SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no 392/1999

FIRST NATIONAL BANK OF SOUTHERN AFRICA LIMITED **Appellant**

and

ROSENBLUM, HIRSCH **First Respondent**

ROSENBLUM, JEANETTE **Second Respondent**

CORAM: **MARAIS, NAVSA JJA *et* CHETTY AJA**

DATE HEARD: **21 MAY 2001**

DATE DELIVERED: **1 JUNE 2001**

Bank – safe deposit box and contents stolen – employee of bank complicit in theft – liability of bank – interpretation of exemption from liability clause in agreement.

JUDGMENT

MARAIS JA

MARAIS JA:

[1] Respondents in this appeal, which comes before this Court by virtue of leave granted by the court *a quo* (Snyders J), are a husband and wife who sued appellant bank for damages arising out of the theft of the contents of a safe deposit box provided by appellant for the use of first respondent. Appellant sought to avoid liability on the ground, *inter alia*, that a term (clause 2) of the contract for the provision of the box expressly excluded liability. A stated case was placed before the court *a quo* the object of which was to obtain a finding as to the effect, if any, of that term upon the claims made.

[2] The court *a quo* concluded and declared "that the defendant is not entitled in its defence to this action to rely upon clause 2 of the standard contract".

[3] The term in contention was the following:

> "2. The Bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, flow of storm water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause whatsoever, including war or riot

damage, and whether the loss or damage is due to the Bank's negligence or not."

Another term which it was contended is relevant is clause 3:

"3. The Bank does not effect insurance on items deposited and/or moved at the depositor's request and the depositor should arrange suitable insurance cover."

[4] The statement of facts in the stated case was in the following terms:

"2. During or about 1983 First Plaintiff, acting personally and Barclays National Bank Ltd, entered into a partly written and partly oral agreement. A true copy of the written portion thereof is attached to Defendant's plea as annex "D", being a standard contract then used by Barclays National Bank Ltd.

3. Defendant is the successor in law of Barclays National Bank Ltd and the said agreement is also a binding agreement between First Plaintiff and Defendant.

4. In terms of the agreement Defendant undertook for remuneration to retain for First Plaintiff a safe deposit box at it Auckland Park branch. In 1996 the remuneration was approximately R150,00 per annum. It was furthermore agreed that First Plaintiff would be permitted to place articles of value in the safe deposit box. Defendant was obliged to give First Plaintiff access to the safe deposit box and its contents upon his demand. First Plaintiff was entitled to place articles in his possession into the safe deposit box even if the articles be owned by other persons

5. No agreement was reached between Second Plaintiff and Defendant in relation to the articles being claimed by Second Plaintiff. First Plaintiff placed these articles in his safe deposit box without Defendant's knowledge or consent. At all times Defendant was unaware of the nature of the articles in the safe deposit box. The safe

deposit box itself (with its contents) was locked by the First Plaintiff who retained his keys thereto.

6. On or about 28 October 1996 Defendant orally informed First Plaintiff that it was unable to return to First Plaintiff the said safe deposit box together with any articles that might have been contained therein.

7. On or before 28 October 1996, one or more of Defendant's members of staff stole First Plaintiff's safe deposit box from the possession of the Defendant, or allowed one or more third parties to steal same, or acted in concert with such third parties.

8. The theft did not arise from and was not associated with violence or any threat thereof or robbery or burglary.

9. Defendant's inability to give First Plaintiff access to the safe deposit box and any articles that might be contained therein and any loss suffered in respect thereof are direct results of and were caused by the said theft.

10. For purposes of the stated case it is assumed (but Defendant does not admit) that:-

10.1 The safe deposit box contained articles owned and with values as alleged by First Plaintiff;

10.2 Defendant did not exercise every reasonable care as envisaged in Clause 2 of the said annex "D" and Defendant's negligence rendered it possible for the theft to take place.

10.3 One or more members of Defendant's staff acted with gross negligence or negligently, regarding the control of the keys safeguarding the place where the safe deposit box and its contents were kept and this rendered it possible for the theft to take place; and

10.4 The member(s) of Defendant's staff referred to in paragraph 7 and 10.3 was/were acting in the course and scope of such employment with Defendant."

