The Beneficiary’s Bank and Beneficiary Described by Name and Number: Liability Chain and Liability Standard in Wire Transfers (Part 1)

Benjamin Geva
Osgoode Hall Law School of York University, bgeva@osgoode.yorku.ca

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BENJAMIN GEVA*

1 Introduction

The wire transfer is a species of a credit transfer, or in the American terminology, funds transfer. A credit (or funds) transfer is a payment transaction under which the payor “pushes” funds from the payor’s account to that of the payee. It is to be contrasted with the debit transfer, such as the cheque collection, in which the payee, acting under the payor’s authority, collects or “pulls” funds to the payee’s account, from that of the “payor”. While a credit transfer is initiated by the payor’s instructions to the payor’s bank, a debit transfer is initiated by the payee’s instructions, acting under the payor’s authority, to the payee’s bank. So far as entries are posted to accounts of parties, a credit transfer (or “credit push”) commences with a debit to the payor’s account and concludes with a credit to the payee’s account. This is the reverse of the banking operation in a debit transfer (or “debit pull”) where the process commences with a credit (albeit provisional) to the payee’s account and concludes with a debit to the payor’s account.

In a credit transfer, the payor is the “originator” and the payee is the “beneficiary”. Their respective banks are the “originator’s bank” and the “beneficiary’s bank”. A credit transfer from the originator’s account in one bank to the beneficiary’s account in another bank is an interbank transfer. In an interbank transfer, having debited the originator’s account, the originator’s bank carries out the originator’s instructions by issuing its own instructions either to its correspondent, acting as an intermediary bank, or directly to the beneficiary’s bank. Each set of instructions in the performance of a credit transfer is a “payment order”. A payment order may be communicated in writing, electronically, and under some conditions, even orally. Ultimately, the credit transfer is carried out by one or more payment orders, each from a sender to a receiving bank, and each moving funds from the sender to the receiving bank. Movement of funds could be by means of a debit or credit posted to an account one has with the other. Where the sender is a bank, movement of funds could also be by means of entries to accounts both sending

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and receiving banks hold with another bank, which may act as a central counterparty.

The wire transfer is a credit transfer, in which interbank payment orders are processed individually or in small batches. It is characterised by a single transaction focus, speed and high security. In the past, before the advent of SWIFT, an interbank payment order in a wire transfer was typically communicated by wire or cable; that gave the payment transaction the name “wire transfer”. However, as indicated, from a strictly legal perspective, there are no media or form requirements for a “payment order” on which instructions are communicated in a wire transfer.¹

This article deals with issues evolving around the identification of the beneficiary in the last payment order in the credit transfer received by the last bank in the transfer chain (“beneficiary’s bank”), the duties of the beneficiary’s bank in the case of an ambiguous description of the beneficiary in the payment order, and the liability of the beneficiary’s bank in case it broke such duties. A beneficiary may be described in a payment order by name, account number, or both. Identification is per the description of the beneficiary in the payment order received by the beneficiary’s bank; unless a communication error occurred, this is the same description as in the originator’s one.² A beneficiary may be identified erroneously in a payment order when it is identified by both name and account number, and the account number does not belong to that named beneficiary. The ambiguity in the instructions may have been generated either by mistake or by fraudulent design.³

A mistake in the originator’s organization could be caused by human error or due to malfunction in internal automated systems. An example of a fraudulent design is where a dishonest insider in the originator’s organization manages to generate a payment order from the originator that appears to instruct payment, out of the originator’s account, into an account of a genuine creditor of the originator, or even into another account of the originator itself, at the beneficiary’s bank. The payment order identifies the beneficiary by name and account number. In effect, the named beneficiary is not the account holder.⁴

The fraudulent insider may be an employee or agent with authority to issue a binding payment order on behalf of the originator. Alternatively, the fraudulent insider is one in a position to provide those with authority to bind the originator with incorrect beneficiary information. The destination account identified by number belongs to the insider, an accomplice of the insider, the mastermind of the fraud for whom the insider is the accomplice, or even to a

¹ For an overview (regarding the first three paragraphs of this article), see eg, Geva “International funds transfers: mechanisms and laws” in Reed, Waldren and Edgar (eds) Cross-Border Electronic Banking — Challenges and Opportunities (2000) 1.
² This article supposes that the beneficiary’s description in the payment order received by the beneficiary’s bank conforms to that in the originator’s payment order. The article will not deal with issues arising when the payment order received by the beneficiary’s bank differs in content (such as, in beneficiary’s description) from that of the originator. Errors in transmission and execution are respectively dealt with in the US by s 4A-206 and -303 of the Uniform Commercial Code (“UCC”).
³ See Official Comment 2 to UCC par 4A-207.
⁴ An example is where the payment order instructs payment to account no 12345 of X. In fact, the account holder of account no 12345 is Y and not X.
genuine but unsuspecting bona fide creditor of the defrauder. Through the use of either the originator itself or one of its creditors as named beneficiary, the fraudulent payment order does not raise any suspicion in the originator’s organization. In devising the fraudulent scheme, the perpetrator counts on processing at the beneficiary’s bank on the number alone.

Indeed, in an automated processing environment, the beneficiary’s bank is bound to overlook the named beneficiary, so as to misdirect the funds into the destination account, identified in the payment order by number. In a fraudulent design, this implements the perpetrator’s scheme.

A case involving a payment order instructing payment to a beneficiary identified by name and number, in which the destination account does not belong to the named beneficiary, whether generated by mistake or fraud, may be referred to as a case of inconsistent beneficiary information; a case of inconsistency, incompatibility, or discrepancy between beneficiary’s name and number; or a case where name and number do not match. In such a case, recourse is available against the holder of the destination account, the innocent actual recipient of payment. Recovery is also available against any defrauder, where there is one. The remedy is in restitution; against a defrauder, it is also in fraud. Only too often, however, absconding defrauders and innocent recipients are not promising defendants; each may be far away, impecunious, or even insolvent. As well, an innocent recipient may successfully raise a defence under the law governing mistake and restitution, such as change of position or discharge for value. Loss is then initially allocated to the originator, whose account was debited; whether the payment order was fraudulent or not, it was an authorized payment order on behalf the originator, so that the originator’s bank was justified in debiting the originator’s account. The question is then whether the originator may pass the loss onto the beneficiary’s bank that did not verify consistency between name and number and acted on the number. Two issues come up: first, that of breach of duty by the beneficiary’s bank, and second, chain of liability, that is, who can sue whom.

