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GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (DEPARTMENT OF INDUSTRIES) v FIBRE SPINNERS & WEAVERS (PTY) LTD 1977 (2) SA 324 (D)

Citation	1977 (2) SA 324 (D)
Court	Durban and Coast Local Division
Judge	Didcott J
Heard	June 8, 1976
Judgment	February 1, 1977
Annotations	Link to Case Annotations

G

Flynote : Sleutelwoorde

Bailment - Liability of bailee - Delegation of obligations by bailee - Bailee's liability has nothing to do with vicarious responsibility of master for the conduct of his servant - Bailor's grainbags stored for reward in bailee's store - Grainbags stolen H from store by thieves of which one was bailee's servant - Bailor alleging gross negligence by bailee - Alleged grounds of gross negligence falling short thereof - What constitutes gross negligence. Bailee, in letter from bailor, "... absolved from all responsibility for loss of or damage howsoever arising in respect of..." the grainbags in consideration of bailee insuring in an all risks policy such grainbags - Scope of bailee's exemption from liability - Exemption applying to negligence by bailee and its servants and to loss caused by theft by its servant is - No principle of insurance law whereby theft by

bailee's servants excluded from cover of policy - Exemption wide enough to exempt bailee from consequences of "fundamental breach" of contract - Stipulation in insurance policy that bailee was to "take all ordinary and reasonable precautions for the safety of the property A insured" - Such governing bailee's relationship with insurer only and not affecting exemption in bailor's letter - Insurance - All risks policy - - No principle of insurance law whereby theft by insured's servant not covered by policy - Stipulation in policy that insured was "to take all ordinary and reasonable precautions for the safety of the property insured" - Property insured the property of B bailor stored with insured under a contract of deposit - Stipulation governing the insured's relationship with insurer and not with the bailor - Bailee has insurable interest in the goods deposited with him - Scope of.

Headnote : Kopnota

The bailee's liability in a case of delegation by him of his C obligations has nothing, in theory, to do with the vicarious responsibility of a master for the conduct of his servant. The principles and policies which have influenced the law's development in each direction are no doubt similar, and much the same factual enquiry may often be relevant to both categories of liability. But the one is notionally quite distinct from the other. The bailee's liability lies in the field of contract. It ensues from the non-performance without adequate excuse of his contractual duty to retain and return the property intact, which is unaffected by its delegation and D continues to bind him notwithstanding that fact. The master's vicarious responsibility, on the other hand, belongs to the law of delict. What is more, it does not depend on the breach of any duty owed by the master. The servant's delictual wrong committed in the course of his employment, when proved as a fact, is that for which the master must answer.

There is no principle of insurance which deprives an all risks policy of insurance of its effect in the case of theft of the E property insured by the insured's servants. Subject to one limitation, a person may effectively insure against the consequences of his own conduct, even if it is culpable. He may be indemnified, for instance, against loss or damage resulting from his own negligence, gross negligence or recklessness. The limitation referred to applies to a wilful or deliberate act bringing about the risk, especially but not only when it is a crime. An insured who perpetrates such an act is not entitled to indemnification against its consequences. The rule extends F to the same behaviour on the part of anyone acting with the consent or acquiescence of the insured. But, unless the insured acquiesced in or consented to it, the conduct of his servant is not hit. Although a master may sometimes he liable for his servant's actions, the act of the servant is not the act of the master. This distinction, which is of general validity, has been drawn in the particular field of insurance law. Dealing with conditions in policies which referred to the acts of policyholders, the Courts have refused to treat the acts of G their employees as such.

A bailee has an insurable interest in the goods deposited with him. He may insure them for their full value, and he may recover it from the insurer if they are lost. He must then account to the bailor for what he has received.

Plaintiff had instituted action against the defendant for damages for the loss of certain grainbags which had been stored by defendant for reward in terms of a contract of deposit. In terms of a letter written by the plaintiff, the defendant was, in consideration for the defendant arranging and maintaining an H all risks insurance policy covering the grainbags, "absolved from all responsibility for loss of or damage howsoever arising in respect of..." the grainbags. The exemption contained in the letter was limited in one respect: it applied only to property lost or damaged"... whilst in the care of your company and in or upon any premises owned or used by your company...". Over a period of time the grainbags were stolen by three persons, one of whom was the defendant's chief security officer. In order to avoid the exemption contained in its letter to the defendant, the plaintiff in its particulars of claim averred that defendant's chief security officer, in assisting in the theft of the grainbags, was acting in the course of his employment with the defendant and that

the damages had been caused by the gross negligence of the defendant in appointing a security officer who was not competent or qualified to carry out his duties honestly, in failing to 'exercise sufficient and proper control over the manner wherein the security officer carried out his duties, in describing the security officer's duties in a manner which enabled him to commit the thefts, in failing to keep control of A the stocks in the store, in failing to take measures to prevent the unlawful removal of stocks from the store and in not keeping adequate records of the stocks in the store. Plaintiff also averted that defendant was vicariously responsible for thefts in which its servant, the chief security officer, had assisted. Relying on the letter of exemption written by plaintiff to defendant, defendant excepted to the particulars of claim on the ground that the facts alleged were B insufficient to support the cause of action. Plaintiff contended that the exemption should be so construed as to mean that defendant was not absolved from liability if it was guilty of gross negligence. It was further contended that it did not apply where the grainbags were lost through the negligence of the defendant or its servants, or where such loss was caused by its own servant's theft of the bags and that the insurance policy did not indemnify the defendant against theft by its own servants. Plaintiff further contended that defendant was guilty C of what amounted to a "fundamental breach" of its contract and that the exemption did not protect the defendant in a situation as grave as that. In addition, the plaintiff contended that, as the insurance policy stipulated that the defendant was to "... take all ordinary and

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reasonable precautions for the safety of the property insured" and the letter of exemption referred to the policy, and thus to such stipulation, the parties could not have intended the defendant to be free from liability for its negligent loss of the grainbags when, simultaneously with the grant of the exemption, its duty under the policy to be careful of them had been noted.

