Sneller Verbatim/MS

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NO: 28719/01

2003-05-08 5

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED.

DATE 5/6/2003 SIGNATURE

In the matter between 10

TFN DIAMOND CUTTING WORKS (PTY) LTD Plaintiff

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES 1st Defendant

THE MINISTER OF FINANCE 2nd Defendant 15

JUDGMENT

SWART, J: This is an action for damages. The plaintiff's claim arises from the following circumstances. A parcel of diamonds was declared 20 to customs at Johannesburg International Airport on 8 November 2000 and detained by the customs officers. When the plaintiff's agent, Brinks SA (Pty) Limited, claimed the diamonds, it was established that they were missing, having been stolen. A number of the diamonds have been recovered, which w'll reduce the quantum of 25 the plaintiff's claim.

In terms of rule 33(4) a separation of issues has been ordered and the question of the defendants' liability, essentially, is to be determined at this stage. The question of liability involves those factual and legal issues traversed in paragraphs 4 to 12, 17 to 25 and 27 (save for the issues relating to the number of diamonds ,the carats 5 and value of the diamonds) of the particulars of claim and the corresponding allegations contained in the defendants' amended plea.

The undertaking to return the diamonds is admitted (defendants' plea paragraph 8.2 page 33). The defendants rely, however, upon the provisions of section 17(3) of the Customs and 10 Excise Act 91 of 1964, contending that such provisions exempt them from liability to the plaintiff. The delictual cause of action is based, in the first instance, upon the theft by an employee of the South African Revenue Service, one Matshivha, of the diamonds. Matshivha, it is alleged, acted within the course and scope of his 15 employment. Whilst the theft of the package detained by the customs officers (which the plaintiff contends contained the diamonds) is common cause, the defendants assert in their plea to the amended particulars of claim that the theft by Matshivha has not been proved in a court of law and, accordingly, deny the theft (defendants' 20 amended plea paragraph 10 page 34, paragraph 15 A page 35 A). It has been conceded by the defendants' counsel that, on the probabilities, the diamonds were stolen by Matshivha.

In the alternative, the plaintiff asserts that the defendants breached a duty of care owed to it, to safeguard the diamonds. 25 Relying upon the provisions of section 17(3) of the act the defendants

deny the duty of care. The breach of the duty, if it existed, is also in dispute. In considering the liability of the defendants the following issues have to be resolved, the plaintiff bearing the onus excluding as to purely legal argument.

1. Whether the deposited package contained diamonds (the number of diamonds, weight and value are not relevant at this stage). 5
2. The plaintiff's ownership of the diamonds.
3. The theft of the diamonds by Matshivha.
4. Whether Matshivha was acting in the course and scope of his employment with the first defendant. (That is whether defendants can be held vicariously liable). 10
5. The duty of care and its breach.
6. The plaintiff's entitlement to the return of the diamonds by first defendant had it not been for the theft 15
7. The applicability of section 17(3) of the Customs and Excise Act 91 of 1964 and its proper interpretation.

The evidence was briefly the following. The plaintiff adduced the *viva voce* evidence of Glowiczower, a director of the plaintiff, and Sadler, an employee of Brinks SA (Pty) Ltd. The defendants adduced 20 the evidence of Khomola, Lebang, Ngobeni, Khoza and Mangolele, who are customs officers at the time and were on duty during the relevant period, 8 November 2000 to 10 November 2000. They testified about the detention of the diamonds and their disappearance. Tripmaker, a manager employed by the South African Revenue 25 Service, testified about certain procedures and the State warehouse.

Mahape explained an affidavit filed by him in response to the plaintiff's notice in terms of rule 35(3) and, finally, Molaudzi, a controller, testified about the State warehouse.

Glowiczower, a diamond dealer of many years' experience, testified to the plaintiff's ownership of the diamonds in question. He stated that he, on behalf of the plaintiff, bought rough diamonds from a variety of sources in South Africa, such as De Beers, Diamdel, the Kimberley Diamond Exchange and other dealers. The diamonds were paid for in cash against delivery. The plaintiff's business was to cut and polish the diamonds for resale.

On approximately 20 October 2000 he travelled to New York for the purpose of selling certain diamonds. A parcel of diamonds accompanied him. The requisite documentation for the export of the diamonds (for possible re-importation) was completed (Bundle pages 19, 20, 21,22). The diamonds were inspected and sealed by the Diamond Board and the documentation duly stamped. The diamonds were declared upon arrival in New York. Whilst in New York the diamonds were under his control. They were not subjected to any process of manufacture or manipulation. Some of the diamonds were sold, the remainder were brought back by Glowiczower to South Africa.

