

**Alisop v Payet
(2000) SLR 50**

Franky Simeon for the plaintiff
Frank Elizabeth for the defendant

Judgment delivered on 24 May 2000 by:

PERERA J: This is an action under the Summary Procedure on Bills of Exchange, provided in section 295 of the Code of Civil Procedure (Cap 213). The plaintiff claims a sum of R50,000 due to him as holder of a cheque dated 13 March 1998 issued by the defendant on his business account of "active electronics", which had been returned by the bank with the endorsement "PL represent 19.3.98".

The defendant in seeking leave to appear and defend the writ as averred in his affidavit dated 20 November 1998 admitting that he issued the said cheque, but that the balance in his account had dropped between the date of issue and the presenting. He avers however that upon the plaintiff advising him that the cheque was not cleared, he paid R.46,000 to him in cash against the cheque and hence he owes only a balance sum of R4000.

The plaintiff has filed a counter affidavit averring that the cheque for R.50,000 was issued by the defendant as part payment for the sale of a motor vehicle he had purchased from him for R78,000 and that the balance sum of R.28,000 was paid in cash. He denies that the defendant paid R46,000 in cash after the cheque was not cleared by the bank on presentment.

As was held in the case of *Rolly Payet v Karly Faure* (1996) SLR 188, upon the granting of leave to defend, the defendant should be given an opportunity to adduce evidence of his ground of defence. In such circumstances it would be required of the plaintiff as holder, to prove consideration. In this respect, Lord Denning, in the case of *Fielding and Platt Ltd v. Salim Najjar* (1996) W.L.R 35 stated:

We have repeatedly said in this Court that a bill of exchange or a promissory note is to be treated as cash. It is honoured unless there is an arguable case based on total failure of consideration

Hence a cheque issued unconditionally is as good as cash and should be honoured unless there is some good reason to the contrary. Some of the "good reasons" accepted by the Courts are where:

1. the bill of exchange itself was induced by fraud or misrepresentation;
2. the transaction for which the bill was given is tainted with illegality; or

3. there has been a total failure of consideration.

Hence unless the defendant can show facts which if proved would impugn the plaintiff's right to consideration on the instrument, the plaintiff would be entitled to judgment.

In this respect the issue arising from the defence for determination would be whether the defendant paid R46,000 in cash after the cheque was not cleared on presentment.

Article 1315 of the Civil Code provides that:

A person who demands the performance of an obligation shall be bound to prove it. Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.

The Plaintiff testified that on 13 March 1998 that he sold his pick-up truck to the defendant for R78,000 and received R28,000 in cash and a cheque dated 13 March 1998 for R50,000 (exhibit PI). The defendant told him that the cheque will be cleared in three days. But as he was going to Praslin that day, he banked the cheque at the Nouvo Banq Branch at the Airport. The seal on the cheque confirms that. After about a month he noticed that the cheque had not been credited to his account at Nouvo Banq. The plaintiff claims that when he contacted the defendant from Praslin, he told him that he was in financial difficulties and that he had utilised the money payable on that cheque. He denied that he was paid R46,000 thereafter.

The plaintiff further testified that as the defendant had not paid the sum of R50,000 even after four or five months later, he went to a lawyer for advice. But no letter of demand was sent to the defendant.

Bernadette Toussaint (PW2), the girlfriend of the plaintiff, testified that she was aware of the transaction between the parties. She stated that the plaintiff who was living on Praslin sent her to collect some money from the defendant three or four times, but did not receive any. She further stated that she was sent *several months after the cheque had bounced*. On being cross examined by counsel for the defendant, she admitted that she was asked to collect R6000 from the defendant, but that amount was not given to her.

