LEGAL ASPECTS RELATING TO THE DEVELOPMENT OF MONEY AND PAYMENT IN SOUTH AFRICAN LAW

by

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For my mother, for all her love and support. She never gives up on her children. My late father, may his soul rest in peace.

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ABSTRACT

This dissertation considers the questions concerning the legal aspects relating to the development of money and payment in South African law. In attempting to answer the questions posed, the dissertation seeks to provide satisfactory definitions of money and payment drawing on local, foreign and international jurisprudence. The relationship between the bank and the customer is discussed, looking specifically at transactions dealing with cheques and electronic fund transfers (EFTs). Problematic questions such as moment of payment and whether countermanding an instruction is possible are considered. Further legal problems considered include posting of cheques and delivery of cheques in full and final settlement. Finally the question of enrichment is discussed briefly. The study indicates that the answers to the questions posed in the dissertation are complex and depend on various considerations.

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1 **Introduction**

The means of payment have evolved throughout the ages, from the historical method of bartering to the current and modern method of electronic fund transfer (EFT). The objective of this dissertation is to discuss critically the legal aspects relating to the development of money and payment in South African law as the title proposes.

The subject matter of this dissertation is payment and some of the main orthodox methods of effecting payment are considered, namely, physical delivery of money, payment by cheque and EFT. Other methods of effecting payment such as alternative negotiable instruments,[1] debit and credit cards are not discussed but are referred to throughout the study where applicable. This dissertation sets out the principles of South African law that regulate payment coherently.

This dissertation begins by attempting to provide a satisfactory definition of payment making the points that payment is the manner in which a monetary obligation is discharged and that it is a bilateral juristic act. Furthermore, the conventional methods of effecting payment referred to above are discussed comprehensively.[2]

Once the above issues have been dealt with, the concept of money is considered closely. The different theories leading to the troublesome definition of money are analysed and reference is made to legal tender. This paragraph contains a section on the role of the South African Reserve Bank (SARB) and deals with the legal nature of banknotes and ownership.[3]

Finally some legal problems relating to payment are evaluated looking extensively at problems relating to cheques and EFT. Problematic questions such as moment of payment and whether countermanding an instruction is possible are considered. Further legal problems considered include posting of cheques and delivery of cheques in full and final settlement. Finally the question of enrichment is discussed briefly.[4]

A conclusion is presented summing up the above paragraphs and coherently answering the questions posed in the dissertation.

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[1] Bills of exchange and promissory notes used as credit instruments.
[2] See par 2.
[3] See par 3.
[4] See par 4.

2 **What is payment?**

2.1 Definition

South African law regards payment as a bilateral juristic act, requiring the meeting of two minds.[5] The authors of *Black's Law Dictionary* define payment as "the performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation".[6]

Proctor is of the opinion that payment in the legal sense refers to "a gift or loan of money or any act offered and accepted in performance of a money obligation".[7] This definition of payment displays two noteworthy features. In the first instance, although payment frequently comprises of the performance of a money obligation, it does not inevitably consist of the delivery of money.[8] For instance money may not be delivered where goods are delivered in part exchange for other goods. Secondly, payment necessitates some conduct not only on the part of the transferor but also on the part of the transferee, who must in some sense assent to the transfer.[9]

Malan, in the context of paying a bill of exchange,[10] defines payment as "the duty of the drawee[11] or acceptor[12] to make payment of the bill in money".[13] This, accordingly, denotes payment in money. In broader context, however, obligations cannot only be discharged by payment in money

[5] *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* 1991 3 SA 605 (AD) 612 C-D; *Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd* 2004 1 SA 284 (SCA) 289 par 7; and *Vereins – und Westbank AG v Veren Investment* 2002 4 SA 421 (SCA) 429 B, C – E para 11.
[6] Garner, Jackson and Newman *Black's Law Dictionary* (2009) 1243.
[7] Brindle and Cox *Law of Bank Payments* (2010) 1; and McKendrick *Goode on Commercial Law* (2010) 498.
[8] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 384.
[9] Mann *Legal Aspect of Money* (1992) 75; and Proctor *Mann on the Legal Aspect of Money* (2005) par 7.08 – No creditor is under any legal duty to accept any payment and no debtor can force any payment of any kind upon his creditor without the latter's consent express or implied precedent or subsequent.
[10] s 2 of the Bills of Exchange Act 34 of 1964 (hereinafter referred to as the Act) provides that a bill of exchange is: "[A]n 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 certain in money to a specified person or his order, or to bearer". References in this paragraph to "the Act" in the text and in the footnotes are references to Act 34 of 1964 (as amended), unless the context clearly indicates to the contrary.
[11] *Wilkinson v Jackson* (1838) 11 Moore 275 (12 ER 1008).
[12] s 52; and *Harmer v Steele* (1849) 4 Ex 1 13 (154 ER 1100). The acceptor is the drawee who indicates his agreement with the order of the drawer.
[13] Malan, Pretorius and Du Toit *Malan on Bills of Exchange, Cheques and Promissory Notes* (2009) 237.

and it is submitted that other common-law methods of discharge should be included in the definition of payment.[14]

2.2 It can consist in the physical delivery of money

This method of payment is normally encountered in small transactions, for instance in the case of sale of simple goods. Usually the creditor sells goods at a stipulated purchase price and the debtor buys the goods by delivery of the purchase price to the creditor.

In cases where payment is made to a third party, such third party must have actual or ostensible authority to receive payment on behalf of the creditor.[15] In a case where a managing agent of a landlord had received payment from the tenant at a time when the tenant had committed a breach of contract, it was held that the agent had general authority and thus the acceptance of rent through their agents with knowledge of the breach of covenant effected a waiver of the forfeiture.[16]

Hugo rightfully refers to Roman-Dutch authority when dealing with third-party payments:

> "It is not essential to the validity of the payment, that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will".[17]

Subsequently this has been applied by South African courts finding that "it is hardly necessary to say that a debt owing by A to B may be extinguished by a payment made by a stranger to B in discharge of that debt even if A is unaware of such payment".[18] It is submitted that payment by a third party on behalf of the debtor with the aim of extinguishing the money obligation cannot be declined by the creditor.

[14] *Estate Liebenberg v Standard Bank of South Africa Ltd* 1927 AD 502 527 – the Act does not replace the common law.
[15] Brindle and Cox (n 7) 16.
[16] *Central Estates (Belgravia) Ltd v Woolgar* (No.2) [1972] 1 W.L.R. 1048G 1052F-H, 1055D-F and 1056C-D.
[17] Hugo "Payment" in MacQueen and Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 240 – 241 see footnote 52.
[18] *Info Plus v Scheelke* 1998 3 SA 184 (SCA) 192D.

2.3 It can take many other forms which essentially consist in enabling the creditor to obtain money.[19] The following ones are considered:

2.3.1 By acquiring it from the debtor's bank account (by presenting to the debtor's bank the debtor's cheque[20] for payment – either directly (over the counter) or through a collecting bank)

A cheque is neither money nor legal tender.[21] A creditor is not obliged to accept it in payment of a monetary debt and consequently may, in the absence of an agreement or trade usage, insist on payment in currency by the debtor.[22] Malan describes a cheque as "an instrument by which a person can easily dispose of amounts to his credit with a bank. It is an instrument of the cashless society".[23] It is submitted that the main disadvantages of a cheque are forgery, high bank costs and theft.[24]

The bank-customer relationship is based on a mandate (*mandatum*) between the bank and the customer.[25] A fundamental principle of this contract is that the mandatary (the bank) has a duty of care towards the mandator (customer) in dealing with his/her current account.

The general principle is that where the signature of the drawer on a cheque is forged, the drawee bank pays the cheque at its own risk and may not debit the account of the drawer.[26] In *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd*[27] Philips AJ held that:

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[19] Other forms include novation. For instance, A may agree to refinance B's indebtedness to him under a loan agreement by giving him a fresh advance under a new agreement which is applied in discharge of the existing indebtedness. Also set-off of matured liabilites. This is also known as settlement netting and does not involve novation. The banker's implied contractual right to combine accounts, although not usually described in netting terms, is similar in character.