Upon his return to South Africa on 8 November 2000 Glowiczower declared the diamonds to customs. He was met at the customs hall by Sadler. Glowiczower did not have an invoice for the diamonds with him and nor did Sadler as a result of some miss-communication between Brinks' offices and those of the plaintiff.

Some time was spent by Sadler obtaining a faxed invoice, but this was unacceptable to the customs officers. A promise was made to produce an original invoice the following day. This was attended to by a colleague of Sadler. The customs officers also required Glowiczower's flight ticket. Inadvertently he had given it, together 5 with some luggage, to the person who had come to the airport to collect him. He went out to retrieve the air ticket and produced it for customs. The diamonds were detained.

Two days later Glowiczower was informed that the diamonds had gone missing. The matter was reported to the South African 10 Police and subsequently about half of the diamonds were recovered. Glowiczower was criticised, as an experienced courier of diamonds, for not having had the requisite documents with him when he declared the diamonds to customs. The absence of the air ticket was explained. It was as a result of inadvertence when he had gone out 15 to inform the person who was collecting him, of the delay, and had handed some of his luggage to that person. The retrieval of the air ticket is not in dispute. The absence of the requisite invoice was also explained. Glowiczower stated that the invoice would have been brought by the Brinks representative in terms of an arrangement 20 concluded with his office. There had been some miss-communication between Brinks and his officers. An invoice was produced the following day. This is common cause as it was confirmed by the defendants' witnesses, Khoza and Ngobeni.

The factual discrepancies between Glowiczower's evidence and 25 the defendants' witnesses were few in number and of little

consequence. Glowiczower testified that he was asked to reveal the diamonds to Khomola. Khomola denied this. Little turns on this dispute. Khomola would not have known the diamonds from glass. In any event, Khomola's evidence was unpersuasive in relation to the description of the containers holding the diamonds and the sealing of the parcel. He referred to only one envelope while Glowiczower talked of four envelopes. He did not described the cardboard boxes. The envelopes would not have been visible to the customs official had the cardboard box or boxes not been opened.

It was in dispute who sealed the parcel. Glowiczower and Sadler testified that Sadler sealed the parcel. Their evidence in this regard was not challenged during cross-examination. Khomola and Lebang testified that Khomola sealed the parcel. The dispute is immaterial. It is common cause that the parcel was sealed and detained. It was in dispute who retrieved Glowiczower's air ticket. Again, little turns on this. The ticket was retrieved and produced.

In a lengthy cross-examination Glowiczower was questioned about a variety of aspects relating to the export and re-import of the diamonds. This line of questioning was largely exploratory in order to test the plaintiff's case on the disputed issues and no conflicting version was put to Glowiczower, except that there was no document, bearing a stamp of the Department of Customs on the export of the diamonds. It is not in dispute that the Diamond Board examined the goods for export, stamped the requisite documents and that the diamonds would again have been subjected to examination by the Diamond Board upon re-importation, had they not been stolen. The

procedure was common cause (vide evidence of Sadler and Tripmaker). The form DA 310 (Bundle page 122) produced by the plaintiff calls upon the Diamond Board to verify, upon re-importation, "if ZA for origin cut and polished diamonds."

The criticism, levelled against Glowiczower, of a lack of documentary records, is somewhat curious in the light of the failure on the part of the defendants to produce all relevant documentation. The form DA 500 was only produced at the last minute and under compulsion, the plaintiff having launched an application to compel compliance with its notice in terms of rule 35(3). The DA 310 was not disclosed.

Sadler's evidence corroborated that of Glowiczower relating to the events at the airport on 8 November 2000 when the goods were detained. Sadler testified that a colleague of his was sent to the airport on 9 November 2000 to deliver a copy of the invoice to the customs officers for the reason that an undertaking had been given the previous day to bring the original invoice. He testified that he attended at the airport to collect the parcel on 10 November 2000. He stated he had the requisite documentation with him, comprising the detention note, the DA 310, the DA 500 and the duly completed DA 74. He was unable to state what had become of the DA 74. Notwithstanding a search made by him, and request for a search to be made by Renfreight, the document had not been located. This is not surprising in view of the fact that other documentation has also gone missing.

