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Case No 434/1993

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

FIRST NATIONAL BANK OF S A LTD Appellant

and

QUALITY TYRES [1970] (PTY) LTD Respondent

CORAM: CORBETT CJ, BOTHA, EKSTEEN, HOWIE

et SCHUTZ JJA

HEARD: 19 MAY 1995

DELIVERED: 30 MAY 1995

JUDGMENT

BOTHA JA:

This is an appeal, with the leave of the Court a quo, against a judgment granted in the Witwatersrand Local Division against the appellant ("the defendant") in favour of the respondent ("the plaintiff") for the payment of damages in the sum of R954 371,00 with interest and costs.

The plaintiffs claim rested basically on an allegation that the defendant had breached its duty of care to the plaintiff arising out of the defendant's acting as the collecting banker in respect of a cheque of which the plaintiff was the payee and allegedly the owner. The cheque was dated 11 May 1989 and it was drawn by Central Merchant Bank Limited ("Senbank") on Trust Bank of Africa Limited ("Trust Bank") for the sum of R954 376,71. This amount was expressed to be payable to the order of the plaintiff, but the cheque bore two crossings: one was printed on it, with the words "not negotiable", and the other, which had been affixed by means of a stamp next to and parallel with the first, carried the words

"not transferable".

The cheque was deposited for collection by Senbank at the Bree Street branch of the defendant in Johannesburg on 11 May 1989. Accompanying the cheque was a credit transfer form which had been filled in and signed by an employee of Senbank. It was addressed to the Parktown branch of the defendant, with the instruction to credit the plaintiff with the amount of the cheque. In the space provided on the form for filling in the "account number" (obviously of the person to be credited), the number 8006109314 had been inserted. That number had been supplied to Senbank by one E D Philip, who was a director of the plaintiff, and who had arranged with Senbank to draw and deposit the cheque. The number so supplied was not, however, the number of the plaintiffs account at the defendant's Parktown branch; in fact the plaintiff was not a customer of the defendant at any of its branches. The number on the credit transfer form was the number of an account that was being

conducted at the defendant's Parktown branch under the name of the Philip Children's Trust. The person who operated on that account was the same E D Philip.

When the cheque was presented for payment by the defendant to Trust Bank, through the automated clearing bureau, it was honoured, but the proceeds never reached the plaintiff. They were credited by the defendant, through its centralized bookkeeping centre, to the Philip Children's Trust account at its Parktown branch. At the time (11 May 1989) that account was in overdraft to the tune of R852 308,44. The credit of R954 376,71 liquidated the overdraft and left a balance of R102 068,27, which was transferred at the request of Philip to an investment call account in the name of the Philip Children's Trust on 13 May 1989. On 16 June 1989 the balance then standing to the credit of the account (R158 703,55) was withdrawn by Philip, ostensibly acting on behalf of the Philip Children's Trust, and the account was closed. It was

only in January 1990 that the defendant at management level discovered that the cheque in question had been the source of the funds credited to the account on 11 May 1989,

From the above resume of the salient facts (which are not in dispute) it is apparent that Philip played a key role in the events, linking as he did the plaintiff with Senbank, Senbank with the defendant, and the defendant with the Philip Children's Trust. It will be necessary to examine his conduct somewhat more closely, in the light of the evidence given at the trial. Before I do so, however, it will be convenient to refer to the issues raised in this appeal.

In the judgment of the Court a quo (DU PLESSIS J) reference was made to the requirements for holding a collecting banker liable for negligently causing loss to the true owner of a cheque, as stated in the judgment of this Court (per VIVIER JA) in Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A) at 797A-D:

> "There can now be no reason in principle why a collecting banker should not be held liable under the extended Lex Aquilia for negligence to the true owner of a cheque, provided all the elements or requirements
> of Aquilian liability have been met……In a situation
> such as the present a delictual action for damages would accordingly be available to a true owner of a cheque who can establish (i) that the collecting banker received payment of the cheque on behalf of someone who was not entitled thereto; (ii) that in receiving such payment the collecting banker acted (a) negligently and (b) unlawfully; (iii) that the conduct of the collecting banker caused the true owner to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss."

Upon a consideration of the evidence the trial Judge held that all these

requirements had been established and accordingly found for the plaintiff.