[20] A cheque is a bill drawn on a bank payable on demand. The provisions of the Act applicable to a bill payable on demand apply to a cheque except as otherwise provided for in Chapter 2 of the Act see s 71. Hence a cheque must comply with the formal requirements of a bill, and in addition be drawn on a bank and be payable on demand.

[21] *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A) 876.

[22] Schulze "E-money and electronic fund transfers. a shortlist of some of the unresolved issues" 2004 *SA Merc LJ* 50 51.

[23] Malan *et al* (n 13) 243.

[24] Schulze "Countermanding an electronic funds transfer: the supreme court of appeal takes a second bite at the cherry" 2004 *SA Merc LJ* 667 668.

[25] Malan *et al* (n 13) 266.

[26] Pretorius "Bank-customer relationship" 1985 *Annual Survey of SA Law* 342 344.

[27] 1979 3 SA 267 (W).

> "[A] customer's duty to his banker is a limited one. Save in respect of drawing documents to be presented to the bank and in warning of known or suspected forgeries he has no duty to the bank to supervise his employees, to run his business carefully, or to detect frauds".[28]

Malan states that "the customer's negligence must be in the manner in which the cheque was drawn and it is unlikely that the customer's negligence as custodian of his cheque book[29] or in the appointment or supervision of his employees would entitle the bank to debit his account".[30]

According to sections 43 and 43A of the Bills of Exchange Act[31] a cheque must be presented for payment in order to hold the debtors on the bill liable. A bill payable on demand must be presented within a reasonable time after its issue to render the drawer liable, and within a reasonable time after its indorsement to render the indorser liable.[32] If not presented within a reasonable time the debtor will be discharged.[33] However section 72 which takes precedence over section 43,[34] provides that if a cheque is not presented for payment within a reasonable time,[35] of its issue, and the drawer had the right to have the cheque paid, and suffers actual damage through the delay, he (the drawer) is discharged to the extent of such damage.

2.3.2 By virtue of an EFT in the form of either a debit or a credit transfer

The law relating to electronic payments is particularly difficult and as an aid, authority from foreign jurisdictions will be used when discussing this area of law since there is little clear South African authority. It is noteworthy that the Legal Guide of the United Nations Commission on

[28] *Big Dutchman (South Africa) (Pty) Ltd* case (n 27) 283 – 285.
[29] This is subject to s 72B which stipulates that: "Any person who is required by law to have his financial statements audited by a person registered in terms of section 15 of the Public Accountants' and Auditors' Act, 1991 (Act 80 of 1991), or by the Auditor-General, and any person obliged to appoint an accounting officer in terms of section 59 of the Close Corporations Act, 1984 (Act 69 of 1984), shall exercise reasonable care in the custody of cheque forms and in the reconciliation of its bank statements".
[30] Malan *et al* (n 13) 267.
[31] 34 of 1964.
[32] s 43(2)(b).
[33] s 43(1)(b).
[34] *Brakpan Produce and Livestock Agency Ltd v Dennill* 1922 TPD 150 152.
[35] In determining a reasonable time for the purposes of this section, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case.

International Trade Law[36] (UNCITRAL) and the Model Law of the UNCITRAL[37] are two separate authorities. According to Schulze, in South Africa there is no explicit legislation governing payment by EFT and such transactions are governed by the law of mandate and the law of contract.[38] The Electronic Communications and Transactions Act[39] (ECTA) provides a wide structure for the regulation of electronic communications and transactions, including electronic transactions for financial services[40] but it does not deal directly with electronic banking services. Later in this paragraph there will be a comparison with other jurisdictions and how they govern this area of law.

The Legal Guide of the UNCITRAL is designed to help legislatures when drafting legislation on this field and has persuasive authority. The Guide gives a wide definition of EFT stating that it is "a funds transfer in which one or more of the steps in the process that were previously done by paper-based techniques are now done by electronic techniques".[41]

However, a more comprehensive and preferable definition is provided by the Electronic Fund Transfer Act[42] (EFTA) which is legislation of the USA. It provides as follows:

> "[EFT] is a transfer of funds [and] is initiated through an electronic terminal, telephone, computer (including on-line banking) or magnetic tape for the purpose of ordering, instructing, or authorising a financial institution to debit or credit a consumer's account. EFTs include, but are not limited to point-of-sale (POS) transfers; automated teller machine (ATM) transfers; direct deposits or withdrawals of funds; transfers initiated by telephone; and transfers resulting from debit card transactions, whether or not initiated through an electronic terminal".[43]

[36] Guest "Current Work of the United Nations Commission on International Trade Law" in Chinkin, Davidson & Ricquir *Current Problems of International Trade Financing* (1983) 134 - UNCITRAL was established pursuant to Resolution 2205 (xxi) of the General Assembly of the United Nations, dated 17 December 1966. General Assembly Resolution 2102 "Consideration of Steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade" 20 December 1965 - The basic mandate of the Commission is to "further the progressive harmonisation and unification of international trade". The first meeting of the Commission was held in 1968 and since then it has met each year.

[37] *Model Law on International Credit Transfers* 1994.

[38] Schulze (n 24) 670; Schulze "Countermanding an electronic transfer" 2004 *Juta's Business Law* 84 86; and Schulze (n 22) 57 - 59.

[39] Act 25 of 2002; and The Regulation of Interception of Communications and Provisions of Communication Regulated Information Act 70 of 2002 (as amended) may also be relevant to electronic banking.

[40] s 42 of the ECTA.

[41] UNCITRAL *Legal Guide on Electronic Funds Transfers* (A/CN 9/SER B/1 (1987) 12 par 6.

[42] 15 USC 1693 (1978).

[43] s 205.3(b) of regulation E (12 CFR 205) implementing the EFTA (n 42).

The bank is obliged to give effect to payment orders of its customers. This same relationship governs EFT transactions, and as in the case of cheques, this is a contract of mandate.[44] It is the common-law duty of a mandatary to perform his/her mandate timeously, in good faith and without negligence.[45] The mandatary (bank) must accordingly act the same way as a reasonable bank acting in the same circumstances.[46]

Brown is of the opinion that the use of an EFT system can be said to amount to "the ultimate act of payment faith" for "not only is the value which is transferred reduced to a symbolic form, but the symbolic form itself is removed from the immediate possession of the parties to the transfer".[47] It is submitted that the main objective of EFTs are to "transfer credit from one financial institution to a creditor having an account in the same or some other financial institution".[48]

A credit transfer is achieved due to a number of mandates resulting in the crediting of the beneficiary's account. The beneficiary acquires a personal right against his bank to credit and advance the amount of the transfer to him; simultaneously the originator's account is debited reducing the amount of his bank balance.[49] It follows that in the case of a credit transfer funds are "pushed" through the banking network from debtor to creditor. Common sense dictates that a transfer of value has taken place but according to the law of property or obligation, no such transfer has taken place.[50] This transaction does not amount to a cession of the originator's rights to the beneficiary. It is irrelevant whether or not the beneficiary's account is with the same or a different bank.[51]

On the other hand, the creditor initiates a debit transfer with the debtor's consent. He/she instructs his/her bank to gather payment of a specified amount from the debtor and this amount is most often a recurring debit.[52] Debit transfers are also known as "direct debiting" or "debit order" and are

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44 *Gilbey Distillers & Vintners (Pty) Ltd v ABSA Bank Limited* 2001 JDR 0411 (C) par 57.
45 Van Zyl and Joubert "Mandate and Negotiorum Gestio" 1999 *LAWSA First reissue* 10 – 11.
46 *Royal Products Ltd v Midland Bank Ltd and Bank of Valetta* 1981 2 Lloyd's LR 194 198 – 199.
47 Brown "Implications of the informational nature of payments" 1980 2 *Computer Law J* 153 157.
48 Lee and Zinnecker *Payment Systems, Banking and Documentary Transactions: Problems, Cases and Comments* (2003) 6; and Brindle and Cox (n 7) 49.
49 Visser "The evolution of electronic payment systems" 1989 *SA Merc LJ* 189 200 and McLaren "Commercial law: payment by credit transfer" 1978-1979 *University of Western Ontario Law Review* 299 300 – 301.
50 Ellinger, Lomnicka and Hooley *Modern Banking law* (2011) 562.
51 *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 750; and *Royal Products Ltd* case (n 46) 198.
52 Schulze "Stop orders, debit orders, and insurance premiums" 1992 *SA Merc LJ* 53; and Visser (n 49) 201.

directly the opposite of credit transfers. It follows that with a debit transfer the creditor "pulls" the funds to his account instead of the debtor "pushing" the funds to the account of the creditor.[53]

In some jurisdictions, for example in the United States of America (USA), there is legislation differentiating between credit transfers initiated by the customer and transfers initiated by the bank.[54] Meiring[55] is of the opinion that in South African law there is no point in this differentiation and that the same legal consequences should follow from both transfers.

