REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 5278/2007

DATE:20/05/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

CHHC TRADING (PTY) LIMITED Plaintiff

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED First Defendant

ABSA BANK LIMITED Second Defendant

J U D G M E N T

KATHREE-SETILOANE, J:

[1] Central to this action is the protection granted to bankers by s 79 of the Bills of Exchange Act 34 of 1964 ("*the Act*") thus involving an examination of the intersection between the private law of mandate, s 79 of the Act, and the delictual liability of a collecting bank to the true owner of a cheque. The

plaintiff, CHHC Trading (Pty) Ltd ("*CHHC*") issued summons in the South Gauteng High Court, Johannesburg against the first defendant, Standard Bank of South Africa Ltd ("*Standard Bank*") and the second defendant, Absa Bank Ltd ("*Absa Bank*"), respectively for payment of the amount of R4 200 000, 00 jointly and severally the one paying the other to be absolved, together with certain ancillary relief.

[2] CHHC's claim against Standard Bank is in respect of the loss suffered by it as a result of Standard Bank's failure to perform its mandate as a drawee bank. CHHC alleges that Standard Bank breached its contractual obligation to make payment of the cheque in accordance with its tenor when it paid out the cheque to Absa Bank. CHHC alleges further that Standard Bank's contractual obligation was to comply with the written instruction given to it by means of the cheque and with its fiduciary relationship with CHHC. CHHC's claim against Absa Bank is grounded on a collecting banker's Aquilian liability to the true owner of a cheque. CHHC alleges that Absa Bank breached its duty of care, as collecting banker, owed to it (as true owner of a cheque) not to collect payment of a cheque negligently for a person not entitled to it. It also alleges that Absa Bank breached its duty of care by receiving payment of the cheque on behalf of someone who was not entitled thereto, namely Mr AJ Coetzee (*"Coetzee")*, and in receiving such payment, acted negligently.

[3] The circumstances in which the cheque was drawn has its genesis in an extraordinary, and highly irregular transaction (described by counsel for CHHC, Mr Wagenaar SC, as '*curious*') between CHHC and a certain Mr AJ

Coetzee, who on 28 January 2006 ceased to practice as an attorney as a result of being suspended by the Law Society. During the week preceding 28 January 2006, Mrs Harcourt-Cooke ("*Harcourt-Cooke*"), a director of CHHC, in charge of handling its financial matters received a 'curious' telephonic call from Coetzee, completely 'out of the blue'. He informed her that he was an attorney, and that he ran an investment company. He claimed to have some sort of association to a financial brokerage company that administered CHHC's pension fund. He requested her to make an investment of R4.2 million into the trust account of AJ Coetzee Attorneys. Coetzee, who was the sole proprietor of AJ Coetzee Attorneys, was not known to Harcourt-Cooke.

[4] The explanation given by Coetzee for requiring the funds was vague, and the most Harcourt-Cooke understood was that there was a consortium of people who were intending to acquire a 49% interest in Nationwide Airlines. Coetzee had also informed her that he had secured funding, from Investec Limited *("Investec")*, for the transaction provided that a successful due diligence was carried out. The due diligence could, however, not take place unless the existing shareholder's of Nationwide Airlines were satisfied that the prospective purchasers of the 49% interest in Nationwide Airlines were people of substance. Confirmation that the money had been deposited into an attorney's trust account was, therefore, required by Nationwide Airlines.

[5] The investment of R4.2 million which Coetzee requested Harcourt-Cooke to deposit into the trust account of AJ Coetzee Attorneys was to be used to convince the existing shareholders of Nationwide Airlines that the

prospective purchaser's were people of substance. Harcourt-Cooke, however, took no measures to ascertain the details and identities of the members of the consortium which Coetzee claimed to represent or, indeed, the funding which he said that he had secured through Investec Bank. This inevitably involved a deception, as Harcourt-Cooke's understanding was that the money was safe, and would remain in the trust account, to be returned to CHHC. The money would not belong to the purchasers, and Coetzee would not represent to the sellers that it belonged to the purchasers. She understood that it would be returned to CHHC on 21 March 2006 regardless of whether the due diligence was successful or not.

[6] Harcourt-Cooke appeared to be persuaded to participate in the investment primarily because of the high interest rate of 2.5% per month, which equals 30% per annum ─ substantially higher than the market rate, or the money market rate at the time. It also appears that Harcourt-Cooke was persuaded by the fact that CHHC was being offered an opportunity to participate in the purchase of the shares after completion of the due diligence. There was, however, no confirmation of this in the correspondence which Coetzee gave to her or the letter which she prepared recording the arrangement, as discussed, between Coetzee and herself. Harcourt-Cooke's insistence that the premium in the form of the high interest rate could have arisen by virtue of the fact that there were delays in obtaining bank loans indicates that she understood that the money could be utilised by Coetzee. So too, her explanation that whilst Coetzee had already secured R185 million finance for the project, she thought that he might still need her investment, as

the securing of finance does not always enable access to be had to cash, again indicates that she was aware that the money could be used by Coetzee.

[7] Despite the amount of the investment proposed, and its materiality to CHHC's operations and the liquidity of the group, Harcourt-Cooke did not discuss the transaction with any director of CHHC other than her husband, Mr Harcourt-Cooke. Hence, the only authority for her to make the investment was an unsigned version of a resolution, supported only by herself and her husband, and no other director of CHHC. This was confirmed by Mr Harcourt-Cooke in evidence in chief.

[8] Harcourt-Cooke requested a Fidelity Fund certificate (*"the certificate"*) from Coetzee, which he then provided her with. She did not request the original certificate, nor did she verify its contents with the Law Society. Unsurprisingly, the Fidelity Fund certificate turned out to be a forgery, and Coetzee was by then suspended as an attorney. Harcourt-Cooke prepared a letter setting out the conditions upon which she was prepared to make the investment, but she never sent it to Coetzee. Its existence is in issue, as she failed to discover it, without any convincing explanation.

