IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE**

NO.4323/06

In the matter between:

ESOR LIMITED

PLAINTIFF/RESPONDENT

AND

FIRST NATIONAL SWAZILAND LIMITED

DEFENDANT/EXIPIENT

CORAM	**:**	**ANNANDALE J**
FOR THE PLAINTIFF		**ADV. P.E. FLYNN**
		INSTRUCTED BY RJS PERRY
FOR THE DEFENDANT		**ADV. R.M. WISE**
		INSTRUCTED BY CLOETE HENWOOD/DLAMINI ASSOC.

JUDGMENT
(ON EXCEPTION)
24TH JANUARY 2008

[1] Plaintiff's company joined its resources with another company, Tiger Drilling (Pty) Ltd to form a joint venture,

which secured certain construction works for the Government of Swaziland. The joint venture duly performed and received payment from Government in the form of five cheques in the total amount of E2 156 157. Of this, the Plaintiff claimS an entitlement of E1 683 359.

[2] It is common cause between the parties that the cheques were drawn by the Government of the Kingdom in favour of “Tiger Drilling/Esor Joint Venture” and that the cheques were crossed, endorsed to be “Not Transferable”.

[3] It is also common cause that the cheques were delivered to Mr. Mike Temple, as representative of the Swaziland partner in the joint venture and further that the cheques eventually ended up into the banking account of Tiger Drilling (Pty) Ltd, after being deposited into its account through the collecting banker, the

Defendant.

[4] The Plaintiff company now sues the collecting banker for its alleged losses occasioned by the crediting of the account held by the other entity of the joint venture. The Defendant has opted to resist the claim against it by way of an exception. No special plea has been filed.

[5] The exception that was filed forms the issue to decide and is determinative of the way forward in this action.

[6] The Pleadings

In its particulars of claim, the Plaintiff sets out how it alleges to have become entitled to a lion's share in the contract with the Government but which resulted in a hollow benefit. It states that a Joint Venture was formed between the two companies for the purposes of performing certain civil construction works for

Government, known as the “Sport Centre Contract”, wherein the Plaintiff was to perform work relating to piling.

[7] Some years later, after the sweet milk had turned to sour curd and litigation was instituted between the current Plaintiff and its former business associate, Tiger Drilling (Pty) Ltd and Mr. Michael Temple as further defendant, the parties reached an agreement of settlement (page 12 of the record, annexure “A”) wherein it was agreed that Mr. Temple, as representative of Tiger, would ensure payment to the Plaintiff (Esor) amounting to some E1 683 359, plus certain costs and interest, with a further agreement to obtain judgment by consent against Mr. Temple in the event of default.

[8] More specifically, it was also agreed that-

“ 6.3 All of the right, title and interest of the 1*st and 2nd*

Respondents (i.e. Tiger Drilling and Michael Temple, my insert) in the (sic) *and to the aforesaid joint venture is hereby transferred to and vested in the Applicant and neither of the Respondents had* (sic) *any further claim or interest in the said joint venture".*

[9] This agreement was signed on the 30th August 2006 whereas the cheques issued by Government were dated between the 19th December 2003 on the 24th March 2004. During the hearing of the exception, no reference was made to the relatively short period of validation of Government cheques, being three months instead of six. From the pleadings, it remains unknown on which date or dates the contentious cheques were deposited with the Defendant Bank and whether they were in fact honoured. Furthermore, it remains unknown, at present, whether there in fact existed an account with any bank in the name of "Tiger

Drilling Esor Joint Venture".

[10] The Plaintiff further alleges in its particulars of claim that following delivery of the cheques to Mr. Temple, or some other representative, the Joint Venture became the "true owner" of the cheques, by necessary implication that neither of the two entities which formed the joint venture could obtain exclusive entitlement to the proceeds, to the disadvantage of the other.

[11] The crux of the claim is that despite the cheques having been crossed and endorsed as "not transferable", the collecting Defendant Banker allowed the account of the other partner in the joint venture, Tiger Drilling (Pty) Ltd, to be credited, which caused the Plaintiff to remain without benefit of the proceeds of their joint venture. The Bank is now blamed for its loss as it is alleged that the Defendant acted negligently and unlawfully.