Gilbey Distillers and Vintners (Pty) Ltd v Absa Bank Limited involved a payment order instructing payment to a beneficiary identified by name and account number. The account number did not belong to the beneficiary as named in the payment order. In its action, the originator attempted to recover from the beneficiary’s bank amounts that could not be recovered from the recipient to whose account funds were paid. The judgment does not tell us whether this was a case of an internal error or fraud; nevertheless, nothing would have turned on it. The court held that the beneficiary’s bank was not liable to the originator in either contract or delict. The issue of the duties of the beneficiary’s bank in matching between name and number for a beneficiary was not dealt with in the judgment.

6 A leading authority in the US for the discharge for value defence, dispensing with the good faith change of position, and being satisfied with the good faith application of the payment to the discharge of a debt owed to the recipient, see Banque Worms v Bank America International 77 NY 2d 362, 568 NYS 2d 541 (NY CA 1991), applied 928 F 2d 538 (2d Cir NY 1991).
7 Case 12698/94 (unreported 4 Dec 1998 (C)), per Brand et Traverso JJ. I provided expert assistance to the defendant. Throughout this article, I endeavoured to restrict myself to the facts of the case only as in the judgment.
This article will examine both issues, that of chain of liability, and that of breach of duty by the beneficiary’s bank. Stated otherwise, both the originator’s cause of action against the beneficiary’s bank, and duties fastened on beneficiary’s bank in matching name and number, are covered. The article will present an outsider’s view of the determination of pertinent issues under South African law in a broader comparative context. I will be using some of my published research, but will also be seizing on the opportunity to build and expand on it.

Following the introduction in part 1, part 2 presents the facts of the case and the principal issues. Part 3 discusses the resolution of these issues under article 4A of the American Uniform Commercial Code which is a most comprehensive statute dealing with rights and obligations of participants in a credit transfer. In the absence of such a statute in South Africa, the issues are to be determined under general principles of law. Part 4 presents the treatment of the issues by the court. Part 5 is a critical evaluation of this treatment. Part 6 deals with the issue not covered by the judgment, that of the obligations of the beneficiary’s bank to match name and number for a beneficiary of a payment order. The conclusion of part 6 favours the passage of legislation; it is however argued that principles derived from article 4A may be adopted by case law to govern a situation such as in Gilbey.

2 Gilbey v Absa Bank: Facts and issues

Gilbey was an action by Gilbey Distillers and Vintners (Pty) Ltd, carrying on business in the production, distribution and marketing of alcoholic beverages under the trade name Gilbeys (“Gilbeys”) against Absa Bank Limited, a deposit-taking institution, successor in interest of Bankorp, whose trading name was Trust Bank. The matter came before the court by way of an exception to the plaintiff’s particulars of claim. Subsequent to the judgment in the matter, the parties settled. As a result, no final word was pronounced on any of the issues. Furthermore, in the particular context of an exception to the particular of claims, not all issues required a determination or even a discussion. Yet, some points were exhaustively dealt with. In the final analysis, the case gives a good opportunity to address fundamental issues in the law of wire transfers, particularly as they pertain to the position of the beneficiary’s bank, and thus merits an exhaustive discussion.

The facts that gave rise to the action are set out as follows. During September and October 1991 eight transfers, totalling R103 million, were effected by the Cape Town corporate branch of First National Bank of Southern Africa (“FNB”) to the Heerengracht Branch of Trust Bank in Cape Town. In each instance the transfer was effected pursuant to delivery by FNB to Trust Bank...
of a “clearance voucher” and a “credit transfer form”. Each transfer was
affected from funds held by FNB for Gilbeys and in each instance FNB acted
upon a written telefax instruction from Gilbeys.

Each of Gilbeys’ written telefaxes instructed FNB to make payment out of
Gilbeys’ account at an account maintained at Trust Bank Heerengracht. The
telefax that is part of one set of documents reproduced in the judgment instructed the transfer of a specified sum from Gilbeys’ account 500/233084
with FNB to account 01238320603 of “Trust Bank (Gilbeys)” at Trust Bank
Heerengracht and was properly signed. The judgment does not provide any
information on variations in the language of each telefax instruction. It was
however pleaded that in each case FNB properly acted as an agent for Gilbeys,
pursuant to Gilbeys’ telefax instruction.1

In executing each of Gilbeys’ telefaxed instructions, FNB issued to Trust
Bank a credit transfer form and a clearance voucher. Each credit transfer form
was issued by FNB, and instructed the beneficiary’s bank to credit a bene-
ficiary’s account. It was addressed to Trust Bank, Heerengracht Branch (as the
beneficiary’s bank), identified Gilbeys as the remitter, and following Gilbeys’
telefaxed instructions, identified the destination account as 01238320603. Five
credit transfer forms identified the beneficiary as “Trust Bank (Gilbeys)”. The
three remaining credit transfer forms identified the beneficiary as “Trust Bank,”
that is, with no reference, in brackets or otherwise, to Gilbeys (other
than as the remitter).

Each clearance voucher was issued by the FNB corporate branch in Cape
Town and was properly signed. It acknowledged that FNB holds at the dis-
posal of Trust Bank, Heerengracht, a specified sum of money, “to be ac-
counted for in the next settlement”. On six clearance vouchers the specified
sum so held was described as “Being: Trust Bank (Gilbeys) B/O
Gilbeys”. On
two clearance vouchers, the sum so held was described as “Being: Trust Bank
B/O Gilbeys”, that is, without the name “Gilbeys” following, in brackets or
otherwise, the name of “Trust Bank”, other than as the remitter of the pay-
ment. Stated otherwise, six clearance vouchers referred to funds transfers
from Gilbeys to Trust Bank (Gilbeys) while two clearance vouchers referred
to transfers from Gilbeys to Trust Bank. No beneficiary’s account number was
specified in any of the credit vouchers.