D *Held*, that plaintiff's allegations fell noticeably short of what was required to establish gross negligence: there was nothing in the allegations which smacked of wanton irresponsibility. All that had been pleaded was a lack of reasonable care in various respects and the charge, when all was said and done, was one of ordinary negligence, and neither its true nature nor its real gravity had been increased by the plaintiff's use of an exaggerated adjective to describe it.

E *Held*, further, that, if the language used in the letter of exemption was to be understood literally, the defendant was not to have been liable for any loss at all of grainbags, whatever its cause or the circumstances of its occurrence.

Held, further, that the contention that the exemption was not meant to apply to the loss of grainbags through the negligence of the defendant or its servants could not be accepted as it left no room at all for the exemption to operate, and therefore deprived it of all force: a bailee was not in any event liable F when there was no such negligence.

Held, further, in regard to the contention that the exemption did not apply to loss caused by the theft of the grainbags by defendant's servants, that *prima facie* the language of the exemption was wide enough to cover such loss and that it in fact did so was the conclusion to be drawn from the rest of the letter of exemption: the effect of the exemption was that the G defendant's duty to arrange for and maintain the specified insurance, to keep it in force and to pay for it, was substituted for the ordinary liability of a bailee in the event of the property's loss or damage to it.

Held, further, that there was no principle of insurance which deprived the insurance policy of the effect of covering thefts by the defendant's servants.

Held, further, that it followed that, when the exemption was granted, it must have been appreciated that the defendant would H have had a claim under the policy in question for the loss of any grainbags through the theft of its servant.

Held, further, if there was a "fundamental breach", as contended, it did not matter: the exemption was sufficiently wide to exempt the defendant from the consequences, of the breach alleged against it.

Held, further, that the contention, based on the stipulation in the insurance policy that defendant was to take all ordinary and reasonable precautions for the safety of the property insured, had no merit as the stipulation governed the defendant's relationship with the insurer and not the plaintiff; and the result of its default in that connection would have been, not its liability for the loss of the insured property, but simply the insurer's right to repudiate a claim under the policy.

Held, accordingly, that the defendant was entirely exempt from liability and it followed that the particulars of claim disclosed no cause of action. Exception allowed.

Case Information

Exception to plaintiff's particulars of claim. The nature of A the pleadings appears from the reasons for judgment.

D. J. Shaw, Q.C. (with him *P. M. Meskin*), for the excipient (defendant).

I. W. B. de Villiers, S.C. (with him *P. M. Nienaber*), for the respondent (plaintiff).

Cur. adv. vult.

Postea (February 1). B

Judgment

DIDCOTT, J.: The plaintiff is suing the defendant for damages amounting to R207 843. The defendant has filed an exception to the plaintiff's particulars of claim, which must now be decided. According to the defendant, they do not disclose a C cause of action.

The particulars of claim start with the allegations that a contract was concluded between the plaintiff and the defendant; that the defendant thereby undertook for reward to manufacture jute grainbags for the plaintiff, to release them to the plaintiff as and when the plaintiff required it to do so, and in the meantime to store them in its premises D for the plaintiff; that 477 800 grainbags worth R207 843 altogether, which the defendant had manufactured and was storing for the plaintiff under the agreement, were stolen from the defendant's premises over a period of about nine months and not recovered; and that the plaintiff, E to which the stolen grain-bags belonged, thus lost them.

The defendant is liable to compensate the plaintiff for such loss, so the particulars of claim continue, on one or another of the grounds that:

(a) the defendant, unable as it now is to release the grainbags in question to the plaintiff as and when required, is in breach of its contract with the plaintiff;

(b) the defendant is vicariously responsible to the F plaintiff for the thefts;

(c) the thefts resulted from the defendant's gross negligence, or, alternatively, from its negligence.

The plaintiff has fired this salvo, rather than a single shot, in an attempt to penetrate the protection gained by the defendant from what are said to have been supplementary terms G of the contract, added after its conclusion but before the thefts, which governed the storage of the stolen grainbags. According to the particulars of claim, they were recorded in a letter to the defendant which the Secretary for Industries wrote on the plaintiff's behalf. A copy of the letter is attached to the particulars of claim. The relevant part of it goes like this:

> "2. In consideration of Messrs. Fibre Spinners and Weavers H arranging, and keeping in force, insurance as detailed in para. 2 hereunder, you are hereby absolved from all responsibility for loss of or damage howsoever arising in respect of this department's stocks of... finished jute... products whilst in the care of your company and in or upon any premises owned or used by your company and/or any of its associated or subsidiary companies; but
>
> 3. it shall be your company's responsibility to maintain, with my department's interest properly noted in the policies, insurance in the following forms:
>
> (i) Grainbags:
>
> Cover as reflected in all risks policy BAR 0512000280 (or any policy issued in

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> replacement). Every year this policy is renewed the Department must be advised of its renewal *(a)* stating that none of the conditions contained in the original policy has been changed and *(b)* furnishing the Department with a photostat or certified copy of the renewal receipt.
>
> (ii) ...
>
> A 4. Premiums payable by yourselves in respect of the insurance cover under para. 3 (i) above shall continue to be borne by yourselves...".

Counsel agreed that the reference in para. 2 of the letter to "para. 2 hereunder" was a mistake, and that these words were to be read as if they had been "para. 3 hereunder". The stolen B grainbags, it was likewise common cause, were "finished jute products" for the purposes of para. 2 of the letter.

The papers also contain a copy, annexed to further particulars amplifying the particulars of claim, of an all risks insurance policy numbered 0512000280. The further particulars identify it as the policy specified in para. 3 (i) of the letter, and C assert that it was already in force when the letter was written. One learns from the copy that the "cover as reflected in all risks policy BAR 0512000280", as the letter put it, included the insurance, against the risk of loss by theft, of jute bags owned by the plaintiff and stored in the defendant's premises. The copy furthermore shows that the policy was issued D in favour of both the Jute Industry Control Board and the defendant, which it collectively described as "the insured". It is common cause that the Jute Industry Control Board must be equated for present purposes with the plaintiff.