[12] In particular, the Bank is accused of disregarding the words on the face of each cheque that it was not transferable; that by permitting the account of Tiger Drilling (Pty) Ltd to be credited, it would result in the latter diverting funds away from the payee (Tiger Drilling/Esor Joint Venture) for its own purposes; that by so doing, the Bank knew or reasonably ought to have known that it would cause loss to the Joint Venture, or the Plaintiff for that matter; that in fact the whole amount, or at least E1 683 359 of it was diverted away from the Joint Venture payee for the sole advantage of Tiger Drilling, resulting in an equivalent loss of the Joint Venture payee.

[13] The Plaintiff further pleads the terms of its settlement agreement with Mr. Temple, acting for its former business partner, and that only a relatively small amount was paid to it by Mr. Temple. Obviously, the

arrangement between the Plaintiff and Mr. Temple's company has no binding effect on the Defendant. It could well be excepted to as being embarrassing but that does not form the real basis of the exception. Nor does the further pleadings relating to how much damages the Plaintiff has suffered due to the alleged misconduct of the Bank, in relation to non-performance by Mr. Temple or his company.

[14] The basis of the claim, when stripped of superfluous innuendo and importation of an agreement between itself and another, is that the Bank erred in processing payment in favour of Tiger Drilling (Pty) Ltd, instead to the credit of "Tiger Drilling/Esor Joint Venture", as endorsed on the crossed cheques. By so doing, it is thus alleged that the Defendant. Bank was at fault and that it resulted in a nett loss of less than the total amount of the five cheques, about 1, 6 million Emalangeni in all.

[15] The exception

After receipt of the combined summons, the Defendant filed a notice of its intention to defend the matter but failed to file a plea within the relevant period of time. It was only after being served with a notice of bar that it opted to rather file a notice of exception under the provisions of Rule 23(1) which has served to protract the litigation and generate much additional costs but which fails to substantively address the issue. Simultaneously, a demand of security for costs was issued against the Plaintiff Company, a *peregrinus* of this jurisdiction. I take it for granted that it has been dealt with appropriately as it was not raised as a further issue at stake.

[16] A variety of technicalities were raised by the Bank, which in isolation is intended to put an end to the litigation. The exception seeks to obtain an order to

the effect that the Plaintiff has no valid cause of action, in other words, that it would not be able to adduce evidence to succeed at a trial. In the alternative, the particulars of claim are averred to be vague and embarrassing. If this was so, the exception would dispel further ado and the Plaintiff would have to seek recourse by other means than what it pleaded in its action against the Defendant, with no trial on the merits of the present matter as it now stands.

[17] The exception, long winded as it is, sets out four parts: Firstly, whether the payee of the cheques is a legal *persona* or whether it is a fictitious or non-existent person. Secondly, whether "Tiger Drilling/Esor Joint Venture" became the true owner of the cheques. Thirdly, whether the cheques were "transferred" within its meaning under the relevant legislation and finally, whether the Defendant Bank owed the Plaintiff a duty of care.

[18] The nature and purpose of an exception is to allow a defendant to show that:

i) The summons does not disclose a cause of action;

ii) That the summons is vague and embarrassing;

iii) That the summons does not substantially comply with the rules of court;

iv) That the summons has not been properly served; and

v) That the copy of the summons served upon the defendant differs materially from the original.

[19] A successful excipient has the benefit of setting aside the summons and its particulars, thereby avoiding a trial on the merits of the matter, in which the inevitable conclusion otherwise would have been that the

summons and its particulars of claim cannot properly be adjudicated upon if meets one of the abovementioned categories.

[20] It is therefore incumbent upon a defendant to take exception to the summons, if it does not disclose a cause of action or when it is vague and embarrassing, improperly served, non-compliant with the rules or if material differences exist between the served copy and the original. An exception under the rules of court must be taken in a timeous matter, before the accumulation of costs resultant from defending a suit that could not have been successful from the onset. A failure to do so could also result in the limitation of a costs order despite a dismissal of the claim as formulated in summons.

[21] Other objections against the particulars of claim like misjoinder, non joinder, absence of jurisdiction, non

locus standi in judicio, *etcetera* must be raised by way of a special plea.

