THE NON TRANSFERABLE CHEQUE AND THE LIABILITY OF THE COLLECTING AND DRAWEE BANKS

by

JOHN PAPADOPoulos

nitted in part fulfilment of the requirements for the degree of

MASTER IN LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF JT PRETORIUS

DECEMBER 1999

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"I declare that: The Non-transferable Cheque and the Liability of the Collecting and Drawee Banks is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references."
Summary

The paper is an attempt to deal with the non-transferable cheque. Three questions have been addressed:

(a) Whether sections 58, 79 and 83 apply to non-transferable cheques;
(b) whether the non-transferability of a cheque implies only that a cambial transfer is excluded, but transfer by means of an ordinary cession is still possible;
(c) whether the collecting and drawee banks can be held liable for damages to the owner of a non-transferable cheque.

(a) It is clear that section 58 does not apply to non-transferable cheques. After the decision in Eskom, it is also clear that section 79 does apply to such cheques. Regarding the applicability of section 83 to non-transferable cheques, there is uncertainty.

(b) Whether the rights arising from a non-transferable cheque can be transferred by means of an ordinary cession, it is not yet clear.

(c) That a collecting bank can be held delictually liable under the extended lex Aquilia was decided in Indac Electronics. By way of analogy, the same applies to a drawee bank acting negligently.

Key terms:

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1 Introduction

South African legislation provides for order and bearer cheques. It does not specifically provide for a non-transferable cheque, but it is possible in terms of s 6(5),\(^1\) to prevent or restrict the negotiability of a bill, cheque or note.\(^2\) Only one person, namely the payee, can be the holder of a cheque that was drawn containing words prohibiting transfer or indicating

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1 Bills of Exchange Act 34 of 1964 (hereafter the Act). Section 6(5) is made applicable to cheques by s 71.

an intention that it should not be transferable\(^3\). In terms of the bank and customer relationship, the bank on which such a cheque is drawn may, in principle, debit the customer's account with the amount of the cheque only when payment has been made to the holder.\(^4\)

The non-transferable cheque is however, not without its own particular problems. Two questions are of special importance. The first is whether ss 58, 79 and 83 apply to non-transferable cheques. With reference to s 79, the question may be put as follows: can a drawee bank rely on due payment (which discharges its duty towards the drawer) if it pays the amount of a non-transferable cheque in good faith and without negligence to another bank, which is collecting the cheque for the wrong person? The second question is whether the non-transferability of a cheque implies only that a cambial transfer (ie a transfer by means of indorsement plus delivery of the instrument) is excluded. In other words, can the rights arising from a non-transferable cheque still be transferred, subject to existing defects of title, by means of an ordinary cession?\(^5\)

Finally, does a bank paying a non-transferable cheque to or collecting it for someone other than the owner incur delictual liability to the owner for any loss he suffers because the cheque was paid, ie discharged?

This paper is an attempt to deal with the non-transferable cheque and its problems. The liability of the collecting and drawee banks will also be dealt with.

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\(^3\) Aboobaker v Gablete Distributors (Pty) Ltd 1978 (4) SA 615 (D). See Malan and Pretorius para 229.

\(^4\) Volkskas Bpk v Johnson 1979 (4) SA 775 (C) 778; Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A) 397.

2 Expressions excluding negotiability

In terms of s 29 of the Act a bearer cheque is *negotiated* by mere delivery and an order cheque by indorsement plus delivery.\(^6\) In principle, a cheque is transferable.\(^7\) *Section 6(5)* however, provides that if a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties to the bill, but is not *negotiable*.\(^8\) A cheque can, therefore, be made not transferable by the addition of the applicable words - words indicating an intention to prohibit transfer.

In *R Barkhan Finance Corp. v Dabros (Pty) Ltd*\(^9\) the then Appellate Division accepted that a cheque would be non-transferable if made payable as follows: "Pay X only". An important qualification was added, namely, that the words prohibiting transfer must be legible (in this case the word "only"). The court said that such words should be sufficiently legible and clear to indicate the intention with certainty on perusal of the document with ordinary care. A cheque can also be made non-transferable by placing the words "not transferable" on it.\(^10\) The words "account payee only" on a

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\(^6\) The verb *negotiate* is defined in *s 29*. In particular *s 29 (1)*) provides that a bill is negotiated if it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. It follows that for a bill (including a cheque - a cheque is a bill drawn on a bank and payable on demand) to be *negotiable* in terms of *s 29 (1)*, the payee must be able to transfer it in such a way that the transferee becomes the holder.

\(^7\) See also *s 6*.

\(^8\) In *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A) Holmes JA remarked that 'sometimes the Act and the cases do not make immediately clear in what sense the word "negotiable" is used' (at 493 H). The learned Judge of appeal held that the two concluding words of *s 6 (5)" must mean "not transferable"' (at 493).

\(^9\) 1968 (2) SA 686 (A) 691-692.

\(^10\) *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A)504-505; *Aboobaker v Gableite Distributors (Pty) Ltd* 1978 (4) SA 504-505.

Continued on next page...
cheque do not exclude transferability. The question may arise as to what the effect of these words is, if any. In the Sham Magazine case Holmes JA stated the following concerning the words “account payee only”:

“They may operate as some safeguard if the cheque should fall into the wrong hands. They are, in effect, a direction to the collecting banker that the specified payee should receive the money. These words cease to have any operation if the payee specified in the cheque transfers it (eg by special indorsement) because there upon the specified payee parts with his right to receive the money”.  

Before the decision in Indac Electronics (Pty) Ltd v Volkskas Bank (Pty) Ltd, the standpoint of South African courts was that a collecting bank was not liable to the true owner for the negligent (in contrast to intentional) collection of a cheque for an unlawful possessor. In view of this, De Wet and Van Wyk expressed the opinion that the courts might recognise


See in this regard the Sham Magazine case (Standard Bank of SA Ltd v Sham Magazine Centre 491ff) which overruled Dungarvin Trust (Pty) Ltd v Import Refrigeration Co (Pty) Ltd 1971 (4) SA 300 (W) 305 and Rhostar (Pty) Ltd v Netherlands Bank of Rhodesia Ltd 1972 (2) SA 703 (R) 705. In the meantime it has also been accepted in Zimbabwe that the words “account payee only” do not result in the non-transferability of a cheque, and that the decision in the Rhostar case is wrong. (Philsham (Pty) Ltd v Beverley Building Society and another 1977 (2) SA 546 (R) 550).

11 See in this regard the Sham Magazine case (Standard Bank of SA Ltd v Sham Magazine Centre 491ff) which overruled Dungarvin Trust (Pty) Ltd v Import Refrigeration Co (Pty) Ltd 1971 (4) SA 300 (W) 305 and Rhostar (Pty) Ltd v Netherlands Bank of Rhodesia Ltd 1972 (2) SA 703 (R) 705. In the meantime it has also been accepted in Zimbabwe that the words “account payee only” do not result in the non-transferability of a cheque, and that the decision in the Rhostar case is wrong. (Philsham (Pty) Ltd v Beverley Building Society and another 1977 (2) SA 546 (R) 550).

12 504H.

13 1992 (1) SA 783 (A).

14 See the discussion below.

liability for negligent collection if the words “account payee only” were placed on a crossed cheque. Since the Appellate Division in *Indac Electronics* has now recognised liability for negligent collection without the words “account payee only” appearing on the cheque, it is clear that the words are without meaning in our law.\(^{16}\) In England, the Bills of Exchange Act was amended in 1992 by the insertion of a new provision.\(^{17}\) According to this provision, the words “account payee” or “a/c payee” (with or without the word “only”) on a crossed cheque, result in the cheque being *not transferable*.\(^{18}\) As it is already explained, these words do not make a cheque non-transferable in South African law.

Where words and expressions prohibiting transfer or indicating an intention that the instrument should not be transferable are used in addition to words such as “order” or “bearer”, questions of interpretation arise.

In *Aboobaker v Gableite Distributors (Pty) Ltd*\(^ {19}\), a cheque was made payable to “A Baker Bros and Sons”. The words “or bearer” were deleted and replaced by the word “order”. The cheque also bore the words “not transferable”. It was held

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\(^{16}\) These words however, may indicate negligence on the part of the collecting bank when someone else and not the specified payee, receives payment. See again the dictum of Holmes JA in the *Sham Magazine* case quoted above. See also *Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1991(4) SA 82 (ZSC) 88. The Supreme Court of Zimbabwe held that the words ‘account payee only’ had been a warning to the appellant to credit the proceeds of the cheque only to an account bearing the identical name to that of the payee named on the cheque; and that its failure to do so, more especially when special clearance had been requested, had been negligent. McNally JA was specific. He said: “In that connection it can not be overlooked that the cheque was crossed ‘account payee only’. The decision in the *Sham Magazine* case *supra* did not deprive the words of any meaning. It simply said that the words do not affect transferability” (88E).

\(^{17}\) S 81A BEA.


\(^{19}\) 1978 (4) SA 615 (D) 616.
that the cheque was non-transferable. The impression of
transferability created by the word “order” is subordinate to
the clear indication of non-transferability flowing from the
words “not transferable”.20

In Impala Plastics (Pty) Ltd v Coetzer 21 the cheques were
also marked “not transferable”, but were made payable to a
specified person or bearer. As in Aboobaker the court came
to the conclusion that the cheques were non-transferable. It
follows from this decision that no one but the original payee
can be the holder of an instrument drawn in favour of a named
payee but also containing words prohibiting negotiation. To
be holder of such a cheque, parties subsequent to the payee
must acquire by negotiation, that is, by indorsement of the
payee and delivery, but the payee is, in terms of s 6(5) unable
to indorse and thus negotiate the cheque. What the position
would be if the order simply read “pay bearer”, and the
cheque were marked “not transferable”, is not yet clear.22

20 See also Standard Bank of SA Ltd v Sham Magazine Centre 1977 (1)
SA 484 (A) 504-505.
21 1984 (2) SA 392 (W).
22 Malan and Pretorius (para 229) suggest another possible interpretation of
s 6(5). Section 6(5) provides that a bill containing words prohibiting
transfer or indicating an intention that it should not be transferable is valid
as between the parties to the Bill, but is not negotiable. The parties to a
bearer bill are the drawer, the payee (if one is named), and any person in
possession or the bearer. One becomes holder of a bearer instrument
simply by taking possession. According to the authors, although the payee
in Impala Plastics was incapable of negotiating the cheques, any person
who acquired possession became holder, since the cheques were payable
to bearer. But since the “delivery” of the cheques would not have been
effective as a negotiation, there cannot be a holder in due course of such
an instrument. On the other hand, since the person in possession of a
bearer instrument is holder, he can give a valid discharge for the cheque
and a payment in due course can be made to him.
This interpretation, it is considered, ignores the first part of the definition,
namely, a bill containing words prohibiting transfer or indicating an
Continued on next page...
The crossing of a cheque does not affect its negotiability.\textsuperscript{23} The words “not negotiable” on a crossed cheque (as distinct from a bill of exchange\textsuperscript{24}) imply that the cheque is still transferable,\textsuperscript{25} but that nobody can become a holder in due course of such cheque. This needs to be qualified. If the words “not negotiable” are added to the crossing, the cheque can still be negotiated within the meaning of s 29(1), so that the transferee is constituted the holder of the cheque. But the negotiability of such a cheque is determined by s 80, and the true owner’s rights in the event of theft or loss are determined by s 81. Under s 80, a person who takes a crossed cheque which bears the words “not negotiable” cannot acquire a better title than that which the person from whom he took it had; and he bears the risk that the transferor may have had a defective title to the cheque. The cheque retains its transferability, but loses that part of negotiability normally enjoyed by negotiable instruments, that is, the ability of a

\textit{intention that it should not be transferable.} The cheques in \textit{Impala Plastics} were marked “not transferable”, and this is a clear indication that they should not be transferable. See also \textit{R Barkhan Finance Corporation v Dabros (Pty) Ltd} 1968 (2) SA 686 (A) 691; \textit{Gibson South African Mercantile and Company Law} (1988) 6ed 549 fn 66e.

\textsuperscript{23} See Malan and Pretorius paras 44 and 221.

\textsuperscript{24} The same words “not negotiable” when written on a bill of exchange, not being a crossed cheque, render the bill non-transferable (\textit{Hibernian Bank v Gysin and Hansen} All ER 166 (CA), affirming on appeal (1938) 2 All ER 575, although not on identical reasoning. See also \textit{Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd} 1968 (3) SA 166 (A) 180 191). Only the payee can be the holder of such a bill. If the payee indorses a bill of exchange marked “not negotiable”, the transferee does not become the holder within the meaning of s 29. Thus for a bill to be negotiable in terms of s 29, the payee must be able to transfer it in such a way that the transferee becomes the holder.

\textsuperscript{25} \textit{Commissioners of the State Savings Bank of Victoria v Permewan Wright and Co Ltd} (1914) 19 CLR 457 458: “The words ‘non-negotiable’ though restricting the negotiability of the cheque in a certain sense, are not prohibitive of payment to a person other than the named payee or ‘bearer’.” See \textit{Standard Bank of SA Ltd v Sham Magazine Centre} 1977 (1) SA 484 (A) 493; \textit{OK Bazaars (1929) Ltd v Universal Stores Ltd} 1972 (3) 187 (C) 179; \textit{Aboobaker v Gableite Distributors (Pty) Ltd} 1978 (4) SA 615 (D) 616.
transferee, who takes the instrument in good faith and for value, to acquire a title free from defences which could otherwise have been raised against his predecessor. If the payee of a crossed cheque bearing the words “not negotiable” indorses and delivers it to another person, the transferee becomes the holder of the instrument, but he can not have a better title than the payee had had. The transferee is said to take the cheque “subject to equities”. To put it in another way. If a drawer adds the words “not negotiable” to the cheque, no subsequent holder can become a holder in due course. The addition of the words “not negotiable” does therefore affect the negotiability of the cheque in the sense that no transferee can become a holder in due course of such a cheque. Now, if a “not negotiable” crossed cheque is made payable to a particular person only, or contains the words “not transferable”, the cheque is non-transferable.

3 Applicability of sections 58, 79 and 83 to Non-transferable Cheques

The drawee banker, i.e. the banker on whom the drawer draws the cheque, in carrying out his duty to honour his customer’s cheques must make payment in due course, being payment at or after maturity, to the holder in good faith, without knowledge of any defect in the holder’s title. Holder means the payee or indorsee of a bill who is in possession of it, or the

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26 See Gering Crossed Cheques Inscribed ‘A/c payee’ or ‘Not-transferable’ (1977) 94 SALJ 152 155.
28 Volkskas Bpk. v Johnson 1979 (4) SA 775 (C). In this case too, the impression of transferability created by the “not negotiable” crossing was overridden by the words clearly prohibiting transfer. With regard to markings see also Sharrock and Kidd Understanding Cheque Law (1993) 81-86 (hereafter Sharrock and Kidd).
29 s 1 ‘payment in due course’.
bearer thereof, and bearer is the person in possession of a bill payable to bearer. Thus, if the cheque is payable to order he must pay the named payee or the last named indorsee or, if it is payable to bearer, he must pay the person who is in possession of the cheque. Only then is the drawee entitled to debit his customer's account with the amount of the cheque.

Where the banker makes payment in due course he may debit his customer's account, and in certain circumstances in failing to do so, may rely on ss 58, 79 or 83.

3.1 Section 58

3.1.1 A cheque is payable to order if it is expressed to be so payable, or if it is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

If the drawee banker pays a cheque drawn payable to order, which bears a forged indorsement, he would not be making payment in due course because he would not be making payment to a holder. The reason is that any party who acquires a cheque through a forged or unauthorised indorsement cannot be a holder because such an indorsement is wholly inoperative and no right to retain the instrument can

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30 s 1 'holder'.
31 s 1 'bearer'.
32 See National Bank v Paterson 1909 TS 322 327; Stapelberg NO v Barclays Bank DC and O 1963 (3) SA 120 (T) 124; Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A)391; Malan and Pretorius para 207; Gering Handbook 235.
33 See Malan and De Beer paras 297 and 349. The authors submit that the provisions relating to payment in due course, as well as ss 58,79 and 83 are terms of the contractual relationship between drawee bank and customer. See however, Crosskopf JA's remarks in Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A) in regard to s 79 (at 391A-E). These terms arise ex lege and not ex consensu, Grosskopf JA said.
34 s 6 (3).
be acquired through it. However, s 58 allows for an important exception to this rule. The section is designed to protect the drawee banker and it is of great practical importance. *Section 58* provides as follows:

“If a bill payable to order on demand is drawn on a banker, and the banker pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority: Provided such indorsement does not purport to be that of a person who is a customer of the banker at the branch on which the said bill is drawn.”

It follows that if an indorsement on a cheque is forged but the drawee bank pays the instrument in good faith and in the ordinary course of business, it would be entitled to debit the account of its customer.

*Section 58* relieves the drawee banker of the burden of proving the genuineness of indorsements or who authorised them in those cases where the banker must show that he has made payment to the *holder* of a bill payable to order on

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35 *s 22*. It states: “Subject to the provisions of this Act, if a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority: Provided that nothing in this section contained shall affect the ratification of unauthorized signature not amounting to forgery.”

Thus, the section applies only when the person to whom payment has been made derived his title as *holder* of the instrument from the validity of these indorsements. To qualify for this protection, the indorsement in question must be an indorsement in the legal sense of the word. It must have been placed on the cheque *animo indorsandi*, that is, with the intention of incurring the liability of an indorsement and transferring the instrument. 37

3.1.2 It has been mentioned that the effect of the words "not transferable" is to render the cheque valid only between the parties to the cheque 38 and will therefore not be payable to bearer or to order. If a banker pays any person other than the named payee, he would not be paying the cheque in due course - not to a *holder* - as envisaged by the Act, 39 and the protection afforded by s 58 would not apply in this case since this section applies only to cheques which can be validly indorsed. Not transferable cheques are therefore excluded. Furthermore, a non-transferable cheque is, by definition, not payable “to order” as required by s 58 but to a specific person only. *Section 58* therefore, does not protect the drawee of a non-transferable cheque since this section applies to bills payable to order on demand. 40

3.2 Section 79

3.2.1 The crossing of a cheque qualifies the order of a drawer and requires the drawee bank to pay the cheque in a specific

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37 National Bank v Paterson 1909 TS 322 326-327; Stapelberg v Barclays Bank DC&O 1963 (3) SA 120 (T) 125; Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A) 391. See Malan and De Beer para 324.