The Uniform Commercial Code[56] (UCC) of the USA excludes any transfer regulated by the EFTA. The purpose of UCC Article 4A was to govern transfers between commercial parties. The EFTA originally only governed consumer wire transfers.[57] It omitted from its scope any instruction that funds be transferred from one bank to another (a remittance transfer), either for its own account or that of third parties. After the Dodd-Frank[58] came into effect in 2013, it also governed remittance transfers, whether or not such transfers are EFT as defined above.[59] Subsequently a fund transfer initiated by a remittance transfer will be beyond the scope of Article 4A, even if such transfer is not an EFT. It follows that there will be a number of important issues in specific remittance transfers that will be beyond the scope of both Article 4A and the Dodd-Frank. The Dodd-Frank reiterates the rule of the supremacy clause that the federal statute will control in the case of any conflict between Article 4A and the EFTA.

However, in the United Kingdom (UK), in the *Royal Products Ltd* case the court held that the relationships between banks involved in a funds transfer transaction are governed by the rules of agency. Schulze has submitted that this would be the similar case for relationships between South African banks involved in a funds transfer transaction. Such relationship would be governed by

[53] Geva *Bank Collections and Payment Transactions a Comparative Legal Analysis* (2001) 4.
[54] Brindle and Cox (n 7) 75.
[55] Meiring "Electronic funds transfers: a legal update" 1998 *Juta's Business Law* 36 37.
[56] Mentschikoff "Highlights of the Uniform Commercial Code" 1964 *Modern Law Review* 167 167 – 168: "[The UCC] is peculiarly a 'private' law codification centering around the movement of goods by way of sale and the incidental services of railroads, warehouse men, bankers, finance companies and the like in connection with that movement. Its unity rests essentially on the functional unity of this movement of goods rather than on uniformity of conceptual treatment, but there are a number of important general concepts both of substance and drafting technique, for this code has been planned to endure and to afford both the courts and the people affected by it room to move in the best American Common Law tradition".
[57] s 205.3(a)-1) of regulation E (12 CFR 205) implementing the EFTA (n 42).
[58] The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.
[59] s 1073 and 919 Dodd-Frank (n 58).

the so-called "inter-bank agreement" and the provisions, as well as the *naturalia*[60] of their relationship, would be governed by the common-law principles of representation.[61]

Meiring[62] correctly refers to the Jack Report in the UK which suggested a two – pillar approach to govern EFT systems. Firstly the statutory regulation was to govern a few common issues, while the standards of best practice was to govern more detailed issues. The Government accepted most of the review committee's suggestions. Despite this, the banking sector has since drawn up a "voluntary code of best practice" for the provision of EFT services to personal customers. Subsequently similar codes of practice have emerged governing EFT systems in South Africa,[63] Australia and New Zealand. These codes are enforced by a Banking Ombudsman to whom complaints may be referred by disgruntled customers if matters are not resolved by the bank.

3 **The concept of money and associated legal problems**

This paragraph critically discusses the definition of money. Unfortunately, South African legislation does not define the concept of money; therefore as an aid, authority from foreign jurisdictions will be utilised when discussing this definition. A comparison will be made between the state and the societary theories of money. In addition the problematic question relating to ownership will also be considered. Furthermore the economists' definition of money will be discussed briefly. In conclusion it will be submitted that a definition of money in law must recognise both the functions of money and the legal context within which it must be shaped.

3.1 Different theories leading up to the definition

The authors of *Black's Law Dictionary* define money as "the medium of exchange authorised or adopted by a government as part of its currency".[64] It is submitted that this definition is consistent

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[60] Kahn *Contract and Mercantile Law Through the Cases* (1971) 194 – things which are only of the nature of the contract.
[61] Schulze "Electronic fund transfer and the bank's right to reverse a credit transfer: one big step (backwards) for banking law, one huge leap (forward) for potential fraud: *Pestana v Nedbank* (act one, scene two)" 2008 *SA Merc LJ* 290 294.
[62] Meiring (n 55) 38.
[63] The Banking Association of South Africa "Code of Banking Practice (2012)" – clause 9 of the code provides for payment services. Clause 9.3 and 9.4 particularly deal with EFT.
[64] Garner *et al* (n 6) 1096.

with the so-called "state theory of money" developed by GF Knapp and also supported by Mann. Consequently this led to Mann concluding that:

> "[I]n law, the quality of money is to be attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange in the state of issue".[65]

According to this definition money can easily be differentiated from other payment instruments, for instance negotiable instruments, since it is both palpable and signifies a direct exercise of the sovereign authority of the state.[66] It follows that the definition is not concerned with the question of credit or debt but rather with the physical assignment of tokens that are deemed to have value.

In contrast, Proctor critically remarks that "the role of private institutions in the creation of money" is overlooked in the definition and that the modern idea of money, fundamentally, is conceptual rather than palpable. He further opines that there should be no differentiation between money issued by the state and the role that private institutions play.[67] Brindle and Cox, however, are of the opinion that Proctor's wide-ranging approach confuses money with payment, and that there is a significant difference.[68]

Money differs in important respects from other payment instruments; as remarked by Smith:

> "[M]oney does not involve questions of credit or debt, but merely the transfer of tokens that are accepted as having value, whether they are intrinsically valuable or not. In this, money differs from other forms of payment. Money simply consists of the chattel held by its owner; other forms of credit – such as banking account or bills of exchange – involve the creation of obligations. Thus, in the case of a bank account, the bank owes a debit to the account holder, which is a purely personal obligation. The account holder has no proprietary claim in any money. Where there is payment in money, an object is transferred, and apart from the *in rem* consequence of ownership, no other rights are created. If there is payment by other means, personal obligations are either created, or changed".[69]

In comparison, the so-called "societary theory of money" defines money as the practice of commercial life or the assurance of society which has the authority to acknowledge money. Above

[65] Mann (n 9) 8; Proctor (n 9) par 1.15; and McKendrick (n 7) 486.
[66] Gleeson *Personal Property Law* (1997) 142 – 143; and Brindle and Cox (n 7) 35.
[67] Proctor (n 9) pars 1.49 – 1.53.
[68] Brindle and Cox (n 7) 35.
[69] Smith *The Law of Assignment* (2007) par 21.43 and Smith *The Law of Assignment* (2013) par 12.36.

all the attitude of society is paramount in identifying money. It follows that a mere functional approach cannot of itself offer a satisfactory basis for a legal definition of money. This theory adds to a definition of money as a means of payment, and to the expansion of new forms of money.[70]

In an attempt of giving a definition the Queen's Bench in *Moss v Hancock*[71] held that:

> "[Money is] that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities".[72]

On the other hand, the UCC stipulates that money is:

> "[A] medium of exchange currently authorised or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an inter-governmental organisation or by agreement between two or more countries".[73]

Likewise the Supreme Court of Canada found that "any medium which, by practice, fulfills the function of money which everyone will accept in payment of a debt is money in the ordinary sense of the words, even though it may not be legal tender".[74]

Economists are inclined to define money by referring to its main functions namely:

a) Medium of exchange:[75]

If a state's system of trade and commerce is to be founded on money as a means of exchange, then the law must support that position and permit for the guaranteed discharge of monetary debts by payment in that medium. It follows that the law must oblige creditors to assent to payment through that medium (legal tender).[76]

