IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 09/15228

DATE:30/09/2011

REPORTABLE

In the matter between:

LOUREIRO, LICINIO	First Plaintiff
LOUREIRO, VANESSA	Second Plaintiff
LOUREIRO, LUCA-FILIPE	Third Plaintiff
LOUREIRO, JEAN-ENRIQUE	Fourth Plaintiff
And	
IMVULA QUALITY PROTECTION (PTY) LIMITED	Defendant

JUDGMENT

SATCHWELL J:

Introduction

1. This judgment raises, yet again, the responsibilities of security companies and their employees, especially persons employed as security guards, to those who hire their services. It examines what can be expected by a family in their home of

a security guard staffing a guardhouse at the entrance to the family property. I discuss the expectations of security personnel, including their attributes, skills and obligations.

2. The Loureiro family moved into their new home at 50 Jellicoe Avenue, Melrose on 25th November 2008. On 22nd January 2009 they were robbed by persons who gained access thereto posing as members of the South African Police. Arising therefrom damages are sought from the security company which was responsible for providing security services at their home.

3. The claim of Mr Loureiro (first plaintiff) is based upon alleged breaches of a security services agreement with the security company (defendant) and/or negligence in regard to such agreement. The claim of Mrs Loureiro (second plaintiff) is based upon the alleged failure of the security company to meet the duty of care owed to her and the children by reason of negligence including various failures to meet the standards required of security service providers.

Conduct of Trial

4. At commencement of the trial, I was informed that the parties had reached agreement on separation, (in terms of Rule 33(4) of the Rules) of the merits of the claims from the quantum thereof. However, nothing was simple in this trial and certainly neither the pleadings nor this agreement. I was presented, not once but twice, with a document[1] setting out what the court was "not" to decide by references to a number of paragraphs in the pleadings. This was most unhelpful. At the end of the day, I confirmed in court that what the parties intended was that I was to decide only the issues of breach of contract and negligence i.e. the merits and that I would not decide issues of quantum of specific or general damages. Accordingly, this judgment is only concerned whether the defendant is liable to

[1] Ex A1 and A2

Mr Loureiro (first plaintiff) in contract and to Mrs Loureiro and the two minor children (second to fourth plaintiffs) in delict.

5. The task of this court has not been assisted by the continuing confusion attendant upon the pleadings prepared on behalf of the plaintiffs. Clarity in grammar, logic and hence pleading has certainly not been the draughtsman's talent. There have been several amendments to the particulars of claim prior, during and after the trial. The replication was amended during trial. The latest amendment to the particulars was presented after the trial was completed but before judgment handed down. No objection thereto having been filed, the pleadings have been amended. It is therefore on that basis that I must decide this case. This most recent amendment applies only to claim B – that of Mrs Loureiro – the claim in delict, claim A being founded in contract.

6. Extra work has been created by reason of the apparent lack of preparedness on the part of plaintiff's counsel – objections in court to cross examination on the grounds that an issue raised was not in the pleadings when it clearly was; failure to prepare on the legal issues (such as the identity of the contracting parties or the validity and effect of the cession) and then arguing that it was the defendant which had failed to prove other contracting parties or simply failing to deal with the law on the cession of a portion of a claim arising out of one cause of action. There was a sense of confusion throughout the presentation of plaintiffs' case and argument thereon.

7. The trial concluded on 11th May 2011 on which day the possibility arose of an amendment to the Particulars of Claim. The particulars were amended, the plea was amended and supplementary heads of argument were filed, dated 19th July. The last documents were only received by my chambers in the third term in mid August. Yet, phone calls were received from the office of one attorney querying

when the judgment would be handed down – even before the final pleadings had been received. As a result my registrar wrote to the parties on 18th August advising that my chambers had received the defendant's amended plea and supplementary heads of argument and enquiring whether the plaintiff wished to file supplementary heads of argument. In addition was stated "Satchwell J has further asked me to advise that it is inappropriate for the plaintiffs attorney to ascertain when judgment will be handed down". This resulted in profuse apologies. However, it is of some concern that the first plaintiff himself, Mr Loureiro, telephoned my registrar on his cellphone to express his apologies and to stress his anxieties with regard to this matter. This is most improper.

Security Measures

8. Mrs Loureiro and one of her sons had previously been "held up" (I understand this to mean robbed at gunpoint) in the complex in which they previously lived. They were determined that there would be no such risk in their new home.

9. Accordingly, an extremely comprehensive security system was installed by Mr Barboza involving multiple alarm systems, beams, electric fencing, a guardhouse, intercom systems, closed circuit television.[2] Within the house were a number of safes as also concealed 'safe rooms'.[3] The defendant company was employed to provide a twenty four hour armed guard situated in the guardroom at the entrance to the premises. There were transmitters (a long range receiver on the roof) for both silent and audible panic buttons linked to an armed response company – ADT.

