THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO: 278/2000

In the matter between :

OK BAZAARS (1929) LIMITED Appellant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

Before: **NIENABER, ZULMAN, CAMERON, NAVSA AND NUGENT JJA**

Heard: **18 FEBRUARY 2002**

Delivered: **12 MARCH 2002**

Misstatement - whether made negligently - whether causing loss - new causative act not breaking chain of causation.

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] This appeal arises from a misstatement made by an employee of the appellant that is alleged to have caused economic loss to the respondent. The respondent's claim for recovery of damages in respect of the loss succeeded in the Johannesburg High Court (before **A Gautschi AJ**) and the appellant appeals to this Court with the leave of the court *a quo.*

[2] The respondent ("Standard Bank") is a well-known commercial bank. At the time that is relevant to this appeal its customers included the appellant (I will refer to it as Hyperama, which is the name of the relevant division of the appellant) and a company known as KTC Resources (Pty) Ltd ("KTC"). KTC was controlled by a certain Mr Khalid Malik. Malik also controlled a company known as Samarkand (Pty) Ltd ("Samarkand").

[3] KTC's account was held at the Sandton branch of Standard Bank. When KTC opened the account in October 1996 it ceded to Standard Bank

its rights to "all book debts and other debts, and claims of whatsoever nature, present and future, … as a continuing covering security … for all sums of money which (we) may now or at any time hereafter owe or be indebted in to the Bank …". The deed of cession entitled Standard Bank to collect any debts that might become due to KTC, obliged KTC to hand to the bank all bills of exchange that it received in respect of such debts, and recorded that KTC would act as Standard Bank's agent in the collection of moneys that became due to KTC.

[4] KTC was an importer of merchandise. The financing of its international transactions was dealt with at Standard Bank's international business division where Mr Vaughan McTaggart was employed as an international business consultant.

[5] Early in September 1997 Malik wrote to McTaggart requesting the bank to establish what he referred to as a "back-to-back" letter of credit for

KTC to enable KTC to import a quantity of swimming pool chemicals from Spain. What he had in mind was a transaction that entailed Standard Bank establishing an irrevocable letter of credit in favour of KTC's overseas supplier against the security of an assurance by KTC's customer in this country that Standard Bank would be reimbursed from the purchase price of the goods.

[6] Attached to Malik's letter was a completed application form for the establishment of the letter of credit, a pro forma invoice recording the purchase of the goods by KTC from a Swiss corporation known as Serenade Holdings Inc ("Serenade"), and an unsigned document that was described by Malik as a copy of a "guarantee format from the Hyperama". The document, which was unsigned, purported to emanate from Hyperama, and recorded that Hyperama had placed an irrevocable order upon KTC for the supply of the goods in question. It also recorded that Hyperama

undertook to pay Standard Bank a specified sum (a portion of the purchase price) for the account of KTC sixty days after the goods had been delivered. (Provision was made for part payments to be made against part deliveries.)

[7] In anticipation of the undertaking being given by Hyperama McTaggart arranged for an irrevocable letter of credit to be prepared in accordance with KTC's instructions. The effect of the letter of credit was that Standard Bank undertook irrevocably to pay Serenade the sum of US$ 210 800 (plus or minus 5% to allow for a variation of the price as a result of part shipments) against presentation to Standard Bank of specified documents. Those documents included commercial invoices in triplicate for the amount of the particular drawing (quoting a specified indent number) and three sets of clean on board negotiable marine bills of lading to the order of the consignor and endorsed in blank. The moneys were to

be paid by Standard Bank to the account of Serenade's bank (Banque Francaise de l'Orient) at Bankers Trust New York 120 days from sight of the documents. The letter of credit recorded that the goods would be shipped in five equal deliveries between certain specified dates.

[8] Mr John Overton was at that time the general manager of the home and wear section of Hyperama's business (the section of its business that dealt in merchandise other than foodstuff). He had overall responsibility for buying merchandise for that section of the business and about thirty buyers reported to him.

