Case No 173/90
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

INDAC ELECTRONICS (PTY) LIMITED Appellant

and

VOLKSKAS BANK LIMITED Respondent

CORAM: JOUBERT, HEFER, VIVIER, GOLDSTONE et VAN DEN HEEVER JJA.

HEARD: 20 September 1991.

DELIVERED: 29 November 1991.

J U D G M E N T

VIVIER JA:

The appellant ("the plaintiff") instituted a delictual action for damages against the respondent ("the defendant") in the Transvaal Provincial Division. The defendant excepted to the alternative cause of action set out in the plaintiff's particulars of claim and, in the alternative, applied for the striking out of certain words in the particulars of claim. The exception was upheld with costs by ELOFF DJP who set aside the particulars of claim despite the fact that the exception only related to the plaintiff's alternative cause of action, namely that based on negligence. With the leave of the Court a quo the plaintiff now appeals to this Court.

In its particulars of claim the plaintiff alleged that it was the true owner of a cheque, dated 2

May 1989, drawn by the defendant's Silverton branch in the sum of R58 218-00 in favour of the plaintiff or order (the payee being specified as "Indac Electronics"). The cheque was crossed and marked "not negotiable". The plaintiff further alleged that it did not indorse the cheque either in blank or specially in favour of a certain M J le Roux. That notwithstanding, the defendant's Wonderboom South branch received the cheque for collection on 2 May 1989, not on behalf of the plaintiff but on behalf of Le Roux, who was a customer of the defendant at the latter branch. It paid the proceeds of the cheque to him despite the fact that he had no right to receive such payment. The plaintiff alleged that the defendant was aware, alternatively should have been aware of the fact that Le Roux was not entitled to payment of the proceeds of the cheque, and that, in the

circumstances, as the collecting banker, it owed a duty of care to the plaintiff as the payee and true owner of the cheque to avoid causing loss to it by dealing negligently with the cheque. The plaintiff alleged that the defendant acted in breach of this duty and caused the plaintiff to sustain loss in the amount of the cheque. The basis of the exception was that, in the absence of actual knowledge of its customer's defective title, there existed no legal duty on the part of the defendant, as the collecting banker, to avoid dealing negligently with the cheque. In upholding the exception ELOFF DJP regarded himself bound by the decisions to that effect in the Witwatersrand Local Division in Yorkshire Insurance Co Ltd v Standard Bank of S A Ltd 1928 WLD 251 and Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd 1977(3) SA 188(W).

The question which accordingly arises for

decision at the exception stage of this case is whether a collecting banker who negligently collects payment of a cheque on behalf of a customer who has no title thereto, can be held liable under the lex Aquilia for pure economic loss sustained by the true owner of the cheque who is not its customer.

This issue was long regarded as settled in favour of the collecting banker by the decision in the Yorkshire Insurance case, supra. In recent years, however, it has become a controversial one in South Africa, provoking a great deal of academic discussion. This was the result of the recognition by this Court in Administrateur, Natal v Trust Bank van Afrika Bpk 1979(3) SA 824(A) of Aquilian liability for pure economic loss caused negligently, and the decisions of the courts in Zimbabwe recognising such liability to the true owner of a stolen cheque on the part of a

negligent collecting banker in the following cases: Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd 1972(2) SA 703(R); Philsam Investments (Pvt) Ltd v Beverley Building Society and Another 1977(2) SA 546(R); Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd 1985(4) SA 553 (ZSC) and UDC Ltd v Bank of Credit and Commerce Zimbabwe Ltd 1990(3) SA 529 (ZHC). The question of the collecting banker's liability for negligence was left open by this Court in Trust Bank of Africa Ltd v Barnes NO 1975(3) SA 1002(A) at 1011 B on the ground that the plaintiff's case was based not on negligence but on fraud.

Before dealing with the decision in the Yorkshire Insurance case, supra, I should refer to two earlier decisions of our courts which were referred to in that case. In Leal and Co v Williams 1906

