THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO. 344/2001

In the matter between

ABSA BANK LIMITED **Appellant**

and

JUDY ANN FOUCHE **Respondent**

CORAM: NIENABER, SCHUTZ, STREICHER, MPATI et CONRADIE JJA

HEARD: 19 AUGUST 2002

DELIVERED: 19 SEPTEMBER 2002

Delict – wrongfulness – banker – exemption from liability for contents of safety deposit box – non-disclosure of aspects of security – no duty to have disclosed absence of certain security arrangements – banker not liable in delict.

JUDGMENT

CONRADIE JA

[1] A written contract for the hire of safe deposit box number four at the appellant's Voortrekker Street Branch, Pretoria ('the branch') concluded between the appellant and the respondent on 31 August 1986 recorded the following terms :

"While the Bank will exercise every reasonable care for the security of the Locker Area, it is a special term and condition of the acceptance thereof that no responsibility for loss or damage of the contents of the Locker whether partial or total, from whatever cause, whether by theft, fire, water, explosion, war, riot or otherwise, is accepted and that the client himself shall be responsible to insure the contents of the locker."

[2] For a little over eight years all went well. Then, during the night of 2 to 3 February 1995 certain obviously knowledgeable burglars broke into the branch by making their way through burglar bars protecting a row of small windows at the side of the premises. Using an angle grinder, they cut open a safe standing in an open area of the branch as well as the safe deposit boxes which it contained. Among the boxes was the one hired by the respondent. She lost valuable jewellery when the burglars made off with its contents and sued the appellant to recover its value. The Court *a quo* (De Vos J) found the appellant liable to the respondent in contract, but remarked that there had in any event been a non-disclosure of relevant facts

to the respondent which amounted to a fraudulent misrepresentation. The appellant, with the leave of this Court, appeals against the finding.

[3] By the time the matter came before us the respondent accepted that she did not have a cause of action in contract. The parties were agreed that the terms of the contract exempted the appellant from loss arising from negligence, whether gross or of the ordinary kind (*cf First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA). The respondent's counsel at first characterised as 'the decisive issue' on appeal the (alternative) finding of the court *a quo* that the appellant had been guilty of a fraudulent non-disclosure inducing the respondent to enter into the contract of deposit. During argument, he acceded to the suggestion that the respondent would or might also have a right of action on negligent non-disclosure (an issue covered by the pleadings) so that this also needs to be considered.

[4] It is by now settled law that the test for establishing wrongfulness in a pre-contractual setting is the same as that applied in the case of a non-contractual non-disclosure. (*Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 568 F - I and 570 D - G). In each case one uses the legal convictions of the community as the touchstone. (*Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) at 494 E-F

applying *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 317C –318J).

[5] The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context - a non-disclosure - have been synthesized into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (*Speight v Glass & Another* 1961(1) SA 778 (D) at 781H – 783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful (*BoE Bank v Ries* 2002 (2) SA 39 (SCA) at 46 G – H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances.' (*Pretorius and Another v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 (3) SA 410 (W) at 418E-F)

[6] Having established a duty on the defendant to speak, a plaintiff must prove the further elements for an actionable misrepresentation, that is, that the representation was material and induced the defendant to enter into the

contract. In the case of a fraudulent misrepresentation, that must have been the result intended by the defendant *(E P Lebowa Development Corporation Ltd* 1989 (3) SA 71(T) at 103F – J).

[7] It is the respondent's case that the appellant's officials should have revealed to her two shortcomings in the security system at the branch which were not apparent to a customer. The first is that there was no peripheral or motion detecting device connected to an alarm; the second is that no guard was employed to watch over the branch at night. These are the features of security at the branch that the respondent says the appellant's officials deliberately, or perhaps negligently, withheld from her and which, had she known of them, would have prompted her not to hire the safety deposit box.

[8] I am prepared to assume, though not without some hesitation, that the information about the alarm and the guards can be classed as falling within the exclusive knowledge of the branch officials. My hesitation stems from the fact that information which is, if desired, as readily ascertainable as this was, should not be categorised as exclusive knowledge. ‘Exclusive knowledge’ in this sense is knowledge which is inaccessible to the point where its inaccessibility produces an involuntary reliance on the party possessing the information.(Christie *The Law of Contract* 4 ed at 322)

[9] Assuming, however, that the information could be characterised as 'exclusive' the question remains whether an honest person in the position of the branch officials would have thought to communicate it to a future depositor. The answer to that question depends upon how an honest person would have assessed the circumstances, and evaluated the duties which they cast upon him, in accordance with the legal convictions of the community (*McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 726A-G). I use the expression 'honest person' to denote someone embodying these convictions. Where I speak of a 'customer' I include a future customer.