[5] *Ex facie* the stated case respondents sought to hold appellant liable because of the theft of the box and its contents by employees of appellant and/or because of the gross (alternatively ordinary) negligence of employees in controlling the keys to the place in which the box and its contents were kept thus rendering it possible for the theft to take place. In both instances it was to be assumed that the employees were acting in the course and within the scope of their employment with the bank. It is not entirely clear whether the assumption in par 10.2 of the stated case that the bank did not exercise every reasonable care and that its negligence rendered it possible for the theft to take place is an additional and distinct head of liability or whether it is simply a conclusion flowing from the assumptions made in paras 10.3 and 10.4 in short, an assertion of vicarious liability. However, I shall assume it is intended to be the former. Does clause 2 exclude the three heads of liability upon which respondents rely?

[6] Before turning to a consideration of the term here in question, the traditional approach to problems of this kind needs to be borne in mind. It amounts to this: In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. This strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply

and so have a field of meaningful application. (See *SAR&H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419 D – E.)

[7] It is perhaps necessary to emphasize that the task is one of interpretation of the particular clause and that caveats regarding the approach to the task are only points of departure. In the end the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common law and, now, with due regard to any possible constitutional implication.

[8] It is immediately apparent that whether the claim be regarded as grounded in theft or in negligence both are causes of loss which are specifically enumerated in the clause. That much is common cause. But, say respondents, not all the possible manifestations of theft are covered by the clause and theft by the bank's employees acting within the course and scope of their employment is not covered. As for negligence, respondents say that gross negligence has not been excluded and nor

have negligent acts or omissions (whether gross or not) committed by the bank's employees.

[9] The respondents argue thus. Clause 2 is silent as to by whom a theft must be committed before the bank will be immune from a claim. It cannot have been intended to mean that the bank will not be liable even if it is the bank itself which steals in the sense that those who are the "controlling minds" of the bank have committed the theft. That is so because no one may contract out of liability for deliberately committed dishonest acts. (*Wells v SA Alumenite Co* 1927 AD 69 at 72.) That shows that there is at least that limitation to be placed upon the theft of which clause 2 speaks. But the limitation goes further: the same principle extends to employees of the bank acting within the course and scope of their authority. However, even if the principle affirmed in the case of *Wells* does not extend to employees, the absence of any reference to employees in the clause shows that their

dishonest acts while acting within the course and scope of their employment were not intended to be covered by the clause.

[10] Restricting the superficially wide ambit of the word "theft" in this way is, so the argument continued, borne out by the setting in which the word occurs. It is listed together with other potential causes of loss which it is said are examples of *vis major* or *casus fortuitus* such as "rain, flow of storm water, wind, hail, lightning, --- action of the elements, --- war or riot damage". Those other potential causes of loss are all "matters beyond the control" of the bank. Applying the *eiusdem generis* principle of interpretation, it is only categories of theft which are "beyond the control" of the bank that the clause comprehends. Theft by employees acting in the course and within the scope of their employment is something over which the bank does have control. So of course does it have control over theft by itself. Theft by such persons is therefore not within the protection against liability provided by clause 2.

[11] The additional phrase "or as a result of any cause whatsoever" does not serve to expand the protection afforded by the clause to encompass any other cause, whatever its nature. It should be interpreted restrictively because it is preceded by causes over which the bank has no control and succeeded by the words "including war or riot damage" which are also causes over which the bank has no control. It should therefore be read as "or as a result of any cause whatsoever over which the bank has no control". At the very least there is doubt as to whether theft of the kind under consideration is covered by the clause and the *contra proferentem* rule requires one to conclude that it is not.

