IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 581/98

In die matter between:

ESS KAY ELECTRONICS PTE LTD First Appellant

SUGNOMAL HOLDINGS PTE LTD Second Appellant

and

FIRST NATIONAL BANK OF SOUTHERN AFRICA LTD Respondent

CORAM: Van Heerden ACJ, Grosskopf, Howie, Streicher JJA and Mthiyane AJA

HEARD: 7 November 2000

DELIVERED: 28 November 2000

Vicarious liability for employee's fraud - course of employment - ostensible authority.

J U D G M E N T

HOWIE JA

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[1] Each of the two appellants instituted a damages claim in a joint action in the High Court at Johannesburg, seeking to hold the respondent vicariously liable for fraudulent misrepresentation to which one of its employee's was a party. Their claims failed and with the trial court's leave they appeal. For convenience I shall refer to the parties by their trial designations. (The trial court's judgment is reported in 1998 (4) SA 1102 (WLD)).

[2] The plaintiffs are Singapore companies trading in electronic equipment and the defendant is a South African commercial bank. The evidence on the plaintiffs' behalf was given by Mr K Primalani, a director of first plaintiff, Mr E Ishmael a South African business associate of Mr Primalani's, and Mr KP Wildig, the employee for whose wrongful conduct defendant was allegedly vicariously liable.

[3] Primalani testified that in April 1996 a South African business contact telephoned him, intimating that someone by the name of Mynhardt was interested in buying goods for import into South Africa. In time, a man professing to be

Mynhardt and to be acting on behalf of a Swaziland business called Southern Fashions telephoned Primalani and eventually placed orders with both plaintiffs. Terms were discussed and finalised. The purchase price payable to first plaintiff was US $130 000 and that payable to second plaintiff, US $120 000. Payment was to be effected by a banker's draft in favour of each plaintiff. The goods were to be shipped to Durban and would be released only when the plaintiffs' South African agent received the drafts in exchange for the bill of lading. These arrangements having been made, Primalani invoiced the plaintiffs, organised the shipment and took out insurance for the goods while in transit. After the ship left Singapore he received the bill of lading and sent it, with the invoices and insurance documentation, by courier to Ishmael in South Africa. As the bill of lading entitled anyone possessing it to release of the goods, Primalani instructed Ishmael to be certain not to hand over the documents without first faxing him a copy of the drafts so that he could satisfy himself that they were in order. If so satisfied, he would

authorise Ishmael to release the bill of lading and to send him the drafts by courier.

[4] In due course Primalani received from Ishmael two faxes purporting to be copies of bank drafts. They bore the date 3 May 1996 and were drawn on Barclays Bank PLC, 75 Wall Street, New York. He checked that the names of the payees and the amounts payable were correct and noted that the drawer was First National Bank of Southern Africa Limited. He testified that when he had done business with South African purchasers in the past, first plaintiff's bankers in Singapore had told him that the defendant was one of a number of South African banks with which it would be safe to deal. Relying on that earlier assurance and also on the contents of the faxes, he was satisfied that the drafts received by Ishmael were in order and that the plaintiff would be paid in terms of them. He therefore telephoned Ishmael and told him to exchange the bill of lading for the drafts. When the drafts later reached Singapore they were deposited at the plaintiffs' respective banks but subsequently dishonoured. Primalani telephoned

Mynhardt who said he had obtained the goods and sold them all. He could not explain the non-payment of the drafts and promised to investigate. In a later call Mynhardt professed that he could not himself pay as he had exhausted his resources in paying for the drafts. In the result the plaintiffs were unable to exact payment from Mynhardt and turned their attention to the defendant. They were met with the response that the drafts were forgeries and that the defendant denied all liability. Hence the present litigation.

[5] The thrust of the plaintiffs' case is that Wildig, acting in the course of his employment with the defendant, forged the drafts knowing that they would be presented to the plaintiffs as payment for the goods in question and that upon the drafts being dishonoured the plaintiffs would suffer damages by reason of non-payment. By causing the drafts to be presented to the plaintiffs Wildig falsely represented that the drafts were regular, had been issued by the defendant and would be honoured on presentation for payment. Acting on this misrepresentation,

the plaintiffs caused the goods to be delivered to their customer, who had failed to pay for them. Accordingly, the respective sums claimed as damages correspond to the unpaid purchase prices.

[6] It is not disputable on the evidence in this case that the plaintiffs were indeed defrauded, that Wildig was a party to the fraud and that they have suffered the damages claimed. Wildig, in fact, was the person responsible for the making of the forged drafts. The crucial issue is whether his actions render the defendant liable as alleged.

