THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER: 580/98

In the matter between:

ABSA BANK LIMITED **APPELLANT**

AND

BOND EQUIPMENT (PRETORIA) (PTY) LIMITED **RESPONDENT**

CORAM : SMALBERGER, HARMS, SCHUTZ, ZULMAN JJA et MPATI AJA

DATE OF HEARING : 8 SEPTEMBER 2000

DATE OF JUDGMENT : 29 SEPTEMBER 2000

Delictual action for damages against collecting bank guilty of negligence - vicarious liability of claimant for wrongful action of its employee in regard to the proceeds of cheques of the employer wrongfully stolen by the employee for his own benefit.

JUDGMENT

ZULMAN JA

[1] The respondent (the plaintiff), a customer of the appellant bank (the defendant), instituted an action for damages against the defendant. In its particulars of claim the plaintiff alleged that it was the true owner of thirteen crossed cheques endorsed either "not transferable" or "not negotiable". Possession of the cheques was obtained by an employee of the plaintiff (Steyn) who unlawfully deposited them to an account conducted by Steyn under the name of Bond Equipment (Pretoria). The plaintiff's name is Bond Equipment (Pretoria) (Pty) Ltd. The cheques were collected for payment by the defendant not for the plaintiff but for Bond Equipment (Pretoria), notwithstanding the absence of any endorsement by the plaintiff. The action was founded in delict and based on the defendants' negligent conduct in collecting payment as aforesaid. (*Cf Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992(1) SA 783 (A).) The essential defence was ultimately that the defendant was absolved from liability for its negligence because

the plaintiff was vicariously liable for Steyn's conduct.

[2] The parties reached agreement on certain facts which were recorded in a written statement. The court *a quo* was requested to answer various questions arising from these facts in terms of Rule 33(4). Willis AJ granted judgment for the plaintiff for the full amount of its agreed loss, being the face value of the cheques. The judgment is reported *sub nom Bond Equipment (Pretoria) (Pty) Ltd v Absa Bank Ltd* 1999(2) SA 63 (W). The present appeal is with the leave of the Court *a quo.*

[3] The statement of agreed facts reads as follows:-

> "1. The South African Defence Force/National Defence Force/the Defendant ('the debtors') were indebted to pay certain amounts to the Plaintiff ('the debts').
>
> 2. In settlement of the debts, the debtors drew cheques Annexures 'B' to 'N' to the summons. All the cheques except Annexure 'D' were delivered to A J Steyn (Steyn) Plaintiff's duly authorised employee at the office of the Chief Payment Officer, Department of Finance, Poyntons Building, Kerk Street West, Pretoria. Annexure 'D' was

delivered to Steyn at Trust Bank, Andries Street, Pretoria.

3. The particulars of these cheques are as follows:

3.1 They were all drawn as reflected on the copies of the cheques which are annexed as annexures ‘B’ to ‘N’ to the summons respectively.

3.2 They were all crossed and endorsed either ‘not transferable’ or ‘not negotiable’.

3.3 The cheques crossed and endorsed “not negotiable” were at no stage endorsed or negotiated by the Plaintiff.

3.4 The cheque Annexure ‘I’ was endorsed by Steyn without Plaintiff’s knowledge or authority.

4. Steyn obtained possession of the cheques and unlawfully caused them to be deposited to the account of ‘Bond Equipment (Pretoria)’ an account conducted by Steyn under this name with the Defendant.

5. The Defendant as collecting bank owed the true owner of the cheques a duty to take care that it did not negligently collect payment of the cheques for the benefit of anyone not entitled thereto.

6. The Defendant collected payment of all of the cheques for Bond Equipment (Pretoria).

7. The banks on which the cheques were drawn honoured the cheques

in circumstances which do not render these banks liable against the Plaintiff or the debtors.

8. The depositing for collection of the cheques by Steyn and the unlawful appropriation by him of the proceeds thereof were delicts committed by Steyn.

9. Should the first question of law be answered affirmatively then the *quantum* of the Plaintiff's loss suffered as a result of the aforementioned facts is the aggregate total of the face value of the cheques being an amount of R219 783,74.

10. The Plaintiff has instituted action against the Defendant. Steyn is not a party to these proceedings and the Plaintiff has not instituted any civil action against Steyn.

11. When Steyn stole the cheques from the Plaintiff he was an employee of the [Plaintiff] and the opportunity to steal the cheques arose during the course and scope of such employment. The cheques so received and stolen by Steyn were not reflected in the Plaintiff's records as having been received by the Plaintiff and it was only between March and April 1996 that Plaintiff became aware of the thefts."