[9] Soon after the letter of credit was prepared McTaggart received a telefax from Malik enclosing a copy of a letter that had been signed by Overton on behalf of Hyperama. That letter is the foundation for the respondent's claim and it is useful to set it out in full. The letter was addressed to the manager of Standard Bank and continued as follows:

“Dear Sir,

IRREVOCABLE UNDERTAKING TO PAY

We confirm that we have purchased from KTC RESOURCES (PTY) LIMITED, (“the goods") for the price of R1,881,268.20 excluding VAT (One Million Eight Hundred and Eighty One Thousand Two Hundred and Sixty Eight and 20/100 Rands only) as presented by our contract numbers JAB 003/3084; JAB 003/3085; JAB 003/3086; JAB 003/3087; JAB003/3088; JAB003/3089 (“the order”), and that KTC RESOURCES (PTY) LIMITED’S rights but not its obligations in terms of the order have been ceded to you.

We understand that you have agreed to finance the purchase of the goods from the supplier in Spain on the strength of our undertaking, which is given as follows:

1. We hereby irrevocably undertake that 60 days after the end of the month of delivery of the goods to Hyperama stores, which goods are substantially in compliance with the order, we shall pay you an amount of R1,702,547.76 (One Million Seven Hundred and Two Thousand Five Hundred and Forty Seven and 76/100 Rands only) plus VAT. The cheque will be made payable in favour of KTC RESOURCES (PTY) LIMITED and will be available about one week before due date at OK Shared Service Centre at Edenvale Hyperama, Brickfield Road, Germiston. KTC RESOURCES (PTY) limited are to collect cheques from Edenvale.

2. We acknowledge the fact that you are acting purely as financiers. We confirm that we will pay the amounts to you as per condition 1) of this letter and that any claims or disputes which might arise in respect of the goods will be instituted against KTC RESOURCES (PTY) LIMITED.

> 3. We further confirm that until payment has been received by you, ownership in the goods will remain vested in you, although risk in the goods shall pass to us upon delivery to our stores." (*sic*).

[10] Who was responsible for the wording of the letter is not altogether clear. Overton said that it might have been based upon a draft submitted to him by Malik and that the wording was approved, if not drafted, by Hyperama's administration department. But whoever it was who chose the wording, there was no suggestion that anybody but Overton was responsible for the contents.

[11] The wording of the letter did not correspond with that of the "guarantee format" submitted to McTaggart at the outset, but the only discrepancy that is relevant for present purposes relates to the manner in which payment would be made. The initial document recorded that payment would be made direct to Standard Bank for the credit of the account of KTC held at its Sandton branch, whereas the letter signed by

Overton recorded that Hyperama would effect payment by furnishing a cheque to KTC drawn in KTC's favour. As pointed out by the appellant, that arrangement left Standard Bank vulnerable to dishonesty on the part of KTC, but it was nonetheless acceptable to McTaggart (who said that he expected KTC to deposit the cheque in its account with Standard Bank, which is what it was obliged to do in terms of the deed of cession) and upon receiving the letter Standard Bank established the letter of credit.

[12] Unbeknown to Overton, and to Standard Bank, the letter was false in one essential respect: Hyperama had not purchased the goods from KTC. That is not to say that Hyperama had not purchased the goods at all, but only that it had purchased them from Samarkand and not from KTC. It follows that the purchase price would accrue to Samarkand, and not to KTC, and there would be no debt to which the undertaking could apply.

[13] In the ordinary course a copy of the letter would have been forwarded by Overton to the accounts department of Hyperama so that payment for the goods could be effected in accordance with its terms. Had he done so the error might have been discovered, but Overton was retrenched shortly after he wrote the letter and his copy was still on his desk when he vacated his office; its fate is unknown.

[14] Standard Bank discharged the letter of credit on due date by paying the sum of US$210,080.35 to Serenade's bank in five tranches. (I will return later in this judgment to certain events that occurred before that took place). Meanwhile McTaggart received a delivery schedule from KTC reflecting that the goods were to be delivered to Hyperama, in batches, between October 1997 and January 1998.

[15] By early July 1998 Standard Bank had received no payments from either KTC or Hyperama and McTaggart began to make enquiries. It was

then that he discovered that Hyperama had purchased the goods from Samarkand and not from KTC, and that Hyperama appeared to be unaware of the undertaking that Overton had given. By then part of the purchase price had already been paid to Samarkand. McTaggart presented Overton's letter to Hyperama and requested that the balance be paid to Standard Bank but Hyperama considered that it was obliged to pay Samarkand. Presumably it then did so because no payments were received by Standard Bank.

