THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 138/06

In the matter between:

FREDERICK WILLEM WYPKEMA **Appellant**

and

TOBIAS JOHANNES LUBBE **Respondent**

Coram: Harms ADP, Brand, Lewis, JJA and Snyders, Theron AJJA
Heard: 12 MARCH 2007
Delivered: 28 MARCH 2007

Summary: Attorney – drawing of cheque on trust account – acts as principal and not in a representative capacity.

Neutral Citation: This judgment may be referred to as *Wypkema v Lubbe* [2007] SCA 36 (RSA).

J U D G M E N T

SNYDERS AJA/

SNYDERS AJA:

[1] The appellant was refused provisional sentence in proceedings against the respondent by Van Rooyen AJ in the Pretoria High Court. He appeals against that decision with leave of this court. The respondent is not opposing the appeal.

[2] The respondent, a practising attorney, approached the appellant on behalf of a client, Rooihak Eiendomme (Edms) Bpk (Rooihak), for a loan as bridging finance for the acquisition of an immovable property pending the registration of a mortgage bond over the property. The appellant agreed to extend a loan of R1 850 000 at a fee of R350 000. Prior to the money being advanced in terms of the loan agreement the respondent, under cover of a letter dated 13 September 2004, furnished the appellant with a cheque dated 14 September 2004 drawn by him on his firm's trust account in favour of the appellant in the agreed amount of R2 200 000, the total amount of the loan and the fee of R350 000. This cheque was duly presented for payment by the appellant on 30 September 2004 when it was dishonoured by non-payment and returned to the appellant marked 'effects not cleared'.

[3] The court a quo upheld all the defences raised by the respondent in his answering affidavit and found:

'. . . 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.'

Flowing from that finding the court concluded that the respondent issued the cheque in a representative capacity as agent for Rooihak and therefore was not

personally liable. On the facts the court found that the respondent had not bound himself or his firm as surety and co-principal debtor for the obligation of Rooihak and that the agreement to repay the loan with this cheque was subject to the registration of the mortgage bond on or before 29 September 2004. All of these findings are attacked by the appellant.

[4] Section 78(1) of the Attorneys Act 53 of 1979 compels a practising attorney to keep a separate trust banking account. It reads:

'(1) Any practising practitioner[1] shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him on account of any person.'

The money deposited into that account generally does not form part of the assets of the relevant attorney, as s 78(7) provides:

'(7) No amount standing to the credit of any practitioners'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: Provided that any excess remaining after payment of all claims of persons whose money has, or should have, been deposited or invested in such trust account, and all claims in respect of interest on money so invested, shall be deemed to form part of the assets of such practitioner.'

[5] The nature of an attorney's trust account and the relationships between bank, attorney and the latter's client were summarised in *Fuhri v Geyser NO* 1979 (1) SA 747 (N)[2] at 749C-E as follows by Hefer J:

---

[1] 'Practitioner' is defined in s 1 as meaning 'any attorney, notary or conveyancer'.
[2] The principles were approved on appeal by the full court in *Fuhri v Geyser NO* 1980 (1) SA 598 (N). The matter related to an attorney's trust account in terms of s 33(3) of the Attorneys Act 23 of 1934 the predecessor to the current Act which section was worded in essentially the same terms as s 78(7).

'. . . despite the separation of trust moneys from an attorney's assets thus affected by s 33 (7), it is clear that trust creditors have no control over the trust account: ownership in the money in the account vests in the bank or other institution in which it has been deposited (*S v Kotze* 1965 (1) SA 118 (A) at 124), and it is the attorney who is entitled to operate on the account and to make withdrawals from it (*De Villiers NO v Kaplan* 1960 (4) SA 476 (C)). The only right that trust creditors have, is the right to payment by the attorney of whatever is due to them, and it is to that extent that they are the attorney's creditors. This right to payment plainly arises from the relationship between the parties and has nothing whatsoever to do with the way in which the attorney handles the money in his trust account.'

[6] In *De Villiers NO v Kaplan* 1960 (4) SA 476 (C), referred to and approved of by Hefer J, the court stated at 479A-C that the section:[3]

'. . . left unimpaired the right of the attorney to direct the bank at which the trust account is kept to dispose of the amount standing to the credit of that trust account in a manner as directed by him. Katz [the attorney] retained the right to direct the bank to pay the money in his trust account to his trust creditors or to persons to whom such creditors had instructed him to make payment. He similarly retained the right if there was a sum in such account in excess of that required to meet his trust obligations, to direct the bank to pay such excess to his personal creditors or to him personally. Indeed as between himself and the bank, unaware of the fact that he was acting in conflict with his trust obligations, he could direct the bank to pay the amount standing to the credit of his trust account to his personal creditors or to himself. Should the bank, acting on any such directions, pay out the amount standing to the credit on his trust account, such amount would, as indicated above, cease to be amenable to the terms of sec. 33(3). In effect, therefore, even although the amount in the trust account was not, while it was still in such account, an asset belonging to Katz, he had a right of disposal over such amount . . .'

