



REPORTABLE

CASE NO: SA 10/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

URSULA ESTER BLAAUW

Appellant

and

CHRISCHENDA AKIMI PALLAIS

First Respondent

BANK WINDHOEK LIMITED

Second Respondent

Coram: SHIVUTE CJ, HOFF JA and ANGULA AJA

Heard: 16 June 2023

Delivered: 30 August 2023

Summary: This is an appeal against a judgment given in the High Court of Namibia, Main Division, dismissing appellant's claim against the second respondent for payment in the amount of N\$403 044,70 plus interest, for money allegedly misappropriated from appellant's bank account, by the first respondent who was an employee of the second respondent.

The alleged misappropriation came as result of various mandates signed by appellant in favour of first respondent, authorising first respondent to perform transactions on appellant's accounts in her absence. Appellant based her claim against the bank (second respondent) on the principle of vicarious liability, contending that when the delict was committed, first respondent was acting within the course and scope of her employment. The bank denied liability, contending that appellant personally and knowingly, created the risk leading to the misappropriation of her money by first respondent. First respondent did not participate in the trial.

The issues for determination on appeal were whether the first respondent was acting within the course and scope of her employment with the bank when she committed the delict, and whether the bank should be held vicariously liable for the damages suffered by the appellant.

Held that, the first respondent was not instructed to misappropriate the monies. Neither can it be said that the misappropriation related to her duties or that the misappropriation was reasonably necessary to achieve her employment mandate or reasonably necessary to achieve a specific instruction. The first respondent, acted for her own interests and purposes. She did not act in the furtherance of the bank's business.

Held that, the fact that the appellant in the mandates gave authority to the first respondent to act as her 'assignee' together with the fact that the appellant unreservedly bound herself to all transactions performed by the first respondent point to the conclusion that the first respondent did so as an independent individual and not as an employee of the bank.

Held that, a master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must

have been done by the servant in his capacity *qua* servant and not as an independent individual.

Held that, it was not part of the first respondent's employment duties with the bank to act as an agent for a client. Thus when appellant signed the mandates, given the knowledge of their personal relationship, the appellant created a risk associated with such mandates.

Held further that, there is a significant connection between the creation or enhancement of the risk and the wrong that accrues therefrom, a risk created by the appellant herself, and not by the bank.

Held further that, having regard to the values of justice and fairness embodied in the Namibian Constitution and in view of the particular facts of this case, a finding of vicarious liability would not be fair and justifiable in the circumstances.

Consequently, the appeal is dismissed with costs including the costs of one instructing and one instructed legal practitioner.

APPEAL JUDGMENT

HOFF JA (SHIVUTE CJ and ANGULA AJA concurring):

Introduction

[1] This is an appeal against a judgment given in the High Court of Namibia, Main Division, (*court a quo*) dismissing appellant's claim against the first and second respondents, jointly and severally, for payment in the amount of N\$588 044,70 plus interest, for money allegedly misappropriated from appellant's bank account, by the first respondent who was an employee of the second respondent. The amount claimed was during the trial reduced to N\$403 044,70.

The pleadings

[2] The appellant's cause of action is derived from the following allegations as they appear in the particulars of claim:

- (a) The appellant had several bank accounts at the Mariental Branch of the second respondent and at all relevant times the first respondent, a senior credit clerk, was employed by the second respondent and has performed her duties at the second respondent within the course and scope of her employment and that second respondent had appointed the first respondent as the personal banker of the appellant;
- (b) The first respondent provided the appellant with advice regarding the management of her accounts and on or about 20 May 2014 proposed that because the appellant was not always available to approve necessary transactions on her accounts, that the appellant sign a mandate on each of her four accounts to authorise the first respondent to act on behalf of the appellant;
- (c) The appellant trusted the advice of the first respondent in her capacity as a personal banker of the appellant and signed the mandates on each of her four accounts;

- (d) On or about February 2016, a senior employee of the second respondent informed the appellant that certain transactions on the bank accounts of the appellant appeared to be irregular and appellant was asked to investigate;
- (e) The appellant subsequently investigated her accounts and discovered that the amount referred to in the introductory part of the judgment had been misappropriated; and that;
- (f) This amount was unlawfully and with intent to steal misappropriated by the first respondent.