[22] Further useful guidance on the broad principles of exceptions, *vis-à-vis* Rule 17 of the South African Magistrate's Courts, which have *mutatis mutandis* been applied and endorsed by the courts, may be found in Jones and Buckle: The Civil Practise of the Magistrate's Courts in South Africa, where the learned authors state that:

> "Even in those cases where exceptions can be taken the court cannot uphold the exception unless it is satisfied that the defendant would otherwise be prejudiced in the conduct of his defence and effectively limits the scope of technical defences (See Dusheiko v Milburn 1964 (4) SA 648 (A) at 655; Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd 1976 (1) SA 100 (W) at 107; Van Eck Bros Van der Merwe 1940 CPD 357 at 360.
>
> *An exception is a legal objection to the opponent's*

pleading. It complains of a defect inherent in the pleading; admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not either disclose a cause of action or a defendant, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands; no facts outside those stated in the pleading can be brought into issue – except in the case of inconsistencies (See Cassim's Estate v Bayatt and Jadwat 1930 (2) PH F81(N); Sama v Morulane NO 1975 (3) SA 53 (T)) and no reference may be made to any other document (SA Railways and Harbours v Pepeta 1926 CPD 45; Umpelea v Witbooi NO 1926 OPD 251; Amalgamated Footwear & Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (C))".

[23] In *Makgae v Sentraboer (Ko-operatief) Bpk. 1981 (4) SA 239 (T)* at 244H-245A Ackermann J pointed out that where an exception is noted against a summons, *"the correctness of the facts set out therein is accepted for the purposes of the exception but the correctness of the legal conclusion is placed in dispute"* (my translation).

[24] The alleged offending pleading must be looked at as a whole and no paragraph must be read in isolation (*Nel and Others NNO v McArthur 2003 (4) SA 142 (T)* at 149F).

[25] In order for the exception to succeed the excipient must prove that in whichever way the contents of the pleading are interpreted it would still be excipiable (*Theunissen v Transvaalse Lewendehave Koop. Bpk. 1988(2) SA 493 (A)* at 500E-F; *Lewis v Oneanate (Pty) Ltd 1992(4) SA 811(A)* at 817F; *Sun Packaging (Pty)*

Ltd v Vreulink 1996(4) SA 176 (A) AT 183E; *Shell Auto Care (Pty) Ltd v Laggar 2005(1) SA 162 (D)* at 168E-F).

[26] It is against this backdrop that the Defendant's exception has to be evaluated in order to decide the way forward – is the matter to proceed on trial where all issues may be canvassed and where the Plaintiff has to prove its allegations as contained in its particulars of claim combined in the summons, or is the matter to now be given a hard blow, terminating further proceedings on the particulars of claim as it now stands.

[27] Having heard well prepared argument by most able counsel on either side and having read the papers filed of record and having considered the authorities of law advanced before this court, I am of the considered view that the Defendant Bank should not now be given the liberty to step out of the arena by upholding its

exception. It should file its plea, thrown down the gauntlet and have the full merits of the case decided by the court at the conclusion of a trial on the merits. The Plaintiff might conceivably be in a position to justify and prove its case against the Bank. It is, in my considered view, not the position that the particulars of claim are either so vague and embarrassing that the Defendant cannot plead to it, nor that there is no *prima facie* cause of action raised in the particulars of the claim against the Bank. By so saying, there is no conclusion that the Plaintiff shall ultimately succeed in its claim. There is a triable issue which requires proper ventilation and exposure on trial and only thereafter could a verdict be made by the court. The Defendant might also be in a position to successfully resist the claim against it during the cause of a trial.

[28] <u>The merits</u>

The exception which the Defendant raises is under four

different parts, the first being whether the payee is a legal *persona* or a fictitious or non-existent person.

[29] It is common cause that the payee is endorsed on the cheques to be "Tiger Drilling/Esor Joint Venture". Five cheques were issued by Government of Swaziland to settle its obligations incurred through work done by the joint venture. The total amount of the cheques is E2 156 157 and the Plaintiff pleads that it was entitled to E1 683 359 for its part in the joint venture. It further pleads that the other party in the joint venture, Tiger Drilling (Pty) Ltd, presented the cheques to the Defendant Bank for its own account to be credited, to the detriment of the Plaintiff Company, the other party in the joint venture.