TS 554, (a case which did not concern a collecting banker's duties), a bank draft, drawn by a bank in England on the Standard Bank at Johannesburg in favour of Williams, was posted to Williams, but was intercepted and stolen and Williams's indorsement forged thereon. The draft was tendered to Leal and Company in payment for goods purchased by the thief. Leal and Company received payment of the draft from the Bank of Africa. It handed the proceeds to the thief less the amount owed for the price of the goods. Williams, as the true owner of the draft, sued Leal and Company to recover the amount thereof. In giving judgment against Williams, INNES CJ pointed out, at 557, that had the action been brought in England, Williams might have succeeded by an application of the doctrine of conversion. At 558 he quoted the following definition of that doctrine

appearing in an English case: "Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them and disposes of them, whether for his own benefit or that of any other person, is guilty of conversion". INNES CJ went on to say, at 558-559, that in our law the remedy available to the true owner of stolen property was the rei vindicatio, provided the property was still in esse. He might also bring the actio ad exhibendum to recover the property or its value (should it have been sold or consumed) against the thief or his heirs or against any person who received it with knowledge of the tainted title. The fact that these were the only remedies allowed by our law is inconsistent with the doctrine of conversion, which allowed the true owner to sue a bona fide intermediary. INNES CJ concluded with the passing remark that "something might possibly

be made of the case on the ground of negligence", but said that counsel for Williams had not seriously pressed that point.

The case of Standard Bank v Estate van Rhyn 1925 AD 266, which was specifically relied upon by TINDALL J in the Yorkshire Insurance case, supra, dealt with the liability of the drawee or paying banker. One Schultz, the agent of the executor in a deceased estate, drew a cheque on the estate account intending to misapply the proceeds. The drawee banker paid the cheque, which did not comply in form with the statutory direction to executors. It was held that since the bank was not privy to the intended misapplication, it incurred no liability to its customer by paying the cheque.

This brings me to the Yorkshire Insurance case, supra. The facts of that case, briefly stated,

were the following. One Harris was the trustee in various insolvent estates and the liquidator of certain insolvent companies. He opened bank accounts in the name of the estates with Barclays Bank while he had his own personal account with Standard Bank. He proceeded to steal 19 cheques representing payments due to the estates, which he presented for payment into his personal account. He furthermore drew 45 cheques in favour of himself on the estate accounts at Barclays Bank which he presented for payment into his personal account with the Standard Bank. The Yorkshire Insurance Company, having guaranteed Harris's fidelity, made good the losses suffered by the estates and took cession of their rights. It thereafter sued Barclays Bank as the drawee banker in delict under the lex Aquilia for the losses, alleging actual knowledge by Barclays Bank of the breach of trust. (Yorkshire

Insurance Co Ltd v Barclays Bank (Dominion, Colonial and Overseas) 1928 WLD 199). That case was decided on exception, GREENBERG J upholding an objection to the plaintiff's main cause of action (on a point not relevant for present purposes) and dismissing the exception against the alternative cause of action. In the course of his judgment GREENBERG J said at 206-207 that if it could be established that Barclays Bank acted with full knowledge of Harris's breach of trust, it would be liable in delict under the lex Aquilia on the basis of the decision in Matthews v Young 1922 AD 492 ie for loss caused by an intentional infringement of the legal rights of another. Yorkshire Insurance Company thereafter brought a second action under the lex Aquilia, this time against the Standard Bank as the collecting banker in respect of all the cheques. It alleged that the

Standard Bank knew that Harris was misapplying trust funds, alternatively that the Bank acted negligently and in breach of a duty of care to enquire whether Harris was entitled to the proceeds of the cheques received by him for the estates and whether he had authority to draw the cheques which he drew on the estates in his own favour. At the conclusion of the trial TINDALL J held, with regard to the main cause of action, that it had not been established that the Standard Bank had knowledge that Harris was misapplying trust funds.

With regard to the alternative cause of action based on negligence, TINDALL J held that in our law a bank collecting payment of a cheque, whether crossed or not, on behalf of a customer who has no title thereto, is not liable to the true owner for any loss sustained by him on the ground of negligence,

either at common law or under sec 80 of the Bills of Exchange Proclamation 11 of 1902(T). Sec 80 of both the Cape and Transvaal Statutes provided that where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment. TINDALL J referred to English cases which were decided under the corresponding section (sec 82) of the English Statute from which sec 80 in both the Transvaal and Cape Statutes was taken almost verbatim. He pointed out, at 278-279, that under English common law a collecting banker was liable to the true owner of the cheque, not by reason of any duty he owed the true owner, but under the doctrine of conversion. He said

