

NOT WORTH THE PAPER IT'S WRITTEN ON

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The 'true owner' of a cheque

The case of *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) brought about a considerable change in the South African law on the delictual liability of a collecting bank for the incorrect collection of a cheque. In principle a collecting bank can now be held liable by the 'true owner' of a cheque for its wrongful collection. As only the 'true owner' of a particular cheque is entitled to recover damages for wrongful collection, this concept is particularly important. It originated in English law and is not defined in our Bills of Exchange Act 34 of 1964. Until recently the concept of true ownership was not authoritatively defined in our case law. Now the situation has been clarified to a large extent by two recent decisions of the Appellate Division.

The first is *First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd* 1995 (3) SA 556 (A). P, a director of Quality Tyres and of its parent company, approached Senbank to increase the existing overdraft facilities of Quality Tyres. Senbank granted the request and deposited a cheque in favour of Quality Tyres into an account named by P. The account was supposedly an account of Quality Tyres held at First National Bank. In fact, it related to a different entity altogether. The trial court held that Quality Tyres was the true owner of the cheque. This issue was then taken on appeal.

In dealing with the concept of true ownership, the Appellate Division held that, outside the ambit of section 81 of the Bills of Exchange Act, the decisive issue was simply whether the ownership of the cheque had been transferred from the drawer (Senbank) to the payee (Quality Tyres). The word 'true' did not serve to qualify the ordinary meaning of the word 'owner' as used in legal language. The ownership of a cheque, viewed as a piece of paper and thus corporeal movable

property, could be transferred only in accordance with the general requirements of the law on the transfer of corporeal movables: there must be delivery of the movable as the result of an agreement (a 'saaklike ooreenkoms') between the drawer and the payee. Under that agreement, the drawer intends to transfer ownership to the payee and the payee intends to accept ownership.

Turning to the facts, the Appellate Division held that P had defrauded Senbank, Quality Tyres, and First National Bank by means of a preconceived scheme. P had acted in pursuit of his own illegal goals. When proper regard was had to the true ambit of P's planning and execution of the fraud, it could not be said that P had ever intended ownership of the cheque to pass to Quality Tyres. No agreement about the transfer of ownership had been made. As a result, Senbank had remained the true owner of the cheque. The claim by Quality Tyres failed.

The second decision is *ABSA Bank Ltd v Natasha Investments Co (Pty) Ltd* (AD 29 May 1996, unreported). Natasha Investments drew a cheque in favour of 'Chemsteel Mineral Developments (Pty) Ltd'. It was collected by ABSA on behalf of an account styled "Marilor Properties and Investments CC". In the trial court ABSA was held liable in delict for the wrongful collection of the cheque. ABSA appealed against this decision on the basis that Natasha Investments had not proved that it was the true owner of the cheque. Natasha Investments relied largely on the evidence of a single witness, L, a manager of the payee, Chemsteel. L testified that he had met Messrs DT and W, who had shown him the cheque. DT and W had wanted L to deposit the cheque into the account of Chemsteel and then to make disbursements from those funds. As L knew nothing about the transaction underlying the cheque, he had refused to do so. DT and W then left. Natasha Investments did not explain how DT and W came into possession of the cheque or what the reason for the cheque was. It seems that L was called to testify that Chemsteel never took delivery of the cheque. Besides L's evidence, it was argued that an inference could be drawn from the cheque itself: Natasha Investments intended ownership of the cheque to pass to Chemsteel as payee of the cheque.

The Appellate Division held that, although an inference could be drawn from a cheque about the drawer's intention as regards ownership, that inference could be neutralized by other evidence.

The invariable inference of an intention to pass ownership in a cheque to the payee, merely from the express terms of the cheque, is incorrect. In considering whether the drawer of a cheque intended ownership to be transferred to the named payee, one must be careful not to confuse the proceeds of the cheque (which the drawer might or might not have wished the payee to receive) with the cheque itself and its ownership.

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On the evidence before it, the Appellate Division then held that Natasha Investments could have intended ownership of the cheque to vest in DT and W, although the probable intention was that the proceeds of the cheque should have gone to Chemsteel. As plaintiff in the trial court, Natashsa Investments had borne the burden of proving that it was the true owner of the cheque. From the evidence led by Natasha Investments it could not be said that the only reasonable conclusion was that the company had intended ownership of the cheque to vest in Chemsteel. The court therefore held that Natasha Investments had not discharged the burden of proof regarding true ownership. The action failed.

The two cases may be summarized as follows:

- Except in the case of section 81 of the Bills of Exchange Act, the true owner of a cheque is established by the application of the ordinary principles regulating the transfer of ownership of movable corporeal property.
- The ownership of a cheque can therefore be transferred only by delivery of the cheque, together with the intention to transfer ownership of it to another person and acceptance of ownership by or on behalf of the person to whom the transferor intended to transfer ownership.



- A distinction must be drawn between the transferor's intention to transfer the ownership of the cheque form itself and his intention to transfer the ownership of the proceeds of the cheque. For example, A can draw a cheque in favour of B, but hand it to C with the intention of transferring ownership of the cheque form to C without intending that C should become entitled to the proceeds of the cheque. It seems that the transferor's intention regarding the transfer of ownership of the cheque form is the determining factor in establishing true ownership.

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