THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 48/2001

In the matter between:

KELLAPRINCE PROPERTIES (PTY) LTD Appellant

and

SALLY MUNTINGH 1st Respondent

AND

NEDCOR BANK 2nd Respondent

Coram: Olivier, Streicher, Cameron, JJA

Heard: 14 March 2002
Delivered: 28 March 2002

J U D G M E N T

STREICHER JA:

[1] In a judgment by Van der Walt J in the Transvaal Provincial Division the first appellant, as agent of the respondent, and the second appellant as surety in

respect of the obligations of the first appellant to the respondent, were held liable in respect of a loss, as a result of a robbery, of monies belonging to the respondent. With the necessary leave the appellants appeal against that judgment.

[2] The respondent is a bank registered in terms of the Banks Act 94 of 1990. The first appellant is a close corporation doing business as an estate agency. On 23 September 1993 the respondent and the first appellant entered into a written agreement in terms of which the first appellant was appointed as an agent of the respondent to operate an agency of the respondent's Perm Division in Barberton (the 'Perm Agency').

[3] Clauses 4.1, 4.2 and 9 of the agency agreement provided as follows:

'4.1 A trust banking account will be opened by the Bank, in the name of the Bank, to serve the Agency, and you will operate such account in accordance with the Bank's regulations.

4.2 All monies, cheques or any other instruments of value received by you on behalf of the Bank shall be and remain the property of the Bank. You will be responsible for depositing such monies, cheques or any other instruments of value to the credit of the aforesaid trust banking account in the name of the Bank at latest by the next business day following receipt of such monies, cheques or instruments of value.'

'9 You will be wholly accountable and responsible for the management and conduct of the Agency and for all monies,

> cheques and any other instruments of value received on behalf of the Bank and for any loss to the Bank whatsoever arising out of your services as the Bank's Agent including loss arising from: any act of fraud or; errors of commission or; errors of omission by your staff.'

[4] The first appellant employed Ms Retha Theron as a teller in the Perm Agency with overall responsibility for the Perm Agency and a Ms Du Toit as a 'flexi girl' to assist her. Whenever necessary Ms Hannie Strydom, one of the members of the first appellant, also assisted in the Perm Agency.

[5] On 9 July 1997 the respondent gave notice to the first appellant that the agency would terminate on 30 November 1997. As a result it was agreed between the first appellant and Theron that her last day of employment would be Saturday 29 November 1997.

[6] Prior to Saturday 29 November 1997 Mr Madden, an employee of the respondent, acting on behalf of the respondent, arranged with the second appellant, one of the three members of the first appellant, and with Theron that the final accounting of the first appellant to the respondent would take place at 08h00 on Monday 1 December 1997. According to the second appellant the other members and she were going to be present as a courtesy gesture on their part.

[7] The automatic teller machine ('ATM') installed on the premises of the Perm Agency would also have been removed on the Monday and the accounting, which had to be done on Monday, would have included an accounting in respect of the transactions done through the ATM. However, on Saturday 29 November 1997 people unexpectedly arrived at the premises of the Perm Agency to remove the ATM. Theron notified Madden whereupon he proceeded to the Perm Agency to assist. He and Theron closed the ATM, balanced the transactions conducted through the machine with the cash still available in the machine, removed the cash from the machine and locked it in

the safe used by the Perm Agency. Madden was still present at closing time when Theron put the other money held by her in the safe, locked the safe and locked the front door. Two keys are required to lock and unlock the safe and one of the requirements of the respondent was that, for security reasons, the two keys be kept separately. Madden testified that it did not strike him that Theron was, contrary to the respondent's requirements, in possession of both keys of the safe.

[8] At 06h10 on Monday morning Strydom telephonically advised the second appellant that there had been a robbery at the Perm Agency. The second appellant telephoned Theron, who was at the Agency, and asked her what she was doing there at that time of the morning. Theron said that Madden told her to get her administrative work up to date before 08h00 on Monday morning. The second appellant was angry because one of the first appellant's in house rules was that the premises were never to be entered alone. According to Theron she went to the Perm Agency at about 06h00 to bring her work up to date. Two men knocked at the door and asked whether the bank was open. She ignored them but they persisted in knocking at the door. When she opened the door to tell them that the bank was closed they forced their way in, assaulted her and demanded money. They got hold of the keys to the safe and removed money from the safe.

[9] It is common cause between the parties that a robbery took place on Monday morning and that there was a shortfall of R217 236,84 after the robbery.

[10] Clause 9 of the agreement of agency provided that the first appellant would be 'wholly . . . responsible . . . for all monies . . . received on behalf of the Bank and for any loss to the Bank whatsoever arising out of (its) services as the Bank's Agent including loss arising from: any act of fraud or errors of comission or; errors of omission of your staff'. The court *a quo* held that by these words absolute liability was imposed on the first appellant in respect of the loss of money of the respondent arising out of the first appellant's services to the respondent. In my view the court *a quo* was correct in doing so, for the following reasons:

1 The parties agreed that the first appellant would be **wholly**

responsible for all monies received on behalf of the respondent. If they intended no more than the common law responsibility for negligence there was no need for the word ‘wholly’.