[10] An honest person in the position of the branch officials would only have thought of revealing details of the manner in which the appellant intended performing its obligations under the contract - the quality of the service which it intended rendering to its customer - if he considered that it might influence the customer's decision to leave her valuables with the branch. This in turn would depend on whether he thought that the appellant's arrangements for the security of safety deposit boxes in its custody were adequate. If this caused him no concern, he would not take the trouble to debate with the respondent the absence of an alarm and of guards at night.

[11] An honest person's concern about the safety of deposit boxes (and his assessment of the measures required to keep them reasonably safe) would have depended in the first place on the level of anxiety about break-ins at banks in 1986. There is only the evidence of the manager of the branch at the time, a Mr Brenkman, who said that burglaries into bank premises were not a major cause for concern; they occurred less frequently than robberies. That is understandable. Forcibly taking money away from people is, I suppose, less troublesome than breaking into a safe, an enterprise for which one would require specialised knowledge and equipment more cumbersome than a 9mm pistol.

[12] An honest person's concern for the safety of a customer's property at the branch would also have taken account of the likelihood of burglars successfully attacking the safe in which her deposit box was to be kept. If the safe were impossible to open without a key, and could not be moved, it would obviously not matter whether there was an alarm or a guard at the premises or not. An inviolable safe could have stood on the pavement and its contents would have been perfectly safe. The respondent did not present evidence on the sturdiness of the type of safe used. From the appellant's side we only know that it was very heavy. In addition, the respondent (who had a safe at her business premises) at no stage during the eight years that

her jewellery was stored there, expressed any misgivings about the quality of the safe. An honest person would also have known that although the branch premises were not all that difficult to break into, the opening of the safe presented a major obstacle to a thief. It could not be opened without using an explosive charge or a cutting device such as an angle grinder. Either of these methods for securing access to the safe would be very noisy; an angle grinder, moreover, would emit a shower of sparks which might set alight inflammable material nearby and easily attract attention during a cutting operation that in the nature of things had to take time.

[13] Now, although the shopping center housing the branch was small and probably not much frequented at night, there was close by on its southern side, as part of the same development, a block of offices, shops and flats. This building overlooked the courtyard enclosed on three sides by the body and the two wings of the branch premises. The safe was located in one of the wings. An honest person would have asked himself what the prospect was that anyone would risk either of these two ways of opening the safe which, besides, was visible from the outside of the premises. I think that he would have said to himself that the chance of burglars blowing up or cutting open the safe on the premises was too small to worry about. Brenkman said in his evidence that in his forty years of service with the

appellant and its predecessor, he had not encountered any similar break into a safe and would never have thought that it was a possibility.

[14] Having regard to the mass of the safe an honest person would not have been concerned about its being taken away and opened elsewhere. This, he would have thought, could not be done without a substantial labour complement and heavy equipment which would have to be brought through a narrow passage into the courtyard, all of which would tend to increase the risk of detection. And it goes without saying that anyone seen carrying off a safe in the middle of the night would excite suspicion.

[15] I accept that an honest person in the position of a branch official would have realised that security at the branch was not as tight as perhaps it might have been. That appears from the evidence of Brenkman and from expert testimony tendered on behalf of the respondent. Certain other branches of the appellant had a walk-in strong room for keeping safety deposit boxes, some had an area for the safe containing these boxes that could be specifically locked, and some had alarms to protect the premises, including the area in which the safe stood; but that is a far cry from saying that an honest person must have considered the absence of supplementary security measures so alarming that in all fairness the respondent should have been warned about it. I think that an honest person would have said

to himself, 'the customer knows that she is not putting her safety deposit box into Fort Knox; she can see for herself that this is only a little branch without sophisticated services; if she wants anything more, she will ask for it'.

[16] Of course, no honest person would have pretended to himself that there was no risk at all that the respondent's property might be lost. The respondent rather suggested that her perception was that her jewels could under no circumstances be stolen from the branch's custody, that they would be absolutely safe. This exaggerated notion of the appellant's obligations under the contract of deposit was not one for which the appellant was responsible. The safekeeping of something by a banker does not mean that it becomes an insurer of the safety of the property. Had there been no exemption clause, the appellant's common law obligations as a depositee would not even have extended that far. Its only obligation is not to negligently lose or damage the thing in its care. (Joubert (ed) *The Law of South Africa,*(LAWSA) 1st re-issue, vol 8 para 128 p 186).