Altogether then, eight payments were instructed and carried out. For five
payments, the beneficiary was effectively identified as “Trust Bank (Gilbeys)”
on both the credit transfer form and the clearance voucher. For two other
payments the beneficiary was identified on both the credit transfer form and
the clearance voucher as “Trust Bank”. For one payment, the beneficiary was
identified as “Trust Bank” on the credit transfer form and “Trust Bank

1 (n 7) 6. The factual background is set out by the court on 4-13. On occasion, it has to be
supplemented from the particulars of the claim set out on 14 of the judgment.
12 (n 7) 14; par 7.2 of the particulars of the claim.
13 The standard form reproduced in the judgment did not identify the particular FNB branch. Nor
did it seem to bear FNB’s signature(s). Yet, nothing turned on these two facts.
14 B/O stands for “by order of”; hence it identifies the remitter indicated on the credit transfer
form.
15 This variation, while not spelled out clearly in the judgment emerges from par 7.4 and 7.5 of the
particulars of claim as reproduced on 14 of the judgment.
(Gilbeys)” on the clearance voucher. Each credit transfer form and clearance voucher identified Gilbeys as the remitter. Beneficiary’s account was designated as 01238320603 in each credit transfer form but was not specified at all on any clearance voucher. It can be assumed that for each transfer, the three operative documents, namely, Gilbeys’ telefaxed instructions, FNB’s credit transfer form, and FNB’s clearance voucher, were issued on the same date. It can further be assumed that for each such set of documents there was no internal discrepancy in the amount and that particularly, the credit transfer form and the clearance voucher were properly paired. The omission of “(Gilbeys)” from the credit transfer form, but not from the clearance voucher, was thus the only evident internal discrepancy within a set of document relating to one payment.

In each instance, FNB debited Gilbeys’ account with the amount of the transfer. On its part, purporting to carry out FNB’s instructions pursuant to the clearance voucher and credit transfer form, Trust Bank Heerengracht credited the destination account, 01238320603, identified for each transfer on FNB’s credit transfer form (but not clearance voucher). In fact, this account belonged to Fundstrust (Proprietary) Limited (“Fundstrust”), that carried on business as funds managers in the capital and money markets. Not being registered as a deposit-taking institution, Fundstrust was prohibited from receiving deposits from the general public. In the circumstances, there was no payment owed by Gilbeys to Fundstrust. Fundstrust was liquidated on 22 November 1991, by which date all but R45 million of the R103 million had been refunded to Gilbeys by Fundstrust. Gilbeys had received from Fundstrust’s liquidators dividends totalling R12 036 144. The claim by Gilbeys against Trust Bank was essentially for R32 963 856, namely, for the amount of R45 million that had not been refunded, less the R12 036 144 dividend on it, plus interest.

The particulars of claim did not elaborate as to whether Gilbeys’ instructions to FNB were induced by fraud or honest error. Claim was for funds that could not be recovered from the insolvent recipient, and there is no reference to any defrauder, not to mention any recovery from a defrauder. Rather, Gilbeys was an action by the originator against the beneficiary’s bank for misdirecting funds in breach of duty.

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16 This is so since there were six clearance vouchers but only five credit transfer forms with the “Trust Bank (Gilbeys)” identification. There is no explanation in the judgment as to this internal inconsistency in that one set and nothing turned on the fact that one such a document in the set must not have followed the designation of the beneficiary in the telefaxed instructions that triggered that transfer.

17 The judgment reproduces (6) only one set of documents, from which, and in conjunction with the discussion that follows, these conclusions may be drawn. In fact, it is not obvious how each credit transfer form and clearance voucher pertaining to the same payment cross-referenced each other, other than by transaction details (such as names of parties and sums of money). Yet, nothing turned on this, from which one could surmise adequate cross-referencing.

18 The judgment specifically states (4) that “[i]n each instance the transfer was effected pursuant to delivery by FNB to Trust Bank of a ‘clearance voucher’ and a ‘credit transfer form’”. As to which between the two is the effective payment order containing the instructions on which Trust Bank was to act on, will be touched on in text at n 135-136 below.

19 Relevant legislation cited by the court in n 5 at 14 is the Deposit Taking Institutions Act, 94 or [sic] 1990.
The issue dealt by the court is that of the availability to Gilbeys of a cause of action against Trust Bank. The court held that no such cause of action existed, which in the circumstances, precluded further discussion as to obligations of Trust Bank as the beneficiary’s bank in the credit transfer. This article will examine the disposition of the privity issue and will further discuss the obligations of a beneficiary’s bank. In the absence of a specific statute in South Africa, the issue is governed by general principles of law. To that end, the issues will be examined in a broader comparative context. Particularly, article 4A of the American Uniform Commercial Code is a most detailed statute specifically governing rights and obligations of participants in a credit transfer. To highlight the relative advantage of specific legislation, the discussion will commence by examining how the case would have been resolved under UCC article 4A.

3 UCC Article 4A — overview

In the United States, the situation dealt with in this case would have been governed by article 4A of the Uniform Commercial Code. In the Prefatory Note to UCC article 4A, the drafters explained the need for article 4A on the basis of the absence of a “comprehensive body of law that defines the rights and obligations that arise from wire transfers”. They recognized that rules based on contract and funds transfer system rules may not reach parties not in privity of contract and that analogy with laws governing other payment mechanisms is of limited value. They thus concluded that in the absence of a specific statute “[t]he result is a great deal of uncertainty. There is no consensus about the juridical nature of the wire transfer and consequently of the rights and obligations that are created”. Hence, Article 4A was intended to fill the gap and “provide the comprehensive body of law that we do not have today”. Under the terminology of article 4A, Gilbeys’ payments were carried out as “funds transfers”. In each funds transfer, Gilbeys was the “originator,” FNB was the “originator’s bank,” and Trust Bank was the “beneficiary’s bank”. Apparently, no “intermediary bank” was involved. The “beneficiary” was identified by name as either “Trust Bank (Gilbeys)” or “Trust Bank” as well as by Fundstrust’s account number. Gilbeys’ instruction to

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20 Some aspects of the position of the beneficiary’s bank under UCC a 4A, particularly in the context of s 4A-207(b) and (c) in relation to s 4A-207(a), are more extensively discussed below in part 4.
21 See definition in UCC par 4A-104(a).
22 See definition in UCC par 4A-104(c).
23 See definition in UCC par 4A-104(d).
24 See definition in UCC par 4A-103(a)(3).
25 “Intermediary bank” is defined in UCC par 4A-104(b) as a receiving bank other than that of the originator or the beneficiary. “Bank” is defined in s 4A-105(a)(2) to include a branch or separate office of a bank so that if the transfer between the respective branches of FNB and Trust Bank was intermediated by any separate office of either of these two banks, such separate office would be considered an “intermediary bank” under a 4A. There is nothing in the judgment to suggest the involvement of such separate office of either bank, and anyway, in the final analysis, nothing would have turned on this.
26 “Beneficiary” is defined in UCC par 4A-103(a)(3). S 4A-207(b) envisages both name and account number as methods for the description of the beneficiary.
FNB was a “payment order”,\(^\text{27}\) that was “executed”\(^\text{28}\) by FNB’s own payment order to Trust Bank. Under article 4A, parties to each payment order, of which a funds transfer consists, are the “sender” and “receiving bank”.\(^\text{29}\) Accordingly in the case at bar, in each funds transfer, Gilbeys was the “sender” and FNB was the “receiving bank” of the first payment order. In turn, FNB was the “sender” of the second payment order and Trust Bank was its “receiving bank”.

