

HADZIPETROS v. ONASIS DISCOUNT STORE.

(DURBAN AND COAST LOCAL DIVISION.)

1971. March 19, April 16. MULLER, J.

**Provisional sentence.—Cheque.—Cheque endorsed by husband to his wife.—Cheque to be used for her maintenance.—Handing over of cheque a valuable consideration.—Bills of Exchange Act, 30 of 1964, secs. 1, 25 (1) (a) and 27 (1) (b).*

A cheque drawn by the defendant in favour of the plaintiff's husband was endorsed over to her by her husband to whom she was married out of community of property to be used as maintenance for herself and her child. When the cheque was presented to the bank it was returned marked "account closed". In an application for provisional sentence, *Held*, that the cheque had not been obtained *ex causa lucrativa*. *Held*, further, that the handing over of the cheque for the purpose of the plaintiff's maintenance was a valuable consideration as required in sections 1, 25 (1) (a) and 27 (1) (b) of the Bills of Exchange Act, 34 of 1964. She was therefore a holder in due course.

Application for provisional sentence. The facts appear from the judgment.

D. B. Friedman, for the plaintiff.

W. H. Booysen, for the defendant.

Cur. adv. vult.

Postea (April 16th).

MULLER, J.: Plaintiff is a woman married to one Costas Hadzipetros out of community of property. She sued the defendant, a firm of which Christos Sideras is the sole owner for provisional sentence. The cause of action on which she relies is a cheque for R6 000 drawn by the defendant in favour of her husband and which was endorsed over to her by him and delivered. On 9.5.1970, the due date, she duly presented the cheque for payment but it was returned to her marked "account closed". The cheque was therefore dishonoured despite proper presentation. All the formal requirements of Rule of Court 8 were complied with.

From the affidavits which were filed it appears that plaintiff's husband purchased a supermarket business at Piet Retief on 23.2.1970 from

Stolp Brothers Ltd. for R36 500. On 24.4.1970 her husband sold the same business to one Johnny Halidis (whose proper name appears to be Joannis Holidis) for R46 500. Her husband ran the business for almost two months. He ran up unpaid debts in the amount of R11 000 and pocketed some R12 000 in cash receipts. It is alleged that he had a

receipt by an agent for Stolp Brothers, giving out that he had paid off R10 000 for the business, forged. The allegation is thus that he misled Halidis in material respects and in this way persuaded him to purchase the business. *Inter alia*, he misrepresented the debts owing to and by the firm in material respects. The estate of Halidis was thereafter sequestrated. There is no allegation in the statements that Halidis or the trustee of his insolvent estate cancelled the contract because of fraud (or otherwise). No rescission whatever is alleged.

The defendant comes into the picture because Halidis was not in a financial position to pay the purchase price (or any instalment thereof) to plaintiff's husband, himself. Defendant, at the request of Halidis, delivered the cheque for R6 000 to her husband and made it payable to him. This agreement was entered into by Mr. Hadzipetros and Halidis and Sideras to the benefit of Halidis. In effect it is a loan by Sideras to Halidis.

There is no statement by Mr. Hadzipetros before the Court to deny the allegations of fraud. For the sake of argument it must be accepted at this stage in favour of the defendant that the allegations are true. Nevertheless a contract is not terminated *ipso facto* by fraud. The innocent party has a choice: he can enforce the contract (with a supplementary claim for damages) or he can cancel the contract and claim damages as a substitute for performance. (See *Frost v. Leslie*, 1923 A.D. 276; *Trollip v. Jordaan*, 1961 (1) S.A. 238 (A.D.)).

As I have said, in this case there is no allegation that Halidis or the trustee of his insolvent estate cancelled the contract with Mr. Hadzipetros. Consequently any liability on the cheque as against the plaintiff is not affected by the fraud, as long as she is a holder in due course.

