

IAFRICA TRANSCRIPTIONS (PTY) LTD  
IN THE SOUTH GAUTENG HIGH COURT  
JOHANNESBURG

CASE NO: 1464/09

DATE: 08/12/2009

10 In the matter between

RAZEE INVESTMENTS CC

APPLICANT

and

MINEWORKERS PROVIDENT FUND

RESPONDENT

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J U D G M E N T

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20 SPILG J: The applicant, The Mineworkers Provident Fund applies for the rescission of a judgment granted in favour of Razee Investments CC on 21 July 2009 in default of appearance. The judgment was granted by my Brother Mokgoathleng J after hearing evidence. No record has been presented and the extent of the evidence led is not known to me. However a few things appear self evident.

Firstly a judgment was granted on the basis that service of the

application, upon which judgment had been granted, had been duly effected on the Fund at its principle place of business. Secondly, Razee had alleged that it was entitled to claim payment of an amount of R489 372.88 on the grounds either that Razee was the agent, alternatively a possessor or holder in due course of seven cheques drawn by the Fund on individual members, further alternatively (as alleged in Paragraph 5 at Page 63): *“In giving value on the seven cheques the applicant is discharged the debt to obligations of the respondent.”*

10           Each cheque was drawn in favour of an individual payee. It was not marked payable to either bearer or order, but was marked *“not transferable”*. They were all crossed and marked not negotiable. However also prominently displayed on the face of each cheque was a block containing the following words.

20                           *“To persons encashing this cheque or receiving it in exchange for any consideration, if this cheque has been stolen from or lost by the true owner you may be liable to reimburse such true owner for his/her loss if you in cash it or receive it in exchange for any consideration (Section 81 of the bills of exchange act 1964).”*

There follows in bold and larger print the letters **“NB”** followed with the words, in slightly smaller print but still in capital letters.

***“THIS CHEQUE IS CROSSED AND MARKED NOT NEGOTIABLE.”***

The reverse side of each cheque contains the signature of the payee and of Six Bar Trading CC but not of Razee.

Even if the cheques are to be regarded as being crossed and marked not negotiable, a difficulty arises from the substantive allegation made by Razee that each cheque was negotiated by the payee to Razee, that in turn Razee renegotiated the cheques with Six Bar Trading CC and that it was Six Bar Trading CC which deposited the cheques at the Port Shepstone Branch of the Standard Bank. Moreover it is alleged, in the application upon which judgment was granted, that

10 on payment being stopped Razee had reimbursed Six Bar Trading CC in full. Nonetheless there is no endorsement by Razee on the back of any instrument.

The Fund contends that it never received the application although it concedes that the application was served at the applicant's main place of business, 33 Park Terrace corner Princess of Wales and Carse O'Gawrie Roads, Parktown. The Fund claims that 33 Park Terrace is the address of a complex which has a single receptionist and that a number of companies have their place of business within its precinct. The Fund also contends that entry to the

20 precinct can only be gained via the reception area and that there is a single receptionist on duty. The receptionists will request the visitor to identify the person to be seen and that person will then be called to receive the visitor.

In its answering affidavit Mr Moosa states that in early December 2008 attorney Sully contacted the Fund's offices on telephone number

(011) 485 7000 and was advised by the receptionist that its' offices are situated inside the offices of Momentum at 33 Park Terrace. He was also advised that the Fund was administered by Momentum with the direct telephone number (011) 485 7167. Mr Sully then contacted that number and spoke to one Victor who confirmed the address and I quote from the affidavit:

10                   *"Mr Sully explained the situation to Victor in detail and was advised by Victor that the applicant's address was indeed correct at 33 Terrace Road corner of Princess of Wales and Carse O'Gawrie Roads Parktown and that the application should be served at that address and that Momentum i.e. the person at the reception could accept all documentation on behalf of the applicant. The sheriff was advised accordingly."*

                  In reply the Fund confirmed that Victor did not work for it but worked for Momentum. There is some confusion in the Fund's replying affidavit: The Fund claims that the phone numbers referred to earlier are those of Momentum and the letterhead of Momentum clearly reveals  
20   this, but the deponent goes on to state at Page 159 Paragraph 57 that:

*"The respondents (i.e. Razee Investments CC) phone number is (011) 485 7000 as it was as at 04 December 2008."*

Clearly there is an error.

What appears to be relevant to this inquiry is the return of service. This

is the return of service to the application in respect of which judgment was granted and which is now sought to be rescinded. It reads:

10                   *“Notice of motion, founding affidavit and annexure’s was served on the respondent by delivering a copy thereof to T Klokkele the secretary at Momentum who is apparently over the age 16 years and being a responsible employee of Momentum and having advised that as administrators of the respondent they are authorised to accept service on behalf of the respondent which also has offices within the same building upon exhibiting the original explaining the nature and content thereof.”*

It is trite that when a company is sought to be held liable for an act of its agent by reason of imputed or ostensible authority there must be proof of an act by the company itself giving the agent the trappings of authority. A representative cannot lift himself by his boot straps. It requires an act or omission by the principal itself. See for instance *Inter Continental Finance and Leasing Company (PTY) Ltd v Stands 56 and 57 Industrial Ltd* 1979 (3) SA 740 W at 749.