[3] The second respondent entered appearance to defend the action and pleaded *inter alia* as follows:¹

- (a) Save to admit that the first respondent was employed as a senior credit clerk by the second respondent and that the appellant at all relevant times appointed the first respondent as her assignee in all matters and affairs set out in the signed mandates in respect of each of appellant's bank accounts, the second respondent denied that the first respondent was acting within the course and scope of her employment;

¹ The first respondent's legal representative withdrew his representation on 20 November 2018 and as a result thereof only the appellant and the second respondent took part in the trial in the court *a quo*.

- (b) The terms stipulated in the mandates given by the appellant to the first respondent, had given the first respondent authority to operate on the appellant's bank accounts on the appellant's behalf and to act as the appellant's assignee in all matters and affairs;
- (c) The appellant had given assurance and bound herself in the mandates that all acts of the first respondent shall be binding upon the appellant;
- (d) The said authority in the mandates given by the appellant shall remain in force until the second respondent received written notice from the appellant of alteration or cancellation thereof; and
- (e) All relevant transactions that were conducted on the appellant's accounts were authorised, with permission or consent of the appellant, alternatively, deemed to have been so authorised by the appellant.

Proceedings in the court *a quo*

The appellant's case

[4] The appellant testified that as a businesswoman she had many business interests ranging from being a bookkeeper, renting out properties to speculating in livestock, and because of her speculating business she was frequently out of town.

[5] The second respondent (the bank) appointed the first respondent as her personal banker and on 20 May 2014 the first respondent proposed to the appellant

that due to her frequently being out of town, the appellant sign mandates in first respondent's favour which would enable the first respondent to sign documentation and to approve transactions on appellant's behalf on those occasions on which the appellant would not be available. The appellant welcomed this proposal and signed mandates in respect of all her bank accounts.

[6] The appellant had known the first respondent since September 2011 when first respondent became a tenant of one of the flats owned by the appellant. The first respondent also used to confide in the appellant about her personal issues and the appellant had on more than one occasion lent money to the first respondent. This occurred after 2011. The first respondent at one stage rented a bar from the appellant and she also used to collect rental payments from other tenants on the appellant's behalf and paid the money into one of the appellant's bank accounts. The appellant had been informed by her daughter during the year 2014 that the first respondent had stolen money from her daughter. During cross-examination the appellant could not dispute that she had been informed of the theft from her daughter during August 2014. The mandates were signed in May 2014. The appellant never thought that the first respondent would abuse her position of trust to defraud appellant by withdrawing amounts of money from her accounts for the first respondent's own use.

[7] A senior employee of the bank, a Mr Schroer, informed the appellant that he believed that transactions on her account appeared to be irregular and that appellant should investigate her accounts. Appellant subsequently found that an amount of N\$403 044,70 was misappropriated from her accounts by the first respondent and

demanded that the bank compensate her because the loss was caused by the first respondent who acted in the course and scope of her employment with the bank. When the bank denied liability the appellant issued summons.

[8] During cross-examination the appellant conceded that the first respondent acted as her agent. The appellant could provide no answer as to how the bank would have been able to distinguish between authorised and unauthorised transactions. Appellant confirmed that the first respondent could not have performed transactions on appellant's accounts without the mandates in place. On occasion, appellant would phone the first respondent to withdraw money over the counter and the first respondent would then subsequently hand over the money to the appellant. The appellant confirmed that she did not institute criminal proceedings against the first respondent.

The bank's case

[9] The Mariental branch manager, Johann Kube Schroer testified that he recalled that whenever the appellant visited the branch, she would ask for the first respondent to assist her with her banking needs – this was also the general knowledge of all staff members in the branch. He was aware that the appellant gave mandates in favour of the first respondent which mandates gave the first respondent the authority to operate the appellant's bank accounts and to act as appellant's agent in respect of those bank accounts.

[10] These mandates were signed on 20 May 2014 by the appellant. In terms of these mandates, appellant was expected to inform the bank in writing in the event of the cancellation of those mandates. However, the appellant verbally informed the bank during December 2016 that the mandates should be cancelled and subsequently on 16 December 2016 the mandates were cancelled.