Plaintiff comes into the picture because immediately after the sale of the business to Halidis, her husband brought her and her child from Piet Retief to Johannesburg. According to her, her husband moved in with her parents together with her and the child while he sought proper employment for himself. He allegedly however received a letter from Greece instructing him to return to Greece at once because of his mother's illness. Since then almost a year has elapsed. He left on 30.4.1970, and has not returned. It is noticeable that no statement by him is before the Court or any other indication of when he will be back. At his departure he delivered the relevant cheque to his wife to provide for the maintenance of her and her son. In the meantime they are being maintained by her parents who advance money to them from time to time. From the proceeds of the cheque she wishes to repay them and maintain herself and her son. She states that she knew nothing of her husband's actions as a businessman and that she was (and

is) unaware of any misrepresentation. Defendant cannot deny this. For the sake of argument it must be accepted at this stage that she received the cheque in good faith. In a case like this where provisional sentence

is concerned, there is no *onus* on plaintiff. She complied with all the formalities. The *onus* therefore rests on defendant who cannot dispute her allegation of *bona fides*. (See *Allied Holdings Ltd. v. Myerson*, 1948 (2) S.A. 961 (W) at pp. 966-967).

Mr. *Booyesen* for defendant, contended that plaintiff is not a holder in due course of the cheque because she did not receive the cheque in good faith for value and that (when the cheque was negotiated to her) she knew of the defects attaching to her husband's title. (See secs. 27 (1) (b); 27 (2) and 28 (2) of the Bills of Exchange Act, 34 of 1964).

The argument about her lack of good faith fails. For the purposes of provisional sentence it must be accepted that she received the cheque from her husband in good faith.

As regards the argument that she did not take the cheque for value as demanded by Sec. 27 (1) (b) of the Bills of Exchange Act, defendant can at this stage also not dispute that her husband is compelled to maintain her and the child and that he negotiated the cheque to her for this purpose. All the surrounding circumstances concerning value and her good faith can be ironed out later at the trial.

In conclusion Mr. *Booyesen* argued that the duty to maintain and the delivery of the cheque by the husband to the wife for this purpose does not legally amount to value as specifically required by sec. 27 (1) (b) of the Act.

Sec. 25 of the Bills of Exchange Act provides in turn:

"(1) Valuable consideration for a bill may be constituted by

(a) Any cause sufficient to support an action founded on contract or agreement;

(b) an antecedent debt or liability, irrespective of whether the bill is payable on demand or at a future time.

(2) If value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become such parties prior to such time."

As regards the Roman-Dutch law it is trite that *justa causa debendi* also includes a serious promise made intentionally with the object of giving rise to an enforceable, lawful obligation. A *quid pro quo* is not required. (See *Conradie v. Rossouw*, 1919 A.D. 279). Sec. 25 (1) (a) is directly applicable here. The question remains whether *justa causa debendi* can also be a mere promise here or whether valuable consideration embracing more than a mere promise is required. In other words is a *quid pro quo* required? This is an old debate in our law of Bills of Exchange. (See Cowen, *The Law of Negotiable Instruments*, 4th ed., p. 283-284; de Wet and Yeats *Kontraktereg en Handelsreg*, 3rd ed., p. 359). See also *Factory Investments (Pty.) Ltd. v. Ismails*, 1960 (2) S.A. 10 (T) at p. 15.

In my opinion it is unnecessary and unwarranted in this case to untie this Gordian knot. If it is accepted for purposes of provisional sentence

that Mr. Hadzipetros delivered the said cheque to his wife, the plaintiff, to provide for the maintenance of herself and their child, then she did

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(Translation)

not receive the cheque *ex causa lucrativa*. She has the right to claim maintenance for herself and her child from her husband. Conversely, her husband is compelled to maintain them and the delivery of the cheque for this purpose is a valuable consideration as required by secs. 1, 25 (1) (a) and 27 (1) (b) of the Bills of Exchange Act. A *quid pro quo* is present, a *causa onerosa*. The quantum or extent thereof need not be further determined here since in any event it is clearly not trivial. She is therefore a holder in due course. Consequently defendant cannot rely on any fraud by her husband as a defence against her. Therefore provisional sentence in favour of plaintiff against defendant in the following terms is granted:

- (1) provisional sentence in the amount of R6 000; and
- (2) interest on R6 000 at 6 per cent per annum from 5th February, 1971, to date of payment; and
- (3) costs of suit.

Plaintiff's Attorneys: *Britz & Bonamour*. Defendant's Attorneys: *Berkowitz, Jacobs & Kinkel*.