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In an effort to steer clear of the exemption from liability which the letter granted to the defendant, the plaintiff has E pleaded various limitations to it. Somewhat elaborate permutations have been used, which base the separate causes of action upon different interpretations of the immunity's extent. What they amount to is this. Under the heading of each alternative ground for attack on the defendant, the plaintiff has alleged that, according to the true construction of the letter, the defendant was absolved from liability on all the other grounds, but not on that particular one.

F All the causes of action but the first need further explanation. Paras. 10 to 13 of the particulars of claim contain the plaintiff's allegations in support of its case that the defendant is vicariously responsible to it for the thefts. Its case of gross negligence, or alternatively of negligence, emerges on the other hand from para. 14 of the particulars of claim. Referring to the defendant's store where the grainbags G were kept and from which they were stolen as "die gemelde store" or "die gemelde bergingstore", the paragraphs in question read as follows:

"10. Die gemelde diefstal is gepleeg deur ene Jan Abezini van Wyk, ene Robert Milburn en wyle R. F. Milburn wat in samewerking met mekaar opgetree het.

H 11 *(a)* Te alle tersaaklike tye was gemelde R. F. Milburn in diens van die verweerder as die hoof sekuriteitsbeampte.

(b) In sy hoedanigheid as hoof sekuriteitsbeampte was die veilige bewaring van die gemelde sakke sowel as die toegang tot die gemelde store onder sy direkte beheer en toesig.

12. Die gemelde diefstal in para. 10 vermeld is moontlik gemaak deur die aktiewe en doelbewuste medewerking van gemelde R. F. Milburn wat in sy voormelde hoedanigheid:

(a) die hekke wat tot die gemelde store toegang verleen vir gemelde Van Wyk en gemelde Milburn oopgesluit het; en

(b) gemelde Van Wyk en gemelde Milburn toegelaat het om die gemelde sakke ongestoord uit die gemelde store te laat A verwyder, op voertuie te laai en aldus weg te karwei.

13. Deur sy optrede vermeld in paras. 10 en l2 hiervan het gemelde wyle R. F. Milburn gehandel gedurende en binne die bestek van sy diensverhouding met die verweerder.

14 *(a)* Te alle relevante tye het die verweerder die direkte fisiese beheer en kontrole oor die gemelde sakke op B hom geneem en uitge-oefen.

(b) In die omstandighede het daar regtens 'n plig op die verweerder gerus om die gemelde beheer en kontrole op 'n behoorlike, voldoende en redelike wyse uit te oefen.

(c) Die verweerder het nagelaat, in stryd met die plig in C sub-para. *(b)* vermeld, om die gemelde beheer en kontrole op 'n behoorlike, voldoende en redelike wyse uit te oefen ten gevolge waarvan die gemelde sakke gesteel is en die eiser skade gely het, soos voormeld.

(d) Die gemelde skade is veroorsaak deur die growwe nalatigheid, alternatiewelik, die nalatigheid van die D verweerder wat in een of meer van die volgende opsigte nalatig was:

(i) hy het 'n persoon as sekuriteitsbeampte aangestel wat nie bevoeg en bekwaam was om die pligte van 'n sekuriteits-beampte behoorlik en eerlik uit te oefen nie;

(ii) hy het nagelaat om toe te sien dat daar 'n E voldoende en behoorlike kontrole uitgeoefen word oor die wyse waarop gemelde sekuriteitsbeampte sy pligte uitvoer;

(iii) hy het die pligte van die gemelde sekuriteitsbeampte 50 ingeklee dat hy laasgenoemde in staat gestel het om die pleeg van 'n diefstal van 'n aansienlike aantal sakke oor 'n lang F tydperk moontlik te maak en te bewerkstellig;

(iv) hy het nagelaat om enige, alternatiewelik, voldoende kontrole uit te oefen oor die voorraad wat oor die relevante tyd in die gemelde bergingstore gestoor was;

(v) hy het nagelaat om voldoende en redelike voorsorgmaatreëls te tref om te verhoed dat 'n groot hoeveelheid sakke oor 'n lang tydperk uit die gemelde store verwyder word;

(vi) hy het nagelaat om voldoende, alternatiewelik, redelike voorsorgmaatreëls te tref om onmiddellik vas te stel of enige van die sakke uit die gemelde store op H onregmatige wyse verwyder is;

(vii) hy het nie voldoende en tydige voorraadopnames van die voorraad in die gemelde store gemaak nie."

The defendant sought further particulars in this connection. It asked the following questions:

"2. Paras. 12 and 13:

(1) In what sense is it alleged that R. F. Milburn was acting in his capacity as chief security officer ('in sy voormelde hoedanig-heid') in acting as set out in para. 12?

(2) In what sense is it alleged that the said R. F. Milburn was acting in the course of his employment in acting as set out in paras. 10 and 12?

(3) In particular, is it alleged that it was part of the A said R. F. Milburn's employment:

(a) to co-operate with persons stealing goods under his care?

(b) to open the gates so as to allow persons to enter in order to steal goods?

(c) to allow persons to act as set out in para. 12 *(b)*?

B 3. Para. 14 *(c)*:

(1) Are the particulars of the manner in which the defendant failed to carry out its duties set out in para. 14 *(b)*, as alleged in para. 14 *(c)*, those set out in para. 14 *(d)*?

(2) If not, full particulars are required.

C 4. Para. 14 *(d)*:

(1) By the allegation that the damage was caused by the gross negligence of the defendant, is it intended to allege:

(a) that the defendant acted deliberately and knowingly as set out in paras. (i) to (vii)?

(b) that the defendant acted recklessly as there set out?

D *(c)* that the defendant acted in some other manner constituting gross negligence and, if so, in what manner?

(2) If it is alleged that the defendant acted knowingly, when, where and through what person did the defendant acquire any relevant knowledge?"

