defendant had to prove his defence of prescription. The only question was whether this situation was changed in respect of certain elements in his defence where the facts were peculiarly within the knowledge of the plaintiff. That is why the court approached the question in issue as being whether the incidence of the onus could be altered where the facts happen to be within the knowledge of the other party, and it answered this question in the negative.

Cohen's case, to which the court referred, was similar. There the court held that the **onus** in a criminal case did not pass to the accused where the facts in a particular case were peculiarly within his knowledge. Clearly, as the court said in **Gericke's** case, it is not a principle of our law that the **onus** of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the **onus** is determined by law. In many cases the person burdened by the **onus** as laid down in the sources of our law may be required to prove a fact which is peculiarly within the knowledge of his adversary. This does not, however, mean that a court, where the incidence of the **onus** of proof in a particular situation is uncertain and has to be determined, may not have regard, **inter alia**, to matters of practical convenience and fairness such as the sources of knowledge available to the rival parties. There is accordingly no conflict between the cases of

Mabaso v Felix and **Gericke v Sack** as suggested by Hoffmann and Zeffertt in **The South African Law of Evidence** 4 ed (1988) 511-2.

In argument before us counsel for the Bank, relying mainly on **Eagle Star Insurance Co Ltd v Willey** 1956 (1) SA 330 (A) at 334D-H, contended that the question of **onus** should be approached in the following manner. The court should, he said, determine whether, on the one hand, sec 79 created an exception to the banker's liability, or, on the other, it formed a part of the definition of his liability. In the former case the **onus** would be on the Bank, in the latter on the appellant. In determining this matter the important consideration was

> "... whether the exception is as wide as the promise, and thus qualifies the whole of the promise, or whether it merely excludes from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified." (**Munro, Brice & Company v War Risks Association Ltd and Others** (1918) 2 KB 78 at 88-9, followed in the **Eagle Star**

Insurance case at 334E.

In the present case, the contention proceeded, the exception is as wide as the promise. The banker's obligations are modified by sec 79. His duty is to pay a crossed cheque in good faith and without negligence, to a banker. We are accordingly not dealing with a true exception but with a part of the definition of the banker's liability, and the **onus** should be on the appellant.

I do not agree. First, the **Eagle Star** case dealt with the interpretation of a written contract of insurance. I do not think the same considerations necessarily apply to a statute which engrafts qualifications onto a common law contract. Second, and in any event, as is emphasized in the **Eagle Star** case at 334H (para 5), a promise with exceptions can generally be turned by an alteration of phraseology into a qualified promise. One must consequently look at the form in which the contract is expressed. In the

present case sec 79 provides relief to a banker from his normal obligations if certain features are present. **Prima facie** this seems to me to create an exception. This conclusion is fortified by the wording of the section and the considerations of fairness discussed above. The present is in my view eminently the type of case to which the following passage from **Pillay's** case, **supra** at 952, refers:

> "Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded **quoad** that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it."

I come to the conclusion therefore that the **onus** of proving, for purposes of sec 79 of the Act, that payment was made in good faith and without negligence, lay upon the Bank.

Second question: Does sec 79 apply where the collecting bank and the drawee bank are branches of the same institution?

Sec 79 applies only where "the banker on whom a crossed cheque is drawn ... pays it ... to a banker." This language is apposite to the situation where two banks are involved. In such a case the holder of the cheque hands it for collection to the collecting bank; the collecting bank presents it for payment to the drawee bank; the drawee bank pays it to the collecting bank and debits the drawer's account; and the collecting bank receives the money and credits the holder's account.

The language of the section does not, however, cover with equal felicity the situation where one bank, whether in one or several branches, acts both as collecting banker and as paying banker. In such a case the procedure would, in practice, simply be that the holder hands the cheque for collection to his bank, which is also the drawee bank; and that the bank then debits the drawer and credits the holder. Only with some difficulty can this be regarded as payment by a

banker to a banker.