[11] Schroer testified that in respect of all the relevant bank transactions, authorised by the first respondent, she was acting as the agent of the appellant, and not as an employee of the bank. Insofar as the bank was concerned, all the transactions on the relevant accounts by the first respondent were binding on the appellant in terms of the mandates and the bank was entitled to rely thereon and act in accordance with the first respondent's instructions on behalf of the appellant. He testified that the bank denied that it was liable to the appellant for payment of the amount claimed.

[12] The second witness, Salome Korf (Korf) testified that she was employed by the bank as a supervisor at customer service. During May 2014, the first respondent approached her with the request that she should complete mandates and power of attorney documents for the appellant in favour of the first respondent as the first respondent was handling the affairs of the appellant.

[13] She testified that the first respondent at that time rented one of the flats owned by the appellant. She was aware that the first respondent and the appellant developed a close relationship. She confirmed that whenever the appellant called or

visited the bank, appellant would call for the first respondent to assist her. She testified that she was duly authorised to handle mandates and that the first respondent requested that she should get powers of attorney on all the accounts of the appellant.

[14] Korf testified that she knew of transfers made by the first respondent because she was responsible for compiling the online transfer report of the bank and that every transfer at the end of the day came to her. The first respondent would complete the transfer forms and then ask one of her co-employees to do the transfer because the first respondent herself was not authorised to 'action' the transfer. She testified that due to the relationship between the appellant and the first respondent and the mandates given to the first respondent, no one questioned the first respondent on her actions.

Judgment of the court *a quo*

[15] The trial judge correctly remarked that the circumstances before her involved a bank employee donning the hat of an employee where she stood in an employer/employee relationship to the bank, but also donning the hat of a mandatory relationship with the appellant.

[16] The fact that there was an employer/employee relationship and that a delict had been committed by an employee of the bank was common cause between the parties.

[17] The issues which remained for determination in the court *a quo* (as well as on appeal) were whether the first respondent was acting within the course and scope of her employment with the bank when she committed the delict, and whether the bank should be held vicariously liable for the damages suffered by the appellant.

[18] The court *a quo* in its judgment² discussed the principles relating to vicarious liability and the issue of whether or not the first respondent was acting within the course and scope of her employment, and referred to relevant authorities in respect of these issues.

[19] In para 39 of the judgment the following appears:

[39] In the matter before me the plaintiff trusted the first defendant apparently due to their history and friendship that they had. The plaintiff trusted the first defendant apparently against her better judgment as she did not withdraw or cancel the mandates in spite of the fact that it came to her knowledge shortly after signing the mandates in 2014 that the first defendant actually stole money from her daughter. She did not withdraw or cancel the mandates in spite of the knowledge that the first defendant had financial difficulties. The plaintiff retained the first defendant as her mandatary, who had the right to deal with her accounts as she wished. As a result of the mandates the first defendant dealt with the bank accounts as if it was the plaintiff in person. The moment the first defendant conducted any financial transaction with the bank she literally stepped into the shoes of the plaintiff. The first defendant would complete the withdrawal slip but could not process it the same as any other client. Another bank official had to process the transaction. When transacting the first defendant did it in terms of the authority granted to her by the plaintiff in terms of the mandate and not in her capacity as an employee of the bank.'

² Reported as *Blaauw v Pallais & another* 2021 (1) NR 64 (HC).

[20] The court *a quo* also found that when the first respondent acted on behalf of the appellant as her mandate holder she acted in her personal capacity as the appellant's agent and not in her capacity as personal banker.

[21] In para 42, the court *a quo* concluded as follows:

'[42] The question is thus whether or not first defendant was furthering the interests of the second defendant when she misappropriated the money from the plaintiff's account in accordance with the Mandates. Having considered the above, I am of the opinion that the first defendant's actions in this matter are completely detached from the expectations of second defendant in the circumstances. There is no sufficient link and/or connection that can qualify the first defendant to have been acting within the scope of her employment. First defendant's conduct and nature of her duties are far and remotely connected to her mandate from the plaintiff. It can therefore, be safely held that first defendant was on a frolic of her own and as such vicarious liability cannot and should not be extended to engulf second defendant in the circumstances.'