38 s 6(5).

39 see s 1 ‘payment in due course’.

manner, namely, in accordance with the provisions of s 78.\textsuperscript{41} If a cheque is crossed generally, the drawee bank may pay only to a banker, to any banker.\textsuperscript{42} If a cheque is crossed specially, the drawee bank may pay only to the specific banker to whom it has been crossed, or to that banker’s agent for collection, who must also be a banker.\textsuperscript{43}

By crossing a cheque, the duty of the drawee banker is modified in the sense that he is required to pay the cheque through the medium of a bank only. The assumption is that bankers are persons of great respectability who are incapable of lending themselves to any concealment or suppression of the truth.\textsuperscript{44} Malan and Pretorius,\textsuperscript{45} commenting on that, say that by involving a bank in the cheque collection process, it

\textsuperscript{41} Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A) 391. See Malan and Pretorius para 219; Gering Handbook 270.

\textsuperscript{42} s 78(1).

\textsuperscript{43} s 78(2). If the drawee bank pays the crossed cheque in contravention of these prohibitions, it is liable to the true owner for any loss he may suffer because the cheque was so paid (s 78(4)). The liability in s 78(4) is not based on fault- it is strict liability \textit{ex lege} (Malan and De Beer para 332). There are several grounds on which a drawee banker who acts in contravention of these prohibitions would not be entitled to debit his customer’s account. Paget (\textit{Paget’s Law of Banking} (1989) 371) says that payment contrary to the crossing is, apart from statutory enactment, negligence on the part of the drawee banker, and if loss ensues the drawee banker cannot debit the account of its customer. But the more important reason is that payment in contravention of the crossing, \textit{in disobedience of the customer’s mandate}, is an unauthorised payment with which the banker cannot debit its customer’s account. He then says: “In the face of the crossed cheques sections and the \textit{universal practice of bankers} (emphasis added) no banker could for a moment contend that he did not understand what his customer meant by crossing the cheque, or that it meant anything but what it did during the period the direct prohibition remained on the statute book.”

The proviso to s 78(4) protects the drawee bank where it pays in good faith and without negligence in accordance with the appearance of the cheque at the time of presenting it (see Gering \textit{Handbook} 271).

\textsuperscript{44} Bellamy v Marjoribanks 1852 (7) Ex 389 403- 404; 155 ER 999 1006; Discounting and Shipping Co (Pty) Ltd v Franskraalstrand (Pty) Ltd 1962 (2) SA 559 (W) 562.

\textsuperscript{45} 1992 \textit{TSAR} 77 79.
would in theory improve the protection afforded to the true owner of a cheque, in the event of theft or loss. By crossing a cheque the drawer thus ensures that “payment is made through the filter of banker-customer relationship.” To some extent, theoretically at least, the bank receiving payment would have taken some steps to verify the identity, address, etc. of the person depositing the cheque for payment. However, experience has shown that this safeguard of the drawer is somewhat illusionary since the banks do not always take all the necessary steps to verify the identity and other particulars of their depositors. Furthermore, the drawer’s recourse against his own bank is limited - it is practically only when the bank pays contrary to the crossing, for example, when it pays in cash over the counter, the amount of the crossed cheque, that it incurs liability to the true owner of the cheque; only then will the drawee bank not be able to debit the drawer’s account with the amount of the cheque. This happens very seldom, if at all. The drawee banker is given further protection by s 79. This section stipulates that when the drawee banker, in good faith and without negligence, pays in accordance with the crossing, that is, when he pays to a banker on a general crossing or the banker to whom it is crossed specially or his agent for collection, on a special crossing, the bank paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, “shall respectively be entitled to the same rights, and placed in the same position as if payment of the cheque had been made to its true owner thereof.”

Thus, if the drawee banker does pay to a bank in accordance with the crossing, and pays in good faith and without negligence, it will, in terms of s 79, be deemed to have paid in due course although in actual fact it has not (eg because payment has been made to a collecting bank of a thief who was not the holder). Since, under s 79, the drawee bank’s payment is deemed to have been in due course, the cheque is

\[46\] s 78(4).

\[47\] s 78.
discharged (all rights of action thereon have been extinguished), and the drawee banker is entitled to debit the drawer’s account with the amount of the cheque. 48 Furthermore, the drawer’s liability on the cheque and on any underlying obligation is also discharged where the cheque came into the hands of the payee, even though the cheque has not been technically discharged because payment may not have been made to a bank collecting for the holder. 49

3.2.2 As far as the applicability of s 79 is concerned, in our view this section does not apply to non-transferable cheques, for the same reason that ss 58 and 83 do not apply to such cheques, namely, because these sections apply only to cheques which can be validly indorsed.

It has been mentioned that the crossing of a cheque qualifies the order of a drawer and requires the drawee bank to pay the cheque in a specified manner, namely, in accordance with the provisions of s 78. Although the instruction to pay is altered by the crossing, the crossing has no effect on the negotiability of the cheque. Even if the words “not negotiable” are added to the crossing, the cheque can still be negotiated within the meaning of s 29(1), so that the transferee is constituted the holder of the cheque. Crossed cheques can therefore be validly indorsed. Now, where a cheque is drawn payable to a certain person and in addition contains words prohibiting transfer, it is not transferable and only the named payee can be

48 *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) SA (A) 391. See also *Robarts v Tucker* 1851 (16) QB 560 (117 ER 994); Malan and Pretorius para 179.

49 *Volkskas Bank Bpk v Bonitas Medical Aid Fund* 1993 (3) SA 779(A) 794. In *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) SA 386 (A), the then Appellate Division stated that a banker who is in terms of s 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 to somebody who was not the holder (at 391B-C).
the *holder* of it. To be a holder of such a cheque, parties subsequent to the payee must acquire by *negotiation* (by indorsement of the payee and delivery), but the payee is, in terms of *s 6(5)*, unable to indorse and thus negotiate the cheque. Since non-transferable cheques *cannot* validly be indorsed, *s 79* does not apply to them. Furthermore, non-transferable cheques are not payable to the *order* of the payee - only to the named payee.

In *Johnson*, where a crossed, non-transferable cheque was involved, the court stated that in terms of the bank and customer relationship, a bank on which a cheque is drawn, is obliged to execute its customer’s order as it is expressed in the cheque. A bank may debit the account of its customer with the amount of the cheque paid only if it has complied with the instructions given to it. It is part of this relationship that the bank is precluded from paying anyone other than the person indicated by the customer. The court further held that a non-transferable cheque affords no-one but the payee the right to claim payment. The fact that the cheque was crossed imposed an obligation on the drawee not to pay anyone but a bank and this duty does not conflict with the duty to pay only the payee. The order given by the drawer to the drawee was to pay the amount of the cheque to the payee, and since it was crossed, to a bank collecting on behalf of the payee. Because *in casu*, payment was made to neither the payee nor a bank collecting on behalf of the payee, the court held (correctly, it

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50 *Aboobaker v Gableite Distributors (Pty) Ltd* 1978 (4) SA 615 (D) 616.
51 See *Impala Plastics (Pty) Ltd v Coetzer* 1974 (2) SA 392 (W) 397.
52 See also *s 6(1)*. It states : “A bill must be payable either to bearer or to order to be negotiable.”
53 *Volkskas Bpk v Johnson* 1979 (4) SA 775 (C).
54 777-778.
55 778. See *National Bank v Paterson* 1909 TS 322 325-327.
56 *s 6(5)*.
57 778.
58 *s 78*. See also *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) SA 386 (A) at 397 H-J.
59 780.
is respectfully submitted) that the drawee bank had acted in breach of its mandate and was therefore not entitled to debit the account of the drawer.\textsuperscript{60} It rejected the plaintiff’s claim.\textsuperscript{61}

However, in \textit{Gishen v Nedbank Ltd} \textsuperscript{62} the drawer of a non-transferable, crossed cheque alleged that the cheque was not paid to the named payee and that the drawee bank had thus acted in breach of its mandate to pay the cheque to the named payee only. The court accepted that the cheque was not transferable\textsuperscript{63} but said\textsuperscript{64} that \textit{s 79} contains no indication that it

\textsuperscript{60} Malan and De Beer (para 349) maintain that the crossing of a \textit{non-transferable} cheque does not \textit{contradict} the order to the drawee bank. The crossing of a cheque does not, according to them, mean that payment must be made only to a bank (or in terms of \textit{s 78}); it means that if the cheque is not paid in accordance with the crossing the drawee bank will be liable to the true owner for any loss he may suffer. But see above what Paget has to say in this regard (fn 43). In \textit{Eskom v First National Bank of Southern Africa Ltd} 1995 (2) SA 386 (A) Grosskopf JA stated: “Moreover it is clear that the sections of the Act dealing with crossed cheques form a coherent whole” (at 396 A-B). And at 397 H-J that: “If a cheque is crossed generally, the drawee bank may not pay it to any person other than a banker .... Therefore if a cheque is crossed generally, and in addition bears the words ‘not transferable’, the drawee bank is instructed: (a) to pay the cheque only to the named payee; (b) to pay the cheque to a banker. The drawee bank can comply with both these instructions by paying to a banker acting on behalf of the payee (\textit{Volkskas Bpk v Johnson} 1979 (4) SA 775 (C) at 779G).” But it was added at 397J-398A: “For present purposes I need not consider whether a bank may also properly (or at any rate, with impunity) pay such a cheque to the true owner or his agent personally, as suggested by Malan ... in para 349.”

\textsuperscript{61} Malan and De Beer (para 349) are of the view that \textit{s 79} applies to non-transferable cheques and the real issue in \textit{Johnson} was whether payment was made in terms of \textit{s 79}, that is, “in good faith and without negligence”. They add that the presence of the indorsements on the back of the cheque could indicate negligence on the part of the drawee bank.

\textsuperscript{62} 1984 (2) SA 378 (W) followed in \textit{Bonitas Medical Aid Fund v Volkskas Bank Ltd} 1992 (2) SA 42 (W) which finding was not disputed on appeal in \textit{Volkskas Bank Bpk. v Bonitas Medical Aid Fund} 1993 (3) SA 779 (A). \textit{Gishen}, like \textit{Johnson}, deals with the banker-customer relationship in respect of crossed cheques marked “not-transferable” (Sinclair and Visser 1984 \textit{Annual Survey} 389 ).

\textsuperscript{63} 380.

\textsuperscript{64} 382.
applies only to transferable cheques. It distinguished the *Johnson*\(^{65}\) case on the ground that that case had been dealing with a stated case which had left no room for the question as to the applicability of *s 79*\(^{66}\). It held that *s 79* applies to non-transferable cheques and since the bank had acted without negligence, was entitled to debit the account of the drawer. It rejected the drawer’s claim.

According to Pretorius,\(^{67}\) the result of that judgement was that “we could say that there was a valid transfer of a non-transferable cheque.” The learned author explains that the purpose of *s 79* is to shift the loss in the event of a *forged indorsement* on a crossed cheque from the drawee bank to the true owner thereof. In the case of a cheque made non-transferable by the drawer there is no possibility of a forged “indorsement”, and the same reason to protect the drawee bank in terms of *s 79* does not exist. Non-transferable cheques are *not* capable of being indorsed. *Section 79* was never intended to deal with non-transferable cheques.\(^{68}\)

That *s 79* applies to non-transferable cheques was confirmed by the then Appellate Division in *Eskom v First National Bank of Southern Africa Ltd.*\(^{69}\) The court reasoned that banks

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65 *Volkskas Bpk v Johnson* 1979 (4) SA 775(C).
66 See also Malan and De Beer (para 349) and Sinclair and Visser (1984 *Annual Survey* 390) who make the same point.
67 1984 *SALJ* 250 256.
68 For a full discussion of the *Gishen* case see Pretorius A Transferable ‘Non-transferable’ Cheque 1984 *SALJ* 250. In a less than enthusiastic case note on this decision Sinclair and Visser (1984 *Annual Survey* 389 ff) remark that the plaintiff would have been better off had the cheque not been crossed for bankers’ protection in such cases apply where payment is made ‘in the ordinary course of business.’ The authors conclude: “It would be rather absurd for a drawee bank to get away with saying that in the ordinary course of business, even when apprised of the facts, it ignores part of the mandate of the drawer (its customer).” They call for legislative intervention “to bring this part of our law into line with contemporary banking practice.”
69 1995 (2) SA 386 (A) 400.
need protection against paying a person falsely pretending to be the payee of a non-transferable cheque and that the remedy is in the drawer’s own hands - he need not cross the cheque if he wants to exclude the protection of s 79. It however appears that this point was decided on convenience rather than principles of law. 70

3.2.3 With regard to the question whether the presence of an “indorsement” on the reverse side of a non-transferable cheque is an indication of negligence on the part of the drawee bank, there is uncertainty. In Gishen, 71 the opinion was expressed that the presence of a single “indorsement” on the back of a non-transferable cheque does not indicate negligence on the part of the drawee bank, whereas in Johnson, 72 it was accepted that the presence of more than one “indorsement” on the back of such a cheque does indicate negligence. In Bonitas, 73 this question did not arise because there was no such “indorsement” on the back of the cheque. The Eskom 74 case was decided on exception, and the question whether the bank had been negligent, was accordingly not an issue for decision before the court. 75 It is suggested that it should make no difference whether there is only an “indorsement” professing to be that of the payee, or whether there are more indorsements on the cheque. In both cases it is an indication that the collecting bank is collecting for someone other than the payee. In both cases the drawee bank

70 See the discussion above.
71 Gishen v Nedbank Ltd 1984 (2) 378(W) 381H - 382A.
72 Volkskas Bank Bpk v Johnson 1972 (4) SA 775 (C) 777H.
73 Bonitas Medical Aid Fund v Volkskas Bank Ltd and another 1992 (2) SA 42 (W).
75 The Eskom case is discussed by Malan and Pretorius in 1996 SA Merc LJ 282.
will be negligent and will therefore lose the protection of s 79 if the cheque is paid without further enquiry.  

3.2.4 On the question whether s 79 applies where the drawee bank and collecting bank is the same bank, that is, where two branches of the same bank are involved, two cases are relevant. The first is the judgement of Stegman J in Allied Bank Ltd v Standard Bank of SA Ltd. The other is the judgement of Goldblatt J in Hollandia Reinsurance Co. Ltd v Nedcor Bank Ltd. Both judgements deal with a claim for the re-crediting of a cheque account after a crossed, non-transferable cheque had been paid by the crediting of the account of someone other than the payee. In both cases the cheque concerned had been drawn on the defendant bank, by a drawer which had its account at a certain branch of the defendant bank, and was deposited in an account kept at another branch of the same bank. In both cases the bank relied on s 79.

In Allied Bank Ltd Stegmann J interpreted s 79 to mean that the provision applies only if payment has in fact been made by one bank to another bank. That is, of course, not the case where the drawee bank and the collecting bank is the same bank, which was the position in the two cases. Where two branches of the same bank are involved, payment takes place

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76 See also Sharrock and Kidd 165 fn 25. The authors say that failure to observe inoperative indorsements on the cheque may amount to negligence on the part of the bank. Hugo (1992 Stellenbosch LR 115 128) says that the bank will be negligent if it collects a non-transferable cheque on behalf of a customer who purports to be holding it in terms of an indorsement. Malan and Pretorius (1993 SA Merc LJ 206 215) say that non-transferable cheques cannot be ‘indorsed’ and a bank would be prima facie negligent if it collects payment of such a cheque on behalf of a customer who purports to be holding in terms of an ‘indorsement’.

77 case no. 17379/91, WLD, unreported.

78 1993 (3) SA 574 (W).
by mere debiting and crediting of the two accounts. There is no payment by one bank to another bank. Consequently, Stegmann J held, that s 79 did not apply.\(^7\) In *Hollandia Reinsurance Co Ltd*,\(^8\) Goldblatt J was of the view that the debiting and crediting of the accounts does amount to payment by a bank to a bank, although it is a payment by one bank to itself. He held that s 79 does apply where two branches of the same bank are involved. Support for the latter view can also be found in English case law.\(^9\) Goldblatt J regards it as unlikely that the legislature wished to limit the protection of s 79 to the case where two completely different banks are involved. The latter view was confirmed by the Appellate division in *Eskom v First National Bank of Southern Africa Ltd*,\(^\) that is, that s 79 applies where two branches of the same bank are involved.

It would appear that the interpretation in the *Hollandia* case is correct. *Section 79* speaks of a payment “to a banker.”\(^8\) There is no reason why the drawee bank should not be protected by

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7 The *Allied Bank Ltd* case is discussed by Malan and Pretorius in 1993 *TSAR* 454. See further *Standard Bank of SA Ltd v Oneanate Investments Ltd* 1995 (4) SA 510 (C) 529; *Cambanis Buildings (Pty) Ltd v Gal* 1983 (2) SA 128 (N). Also, *Volkskas Bank Bpk v Bankorp Bpk* 1991 (3) SA 605 (A) and the comments of Prof Pretorius in 1991 *Annual Survey* 271-272.

80 1993 (3) SA 574 (W) 556-557.

81 See *Gordon v London City and Midland Bank* (1902) 1 KB 243 275.

82 1995 (2) SA 386 (A) 397D-E. At 397A-E the court stated: “The language of ss 78 and 79 suggests that the sections require payment of a crossed cheque to be made by one bank to another. On the other hand, it would not place an intolerable strain on the language to permit one bank to be both the collecting banker and paying banker and the exigencies of commerce would be best served by such a construction.” Fourie *Protection of the Drawee Bank 1995 De Rebus* 495) points out the practical difficulties which would arise if two branches of the same bank are involved and the bank is not protected, as was held by Stegmann J. He adds that the decision in *Eskom* on this point “has been well received by the banks”.