(It may be noted in passing that the slight discrepancy - which can be

seen above - between the amount of the judgment and the amount of the

cheque is of no consequence: it appears that the learned Judge took the

figure he put in the judgment from the prayer in the plaintiffs particulars

of claim, which was in turn derived from a misstatement of the amount

of the cheque in the body of the particulars.)

In this (Court it was argued for this defendant that the Court a quo had erred on the grounds that on the evidence the plaintiff had failed to prove -

(1) that it was the true owner of the cheque;

(2) that the defendant acted either unlawfully or negligently when it collected the cheque;

(3) that the plaintiff suffered any loss, or, if it did, that such loss was legally caused by the defendant's conduct.

The first issue to be considered, then, is whether the plaintiff established that it was the true owner of the cheque. Turning to the evidence relevant to this point, it will be convenient first to make some general observations about the evidence placed before the trial Court. Both parties called witnesses, the majority of whom were managers (of various ranks) employed by Senbank or by the defendant at the relevant

times. Philip was not called to testify. Most of the evidence was directed to the issues of unlawfulness and negligence. Such evidence will be referred to, when dealing with the first issue, only to the extent necessary to follow the course of the events and to explore the role played by Philip, which is pivotal to the first issue. In this regard the facts given in evidence are not in dispute in any material respect. Consequently I shall set out the facts in the form of a paraphrase without naming the particular witnesses from whose evidence they are taken; and in a few instances, where witnesses gave varying or conflicting accounts on immaterial matters of minor detail, I shall simply use one version and ignore the other.

The plaintiff is represented in this litigation by its liquidators. The company was placed under provisional liquidation on 8 December 1989 and a final winding up order was issued on 9 January 1990. The company was a subsidiary in a group of which the holding company was

Quality Tyres Limited. This company ("the parent company"), which had been listed on the Johannesburg Stock Exchange, was placed under liquidation simultaneously with the plaintiff. Philip was the financial director of the parent company and a director of the plaintiff. He was held in high esteem by and enjoyed the confidence of the officials of both Senbank and the defendant who dealt with him. One of the witnesses described him as "'n gesiene sakeman". His estate was also sequestrated in the beginning of 1990.

Before its liquidation the plaintiff carried on business as a dealer in new and retreaded tyres. It had traded in insolvent circumstances for some time before the liquidation. In fact, both the plaintiff and the parent company were insolvent at all times since 1987. But the shareholders and creditors did not know this. The evidence showed that Philip had fraudulently manipulated the books of account and financial statements of the companies to create a false impression of profitability, inter alia

by concealing that the plaintiff was indebted to bankers to the tune of R40 million, by inflating the profits of the companies, and by declaring and paying dividends out of non-existent profits.

In November 1987 the parent company and its trading subsidiaries entered into a written agreement with Senbank in terms of which Senbank placed bank acceptance credit facilities to an amount of R4 million at the disposal of the subsidiaries. Philip signed the agreement on behalf of the parent company and on behalf of each of the subsidiaries, including the plaintiff. Pursuant to the agreement the plaintiff could avail itself of the facility by means of drafts drawn by it on Senbank to its own order and endorsed in blank, and payable not more than 90 days after sight. The credit was a revolving one intended to cover continuous drawings. On acceptance of the drafts Senbank, as the plaintiffs agent, would offer them for discount at the ruling rate and account to the plaintiff by crediting its account at its commercial bank

with the net proceeds, i e their face value less acceptance commission, discount charges and stamp duty. The plaintiff could meet its liability by fresh drafts drawn in replacement of those maturing or by repaying maturing drafts in cash. The facility could only be used against sales of new and retreaded tyres, i e it was confined to financing the acquisition of trading stock. The plaintiff was obliged during the currency of the agreement to furnish copies of its audited financial statements as soon as they became available. In was Senbank's policy to limit the total amount of the facility to one-quarter of the total expected sales for the ensuing year.