The grounds of appeal

[22] In summary the grounds of appeal are:

- (a) The court *a quo* erred and/or misdirected itself when it found that the bank could not be held liable for the appellant's loss despite the fact that the first respondent acted in the capacity of personal banker and/or senior credit clerk when the appellant gave the first respondent the mandates to conduct certain banking transactions on behalf of the appellant.

- (b) The court *a quo* erred and/or misdirected itself when it found that the first respondent did not act in the course and scope of her employment despite the fact that the first respondent approached the appellant to obtain signed mandates in her capacity as an employee of the bank and not in another capacity such as friend or agent.
- (c) The court *a quo* also erred and/or misdirected itself when it found that the first respondent did not act within the course and scope of her employment when the first respondent endeavoured to obtain signed mandates on official letterheads bearing stamps of the bank and to which the first respondent had access by virtue of her employment with the bank and not in any other capacity.
- (d) The court *a quo* erred and/or misdirected itself when it found that the first respondent did not act within the course and scope of her employment despite the fact that the bank manager testified that he was aware of the fact that the appellant gave official mandates to the first respondent, which mandates gave the first respondent authority to operate the appellant's bank accounts. This authority emanated from the employee/employer relationship between the first respondent and the bank. Had the first respondent not acted within the course and scope of her employment at the time when she approached the appellant to obtain such signed mandates, the then branch manager with the knowledge of such signed mandates would have acted

appropriately since the mandates were directed to the bank manager, and therefore carried his approval which would be the bank's approval.

- (e) The court *a quo* erred and/or misdirected itself when it found: that the first respondent transacted in terms of the mandates and not in her capacity as an employee of the bank; that the first respondent acted in her personal capacity as the appellant's agent and not in her capacity as personal banker; that acting as the appellant's agent was neither part of the first respondent's duties nor was it reasonably incidental thereto, and when the appellant signed the mandates she attracted the risk that was associated with such mandate.

- (f) The court *a quo* erred and/or misdirected itself when it concluded that the first respondent was on a frolic of her own, and as such vicarious liability could not engulf the bank in the circumstances.

Submissions on appeal

On behalf of the appellant

[23] It was submitted by the appellant's legal representative that the finding by the court *a quo* that the first respondent acted in her personal capacity as the appellant's agent was unsustainable, factually incorrect and bad in law, since a contract of mandate as well as a contract of employment may be entered into by someone who is not an agent at all, or one who is an unempowered agent but obliged to carry out

certain instructions or one who is obliged to further his principal's interests, and that a mandatary is not necessarily an agent and an agent not necessarily a mandatary.

[24] It was submitted that if one has regard to the wording of the mandates, the court *a quo* incorrectly ruled that the first respondent acted on behalf of the appellant as her mandatary as there was no 'obligation' by the first respondent to fulfil the mandates so given. It was also submitted that a 'mandate' is a contract and not an 'authority'.

[25] It was consequently submitted that the first respondent was at best an 'unempowered agent' (not a mandatary) *vis-à-vis* the appellant as the first respondent obtained her 'authority' to act as an 'agent' on behalf of the appellant from the 'mandates' that were executed in the name of the bank.

[26] It was furthermore submitted that the bank could not have distanced itself from the mandates – it was party to the mandates for the following reasons:

The first respondent was employed by the bank; the bank was aware and approved of such 'mandates' to be given to clients; the letterhead emanated from the bank; the bank was the author of the mandates; in order to issue a mandate certain internal banking procedures were required; the mandates were sanctioned by the bank; the bank was in total control of the process of mandates; it was the business of the bank to engage in mandates for its clients; the bank was aware of the risk involved namely that an employee might go beyond the scope of her employment duties; the first respondent did

not completely disengage herself from her employment with the bank; the mandates were addressed to the bank manager; 'you' in the mandates was references to the bank; the bank controlled the execution of the transactions in terms of such mandates and the first respondent had to obtain approval from a senior bank official to obtain the mandates and powers of attorney.

[27] It was submitted therefore that the bank must share responsibility or be responsible for the risk associated with such mandates and the execution of the transactions in respect thereof.