83 Compare the wording of s 83(1): ‘pays to another banker.’ See *Carpenter’s Co v British Mutual Banking Co* 1937 (3) All ER 811 822.
s 79 against a forged indorsement merely because the cheque has been deposited with another branch of the same bank.\textsuperscript{84} Support for Goldblatt J's view can also be found in s 78. According to s 78, a crossed cheque may only be paid to a bank. If Stegmann J's interpretation is correct, it is not possible to comply with s 78, in the case where the cheque is deposited in another account with the same bank.\textsuperscript{85}

Although s 79 was therefore applicable \textit{in principle} in both the above-mentioned cases we are of the view that in both cases the bank could not rely on s 79, because the payment did not take place \textit{without negligence}. In this regard it should be kept in mind that the cheque in both cases was \textit{non-transferable}. Furthermore, the same bank was involved as drawee and collector. Clearly the bank was negligent in accepting the cheque for credit of the account of someone other than the payee. Since payment of the cheque took place by a mere debiting and crediting of the accounts, the conduct of the branch where the cheque was deposited was also part of the payment process, and negligence in this regard should be taken into account in the application of s 79.\textsuperscript{86} Accordingly it appears that, in the case of a non-transferable cheque, s 79

\textsuperscript{84} See Pretorius 1993 \textit{Annual Survey} 482. Professor Pretorius is also of the view that there is no compelling reason why s 79 should be so restrictively interpreted and apply only if payment has in fact been made by one bank to another bank.

\textsuperscript{85} See the remarks of Goldblatt J in \textit{Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd} 1993 (3) 574 (W) at 557-558, and those of Grosskopf JA in \textit{Eskom v First National Bank of Southern Africa Ltd} 1995 (2) SA 386 (A) at 397B-C. See also Gering \textit{Handbook} 271.

\textsuperscript{86} See the remarks of the then Appellate Division in \textit{Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n ander} 1991 (3) SA 605 (A) at 611E-F in this regard. It was stated there: when the bank acts as drawee and also operates as a collector, the bank is obliged, as an authorised collector, to be aware of its act as authorised drawee in so far as it acts for the creditor or debtor of the different accounts which must be on equal footing of payment. \textit{In both capacities the bank must have knowledge of the payments} (our translation). Also, the remarks of Grosskopf JA in \textit{Eskom v First National Bank of Southern Africa Ltd} 1995 (2) SA 386 (A) at 399B-C.
will protect the drawee bank only if the amount of the cheque is collected by another bank.  

If the bank in the Allied Bank Ltd and the Hollandia Reinsurance Co Ltd case could in fact have relied on s 79 (which in our view is not the case), it would of course have been entitled to debit the drawer’s account. However, that does not mean that the bank would then have incurred no liability. The bank would have been delictually liable to the true owner as a result of negligent collection.  

As mentioned the difference of opinion between The Allied Bank Ltd case and the Hollandia Reinsurance Co Ltd case was finally decided in Eskom v First National Bank of Southern Africa Ltd, that is, that s 79 applies where two branches of the same bank are involved.  

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88 Allied Bank Ltd v Standard Bank of SA Ltd case no 17379/91, WLD(unreported).  
89 Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd 1993 (3) SA 574 (W).  
90 In connection with the Allied Bank Ltd and Hollandia Reinsurance Co Ltd cases Malan and Pretorius (Holders Collecting Banks and Payment 1993 TSAR 454 462), are of the opinion that a bank’s intention or negligence in its capacity as collector cannot be ascribed to it in its capacity as drawee. For the reasons mentioned above we cannot agree with that. Such a result would only be possible if the Bills of Exchange Act is amended to the effect that two branches of the same bank should be regarded as different banks for the purpose of, inter alia, s 79. See Oelofse 1991 SA Merc LJ 364 379 for such an arrangement in New Zealand law.  
91 1995 (2) SA 386 (A).  
92 In Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A), firstly, the Appellate Division confirms the finding in the Gishen case (Gishen v Nedbank Ltd 1984 (2) SA 378 (W)) that s 79 does apply to non-transferable crossed cheques (400F). Secondly, the court confirms the finding in the Hollandia case (Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd 1993 (3) SA 574 (W)) that s 79 applies when the Continued on next page...
Although it is now clear that s 79 does apply in principle to a non-transferable cheque drawn on a specific bank and deposited in an account at the same bank, this does not mean that the bank will succeed in relying on s 79. Except in extraordinary circumstances, the bank will be negligent if the account of someone other than the payee is credited. As already mentioned, the *Eskom* case was decided on exception, and the question whether the bank had been negligent, was accordingly not an issue for decision before the court. Although the bank can rely on s 79, it still has to prove the absence of negligence. In the large majority of cases it will not be able to do so if a non-transferable cheque deposited at one of the bank’s own branches is involved.93

### 3.3 Section 83

#### 3.3.1 This section protects a bank paying cheques and certain other instruments that have not been indorsed or have been irregularly indorsed. *Section 83(1)* provides that if a bank in good faith and in the ordinary course of business credits the account of a customer with or pays to another bank the amount of any cheque drawn on it, it shall not incur liability by reason only of the absence of, or irregularity in, its indorsement, and the cheque shall be discharged by such crediting of the account in question by such payment. In terms

drawee bank and the collecting bank is the same bank (397D). Thirdly, the court held that a drawee bank that wishes to rely on s 79 carries the onus to prove that it has paid in good faith and without negligence in accordance with the crossing (394D-E).

93 In *Eskom v First National Bank of Southern Africa* 1995 (2) SA 386 (A) the Appellate Division emphasised that the bank will not be protected by s 79 if it acted negligently. Grosskopf JA said: “it must be emphasised that the banker is not protected if he acts negligently. And in determining whether the paying bank was negligent one cannot leave out of account, I consider, that the paying bank was dealing with a non-transferable cheque” (400B-C). See Further *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377(D) 393; Malan and Pretorius *Eskom on Crossed Cheques marked ‘Not Transferable’* (1996) 8 *SA Merc LJ* 282 286 287.
of s 83(1)(b) and (c) it is not only the payment of a cheque, but includes any other document issued by a customer of the banker, which is intended to enable any person to obtain payment on demand (or from any banker, if the document was issued on behalf of the state), or a draft, payable on demand and drawn by the banker on himself or his agent who is a banker, whether payable at the head office or at some other office of his bank or agent. In terms of s 83(2) the provisions of s 83(1) apply mutatis mutandis to any document which -

(a) was issued on behalf of the state;
(b) is drawn upon or addressed to a servant of the state (referred to as the drawee), and
(c) is intended to enable any person to obtain payment on demand from the drawee upon or from or through a banker, as if the document were a cheque and as if the drawee were a banker, and the state his customer.

It is provided in s 86 that the documents referred to in ss 83 - 85 are not to be regarded as negotiable instruments unless they would otherwise be negotiable.

Furthermore, when payment is made in accordance with s 83 the cheque will be discharged, ie the drawee banker will be entitled to debit the drawer’s account with the amount of the cheque. Only if the drawee bank makes payment in good faith and in the ordinary course of business and it either credits the account of its customer with, or pays to another bank, the amount of the cheque drawn on it, the bank will be protected by the section. There is no additional requirement that the bank must act without negligence.

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94 A cheque is discharged by payment in due course ( s 1 ‘payment in due course’) or in terms of ss 58, 79 or 83.
95 s 83.
Section 83 is yet another provision that governs the relationship between banker and customer. It is clear from the opening words of s 83(1) that the existence of an account is required in order that the drawee banker should be entitled to protection where payment is not made to another banker: "credits the account of a customer of his or pays to another banker." The protection afforded to the drawee bank by s 58 is extended by virtue of s 83. In terms of s 58 there must be an indorsement before the banker can avail himself of the section, whereas in terms of s 83 the bank may be protected if the indorsement is irregular or in the absence of an indorsement. On the other hand, if the indorsement on the cheque is a forged indorsement, s 83 may not apply. In such a case the drawee bank may be able to rely on s 58, provided that the forgery is not a forgery of a customer of that branch of

96 The Act does not define customer but the term is used in several sections (ss 58 (proviso), 73, 81(5), 82 and 83). To be a customer a person must have a current or other account with a bank (Importers Co Ltd v Westminster Bank Ltd 1927 (2) KB 297 305). In Commissioners of Taxation v English and Australian Bank 1920 AC 683, Lord Dunedin said: "Their lordships are of the opinion that the word "customer" signifies a relationship in which duration is not of the essence. A person whose money has been accepted by a bank on the footing that they undertake to honour cheques up to the amount standing to his credit is... a customer in the sense of the statute, irrespective of whether his connection is of short or long standing. The contract is not between an habitue and a newcomer, but between a person for whom the bank performs a casual service such as for instance, cashing a cheque introduced by one of their customers, and a person who has an account of his own at the bank" (at 687).

97 See Gering Handbook 286-287. Also, Sharrock and Kidd 166 where they say that the protection of s 83(1) applies where the party who presents the instrument for payment is also a customer at the bank, or is itself a bank.

98 The word “indorsement” in s 83 is strictly speaking incorrect. In the past the intention was, after all, not as a rule that payees should make collecting banks holders by virtue of their “indorsements”. In actual fact those signatures which banks demanded from depositors in the past were usually not true indorsements in the true sense of the word. See National Bank v Paterson 1909 TS 322 326-327. See also Gering Handbook 290; Cowen (1966) 4ed 442-444.
the bank,\textsuperscript{99} and the other requirements of \textit{s 58} are met. If the cheque is crossed and it pays over the counter, \textit{s 78} will not apply, neither of course, \textit{ss 58 or 79}.\textsuperscript{100}

\textbf{Section 79} protects a banker who pays a cheque in accordance with the crossing,\textsuperscript{101} in good faith and without negligence. A forged indorsement will not disqualify the bank from the protection afforded by \textit{s 79}. If there were no indorsement or an irregular indorsement, \textit{s 83} extends the protection of the bank. Where \textit{s 79} does not apply (eg because the bank was negligent), the banker may be protected by \textit{s 83} if there is no indorsement or an irregular indorsement, but probably not where there is a forged indorsement - irregularities in indorsement can put a bank on inquiry which could exclude its good faith\textsuperscript{102}, or render its payment out of the ordinary course of business\textsuperscript{103}. It is clear that a banker who pays cash over the counter on an unindorsed or irregularly indorsed cheque will not be protected by \textit{s 83}. The banker must either credit the

\begin{quote}
\textsuperscript{99} proviso to \textit{s 58}.
\textsuperscript{100} See Sharrock and Kidd 166.
\textsuperscript{101} \textit{s 78}.
\textsuperscript{102} \textit{s 94}: “A thing is deemed to be done in good faith within the meaning in this Act, if it is in fact done honestly, whether it is done negligently or not.” Thus, the bank will not be in good faith when it \textit{knows} that the person to whom payment is made is not entitled to it, or where it suspects that fact, but deliberately.refrains from making inquiries. The fact that the bank may have been negligent does not render its payment one in bad faith. See Malan and Pretorius para 119.
\textsuperscript{103} A cheque is paid outside the \textit{ordinary course of business} where it is paid after close of business (payment within a reasonable time after closing does not necessarily mean a departure from the \textit{ordinary course of business} - \textit{Baines v National Provincial Bank Ltd} (1927) Com Cas 216 218), where it is presented by post and payment is made by sending bank notes through the post, or where a large amount is paid over the counter in suspicious circumstances (\textit{The Governor and Company of the Bank of England v Bagliano Brothers} 1891 AC 107 (HL) 117-118; \textit{Auchterlon and Co v Midrand Bank Ltd} 1928 (2) KB 294 314-315). Payment in these circumstances will not be in good faith. See Malan and Pretorius para 209.
\end{quote}
customer’s account with the amount of the cheque or pay to another bank.\textsuperscript{104}

It is not clear whether the operation of \textit{s 83} would include a forged indorsement. Malan and Pretorius\textsuperscript{105} are of the opinion that \textit{ss 83} and \textit{84} are intended to afford bankers protection in the event of an absent or irregular indorsement and that the two sections should be given the same interpretation. According to them a forged or unauthorised indorsement is not an ‘irregular indorsement’ for the purposes of these sections.

\textit{Section 83(1)} uses the wording: ‘absence of, or irregularity in indorsement,’ while in \textit{s 84} the wording is: ‘is not indorsed or, was irregularly indorsed’; and \textit{s 85} refers to ‘an unindorsed or irregularly indorsed cheque’. Gering submits that all three forms of wording have the same meaning.\textsuperscript{106}

In \textit{Arab Bank Ltd v Ross}\textsuperscript{107} the indorsement was made by “Fathi and Faysal Nabulsky” although the note was payable to “Fathi and Faysal Nabulsky Company”. The court held the indorsement to be valid but irregular, excluding a purchaser from being a holder in due course. Malan and Pretorius\textsuperscript{108} say that \textit{s 83} excludes reliance on irregularities such as this.

\textsuperscript{104}This requirement ensures that payment in effect, will be made only to customers of banks. \textit{Section 83} does not require the customer to be the payee of the cheque. However, South African Banks require the indorsement of the payee or a subsequent indorsee except where the cheque has been specially indorsed to the customer for whose account it is collected. See the banks’ resolution dated 25-5-1964 cited by Cowen (1966 4ed) 448-449. According to Cowen (449) a ‘new course of business’ has been created in our banks. Conduct contrary to this resolution is unlikely to be “in the ordinary course of business.” See Malan and De Beer para 343.

\textsuperscript{105}para 224.

\textsuperscript{106}Gering \textit{Handbook} 287.

\textsuperscript{107}1952 All ER 709 (CA).

\textsuperscript{108}para 224 fn 122.
There can be no doubt that a forged indorsement does not fall within the ambit of s 84. In terms of s 84 the collecting bank is protected only if a holder delivers the cheque for collection. If an order cheque bears a forged indorsement there can be no subsequent holder.\textsuperscript{109} Tager\textsuperscript{110} suggests that s 83 should be restrictively construed and limited to the precise situation envisaged by the legislature. She explains that in terms of s 83 the banker in certain circumstances will not “incur any liability by reason only of the absence of, or irregularity in” an indorsement. Accordingly, the section is intended to apply either when an indorsement is absent where one is necessary, or where an indorsement is irregular, ie where the name of the indorsing company is not correctly stated. Others\textsuperscript{111} proceed on the assumption that s 83 covers forged indorsements. It follows that the matter awaits clarification by the courts. It does however appear that a forged indorsement cannot be regarded as regular.

3.3.2 The question whether s 83 also applies to non-transferable cheques was left open in \textit{Gishen}.\textsuperscript{112} Malan and Pretorius\textsuperscript{113} say that the history of s 83 makes the application of that section to non-transferable cheques unlikely, since non-transferable cheques are incapable of being “indorsed”. But they also say that the words of the section are “wide enough” to be applied to non-transferable cheques.\textsuperscript{114} Pretorius\textsuperscript{115} considers it unlikely that it was intended that s 83 would apply to non-transferable cheques.

\textsuperscript{109} s 22.
\textsuperscript{110} 19 \textit{LAWSA} para 166.
\textsuperscript{111} Van Jaarsveld \textit{et al} \textit{Suid-Afrikaanse Handelsreg} (1988) 3ed 607.
\textsuperscript{112} \textit{Gishen v Nedbank Ltd} 1984 (2) SA 378 (W) 382-383.
\textsuperscript{113} para 233.
\textsuperscript{114} See also Malan and De Beer para 349 fn 24; Malan and Pretorius 1992 \textit{TSAR} 77 90. If this interpretation is accepted and applying both ss 83 and 79 to non-transferable cheques could lead to a cheque being discharged by virtue of the provisions of s 83 (s 83 merely requires a payment “in good faith and in the ordinary course of business”) although the payment was not made without negligence as required by s 79.
\textsuperscript{115} 1984 \textit{SALJ} 250 253.
because such cheques are not capable of being indorsed. The learned author also says that the protection afforded to banks in terms of ss 58 and 84 which are applicable to order instruments, are not applicable to non-transferable cheques, since such cheques are not payable to the order of the payee - only to the named payee. According to Tager\footnote{116} non-transferable cheques do not fall within the ambit of s 83 since no indorsement at all is intended on such cheques.

In our view, s 83 (like s 58) clearly applies only to cheques which can be validly indorsed - there can be no indorsement on non-transferable instruments, and therefore, there can be no question of an “absence of or, irregularity in indorsement” as section s 83(I) requires in respect of such cheques. Non-transferable cheques are therefore excluded. Furthermore, the purpose of the sections,\footnote{117} as appears from the parliamentary Report of the Select Committee,\footnote{118} was “to abolish the necessity for the indorsement of cheques when they are deposited in the banking account of the payees concerned.” The underlying motive for this amendment was to save the commercial banks and other large bodies who had to “indorse” many cheques, time and labour.\footnote{119} It is submitted that s 83 has nothing to do with non-transferable cheques.

4 Crossing of Non-transferable Cheques

In Gishen\footnote{120} it was said that the customer (drawer) using the device of crossing a cheque, can hardly complain if the provisions of the Act in relation to such crossing are applied

\footnotesize
\begin{itemize}
  \item \footnotetext[116]{19 LAWSA para 166.}
  \item \footnotetext[117]{ss 83, 84, 85 and 86.}
  \item \footnotetext[118]{Report of the Select Committee on the subject of the Bills of Exchange Amendment Bill, SC 10 1963. See Malan and De Beer para 341 fn 100.}
  \item \footnotetext[119]{For the position in England see the Mocatta Report (para 14) and S 32(4) BEA. See also Sinclair and Visser 1984 Annual Survey 391.}
  \item \footnotetext[120]{Gishen v Nedbank Ltd 1984 (2) SA 378 (W).}
\end{itemize}
according to their tenor. The same things were repeated by Grosskopf JA in *Eskom*. He said: "The main anomaly lies in the difference in the rights of the drawer depending on whether the non-transferable cheque is crossed or not. However, the remedy is in his own hands - he need not cross the cheque if he wants to exclude the protection of s 79."  