[2] For instance, in the course of the inspection in loco I observed that a television screen was attached to the wall of the driveway so that occupants of any vehicle would be able to view the exterior of the premises, the driveway and the public road.

[3] These were seen on the video recording of the interior of the house during the theft as also during the inspection in loco – extremely large mirrors with gold frames concealing safe rooms.

10. So concerned were the Loureiros about security that Mr Loureiro was most unhappy when his brother simply arrived at the front door one day without there first having been an intercom query from the guardhouse before the gate was opened. This led to an instruction from Mr Loureiro to Mr Green of the defendant company (at which conversation Mr Barboza was present) that no one was to be permitted onto the premises by the security guards before they had contacted the house via the intercom and permission obtained. To ensure this instruction was adhered to, the intercom instrument in the guardroom was partially disabled so that it could not be used to open or close the main driveway gates. The result was that the security guard on duty could not grant access to any vehicle wishing to enter the premises. Access could only be granted from inside the house after the occupants had been alerted by the guardhouse.

11. At the entrance to the premises from Jellicoe Avenue there are two gates: the first gate, at the centre of the premises, is a large full metal with reinforced steel double doored gate through which vehicles can access. The second gate, to the left side of the premises (as one faces) also with a paved path, is a pedestrian armoured gate.

12. To the right of the main driveway and the main gates is the guardhouse. Portion thereof is aligned parallel to the main driveway. Along that wall and the corner thereof are bulletproof glass. This guardhouse window has full view of the driveway. Accessible from the driveway, at waist height (convenient to the driver of a vehicle) is an intercom speaker attached to a gooseneck which communicates with an intercom phone inside the guardhouse. When standing at this internal intercom phone, which is somewhat to the rear of the guardhouse[4], one can still see through the guardhouse window to Jellicoe Avenue. However, it is then not possible to see through the guardhouse window to anyone at the external intercom

[4] Post these events it is now in a different placement.

speaker nor is it possible to see across the main driveway/gate entrance to the other side of the property where the pedestrian gate is to be found.

13. The intercom phone has four buttons (one of which had been disabled and so could not control the opening or closing of the main gates) which are alarms and panic buttons. The intercom can communicate to the staff quarters, the kitchen and the main bedroom of the house.

Events of 22nd January 2009

14. The evidence was led of Mr and Mrs Loureiro (the plaintiffs), Mr Barboza (who installed certain security equipment including a CCTV system on the premises and both inside and outside the house) and Mr Mahlangu (the security guard on duty on the relevant evening).

15. A video was played in court on several occasions of the events both outside and inside the property and inside the house. The video recording was operated by Mr Barboza and none of the events shown thereon were in dispute. The recording was created by the CCTV security system which had cameras installed throughout. The video recording could (and was) played in court either as a series of small screens displaying events at different places at the same time or as one screen. The time of events shown on the screen was also displayed.[5]

16. An inspection in loco was held one morning before court.

17. Camera 1 recorded (at 19h47 onwards):
    a. A white BMW motor vehicle with a blue light driving along Jellicoe Avenue and, without hesitation, driving off the road and partially onto the driveway where it stopped.

[5] This CCTV Recording was handed in as Exhibit C.

b. A man exiting from the front passenger seat of the BMW. He was wearing dark trousers, a dark blue top of the type worn by members of the SAPS, a reflective vest t marked 'Police', a cap with a badge thereon (similar to that of the SAPS).
c. This man walking in the direction of the guardhouse, pulling from his pocket and then extending towards the guardhouse a card of some type. He makes no attempt to speak into the intercom and then walks back to the car and continuing towards the pedestrian gate.
d. Two men exiting the rear seats of the vehicle and walking to the pedestrian gate.

18. Camera 7 recorded (at 19h47 onwards) :
    a. The security guard sitting in the guardhouse, the television on.
    b. The guard, seeing the BMW drive up and stop, then leaning forward.
    c. The guard rising up off his chair and going to the intercom telephone.
    d. He disappears from the screen.
    e. Another camera (outside) records the guard walking across the driveway towards the pedestrian gate.
    f. He re-emerges into the guardroom with two men, sits on the floor and talks to one of these men who is carrying a gun in his right hand and who is kneeling in the door.

19. Mr Mahlangu's evidence was that he went to the pedestrian gate and opened it with the key in order to find out what the man outside wanted. He was confronted with a gun, forced into the guardroom and thereafter taken into the house itself where he was held captive with the children and the staff while the robbery took place.

20. There is a gate between the back door of the house and the staff quarters (which is supposed to be locked) but on camera at 19h48 dogs can be seen walking through the gate.