[4] Six questions of law arising from the agreed statement of facts were

formulated by the parties. Only the answers given by the court *a quo* to three of these questions are challenged on appeal. The three questions are:-

1. Is the Plaintiff in law vicariously liable for the actions of Steyn?
2. Is the Defendant's conduct as set out above the proximate cause of the Plaintiff's loss?
3. Is the Defendant liable to the Plaintiff for any negligent actions performed by its employees in view of Steyn's conduct as aforesaid?

The court *a quo* answered the second question affirmatively and the first and third negatively.

[5] The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of, the employer (see for example, *Minister of Police v Rabie* 1986(1) SA 117 (A) at 132 G; *Minister of Law and Order v Ngobo* 1992(4) SA 822(A) at 827B). It

should not be overlooked, however, that the affairs of the employer must relate to what the employee was generally employed or specifically instructed to do. Provided that the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable even where the employee acts contrary to express instructions (see for example, *Estate van der Byl v Swanepoel* 1927 AD 141 at 145-146, 151-152). It is also clear that it is not every act committed by an employee during the time of his employment which is for his own benefit or the achievement of his own goals which falls outside the course and scope of his employment. (*Viljoen v Smith* 1997(1) SA 309 (A) at 315 F-G.) A master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must have been done by the servant in his capacity *qua* servant and not as an independent individual. (See for example *Feldman (Pty) Ltd v Mall*, 1945 AD 733 at 742 and *H.K. Manufacturing*

Co (Pty) Ltd v Sadowitz 1965 (3) SA 328 (C) at 336 A.)

The test in this latter regard was formulated by Jansen JA in *Minister of Police v Rabie* (supra) at 134 D-E as follows:-

> "It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (c*f Estate van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's act for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that according to the *Salmond* test (cited by Greenberg JA in *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 774).
> 'a master ..... is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them .....' "

Tindall JA put the matter as follows in the *locus classicus* on the vicarious liability of an employer for the deeds of an employee, in *Feldman (Pty) Ltd v Mall,* supra at 756 - 757:

> "In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise

> terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case the matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed."

(See also the remarks of Watermeyer CJ at 742 and Davis AJA at 784). The effect of the "two tier test", as postulated by Jansen JA, is that an employer will only escape liability if his employee had the subjective intention of promoting solely his own interests and that the employee, objectively speaking, completely disassociated himself from the affairs of his employer when committing the act. The nature and extent of the deviation is a critical factor. Once the deviation is such that it cannot reasonably be held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of fact (see for example *Feldman (Pty) Ltd v Mall* (supra) at 756-7; *Union Government v Hawkins* 1944 AD 556 at 563; *Viljoen v Smith*, (supra) at 316 E - 317A). The answer in each case will depend upon a close

examination of the facts. The same is true of the enquiry as to whether the deviation has ceased and the employee has resumed the business of his employer.

[6] As far as social policy may have a bearing on the matter (cf the remarks of Corbett JA in *Mhlongo and Another NO v Minister of Police* 1978(2) SA 551 (A) at 567 H), it seems to me to be beyond doubt that it would not be sound social policy to hold an innocent master liable or responsible to a third party, where his dishonest servant steals the master's own property, as is the situation in this case. This is especially so where there is no suggestion that the master was in any way negligent in the selection of Steyn.

[7] English law has undoubtedly had an influence on the decisions of our courts in the field of vicarious liability. (See for example *Mkize v Martens* 1914 AD 382 at 391 and 400; *Feldman (Pty) Ltd v Mall,* (supra) at pp 736, 765, 776 and 778; *Midway Two Engineering and Construction Services v Transnet Bpk* 1998(3) SA 17 (SCA) at 22 B-C.) The English courts, at one time held that an employer could

never be liable for a theft committed by his employee on the grounds that the act of stealing must necessarily be an act outside the scope of his employment (see for example *Cheshire v Bailey* [1905] 1KB 237). This approach has changed. The position is now that theft by an employee to whom goods were entrusted is in fact an improper mode of performing what the employee was employed to do with the result that his employer could be held liable to third parties for such theft. (See for example *Morris v C W Martin and Sons Ltd* [1966] 1 QB 716 in which the opinion expressed in *Lloyd v Grace, Smith & Co* [1912] AC 716 (HL) was accepted. See also Atiyah- *Vicarious Liability in the Law of Torts* (1967 edition) pp 199 - 200.)

More recently the Privy Council in a bailment case involving the loss of a third party's goods entrusted to a bailee made it clear that it was incorrect to hold that an employer could never be liable for a dishonest act on the part of his employee (*Port Swettenham Authority v T. W. Wu and Co. (M) SDN. BHD*. [1979] AC 580; see also *Clerk and Lindsell on Torts* (17th edition) (1995) p 187). It would

however seem that the English cases confine the employer's liability to situations where the goods of a third party were in some way entrusted to the employee (see for example *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827) and not to situations where the servant steals goods belonging to his master. Furthermore, the mere fact that the employment provided the opportunity for the theft will not be sufficient. It would appear that in English law even today there is no authority for holding the employer vicariously liable or responsible in a case such as is before us.