E The plaintiff supplied the further particulars which had been requested. It replied thus to the defendant's questions:

"2. Ad paras. 12 en 13:

(1) In die sin dat gemelde R. F. Milburn die hoof sekuriteitsbeampte was toe hy sy medewerking verleen het soos uiteengesit in para. 12, en dat hy as gevolg F van sy gemelde amp juis in 'n posisie was om die verwydering van die sakke deur Van Wyk en Robert Milburn moontlik te maak soos in para. 12 uiteengesit. Dit was deel van sy funksies om toegang tot gemelde persele te beheer.

(2) In die sin dat verweerder op grond van middellike aanspreeklikheid aanspreeklik is vir gemelde G diefstal, soos ook uiteengesit is in para. 16 *(b)* van die besonderhede van vordering.

(3) *(a)* Nee.

(b) Nee.

(c) Nee.

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3. Ad para. 14 *(c)*:

(1) Ja.

H (2) Hierdie vraag val weg.

4. Ad para. 14 *(d)*:

(1) *(a)* Nee.

(b) Nee.

(c) Nee. Die besonderhede vervat in para. 14 *(d)* (i) tot (vii) van die besonderhede van vordering is die besonderhede van verweerder se growwe nalatigheid, en in die alternatief is dit besonderhede van verweerder se nalatigheid.

(2) Sien para. 4 (1) *(a)* hierbo. Hierdie vraag val dus weg."

The reference in para. 2 (2) of this answer to para. 16 *(b)* of the particulars of claim added nothing significant. The relevant part of the latter is merely the blunt assertion that:

> "Uit hoofde van die voorgaande is die verweerder op grond A van middellike aanspreeklikheid vir gemelde diefstal... verplig om aan eiser gemelde bedrag van R207 843 te betaal."

The main point made in the exception is that, in terms of the letter which the Secretary for Industries wrote to it, the defendant is exempt from liability on each of the separate B grounds advanced by the plaintiff. Two of them, the defendant's vicarious responsibility for the thefts and its gross negligence, have drawn additional fire. According to the exception, the facts alleged in the particulars of claim, as read with the further particulars, are insufficient in any event to support either ground.

In its relevant respects the contract between the plaintiff and the defendant was one of bailment (or deposit) for reward. The C ordinary results of such a contract which have a bearing on the present case should first be considered. They have been explained in many cases, of which the best known in this country are no doubt *Weinberg v Oliver*, 1943 AD 181 at p. 187; *Rosenthal v Marks*, 1944 T.P.D. 172 at p. 176; *Essa v Divaris*, 1947 (1) SA 753 (AD) at pp. 763 - 6; and they are D the following. The bailee (or depositary) is *prima facie* liable to compensate the bailor (or depositor) for the loss of or damage to the property left with him by the bailor. This is so because the duty which the contract imposed on him was to keep the property under his control, to preserve it, and in due course to restore it intact to the bailor. He is not, on the E other hand, the insurer of the property. He can therefore avoid liability, but only if he proves that he took all reasonable care of the property which the circumstances demanded, yet it was lost or damaged in spite of his diligence. As TINDALL, J.A., remarked in *Essa v Divaris, supra* at p. 769:

> "... the onus which lies on the bailee arises as an inference from the nature of the contract, which places him under an F obligation to return the article or to prove the reason why he has failed to do so."

That the property was stolen by someone else is not in itself a sufficient answer. Dealing with the test to be passed by the bailee in that situation, MURRAY, J., said in *Rosenthal v Marks*, supra at p. 176:

> "... even if the loss be shown to be the result of theft by a third person, he does not avoid liability unless he proves that G such theft occurred despite the observance by him of the precautions expected to be taken."

The bailee's duty to keep the property under his control, and to see to it that the bailor eventually gets it back undamaged, may be delegated by him to any of his servants. But he cannot thereby rid himself of any part of the duty or lighten his own task in accounting for the property. It follows that, when there has been such a delegation, the bailee remains H responsible for the loss of or damage to the property unless he demonstrates, not only that he personally did everything which was reasonably necessary to keep it safe, but also that the servant to whom he entrusted it did likewise. He is obviously unable to prove this once it emerges that, far from having looked after the property, the servant actually stole it. In such a case he is therefore liable. The point was made very clearly by Lord DENNING, M.R., in the following extract from his judgment in *Morris v C. W. Martin and Sons*

Ltd., (1966) 1 Q.B. 716 (G.A.) at p. 726A - F:

> "Once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe, and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged whilst they are in his A possession, he is liable unless he can show - and the burden is on him to show - that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his.... The bailee, to excuse himself, must show that the loss was without any fault on his part or on the part of his servants. If he shows that he took due care to employ trustworthy servants, and that he and his servants exercised all diligence, and yet the goods were stolen, he will be excused; but not otherwise. Take a case where a cleaner hands a fur to one of his servants for B cleaning, and it is stolen. If the master can prove that thieves came in from outside and stole it without the fault of any of his servants, the master is not liable. But if it appears that the servant to whom he entrusted it was negligent in leaving the door unlocked, or collaborated with the thieves, or stole the fur himself, then the master is liable."

The principles of bailment in our law surely lead to the identical conclusion, which seems to be dictated in particular C by what was said about the delegation of contractual obligations in *Weinberg v Oliver, supra* at pp. 187 - 8, and *South British Insurance Co*. v *Do Toit*, 1952 (4) SA 313 (SR) at p. 318E.

The bailee's liability in a case of delegation, as I see it, has nothing in theory to do with the vicarious responsibility D of a master for the conduct of his servant. The principles and policies which have influenced the law's development in each direction are no doubt similar, and much the same factual enquiry may often be relevant to both categories of liability. But the one, so it seems to me, is notionally quite distinct from the other. The bailee's liability lies in the field of E contract. It ensues from the non-performance without adequate excuse of his contractual duty to retain and return the property intact, which is unaffected by its delegation and continues to bind him notwithstanding that fact. The master's vicarious responsibility, on the other hand, belongs to the law of delict. What is more, it does not depend on the breach of any duty owed by the master. The servant's delictual wrong F committed in the course of his employment, when proved as a fact, is that for which the master must answer.

