REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number: 070 / 04

In the matter between

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — **FIRST APPELLANT**

THE MINISTER OF FINANCE — **SECOND APPELLANT**

and

TFN DIAMOND CUTTING WORKS (PTY) LTD — **RESPONDENT**

Coram : **ZULMAN, STREICHER, LEWIS, HEHER and PONNAN JJA**

Date of hearing : **22 MARCH 2005**

Date of delivery : **31 MARCH 2005**

SUMMARY

Employer – vicarious liability of – for theft by employee of goods entrusted to him – s17(3) of the Customs and Excise Act 91 of 1964 - does not exempt an employer from liability for loss occasioned in consequence of a theft perpetrated by its employee.

J U D G M E N T

PONNAN JA

[1] In an action on certain separated issues before Swart J in the High Court (Pretoria), the appellants were held jointly and severally liable to the respondent 'for the loss of its diamonds in such damages as may be agreed or proved'; and were ordered to pay the costs of that portion of the proceedings. The first appellant, the Commissioner of the South African Revenue Service (the first defendant in the court below), was cited in his capacity as the official of state charged with the administration of the Customs and Excise Act No 91 of 1964 (the Act). The second appellant, the Minister of Finance (the second defendant in the court below), was cited as the Minister of State under whose control the Commissioner administers the Act. They appeal with leave of the trial court. For convenience I will refer to the appellants and the respondent as ‘the defendant’ and the ‘the plaintiff’ respectively.

[2] TFN Diamond Cutting Works (Pty) Ltd (the plaintiff in the court below), as the name suggests, purchases rough diamonds from a variety of sources in South Africa, which it then cuts and polishes for resale. On 20 October 2000, Mr W S Glowiczower, a diamond dealer of

long standing and a director of the plaintiff, travelled to New York with a consignment of diamonds. The diamonds had been duly inspected and sealed by the South African Diamond Board in accordance with the prescribed practice of the South African customs authorities.

[3] The requisite documentation for the export (and in due course possible re-importation) of the diamonds had been lodged with the designated employees of the defendant. Some of the diamonds were sold in New York. The remainder accompanied Glowiczower on his return to South Africa. Upon his arrival at the Johannesburg International Airport on 8 November 2000, Glowiczower declared the diamonds to employees of the defendant. He was met at the red zone in the customs hall by Sean Sadler an employee of Brinks SA (Pty) Ltd, a clearing agency. As a result of some miscommunication the original invoice for the diamonds could not be produced. A faxed copy did not satisfy the customs officials on duty and the diamonds were detained. The consignment was placed into a plastic pouch supplied by Sadler and sealed. Sadler then accompanied Daniel Khomolo and Cuthbert Lebang, both employees of the defendant, to a strongroom at the customs hall where the sealed pouch was placed in a locked safe. Sadler was issued with a detention slip and an appropriate entry recording the detention of the package was made in a bond book.

[4] Sadler went to the airport with the duly completed documentation on 10 November 2000 to secure release of the diamonds. Those documents he presented to Tycoon Khosa, an employee of the defendant, who was then on duty. Having accepted the documentation without any query, Khosa returned from the safe and informed Sadler that the diamonds were missing. Glowiczower and the SAPS were duly notified of the loss.

[5] The plaintiff alleged that the diamonds had been stolen by one Joseph Matshiva, an employee of the defendant. The plaintiff's cause of action in the first instance, one not persisted with before the trial court, was that the defendant was in breach of its obligations to the plaintiff under a contract of deposit. In the alternative, the plaintiff asserted a delictual cause of action, based on the alleged breach of a duty of care owed to it by the defendant.

[6] The defendant admitted that a package allegedly containing diamonds had been detained by its employees, who had undertaken to return the package upon due entry of its contents. The trial court had little hesitation in concluding that the package detained by the employees of the defendant contained diamonds as testified to by Glowiczower. On the evidence adduced on behalf of the defendant the

trial court was satisfied that the diamonds had been stolen during Matshiva's shift whilst he was in control of the strongroom and safe. The irresistible inference, said the trial judge, was that Matshiva stole the diamonds. None of those findings were attacked on appeal.

[7] Before this court the defendant contended: first, that in stealing the diamonds Matshiva did not act within the course and scope of his employment with it and accordingly it was not vicariously liable; and, secondly, that it was exempt from liability to the plaintiff by virtue of s17(3) of the Act. Each of those contentions will be considered in turn.

[8] *As to the first:*

In *Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA), Howie JA stated (paras 7 and 8):

'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).

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 at 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"…'

The question is always as Howie JA put it (para 10), 'were the acts in the case under consideration in fact authorised; were they in fact performed in the course of the employee's employment?'

[9] Against that backdrop I revert to the present facts. Glowiczower was obliged to hand over the diamonds to employees of the defendant. Those diamonds were secured in a safe which was located in a strongroom in the customs hall of the airport building. The keys to the safe were entrusted to Matshiva. The safe, as also its content, was in his custody. Counsel for the defendant conceded that had Matshiva been negligent in safeguarding the contents of the safe there would have been no doubt that his employer would have been vicariously liable for any loss occasioned in consequence thereof. Negligence is but a form of fault. So, too, is intention. If liability were to attach to the defendant in consequence of Matshiva's negligent failure to safeguard

the diamonds, why, it must be asked, would it escape liability if he acted intentionally? Put simply, Matshiva's duty as an employee of the defendant was to keep the diamonds safe. In that he failed. It follows that the defendant cannot escape liability for the theftuous conduct of its employee.

[10] *As to the second:*

S 17(3) of the Act provides:

'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.'

'State warehouse' is defined in the Act as:

'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.'

[11] On appeal, as also before the court below, counsel for the plaintiff submitted that the strongroom in the customs hall at the Johannesburg International Airport was not a state warehouse as contemplated in the Act. For the purposes of this judgment, I shall assume in the defendant's favour, without deciding, that the strongroom in which the safe was located from which the diamonds were stolen, was indeed a state warehouse as envisaged in the Act.

[12] It is by now well established that a statutory provision such as this should be strictly construed. (See *Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185; *Administrateur, Transvaal v Carletonville Estates* Ltd 1959 (3) SA 150 (A) at 152H-153A.) The main thrust of the defendant's argument is that the words 'any loss' in s17(3) encompasses theft as well. I cannot agree. First, had the legislature intended to include theft within the scope of the exemption, it ought to have said so in express terms. Secondly, the construction sought to be placed on the section by the defendant is untenable. The section seeks to indemnify both the state and 'any officer'. Any officer in that context would include the person who perpetrated the theft. That an officer who has been entrusted with the responsibility of safeguarding goods could with impunity steal and thereafter invoke the protection afforded by s 17(3) is plainly preposterous. Such an absurd result could not have been the intention of the legislature. (See *Venter v Rex* 1907 TS 910.) Accordingly, the second defence raised by the defendant is also devoid of substance.

[13] It follows that the appeal must fail. In the result the appeal is dismissed with costs.

V M PONNAN
JUDGE OF APPEAL

CONCURRING:

ZULMAN JA
STREICHER JA
LEWIS JA
HEHER JA