The following provisions would have governed *Gilbeys* under UCC article 4A:

1. In principle, liability under UCC article 4A is premised on strict privity as well as personal liability requirements. Under section 4A-212, “A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or if any other party to the funds transfer” so that “the bank owes no duty to any party to the funds transfer except as provided by this Article or by express agreement”. No vicarious liability is fastened by article 4A on one bank for an action or default by another bank.

2. However, under UCC paragraph 4A-402(c) and (d), when a funds transfer is not completed by acceptance of the beneficiary’s bank of a payment order instructing payment to the beneficiary of the originator’s payment order, the originator is excused from paying the originator’s bank or is entitled to a refund from the originator’s bank if payment has already been made. This is known as the “money-back guarantee rule”\(^\text{30}\) that operates as an exception to the general rule of section 4A-402 under which a sender incurs liability to a receiving bank that accepted the sender’s payment order.

3. Acceptance is governed by UCC paragraph 4A-209; acceptance by a receiving bank other than the beneficiary’s bank is by the execution of a conforming payment order. Acceptance by the beneficiary’s bank is either by receiving payment or making payment to the beneficiary. Under section 4A-402(b), it is upon acceptance of the payment order sent to it, that the beneficiary’s bank is entitled to payment from its own sender. At the same time, it is in the absence of an effective acceptance by the beneficiary’s bank, that the originator may invoke the “money-back guarantee rule” of section 4A-402.

4. The effectiveness of acceptance in the case of misdescription of the beneficiary is governed by section 4A-207 (a) and (b). The general principle, codified in section 4A-207(a), is that no acceptance by a beneficiary’s bank could occur for a payment order directing payment to a beneficiary who is nonexistent or unidentifiable. Surely, a beneficiary identified by name and account number that identify different persons would have fallen under the latter provision. Yet, UCC paragraph 4A-207(a) is stated to be superseded by section 4A-207(b); the latter applies to

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\(^{27}\) See definition in UCC par 4A-103(a)(1).

\(^{28}\) Under UCC par 4A-301(a), “A payment order is ‘executed’ by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary’s bank cannot be executed.”

\(^{29}\) See definitions in UCC par 4A-103(a)(5) and (4) respectively.

\(^{30}\) See Official Comment 2 to s 4A-402. In fact, the “money-back guarantee rule” benefits each sender in the funds transfer and not only the originator.
the case in which a payment order received by the beneficiary’s bank identifies the beneficiary both by name and by an identifying or bank account number, and the name and the number identify different persons.

5. In such a case of inconsistency between a beneficiary’s name and account number, under section 4A-207(b)(1), a beneficiary’s bank which does not know that the name and number identify different persons, need not determine the consistency between name and number and may rely solely on the number as the proper identification of the beneficiary. Acceptance by it on the basis of the number alone is thus valid, and hence deemed to be of a payment order instructing payment to be beneficiary of the originator’s payment order.

6. Conversely, under section 4A-207(b)(2), other than in the unusual case of payment to a named beneficiary who was anyway entitled to receive payment from the originator of the funds transfer, no protection is accorded to the beneficiary’s bank, that in case of name and number identifying different persons, either pays the named beneficiary, or pays into the account with knowledge that the named beneficiary and the holder of the account identified by number are different persons. Under such circumstances, acceptance by the beneficiary’s bank of the payment order addressed to it “cannot occur”, and hence the funds transfer has not been completed. In such a case, the originator may invoke against the originator’s bank the “money-back guarantee rule” of section 4A-402. As well, in the absence of effective acceptance, the beneficiary’s bank is not entitled to receive payment from its own sender.

7. In any event, under section 4A-207(c), acceptance by the beneficiary’s bank on the basis of number alone without knowledge of the inconsistency between name and number, while in itself valid, so as to entitle the beneficiary’s bank to payment from its own sender under section 4A-402(b), may not always bind a non-bank originator as against the originator’s bank. To be bound, a non-bank originator must have been advised by the originator’s bank of the possibility that payment might be made by the beneficiary’s bank on the basis of an identifying or bank account number even if it belongs to a person different from the named beneficiary. Where notice was not properly given by the originator’s bank to the non-bank originator, loss is allocated to the originator’s bank.

8. Recovery from the account holder properly paid by the beneficiary’s bank (under subsection (b)(1)) but with no right to receive payment from the originator is governed by section 4A-207(d). There, “where the beneficiary’s bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person, to the extent allowed by the law governing mistake and restitution”. Recovery under section 4A-207(d) may be made by the one on whom loss is allocated under section 31. Where payment by the beneficiary’s bank was not made to “the beneficiary of the originator’s payment order” within the meaning of s 4A-406(a), the originator is not discharged from its debt to the intended beneficiary, and thus, other than for sums recovered from the unintended recipient under s 4A-207(d), as discussed immediately below, the originator who is bound under s 4A-207(c) may end up paying both to the originating bank (under s 4A-207(e)) and the intended beneficiary (for the original debt still to be paid).
4A-207(c). The latter is either the non-bank originator who was advised of the possibility of action on the basis of number alone, or the originator’s bank that failed to give the notice. But there is no action against the beneficiary’s bank that acted on the number without knowledge that it referred to a person other than the named beneficiary.

On the facts of Gilbey, section 4A-212 would have precluded Gilbeys from suing both Trust Bank directly as well as FNB. This is so since Trust Bank was the beneficiary’s bank with which Gilbeys (as the originator) was not in privity, and FNB, the originator’s bank in privity with the originator Gilbeys, could not be held liable for the alleged breach or default of Trust Bank.