[9] Prior to investing the R4.2 million, Harcourt-Cooke only met Coetzee twice ─ once on 25 or 26 January 2006, and again on 28 January 2006 when she handed him the cheque. She was content to give him the cheque based on no independent investigations, and even though she had reason to doubt Coetzee by virtue of the content of the letter which he presented to her on 28

January 2006 ─ the very day on which she gave him the cheque. The letter was addressed to her in her deceased husband's name, and contained a material difference to the information which he had given to her earlier. Reference was made, in the letter, to usage of the funds as bridging finance. Harcourt-Cooke says that Coetzee agreed that the information, which was recorded in the letter, was incorrect. However, she explained that his only answer was to refer her to a contradictory allegation in the same letter, which was not corrected in writing. I am, therefore, of the view that there can be little doubt that Harcourt-Cooke must have suspected that Coetzee intended to use the funds, and that he was dishonest and unreliable.

[10] Apparently, even on her own version, and despite her instruction to Coetzee that the money should remain in the trust account, Coetzee was able to utilise it, provided he was given a back-to-back guarantee from Investec. Precisely how this would operate is unclear, but it certainly did involve the possibility that the funds would leave the account. Harcourt-Cooke handed the cheque payable to A.J. Coetzee Attorneys' trust account 10011044151 there and then, accepting that she had not verified that the account number was the account number of the trust account. She said that he had already asked for an electronic transfer but she refused as she could not verify the account number. He did not have a bank statement to verify the account number, but she nevertheless went ahead and presented him with the cheque. Seemingly, for no explicable reason, she treated the transaction as urgent, admitting that she gave the cheque to Coetzee voluntarily, and that she

intended to do so knowing that he intended to deposit it — hence fully assuming the risk of the consequences.

[11] When Standard Bank called Harcourt-Cooke for confirmation that the cheque was valid, she confirmed that she had drawn it. She did not alert Standard Bank to any concerns which she might have had about Coetzee and, in particular, whether he would deposit the cheque into the account number which she had specified on the cheque. Neither did she give Standard Bank any special instruction or warning that it should exercise any caution in relation to the cheque. On the contrary, she seemed to convey that the cheque could be handled in the ordinary course.

[12] She contacted Coetzee, shortly before 21 March 2006, to confirm that he would pay, and when he did not do so, she spent two to three months contacting him to try and extract the money, but to no avail. She took no further steps to recover the monies from him. She instructed an attorney sometime thereafter, but ascertained that Coetzee was struck off the roll of attorneys, and that he was in the process of being sequestrated. She did not, however, send a letter of demand, nor did she lay a criminal charge. She could not remember the payments made by Coetzee, other than an amount of R15 000, 00. She did not even remember the amount of the bogus cheque which he gave her in order to attempt to persuade her that he was in the process of making payment. Save for the instant summons, the only step which she took to recover the money was a claim lodged with the Fidelity Fund, which it rejected as Coetzee had already been struck from the roll, and

had ceased to be a practising attorney at the time. Consequently, the Fidelity Fund certificate provided by Coetzee to CHHC was a forgery. The Law Society was not aware of any trust account utilized by Coetzee other than a Standard Bank and a Nedbank trust account.

[13] Harcourt-Cooke accepted that it was difficult for the drawee bank to establish the identity of an account into which a cheque is deposited, but suggested that there was a difference, because the special clearance envelope contained a line inserted by Standard Bank that payment was being made to A.J. Coetzee, and not A.J. Coetzee Attorneys' trust account. It, however, turned out that Harcourt-Cooke was mistaken in this assumption, as Absa Bank had conceded that the identity of the payee was inserted by it, and not Standard Bank. She later claimed that it was simply the fact of special clearance which changed the position. However, as will become apparent later in this judgment, this was plainly not correct.

[14] Thus, as a result of the fraudulent misrepresentations of Coetzee, CHHC, on 28 January 2006, issued cheque number 103717 for the amount of R4.2 million. The cheque was drawn on Standard Bank as the drawee bank, and was made payable to "*A.J. Coetzee Attorneys Trust Account – No. 10011044151*" with the words "*or bearer*" and "*of toonder*" deleted. The cheque was cross generally and marked "*Not Transferable*", and was therefore only payable to a banker in terms of s78 of the Act. On 28 May 2006, Coetzee deposited the cheque into an account held at Absa Bank, and Absa Bank thereafter acted as the collecting banker for Coetzee. The amount was, on face value, deposited by Coetzee into

an account held at Absa Bank with the account name "*A.J. Coetzee*" and with account number 01043960306. Absa Bank, as the collecting bank, presented the cheque to Standard Bank, as drawee bank, in accordance with the so-called special presentation procedure that forms part of the long-standing and highly evolved system of cheque collection and payment. Standard Bank made payment of the cheque to Absa Bank. The money eventually found its way into an Investec account held in the name of "*Albertus Johannes Coetzee*" with account number 10011044151. The money was paid out of the Investec account concerned by 2 March 2006 at the latest. Coetzee's estate was provisionally sequestrated on 9 November 2006.

[15] CHHC contends that Standard Bank breached its contractual obligation to make payment of the cheque in accordance with its tenor when it paid out the cheque to Absa Bank. Standard Bank's contractual obligation, so it contends, was to comply with the written instruction given to it by means of the cheque and with its fiduciary relationship with it. It contends, in this respect, that when Standard Bank decided to make payment of the cheque to Absa Bank, Standard Bank as mandatory of CHHC, and a reasonable banker, was aware or should reasonably have been aware that the cheque was payable to "AJ Coetzee Attorney's Trust Account – number 10011044151" and not to "AJ Coetzee" or "A.J. Coetzee Attorneys", as there is a material difference between a normal personal or business account and an attorney's trust account.

[16] CHHC also contends that Standard Bank ought to have also been aware that it was required to insert the number of the account that it would credit with the amount of the cheque into Field A of the so called pink (special clearance) envelope, yet it failed to do so, and in so doing failed to comply with the long-established and highly evolved system for the collection and payment of cheques, that had to be followed strictly by all parties. In support of this contention, CHHC relies on *Di Giulio v First National Bank of South Africa Limited* 2002 (6) SA 281 (C) at 288F where it was stated that:

"the relationship between banker and customer is that of debtor and creditor, with the super-added obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. That the underlying agreement between bank and client is one of mandate, has been unequivocally accepted in South African law, as appears from the dictum of Grosskopf J in *Volkskas Beperk v Johnson* 1979 (4) SA 775 (C) at 777H-778A. ... '*Die verhouding tussen bankier en kliënt behels dat die bankier sy kliënt se opdrag om te betaal, soos uitgedruk in 'n tjek, moet uitvoer. Indien hy dit doen, is hy geregtig om die kliënt se rekening te debiteer met die bedrag van die tjek*."