In December 1988 the agreement was replaced by a fresh one on the same terms as before. On 24 April 1989 Philip, purporting to act on behalf of the parent company, approached Senbank with a request to increase the amount of the existing facilities from R4 million to R8 million. Senbank acceded to the request. At that time the total amount

utilized by the group stood at R2,9 million. On 11 May 1989 Philip, purporting to act on behalf of the plaintiff, approached Senbank with a request to draw a bill in terms of the agreement, for R2,5 million. Senbank again acceded to the request. It prepared five bills, each for half a million rand, in the form provided for in the agreement, and Philip signed each as drawer and endorser purportedly for and on behalf of the plaintiff. Senbank accepted the bills and caused them to be discounted. Under the agreement the proceeds were to be paid into the plaintiffs bank account, but Philip requested that the amount be split, saying that he wished payment to be made into two different accounts of the plaintiff. Accordingly Senbank made out and signed two cheques, one of which was the cheque in issue in this case, and the amount of which, at the direction of Philip, represented Rl million of the advance, less the deductions provided for in the agreement. In respect of this cheque, as has been mentioned before, Philip supplied Senbank with the number

supposedly relating to the plaintiffs account at the defendant's Parktown branch, which Senbank filled in on the credit transfer form it prepared, but which in reality was the number of the Philip Children's Trust's account. The defendant's Bree Street branch was situated close to Senbank's premises and Senbank customarily did its banking with the defendant there. And so the cheque was deposited at the Bree Street branch.

The credit transfer form which accompanied the cheque (henceforth referred to for convenience as "the deposit slip") consisted of an original and three copies. The teller who received the documents would have been able to check the name of the payee on the cheque against the name of the person to be credited on the deposit slip. Whether or not that was done is unknown but irrelevant, for the names were identical; the cheque and the deposit slip were on the face of it complete and regular, they matched, and there was no apparent reason for

the teller not to accept the cheque for collection. But the teller had no ready means by which to check the name of the payee and the person to be credited against the account number given on the deposit slip. At that time the defendant's computerized system did not allow for a teller at one branch (Bree Street) to check the correctness of the account number supplied in respect of a customer at another branch (Parktown).

From Bree Street the cheque and the original deposit slip were despatched to the defendant's centralized bookkeeping centre. There the slip was processed through a machine which caused the account having the number on the slip to be credited with the amount of the cheque. Again there was no ready means for checking that that account belonged to the person whose name appeared on the slip. The cheque went to the automated clearing bureau, and from there to Trust Bank, where, on being honoured, it was retained to be returned to Senbank. So the cheque was never seen by the Parktown branch. The original deposit slip was,

however, sent by internal mail from the bookkeeping centre to the Parktown branch. In the normal course of events it would have been received there a day or two after (he credit had been entered on the account on 11 May 1989, and it would have been filed away without further ado.

The account of the Philip Children's Trust ("the Trust") at the defendant's Parktown branch had been opened on 17 December 1986. The deed creating the Trust had been executed some two months before by Philip's mother in favour of his children. There were two trustees; Philip was not one, but he held a general power of attorney from the trustees to act on behalf of the Trust. This was filed at the Parktown branch when the account was opened, together with a written authority, addressed to the branch and signed by the trustees, that Philip was authorized to operate on the Trust account in all respects. The bank's signature card reflected each of the trustees and Philip as having signing

powers, but in fact only Philip seems to have operated on the account throughout its currency.

The account opened with a debit item of R843 000,00 which was an amount that the defendant, at the request of Philip, had agreed to advance to the Trust for the purposes of making a loan to a third party. As security for the advance the defendant took in pledge two large parcels of shares in the parent company, which were held by Philip in the name of the Trust, and the market value of which the defendant estimated to exceed R3 million. The advance was intended to provide bridging finance, it being expected that the third party would repay the loan within a short period of time. That did not happen. Philip was tardy in paying the interest on the advance, and pressure had to be put on him time and again to do so. At one point the defendant caused some of the pledged shares to be sold to pay overdue interest. There was much debate in the evidence as to whether this was a "problem account". For present

purposes that may be left aside. In general, though, the defendant regarded Philip as a "triple A" customer, signifying that he was held in high esteem by the bank and that the account controlled by him was not thought to be a risky one. And in May 1988, when Parktown branch reported to head office that Philip had again failed to pay interest as promised and suggested that the loan be called up and the scrip sold, the defendant's general manager responded by advising that the Philip family was involved in the parent company which had availed itself of large facilities at the defendant's Pritchard Street branch, and that "we would not wish to take a hard line at this stage for fear of alienating the group". In October 1988 Philip approached the then manager of the Parktown branch, Mr Fillmore, and told him that negotiations were under way for bringing about a merger between the parent company and Malbak Supertread Division, which was described in the evidence as a division of one of "the very biggest conglomerates" in the country. To enable him

to carry through the proposed merger, Philip said, he required to have the shares which had been pledged, and he wanted Fillmore to release them to him, in return for which he offered to furnish his personal suretyship for the Trust's indebtedness. Fillmore turned down the request and reported accordingly to head office, recommending that the Trust's debt be called up. Head office asked for further information and for further discussions to be held with Philip. Ultimately, on 2 March 1989 Fillmore, with the prior approval of head office, wrote to Philip advising him "that unless satisfactory arrangements can be made to provide us with alternate full firm security to cover the outstanding debt or the overdraft is repaid in full, we are unable to accede to your request in releasing the Quality Tyres Limited shares by replacing them with your guarantee in favour of the Trust".