20                   The person receiving the application was not an employee of the Fund but of Momentum. On the evidence before me an employee of Momentum was not the agent nor the administrator of the Fund. This is because the agreement that the Fund has in relation to its administration shows that the administrator has at all relevant times been Advice at Work (PTY) Ltd. This has been the position since 2005

in terms of the written agreement that forms part of the papers.

Accordingly, while the sheriff's return may be *prima facie* proof that the person who made the disclosures was an employee of Momentum, without more from the Fund itself, that person cannot be regarded as having received service of the summons on its behalf. It is unnecessary therefore to embark on an enquiry as to what may or may not have happened to the application once it had been received. It is equally likely that, being an employee of Momentum, he took the documents to someone within Momentum's administration which has no  
10 obligation to pass on any documents to the Fund nor can the Fund be held responsible for a failure on the part of Momentum to forward the documents to it.

Accordingly on the basic principles applicable to representative capacity and the competency of a person to represent another, there was not service on the Fund in terms of the rules. As a consequence there was *de facto* a failure of proper service. The most fundamental step in an entitlement to obtain judgment is lacking; namely service of a process on the affected party. To the extent that is necessary to deal with a *bona fide* defence in such circumstances, suffice it that a *bona*  
20 *fide* defence has been *prima facie* established.

Although the instrument itself may require interpretation, and while estoppel may operate against the Fund there certainly was no evidence nor allegation to that effect contained in Razee's application. Without more it is arguable that Section 75A, which was introduced to deal pertinently with non transferable cheques, may be interpreted as

trumping even words that may on the cheque appear to conflict. I however wish to pass no comment, nor should anything that I say be regarded as tending to lean one way or the other in this regard. Suffice it to indicate that a *bona fide* defence *prima facie* established does exist and I certainly did not hear full argument on the implications of Section 75A. I was directed rather to the provisions of Section 43.

As regards costs. The Fund is seeking an indulgence. Against this is the fact that Razee was informed beforehand of the facts upon which the rescission was sought and was invited to consent. Razee did  
10 not consent to rescission of the judgment, even when the application was brought and averments were deposed to under oath.

However, at the heart of the case is likely to be the issue of whether or not the Fund has allowed a practice to develop, upon which Razee relied, whereby despite the crossings and the markings on the cheques, the Fund has allowed cheques payable to its members to be negotiated because many of its members did not have, and presumably do not have, banking accounts.

There is also the issue of the correct interpretation of the prohibition of transfer in light of the statement contained in the cheque  
20 contemplating negotiability. It may well be necessary before this matter is finalised for evidence to be led as to why the Fund did not simply content itself with the "*not transferable*" marking and why it was at pains to insert a further block directed at informing anyone who may encash the cheque or take it in consideration for purchases made by the payee of the instrument.

How that plays out against the provisions of Section 75A and the role of estoppel are no doubt matters that will engage a Court in due course. They are not my concern at this stage. However in the end there is no suggestion that the cheques were lost or stolen, nor that the employee received anything other than full value.

If that is the case then Razee has been out of pocket, whilst the Fund will never be called upon to pay to its member the face value of the cheque. This again brings me back to what I believe will ultimately be the real issues although not yet properly formulated in the application; namely, whether there is a factual base open for Razee to  
10 raise an issue of estoppel, and if so whether the law will allow an estoppel to operate in these circumstances.

If the facts are as suggested by Razee then it appears that the Fund at this stage ought to be alive to them. If that is the case then it would be unfair to make a cost order in favour of the Fund where ultimately facts which ought to be known to it are found to have existed. I am not convinced that the Fund has fully dealt with the issue even as raised by the applicant regarding a course of conduct whereby members have effectively negotiated the cheques. There remains unexplained the  
20 additional features appearing on a cheque when the existing insertion of the “not *transferable*” endorsement would have been sufficient and covered everything. This goes to the question of whether the cheques were truly intended to be incapable of negotiation.

It is inappropriate for Razee to now be asked to pay costs when ultimately its position may be vindicated on facts, facts that may have,

or ought to have, been known to the Fund. I therefore believe that the fairest order is to make costs in the cause.

Accordingly I grant the orders sought in Paragraphs 1, 2, 3 and 4 of the notice of motion dated 30 September 2009. It will be recalled that Prayer 4 relates to costs being cost in the cause. The alternative prayer for costs in the event of opposition does not apply despite there being opposition.

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**B SPILG  
JUDGE OF THE SOUTH  
GAUTENG HIGH COURT,  
JOHANNESBURG**

DATE OF JUDGMENT: 24 August 2010

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FOR APPLICANT: Adv Barry Witter

Geoisserow and TL Friedman Inc

FOR RESPONDENT: Adv Gerri Nel

Bel Dewar Attorneys