[7] Vicarious liability is imposed on innocent employers by a rule of delictual law. The rule in its most simple form is that the liability arises when an employee commits a delict within the course of such employee's employment. The foundational formulation of the rule is to be found in *Mkize v Martens* 1914 AD 382 at 390. The dictum in question goes on to warn that an act done solely for the employee's own interests and purposes, and outside the employee's authority, is

not done in the course of employment even if done during such employment. Uncertainty created by later judicial pronouncements as to the content and ambit of the rule was removed by the decision in *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A).

[8] The reason for the rule is often stated to be public policy. See for example, *Salmond and Heuston on the Law of Torts* 19th ed, 507. And an underlying reason for that policy has been held in *Feldman (Pty) Ltd v Mall* 1945 AD 733, in a passage at 741, to be the consideration that because an employer's work is done "by the hand" of an employee, the employer creates a risk of harm to others should the employee prove to be negligent , inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee's improper or negligent conduct "in carrying on his work". (Of course "the work" referred to in that passage is either that of the employer or the employee. It makes no difference. It the employee's wrong is done within the course of the

employment it will be also within the course of the employer's business.)

[9] The statement in *Feldman* of what one might term the "risk theory" was, in the majority judgment in *Minister of Police v Rabie* 1986 (1) SA 117 (A), taken not as a reason for the rule, but as another way of stating the rule itself. This mistaken view of the legal position was set right in *Ngobo.* In particular at 831 F - G (with reference to *dicta* in *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A)) it was pointed out that the reason for the rule - whatever the reason may be - is not the same as the rule.

[10] What seems to require continual emphasis, therefore, is that the rule and the reason for its existence must not be confused. The risk referred to, and considerations of public policy, have to do with the reason for the rule. They are not elements of the rule and they do not inform its content. It follows that unless the requirements of the rule are met, it cannot matter that it is the employee's appointment and work circumstances that place the employee in a position to

commit the wrong. It also cannot carry the day for a plaintiff that, without more, the employee's acts involved in perpetrating the wrong are acts of a kind which the employee is normally authorised to perform and which, superficially, appear to forge a close link between the wrong and the employee's duties. The question is always : were the acts in the case under consideration in fact authorised; were they in fact performed in the course of the employee's employment?

[11] Reverting to the present case, Wildig's conduct and the nature of his duties and authorisation emerge from his evidence. He entered the defendant's employ in 1981. By March 1996 he was the head of various departments at the Life Centre branch, Commissioner Street, Johannesburg. One of them was the foreign exchange department where his work included the issue to customers of bankers' drafts payable in foreign currency to their creditors abroad. Because blank drafts were susceptible to ill-gotten advantage in the wrong hands they were strictly stored under lock and key. A bulk supply was held in a basement strongroom and a small

stock kept in a locked container fixed to a desk in the foreign exchange department. There were two keys to the container. Wildig had one and the other was in the strongroom. When he needed to replenish the stock in the container, draft forms were drawn from the strongroom. He had to sign an acknowledgment that he had received them and their details were entered in a register in the department. Every issue of a draft, and all its details, were recorded in the register. Drafts in excess of US $1 500 required two authorised signatories, of which he was one. Drafts were issued only to customers who presented original proof of the need to pay their debts in foreign currency. Proof included production of invoices and bills of lading. Drafts had to be paid for in the rand equivalent of the foreign currency amounts required. If payment was to be by way of debiting a customer's account, the latter was required to authorise the debit by completing and signing what was referred to as a Form A.

[12] What happened in the present case was that between March 1996 and 3 May

1996 Wildig received several approaches from an acquaintance named Jerome Clack. What the latter said made it clear that he wished to obtain drafts or draft forms to use for fraudulent purposes. Wildig testified that he was initially reluctant to co-operate but eventually relented when Clack undertook to pay him R10 000 for his efforts. Accordingly, it was agreed that in return for that sum Wildig would prepare two drafts. They were to reflect the respective plaintiffs' names and the US dollar amounts payable to each, all of these details being supplied by Clack. On 3 May 1996 Wildig unlocked the container with his key and removed two blank draft forms. Because he had neither the need nor the wish to make any entry in the register, he effected the removal towards the end of business hours in order to minimise the chance of a co-employee discovering the removal and the lack of any record. There was, of course, also no resort to any Form A. He then took the form to his wife's place of employment in a nearby building in the city. She had typed bank documents for him before, so he said, when the typewriter in the

foreign exchange department was out of order. In her office the drafts were completed as required by Clack. Wildig then forged two signatures on each draft. He later handed them to Clack and received the promised payment. Some days afterwards he contrived the "discovery" that the two draft forms were missing and alerted his staff accordingly. This, he knew, would ensure a "payment stopped" response if ever the drafts were presented for payment.

[13] It remains to add that nothing on record shows how the drafts got to Mynhardt, whether that was his true name or whether there was ever a genuine buyer at all. For present purposes, however, none of that matters.

