De Libris Novis

Understanding Cheque Law

by Robert Sharrock and Michael Kidd

Juta & Co Ltd

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Concentrating solely on cheques, this book is a welcome addition to the literature on bills of exchange.

The authors mention in the preface that the book "is not intended to be an encyclopaedic treatise" on the subject. Nonetheless the omission to deal fully with the important topic of the postdated cheque is disappointing, particularly where, at page 34 of the work, the authors conclude that

> . . . if the former interpretation is chosen, a postdated cheque is not valid as a cheque because it is payable after the date of drawing. But it is none the less a valid *bill of exchange* because s 11(2) says that a bill is not invalid by reason only that it is postdated. Moreover, it would seem that the instrument *becomes* a valid cheque once the postdate has arrived. In the result, there appears to be little, if any, practical difference between the two interpretations.

The authority cited for the postdated instrument *becoming* a valid cheque is that of *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A) at 505, where *Holmes JA* said *obiter* (at E)

> I would add that it was not disputed that this postdated cheque became valid on or after the period of the postdate. See *Cowen* p. 60.

Cowen. The Law of Negotiable Instruments in South Africa (4th ed.) p. 60 mentions that

> Strictly speaking a postdated cheque is in substance equivalent to a bill payable at a further date, namely, the postdate . . . and it is treated in practice as payable on demand on or after the postdate.

I must confess I have often wondered how an instrument, hitherto at the time of drawing not a cheque, suddenly 'becomes' a cheque, presumably by some form of legal osmosis.

Whether the instrument qualifies as a bill of exchange (in the wide sense) or a cheque, is, of course of paramount importance in considering the effect of section 81 of the Bills of Exchange Act 34 of 1964, since section 81 deals only with stolen or lost *cheques* and not stolen or lost *bills*.

The matter was moreover considered by the High Court of Australia in *Brien v Dwyer* (1978) 141 CLR 378, where it was held by members of that Court that the instrument did not constitute a cheque, but constituted a bill of exchange. (See pages 394 and 408 of the judgment).

Unfortunately the authors (at least in the bibliography) appear to have relied upon superseded editions of textbooks, for example, *Falconbridge's Banking and Bills of Exchange* (7th ed.) (1969). This work entered its eighth edition as long ago as 1986 (*Crawford and Falconbridge. Banking and bills of Exchange*).

So too, *Chalmers' Bills of Exchange* (13th ed.) (1964) was succeeded by a fourteenth edition (Chalmers and Guest on Bills of Exchange) (1991).

Although *Riley. Bills of Exchange in Australia* (3rd ed.) (1976) is referred to, the authors, apart from *Alan Turee's Australian Law of Cheques and Payment Orders* (1988), have not seemingly had reference to another Australian work of considerable merit, *The Law of Negotiable Instruments in Australia* (2nd ed.) by Conrick (1989).

At page 91 of their book, the authors opine that where there are co-

drawers or co-indorsers, they are liable jointly and severally unless a contrary intention appears on the face of the instrument. Now both the authors are happily ensconced at the University of Natal, Pietermaritzburg, and thus aware of the fact that the rest of the country is out of step with the Natal Provincial Division where it has been held (and still *is* held in Motion Court) that liability of co-drawers and co-indorsers is joint and not joint and several. See: *Havemann v Lazarus* (1881) 2 NLR 123; *Rughbeer v Mitha* 1950 (3) SA 316 (N).

A reference to this (if only out of loyalty to Natal) should have been made.

The authors boldly advocate the view that a countermanded cheque dispenses with the need for presentation (page 106 and footnote 83), because section 44(2)(c) dispenses with presentment as regards the drawer

> if the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

However, section 48(2)(c)(iv) dealing with the dispensation with notice of dishonour, more or less repeats section 44(2)(c) apart from the reference to the drawer's belief, but section 48(2)(c)(v) specifically deals with the situation where notice of dishonour is dispensed with

> where the drawer has countermanded payment.

Since section 48(2)(c)(iv) and section 44(2)(c) have virtually the same wording, it would appear that countermand is excluded from the provisions of section 44(2)(c) as a ground for the dispensation of presentment for payment.

The matter was fully debated in *Commercial Union Trade Finance v Republic Bottlers of SA (Pty) Ltd t/a Booth's Bottle Store* 1992 (4) SA 728 (D), and in respect of which (although this does not appear from the report) an appeal is presently pending before the Appellate Division.