[17] I doubt, however, whether the respondent had the high expectations from the branch that she now says she then had. The contract told her that the appellant was not prepared to offer her an absolute level of security for her jewellery. She must have foreseen - the contract invited her to foresee -

the possibility of loss, not only from disasters like fire, water, explosion or war but from theft. She explicitly dealt with it in the contract. The way in which she dealt with it was to accept liability for these calamities. She agreed to bear responsibility for insuring the contents of her safety deposit box but decided not to insure them because it cost too much. She knew therefore that the contract obliged her to bear some of the risk. The contract did not tell her how great this risk was and she made no enquiries to establish its extent. She thought that her jewellery would be less vulnerable at the branch than in the safe at her business, but she did not alert the branch officials to the level of security she thought she was getting. She seems to have been prepared to compromise between security and convenience. The branch of the appellant at which she conducted her account was bigger but further away from her home, so it would be more troublesome for her to collect and return her jewellery on the occasions that she wished to wear them.

[18] Would an honest person have thought that the risk which the respondent was taking upon herself was unacceptably high? So high that he was obliged to tell her that certain additional security measures which might have been taken had not been taken? In my view he could be forgiven for thinking that the risk of loss by theft was so small that it was not necessary to debate these issues with a customer.

[19] Of course, if the customer had given any indication that she considered the level of security at the branch pivotal to her decision to contract, an honest person might have behaved differently. However, there was nothing in the conduct of the respondent at the time of contracting that would have alerted an honest person to the fact that she considered information about security arrangements at the branch to be material. Nothing could have made him suspect that she required a level of security higher than that offered to all customers by the appellant's modest suburban establishment on Voortrekker Street.

[20] From time to time the respondent took jewellery from her safety deposit box and put it back again. In taking jewellery from the box and returning it to the box she was treated like any other customer. If she wanted something from her safety deposit box a bank official would have an 'identification card and register' completed and then accompany her to the safe. After having opened the safe with two keys, the safety deposit box would be produced and opened with two keys, one carried by the respondent and one by the official. The respondent would thus have become aware that the safety deposit boxes were not kept in a strongroom and that the safe was located in an open plan area of the branch next to a plate glass window facing the outside. Access to the safe from the inside

was not impeded by a barrier of any kind. I should mention that in 1986 the safe did not stand where it stood in 1995. It was moved to its position in front of the plate glass window where it would be visible to passers-by for the very reason that its visibility from outside made it a less attractive target to burglars.

[21] Of all this the respondent became aware after she started using her safety deposit box. Although she had eight years to think about what she now maintains were poor security arrangements, and despite the fact that the risk of loss of the jewellery was hers, she expressed no disquiet. Her conduct after the conclusion of the contract leads to the clear inference that, although the absence of a strongroom and the location of the safe in an open area were raised in the trial as defects in the security system, the respondent did not regard them as worrying. I am therefore sceptical of her assertion that she was induced to enter into the contract by reason of facts which the branch officials, deliberately or carelessly, withheld from her. The operational details of the branch's security do not at any stage appear to have occupied her sufficiently to have influenced her decision on whether or not to contract. The case cannot be decided on the respondent’s assertions unsupported by the probabilities.

[22] However, I am content to rest my decision on the absence of a duty on the branch officials to have disclosed the absence of an alarm and a guard at night, so that I need say no more about the inducement factor. In the light of this conclusion it is also not necessary to decide whether the officials' failure to comply with such a duty, had it existed, would have been fraudulent or negligent.

I make the following order-

1. The appeal is upheld with costs which are to include those consequent upon the employment of two counsel.

2. The order of the Court below is altered to read : "The plaintiff's claim is dismissed with costs."

J H CONRADIE
JUDGE OF APPEAL

NIENABER JA)
STREICHER JA) CONCUR
MPATI JA)

SCHUTZ JA

[1] I differ from my brother Conradie, who would allow the bank's appeal. The reasons for my differing view are that I think that a duty on the part of the bank to warn the plaintiff has been established and that negligence has also been established, so that the bank is liable to the plaintiff in delict.