The effect of these findings is that an uncrossed, non-transferable cheque is a safer payment mechanism than a crossed, non-transferable cheque. If the cheque is crossed, the drawee bank enjoys the protection of s 79 where the cheque is collected for the account of the wrong person. If the cheque is not crossed, s 79 (which applies to crossed cheques only) is not applicable. Nor do ss 58 and 83 apply, because they apply only to transferable cheques.

However, banks have decided, with effect from 19 August 1991, not to accept uncrossed, non-transferable cheques for collection. The reasons for this are that the drawee bank cannot check whether the collecting bank is collecting the cheque for the account of the correct person, and that the drawee bank is also not protected by ss 58, 79 or 83. Accordingly, the banks' resolution is aimed at eliminating this risk run by the drawee bank. The application of the resolution eliminates the large-scale use of uncrossed non-transferable cheques, since most cheques are deposited in accounts. In terms of the resolution, payment of such a cheque can be obtained only by presenting it over the counter at the branch on which it is drawn.

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121 383.
123 400 E.
125 See the notice published in, *inter alia*, the *Citizen* of 5 August 1991.
The above findings and the banks' resolution proceed from the assumption that, from the drawer's point of view, a non-transferable cheque which has not been crossed by him, is a safer instrument of payment than one which has in fact been crossed by him. The question therefore arises as to who is entitled to cross a non-transferable cheque. Of particular importance is the power of the collecting bank to cross a non-transferable cheque.

When a cheque is handed to a bank for collection, the bank puts its stamp on the cheque. Since the collecting bank's stamp complies with the formal requirements for a special crossing,\(^\text{126}\) and since \(s\ 76(6)\) gives the collecting bank the authority to cross the cheque specially to itself,\(^\text{127}\) it can be argued that the stamp constitutes a valid special crossing.\(^\text{128}\) If this is so, the drawee bank would still enjoy the protection of \(s\ 79\), since the cheque would be crossed when it reached the drawee bank. It would also mean that the banks' resolution not to accept uncrossed non-transferable cheques for collection would be unnecessary, because the drawee bank would still enjoy the same protection that it would have enjoyed had the cheque already been crossed when it was handed to the collecting bank.

Malan and Pretorius\(^\text{129}\) acknowledge that the stamp of the collecting bank formally constitutes a special crossing. They however, deny that in terms of \(s\ 76(6)\), the collecting bank has a general power to cross a cheque specially. They argue that \(s\ 76(6)\) provides for a cheque which is 'sent' to a banker for collection. Therefore, they are of the opinion that, if someone deposits a non-transferable cheque in his account, the

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\(^{126}\) \(s\ 75(2)\).


\(^{128}\) See Fourie *Protection of the Drawee Banker* 1995 *De Rebus* 495. In his view the bank stamp which is placed on a cheque by the collecting bank when it is deposited is a crossing in terms of \(ss\ 75 (2)\) and \(76 (6)\).

\(^{129}\) para 231; 1992 *TSAR* 77 88-90.
collecting bank is not entitled to cross the cheque and that the stamp does not constitute a special crossing. It seems to be an anomaly that the stamp has legal consequences if the account holder sends the cheque to the bank, but not if he personally deposits the cheque. Malan and De Beer\textsuperscript{130} apparently do not make a distinction between ‘sent’ and ‘deliver’. They say that the word ‘sent’ in \textit{s 76(6)} was probably used to draw a distinction in cases where a cheque is delivered to the bank by the holder and can be returned immediately with a request to cross it, and where it is posted to the bank and cannot be returned to the holder immediately for crossing. They do not however, see any reason for this distinction to be maintained today. Cowen\textsuperscript{131} also interprets the word ‘sent’ widely to include deliver. Whatever the truth of the matter is, this is a subject that will have to be finally decided by the courts. However, it seems unlikely that the legislature intended to give such general power of crossing to the collecting banks. The fact that the banks felt threatened and passed the above-mentioned resolution, may bear testimony to this.

5 The meaning of the concept ‘Non-transferability’ in the law of the bills of exchange

The cambial transfer of the rights to and flowing from a cheque, takes place by indorsement plus delivery in the case of order cheques,\textsuperscript{132} by mere delivery in the case of bearer cheques.\textsuperscript{133} The personal rights flowing from a cheque can however, also be transferred by ordinary cession.\textsuperscript{134} The question now is whether the words ‘not transferable’ or ‘pay X only’ mean that only the cambial transfer is no longer possible, but that cession is still possible. To put it in another

\textsuperscript{130} para 331 fn 9.
\textsuperscript{131} (1966) 4ed 423.
\textsuperscript{132} \textit{s 29(3)}.
\textsuperscript{133} \textit{s 29(2)}.
\textsuperscript{134} \textit{Factory Investments (Pty) Ltd v Ismails} 1960 (2) SA 10 (T) 12-13.
way, can the rights in no way be transferred by the payee of such cheque? This is also a disputed matter.

According to s 14 of the German Cheque Act, a cheque payable to a particular person with the words ‘not to order’ added, cannot be transferred by indorsement. The rights flowing from such a cheque can, however, be transferred in this way and with the results of an ordinary cession.\textsuperscript{135} The South African Act contains no similar provision.

Malan and De Beer\textsuperscript{136} are of the opinion that only the cambial method of transfer is excluded, so that cession of the rights flowing from the cheque is still possible. Malan and Pretorius\textsuperscript{137} say that s 6(5) applies to the instrument only and prohibits its negotiation; it does not specifically deal with the rights embodied in it. They submit that words prohibiting transfer on a non-transferable cheque prevent the \textit{negotiation} of the instrument but not necessarily a \textit{cession} of the rights embodied in it. Accordingly, the rights embodied in a bill can be ceded.\textsuperscript{138}

Malan and De Beer\textsuperscript{139} rely especially on the case of \textit{Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd}\textsuperscript{140}. In this case the court had to determine the meaning of the words “this deposit voucher is neither transferable nor negotiable” on a deposit voucher. Botha JA who delivered the majority judgement said:

“The deposit vouchers in question .... are not negotiable instruments, and the rights thereunder can ordinarily be

\textsuperscript{135} See Hefermehl and Baumbach \textit{Baumbach - Hefermehl Wechselgesetz und Schechgesetz mit Nebengesetzen und einer Einführung in das Werttapierrecht} (1990) 17ed 549.

\textsuperscript{136} para 118.

\textsuperscript{137} 1992 \textit{TSAR} 77 91.

\textsuperscript{138} See also Malan and Pretorius para 234.

\textsuperscript{139} para 118.

\textsuperscript{140} 1968 (3) SA 166 (A).
transferred from one person to another by way of cession under the common law. There seems to be all the more reason, therefore, that the words 'neither transferable nor negotiable' thereon should be given their ordinary literal meaning, namely that they are not to be transferred - in the only way in which they are capable of being transferred in law, i.e. by cession under the common law - from one person to another". 141

The authors make a distinction between negotiable and non-negotiable instruments and say that the implication seems to be that had these words appeared on a bill, cheque or note they would have excluded their negotiability but not a cession of the rights embodied in them. According to Oelofse 142 the majority view in Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 143 does not really provide support for the authors' opinion. In his view such an express indication of non-transferability also affects the possibility of cession. The author says that greater support is to be found in a few old cases which were still decided under the common law. In terms of the common law, a bill or promissory note made payable to a specific person, and not to him or his order, could not be negotiated further. 144 However, in Van der Merwe v Franck, 145 Jagger v Duncan, 146 Enslin v Haupt 147 and Thompson, Watson and Co v Malan 148 it was held that the rights in terms of such a document could still be ceded. 149

141 191.
143 1968 (3) SA 166 (A).
145 1885 (2) SAR 26.
146 1887 (2) SAR 214.
147 1877 (7) Buchanan 58.
148 1843 (2) Menzies 270.
Today transferability can be excluded only by the addition of express words to that effect.\textsuperscript{150}

It is submitted that Oelofse's view seems to be correct and it would appear that this view was also tacitly accepted in cases such as \textit{Johnson}\textsuperscript{151} and \textit{Gishen}\.\textsuperscript{152} It seems illogical to distinguish between transferability in the cambial sense and transferability by ordinary cession when a cheque contains words clearly aimed at ensuring that only the payee receives payment. If cession was still possible, the drawer's intention would definitely be frustrated. Added to this is the fact that the drawee bank is obliged to carry out its customer's orders. This is the basis of the judgement in \textit{Johnson}. Grosskopf AJ sums up his conclusion as follows:

\begin{quote}
Concerning the things that went on I am of the opinion that the cheque in question is within the ramifications of \textit{s 6(5)} of the Bills of Exchange Act, and was therefore not transferable. As a result therefore, in my view, the defendant gave the plaintiff instruction to pay the amount of the cheque to the payee, \textit{Tennant and Co}, or as a result of the crossing, to pay to the payee's collecting bank. I do not have to decide which of these methods of payment would be correct, because the plaintiff did not follow one of them. The plaintiff had paid to Sonia Feinberg's collecting bank, and therefore the defendant in my view, gave no authority (our translation).\textsuperscript{153}
\end{quote}

Further support for the view that cession is also excluded by the words 'not transferable' and 'pay X only' is to be found in \textit{De Villiers and others NNO v Electronic Media Network (Pty) Ltd}\.\textsuperscript{154} This case concerned an action for provisional sentence on a cheque drawn by the defendant in favour of a

\begin{footnotes}
\item[150] See \textit{ss 6(3)} and 6(5).
\item[151] \textit{Volkskas Bank v Johnson} 1979 (4) SA 775 (C).
\item[152] \textit{Gishen v Nedbank Ltd} 1984 (2) SA 378 (W).
\item[153] 779-780.
\item[154] 1991 (2) SA 180 (W).
\end{footnotes}
company. The cheque was marked ‘not transferable’. The company was liquidated, but was afterwards discharged from liquidation as a result of a compromise in terms of s 311 of the Companies Act.\footnote{Act 61 of 1973.} The plaintiffs were appointed as receivers in terms of the compromise. The court held that, in view of the words ‘not transferable’, only the company could be the holder of the cheque and therefore sue for provisional sentence. Unlike the position of a liquidator, a receiver is not a representative of a company. Therefore, the receivers could not sue for provisional sentence. In the course of his judgement, and after indicating how a cheque could be rendered non-transferable, Kirk - Cohen J stated the following: “That is what the defendant did in this case and the effect thereof would be... to prevent and eliminate the possibility of transfer of rights under the cheque (our emphasis), to any person other than GBS (the company).”\footnote{183F.}

Oelofse’s view does not, of course, mean that the exclusion of a cambial transfer necessarily also excludes cession. Cambial transfer can be excluded by the appropriate words, with retention of the possibility of a transfer by way of cession, for example, by placing the words ‘indorsement not possible’ on a cheque. This will clearly indicate that only a cambial transfer is excluded. The effect of restrictive words is, in the final analysis, determined by the interpretation of the words.\footnote{See Oelofse Rektawissel en Rektatjek, Verhandeling en Sessie in die Duitse en Suid-Afrikaanse Reg (1987) 9 Modern Business Law 129 for a detailed discussion of the question as to whether the rights flowing from a non-transferable cheque can still be ceded.}
6 The Amendment Bill

Mofokeng and Pretorius make the following remarks in regard to the proposed amendments for non-transferable cheques:

(a) The proposed s 75A states that only a cheque which contains the words *not transferable* written boldly across the face of it is to qualify as a ‘not transferable cheque’.

At present a cheque can be made non-transferable in a number of ways, eg, ‘Pay X only’, or by placing the words ‘not transferable’ on it. The general public is used to making a cheque non-transferable in a certain manner and it is educated to do so by the banks themselves. The proposed amendment creates uncertainty. Are the common law ways to make a cheque non-transferable to be disregarded? Furthermore, when is *boldly* boldly enough? In other words, how is boldly to be determined?

(b) *Section 6(5)* provides that if a bill contains words prohibiting transfer or indicating an intention that it should not be transferable, it is valid as between the parties to the bill, but not negotiable. *Section 29(1)* provides that a bill is negotiated if it is transferred from one person to another in such a manner as to constitute

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161 *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A) and see the discussion above as to the acceptable ways for making a cheque non-transferable.
162 See in this regard the remarks of Combrink J in *KwaMashu Bakery Ltd v The Standard Bank of South Africa Ltd* 1995 (1) SA 377 (O) at 393A-C.
the transferee, holder of the bill. The proposed s 75A(2) says that cheques which do not comply with the provisions of s 75(A)(1) will be negotiable. Does this mean that if a cheque is made payable to ‘X only’ and does not have the prescribed words ‘not-transferable’ written across the face of it, the named payee would be entitled to negotiate the cheque to Y, who then would be entitled to become holder or even holder in due course of the cheque? There is uncertainty here.

Section 6(1) provides that a bill must be payable to bearer or to order in order to be negotiable. If s 75A(2) says that a cheque which does not comply with s 75A(1) will be negotiable, the question is then whether such a cheque will be payable to bearer or to order in order to be negotiable within the meaning of s 6(1). This is not clear. It is also not clear what the meaning of the word ‘negotiable’ in s 75A(2) is. It is further not clear how these provisions will affect ss 29-32 (dealing with the negotiation and indorsement of cheques), and whether these cheques will be capable of being indorsed at all.

The proposed s 75A(2) says that cheques that do not comply with the provisions of s 75A(1), that is, cheques that do not have the words not transferable written boldly across their face, will be negotiable. This provision creates confusion and in more ways than one conflicts with the existing Act. Assume that the drawer writes the words non transferable across the face of the cheque while he intended to write the words not transferable. On the literal reading of s 75A(1) such a cheque will not qualify as a non-transferable cheque. But in terms of s 6(5) this is clearly an indication of an intention to prohibit transfer of the cheque. The proposed amendment will disregard the clear intention of the drawer and such a cheque will be negotiable notwithstanding the provisions of s 6(5).
(c) The proposed amendment creates a lot of uncertainty and conflicts with the rest of the Act. It provides in s 75A that the words ‘not transferable’ must be written across the face by ‘the drawer’. What happens if the words are, eg, written by the payee? This is not stated. In a dispute, who will decide which party wrote the words on the cheque and who will have the onus of proof? If the words are written by the payee, what will the effect of this be? Are the words to be disregarded and would the cheque become negotiable within the meaning of s 75A(2)? There is uncertainty here as well.

(d) Section 75A is in the part of the Act dealing with ‘crossed cheques’. It is not clear whether the proposed non-transferable cheque has to be crossed in order to qualify as such.

(e) Clause 40 proposes to amend s 84 by inserting a new subsection which provides that if a ‘not transferable cheque’ is delivered to a banker for collection, such banker would have such rights as it would have had, had it been the payee of such cheque.

The proposed conferring of rights on the collecting banker here runs contrary to any existing legal principle. The effect of the proposal would be that rights are conferred on an outside party where the intention is that no one but the named payee should have any rights in the cheque. Let it be explained. Although a non-transferable cheque is “valid as between the parties” in terms of s 6(5), it is not negotiable under the provisions of s 29. Only one person can be holder of such an instrument, namely, the payee. Thus a bank collecting payment of such a cheque on behalf of a customer cannot be holder or holder in due course. Nor will s 84 assist the bank

163 Mofokeng and Pretorius 1999 SA Merc LJ 152 at 158 and 165.
because it applies only to cheques and certain other instruments payable to order.\textsuperscript{164} The proposed clause 40 gives to a collecting bank rights which it could not and should not have. When a cheque is made non-transferable the clear intention is that no-one but the named payee should have any rights in the cheque.

(f) Finally, the answer to the argument that it has become too onerous for banks to recognise ‘not transferable’ cheques and that the costs for the banks is too much to bear,\textsuperscript{165} has been given by Combrink J in \textit{KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd}.\textsuperscript{166}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{164} See Malan and De Beer para 349.
\item \textsuperscript{165} See para 7 of the ‘Backgrounder’ to the Amendment Bill.
\item \textsuperscript{166} 1995 (1) SA 377 (O). At 393D-I the judge said: “The banks ... have even, prior to the decision in the \textit{Indac Electronics} case (\textit{Indac Electronics (Pty) Ltd v Volkskas Bank Ltd} 1992 (1) SA 783 (A) which recognized that a collecting bank can be held liable for negligence under the extended lex Aquilia to the true owner of lost or stolen cheque) developed a system of checking that the proceeds of a non-transferable cheque go to the actual payee and not to someone not entitled thereto. This is not to say that the defendant has taken upon itself a duty which otherwise did not exist, because that would be a \textit{non sequitur}, but it is of cardinal importance when considering whether such conduct can be reasonably expected from a banker. The analysis of the evidence above showed that the defendant requires the tellers to remove all cheques with restrictive endorsements and for a designated officer to examine such cheques and exercise a discretion as to whether further enquiry is necessary or not. This evidence also impacts on the argument regarding the costs associated with checking on non-transferable cheques because it appears that those costs have already been absorbed by the defendant without any difficulty. There was evidence that the commercial banks of South Africa adopted the following resolution:

“Banks will deal with cheques, the transfer of which is prohibited by wording on the face thereof (such as ‘not-transferable’) in only one manner, namely by accepting them for the credit of an account bearing the identical name to that of the payee named on the cheque.”

The banks \textit{inter se} accepted that it is a responsibility of a collecting bank to ensure that the instruments bearing non-transferable markings are
\end{enumerate}
\end{footnotesize}
The authors' conclusion\textsuperscript{167} is that there is no compelling reason for the adoption of the amendment and that making \textit{not transferable} cheques more easily identifiable will not in any way relieve banks of the duty imposed on them to act without negligence. After the decision of the Appellate Division in \textit{Indac Electronics},\textsuperscript{168} even if the proposed s 75A will help the banks to identify \textit{not transferable} cheques more easily, they still have to observe their common law duty for other cheques and 'not transferable' cheques as well. The wisdom therefore, of a separate provision for the non-transferable cheques, becomes questionable. Furthermore, the proposed amendment would create legal uncertainty and it is one-sided as it addresses only the concerns of the banking industry.