Sadler testified, furthermore, that when he produced the

documentation at customs, the customs officials did not query the documentation and there was no criticism levelled against him in this regard. On the contrary, the customs officials went to retrieve the diamonds, but they discovered that they had gone missing. Sadler's evidence that he presented the requisite documentation to customs, 5 was not challenged. The procedure described by him was confirmed by the defendants' witness, Tripmaker, it is, hence, common cause that the diamonds would have been subjected to an examination by the Diamond Board had they not been stolen and had they been released to Sadler. 10

I turn to the aforesaid issues:

1. I have no hesitation in finding that the package contained diamonds. Glowiczower testified that it did. He described the cardboard boxes with the envelopes containing diamonds inside. He described opening one of the boxes because the 15 customs official wanted to see what was inside. Insofar as there are any conflicts, with the evidence concerning this point and the description of the parcel, I accept the evidence of Glowiczower. Khomola would not have know that they were envelopes unless a box was opened. A man declaring a parcel 20 as containing diamonds would have been reluctant to open it if it had not been so.

The evidence, the export of the diamonds (which was not effectively challenged and which was supported by the endorsement and stamp of the Diamond Board) renders the 25 version of the re-importation of unsold diamonds probable.

Sadler was under the impression that the parcel contained diamonds at all times acted accordingly and supported the version of Glowiczower concerning the events. Both witnesses made a good impression on me and their versions were coherent, plausible and in conformity with the probabilities. 5
The most important aspect is that if the parcel did not contain diamonds, the so-called re-importation subsequent notification to the police and indeed plaintiff's claim, would have amounted to a perjurious charade. No evidence of the kind was produced and it was not put to Glowiczower. Mr Kruger did not invite 10 me to make a finding that the parcel did not contain diamonds and it should be added in the final instance, that the ploy could only have worked if Glowiczower had known that the parcel would be stolen. There was no evidence to this effect.

2. Ownership of the diamonds was addressed by Glowiczower. 15 He testified that the plaintiff was the owner and substantiated a description of the plaintiff's ownership. This was not challenged. The obtuse suggestion that the parcel may not have contained the diamonds does not bear scrutiny. How can it then be explained that in consequence of police investigation 20 into the disappearance of the parcel, approximately half of the diamonds were recovered and ostensibly returned to plaintiff.

3. In making out its case on the issues of the theft of the diamonds the plaintiff relied, in the first place, upon the formal admissions contained in the plea and in the defendants' 25 response to the plaintiff's notice in terms of rule 37(4).

Secondly, the plaintiff relied upon the informal admissions contained in the documents in the bundle and, thirdly, the plaintiff relied upon the statement by Gumula implicating Matshivha in the theft.

The need for plaintiff to rely on statements made by employees 5 of first defendant to the police, about the detention and subsequent disappearance of the package, fell away because defendant produced evidence thereof.

It was admitted by the defendants that a package (shown by the plaintiff to have been diamonds) was declared to the 10 customs officer, Khomola, on 8 november 2000. Khomola was on duty as a supervisor from 13:00 to 21:00 on 8 November 2000. The package was detained by Khomola and placed in the small safe in the strongroom by Khomola and Lebang, another customs officer. Matshivha came on duty on 8 15 November 2000 at 21:00 and remained on duty until 05:00 on 9 November 2000. When he came on duty he took control of the keys to the strongroom and the safe during the period of his duty. Matshivha was relieved at 05:00 on 9 November 2000 by Khoza, Mangolele and Kekana. When they came on duty (or 20 some time thereafter) the package was not in the small safe. There is no record of the diamonds having been released from or removed from the small safe.

The evidence adduced at the disciplinary enquiry and the findings made by the chairperson of the enquiry constitute 25 admissions admissible against the defendants. It is clear that

the disciplinary enquiry was instituted by Matshivha's employer, the South African Revenue Service, and that the evidence adduced by the employees and the findings made by the chairperson were authorised by the South African Revenue Services. 5

In *Hoffman & Zeffert's* The South African Law of Evidence 4th edition at 185 the learned authors state:

"Thus in *Kirkstall Brewery Co Ltd v Furness Railway Co Ltd* the defendants were sued for the value of a parcel alleged to have been stolen in transit by one of their porters. The court 10 admitted evidence that the stationmaster who had called the police to investigate the matter also told them that he suspected the porter of theft. COCKBURN CJ said that as the stationmaster had authority to cause enquiry to be made it was within his duty and authority to make communications to the 15 police."