[30] The joint venture itself is pleaded to have become the true owner of the cheques crossed *"not transferrable"* and the collecting banker is alleged to be responsible

for the Plaintiff's inability to recover its own entitlement to a part of the full amount, caused by alleged negligence in causing the account of Tiger Drilling (Pty) Ltd to be credited with the full amount.

[31] The Plaintiff pleads that it has previously instituted legal proceedings against Tiger Drilling (Pty) Ltd and its director, Mr. Temple, to recover its share in the joint venture. Despite an acknowledgement of debt and agreement to pay, no repayment over and above a relatively small amount of E60 000 was received and that the prospects of further recovery is regarded as improbable.

[32] The cause of the loss of the Plaintiff, some E1 683 359 plus interest from different dates and costs is thus imputed on the Defendant Bank, due to its position as collecting banker which caused the cheques in favour of *"Tiger Drilling/Esor Joint Venture"* to be credited to the

account of Tiger Drilling (Pty) Ltd to the detriment of the Plaintiff company.

[33] In its notice under Rule 23(1), the Defendant avers that *"(a)s a joint venture is not a person in law it follows that the payee named on the said cheques is non-existent and/or (a) fictitious person and that the cheques could in law be treated as payable to bearer".*

[34] For this, reliance is placed on the Bills of Exchange Act, 1902 (Act 11 of 1902). Section 3(1) reads:-

> *"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum of money to, or to the order of a specified person, or to the bearer"* (my emphasis).

Section 3(2) of the Act holds that

> "An instrument which does not comply with these conditions or which orders any act to be done in addition to the payment of money is not a bill of exchange".

Section 72 provides that the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque.

[35] Regarding certainty as to the payee, Section 6 reads that:

> "6(1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.
>
> 2) *A bill may be made payable to two or more persons jointly, or it may be made payable in the alternative to one of two or one or some of several payees.*
>
> 3) *...*
>
> 4) *Where the payee is a fictitious or non-*

existing person, or a person not having capacity to contract, the bill may be treated as payable to bearer".

[35] The gist of the Defendant's first exception is that the cheques were not drawn in favour of a *"specified person",* that a joint venture is not recognized as a juristic person or as having legal personality and as a *"person*" is either a natural person or a juristic person which the law recognizes as having legal personality, *"Tiger Drilling/Esor Joint Venture"* does not qualify under the Act to be regarded as payee and in the result, the cheques were to be regarded as payable to bearer.

[36] For this to be so, the Defendant argues that apart from the common law recognizing a person to be either a natural or a juristic person, Section 2(C) of the Interpretation (Act 21 of 1970) extends it to also include, *inter alia*,

“any body of persons corporate or unincorporated”.

The Defendant argues that the Joint Venture, as endorsed on the cheques as payee, is regarded by the Plaintiff in its pleadings as being either a juristic person or an unincorporated body of persons, but that it cannot be found to be so. This in turn is based upon an absence alleged to void such definition of a person, as the Plaintiff did not allege the specific nature of such juristic person by describing it as either an incorporated company or such-like person, or, on the other hand, as an unincorporated body of whatever alleged nature. The defendant thus has it that a joint venture as such is not recognized by the law as a juristic person, or with a legal *persona*, mainly because the Plaintiff did not specifically plead it to be so, based on the terms of agreement of the joint venture, which were not

incorporated in the summons.

[37] Fundamental to the Plaintiff's argument is the meaning of *"person",* as referred to above, as per the Interpretation Act, which provides for both incorporated and unincorporated bodies of persons to be recognised. The crux of Advocate Flynn's submissions is that the payee of the cheques is an unincorporated body of persons, a specific entity known and recognized as *"Tiger Drilling/Esor Joint Venture".* Otherwise put, the payee is said not to be an unspecified person as argued by the Defendant. The *"Joint Venture"* thus consists of an unincorporated body of two persons, or two legal entities, each on its own being an incorporated company.

[38] The cheques were drawn in favour of this unincorporated body of persons, the joint venture between two registered companies. This is pleaded by the Plaintiff in its particulars of claim. The purpose of the joint venture was to perform certain work on contract for the Government,

of which the Plaintiff was to perform work relating to piling. It is further pleaded that in August 2006 a Deed of Settlement was entered between the two companies, terminating the joint venture and transferring the right, title and interest of Tiger Drilling (Pty) Ltd to the Plaintiff. The Plaintiff pleads to have performed work in the joint venture that entitles to E1 683 359, out of the E2 156 157 which was paid by Government to the Joint Venture.