It is submitted that the above conclusions of Mofokeng and Pretorius are correct. It is further submitted that the existing Act is heavily biased in favour of the banks. Add to that the fact that so-called bank usages can create law.\textsuperscript{169} Whether or

\textsuperscript{167} Mofokeng and Pretorius 1999 SA \textit{Merc LJ} 152 at 156 and 165.

\textsuperscript{168} \textit{Indac Electronics (Pty) Ltd v Volkskas Bank Ltd} 1992 (1) SA 783 (A). See the discussion below in this regard.

\textsuperscript{169} See the remarks in regard to \textit{bank usage} of Somervell LJ in \textit{Arab Bank Ltd v Ross} (1952) 2 QB 216 at 222 and those of Denning LJ at 227-228. In South Africa regarding the \textit{bank usage} of charging interest on an overdrawn account see \textit{Senekal v Trust Bank of South Africa Ltd} 1978 (3) SA 375 (A) at 384F-H. In \textit{Standard Bank v Sham Magazine Centre} 1977 (1) SA 484 (A) Holmes JA remarked: “In my view it is inappropriate to endeavour to solve the problem by reference to the ordinary grammatical meaning of these words, divorced from the context of \textit{banking practice} (it) and judicial interpretation over many years. One is not here dealing with ordinary language which is susceptible of interpretation by reference to consideration of grammar and plain meaning. One is dealing with an involved mystique of hieroglyphs such as Continued on next page...
not the banks’ practice (usage) constitutes law is a question of fact.\textsuperscript{170} However, practices which have not acquired the status

\textsuperscript{170}Regarding the non-transferable cheques the banks initially decided not to pay a non-transferable cheque over the counter. It was further decided to accept a non-transferable cheque for collection only if the name of the payee on the cheque corresponded exactly to the name of the account for the credit of which collection took place (see November 1976 Financial Mail 821 and December 1976 Financial Mail 974). As far as payment over the counter is concerned, this resolution is no longer applied. Consequently, an uncrossed non-transferable cheque will be paid over the counter, provided that the person presenting it for payment can properly identify himself as the payee (see Cowen (1985) 5ed I 209 fn 130). In the meantime banks have given notice in the press (see eg the Citizen of 5 August 1991) of a new resolution in connection with non-transferable cheques, applicable with effect from 19 August 1991. According to this resolution, uncrossed non-transferable cheques are no longer accepted for collection for the credit of a customer’s account (see the discussion above in this regard).

Since the banks’ resolution obviously does not reflect an established practice, it cannot form part of the relationship between a bank and his customer (account holder) on the basis of banking usage (see Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd 1973 (2) SA 642 (C) 645). However, banks can avoid breach of their contracts of mandate with their customers (viz to collect cheques for their customers) by giving each customer reasonable notice of the introduction of the new practice. Since a bank can terminate the entire contract with its customers by giving reasonable notice (see Volkskas Bpk v van Aswegen 1961 (1) SA 493 (A) 459-596; Cowen (1966) 4ed 481; Malan and De Beer para 328), it can also amend the contract on reasonable notice. The customer who does not wish to accept the amendment, can then terminate the contract. However, it will be of no avail to transfer his account to another bank, since the resolution is applied by all banks. Although the resolution is concerned primarily with the relationship between a customer and his bank, in its capacity as a collecting bank, it is also of secondary interest as regards the relationship between a customer and his drawee bank. According to the resolution, an uncrossed non-transferable cheque which is fortuitously accepted for collection, will be returned by the drawee bank bearing the following note: “unable to identify payee”.

\textsuperscript{170}Transverse parallel lines; snatches from words such as ‘and Co’; verbless expressions such as ‘a/c payee only’; and an inscription such as ‘not negotiable’ which has one meaning in relation to a bill of exchange and another meaning in relation to a crossed cheque, although a cheque is statutorily defined by a reference to a bill, and both are classified as negotiable instruments” (at 501-502).
of law may form the foundation of contractual terms. Established and developing bank usage is a very important source of the law of cheques in particular and banking law in general. The Amendment Bill, instead of restoring the balance as it professes to do,\textsuperscript{171} is even more biased in favour of the commercial banks.\textsuperscript{172}

7 Liability of the drawee and collecting banks

7.1 Whether a bank paying a non-transferable cheque to or collecting it for the wrong person incurs delictual liability to the true owner depends on whether the drawee or collecting bank can be delictually liable to the true owner of any cheque that has been stolen or lost.\textsuperscript{173} Although a cheque is primarily an instrument of payment which is often not negotiated, it is nevertheless in principle a negotiable and transferable instrument. The drawer or the owner may suffer loss if a cheque is stolen or lost. For example, a thief can obtain payment of a cheque by devious means and then disappear without trace. A thief can also "negotiate" (through a forged indorsement) or sell a cheque to another person, who then obtains payment of the cheque. Theft or loss of a cheque can also cause the drawer or the true owner to lose his proprietary

\textsuperscript{171}See the objectives set out in clause 2 of the Amendment Bill.


\textsuperscript{173} See Malan and De Beer para 354.
rights to, and his personal rights arising from the instrument, since it is possible for a subsequent possessor to become a holder in due course.

Who the true owner of a cheque is, is a matter that must be determined according to the ordinary principles applicable to movable corporeals. The true owner is not defined in the Act but, it is submitted, is usually the person in possession of the cheque and out of whose possession it was stolen or lost.

In order to found the liability of the possessor of a stolen or lost cheque to the owner, the cheque is in our law, seen mainly as a movable corporeal. In common law the owner of stolen property has no action for damages against a bona fide possessor of his property. The owner can only claim his property by using the rei vindicatio. In Leal and Company v Williams Innes CJ stated:

"The remedy .... our law gives to the owner of stolen property is this: he may follow his property and vindicate it anywhere, provided it is still in esse. And he may bring an action 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 has received it with knowledge of the tainted title" (our emphasis).  

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175 See also Sharrock and Kidd 167.

176 1906 TS 556.

177 558-559. See also John Bell and Co Ltd v Esselen 1954 (1) SA 147 (A) 153; Van der Westhuizen v McDonald and Mundel 1907 TS 933 940-943; Campbell v Blue Line Association Ltd 1918 TPD 309 311-312; Morabane v Bateman 1928 AD 460 465-466; Kahn v Volschenk 1986 (3) SA 84 (A); Secfin Bank Ltd v Mercantile Bank Ltd 1993 (2) SA 34 (W).
According to this principle, the owner of stolen property cannot claim its value from a *bona fide* intermediary by means of the *actio ad exhibendum*.\(^\text{178}\) He can only claim his property from the possessor using the *rei vindicatio*. As will appear later\(^\text{179}\) mere good faith no longer offers the collecting bank, through whose hands the stolen cheque passed any protection. If it can be proved that the collecting bank was *negligent*, it will indeed be liable to the true owner for the damages the latter suffered.

The scope of these remedies is however, very limited. This is also the case with the action based on unjustified enrichment against a possessor who has either sold the lost or stolen cheque or obtained payment of it.\(^\text{180}\)

The same applies to drawee or collecting banks that came to possess lost or stolen cheques. The traditional view is that a drawee or collecting bank is not liable in delict for negligence to the true owner of a lost or stolen cheque, but is liable only for *mala fides*.\(^\text{181}\)

7.2 In English law the collecting and drawee banks can incur liability for conversion to the true owner of a stolen or lost cheque. Liability for conversion is not part of South African law.\(^\text{182}\) Whether in South African law the collecting or drawee

\(^{178}\) The *actio ad exhibendum* is a delictual remedy in modern law (*Sorvaag v Petterson and others* 1954 (3) SA 636 (C)). See also Cowen *The Liability of a Bank in the Computer Age in respect of a Stolen Cheque* 1981 *TSAR* 193-194ff.

\(^{179}\) See the discussion below.

\(^{180}\) See *Van Der Westhuizen v McDonald and Mundel* 1907 TS 933. A person who acquires a bill as holder in good faith and for value usually becomes a *holder in due course* entitled to the instrument and its proceeds. See further Malan and Pretorius para 114; Sinclair *The rights of the True Owner of a Stolen Bill* (1972) 89 *SALJ* 414.

\(^{181}\) See *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 251 280-283 where it was said that the *bona fide* possessor of stolen property is not liable to the true owner for the value of the property.

\(^{182}\) See Malan and De Beer para 351.
bank can incur delictual liability for negligence\textsuperscript{183} to the owner of a stolen cheque depends, \textit{inter alia}, on whether it owes him a \textit{duty of care}. A duty of care is the outcome of a judicial value judgement embracing all relevant facts, including matters of policy.\textsuperscript{184} South African courts have held that neither the drawee nor the collecting bank owes such a duty of care.\textsuperscript{185}

7.3 Collecting Banker is not defined in the Act, but several sections refer to the banks in that particular capacity.\textsuperscript{186} The collecting bank plays an important role in the payment process of crossed cheques, since by virtue of the crossing the drawee bank must pay the cheque to a bank.\textsuperscript{187} The collecting bank acts as an agent and performs its duties as mandatary.\textsuperscript{188} The process of the collection of a cheque on behalf of a customer involves the conveyance of the instrument by the collecting bank to the bank on which it is drawn (the drawee bank), the receipt of the money from the drawee bank and the crediting of the amount received to the customer’s account. This is usually done through a \textit{clearing house}. A \textit{clearing house} is the

\begin{footnotesize}
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\item \textsuperscript{183} Generally, negligence will be found if-
\begin{enumerate}
\item a \textit{diligens paterfamilias} in the position of the defendant - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps (per Holmes JA in \textit{Kruger v Koetzee} 1966 (2) SA 428 (A) 430 E-F).
\end{enumerate}

When liability of a professional is in question, the standard of care against which his conduct has to be measured is that which may be expected of a person engaged in that profession (\textit{Van Wyk v Lewis} 1924 AD 438 444).

\item \textsuperscript{184} \textit{Administrateur Natal v Trust Bank van Afrika Bpk} 1979 (3) SA 824 (A) 833-834. See Malan 1979 \textit{De Jure} 31 32-34; Van Der Walt 1979 \textit{TSAR} 145.

\item \textsuperscript{185} See \textit{Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd} 1928 WLD 251; \textit{Standard Bank of South Africa Ltd v Estate Van Rhyn} 1925 AD 266; \textit{Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd} 1977 (3) SA 188 (W). See also Cowen 1981 \textit{TSAR} 193.

\item \textsuperscript{186} ss76(5); 84; 78(2), (3) and (4); 79; 81(2); and 81(5).

\item \textsuperscript{187} s 78.

\item \textsuperscript{188} \textit{Capital and Counties Bank Ltd v Gordon} 1903 AC 240 (HL) 245.
\end{itemize}
\end{footnotesize}
place where representatives of various member banks meet to exchange cheques drawn on each other and to make or receive payment of balances and so to clear the transactions of the day on which the settlement is made.\textsuperscript{189}

The recognition in South African law of the delictual liability of a collecting bank to the owner of a stolen or lost cheque was quite controversial. For years the South African courts dealt with the collecting bank in exactly the same way as they did with any person through whose hands stolen property had passed. Consequently, they consistently held that the collecting bank was liable only if \textit{intent} on the part of such bank could be proved (ie if it was \textit{mala fide}). Negligence was not sufficient.\textsuperscript{190} On the other hand, academic writers were as consistently in favour of liability for negligence.\textsuperscript{191}

In contrast to the South African courts the Zimbabwean courts consistently held that the collecting bank was in fact liable for negligence. In \textit{Rhostar (Pvt) Ltd v Netherlands Bank of

\textsuperscript{189} See Malan and De Beer para 311. See also Cowen 1981 \textit{TSAR} 193.

\textsuperscript{190} See \textit{Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd} 1928 WLD 251; \textit{Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd} 1977 (3) SA 188 (W); \textit{Worcester Advice Office v First National Bank of Southern Africa Ltd} 1990 (4) SA 811 (C) (discussed by Nagel in (1991) 24 \textit{De Jure} 178 and by Malan and Pretorius in (1991) 54 \textit{THRHR} 705); \textit{Bonitas Medical Aid Fund v Volkskas Bank Ltd and another} 1992 (2) SA 42 (W). The only exception here was \textit{Bonitas Medical Aid Fund v Volkskas Bank Ltd and another} 1991 (2) SA 231 (W), a judgement which is difficult to understand. See the discussion by Oelofse in 1991 \textit{SA Merc LJ} 364.

\textsuperscript{191} See eg De Beer \textit{Die Aanspreeklikheid van die Invorderingsbankier teenoor die Ware Eienaar van 'n Tjek} (1977) 40 \textit{THRHR} 360; Tager \textit{The Collecting Banker's Liability to the True Owner of a Lost or Stolen Cheque} 1979 \textit{SALJ} 372; Malan \textit{Professional Responsibility and the Payment and Collection of Cheques} (1978) 11 \textit{De Jure} 326 and (1979) 12 \textit{De Jure} 31 (also see the supplement in 1979 \textit{De Jure} 363); Pretorius \textit{Professionele Aanspreeklikheid, die Invorderingsbank en Regshervorming} (1987) 9 \textit{Modern Business Law} 56. The exception here was Cowen (\textit{The Liability of a Bank in the Computer Age in respect of a Stolen Cheque} 1981 \textit{TSAR} 193).
Rhodesia Ltd$^{192}$ and Philsham Investments (Pvt) Ltd v Beverley Building Society and another $^{193}$ the court held the collecting bank liable. In Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd, $^{194}$ the supreme court of Zimbabwe confirmed the view taken in the Rhostar and Philsham cases. According to the court, it is incorrect to treat a collecting bank in exactly the same way as a bona fide purchaser of stolen property, who is liable only for intentional unlawful disposition of such property. In his judgement Gubbay JA stated, *inter alia*, the following:

“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 is being collected on behalf of the person entitled to receive payment; the paying banker has no knowledge of that... If the cheque indicates that his client is not so entitled, the collecting banker is able to safeguard the drawer from loss by acting as a buffer. He has the machinery at his disposal to do so. He can allow a reasonable period of time to elapse before paying out to his client the funds represented by the cheque, thereby permitting either enquiries to be made as to the depositor’s title, or the drawer an adequate opportunity to instruct the drawee bank to stop payment on the cheque. By exercising reasonable diligence in this regard the collecting banker is able to minimise, if not neutralise, the relatively high risk affecting a cheque in the sense that payment can be

$^{192}$ 1972 (2) SA 703 (R). The case is discussed by Sinclair in 1973 *SALJ* 369.

$^{193}$ 1977 (2) SA 546 (R).

$^{194}$ 1985 (4) SA 553 (ZSC).
obtained by an unlawful possessor with comparative ease."195

With regard to South African case law, the matter eventually came before the Appellate Division in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd.*196 The Appellate Division decided on exception that a collecting bank is indeed liable for damages to the true owner, under the extended *lex Aquilia*,197 if such bank negligently collects the amount of a cheque for the wrong person.198 This judgement therefore reflects the current legal position.199

195 at 565F-I. This judgement was also followed in *Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1991 (4) SA 82 (ZSC). An interesting aspect of this decision is that the court made a finding of contributory negligence on the part of the plaintiff (the true owner) and consequently awarded a reduced amount of damages.

196 1992 (1) SA 783(A). This judgement is discussed in 1992 *THRHR* 314 by Nagel and Greeff, in (1992) 21 *Modern Business Law* 211 by Visser and in 1992 *Stellenbosch LR* 115 by Hugo. Hugo (*The Negligent Collecting Bank: Recent Decisions Introduce a New Era* (1992) 3 *Stellenbosch LR* 115 129-130) is of the view that the collecting bank should also be held liable for negligent collection, in spite of the fact that it became a holder in due course of the cheque. However, this creates an unacceptable anomaly. On the one hand, the bank has an indisputable right derived from the fact that it is a holder in due course. On the other, it is held liable for negligent collection. It is only logical that the fact that the bank became a holder in due course would eliminate any possible liability for negligence.

197 Provided all the requirements of Aquilian liability have been met. They are: the act, unlawfulness, fault, causation and damage. See Neethling *et al* *Law of Delict* (1990) 21ff.

198 See 797C-E of the judgement for the elements which the plaintiff has to prove. They are: (a) that the collecting bank had received payment of the cheque on behalf of someone who had not been entitled to payment; (b) that in receiving such payment the collecting bank had acted unlawfully and negligently; (c) that the conduct of the collecting bank had caused the owner to sustain loss, and (d) that the damage claimed represented proper compensation for such loss.

199 In the meantime, the *Indac Electronics* case has been applied in *Volkskas* Continued on next page...
In *Indac Electronics* the plaintiff was the true owner of a crossed order cheque marked "not negotiable" and made payable to Indac Electronics. The defendant collected the cheque on behalf of a certain Le Roux who was not entitled to receive payment. There was no indorsement on the back of the cheque. The plaintiff instituted action in the Transvaal Provincial Division alleging that the defendant had, in breach of duty, negligently caused loss to the plaintiff. The defendant excepted on the basis that in the absence of *actual knowledge* on its part, it was under *no legal duty* to avoid dealing negligently with a cheque. The exception was upheld and the plaintiff appealed.\(^{200}\)

One of the elements of Aquilian liability that must be met is *unlawfulness*.\(^{201}\) The court pointed out that unlawfulness depends on whether the defendant was under a duty not to act negligently. This duty concept can be regarded as "a device of

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\(^{200}\) In upholding the exception, Eloff DJP considered himself bound by the earlier Witwatersrand Local Division decisions in *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 251 and *Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd* 1977 (3) SA 188 (W). In both these cases it was held that in the absence of *actual knowledge* of its customer's defective title there *existed no legal duty* on the part of a collecting bank to avoid dealing negligently with a lost or stolen cheque. See Pretorius 1990 *Annual Survey* 319ff for a discussion of the historical development leading up to the decision in *Indac Electronics*.

