

SUMMARY: CIVIL MATTER

CAPE FINANCE CORPORATION LTD vs BEZER'S TRAILERS & BODY CRAFT CC

The Plaintiff, the holder of a post-dated cheque, drawn in Namibia on a Namibian Bank deposited this cheque into its bank account in Cape Town on the date the post-dated cheque was due.

Held that a post-dated cheque was not a cheque in terms of the Bills of Exchange Act but a Bill payable on a particular day in the future at a particular bank. Failure to present the cheque on such date at that bank discharged the drawer.

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IN THE HIGH COURT OF NAMIBIA

In the matter between:

CAPE FINANCE CORPORATION LTD

PLAINTIFF

versus

BEZER'S TRAILERS & BODY CRAFT C.C.

DEFENDANT

CORAM: LEVY, A.J.

Heard on:

21.02.2000

Delivered on

07.03.2000

JUDGMENT:

LEVY, A.J.: In this matter Plaintiff is represented by Adv G.S. Coetzee and Defendant is represented by Adv L.C. Botes.

On 10 September 1999, Plaintiff caused to be served on Defendant a summons for Provisional Sentence for N\$143 330,00 relying on a document which Plaintiff erroneously referred to as a cheque. In the summons, Plaintiff says that the "cheque" was drawn by Defendant, a close corporation with its principal place of business in Windhoek on the Ausspannplatz Branch of the First National Bank of Namibia Limited, Republic of Namibia, payable to "Chereau", which was understood by all relevant parties to be Chereau C.C, with its principal place of business in Beaconvale, Cape Province, Republic of South Africa. It is alleged in the summons that the "cheque" is dated 30 June 1999 and endorsed in blank by Chereau C.C.

Furthermore it is alleged that the "cheque" was duly presented on 30 June 1999 for payment at the Ausspannplatz Branch of First National Bank of Namibia at Windhoek and was dishonoured by non-payment, payment having been countermanded by Defendant. Plaintiff says that by virtue of Section 48(2)(c) of the Bills of Exchange Act 34 of 1964, notice of dishonour is dispensed with. Plaintiff annexes a photocopy of the "cheque" to its summons.

The application for Provisional Sentence was opposed by Defendant and an affidavit with certain annexures was duly filed on behalf of Defendant signed by one Bezuidenhout. Plaintiff filed a replying affidavit signed by its managing director one Dennis Shorkend and he also had certain annexures.

The background to this dispute is that Defendant had drawn a postdated cheque in favour of Chereau as payment pursuant to a contract concluded by Defendant and Chereau but when Chereau failed to fulfil its obligations in terms of the contract, Defendant stopped payment of the cheque. Meantime Plaintiff had come into possession of the "cheque" and allegedly presented it for payment but it was dishonoured.

Section 1(vi) of the Bills of Exchange Act (Act 34 of 1964), defines a cheque as "a bill drawn on a banker payable on demand".

The operative words in this definition are "drawn on a banker" and "payable on demand" conveying two separate and distinct essentials.

In the present case, it was never disputed that the banker concerned was the "Ausspannplatz Branch of the First National Bank of Namibia Ltd" situate in Windhoek. It was also common cause that the cheque concerned was drawn early in May 1999 and was payable on 30 June 1999, that is, it was a post-dated cheque.

To qualify as a cheque in terms of the aforesaid definition, a cheque must be payable on demand. Inasmuch as a post-dated cheque is not payable on demand but is payable on some date in the future, it does not constitute a cheque for the purposes of the Bills of Exchange Act, but is a bill payable on a specific date.

In Cowan "The Law of Negotiable Instruments in South Africa", 5th ed. at page 188, after referring to an illustration in the book of what *ex facie* appears to be a cheque, but has thereon the date on which it is signed (i.e. the date of issue) as well as the date when it is payable which is three months hence the learned author says the following:

"Although Illustration 12 is drawn in the form of a cheque, and contains an order addressed to a bank to pay a sum of money, it plainly is not a cheque in the eye of the law. In the top right hand corner of the instrument it is recorded that the due date of the instrument is 11th October, 1982, and the bottom left hand corner it is recorded that the date of issue is 12th July 1982. The instrument is not therefore, payable "on demand" - a requirement of the definition of a cheque - but is expressly stated to be payable on a fixed due date, three months after the expressed date of issue. Falconbridge in his book "Banking and Bills of Exchange" expresses a view which is applicable to these instruments, and which appears to be manifestly sound. He says, "A document in the form of a cheque but bearing on its face a memorandum that it is payable at a specified date in the future is clearly not a cheque, but a bill of exchange payable at a future date."

By reason of the fact that the parties hereto have always agreed, and still agree that the "cheque" concerned is a post-dated cheque, the remarks of Falconbridge as to the memorandum on the cheque which proves that it is a post-dated cheque are irrelevant and inapplicable hereto. Inasmuch as the instrument on which Plaintiff relies, is according to all concerned a post-dated cheque it is not a "cheque" in law, but it is a bill payable on 30 June 1999.

Section 43(1) of the Bills of Exchange Act provides:-

"(a) Subject to the provisions of this Act, a bill must be duly presented for payment in accordance with the provisions of sub-section (2).

(b) If it is not so presented, the drawer and endorsers shall be discharged." (My underlining.)

Section 43(2) as far as is relevant provides:-

"(2) A bill is duly presented for payment if it is presented in accordance with the following rules, namely -

(a) if the bill is not payable on demand, presentment must be made on the day it

falls due."

Sub-section (4)(a) provides,

"(a) When a place of presentment is specified in the bill the bill is presented there."

It is common cause that the bill in the instant case was drawn on the Ausspannplatz Branch of the First National Bank of Namibia at Windhoek and it had to be presented for payment at this bank on 30th June 1999.

In the summons, it was alleged that there had been such presentment on 30th June 1999 but in its affidavit Defendant says the "cheque" was presented for payment at its bank but "that the cheque was presented for payment on 14 July 1999." In other words it was not duly presented for payment on 30th June 1999. In reply to this allegation Shorkend on behalf of Plaintiff in his replying affidavit says,

"Save to aver that the cheque was deposited into the Plaintiffs bank account in Cape Town on 30 June 1999, these allegations are admitted."

Shorkend therefore admits that the post-dated cheque copy whereof is annexed to the summons and on which Plaintiffs claim is based was not presented for payment on due date.

Accordingly, it is common cause, between the litigating parties (as opposed to their counsel) that the cheque was not presented on 30 June 1999 at Ausspannplatz Branch of First National Bank of Namibia as required in law. Furthermore Section 39(3) of the Act provides:-

"(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured, does not excuse presentment."

This vital fact that the bill was not duly presented is borne out by reference to the "cheque" itself. On the face thereof is the bankstamp of "Nedbank Cape CD" on 30th June 1999 while on the reverse side is the stamp of "First National Bank, Ausspannplatz Windhoek", dated 14 July 1999.

In view of the fact that the post-dated cheque, or more correctly bill was not duly presented for payment on due date, the Defendant is discharged.

The Order of this Court is:

The Claim for Provisional Sentence is refused with costs.

ON BEHALF OF THE PLAINTIFF

ADV G S COETZEE

Instructed by:

P F Koep & Company

ON BEHALF OF THE DEFENDANT

ADV LC BOTES Engling,

Instructed by:

Stritter & Partners