[14] In advancing the plaintiffs' case on appeal, their counsel urged that application of the vicarious liability rule to these facts required placing in one scale all those facts which were consistent with Wildig's having been occupied with carrying out his appointed and authorised duties and, in the other scale, all those which indicated his having been solely about his own affairs. This process, said

counsel, clearly showed that the former substantially outweighed the latter and thereby established, employing the language in *Rabie's* case at 134 D - E, "a sufficiently close link between (Wildig's) acts for his own interests and purposes and the business of (the defendant)" to render the defendant liable.

[15] It is plain, in my view, that scoring the various facts "for and against" in that fashion cannot supply the answer to the crucial question. The more a dishonest employee makes use, in committing a wrong during employment, of the trappings of appointment, the facilities of the job and the tools of the trade, the more a unauthorised conduct is going to appear authorised. The essential enquiry is: what shows whether Wildig was acting within or without what was authorised and required by his duties as employee?

[16] Clearly, Wildig was only authorised to take draft forms from the container and to complete and issue them to a customer who presented the necessary proof of indebtedness requiring payment in foreign currency. And a customer,

moreover, who either paid for the drafts or the debiting of whose account was authorised by way of a signed Form A. Clack met none of these requirements. It follows that everything Wildig did relative to the drafts which deceived the plaintiffs was outside the scope of his actual authority and the course of his employment. (Implied authority was not raised in this case but manifestly none existed.)

[17] Counsel for the plaintiffs nonetheless submitted that the reasonable international trader's sense of fairness would be offended by the fact that the wrongdoer in this case was the very person whom his employer had authorised to effect or oversee the issue of drafts. In the circumstances, said counsel, fairness tended to require that the defendant should be liable. There are two answers to this submission. The first is based on the facts. When the plaintiffs decided to accept the drafts and to release the goods they relied on nothing at all conveyed to them or held out generally by the defendant. What instilled in them the impression that

the drafts received by Ishmael from Mynhardt were genuine and formally in order, was founded purely on Primalani's examination of the faxes and his banker's comments on the defendant's good standing. The plaintiffs would have been as easily prejudiced had the wrongdoer been an employee with no authority even to deal with banker's drafts. Primalani could have delayed releasing the goods until the simple expedient had been employed of Ishmael's making the necessary enquiries of the defendant, or until the drawer's reaction had been obtained. Such precautions in the case of a new business contact would be entirely reasonable and would not unduly hamper the process of international trade.

[18] The second answer is this. Considerations of fairness and reasonableness no doubt do play a role in regard to vicarious liability but, for reasons stated above, that role is played in shaping public policy which, arguably is the reason underlying the rule. Fairness and reasonableness do not require, in my view, that an employer should, in effect, be an insurer for the employee's wrongs in a

situation such as the present.

[19] Wildig's having acted outside the scope of his actual authority and outside the course of his employment would, on the basis of existing South African law, be quite sufficient to warrant dismissal of the plaintiffs' claims.

[20] It remains, however, to give brief consideration to the matter of ostensible authority. This aspect was not raised by counsel in argument but it must be mentioned that in England the course of an employee's employment is determined in the case of vicarious liability for fraud, by such employee's authority: see *Lloyd v Grace Smith & Co* [1912] AC 716 and *Armagas Ltd v Mundogas SA* [1986] AC 717 (H.L. (E.)), both being decisions of the House of Lords.

[21] Notionally, because ostensible authority may exceed the scope of actual or implied authority, and thus the course of employment, this approach in the case of fraud is logical. In *Clerk & Lindsell on Torts,* 17th ed, the following is said at 188 (para 5 - 38):

> " Of its very nature fraud involves the deception of the victim and by that deception his persuasion to part with his property or do some other act to his own detriment and to the benefit of the person practising the fraud, and for this reason the decision whether an employee committed fraud in the course of his employment can only be made after the authority, actual and ostensible, with which the employee is clothed, has been ascertained."

For there to be ostensible authority the employer must, by words or conduct, induce the victim's belief that the employee was acting within the latter's authority : *Clerk and Lindsell,* in the work cited, 189 (par 5 - 40).

[22] For present purposes one may assume that South African law is no different in the present respect. However, as indicated already, the plaintiffs, represented by Primalani, relied on nothing but the faxes and the reputation of the defendant. There was no dealing between the plaintiffs and Wildig (not that he could have conferred authority on himself) and nothing about him or his authority was conveyed to them by the defendant. Consequently, Wildig had no ostensible authority.

[23] For all these reasons the conclusion and order of the trial court was correct.

The appeal is dismissed, with costs.

CT HOWIE

CONCURRED:

VAN HEERDEN ACJ
GROSSKOPF JA
STREICHER JA
MTHIYANE AJA