

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

2001 **CASE NO : 4816 /**
+ 5637 / 2001

In the matter between:

MPHATISI LUSIZI

Applicant

and

**TRANSNET LIMITED t/a SPOORNET
SAAMBOU BANK LIMITED
Respondent**

First Respondent
Second

JUDGMENT DELIVERED : 13th November 2001

JOSMAN, J

The facts in this matter are relatively simple. The applicant borrowed money in the form of a micro-loan from the second respondent (Saambou), which was to be repaid monthly over a period of time. Applicant was working for the first respondent (Spoornet) and he authorized Saambou to arrange with Spoornt for a deduction from his monthly salary of the amount of the repayment each month. Thereafter applicant encountered financial difficulties, and was placed under an administration order in terms of section 74 of the Magistrate's Court Act. In order to qualify for such an order he requested Spoornt to cease making the deductions from his salary in repayment of Saambou's micro-loan.

Spoornet adopted the attitude that it was unable to stop the deductions without Saambou's consent and Saambou

withheld its consent. Applicant therefore brought this application in which he sought an order compelling both Spoornet and Saambou to take all steps necessary to ensure that the deductions from his salary in favour of Saambou are cancelled. Saambou's attitude is that the applicant had irrevocably instructed Spoornet to make the deduction and that Saambou and Spoornet had an agreement that Spoornet would make ("permit") such deductions for the period of the contract.

The authority to deduct the payments was not given directly by applicant to Spoornet but rather is contained in cl. D 2.2 of the standard terms and conditions of the loan agreement between Saambou and applicant. It reads as follows:

"The Lender is irrevocably authorized to arrange with the Borrower's employer for the deduction of his installments from his remuneration or for the application of a debit order against the account specified in the application in accordance with the applicable repayment arrangement"

Applicant challenges the stance adopted by Saambou. At this stage Spoornet has adopted a neutral stance and is abiding the decision of this court and it is Saambou that is opposing the matter. The two issues that I have to consider are: (i) whether applicant is entitled to revoke his instructions to make the deductions from his salary in favour of Saambou; and (ii) whether Saambou is entitled to prevent Spoornet from implementing the applicant's instructions.

Applicant's first challenge is to the enforceability of cl. D 2.2 of the standard terms and conditions of the loan. At the outset the applicant challenges the enforceability of the entire

agreement alleging that it is *contra bonos mores* because the applicant is illiterate, totally uneducated, and was unaware of the complex interlocking clauses in the contract. Applicant does not seek however to avoid the entire contract but merely wishes an order declaring cl. D 2.2 to be unenforceable to the extent that it creates an irrevocable authority to Spoornet to make the deductions in favour of Saambou. Whether it has this effect is an issue that will be considered separately.

The next basis of challenge is that in terms of section 34 of the Basic Conditions of Employment Act no. 75 of 1977 an employer is prohibited from making deductions from an employee's remuneration unless the latter has agreed to such deduction in writing in respect of a debt specified in the agreement. Applicant contends that cl. D 2.2 does not form part of any written agreement between himself and Spoornet.

The third issue raised is that since the instruction to Spoornet constituted a mandate from the applicant, applicant as principal is entitled to revoke that mandate. The mere fact that the mandate was described as being irrevocable does not operate to deprive the grantor of the power to revoke.

I will deal with these issues separately, starting with the last one.

IS THE MANDATE REVOCABLE

1. In June 2001 Spoornet and Saambou entered into an agreement whereby Spoornet undertook to assist with the repayment of loans made to its employees by Saambou. The purpose of the

agreement was to ensure that Spoornet would grant a salary deduction at the request of each employee from his or her salary in favour of Saambou. In terms of cl. 3.2 of the agreement Spoornet undertook to execute each salary deduction for the duration of the relevant loan, granted to such Spoornet employee “unless same is terminated as provided for in this agreement”. Cl. 3.3 provides that such salary deductions would only be made at the written request of a Spoornet employee, and that only if all the conditions detailed in the agreement had been complied with.

2. This obligation is expressed in the following terms in para 5.1.4 of the agreement, namely that Spoornet shall “deduct the monthly installments from the salary of each qualifying Spoornet employee for whom Spoornet holds a written authority by such Spoornet employee to do so, and continue to make such deduction for the period so authorized, unless the employee is entitled in law to unilaterally terminate such authority to Spoornet or when an order of court authorizes termination thereof.”