However, in the absence of acceptance by Trust Bank of a payment order instructing payment to a beneficiary of Gilbeys’ payment order as issued to FNB, Gilbeys would have been entitled to a refund from FNB under the “money-back guarantee rule” of section 4A-402(c) and (d). Per section 4A-402(b), in the absence of acceptance by Trust Bank, FNB would not have been obliged to pay Trust Bank. Thus, in the absence of acceptance by Trust Bank, Gilbeys would not have been able to recover directly from Trust Bank, though it might have been able to pass on the loss to Trust Bank through FNB. Presumably, per general principles of law, Trust Bank would have then been left with a claim in restitution against Fundstrust.

Conversely, upon valid acceptance, Trust Bank would have been fully protected. In such a case, per section 4A-207(c), Gilbeys would have been entitled to recover from FNB only if Gilbeys had not been properly advised of the possibility of processing at Trust Bank solely on the basis of number. Had Gilbeys been advised, it would not have been able to recover from FNB. Between Gilbeys and FNB, whoever would have borne the loss towards Trust Bank under section 4A-207(c), would have been left, under section 4A-207(d), with an action in restitution against Fundstrust.

In sum, unless advised of the possibility of processing solely by number at Trust Bank, Gilbeys would have been entitled to recovery, though from FNB and not Trust Bank, only in the absence of valid acceptance of Trust Bank. As well, on its part, and regardless of any notification to Gilbeys, Trust Bank would have been exposed to liability, though to FNB, and would become the one left with the action in restitution against Fundstrust, only where no valid acceptance had taken place.

The occurrence of acceptance, which is then the crux of the matter, would have been determined by section 4A-207(a) and (b). Regarding subsection (a), the question would have been whether in the payment order received by Trust Bank “the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable beneficiary”, in which case, “acceptance of the order cannot occur”. In the facts of the case, the designation of “Trust Bank” as the beneficiary of the funds transfer, cannot be said to be a designation of “a nonexistent or unidentifiable beneficiary”.

At the same time, the designation of “Trust Bank (Gilbeys)” is certainly that of a nonexistent or unidentifiable beneficiary. Indeed, one may argue that a

\[\text{For the distinction between “nonexistent” and “unidentifiable”, see eg. Geva Bank Collections (n 8) 529-536.}\]
payment order received by Trust Bank instructing payment to, what is in effect, Fundstrust’s account for either “Trust Bank (Gilbeys)”, or “Trust Bank”, identifies the beneficiary (by account number) as Fundstrust. It also contains further instructions to the beneficiary, as to how to distribute the funds,33 so as to be capable of being properly accepted in favour of Fundstrust as the beneficiary. Nonetheless, this analysis became moot in light of the fact that Gilbeys would have fallen under subsection (b), which is stated, in subsection (a), to supersede subsection (a).

As indicated, subsection (b) governs the case of “a payment order received by the beneficiary’s bank [that] identifies the beneficiary both by name and by an identifying or bank account number” in circumstances where “the name and the number identify different persons”. Certainly, a payment order that identifies the beneficiary by (what is effectively) Fundstrust’s account number and by “Trust Bank” name is a payment order in which “the name and the number identify different persons”. It however appears that this is equally true for a payment order that identifies the beneficiary by (what is effectively) Fundstrust’s account number and “Trust Bank (Gilbeys)” name. Stated otherwise, subsection (b) does not require both “different persons”, one identified by name and the other by account number, to be existing and identifiable; for a payment order identifying a beneficiary by name and number, there is nothing to preclude subsection (b) from applying to the situation when the named beneficiary is “nonexistent or unidentifiable” in the sense of subsection (a). This interpretation is supported by case law, and is also logical. As will be discussed further below,34 subsection (b) was designed to protect a beneficiary’s bank processing a payment order exclusively on the basis of the number identification, and allow that bank to disregard the name identification; to that end, it would not have mattered if the name itself is or is not of an existing or identifiable person.

In the facts of the case, according to subsection (b)(1) and (2), where Fundstrust was not entitled to receive payment from Gilbeys, the effectiveness of Trust Bank’s acceptance on the basis of the number alone would thus have been dependent on whether Trust Bank had known that name and number referred to different persons, that is, per above, whether Trust Bank had known that the account identified by number (belonging to Fundstrust) did not belong to the named beneficiary (either “Trust Bank” or “Trust Bank (Gilbeys)”; this is so regardless of whether by itself the name (either “Trust Bank” or “Trust Bank (Gilbeys)”) was of an existing or identifiable beneficiary. Acceptance would have been effective only if made on the basis of the number alone without such knowledge.

33 Cf Tzaras v Evergreen International Spot Trading 2003 WL 470611 (SDNY), in which payment orders instructed payment to a beneficiary, properly identified by name and account number, “for further credit” to the originator into sub-accounts. In fact, no such sub-accounts existed, and the beneficiary’s bank did not act beyond crediting the beneficiary’s account. It was held that effective acceptance by the beneficiary’s bank had taken place, irrespective of whether the beneficiary itself complied with the “further credit” instructions of the originator.

34 For both points, that is, case law and rationale, see part 7 below.
4 Particulars of claim and their disposition by the court

On the basis of the conclusive academic position to that end, Gilbey held that in a credit transfer, "the relationship between [an originator] and [the originator’s bank] which result[s] from the transfer instructions to the latter [is] one of mandate". Mandate is governed in South Africa by Roman-Dutch law. Gilbey however further acknowledged that, "The South African banking law — most notably in regard to the relationship between banker and customer — is largely derived from English law." Yet, on the particular issues, fundamentals of both legal systems are substantially identical.

Neither creating a trust nor initiating an assignment of a debt (that is, cession in the terminology used in South Africa), but rather being "simply an authority and instruction, from a customer to its bank, to transfer an amount standing to the credit of that customer with that bank to the credit of [another] account", the originator’s payment order is regarded in the common law as a mandate. Where the account to be credited is with another bank, the originator’s payment order generates a string of banking operations, commencing with the debit to the originator’s account and culminating with a credit to the beneficiary’s account. In each banking operation of which the credit transfer consists, a bank carries out the mandate contained in the payment order it received in performance of the originator’s mandate. In this string of banking operations or successive mandates, an intermediary bank, where needed, is a sub-agent in English law, and sub-mandatory in South Africa, who, so far as the orthodox position goes, is liable to its own sender alone. It is the originator’s bank, as the agent or mandatory, that is vicariously liable to its customer, the originator, as principal or mandator, for any default by an intermediary bank, as a sub-agent or sub-mandatory. As sub-agent or sub-mandatory, an intermediary bank that received a payment order from the originator’s bank is answerable for its own breach to the originator’s bank, the mandatory, but not to the originator-principal-mandator. Gilbey dealt however with the position of the beneficiary’s bank, where the law applicable is less clear.