that sec 82 of the English Statute was designed to afford a protection to the collecting banker, and that the frame of sec 80 of our former Statutes was, similarly, not that of a section designed to impose a liability where none existed before, but to afford a protection. In view of the fact that the doctrine of conversion formed no part of our common law, sec 80 was superfluous, and did not alter the Roman-Dutch common law principles. (The Bills of Exchange Amendment Act 25 of 1943 repealed sec 80 of our former Statutes and substituted a new sec 80, the precursor to sec 81 of the Bills of Exchange Act 34 of 1964, which afforded a remedy to the true owner of certain lost or stolen instruments.) TINDALL J proceeded, at 281-283, to consider the question whether, according to Roman-Dutch Law, the collecting banker owed a duty of care to the true owner of a cheque not to act

negligently. After referring to certain authorities dealing with a duty of care in general terms, he said that the Roman-Dutch authorities dealt specifically with the case of a person who innocently received stolen property and parted with it innocently. Such a person is not liable to the true owner for the value of the property, as he would be under English law. The Roman-Dutch authorities, dealing with the actio ad exhibendum, stated expressly that the purchaser who buys and disposes of stolen property in good faith is not liable on any ground, whether ex delicto, upon contract or quasi-contract or in natural equity. TINDALL J said that he was unable to find any trace in the Roman-Dutch authorities of negligence as a ground of liability, and concluded as follows on this aspect at 283:

> "The law, therefore, being clear in the specific case of the bona fide purchaser that he is not liable on the ground of mere negligence, that, in my opinion, is the law which I must apply; and if it applies in the case of a bona fide purchaser, it applies a fortiori to the defendants who were for all purposes relevant to this question, mere agents of Harris."

TINDALL J added that this view put the liability of the collecting banker on the same footing as that of the paying banker. That seemed to him to be a satisfactory result to arrive at, because the different positions of the paying and collecting banker respectively in England was due to the development of the common law in that country in regard to the doctrine of conversion and the action for "money had and received".

TINDALL J thus equated the position of a

collecting banker, dealing in good faith with a stolen cheque, with that of an ordinary bona fide purchaser of movable property who innocently bought stolen property and then parted with it innocently. He furthermore considered that the question of the delictual liability of the intermediary through whose hands stolen property has passed was exhaustively dealt with by the Roman-Dutch writers under the rubric of the actio ad exhibendum in its delictual aspect. It followed, so he held, that there was no room for invoking the lex Aquilia to hold the intermediary liable on the ground of negligence. See the commentary of Prof D V Cowen in his L C Steyn Memorial Lecture: "The liability of a bank in the computer age in respect of a stolen cheque", 1981 TSAR 193, at 202-206.

In the Rhostar case, supra,decided in 1972,

GOLDIN J held that the test for liability of a collecting banker adopted in the Yorkshire Insurance case, supra, should no longer be applied in modern times. He upheld a claim against a collecting banker based on negligence under the lex Aquilia by the drawer of a cheque. The plaintiff company in that case required two signatures on all cheques drawn by it on its bankers, The Standard Bank. It was customary for one director to sign cheques in blank which were crossed and marked "not negotiable - a/c payee only" and to give them to a trusted employee, one Paterson, who had authority to complete the cheques, add his signature and pay trade creditors. Paterson fraudulently, and with the intention of stealing from the plaintiff, filled in the name of one Henriques on the cheque in question, struck out the words "or bearer" and deposited the cheque for collection into

his own personal account with the Netherlands Bank. The plaintiff was not indebted to Henriques. The drawee bank (The Standard Bank) paid the Netherlands Bank and debited the plaintiff's account with the amount of the cheque. The plaintiff sued the Netherlands Bank, as the collecting banker, for the amount of the cheque on the ground of negligence. The Netherlands Bank denied that it owed any duty of care to the plaintiff. GOLDIN J commenced his judgment on this issue by saying that the decision in the Yorkshire Insurance case, supra, was no doubt correct on the evidence before that Court having regard to the duties and functions of a collecting banker which prevailed at that time. He added, however, that:

> ".... the practice and theory of banking differ from age to age ..... The nature of a banker's business cannot, of course, alter

> the common law, but the application and relevance of a principle of common law to a particular type of business or conduct, as the position is here, can vary with the changing nature of the business in question" (at 714 H).

GOLDIN J pointed out, at 715 B-E, that, while there is no contractual relationship between the drawer of a cheque and a collecting banker, the latter, by acting on behalf of its customer to collect the proceeds of the cheque from the paying banker, assumes and accepts obligations relating to third parties. He is aware that his failure to act in a reasonable manner can result in loss to the drawer of the cheque accepted for collection. The collecting banker is the only one who is in a position to know whether or not the cheque is being collected on behalf of the person who is entitled to receive payment.