On learning that he could not obtain the release of the scrip without securing or paying the Trust's debt, Philip told Fillmore that he

was arranging for finance from other sources to liquidate the liability. Then, on 10 May 1989, Philip called Fillmore to say that he had raised the finance and would be depositing the funds shortly to repay the debt. As we know, the account was credited with the amount of Senbank's cheque on the next day. Fillmore became aware of that when, in the ordinary course of the defendant's practice, the daily "large items report" was placed before him, reflecting inter alia that credit. It would have been possible for him to trace the source of the deposit by calling for the deposit slip (which would not have been available immediately), but it did not occur to him to do so, for he felt no surprise nor any concern, having been told to expect such a deposit and not having reason to suspect Philip's integrity. So the Trust's overdraft was wiped out and the credit balance transferred to a call account. At the same time (13 May 1989) Philip requested in writing that the pledged shares be released to him. Since the defendant no longer required the security, the share certificates

were returned to Philip. About a month later, as has been mentioned, the account was closed.

As far as the defendant is concerned, the Trust account came up for consideration again for the first time in January 1990. The senior manager, in the course of an investigation into the affairs of the parent company in connection with its dealings with the defendant, called on the defendant's branch network in Johannesburg for information about the activities of the company and its personnel, as a result of which the Parktown branch produced the deposit slip in question from its records, and it was seen that it had been made out in favour of the plaintiff, and not the Trust. The manager reported this to the liquidators. They investigated, and later the present litigation followed. In the meantime Senbank proved a claim against the plaintiff in liquidation for payment of (inter alia) the sum of R2,5 million, based on its liability arising out of the five bills mentioned earlier. The liquidators accepted the claim and

Senbank was paid a dividend of R600 000,00.

The conclusion to be drawn from the facts recited above is clear, in my view: Philip defrauded Senbank and the plaintiff and the defendant. As far as Senbank is concerned, my conclusion differs from that of the Court a quo. The trial Judge rejected an argument for the defendant that Philip had induced Senbank by means of a misrepresentation to issue the cheque. His reasoning was as follows: while "it might well be" that Philip, when he requested Senbank to draw against the facility, had already conceived the idea of diverting the proceeds of the cheque, it did not follow that the plaintiff was not entitled to draw against the facility; on the evidence Philip told Senbank that the plaintiff wished to draw on the facility, Senbank considered the request and then allowed it; no proven misrepresentation affected that part of the transaction. I do not agree. The probabilities are overwhelming that it was not the plaintiff that wished to draw on the facility, but Philip

himself in the pursuit of achieving his own ends - at least to the extent of the cheque in issue (the fate of the other cheque was not disclosed in the evidence). To that extent Philip, by making the request, misrepresented to Senbank that the plaintiff required this funds for the purpose of acquiring trading stock as contemplated in the agreement. He must have known that Senbank would not have issued the cheque if it had known that the proceeds would be used to enable Philip to liquidate the Trust's indebtedness. Moreover, it is obvious that Senbank would never have parted with the cheque if it had known that Philip had supplied a false number for entry on the deposit slip and that the plaintiff had no account at Parktown.

The trial Judge found that Philip defrauded the plaintiff by diverting the proceeds of the cheque; and he observed, as has appeared above, that "it might well be" that Philip had conceived the idea of doing so before he requested Senbank to draw against the facility. In my view

it is not open to doubt that Philip had already decided upon his fraudulent plan of action before he approached Senbank for the funds on 11 May 1989. Quite possibly the scheme had already been conceived by as early as 24 April 1989, when Philip asked Senbank to increase the limit of the facility from R4 million to R8 million, for he had been trying to get hold of the pledged shares since October 1988, he learnt during March 1989 that he would be unable to do so unless he secured or paid off the Trust's overdraft, and he then told Fillmore that he would be procuring the required funds from other sources. However that may be, his call to Fillmore on 10 May 1989, when he told him that the required funds would be deposited shortly, taken together with his conduct thereafter, leaves no room for doubt that his dealings with Senbank on 11 May 1989 constituted the execution of a plan to defraud the plaintiff which had been carefully and precisely preconceived.