[12] In my view the argument rests upon shaky foundations. The assemblage of causes of loss or damage consists of an unrelated collection of phenomena. Some are phenomena of nature the occurrence of which are beyond human control (rain, flow of storm water, wind, hail, lightning, action of the elements). Some are phenomena which emanate or could emanate from human conduct (theft, fire,

explosion, war, riot damage, negligence). While the occurrence of the natural phenomena is not preventable, the damaging consequences of their occurrence may be. Thus, shelter may be provided against rain, wind and hail; the flow of storm water may be capable of diversion; the installation of lightning conductors may avoid damage by lightning; fires caused by spontaneous combustion may be doused by sprinkler systems. If there was negligence in averting the damaging consequences of these occurrences and a duty in law to avert them existed, the bank would be liable at common law for the ensuing loss even although it had no control over the **occurrence** of those phenomena. Yet the clause is plainly intended to exclude liability for negligent failures in that respect, that is, even in circumstances where the bank did have control over the consequences of the occurrence of those natural phenomena. It is therefore wrong to say that the references in the clause to these natural phenomena show that the bank was only intended to enjoy immunity from liability in circumstances where it had no control over the causing of the loss

or damage. I might add that if the ambit of the clause was really intended to be restricted in that manner, it would have been unnecessary to incorporate it in the agreement for there would have been no liability at common law in such circumstances. The resort to the *eiusdem generis* principle seems to me to be fallacious. For the reasons I have given earlier in this paragraph there is no identifiable *genus* to which all the listed causes belong.

[13] For the same reasons the breadth of the phrase "or as a result of any cause whatsoever" cannot be narrowed so as to exclude liability only for causes beyond the control of the bank. If the causes preceding the phrase cannot justify doing so, the causes succeeding it (war or riot damage) are far too slender a basis for doing so.

[14] Respondents' reliance upon the decision in *Cardboard Packing Utilities v Edblo Transvaal Ltd* 1960 (3) SA 180 (W) appears to me to be misplaced. At issue was the defendant's liability for loss caused by the negligent failure of its servants

to prevent a fire either from starting or from spreading to adjoining property which defendant had leased to plaintiff for the storage of large stocks of paper used in the manufacture of cardboard products. A clause in the lease provided that the defendant was not to be responsible for any damage to plaintiff's stock-in-trade or other articles kept in the leased premises "as a result of rain, the flow of storm water, wind, hail, lightning, fire, action of the elements, or by reason of riots, strikes, the King's enemies, any Act of God or force major, or as a result of any other cause whatsoever". The court held that the listed causes were all "beyond the defendant's control" and, there being no reference at all to negligence in the clause, it had to be concluded that the clause did not apply to acts of negligence. It considered it to be "probable" that the word "fire" did not apply to a man-made fire (except in the context of riots, strikes or action by the King's enemies) because, in the setting in which the word appeared, it must have been intended to mean a fire which is a phenomenon of nature. The court noted the distinction between the

negligence of defendant's servants "in their capacity as agents for the lessor" and their negligence "when --- acting as agents of the defendant in the conduct of its ordinary business". It considered that the exclusionary provision in the lease would not avail the defendant in either situation and 'certainly not" in the latter situation which was the situation facing it.

[15] The decision is distinguishable. There was no reference at all to negligence in the provision. Nor could an exemption from liability for negligence be implied once all the specified causes of damage had been characterized by the court as "beyond the lessor's control". (Whether correctly so described is neither here nor there; the fact is that the court regarded them in that light.) In the case before us negligence is specifically included in clause 2 and the setting in which the word "theft" occurs does not justify the invocation of the *eiusdem generis* principle to narrow its wide scope in the manner suggested by respondents. As for the words "or as a result of any other cause whatsoever" in the case of *Cardboard Packing*

Utilities (supra)", the learned judge said nothing about them. However, it seems fair to assume that he regarded them as meaning other causes of a character similar to those previously listed, namely, causes over which the defendant had no control. No justification exists for limiting the similar phrase in clause 2 in that way for the reasons already given. (Cf *Scottish Housing v Wimpey Construction* [1986] 2 All ER 957 (HL).)

[16] A further contention raised in the heads of argument filed by counsel for respondents was that the introductory words of clause 2 ("while [the bank] will exercise every reasonable care") amounted to a "precondition" for the operation of the remainder of the clause of the kind recognized in *Minister of Education and Culture (House of Delegates) v Azel and Another* 1995 (1) SA 30 (AD). However, it was abandoned at the hearing. Rightly so, in my opinion. As was said in *Elgin Brown and Hamer v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (AD) at 429 C, such an interpretation "would create an antithesis between [them]

and [the rest of the clause] which would entirely deprive the exclusionary provisions of contractual force". In my view, those introductory words were intended to amount to no more than an honest statement of intent and they have no significant bearing on the true ambit of the remainder of clause 2.