GOLDIN J said that the evidence established that the paying banker has no such knowledge and relies on the collecting banker to present a cheque for collection on behalf of a person to whom it is lawfully payable. The evidence further showed that all bankers were fully aware of this position and that collecting bankers considered it their duty to ensure that they only presented a cheque for collection on behalf of a client who was entitled to receive payment under it. GOLDIN J continued as follows at 715 E-F:

> "In such a situation and in these cir= cumstances a duty of care arises and is owed by the collecting banker to the drawer of the cheque to take due and reasonable care to prevent him from sustaining loss. The drawer has the right to expect that the collecting banker will not cause him loss by carelessly collecting from his bank on behalf of a person who is not entitled to receive payment."

In support of his conclusion that a collecting banker owed a duty of care to the drawer of a cheque, GOLDIN J relied upon two passages from the judgments in Cape Town Municipality v Paine 1923 AD 207 at 216-217 and Peri-Urban Areas Health Board v Munarin 1965(3) SA 367(A) at 373 E-H. The effect of those judgments is that a duty of care arises if a diligens paterfamilias would foresee the possibility of harm occurring and take steps to guard against its occurrence. GOLDIN J pointed out (at 716 D-E), that if no such a duty of care is owed by a collecting banker, he need not examine or even look at a cheque to ascertain to whom it is payable. In this way he would ensure that he had no knowledge of his customer's defective title and, on the authority of the Yorkshire Insurance case, supra, he would not be liable for any

loss incurred. Having found on the facts that the defendant had been negligent, the Court gave judgment for the plaintiff.

The cases of Paine and Munarin referred to by GOLDIN J, dealt with liability for negligence which had resulted in physical injury. GOLDIN J appears to have overlooked the fact that a claim against a collecting banker is one for pure economic loss unrelated to damage to property or physical injury to a person. The fact that it is foreseeable that payment of a cheque to a person who has no title to it may cause financial loss to the true owner, is not sufficient to give rise to a legal duty. As in all cases of Aquilian liability it must, in addition, be shown that the defendant acted unlawfully. As E M GROSSKOPF AJA pointed out in Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985(1)

SA 475(A) at 497 B-C, the element of unlawfulness as a requisite for delictual liability is sometimes overlooked because most delictual actions arise from acts which are, prima facie, clearly unlawful, such as the causing of damage to property or injury to the person. This, it would seem, is what happened in the Rhostar case, supra. The question of liability for pure economic loss arising from a collecting banker's negligence in dealing with a cheque handed to him for collection was not given attention. See the Zimbabwe Banking Corporation case, supra, at 562 G-I and see also the comment on the Rhostar case, supra, by Prof P Q R Boberg in 1972 Annual Survey of S A Law 130 at 136 and by Prof J Sinclair in (1973) 90 SALJ 369 at 383.

The correctness of the judgment in the Rhostar case, supra, was not challenged by either

counsel who appeared for the defendants in the Philsam case, supra, with the result that NEWHAM J adopted the reasoning of GOLDIN J (at 552-553). He did not consider the requirement of wrongfulness in actions under the lex Aquilia for pure economic loss.

In Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd, supra, which was the next decision on the collecting banker's liability for negligence, FRANKLIN J endorsed the finding in the Yorkshire Insurance case, supra. In the Atkinson Oates Motors case five cheques, payable to "Atkinson Oates" (four of which were crossed generally and one of which was crossed generally and marked "a/c payee only"), were stolen from the payee by one Williamson. She altered the name of the payee on each cheque by the addition of the initial "J" before the name of the payee in each case. She then deposited them in a savings account with

Trust Bank in the name of Janet Atkins-Oaks. Trust Bank accepted the cheques for collection and collected the amounts thereof. Atkinson Oates Motors Ltd sued Trust Bank for the amounts of the cheques. Trust Bank excepted to the claim on the ground that the collecting banker owed no duty of care to the payee of the cheque. In upholding the exception FRANKLIN J confessed to considerable difficulty in deciding whether to extend liability for negligence causing pure economic loss to the situation confronting him. He emphasised the need to exercise judicial caution and concluded, at 198 H, that there was no sound reason to depart from the safe guide adopted by TINDALL J in the Yorkshire Insurance case, supra. In the course of his judgment FRANKLIN J dealt with the contention of GOLDIN J in the Rhostar case, supra, that, in the absence of a duty of care, a collecting banker need not look at the

markings on cheques which it collects. FRANKLIN J sought to discount this argument by invoking the principle that a person who, having a suspicion that something is wrong, deliberately shuts his eyes and refrains from making enquiries so as not to have his suspicions confirmed, will be deemed to have knowledge. Cowen. op cit 209 correctly points out, however, that "to throw caution to the winds" because there is no legal duty to be cautious, is not the same thing as deliberately refraining from making enquiries after one's suspicions have been aroused in a particular case.