The defendants in paragraph 10 of their plea admitted that the packaged had been stolen. As far as Matshivha being the thief, defendants in paragraph 15 A pleaded, that criminal proceedings against Matshivha are still pending. His guilt has 20 not been proven in a court of law and the allegation that he was the thief was consequently denied. But that is by no means the only evidence implicating Matshivha. A charge of misconduct was brought against him by the South African Revenue Service. The first charge read as follows. (See page 25 78 of the bundle).

> "1. That you are charged with misconduct in terms of section 20(b) of the Public Service Act, as incorporated in the collective agreement in that during the period November 2000, whilst you were responsible for the safekeeping of the contents of the safe, a parcel of diamonds which form part of the contents of the said safe, were found missing whilst you were in lawful control of the said safe. An action which amounts to theft." 5

The second charge read as follows (See as well page 78 of the bundle). 10

> "2. That you are charged with misconduct in terms of section 20(b) of the Public Service Act, as incorporated in the collective agreement in that during the period November 2000, whilst you were supposed to check the 15 contents of the safe as a standard procedure during the changing of shifts, you failed or ignored to follow the said known procedure which resulted in a parcel of diamonds in the lawful custody of SARS disappearing from the safe. An action which amounts to gross 20 negligence."

He was found guilty of the first charge. His appeal was dismissed and he was dismissed from service. Of course, the first charge could have been more directly framed as theft, but in view of his conditions of employment presumably had to be 25 framed as misconduct. But then, because of "an action which

amounts to theft", he was moreover not found guilty of negligence only, the finding of aggravating circumstances at page 87 of the bundle reads:

"The present case of J Matshivha has been proved beyond any reasonably doubt that he committed an offence of theft and/or fraud of stealing the diamonds intentionally." 5

His evidence of a bare denial was rejected. Furthermore it was recorded at the enquiry:

"It is common cause that the diamonds were in the safe and that they had gone missing between the hours 09:00 pm to 05:00 am on which shift the employee (Matshivha) was on duty." 10

It is also common cause that when he came on duty as shift supervisor the keys, including that of the small safe, were handed to him personally in a sealed envelope. In addition there is Gumula's statement at page 71 of the bundle which reads: 15

"1. Where were you on 8/10/11/200?

I was at my home at given address above.

2. Do you know Mr E Hayward and in which connection? 20

I know him because he use to panelbeat my car if get collided.

3. Do you know something about the diamonds which; found in possession of him?

Yes, given him. 25

4. Where do you get that diamonds which was founded to

Mr E Hayward?

I was given by the other gentleman who works at Johannesburg International Airport by the name of Joseph Matshivha.

5. How long did you know that Joseph Matshivha? 5

I knew him since 1988 at Dimani High School because he was my class mate.

6. Have he explained you where did he get that stolen diamonds?

He told me that he took from his work at Johannesburg International Airport." 10

I think this statement is admissible under section 3 of the Law Evidence Amendment Act 45 of 1988. The purpose for which this evidence is tendered is to corroborate the other evidence to the effect that Matshivha stole the diamonds. Gumula is 15 deceased and, hence, cannot give the evidence himself. The probative value of the evidence is high. It is not exculpatory of Gumula's involvement, the statement was made recently after the events in question and accords with the other evidence. See *S v Ndhlovu & Others* 2002 (6) SA 305 (SCA) at 325I - 20 326A.

The evidence adduced on behalf of the defendants (in particular the evidence of Khoza an Mangolele) puts it beyond doubt that the diamonds were stolen during Matshivha's shifts and whilst he was in control of the strongroom and the keys to it and the 25 safe. The irresistible inference is that Matshivha stole the

diamonds.

Mr Kruger, without making any formal concession, submitted fairly that Matshivha probably stole the diamonds. I agree, "probably" is good enough. I should add that an employer who finds an employee guilty of theft and dismisses him without restitution can hardly be seen to contest those facts in subsequent civil litigation. 5

4. I come to the question of the course and scope (of Matshivha's) employment.

This is a vexed, long standing and intricate subject, which as a matter of interest justifies more detailed reference and debate than as part of a judgment, which already over extended, warrants. The *locus classicus* on the principles of vicarious liability is *Mkize v Martens* 1914 AD 382. At 390 INNES, JA stated that: 10 15

"…. 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." 20

In *Ess Kay Electronics PTE Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) at 1219 HOWIE, JA stated:

"[9] The statement in Feldman of what one might term 'risk theory' was, in the majority judgment in 25

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* (supra) in particular at 831F-G (with reference to dicta in 5 *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, 10 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 15 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 20 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 25 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?"

