THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 615/12

In the matter between:

STABILPAVE (PTY) LIMITED **APPELLANT**

and

SOUTH AFRICAN REVENUE SERVICES **RESPONDENT**

Neutral citation: *Stabilpave v SARS* (615/12) [2013] ZASCA 128 (26 September 2013).

Coram: Brand, Lewis, Bosielo, Theron JJA and Meyer AJA

Heard: **12 September 2013**

Delivered: **26 September 2013**

Summary: **Payment – Cheque sent through post stolen before it reached payee – Whether tax assessment form, on a proper construction thereof, afforded creditor a choice as to the mode of payment, and, if it did, whether creditor made a choice, expressly or by necessary implication, that payment should be effected by a cheque through the post, and creditor thereby assuming risk of loss of the cheque – Defence of payment dismissed.**

ORDER

On appeal from: Full Court of the North Gauteng High Court, Pretoria (Mavundla, Fabricius and Mothle JJ).

1. The appeal is upheld with costs.
2. The order of the court a quo dismissing the appellant's appeal with costs is set aside and there is substituted an order which reads:
   (a) The appeal is upheld with costs.
   (b) Judgment is granted in favour of the plaintiff against the defendant for:
      (i) Payment of the sum of R724 494.29;
      (ii) Interest *a tempore morae* on the aforesaid sum at the rate of 15.5 percent per annum from 17 October 2006 until date of payment;
      (iii) Costs of suit.

JUDGMENT

MEYER AJA (BRAND, LEWIS, BOSIELO and THERON JJA concurring)

[1] This is an appeal against a judgment of the Full Court of the North Gauteng High Court dismissing an appeal against the judgment and order of Ismail AJ, sitting as court of first instance. The court of first instance dismissed with costs the claim of the appellant, Stabilpave (Pty) Ltd, against the respondent, the South African Revenue Service, for payment of the sum of R724 494.29 plus interest and costs. I shall refer to the parties as SARS and Stabilpave. SARS posted a cheque to Stabilpave's postal address for the amount and interest claimed, but the cheque was stolen and paid to a thief.

[2] The parties agreed on a written statement of facts. SARS owed Stabilpave a tax refund of R724 494.29. This amount was reflected as the amount due to Stabilpave on the tax assessment form (IB34) dated 16 October 2006 which was issued to Stabilpave. The core issue between the parties concerns the interpretation of the following notice that was included in the tax assessment form:

'Die kredietbedrag wat nou op u belastingrekening reflekteer word eersdaags aan u betaal. Hierdie betaling sal geskied deur middel van 'n tjek wat by u naaste Poskantoor afgehaal kan word OF indien geldige bankbesonderhede beskikbaar is sal 'n elektroniese oorbetaling gemaak word deur gebruik te maak van die bankbesonderhede soos per u belastingrekord.

Nota: Die kredietbedrag aan u terugbetaalbaar verteenwoordig die kredietbedrag soos gereflekteer op u belastingrekening op datum waarop die tjek of elektroniese oorbetalingstransaksie gegenereer is. As gevolg van finansiele transaksies wat moontlik mag plaasvind op u belastingrekening tydens die datum van uitreiking van hierdie aanslag en die datum waarop die terugbetaling gegenereer is, mag die bedrag derhalwe terugbetaal verskil van die bedrag getoon as VERSKULDIG AAN U op hierdie aanslag.

U huidige bankbesonderhede soos per u belastingrekord is soos volg:

Naam van bank en tak

Taknommer

Tipe rekening

Rekeningnommer

Geliewe kennis te neem dat indien hierdie besonderhede nie geldig is tydens die prosessering van die kredietbedrag op u rekening, sal die terugbetaling van die kredietbedrag geskied deur middel van 'n tjek wat aan u naaste Poskantoor gestuur sal word vir kollektering.'

[3] The essential facts are these. The banking details of Stabilpave were not available to SARS. A cheque, dated 12 November 2006, made payable to Stabilpave for the sum of R728 474.74, being the amount of the refund that was due to Stabilpave plus interest that had accrued thereon until 12 November 2006, was drawn by SARS on ABSA Bank Ltd, at its Vermeulen Street, Pretoria branch. The cheque was crossed and marked 'not transferable'. SARS handed the cheque in a sealed envelope (addressed to Stabilpave's post-box number at Menlyn Retail Post Office) to Securemail, a division of the South African Post Office. Securemail caused a delivery notification to be issued. Neither Stabilpave nor anyone representing it received the delivery notice. It got into the hands of a stranger to the parties, one Mbukuman Wellington Mtima, who collected the envelope containing the cheque from the Menlyn Retail Post Office. Mtima succeeded in stealing the cheque

by presenting the delivery notice as well as a fake letter that professed to be from a firm of accountants, Prinsloo & Du Plessis, and authorising the collection.