It is relevant the employees are not parties to this agreement and the relevant clauses referred to above raise the issue as to when an employee is entitled in law to terminate the authority given to Spoornet unilaterally.

The other relevant documents are a credit application and agreement dated the 27th August 1999, in which the applicant applied for credit and provided details of his employment with Spoornet. The standard conditions containing cl. D. 2.2 are annexed to the credit application and agreement. Also

forming part of the papers and presumably part of the credit application is a document containing two subheadings, the first is “Bank details/debit order” giving details of the applicant’s bank and the second is headed “salary stop order” which appears to have been partially completed. It refers to his rank and his salary number but does not refer to the amount to be deducted, it is not dated, and it is not signed by the counting officer (whomever he might be). The page is signed at bottom by the applicant. The salary stop-order contains the following sentence in bold print: “This authority can only be cancelled if Saambou Bank agrees thereto in writing”. It formed part of the salary stop order section which as previously stated was not completed.

It is necessary to analyse the nature of the arrangement contained in para. D 2.2. In the first place it is an irrevocable mandate to Saambou to arrange with Spoornet for the deduction of installments from the applicant’s salary by means of a debit order against his account. Clearly this is an arrangement that the applicant could have made himself but instead of doing so, he constituted Saambou his agent to do so. Counsel for both the applicant and Saambou are in agreement that this was a onetime authorization to put the arrangement into effect. It is not an ongoing authorization operating each month. Where the parties differ however is that Saambou alleges that Spoornet’s undertaking to deduct the payments from applicant’s salary is irrevocable, whereas applicant contends that only his instruction to Saambou to put the arrangement in place was irrevocable.

On a proper analysis there are two agencies that are created here; the first derives from a mandate to Saambou to arrange for

Spoornet to make the required deductions from his salary; the second is a continuing mandate to Spoornet to make the deductions thereafter. As previously stated the latter mandate could have been created directly with Spoornet by the applicant but he chose, or rather Saambou required, that Saambou be constituted his agent for the purposes of establishing this agency. The real issue therefore is whether applicant's mandate to Spoornet, however constituted, is revocable.

In Ward v Barrett N.O. and another 1962 (4) SA 732 (N) Caney J authoratively considered the question of when a mandate given to an agent is revocable. At p737 D he said:

“Generally, the authority of an agent is revocable by his principal and terminates on the death or insolvency of himself or of the principal. The question whether a power of attorney or the authority of an agent howsoever conferred is irrevocable depends, it seems to me, upon an interpretation of the transaction into which the principal has entered with the agent and an application of the general principles of law to that transaction. There seems to be no particular magic in the use of the terms “irrevocable” or “*procuratio in rem suam*” or “a power coupled with an interest”; it is essential to discover precisely what was the transaction. The principal may have bound himself to the agent in terms, express or implied, which oblige him contractually not to revoke the agent’s authority save on pain of liability in damages. Such a case was *Glover v Bothma*, 1948 (1) SA 611 (W), see pp. 626, 627. Or the transaction may have been one of providing security for meeting a liability to the agent, and this may have been effected in such a manner as not to affect creditors in a *concurso creditorum*.”

He added at p738 A: “It is clear that a power of attorney given by a principal as security for recovery of what is owing to the grantee is irrevocable.” I will deal with this in greater detail below.

In Glover v Bothma 1948 (1) SA 611, at p626 Roper J said the following:

“A *procurator in rem suam* is defined by Voet (3.3.8) as “one who does not carry on business for the benefit of the principal but for his own benefit.” The effect of the rule as stated by Voet appears to be substantially the same as that of the English rule that an agency cannot be revoked where it is coupled with an interest.

