REPORTABLE ZLR(23)

Judgment No. SC 32/10
Civil Appeal No. 272/08

RICK'S UPHOLSTERY (PVT) LTD v BIDDULPHS REMOVALS & STORAGE (PVT) LTD

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA
HARARE, MARCH 22, 2010 & FEBRUARY 8, 2011

R M Fitches, for the appellant

J B Wood, for the respondent

ZIYAMBI JA: This is an appeal from a decision of the High Court (MAKARAU JP). The issue to be determined is whether the respondent is liable for the theft of goods left in its care by the appellant under a contract of bailment between the parties.

It is common cause that sometime in December 2006, the appellant represented by Alwyn Richard Pahla, its managing director ("Pahla"), left certain goods including 31 rolls of leather fabric ("the goods") in storage with the respondent. The respondent carries on the business of removals and storage of goods from its premises at 15 Craster Road, Southerton. At the time of leaving the goods in storage Pahla signed a contract of which the following clauses are significant:

> "2. **Insurance:**
>
> All goods are transported and stored at owner's risk. You are advised to effect insurance for your goods whilst in our care by completing the insurance proposal form and paying the relevant premium. Please confirm you require insurance cover".

On the next line he was required to confirm his requirement of insurance cover by ticking the "Yes" box, which he did. The next paragraph of Clause 2 read:

> **"<u>Insurance Waiver</u>**
>
> I acknowledge that I have received the insurance proposal form and have been advised of its merits…
>
> 3. **<u>Payment</u>**
>
> (i) …
>
> (ii) …
>
> **Please note that our normal terms and conditions of carriage apply. These can be seen on the back of our quotation form.**
>
> I hereby acknowledge and accept the above Terms and Conditions."

The contract was signed by Mr Pahla on 7 December 2006. He was not shown a quotation with the terms endorsed thereon and he did not ask to see one. Further, although he indicated on the face of the contract form that he required insurance for the goods, he neither completed the insurance proposal form nor paid the relevant premium. The goods were therefore not insured.

Clause 7 of the terms and conditions accepted by Mr Pahla (in clause 3 *supra*) reads:

> "The Contractors shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and from whatever cause arising even if the customer (*sic*) and/or their servants and/or agents are negligent, the basis of this quotation being that the work and storage will be effected entirely and solely at the customer's risk."

Sometime in October 2007, the respondent telephoned Pahla and advised him that some of the appellant's goods had been stolen. Upon checking, Pahla ascertained that 31 rolls of leather fabric were missing. A report of theft was made to the Police and subsequent investigations pointed to the fact that the fabric might have been stolen by

persons who included one Alexio Chinzara, a former employee of the respondent. The appellant thereupon issued summons in the High Court for the return of the goods or, in the alternative, payment of the value thereof. Dissatisfied with the dismissal of its claim by the High Court, the appellant has appealed to this Court.

It was common cause, both in the court *a quo* and in this Court, that the fabric was deposited with the respondent under a contract of bailment or deposit. The principles applicable to such a contract were stated by WESSELS ACJ as follows:[1]

> "I am of the opinion that, in so far as the contract created the relationship of bailor and bailee between the parties, the following principles are applicable thereto. They were summarised as follows by MURRAY J in *Rosenthal v Marks* 1944 TPD 172 at 176:
>
> > 'The principles of our law in connection with the obligations of a bailee in the case of an ordinary bailment for reward are I think reasonably clear. The bailee is not an insurer of the article deposited for safekeeping and is consequently not liable for the effects of a *casus fortuitus*. On the other hand he must display ordinary diligence and is liable for the consequences of *culpa levis* on his part; if the article is lost or damaged while in his custody, he must make compensation unless he can show that such loss or damage was occasioned despite the exercise by him of the care which a reasonably prudent and careful man might be expected to have taken in the particular circumstances. The *onus* rests on him and, 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 such theft occurred despite the observance by him of the precautions expected to be taken (*vide, inter alia*, *Lutuli v Omar* 1909 TS 192; *Fruhauf v Morrison* 1911 TPD 963; *Melrose Steam Laundry v Power* 1918 TPD 314). It is, however, clear, both on principle and authority, that (subject to certain limitations when public policy is in issue) it is competent for a bailor to waive rights created for his protection and to agree to rest content with recourse of less extent against the bailee.'
>
> In this regard, see, too, *Essa v Divaris*, 1947 (1) SA 753 (A) at 767."