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[70] Proctor (n 9) par 1.27.
[71] [1899] 2 QB 111.
[72] *Moss* case (n 71) 116.
[73] s 1 – 201(24).
[74] *Reference Re Alberta Statutes* [1939] SCR 100 39.
[75] Klein and Lambert *The Business of Banking* (1987) 28; Proctor (n 9) par 1.09 and 1.35; Brindle and Cox (n 7) 36; Schulze (n 22) 51; and Geva "Legal aspects relating to payment by E-money: review of retail payment system fundamentals" 2000 - 2001 *International Financial and Economic Law* 255 257.
[76] Nussbaum *Money in the Law: National and International* (1950) 45 – 46: "Legal tender is money which a creditor is not privileged to refuse if it is tendered by a debtor in payment of his debt."

b) Store of value:[77]

The value must be recognised in a method which the law can maintain. From this, one can deduce that money must be expressed by reference to a well-known unit of account. Assume, for instance that bread (or any item that decreases in value) is money and that a loaf of bread costs R10. If the bread becomes stale, it will be of less value. But if it is sold while fresh, the entire R10 can be recouped. Thus the R10 can be used to purchase another item.

c) Unit of account:[78]

The unit of account must be uniform throughout the monetary area concerned. In South Africa we use the Rand for valuing our revenue and domestic expenses. Businesses use the Rand for valuing their goods and calculating their profits and losses. At state level, the Rand is used to calculate the national income, state expenditure, and so on. It is noteworthy that the paper that a banknote is printed on is of far-less value than the actual note itself, for example the R100 note. The value of the paper the banknote is printed on does not amount to R100.

Although what is said above is normally true it is of interest to note that on 8 March 1983 a 1,000 pound banknote issued by the Bank of England in 1933 was sold to Spink's, the London dealers, for 6,800 pounds (Times, 9 March 1983). If the owner, instead of selling the note had presented it for payment to the Bank of England, he would have been entitled to no more than its face value in notes of current legal tender.[79]

It is abundantly clear that the power of the state is a fundamental element of the definition of money and it is submitted that a definition of money in law must recognise both the functions of money and the legal context within which it must be shaped.

[77] Klein and Lambert (n 75) 29; McKendrick (n 7) 486; Proctor (n 9) par 1.37 – 1.42; Geva (n 75) 259 – 260; and De Jager "Much ado about nothing? Legal principles on money, banks and their clients after *Joint Stock Company Vavarinskoye v ABSA Bank Ltd*" 2010 *SA Merc LJ* 127 128.
[78] Klein and Lambert (n 75) 29 and Proctor (n 9) par 1.32 – 1.34.
[79] McKendrick (n 7) 487 see footnote 8.

3.2 SARB

The South African Reserve Bank Act (SARBA) 90 of 1989[80] provides that the South African Reserve Bank (SARB) shall have the sole right to issue or cause to be issued banknotes and coins in the Republic.[81]

The primary objective of the SARB is to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic.[82] Other powers and duties of the SARB are set out comprehensively in section 10 of the Act.

The independence of the SARB is constitutionally protected. Section 223 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the constitution) stipulates that the SARB is the central bank of the Republic and section 224(1) reiterates the primary object set out in section 3 of the Act. Thus, when pursuing its object, the SARB must perform its functions independently and without fear, favour or prejudice.[83]

The SARB shall have the sole right to issue or cause to be issued banknotes and coins in the Republic.[84] Subject to the provisions of section 14(1), the monetary unit of the Republic shall be the Rand (R), and the Cent (C), which is one hundredth part of the rand.[85]

The Act refers to five banknote denominations and nine coin denominations.[86] The main disadvantages of these denominations are handling costs, counterfeiting, and the high security risk.[87] The denominations are set out in the table below.

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[80] References in this par to "the Act" in the text and in the footnotes are references to Act 90 of 1989 (as amended), unless the context clearly indicates to the contrary.
[81] s 14(1).
[82] s 3.
[83] Malan "The Reserve Bank, banks and clearing houses in South African law" in Weerasooria (ed) *Financial Regulation and Payment Systems* Prospect Media Australia (2001) 4 refers to Oelkers *Das Recht der South African Reserve Bank: Ein Beitrag zum neuen Südafrikanischen Verfassungsrecht* (1999) 27 – defines the concept as the power of the central bank to perform its duties without political, economic and legislative interference, in particular without directives from the government and without being subject to government supervision.
[84] See (n 81).
[85] s 15(1).
[86] This table is currently set out in the Act. Due to the diminishing value of the Rand 1 and 2 cent coins are no longer minted and are no longer in circulation.
[87] Brindle and Cox (n 7) 49; and Schulze (n 22) 52.

Notes	Coin
R10	1 cent
R20	2 cent
R50	5 cent
R100	10 cent
R200	20 cent
	50 cent
	R1
	R2
	R5

3.3 Legal tender

Section 17(1) confirms that banknotes and coins issued by the SARB are legal tender for payment of an amount equal to the amount specified on the notes or coins. Mann defines legal tender as money or chattels "that the legislature has so defined in the statutes organising the monetary system".[88]

3.4 The legal nature of banknotes

Oelofse submits that the legal nature of banknotes has been a topic of discussion in several cases in foreign jurisdictions but this has not been the situation in South African case law.[89] In *Banco de Portugal v Waterlow and Sons Ltd*[90] the respondent, a firm of printers, undertook to printout banknotes for the appellant, the central bank of Portugal. Due to the negligence of the respondent thousands of banknotes were printed in duplicate and circulated by conspirators. Consequently the appellant had to withdraw all these banknotes to prevent total anarchy and the currency of Portugal suffering further prejudice. Furthermore the appellant had to reprint and circulate original banknotes. Unfortunately the wording of the banknotes is not made available in the case transcript.

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[88] Mann (n 9) 42.
[89] Oelofse "The nature of bank-notes issued by the South African Reserve Bank" 1982 *Modern Business Law* 90 91.
[90] 1932 AC 452.

The questions before the court were as follows:

First, whether the central bank, issuing an inconvertible currency,[91] suffered any other than a merely nominal loss (apart from the cost of printing) when they called in bad notes put into circulation by forgers and gave good notes in exchange for them.

Secondly, whether in the circumstances of this case the central bank, when they gave in exchange for a forged note of the face value of 500 escudos a good note of that face value, could properly be said to have suffered a loss of 500 escudos, with the result that the respondents, who are liable by reason of a breach of contract which enabled the forged notes to be put into circulation, are bound to pay to the central bank 500 escudos converted into sterling at the rate current at the date of the loss.

Thirdly, whether the central bank gave evidence of, or proved, any loss at all.

Finally, whether, if the central bank proved any loss, such loss was not caused in whole or in part by the voluntary action of the central bank themselves or was not in whole or in part such a loss as could not fairly and reasonably be considered as arising naturally from the breach of contract or such a loss as could not be reasonably supposed to have been in contemplation by both parties at the time of making the contract as the probable result of the breach, or whether the loss was not aggravated by the failure of the central bank to take reasonable steps to limit the loss.

The court found that the damages which the appellant could claim from the respondent included the face value of the replaced duplicate banknotes and not only the printing cost of the replacing banknotes.

Lord Warrington held that:

> "[T]he whole question in my opinion turns on the nature of the obligation incurred by the issuing Bank under the notes it issues. They are in effect promissory notes payable to bearer on demand… As soon as a note is issued it imposes an obligation on the Bank to pay to the bearer on demand 500 escudos. This last is the only material obligation in the present case. There may be two others: namely a) to pay in gold should the notes

[91] Having a right to issue notes but no obligation to honour them otherwise than by giving in exchange other notes, until some future return to convertibility at a date so remote and unlikely to occur that it could not be taken practically into account.

> hereafter cease to be inconvertible [*sic*], and b) to pay in some new form of currency should any such new form be introduced".[92]

Lord Warrington was of the opinion that a banknote has no inherent value, unlike other forms of immovable or movable property. Accordingly, the banknote derives its value from the obligation of the central bank evidenced by the banknote. In the above case, Lord Warrington would only have granted the printing cost of the replacement banknotes, and not the face value of the banknotes which were unlawfully put into circulation.