But for the exemption from liability, the plaintiff could therefore have pleaded that the defendant was liable to it for the loss of the grainbags in question on the simple grounds that it was their owner, that, in terms of a contract of G bailment for reward, it had left them with the defendant as the bailee, and that the defendant was unable to deliver them to it. In order to explain what had prevented the defendant from doing so, it might have added that they had been stolen. It would then have been for the defendant, when pleading in turn, to allege that the grainbags had been stolen, and thus lost, in spite of its own and its servants' reasonable care of them. That is the effect of the cases on the point, amongst which are H Lituli v Omar, 1909 T.S. 192 at pp. 193 - 4, and *Sirelitz (Pty.) Ltd. and Another v Siegers & Co. (Pty.) Ltd*, 1959 (3) SA 917 (E) at p. 919D - H. Having granted the exemption from liability, the plaintiff could still have pleaded in exactly the same way, if it had chosen to remain silent for the time being about the exemption and to leave it to the defendant to raise that topic in defence, where it strictly belonged. But, obviously realising that it would inevitably be confronted with the exemption, the plaintiff preferred to anticipate the defendant's answer and to endeavour in the particulars of claim to get past

it immediately.

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I have alluded to the plaintiff's different causes of action because that is how they have been pleaded in these circumstances. But, as soon as its case is viewed against the background of bailment which I have tried to sketch, what initially looked like separate grounds no longer A have that appearance. I shall explain why I say this.

According to the first charge against the defendant, it is liable under the contract of bailment for the loss of the grainbags in question. That is the effect of the accusation, though not exactly its pleaded form. Then, so the third ground B goes, the defendant's gross negligence or its negligence caused the loss, with the result, as I read the particulars of claim, that it is independently liable in delict. But the acts and omissions attributed to the defendant in this connection, and said to have amounted to gross negligence or negligence on its part, are no less relevant to or classifiable as such for the purposes of the enquiry into its contractual liability. C They all relate to the defendant's control of the grainbags and the premises containing them. It follows that, if the loss was indeed occasioned by the defendant's negligence in those respects, gross or otherwise, it is liable in any event under the contract, unless of course the exemption from liability has altered that. If on the other hand the defendant were acquitted of contractual liability because it was considered to have D taken all reasonable care of the grain-bags, no room would be left for the conclusion that it was negligent, grossly or at all, in a delictual setting. Nothing is to be gained, once this is so, from the attempt to attach to the defendant a responsibility in delict as an alternative to, or for that matter alongside, a contractual liability. The difference between the measure of damages for breach of contract and in E delict, for instance, does not affect the amount of the claim in this case and is irrelevant to it. The third cause of action thus adds nothing significant to the first.

The same, in my opinion, goes for the second, which is to say the allegation of vicarious responsibility.

One of the questions canvassed before me was whether a servant could be said to have acted in the course of his employment F when, having been employed to look after goods, he stole them instead and, what is more, did so for his own purposes. Using the classic test set out in such cases as *South African Railways and Harbours v Marais*, 1950 (4) SA 610 (AD) at pp. 616F - 617E, Mr. *Shaw*, who appeared for the defendant and contended for a negative answer to this question, argued that G the theft could not be described as a wrongful performance of the work entrusted to the servant or as anything ancillary to that, but fell altogether outside the scope of his employment. Mr. De Villiers, on the other hand, submitted on the plaintiff's behalf that I should follow the decision in *Morris v C. W. Martin and Sons Ltd., supra*, and thus answer H the question affirmatively.

I have already cited that case as authority for the proposition that, because of the special principles of bailment, a bailee for reward is ordinarily liable for the loss of property deposited with him which was stolen by his servant to whom he had delegated its custody. But the decision went somewhat beyond that point. A similar liability was cast on everyone who, as Lord DENNING, M.R., put it (at p. 728A - C):

> "... has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depradation."

This wider liability did not arise from any breach of contract. It was based on tort. And it had vicarious responsibility as one of its elements. All this is especially clear from the judgment of DIPLOCK, L.J. Referring to the defendants in that A case, with whom a fur had been left for cleaning and whose servant named Morrissey had stolen it, he said (at p. 737A - B):

> "They put Morrissey as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. What he was doing, albeit dishonestly, he was doing in the scope or course of his employment in the technical sense of that infelicitous but time-honoured phrase. The defendants as his masters are responsible for his tortious act."

B SALMON, L.J., who agreed, spoke (at p. 740A - B) of:

> "... the heresy... that any dishonest act on the part of a servant is necessarily outside the scope of his employment and the master cannot he liable for it unless done for his benefit or with his privity."

This belief, he added (at p. 740B - G), had led to:

> "... the startling proposition of law that a master who was C under a duty to guard another's goods was liable if the servant he sent to perform the duty for him performed it so negligently as to enable thieves to steal the goods, but was not liable if that servant joined with the thieves in the very theft."

I do not find it necessary to decide whether the "heresy" condemned by SALMON, L.J., is dogma in this country. I shall assume that it is not, and that the notion of vicarious D responsibility, as we understand it here, is large enough to accommodate behaviour like that for which the defendants were held liable in *Morris v C. W. Martin and Sons Ltd., supra*. What is important at present is to notice the limits to the doctrine recognised in that case. SALMON, L.J., spelt them out in the following passage from his judgment (at pp. 740G - 741G):

> "A bailee for reward is not answerable for a theft by any of E his servants, but only for a theft by such of them as are deputed by him to discharge some part of his duty of taking reasonable care. A theft by any servant who is not employed to do anything in relation to the goods bailed is entirely outside the scope of his employment and cannot make the master liable. So in this case, if someone employed by the defendants in another depot had broken in and stolen the fur, the defendants would not have been liable. Similarly, in my view, if a clerk F employed in the same depot had seized the opportunity of entering the room where the fur was kept and had stolen it, the defendants would not have been liable. The mere fact that the master, by employing a rogue, gives him the opportunity to steal or defraud does not make the master liable for his depradations."