Against this factual background the way is now clear for a

consideration of the issue of the true ownership of the cheque. In the Court a quo the issue was dealt with in the following passage of the judgment:

> "It was also argued on behalf of the Defendant that Senbank intended to deliver the cheque to Plaintiff, while Philip, acting on behalf of the Plaintiff, intended the cheque to be delivered to the Trust. It follows, so the argument went, that there was no consensus ad idem, and ownership in the cheque did not pass. The argument is certainly interesting, but incorrect. Philip intended that ownership in the cheque should pass to the Plaintiff. That was the only way in which he could complete the fraud. By misrepresenting that the account number is that of the Plaintiff, he managed to let ownership pass while diverting the proceeds to the account of the Trust."

This reasoning in my opinion runs counter to the true nature and scope of the fraud as planned and perpetrated by Philip. It seems to me, with respect, that the learned Judge was led into error by not perceiving that Philip's scheme encompassed a fraud on Senbank as well as on the plaintiff and that the detailed manner of execution of the scheme must

have been firmly in place in Philip's mind before he approached Senbank. The Court a quo's failure to appreciate the full thrust of the deceit is illustrated, perhaps, as was argued by counsel for the defendant in this Court, by the use of the expression "Philip, acting on behalf of the plaintiff, in the first sentence of the passage quoted above, instead of a phrase like "Philip, ostensibly acting on behalf of the plaintiff". (Counsel submitted also that the learned Judge's rendering of the argument in the Court below was inaccurate.) As far as Philip's negotiations with Senbank concerning the cheque in issue are concerned, Philip, while misrepresenting to Senbank that he was acting on behalf of the plaintiff, was unquestionably doing nothing of the kind. He was acting purely and simply in the furtherance of his own interests, and in fraud of the plaintiff.

When proper regard is had to the true ambit of Philip's planning and execution of the fraud there can be no warrant for a finding that he

intended ownership in the cheque to pass to the plaintiff. His intent, which is to be inferred from the evidence as analysed above, was from beginning to end that neither the cheque itself nor its proceeds would ever reach the plaintiff. In truth it is a feature of the cunningness of his scheme that it was based on the knowledge he had beforehand that the cheque would not be delivered but would be deposited with a bank, thus enabling him to bring about the diversion of its proceeds, unbeknown to the plaintiff. By the same token there is no justification as a matter of fact for the trial Judge's remark that it was only by ownership passing to the plaintiff that Philip could complete the fraud. As a matter of law the proposition is unsound, as counsel for the defendant argued and as will appear from what follows. Consequently the Court a quo's reasons for holding that the plaintiff was the true owner of the cheque cannot be sustained.

In this Court counsel for the plaintiff sought to support the

Court a quo's conclusion along a different route. Philip's intention was irrelevant, he argued; what had to be looked at was Senbank's intention, on the one hand, and the defendant's intention, on the other. As to Senbank, it was contended that it believed that the plaintiff was entitled to the proceeds of the cheque; that it delivered the cheque to the defendant with the object of enabling the latter to collect the proceeds on behalf of the plaintiff; that it did not intend to retain a right of possession or any other right in respect of the cheque; and that it accordingly intended the plaintiff to become the owner of the cheque through its delivery to the defendant. As to the defendant, the contention was that it, too, intended ownership of the cheque to pass to the plaintiff, because by accepting the cheque for collection the defendant undertook to act as the collecting agent for and on behalf of the payee named in the cheque, being the plaintiff. In this way, the argument concluded, the delivery of the cheque by Senbank to the defendant was effective to transfer the

ownership to the plaintiff, who was the only party having any real interest in the cheque and its proceeds.

In my view this argument for the plaintiff is flawed in a number of respects and for a number of reasons. Before I deal with these, however, it will be convenient to make some general observations about the nature of the enquiry with which we are concerned.