In 1979 came the decision of this Court in the Administrateur, Natal case, supra. I will return to that case presently. In 1985 the decision in the Rhostar case, supra, was confirmed by the Zimbabwe Supreme Court in Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pty) Ltd, supra. The facts

were these. Pyramid drew a cheque in favour of one Morris on the Standard Bank. The cheque was crossed with the addition of the words "A/c payee only Not negotiable and Co". The next day, despite the restrictions on the face of the cheque, Zimbabwe Banking Corporation received the cheque for collection, not on behalf of Morris but on behalf of "Black Mona Lisa" and paid the proceeds to one Mandunya. Pyramid sued the collecting banker in an Aquilian action for negligence, alleging a duty of care on the part of the bank. The latter excepted to the declaration on the ground that it owed no duty of care to Pyramid. In dismissing the exception McNALLY JA referred to a statement by Cowen, op cit, at 205 that a collecting banker does not in England owe any common law duty of care to the owner of a stolen cheque to avoid loss to that owner through negligence in dealing with the

cheque. He said, at 556 E-F, that although correct, the statement was without significance, as the collecting banker in England had an obligation under the doctrine of conversion which is far wider than that which would arise under a duty of care. McNALLY JA proceeded to hold that a cheque, and more particularly one such as that with which he was concerned, with its various restrictive endorsements, could not be equated with an ordinary piece of stolen property. The endorsements on the cheque indicated that the drawer or a subsequent endorser had given certain instructions to the bank on which it was drawn and certain directions to the collecting banker. "Such a cheque not only describes itself in a way that a stolen car or watch does not. It also describes and prescribes how it is to be dealt with." The correct "handling of paper" is fundamental to the whole system of negotiable

instruments (at 558 G-J). To refer to the collecting banker as one of the intermediate possessors of the cheque and a mere agent for his customer was to ignore his essential role in the banking system (at 559 G-J).

GUBBAY JA delivered a separate concurring judgment in which he agreed with McNALLY JA that "considerations of justice and convenience warrant a recognition of a common law duty of care on the part of a collecting bank to the owner of a stolen cheque to prevent loss by negligently dealing with that cheque" (at 568 D-F). Earlier in his judgment GUBBAY JA pointed out (at 564 G-J) that in an action based on a cheque such as the one in that case the problem of indeterminate or limitless liability for economic loss does not arise since the potential plaintiffs are limited to the drawer or the payee or persons holding title under him and the loss is restricted to the

amount of the cheque. There is thus only a single loss with little, if any, likelihood of a multiplicity of actions. He said that this proposition had earned the approval of academic writers and referred to Boberg 1979 Annual Survey of S A Law at 136; Tager (1979) 96 SALJ at 391; Malan 1979 De Jure at 38 and Waring (1980) 43 THRHR at 420. He also referred to a passage in Cowen's L C Steyn Memorial Lecture op cit at 207, n 55 to the effect that "in practice it would be impossible for a large bank to predetermine the extent of potential liability in respect of all cheques passing through clearance even on any one day, let alone during a longer period", and said, at 565 A-B, that while this may be true in a generalised sense, it underplayed the fact that each potential claim will be finite, will arise separately from any other and will be related to a specific act on the part of the

collecting banker. The bank will not be faced with the dilemma of a single negligent act giving birth simultaneously to inestimable loss from an indeterminate class of potential victims launching an endless stream of actions.

The decision in the Zimbabwe Banking Corporation case, supra, was followed in 1990 in UDC Ltd v Bank of Credit and Commerce Zimbabwe Ltd, supra. The most recent South African case on the subject is Worcester Advice Office v First National Bank of Southern Africa Ltd, 1990(4) SA 811(C). The Court (VAN NIEKERK J and COMRIE AJ), although recognising the "impressive set of reasons" for extending Aquilian liability to a collecting banker, in effect followed the decision in the Yorkshire Insurance case, supra, and refused to impose such liability on a collecting banker for negligence in dealing with a lost or stolen

cheque.