The following passage occurs in Wille and Millin’s *Mercantile Law of SA* (11th Ed., p. 362):

“An authority coupled with an interest is one given for the purpose of protecting or securing any interest of the agent. Such an authority or power is usually styled ‘irrevocable’ in the instrument conferring it, and it often takes the form of what is called a procuratorship *in rem suam*, i.e., an agency in which the agent is given authority to sue in his own name and in which he transacts the business committed to him for his own benefit and not for the benefit of the principal. In a case of this sort, as well as in every other case where the power has been given by way of security, irrevocability will be implied, even if the power is not expressed on the point. On the other hand, merely to call a power ‘irrevocable’ is not to make it so. Subject to an action for damages an ordinary power styled irrevocable may be revoked...The test is whether it is

intended for protection or securing of an interest of the agent. If it is, it is irrevocable, until such time as the protection or security is no longer needed.”

I am satisfied that this correctly sets out the results of our authorities (citations omitted).” (emphasis added)

In Glover’s case the distinction was drawn between an interest on the part of the agent in the exercise of his authority as opposed to an interest in the thing actually vesting in the agent. Only the latter qualifies as an agency coupled with an interest, a good example of that is found in the case of Netherlands Bank v Yull’s Trustee 1914 WLD at p.131. In that matter a pledge of book debts to a person as security for a debt, coupled with the vesting of power or authority in that person (the agent) to collect the debts was held to constitute an agency with an interest and was therefore irrevocable. The words *in rem suam* are often used to connote such a power and in Yull’s case it was intended to mean that the agent was able to sue in his own name in order to collect the book debts.

In the case of Consolidated Frame Cotton Corporation Ltd v Stihole and others 1985 (2) SA 18(N), the court considered a situation not too dissimilar from the matter *in casu* in which nineteen employees’ of a cotton mill who were members of a trade union had agreed that the weekly dues to the union could be deducted from their salary and a stop order authorization had been signed by each of them. This was contained in the application for membership of the union and on the same form there was an acknowledgement and an acceptance to abide by the constitution of the union. Upon

resignation from the union the employees withdrew their written authorization to their employer to make the deductions with immediate affect. The constitution of the union required one month's notice of cancellation and the employer accordingly declined to give effect to the cancellation. The employees thereupon sought a declaratory order that the continued deduction of dues was unlawful and an order interdicting the employer from making such deductions.

The matter was heard in the magistrate's court and the employees were successful. Thereafter the employer took the matter on appeal. At that stage it was argued that the entire arrangement was a contract for the benefit of the union, which benefit had been accepted and could therefore no longer be withdrawn. The essence of this construction was that the union thereby acquired a right to claim payment of the members' subscription directly from the employer.

Nienaber J, as he then was, reiterated the general rule that a principal may freely terminate the authority of his agent, even if the mandate establishing the authority provided that it is not to be revoked; breach of that provision giving rise to a claim for damages but not preventing the principal from terminating the agency. He then went on to consider exceptions to the rule, but he dismissed the contention that an authority coupled with an interest had been created in the circumstances. He did so on the basis that the interest had to be that of the agent (the employer) and not of an outsider such as the union. Indeed this contention was not even argued strenuously on appeal. One of the reasons advanced was that the employer did not face a claim for damages from the union

if it failed to continue to deduct the union dues. No such arrangement existed in that matter and Nienaber J pointed out that the employer's undertaking, insofar as there was any undertaking towards the union, was to make the deductions until such time as the stop-order authorization ceased to have force. The employer had not undertaken to make the deductions until such time as the members ceased to be a members of the union. It will be necessary to consider the matter *in casu* to determine whether the circumstances are different in this instance.

With regard to the issue of whether it was a contract for the benefit of a third party Nienaber J pointed out that the essence of this type of contract is that it would have been entered into between the employer and the employees with the intention that the union, upon acceptance of the benefit, would be able to enforce its claim for subscriptions directly against the employer. This would have entailed a finding that the constitution of the union was incorporated into the contract between the employer and the employee. The fact that the stop order authorization contained an undertaking to abide by the terms of the union's constitution was not sufficient. Nienaber J regarded the juxtaposition of these two documents as a matter of convenience only which had no contractual significance. What is more the constitution of the union did not provide that the only manner of payment of the dues was to be by stop-order against the employees' salary. There was no compelling reason why a member should not be free to make alternative arrangements for payment of the dues.