36 (n 7) 38.
37 See in general, Joubert and Van Zyl “Mandate and negotiorum gestio” in Joubert (ed) LAWSA vol 17 (1999).
38 (n 7) 59. For the broader proposition as to the application of English law to the relationship between banker and customer in South Africa, the court cited (59 n 31) Rosen v Barclays National Bank Ltd 1984 3 SA 974 (W) in fine; Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd 1995 4 SA 510 (C) 566A-D.
39 The assignment theory was specifically rejected in Libyan Arab Foreign Bank v Banker’s Trust Co [1988] 1 Lloyd’s LR 259 (QB) 273, per Staughton J.
40 Royal Products v Midland Bank Ltd [1981] 2 Lloyd’s LR 194 (QB) 198, per Webster J.
41 that is, whenever the originator’s and the beneficiary’s banks are not correspondent nor do they settle on the books of a central counterparty.
42 But cf text at n 95-101 below, as to possible inroads into this orthodoxy.
43 See the Royal Products case (n 40) 198 (under English law) and Joubert and Van Zyl (n 37) 9-10 (under South African law).
Altogether, Gilbeys’ particulars of claims stated six alternative causes of action, three in contract and three in delict. Two alternative claims pre-supposed that instructions received by Trust Bank were clear and unambiguous while the other four pre-supposed that they were ambiguous. Each of the six causes of action alleged a breach of duty in crediting Fundstrust’s account. Gilbeys’ contract claims were of breach of contract established between it and Trust Bank on the basis of the instructions contained in the clearance vouchers and credit transfers. Under the first two contract alternatives, the instructions were alleged to be clear and unambiguous. Under the first alternative, the contract was alleged to be between Gilbeys, as the originator, and Trust Bank, as the beneficiary’s bank, in a credit transfer. Under the second alternative, the alleged contract was between Gilbeys as a customer and Trust Bank as a bank.

As indicated, the first two contract alternative claims were premised on the alleged proper construction of clear and unambiguous instructions. Conversely, Gilbeys’ third alternative claim in contract alleged that transaction documents were ambiguous. Three alternative delictual claims were equally premised on the ambiguity of the documents. They alleged negligence in crediting Fundstrust’s account in breach of, first, a fiduciary obligation, second, a duty to respect “proprietary interests” in money placed for deposit, and third, a duty in relation to statutory prohibitions on a non-deposit taking institution (Fundstrust) to take deposits from the public.

The court upheld Trust Bank’s exceptions directed against all six alternative causes of action. Briefly stated, the court rejected any notion that the instructions were clear and unambiguous, thereby upholding the exceptions directed against the first two contract alternatives. With regard to the second alternative, the court also dismissed the existence between Trust Bank and Gilbeys of a relationship of bank and customer. As against the third alternative in contract, based on the ambiguity of the instructions, the exception was upheld for lack of privity of contract between Gilbeys and Trust Bank. In fact, this reasoning applies to all three claims in contract. The dismissal of all three claims in delict was premised on a conscientious refusal by the court to further extend Aquilian liability covering pure economic losses. As well, so far as specific claims in delict were concerned, the court rejected the existence of a fiduciary obligation (for the first claim), proprietary interests in sums deposited with a bank (for both first and second claims), as well as, in the facts of the case, of any violation in connection with the prohibition against unlawful deposit taking. The following is a detailed discussion of all six causes of action and their disposition by the court.

Gilbeys’ first alternative claim in contract was premised on what was alleged to be the “proper construction” of the instructions contained in the clearance vouchers and credit transfers, as establishing a direct contractual relationship between it, as the originator of the funds transfer, and Trust Bank, as the beneficiary’s bank. In this context, Gilbeys particularly argued that in each case, the meaning of these instructions, and hence the contents of the contract,
was clear and unambiguous. Alternatively, Gilbeys argued that the same construction of the written instructions, and hence the same contract terms, could be established with the support of evidence relating to background and surrounding circumstances. For each set of instructions, the court understood the contract pleaded to be not of a mandate or agency,46 but rather, a contract of deposit, establishing a debtor and creditor relationship between Gilbeys and Trust Bank. Under this analysis, such a contract was allegedly concluded by the acceptance by Trust Bank of Gilbeys’ written offer communicated to Trust Bank, through the agency of FNB, over each set of a credit transfer form and a clearance voucher. Under each such an alleged contract, “Trust Bank agreed to hold the amount in question for the benefit — or in the account — of Gilbeys and not to credit the Fundstrust account bearing the number indicated in the credit transfer form”.47

In upholding the exception directed against this first alternative in contract, so far as it pertains to the alleged clear meaning of the documents, the court dealt separately with the first five transfers and the last three ones. With respect to the last three the court noted that in each case FNB’s credit transfer form identified Gilbeys as the remitter and gave the number of the account into which payment was to be made. Each such form further instructed payment to the credit of Trust Bank without mentioning Gilbeys, in brackets or otherwise, as the destination party. Under such circumstances, the court accepted Trust Bank’s submission that “any suggestion to the effect that according to their clear meaning these three documents indicated that Trust Bank is to credit an unknown account of the remitter and not the account number specifically stated, borders on the ludicrous”.48 But also with respect to the first five transfers, in which each credit transfer form instructed payment to “Trust Bank (Gilbeys)”, the court agreed with Trust Bank’s submission that “any interpretation which simply ignored the specific reference to the account number of [Fundstrust], cannot be described as “clear and unambiguous”.49

Nor did the court find alleged background and surrounding circumstances to support contractual terms sought to be established by Gilbeys. Rather, it agreed with Trust Bank “that such background and/or surrounding circumstances that are in fact pleaded by Gilbeys, do not support the interpretation of the contract contended for by Gilbeys, but that they in fact support the opposite construction, namely that Gilbeys intended that the account of Fundstrust should be credited”.50 Such intention was attributed to the instructions themselves, coupled with the indication that Gilbeys knew that the account bearing the number was in the name of Fundstrust. It was also evidenced by the fact that Gilbeys proceeded to recover from Fundstrust, which appeared to be

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46 Therefore, in this context, the court avoided discussing the issue as to whether the beneficiary’s bank is to be regarded a mandatary, sub-mandatary, or substitute mandatary for the originator or originator’s bank. But regarding the court’s analysis of the third alternative claim in contract, see text at n 55-63, below.