[17] I turn to the question of whether the clause should be read as excluding liability for theft by the bank's employees when committed in the course and within the scope of their employment. There is no direct reference to the bank's employees in the clause but it seems obvious that they are included in it. If the exemption from liability accorded by the clause were to be construed as being confined to cases in which only the acts and omissions of those who are identified as the "controlling or directing minds" of the bank are involved, the potential field of operation of the exemption would be so slight that it is scarcely conceivable that it would have been worth the bank's while to insist upon the clause. It would have left it entirely unprotected against liability stemming from the potential negligence

or dishonesty of many thousands of employees over whose shoulders it could not be expected to be constantly peering to ensure that they were guilty of neither.

[18] The bank, as an artificial non-human entity, is obviously incapable of being negligent itself in fact. In law it is the negligence of human beings which is either attributed to the bank itself if those human beings were the controlling or directing minds of the bank or, if they were not and were mere employees acting in the course and within the scope of their employment with the bank, it is their negligence for which the bank is vicariously liable. (See *Barkett v SA Mutual Trust and Insurance Co Ltd* 1951 (2) SA 353 (AD) at 362.) When the bank says in clause 2 that it is not to be liable "whether the loss or damage is due to the Bank's negligence or not", it cannot be taken to have meant "whether or not the loss or damage is due to the negligence of those who are the controlling or directing minds of the Bank but not if the loss or damage is due to the negligence of the Bank's employees".

[19] Counsel for respondents submitted that the decision in *Levy v Central Mining and Investment Corporation Ltd* 1955 (1) SA 141 (AD) provided support for a contrary conclusion. I do not agree. The court in that case was concerned with the interpretation of a statute and it held that the words "an action founded upon the fraud of a debtor" in s 7(1)(e) of the Prescription Act 18 of 1943 did not apply to an action founded upon the vicarious liability of a company for fraud committed by its servants or agents, but only to an action founded upon the fraud of the company itself, in other words, of the person or persons who is or are identified as the directing or controlling mind or minds of the company. The conclusion rested upon the literal meaning of the language, an analysis of the provision in the context of other provisions of the Act and a postulated (albeit speculative) reason for the legislature not having extended the operation of the provision to cases of vicarious liability, namely, the absence of "moral culpability" of the person sought to be held liable vicariously for the fraud of another.

[20] In the present case a contract is involved which it is common cause is a standard contract prepared by the bank. Appellant is a large bank with many branches throughout the country and a great many employees. Its directing and controlling minds may be situated geographically many hundreds of kilometers away from the branch of the bank at which a safe deposit box is made available. While theoretically possible, it would surely only be in the rarest circumstances that the bank itself (meaning those who are its controlling minds) could be said to have stolen or been complicit in the theft of the contents of a safe deposit box. In any event, if such a case were to arise, the protection which the clause might purport to give would be unenforceable because of its violation of the principle laid down in the case of *Wells (supra).* It would be no less rare for the bank itself (in the above sense) to be found to be guilty of negligence in respect of the theft of the contents of such a box. The same applies to all the other causes listed in clause 2.

[21] Far more realistic, in my opinion, is the risk of an employee of the bank being guilty of such conduct. It strikes me as absurd to conclude that clause 2 was not intended, and was understood by the parties not to be intended, to exclude the acts or omissions of employees from its ambit. In contrast to *Levy's* case *(supra)*, such a conclusion would exempt the bank from liability for negligence where the bank itself is to blame for the loss but expose it to liability where it was not itself to blame but liable only vicariously for the blameworthy conduct of its employee or employees. In short, protection would exist where the bank itself is "morally culpable" but not where it is not – a strange result and one which I am satisfied clause 2 was not intended to bring about.