Once all this is accepted, it seems to me that the doctrine takes the case against the bailee for reward no further than the ordinary principles of bailment. Theoretically, the bailee G may bear a vicarious responsibility in delict for his servant's theft of the property left with him, provided that the duty of looking after the property was delegated to the servant in some or other respect and was thus one which he was employed to fulfil. But in those self-same circumstances, as I understand the law, the bailee is contractually liable in any event. It may be open to the bailor to sue him in delict instead or in the alternative, and according to my assumption H it is. But the bailor achieves nothing useful by taking that winding route, rather than the more direct and obvious one. Indeed, as has happened in the present case, he is likely to get himself entangled in thickets which would otherwise have been avoided.

The plaintiff has alleged in this connection that, while he was employed by the defendant as its chief security officer, R. F. Milburn gave two other men access to the store containing the grainbags, allowed them to remove the grainbags from the store, and thus collaborated with them in the commission

of the thefts. If this is true, Milburn was plainly guilty of participation in the thefts. His was indeed the crucial contribution, without which they are unlikely to have occurred. As the defendant's chief security officer, he is then said in the particulars of claim to have controlled and supervised the store and to have had custody of the grainbags. It was moreover A his function, according to the further particulars, to control access to the store. These allegations, I consider, sufficiently make the case that the defendant had delegated to him the task of looking after the grainbags, or an important part of that activity at least.

The final point that I wish to make about the plaintiff's B pleaded case concerns the particular charge of gross negligence. In *Central South African Railways v Adlington & Co.*, 1906 T.S. 964 at p. 974, a contract of carriage at "owner's risk" was held not to have protected the carrier against liability for gross negligence. Dealing in *Essa v Divaris, supra*, with a stipulation for the accommodation of a C car in a garage at "owner's risk", the Appellate Division assumed without deciding (at p. 767) that it did not apply to gross negligence on the garage proprietor's part. Thus encouraged, the plaintiff introduced the allegation of gross negligence into the present case in the hope that, when the letter from the Secretary for industries was construed, it might be held not to have absolved the defendant from liability once he was guilty of that, and Mr. De Villiers argued that D this was how the letter should indeed be interpreted. But, before that question can arise, it must be established that gross negligence has in truth been alleged. Gross negligence is not, of course, an exact concept lending itself to a neat and universally apt definition. The degree of negligence which is called gross for one purpose may not necessarily be thought E such for another. There has

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however been some judicial discussion of the topic in connection with "owner's risk" clauses, and therefore in a context which is now relevant. MURRAY, J., said in *Rosenthal v Marks, supra* at p. 180:

> "Gross negligence... connotes recklessness, an entire failure to give consideration to the consequences of his actions, a total disregard of duty."

WESSELS, J., had much the same idea in mind in *Central South* F *African Railways v Adlington & Co., supra*. Having expressed it (at p. 973), he gave as an example of gross negligence what happens when:

> "... a person who takes charge of property leaves it so exposed that thieves may carry it off."

The allegations in this case, on the other hand, fall G noticeably short of the degree of blameworthiness thus postulated. Although virtually challenged to do so in the request for further particulars, the plaintiff declined to accuse the defendant of wilful dereliction of duty or even of recklessness. When asked what had then comprised the gross negligence of which it complained, the plaintiff pointed merely to the acts and omissions attributed to the defendant in H the particulars of claim and said there to have amounted either to gross negligence or to negligence. There is nothing in these which smacks of the wanton irresponsibility envisaged by MURRAY, J. All that has been pleaded is a lack of reasonable care in various respects. The charge, when all is said and done, is one of ordinary negligence alone, and neither its true nature nor its real gravity has been increased by the plaintiff's use of an exaggerated adjective to describe it.

This then is fundamentally the plaintiff's cause of action, as I at any rate

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see it. The defendant is obliged to compensate it for the loss of the grain-bags because they were stolen while the defendant had the custody of them as their bailee for reward. The A defendant cannot avoid liability on the grounds which would otherwise have enabled it to do so. In the first place, the defendant itself was negligent in its overall control of the situation. In the second, one of the defendant's servants, to whom it had delegated an important aspect of the task entrusted to it, participated in the thefts. It cannot therefore be said, as it must be for an escape from liability, that both the defendant and its servant took reasonable care of the B grainbags. This is not, it is true, exactly how the plaintiff has pleaded its case. But my para-phrase does not stray beyond its allegations or distort their true meaning and effect. Those which are essential, on the other hand, are covered. Except for the details amplifying them, and of course the information supplied about the exemption from liability, C the rest of the pleaded case strikes me, by and large, as superfluous elaboration which takes the litigation nowhere and may be ignored.

The question then is the extent to which the exemption from liability has impaired the plaintiff's cause of action, as I have reconstructed it. This depends on the interpretation of the letter written by the Secretary for Industries. It was D common cause between counsel that evidence could not shed any light on the meaning of the letter, and that it was safe and altogether appropriate to construe it at this stage of the proceedings.

The exemption was limited in one respect. It applied only to property lost or damaged:

> "... whilst in the care of your company and in or upon any E premises owned or used by your company and/or any of its associated or subsidiary companies."

Otherwise however, it was very widely expressed. The defendant was:

> "... absolved from all responsibility for loss of or damage howsoever arising in respect of this department's stocks of... finished jute... products."

As I read this, "howsoever arising" governs "damage" only, and not "loss" as well. In other words, the "loss of" the property F was the one contingency dealt with, while "damage howsoever arising in respect of" it was the other. But this does not mean that what was contemplated was loss caused by some events alone and not others. The word "loss" was not qualified in any way. What is more, one's attention is attracted by the appearance, immediately before the noun "responsibility", of the adjective "all, which must be given its due emphasis. If the language G used is to be understood literally, the defendant was not to have been liable for any loss at all of grainbags, whatever its cause or the circumstances of its occurrence.

I can find nothing in the purpose of the provision, as revealed by the letter, which tells against this literal meaning. The exemption was plainly designed to go far. The basic right of a H bailor is either to recover his property intact from the bailee or to call the bailee to account for its loss or damage. Yet, at the very least, a substantial inroad was made into the plaintiff's right to do that.

Mr. *De Villiers* contended that the exemption was not meant to apply to the loss of grainbags through the negligence of the defendant or its servants. The submission cannot however be accepted. It leaves no room at all for the exemption to operate, and therefore deprives it of all force. I say this because a bailee is not in any event liable when there was no such negligence.