[1] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA v FIBRE SPINNERS & WEAVERS (PTY) LTD 1978 (2) SA 794 (A) at p802

Thus under a contract of bailment, the bailee must take the goods into his custody and must return the goods unscathed to the bailor when called upon to do so or at the conclusion of the contract. The bailee is not an insurer of the goods and is therefore not liable for the results of a *casus fortuitus*. The bailee avoids liability if he can prove that the loss of or damage to the goods was not caused by his negligence. An "owner's risk" clause appropriately worded could therefore serve not only to free the bailee from the *onus* of disproving negligence but also to absolve him from responsibility for his own or his servants' negligence. The bailee for reward is not liable for failure to restore the property bailed if its loss or destruction occurs without negligence on the part of the bailee or on the part of his servant to whom he has entrusted the task of looking after the property.[2]

The court *a quo* found that the owner's risk clause, which was part of the contract signed by the appellant, exempted the respondent from negligence whether of itself or its servants.

In so finding the learned Judge said:

> "It may be pertinent for me to note at this stage that while the witness testified that he was not shown the quotation on which the terms and conditions of storage were endorsed, he nevertheless signed the contract, specifically accepting the importation of those terms and conditions into the contract he signed. That he accepted the terms and conditions blindly does not in my view make the terms and conditions invalid and inapplicable. C*aveat subscriptor*. On the basis of the foregoing, it is therefore my finding that the terms and conditions as endorsed on the reverse side of the defendant's quotation are binding on the parties."

I can find no fault with this reasoning. It may, in addition, be observed that the fact that the appellant was conscious at the time of signing the agreement of the need to

[2] Government Of The Republic Of South Africa V Fibre Spinners & Weavers (PTY) LTD 1978 (2) SA 794 (A) ; Rosenthal v Marks 1944 TPD at 176; Essa v Divaris 1947 (1) SA at 767

insure the goods indicates, regard being had to the fact that he had stored his goods with the respondent before, that he understood that the goods were being stored at his own risk. In view of the finding of the court *a quo* as to the binding nature of the owner's risk clause, there was no need on the part of the respondent to prove that he was not negligent. However it is quite clear that no negligence on the part of the respondent/bailee was established on the evidence.

The goods were kept in a warehouse secured by a steel door. The respondent's financial manager told the court:

> "We have various security (*sic*) in place including steel doors which are locked from the inside, padlocks and inter-leading doors, key to the main door with a further big padlock on the outside and in addition to that we have three security guards on duty one on each entrance and exit …".

He said that on the morning of the 8 October 2007, he received a report that the steel door to the warehouse where the goods were kept had been forced open leaving a gap which could afford a person to get through and, further, that several slats had been removed from the durawall surrounding the premises. On further checking, it was discovered that some of the fabric stored on behalf of the appellant was missing.

The court *a quo* found that the respondent had taken sufficient precautions to secure the goods. It also found that the goods were stolen consequent to a break-in in October 2007, at the respondent's warehouse where the goods were kept, and by a person unknown. Accordingly, it was established that the goods were stolen without negligence on the part of the respondent.

It was submitted on behalf of the appellant that the respondent could not, by an owner's risk clause, exempt himself from the *dolus* of his servant. This being a contract of bailment, the submission must necessarily be based on two premises. The first being that it was an employee of the respondent that stole the goods; and the second, that that employee had been entrusted by the respondent with the care and safekeeping of the goods. Neither premise has been established. As I have already said, the court *a quo* found the goods to have been stolen by a person unknown. That finding is amply supported by the evidence.

Finally, we were referred to the judgment in *Tubb (Private) Ltd v Mwamuka* 1996 (2) ZLR 27 (S) as authority for the submission by Mr *Fitches* that an employer cannot, by an exemption clause, exempt itself from the *dolus* of its servant. Mrs *Wood*, in reply, referred us to the judgment of this Court in *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1992 (4) SA 425 (ZSC) at 428.

Since neither of the judgments dealt with contracts of bailment I do not consider it necessary in this judgment to comment on them.

Accordingly, the appellant has established no basis for interference, by this Court, with the judgment of the court *a quo.*

The appeal is therefore dismissed with costs.

CHIDYAUSIKU CJ: I agree

SANDURA JA: I agree

Mushangwe & Company, appellant's legal practitioners

Venturas & Samukange, respondent's legal practitioners