In stark contrast, Lord MacMillan accepted that banknotes are promissory notes but criticised the opinion that they do not have an inherent value by opining that:

> "[I]t overlooks the cardinal fact that a note when issued by the Bank of Portugal becomes by the mere fact of its issue legal tender for the sum which it bears on its face. The issued note represents so much purchasing power in terms of commodities. It can be used by the holder of it to purchase at current prices any commodity in the market, including gold and securities. It can equally be used by the Bank to purchase commodities, including gold and securities, or to discharge debts due by it. It must be accepted by the Bank in discharge of debts due to it. All this is quite irrespective of the convertibility of the note. With all respect to the contrary view it is in my opinion quite an irrelevant circumstance for the present purpose that the holder of a Bank of Portugal note is not entitled to demand for it from the Bank a fixed amount of gold. Gold after all is only a medium of exchange. Its special importance as such arises from its universal acceptability and the stability of its value".[93]

It appears from this *dictum* that although Lord MacMillan accepts that the banknotes are promissory notes (a controversial issue),[94] they have an inherent value as a result of the fact that they are legal tender. Therefore the banknotes cannot simply derive their value from the obligation of the central bank.

A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer.[95]

[92] *Banco de Portugal* case (n 90) 483 – 484.
[93] *Banco de Portugal* case (n 90) 508 – 509.
[94] As mentioned above, the wording of the banknote is not made available in the case transcript. Therefore it is not evident if the word "promise" appears on the banknote.
[95] s 87(1) Bills of Exchange Act 34 of 1964.

According to Oelofse[96] the SARB notes of the early 80s contained a promise to pay rather than a particular face value without a promise to pay. In *The Bank of Canada v The Bank of Montreal*,[97] Laskin CJ remarked that money cannot be a promise to pay money.[98] Consequently it is submitted that SARB notes are money and have an inherent value. It is further submitted that this is why the word "promise" no longer appears in the current SARB notes. The banknotes represent a certain amount of purchasing power and would only be a promissory note if it is convertible.[99] Consequently the Bills of Exchange Act is not applicable to the SARB notes.

3.5 Ownership

According to South African law, money is *res corporalis*[100] and ownership in money is generally obtained in derived fashion by *traditio*[101] and other methods of obtaining ownership in movables. Ownership of money can, however, also be acquired in original fashion through *commixtio*. This occurs where money belonging to different owners is mixed in such a manner that it cannot be readily identifiable.[102] *Commixtio* applies whether or not the money has been obtained in good or bad faith and whether or not value was given. It follows that the rule *nemo plus iuris ad alium transferre potest quam ipse habet*,[103] is limited in terms of the recovery of money. In *Adams v Mocke*[104] it was held that:

> "[The rule] … is that the owner has the right of vindication, and the cases where he is deprived of this right are really exceptions to the general rule. One of these exceptions is where the owner of money or of a

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96 Oelofse (n 89) 93.
97 1978 1 SCR 1148.
98 *The Bank of Canada* case (n 97) par 50.
99 In other words, does not entitle the holder to claim payment of its face value from the central bank in gold at a fixed rate, the only obligation which the central bank incurs when it issues a note is to give on demand another note in exchange for it.
100 Garner *et al* (n 6) 1421 – tangible things that are perceptible to the sense; Malan "Share certificates, money and negotiability" 1977 *SALJ* 245 249; and Malan *et al* (n 13) par 40.
101 Garner *et al* (n 6) 1634 – the simple delivery of a piece of property by one person to another with the intention of transferring ownership; *R v Gordon* 1914 CPD 123 125; and *Woodhead Plant & Co v Gunn* (1894) 11 SC 4 7 – 8. Delivery in this case can be actual delivery or fictional delivery including *traditio longa manu* and *constitutum possessorium*.
102 *Gordon* case (n 101) 125; and *Ex parte Estate Kelly* 1942 OPD 265 271.
103 Claassen *Dictionary of Legal Words and Phrases* Vol 3 (1976) 23 – no one can transfer to another a greater right than he has himself.
104 (1906) 23 SC 782.

> negotiable instrument, payable to the holder, seeks to recover the same from a person who has obtained it bona fide and for value".[105]

This is justified with reference to the currency of money, which is "quite incompatible with the right of anyone to follow stolen money into the hands of others who have honestly received it for value".[106]

4 **Some legal problems relating to payment**

4.1 Is the delivery of a cheque or the provision of an EFT payment?

Payment to the creditor extinguishes a monetary debt.[107] As stated above, a creditor is not obliged to accept a cheque in payment but it is a convenient and generally an accepted method of extinguishing monetary debts.[108] It is evident that a debtor is entitled to effect payment by cheque if the creditor expressly or impliedly agrees to accept such method of payment.

Acceptance of a cheque in payment suspends the rights of the creditor under the *causa*[109] for the cheque only until such time as the instrument is paid, or dishonoured.[110] It follows that such acceptance amounts to payment of the monetary debt subject to the condition[111] that the cheque is honoured on presentation.[112]

In January 2002, South African banks unanimously decided not to accept any cheque in excess of R5 million for collection. This decision was a result of the decrease over the preceding few years in the number of processed cheques, and the decrease in the total face value of these cheques.[113]

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[105] *Adams* case (n 104) 788.
[106] *Woodhead Plant & Co* case (n 101) 8.
[107] *Harrismith Board of Executors v Odendaal* 1923 AD 533 539; and *Bouwer No v Saambou Bank Bpk* 1993 4 SA 492 (T) 498 – 499.
[108] *B & H Engineering v Frist National Bank of SA Ltd* 1995 2 SA 279 (A) 285 – 286; *Colley v UDC Rhodesia Ltd* 1976 1 SA 821 (RA) 823; and *Sibbald v Dakota Motors* 1956 3 SA 203 (T) 206 – 207.
[109] The debt underlying the cheque. See Claassen (n103) Vol 1 233 and Garner *et al* (n 6) 248.
[110] *B & H Engineering* case (n 108) 285 – 286; *Harris v Pieters* 1920 AD 644 652; and *Hallmark Motor Group (Pty) Ltd v Phillip Motors CC* [1997] 4 All SA 707 (W) 710 a-c.
[111] *Currie No v Tromp and Playfair* 1966 1 SA 561 (SR) 567; and *Govender v Standard Bank of SA Ltd* 1984 4 SA 392 (C) 405.
[112] *Van Loggerenberg v Sachs* 1940 WLD 253 255. In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 SA 685 (A) 693 it was held "that payment by cheque is prima facie regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on presentation. When the cheque is so honoured, the date of payment of the debt is the date of the giving of the cheque. Conversely, if the cheque is dishonoured there has been no payment".
[113] Schulze (n 22) 52.

Another consequence of this decision was the phenomenal growth of electronic payments in the banking industry.

Schulze has submitted that EFT is not a payment instrument as, for example, banknotes and coins, or cheques. I agree with this submission because there is no actual instrument that represents certain rights that can be transferred from one individual to another. Thus, to speak of a transfer of funds is a misnomer since there is no physical transfer of banknotes and coins from one person to another.[114] It follows that EFT is a method of payment rather than an instrument. It is a medium through which a third party[115] is given an instruction by the payer to effect payment through an electronic medium to the beneficiary's bank account.[116]

In the *Libyan Arab Foreign Bank* case the court held that "[an electronic fund] transfer may be a somewhat misleading word, since the original obligation is not assigned; a new obligation by a new debtor is created". This constitutes a novation[117] of the original debt.

EFT includes credit and debit transfers; stop orders;[118] debit orders;[119] EFTPOS[120] and ATMs.[121] An ATM may perform the function of transfer of funds, for example when funds are transferred from one account to another, or it may perform the function of payment, for example payment of debt owed to the financial institution holding these accounts. However it is more often used as an instrument to obtain cash.