Our legislation on bills of exchange was modelled on that of England, and, in particular, on the Bills of Exchange Act, 1882. For present purposes there is no material difference between our statute and the English one. Nevertheless, and despite the linguistic difficulties, there is strong authority in England for the proposition that a bank may at the same time be both collecting banker and paying banker. See **Gordon v London, City and Midland Bank Ltd** (1902) 1 KB 242 at 274-5 and 281 and **Carpenters' Co v British Mutual Banking Co Ltd** (1938) 1 KB 511 at 537-539. English text-books have followed these cases without criticism. See Ryder and Bueno, **Byles on Bills of Exchange** 26 ed (1988) 311-2; Guest, **Chalmers & Guest on Bills of Exchange** 14 ed (1991) 647 and 651; Hapgood, **Paget's Law of Banking** 10 ed (1989) 427, 452-453; and **Halsbury's Laws of England**, 4 ed Reissue vol 3(1) para 167 footnote 3, and 214. The reason is a practical one. If

the drawer of a crossed cheque and the holder are both customers of the same bank, what is the bank to do? In terms of sec 78 (1) of our Act (corresponding to sec 79 (2) of the English Act) the drawee banker "shall not pay it to any person other than a banker". If he cannot in effect act both as collecting banker and as paying banker he would have to insist that his customer, the holder, open an account with another bank to enable that bank to act as collecting banker (see the **Carpenters'** case, **supra**, at 538). Since banking business in England, as in this country, is concentrated in the hands of relatively few institutions, and it frequently occurs that the drawer and the holder are customers of the same bank, a literal interpretation of sec 78 (1) and its English counterpart would render the use of crossed cheques impractical. And the purpose of the rules concerning crossed cheques is served as well where the collecting bank and the paying bank constitute one entity as where

they are separate ones. In both cases the holder collects the payment through a bank, which can be expected to ensure that payment is made to the right person.

The English cases have been accepted as good law in South Africa by Cowen and Gering, **Cowen on the Law of Negotiable Instruments in South Africa** 4 ed (1966) 424 where the following is stated:

> "If a customer draws a cheque payable to another customer of the same bank, and crosses it generally or specially to that bank, the bank is both the paying and the receiving bank, and pays to a banker within the meaning of the Act by debiting the drawer and crediting the payee. Similarly, where a crossed cheque is drawn on one branch, and handed to another branch of the same bank for collection, payment to the collecting branch complies with the Act."

This question has also been considered in two cases in South African courts, but for convenience I deal with them later.

In argument before us Mr Thompson accepted on the strength of the above authorities that, for purposes of

sec 78 (1) of the Act, it would be possible for a single bank to be both the collecting banker and the paying banker. He contended however that in such a case the banker would not, **qua** paying bank, be entitled to the protection of sec 79.

The first point made in this regard was that there is a difference in the wording between the two sections. Sec 78 (1) is expressed in negative terms: a banker is not entitled to pay a crossed cheque "to any person other than a banker". Sec 79, on the other hand, is expressed positively: protection is granted if the banker "pays it to a banker". In my view nothing turns on this difference. Every person to whom payment may be made for purposes of sec 78 (1) is either a banker or a person other than a banker (for brevity called a non-banker). This classification is, by its very nature, exclusive. There cannot in logic be a third category of persons who are neither bankers nor non-bankers. Accordingly, since a paying banker may not pay to a

non-banker, he must, if he pays anybody, pay to a banker. It further follows that, if a banker acting both as collecting banker and as paying banker pays the holder of a crossed cheque, this can only comply with sec 78 (1) if he is regarded as having paid a banker. This is exactly the same enquiry as in section 79. There also what must be ascertained is whether payment was made to a banker. There is accordingly nothing in the language to suggest that there is any difference in this enquiry depending on which section is in issue.

Moreover it is clear that the sections of the Act dealing with crossed cheques form a coherent whole. Section 78 prescribes the duty of a banker regarding the payment of crossed cheques. Section 79 grants protection to a banker who complies with this duty in good faith and without negligence. It would be a strange anomaly if the two sections dealt with different types of payment. At the very least such a distinction would have required clear language, which,

as I have indicated, is not present here.