2 The words ‘for any loss to the Bank **whatsoever’** are another indication that not only losses caused by the negligence of the first appellant or its employees were intended. Once again if the parties intended no more than the common law responsibility for negligence one would have expected them to say ‘for any loss caused to the Bank by the negligence of the (first appellant)’ and not to have used the word ‘whatsoever’.

[11] The appellants submitted that:

1 The agency relationship between the first appellant and the respondent terminated at the end of November 1997 with the result that clause 9 of the agreement could no longer be relied upon.

2 Alternatively:

a. Madden took control of the money in the safe on Saturday.

b. Madden was responsible for the loss as he left Theron in possession of both keys of the safe.

c. Theron was no longer an employee of the first appellant on 1 December 1997.

d. The loss did not arise out of the first appellant’s services as the

respondent's agent.

I shall deal with each of these submissions in turn.

[12] I do not think that there is any merit in the contention that clause 9 of the agency agreement could no longer be relied upon after 30 November 1997. The termination of the agency agreement as of the end of November meant that the first appellant as agent for the respondent would after 30 November 1997 no longer conduct the Perm banking business. It did not mean that all obligations in terms of the agency agreement came to an end on that day. In terms of clause 9 the first appellant was wholly accountable and responsible for monies received on behalf of the respondent. That obligation was clearly an obligation that was intended to survive the termination of the agency agreement in that a final accounting of necessity had to take place after termination of the agency agreement.

[13] There is no evidence that Madden took control of the money held by the first appellant on behalf of the respondent. The evidence is to the contrary. At closing time on Saturday Theron and not Madden counted the money. Moreover, Theron locked the safe and the front door and kept the keys. If Madden had taken control of the money one would have expected him to give a receipt for the money taken and one would have expected him to take at least one of the keys of the safe.

[14] Madden was not the employer of Theron or in a position of authority over Theron. He could not have given her instructions as to what to do with the keys of the safe. He or his employer can therefore not be held responsible for the fact that Theron was in possession of two keys.

[15] In terms of the arrangement with the first appellant the final accounting would have taken place on Monday. It was going to be done by Theron on behalf of the first appellant and the members of the first appellant were going to be present as a courtesy gesture. Theron locked the safe and the front door and kept the keys. The appellants did not suggest that she was not entitled to remain in possession of at least one of the keys of the safe and of the key of the front door. In these circumstances the accounting by Theron was probably considered by Theron as well as by the first appellant as a finalisation of her duties as an employee of the first appellant. She was, therefore, when she went to the Perm Agency premises to bring her administrative work up to date, and when she was doing so, acting as an employee of the first appellant.

[16] Theron was 'in overall charge' of the Perm Agency, she was entrusted with the key to the front door and, therefore, was entrusted with control as to who entered the premises. On Monday morning she was engaged in the affairs

of her employer and it was in the course of doing so that she opened the door in order to tell the two strangers that the bank was closed. In these circumstances the first appellant was vicariously liable for her actions. Theron may have been acting against instructions by entering the premises on her own but it is not only when an employee acts according to instructions that his employer can be held liable. In *Estate Van der Byl v Swanepoel* 1927 AD 141 at 147 Wessels JA said:

> 'It is clear therefore that this Court in applying the general principle that a master is liable for the torts of his servant acting within the scope of his employment has taken the extended view of the master's liability to third parties (rather) than the narrower one which would confine his liability strictly to acts done within the instructions or necessarily incidental thereto.'

The critical question is whether the employee was engaged in the affairs or business of his employer (see *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 826H to 827B). In this case, in contrast with many other cases where the question of vicarious liability arises the application of the test does not present a problem. Theron was engaged in the affairs or business of the first appellant.

[17] It follows that the loss arose from the first appellant's services to the respondent and that the court *a quo* correctly held the first appellant liable for such loss.

[18] In any event, in terms of the common law the first appellant had to account to the respondent in respect of all monies received on behalf of the respondent. If, through the first appellant's own fault, it allowed such money to be lost, the first appellant is responsible to make good such loss (*Pothier's*

Treatise on the Contract of Mandate para 51).

[19] There can be no doubt that Theron acted negligently by opening the doors of the Perm Agency at 06h00 in the morning for two strangers. She was alone with the keys of the safe, there was some R400 000 in the safe and the two strangers had absolutely no business to be there and could not possibly have thought that the bank was open. A reasonable person would in those circumstances not have opened the door.

[20] It follows that the liability of the first appellant for the loss suffered was established independently of the provisions of clause 9 of the agency agreement.

[21] It is common cause that if the appeal of the first appellant fails the appeal of the second appellant also has to fail.

[22] The appeal of both the first and the second appellants is therefore dismissed with costs.

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P E Streicher
Judge of Appeal

Olivier, JA)
Cameron, JA) concur