[28] In respect of the issue of vicarious liability, it was submitted with reference to decided cases that an employer may only escape vicarious liability if the employee, viewed subjectively, had completely disengaged himself or herself from the duties of his or her contract of employment or that the actions of the employee must be completely 'unconnected with those of his or her master to exculpate the employer' – and that this was not the factual position with regard to the issues at hand.

[29] It was submitted, with reference to authority, that there are indications that the question whether the employee has acted within the scope of his or her employment, may be decided using the criteria of the creation of risk by the employer.

[30] It was submitted in conclusion that when stealing money from the appellant, the first respondent did so with actions (transfer and drawings of money) which were closely connected to the general character of her employment with the bank

(assisting clients with transfers and drawings) and therefore, falls within the scope of her employment with the bank when doing such transfers and, drawing cash for herself, from the accounts of the appellant.

On behalf of the bank

[31] It was submitted that the court *a quo*'s finding that the bank should not be held liable, could not be faulted, and in this regard the following submissions were made:

- (a) The first respondent did not act within the course and scope of her employment with the bank because it was not part of her employment to sign on behalf of a client and to give instructions on behalf of a client to the bank to withdraw and/or transfer funds from those client's bank accounts.
- (b) It could therefore not be said that the first respondent was at the relevant times busy with the affairs or business of the employer, but that the wrongful acts were done solely for the purposes of the employee and/or as agent for the appellant.
- (c) In accordance with the mandates provided, the first respondent at the time of providing instructions for withdrawals and/or transfers disassociated herself from the affairs of the bank and it cannot

reasonably be held that the employee was still exercising the functions to which she was appointed, or still carrying out some instructions of the bank.

- (d) In answering the question whether liability should lie against the bank, the court should have regard to whether the alleged wrongful act is *sufficiently related* to conduct authorised by the bank, ie is there a significant connection between the *creation of or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires.
- (e) On the evidence before the court *a quo*, the actions of the first respondent were as an agent duly appointed by the written mandates signed by the appellant. The first respondent was not acting as an employee of the bank, therefore the withdrawals and/or transfers did not occur as a result of any enhanced risk created by the employment of the first respondent with the bank, but was directly and solely as a result of the appellant providing the first respondent with the mandates.
- (f) In accordance with the provisions of the mandates, and the law of agency, the first respondent acted in line with the authority provided by the appellant to her when first respondent gave instructions for the relevant withdrawals and/or transfers. Hence, whether or not the instructions were *mala fide* or given in fraud by the first respondent, the

appellant remains bound to the bank, and the bank (as a third party) was entitled to have relied on those instructions received from the first respondent as the appellant's duly authorised agent.

Discussion

[32] Although in terms of the pre-trial order there were issues of fact in dispute between the parties, at this stage, having regard to the judgment of the court *a quo*, I shall accept that those issues had been decided, and that the issue of law to be resolved on appeal (as in the court *a quo*) is whether the bank is vicariously liable for damages to the appellant caused by the first respondent.

[33] Since the mandates and its contents were crucial in the determination of the question of law to be resolved during the trial, it is important to look at the language used in the mandates. The four mandates received by the court *a quo* (as exhibits 'A' to 'D') used exactly the same wording and construction, and had all been signed by the appellant. The following is reflected in exhibit 'A':

**'THE MANAGER
BANK WINDHOEK LIMITED
Mariental BRANCH**

Sir,

**MANDATE BY Ursula Ester Blaauw IN FAVOUR OF Chrischenda Akimi
Pallais**

I have given my authority to **Chrischenda Akimi Pallais** to operate on my account on my behalf and to act as my assignee in all matters and affairs having reference to, or in any way connected with, my transactions with you, and for that purpose to sign all agreements and documents which may be necessary or expedient, and furthermore, without prejudice to the foregoing generality, as my assignee and on my behalf, to –

- (1) draw, sign and endorse cheques;
- (2) draw, accept and endorse bills of exchange and promissory notes;
- (3) negotiate for and take discounts and loans with or without security, and to pledge and/ or cede any species of security for the repayment thereof; and to withdraw securities and to sign receipts therefore; *(sic)*
- (4) establish credits for others;
- (5) guarantee payment of any liability or indebtedness of others to you;
- (6) deposit or withdraw articles for safe custody and to sign acquaintances therefore; *(sic)*
- (7) invest money on Fixed Deposit, Special Deposit and/or Savings Account in my name with you to withdraw such money and to sign receipts in respects thereof;
- (8) provide and sign indemnities;
- (9) bind myself to you as surety and co-principle debtor under renunciation of the benefits of division and excussion for the liabilities of others; and to pledge or cede any of my assets and to provide it as security in any other way, for any of my liabilities to you and/ or as security for the liabilities of others to you.