[3] Again a reference to s 33(3) of Act 23 of 1934 and the comments made in fn 2 above are applicable. See also *Crowther & Pretorius v Warda Butchery BK t/a R S Butchery* 1999 (1) 847 (N) at 852A; Cameron *et al Honore, SA Law of Trusts* pp 293, 336 para 209 and 569 para 352.

[7] The court a quo failed to have regard to these basic principles and consequently erred in its conclusion. When an attorney draws a cheque on his trust account, he exercises his right to dispose of the amount standing to the credit of that account and does so as principal and not in a representative capacity.

[8] Flowing from that incorrect premise the court a quo found that the respondent issued the cheque on behalf of Rooihak. That conclusion is contrary to the Bills of Exchange Act 34 of 1964 that provides in s 24(1):

'. . . if a person signs a bill as drawer . . . and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative capacity, or if he signs as drawer and the name of the principal appears with his signature, he is not personally liable thereon . . .'

The respondent's signature on the cheque is unqualified and appears below the printed words 'TOBIAS LUBBE ATTORNEY TRUST ACCOUNT ACT 53/1979 SECTION 78(1)' in the space provided for the drawer to sign. These words do not qualify the signature of the drawer but merely identify the bank account on which the cheque is drawn. There are no facts that bring the respondent's signature as drawer within the ambit of s 24(1): thus the conclusion follows that he signed the cheque in his personal capacity.

[9] The finding that the respondent did not undertake liability as surety and co-principal debtor does not relate to any of the facts and issues in the case and is inconsequential in view of the conclusions reached.

[10] The letter of 13 September 2004 that accompanied the respondent's cheque to the appellant formed the basis of the conclusion by the court a quo that the

agreement underlying the cheque was subject to the registration of a mortgage bond. The relevant portions from the body of that letter reads:

'Soos u bewus is sien ons toe tot die registrasie van 'n eerste verband ten gunste van Standard Bank oor die eiendom en is ons in besit van die brief van onderneming vir betaling van die gemelde bedrag teen registrasie van die gemelde verband.

Ons onderneem onherroeplik dat registrasie van die verband sal plaasvind en dat registrasie sal plaasvind nie later nie as 28 September 2004, ten einde u terug te betaal nie later nie as 29 September 2004.

Vind dan hierby aangeheg die volgende:

1. Afskrif van waarborg van Standard Bank vir betaling van R2 200 000.00;
2. Ons trusttjek in die bedrag van R2 200 000.00 met die uitdruklike verstandhouding dat u die tjek slegs sal aanbied vir betaling op 29 September 2004 en verlang weer u onderneming in die verband.

Ons vertrou dat u voormelde in orde vind en bevestig dat u met ontvangs van die dokumentasie ons sal voorsien van u tjek in die bedrag R 1 850 000.00, alternatiewelik elektroniese oorplasing na ons rekening . . . .'

[11] Nothing in this letter suggests the suspensive condition found by the court a quo. The only term apparent from the letter is that the cheque was delivered subject to it not being presented for payment before 29 September 2004.

[12] None of the grounds upon which provisional sentence was refused can be upheld. However, a question arose during the hearing of the appeal whether the agreement to take a trust cheque as security for repayment of a loan when the funds from which that cheque was meant to be paid were not yet in the trust account was not contra bonos mores and therefore unenforceable.

[13] It is a fundamental principle of our law that an agreement to commit an unlawful act or serve an unlawful purpose is invalid. The maxim *ex turpi causa non oritur actio* operates against any attempt to enforce an unlawful agreement.[4]

[14] The question of unlawfulness has arisen primarily because of the following allegations in the appellant's replying affidavit:

'4.3 At all relevant times I was induced to enter into the loan agreement by the defendant's proposal that he provide me with his trust account cheque for the sum of R2 200 000,00, subject to the condition only that it be deposited by me on the 29th September 2004. By this act the defendant guaranteed to me that I would receive full payment of the sum of R2 200 000 on the 29th September 2004.'

'8.1 I submit that the mere fact that the defendant placed me in possession of a cheque drawn on his trust account, an utterly irregular act, the unlawfulness and consequences whereof the defendant was undoubtedly aware, refutes any suggestion of a suspensive condition.'