[4] The particulars of the directors of Stabilpave (JM Geyser, JE Raubenheimer and F Kenney) were fraudulently changed in the records kept by the Registrar of Companies to reflect one Petros Mandla Radebe as its sole director. Radebe, acting fraudulently and without the authority of Stabilpave, opened a bank account with First National Bank, Hatfield Branch, in the name of 'Stabilpave (Pty) Ltd'. The cheque was deposited at First National Bank, Menlyn Branch and the account opened by Radebe was credited with the amount of R728 474.74. The cheque was presented for payment to ABSA Bank which duly paid that sum to First National Bank and the account of SARS was debited with the amount paid. The proceeds of the cheque were withdrawn by Radebe, ostensibly acting as a director of Stabilpave, over a relatively short period.

[5] Stabilpave instituted action against SARS for payment of the tax refund which became due and payable to it on 16 October 2006 plus interest and costs. SARS admitted the debt but raised the defence of payment. In the alternative it raised a defence '... based on the wording of the assessment ...', which is that by not providing any banking details to SARS in order for the payment to have been effected by electronic transfer, Stabilpave '... elected, alternatively accepted that payment be effected by way of a cheque which would be collected at the nearest post office ...' to Stabilpave.

[6] Stabilpave's contention is that the obligation of SARS to pay the tax refund to it has not been fulfilled because in law there is no payment if a cheque is posted and lost before it reaches the creditor.[1] SARS's contention, on the other hand, is that its obligation to pay the tax refund is legally deemed to be fulfilled even though the amount of the cheque was never credited to Stabilpave. The tax assessment form, on a proper construction, it argued, afforded Stabilpave the choice as to the mode of payment – by cheque through the post, or by providing its banking details, by means of electronic transfer. By not providing its banking details Stabilpave chose to be paid by cheque through the post. SARS relies on the trite legal principle '... that if a

[1] See: *Barclays National Bank Ltd v Wall* 1983 (1) SA 149 (A) at 156H-157C.

creditor requests a debtor to settle his debt by sending a cheque through the post he agrees to run the risk in the transit'.[2]

[7] The court of first instance accepted the contention of SARS, and the claim of Stabilpave was accordingly dismissed with costs. The judgment of Ismail AJ has elicited comment from the authors C J Nagel and J T Pretorius[3] who expressed the view that the notification under consideration cannot be construed as an agreement between the parties or as a request that payment be made by cheque and be posted to the creditor.

[8] The majority of the Full Court - Mavundla J and Mothle J concurring - held that

'. . . the only plausible inference to be made was that there was a tacit agreement that remittance of payment should be done through registered post',

and that Ismail AJ

'. . . correctly found that the appellant made a choice as to how the cheque was to be remitted per post, and that the risk lied [sic] with the appellant'.

The dissenting view of Fabricius J is to the effect that the existence of any agreement relating to the mode of payment was not established and that

'. . . the relevant notification does not contain any indication to the appellant that it was entitled to express its approval or disapproval with the intended mode of payment. . . . The assessment read as a whole, simply and clearly indicates that because respondent did not have the banking details of appellant, payment would be made by cheque posted to the nearest post office . . .'.

[9] The principles to be applied in cases where cheques have been intercepted in the post and misappropriated by a thief have been concisely summarised by Nienaber J in *Mannesmann Demag (Pty) Ltd v Romatex*[4] thus:

'When a debtor tenders payment by cheque, and the creditor accepts it, the payment remains conditional and is only finalised once the cheque is honoured. (*Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another* 1973 (3) SA 685 (A) at 693; Christie *The Law of Contract in South Africa* at 413.) Until that happens a real danger exists that the cheque may be misappropriated or mislaid and that someone other than the payee may, by fraudulent means, convert it into cash or credit, for instance, by forging an endorsement or by impersonating the true payee. That risk is the debtor's since it is the debtor's duty to seek out his creditor.

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[2] Per Rumpff J in *Dadoo & Sons Ltd v Administrator, Transvaal* 1954 (2) SA 442 (T) at 445.
[3] *'Taxpayers beware the SARS cheque refund'* 2010 (73) THRHR 482.
[4] *Mannesmann Demag (Pty) Ltd v Romatex* 1988 (4) SA 383 (D) at 389F-390D.

But when the creditor stipulates (or requests) a particular mode of payment and the debtor complies with it, any risk inherent in the stipulated method is for the creditor's account. That is said to be "the legal position" (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 908B-E), "the principle", or "the law" (*Barclays National Bank Ltd v Wall (*... [1983 (1) SA 149 (A)] at 156H-157C)), at least when the post is to be employed for that purpose. And of necessity that must mean that, if the worst comes to the worst and the cheque is intercepted and misappropriated by a thief, the obligation to pay is deemed to be fulfilled even though the amount of the cheque was never credited to the creditor. (Cf *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd ...* [1950 (2) SA 763 (T)] at 769).)