It is understood that, so far as you are interested or concerned all such acts of the said **Chrischenda Akimi Pallais**, shall be binding upon me and that the authority

given to **Chrischenda Akimi Pallais** remains in force until you receive written notice by me of alteration or cancellation thereof.

This notice will also be effective at any other branch(es) of BANK WINDHOEK LIMITED to which the account may be transferred in future.'

[34] Before I consider the contents of the mandates and the legal effect thereof, it would be useful to first refer to the applicable legal principles relating to the issue of vicarious liability.

Legal principles in respect of vicarious liability

[35] Mogoeng J in *F v Minister of Safety and Security & others*³ explained vicarious liability in general as follows:

'[40] Vicarious liability means a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct. This would arise where there is a particular relationship between those persons, such as employment. As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment, or whilst the employee was engaged in any activity reasonably incidental to it.

[41] Two tests apply to the determination of vicarious liability. One applies when an employee commits the delict while going about the employer's business. This is generally regarded as the "standard test". The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as "deviation cases". . . .'

³ *F v Minister of Safety and Security & others* 2012 (1) SA 536 CC at 547 paras 40 and 41.

[36] In *Minister of Police v Rabie*⁴ the South African Appellate Court referred to a test which has both a subjective and objective element as follows:

'It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test'

[37] The general principles for vicarious liability were reiterated in *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*⁵ by Zulman JA as follows:

'It should not be overlooked, however, that the affairs of the employer must relate to what the employee was generally employed or specifically instructed to do. Provided that the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable, even where the employee acts contrary to express instructions (see, for example, *Estate Van der Byl v Swanepoel* 1927 AD 141 at 145-6, 151-2). It is also clear that it is not every act committed by an employee during the time of his employment which is for his own benefit or the achievement of his own goals which falls outside the course and scope of his employment (*Viljoen v Smith* 1997 (1) SA 309 (A) at 315F-G). A master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must have been done by the servant in his capacity *qua* servant and not as an independent individual.'

⁴ *Minister of Police v Rabie* 1986 (1) SA 117 AD at 134C-E.

⁵ *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) at 378C-F.

[38] The applicant in *K v Minister of Safety and Security*⁶ sought leave to appeal against the judgment of the Supreme Court of Appeal in which her claim for damages in delict from the Minister of Safety and Security based on vicarious liability (of the Minister) was dismissed. The applicant was raped by three uniformed and on-duty policemen after she had accepted a lift home from them in the early hours of the morning.

[39] In her application for leave to appeal the applicant raised three arguments *inter alia* that if the Supreme Court of Appeal did not err in the application of the test for vicarious liability, the test should be developed in the light of s 39(2) of the South African Constitution as the result (ie the dismissal of her claim) does not accord with the spirit, purport and objects of the Constitution.

[40] O'Regan J writing for a unanimous court reflected at para 32 as follows:

'The approach⁷ makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmation, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is "sufficiently close" to give rise to vicarious liability. It is in answering this question that

⁶ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

⁷ Referring to the test expounded in *Rabie*.

a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.’

(Footnote omitted)

[41] Having considered the law of vicarious liability in other jurisdictions, O’Regan J concluded as follows in para 44:

‘From this comparative review, we can see that the test in *Rabie*, with its focus both on the subjective state of mind of the employees and the objective question, whether the deviant conduct is nevertheless sufficiently connected to the employer’s enterprise, is a test very similar to that employed in other jurisdictions. The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objectives of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.’