[8] Against this background I turn to consider the fundamental question in issue in this appeal, namely, whether on the common cause facts, as they emerge from the stated case, the court *a quo* was correct in concluding that Steyn was not acting in the course and scope of his employment with the plaintiff at the relevant time and that the plaintiff is accordingly not vicariously liable or responsible for his wrongful conduct.

[9] If proper regard is had to the agreed facts I am of the view that:-

Neither on the subjective approach nor on the objective one can it be said that Steyn acted within the course and scope of his employment in depositing the cheques into an account other than that of his employer, so that he could thereafter appropriate the proceeds for himself. To use the classic phrase, said to have first been mentioned in *Joel v Morison* (1834) 6 *CAR & P* 502 (172 ER 1338), Steyn was engaged on a "frolic of his own". Steyn never subjectively intended to act on behalf of the plaintiff. Moreover, objectively seen, no link was established, whether close or otherwise, between what Steyn did and his authorised functions. What he did was unauthorised and criminal. Indeed the act of a servant who steals his master's property whilst employed by his master is the very antithesis of an act carried out in the course and scope of the servant's employment. Steyn misused his position to steal from an innocent plaintiff and to defraud a negligent defendant. None of this, despite the fact that it might have been one of Steyn's

duties to deposit cheques collected for his employer into his employer's bank account, had any connection with the duties that he was in fact empowered or authorised to perform; at the relevant time he was not performing his duties at all. In stealing the cheques and subsequently depositing them for his own account Steyn had abandoned and completely disengaged himself from his employment with the plaintiff. The plaintiff cannot therefore be held vicariously liable for Steyn's criminal acts. (See for example *Ess Kay Electronics PTE Ltd and Another v First National Bank of Southern Africa Ltd* 1998(4) SA 1102 (W) at 1109 F-G; *Columbus Joint Venture v Absa Bank Ltd* 2000(2) SA 491 (W) at 512 F-I and *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd* [2000] 2 All SA 396 (W) at 431 - 435 paras 144 to 155.)

[10] In *Greater Johannesburg Transitional Metropolitan Council v Absa Bank Ltd t/a Volkskas Bank* 1997(2) SA 591 (W) 600 F - H, Goldstein J held the defendant bank liable for a fraud perpetrated by one of its employees. In that case

an employee was engaged in the precise work that her employer required her to carry out, namely to check cheques and deposit slips presented to her employer. Pursuant to an unlawful conspiracy with her husband, who was an employee of the plaintiff, she improperly inserted one of the cheques that he had stolen amongst others to be cleared, so as to obtain the benefit of the proceeds of the cheque for herself. The *Greater Johannesburg Transitional Metropolitan Council* case is relied upon by the defendant in support of its contention that in the present matter, Steyn was acting in the course and scope of his employment with the plaintiff, much in the same way as the employee's husband had acted. It seems to me that the vicarious liability of the plaintiff as the employer of the thief who occupied a similar position to that occupied by Steyn in the instant case, was never an issue specifically considered by the court and it played no part in the apportionment ordered by the court in terms of the provisions of the Apportionment of Damages Act 34 of 1956.

[11] At common law the defendant and Steyn are concurrent wrongdoers who caused the same loss to the plaintiff. The fact that Steyn committed the wrongful acts of theft and fraud with intent or *dolus,* whilst the defendant's delict lay in the negligence or *culpa* of its employees, is not relevant. The plaintiff is entitled to hold either the defendant or Steyn liable in full for its admitted loss. (See *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* 1998(2) SA 667 (W) upheld on appeal for somewhat different reasons in *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* SCA Case No 267/98 - judgment delivered on 7 September 2000). Once the plaintiff is not liable or responsible for Steyn's conduct, the plaintiff in no sense caused the loss that it suffered. This conclusion disposes of questions 2 and 3 referred to in paragraph **[4]** above.

[12] The appeal is therefore dismissed with costs.

R H ZULMAN JA

HARMS JA:

[1] Although I am in agreement with Zulman JA that the appeal should be dismissed, my reasons are different. I agree as a general proposition that the act of an employee who steals from his employer is the very antithesis of an act carried out in the course and scope of his employment, but I expressly wish to refrain from laying down a general principle that an employer can never be responsible for the intentional wrongful act of an employee which causes the employer loss. Whether the judgment in *Greater Johannesburg Transitional Metropolitan Council v Absa Bank Ltd t/a Volkskas Bank* 1997 (2) SA 591 (W) is correct in this regard we need not consider, especially since the judgment did not focus on the question and because all the salient facts do not necessarily appear from the report.