21. Camera 4 recorded (at 19h58 onwards):
    a. An area inside the house (identified as an anteroom to the main bedroom suite) containing two large mirrors (concealing safe rooms) which provide good viewing of what takes place in this room and in adjacent rooms.
    b. One intruder wearing a balaclava enters, followed by two intruders, the security guard with bare chest, houseman in a T shirt, eldest son, another intruder, a domestic worker, second son, domestic worker, youngest son, and another intruder in balaclava.
    c. There is opening of a box on the table, one intruder puts on gloves, the mirror concealing a safe room is opened, a heavy looking bag is carried, a rifle is on the table, handbags and luggage are carried through and/or piled up at the door, Mr Loureiro is taken through.

22. Mr and Mrs Loureiro returned home, parked in the garage and as they were exiting the car were confronted by intruders. Mrs Loureiro gave evidence that she did not press her panic button (in her handbag) because she wanted to get to her children. Mr Loureiro was told, at gunpoint, to do nothing.

23. Camera 16 recorded (at 20h56):
    a. The scullery off the kitchen which is accessed from the garage.
    b. An intruder grabs Mrs Loureiro, removes jewellery, takes a handbag and returns it.

24. The three Loureiro children and the staff were escorted at gunpoint to the main bedroom suite. There they were all, save for the youngest child (a toddler)

restrained. Subsequently, both Mr and Mrs Loureiro were also brought upstairs. The ordeal for the captives lasted some hours.

Special Plea – insurance cession

25. Defendant noted a special plea challenging the locus standi of the first plaintiff[6]. It relies upon an "agreement of loss"[7] concluded with Insurance Zone Administration Services ("IZAS") contained a cession by the first plaintiff to the IZAS of any claim which first plaintiff had "against any party arising from the loss referred to (being those items listed in Annexure 'B').[8] Defendant pleaded

[6] "1. During 2009, the first plaintiff concluded a written "agreement of loss" with Insurance Zone Administration Services.

2. In terms of the agreement of loss:

2.1. the first plaintiff accepted that the loss which he had suffered was-

2.1.1. in respect of jewellery – R1.5, million;

2.1.2. in respect of general risk items – R300,00.00; and

2.1.3. in respect of household contents – R257, 672.00.

2.2. the items alleged to have been lost by the first plaintiff and for which the first plaintiff receiving an indemnity payment from Insurance Zone Administration Services, are those listed in annexure "B" to the agreement of loss;

2.3. the first plaintiff ceded, assigned and transferred to and in favour of Insurance Zone Administration Services all the rights which it had against any party arising from the loss referred to (being the loss of those items listed in annexure "B" to the agreement of loss).

3. In the circumstances, the first plaintiff has divested himself of all rights to claim the losses referred to in paragraphs 9.3 and 11.1 of the particulars of claim, prayer 1.1.1 and as set out in the schedule attached to the particulars of claim marked annexure "B".

4. The first plaintiff lacks locus standi to make a claim for those items listed in "Annexure B" to the particulars of claim.

[7] Document at page 1 of Bundle.

[8] It is noted that the Special Plea quotes the cession as being a cession by "it" had against any party arising from the loss. The special plea may then be read to refer to any claims which IZAS had against any party but it is obviously meant to refer to the first plaintiff. – "he".

that the first plaintiff had divested himself of all rights to claim the losses in the particulars of claim. To this special plea, first plaintiff replicated.[9]

26. According to the witnesses, the 'Agreement of Loss' document was an agreement only in respect of the loss for which IZAS would provide cover/compensation. Mr Loureiro understood that he was covered, in respect of jewellery, for "first loss" only. Mr Johnston, Director of IZAS, had provided cover[10] for Mr Loureiro only in respect of "first loss for jewellery". Mr Johnston had 'contracted [Loureiro] out of the standard clause in all policies limiting jewellery to one/third of the sum insured". This was done by making specific mention of the jewellery. The cover was not in intended to be in respect of specified items but to a maximum within the home.

27. Mr Turner, appearing on behalf of the defendant, submitted that any claim which the plaintiff has against the defendant is a 'single and indivisible claim that could [only] be pursued in one action'. The first plaintiff having ceded 'all rights' to IZAS, the 'once and for all rule' precluded him from pursuing the defendant; the rights are now vested in the cessionary.

28. However, the first plaintiff did not and has not ceded "all rights" in respect of the total loss allegedly sustained by him and his family on the night of 22nd January 2011 – which are set out in Annexure B as being in the region of R 11 million (eleven million rand). IZAS has not taken cession of the right to claim

[9] "AD paragraph 2.2:
3.1 All allegations are denied as if specifically traversed. It is denied that the agreement of loss included an "annexure B" as contended fro by the defendant.
3.2 It is denied that the first plaintiff accepted the loss which he had suffered was that as described herein by the defendant. The first plaintiff pleads that the agreement of loss was entered into to cover the extent of the first plaintiff's loss for which the first plaintiff was to be compensated in accordance with the express provisions of the policy of insurance and the insurer's obligations thereunder.
4. Ad paragraph 2.3
4.1. These allegations are denied as if specifically traversed. In particular it is denied that the loss that is described herein by the defendant and the allegations contained in 3.2 and 3.3. above are repeated herein *mutatis mutandi."*

[10] Policy Schedule NO IZIP4150 underwritten by Hollard Insurance Company Limited

from the defendant company (or anyone else) this full amount of some R 11 million.