Moreover the mere fact that an employee is dishonest while enjoying the status of employee, does not entail vicarious liability. See e.g *Absa Bank v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA), the *Ess Kay Electronics* case (supra), and *Minister van Veiligheid & Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA). The plaintiff, however, relies on a particular application of the principle of vicarious liability in the case of theft or other misconduct on the part of an employee, which evolved in the English law where the property of a third party had been entrusted to the employer. (The quotations that now follow are from plaintiff's heads of argument.)

In *Morris v CW Martin & Sons [1965]* (2) All ER 725 (CA) it was held by Lord Denning at 730 h-:

"If you go through the cases on this difficult subject, you will find that in the ultimate analysis, they depend on the nature of the duty owed by the master towards the person whose goods have been lost or damaged. If the master is under a duty to use due care to keep goods safely and protect them from theft and depredation, he cannot get rid of his responsibility by delegating his duty to another. If he entrusts that duty to his servant, he is answerable for the way in which the servant conducts himself therein. No matter whether the servant be

negligent, fraudulent or dishonest, the master is liable. But not when he is under no such duty."

At 732 e-f the learned judge continued:

"From all these instances we may deduce the general proposition that when a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them ....."

In the later case of *Rustenburg Platinum Mines v SA Airways and Pan American World Airways* 1979 (1) Lloyds Rep 19 (CA) Lord Denning said the following at 24:

"To have wilful misconduct in the scope of the man's employment it has to be pinned onto some person who was entrusted with the task of taking care of the goods. As I ventured to say in *Morris v CW Martin & Sons Ltd* [1965] 2 Lloyd's Rep. 63; [1966] QB 716 at pp 728:

"When a principle has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty ...

To which I may add if that servant is guilty of wilful misconduct in the way he carries out his duty, insofar as he steals the goods himself or combines with others to steal them or allows them to steal the goods, then in those circumstances that servant or agent is guilty of wilful misconduct within the scope of his employment."

These principles were approved of by the Zimbabwe Supreme Court in the case of *Fawcett Security Operations (PVT) LTD v Omar Enterprises (PVT) LTD* 1992 (4) SA 425 (ZSC). At 430H GUBBAY, CJ quoted with approval from the *Rustenburg Platinum Miners'* case at 25: 10

"Accordingly, as I perceive the law, in order to render the employer vicariously liable for the theft of goods by the employee, the goods must in some way or other have been entrusted into the position or charge of the employee. The 15 culpable employee must be one to whom the custody of the goods was deputed by his employer, not just any employee whose employment simply afforded him the opportunity to steal them."

On the facts of the case the employer was held to be not liable. 20

In *Hirsch Appliance Specialists v Shield Security Natal (PTY) LTD* 1992 (3) SA 643 (D) the defendant had been employed to guard the property of exhibitors at a show. Property belonging to the plaintiff had been stolen from a storeroom at the show by the security guards employed by the defendant. BOOYSEN, 25 J considered the English and South African authorities in some

detail. At 651 H - J the learned judge concluded:

"It seems to me that, when considering the liability of an employer for the intentional wrongdoing of the servant for his own benefit, it is important to distinguish between those instances in which the principal is simply under a duty not to cause injury to another and those instances in which the principal is in addition under a duty to prevent third parties from causing injury to that person. Where an employer is, unlike an ordinary citizen, indeed under a legal duty to be his brother's keeper or the guardian or custodian of his brother's goods, and he entrusts that function to a servant who then not only omits to perform his duty, but causes the very injury which it is his and his master's duty to prevent, then, as a general rule, the master will be held liable."

See also 752 G - I.

Mr Cook submitted that there has never been a deviation from this principle and that the facts in cases which may be seen as a deviation in the case of dishonest and wilful conduct of an employee are clearly distinguishable, because they do not deal with circumstances where the property of a third party had been entrusted to the employer with a liability of securing or safekeeping.