When our courts have been called upon in the past to decide the issue of the true ownership of a cheque, the most familiar factual situations giving rise to the issue have been of the kind where the cheque was stolen and then either cashed by the thief with a third party (raising the question of the latter's liability to the true owner under section 81 of the Bills of Exchange Act 34 of 1964), or deposited for collection by the thief at the bank of which he was a customer (raising the question of the bank's liability in delict to the true owner), and where potentially only the drawer and the payee of the cheque could compete for the ownership of

the cheque. In the present case the facts present two unusual features: the cheque was not stolen, and it was deposited for collection by the drawer. Despite these features, however, the fundamental question to be resolved here is the same as it was in the familiar situations I have mentioned, viz whether at the material time the ownership of the cheque vested in the drawer or in the payee. And since the drawer was obviously the first owner of the cheque and there can only be one owner at a time (in a context such as the present), the ultimately decisive question is whether the evidence establishes a juridical act which had the legal effect of transferring the ownership from the drawer (Senbank) to the payee (the plaintiff).

At this point some comment is called for, I think, on the concept of the "true owner" of a cheque. The expression is used in section 81 of the Bills of Exchange Act 34 of 1964 ("the Act"), to which reference was made above. In that setting the expression bears a specialized meaning

derived from the context of the legislative enactment in which it occurs and its historical origins. But in the context of a case such as the present, where the decisive issue is simply whether ownership was transferred from the drawer to the payee, it seems to me that the specialized meaning of "true owner" as used in the Act has no impact and that the word "true" does not serve to qualify the ordinary meaning of "owner" as used in legal parlance; it serves merely to signify that party, of the two parties who are the potentially competing claimants to ownership, who is found to be the owner in fact. It is in a similar sense, I consider, that the expression "true owner" was used in the judgment of this Court in the Indac Electronics case supra (1992 (1) SA 783). In that case the Court was not concerned with the issue of true ownership arising from potentially conflicting claims to ownership as between the drawer and the payee of the cheque. It was considering the claim of a payee against a collecting bank based inter alia on an allegation that the bank had

collected the cheque on behalf of a customer who had presented the cheque for collection but who had had no right to receive the proceeds (see at 788I-789A). In such a situation it seems to me that the function of the expression "true owner" is no more than to point to the person who was the owner as opposed to the person who purported to be but was not. This contrast is reflected, I think, in the formulation of the general principles of liability in the passage of the judgment quoted earlier (at 797A-D) - "true owner" as opposed to "someone who was not entitled thereto". In any event, in setting out, in the passage cited, the general considerations governing the collecting bank's legal duty of care (in the sense explained at 797E-798C) as against the "true owner", this Court did not, in my opinion, intend the expression "true owner" to bear any specialized or technical meaning; in particular, "true" does not qualify the ordinary legal sense of "owner". As a matter of terminology, it seems to me that the word "true" is strictly unnecessary in the present context and

might as well be dispensed with.

The ownership of a cheque, viewed as a piece of corporeal movable property, can be transferred only in accordance with the general requirements of the law regarding the transfer of ownership of corporeal movables. There must be a delivery of the thing, i e transfer of possession, either actual or constructive, by the transferor to the transferee, and there must be a real agreement (in the sense of "saaklike ooreenkoms") between the transferor and the transferee, constituted by the intention of the former to transfer ownership and the intention of the latter to receive it (see e g Air-Kel (Edms) Bpk H/A Merkel Motors v Bodenstein en 'n Ander 1980 (3) SA 917 (A) at 922E-H). Either party can, of course, act through someone duly authorized to act on his behalf. This is what the plaintiff was required to establish in evidence to substantiate its claim to the ownership of the cheque. On the facts of this case there is no need to consider the transfer of the rights flowing from

the cheque, viewed as a contractual document; having regard to the definitions of "delivery" and "issue" in section 1 of the Act, the transfer of the rights is inextricably tied up with the transfer of the ownership of the cheque. Nor is there any need to consider the question raised in argument whether Philip's fraud rendered the underlying contract (in terms of which Senbank undertook to advance the funds) void or voidable; whatever the answer might be, it would not affect the reasoning which follows.

