



Mr L Basson
Chief Master
Office of the Chief Master
Department of Justice and Constitutional Development
Private Bag X668
Pretoria
0001
(Delivered by e-mail: lbasson@justice.gov.za)

16 July 2012

Dear Mr Basson,

CHEQUE ITEM LIMIT: PAYMENT METHODS PRESCRIBED BY LAW

I refer to two meetings at your office, the first of which took place on 28 June 2012 and attended by a representative of the Banking Association of South Africa and two PASA representatives, during which meeting the potential impact of the new cheque item limit of R500 000.00 on the provisions of several pieces of legislation was discussed. The second meeting took place on 16 July 2012 and attended by two PASA representatives. The purpose of the second meeting was to discuss our draft letter containing certain views and proposals.

Based on the feedback received from Messrs. Ismail and Coetzee from my office, it was agreed that the parties would consider briefing senior legal counsel for a legal opinion on the interpretation of the Administration of Estates Act, Act No. 66 of 1965 (the Act), as well as other pieces of legislation containing similar provisions regarding the use of cheques as a payment method.

However, after extensive internal debate it was decided to provide you with a PASA view of these provisions, as well as other considerations which may give you the necessary sense of comfort in issuing a directive to allow executors to use other (electronic) payment methods.

I will deal with these considerations as follows:

PASA Mandate

The Payments Association of South Africa (PASA) is recognized by the SA Reserve Bank as a payment system management body in terms of the National Payment System Act, Act No. 78 of 1998 (the NPS Act). PASA is empowered to organize, manage and regulate the participation of banks in the National Payment System (NPS) and to issue policies and rules that are binding on such banks.

PAYMENTS ASSOCIATION OF SOUTH AFRICA



The reduction of the cheque item limit from R5M to R500 000.00 is just one example of such rules.

Decision to reduce the Item Limit

The decision to reduce the item limit of cheques was motivated by two primary factors, namely the inefficient nature of cheques, leading to high charges for their use, and secondly, the significant fraud risk that would be addressed in lowering the limit. On average more than 40% of the value of total industry fraud losses will be addressed by a decrease to the limit.

Additional factors were the very low customer impact (0.7% of customers issue cheques for more than R500 000), as well as the fact that cheques have been consistently declining in volume and value over the past decade or more. The decline continues at a steady rate of over 20% on average per annum. This is a worldwide trend and is a market signal for preference of electronic payments. These more efficient and secure alternatives developed over the last 10 years include amongst others card, internet (EFT transfers, etc) and mobile payments.

There has been strong support for the change to the limit from many stakeholders aside from PASA member banks. Domestically, SARS has also informed the public that no cheque payments can be made for values greater than R100 000. Similarly in the Common Monetary Area, countries like Swaziland, Namibia and Lesotho have aligned cheque limits, with Swaziland also adjusting their limits to R500 000 in July 2012 and Namibia considering a further decrease to R100 000 in 2013. Lesotho is already on a R100 000 limit.

The promotion of secure and much more efficient electronic payments was thus inevitable.

Process

Once member banks, some governmental departments (such as National Treasury), private institutions and other industry stakeholders were consulted, a proposal was made to the SA Reserve Bank to formally support the reduction of the item limit. This proposal was subsequently endorsed by the SA Reserve Bank's Governor's Executive Committee. See copy of the accompanying SA Reserve Bank letter, dated 7 November 2011.

Administration of Estates Act, No. 66 of 1965 (the Act)

We have considered the specific provisions of the Act, as well as of the Insolvency Act, Act No. 24 of 1936 and the Companies Act provided to us at the aforesaid meeting.

We have also considered additional provisions of the Act to ensure our interpretation is consistent with the intention of the legislature and the Act as a whole.

We have concluded that:

1. The pieces of legislation in question were issued before electronic retail payment products systems were in place. As a result no specific reference was made in the Act to other payment products or methods other than cheques.
2. The Act, with the exception of cheques, refers generically to 'payment of money', without prescribing the method of payment.



3. When reference is made to 'payment by cheque', certain requirements are however prescribed.
4. The reference to the opening of a cheque account should not be interpreted as though cheques are the only payment method allowed by the Act. Cheque accounts could also be described as transmission accounts or transactional accounts from which any EFT debit order or EFT credit transfer, or even debit/ cheque cards for that matter, can be processed.
5. Section 28(6) of the Act provides that the Master may in writing direct the bank with which an account has been opened, inter alia, to pay over into the guardian's fund all moneys standing to the credit of the account. This is equivalent to instructing a bank via the internet or any other electronic method to make a payment, such as an EFT credit transfer. An electronic instruction is equal to a written direction by the Master.
6. Sections 28 (11) – (13) make reference to payment without specifying the method of payment. Our view is that one can safely deduce that the Act is not prescriptive as far as the payment method is concerned, but only prescriptive when a certain payment method (such as a cheque) is used.
7. A similar interpretation should be given to other provisions of the Act using the same language.
8. Section 35(12)(c) provides that the executor shall pay creditors after the fulfilment of certain requirements. It states that **either** a cheque (purported to be drawn payable to a creditor or heir) **or** an affidavit by the executor in which he declares that a creditor was paid or that an heir received his share in accordance with the account, may be accepted by the Master in lieu of any such receipt or acquittance. This leaves room for an interpretation that alternative payment methods could be available to the executor. The fact that the affidavit does not have to state that payment was made by cheque is an indication of an interpretation in favour of alternative payment methods.
9. We attach the specific sections of the Act, together with some of our comments, for your convenience.

In summary then, it appears that the Act does not exclude the use of other payment methods such as EFT credit transfers, but is prescriptive regarding certain requirements when a cheque is used. The absence of wording explicitly prohibiting any other payment method, serves as a clear indication that any such other payment method may be used.

The fact that strict guidelines apply when cheques are drawn should also not be interpreted as limiting the payment method to cheques only.



Interim and Alternative Arrangements

Although we are confident that the Act allows for alternative payment methods, we would be agreeable to the splitting of cheque payments for payments in excess of R500 000.00 for a pre-defined and pre-agreed limited period. This is not ideal but could be considered in the event of a definitive interpretation to the contrary.

We suggest however, that you consider the above and advise whether you would be comfortable to adopt our view without contravening the provisions of the legislation in question.

We further wish to offer our assistance in proposing appropriate changes to the Act and other relevant legislation to accommodate alternative methods of payment.

We look forward to your response and kindly request you to contact Pierre Coetzee or Arif Ismail should you need more information.

Yours sincerely,

Walter Volker
Chief Executive Officer