[22] As for the contention that the principle in the case of *Wells, (supra)* prohibits the bank from protecting itself effectively against vicarious liability for thefts or other wilful misconduct committed by its employees in the course and within the scope of their employment, I am unable to accept so widely formulated a

proposition. It may well be that public policy will not countenance a situation in which an employer will derive a benefit from such conduct but where, as here, the bank does not seek to benefit, nor has it benefited, from the theft committed by its employee or employees, the position is very different. No authority was cited which clearly supports the proposition that in the latter situation the employer cannot validly seek protection against liability by way of an appropriately worded provision in the contract. Nor am I aware of any. On the contrary, there is authority to the contrary to be found in the decision of the full bench in *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) at 97H-103G and 106G-107D. In such a situation the considerations of public policy which require adoption of the principle are absent. The liability is only vicarious and the bank itself (as represented by its controlling or directing minds) has not committed theft or otherwise been guilty of wilful misconduct. In any event, as has been pointed out in *Government of the RSA v Fibre Spinners and Weavers* 1978 (2) SA 794

(AD) at 803 B the principle is not relevant to the proper construction of an agreement; it is in essence a rule of law affecting its enforceability.

[23] It was argued by counsel for respondents, that the phrase "and whether the loss or damage is due to the Bank's negligence or not" is not "an extra cause for exemption" but simply a provision relieving the bank of the burden of having to prove, as it would have had to prove at common law if it was to escape liability, that there was no negligence on its part or that of its employees. It is true that the phrase is integrally linked with the causes which precede it but they include "any cause whatsoever" and the phrase is not cast in such a way as to merely shift an onus of proof from the bank to the claimant. It provides quite plainly that even if the loss or damage *is* due to the bank's negligence, it is to be immune from liability.

[24] Counsel for the bank placed some reliance upon clause 3 which I have set out in par [3] and drew attention to the decision in *Mensky v ABSA Bank Ltd* 1997

CLR 648 (W). That case is distinguishable in certain respects the most important of which is that the agreement in that case was treated as bringing about a "transference of risk" because of a provision that "the client himself shall be responsible to insure the contents of the locker". Where, as in the present case, it is clear that, whatever the correct interpretation of clause 2 may be, there will be at least some circumstances in which the bank will not be liable for the loss of the contents of a safe deposit box, thus rendering insurance desirable, a mere recommendation to the client to insure does not necessarily imply that that there will be no circumstances in which the bank will be liable for such loss. The existence of clause 3 is therefore of no assistance to the bank in determining the true ambit of clause 2. It is a neutral factor.

[25] So too are the other factors to which the bank refers, namely, its ignorance of the contents of such a box, its inability to itself insure against the loss of the contents, the modesty of the annual charge it makes for providing the box (given

that a client can require it to be produced as often as it is needed), and the inability of the bank to open the box itself without the co-operation of its client. These are all factors which might make it reasonable for the bank to immunize itself against liability for loss of the kind here in question but that begs the question of whether, objectively regarded, the clause it devised did in fact and in law have that result.

[26] Finally there is the submission for respondents that gross negligence is not covered by clause 3. In my view, it cannot be upheld. Nothing in clause 2 suggests that only *culpa levis* is to enjoy immunity but not *culpa lata*. Indeed, in the case of *Fibre Spinners and Weavers (supra)* a clause which made no mention of negligence at all was held to cover both negligence and gross negligence. (Here negligence is expressly mentioned in clause 2.) It was also held that there was no reason, founded on public policy, why a clause exempting a person from liability for gross negligence should not be enforceable. (At 807 D.)

[27] Certain of the questions posed in the stated case have fallen away as a consequence of agreements reached between the parties. The parties were agreed that, if it were found by this Court that clause 2 exempted the bank from liability for

(a) theft committed by its own employees in the course and within the scope of their employment;

(b) failing to exercise reasonable care and so negligently rendering it possible for the theft to take place;

(c) the negligence or gross negligence of its staff, acting in the course of and within the scope of their employment, regarding control of the keys to the place where the safe deposit box and its contents were kept, thus rendering it possible for the theft to take place,

the claims of both respondents should be dismissed.

[28] Having so found, the following order is made:

28.1 The appeal is upheld with costs, including the costs of two counsel;

28.2 Such costs are to be paid by the respondents jointly and severally, the one paying the other to be absolved;

28.3 The orders made by the court *a quo* are set aside and substituted by the following order:

"The claims of first and second plaintiffs are dismissed with costs. Such costs are to be paid by first and second plaintiffs jointly and severally, the one paying the other to be absolved."

R M MARAIS

JUDGE OF APPEAL

NAVSA JA)

CHETTY AJA) CONCUR