[17] In order to succeed in its claim based on the breach of the contractual mandate, the plaintiff would ordinarily bear the *onus* of proving the conclusion of the contract, the terms thereof, the breach and that it caused the loss claimed (*Kriegler v Minnitzer* 1949 (4) SA 821 (A)). However, by virtue of the fact that the execution of the mandate, in issue, relates to the payment of a cheque by Standard Bank, in its capacity as drawee bank, the statutory exemption of liability contained in s 79 of the Act has application. Section 79 of the Act provides:

"*79.* ***Protection to bank and drawer where cheque is crossed. –***

If the bank on which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a bank, and, if crossed, specially, to the bank to which it is crossed, the bank paying the cheque … shall … be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

[18] In *Eskom v First National Bank of South Africa Limited* 1995 (2) SA 386 (A), the Appellate Division explained the juridical interaction between s 79 of the Act, and the contract of mandate with a drawee bank. The Appellate Division (per Grosskopf JA) stated (at 391B) that:

"*… Section 79 provides a statutory protection for bankers in certain circumstances. It is true that Section 79 affects the rights and obligations of parties to a crossed cheque and thus, in a sense, modifies the parties' contract. A banker who is, in terms of Section 79, 'entitled to the same rights and . . . placed in the same position as if payment of the cheque had been made to the true owner thereof' may debit his customer's account with the amount of the cheque even though payment may have been made to somebody who was not the holder. This does not, however, arise from consensus between the parties. It arises from a legislative act. If the statutory origin of Section 79 were kept firmly in mind, no great harm would be done by regarding it as creating an implied term in the banker-customer relationship. Nothing is gained, however, by so regarding it, and it may tend to mislead, as happened in the present case. Whether or not Section 79 is deemed to form a part of the contract between the parties, its nature and effect must be ascertained by the ordinary processes of statutory interpretation. The section cannot have a different effect depending on whether it is regarded, on the one hand, as a statute applying to the contract or, on the other hand, as a contractual term imposed by statute.*"

[19] Although it is settled law that the underlying agreement between bank and client is one of mandate, the Appellate Division made it clear in *Eskom* that the contract of mandate must yield to s 79, regardless of whether the statute applies to contract, or it has become a contractual term imposed by the statute. Accordingly, I agree with Standard Bank's contention that CHHC's sole reliance on *Volkskas Beperk v Johnson* and *Di Giulio* in construing the dispute as entailing only the interpretation of a mandate, is

misplaced, and displays an incorrect appreciation of the effect of s 79 of the Act. In this regard, the Appellate Division in *Eskom* stated (at 391E-H) that:

"*… Before analysing the wording itself* [of s 79] *it is convenient to set out the broader context in which the section operates. It is common cause that the prime obligation of a banker towards a customer who operates a cheque account is to pay the cheque drawn on him according to its tenor (I assume that the customer's account is sufficient in credit or that sufficient overdraft facilities have been granted). Included in this general obligation is a duty to pay to the correct person designated by the cheque, i.e. to the holder thereof (defined in Section 1 of the Act as 'the payee or endorsee of a bill who is in possession of it, or the bearer thereof'). Where the cheque is crossed there is an additional obligation on the drawee banker to pay the amount of the cheque to a banker. The drawee banker would accordingly be obliged to pay to a banker (the collecting banker) acting on behalf of the holder. Section 79 disturbs this situation by granting a drawee banker protection where he pays the wrong collecting banker, i.e. a collecting banker acting for somebody other than the holder. In such a case, if the drawee banker made payment in good faith and without negligence, he is placed in the same position as if he had made payment to the true owner of the cheque.*"

[20] it is clear from the *Eskom* judgment that in terms of the statutory exemption of liability contained in s 79 of the Act, even if it is established that the terms of the mandate have been breached causing loss, there will be no liability on a drawee bank, provided the cheque in issue has been crossed generally and it was paid to a bank, in good faith and without negligence. It is accordingly clear from the protection which s 79 affords to a drawee bank, that where a cheque is crossed, a breach of mandate is not *per se* sufficient to recover loss against a drawee bank.

[21] Underlying the protection afforded by s 79 to bankers, is the public policy imperative relating to the clash in value between the recognition that a breach of contract should attract a private law remedy and the public law

interest in creating an efficient system for the collection and payment of cheques, in which the collecting banker and the drawee banker have well-established and distinct functions and responsibilities.

[22] In a constitutional dispensation, such as ours, this would involve balancing the legitimate expectations of a drawee bank's customer, that its instruction in respect of a cheque will be met, against a recognition that sometimes private arrangements have to yield to greater expediency within a larger economic system. Significant, in this regard, is that the cheque payment system is a matter of national importance requiring speed and fluency to settle debt without cash, and in an environment which must accommodate the payment of thousands of cheques on a daily basis.

[23] Our law has accordingly resolved this public policy dilemma by allocating the responsibility for harm in accordance with the function performed within the system. If loss is caused to a customer in circumstances deserving of compensation, it is fair and appropriate that it should ordinarily be borne (if not caused by the customer itself) by the banker (drawee or collecting), whose role in processing the cheque in issue is most closely associated with the fault, and hence the loss. It is within this context that it becomes essential to determine the different roles and functions performed by each of the bankers in the system. Now a collecting bank, such as Absa Bank in this case, is ordinarily concerned with the creditor who requires the cheque to be deposited to discharge the debt of the debtor. Typically, the collecting banker determines the identity of the account into which the

proceeds of the cheque will be paid and will do so by reference to the named payee on the cheque and the account into which it is proposed to be deposited, particularly if the cheque is marked "*not transferable*". The drawee bank such as Standard Bank, on the other hand, has no insight into the identity of the account of the customer of the collecting bank into which the proceeds of the cheque are to be paid. In this situation, it accords with a sense of fairness and justice that the remedy, if any, for the payment of the proceeds into the wrong account (if not attributable to the customer itself) must lie against the collecting bank.