[39] It is this Joint Venture which contracted with the Government and which was endorsed as payee on the crossed cheques, which the Plaintiff pleads to have become the true owner of the cheques, and not some *“”unspecified person”* as the Defendant states it to be in its exception. The point of the Plaintiff’s claim is that the accepting Bank, the Defendant, erred in permitting the crossed cheques to be paid to the credit of the Tiger Drilling (Pty) Ltd, instead of the stated payee, *“Tiger Drilling/Esor Joint Venture”.*

[40] The Plaintiff’s pleading that the cheques were crossed and marked *“not transferable”* remains uncontroversial at this stage. It prohibits further transfer of the cheque, for instance to Tiger Drilling (Pty) Ltd. The

effect of such addition is to render the cheque valid only between the parties to the cheque and it will therefore not be payable to the bearer or to order. A banker who pays any other person than the specified payee does not comply with the customer's order. A cheque proclaiming a named payee, crossed and marked *"not transferable"* within the crossing, is indeed not transferable, with the consequence that only the named payee is entitled to payment. *(See Impala Plastics (Pty) Ltd v Coetzer 1984(2) SA 392 (W); Gishen v Nedbank Ltd 1984(2) SA 378 (W) and LAWSA, first re-issue paragraph 165).*

[41] It is this consequence which the Plaintiff seeks to invoke and which the Defendant seeks to avoid by taking an exception founded on its untenable reliance on interpreting the payee as a non-existing entity, which if it would have succeeded, would have rendered the cheques as payable to bearer.

[42] In my considered view, the Defendant cannot do so. The Plaintiff's pleadings, in its particulars of claim, *prima facie* establishes that the two companies, each a separate established legal *persona*, entered into a contractual agreement with the government to perform certain civil works as a single entity, a joint venture, formed for that purpose. It duly performed and was paid for the work it had done. Payment was by a number of cheques, each in favour of a specified payee, *"Tiger Drilling/Esor Joint Venture*" and crossed *"not transferable".*

[43] The Interpretation Act renders a *"person*" as referred to in the Bills m of Exchange Act, to also be a body of unincorporated persons, such as the Joint Venture. The omission of the contractual agreement between the parties to the joint venture, as annexure to the summons, is not detrimental to the claim, as argued by

the Defendant. *Prima facie*, it was the duty of the accepting bank to take heed of the crossing and not to treat the cheques as payable to bearer or to the account of Tiger Drilling (Pty) Ltd, as it had done.

[44] It is for these reasons that the first part of the Defendant's exception, namely that the payee is not a *"specified person",* neither a natural person or a juristic person, cannot be upheld.

[45] The second part of the exception deals with issue of whether *"Tiger Drilling Esor Joint Venture"* became the true owner of the cheques.

[46] This was pleaded in paragraph 8 of the particulars of claim and is crucial to the matter. The Defendant has it that a joint venture is not recognized by the law as being a person or as having legal personality and that only an entity which is indeed recognized by the law as being a person and having full legal personality can become an owner or acquire ownership (of a cheque) – See paragraphs 11 and 12 of the Notice of Exception.

[47] The arguments advanced by Advocate Wise is again

predicated on the manner in which a *"person"* is interpreted. Again, as pointed out above, the Bills of Exchange Act has to be read in conjunction with the Interpretation Act when the meaning of *"person"*, which remains crucial to the matter, is sought.

[48] A person is by definition also a body of persons, incorporated or unincorporated. Tiger Drilling/Esor Joint Venture is such body of unincorporated legal *personae* clearly indicated on the non transferable cheques as payee. Each of the two companies, Esor and Tiger Drilling, is a separate legal entity, incorporated as such, with the two entities together forming a joint venture.

[49] Delivery to the payee is pleaded to have been effected on a natural person, Mr. Temple, representing the joint venture, alternatively to a person unknown to the Plaintiff. The Plaintiff further pleads that the

Defendant *qua* collecting banker caused and permitted the cheques to be paid to the credit of the account that Tiger Drilling (Pty) Ltd held with the Defendant. This is said to be contrary to the *"not transferable"* crossing, to the detriment of the true owner, the payee *"Tiger Drilling/Esor Joint Venture*.