In further support of his distinction between sec 78(1) and 79 Mr Thompson submitted that only **Gordon's** case, **supra**, dealt specifically with the English counterpart to sec 79 (sec 80 of the English Act) and that there is also authority to the contrary in **Lacave & Co v Crédit Lyonnais** [1897] 1 QB 148. I do not agree that the latter case supports the appellant's contention. The facts there were as follows. The defendant bank in that case had two branches, one in London and one in Paris. A cheque was drawn on the branch in London in favour of the plaintiffs. After various vicissitudes the cheque came into the hands of a certain Ponce, who handed it to the Paris branch of the bank for collection. The London branch paid the Paris branch which in turn paid Ponce. The plaintiffs, who admittedly were the true owners of the cheque, then sued the bank for conversion, i e, for dealing unlawfully with their property (for a discussion of the

principles of conversion in English Law and a comparison with our law, see **Leal & Co v Williams** 1906 TS 554; **John Bell & Co Ltd v Esselen** 1954 (1) SA 147 (A) at 152C-154H). The bank defended the action and contended "that, so far as their conduct is impugned by reason of their having cashed or paid in London a cheque, crossed, and so drawn on them, and coming to them from another bank, they are within the protection of the 80th section of the Bills of Exchange Act..." (p 153). This defence was upheld (p 153-4) and the court proceeded to consider (at p 154) "whether there is any other part of the conduct of the defendants which can be made the subject matter of an action in England". This obviously entailed problems of conflict of laws with which we are not concerned. The final conclusion was that the actions of the Paris branch amounted to conversion for which the defendant bank could be held liable in England. Thus, to sum up, **qua** paying bank the defendant was protected by sec 80 of the English Act,

but **qua** collecting bank it was unprotected and had to pay. This is a clear recognition that a bank can properly act in both capacities without losing its protection under sec 80 of the English Act.

I turn now to the two South African cases on this point. The first was **Allied Bank Limited v Standard Bank Limited**, an unreported judgment delivered by Stegmann J in the Witwatersrand Local Division on 8 October 1992. In this case it was held that where a bank acts both as collecting banker and as paying banker it is not protected by sec 79 of the Act. Stegmann J came to this conclusion without reference to authority. In **Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd** 1993 (3) SA 574 (W) Goldblatt J expressed doubts about the correctness of the judgment in the **Allied Bank** case but found it unnecessary to come to a definite decision on the point.

The position may be summed up as follows. The language of sections 78 and 79 suggests that the

sections require payment of a crossed cheque to be made by one bank to another. On the other hand, it would not place an intolerable strain on the language to permit one bank to be both collecting banker and paying banker and the exigencies of commerce would be best served by such a construction. The English courts have consistently over a long period followed the practical course by recognising such a dual capacity, and this has been approved without question by the authors and editors of standard text-books, in England as well as here. The only authority to the contrary is the judgment in the **Allied Bank** case, in which, as I have said, no previous authority on this point was considered. Not only is our Act for present purposes the same as that in England, but our commercial and banking systems also do not differ materially. In these circumstances I consider that we should follow the English authorities, which in my view provide a reasonable and practical answer to this problem.

My view is accordingly that the Bank, which acted both as collecting banker and as paying banker in the present case, did not thereby forfeit the protection of sec 79 of the Act.

Third question: Does sec 79 apply to a crossed cheque which is marked "not transferable"?

The effect of marking a cheque "not transferable" derives from sec 6(5) of the Act, which 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 is not negotiable."

The word "negotiable" is used in different senses in the Act. See Cowen & Gering, **op cit**, 5 ed Vol 1 3-4, **Standard Bank of S A Ltd v Sham Magazine Centre** 1977 (1) SA 484 (A) at 493E-H . In sec 6(5) it means "transferable" (**Sham Magazine** case, **loc cit**). Consequently, "... if the drawer wishes to render a cheque completely non-transferable ... he could boldly write or print across the face of the cheque the words

'not transferable', so that he who runs may read." (**Ibid** 504H-505A). Since the cheque is not transferable, the drawee bank would act contrary to its customer's instructions if it were to pay the cheque to any person other than the named payee. See **Volkskas Bpk v Johnson** 1979 (4) SA 775 (C).

If a cheque is crossed generally, the drawee bank may not pay it to any person other than a banker, as has been discussed above. Therefore, if a cheque is crossed generally, and in addition bears the words "not transferable", the drawee bank is instructed:

(a) to pay the cheque only to the named payee; and

(b) to pay the cheque to a banker.

