REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 364 / 05

In the matter between

A MELAMED FINANCE (PTY) LTD **APPELLANT**

and

VOC INVESTMENTS LTD **RESPONDENT**

Coram : **SCOTT, ZULMAN, BRAND, CONRADIE et CLOETE JJA**

Date of hearing : **18 MAY 2006**

Date of delivery : **31 MAY 2006**

SUMMARY

Bill of Exchange - printed cheque with date thereon altered in manuscript - instrument not regular on the face of it - holder thereof not qualifying as holder in due course.

Neutral citation: This judgment may be referred to as:
Melamed Finance v VOC Investments **[2006] SCA 75 (RSA)**

J U D G M E N T

CONRADIE JA

[1] Can the holder of a cheque with a material alteration apparent on its face be a holder in due course? In the court *a quo* Schwarzman J held that, at any rate where the alteration is made after issue, he can not. He refused leave to appeal which was granted by this court.

[2] The plaintiff was not a holder in due course, so the court *a quo* reasoned, because, although it was a holder, it was not, in the words of s 27(1) of the Bills of Exchange Act 34 of 1964 (the Act), 'a holder who has taken a bill complete and regular on the face of it'. A change in the date on the face of each of two cheques sued upon was held to be a material irregularity.

[3] On 13 November 2000 the respondent's computer system generated four cheques in favour of a payee, Damelin Textiles, all drawn on the Standard Bank of South Africa Ltd and bearing that date. They were intended to be post-dated but the system used for the printing of cheques could not produce such cheques so the date on each was altered in manuscript to reflect the intended date of payment and the alteration signed by the same two signatories who were authorized to draw the cheques on behalf of the respondent.

[4] After the dates had been changed, the cheques, the negotiability of which was unrestricted, were issued to the payee who negotiated three of them to the appellant. One was met on presentation. The other two were dishonoured by the bank because payment had been stopped by the respondent when it learnt that Damelin Textiles, contrary to its undertaking not to negotiate them, had discounted them with the appellant.

[5] Section 27 of the Act provides:

'27 (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances, namely—

(a) he must have become the holder of it before it was overdue, and if it had previously been dishonoured, without notice thereof; and

(b) he must have taken the bill in good faith and for value, and at the time the bill was negotiated to him, he must have had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act if he obtained the bill, or the acceptance thereof, by fraud or other unlawful means, or for an illegal consideration, and is deemed to have been so defective if he negotiates the bill in breach of faith, or under such circumstances as amount to fraud.

(3) A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.'

[6] The obligations of a debtor liable on a bill to an immediate party arise also from the transaction pursuant to which the bill was delivered. All disagreements arising from such a transaction may be aired when the debtor is sued by the holder of the bill. The holder in due course is above and beyond all such disputes. He may be met only by the so-called absolute defences, those that go to the root of the bill's validity. But since an earlier party to the bill may be deprived of a defence, the immunity of a holder in due course comes at a price. For one thing, the bill must be 'complete an regular on the face of it'. The expression 'on the face of it' means 'as far as one can tell by looking at the front and back of it'. The Afrikaans version of the text conveys the concept by using the words 'voltooi en oënskynlik reëlmatig' which De Wet and Yeats[1] suggest would be better rendered by 'volledig en na sy uiterlike reëlmatig.'

[1] *Kontraktereg en Handelsreg* 4 ed 775 footnote 261.

[7] The bill must speak for itself, as Didcott J remarked,[2] ' . . .unaccompanied by any external voice.' The well-established principle that the history of the issue and negotiation of a bill may not be used to establish whether or not its appearance is regular was not challenged before us.[3] It was common cause that the only permissible question was whether each of the cheques displayed an alteration that could be said to make it irregular.[4]

[8] Two types of irregularity occur in bills: irregular endorsements and material alterations. They are not treated by the law in the same way. An endorsement is considered to be irregular when its form is such as to reasonably put the holder on enquiry. In *Estate Ismail v Barclays Bank (DC & O)* 1957 (4) SA 17 (T) Ramsbottom J explained that it was for assessing the regularity of an endorsement (and not of a material alteration) that Denning LJ in *Arab Bank Ltd v Ross* (1952) 1 All ER 709 (CA) at 716A -B put forward the following test:

'When is an indorsement irregular? The answer is, I think, that it is irregular whenever it is such as to give rise to doubt whether it is the indorsement of the named payee. A bill of exchange is like currency. It should be above suspicion. But if it is asked: When does an indorsement give rise to doubt?, then I would say that that is a practical question which is, as a rule, better answered by a banker than a lawyer.'