[24] By contrast the drawee bank is typically concerned with the debtor, whose account must ultimately be debited to meet the cheque. The fault causing the loss may lie within the functionality of the drawee bank. For example, if it pays the proceeds of a cheque to a collecting banker despite the fact that the signature of the drawee on the cheque is a forgery. It is important to recognise, in this regard, that only the drawee bank has insight into the mandate, and the authorised signatories on cheques. The collecting banker will have no insight or role to play in the loss caused by the forgery as it does not have the means to verify the signature. In this instance, the loss (if not attributable to the customer) should be borne by the drawee bank.

[25] The imposition of liability for fault in the system in accordance with the function most closely related to the loss underlies the exemption contained in s 79 of the Act. It recognises that in the ordinary course (other than instances of negligence and bad faith on the part of the drawee bank), it will have

discharged its duty within the system by paying the collecting banker the proceeds of the cheque. It is the collecting banker (having satisfied itself that its customer is entitled thereto), which will credit the relevant bank. If the fault in the system lies in the process of collection, it is (in an appropriate case) for the collecting bank to meet the loss. The allocation of liability in this manner satisfies the public policy imperative of enabling the system to function expeditiously, and allocating responsibility where the fault most closely associated with the loss lies. This was articulated for the first time in *Standard Bank of South Africa Ltd v Nair and Others (Bissessur & Another, Third Parties)* 2001 (1) SA 998 (D), where the court referred to two Zimbabwean cases. The first was *Rhostar (Pvt) Limited v Netherlands Bank of Rhodesia Limited* 1972 (2) SA 703 (R) at 717E-G, where it was said that where a cheque is payable to a specified payee, it is *prima facie* evidence of negligence in the collecting banker to take the cheque for collection on behalf of a person other than that indicated.

[26] The second case was *Zimbabwe Bank Incorporation Limited v Pyramid Motor Corporation (Pty) Ltd* 1985 (4) SA 553 (Zs) at 565F-G, where it was emphasised that it is usually only the collecting banker that will know whether the client is the payee named in a cheque:

"After all the collecting banker appreciates or ought to appreciate the significance of instructions upon a cheque and that they are there to be observed. He can verify whether the payee designated on the cheque is his client. He alone is in a position to know whether it has been collected on behalf of the person entitled to receive payment; the paying banker has no knowledge of that …"

[27] Accordingly, the court in *Nair* held, on account of the different functionality between the banks, that (at 1004H):

"While the collecting banker is prima facie negligent, the paying banker, in the absence of some particular factual circumstance which indicates otherwise, is normally in no position to know whether the collecting banker's client is the payee named in the cheque. In ordinary circumstances the paying banker would not therefore be negligent in paying the collecting banker."

It reiterated the point (at 1005F), by stating that:

"The paying bank, in the absence of some particular reason to suggest otherwise, cannot know, if such be the case, that the collecting bank's client is not the payee in the cheque. On the facts before me there is no suggestion that the employees of the plaintiff's Greyville branch were in any different position and there is no reason to suspect that they might or ought to have had contra information at their disposal. In the result the plaintiff's Greyville branch, as the paying banker, was entitled to the protection offered by Section 79. …"

[28] The court held in *Nair* that negligence for purposes of s 79 was to be tested against the functionality of the particular bank – drawee or collecting bank closest to the cause of the loss. It held that the collecting banker was *prima facie* liable for the loss if a non-transferable cheque was collected for the account of its customer, which did not correspond with the named payee of the cheque. That was the collecting banker's sphere of functionality, and fell to be contrasted with that of the drawee bank, which did not participate in the identification of the account into which the proceeds would be paid, and ordinarily had no insight therein. Hence, the drawee bank would not be liable for a fault in the system when the collecting banker collected the cheque for the wrong account.

[29] In articulating this basis for liability, and balancing the interests of promoting a functional and effective cheque payment system against the need for a private law remedy when a mandate has been breached, and allocating responsibility in accordance with functionality, our courts followed Zimbabwean precedent. As is clear from *Pyramid Motor Corporation* (above), the Zimbabwean courts were ahead of the courts in South Africa in appreciating the basis for the exemption as lying with the allocation of responsibility in accordance with functionality. Presumably, this was because the Zimbabwean courts recognised the delictual liability of a collecting banker for the negligent collection of a stolen or lost cheque as far back as in 1972, in *Rhostar*, whilst the South African courts only recognised this for the first time, in 1992, in *Indac Electronics (Pty) Ltd v Volkskas Bank Limited* 1992 (1) SA 783 (A), where the Appellate Division held (at 797A-D) that:

"*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. … 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.*"

[30] Accordingly, the recognition of a delictual claim by the true owner against the collecting bank enabled responsibility to follow functionality – if the collecting banker would be responsible to the true owner for loss caused on account of the negligent collection of a cheque, there would be no basis to

make the drawee bank liable unless it was also negligent, or acted in bad faith.

[31] Mr Symon SC, appearing on behalf of Standard Bank, referred me to yet another Zimbabwean case - *Bank of Credit and Commerce, Zimbabwe Limited v UDC Limited* 1991 (4) SA 82 (Zs) – in which the facts are strikingly similar to those in the current matter. In that case the drawer was a finance company, which had issued a cheque pursuant to a purported sale, by Mixed Tums (Pvt) Limited, of a tractor to a farmer. He was to have repaid the drawer in monthly instalments. The cheque was marked "*Not Negotiable*", but also "*a/c Payee Only*" (which the Zimbabwe court accepted as being a restriction on transferability). It turned out that Mixed Tums (Pvt) Limited, the tractor and the farmer never existed, and the cheque was presented for payment into an account in the name of Mixed Tans (Pvt) Limited, trading as Mixed Tans Global Fashions (i.e. into an account which did not match the name of the payee). A special clearance on the cheque had been requested by the customer of the collecting bank, and the drawee bank (Barclays Bank Zimbabwe Limited, Pearl House branch) paid the cheque to the collecting banker at its request.