[2] *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559(A) finally demonstrated that a person who induces another to enter into a contract by making a negligent misstatement may not only face the avoidance of the contract, but also be liable to that other for loss he suffers in consequence. But negligence alone is not enough. The party induced must also establish unlawfulness, which in the context of this case means proving that there was a duty to speak. Whether such a duty existed must be ascertained by reference to what has been called the legal convictions of the community. Notoriously the views of judges as to what the ordinary man expects sometimes differ. This happens when value judgments have to be made, as in this case.

[3] The principles applicable to whether there is a duty to speak are conveniently summarized in *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718(C) at 726A-G:

> 'From the aforegoing exposition of the law the following principles emerge:
>
> (a) A negligent misrepresentation may give rise to delictual liability and to a claim for damages, provided the prerequisites for such liability are complied with.
>
> (b) A negligent misrepresentation may be constituted by an omission, provided the defendant breaches a legal duty, established by policy considerations, to act positively in order to prevent the plaintiff's suffering loss.
>
> (c) A negligent misrepresentation by way of an omission may occur in the form of a non-disclosure where there is a legal duty on the defendant to disclose some or other material fact to the plaintiff and he fails to do so.
>
> (d) Silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act as aforesaid.
>
> Examples of a duty of this nature include the following:
>
> (i) A duty to disclose a material fact arises when the fact in question falls within the exclusive knowledge of the defendant and the

plaintiff relies on the frank disclosure thereof in accordance with the legal convictions of the community.

(ii) Such duty likewise arises if the defendant has knowledge of certain unusual characteristics relating to or circumstances surrounding the transaction in question and policy considerations require that the plaintiff be apprised thereof.

(iii) Similarly there is a duty to make a full disclosure if a previous statement or representation of the defendant constitutes an incomplete or vague disclosure which requires to be supplemented or elucidated.

These examples cannot be regarded as a *numerus clausus* of the occurrence of a duty to disclose, as may possibly be inferred from the authorities mentioned above. There may be any number of similar factual situations which could give rise to such duty.'

[4] In considering the facts it is convenient to start with an evaluation of the security system which the bank provided. There was a steel safe which required two keys, in the possession of different persons, to open it. It was a heavy safe. The front door was locked. Again two separately held keys were needed to open it. The small windows at the back were protected by burglar barring about a finger thick. That seems to be the sum total of the positive features.

[5] I turn to the negative factors. The safe was free-standing, not bolted to the floor or a wall. There was no perimeter alarm system of any sort, nor an alarm on the safe. Nor was there any movement detector. At night there was no guard on duty. Certain of the outer walls of the branch, including one next to which the safe stood, were made of breakable glass 5 mm thick.

[6] Mr Brenkman, who had been the manager of the branch at the time of the break-in, was cross-examined about how secure the system was. He agreed that a lorry could have been driven into the courtyard beside the glass wall next to which the safe stood. The glass could have been broken and the safe loaded up by the use of suitable equipment. In answer to a question that what was provided could hardly be described as a security system, he answered, 'Wel dit kan nie as 'n sekuriteitstelsel beskryf word nie'. The succeeding question and answer read:

'Niemand kan in sy wildste drome dink dat jou item wat jy daar binne in daardie bank laat veilig bewaar sou word nie, stem u met my saam? Dit is korrek.'

[7] I think that he was driven to that answer because, in my view, it would be almost whimsical to describe what was provided as a security system.

[8] Nor was Brenkman alone in perceiving grievous shortcomings in the security system. Ms Loubser, a former employee at the Voortrekker Street Branch was asked, 'Met ander woorde wat se maatreëls het die bank getref vir veiligheid vir hierdie lokette wat u kon sien?' She answered, 'Niks nie'. When further asked, 'Het u van uself af enige kommer gehad daaroor?' she answered, 'Baie'.

[9] Mr Lubbe is a former major in the forensic investigation department of the police who subsequently entered the private sector. Among his activities was the examination of security systems at banks. This passage appears in his evidence:

> 'En u as forensiese ondersoeker en as eks (sic) majoor in die Suid-Afrikaanse Polisie sou u tevrede wees met die veiligheidstelsel van daardie perseel? --- U edele daar is basies nie 'n veiligheidstelsel as ons dit so kan noem nie. Al wat daar basies is, is maar die oop en toesluit van die deur en die wagte wat deur die dag daar is. So daar is niks anders nie.'

A little later he was asked, 'Nou het u ooit 'n bank teëgekom wat so 'n afwesigheid van 'n veiligheidstelsel gehad het soos hierdie een?' and he answered, 'Nee, u edele'.