47 (n 7) 26.

48 (n 7) 30, emphasis in the original.

49 (n 7) 32.

50 (n 7) 39.
inconsistent with the position of a debtor-creditor relationship with Trust Bank.\textsuperscript{51}

Presumably, the intention to transfer funds to Fundstrust was derived by the court from the interpretation of the instructions as requiring the transfer of funds to Fundstrust to be invested for Gilbeys. Arguably, however, such interpretation is possible with respect to the first five transfers, but not the three last ones, as it is only in the first five that Gilbeys was identified in connection with the destination party. Under this logic, in the absence of reference to Gilbeys (other than as the remitter) in the last three transfers, funds transferred to Fundstrust must have been viewed as earmarked for some investment involving Trust Bank.

In upholding the exception directed against the first alternative in contract, the court appears to suppose that the contents of the instructions communicated to the beneficiary’s bank are to be determined by the construction of both the credit transfer form and the clearance voucher. Yet, it appears that the focus of the court was on the former not the latter.\textsuperscript{52} Regardless, the exception was upheld on the basis of the interpretation of the particular documents, with as well as without background and/or surrounding circumstances, as pleaded. But in the final analysis, the court did not reject the theoretical possibility of finding a direct contract between the originator and the beneficiary’s bank, and viewing it as a contract of deposit establishing a debtor and creditor relationship. Strictly speaking, this view appears to be feasible only where the originator is also the beneficiary. Nevertheless, the view can be broadened so as to allow in any transfer of funds, the possibility of finding a direct contract established between the originator and the beneficiary’s bank, for the deposit of funds to the beneficiary’s account. Such contract is formed by the acceptance by the beneficiary’s bank of the originator’s offer, embodied in the instructions communicated to the beneficiary’s bank by its sending bank, acting as the originator’s agent or sub-agent.

Gilbeys’ second alternative claim in contract, very much like the first one, was premised on what was alleged to be the “proper construction” of the instructions contained in the clearance vouchers and credit transfers. However, in the context of the second alternative claim, the instructions embodied in each set of a credit transfer form and clearance voucher, were alleged to establish a contractual duty towards Gilbeys by Trust Bank, not as that of the beneficiary’s bank towards the originator, but rather that of a bank to its pre-existing customer.\textsuperscript{53} The exception against this theory of liability succeeded for the same reasons underlying the success of the exception against the first alternative claim, namely, on the basis of the failure of Gilbeys to convince the court as to the interpretation of the instructions received by Trust Bank. Yet,

\textsuperscript{51} On this point, the court accepted Trust Bank’s contention that “if the contract that Gilbeys intended to create with Trust Bank was simply a contract between banker and customer or debtor and creditor, there would be no basis upon which Gilbeys would have a claim against Fundstrust”. That is, “if the relationship between Gilbeys and Trust Bank was purely one of debtor and creditor — as contended by [Gilbeys] — Trust Bank simply paid its own money to Fundstrust”, so that “[i]n such circumstances it would be Trust Bank and not Gilbeys who would have claim against Fundstrust” — (n 7) 38(f).

\textsuperscript{52} As explained below, in text at n 135-136, this is quite justified.

\textsuperscript{53} The second contract alternative claim was formulated in par 16-20 of the particulars of the claim, set out on 14 of the judgment and discussed by the court on 41-49.
the court went on to specifically reject, as a matter of fact, the existence of an outstanding bank and customer relationship between Gilbeys and Trust Bank. Indeed, as it happened, there had been some history, as well as expectations, of investments by Gilbeys through Trust Bank, with past “call accounts” opened for Gilbeys in Trust Bank to that end. Yet, there was nothing to suggest that these accounts were still extant in September/October 1991. More generally, Gilbeys was “unable to allege that it had any extant account with Trust Bank at the time of the transfers or that Trust Bank had been instructed to open an account for Gilbeys in connection with any of all the transfers”. Under such circumstances, facts pleaded were held as not reasonably sustaining the inference that Gilbeys was at all material times a customer of Trust Bank.

Gilbeys’ third alternative claim in contract alleged that transaction documents were ambiguous. The ambiguity envisaged arose from the fact that it was not clear from the documents whether funds should have been held for the benefit of Gilbeys or credited to the account identified by number, namely the one that in fact belonged to Fundstrust. Obviously, though the court did not address the issue, it is only with respect to transaction documents naming Gilbeys in conjunction with the beneficiary, that it could have been argued that funds were to be held for Gilbeys. Yet, ambiguity could have existed also as to transaction documents identifying Trust Bank as the beneficiary (with no mention of Gilbeys) while designating (by number only) Fundstrust’s account as the destination account. Presumably, in the facts of the case, for five payments, the beneficiary was named “Trust Bank (Gilbeys)” on both the credit transfer form and the clearance voucher; for two payments, the beneficiary was named “Trust Bank”; and for one payment, the beneficiary was named “Trust Bank” on the credit transfer form and “Trust Bank (Gilbeys)” on the clearance voucher.

In upholding the exception directed against this third contract alternative, the court addressed neither the alleged existence of ambiguity in the transaction documents nor Trust Bank’s alleged duties in relation to such ambiguity. Rather, the court disposed of the issue on the basis of privity. Having characterized, for the purpose of this third contract alternative, the transaction documents as “instructions”, the court concluded that “the contract relied upon under [that heading] is capable of only one construction, namely, that it is a contract of mandate”. The court however added, “as a matter of banking law”, that taking into account the role of Trust Bank in the transaction as the beneficiary’s bank, “there was no privity of contract between Trust Bank and Gilbeys as originator of the payment instructions”. In the court’s view, as a matter of ordinary principles of banking law, the relationship between Gilbeys and FNB resulting from the telefaxed transfer instructions, was one of mandate. “FNB did not become the representative of Gilbeys. When FNB executed the instruction to transfer it functioned as a mere...
mandatory.” In this context, the court noted the absence of any local authority directly in point. It specifically recognized “that the South African banking law — most notably in regard to the relationship between banker and customer — is largely derived from English law”. The court thus went on to hold on the basis of English law that “[w]here a sequence of mandates is necessary in order to give effect to a payment instruction”, namely, “where the first mandatary has to engage a second mandatary or sub-mandatary for the purpose — there is no direct nexus between the first principal and the sub-mandatary or for that matter further sub-mandataries that may be required”. In the court’s view, “[t]he creation of such nexus between the principal and the sub-mandatary — and for that matter all sub-mandataries all the way down the line — would only tend to complicate banking transactions unnecessarily.”