[32] The Zimbabwean High Court held the collecting banker to be liable to the drawer for the negligent collection of the cheque, and the case proceeded to appeal. The Appeal Court also considered the possible liability of the drawee bank, and rejected it on the basis that the drawee bank would not, in the ordinary course, know the identity of the account into which payment

would be made by the collecting bank, and it was the collecting bank (and not the drawee bank) which bore responsibility for ensuring that the proceeds were credited to the correct account, regardless of whether a special clearance procedure was used or not.

[33] As to special clearance, the Zimbabwe Supreme Court held (at 87D-F) that:

"*In my view, it is not a question of whether the collecting banker acted as such for the cheque or for the clearance voucher. It acted as collecting banker for the proceeds. It collected the proceeds for its client. The technique of collection may differ depending on whether or not special presentation is requested, but the reality remains the same. The cheque would have to be sent to the paying bank in any event. The only real difference between the ordinary clearing system and the special presentation system is that the latter is an accelerated version of the former.*"

The Zimbabwe Supreme Court also held (at 88A-D) that:

"*… We are dealing with the different responsibilities of different banks. On the facts of the present case it was the primary responsibility of BCCZ* [the collecting bank] *to ensure that the proceeds were credited to the right account. That is because they were the bankers of the alleged payee (or at least they considered themselves so). They knew the person who claimed to be the payee. He was their customer. Barclays Bank did not know the payee. They knew the drawer. He was their customer. Their responsibility was to him. They had to ensure that the cheque was in fact drawn by their customer, properly signed and dated, that the words and figures agreed, and that all the other technical aspects of a good and available cheque were present. In their own interests they would have also wanted to be satisfied that their customer's account was in funds to meet the cheque. I have no*

doubt whatsoever that the responsibility for ensuring that the proceeds of the cheque were credited to the right account fell squarely on the bank purporting to carry out that service, namely BCCZ, Chitungwiza."

[34] That the drawee bank could not be responsible for an incorrect collection was further emphasised by the Zimbabwe Supreme Court (at 89C-G):

"*The special presentation form prepared by BCCZ, Chitungwiza, does not actually have a space on it for the name of the account holder. It has a space following the words 'deposited by'. In that space someone at BZZC wrote 'Mixed Tans Global', which is not even the correct name of the account. How was Barclays Bank, Pearl House* [the drawee bank], *to know what was the name of the account holder? They would know that Mixed Tans Global was not the name of a person, whether natural or legal. It was clearly a trading name. How could they be expected to know what individual or company was trading under that name? It seems clear that they had to rely on BCCZ, Chitungwiza, for that knowledge. It does not seem to me to be unreasonable for Barclays Bank, Pearl House, to have assumed that BCCZ was satisfied that Mixed Tums (Pvt) Limited, to whom the cheque was made out, was the company trading as Mixed Tans Global. … That is the very point made by Gubbay JA (as he then was) in the* ***Pyramid Motor Corporation*** *supra when he said at 375F et seq:*

> *'After all the collecting bank appreciates or ought to appreciate the significance of instructions upon a cheque, and that they are there to be observed. He can verify whether the payee designated on the cheque is his client. He alone is in a position to know whether it has been collected on behalf of the person entitled to receive payment; the paying banker has no knowledge of that.'*"

[35] It is evident from these cases that liability follows functionality, and that the banker closest to the loss must assume responsibility for a fault lying within its sphere of activity, provided the customer itself is not to blame. The fact that a special presentation process is followed makes no difference to the principle, and the drawee bank is entitled to assume that the collecting banker has satisfied itself as to the party on whose behalf the cheque has been

collected. It is the responsibility of the drawer bank to ensure that the cheque is in fact drawn by the customer, properly signed and dated, that the words and figures agreed and that all other technical aspects of a regular cheque are present. It is not its function to second guess the collecting banker in this regard.

[36] Public policy leans in favour of fluency in the system, but does not abandon the plaintiff. If a mandate is breached without fault by the drawer bank, the plaintiff's remedy lies in depict in an action against the collecting bank for the negligent collection of a cheque. The onus is on the plaintiff to prove all the elements of the cause of action (*Fudge Insurance Ltd v Bancorp Ltd* 1994 (2) SA 399 (W) at 410E). Significantly, a failure by the plaintiff to prove any one of the requirements or elements will be fatal to the success of its claim.

[37] Based on the case law set out above, the CHHC bears the onus of proving the mandate, its breach, causation and the loss as against Standard Bank, and as against Absa Bank that it received payment of the cheque on behalf of someone who was not entitled thereto; that in receiving such payment Absa Bank acted negligently and unlawfully; that the conduct of Absa Bank caused the true owner of the cheque to sustain loss; and that the damages claimed represent proper compensation for such loss.

[38] I now turn to the evidence to establish whether the respective onuses have been discharged. The first question for determination is whether the

plaintiff has discharged the onus in respect of the breach of the mandate, causation and loss. The existence of the mandate that, in terms of the banker-customer relationship between CHHC and Standard Bank, the latter was obliged to pay cheques drawn upon it by CHHC according to the tenor of the cheque, and to debit the account of CHHC with the amount of the cheque so drawn is not in issue. It is also not in issue that by statutory intervention or implied term s 79 of the Act forms part of the mandate. However, whether the mandate has been breached, causing the loss, is in dispute. Central to the determination of this dispute is the question of whether Harcourt-Cooke, on behalf of CHCC, intended to pass ownership in the cheque and deliver it to Coetzee, who intended to accept it.

[39] In *Standard Bank of SA Ltd v Harris and Another NNO (JA du Toit Inc intervening)* 2003 (2) SA (SCA), the Supreme Court of Appeal explained the term "*true owner*" of a cheque. It found that:

"… In a similar context it was held in First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd at 568A-F that the term 'true owner' bears no specialised or technical meaning and that, more specifically, the reference to 'true' is not intended to qualify the ordinary meaning of 'owner'. In the result the enquiry in a matter such as this is whether the claimant for damages has shown that he became the owner of the cheque in accordance with the ordinary requirements of property law. These requirements were succinctly formulated as follows by Botha JA in the Quality Tyres case (at 568G-H):

'There must be a delivery of the thing, i.e. transfer of possession, either actual or constructive, by the transferor to the transferee, and there must be a real agreement (in the sense of "saaklike ooreenkoms") between the transferor and the transferee, constituted by the intention of the former to transfer ownership and the intention of the latter to receive it. . . . either party can, of course, act through someone duly authorised to act on his behalf '."