[10] Returning to Brenkman, he also conceded that there was a perception among members of the public that when they left their goods for safe-keeping, they would be safe, in the sense held out by the use of the phrase 'safe deposit'. Also, he agreed, the bank staff was aware of that perception. Further, that a customer who was unaware of the true state of affairs was in no position to make an informed choice as to whether to make use of the bank's facility. Against this must be balanced the fact that over the years the plaintiff has had the opportunity to see that the safe was a free-standing one beside a glass wall. But this does not mean that she was aware of the absence of alarms and guards. It was also sought to be held against her that she did not make detailed enquiry as to what the bank's security system comprised. I find this suggestion quite unrealistic. Rather I think would a member of the public's outlook conform with the idiom 'safe as the Bank of England'. The bank's argument seems to me to be a classic case of blaming the victim.

[11] Then the bank points to the fact that the plaintiff had read the exemption clause and thus knew that there was an element, at least, of risk for her. In addition she was warned, in the clause, that it

behoved her to insure her goods. But to my mind, in the context that we are now discussing, duty to speak, the exemption clause works against the bank rather than for it. Of course she knew there was a risk, but she did not have the means to know that the risk was enhanced by a woefully deficient security system. And the bank officials knew that she did not know. Yet they procured that she should sign her rights away, or so they thought. This approaches, it may equate, the case on which our courts have frequently ruled, where a motor dealer, well knowing of a latent defect, procures a signature to a voetstoots clause.

[12] The next aspect which is to my mind important is that the bank held out that it offered a safe deposit facility and entered into not merely a contract of lease or of deposit, but of safe deposit. That fact is fundamental. Nothing can be completely safe, but if the service fell well short of being 'safe' in the sense that allows that there is always some risk, then it was a misrepresentation, if in fact the facility was 'unsafe'. It is also relevant to the question of lawfulness that the service was not a free service. It was provided in return for money. Not much money, perhaps, but that is not the full measure. A bank that does not offer such a service might well lose some customers. The relevance of money to lawfulness is that I think that members of the public will consider that where they pay money they will obtain what they were promised in return, failing which the law will intervene.

[13] To be added to the holding out of the facility are the opening words of the exemption clause 'While the bank will exercise every reasonable care for the security of the locker area…'. For the reason given in para [3] of the judgment of Conradie JA, those words do not import a contractual duty. But they nonetheless constitute a pre-contractual representation and the plaintiff read them. When one surveys the security system as it existed in 1986, when coupled with the fact that there was no intention to improve it, it was simply not true that the bank intended to take 'every reasonable precaution'.

[14] Further factors relevant to the existence of a duty were the facts that for all the bank knew the value of goods deposited might be high and that the interests of not only one but of at least several customers were affected.

[15] Another factor was that reasonably practicable steps could have been taken, if not entirely to forestall, then at least greatly to diminish, the chances of a burglary being successful. The expense, although not inconsiderable, was such that a bank holding itself out to have a safe deposit facility, could reasonably afford. And if the bank was not prepared to bear the expense at all its branches, it should either have warned customers as to what they were not getting or referred them to a larger and more secure branch.

[16] When one proceeds through the check-list in *McCall's* case (above) it seems to me that every requirement is met. True, there had been only an omission to speak, but it had been preceded by a positive representation as to what service was offered, and a statement in the exemption clause as to the bank's intentions. These were acts of commission which, at best, were incomplete or vague, calling for clarification. Then, the true facts were known to the bank officials but not to the plaintiff. In order to make an informed choice she needed a frank disclosure. Finally policy, what I perceive to be an element of the legal convictions of the community, demanded of the bank officials that they should speak. Why they did not is plain. It would have discouraged her from entrusting her valuables to this branch and it would have been bad for the bank's image.

[17] There can be little doubt that had the plaintiff known of the true facts she, like Brenkman, would not have entrusted her valuables to the bank. Causation has been established.

[18] The presence of negligence was not seriously challenged in argument and I think it has been established. The loss was foreseeable, and a reasonable bank could and would have taken steps which would more than likely have prevented the loss. Here I single out the absence of an alarm system coupled with the lack of a guard, these two added to the fact that the plaintiff was not informed in such a fashion that she could protect herself.

[19] Accordingly I am of the view that the bank's negligent misstatements caused the plaintiff's loss.

[20] There remains the exemption clause. The plaintiff's subjection to this clause was itself caused by the misstatement, so that the plaintiff, having avoided the ensuing contract, is not bound by it.

[21] I would dismiss the appeal with costs.

W P SCHUTZ
JUDGE OF APPEAL