[16] In the meantime Malik fled the country and KTC was placed in liquidation. It is not disputed that Standard Bank will recover no more than R52 272 in respect of its claim against KTC for the moneys that were paid on its behalf. In the action that is the subject of this appeal Standard Bank claimed damages from Hyperama equivalent to the balance that it lost and the court *a quo* granted judgment in that amount.

[17] It is well established that a negligent misstatement causing economic loss is actionable in our law. In *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 568B-D Corbett CJ set out the requirements of the action as follows:

> "…a delictual action for damages is available to a plaintiff who can establish (i) that the defendant, or someone for whom the defendant is vicariously liable, made a misstatement to the plaintiff; (ii) that in making this misstatement the person concerned acted (a) negligently and (b) unlawfully; (iii) that the misstatement caused the plaintiff to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss. (See also *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 911B-C.) The defendant may, of course, have some special defence in law, but the abovestated formulation represents in broad outline what a plaintiff must prove in order to establish prima facie a cause of action on the ground of a negligent misstatement."

[18] McTaggart said that Standard Bank relied upon the undertaking that was given by Hyperama when it established the letter of credit. The undertaking, by itself, did not amount to a misstatement (it was a promise, no doubt genuinely made, rather than a statement of fact) but the

undertaking was not given in isolation. It was linked by its context to the misstatement of fact that preceded it (that the goods had been purchased from KTC). What Overton stated, in effect, was that a debt would become due to KTC, and he then undertook to pay that debt to Standard Bank. The undertaking, without the assurance that a debt would become due, would have been of no account, and the two went hand in hand: to rely upon the undertaking was to rely as much upon the preceding misstatement of fact.

[19] In its heads of argument the appellant submitted, rather ingeniously, that inasmuch as the debt was to be paid by furnishing a cheque to KTC, the letter truthfully recorded that Standard Bank would not be paid (which is indeed what occurred) and accordingly that the letter was not false in its essential respect. That construction of the letter is somewhat artificial but is also, in my view, not correct. Far from stating that Standard Bank would not be paid the letter expressly recorded that the debt would be paid to

Standard Bank, to whom the debt had in any event been ceded in terms of the general cession of debts: the furnishing of a cheque to KTC was no more than the means by which that obligation would be discharged. But what is in any event more important than the proper construction of the undertaking is that the whole arrangement was underpinned by the false statement of fact. If the misstatement had not been made there would have been no undertaking and indeed no transactions at all concerning KTC.

[20] The learned judge found that Overton made the misstatement negligently and that finding was placed in issue before us but in my view it was clearly correct. Overton was well aware that Standard Bank intended financing the acquisition of the goods on the strength of what was said in the letter and he was clearly under a duty to take reasonable care to ensure that what he said was correct. The most cursory examination of Hyperama's records would have revealed the true state of affairs. Written

orders placed by the buyers in Overton's department were recorded in a book that was readily to hand. Perusal of the book, if not of the orders themselves, would have shown that the goods had been purchased from Samarkand and not from KTC. There was some suggestion by the appellant that Overton was misinformed by one of the buyers in Hyperama's employ as to what was recorded in the book but that is not correct: the buyer gave him the reference numbers of the relevant orders but nothing more than that. Neither Overton, nor anyone on Hyperama's staff, took any steps to verify the facts. On his own account Overton merely assumed that what had been said by Malik was correct. It was also submitted that Overton was entitled to rely upon what had been said by Malik but it must have been abundantly clear to Overton that Standard Bank required Hyperama's independent confirmation of the facts and not

merely a repetition of what Malik had said for otherwise the letter would not have been required.

[21] In my view the learned judge correctly found that Overton was negligent. It was not disputed before us that his negligent conduct was unlawful, nor was it disputed that Hyperama is vicariously liable for his conduct.