[9] An alteration need not give rise to suspicion before it leads to the irregularity of a bill. It need only be apparent and material. An apparent alteration is one that appears from such an inspection of the bill as might be expected from one who is accustomed to handling bills[5] but that is not an issue in this case: The alterations to the cheques were patent and were in fact

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[2] *Dependable Aluminium Windows and Doors CC v Antoniades* 1993 (2) SA 49 (N) at 52 E-F.
[3] The undisputed facts in the founding affidavit set out in paras 3 and 4 could therefore not be taken into account.
[4] This approach imported from the English law was accepted as correct in *Sappi Manufacturing (Pty) Ltd v Standard Bank of SA Ltd* 1997 (1) SA 457 (SCA) at 463C-E with approving references to *Silcan Estate and Finance Co (Pty) Ltd v Astra Café* 1973 (3) SA 7 (N) at 9A and *Dependable Aluminium Windows and Doors CC v Antoniades* 1993 (2) SA 49 (N) at 52E –F.
[5] *Dependable Aluminium Windows and Doors v Antoniades* 1993 (2) SA 49 (N) at 52F-G.

immediately noticed by the person who took them on behalf of the appellant. The validity of the cheques was unaffected by the alterations to the dates, but that is irrelevant. Validity and regularity are different concepts, as Denning LJ explains in *Arab Bank v Ross*[6]. A bill could be valid but irregular, or invalid but nevertheless regular.

[10] The appellant was driven to contending that *Estate Ismail* had been wrongly decided or, if that were not so, that on a proper reading of the *dicta* in the case they were meant to apply only to alterations made after the issue of a bill. Counsel for the appellant suggested that the recent decision of this Court in *Sappi Manufacturing (Pty) Ltd v Standard Bank of SA Ltd* 1997 (1) SA 457 (SCA) effectively overruled *Estate Ismail* by holding that the reasonable suspicion test for judging regularity was a general one, applying to endorsements as well as material alterations.

[11] *Sappi Manufacturing* dealt with an inchoate endorsement. It was in this context that Hefer JA adopted the test in *Arab Bank* as being well established in this country. He refers without criticism to *Mobeni Supersave v Suleman* 1992 (3) SA 660 (N) in which there are passages dealing with the deletion of a crossing that confuse the test with regard to irregular indorsements and material alterations. But the passage he cites from *Mobeni Supersave* at 671D-F deals mainly with an enquiry as to whether an alteration, having regard to the time it was made, could be regarded as material. He cannot thereby be understood to have approved the reasoning in *Mobeni Supersave* generally. This is particularly so in the light of his comment at 465B that the reasonable suspicion test was considered inapposite on the facts of *Estate Ismail.* There is accordingly no merit in the submission that the decision has been overruled.

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[6] *Arab Bank Ltd v Ross* [1952] 1 All ER 709 at 715F-716A

[12] When is an alteration material? The answer proposed by Brett LJ in *Suffell v The Bank of England* (1882) 9 QB 555 at 568 has been accepted ever since:

'Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such instrument or any part of it is used.' [7]

The changes to the dates on the two cheques altered the earliest date for their presentment and thereby altered their business effect.[8]

[13] The appellant's second point was that the changes to the dates could in law not have been material alterations because they were made before the issue of the cheques. The judge *a quo* concluded from an examination of the cheques that the signatures to each alteration appeared to be those of the two persons who signed each of the cheques on behalf of the respondent drawer but held that as far as one could tell from the cheques they might as well have been altered before as after issue. In my view this conclusion was correct and suffices to dispose of the appeal. I nevertheless think that I should deal briefly with the legal position had the dates been changed before the cheques were issued.