29. The cession in paragraph E of the Agreement of Loss - "*I hereby cede, assign and transfer to and in favour of Insurance Zone all rights which I might have against any other party arising from the loss referred to above"* was, said Mr Johnston in respect of "all we want to recover is the value we paid out". The cession by first plaintiff is limited to "the loss referred to above". That reference is spelt out in the preamble to the Agreement of Loss as

> *"the loss which occurred on 22 January 2009, as a result of Theft, in respect of claim number IZIP4150/1 in respect of*
>
Jewellery	*R 1 500 000,00*
General All Risks	*R 300 000,00*
Household Contents	*R 256 672,43*
Less Excess	*R 250,00*
Less Interim Payment	*R 500 000,00*
	R 1 556 ,422,43"

30. That which was ceded by first plaintiff to IZAS was limited to and no more than the loss set out in the document, namely R 1 555 442, 43 (to which the interim payment may also be added). The balance of Mr Loureiro's claim (which on his arithmetic and the document setting out the value of the total loss sustained in the robbery) is R 11 678, 059 (Eleven million six hundred and seventy eight thousand and fifty nine Rand).[11]

31. It certainly cannot be the case that IZAS (cessionary of a claim in re R 1.5 million) could proceed to claim the full R 11 million alleged loss and equally so it would be most unjust if Loureiro were precluded from pursuing his total loss.

[11] Annexure B to Agreement of Loss.

32. It certainly appears that the cession contained in this Agreement of Loss does amount to "a splitting of one cause of action between two creditors" (i.e. claim based on the robbery against the security company by both IZAS and Loureiro – IZAS having a claim for some R 1.5 million and Loureiro for some R 9.5 million) (see Van der Merwe v Nedcor Bank BPK 2003(1) SA 169 headnote). This cession is struck by the prohibition against the splitting of claims.[12]

33. I am in agreement with Mr Turner, appearing for defendant, who conceded in argument that this cession may be legally invalid. This issue was neither properly researched nor argued by counsel appearing for the plaintiff and the cessionary, IZAS, was not heard on this issue. However, the plaintiff knew the contents of the Special Plea and the cessionary had been consulted by the plaintiff's legal representatives and Mr Johnston gave evidence.

34. In the result, I take the view that this cession is invalid. Accordingly, Mr Loureiro has locus standi to bring this action and the special plea must fail.

The Contract

35. First plaintiff (Mr Loureiro) pleaded that he, "represented by Ricardo Loureiro" (his nephew), "entered into an oral agreement ('the guarding service agreement')" on 1st December 2008 with the defendant which agreement was amended orally by the first plaintiff on 10 December 2008.[13] Defendant's plea disputed the agreement as pleaded[14].

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[12] "Except with the consent of the debtor, a right can be ceded only in its entirety; a cession of part of a debt otherwise capable of partition or a cession purporting to apportion the debt among several cessionaries is invalid (LAWSA Vol. 2 Pt 2 para 40 - quoted with approval in Van der Merwe supra 175B-C)."

[13] The terms of the guarding service agreement are pleaded in paragraphs 6.1 – 6.15 of the Particulars of Claim. The orally inserted term is set out in para 6.8 of the Particulars.

[14] Para 4.1 of the Defendants plea.

36. Both Mr Loureiro and his nephew, Ricardo, gave evidence to the effect that Mr Loureiro asked Ricardo to contact the security company because he had previously dealt with them on behalf of other family members and their business. Ricardo approached the regional manager, Mr Gumede, to make the security arrangements and passed on Mr Loureiro's cellphone to make contact. Mr Loureiro met with Mr Green of the defendant at his home on one occasion to give instructions that security would have no control over the main gate and have a key to the pedestrian gate for change of shift only. The defendant's representatives did not give evidence and the Loureiro evidence was not disputed.

37. No written contract was produced in evidence. A series of invoices from the defendant[15] addressed to "Rick 4 Beryl Street Cyrildene Johannesburg" are understood to be invoices to Ricardo Loureiro (1st Plaintiff's nephew) at the business address of one of the family businesses. The invoice purports to "ship" services to "5 Jellico Rd Melrose" which is the obviously intended to refer to the home of the Plaintiffs[16] and the services are the provision of "armed grade D security officers".

38. There can be no dispute (in view of the invoice and the evidence of Mr July Mahlangu) that guarding services were provided to the Loureiro home. The only issue is whether arrangement of and payment for such services by Ricardo Loureiro and the family business means that the contract was not concluded between the first plaintiff and the defendant?