[22] The remaining question is whether the negligent misstatement caused Standard Bank's loss. In applying the test for factual causation as set out by this Court in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-G it is of no consequence whether one notionally eliminates the unlawful conduct altogether, or whether one substitutes lawful conduct in its stead, for in either event the result is the same. The evidence is clear that, but for the undertaking given by Overton, the letter of credit would not have been established, and I have already observed that

the evidence in that regard ought not to be too narrowly construed. The undertaking went hand in hand with the preceding misstatement of fact and the reliance that was placed upon the undertaking was equally reliance upon the misstatement. Had the misstatement not been made, in my view it is clear that Standard Bank would not have established the letter of credit, and if it had not established the letter of credit then naturally it would not have sustained the loss. Moreover, if Standard Bank had been told instead that the goods had been purchased from Samarkand, it obviously would not have established a letter of credit on behalf of KTC. Whether it would have established a letter of credit on behalf of Samarkand is a matter for speculation, but if it had, there is no reason to conclude that it would have suffered the loss (no doubt the 'back to back' arrangement would have related instead to Samarkand's debt). Factually, then, the misstatement caused the loss.

[23] A further question, however, is whether that causative link should be recognized as a matter of law (which is usually described as a question of legal causation). The test to be applied in that regard was described by this Court in *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 765A-B as "… a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part."

[24] The relevant consideration in the present case is whether certain events that occurred after the letter of credit was established, and before payment was made, properly constituted a new intervening cause that severed the causative link as a matter of law. But before turning to those events, it is helpful to reiterate some of the principles relating to letters of credit.

[25] A bank ('the issuing bank') that establishes a letter of credit at the request and on the instructions of a customer thereby undertakes to pay a sum of money to the beneficiary against the presentation to the issuing bank of stipulated documents (*Schmitthof's Export Trade: The Law and Practice of International Trade* 10th ed by D'Arcy, Murray & Cleave [2000] 166-167). The documents that are to be presented (which invariably include documents of title to the goods in question) are stipulated by the customer and the issuing bank generally has no interest in their nature or in their terms (*Commercial Banking Co. of Sydney Ltd v Jalsard Pty. Ltd* [1973] AC 279 (PC) at 286C-D; *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) at 815 G-I.) Its interest is confined to ensuring that the documents that are presented conform with its client's instructions (as reflected in the letter of credit) in which event the issuing bank is obliged to pay the beneficiary. If the presented documents do not

conform with the terms of the letter of credit the issuing bank is neither obliged nor entitled to pay the beneficiary without its customer's consent. The obligation of the issuing bank was expressed as follows in *Midland Bank, Ltd v Seymour* [1955] 2 Lloyd's Rep. 147 at 151:

> "There is, of course, no doubt that the bank has to comply strictly with the instructions that it is given by its customer. It is not for the bank to reason why. It is not for it to say: 'This, that or the other does not seem to us very much to matter.' It is not for it to say: 'What is on the bill of lading is just as good as what is in the letter of credit and means substantially the same thing.' All that is well established by authority. The bank must conform strictly to the instructions which it receives."

[26] Nevertheless, an issuing bank that is presented with non-conforming documents may refer the documents to its customer, who might be willing to accept them notwithstanding the discrepancies. If they are accepted by the customer, and the beneficiary or his agent is so advised, then naturally the issuing bank becomes entitled and obliged to pay the beneficiary.

[27] I have pointed out that in the present case the documents that were required included commercial invoices in triplicate and bills of lading.

Shortly after the letter of credit was established Malik instructed Standard Bank to amend it so as to require that the "notify party" on the bills of lading (the person that is to be notified when the shipment is due to land, which is usually the consignee's clearing agent) was Samarkand. I mention that only because it was the first indication that Samarkand had some connection with the transaction: by itself the instruction was not significant.

[28] On 20 October 1997 Serenade's bank presented documentation to Standard Bank to support the first two draws on the letter of credit and requested confirmation that payment would be made on due date (120 days from sight of the documents). Certain of the documents, and in particular the commercial invoices, did not conform with the terms of the letter of credit. The commercial invoices ought to have reflected that KTC was the purchaser, but reflected instead that the purchaser was Samarkand, and they also omitted to quote the specified order number.

[29] In accordance with ordinary practice Standard Bank forwarded the documents to KTC, drawing attention to the discrepancies, and requested KTC to advise whether the discrepancies were acceptable. Malik replied that they were and authorized Standard Bank to make payment. Standard Bank in turn advised Serenade's bank that the discrepancies had been accepted whereupon it became bound to pay the relevant amount on due date. On 27 November 1997 those events were repeated when similarly non-conforming documents were presented in support of the third, fourth and final draws on the letter of credit.