If the parties agree that payment will be effected by stop order, a form of EFT, the remedies of the creditor on the *causa* are suspended pending execution of the stop order by the bank. All the forms

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[114] Schulze (n 24) 671.
[115] The payer's bank.
[116] Schulze (n 24) 670 – 671.
[117] Hutchison, Pretorius and Du Plessis *et al The Law of Contract in South Africa* (2012) 379 - an agreement to extinguish and replace one or more existing obligations with a new obligation.
[118] Nigel *Banking in South African Law* Juta (1981) 194 – "a stop-order consists of an authorization by a customer to a bank to deduct a fixed amount of money from his account at regular intervals and to pay it over to someone else". It is noteworthy that a debit order is more flexible than a stop-order because it allows for a fluctuating amount to be debited from the customer bank account.
[119] Hooley "Direct debits and set-off – the tiger roars!" 1997 *Cambridge LJ* 500 501; and Tettenborn "Pay now sue later – direct debits, set off and commercial practice" 1997 *LQR* 374 375.
[120] Visser (n 49) 201 - "a payment system is the computer-age version of a cash transaction, it allows retail payments to be effected by the transfer of funds electronically from the accounts of customers to the accounts of retailers". This is an example of a debit transfer combined with the use of a debit card.
[121] Meiring "ATM's and EFTPOS: some legal considerations" 1987 *Modern Business Law* 115; and Visser "Banking in the computer age: the allocation of some of the risks arising from the introduction of automated teller machines" 1985 *SALJ* 646.

of EFT stipulated above follow the same legal structure.[122] It is noteworthy that the bank effecting the payment does not act as the representative of the debtor, but does so in accordance with a contract of mandate.[123] It follows that the originator is entitled to the *condictio indebiti*,[124] should payment not be due by the payer, and not the paying bank.[125] In addition the beneficiary bank consequently also does not represent the beneficiary when it receives payment.[126]

As stated above payment by EFT is payment in accordance with the *causa* for which the order is given; it is not a *datio in solutionem*[127] but performance; the creditor obtains an unconditional right to the payment of money against his/her own bank.[128] In the event of non-payment, the creditor can enforce his/her rights in terms of the *causa*. Payment subsequently takes place when the creditor obtains an unconditional right against his/her own bank.[129]

4.2 What is the moment of payment in relation to the following?

4.2.1 Delivery of a cheque

In the *Volkskas Bank Bpk* case the accounts were held at different banks and the automated clearing bureau (ACB)[130] agreement was applied. The court found "that the object of the agreed time limit was to enable the drawee bank to inform the collecting bank of its decision regarding payment, which accounted for the arrangement that provisional debits only became final upon the expiry of the time limit".[131] In practice payment is complete at the moment the provisional entries on the accounts of the banks involved at the Reserve Bank become final.

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[122] *Esso Petroleum Co Ltd v Milton* [1997] 2 All ER 593 (CA) 607 – 608; and Hugo (n 17) 235.
[123] *Gilbey Distillers & Vintners (Pty) Ltd* case (n 44) pars 66 – 86; and *B & H Engineering* case (n 108) 293 held "that the paying bank is not the drawer's agent, but a neutral payment functionary".
[124] Claassen (n 103) Vol 1 295 "where a person has mistakenly paid money or handed over property to another, thinking that the receiver was entitled thereto when in fact such was not the case, then he is entitled to recover the same".
[125] *Gilbey Distillers & Vintners (Pty) Ltd* case (n 44) pars 54 – 60.
[126] In New Zealand the position is to the contrary: see *Dovey v Bank of New Zealand* 2000 3 NZLR 641 649 – 651.
[127] Claassen (n 103) Vol 1 370 "giving in order to effect discharge, ie giving something else in place of that which is due. This is valid payment if accepted by the creditor". This is giving one thing in payment of another which was due.
[128] Malan *et al* (n 13) 279.
[129] *Burg Trailers SA (Pty) Ltd* case (n 5) 289 B-C; and the *Vereins-und Westbank AG* case (n 5) 429 C-D which emphasises the bilateral nature of payment.
[130] UNCITRAL (n 41) 7 define a clearing house as "[a]n institution which effects the exchange of funds transfer instructions between participating banks and performs the accounting to enable settlement". See Visser (n 49) 195.
[131] *Volkskas Bank Bpk* case (n 5) 608.

In comparison the accounts were held at the same bank in *Rosen v Barclays National Bank*.[132] The court found that payment is completed the moment the bank makes its decision to give effect to the order to pay.[133] It follows that this will apply even where the accounts are held at different branches of the bank concerned. It is clear from the judgment that the clearing agreement is intended to apply between two branches of the same bank as well. It is submitted that the position would be similar in South African law. This decision was not overruled by the Appellate Division in the *Volkskas Bank* case above.

4.2.2 Credit transfer

It is submitted that the same principles that apply for cheques above also apply for EFT. Malan and Pretorius take the view that "a decision to pay is not payment but the two could coincide where, for example, a provisional credit entry becomes final when the decision to pay is made".[134] I fully support the above view because this approach may be followed where payment is to take place between banks. It follows that payment takes place when the beneficiary's bank decides to credit the beneficiary's account unconditionally resulting in the discharge of the *causa* for which the payment order was issued.[135] It is further submitted that by consenting to EFT as a method of payment, a creditor accepts that such transfer is an absolute payment[136] and will consequently extinguish the debt owed by the debtor.[137]

Article 19(1) of the Model Law of the UNCITRAL stipulates that:

> "A credit transfer is completed when the beneficiary's bank accepts a payment order for the benefit of the beneficiary. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it. Completion does not otherwise affect the relationship between the beneficiary and the beneficiary's bank".

Payment into a bank account is deemed to have been made at the moment when the payee bank makes an unconditional decision to credit the payee's account, even if it has not actually credited

[132] 1984 (3) SA 974 (W).
[133] *Eyles v Ellis* (1827) 4 Bing 112 [130 ER 710]; *Momm & others (t/a Delbrueck & Co) v Barclays Bank International Ltd* 1977 QB 790; and *Tenax Steamship Co Ltd v The Brimnes (Owners)* 1975 QB 929 (CA).
[134] Malan and Pretorius "Credit transfers in South African law" 2007 *THRHR* 1 11.
[135] *Libyan Arab Foreign Bank* case (n 51) 728–750G.
[136] The debtor would be discharged from the debt.
[137] Schulze (n 24) 674.

it.[138] It follows that the payment obligation will not be discharged by a provisional crediting of the account or if payment to the payee is subject to a condition precedent or condition subsequent.[139]

4.3 Further legal problems in relation to payment by cheque

4.3.1 Posting of cheques

If a cheque is sent by post as a means of payment but the creditor did not consent to it being posted, the debtor bears the risk of its theft or loss.[140] However, if the creditor has agreed to payment by post, the debtor discharges his/her debt subject only to the condition that the cheque is honoured.[141] This agreement can be express or implied and the creditor bears the risk if the cheque is stolen or lost.[142] It is noteworthy that the post office is not the representative of the creditor.[143]

4.3.2 Delivery in full and final settlement

Whether delivery of a cheque for a lesser amount than the debt can be regarded a constituting full and final settlement of the debt largely depends on whether the parties have reached a compromise (*transactio*)[144] by giving and taking the cheque. Where a debt has been compromised, it is discharged and the debtor will be liable only for the amount agreed on in terms of the compromise (ie the amount of the cheque). The creditor therefore loses any claim he may have had for the balance of the principal debt. It follows that the debtor is discharged from all liabilities.[145]

When determining whether a compromise has been reached, the words and expression used by the parties must be interpreted. Ambiguous words must be interpreted in the light of the circumstances

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[138] Cranston *Principles of Banking Law* (2002) 239; and Brindle and Cox (n 7) 8 – 9.
[139] Geva "Payment into a bank account" 1990 *Journal of International Biotechnology Law* 108 110.
[140] *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) 908; *National Housing Commission v Cape of Good Hope Savings Bank Society* 1963 1 SA 230 (C) 233; *Standard Bank of SA Ltd v Minister of Bantu Education* 1966 1 SA 229 (N) 233; and *SA Railways and Harbours v Outfitters (Pty) Ltd* 1952 4 SA 488 (N) 491.
[141] *Greenfield Engineering Works (Pty) Ltd* case (n 140) 908; *ABSA Bank Ltd v Mutual & Federal Insurance Co Limited* 2003 1 SA 635 (W) 638, 645; and *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 2 SA 763 (T) 769 were it was held "The principle is that if a debtor is asked by his creditor to make payment in a particular way, eg, by drawing a cheque and putting it in the post, then, when he has done what he was asked to do and has posted the cheque, he has, subject to the cheque being honoured, made due payment, and risk of loss thereafter us on the creditor".
[142] Burchell "Payment by posting cheque and rights of true owner of stolen cheques" 1954 *SALJ* 211 213.
[143] *Mannesmann Demag (Pty) Ltd v Romatex (Pty) Ltd* 1988 4 SA 383 (D) 389.
[144] A compromise is an agreement in terms of which the parties settle a dispute between themselves, so discharging the debt in dispute. See *Tauber v Von Abo* 1984 4 SA 482 (E) 486 – 487.
[145] *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 3 SA 523 (A) 528 – 529.

in which they were written or used.[146] The words "please find our cheque in full settlement of your account"[147] have been found to amount to an offer of compromise. Furthermore, the creditor to whom an offer of compromise is directed must accept or reject the offer,[148] and is not entitled to add to it.