In the meantime, how does a holder of a cheque know that it is going to be countermanded unless it is first presented? Or does he go through some form of truncated presentment, obtain a 'Payment Stopped' endorsement at the clearing house, and then maintain that presentment for payment was dispensed with from the beginning?

Section 82 is a provision applicable to an instrument

> as if the document were a cheque . . .

and, I think, merits some comment in a work devoted to cheques.

I would respectfully disagree with the views expressed by the authors on page 137 that where there has been a material alteration which has been initialled showing that the drawer has consented to the change, this would indicate that the instrument was complete and regular. Surely the common element to an authorised material alteration and an unauthorised material alteration is that they are both material alterations? Is an instrument containing a material alteration immaculate? Or to use the words of *Denning LJ* in *Arab Bank Ltd v Ross* (1952) 1 All ER 709,

> . . . like currency . . . above suspicion.?

See: *Mobeni Supersave v Suleman* 1992 (3) SA 660 (N), a case which presumably appeared too late for inclusion.

Having said all this, this work is well balanced; I found the individual topics dealt with clearly and comprehensively; the index helpful, and the division of the work into separate easily identifiable components to be welcomed.

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Handleiding vir Diamant-, Goud- en Aanverwante Sake

deur DS Lambrechts

Direk verkrygbaar by skrywer:

Posbus 38509, Garsfontein,
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In die loop van sy praktyk bly die advokaat maar aanhoudend soek na oplossings vir probleme. Deel van hierdie soektog is om die regte gesag in die hande te kry.

Die mees algemene plek waar na gesag gesoek word, is die handboeke en hofbeslissings. Heel dikwels is die probleem egter dat die advokaat nie eens bewus is van welke handboeke oor bepaalde onderwerpe beskikbaar is nie. Gelukkig kan 'n bekwame bibliotekaresse in hierdie verband behulpsaam wees.

Van tyd tot tyd is daar egter sekere publikasies wat nie deur die welbekende regsuitgewers gepubliseer word nie en dan is daar die sterk moontlikheid dat die praktisyn nie eers van die bestaan van hierdie publikasies bewus is nie.

Een van hierdie tipe publikasies is bovermelde handleiding. Hierdie werk, waarvan die tweede hersiene uitgawe onlangs die lig gesien het, kan seer sekerlik bestempel word as die mees resente en omvangryke publikasie oor hierdie onderwerp.

Die boek beslaan meer as 500 bladsye. Elke aspek wat by hierdie tipe sake ter sprake mag kom, word behandel. Nie alleen word die elemente van die verskillende misdade in besonderhede behandel nie, maar ook die proseduriële aspekte wat tydens die polisie-ondersoek ter sprake mag wees word in detail bespreek. 'n Aspek van polisie-ondersoek waaraan natuurlik heel eerste gedink word is die lokvink-stelsel. Dit is egter nie net dié stelsel wat behandel word nie, maar ook beriggewing en die beskerming van beriggewers se identiteit. Verder word daar ook in besonderhede gelet op die toepassing van die tersaaklike versigtigheidsreëls, arres en vrylating op borgtog.

'n Hele aantal hoofstukke word spesifiek gewy aan die hofprosedures wat op 'n aanklag mag volg. Hier word talle van die bekende fasette van 'n strafverhoor behandel, byvoorbeeld geheueverfrissing, gebruik van video- en foto-bewysmateriaal, bekentenisse, erkennings en vermoedens. Hierdie onderwerpe word telkens op 'n heel basiese vlak behandel. Heelwat van hierdie gedeeltes is uiteraard goed bekend aan ervare strafhofpraktisyns. Die voordeel van die handleiding vir sodanige praktisyns is egter dat daar breedvoerig verwys word na elke statutêre bepaling, hofbeslissing en tydskrifartikel wat op die betrokke gedeelte van die prosesreg toepaslik mag wees insoverre dit 'n rol mag speel by diamant- en goudsake.

Talle van die statutêre bepalings en hofbeslissings word baie breedvoerig in die teks aangehaal en dit op sigself is beslis 'n voordeel vir die praktisyn.

Na my mening lê die grootste waarde van die boek juis daarin dat dit so volledig na al die bogemelde aspekte verwys. 'n Mens kry die

indruk dat die skrywer sy bes gedoen het om elke stukkie gesag wat van toepassing mag wees, in die werk te vermeld.

Wat baie nuttig is, is die feit dat daar 'n bespreking is van die Wet op Minerale 50 van 1991 wat op 1 Januarie 1992 in werking getree het en die Wet op Edelgesteentes 73 van 1964 vervang het.