There had be shown, on the balance of probabilities, that

the employer and the employee intended by the authorization of the stop-order to vest a right in the union to enforce a claim against the employer directly should it fail to transmit the subscriptions. Furthermore that right had to endure for as long as the employee remained a member of the union. It was his conclusion that a more feasible interpretation of the entire arrangement was that it was regarded as a convenient means of facilitating payment of the dues, (presumably to ensure regular and timeous payment), in a manner that did not contravene the Basic Conditions of Employment Act, which required such authorization to be in writing. An alternate argument advanced in that case was that if the circumstances did not show a *stipulatio alteri* then there was a tri-partite agreement between all three parties, the employer, the employees and the union. Nienaber J concluded that nothing in the papers suggested the existence of such an overriding tripartite agreement in which it is essential that each of the three parties should intend to be a party to the agreement. The employer had argued in that matter that the tripartite agreement was partly oral, partly in writing and partly to be inferred from conduct. Nienaber J concluded that the circumstances before him were not so unequivocal as to render the construction contended for by the employer more plausible than any other. At p.25 I he said the following;

“Even if each stop order authorization is viewed not in isolation but in a setting of all surrounding facts, no comprehensive tripartite agreement is revealed of which the stop order is but a single component. The better view, in my opinion, is to regard each stop order authorization as a separate transaction between (the employer)

and (each employee) in terms whereof (the employer), as the debtor of (each employee) in respect of wages, is appointed as his agent with the express power to effect payment on his behalf to his creditor, (the union). (The union), being the nominated recipient of the money, can properly be termed an *adjectus solutionis causa* (citation omitted). This is a mutually convenient arrangement. (The employee) concerned is not bothered to arrange for a weekly payment and (the union) is not bothered to arrange for its collection. But that does not mean that (the employee) is irrevocably committed to the arrangement or that (the union), or (the employer) for that matter, can enforce it against his continued will. Nothing in the constitution of (the union) obliges him to effect payment in this manner only.”

He went on to add that the stop order contained nothing to suggest that it was irrevocable and therefore that each employee was perfectly free to revoke the authority by addressing an appropriate communication to the employer. Whether the employees remain liable to the union in terms of its constitution was another matter which did not arise in the appeal. I would add that even if the stop order authorization had purported to be irrevocable, this would not have given rise to a claim for damages by the union against the employer, but left the union with a claim against the employees.

It remains to compare the circumstances *in casu* with those in the Consolidated Frame case. It was contended on behalf of Saambou that it was indeed an agent coupled with an interest and that for this reason applicant was not entitled to revoke the instruction to Spoornet. The fallacy in this argument is clear since the agent for making payment is Spoornet and not Saambou. The interest that Saambou has in

receiving payment does not derive from the agency between applicant and Spoornet, but rather from its own contract with the applicant. In order to create an interest that was enforceable vis a vis Spoornet, Saambou would have to show either a *stipulatio alteri* entered into between applicant and Spoornet for its benefit, which benefit it had accepted, or it would have to show a tripartite agreement between all three parties. In my opinion neither has been shown.

The mandate to Saambou was simply to arrange with Spoornet for the stop-order and salary deduction arrangement to be put in place. This mandate was expressed to be irrevocable. It did not allow Saambou to establish an irrevocable mandate for Spoornet to pay Saambou on appellant's behalf. It lacks the essential stipulation that the deductions were to be made for as long as applicant remained an employee of Spoornet or until the loan was repaid, whichever were to happen first. Had it done so failure to make the deductions would then have rendered Spoornet liable in damages to Saambou. This would then have constituted Spoornet an agent with an interest to make the payment and as such the mandate would then have been irrevocable. No such stipulation can be read into cl.2.2 of the loan agreement between applicant and Saambou. Spoornet had no independent interest to continue to deduct the amounts from applicant's salary. This arrangement also does not qualify as a *stipulatio alteri*.

Mr. Burger who appeared with Mr. Kirk-Cohen for Saambou argued that there are three distinct relationships which feature in this matter, the first being the loan

agreement between applicant and Saambou, the second being the employment relationship between applicant and Spoornet and the third being what he refers to as the ‘umbrella’ agreement between Saambou and Spoornet. This triad of agreements he calls a ‘globular arrangement’ the result of which being that applicant’s authorization to Saambou to arrange for the salary deductions with Spoornet are intended to operate for the entire period of the loan, and by implication, cannot be revoked by applicant. Cl.2.2 does not state this nor does it provide that the obligation to pay is contingent upon applicant’s continued employment with Spoornet. Such a term is not to be implied since it would effectively preclude applicant from making alternate arrangements for repayment of the loan, as suggested by Nienaber J in the Consolidated Frame case.