[30] At that stage Standard Bank was not yet bound to pay Serenade (it was bound to pay only against the presentation of conforming documents) but it became bound to pay once Serenade's bank was informed that the discrepancies were accepted. If the person who examined the documents had been astute (and if he was aware of the undertaking that had been given

by Hyperama) he might have realised that something was amiss when he saw Samarkand's name on the invoice. The question that he might have asked is how the goods could have been sold by KTC to Hyperama if Samarkand, and not KTC, was the importer? If, on the other hand, he was not particularly suspicious, he might also have thought that the invoice was merely erroneous, or that some arrangement had been made between Samarkand and KTC, and given the matter no further thought, bearing in mind that an issuing bank generally has no interest in the documents other than to ensure that they conform (or to ensure that the customer accepts the discrepancies if they do not conform).

[31] The appellant submitted that Standard Bank's loss was not caused by the establishment of the letter of credit, but was caused rather by Malik's acceptance of the discrepancies, for without that, Standard Bank would not

have become obliged to pay. Accordingly, it was submitted, the loss was caused by Malik and not by Hyperama.

[32] Whether or not a new intervening cause relieves the original actor of liability for the consequence of his act is one aspect of the broader enquiry into legal causation (*Standard Chartered Bank of Canada, loc cit*). It might, in some cases, have the effect of "severing the legal *nexus* with the result that the consequence should not be imputed to the [original] actor" (Neethling, Potgieter & Visser, *Law of Delict* 4th ed [2001] 205) notwithstanding that the causative link remains factually intact.

[33] I have already drawn attention to the fact that the test for legal causation is, in general, a flexible one. When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the forseeability of the new act occurring will clearly play a prominent role

(*Joffe & Co Ltd v Hoskins and Another* 1941 AD 431 at 455-6; *Fischbach v Pretoria City Council* 1969 (2) SA 693 (T); *Ebrahim v Minister of Law and Order and Others* 1993 (2) SA 559 (T) at 566B-C; Neethling *et al*, *supra*, 205; Boberg *The Law of Delict* 441). If the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability.

[34] It must have been apparent to Overton that Standard Bank required independent assurances from Hyperama precisely because it wished to guard against being defrauded. It was reasonably foreseeable in the circumstances that if the assurances were incorrect Standard Bank might be defrauded, and moreover, that any fraud that was perpetrated would be brought to its natural conclusion, which is what occurred when Malik accepted the discrepancies. In my view the fact that he would do so could

reasonably have been foreseen and it does not operate to relieve Hyperama of liability.

[35] In argument before us it was also submitted that Standard Bank was at fault itself for omitting to detect the significance of the discrepancies and then acting so as to avoid incurring liability. A corporation has no capacity for either thought or for action: it thinks and acts only through the intervention of human agency. The appellant's submission invites the question who the human agent might have been who should have realized the significance of the inconsistency and thereby averted the occurrence of the loss. It would need to have been a person who not only saw the invoice, but who also knew of the terms of the undertaking, for in the absence of one or the other the inconsistency would not have been significant. Initially the appellant selected McTaggart to shoulder the blame but the evidence does not establish that McTaggart saw or even

knew of the discrepancies before they were accepted (he said that he might have been aware of them but he could not be sure). Conversely, the evidence does not establish that his assistant (who dealt with the discrepancies) was aware of the undertaking. Whether Standard Bank was at fault was an issue that might have been explored if a plea of contributory negligence had been raised. It was not. In the context of causation the criticism levelled against Standard Bank is of no consequence.

[36] Even if one or other of Standard Bank's employees was in a position to discover the inconsistency and recognize its significance, in my view his failure to do so did not relieve Hyperama of liability. Overton was well aware that Standard Bank intended to finance the purchase of the goods and he must have expected that it would do so in accordance with ordinary banking practice as it applies to international trade. He could reasonably have foreseen that once the letter of credit was established a financial

commitment would arise in the ordinary course without any further enquiries being made in relation to the transactions, and that is what occurred. The subsequent events were neither unusual nor unexpected and occurred as a natural consequence of the letter of credit being established. In the absence of other compelling considerations (and in my view there are none) the casual link (as a matter of law) remained intact notwithstanding the omission (if there was one) and the court *a quo* correctly held that Hyperama was liable.

[37] The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.

R.W. NUGENT JA

NIENABER JA)
ZULMAN JA)
CAMERON JA) **CONCUR**
NAVSA JA)