The correctness of the decisions in the Yorkshire Insurance and Atkinson Oates cases must today be considered in the light of the subsequent development of our law. In the Yorkshire Insurance case, supra, the court, as I have already indicated, did not approach the question of the collecting banker's liability for negligence squarely on the basis of Aquilian liability. It simply denied the existence of an action for negligence under the lex Aquilia on the ground, firstly, that no trace of such an action could be found in the Roman-Dutch authorities and, secondly, that a bona fide purchaser who has negligently parted with property of another could not be held liable to him for his loss. (See Tager, op cit 387-388). As McNALLY JA put it in the Zimbabwe Banking Corporation case, supra, at 560 C-D

"the Courts had no choice but to fall back upon the inadequate actio ad exhibendum."

Aquilian liability for pure economic loss caused negligently was, however, recognised by this Court in 1979 in the case of Administrateur, Natal, supra. In so doing it settled a controversy which had been simmering, particularly in academic circles, but also in the courts, ever since the much-debated judgment of WATERMEYER J delivered 45 years before in Perlman v Zoutendyk 1934 CPD 151 (See CORBETT CJ in his Third Oliver Schreiner Memorial Lecture: "Aspects of the Role of Policy in the Evolution of our Common Law" (1987) 104 SALJ 52.) In the Administrateur, Natal case, supra, it was held that Aquilian liability could in principle arise from negligent misstatements which caused pure financial loss. The Court, however, found (at 835) that the defendant was in the circumstances

of that case not under a legal duty to exercise care in making the statement which it did. See also Siman and Co (Pty) Ltd v Barclays National Bank Ltd 1984(2) SA 888(A). In the Lillicrap case, supra, the question on exception was whether the breach of a contractual duty to perform professional work with due diligence was per se a wrongful act for the purposes of Aquilian liability. This Court held, mainly for reasons of policy, that it was not desirable to extend Aquilian liability to the duties subsisting between the parties to such a contract for professional service.

In view of the decision in the Administrateur, Natal case, supra, the Yorkshire Insurance case, supra, can, in my view, no longer be regarded as authority for the proposition that no delictual action lies against a collecting banker who has negligently caused loss to the true owner of a cheque. There can now be no reason in principle

why a collecting banker should not be held liable under the extended lex Aquilia for negligence to the true owner of a cheque, provided all the elements or requirements of Aquilian liability have been met. See the Proposals for the Reform of the Bills of Exchange Act submitted by Malan, Oelofse and Pretorius to the S A Law Commission at 586-637; De Beer, Die ware eienaar van die tjek en sy beskerming in geval van diefstal (1979, unpublished LLD thesis, University of Leiden); Malan and De Beer, Bills of Exchange, Cheques and Promissory Notes in South African Law, para 354 at 325; Sinclair op cit at 385; Tager op cit at 392; Waring op cit at 418; Pretorius, 1987 Moderne Besigheidsreg 56 at 61 and Van Zyl, 1988 Moderne Besigheidsreg 79 at 85. In a situation such as the present a delictual action for damages would accordingly be available to a true owner of a cheque who can establish (i) that the collecting banker

received payment of the cheque on behalf of someone who was not entitled thereto; (ii) that in receiving such payment the collecting banker acted (a) negligently and (b) unlawfully; (iii) that the conduct of the collecting banker caused the true owner to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss. (Cf the minority judgment of CORBETT JA in the case of Siman and Co, supra, at 911 A-D).

In the case before us only the element of unlawfulness is presently in issue: the exception has been taken solely on the ground that the facts alleged by the plaintiff do not give rise to a legal duty on the part of the defendant not to act negligently, so that the defendant's conduct as the collecting banker was consequently not unlawful.

In determining whether the defendant was under such a duty not to act negligently (for without this legal duty there can be no unlawfulness) the Court is required to exercise a value judgment embracing all relevant facts and involving considerations of policy. In the Administrateur, Natal case, supra, (at 833 D-F) RUMPFF CJ quoted the following passage from M A Millner Negligence in Modern Law (1967) 26 on the unlawfulness element of the duty of care concept, as distinct from the negligence (reasonable foreseeability) element (at 833 D-F).

> "The duty concept, on the contrary, shows abounding vitality. The key to this paradox is the utility of this concept as a device of judicial control over the area of actionable negligence on grounds of policy. Here the

ascertainment of liability is linked to the second of the two elements of duty of care referred to above. This second element is not at all concerned with reasonable foresight; it is to do with the range of interests which the law sees fit to protect against negligent violation."

RUMPFF CJ also quoted the following passage from Fleming The Law of Torts 4th ed at 136 on the duty element (at 833H - 834A).