\(^{201}\) The exception in *Indac Electronics* was taken solely on the grounds that the facts alleged by the plaintiff did not support a legal duty on the part of the defendant not to act negligently, and therefore that the defendant's conduct was not unlawful (797E-F).
judicial control over the area of actionable negligence on grounds of policy."\textsuperscript{202} It involves a "value judgement that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference."\textsuperscript{203} The considerations the court regarded as important in establishing whether a collecting bank owes a \textit{duty of care} to the owner of a lost or stolen cheque are:

(a) There would be no question of indeterminate or limitless liability, as is sometimes feared in cases involving pure economic loss, since the potential claimants can only be the true owner of the cheque, and he is identifiable on the face of the cheque. 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.\textsuperscript{204}

(b) The true owner faces an ever-present risk when using a cheque since payment can be obtained by an unlawful possessor with relative ease. 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

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  \item \textsuperscript{202} 797H.
  \item \textsuperscript{203} 797I.
  \item \textsuperscript{204} 798D-E. See also \textit{Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pty) Ltd} 1985 (4) SA 553 (ZSC) where the court remarked that "in an action based on a cheque in circumstances such as the present (ie instances where the potential delictual liability of the collecting bank may arise) the potential plaintiffs are limited to two and are easily predictable, namely the drawer of the cheque or the payee (or persons holding title under him); indeterminate liability for economic loss does not arise since the loss will be restricted to the amount \textit{ex facie} the cheque itself; and there is and will only be a single loss with title, if any, likelihood of a multiplicity of actions. I find this a cogent and acceptable proposition, which has earned the approval of academic writers". 564G-I. See further Malan \textit{Professional Responsibility and the Payment and Collection of Cheques} (1978) 11 \textit{De Jure} 326, (1979) 12 \textit{De Jure} 31 38; \textit{First National Bank of SA Ltd v Quality Tyres (Pty) Ltd} 1995 (3) SA 556 (A) 568ff.
\end{itemize}
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paying the cheque which his customer handed to him for collection.\textsuperscript{205}

c) Taking into account the skill of the collecting banker in his field and his understanding of instructions written on the cheque the court regarded him as being able to reduce or avoid loss to the true owner by exercising reasonable care in collecting cheques. The court said that 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.\textsuperscript{206}

d) The court pointed out that the collecting banker is 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 collecting banker is fully aware of this position and therefore 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.\textsuperscript{207}

e) In the absence of an action against the collecting banker, the true owner of a cheque is without recourse where the cheque has been collected for the wrong person. But the collecting banker has recourse against his customer. Should the customer be unable to pay, it is “more appropriate to visit liability on the banker who chose to accept his customer’s business than on an innocent true owner.”\textsuperscript{208}

\textsuperscript{205} 7981-799B.
\textsuperscript{206} 799B-E.
\textsuperscript{207} 799E-G.
\textsuperscript{208} 799H-I. See also Pretorius Professionele Aanspreeklikheid, die Invorderingsbank en Regshervorming (1987) 9 Modern Business Law 56 64 fn 72.
The court also dealt with the argument that the recognition of a legal duty on the part of the collecting bank will slow down banking and significantly increase the cost thereof. This, according to the court, can only be evaluated in the light of such evidence as may be led at trial and relates "not only to the issue of unlawfulness, but also that of the standard of care, an entirely distinct issue ...". 209

Finally, the contention that a change of law in this regard is more properly a matter for Parliament was dismissed by the court. It stated: "The issue is one of law. The policy considerations are of a nature which is not infrequently the concern of Courts of law." 210

Taking into account all the above factors 211 the court considered that they operated "in favour of recognising the existence of a legal duty on the part of the 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." 212

209 800I.
210 801D.
212 801A-B. It may be pointed out here that the facts in Indac Electronics indicate prima facie negligence. The bank accepted an order cheque which contained no indorsement for the account of someone other than the payee of the cheque. The cheque in question was never paid in due course, since the respondent did not pay to a holder (the cheque was never indorsed by the appellant). Section 58 could not be used to protect the respondent since there was no attempt to forge the appellant’s signature. Continued on next page...
The next case in which the principles set out in *Indac Electronics*\(^{213}\) were applied is *Volkskas Bank Bpk v Bonitas Medical Aid Fund.*\(^{214}\) A cheque of R2 million was drawn on Nedbank by Bonitas in favour of Volkskas Bank (the appellant). The cheque was crossed. The words "not transferable" appeared between the two lines of the crossing. The printed word "bearer" was deleted. The cheque was therefore *non-transferable.*\(^{215}\) The cheque was presented to the appellant for collection by Eurotrust, a customer of the

Furthermore, the payee’s account was not credited and consequently *s 83* could also not be used to protect the respondent. The respondent here had acted both as collecting bank and as drawer bank. If it is accepted that the respondent was negligent (which was *prima facie* the case), *s 79* could also not be used to protect the respondent as drawer bank. The negligence of the respondent at its Wonderboom South branch could be ascribed to the respondent as a whole (see the remarks in *Volkskas Bank Bpk v Bankorp Bpk (h-a Trust Bank) en ’n ander* 1991 (3) SA 605 (A) at 611E-F, and those in *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) SA 386 (A) at 400B-C. Also see Malan and Pretorius (1996) 8 *SA Merc LJ* 282 at 286-287; Oelofse (1991) 3 *SA Merc LJ* 364 379ff). Therefore, the respondent's payment never discharged the cheque and the respondent remained contractually liable to the appellant, both on the underlying obligation and as drawer of the cheque. In these circumstances the appellant did not suffer damages as result of the payment made to Le Roux. The appellant’s correct remedy was therefore a contractual claim based on the cheque or on the underlying obligation.

As the law stands at the moment, it would seem that the true owner may elect either to rely on the cheque itself or on the underlying obligation, or to disregard the requirement of damage and institute a delictual claim. See in this regard Oelofse *Die Posisie van die Trekker en die Betrokkene Bank na Onreëlmatige Betaling van ’n Tjek* (1983) 5 *Modern Business Law* 12 at 19-20 for criticism of the latter possibility.

\(^{213}\) *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).

\(^{214}\) 1993 (3) SA 779 (A) 785. The case is discussed by Pretorius in 1993 *Annual Survey* 484-485. It is mentioned (fn 199) that although the matter in *Bonitas* did go to trial *no evidence* was led to rebut the *prima facie* indication of the existence of a legal duty on the part of the collecting banker to prevent loss by negligently dealing with the cheque in question (See the remarks of Van Heerden JA at 790D-E in this regard). This, according to Prof Pretorius (1993 *Annual Survey* 485), might be explained by the fact that the trial ended before the decision in *Indac Electronics.*

\(^{215}\) *s 6(5).*
appellant. The appellant presented the cheque to Nedbank, received payment, and credited the account of Eurotrust. Shortly thereafter Eurotrust was liquidated. The respondent instituted an action for damages in a Local Division against the appellant, claiming R2 million, the amount of the cheque, plus interest. The respondent alleged that by reason of the appellant’s intentional or negligent conduct consisting of a failure to appropriate the amount of the cheque, in favour only of the appellant in accordance with the payment instruction on the cheque; that in conflict with the instruction the account of Eurotrust had been credited, and that because of the insolvency of the latter the amount could not be recovered from Eurotrust. The action against the appellant succeeded.

On appeal it was, inter alia, contended for the appellant (a) that the appellant’s officials had not acted negligently and further that they had not acted negligently vis-a-vis the respondent as a reasonable bank official would not have foreseen prejudice to the respondent, and (b), relying on s 79, that the negligent failure of the appellant’s officials had not prejudiced the respondent because the latter was still in the position in which it would have been had the appellant collected the cheque for its own account.

As to (a) above, the court found that the appellant’s duty of care required that the collection of the cheque had to be done strictly in accordance with the payment instruction on the cheque, and that had not occurred because the bank’s officials (a teller and an official charged with checking) had simply not noticed that the cheque was payable to the appellant only, or if they had noticed it, they had ignored the restrictive crossing. There was little doubt that the bank’s officials had indeed been negligent: the crossing and the name of the payee had been clearly inscribed on the cheque; any reasonable bank official would have noticed them, and there could be no excuse for the payment instruction having been ignored.\footnote{791H-792A.}
was also found that any reasonable bank official would have foreseen that, had the cheque been collected for the account of the appellant, the respondent would not have suffered damages, but that the respondent could be prejudiced if in the collection process the payment instruction was not obeyed.\textsuperscript{217}

As to (b), the court found that although the appellant had been placed in possession of the cheque, the acquisition of possession was not by the payee \textit{qua} payee as required by \textit{s} 79. Further, that the cheque had been delivered to the appellant by Eurotrust which had represented that it was entitled to the proceeds of the cheque. Therefore, Eurotrust had never contemplated delivering the cheque to the appellant as payee; the appellant had also not contemplated taking possession of and dealing with the cheque as payee.\textsuperscript{218} The appeal was dismissed.

The liability of a collecting bank as a result of a negligent collection for an unlawful possessor again received attention in \textit{Fedgen Insurance Ltd v Bankorp Ltd}.\textsuperscript{219} Fedgen owed an amount of approximately R26 000 to a company named RH Johnson Crane Hire (Pty) Ltd ("Johnson"). Fedgen drew a cheque for this amount in favour of "RH Johnson Crane Hire (Pty) Ltd". It was therefore an order cheque.\textsuperscript{220} The cheque was posted to Johnson's broker, but it did not reach its destination and was presumably stolen. The cheque was deposited in an account at Bankorp and payment was received from the drawee bank. When the cheque was deposited, it contained a forged indorsement. The indorsement consisted of a rubber stamp with the name "RH Johnson Crane Hire" and an address. Since Johnson had not authorised the posting of the cheque, Fedgen remained the true owner of the cheque. Fedgen then instituted a claim for damages based on negligent

\textsuperscript{217} 792-793.
\textsuperscript{218} 793-794.
\textsuperscript{219} 1994 (2) SA 399 (W).
\textsuperscript{220} \textit{s} 6(3).
collection against Bankorp. It was not disputed that the drawee bank's payment had discharged the cheque. In this regard s 83(1) was relied on, but since the indorsement was a forgery, it seems that it was rather s 58 or 79 that applied.

The judgement in *Fedgen* accepted the existence of a duty of care\(^\text{221}\) and was more concerned with the question of negligence on the part of the collecting bank. The judgement does not add much to what was already said in the *Indac Electronics* case.\(^\text{222}\) Nevertheless, the *Fedgen* judgement brings more clarity on the degree of care expected of a collecting bank. As one could expect, *Fedgen* relied on the fact that the indorsement did not correspond exactly with the name of the payee on the cheque. As far as that is concerned, it was rightly held\(^\text{223}\) that the difference between the name of the payee and the indorsement was not so great that it should have aroused any suspicion about the validity of the indorsement. The claim was accordingly dismissed.

Another case concerning the liability of the collecting bank, is that of *Holscher v ABSA Bank en 'n ander*.\(^\text{224}\) The judgement is of interest because it clearly indicates that even after

\(^{221}\) At 411 of the judgement Van Zyl J observed: "If it is accepted, as I believe it should be, that a legal duty or duty of care exists in the present instance (such in fact being common cause between the parties), and if the elements of causation and loss or damage are not in dispute, it follows that the only remaining issue is whether or not the defendant was negligent. This would be established if it can be proved that the defendant, as collecting banker, acted in breach of his legal duty aforesaid by not exercising reasonable care .... it is clear that this does not mean that a banker must examine every cheque minutely to determine whether the customer has title thereto. But if, in the course of the transaction, something unusual, untoward and anomalous should attract his attention or arouse his suspicion, it may reasonably be expected of him to institute an enquiry and to take such steps as may be required to prevent loss or damage. This is the standard of care which one would expect of ... the *bonus argentarius*."

\(^{222}\) *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).

\(^{223}\) 411J-412.

\(^{224}\) 1994 (2) SA 667(T).
delivery of a cheque by the drawer, the payee thereof is not necessarily the true owner of the cheque. Secondly, the court held that the claim against the collecting bank had to be reduced by the amount which could have been recovered from the eventual recipient of the money. As far as this aspect is concerned, in our view the judgement is clearly wrong. The court’s approach in this regard has never been argued or accepted in the earlier cases.

The salient facts in the Holscher case were the following: On his retirement, Holscher was entitled to an amount of pension money. He wished to invest the full amount with the well known insurer Old Mutual. On Holscher’s instructions the managing director of D, a company acting as Holscher’s broker, requested the pension fund to furnish a cheque for the pension money made payable to Old Mutual. The pension fund drew a cheque for the amount due on the Standard Bank, crossed it and marked it “not transferable”. The cheque was made payable to Old Mutual, was sent to D and received on behalf of D by H. H deposited the cheque in D’s account at ABSA Bank. ABSA bank collected the amount of the cheque from Standard Bank and credited D’s account with it. Shortly after the cheque was received by D and deposited in its account, Holscher telephoned H for advise on the type of investment that should be made with Old Mutual. To his astonishment H told him that he (H) had deposited the money in the account of his company (D), that D was insolvent and that Holscher could not be repaid. D was in fact wound up thereafter. Holscher then decided to sue ABSA bank for damages in the amount of the cheque. Although Old Mutual was originally cited as second defendant, no legal relief was sought against it. It is clear that Old Mutual had no liability at all towards Holscher. ABSA Bank closed its case without tendering any explanation why a non-transferable cheque had

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225 672H-673C.
226 See Malan and Pretorius para 251 fn 85; Van der Linde The Liability of a Collecting Bank for Negligence 1995 Juta’s Business Law 10 11.
been collected for the account of someone other than the payee. Holscher never proved a case against the insolvent company, nor did he try to recover the money from H.

There were two issues at the trial:
(a) Was Holscher the true owner of the cheque, and was he entitled to claim damages from ABSA Bank?
(b) Did Holscher prove that his damage was the amount of the cheque?

As far as the first point is concerned, the court pointed out\textsuperscript{227} that the payee of a cheque is not necessarily also the true owner thereof. An example of this is the case of a cheque that is to be posted to a creditor on his instructions. It is clear that the drawer remains the true owner until the cheque is posted.\textsuperscript{228} In the instant case the cheque was delivered, but not to the payee, Old Mutual. The cheque was delivered to Holscher’s agent who did have authority to receive it on his behalf.\textsuperscript{229} Accordingly, Holscher was the true owner of the cheque when it was deposited in D’s account. The mere fact that the true owner’s identity did not appear from the cheque itself, does not mean that the collecting bank had no legal duty

\textsuperscript{227} 6721-673C.
\textsuperscript{228} See \textit{Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd} 1978 (4) SA 901 (N); \textit{Mannesmann Demang (Pty) Ltd v Romatex and another} 1988 (4) SA 383 (D); \textit{Goldfields Confectionery Bakery Ltd v Norman Adam (Pty) Ltd} 1950 (2) SA 763 (T); \textit{Dadoo and Sons Ltd v Administrator Transvaal} 1954 (2) SA 442 (T); \textit{H K Outfitters (Pty) Ltd v Legal and General Assurance Society Ltd} 1975 (1) SA 55 (T). In \textit{Barclays National Bank v Wall} 1983 (1) SA 149 (A) Blackwell JA said: “What is the law governing the position where a debtor sends a cheque to his creditor through the post and the cheque is stolen and negotiated? If the creditor has requested the debtor to post him a cheque, or to send him a cheque by post - the post office being mentioned in specific terms - then according to both English and South African authorities, the debtor is considered to have discharged his debt as soon as he deposits a valid cheque in the post .... an implied request (is) equal in it legal implications to an express one” (at 444-445).
\textsuperscript{229} See also \textit{Coetzee v ABSA Bank Bpk} 1997 (4) SA 85 (T) 90H.
towards him. The court rightly indicates\(^{230}\) that a bank knows that a cheque may belong to someone whose identity does not appear from the cheque, and that there is no reason why the bank should have a lesser duty to such a true owner. Accordingly, Holscher did have a delictual cause of action on the basis of ABSA Bank's unlawful and negligent conduct with respect to the cheque.

As far as the second point is concerned, namely whether Holscher had suffered damage in the full amount of the cheque, the court followed a line of reasoning that has apparently not been raised before. Briefly the court's reasoning can be summarised as follows: \(^{231}\) Firstly, the legal remedy against a thief himself is the recovery of what has been stolen, be it money or property. What can be claimed from the collecting bank is damages only. Secondly, ABSA Bank's conduct not only caused damage to Holscher, but it also created claims against D and H. If it appears that any of these claims has substantive value, such value must be taken into account in reduction of the damage, and therefore in reduction of the claim against the collecting bank. Since it was clear that Holscher would have received a dividend of at least R2 400 from the insolvent estate, had he proved a claim against the estate, the court gave judgement for the face value of the cheque less R2 400. Since there was no evidence whether H was solvent or insolvent, or even on the question whether he was still alive or still in the country, the mere possibility of a claim against him was left out of account.\(^{232}\)

As far as the court's finding on the second point is concerned, we respectfully disagree with the court. The court's approach does not accord with the fact that the \textit{actio ad exhibendum} is recognized in our law. This action can be used to claim damages from someone who \textit{mala fide} has got rid of someone

\(^{230}\) 673E.  
\(^{231}\) See 673G-674A.  
\(^{232}\) 675H.
else's property. The owner is not obliged to go and recover his property with a *rei vindicatio* from the eventual processor.\(^{233}\)

In any event, Holscher's claim against D and H was apart from a possible enrichment claim against D, also merely for damages. There were no specific bank notes or coins which could be identified as stolen. The mere fact that the collection of the cheque also led to the foundation of a claim against D (whether based on delict or on unjustified enrichment), does not in itself mean that Holscher had suffered less damage than the amount of the cheque. Only after Holscher had already *recovered* something from D, could the collecting bank say with justification that Holscher's damage had been reduced to the same extent.

In *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd*\(^{234}\) the liability of a collecting bank as a result of negligent collection for an unlawful possessor was again in issue. The case concerned cheques made payable to "KwaMashu Bakery Ltd only". It follows that the cheques were *non-transferable*. After the cheques had been stolen, an account was opened under the name "KwaMashu Bakery Ltd Soccer Club". The cheques were deposited in that account, and payment was obtained. The court held the collecting bank liable. The name of the account into which the cheques were deposited, differed from the name of the payee on the cheques, and simply for this reason the collecting bank was negligent.\(^{235}\) However, the importance of the judgement lies in the court's finding that already at the stage of the opening of the account, the collecting bank has to take reasonable steps to ensure that the person opening the account is indeed who he purports to be.\(^{236}\)

If the thief attempts to open an account under the exact name of the payee as it appears on the cheque, the damage can be averted only if the bank at that stage already takes reasonable

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\(^{233}\) see *Leal and Co v Williams* 1906 TS 554 at 558-559.