[42] O’Regan in *K* also referred to *Bazley v Curry*⁸ where McLachlin J in an unanimous decision of the Supreme Court of Canada comprehensively reviewed not only the existing legal principles but also the policy underlying the doctrine of vicarious liability and concluded at para 38:

(1)

(2) The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorised by the employer to justify the imposition of vicarious

⁸ *Bazley v Curry* (1999) 174 DLR (4th) 45 (Con SC) ([1999] 2 SCR 534) para [26].

liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more) will not suffice.⁹

(3)'

The Constitutional Court in *K* granted the application for leave to appeal. In the present appeal, the issue of the possible development of the common law to accommodate the appellant's predicament was not raised either in the court *a quo* or in this court. We were called upon to determine the appeal purely on the basis of common law principles and the facts of the case.

The application of the test to the facts

[43] The first question to be considered is whether the wrongful acts, the misappropriation of the money by the first respondent, were done solely for the purposes and interests of the employee, the first respondent. This is purely a factual question. The test is subjective – it involves a determination of the subjective intention of the first respondent.

[44] The first respondent did not participate in the trial and there is thus no direct evidence regarding her state of mind, but the first question may be answered in view of the other available evidence. The first respondent was employed as a senior credit

⁹ Emphasis in the original.

clerk and, in my view, by the misappropriation of monies cannot be said that she was doing the work of her employer, the bank, or that she was going about her employer's business. The first respondent was also not instructed to misappropriate the monies. Neither can it be said that the misappropriation related to her duties or that the misappropriation was reasonably necessary to achieve her employment mandate or reasonably necessary to achieve a specific instruction. The first respondent, in my view, acted for her own interests and purposes. She did not act in the furtherance of the bank's business. I agree with the court *a quo* that the first respondent was on a frolic of her own. The first leg of the test thus does not establish vicarious liability in respect of the bank.

[45] The second question, an objective one, is whether even though the misappropriation had been done solely for the purposes and interests of the first respondent, there is nevertheless a sufficiently close link between the first respondent's acts for her own interests and purposes and the business of her employer, the bank. It must be kept in mind that in answering this question one should also take into account the values embodied in the Namibian Constitution.

[46] Counsel for the appellant sought to argue in favour of the sufficiency of the link by relying on factors enumerated in paragraph [26] *supra* which include, *inter alia*, the fact that the first respondent used the bank's mandates, that the mandates had been sanctioned by the bank, that the mandates were addressed to the manager of the bank, that the bank originally approved of the mandates signed by the appellant in favour of the first respondent, that the references to 'you' in the mandates are

references to the bank, and that the bank controlled the execution of the transactions in terms of the mandates.

[47] Objectively viewed these factors, in my view, are but incidental connections to the business of the bank and do not as such when considered in light of other factors establish a sufficient link between the acts of the first respondent and that of the business of the bank. The other factors which need to be considered (amongst others) crucially entail the legal consequences of the contents of the mandates which I shall now consider.

[48] I shall refer to the mandates in the singular since all of them employ exactly the same language.

[49] The mandate is an uncontested document and the language used is clear and unambiguous. It gave the first respondent the appellant's authority to act as the appellant's 'assignee' in all matters and affairs which relate to the appellant's business transactions with the bank.

[50] The Shorter Oxford English Dictionary refers to an 'assignee' as:

1. a person to whom a right or property is legally transferred,
2. a person appointed to act for another, a deputy, an agent, a representative.'

[51] It serves little purpose in my view, in distinguishing, like counsel for the appellant endeavoured to do between the nature of a 'mandate' and that of an

'authority' in order to make a legal point. The fact of the matter is that the appellant appointed the first respondent as her representative or as her agent. The authority given to the first respondent in terms of the mandate was quite extensive as a perusal of the mandate itself would reveal. The first respondent when conducting transactions on behalf of the appellant, and in terms of the mandate, stepped into the shoes of the appellant, as if she was the appellant herself. Irrespective of the incidental factors referred to in paragraphs [26] and [47], the first respondent was the agent of the appellant, irrespective of how one may define 'agent'.

[52] It was conceded by the appellant that the first respondent could not have misappropriated the monies had the mandates not been in place – it was not part of the duties of the first respondent to sign documents on behalf of the clients or to give instructions on behalf of clients to the bank to withdraw and/or transfer funds from those clients' bank accounts.

[53] The submission that the bank controlled the execution of the transactions in terms of the mandates or that the first respondent had to obtain approval from a senior official to obtain the mandates, or that the bank sanctioned the mandates must objectively be seen in light of the fact that where a transaction had been processed and authorised by another bank official, it was done by that bank official to give effect to the authority given to the first respondent by the appellant in terms of the mandates.