It is submitted that neither of the recent judgements of the Supreme Court of Appeal (the matter of *Absa Bank v Bond Equipment Pretoria (Pty Ltd* and *Ess Kay Electronics (PTE) Ltd v First National Bank of SA Ltd,* (supra)) detracts from the

approach adopted by our courts, following the English principles, in relation to the theft by a person employed to look after property. Neither case disapproved of the *Fawcett Security* judgment in the Zimbabwe Supreme Court. The judgment of BOOYSEN, J in the *Hirsch Appliance Specialist* case was not criticised.

In the more recent case of *Minister van Veiligheid & Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA) the Minister was held not to be responsible for the conduct of certain police officers. The facts are clearly distinguishable. In that matter the member of the defendant and his family had been attacked and robbed. The robbers made off with the money and buried it at a plot in Tzaneen. Three detectives (employed by the SAPS) heard about the money and where it was hidden, travelled to Tzaneen and confronted the father of one of he robbers and thereupon attached the money. The money was never returned to the plaintiff.

It was held that the actions of the three policemen had not, objectively or subjectively considered, fallen within the course and scope of their employment. They had embarked upon an unauthorised jaunt for their own purposes. On the contrary, in *Minister van Veiligheid & Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA) the Minister was held responsible for the conduct of dishonest policemen. In that case members of the vehicle theft unit had cooperated with car thieves to make it possible to sell stolen cars. The policemen

had issued motor vehicle clearance certificates in respect of stolen cars.

The objective and subjective tests described in *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134 D-E were applied (paragraph 11 page 659 B-F). On the basis of the close connection between the employees' actions for their own benefit and the purposes and business of the employer, it was held that the employer should be liable (paragraph 12 page 659 H-J). 5

Mr Kruger on the other hand based his submissions on the general principles emphasising the question whether the wrongdoer (employee) was engaged in the affairs or business of his employer. He did refer to the English case of *Morris v C W Martin* (supra at 725) but relating to observations different from the findings relied upon by Mr Cook. To quote from Mr Kruger's heads of argument at page 12: 10 15

"There are many cases in the books where a servant takes the opportunity afforded by his service to steal or defraud another for his own benefit. It has always been held that the master is not on that account liable to the person who has been defrauded." 20

He submitted that this distinction was accepted as valid and applied in the *Fawcett Security Operations PVT* case 1991 (2) SA 441 (ZH), but this ignores the fact that the court expressly stated at 445 D that the case does not involve bailment and also ignores the appeal in the case I have referred to supra, in 25

which the court did not hold the employer liable on the facts but did not differ from the principle relied on by Mr Cook.

The case of *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd* 2001 (3) SA 132 (W) does not assist. It dealt with the theft of cheques of the employer and not with bailment or something akin to it. At 171 B the court refers to the case of *Morris v C W Martin & Sons Ltd* (supra) and the distinction drawn in this regard. Mr Kruger relied heavily on the *Ess Kay Electronics PTE Ltd* case (supra) both in the court of first instance and on appeal. I do not think these assist him. The facts totally differed. In the appeal HOWIE, JA said at 1218 in paragraph 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."

Insofar as drafts were stolen they were stolen from the

employer not from a third party to whom the employer had any duty of care in relation to the third party's property. None of the further authorities relied on by Mr Kruger rejected the principle relied on by Mr Cook. As a matter of fact it was not done in the *Ess Kay Electronics PTE Ltd* matter on appeal and in the court *a quo*, where the employer was not held liable on the facts, the vital distinction relied upon by Mr Cook was discussed but not rejected. (See 1110 F). 5

On the facts of this case defendants admitted the duty to return the diamonds on compliance with the act. The duty to safeguard plaintiff's diamonds in the meantime and to guard against theft and depredation are not in dispute and if they are, such duty clearly emerges from the measures designed by defendants to secure goods detained by customs. I conclude that all else being equal. The defendants are vicariously liable to plaintiff for the theft of the diamonds by Matshivha. I am happy to say that this conclusion accords in my view with logic and principle. 10 15

5. The defendants deny a duty of care and submit that the procedures in place, although not fool proof, gainsay any negligence. I do not think on the facts of this case, that the plaintiff has to prove any so-called duty of care and negligence, apart from the admitted duty to secure the property of plaintiff. After all, if the diamonds were stolen (for which *dolus* is requisite) the thief (Matshivha) would have been liable in *delict* without further ado and the defendants being vicariously liable, 20 25

would have been jointly and severally liable and could have been sued as such on the same basis.