39. Mr Loureiro gave evidence that "I paid" for the service. The invoice and Ricardo confirm that the payment was made out of the family business. It was described as "a perk" of working in the family business. Since the evidence is that the family business debited this expense to "security services", it is unlikely that this amount was actually debited to Mr Loureiro's drawings from the business.

[15] For the period 5th December to 11th February 2009.
[16] 50 Jellicoe Avenue, Melrose.

40. There can be no doubt that, at all times, Mr Loureiro (first plaintiff) was extremely hands-on, active, involved and in control of the specification of security needs, installation, arrangements, changes and ensuring it worked. This was in every sense 'his baby'. When Ricardo was asked by his uncle to find a security company to provide a guarding service, he did so and informed them that armed security was required at the Jellicoe Avenue address and passed the company on to his uncle. Mr Loureiro took over. There is no evidence Ricardo played any further part in these arrangements (or in any other part of the house), Ricardo was indeed Mr Loureiro's representative or agent in sourcing the security company.

41. It is trite that the obligations of one contracting party can be discharged by another (non-contracting) party; in this case the family business[17]. It is clear that Mr Loureiro and the family business had agreed that payment would be made to Defendant Company to meet Mr Loureiro's debt.

42. I am satisfied that the first plaintiff, Mr Loureiro, concluded the contract with the defendant company, initially through his nephew, Ricardo, and subsequently in person.

Company and security guard conduct

43. At the end of the day, the liability of defendant (whether on claim A in contract or claim B in delict) essentially boils down to the question of negligence. Did the company fail to carry out its obligations in terms of the contract? Did the company fail to enable its security guard to meet the terms of the contract? Did the company enable its security guard to meet the standard reasonably required of a security guard? Did the security guard meet the standard reasonably required of

[17] See the discussion at pages 520 to 523 of AJ Kerr, 'The Principles of the Law of Contract'.

a security guard? What was the 'duty of care', if any, expected of the security company and its servant and was there a failure to meet such standard?

44. The Plaintiffs pleadings have been amended several times, including during the course of trial and after evidence had been concluded and argument completed[18]. The amendment post trial was most substantial (so as to introduce the vicarious liability of the company for the actions of its employee) and the plaintiff is certainly most indebted to defendant's counsel, Mr Turner, who was, at all times, aware of the defect in the plaintiffs pleadings and anticipated the need for an amendment and presented his argument as though the plaintiff had raised all essential averments. The court is grateful to Mr Turner and his attorneys for their attitude and helpfulness in finalising this matter rather than pursuing technicalities.

[18] Argument concluded at the end of the trial on 11th May 2011. This was followed by a Notice of Intention to Amend the Particulars of Claim (23rd May) , the amended particulars (13th June), an amended Plea (14th July) , supplementary Heads of Argument - the last of which was filed on 19th July 2011.

45. The most recent pleadings upon which this court must decide this action[19] rely (as to both the contractual claim and the delictual claim) upon the same allegations. Some of the averments are couched in the positive and others in the negative; they are frequently repetitive; often are not couched in clear language.

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[19] Claim A:

8. The defendant breached the guarding service agreement in one or more or all of the following respects in that the defendant failed and/or neglected to:

8.1. provide guarding services at the plaintiffs' residence; and/or
8.2. deploy an armed guard and/or armed Grade "D" guard on day shift; and/or
8.3. deploy an armed guard and/or an armed Grade "D" guard in night shift; and/or
8.4. take all reasonable steps to:
8.4.1. prevent persons gaining unauthorised access and/or entry to the plaintiffs' premises; and
8.4.2. protect the persons and property of the plaintiffs and/or the first plaintiff and his family and/or any other persons lawfully present at the plaintiffs' premises; and/or
8.5 patrol, monitor and guard the premises, 24 hours a day 7 days a week; and/or
8.6. take all reasonable steps to ensure that no persons gained unlawful access to the plaintiffs' premises; and/or
8.7. permit any person to gain access to the plaintiffs' residence other that the plaintiffs' and their two minor sons, unless the defendant had obtained prior authorisation from the first plaintiff alternatively the second plaintiff to allow such persons access to the plaintiffs' residence; and/or
8.8. utilize, *inter alia*, the panic button furnished [by] the first plaintiff in the event when reasonably necessary and/or in the event of any unauthorised persons attempting to gain access and/or gaining access to the plaintiffs' premises; and/or
8.9. ensure that the security guards deployed at the plaintiffs' premises were suitably trained and competent to perform the learned obligations of the defendant at the plaintiffs' premises in terms of the guarding services agreement ; and/or
8.10. maintain an up to date occurrence book at the premises; and or
8.11. ensure that the plaintiffs had reasonable access to a supervisor of the security guards deployed by the defendant at the plaintiffs' premises during business hours and the defendant would provide the plaintiffs with the contract details of a supervisor and/or manager of the defendant in the event of emergencies; and/or
8.12. at all times act in compliance with the Private Security Industry Regulation Act, 56 of 2001 ("the Act") as well as the code of conduct accompanying the Act and to provide the guarding services with due care and in accordance with the general standards prevailing in the private security industry at the time.