Hierdie besondere versameling van gesag word verklaar deur die feit dat die skrywer 32 jaar lank praktiese ervaring by die Diamant- en Goudeenheid van die Suid-Afrikaanse Polisie agter die rug het. Hy het in daardie afdeling gevorder van konstabel tot brigadier en was sedert 1985 tot en met sy aftrede die Hoof van die Eenheid.

Die boek, wat beskou kan word as 'n samevatting van al die ervaring en praktiese wenke wat die skrywer sy hande op kon lê, is klaarblyklik in die eerste plek geskryf vir diegene in die Polisiemag wat betrokke is by die ondersoek van diamant-, goud en aanverwante sake. Die skrywer maak geen verskoning nie vir die feit dat hy, soos hy dit self in die voorwoord stel, "pro-vervolging (Staat) en anti-verdediging (smokkelaar)" was. Maar dan moet terselfdertyd daarby gevoeg word dat hy in dieselfde voorwoord die wens uitspreek dat die Handleiding daartoe sal bydra dat 'n skuldige nie vry sal uitgaan en 'n onskuldige skuldig bevind sal word nie.

As die leser die skrywer se uitgangspunt in gedagte hou en ook die doel waarvoor die Handleiding in die eerste plek geskryf is, dan is dit verstaanbaar dat hy (die leser) nie moet verwag dat die Handleiding in die meer akademiese styl van ander handboeke geskryf is nie. Veel eerder is die Handleiding geskryf soos 'n voorlesing of klasaantekeninge vir polisiebeamptes wat in die daaglikse praktyk staan.

Hoewel die Handleiding dus moontlik 'n redelik beperkte leserskring mag hê, kan dit van baie groot waarde wees vir enige regspraktisyn wat hierdie tipe sake in die howe hanteer.

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Interdicts and Related Orders

by Johan Meyer

Legal Publications and Services, Verwoerdpark

246 pages

Soft cover R114 incl. VAT

Obtainable from

Legal Publications and Services,

PO Box 9422, Verwoerd Park 1453

In the Preface to the book Dr Meyer explains quite candidly that he did not aim at an academic treatise but rather at a handbook for practitioners. This explanation may be taken at face value since there is absolutely no discussion of theory. That being so, the work cannot properly be considered as a successor to Manfred Nathan's 1939 publication *The Law and Practice Relating to Interdicts (Including Mandamus and Spoliation Orders)*. The work is nevertheless a significant attempt at a very useful codification of the law and practice relating to interdicts and related orders and a welcome addition to our legal literature. The related orders of the title are Orders for Specific Performance, Anton Piller Orders, Rules Nisi, Orders of Perpetual Silence and the Interdictum Quod Vi Aut Clam, which areall given adequate treatment with comprehensive referencing in the footnotes.

There is some indication in the Preface that the author intended a "scientific" treatment of the subject matter. This is probably meant to refer to his patently thoughtful organization of the material, a feature of his work which sets it well apart from the equally respectable treatment (in miniature) of LTC Harms SC in Volume 11 of LAWSA.

The work is divided into two Parts. Part I (sic): General Principles is itself divided into six sections numbered from B to G, section A being an Introduction which traces our law on interdicts from the formulation of Van der Linden. Part II: Specific Instances is somewhat unusual for reasons which will be given further on in this review. The various sections of Part I are titled Interdicts and Related Orders, Factors Crucial to the Preparation of and Adjudication upon an Application for Interdictory Relief, Jurisdiction, Procedure/Appeals, Evidence and the Discretion Vested in Courts - The Hearing, and Costs, respectively.

The first point worthy of note regarding the section on Interdicts and Related Orders, is that the author has followed the classification favoured by Nathan, distinguishing three types of interdict, namely prohibitory, mandatory and restitutionary, whereas Harms distinguishes only two types, insisting that what are called restitutionary interdicts are in reality a species of mandatory interdict. The second point worthy of note regarding the said section is the fairly comprehensive treatment of Anton Piller Orders - interlocutory orders for the interim attachment of property in order to preserve it, which are sought mainly for the purpose of preventing the destruction of evidence. Orders of this type are unknown in our common law, but have in recent years been adopted from the English law following the pioneering decision in the case of *Anton Piller KG v Manufacturing Process Ltd and Others* [1976] 1 All ER 779.