[15] If there were sufficient funds which were held on account of other parties – excluding Rooihak – to meet the cheque, it would have been proper to deduce that the underlying agreement had been entered into with an unlawful aim. This is because the bank would have honoured the cheque using funds destined for third parties and the Fidelity Fund would then, ultimately, have had to finance any shortfall. On the other hand, if there were insufficient funds in the trust account to meet the cheque, irrespective of whether they were held on account of others presentation thereof would simply have resulted in the cheque being dishonoured, as did happen, with no real disturbance to the funds in the trust account because it would not have been possible to execute against the trust account.

[4] *Jajbhay v Cassim* 1939 AD 537; *Visser v Rousseau en andere NNO* 1990 (1) SA 139 (A).

[16] The only facts before us that reflect on the state of the respondent's trust account at the time that the cheque was presented are that it did not contain sufficient funds to meet the cheque and the expected proceeds from the mortgage bond were never deposited. It is not known what the state of the trust account was at the time that the agreement was entered into, nor the extent of the trust creditors at that time or at the time that the cheque was presented. It is therefore not possible to conclude that an agreement was entered into with an unlawful aim or purpose.

[17] Aside from establishing the nature of the agreement it is relevant to establish whether either of the parties intended to perform the agreement in an unlawful way.[5] There exists a presumption in law that parties intend to perform agreements in a lawful manner. In *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA (O) at 556H-557A that presumption was expressed as follows:

'. . . a contract perfectly valid on the face of it may stipulate for the performance of an act which is illegal at the time the contract is entered into and then it is void *ab initio*. A contract, however, is not necessarily illegal merely because it may be performed in a manner contrary to law. There is a presumption that the parties intend to act lawfully, and a contract which may be performed in two ways, one lawful, the other unlawful, will not be void except on proof that it was intended to perform it in the illegal way.'[6]

---

[5] In *Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall Third Party)* [1961] 1 All ER 417 (CA) one of the effects of illegality on an agreement was summarised as follows:

'If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all.'

This was quoted with approval in *Essop v Abdullah* 1986 (4) SA 11 (C) at 15F.

[6] See also *Kirsten v Bankorp Ltd* 1993 (4) SA 649 (C) at 661I-J; *Karstein v Moribe* 1982 (2) SA 282 (T) at 291C-F; *Juglal NO v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) para 12.

[18] The appellant was assured, in language which was clear in its intent, in the letter of 13 September 2004 that registration of the mortgage bond that was to provide the proceeds from which the cheque was to be paid, was to have been registered no later than 28 September 2004. He was also told that the respondent was mandated to register the mortgage bond and was in possession of a letter of undertaking from the prospective mortgagee, a bank, to pay the money into the respondent's trust account upon registration of the mortgage bond.

[19] On the strength of these assurances there is no reason why the appellant was not entitled to accept that the respondent was issuing and delivering the cheque with no risk to any of his trust creditors or the Fidelity Fund. In fact, as a general proposition one would be entitled to accept, in the absence of knowledge to the contrary, that when an attorney issues a trust cheque, he acts lawfully and in accordance with the rules of his profession. To be given a trust cheque by an attorney is therefore an added assurance that the cheque is likely to be met.

[20] The events that followed on the delivery of the cheque suggest that there was no unlawful agreement: (a) the cheque was dishonoured; (b) the respondent wrote a letter to the appellant after the cheque was dishonoured that the payment of the funds by the mortgagee into his trust account was imminent;[7] and (c) the respondent never raised the defence that the appellant intended an unlawful consequence when he took a trust cheque as security for payment of the loan.

[7] This letter implies that the mortgage bond was registered, but in contrast, the respondent in his answering affidavit alleges, rather vaguely, that the '. . . transaction, in terms whereof the funds would have been received to be paid from the trust account was cancelled/alternatively did not proceed. . . .'

[21] There is one outstanding aspect. The respondent issued a cheque that was dishonoured, he made promises of the imminent availability of funds which implied the registration of a mortgage bond when that had never taken place. This conduct and the propriety of issuing what was in effect a post-dated cheque on a trust account, should be investigated.

[22] For these reasons:

(a) The appeal is upheld with costs.

(b) The order of the court a quo is set aside and replaced with an order for provisional sentence in the following terms:

i. Payment of the amount of R2 200 000;

ii. Interest on the amount of R2 200 000 at the rate of 15,5% per annum from 1 October 2004 until date of final payment;

iii. Costs of suit.

(c) The Registrar is requested to refer this judgment to the Law Society of the Northern Provinces.

_____

S SNYDERS
ACTING JUDGE OF APPEAL

CONCUR:

HARMS ADP
BRAND JA
LEWIS JA
THERON AJA