

CASES

David Trust

Issue: The business of a bank

Facts: The appellant hires a firm of accountants (KS) to run their business, KS in addition invested certain money on their client's behalf, the money were repayable on demand. A partner in KS used the money and KS was unable to repay the amount and was liquidated.

The appellant claimed in terms of Section 156 of the Insolvency Act from the respondent under insurance policies that KS had taken out, which covered them for loss due to breach of their professional duties.

Court a quo: Insurer is not liable:

1. KS was carrying on the business of Bank;
2. Against public policy to insure against own unlawful conduct (doing the business of a bank without being registered as a bank);
3. Breach was not the kind of breach contemplated in insurance policy and therefore not covered.

Appeal: Upheld with costs

Contract between the appellant and KS was a contract of mandate;

Requirement of mandate is that the duties must be performed honestly with care and skill and the mandatory should be accountable to the principle for their actions. KS committed a breach of mandate.

KS was not getting deposits from the appellant but executing their mandate by investing money.

KS was not performing the business of a bank.

NB!!! Diners Club SA

Issue: Relationship between the Cardholder and Issuer**Facts:**

In terms of written contracts between the plaintiff and the defendants, the plaintiff had issued each of the defendants with a credit card. In terms of the contracts, the cardholder would be liable irrespective of who used the PIN of the cardholder. In an action by the plaintiffs against the defendants for payments of amounts allegedly withdrawn by use of the credit cards, the defendants denied that they had withdrawn the amounts, alleging that it must have been withdrawn by another, unknown person using the defendants PIN.

It was suggested that a clause imposing liability on the cardholder in circumstances where someone else has used his card and his PIN was against public policy. The legal onus of establishing that a term in a contract is contra bonos mores rests on the defendants.

Court decision:

The court held that manifestly a clause of this nature was intended to protect the plaintiff and the plaintiff is entitled to protect itself by placing the risk of wrongful user on its customer.

The court also said that the defendants had accepted their cards knowing that they would be bound by the contractual terms and conditions. They were not obliged to apply for PINs. When they did so they ought to have known of the term applicable to the use of PINs.

Durr

Issue: The Banks duty of care.

Facts: The appellant, a client of the bank, lost a money because of poor investment advise given by one of the bank's investment advisors.

Court held:

The test to establish whether the advisor had acted negligently = whether he failed to act with the necessary skill and knowledge of a regional manager of the broker division of a bank professing investment skill and offering expert investment advice. The court held that the advisor acted negligently and the bank was held liable (vicarious liability).

Zamzar Trading

Issue: Banks liability

Facts: The court had to determine a banks liability towards a customer who attempted to recover loss suffered as a result of a fraudulent scheme in which he himself participated.

The Bank had no knowledge of the unlawfulness of the contract between the customner and a third party.

Court decided:

To hold someone liable irrespective of whether he had knowledge of wrongdoing went against the principle of wrongfulness.

There was no evidence that the bank had breached its contract with the plaintiff or that such contract was unenforceable.

The bank had merely held money legally for the plaintiff and unknowingly assisted in wrong doing. Public policy requires that a bank should not be so liable in that such a liability would be destructive of banking practice.

Would be different after FICA and the Know-your-customer obligation

Chaucer Publications

Issue: Banks duty of confidentiality

Facts: The respondent published a number of articles in magazines. The applicant (FirstRand Bank) claimed defamation to itself and some of its clients. Applied for an interdict to stop the respondent from publishing the identities of the client mentioned in the articles.

decided:

terms of public policy the relationship between a bank and its client is confidential.

The client has the privilege not to have details of its dealings with a bank disclosed.

The bank does not enjoy the privilege.

Application was dismissed as the bank failed to establish locus standi in terms of section 38 of the constitution.

Court

In

Mensky

Issue: Banks duty to exercise reasonable care

Facts: The plaintiff rented a safety deposit locker from the bank.

The safety locker was misplaced by the defendant when it was relocating to new premises.

The bank had undertaken to exercise reasonable care for the security of the locker area, but that the client was responsible for the insurance of the contents of the locker.

Court decided:

The provision of the locker did not warrant an undertaking by the bank that could result in substantial liabilities.

The bank did not breach its obligation as it notified the client that it was relocating

Rosenblum

Issue: Banks liability

Facts: Contents of safety deposit box was stolen due to the negligence of the banks staff.

Contract provided that while the bank will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody, whether the loss or damage is caused by the banks negligence or not.

Court decided:

The bank as a non-human entity (juristic person) was incapable of being negligent itself.

The indemnity also covered gross negligence.

Seevnarayan

Issue: Was the property an "instrumentality of an offence" or proceeds of unlawful activity? Should the properties be forfeited to the state in terms of the Prevention of Organised Crime Act.

Court held:

It could not be found that the property was instrumental to the offence.

Columbus Joint Venture

Issue: Banks duty to identify new clients. The difference between new clients and existing clients when it comes to identifications.

Facts: An employee of the appellant opened an account with the bank in the names of S & H. A franchise agreement between S & H and the appellant was given to the bank. The agreement required that the franchise operate a bank account in the name of S & H. The appellant was an existing customer at the bank. The franchise agreement was a fraud and the appellant suffered a loss which they wanted to recover from the bank because the the bank failed to establish whether the franchise agreement was authentic and whether S & H existed.

The bank did authenticate the customer/appellants ID and personal details.

Appeal:

The bank did not breach its duty.

Appeal was dismissed with costs.

Transitional Council of Randfontein

Issue: 1) Did the bank through the actions of the teller take possession of the money and thereby complete deposit?

2) Contract of deposit (depositum) - who bears the onus?

Facts: In terms of an agreement between the local council and the bank, the bank would send an employee to the council's premises to count and verify cash and cheques intended to be deposited with the bank. The teller issued, stamped and initialled deposit slips. She put cash in a bag which had to be collected by a cash-in-transit security.

Before collection the bag with money was stolen.

Local council - insisted its account be credited with the amount stolen.

Bank - denied that money was deposited - argued that loss was for the account of the local authority.

Bank's counter-claim: that council had a duty of care to safe-guard

Court decided:

1) The court held that the conduct of the teller constituted the taking of deposit.

Ownership of the money passed to the bank.

2) The court held that the parties were engaged in a contract of deposit. The onus was on the depositary (the council) to prove that the loss occurred despite due diligence on its part. However, the court decided in the present case that the claim was couched in delictual terms and not contract. The onus was on the bank to prove that the money was lost as a result of the council's negligence. This was an objective test - reasonable person in the same circumstances.

The court finally decided that the council did not breach its duties under the contract of deposit and the counter claim of the bank was accordingly dismissed with costs.

Joint Stock

Issue: Does someone besides the account holder have a claim to money in the account?

Facts: Bank appropriated money, which was credited to the account of one of its clients, in set off of the amount due by the client to the bank.

The appellant had used the account for the purpose of paying subcontractors hired by himself.

The bank claimed that the amount deposited in the account had become the bank's property.

Appeal court held:

It is incorrect to assume that only an account holder may assert a claim to money deposited in its account with a bank.

Money deposited into a bank account belongs to the bank, but depending on the circumstances another person besides the account holder may have a valid claim to this money. In this case the bank was aware of the purpose of the account from the beginning of the relationship.

The appeal was successful.

Re Charge Card Service

Oeanate Invest

Issue: The nature of the contract between the bank and customer.

Facts: Bank lent Oeanate an overdraft.