"In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of

> administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes."

See also the Lillicrap case, supra, at 498 G-I and the cases there cited; Siman's case, supra, at 913-914 and the majority judgment delivered by CORBETT CJ in the as yet unreported case of Bayer South Africa (Pty) Ltd v Frost (case no 105/89) at 41-42. In Dorset Yacht Co Ltd v Home Office (1970) AC 1004 at 1039 B-D Lord Morris of Borth-y-Gest said the following about the value judgment the court is required to make:

> "I doubt whether it is necessary to say, in cases where the court is asked whether in a particular situation a duty existed, that the

court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise, the court must not shrink from being the arbiter."

A consideration of the question whether a collecting banker owes a duty of care to the true owner of a lost or stolen cheque in circumstances such as the present, reveals the following:

1. The objection of limitless or indeterminate liability usually raised against the recoverability of pure economic loss does not arise in a case such as the present, since the extent of the potential loss incurred is finite (the face value of the cheque) and the potential claimants are easily predictable and are limited to the drawer or the payee (or someone holding title under him). Furthermore, each potential claim will arise separately from any other and will be related to a specific act on the part of the collecting banker.

In the Worcester Advice Office case, supra, the Court said that although "the vigilance and expertise which collecting bankers will be called upon

to exhibit, if the duty of care is recognised, may not seem too much to ask in an individual case" cumulatively the task would be colossal so that the ensuing potential liability would be too great a burden to be placed upon collecting bankers (at 819-820). In the first place it is difficult to see how the Court could have come to this conclusion in the absence of any evidence before it (that case was decided on exception in favour of the collecting banker) and secondly the reasoning of the Court would seem to amount to the indeterminable liability argument in disguise. To say that a collecting banker cannot be expected to take reasonable care in dealing with a particular cheque because that will mean that he will also have to take reasonable care in dealing with a vast number of other cheques, is not a valid argument. What the standard of care should be is another matter.

That will depend on a number of factors including the likelihood of loss and the cost and practicability of taking measures to guard against it.

2. It is apparent from what happened to the cheque in the present case and, I may add, from what happened to some of the cheques in the other cases to which I have referred, that there is an ever present risk in relation to a cheque in the sense that payment can be obtained by an unlawful possessor with relative ease. See the report of the Review Committee on Banking Services Law in the United Kingdom under the chairmanship of Prof Jack ("the Jack Report") para 7.27. There is, therefore, a need for protection in the case of the true owner of a cheque, particularly as he relies on the collecting banker to look at the named payee on the face of the cheque before collecting and paying the cheque which his customer has handed to him

for collection.

3. Furthermore, the collecting banker undertakes in the course of his professional services to collect other persons' cheques payable to his client and he should be aware that his failure to take reasonable care may result in loss to the true owner of the cheque. The collecting banker, by virtue of his calling, possesses or professes to possess special skill and competence in his field and can, or ought to appreciate the significance of instructions upon a cheque. He is thus able to reduce if not avoid loss to the true owner by exercising reasonable care in the collection of cheques. If there were no legal duty to take reasonable care, it would mean that the collecting banker need not examine or even look at the cheque to ascertain to whom it is payable. The crossing of a cheque would be of little consequence if no legal duty

existed on the part of the collecting banker.

4. It must be accepted that the business of banking has changed substantially in modern times. This has resulted in a change in the banker-customer relationship (see the Jack report, paras 2.16-2.19). In South Africa the formation of the Automated Clearing Bureau has mechanised the collecting process. As a result the collecting bankers, while accepting responsibility for collecting the correct amounts, apparently do not regard it as their function to ensure that cheques are collected for the correct party unless they are put on notice to make enquiries in a specific case. The collecting banker, however, remains the only person who is in a position to know whether or not a cheque is being collected on behalf of a person who is entitled to receive payment, and the drawee bank has to rely on the collecting banker to ascertain this

fact. The latter, is fully aware of this position and it might, therefore, well be said that it is his duty to ensure that he only presents a cheque for payment on behalf of a client who is entitled to receive payment of the cheque.

5. The drawer or true owner of a cheque is unable to take any steps to protect himself from the loss he will suffer if the collecting banker negligently collects payment on behalf of a person who is not entitled thereto. On the other hand, when a collecting banker does act negligently, is held liable and pays damages to the true owner, he would always have a claim for reimbursement against his customer who deposited the cheque for collection. If that customer is unable to pay, that is a situation in which it would be more appropriate to visit liability on the banker who chose to accept his customer's business than on an innocent true owner. Furthermore, it may well be established at a trial that a collecting banker by

obtaining insurance cover could, relatively inexpensively, protect himself against such loss. The cost of such insurance would presumably depend on the frequency of such occurrences. At the exception stage the court does not have the factual material with which to reach any decision on this aspect.