The defendant in his testimony stated that on the day of the transaction he gave a cheque for R50,000 and R26,000 in cash to the plaintiff. He requested him to present the cheque for payment only on 19 March 1998 when he expected the proceeds of the sale of his car to be in his account. The plaintiff however maintained that he was told that funds would be available in three days from the date of issue of the cheque, that is on 16 March 1998. He further agreed with the plaintiff to pay the balance sum of R2000 later. He claimed that, that sum was eventually paid. The defendant produced his statement of account at the Seychelles Savings Bank, dated 17 November 1999,

(exhibit D1). The relevant entries are as follows:

<u>Date</u>	<u>Details</u> <u>Value</u>	<u>Reference</u> <u>(Cheque No)</u>	<u>Debit</u>	<u>Credit</u>	<u>Balance</u>
13.3.98	Cheque Deposit	99143	-	50,000	51,796.98
17.3.98	Service Charge	<u>287310</u>		200.00	
20.4.98	<u>Cash</u> Withdrawal	-	42,000		284.82

The defendant testified that after about one month from the date of issue of the cheque, as also testified by the plaintiff, the plaintiff wanted the sum of R50,000 due on the cheque. He further stated that the plaintiff told him that he did not want to re-present the cheque and that he wanted cash. Hence he went to the bank on 20 April 1998 and withdrew R42,000 in cash, leaving a balance of only R282.82 in his account. He also produced a receipt dated 20 April 1998 from the said bank in proof of receipt of that amount by him (exhibit D2).

The bank statement supports the evidence of the defendant that a cheque bearing no. 991433 post dated 19 March 1998 for R50,000 was deposited in his account on 16 March 1998. The cheque bearing no. 287310 (exhibit PI) which is being sued upon, was presented to the bank on 17 March 1998. The seal of the airport branch of Nouvo Banq shows that the cheque was deposited on 13 March 1998 (a Friday). It was sent for clearing on 17 March 1998, but the cheque for R50,000 already in his account on 16 March 1998 was realisable only on 19 March 1998 as it was post dated. This accounts for the endorsement made by the bank "PL represent 19.3.98" on exhibit PI. However, as testified to by the plaintiff, the cheque had been returned to him to the Air Seychelles Office where he was employed previously and it was only about a month later that he became aware that the sum of R50,000 had not been credited to his account. Had he re-presented the cheque on 19 March 1998 or even up to 30 March 1998 when a sum of over R50,000 was available in the defendant's account, the cheque would have been honoured. Hence there was no "dishonouring" of the cheque. According to *The Law and Practice of Banking* by J. Milnes Holden, Page 264, "if a banker has to dishonour a cheque for lack of funds, he will return, it with the answer 'refer to drawer'," and if he has reason to believe that the customer will provide funds to meet the cheque during the next day or two, he will sometimes add "please re-present."

The plaintiff testified that he contacted the defendant from Praslin. The following questions were put to him by counsel for the defendant in cross examination:

Q. When did you contact him, do you remember the date that you telephoned him?

A. No.

Q. But it would have been around 13th to 20th April?

A. Let us say yes.

Q. In that week?

A. A month after.

Q. And you would have come down around that period of time between the 13th of April to around the 21st or 22nd of April?

A. I would say so, yes.

Q. When you came down the following week you saw Mr Payet at his shop?

A. Yes.

Q. He did give you the sum of R42,000 at the shop?

A. No.

In this respect, the entry under date 20 April 1998 (exhibit D1) and the receipt (exhibit D2) support the defendant's evidence that a sum of R42,000 was withdrawn. But these documents on their own are self serving and do not constitute proof of payment to the plaintiff. Hence under article 1315 of the Civil Code the burden falls on the defendant to prove that he has discharged his obligation to pay on the cheque sued upon. In these circumstances, where there is a conflict of evidence between the plaintiff's witnesses and the defendant's witnesses, the court should accept the evidence after examining the totality of the facts. The plaintiff's witness, Bernadette Toussaint admitted that she was asked by the plaintiff to collect R6000 from the defendant and not R50,000. This independent evidence corroborates the defendant's averment in the affidavit in defence and in the testimony before court that he still owes the plaintiff R4000. The averment in the affidavit that he owes only R4000 was explained by the defendant on the basis that he paid R42,000 and later R4000 in respect of the dishonoured cheque leaving a balance of only R4000, and that he had forgotten at the time of preparing the affidavit that he still owed the plaintiff R2000, as he paid only R26,000 in cash and not R28,000 as claimed by the plaintiff at the time the cheque for R50,000 was issued, He now admits that he owes R6000 to the plaintiff.