Claim B

14. In the circumstances, the defendant owed the second plaintiff and the plaintiffs' two minor sons a duty of care in terms of which the defendant was obliged to:

14.1 the defendant would provide guarding services at the plaintiffs' residence;

46. At close of the trial, Mr Smit appearing for the plaintiffs stated that he relied only on paragraphs 6.10[20], 6.14[21] and 6.15[22] of the Particulars of Claim. Unfortunately, these paragraphs refer only to the averred contents/terms of the guarding services agreement and not to the alleged breaches or acts of negligence. The breaches and acts of negligence are set out in paragraphs 8. 15 and 16A of the Particulars

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14.1.1 the guarding service agreement would commence 2 December 2008 and would endure indefinitely until terminated by the first plaintiff, or the defendant, on reasonable notice;

14.3. the defendant would deploy one armed Grade "D" guard on day

14.4. the defendant would deploy an armed guard and/or an armed Grade "D" guard in night shift;

14.5. the defendant would take all reasonable steps to:

14.5.1. prevent persons gaining unauthorised access and/or entry to the plaintiffs' premises; and

14.5.2. protect the persons and property of the plaintiffs and/or the first plaintiff and his family and/or any other persons lawfully present at the plaintiffs' premises;

14.6. the armed guards deployed at the plaintiffs' residence as aforesaid would patrol, monitor and guard the premises, 24 hours a day 7 days a week;

14.7. the defendant would take all reasonable steps to ensure that no persons gained unlawful access to the plaintiffs' premises;

14.8. the defendant was not entitled to permit any person to gain access to the plaintiffs' residence other that the plaintiffs' and their two minor sons, unless the defendant had obtained prior authorisation from the first plaintiff alternatively the second plaintiff to allow such persons access to the plaintiffs' residence;

14.9. the guards deployed by the defendant at the plaintiffs' premises will be furnished with, *inter alia*, a panic button furnished [by] the first plaintiff in the event when reasonably necessary and/or in the event of any unauthorised persons attempting to gain access and/or gaining access to the plaintiffs' premises;

14.10. the defendant would ensure that the security guards deployed at the plaintiffs' premises were suitably trained and competent to perform the learned obligations of the defendant at the plaintiffs' premises in terms of the guarding services agreement ;

14.11. the defendant would maintain an up to date occurrence book at the premises;

14.12. the defendant would ensure that the plaintiffs had reasonable access to a supervisor of the security guards deployed by the defendant at the plaintiffs' premises during business hours and the defendant would provide the plaintiffs with the contract details of a supervisor and/or manager of the defendant in the event of emergencies;

14.13. the plaintiff will pay the defendant an amount of R14 320.68 (including VAT) per month;

14.14. the defendant would at all times act in compliance with the Private Security Industry Regulation Act, 56 of 2001 ("the Act") as well as the code of conduct accompanying the Act.

14.15. the defendant would, in providing the guarding services, act with due care and not act negligently. In particular the Defendant would not act carelessly in the execution of its mandate and observe the required standards as measured against the general standards prevailing in the private security industry at the time.

of Claim. For purposes of this judgment, I need only deal with those averments which are relevant to a decision[23].

47. Firstly, there is no dispute that an "armed" guard was requested and invoiced. Mr Mahlangu's evidence is that he was not armed although he is trained in the use of firearms and holds a firearm licence. However, I see no causal connection between this lack of firepower and what happened on the evening in question. If

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15. On or about 22 January 2009 the defendant unlawfully and wrongfully breached the aforesaid legal duty in one or more or all of the following respects in that the defendant failed and/or refused and/or neglected to:

15.1. provide guarding services at the plaintiffs' residence; and/or
15.2. deploy an armed guard and/or armed Grade "D" guard on day shift; and/or
15.3. deploy an armed guard and/or an armed Grade "D" guard in night shift; and/or
15.4. take all reasonable steps to:
15.4.1. prevent persons gaining unauthorised access and/or entry to the plaintiffs' premises; and
15.4.2. protect the persons and property of the plaintiffs and/or the first plaintiff and his family and/or any other persons lawfully present at the plaintiffs' premises; and/or
15.5 patrol, monitor and guard the premises, 24 hours a day 7 days a week; and/or
15.6. take all reasonable steps to ensure that no persons gained unlawful access to the plaintiffs' premises; and/or
15.7. permit any person to gain access to the plaintiffs' residence other that the plaintiffs' and their two minor sons, unless the defendant had obtained prior authorisation from the first plaintiff alternatively the second plaintiff to allow such persons access to the plaintiffs' residence; and/or
15.8. utilize, *inter alia*, the panic button furnished [by] the first plaintiff in the event when reasonably necessary and/or in the event of any unauthorised persons attempting to gain access and/or gaining access to the plaintiffs' premises; and/or
15.9. ensure that the security guards deployed at the plaintiffs' premises were suitably trained and competent to perform the learned obligations of the defendant at the plaintiffs' premises in terms of the guarding services agreement ; and/or
15.10. maintain an up to date occurrence book at the premises; and or
15.11. ensure that the plaintiffs had reasonable access to a supervisor of the security guards deployed by the defendant at the plaintiffs' premises during business hours and the defendant would provide the plaintiffs with the contract details of a supervisor and/or manager of the defendant in the event of emergencies; and/or
15.12. at all times act in compliance with the Private Security Industry Regulation Act, 56 of 2001 ("the Act") as well as the code of conduct accompanying the Act and to provide the guarding services with due care and in accordance with the general standards prevailing in the private security industry at the time.