It remains to consider whether the so-called ‘umbrella’ agreement between Spoornet and Saambou assists Saambou. In the preamble to the agreement Saambou makes it clear that it is prepared to grant loans to Spoornet employees on the basis that Spoornet would grant a salary deduction “at the request of the employee from the salary of such Spoornet employees in favour of Saambou”. In cl.3.2 dealing with salary deductions Spoornet undertakes “to execute such salary deduction for the duration of each and every loan agreement entered into by a Spoornet employee with Saambou unless same is terminated as provided for in this agreement”. Cl.3.3 provides: “Such salary deductions will only be done on the written request by a Spoornet employee, and further once all the conditions as detailed herein have been complied with”. Clearly there is an undertaking by Spoornet to continue to make the payments for the duration of the loan.

Cl.5.1.4 is also relevant. It requires Spoornet to “deduct the monthly instalments from the salary of each qualifying Spoornet employee for whom Spoornet holds a written authority by such Spoornet employee to do so, and continue to make such deductions for the period so authorized, unless the employee is entitled in law to unilaterally terminate such authority to Spoornet or where an order authorizes the termination thereof. Such authorizations shall reflect the total amount of the loan, monthly instalment to be deducted and the period thereof”. (emphasis added).

In the definition section of the agreement “termination of employment” is defined as including termination as a result of retrenchment, dismissal, termination of employment in accordance with a voluntary severance package, etc. Clearly as between Spoornet and Saambou it is intended that the deductions will continue for as long as the employee remains employed by Spoornet and the loan is still outstanding. The difficulty I have with Mr. Burger’s argument however is to the applicant is not a party to this agreement, nor even is there anything to show that he is aware of the existence of the agreement. In the absence of this, applicant is entitled to revoke its mandate to Spoornet on the principles set out above and if the mandate is revoked then Saambou’s rights in terms of the ‘umbrella’ agreement with Spoornet are not enforceable. Accordingly Spoornet would not be liable in damages to Saambou; as such it does not qualify as an agent with and interest.

Mr. Saner who appeared for the applicant contended that there never was a tripartite agreement between the three parties in this matter and I agree with him. Mr. Burger's contention that the triad of agreements comprises a globular agreement appears to be missing a link if he wishes it to be regarded as a tripartite agreement.

It is my conclusion that there is no bar to applicant terminating its instruction to Spoonet to terminate the salary deductions. I am not without sympathy for Saambou which regards the salary deduction agreement with employers as an essential form of security to underpin loans to employees who would not otherwise qualify. What the facts of this case reveal is that it is not sufficient merely to authorize Saambou to arrange with an employer such as Spoonet to make the deductions. It is necessary to go further and involve the employee in a *stipulatio alterio* for the benefit of Saambou which provides Saambou with a right to claim the salary deductions directly from the employer for as long as the employee remains in employment and until the loan is repaid. The alternative is to make the employee aware of the 'umbrella' arrangement, such as that between Saambou and Spoonet, and to require his consent to being bound thereby.

One of the issues raised in the papers relates to the fact that the applicant is uneducated, illiterate and clearly did not understand the terms of the various agreements referred to above. Fortunately I am not called upon to deal with this thorny issue in the light of the conclusion that I have come to. The issue might well arise however if Saambou seeks to make such an employee a party to a *stipulatio alteri* or a

tripartite agreement. It will no doubt have to take sufficient steps to ensure that the employee understands the ambit of the agreements.

Accordingly I am prepared to grant an order in terms of prayer's 2 of the applicant's notice of motion and to direct that Saambou Bank Limited, the second respondent in this matter be ordered to pay the applicant's costs.

This matter was preceded by an interlocutory application which has not been referred to in this judgment. I have however been asked to make a costs order in the respect thereof. In my opinion the appropriate order in relation to the interlocutory application is that each party should pay its own costs.

JOSMAN, J