The plaintiff testified that the question of issuing a receipt for R28,000 which he received, did not arise as the transaction was done in a hurry and he had to go back to Praslin that day.

The defendant on the other hand testified that when he gave R42,000 in cash he too did not ask for a receipt. But two weeks later when he gave another R4000 he asked for a

receipt and the plaintiff told him that he would give it after all the payments have been made, and that he would retain the cheque as security.

In the case of *Berjaya Beau Vallon Bay v Philibert Loizeau* (Unreported) Civil Side 268/1996 the defendant issued cheques for payment in purchasing "chips" for betting at the casino. When sued upon dishonoured cheques, he claimed that they were given as security and not as payments, and that he had subsequently paid the amount claimed in cash. He further alleged that the cheques were not redeemed after payment as the cashier had locked them away somewhere and he was being sued by the new manager who had discovered them subsequently. This court, upon considering the evidence in the case, applied article 1315 of the Civil Code, and held that the defendant had failed to prove that he made any payments to redeem the cheques which he averred were given as security and not for valuable consideration, and entered judgment in favour of the plaintiff.

The burden on a defendant who claims to have been released from an obligation under article 1315 was illustrated in two Mauritian cases. In the case of *Coo-Marassamy v. Moo Magalingum* 1871 MR 51 the defence case was that a bond sued upon was the reception of a former undertaking arid was not due. The court in the presence of conflicting and ambiguous evidence, gave judgment against the party who relied on his defence to prove his discharge. So also in the case of *Brouard v. Gopalsing* 1871 MR 53, it was held that although a doubt as to the defendant's liability will be interpreted in his favour, yet, if a liberation is relied upon by the defendant as a defence, he will be bound to prove the fact causing his liberation.

The facts of the instant case can be distinguished from those three cases. First, when the cheque dated 13 March 1998 reached the Seychelles Savings Bank for clearing on 17 March 1998, there was in deposit a post dated cheque for R50,000 in the defendant's account on 16 March 1998 but realisable on 19 March 1998. He testified that he had informed the plaintiff to present the cheque in three days as he expected that money to be in his account as sales proceeds from his car. The plaintiff also admitted that the defendant informed him that funds would be available in three days. Hence on 17th March 1998 there were funds in the account as promised but realisable only on 19 March 1998. A sum of R50,000 was available in that account until 30 March 1998, but the cheque could not be re-presented during that time for reasons purely attributable to the [plaintiff. Secondly, the plaintiff's witness, Bernadette Toussaint, categorically stated in her testimony that the plaintiff did not tell her to collect R50,000, but only R6000 from the defendant. This evidence serves as independent corroboration of the defendant's case.

Thirdly, the plaintiff admitted that he informed the defendant about the cheque not being cleared by the bank around the 20 of April 1998. According to the bank statement (exhibit DI), there was a cash withdrawal of R42,000 on 20 April 1998. Although no formal receipt was produced by the defendant for the reasons stated above, yet such evidence, on a balance, makes his case more probable

There are therefore several factors that support the defendant's case on a balance of probabilities that R42,000, against the cheque for R50,000, was paid to the Plaintiff in cash. The defendant has admitted that he still owes R6000 to the plaintiff

The plaintiff's action is therefore dismissed. However the defendant shall pay a sum of R6000 which he admittedly owes the plaintiff together with interest thereon. In view of the circumstances of the case, the defendant will be entitled to costs.

Record: Civil Side No 256 of 1998