[14] Section 62 of the Act governs the liability of parties to a bill. It reads as follows:

'**62. Effect of alteration of bill or acceptance**. —(1) If a bill or an acceptance is materially altered the liability of all parties who were parties to the bill at the date of alteration and who did not assent to it, must be regarded as if the alteration had not been made, but any party who has himself made, authorized or assented to the alteration, and all subsequent indorsers are liable on the bill as altered.

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[7] Quoted with approval in *Mobeni Supersave v Suleman* 1992 (3) SA 660 (N) at 677H and in *Cutfin (Pty) Ltd v Sangio Pipe CC* 2002 (5) SA 156 (D) at 160H-I; see also *Vance v Lowther* (*187*6) (1) Exch Div 176 at 178

[8] *Electricity Printing Works (Pty) Ltd v Kathlyns Cosmetics (Pty) Ltd* 1964 (4) SA 378 (N).

(2) For the purposes of subsection (1) material alterations include any alteration of the date, the sum payable, the time of payment and the place of payment, and, if a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.'

[15] Realizing that s 62 governs the liability of parties to a bill and not its regularity, Ramsbottom J remarked in *Estate Ismail* :

'It is true that sec 62(2) does not give a general definition of the words "material alteration", but it specifies certain alterations which are material, including "any alteration of the date", and I am unable to understand how an alteration which is material for the purpose of sec 62(1) can be non-material for the purposes of sec 27 (1).'[9]

[16] The 'material alterations' contemplated by s 62 are obviously alterations after a bill has been put into circulation;[10] those who assent to the alteration and all who become parties after them are bound; those who do not assent are not bound. When an alteration is made before issue, a bill enters commercial life as altered so the drawer and every other party to the bill is bound by its form: There can be no question of an alteration within the context of s 62(1). That, however, does not mean that a material alteration made before the issue of a bill does not affect the position of a holder in due course.

[17] A change to the date on a bill is, as we have seen, a material alteration because it alters the liability of parties to a bill.[11] Disturbance of the liability of parties is also the reason that a change of date is by s 62(2) declared to be invalid against all non-assenting parties. But the field of application of s 62 is different to that of s 27 and the fact that s 62 applies only to alterations made after issue does not mean that the ambit of s 27 should be similarly confined. As may be seen from the facts in *Estate Ismail*, Ramsbottom J did not intend to

[9] The learned judge was dealing with s 62(1) of the Transvaal Proclamation 11 of 1902 but the wording differs only very slightly from that of s 62(1) of the Act.
[10] *Byles on Bills of Exchange* 26 ed 272.
[11] See footnote 4.

convey that. The alteration to the cheque in *Estate Ismail* was made before issue. The court was fully aware of this when it said at 26A-B:

'In the present case, the alteration was made by the drawer of the cheque himself. That fact affects his liability and the validity of the cheque, but it must be disregarded in considering whether the cheque, as a document, was regular on the face of it when it was delivered to the respondent as a pledge. In my opinion it was not regular on the face of it, and the respondent did not become a holder in due course.'

[18] I conclude by remarking that the appealability of the order dismissing the action for provisional sentence was not challenged. The appealability of an order depends primarily on its effect.[12] An order dismissing an action for provisional sentence where the plaintiff is given leave to enter into the principal case is obviously not a final order. The appellant was not given leave to enter into the principal case and no purpose would have been served by allowing it to do so. The only issue between the parties had been disposed of.[13] The order is final in effect and thus appealable.

[19] The appeal is dismissed with costs.

[12] *Avtjoglou v First National Bank of Southern Africa Ltd* 2004 (2) SA 453 (SCA) 458E.
[13] *Jones v Krok* 1995 (1) SA 677 (A) at 686E-687H; *Scott-King (Pty) Ltd v Cohen* 1999 (1) SA 806 (W) at 826H-827G;

J H CONRADIE

JUDGE OF APPEAL

CONCUR:

SCOTT JA
ZULMAN JA
BRAND JA
CLOETE JA