[50] The effect of this is a factual basis, alleged by the Plaintiff, to support its contention that the true owner of the cheques was deprived of its financial benefits due to negligence or an absence of a duty of care, to which I revert below.

[51] The bottom line is that the Plaintiff alleges a loss suffered at the hands of the collecting banker, by allowing its own client, Tiger Drilling (Pty) Ltd, to divert all of the money obtained by the cheque deposits for its own benefit.

[52] The Defendant's exception to the Joint Venture being unable to have become the true owner of the cheques does not hold water. *"True owner"* could be seen as

somewhat ambiguous or unclear and the term has not been fully defined by our courts. However, the term is commonly used and a true owner is given specific protection under the law. Cowen and Gering, in The Law of Negotiable Instruments in South Africa (1966-4th edition) at page 437 describe the true owner as the person "*entitled to possession of the instrument and to the enjoyment of an interest therein".* Burchell in *"Crossed cheques marked 'not negotiable''* (1953) 70 SALJ 3 5 says that *"in our law the expression means just what it says, namely, the true, or real, owner".* The principles of the law of property are often used by our courts to determine who the owner, or the *"true owner"* of a cheque is (Malan on bills of Exchange and Promissory notes, 4th Edition 2002 at page 404).

[53] In context of the present matter, the entity caller *Tiger Drilling/Esor Joint Venture",* an uncorporated body of

persons was *prima facie* the true owner of the cheques, as pleaded by the Plaintiff. Delivery was pleaded to have been effected on its representative, Mr. Temple, or some other unknown person. That was not a transfer but simply delivery. Mr. Temple is, on face value, involved with Tiger Drilling (Pty) Ltd, one of the two companies that formed the joined venture. The cheques were not drawn in favour of one of the two companies but in favour of the named joint venture, which became the true owner of the cheques and which was entitled to the benefits thereof.

[54] The exception on this aspect thus also stands to fail as the premise that the joint venture cannot be regarded as a person, which in turn excludes it from acquiring ownership of the cheques; falls foul of the definition of *"person"* vis-à-vis the Bills Exchange Act read in conjunction with the Interpretation Act.

[55] The third part of the Defendant's exception deals with an allegation by the Plaintiff which reads that:

> *"Contrary to the statement that the cheques were* "not transferable" *the Defendant caused and permitted the said cheques to be paid to the credit of an account with the Defendant in the name of Tiger Drilling (Pty) Ltd"* (Para 10).

[56] This assertion is excepted to on the basis that it is a conclusion of law that is unsupported by any underlying facts, particularly so that no facts are pleaded to establish that the cheques were indeed *"transferred"* within the context of the law that governs bills of exchange and cheques.

[57] The Plaintiff in fact does make a factual allegation in paragraph 10 of its particulars. It pleads that the Defendant Bank *"caused and permitted*" the cheques which were crossed and marked *"not transferable"* to be paid into the account of Tiger Drilling (Pty) Ltd, a

client of the Bank. In the following paragraph the Plaintiff clearly alleges that Tiger Drilling was not entitled to the proceeds of the (crossed) cheques. It also clearly pleads that by doing so, the Bank knew or ought to have known that its client, Tiger Drilling (Pty) Ltd, would be able to divert the proceeds of the cheques for its own purposes.

[58] The Plaintiff does not aver that the crossing was cancelled or that the cheques were indeed *"transferred"* within the technical meaning of the term by any party. What if does allege is that the Bank acted contrary to the endorsed non-transferability by allowing its client to credit it's own account.

[59] Delivery of cheques does not imply transfer as well. The cheques are said to have been delivered to Mr. Temple, an agent to Tiger Drilling (Pty) Ltd, or to some other person unknown to the Plaintiff. The Plaintiff

does not impute any form or transfer on Mr. Temple or whoever, but has it against the ignoring of the restrictive crossings by the Defendant.

[60] Contrary to the Defendant's exception, this aspect of the particulars of claim does not amount to a conclusion of law, unsubstantiated by pleaded facts. Seemingly, this part of the exception is founded on a misreading of the claim in that the Defendant has it that it was pleaded that the cheques were indeed *"transferred"*.