Amended particulars

13. At all material times hereto:
13.3. July Kleinbooi Mahlangu ("Mahlangu") was employed by the defendant at 50 Jellicoe Avenue, Melrose on the evening of 22 January 2009 as a guard
13.4. Mahlangu at all times acted in the course and scope of his employment with the defendant

Mr Mahlangu had had a gun, there is no evidence that he would have been able to or would have used it and that there might have been a different outcome.

48. Secondly, Mr Mahlangu' evidence was that he is a Grade A security guard, has completed a number of courses and sometimes trains others. Notwithstanding his qualifications and experience, this does not relieve the security company employing him from providing him with instructions concerning this particular posting. Such instructions, whether written or oral, would necessarily have to be clear, understandable and accessible. Such were provided to him at his other postings. However, Mr Mahlangu evidence was that no directions were given to him concerning this posting at 50 Jellicoe Avenue. For instance, he was not told why he had no control over opening and closing the main gate; he was not told that the single key given to defendant company for the pedestrian gate was to be used only to enable shift changes of security guards; he was not clearly instructed that no one could enter the property without authorization from the occupants of the house or staff; he was not instructed to check the operation of the intercom at the beginning of every shift.[24]

16A. Mahlangu in capacity aforesaid acted negligently in that he opened the pedestrian gate of 50 Jellicoe Avenue, Melrose ("the premises") to intruders at approximately 19h55 on 22 January 2009 in circumstances where:
16A.1. He could and should have reasonably foreseen the intruders could pose as policeman in order to gain unlawful entry to the premises;
16A.2. He could and should have first satisfied himself that the intruders were in fact members of the South African police Services but failed to do so;
16A.3. He could and should have first enquired of the intruders and satisfied himself what their business was but failed to do so.
16A.4. He could and should have foreseen that in opening the pedestrian gate there was a reasonable possibility that the intruders would gain entry to the premises and cause harm to the plaintiffs.

[20] Defendant "would ensure that the security guards deployed at the plaintiff's premises were suitably trained and competent to perform the obligations of the defendant at the plaintiff's premises in terms of the guarding services agreement".
[21] Defendant "would at all times act in compliance act in compliance with the Private Security Industry Regulation Act, 56 of 2001, as well as the Code of Conduct accompanying the Act".
[22] Defendant "would, in providing the guarding services, act with due care and not act negligently. In particular, the defendant would not act carelessly in the execution of its mandate and observe the required standard as measured against the general standards prevailing in the private security industry at the time."
[23] The complaints in paragraphs 8.1, 8.5, 8.10, 8.11 have no relevance to the decision which must be made.
[24] See complaints in paragraphs 8.4.1, 8.6, 8.7, 8.9.

49. Thirdly, the defendant company holds itself out as providing specialist services of a security nature and, in this particular instance, guarding of residential premises. The invoice is in respect of only a "Grade D" armed guard but nonetheless this is an employee who could be expected to have been trained (not only as regards specific duties) in the nature of criminal trends in the relevant area and the appropriate security response thereto. Accordingly, one would expect the security company to have updated all employees on the possibility of unauthorized persons attempting to gain access under the guise of being plumbers, electricians, electricity meter readers, friends and relatives and even members of the SAPS such as the notorious members of the 'Blue Light Gang' which had received much media publicity.[25]

50. Fourth, there is a dispute as to whether or not Mr Mahlangu had been provided with a panic button. Mr Loureiro and Mr Barboza gave evidence that this had been handed over. Mr Mahlangu testified that he had never received same. There is no reference in the Occurrence Book to receipt of a panic button. I do not need to decide this dispute because there is no suggestion that there was ever any panic in response to which Mr Mahlangu would have wished or been able to press the button. He did not anticipate any crisis when he went to and opened the pedestrian gate; thereafter he was confronted with a firearm and under great pressure.[26]