Once defendants are vicariously liable the plaintiff do not have to prove as an additional element that defendant was negligent. But I may be wrong, and the question of duty of care was argued. The system in place at the time, governing the custody of the keys to the strongroom and safe, was clearly deficient. The effect of Khoza's evidence was that the system could readily be circumvented without being discovered. He suggested that Matshivha (without detection) simply forged a signature to the envelope which was sealed when Matshivha came on duty. Furthermore, there was no requirement for a running inventory and for an inspection of the safe by the retiring supervisor together with his replacement. Had there been such a requirement Matshivha may well have been dissuaded from stealing the diamonds. Their disappearance would have been readily recognised when he went off duty. At least the disappearance of the diamonds would conceivably have been immediately recognised or recognised earlier which could have led to a full recovery.

6. I turn to the return of the diamonds. But for the theft the plaintiff would have recovered its diamonds. The defendants have neither pleaded nor made out a case for forfeiture of the diamonds or any other basis upon which they would be entitled to deprive the plaintiff of its ownership in them. The evidence of Sadler, that he produced the required documentation to

secure the return of the goods to enable him to transport the diamonds to the Diamond Board, was not challenged. On Glowiczower's evidence the plaintiff would have been entitled to the release of the diamonds from the Diamond Board.

7. I turn to section 17(3) of the act. This reads: 5

"(3) The State or any officer shall in no case be liable in respect of any loss or diminution of or damage to any goods in a State warehouse or in respect of any loss or damage sustained by reason of wrong delivery of such goods." 10

In terms of section 1 of the act:

"'State warehouse' means any premises provided by the State for the deposit of goods for the security thereof and of the duties due thereon, or pending compliance with the provisions of any law in respect of such goods;" 15

The Afrikaans text refers to "'n perseel."

"'officer' means a person employed on any duty relating to customs and excise by order or with the concurrence of the Commissioner, whether such order has been given or such concurrence has been expressed before or after the performance of the said duty;" 20

The defendants rely on "any loss' being given its clear and unambiguous meaning as to include theft, the definition of State warehouse to include "any premises provided by the State for the deposit of goods ...." and the evidence of Tripmaker and Molaudzi. 25

The evidence given by both Mrs Tripmaker and Mr Molaudzi clearly shows that the strongroom and small safe at the airport are regarded as extensions of the bigger State warehouse which is situated some kilometres away. It is submitted that these two witnesses (both holding managerial positions) 5 explained why it is necessary to make use of the vault and small safe, i.e. in order to render an effective service to the public and also to secure goods which will, in any event, be cleared within a matter of days. It is submitted that there exists no reason in logic or in practice why the vault and small 10 safe should not be regarded as an extension of the bigger State warehouse. In any event, the definition of State warehouse refers to "any premises provided by the State" for the purposes as set out in the definition. On that basis alone the vault and smaller safe clearly fall within the definition. The fact that the 15 bigger warehouse is normally referred to as the "State warehouse" is understandable, but does not detract from the fact of the vault and the small safe falling within the definition of "any premises" and hence, a State warehouse.

Counsel are *ad idem* that section 17(3) should be restrictively 20 construed. What that entails appears *inter alia* from the following. In *Du Sautoy v Mineral Baths Board of Trustees* 1940 TPD 56. The headnote contains the following.

"A regulation under the enabling provision of section 19 of Ordinance 10 of 1933 provides: 25

'Persons using the baths or other property of the Warmbaths

Board of Trustees do so entirely at their own risk, and it is an express condition of their admission that the Board in no way shall be held responsible for any accidents or injury of whatsoever nature caused either directly or indirectly to any such person using the aforesaid baths or other property. 5

Plaintiff claims damages sustained by her in using the bath, alleging that they have been caused by the negligence of the defendant, and excepted to a plea that the effect of regulation quoted was to bar her claim, contending that the regulation was *ex facie* unreasonable and therefore void. It was held 10 dismissing the exception, that if the regulation meant that the defendant was exempted from all liability for injuries, caused not only by negligence, but also by malicious or wilful misconduct, it was on the face of it unreasonable, and could be so declared on exception; but that although the words of the 15 regulation were capable of such a wide interpretation, it should not be so interpreted in the absence of express words negativing liability for wilful or malicious misconduct, or in the absence of proved circumstances showing that the regulation was intended to have such effect; but that it should be 20 interpreted as protecting the defendant from liability for negligence."