For this reason the familiar stipulation in bailment for property to be kept at "owner's risk", expressed as laconically as that, is taken to absolve the bailee from responsibility for loss resulting from his own or his servants' negligence. *Rosenthal v Marks, supra* at pp. 179 - 80, and *Essa v Divaris, supra* at p. 767, decided as much. It is hardly A possible to attribute a lesser effect to the more explicit and emphatic terminology of the present provision. Mr. *De Villiers* tried to distinguish these cases by pointing to the words "whilst in the care of your company". He argued that they meant "whilst your company takes care", which was the same as "provided that your company takes care". In my opinion, they B mean nothing of the sort. They mean "whilst in the custody of your company".

What remains to be considered is whether the defendant was absolved from responsibility for the loss of grainbags caused by its own servant's theft of them. *Prima facie*, the language of the exemption was wide enough to cover such loss. That it in fact did so is, I believe, the C conclusion to be drawn from the rest of the letter.

It is important in this connection to remind oneself of the reason for the exemption. According to the letter, it was granted:

> "In consideration of Messrs. Fibre Spinners and Weavers arranging, and keeping in force, insurance as detailed... hereunder..."

The required insurance was then described with reference to a D particular all risks policy; and it was stipulated that the defendant was to maintain and pay the premiums for such insurance.

A bailee has an insurable interest in the goods deposited with him. He may insure them for their full value, and he may recover it from the insurer if they are lost. He must then E account to the bailor for what he has received. All this emerges from *Hepburn v A. Tomlinson (Hauliers) Ltd*., 1966 A.C. 451 (H.L.) at pp. 467A - G, 480C - 481G.

The effect of the letter, it therefore seems to me, was this. The defendant's duty to arrange for the specified insurance, and to maintain it, to keep it in force and to pay for it, was substituted for the ordinary liability of a bailee in the event F of the property's loss or damage to it. The liability may have been replaced in its entirety; or perhaps it was replaced, as at the least it must have been, only to the extent of loss or damage from a risk which was covered by the policy actually referred to in the letter. Whichever the case, it was contemplated that, in the event of loss or damage resulting from the development of any such risk, the defendant would have G recourse to the insurer. No doubt it was also envisaged that, if it were successful in that direction, the defendant would account in turn to the plaintiff, not for the loss or damage, but for what it had got from the insurer in respect of the loss or damage. An alternative source of recompense, at least as far as the insurance cover went, was thereby provided. The plaintiff has not alleged that the defendant failed to H arrange for, maintain, keep in force or pay for the insurance, with the result that the exemption fell away for want of the intended *quid pro quo*. It is implicit in the pleadings that this did not in fact happen. I must therefore suppose that the defendant did all that was required of it in that connection.

As I have already mentioned, insurance against the risk of loss by theft was provided by the policy which the letter identified. Thefts committed

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by any particular class of persons or in any particular circumstances were not

excluded by it from that peril. Indeed, there was nothing in it which limited or qualified the risk in any way. It follows that, unless some principle of insurance deprived it of that effect, the policy covered thefts by the defendants' servants.

A There is no such principle. Subject to one limitation, a person may effectively insure against the consequences of his own conduct, even if it is culpable. He may be indemnified, for instance against loss or damage resulting from his own negligence, gross negligence or recklessness. (See *Tinline v White Cross Insurance Association Ltd*., (1921) 3 K.B. 327 at B p. 332; *James v British General Insurance Co. Ltd*., (1927) 2 K.B. 311 at p. 323; *Nathan, N.O.* v *Ocean Accident and Guarantee Corporation Ltd*., 1959 (1) SA 65 (N) at p. 72F.) The limitation to which I have referred applies to a wilful or deliberate act bringing about the risk, especially but not only when it is a crime. An insured who perpetrates such an act is not entitled to indemnification against its consequences. (See C Beresford v Royal Insurance Co. Ltd., 1938 A.C. 586 (H.L.) at pp. 595, 598 - 9; *Nathan, N.O.* v *Ocean Accident and Guarantee Corporation Ltd., supra* at p. 72A - E; *Parity Insurance Co. Ltd*. v *Marescia and Others*, 1965 (3) SA 430 (AD) at p 435B - H; *Niemand v African Life Assurance Society Ltd*., 1969 (3) SA 259 (C) at p. 264C - E; *Gray and Another v Barr*, (1971) D 2 Q.B. 554 (C.A.) at p. 568H.) In some cases a necessary implication to that effect has been found when the policy was construed. More often public policy has been invoked. The rule extends to the same behaviour on the part of any one acting with the consent or acquiescence of the insured. (See *Midland Insurance Co*. v *Smith and Another*, (1881) 6 Q.B.D. 561 at p. E 568; Ivamy, *General Principles of Insurance Law*, 2nd ed., p. 228.) But, unless of course the insured acquiesced in or consented to it, the conduct of his servant is not hit. Although a master may sometimes be liable for his servant's actions, the act of the servant is not the act of the master. (Cf. *Barkett v SA Mutual Trust and Assurance Co. Ltd*., 1951 (2) SA 353 (AD) at p. 359H; *Levy v Central Mining &* F *Investment Corporation Ltd*., 1955 (1) SA 141 (AD) at p. 148B - G; *Ensor, N.O.* v *Syfret's Trust and Executor Co. (Natal) Ltd*., 1976 (3) SA 762 (D) at p. 764B - C.) This distinction which is of general validity, has been drawn in the particular field of insurance law. Dealing with conditions in policies which referred to the acts of policyholders, the G Courts have refused to treat the acts of their employees as such. (See *Woolfall and Rimmer Ltd*. v *Moyle and Another*, (1942) 1 K.B. 66 (G.A.) at p. 75; *Fraser v B. N. Furman (Productions) Ltd*., (1967) 3 All E.R. 57 (G.A.) at p. 60H - I; *John Dwyer Holdings Ltd*. v *Phoenix Assurance Co. Ltd*., 1974 (4) SA 231 (W) at p. 239E - F.)