\(^{234}\) 1995 (1) SA 377 (D).

\(^{235}\) 397G-H.

\(^{236}\) 3951-J-396A-B.
steps to ensure that it is not a “false” account that is being opened. The KwaMashu Bakery case is also important because it establishes a duty of care on the part of a collecting bank. In the light of the evidence presented the court had to reconsider the existence of a legal duty on the part of a collecting bank to the true owner of a lost or stolen cheque to avoid causing him pure economic loss by dealing negligently with such cheque. The court concluded that “there is nothing in the evidence which has persuaded me to depart from the prima facie finding of the Appellate Division (in Indac Electronics) that there exists a duty on the part of the collecting banker. Nor has it been demonstrated that the factors taken into account by the appellate division in reaching such conclusion are unfounded or inapplicable.”237 The evidence actually weighed in favour of imposing the duty of care, for it revealed that:

(a) The public makes use of the non-transferable cheque particularly when large sums of money are involved and is aware of the value of a non-transferrable cheque. The public is in need of the protection against a possible loss which could be incurred when using this type of cheque.238

(b) The banks have, even prior to the decision in Indac Electronics,239 developed a system of checking that the proceeds of a non-transferable cheque goes to a named payee and not to someone not entitled thereto, and this impacts on the argument regarding the costs associated with checking on such cheques since it appeared from the evidence presented that these costs had already been absorbed by the defendant without difficulty.240

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237 392.
238 393. It was pointed out there that the “non-transferable cheque reflects in modern society what most people want and use a cheque for - not for negotiation between a variety of holders, but as payment to one person” (our emphasis).
239 Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A).
240 393.
(c) There was evidence that the commercial banks of South Africa adopted a resolution to the effect that non-transferable cheques may only be accepted for the credit of an account bearing the identical name to that of the payee named on the cheque. This resolution means that the banks themselves do not regard it as too onerous a duty for a collecting bank to ensure that it collects only for the named payee.\textsuperscript{241}

(d) Although there are costs involved with the existence of a duty, the court was of the opinion that they were not disproportionate to the harm which is guarded against.\textsuperscript{242} The court referred to the evidence presented on behalf of the defendant bank that the amount of R47.8 million represented a scenario where each and every non-transferable cheque had to be followed up and investigated.\textsuperscript{243} In many cases, although there may be a discrepancy between the name of the payee and the name on the deposit slip, the depositor is a well known client of the bank. Even if the cheque goes into the wrong account the designated officer knows that, because of the standing of the customer, the amount of the cheque will be

\textsuperscript{241} 393. The full text of this agreement is quoted in \textit{Bonitas Medical Aid Fund v Volkskas Bank} 1992 (2) SA 42 (W) at 46G-47A.

\textsuperscript{242} 393I.

\textsuperscript{243} The evidence presented on behalf of the defendant bank was aimed at demonstrating that because of the present same day clearing system in operation in South Africa and the bank procedure at present, and given the volume of cheques handled per day, it is not possible for a collecting bank to discharge the duty of care sought to be imposed in regard to the true owner of a cheque. It was also not possible because of the time frame available to banks to achieve same day clearance and even logistically impossible to make the number of phone calls to either the drawer or the drawee bank to inquire about irregularity of the non-transferable cheques. The defendant also presented the court with certain statistics regarding the volume of cheques handled by the banks. About 370 million cheques are presented for collection each year which represented a value of six billion Rand (388). Some 54 million of these cheques are non-transferable, representing approximately 35\% of the value of all cheques drawn (R2 billion). According to the evidence, the possible cost involved in the checking procedures for non-transferable cheques could be around R47.8 million (388).
recovered with ease.\textsuperscript{244} As to the argument that the duty would impact adversely on the same day clearance system, the court said that there is, in principle, no reason why there should not be an extended clearance period for problem cheques.\textsuperscript{245}

(e) Telephonic enquiries to the drawee bank could be avoided by some minor adjustments to the computer software to give the bank official, who is making further enquiries on the cheque, access to the full name of the depositor.\textsuperscript{246}

(f) The court noted that the “one argument which is unanswerable is that if there is no duty of care owned by a collecting banker, the banks need not bother to even look at cheques which are deposited for collection to ascertain whether the depositor is the named payee”.\textsuperscript{247} It continued as follows:

“(I)t offends against one’s sense of fairness and reasonableness for bankers who by statute are the only institutions who are entitled to take and collect negotiable instruments and are regarded by society as professional persons and institutions competent in dealing with money matters to on the one hand, procure custom by inviting the public to bank with them and representing that they will collect cheques on behalf of their customers and on the other hand saying ‘there is a risk that when we collect a cheque it may not be for the true owner but although we are aware of this risk it is going to cost us too much to guard against it and therefore we are going to take no steps to protect the true owner.’... (I)t lies ill in the mouth of the person who does an act which creates a certain risk to aver that because guarding against the risk is very expensive it is therefore not liable. The absurdity of such a proposition

\textsuperscript{244} 393-394.
\textsuperscript{245} 395.
\textsuperscript{246} 394.
\textsuperscript{247} 394.
appears from its logical result being that, the more risky and the more dangerous a venture undertaken by a person who does not have to undertake that venture and more it would cost to safeguard against such a risk materialising, the less likely he is to be held liable, because of the cost being too high.\textsuperscript{248}

Because of the above considerations the court was satisfied that there should be a legal duty on the part of the collecting bank to the true owner of the lost or stolen cheque to avoid causing him loss by negligently collecting the amount of the cheque for the wrong person.\textsuperscript{249} As far as the standard of care was concerned the court suggested that:

(i) A reasonable banker must not only satisfy himself of the identity of a new client but also gather sufficient information regarding such a client to enable him to establish whether the person is who he purports to be.\textsuperscript{250}

(ii) The teller must identify a \textit{non-transferable} cheque as such and treat it accordingly. Having regard to the volume of cheques, cash and various transactions with which the teller has to deal, it may be worth considering the introduction of a special \textit{non-transferable} cheque that would be distinguishable from all other cheques.\textsuperscript{251} This option was in fact considered at a meeting of collecting bankers and was acceptable to all banks save one. Because these cheques would be easily identifiable, they could be removed from the ordinary system and put on a separate two-or-three day clearance system.\textsuperscript{252}

\textsuperscript{248} 394-395.
\textsuperscript{249} This conclusion vindicates the submission made by Malan and Pretorius (\textit{Negligence and the Collecting Bank: Liability at Last?} (1993) \textit{5 SA Merc LJ} 206 212) that “it is unlikely that a collecting bank would be able to rebut the \textit{prima facie} legal duty to prevent loss by negligently dealing with the cheque.”
\textsuperscript{250} 395J-396A.
\textsuperscript{251} 396D.
\textsuperscript{252} 396E-F, 397A.
As to the last question before the court, namely, what can reasonably be expected of a bank, in the exercise of reasonable care, once a non-transferable cheque has been identified and passed through to the designated officer, Combrinck J held that there is an obvious duty on the designated officer to check whether the name of the payee accords with that of the depositor on the deposit slip. At a fairly minimal cost the computer can be programmed in order to give access to the full name of the account holder.253

Although one cannot quarrel with the court’s treatment of the steps which can be expected of a collecting bank, like Indac Electronics,254 this was also a case where the cheques were deposited at a branch of the drawee bank itself. Accordingly, the remarks made above,255 with respect to the Indac Electronics case, also apply to the KwaMashu Bakery case.256 Malan and Pretorius257 submit that after the KwaMashu Bakery case the unlawfulness issue must be regarded as being settled.258

Another case on the liability of a collecting bank, is that of Coetzee v ABSA Bank Bpk.259 The appellant (Mr Coetzee) and his ex-wife (Mrs Coetzee) operated separate, current bank accounts at the Arcadia branch of the respondent bank. The Arcadia branch was in possession of specimen signatures of the appellant and Mrs Coetzee. The Arcadia branch was aware that the appellant and Mrs Coetzee were divorced. The

253 397C-E.
254 Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A).
255 fn 212.
257 para 246.
258 See also Sher The Liability of a Collecting Bank towards the True Owner of a Cheque (1995) 3 Juta’s Business Law 97 at 100.
259 1997 (4) SA 85 (T).
appellant was the payee of a cheque for R18 000 drawn by Diners Club on Standard Bank, with the instruction ‘pay to the order of Mr Coetzee’. It was therefore an order cheque. The cheque was crossed and marked ‘not negotiable, a/c payee only’. As such, the cheque was transferable. The cheque was presented by an unknown person at the Arcadia branch of the respondent as collecting bank for collection for the credit of Mrs Coetzee’s account. On the reverse side the cheque had a signature purporting to be the indorsement of the appellant, but which in fact was not the appellant’s. The cheque was collected by the Arcadia branch and credited Mrs Coetzee’s account with the amount of the cheque. It was common cause that Mrs Coetzee had an account with Diners Club and that she had the right to use the account. Mrs Coetzee had a Diners Club card. The card was in the name of the appellant who was responsible for the account. The appellant had instituted in a magistrate’s court an action for damages against the respondent as collecting bank. The action was dismissed by the court in terms of s 58. Mrs Coetzee’s estate was subsequently declared insolvent. The respondent alledged, inter alia, (a) that it had not acted negligently, and (b) that the appellant was not the true owner of the cheque.

On appeal, the finding of the magistrate’s court that s 58 applied in casu was rejected. Section 58 protects the drawee bank in the case of forged or unauthorised indorsements, and not the collecting bank. The respondent, being the collecting bank, could therefore not rely on the provisions of s 58. The court stated that the case before it was based on the

260 s 6 (3).
261 Standard Bank of SA Ltd. v Sham Magazine Centre 1977 (1) SA 484 (A) 503.
262 89F.
263 89I.
principles explained in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd.*\(^{264}\)

As to the respondent's first allegation, the court held that there was no evidence that the teller at the Arcadia branch of the respondent, or any other official in that branch, took any steps to determine whether the signature on the reverse side of the cheque was indeed the appellant's, or at all to check the indorsement of the cheque.\(^{265}\) The court referred to the principle that it is *prima facie* negligence to collect the amount of a cheque on behalf of a person not entitled to it. Here the court referred with approval to *Holscher v ABSA Bank en 'n ander* \(^{266}\) and *Volkskas Bank Bpk v Bonitas Medical Aid Fund.*\(^{267}\)

It was held further that although the crossing of the cheque did not affect its transferability and the cheque was clearly transferable, the crossing did have the effect of an instruction by the drawer to the collecting bank to collect the amount of the cheque for the account of the payee, the appellant. The crossing served as a warning to the collecting bank to exercise caution in respect of payment to the correct person, the holder.\(^{268}\) This warning included the need, if the payee was no longer the holder *ex facie* the cheque, to take reasonable steps to determine whether the alleged holder was indeed the true holder of the cheque.\(^{269}\) The court held that the respondent failed to verify the indorsement and no reasons were given as

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\(^{264}\)1992 (1) SA 783 (A) at 801 where the Appellate Division recognised a legal duty on the part of the collecting bank to the true owner of a lost or stolen cheque to avoid causing him pure economic loss by negligently dealing with such a cheque.

\(^{265}\)891 -90.

\(^{266}\)1994 (2) SA 667 (T) 672E.

\(^{267}\)1993 (3) SA 779 (A) 791H-I.

\(^{268}\)90D-E.

\(^{269}\)90D-E.
to why the indorsement had not been checked against the specimen signature. Accordingly, the respondent was negligent. 270

As to the respondent’s second allegation, the court held that it had to be inferred from the facts that Mrs Coetzee either collected the cheque or received it through the post. Mrs Coetzee was the authorised agent in respect of the Diners Club account and, in receiving the cheque she received it as the agent of the appellant, even though she had the intention of appropriating the cheque for herself. The appellant was therefore the true owner of the cheque. 271

7.4 When a plaintiff wishes to claim damages due to negligent collection for an unlawful possessor, he has to prove that he was the true owner of the cheque concerned. 272 In First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd, 273 the basic question on appeal was whether the respondent (Quality Tyres) was in fact the true owner of the cheque concerned. It appears that an employee of the respondent, fraudulently persuaded the drawer to deposit the cheque in a trust account, which was kept with the appellant. As a result of the fraud, the drawer was under the impression that the account was the respondent’s account. Since the drawer of a cheque is obviously the initial true owner thereof until he delivers it to someone else, the question was whether the drawer had ever delivered the cheque to the respondent. The answer to this was no. The employee concerned clearly never had the intention to acquire ownership of the cheque on behalf

270 90F.
271 90H. See Schulze Last Month’s Law Reports 1997 De Rebus 741.
272 See Fedgen Insurance Ltd v Bankorp Ltd 1994 (2) SA 399 (W); Holscher v ABSA Bank 1994 (2) SA 667 (T); Coetzee v ABSA Bank Bpk 1997 (4) SA 85 (T); Volkskas Bank Bpk v Bonitas Medical Aid Fund 1993 (3) SA 779 (A).
of the respondent. Moreover, there never was any delivery of the cheque by the drawer to the respondent or to somebody who received the cheque on behalf of the respondent. The drawer simply deposited the cheque directly in an account at another bank. Accordingly, the respondent did not prove its cause of action. The drawer remained the true owner of the cheque at all material times.\textsuperscript{274} The situation was different in \textit{APA Network Consultants (Pty) Ltd v ABSA Bank Ltd.}\textsuperscript{275} In this case the payee of the cheque indorsed it to the plaintiff and delivered it to the plaintiff's authorised employee. Thereafter the employee misapplied the cheque. According to the court, the reasonable inference was that the employee did indeed have the intention to acquire ownership of the cheque on behalf of the plaintiff. An intention to steal the cheque \textit{thereafter} could therefore not prevent transfer of ownership to the plaintiff. Accordingly, the plaintiff had indeed become the true owner of the cheque.\textsuperscript{276}

7.5 We referred, \textit{inter alia}, to the Zimbabwean case of \textit{Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd},\textsuperscript{277} where the court made a finding of contributory negligence on the part of the plaintiff (true owner), and consequently awarded a reduced amount of damages. That follows from the principle of apportionment of delictual damages in the case of contributory fault on the part of the plaintiff, which in South Africa is regulated by the Apportionment of Damages Act.\textsuperscript{278}

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\textsuperscript{274} 568.
\textsuperscript{275} 1996 (1) SA 1159 (W).
\textsuperscript{276} 1167.
\textsuperscript{277} 1991 (4) SA 82 (ZSC). In this case the court held that the \textit{drawer's} negligence was significantly greater than that of the collecting bank: the drawer was persuaded to finance a transaction involving the sale of a tractor by a farming company called "Mixed Tums (Pvt) Ltd" to a farmer called "Gibson Nehati". Gibson Nehati did not exist, nor did Mixed Tums (Pvt) Ltd or the tractor. The court apportioned the loss so as to place 80 per cent of the responsibility on the drawer and 20 per cent on the collecting bank (93D). See also Pretorius 1991 \textit{Annual Survey} 265.
\textsuperscript{278} Act 34 of 1956.
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In an interesting South African case that of *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*, the court found that the relevant employee of the collecting bank, as well as the relevant employee of the plaintiff (true owner), had acted intentionally. It was further held that, notwithstanding their *dolus*, both had nevertheless still acted within the course and scope of their service, with the result that their fault was respectively ascribed to the collecting bank and to the plaintiff. In terms of the Apportionment of Damages Act, the amount of damages awarded was consequently reduced by half. However, the correctness of the finding that the intention of the plaintiff's employee could be ascribed to the plaintiff, is doubtful. Even if it was part of the employee's duties to take delivery of the cheque and to deposit it, it seems inequitable to ascribe his intention to misapply the cheque to the plaintiff, where the collecting bank (through its employee) knew about that intention. This follows from the general principles of vicarious liability. According to Malan and Pretorius the court was correct in ascribing the intention of the plaintiff's employee to the plaintiff. The real significance of the *Greater Johannesburg* judgement, however, lies in its confirmation of the fact that the Apportionment of Damages Act applies not only when there is negligence on both sides, but also when there is intention on both sides. If there was intention on the one side and only negligence on the other side, the Act does not apply, and the plaintiff may either recover his full damages or no damages at all, depending on which party acted intentionally.

The element of *causation* may also play a role in determining the liability of a collecting bank. In *Greenfields Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* the court

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279 1996 (4) All SA 278 (W).
281 1978 (4) SA 901 (N) 912G-H.
concluded that the drawer of the cheque had acted negligently in drawing the cheque "in an improper and unbusinesslike manner", and that the issue of causality did not provide any particular problems in this case. In *Barclays Bank DCO v Straw*,282 the negligence of the drawer was held not to be the *causa causans* of the loss sustained where the amount payable on a cheque had been altered without the drawer’s consent.