In *Administrateur Transvaal v Carltonville Estates Ltd* 1959 (3) SA 150 (AD) STEYN, CJ at 152H and 153A referred to what INNES, J said at 185 in *Benning v Union Government (Minister of Finances)* 25 1914 AD 180:

"Conditions which clog the ordinary rights of an aggrieved person to seek the assistance of a court of law should be strictly construed and not be extended beyond the cases to which they expressly apply."

STEYN, CJ said at 153B - C: 5

"Waar die wetgewer, soos hier, 'n beperking met verbeurende uitwerking lê op 'n reg wat een van die grondslae van ons regsbedeling uitmaak, kan redelikerwys aangeneem word dat hy dit met weloorwoë woorde sal doen wat geen twyfel omtrent die grense van die bepaling sal laat nie. Na my mening sou 'n 10 duidelike noodsaaklike implikasie ook in so 'n geval met 'n uitdruklike bepaling gelykgestel kan word, maar dan moet dit inderdaad so 'n implikasie wees, en nie een wat op aanvegbare gevolgtrekkings berus nie."

Considered thus I reject the contentions of the defendants for 15 principally the following reasons.

(a) To equate "any loss or diminution or damage to any goods" with theft or other intentional wrongdoing would lead to a ridiculous and unreasonable conclusion the legislature could never have intended. This is illustrated by the fact that section 20 17(3) seeks to indemnify both the state and "any officer." It would mean that any officer, despite his personal merits or demerits and without regard to the circumstances of the case and irrespective of when he was ordered on duty (conceivably even after conviction for theft) and despite the fact that he was 25 appointed to secure the relevant goods, could with impurity

steal, wilfully damage or secrete any property the state was for instance securing. If that had been the far reaching intention of the legislature express words, leaving no room for argument, would have been required. Indemnity against negligent loss was intended. This also appears from the latter part of the section "or in respect of any loss or damage sustained by a reason of wrong delivery of such goods" which are hardly compatible with theft or intentional wrongdoing.

(b) It is convenient for defendants that Tripmaker and Molaudzi regard the strongroom and small safe as extensions of the State warehouse, but the question is, whether the legislature so regarded it. (I do not even think it is the official view of the department. See the detention slip at page 29 of the bundle which deals with the detention of goods by customs and includes reference to "TRANSFER OF GOODS FROM CUSTOMS HALL TO STATE WAREHOUSE OR OTHER INSTITUTION" and "REMOVE TO STATE WAREHOUSE" and "THE OFFICER IN CHARGE : STATE WAREHOUSE." This clearly entails that the State warehouse is something different from customs. There is in fact a State warehouse some 2½ kilometres from customs. (See as well page 120 of the bundle)).

I do not think the legislature agrees with Tripmaker and Molaudzi referring as it does in section 17(3) to "any premises" and not "any place" which is something completely different and could be for instance a drawer in an office which does not accord with "premises." (This is borne out at page 120 of

bundle by the "Report on visit to the State warehouses Johannesburg, Johannesburg International Airport and Pretoria on 26 September 2000".) This included reference to the state of buildings and the capacity thereof. It did not include a visit to the strongroom or the small safe. In addition, the latter hardly accords with that which I was informed in argument State warehouses are used for, that is not only for uncleared goods, but also for abandoned, detained and seized goods. "Premises" are for instance defined in the shorter Oxford English Dictionary 5th Edition Volume 2 at page 2326 as follows: 10

> "4. Law. The houses, lands, or tenements previously specified in a deed or conveyance. Lme.
>
> 5. A house or building with its grounds etc. Also, (a part of) a building, housing a business etc." 15

I emphasise that the part of a building is not the primary meaning.

This I think clearly appears from HAT Verklarende Hand Woordeboek van die Afrikaanse Taal at page 794 where "perseel" is defined as follows: 20

> "Perseel' (persele) Stuk grond; eiendom; standplaas, veral 'n bou-erf."

I have not had an occasion to clear the formulation of the order with counsel. If there are any oversights or corrections in formulation required I may be approached in chambers. I have no doubt, 25 however, that the plaintiff must succeed. I make the following order.

1. All the issues in this part of the hearing are decided in favour of the plaintiff.

2. It is declared that the defendants jointly and severally are liable to the plaintiff for the loss of its diamonds in such damages as may be agreed or proved. 5

3. The defendants jointly and severally pay the costs of action incurred in obtaining orders in terms of paragraph 1 and 2.

4. The balance of the action is postponed *sine die.*

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