[40] It is crucial, in this regard, that the cheque which the drawer might or might not have wished the payee to receive must not be confused with the cheque itself and the ownership of it, which is what the CHHC seems to have done in this case. Gering, in *Handbook on the Law of Negotiable Instruments* 3rd ed, at 404 stated as follows in this regard:

"*In Absa Bank v Natasha Investment Co* [AD, 29.5.96, an unreported decision of the AD not included in the SALR] *it was pointed out that in considering whether the drawer of a cheque intended ownership of the cheque to be transferred to the named payee, one must be careful not to confuse the proceeds of the cheque which the drawer might or might not have wished the payee to receive, with the cheque itself, and the ownership of it.*"

Similarly in *First National Bank v Quality Tyres* at 569B-C the court stated that:

"*The argument confuses the proceeds of the cheque, to which Senbank believed the plaintiff to be entitled and which it wishes the plaintiff to receive, with the cheque itself and the ownership of it.*"

[41] It is clear from the evidence of Harcourt-Cooke that she consistently confused the proceeds of the cheque, which she was at pains to state had to be paid into AJ Coetzee Attorney's trust account with the cheque itself and ownership thereof, which she conceded was intended to be, and was indeed handed to Coetzee. I am therefore of the view that there is no merit in CHHC's contention that it never intended to transfer ownership of the cheque to Coetzee or AJ Coetzee Attorneys as Harcourt-Cooke intended that: the protection provided by the provisions of section 78(7) of the Attorneys Act, 1979 would apply; the cheque was drawn in its terms to so provide; and she delivered the cheque to Coetzee on such basis.

[42] I also remain unpersuaded by CHHC's further contention that there can be no real agreement to transfer ownership when consent to do so is induced by fraud. It is important in this regard to point out that our courts have consistently held that even if the transferee was a thief or a fraudster (as is the case here), ownership in a cheque can still pass provided the property has been delivered by the transferor to the transferee and there is a real agreement, between the transferor and transferee, to pass and receive ownership in the sense that the transferor must intend to transfer ownership and the transferee must intend to receive ownership. Accordingly, once the abovementioned requirements are fulfilled, ownership in the property passes to the transferee even if such transfer was obtained by way of false pretences. (*Absa Bank Ltd v Greyvenstein* 2003 (4) SA 537 (SCA) at [8] and [9]; *First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd* 1995 (3) SA 556 (A) at [12]).

[43] The facts in *Absa Bank Ltd v Greyvenstein* are, insofar as they relate to the question of whether ownership of the cheque passed, virtually on all fours with the facts in the present case. In *Greyvenstein* a cheque was drawn by Standard Bank on its Krugersdorp branch and was made payable to Greyvenstein or order. It was for an amount of R325 000, crossed and marked "*Not Negotiable*" as well as "*Not Transferable*". After having received the cheque from Standard Bank, Greyvenstein handed it to one Scott, acting on behalf of Scott Asset Managers, with the intention that Scott should invest the proceeds on Greyvenstein's behalf on the South African Futures

Exchange (SAFEX). For this purpose, Greyvenstein endorsed the reverse side of the cheque by signing it and placing his identity number thereon. Scott, however, deposited the cheque into the account of Investcorp CC. The Supreme Court of Appeal (per Streicher JA) found (at para 10) that at best for Greyvenstein, he had handed the cheque to Scott, acting on behalf of Scott Asset Managers, with the intention that Scott should pay it into a trust account of Scott Asset Managers (which did not exist); Scott received the cheque in that capacity and represented that he would deal with the cheque accordingly; Scott Asset Managers would thus have become the owner of the proceeds of the cheque; if Scott did not intend to deal with the cheque in accordance with his instructions, he obtained it by false pretences. The Supreme Court of Appeal found that ownership of the cheque (the corporeal movable property) had nevertheless been transferred to Scott Asset Managers.

[44] I am in agreement with Mr Gautschi SC, appearing on behalf of Absa Bank, that because ownership in a cheque can pass even if the transferee was a thief or fraudster, it does not avail CHHC to allege a theft by false pretences or a fraud by Coetzee ─ as ownership passed nonetheless. In this regard, the evidence clearly establishes that CHHC, represented by Harcourt-Cooke, physically handed over, and intended to transfer ownership of the cheque to AJ Coetzee Attorneys, represented by Coetzee. AJ Coetzee Attorneys, thus represented by Coetzee, intended to receive ownership of the cheque and to deposit it. Ownership of the cheque thus passed to AJ Coetzee Attorneys (a sole proprietorship) or A.J. Coetzee (a sole practitioner) which is in effect the same thing, and CHHC is no longer the true owner of the cheque.

As is apparent from the testimony of Ms Veldsman, an attorney employed by the Law Society, Coetzee was a sole proprietor who practised under the name of AJ Coetzee Attorneys. Accordingly, the designation of an account as "*Abraham Jacobus Coetzee* or "*AJ Coetzee*" or "*AJ Coetzee Attorneys*" amounts to the same thing, and those descriptions could be used interchangeably. Therefore, by virtue of the fact that Coetzee acted as the agent for Coetzee Attorneys in collecting the cheque for depositing into the trust account, and not as CHHC's agent, ownership of the cheque passed to Coetzee upon him taking the cheque into his possession, even though he obtained possession in fraudulent circumstances, and never intended to deposit the cheque into a trust account.