[2] It is not necessary to repeat the agreed facts since they have been set out in Zulman JA's judgment (in par 3) and that of Willis AJ in the court below (at 66A - 67B). Two of the questions of law are interrelated and they are (a) whether the plaintiff is in law vicariously liable for the actions of Steyn (its employee who stole the cheques) and (b) whether the Bank is liable to the plaintiff for any negligent actions performed by its employees in view of Steyn's conduct as described in the stated case.

[3] In order to answer these questions, it is necessary to understand the defence upon which the Bank wishes to rely. Its case is that Steyn, acting within the course and scope of his employment with the plaintiff, stole the cheques after they had come into his possession; since Steyn was so acting as employee, the plaintiff is vicariously "liable" for his intentional wrongful act; the Bank's employees were merely negligent in collecting the cheques on Steyn's behalf; a plaintiff who acts with *dolus* (albeit through an employee) cannot claim damages from a negligent defendant; therefore the Bank cannot be held liable for the plaintiff's loss.

[4] In the court below Willis AJ had some difficulty with the formulation of question (a) and redrafted it by asking whether the plaintiff is in law vicariously liable *to the defendant* for the actions of Steyn (at 67I). Both the formulation and the original question tend to obscure the issue. A plaintiff can never be "liable" to another for a delict committed against him. The theft was not a delict vis-à-vis the Bank and vicarious liability on the part of the plaintiff can therefore not arise. The question which should have been posed is whether the plaintiff is answerable or responsible for the theft by Steyn, in other words, whether his (intentional)

wrongdoing can be taken into account in reducing or expunging the liability of the concurrent wrongdoer (the Bank).

[5] In *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 (CA) 733, Diplock LJ pointed out that there is sometimes a confusion between two distinct lines of authority: that of the frolicsome coachman and that of the dishonest servant. As I understand the stated case and counsel's argument, we are concerned in this matter with the latter and not with a so-called deviation case (*Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) 827C). In seeking to impose vicarious responsibility to the plaintiff, the Bank does not rely upon the facts set out in par 8 of the stated case but concedes that Steyn, in depositing the cheques (and thereby committing a fraud against the Bank) and in appropriating the proceeds (a delict against the plaintiff) did not act within the course and scope of his employment.

[6] The classic formulation of the principle underlying vicarious responsibility is to be found in *Mkize v Martens* 1914 AD 382 at 390 where Innes CJ stated that:

"(A) master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment."

This principle has to be applied to the scant facts before us. They are: Steyn was duly authorised to accept delivery of the cheques on behalf of the plaintiff, when he stole the cheques he was an employee of the plaintiff and the opportunity to steal the cheques arose during the course and scope of his employment. These facts show merely that the theft was committed during Steyn's employment, solely for his own interest and purposes and outside the scope of his authority. As was said by Malan J in a somewhat similar case -

"What he did was unauthorised and criminal. . . . He misused his position and defrauded his employer and the bank. None of this had any connection with the duties he was empowered or authorised to perform. It is not a case of an improper execution of his duties: he was not performing his duties at all."

(*Columbus Joint Venture v Absa Bank Ltd* 2000 (2) SA 491 (W) 512H - I.)

[7] Willis AJ also came to the conclusion that the plaintiff is not responsible for the acts of Steyn. In this regard he relied upon the so-called "control" test and concluded (at 69A - B) -

"By reason of the fact that arising from the theft of the cheques by Steyn from the plaintiff, the plaintiff lost control over Steyn's dealing with the cheques, I am of the view that the plaintiff cannot be held vicariously liable for Steyn's conduct after the theft of the cheques."

In the light of the way the argument developed on appeal this approach does not assist. The Bank relied only upon the theft of the cheques and not upon Steyn's later conduct. But the Bank's argument leads it into a deeper quagmire. The theft *per se* brought about no loss to the plaintiff, only a potential loss. If Steyn's involvement had ended there and the cheques had been deposited and the proceeds

appropriated by a third party, no responsibility for any ensuing loss could have been attributed to the plaintiff. The position is no different where Steyn deposited and appropriated the proceeds of the cheques outside the course and scope of his authority. The actual cause of the plaintiff's loss is therefore not something for which the plaintiff can be held responsible.

[8] This conclusion disposes at the same time of the other outstanding question of law, namely whether the *plaintiff's* conduct (presumably the theft by Steyn) was the proximate cause of the plaintiff's loss. Willis AJ did not answer the question as phrased but dealt with question whether the *Bank's* conduct rendered it causally liable to the plaintiff (at 71D - F). It is not necessary to say more about this since his ultimate conclusion was in any event correct.

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L T C HARMS
JUDGE OF APPEAL

AGREE:

SMALBERGER JA
SCHUTZ JA
MPATI AJA