7.6 It is now clear that the collecting bank owes a duty of care to the true owner of a lost or stolen cheque.283 By way of analogy, a similar duty of care to that of the collecting bank rests on the drawee bank to prevent loss through negligence in paying and thus discharging the cheque or the rights under it.284

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282 1965 (2) SA 93 (O).
283 *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A); *Volkskas Bank Bpk v Bonitas Medical Aid Fund* 1993 (3) SA 779 (A); *Fedgen Insurance Ltd v Bankorp Ltd* 1994 (2) SA 399 (W); *KwaMashu Bakery Limited v The Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D).
284 *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (2) SA 703 (R) 715-716. It was said there: "There is no contractual relationship between a collecting banker and the drawer of the cheque. The collecting banker acts on behalf of his customer to collect the proceeds of the cheque from the paying banker. But even as an agent the banker assumes and accepts obligations relating to third parties, and 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. The evidence clearly established ... that a paying banker has no knowledge whether or not a cheque is being collected on behalf of a person entitled to it and has to rely, and does rely, on the collecting banker to present a cheque for collection on behalf of the person to whom it is lawfully payable. The evidence revealed that all bankers are fully aware of this position and collecting bankers consider it their duty to ensure that they only present a cheque for collection on behalf of a client who is entitled to receive payment under it. In such a situation and these circumstances a duty of Continued on next page...
Oelofse\textsuperscript{285} is of the opinion that, because the drawee bank has a contractual duty only to its customer in terms of the bank-customer relationship, and not the holder, the drawee bank cannot incur delictual liability to the true owner. However, a duty of care is the outcome of a judicial judgement embracing all relevant facts, including matters of policy.\textsuperscript{286} The policy considerations justifying the imposition of a duty of care are the high risk affecting the cheque in that payment can be obtained by an unlawful possessor with care arises and is owned 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. The collecting banker does not acquire the cheque but undertakes in the course of his business to receive other persons’ cheques payable to its clients for collection on their behalf. In other words, a collecting bank holds itself out as carrying on the business of collecting from paying banks amounts payable in terms of the drawer’s cheque. Accordingly, while there is no contractual relationship between them, the collecting banker owes a duty of care to the drawer to take reasonable precautions that no harm comes to him in such circumstances.

The risk of fraud is ever present in the acceptance of cheques for payment or for collection and the risk that the person presenting the cheque for payment or collection is not entitled to obtain payment under it is equally likely to occur; even when the person presenting the cheque for payment may do so innocently. If no duty of care is owed, it would follow that a banker need not examine or even look at the cheque to ascertain to whom it is payable. Such conduct would ensure that he had no knowledge that his customer had no right to the cheque and consequently he would not be liable for any loss incurred by the drawer ... There is no reason at all why any banker should be in a special position and not be subject to a normal duty of care or why he should be encouraged in not taking care and derive protection from failing to do so. The likelihood of harm to a drawer from failure to observe due care should be realised by any reasonably prudent banker ... therefore... a collecting banker should only undertake to, or present, a cheque for collection after he has reasonably assured himself that his client is entitled to payment.”

\textsuperscript{285} 1982 \textit{4 Modern Business Law} 50 52.

\textsuperscript{286} \textit{Administrateur Natal v Trust Bank van Afrika Bpk} 1979 (3) SA 824 (A) 833-834). See Malan 1979 \textit{De Jure} 31 32-34; Van der Walt \textit{Nalatige Wanvoorstelling en Suwer Vermoënskade : die Appèlhof Spreek ’n Duidelike Woord} 1979 \textit{TSAR} 145.
relative ease; the fact that banks are able to control this risk by exercising reasonable care in the collection and payment of cheques; and that they render professional services calling for professional responsibilities. 287

According to Malan and De Beer 288 the drawee bank would not be held liable to the true owner where in the ordinary course of business it pays a lost or stolen cheque to another bank collecting payment for the wrong person, because only the collecting bank is able to verify the title of its depositor. 289 The authors further say that s 83(1) protects the drawee bank against a delictual claim by the owner where it pays a cheque that has not been indorsed or that has been irregularly indorsed, and that s 58 provides protection for the drawee bank not only within its relationship with the drawer but also against a possible delictual claim by the owner of a lost or stolen cheque. 290 It may be added here that the drawee bank enjoys extensive protection under ss 58, 79 and 83. 291

287 See Malan and De Beer para 354 fn 67.
288 para 354.
289 See Rhostar (Pvt) Ltd v Nederlands Bank of Rhodesia Ltd 1972 (2) 703(R) 715; Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pvt) Ltd 1985 (4) SA 553 (ZSC) 565.
290 See also Malan and Pretorius para 252 and 209.
291 See the discussion above and Malan and De Beer (paras 324, 334 and 341-343) with regard to the protection provided to the drawee bank by ss 58, 79 and 83. Note further that s 58 applies to both crossed and uncrossed cheques. This overlapping with s 79 may be relevant where the drawee bank pays in accordance with the crossing, but does so negligently (s 58 merely requires a payment “in good faith and in the ordinary course of business”). Malan and De Beer (para 334) acknowledge that s 58 applies to both crossed and uncrossed cheques, but they also say that a bank which pays a crossed cheque must necessarily comply with the requirements of s 79 in order to be protected against a forged indorsement. This cannot be correct. Either s 58 applies or it does not, in which case payment must be made without negligence (see Cowen (1966) 4ed 425-426). A further difference between s 58 and s 79 appears from the proviso in s 58. According to the proviso s 58 does not afford protection to the drawee bank if the forged indorsement purports to be that of a customer of the particular branch on which the cheque is drawn. Section 79 does not contain this limitation.
8 Conclusion

Regarding the question whether ss 58, 79 and 83 apply to non-transferrable cheques, the conclusion is that s 58 is clearly not applicable to such cheques. In our view, s 79 does not apply either for the reasons explained. However the Appellate Division in *Eskom v First National Bank of Southern Africa Ltd*292 decided that s 79 is applicable to non-transferable cheques. It is now clear that s 79 does apply to such cheques.

The question whether s 83 also applies to non-transferable cheques was left open in *Gishen v Nedbank Ltd.*293 Malan and Pretorius294 are apparently of the view that s 83 may in fact be applicable. In our view s 83 (like s 58) clearly only applies to cheques which can be validly indorsed. Non-transferable cheques are therefore excluded.295 Furthermore, the history of s 83 leads to the conclusion that the enactment of the section had nothing to do with non-transferable cheques. It has been explained296 that before the Bills of Exchange Act came into operation in May 1964, it was standard practice for banks to require an account holder who deposited a cheque for collection to sign the back of the cheque. Drawee banks required the “indorsement”297 so that they could pay directly to the holder when paying to the collecting bank, and not merely to the collecting agent of the holder. Section 83 made it unnecessary to retain this requirement, while in the case of non-transferable cheques the “indorsement” could in any case not constitute the collecting bank holder of the cheque.298 The

292 1995 (2) SA 386 (A).
293 1984 (2) SA 378 (W).
294 1992 *TSAR* 77 90.
295 See also Tager 19 *LAWSA* para 166; Pretorius 1984 *SALJ* 250 253; Sinclair and Visser 1984 *Annual Survey* 391.
296 See above 29.
298 See Malan and De Beer para 349.
advantage of the indorsement was that collecting banks could claim as *holders* in their own name if the cheque was dishonoured. Accordingly, they were also not prepared to abandon the practice, unless they could retain the rights that they would otherwise have had. *Section 84* provided for this. Normally, the collecting bank has no need to become the *holder*. If the cheque is dishonoured, it merely returns the cheque to its client and debits the account; the latter must then take the necessary steps to obtain payment himself.\(^{299}\) *Section 84* was probably not necessary. Also, because it is an instrument of payment, a cheque is seldom negotiated but is usually deposited by the payee on his account with his bank as an agent for collection.\(^{300}\) And for this reason it is not necessary to indorse cheques deposited for collection. However, the legislatures both here and in England, were ready to oblige.\(^{301}\)

*Sections 83 and 84* are retained in Malan, Oelofse and Pretorius's proposed Cheques Act,\(^{302}\) as clause 60\(^{303}\) with some minor changes: the phrase “in the ordinary course of business” is omitted and the reference to the discharge of the instrument in *s 83* is left out.

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\(^{299}\) *Bloems Timber Kilns (Pty) Ltd v Volkskas Bpk* 1976 (4) SA 677 (A) 686.

\(^{300}\) See Malan and De Beer para 341 fn 96.

\(^{301}\) In England the *Mocatta* Committee was appointed, and as result of its report (*Report of the Committee on Cheque Indorsement* Cmd 13 1956), the Cheques Act of 1957 was enacted. In South Africa a Select Committee was appointed (*Report of the Select Committee on the Subject of the Bills of Exchange Amendment Bill, SC 10 of 1963*), and its recommendations led to the enactment of *ss 83, 84, 85* and 86 of the Act. See Malan and De Beer para 341 fn 100.


\(^{303}\) Clause 60 reads: “Rights of collecting bank - where a cheque which is payable to order, or a non-transferable cheque is delivered by the holder thereof to a collecting bank for collection, and such cheque is not indorsed or was irregularly indorsed by such holder, such bank shall have such rights, if any, as it would have had if, upon delivery, the holder had indorsed it in blank.”
Clause 40 of the Amendment Bill\textsuperscript{304} proposes a new subsection to \textit{s 84} which provides that if a \textit{non-transferable} cheque is delivered to a banker for collection, such banker, shall have \textit{the rights of the payee of such cheque} (emphasis added). This, with respect, cannot be accepted. A non-transferable cheque contains a clear intention that \textit{no-one} other than the \textit{named payee} shall have \textit{any rights} in the cheque.\textsuperscript{305}

Regarding the question whether the non-transferability of a cheque implies only that a cambial transfer is excluded, but transfer of the rights arising from a \textit{non-transferable} cheque by means of an ordinary cession is still possible, the answer is not yet clear. Malan and Pretorius\textsuperscript{306} submit that only the cambial method of transfer is excluded, so that cession of the rights flowing from the cheque is still possible. According to Oelofse\textsuperscript{307} such an express indication of non-transferability also affects the possibility of cession. It appears that Oelofse’s view is correct. It seems illogical to distinguish between transferability in the cambial sense and transferability by ordinary cession when a cheque contains words clearly aimed at ensuring that only the named payee receives payment. If cession was still possible, the drawer’s intention would definitely be frustrated.\textsuperscript{308} Oelofse’s view does not, of course, mean that the exclusion of a cambial transfer \textit{necessarily} also excludes cession. The effect of restricting words is determined by the interpretation of the words. The matter here needs to be clarified by the courts.\textsuperscript{309}

\textsuperscript{304} General Notice 1427 \textit{Government Gazette} 19075 of 21 July 1998.
\textsuperscript{305} See Mofokeng and Pretorius (1999) \textit{11 SA Merc LJ} 152 158.
\textsuperscript{306} para 234.
\textsuperscript{307} 1987 \textit{Modern Business Law} 129 135.
\textsuperscript{308} See \textit{De Villiers and others NNO v Electronic Media Network (Pty) Ltd} 1991 (2) \textit{SA} 180 (W) 183.
\textsuperscript{309} Whether an ordinary cession of the rights arising from a \textit{non-transferable} Continued on next page...
Regarding the question whether a bank paying to or collecting a non-transferable cheque (or any cheque) for someone other than the owner incurs delictual liability to the owner for any loss he may have suffered, the matter was eventually settled by the Appellate Division in Indac Electronics\(^{310}\) as far as the liability of the collecting bank is concerned. The Appellate Division decided on exception that a collecting bank is indeed liable for damages to the true owner if such bank negligently collects the amount of a cheque for the wrong person. The traditional approach of the South African courts was thus rejected and the Zimbabwean approach was followed. A collecting bank will be negligent if it does not take reasonable steps to ascertain whether its client is ex facie the cheque entitled to payment. By way of analogy, the same applies to a drawee bank acting negligently.\(^{311}\)

Clearly, the law regarding the non-transferable cheque needs reform. It is simply because of a “historical accident”, as Lord Chorley put it,\(^ {312}\) that a cheque is a “negotiable instrument” and has been made subject to the same rules which apply to

cheque is possible is not a matter that needs legislating. See Oelofse Rektawissel en Rektatjek, Verhandeling en Sessie in die Duitse en Suid-Afrikaanse Reg 1987 Modern Business Law 129; Malan, Oelofse and Pretorius Proposals for the Reform of the Bills of Exchange Act 1964 (1988) 575.

\(^{310}\) Indac Electronics (Pty) Ltd v Volkskas Ltd 1992 (1) SA 783 (A).

\(^{311}\) See Malan and Pretorius para 252.

\(^{312}\) Chorley The Cheque as Mandate and Negotiable Instrument (1939) 60 Journal of the Institute of Bankers 392. See also Holden The History of Negotiable Instruments in English Law (1955) 315-316; Holden Suggested Reform of the Law Relating to Cheques (1951) 14 Modern Law Review 33 44-45. Murray (1968) 20 Hastings Law Journal 273 states, at 275: “The negotiability concept originated with the law merchant as a means of making the bill and the note efficient commercial substitutes for money... negotiability facilitates the transfer of such instruments, which are issued primarily for credit.”
ordinary bills of exchange. While transferability and negotiability have always been essential features of bills of exchange,\footnote{Although cheques are of course, bills of exchange, the expression is used here to mean bills of exchange which are not payable on demand.} which are used not only as a means of payment but also as a source of credit (and must be capable of circulating freely in the discount markets prior to maturity), cheques, by contrast, are generally used simply as a means of payment (to pay for goods or services) and not for credit, and the instrument’s transferability is, in the vast majority of cases, an unwanted feature exposing both the drawer and the payee to the risk of fraud by third parties.

In its report of February 1989 the Jack Committee proposed two possible solutions to this problem.\footnote{Banking Services : Law and Practice Report by the Review Committee Cm 622 55-56.} The first was to introduce a new non-transferable payment instrument, the “bank payment order”, and the second was to introduce by statute, a clear method for making cheques non-transferable.\footnote{The salient features of the “bank payment order” have as follows: unlike a cheque - the proceeds could be paid only to the person specified as payee in the bank payment order (so that it could not be transferred or negotiated). But like a crossed cheque - it would be addressed by the account holder or his agent, to the banker who holds his account, requiring the banker to pay on demand, a specified sum, only through the agency of a collecting bank (or by internal transfer if the accounts of the drawer and payee were held at the same bank). See appendix M the pro forma of a “bank payment order” and its legal characteristics.} The Committee recommended the first alternative. However, objections by the banks to the introduction of a new payment instrument prevailed and the second alternative was adopted.\footnote{s 81A BEA.}

Malan, Oelofse and Pretorius\footnote{Proposals for the Reform of the Bills of Exchange Act 1964 (1988) 555ff.} in chapter 6 (clause 52) of the proposed Cheques Act, make specific provision that a non-transferable cheque is a crossed cheque which is payable
to a specified person and which complies with the requirement of form set out in the First Schedule, and that it is only capable of negotiation to a collecting banker. Provision is thus made that the words "not transferable" form part of the crossing.\footnote{In Standard Bank of SA Ltd v Sham Magazine Centre 1977 (1) SA 484 (A) 505, Holmes JA explicitly indicated that the words 'non-transferable' do not constitute part of the crossing.} A non-transferable cheque can be indorsed by the payee to a collecting bank only, but because ss 83 and 84 have been retained (clause 60), such an indorsement is not necessary.\footnote{Clause 52 reads: \begin{quote} Non-Transferable Cheque 
(1) A non-transferable cheque is a crossed cheque which is payable to a specified person which complies with the requirements of the form set out in the First Schedule.
(2) A non-transferable cheque may be negotiated by the payee to a collecting bank only (an explanation of clause 52 is given in pages 575-577 of the Proposals). \end{quote}} The banks’ practices announced in the newspapers\footnote{See eg the Citizen of 5 August 1991.} concerning “not transferable” cheques and those marked “only” thus appear to conform closely to the envisaged provisions of the proposed Cheques Act in this regard.

Holden\footnote{Suggested Reform of the Law Relating to Cheques (1951) 14 Modern Law Review 33 45 52.} had already in 1951 suggested the introduction of a non-transferable cheque. He said “that the needs of the business community for a method of making remittances without risk ought to be provided by the introduction of a non-transferable mandate.” He concluded that “if a short Act was passed to facilitate the introduction of a non-transferable order ... there is little doubt that the mercantile community would benefit: businessmen would be provided with a method of making remittances free from risks of loss and theft, and collecting bankers would be freed from most of the risks inherent in the collection of open and crossed cheques today.”
Murray\textsuperscript{322} suggests “an instrument which calls upon a bank to pay the payee, but which can be neither negotiated to a holder in due course nor assigned to anyone for the purpose of collection except a bank in which the payee has an existing account.”

On 13 November 1982 the South African Law Commission invited submissions on the necessity of revision of the Bills of Exchange Act 34 of 1964. Oelofse, Stassen and Du Plessis\textsuperscript{323} made the recommendation that the principle of negotiability of cheques should be abolished. All cheques should be non-transferable and that only the payee should be entitled to payment thereon, in order to give effect to the intention of the majority of users of the cheque as a payment mechanism and also to eliminate abuse of the cheque system\textsuperscript{324}. In view of the present day use of cheques as a means of payment and the risks involved in such use, we tend to agree with this recommendation.

Although a cheque can be made non-transferable\textsuperscript{325} by the addition of the applicable words, the matter is complicated and very few persons who have a bank account have clear and accurate knowledge of how to do it. And even if they know what to do, they may encounter opposition from the banks. No less fundamental and disturbing is the fact that far too few are aware of the real source of danger which is, of course, that a cheque is a “negotiable instrument” and as such subject to the


\textsuperscript{323} Hersiening van die Wisselwet (1983) 5 Modern Business Law 67. The authors also made recommendations regarding amendments to the existing provisions relating to cheques which would have to be considered if the negotiability of cheques is retained, and recommendations relating to bills of exchange in general pertaining to provisions of the Act which are not exclusively applicable to cheques.

\textsuperscript{324} See also the Report of the Mocatta Committee (Cmnd 3 of 1956 para 34) which opted for simplicity rather than allow two different forms of cheques - both transferable and non-transferable - to be used.

\textsuperscript{325} s 6(5).
same rules governing ordinary bills of exchange. Hence, the need for legislative intervention to remove the negotiability of cheques. Until that happens, that is, the negotiability of cheques is abolished, the use of a cheque for the payment of debts will remain fraught with danger for several innocent parties in the all too frequent case of the cheque falling into the hands of dishonest persons.326 However, the proposed amendment327 is bound to create uncertainty, confusion and conflict with the rest of the Act. Moreover, the proposed amendment is biased in favour of the banks.328

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326 See Cowen Two Cheers (or maybe only one) for Negotiability - The Sham Magazine case: Its Implications and Repercussions (1977) 40 *THRHR* 19 35ff.


The paper is written under the guidance of Professor JT Pretorius.

I am indebted to Prof Pretorius for his valuable comments and suggestions. Naturally, any views advanced are my own.
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