In the course of its analysis, the court recognized that upon receiving funds by transfer, “which are identified as being for a credit for a customer’s account,” a “bank has a contractual duty to that customer to credit that account accordingly”. Stated otherwise, privity of contract exists between the beneficiary’s bank and the beneficiary. The court was further prepared to treat “Trust Bank as sub-mandatary of FNB”, namely, to see the beneficiary’s bank as a sub-mandatary of the originator’s bank. All this however, was of no avail to Gilbeys. Not being a customer of Trust Bank, in the facts of the case, no contractual relationship could be said to exist between them. Likewise, being a sub-mandatary of Gilbeys, Trust Bank was exonerated from direct liability to it for any alleged breach of the mandate.

In addition to the three alternative claims in contract, Gilbeys had three alternative delictual claims. As the third claim in contract, they were all premised on the existence of ambiguity in the transaction documents. Gilbeys alleged that Trust Bank did not address that ambiguity properly. More specifically, the allegation was that Trust Bank addressed the ambiguity in the transaction documents in breach of duty towards Gilbeys. Specifically, the particulars of claim alleged the following:

1 In negligently crediting Fundstrust’s account, Trust Bank broke a legal or fiduciary obligation, it owed Gilbeys, to hold the money for the benefit of Gilbeys and to protect Gilbeys proprietary interest in the clearance vouchers and credit transfer forms and/or their proceeds.

2 In crediting Fundstrust’s account, rather than placing funds to the credit of Gilbeys, Trust Bank acted with a reckless disregard of Gilbeys’ proprietary

59 (n 7) 58.
60 (n 7) 60; emphasis in the original.
61 (n 7) 57; emphasis added.
62 (n 7) 60. This, however, ought to be taken to mean mandatory for FNB, and sub-mandatory for Gilbeys.
63 See text at n 53-54 above.
64 Delictual causes in action are dealt with in particulars 21-23 (relating to all alternative claims based on the ambiguity of the documents, including the third alternative claim in contract) and 30-43 (14 of the judgment).
65 In fact, the interchangeability between “legal” and “fiduciary” obligations, noted by the court at 71 n 38, and reflected in the court’s summary of this alternative claim at 66(a), is derived from particular 17.1 and does not appear in particular 31, which sets out this alternative claim, and which refers only to “a legal duty”.

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interest in the clearance vouchers and credit transfer forms and their proceeds, intentionally damaged Gilbeys property, and wrongfully caused it loss, in breach of a legal duty to Gilbeys to exercise reasonable care and skill with regard to money placed with Trust Bank by, or on behalf of Gilbeys and/or with respect to Gilbeys’ “proprietary interests” in such money.

3 In crediting Fundstrust’s account with the proceeds of the transaction documents, without satisfying itself by means of a due and proper investigation that such proceeds were not being received illegally by Fundstrust, Trust Bank was in breach of a legal duty to Gilbeys. Allegedly in this context, proceeds were illegally received by Fundstrust, in itself a non-deposit-taking institution, in breach of statutory prohibitions on a non-deposit-taking institution to take deposits from the public, breach of which Trust Bank ought to have suspected.

The court discussed all these claims jointly and upheld the exceptions directed against them. Highlighting the nature of the banker and customer relationship as fundamentally that of a debtor and creditor, with super-added obligations mainly pertaining to mandates, the court rejected, in the context of a funds transfer, any notion of “property” held by the beneficiary’s bank which belongs to the originator, as well as the existence of a fiduciary duty. On these grounds, the court rather summarily upheld the exceptions directed against the first two alternative claims in delict.

Gilbeys’ third alternative claim in delict was based on Trust Bank’s alleged duty of care to ensure that it did not make any deposits with Fundstrust in contravention of the DTI Act. The court dismissed this ground almost in passing, noting lack of any allegation as to actual knowledge or suspicion by Trust Bank, and stressing that as a matter of statutory interpretation of the DTI Act, “acceptance of deposit” by Fundstrust would have required an agreement between Gilbeys and Fundstrust, which was not even alleged.

Finally, the court elaborated on a fundamental reason as to why any of the Gilbeys’ claims in delict cannot succeed. As explained by the court, “all Gilbeys’ claims in delict are claims in respect of pure economic loss and such would require an extension of the Aquilian liability in order to sustained them”. Yet, the court went on, “[o]ur courts have over the years adopted a fairly conservative approach to the extension of remedies under the lex Aquilia”. For the Aquilian liability to exist, “at the very least there must be some relationship of proximity between the parties before a duty of care will arise”. In South African law, in the context of such proximity, “outside of cases relating to negligent statements, claims for pure economic loss in the context of a banker’s liability have not been extended beyond the liability of a collecting banker to the true owner of a cheque for economic loss caused by the bankers’ [sic] negligence in dealing with the cheque”.

66 The provision cited in par 38 of the particulars of the claim, reproduced on 14 of the judgment, was s 11 of the DTI Act.
67 (n 7) 66-86.
68 (n 7) 78; emphasis in the original.
69 (n 7) 81. The leading case cited (in n 48) in support of this proposition is Induc Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 1 SA 783 (A).
Indeed, in the court’s view, the case at bar did not fall into the category of such cases and was quite distinguishable.

“As originator of a credit transfer which is effected in terms of a transaction between banks, Gilbeys is not in a position comparable to the of [a true owner of a cheque]. Nor was Trust Bank in the position of a collecting bank which intrudes itself into the process at the instance of its own customer for whose identity it effectively vouches.”

In short, respective obligations of participants in a credit transfer are adequately covered by contract, which is not the case of the misappropriation of a cheque from the true owner and its collection by a banker acting for either the wrongdoer or someone deriving title from the wrongdoer. Thus, in the case at bar, the court noted the “sequence of contracts” initiated by Gilbeys and consisting of Gilbeys’ mandate to FNB and the follow-up FNB’s mandate to Trust Bank. In this context, the court did not see a justification for giving a remedy to the originator for an alleged breach by the beneficiary’s bank of its contract with the originator’s bank (that is, its own sender). Specifically, the court could not accept the existence of a duty of care requiring the beneficiary’s bank to protect the originator “outside the framework of the contracts deliberately entered into against the consequences of the originator himself having caused the insertion in the payment instructions of the account number to be credited”.

(to be continued)