A stipulation of this sort may of course form part of the agreement creating the debt which is due to be paid but it does not have to be so. More often than not the request only reaches the debtor thereafter. In that event, if the debtor accedes to the request, the parties have reached agreement about the particular mode of performance to be employed in that particular instance. It is a term of this subsequent agreement that the creditor assumes the risks of any inadequacies in the method selected by him. And to the extent that it is presented, as it invariably is, as a proposition of law, the term becomes one that is implied by law.

The implied term is not, however, inviolable. In the *Greenfield Engineering Works* case *supra* at 908E, Hoexter J spoke of 'the agreement as to the manner of payment' and eventually concluded, at 911A:

'Looking at the evidence as a whole I find myself driven to the conclusion that in the agreement of the parties that the cheque be sent by post it was a tacit term (1) that the cheque should be crossed, (2) that the cheque should name the payee as "Greenfield Engineering Works (Pty) Ltd" and (3) that the cheque should be drawn payable to order.'

What the Court in effect decided was that the term *ex lege* must yield, in the circumstances of that case, to the three tacit terms *ex consensu*.'

[10] It is clear from this passage that any agreement 'about the particular mode of performance' or 'as to the manner of payment' is reached only if the creditor stipulates (or requests or authorises) a particular mode of payment and the debtor accedes to the request. The decisive question in the present case is whether the notice contained in the tax assessment form gave Stabilpave a choice as to a mode of payment, and, if it did, whether the choice was made by Stabilpave, expressly or by necessary implication, that SARS should effect payment by means of sending a

cheque through the post. The parties are ad idem that only the tax assessment form must be looked at in order to determine the first question.

[11] A plain reading of the notice contained in the tax assessment form leads to the inevitable conclusion that it does not give a taxpayer, in this instance Stabilpave, a choice as to a mode of payment to be followed by SARS. The notice concerns the factual position as at 16 October 2006, which is the date of the tax assessment form. SARS informs the taxpayer that the credit amount reflected on its tax statement will be paid to the taxpayer shortly ('eersdaags'). The taxpayer is then informed of the manner of payment. It will be effected either by means of a cheque that could be collected at the taxpayer's nearest post office or by means of an electronic transfer, if valid banking particulars are available. The banking particulars that will be used are those reflected in the taxpayer's tax record. If banking particulars are not valid – for example, a branch or account number has been erroneously captured – at the time of processing the credit amount on the taxpayer's account, then payment will be made by cheque through the post. No time limit for the processing is given.

[12] There is no invitation, expressly or by implication, to the taxpayer to furnish banking particulars should the taxpayer wish to be paid by means of electronic transfer. If there was such invitation one would have expected the taxpayer to be informed that payment would be effected by means of an electronic transfer, if valid banking particulars were available or furnished by the taxpayer. A further and clear indication that the notice does not afford a choice as to the manner of payment is the absence of a cut-off date on or before which the taxpayer might furnish its banking particulars to SARS. Instead, the taxpayer is informed that payment will be made soon. The notice is merely for the information of the taxpayer.

[13] The clear implication of the notice is an advice from SARS that the tax record of Stabilpave reflected no banking particulars and that payment would therefore be effected by means of a cheque through the post. No choice was afforded to Stabilpave. The method of payment was dictated by SARS. The mere fact that a creditor knows or expects to be paid by cheque through the post or that it does not

raise an objection does not in itself give rise to an implied request or election by the creditor to be paid in such manner.[5]

[14] Accordingly, the risk of loss of the cheque was not assumed by Stabilpave and remained with SARS. It thus did not discharge its indebtedness by posting a cheque for the amount of the refund that is due to Stabilpave.

[15] In the result the following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo dismissing the appellant's appeal with costs is set aside and there is substituted an order which reads:
   (a) The appeal is upheld with costs.
   (b) Judgment is granted in favour of the plaintiff against the defendant for:
      (i) Payment of the sum of R724 494.29;
      (ii) Interest *a tempore morae* on the aforesaid sum at the rate of 15.5 percent per annum from 17 October 2006 until date of payment;
      (iii) Costs of suit.

P A MEYER
ACTING JUDGE OF APPEAL

[5] *Wall* (supra) at 159G; *Dadoo* (supra) at 445H; *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 (2) SA 763 (T) at 770.

APPEARANCES:

For Appellant:	JP de Bruin SC Instructed by: Hill McHardy & Herbst Inc Bloemfontein
For Respondent:	PJJ Marais SC and H Kooverjie Instructed by: Rudman Attorneys Pretoria