Prof Cowen is the only one of our academic writers on the subject who does not favour the extension of Aquilian liability for negligence to the collecting banker. He states (op cit 214) that while there is undoubtedly force in the policy considerations mentioned by GOLDIN J in the Rhostar case, supra, to which I have referred, there are other policy considerations which have to be taken into account, and when they are duly evaluated "the balance comes down in favour of not recognising the alleged duty or element of unlawfulness". Earlier, in an article in 1977 THRHR 19 at 34, Prof Cowen said that "In logic, and from the point of view of economic policy, the

reasoning of GOLDIN J is attractive; and it is increasingly gaining academic support". The main considerations which Cowen regards as militating against a legal duty on the part of the collecting banker are firstly, that there is insufficient reason to warrant a departure in the case of bankers from the general rule of our law applicable to the ordinary intermediary. For the reasons stated by McNALLY JA in the Zimbabwe Banking Corporation case, supra, at 558-559, to which I have already referred, I cannot agree with the learned author. For the reasons which I have stated above I also cannot agree with his second contention viz that the test of liability for a collecting banker laid down in the Yorkshire Insurance case, supra, should not be disturbed. In this regard Cowen also contends that when the new sec 80, which is the precursor to the present sec 81 of Act 34 of 1964, was introduced in 1943, the Legislature specifically exempted the collecting banker from liability to the

true owner of a stolen cheque, provided the banker does no more than act as an agent for collection (as distinct from being a purchaser) of a stolen cheque. To hold that the collecting banker has a legal duty to the true owner would thus be in direct conflict with the policy of Parliament. The short answer to this contention is that at the time of its introduction in 1943, the new sec 80 (now sec 81) was considered in the light of the then existing law in terms of which the collecting banker was not liable for negligence to the true owner of a stolen cheque. It cannot be said, therefore, that Parliament legislated for the collecting banker when the new sec 80 was introduced in 1943.

Another factor mentioned by Cowen as militating against the recognition of a legal duty on the part of the collecting banker is the effect such a decision would have on existing banking procedures. He states that there would be a slowing down of the

flow of cheques through the clearing system and a significant increase in the cost of banking services which could have serious effects on the economy. He contends that the public has an overriding interest in a speedy and inexpensive payment system and that attempts to ensure complete safety for the true owner of a cheque by imposing the relevant duty of care on the banks may well be recognised as involving too high a cost. The correctness or otherwise of the factual basis for these considerations are matters which will require to be evaluated in the light of such evidence as may be led at the trial. They relate, I might add, not only to the issue of unlawfulness but also to that of the standard of care, an entirely distinct issue which will also, no doubt, concern the trial Court.

On balance, the factors which I have mentioned above, in my view, operate in favour of

recognising the existence of a legal duty on the part of a collecting banker to the true owner of a lost or stolen cheque to avoid causing him pure economic loss by negligently dealing with such cheque. However, at the stage of deciding an exception a final evaluation and balancing of the relevant policy considerations which have been mentioned above should not be undertaken. It is sufficient for present purposes to say, firstly, that the lex Aquilia does provide a basis upon which a collecting banker may be held liable in negligence to the true owner of a lost or stolen cheque and, secondly, that there are considerations of policy and convenience in the present case which prima facie indicate the existence of a legal duty on the part of the collecting banker to prevent loss by negligently dealing with the cheque in question. This prima facie indication may be rebutted by the evidence which

the defendant might lead at the trial, duly tested and evaluated in the light of any countervailing evidence which might be led by the plaintiff. It cannot, therefore, at this stage be found that the defendant's conduct was not unlawful.

Counsel for the defendant submitted that the question of liability in this branch of the law is more properly a matter for Parliament than for the courts. I do not agree. The issue is one of law. The policy considerations are of a nature which is not infrequently the concern of courts of law.

For the reasons I have stated the Court a quo erred in allowing the exception.

In the result the appeal succeeds with costs. The judgment of the Court a quo is altered to read: "The exception is dismissed with costs."

W. VIVIER JA.

JOUBERT JA)
HEFER JA)
GOLDSTONE JA) Concur.
VAN DEN HEEVER JA)