The drawee bank can comply with both these instructions by paying to a banker acting on behalf of the payee (**Volkskas Bpk v Johnson, supra**, at 779G, Sinclair, 'Liability of a Drawee Banker on a Non-transferable Cheque', 1979 Annual Survey 324 at 326, Pretorius, 'A Transferable 'Non-transferable' Cheque?' 1984 SALJ 250

at 251-2). For present purposes I need not consider whether a bank may also properly (or, at any rate, with impunity) pay such a cheque to the true owner or his agent personally, as suggested by Malan (assisted by De Beer) in **Bills of Exchange, Cheques and Promissory Notes in South African Law** (1983) para 349.

What then is the position if the payee bank pays such a cheque to a banker who does not act on behalf of the payee? Is the drawee bank then protected by sec 79?

This question arose for decision in **Gishen v Nedbank Ltd** 1984 (2) SA 378 (W). In that case Goldstone J held (at 382 F-G):

> "In my opinion there is nothing in s 79 which renders its provisions inapplicable to a non-transferable cheque and no reason occurs to me for giving the words thereof a restrictive meaning."

He added (at 382G)

> "... the customer using the device of crossing a cheque can hardly complain if the provisions of the Act in relation to such a crossing are applied according to their tenor."

Although the correctness of this decision has been

questioned (see e g Cowen & Gering, **op cit**, 5 ed Vol 1 210) nobody has disputed that it does give effect to the clear language of the section (**cf** Pretorius, **op cit**, at 253 and, in a publication prior to the decision in **Gishen's** case, Oelofse, 1982 Modern Business Law vol 4 52). In **Bonitas Medical Aid Fund v Volkskas Bank Ltd and Another** 1992 (2) SA 42 (W) at 47 D-F, the court, although doubting whether sec 79 was intended to cover the situation where a cheque is marked "not transferable", nevertheless held that the plain wording of the section served to protect a bank in such a situation. The doubts about the applicability of sec 79 in such cases are consequently based, not on the language of the section, but on the anomalous results that are said to flow from its application.

The main authority quoted by counsel for the appellant as support for his contention that **Gishen's** case was wrongly decided, was Oelofse, **op cit**. Oelofse's contribution was a review of the text-book

Wisselreg en Tjekreg by Malan and De Beer (a version in Afrikaans of the work quoted above). At p 52 Oelofse writes:

> "Die skrywers is van oordeel ... dat a 79 ook op die nie-oordraagbare tjek van toepassing is. Die skrywers staan nie alleen in hierdie opvatting nie en indien a 79 letterliik beskou word, kan 'n mens ook tot geen ander gevolgtrekking kom nie."

The learned reviewer then considers some of the anomalies flowing from the application of sec 79 to non-transferable cheques (to which I return shortly) and concludes (**ubi sup**):

> "Dit lyk of die wetgewer nooit die nie-oordraagbare tjek in gedagte gehad het met die verordening van art 79 nie. Hierdie aspek is een van dié wat die hersiening van die wisselwetgewing nodig maak."

Oelofse's view, expressed before the decision in **Gishen's** case, consequently does not seem to be that sec 79 is inapplicable to non-transferable cheques, but rather that **de lege ferenda** it should be rendered inapplicable. This does not provide any real support for the contentions advanced on behalf of the

appellant.

A fuller critical discussion of **Gishen's** case is to be found in the article by Pretorius (**op cit** at 253). He commences by saying

> "The finding that s 79 of the [Act] is applicable to a 'non-transferable' cheque is probably correct on a strict interpretation of the section."

As authority for this proposition he quotes the above mentioned English version of Malan and De Beer's work at para 334 where it is stated

> "Section 79 governs the payment of *all* crossed cheques, including those that are 'non-transferable'."

From this point of departure Pretorius then considers various issues that arise from the application of sec 79 to non-transferable cheques. For present purposes I propose concentrating on the anomalies pointed out by the learned author.

The main anomaly is that, if sec 79 is applicable to non-transferable cheques, a drawer would be better

protected by an uncrossed non-transferable cheque than by a crossed one. The drawee bank is obliged to pay an uncrossed non-transferable cheque to the named payee and only to him. On the other hand, if the cheque is crossed, the bank is protected by sec 79 if it pays to a bank which is not acting for the payee, provided the paying bank acts in good faith and without negligence. This same anomaly was mentioned by Oelofse (**loc cit**).