I revert now to the argument for the plaintiff as summarized earlier. The first point on which it must fail is the submission that Senbank intended the plaintiff to become the owner of the cheque. The submission is not justified by way of inference from the facts advanced by counsel in support of it, as recited earlier. The argument confuses the proceeds of the cheque, to which Senbank believed the plaintiff to be entitled and which it wished the plaintiff to receive, with the cheque itself

and the ownership of it. To achieve the channelling of the funds into the plaintiffs account there was no call for Senbank to transfer the ownership of the cheque, and there are facts pointing to the inference that Senbank did not intend to do so. In the written agreement which created the bank acceptance credit facilities for the plaintiff it had been specifically provided that Senbank would account to the plaintiff for the net proceeds of the discounted bills by crediting its account at its commercial bank. It was not contemplated that a cheque would be delivered to the plaintiff itself. The arrangement reached between Senbank and Philip on 11 May 1989 conformed exactly to the procedure laid down in the agreement. Senbank was not paying over the amount of the advance by issuing the cheque to the plaintiff. By drawing the cheque and depositing it to the credit of what was thought to be the plaintiffs account Senbank was merely using a mechanism to cause the funds to reach the plaintiffs coffers, a procedure of which it was no part that the plaintiff would

acquire any rights to the cheque. In these circumstances an inference that Senbank intended the plaintiff to become the owner of the cheque is unwarranted.

The contention that the defendant when it accepted the cheque for collection intended the plaintiff to become the owner of it is also unsupported by the evidence. Counsel relied on the opinion expressed in general terms by some of the defendant's witnesses that a collecting bank can act only on behalf of the payee named in the cheque. Suffice it to say that that evidence patently does not bear out the contention.

Finally, the cardinal fallacy underlying the whole of the argument for the plaintiff is that it overlooks that there was never any delivery of the cheque by Senbank to the plaintiff, as was required for the passing of ownership. Counsel argued that delivery to the defendant constituted constructive delivery to the plaintiff, on the ground that the defendant was acting as the collecting agent for the plaintiff. The

insuperable obstacle in the way of this argument is that the plaintiff never authorized the defendant to receive delivery of the cheque on its behalf, whether in ownership or otherwise. The plaintiff was, in fact, a stranger to, and absent from, the whole transaction between Philip, Senbank and the defendant. Counsel was constrained to invoke the presence of Philip, despite his earlier submission that Philip's intention was irrelevant, arguing that an authorization by the plaintiff to the defendant was to be found in Philip's mandate to Senbank to deliver the cheque to the defendant and Senbank's ensuing mandate to the defendant to take delivery on the plaintiffs behalf. But Philip's fraud prevented his act from being effective to draw the plaintiff into the transaction; counsel rightly conceded that where, in circumstances like the present, a director purports to act on behalf of his company but in reality acts only in his own interests, the act is unauthorized. Moreover, and in any event, as was pointed out earlier, Philip as a matter of fact never had any intention

that the plaintiff was to become the owner of the cheque.

Two further points raised on behalf of the plaintiff can be briefly disposed of. In the written heads of argument it was submitted that a collecting bank's legal duty of care extends to the named payee of a cheque, whether or not he is the owner of it. In argument before this Court counsel said that he was not pursuing the submission. Suffice it to say that counsel's decision was right, for the submission is manifestly without merit. The other point was based on a passage in Cowen's Law of Negotiable Instruments in South Africa (4th edition) at 436-7, the gist of which reads as follows:

> "It would seem that the essence of the concept of being a 'true owner' for the purposes of section 81 is being entitled to possession of the instrument and to the enjoyment of an interest therein."

Counsel submitted that the plaintiff fell within this definition of a "true owner". The learned author was dealing with the specialized meaning of

"true owner" in the context of the provisions of section 81 of the Act, which, as I have already indicated, is not applicable to the resolution of the issue in this case. Indeed, the inappropriateness of invoking Cowen's definition here was demonstrated in the course of the argument, when counsel was asked whether the plaintiff would have fallen within the definition while the cheque remained in the possession of Senbank. Counsel said no, because it had not yet been delivered. The answer was inevitable, and it highlighted the fatal defect in the plaintiffs case.

In my judgment, therefore, the plaintiff failed to prove that it was the owner of the cheque, and thus failed to establish the first ingredient of its alleged cause of action. That being so, there is no occasion for this Court to consider the other issues raised in the appeal.

The order of the Court is as follows:

1. The appeal is allowed with costs, including the costs of two counsel.

2. The order of the Court a quo is set aside and there is substituted for it the following order:

"The plaintiffs action is dismissed with costs, including the costs of two counsel".

AS BOTHA JA

CORBETT CJ

EKSTEEN JA

CONCU

R HOWIE JA

SCHUTZ JA