Among the other sections of Part I, those on Jurisdiction and Costs are particularly noteworthy, the former dealing with the jurisdiction of the Court of the Commissioner of Patents, the Court of Admiralty and the Water Court in some detail with as many references in the footnotes as are possible. The author's treatment of the jurisdiction of the Supreme Court and Magistrates' Courts is also well organized and comprehensively referenced, as is the section relating to the award of costs in applications for interdicts.

As has already been indicated, Part II: Specific Instances is somewhat unusual in that the law relating to the granting of interdicts in various specific instances is not set out by the author. In its place are very useful and very precise references to the case law given under various headings and sub-headings from Agriculture (sub-headed "Lease of Land", "Disposal of Crop" and "Partiarian Lease") to Wills (sub-headed "Interpretation of"). Part II therefore serves as a ready reference to the case law which may be applicable in a specific instance which, given that very many interdicts are sought on the basis of urgency, may save practitioners valuable time in the preparation of applications.

In addition to the Table of Contents given after the Preface, each of the sections from A to G is separately indexed. Part II is likewise separately indexed with page references for each heading and sub-heading thereof. The author's referencing is very precise throughout, each case

reference even including the name of the judge – a device which some practitioners may find particularly useful in certain situations. The case references are, according to the author, exhaustive from 1984 till June, 1993, and selective prior to 1984.

The author should consider expanding the work by setting out the actual rules pertaining to the specific instances to which he has already referred in Part II, and by a thorough treatment of the historical development of the theory in his Introduction. As he himself indicates in the Preface, "[i]n this, the first edition, a usable foundation was laid."

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Boedelbereddering

deur NJ Wiechers en I Vorster

Derde Uitgawe

Butterworths Uitgewers (Edms) Bpk 1992

(xii) en 331

Sagteband R131,10 BTW ingesluit

Die eerste en die tweede uitgawes van hierdie werk het onderskeidelik in 1981 en 1984 onder die titel *Boedelbereddering – 'n Praktiese Handleiding* verskyn. 'n Resensie van die tweede uitgawe van hierdie werk het in die Desember 1984-uitgawe *De Rebus* verskyn.

Weens verskeie belangrike ontwikkelinge op veral die terrein van boedelbelasting, is die verskyning van die derde uitgawe tydig. Alhoewel die indeling van die derde uitgawe nie wesenlik van die vorige uitgawe verskil nie, het die skrywers tog sinvolle en verfrissende veranderinge aangebring. Waar die skrywers in, byvoorbeeld, die tweede uitgawe slegs twee bladsye aan boedelsamesmelting gewy het, word sewe bladsye in die derde uitgawe aan hierdie onderwerp afgestaan. Die bespreking van dié onderwerp word skematies toegelig en die risiko's verbonde aan boedelsamesmelting word aan die hand van 'n voorbeeld verduidelik.

In die voorwoord by die eerste uitgawe verklaar die skrywers dat die boek hoofsaaklik gerig is aan die adres van leerklerke, die jong prokureur en studente aan die regs- en handelsfakulteite van ons universiteite. Daarom is dit jammer dat die implikasies wat die Wet op Belasting op Toegevoegde Waarde 89 van 1991 by boedelbereddering kan hê, glad nie in die werk aangespreek word nie. Alhoewel die vermelde Wet omvangryk is en eintlik 'n studieveld op sy eie is, kan die skrywers dit tog oorweeg om in die toekoms 'n hoofstuk aan dié onderwerp te wy.

Die boek bevat 'n volledige inhoudsopgawe en indeks wat naslaanwerk baie vergemaklik. Die werk word verder toegelig deur voorbeelde en materiaal in die Bylaes. Geriefshalwe het die skrywers ook die Boedelwet 66 van 1965 en die Boedelbelastingwet 45 van 1955 sowel as die regulasies ingevolge hierdie wette uitgevaardig, as Bylaes by die boek gevoeg. (Daar moet egter opgelet word dat die regulasies wat kragtens die Boedelwet 1965 uitgevaardig is, ná die verskyning van die boek weer gewysig is – sien Goewermentskennisgewing No R1539 van 13 Augustus 1993.)

Die beredderingsproses van bestorwe boedels word in eenvoudige taal stap vir stap aan die hand van bestaande wetgewing verduidelik en met praktiese voorbeelde toegelig. Ten spyte van die feit dat verskeie werke oor die onderwerp van boedelbereddering reeds die lig gesien het, lewer hierdie werk steeds 'n baie groot bydrae tot dié vakgebied en skroom ek nie om dit veral vir die minder ervare regspraktisyn en student aan te beveel nie.

J Pienaar
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