4.4 Can an EFT or a cheque be countermanded?

According to Schulze[149] there is a presumption that once an authorisation for an EFT has been given by a client, either to the bank itself, or communicated to the terminal, the EFT cannot be countermanded.[150] I strongly disagree with this presumption as I believe that factors such as fairness and public policy should be taken into consideration. Furthermore I believe that clients who have mistakenly[151] authorised an EFT should be given a grace period to clarify the mistake.[152] Similarly clients who have been defrauded should have the right to countermand an EFT without incurring any addition charges.

Article 12(1) of the Model Law of the UNCITRAL stipulates the following:

> "A payment order may not be revoked by the sender unless the revocation order is received by a receiving bank other than the beneficiary's bank at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act before the later of the actual time of execution and the beginning of the day on which the payment order ought to have been executed."

In *Take & Save Trading v Standard Bank*[153] Harms JA commented *obiter* that:

> "One may assume in the [clients'] favour that the instruction [to transfer the money electronically] had been given. One may even assume in their favour that there is no inter-bank agreement preventing the reversal of electronic transfers. All that being assumed, how can a bank retransfer an amount transferred by A into the account of B back into the account of A without the concurrence of B? [Counsel] could not suggest any ground on which this can be done; there simply is none".[154]

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[146] *Barclays National Bank Ltd v Waisbrod* 1975 1 SA 45 (D) 50.
[147] *Andy's Electrical v Laurie Sykes (Pty) Ltd* 1979 3 SA 341 (N) 345.
[148] *Turgin v Atlantic Clothing Manufactures* 1954 3 SA 527 (T) 532.
[149] Schulze (n 24) 675; and Schulze (n 22) 64.
[150] Geva "The EFT Debit Card" 1989 *Canadian Business LJ* 432.
[151] Eg mistakenly entering the incorrect bank account number.
[152] Although this would open up a can of worms because the whole point of an EFT is instant payment.
[153] 2004 4 SA 1 (SCA).
[154] *Take & Save Trading* case (n 153) 9A – B.

This *obiter dictum* was based on the testimony of the bank's expert witness in the court below, and apparently on the so-called "inter-bank agreement". Schulze disagrees with this *obiter* comment holding that Holmes JA did not provide any context to this *dictum* and opines that factors such as fairness and public policy should be considered.[155] I also respectfully disagree with this *obiter* and concur with Schulze. The prerequisite of the beneficiary's consent to countermand an EFT is unreasonable and "[there] is a need for this aspect of our law to be clarified, if not by our courts, then by the Ombudsman for the Banking Industry".[156]

In *Nissan v Marnitz (Stand 186 Aeroport (Pty) Ltd Intervening)*[157] Streicher JA successfully (in my opinion) tried explaining the above *obiter dictum* as follows:

> "[O]nce an amount is transferred by A to the credit of B's bank account the credit belongs to B and the bank cannot on the instructions of A retransfer it without the concurrence of B. The statement must be read in its context. The Court was dealing with a valid transfer of funds from A's account to B's account in payment of cigarettes to be delivered and actually delivered after such transfer. The transfer could obviously not be reversed without B's consent".[158]

Streicher JA further explained that "if stolen money were paid into a bank account to the credit of the thief, the thief had as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account".[159]

In *First National Bank of Southern Africa Ltd v Perry NO*[160] Schutz JA held that:

> "[W]hat an applicant must do in a case [of fraud], is to trace the money back to the stolen money, to identify it as a 'fund' of stolen money in the defendant's hands… Frequently the bank into whose coffers the money has been paid is joined and an interdict restraining it from paying out is obtained in addition to the one granted against the thief… Usually the bank adopts the attitude of neutrality and awaits the outcome of the dispute between the erstwhile owner and the alleged thief. [Furthermore] one must enquire, as a matter of substantive and not merely procedural law, what cause of action may lie against the bank".[161]

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[155] Schulze (n 24) 677.
[156] Schulze (n 38) 87 – 88.
[157] 2005 1 SA 441 (SCA).
[158] *Nissan* case (n 157) par 22C – D.
[159] *Nissan* case (n 157) par 23E – F.
[160] 2001 3 SA 960 (SCA).
[161] *Perry NO* case (n 160) 968C – H.

The Supreme Court of Appeal (SCA) confirmed the decision of Schwartzman J in *Pestana v Nedbank Ltd*[162] as regards to the reversal of a credit transfer. The SCA held that "in general, entries in a bank's books constitute *prima facie* evidence of the transactions so recorded, and thus, by implication, generally a bank could not unilaterally reverse a credit transfer".[163] However, this does not mean that "in a particular case one is precluded from looking behind such [book] entries to discover what the true state of affairs is".[164]

The *B & H Engineering* case concerned the rights of a banker who had paid a cheque after the drawer had countermanded payment. The drawer had wrongfully countermanded payment but the cheque had been paid to the payee, who was entitled to payment. The drawee bank, overlooking the countermand, paid the cheque in good faith but negligently. It follows that the bank was not entitled to debit the account of the drawer with the amount of the cheque. Grosskopf JA held that:

> "No reason exists why the countermand by the drawer should disturb this result. By countermanding the drawer attempted, unlawfully and unilaterally (ie, without the consent of the payee), to frustrate the debt-extinguishing agreement. In the result he failed. The debt-extinguishing agreement achieved its purpose. The creditor (payee) received his money. There is no need or justification in my view for the law to discountenance this result…[165] My conclusion accordingly is that, where parties agree to make and accept payment of a debt by cheque, the debt is extinguished when the bank pays the cheque to the payee (creditor), whether or not payment was at that stage authorised by the drawer (debtor). I have reached this conclusion by analysis of the nature and purpose of the debt-extinguishing agreement which is created when parties agree to such payment".[166]

4.5 Is there a claim by the creditor against a bank as a consequence of money having been credited to an account at that particular bank wrongly?

"Traditionally, [in South Africa] a person seeking to hold another liable due to his unjustified enrichment must rely on an established specific enrichment action, such as the *condictio indebiti*".[167] In the context of bank payments or transfers two *condictiones* are of importance, namely, the *condictio indebiti* and the *condictio sine causa specialis*. It is noteworthy that in the

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[162] 2008 3 SA 466 (W).
[163] *Nedbank Ltd v Pestana* 2009 (2) SA 189 (SCA) par 7.
[164] *Pestana* case (n 163) par 8.
[165] *B & H Engineering* case (n 108) 291H-I.
[166] *B & H Engineering* case (n 108) 292D.
[167] Du Plessis *The South African Law of Unjustified Enrichment* (2012) 1 - 2. See (n124).