It follows that, when the exemption was granted, it must have been appreciated that the defendant would have had a claim H under the policy in question for the loss of any grainbags through the theft of its servant. Mr. *Shaw* submitted that so, in any event, did the plaintiff itself. He pointed out that the policy was issued in its favour, as well as the defendant's. It looks as if it may have been a composite policy, which insured their interests severally and not jointly. If it was, there seems to be substance in Mr. *Shaw's* contentions that either of them could have claimed under it for the full value of the stolen grainbags, and that the insurer would not have been entitled to reject the plaintiff's claim on the grounds that the defendant had

no right to be indemnified. (See *General Accident Fire and Life Assurance Corporation Ltd. and Another v Midland Bank Ltd. and Others*, (1940) 2 K.B. 388 (C.A.) at pp. 404 - 5; *Lombard Australia Ltd*. v *N.R.M.A. Insurance Ltd*., (1969) 1 Lloyd's A Rep. 575 at pp. 576 - 7, 579 - 80.) It is however unnecessary to pursue this line of thought. Once it is apparent that the defendant could have claimed under the policy for loss caused by the theft of its servant, the insurance cover was a real substitute for the bailee's liability, and it does not matter whether the plaintiff might have done the same.

I shall deal in conclusion with two points made on the B plaintiff's behalf which have not yet been covered.

Mr. De Villiers submitted that, according to the pleadings, the defendant was guilty of what amounted to a "fundamental breach" of its contract with the plaintiff. The exemption from liability, he maintained, had not protected the defendant in a C situation as grave as that. The principle on which he relied, one of English law with a somewhat faint echo in this country, was defined in *Suisse Atlantique Société d'Armement Maritime S.A*. v *N.V. Rotterdamsche Kolen Centrale*, (1967) 1 A.C. 361 (N.L.), and has been taken into account locally in *Hall-Thermotank Natal (Pty.) Ltd*. v *Hardman*, 1968 (4) SA 818 (D) at p. 835A - F, and *Galloon v Modern Burglar Alarms* D *(Pty.) Ltd*., 1973 (3) SA 647 (C) at p. 650E - H.

It emerges from what has been pleaded that the defendant did not fail totally to perform its contractual obligations or pay mere lip-service to them. It stored the grainbags where, when and how it was meant to, and the only criticism levelled at it, as distinct from Milburn, is that it did not do the last of these as carefully as it should have. Perhaps it was E nevertheless guilty of a "fundamental breach" of contract. But, as I am far from sure that I fully understand the notion of a "fundamental breach" in this context, I hesitate to venture a definite opinion either way on that subject. What I do firmly believe is that, if there was a "fundamental breach", it does not matter.

The following passage is to be found in that part of Halsbury, F Laws of England, 4th ed., vol. 9, para. 372, pp. 247 - 8, which deals with the effect of a contract's "fundamental breach" on a provision in it for the exclusion of liability:

> "The true principle is that in all cases the question is one of construction, and the court must determine whether the G exclusion clause is sufficiently wide to give exemption from the consequences of the breach in question. If the clause is sufficiently wide, the result may be that the breach in question is reduced in effect or not made a breach at all by the terms of the clause, notwithstanding that without the clause it would be a breach of sufficient gravity to allow the other party to he discharged from the contract."

Construing the clause in question in this case, I have already concluded that it was sufficiently wide to exempt the defendant from the consequences of the breach alleged against it. Because H of the words of limitation in the clause, the defendant's protection was conditional on its custody and accommodation of the grainbags at the time when they were lost or damaged, and to that extent on its due performance of the contract. But that is all.

That was Mr. *De Villiers'* one point. The other involved a reference to a particular term of the insurance policy, compliance with which was declared to be a condition precedent to indemnification. It stipulated that

the defendant was to:

> "... take all ordinary and reasonable precautions for the safety of the property insured."

Mr. *De Villiers* pointed out that the very document which provided for the exemption from liability had referred to the A policy and thus, albeit indirectly, to this term. He argued that the parties could not have intended the defendant to be free from responsibility for its negligent loss of the grainbags when, simultaneously with the grant of the exemption, its duty under the policy to be careful of them had been noted.

I consider that the contention has no merit. The term in B question governed the defendant's relationship with the insurer and not the plaintiff; and the result of its default in that connection would have been, not its liability for the loss of the insured property, but simply the insurer's right to repudiate a claim under the policy. It may well be that, if the insurer had gained and exercised that right because of the non-fulfilment by the defendant of the policy's requirements, C the plaintiff would have been entitled in turn to recover damages from the defendant for the breach of its contractual obligation to maintain the policy. This involves the supposition that the obligation included the duty to satisfy all conditions precedent to a successful claim in terms of the policy, by no means a self-evident proposition when account D is taken of the distinction between the efficacy of a policy and the enforceability of a claim under it. Then, however, compensation would have been payable, not for the loss of the grainbags, but for the loss of whatever benefit was likely to have accrued to the plaintiff in the event that the claim under the policy had been met; and it would have been incumbent on the plaintiff to allege and prove, not only the amount of such loss, but its

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causation as well, including such circumstances E as the insurer's right and actual decision to reject the claim. That is an altogether different case from the present.

I am satisfied that the defendant is entirely exempt from the liability which the plaintiff has sought to attach to it in this case. It follows that, in my judgment, the particulars of F claim, as amplified, disclose no cause of action. The main grounds for the exception must therefore be upheld, with the result that the exception itself succeeds. That being so, it is unnecessary to adjudicate upon its subsidiary grounds. From what I have said, it is however apparent that, to my mind, the point about gross negligence was well taken too.

The exception is allowed, with costs. Such costs are to include G those incurred by the defendant as the result of its employment of the services of two counsel. The particulars of claim are struck out, together with the further particulars to them. The plaintiff is granted leave to file and serve fresh particulars of claim within 30 days from the date of this judgment.

H Excipient's (Defendant's) Attorneys: *Garlicke and Bousfield*. Respondent's (Plaintiff's) Attorney: *Deputy State Attorney (Natal*).

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