[61] In *KwaMashu Bakery Limited v Standard Bank of South Africa Limited 1995(1) SA 377 (D)* the court pointed out 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".*

[62] South African clearing banks have decided to accept a non-transferable cheque for collection only on an account bearing a name identical to that of the payee – *"That 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 of that of the payee named on the cheque"* (See Gering: *"Crossed cheques Inscribed 'A/c Payee'* or '*Not Transferable'* (1977) 94 SALJ 152 at 159).

[63] The Plaintiff does not plead that delivery and receipt of the cheques to Mr. Temple constituted a *"transfer",* in the strict sense. In my view, if that is what was pleaded, it then would have been excepiable, but not as it now stands. The pleading is also not vague and embarrassing. It is factual and clear to the point – the Bank is alleged to have ignored the restrictive crossing endorsed as *"not transferable"* by allowing its

own customer, which is a different entity than the specified payee, to present the cheques for payment and credit of its own separate account.

[64] Furthermore, as already held above, Tiger Drilling (Pty) Ltd did not become the holder the cheques which could have been treated by the Defendant Bank as being payable to bearer. It could not properly obtain credit for its own exclusive account, which was strictly for the benefit of *"Tiger Drilling/Esor Joint Venture"* only.

[65] It is therefore that the Defendant's exception on the third aspect of transfer also cannot be upheld.

[66] Fourthly and finally, part "D" of the exception contents that no facts have been alleged to establish that the Defendant owed the Plaintiff a duty of care.

[67] In *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd 1972 (2) SA 703(R)* at *717E-H,* Golden J held that:

"Generally speaking, where there is something on the face of the cheque, taken in relation to the customer for whom it is collected, which should put the banker upon inquiry, he ignores it at his peril. So that where a cheque is payable to a specified payee, it is prima facie *evidence of negligence in the collecting banker to take the cheque for collection on behalf of a person other than that indicated".*

[68] In *African Life Assurance Company Ltd v NBS Bank Ltd 2001 (1) SA 432 (W)* at 447 the court remarked that:

" A cursory examination of the face of the cheque would have been sufficient to cast doubt as to the NOK's [the customer's] *title thereto. The cheque is restrictively drawn in favour of the [collecting bank], is crossed and marked* 'not transferable'. *NOK is not the payee or endorsee thereof. A reasonable*

banker would have appreciated the significance of the plaintiff's [drawer's] instructions inscribed on the face of the cheque. Any doubt that existed as to the NOK's entitlement to receive the proceeds could have easily been cleared up by communicating with the plaintiff; its name is clearly evident on the face and reverse of the cheque".

[69] This court agrees with the expressed views as stated by the learned judges in these two matters. *Prima facie* the case of the Plaintiff is that the Defendant ignored, to its own peril, the crossings marked *"not transferable"* and the clearly stated payee endorsed on the face of the cheques. Equally clear is that *"Tiger Drilling (Pty) Ltd* which is alleged to have presented the cheques for credit of its own account with the Defendant collecting bank, is not the same entity that identifies the payee". It is one of two parties that

formed a joint venture, clearly spelled out.

[70] The alleged facts in the claim, taken together, point a straight finger at the Defendant, accusing it of having acted negligently and unlawfully to the detriment of the Plaintiff, the latter suffering loss and damage by reason of the Defendant's negligence.

[71] A *"duty of care"* is not pleaded as such, but clearly implied. It is the alleged absence thereof which forms the care of the Plaintiff's action.

[72] The final leg of the exception also stands to fail.

[73] As stated above, this matter should proceed to take its further course, with the Defendant to file its plea and eventually for a trial court to adjudicate the matter and pronounce on the merits of the claim. Had the Defendant succeeded with its four pronged exception, other avenues could have been followed as the claim itself would not have been dismissed. The Plaintiff will remain with its claim as it is now stated, at least for the time being.

[74] In the event, it is ordered that the Defendant's exception be dismissed, with costs. Both counsel were in agreement that these costs should include costs of counsel, certified under the provision of Rule 68(2) and there is no reason to order otherwise.

J.P. ANNANDALE

Judge