Nissan case the court made no attempt to specify the particular *condictio* involved. In the above case Nissan (the appellant) had given its bank (FNB) the wrong account number, instructing it to transfer funds to TSW. The funds were erroneously transferred into Maple Freight CC's account at Standard Bank. Nissan did not owe Maple any amount nor did it have the intention of instructing any payment to be made to Maple. The question before the court was whether Maple would have been able to claim payment of the amount wrongly credited to its account from its bank? Streicher JA held:

> "Counsel for the first and second respondents submitted that to hold that a bank in FNB's position is not liable to pay the amount standing to the credit of a customer in Maple's position would be destructive of banking practice. They submitted that it would mean that, in respect of each customer and each transaction, a commercial bank would have to ascertain where the customer's funds came from and the reason therefore and why such funds were being paid to a named payee. I do not agree. The claim against the bank is based on enrichment. If the bank, upon the instructions of its customer, without knowledge of the customer's defective title, transfers or pays the amount mistakenly received to a third party, an enrichment action against the bank would not succeed. If a third party claims to be entitled to the money deposited with the bank, the bank need not investigate the matter but may adopt the stance of a stakeholder. It would be well advised to adopt such a stance. Should the bank, in such an event, unilaterally reverse the credit to the customer's account, it would be doing so at its peril".[168]

The court accepted the conclusion in the *Perry* case that where a thief deposits stolen funds into his account he has no claim against the bank for repayment of the funds as stated above.[169] Normally, a customer becomes entitled to repayment when he/she deposits money into their account but it is submitted that this is possible only if the instruction give to the bank is enforceable according to the bank and customer contract and not where it is contra *bonos mores*.[170] The effect of both *Nissan* and *Perry's* cases is that where a thief deposits stolen money into his account the instruction to collect or pay the funds is unenforceable; hence there is no obligation on the bank to account to the customer. Subsequently, the bank retaining the funds could well be enriched where it is not liable to account to its customer, but retains the funds.

[168] *Nissan* case (n 157) par 28.
[169] See (n 161).
[170] *Nedcor Bank Ltd v ABSA Bank Ltd* 1995 4 SA 727 (W) 730E-F.

In *ABSA Bank Ltd v Standard Bank of SA Ltd*[171] a cheque purportedly drawn by the drawer was deposited into the account of the payee and paid. The payee's account was overdrawn at that time but after payment showed a credit balance. On discovering that the signature of the drawer had been forged, the drawer's bank (Standard Bank) reversed the debit on the payee's account and sought to recover the amount paid or what remained in the payee's account from the payee's bank (ABSA Bank). The question before the court was whether ABSA had been enriched as the payee's indebtedness to it had been extinguished as a result of the payment received?

Permitting the claim Van Heerden DCJ held:

> "The cornerstone of the submission is that premise that the amount of the cheque had been unconditionally allocated to Horn's [the payee's] account. If that premise is unsound, the edifice which counsel endeavoured to construct on it comes tumbling down… It was rightly common cause that the appellant [ABSA] bore the onus of proving that it had not been enriched by the respondent [Standard Bank's] payment. In my view the appellant failed to prove that had it sued Horn he could have been heard to say that his overdraft had been extinguished as a result of that payment".[172]

5 **Conclusion**

It has been pointed out above that in SA payment has a bilateral nature and it is the manner in which a monetary obligation is discharged. It can consist in the physical delivery of money or it may take other forms such as effecting payment by cheque or EFT.[173]

As stipulated a cheque is neither money nor legal tender; thus the creditor is not obliged to accept it in payment of a monetary debt. The bank-customer relationship is based on a mandate between the bank and the customer. The mandator has a duty of care towards the mandatary in dealing with his/her current account. The general principle is that where the signature of the drawer on a cheque is forged, the drawee bank pays the cheque at its own risk and may not debit the account of the drawer taking into consideration the *Big Dutchman* case.[174]

The more prominent and preferable definition of EFT is the one set out in the EFTA. The bank is obliged to give effect to payment orders of its customers and as in the case of cheques the

[171] 1998 SA 242 (SCA).
[172] *ABSA Bank Ltd* case (n 171) 252A, F-G.
[173] See par 2.1.
[174] See par 2.3.1.

contractual basis is one of mandate. A credit transfer is achieved due to a series of mandates resulting in the crediting of the beneficiary's account. The funds are "pushed" through the banking network from debtor to creditor. This differs from the debit transfer in which the creditor "pulls" the funds to his account instead of the debtor "pushing" the funds to the account of the creditor.[175]

In defining money, Mann supported the "state theory of money" developed by GF Knapp, opining that:

> "[I]n law, the quality of money is to be attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange in the state of issue".[176]

Whilst the "societary theory of money" defines money as that which is recognised in the practice of commercial life or enjoys the assurance of society which has the authority to acknowledge money, economists focus on its main functions of being a medium of exchange, store of value and unit of account.[177]

The SARB's objective is to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic.[178] It has the sole right to issue or cause to be issued banknotes and coins in the Republic.[179] It follows that banknotes and coins issued by the SARB are legal tender of payment of an amount equal to the amount specified on the notes or coins.[180] Oelofse was of the opinion that the SARB notes of his time contained a promise to pay rather than a particular face value without a promise to pay.[181] In *The Bank of Canada* case, however, it was remarked that a bank note cannot be regarded as a promise to pay money.[182] It is submitted that for this reason, the word "promise" no longer appear in the current SARB notes.

In SA, money is *res corporalis* and ownership in money is not only obtained by *traditio* but also through *commixtio* and other methods of obtaining ownership in movables. Thus the rule *nemo*

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175 See par 2.3.2.
176 See (n 65).
177 See par 3.1.
178 See par 3.2.
179 See (n 81).
180 See par 3.3.
181 See (n 96).
182 See (n 98).

plus iuris ad alium transferre potest quam ipse habet, is limited in terms of the recovery of money.[183]

It is submitted that payment to the creditor extinguishes a monetary debt. The debtor is entitled to effect payment by cheque if the creditor expressly or impliedly agrees to accept such method of payment. Thus, such acceptance amounts to payment of the monetary debt subject to the condition that the cheque is honoured on presentation.[184]

EFT is payment in accordance with the *causa* for which the order is given; it is not a *datio in solutionem* but performance. The creditor obtains an unconditional right to the payment of money against his/her own bank. In the event of non-payment, the creditor can enforce his/her rights in terms of the *causa*. Payment takes place when the creditor obtains an unconditional right against his/her own bank.[185]

In determining the moment of payment by cheque, both the *Volkskas Bank Bpk* case and the *Rosen* case gave clarity.[186] It is submitted that the same principles that apply for cheques also apply for EFT. Payment into a bank account is deemed to have been made at the moment when the payee bank makes an unconditional decision to credit the payee's account, even if it has not actually credited it.[187]

It is submitted that if a cheque is sent by post as a means of payment but the creditor did not consent to it being posted, the debtor bears the risk of its theft or loss. However, if the creditor has agreed to payment by post, the debtor discharges his/her debt subject only to the condition that the cheque is honoured.[188]

Where a debt has been compromised, it is discharged and the debtor will be liable only for the amount agreed on in terms of the compromise. The creditor therefore loses any claim he may have

[183] See par 3.5.
[184] See par 4.1.
[185] See par 4.1.
[186] See par 4.2.1.
[187] See par 4.2.2.
[188] See par 4.3.1.

had for the balance of the principal debt. It follows that the debtor is discharged from all liabilities.[189]

Schulze submits there is a presumption that once an authorisation for an EFT has been given by a client, either to the bank itself, or communicated to the terminal, the EFT cannot be countermanded. The Supreme Court of Appeal (SCA) confirmed the decision of Schwartzman J in *Pestana v Nedbank Ltd* as regards to the reversal of a credit transfer. The SCA emphasised that "in a particular case one is precluded from looking behind such [book] entries to discover what the true state of affairs is". It is evident that the courts are more inclined at looking at factors such as public policy, fraud, and *contra bonos mores*. [190]

In terms of the enrichment question the effect of both *Nissan* and *Perry's* cases is that where a thief deposits stolen money into his account the instruction to collect or pay the funds is unenforceable; hence there is no obligation on the bank to account to the customer. Subsequently, the bank retaining the funds could well be enriched where it is not liable to account to its customer, but retains the funds.[191]

[189] See par 4.3.2.
[190] See par 4.4.
[191] See par 4.5.

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