[45] As indicated above, the evidence demonstrates that Harcourt-Cooke, on behalf of CHHC, intended to pass ownership in the cheque and deliver it to Coetzee, who intended to accept ownership thereof thus enabling him to determine the fate of the proceeds (regardless of the restriction on transferability). Coetzee accordingly had the right to instruct Absa Bank to collect the proceeds of the cheque into any account of his choice. Hence, any loss which the CHHC sustained is not attributable to either Standard bank (because the mandate has not been breached), or Absa Bank (because ownership in the cheque had passed to Coetzee), and it was not negligent in making the collection into Coetzee's personal account. Absa Bank contends, in this regard, that by virtue of the fact that it acted upon the instructions of Coetzee, to whom ownership of the cheque had passed, it acted neither negligently or unlawfully. In support of this contention it relies on *Standard*

Bank of SA Limited v Harris & Another NNO (JA du Toit Inc Intervening) 2003 (2) SA 23 (SCA), where a cheque had been drawn in favour of Demodig Plant (Pty) Limited ("*Demodig*"). It was crossed and marked "*Not Transferable*". One Du Toit occasionally acted as attorney for Demodig. A director of Demodig handed the cheque to Du Toit with a direction that the proceeds thereof be deposited in Du Toit's trust account pending further instructions. Du Toit opened a separate trust savings account for this purpose and deposited the cheque to that account. The liquidators of Demodig (in liquidation) sued the collecting bank for damages, contending that the proceeds of the cheque had never reached the payee (Demodig).

[46] The court in *Harris* found (at para 17) that:

" As a consequence of this finding it is to be accepted that when Du Toit instructed the bank to collect the cheque for his trust account, he acted as the agent of Demodig, duly authorised by a director. It follows that when the bank collected the proceeds of the cheque for the credit of an account nominated by the agent of the payee, it did so in compliance with the payee's instructions, which were conveyed to it by the payee's duly authorised agent. Against the background of the requirements for the collecting bank's liability, as set out in the Indac case, the question arises whether it can be said that in these circumstances the bank 'received payment of the cheque on behalf of someone who was not entitled thereto? And the further closely related question – can it be said that in these circumstances the bank acted unlawfully vis-a-vis the payee in receiving payment? The court a quo held that when a bank collects a cheque crossed and marked 'not transferable' for the credit of an account in the name of someone other than the payee, the inference is justified that the proceeds were received for someone "not entitled thereto" and that such receipts was therefore unlawful. As a matter of prima facie inference, I have no quarrel with this view. On the contrary, there is good authority for the proposition that the collection of a cheque crossed 'not transferable' for an account in the name of someone other than the payee, justifies the prima facie inference not only that the bank acted unlawfully, but also that it was negligent in so doing. (See eg Volkskas Bank Bpk v Bonitas Medical Aid Fund 1993 (3) SA 779 (A) 791H-J and Holscher v ABSA Bank en 'n Ander 1994 (2) SA 667 (T) 672E). The question remains, however — does evidence that the bank acted on instructions of the payee

rebut the prima facie inference of unlawfulness? I think it does. It is true that a cheque marked 'not transferable' is 'not negotiable' in terms of s 6(5) of the Bills of Exchange Act 34 of 1964. This means that the payee's rights derived from the cheque cannot be transferred to anyone else. Consequently, no-one but the payee can enforce payment thereof. This does not mean, however, that the payee cannot authorise someone else to receive the proceeds of the cheque. As was pointed out in African Life Assurance Co Ltd v NBS Bank Ltd 2001 (1) SA 432 (W) 441(C) in similar context:

> *'ordinarily the payee of the cheque is free to deal with the proceeds thereof as it chooses' –*
> *It follows in my view that the payee can authorise the bank to collect the proceeds of the cheque for any account of the payees choice and as long as the bank follows the instructions of the payee, it cannot be said to act unlawfully. Nor can it be said, where the payment of the proceeds of the cheque were received in an account nominated by the payee, that such payment was received 'on behalf of someone who was not entitled thereto'. It was after all received into an account of the payee's choice and for no-one other than the payee."*

The evidence, in this matter, clearly demonstrates that Coetzee collected the cheque on Saturday 28 January 2006, from Harcourt-Cooke and personally deposited the cheque. It was, therefore, he who instructed Absa Bank to credit the proceeds of the cheque to the account of AJ Coetzee. As indicated earlier in this judgment, it is clear from the evidence presented on behalf of CHHC, that Harcourt-Cooke, on behalf of CHHC, delivered the cheque to Coetzee with the intention that he became the owner thereof, and Coetzee accepted it with the intention of taking ownership. After all, no one else could have taken ownership of the cheque destined for his own trust account (if it existed), and hence, based on the authority of *Harris*' case, I am satisfied that Absa Bank followed the instructions of the payee, represented by Coetzee, and it did not act unlawfully or negligently in collecting the cheque for the credit of Coetzee's personal bank account. Consequently no loss would be recoverable against either defendant.

[47] It is clear from Harcourt-Cooke's evidence that the cheque was drawn in very suspicious circumstances, and that she assumed the risk of handing it to Coetzee, knowing full well that he was dishonest and unreliable. She accepted that on the contradictory letter, which Coetzee presented to her on 26 January 2006, describing the proposed investment, there was a possibility that he would view the proceeds of the cheque as bridging finance available to him in connection with the Nationwide transaction. Harcourt-Cooke is a trained chartered accountant. Chartered accountants are specifically trained to assess the credibility of assertions made and the level of assurance to be derived from such assertions. She was, by all accounts, not a naïve investor, who did not understand risk. Thus, despite the inherent risks involved in a transaction of this nature, it remains inexplicable how Harcourt-Cooke, a director of CHHC, for many years, and a chartered accountant by training was unaware of the inherent risks involved ─ as an investment of this nature could not simultaneously be risk-free and attract a high interest rate if it was above board.

[48] I am of the view that, in these circumstances, it would be unacceptable for public policy to place the risk on the bankers, merely because of the tenor of the cheque, which, in any event, identified the payee not only by name as being an attorney's trust account, but also by reference to Coetzee's own account number, which he gave her and into which the proceeds were deposited by him.

[49] I am accordingly of the view that the functionality most closely associated with the loss was the extraordinary risk assumed by CHHC itself. As so eloquently put by Mr Symon SC, the tenor of the cheque is not a mechanism for the protection of the drawer against commercial risk, and misrepresentation by an unscrupulous business partner. It is not a means whereby a drawee bank can be unknowingly appointed by proxy to protect a plaintiff seeking profit from the risk inherent in the unusually high interest return on money supposedly deposited into an attorney's trust account. This is particularly the case where the plaintiff knows or reasonably suspects that the attorney is unscrupulous, and the investment proposed is extraordinary and involves a deception, as is clearly the case in this matter.