I do not think this anomaly is as serious as is suggested. A drawer who marks his cheque "not transferable" has the advantage that the drawee bank should pay only to the named payee. If the cheque is not crossed such payment may be made over the counter. Indeed, there is a school of thought that such a cheque may not be paid to a collecting bank, but must be paid to the payee personally (Sinclair, **op cit**, 326, Pretorius, **op cit, 254**)). A drawer may therefore cross his non-transferable cheque to ensure that it is paid only through a bank, thus providing some assurance that

payment will be made to the correct payee. If sec 79 is applicable he will lose his absolute right to insist on payment to the correct payee, but he may consider that he is compensated for this loss by the practical consideration that in the ordinary course his cheque will be paid properly and that he may be saved disputes with his bank over whether an uncrossed cheque was paid to the right person.

In this regard Goldstone J commented in the passage quoted above that it is the customer who chooses to cross his cheque and thereby to accept the advantages and disadvantages of such a crossing. This proposition was criticized by Pretorius (**op cit**, p 255) who points out that, in terms of sec 76(2) of the Act, the holder of an uncrossed cheque may cross it. The payee of a non-transferable cheque may therefore cross it and thereby (through the operation of sec 79) erode the intention of the drawer that only the named payee should be paid.

I do not think this criticism is valid. Although it would be competent for a payee of a non-transferable cheque to cross it, this would happen so seldom in practice as to be hardly worthy of consideration. And if it were to happen, I do not think the drawer would be concerned about any erosion of his intention. The payee cannot cross the cheque unless it has come into his hands. If he then crosses it, and if sec 79 were to be applied, "... the drawer shall ... be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof." The payee would accordingly have received the cheque and in law he would be deemed to have been paid in accordance with the wishes of the drawer. If the payee was not in fact paid, e g because the cheque was stolen after he had crossed it, he would only have himself to blame if the drawer and the paying banker are protected by sec 79.

Finally, in assessing the weight of the anomaly

which I have been discussing (viz, that if sec 79 were applied also to a non-transferable cheque a drawer would be better served by leaving it uncrossed), it must be emphasized that the banker is not protected if he acts negligently. And in determining whether the paying bank was negligent one cannot leave out of account, I consider, that the paying bank was dealing with a non-transferable cheque. See Cowen and Gering, **op cit** 5 ed Vol 1 213, Malan and De Beer, **op cit**, para 349, Pretorius, **ubi sup**, p 254.

A further point made by Pretorius (at p 256-7 - see also Sinclair,**op cit**, 325) is that sec 79 was intended primarily to protect the drawee bank against forged endorsements. Since there is no real possibility of a forged endorsement on a non-transferable cheque, there is, it would seem, not the same reason to protect the paying bank from the consequences of payment to the wrong person. This may well be correct, but it does not follow that a bank would never need protection against

paying a person falsely pretending to be the payee of a non-transferable cheque, as the facts of the present case illustrate.

To sum up, the language of section 79 is clear and unambiguous. The only reason suggested from departing for it is the existence of certain anomalies. The main anomaly lies in the difference in the rights of the drawer depending on whether the non-transferable cheque is crossed or not. However, the remedy is in his own hands - he need not cross the cheque if he wants to exclude the protection of sec 79. And, in any event, for the reasons set out above, I do not consider that the anomalies mentioned are so serious as to amount to an absurdity or as to indicate with sufficient certainty that the language of the section does not reflect the intention of the legislature (see e g **Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter** 1987 (2) SA 583 (A) at 596G-597B; **S v**

Tieties 1990 (2) SA 461 (A) at 463C-464F).

I consider therefore that sec 79 does apply to crossed cheques marked "not transferable".

In the result the first question has been answered in favour of the appellant but the other two in favour of the Bank. Nevertheless it is clear that the appellant has achieved substantial success before us, since the question on which he has succeeded (relating to the incidence of the **onus** of proof) is fundamental to the fate of this appeal. It follows that the exception should have been dismissed in the court **a quo**.

The following order is made:

(a) The appeal is upheld with costs.

(b) The order of the court **a quo** is set aside and the following substituted:

"The exceptions are dismissed with costs."

E M GROSSKOPF, JA

CORBETT, CJ

NESTADT,JA

EKSTEEN, JA

HARMS, JA Concur