[54] Importantly, in the mandate the appellant bound herself as 'surety', insofar as the bank is concerned, that all acts of the first respondent shall be binding on the appellant, and that the authority given to the first respondent shall remain in force until altered or cancelled by the appellant, in writing. The bank was given an assurance by the appellant that she would be bound by all acts performed by the first respondent. This was an unqualified assurance given to the bank.

[55] In my view, the fact that the appellant in the mandates gave authority to the first respondent to act as her 'assignee' together with the fact that the appellant unreservedly bound herself to all transactions performed by the first respondent point to the conclusion that the first respondent did so as an independent individual and not as an employee of the bank.

[56] Another question which needs to be considered in respect of whether the misappropriation of monies is a sufficiently close conduct authorised by the bank, is the issue of the creation or enhancement of a risk and the delict which flows therefrom. Relevant in this regard is the relationship between the appellant and the first respondent as well as the appellant's conduct *vis-à-vis* the first respondent.

[57] The court *a quo* described the relationship between the appellant and the first respondent as 'diverse'. From the evidence presented it is clear that they had known one another as far back as the year 2001, when the first respondent became a tenant of the appellant. The first respondent collected rent from the other tenants and she and her partner, operated at some stage, a bar from the premises belonging to the

appellant. On a personal level the appellant was the confidant of the first respondent. The appellant on more than one occasion lent money to the first respondent. I agree that the relationship went beyond a client / personal banker relationship.

[58] It appears to me that it was exactly because of this relationship that the appellant was very reluctant to cancel the mandates (because she trusted the first respondent) when it came to her knowledge shortly after signing the mandates in 2014 that the first respondent stole money from the appellant's daughter. In spite of appellant's knowledge that the first respondent experienced financial difficulties, appellant retained the first respondent as her 'assignee' who had the right to deal with all the appellant's bank accounts as first respondent wished.

[59] As I indicated hereinbefore, it was not part of the first respondent's employment duties with the bank to act as an agent for a client. Thus when appellant signed the mandates, given the knowledge of their personal relationship, the appellant created a risk associated with such mandate. Moreover, the appellant enhanced the risk when she failed to cancel the mandates (in writing) in spite of her knowledge of the personal and financial circumstances of the first respondent. The appellant also never laid a criminal charge against the first respondent.

[60] As was stated in *Absa Bank (supra)* a 'master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must have been done by the servant in his capacity *qua* servant

and not as an independent individual'. In the present matter, the first respondent misappropriated the monies during official working hours and all the other employees, including the bank manager, were aware of the fact that the first respondent was the assignee of the appellant. Nevertheless, the unlawful conduct of the first respondent, viewed objectively, was in my view, unconnected with her duties at the bank. When misappropriating monies, the first respondent did not act in her capacity '*qua* servant', and thus there is no sufficiently close link between her misconduct and the purposes and business of the bank. The second question posed in *Rabie* and *K* must therefore be answered in the negative.

[61] In my view, there is a significant connection between the creation or enhancement of the risk (namely that the first respondent may go beyond the scope of her mandate) and the wrong that accrues therefrom (ie the misappropriation of monies belonging to the appellant) a risk created by the appellant herself, and not by the bank.

[62] In view of the aforesaid finding not one of the grounds of appeal raised by the appellant can succeed.

[63] In conclusion, it cannot be said that the appellant had proved during the trial on a preponderance of probabilities that the duties of the first respondent were closely connected to her mandate and that there was thus a sufficient link and/or connection which could qualify the first respondent to have acted within the course and scope of her employment. In my view, the court *a quo* did not misdirect itself when it found that she did not. I am further of the view in any event, that having regard to the values of

justice and fairness embodied in the Namibian Constitution, the particular facts of this case and in view of the creation and enhancement of the risk created by the appellant, a finding of vicarious liability would not be fair and justifiable in the circumstances.

[64] In the result the following order is made:

The appeal is dismissed with costs including the costs of one instructing and one instructed legal practitioner.

HOFF JA

SHIVUTE CJ

ANGULA AJA

APPEARANCES

APPELLANT:

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