[50] I am of the view that if Coetzee had a trust account and the proceeds of the cheque were deposited into that account, it would not avail CHHC to complain to the bankers if Coetzee, who controlled the trust account, disbursed funds from that account. If this is in fact the case, then it makes little sense to punish the bankers because Coetzee, who was authorised to deal with the proceeds, deposited the funds into the very account number into which he advised CHHC that he would.

[51] CHHC is required to prove that its loss was caused by the actions or omissions of Absa Bank as collecting bank (*FNB v Duvenhage* (above at para 13)). CHHC places great reliance on the fact that the cheque was destined for a trust account, namely AJ Coetzee Attorney's Trust Account but was instead paid into Coetzee's personal account. Even if, as contended by CHHC, the

proceeds of the cheque were paid into the wrong account, I am of the view that that was not the cause of CHHC's loss. It is clear that Coetzee would have misappropriated the money regardless of whether it was paid into a trust account or his personal account. It was, in this regard, assumed by the CHHC, but not proved, that the cheque was paid into A.J. Coetzee's personal account with Investec Bank. It is common cause that the cheque was paid into a bank account with number 100110445151 in the name of Abraham Jacobus Coetzee. There was no evidence that the bank account was not A.J. Coetzee's trust account. On the contrary, it is clear from the evidence of Ms Veldsman, of the Law Society, that Coetzee paid attorneys from that account. He also represented to Harcourt-Cooke that it was his trust account, and he paid a cheque designated to a trust account into that account. CHHC did not call an available witness from Investec (as foreshadowed) to establish that it was not a trust account. There is accordingly no proof that the account in question was not the trust account of AJ Coetzee Attorneys, and therefore no proof that the cheque had been deposited into the incorrect account.

[52] CHHC has, similarly, focussed upon certain purported acts and omissions of the teller of Absa Bank in the process of collecting the cheque. In this regard it alleges, *inter alia*, that: Standard Bank failed to complete Field A on the pink envelope at all; it had inserted into Field D of the pink envelope the name of a third party who was neither the drawee of the cheque, the payee of the cheque, the drawee banker or the collecting banker. I am in agreement with Standard Bank that CHHC's focus is entirely misplaced. If the proceeds were ultimately credited to the correct account, then any acts or

omissions by Absa Bank, or even Standard Bank for that matter, prior thereto, no matter how negligent, are simply irrelevant. The requirement that there should be loss consequent upon negligent conduct often receives the least attention as illustrated by Nugent JA in *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (SCA) (at 320F-G) :

"*Of the three elements that combine to constitute a delict founded on negligence – a legal duty in the circumstances to conform with the standard of the reasonable person, conduct that falls short of that standard, and loss consequent upon that conduct – the last often receives the least attention. Yet it is as essential as the others, for without it there is no delictual liability. Indeed, in a recent illuminating note JC Knobel suggests, on doctrinal grounds, that loss, and its causal connection, might even be the proper starting point for the enquiry.*"

[53] As indicated, even if the proceeds of the cheque were paid into the wrong account, I am of the view, on a consideration of all the evidence before me, that that was not the cause of CHHC's loss. It is apparent that Coetzee would have misappropriated the money regardless of whether it was paid into a trust account or his personal account. As indicated, it was assumed by CHHC, but not proved, that the cheque was paid into Coetzee's personal account with Investec Bank. I am of the view that there was nothing which would have prevented him from misappropriating the money even if it had been paid into a trust account. Harcourt-Cooke conceded, under cross-examination, that Coetzee had signing powers on the account and would have controlled the money in the account and could have stolen the money from a trust account just as certainly as he stole the money from the other account. Harcourt-Cooke also stated that had the money been paid into a

trust account bearing that account number she would have been quite content.

[54] By the same token, had Coetzee been honourable, he could have preserved the money in his personal account as if they were trust moneys. In any event, the distinction between a trust account and a personal account has no relevance in this case because the Fidelity Fund rejected CHHC's claim on the basis that Coetzee had, at the time, not been a practising attorney, and not on the basis that the account into which the moneys were deposited was not a trust account. CHHC's loss was accordingly caused by the theft of the money by Coetzee after he had deposited the cheque, and not by the depositing of the cheque. As contended by Absa Bank, the flaw in CHHC's case is that it confuses theft of the proceeds of the cheque (which is what occurred) with theft of the cheque itself (which is not what occurred).

[55] I am accordingly of the view that, even if CHHC was the true owner of the cheque, and both Standard Bank and Absa Bank acted unlawfully and negligently, their actions or omissions would not have caused CHHC's loss. The evidence clearly establishes that Harcourt Cooke, on behalf of CHHC, intended giving Coetzee the cheque for purposes of depositing it into the very account number into which he advised Harcourt-Cooke that he would, yet CHHC made no attempt to recover any of the moneys from him, either before his sequestration, or thereafter. The *sine qua non* of the loss lies in the arrangement concluded between CHHC and Coetzee, and not a breach of the mandate or negligence by the bankers. CHHC is thus not entitled to any right

of compensation against either Standard Bank or Absa Bank. CHHC has, accordingly, failed to discharge its onus to prove, the breach of the mandate, causation and loss, as against Standard Bank and, that Absa Bank was liable under the extended *lex Aquilia* for negligence to the true owner of the cheque, namely Coetzee.

[56] In view of the conclusion which I have reached, it is unnecessary to consider the evidence of the expert witness, Mr Fresci, who was called by Standard Bank to testify on the cheque payment system and the allocation of liability for loss on a functional basis.

[57] For these reasons therefore, I make the following order:

1. The plaintiff's claim against the first defendant is dismissed with costs.
2. The plaintiff's claim against the second defendant is dismissed with costs, such costs to include the costs of two counsel.
3. The plaintiff is to pay the wasted costs occasioned by, the postponement from 24 June 2010 to 5 July 2010 and, the delay on 5 July 2010 when the proceedings commenced at 11h45 only, due to an additional volume of documents having been made available on that day.

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F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATES OF HEARING:	5-7 May 2010, 24 June 2010, 5-7 July 2010, 3 August 2010
DATE OF JUDGMENT:	20 May 2011