51. Fifth, in any occupation, employees require advice, guidance and instruction. For this clear lines of communication are needed. Mr Mahlangu's evidence was that the company, his employer, had provided him with no means of contacting his supervisor, Mr Jehosephat Ndlovu. He was effectively out of touch with any supervisor or guidance and unable to call for backup throughout his twelve hour shift[27]. That Mr Mahlangu happened to have a personal cellphone is of no

[25] See complaint 8.9.
[26] See complaint 8.8.
[27] See Chapter 3, clause 5(b) of the Code of Conduct promulgated in terms of the Security Services Regulation Act.

consequence since the ability to use this cell depended, as he pointed out, on his ability to purchase airtime.[28]

52. Sixth, the security guard, Mr Mahlangu, accepted without questioning or consideration or need for verification that the intruders were members of the South African Police Services. Throughout his evidence he referred to them as the "police".

    a. Mr Mahlangu was presented with a white BMW displaying a blue light. From the front passenger seat emerged a man wearing dark blue clothing, a reflective vest marked 'Police' and blue cap with a bade thereon. To all intents and purposes this was an SAPS vehicle and a member of the SAPS emerging therefrom.
    b. When the man approached the guardhouse, he gave Mr Mahlangu no opportunity to read or inspect the card presented. Mr Mahlangu's evidence was that this man left the guardhouse window just as or before Mr Mahlangu reached the intercom. Mr Mahlangu did not gesture to this man or the driver of the vehicle that he wished to read/see the card.
    c. Mr Mahlangu went to the intercom - obviously intending to find out what was wanted. However, the man was not at the intercom (having already left that portion of the driveway). Mr Mahlangu heard no response. He did not return to the window and gesture to the man or the driver of the vehicle to return to the window and the intercom to explain who they were, where they were from, why they had come, what they wanted.
    d. At the inspection in loco both the occupants of the guardhouse and anyone on the driveway could hear each other through the intercom. Mr Mahlangu did not say that he knew the intercom was not working – he simply said that he assumed it was not working because there was not

[28]The complaint in paragraph 8.11 refers to plaintiff being able to make contact with the defendant, not the security guard.

response from the man no longer at the intercom. He did not try to use the intercom to contact the occupants of the house which would have confirmed whether or not the intercom worked.[29]

e. Mr Mahlangu did not contact the main house to ask the staff if anything had happened to them or the children, whether they had contacted the SAPS, what assistance was required. He made no attempt to establish if these were members of the SAPS, were they at the correct address and what they wanted. He did not seek authorization to let anyone into the property.

f. Mr Mahlangu's evidence was that he "took out the key… when I realized he was no longer at the window… my intention was to open the small gate….so I can hear what he wanted". He left the guardhouse, walked across the interior of the property to the pedestrian gate and opened it. He did not speak through the peephole or through the gate. At the inspection in loco it was easily possible to do so. Mr Mahlangu said that he opened the door because "maybe they want information from me" and "maybe I can help them". "I was not intending to open the gate and let someone in, [I wanted] to find out the story first".

53. Once the pedestrian gate had been opened, Mr Mahlangu was overpowered and some of the robbers went to the main house. There can be no doubt that Mr Mahlangu's action in opening the gate (and thereby in failing to disallow access to the premises) enabled the robbers to reach the house. It serves little purpose to speculate on the manner in which the robbers would have attempted to access the interior of the house – perhaps they would have knocked on the front door, perhaps they would have climbed over the security gate between the staff quarters and the back door. As it was, the security gate (of no great height) was not

[29] The evidence is that the intercom was in working order that very day. Mr Mahlangu supposition is merely because no one of the robbers spoke to him and he could not hear the engine of the BMW motor vehicle.

locked[30] and the robbers did not have to storm the staff quarters to obtain access. Once the pedestrian gate had been opened and the robbers had gained access to the premises, no further significant obstacle existed to prevent their robbery.

The Security Industry

54. The standard required of a reasonable security guard in the circumstances of guarding the Loureiro house have previously received consideration.

55. In Probe Security CC v The Security Officers Board[31], I had occasion to say:

> '[Security service providers] are granted access to private dwellings, industrial premises, retail complexes, vehicles and a host of otherwise private or off-limits areas. The service is rendered for reward. It is without doubt and extremely public undertaking…
>
> Those persons who render such security services "by their very nature carry an air of authority *vis-à-vis* the public. They wear uniforms. They bear arms. They have all the outward appearances of having authority over lay people". Not only on premise to which security officers have been granted access but in the public sphere generally, society as a whole is vulnerable to any abuses which may be perpetrated by such persons.
>
> Without doubt, society at large and the clients of the [security business] have an interest in the control [of] such a large private force and rely upon [the Security Officers Board to do so] by *inter alia*, ensuring that these armed men have training in the use of weaponry, are licensed to carry firearms, are not convicted felons, are register a s security officer[s] and subject to the discipline and occupational standards imposed by [the Security Officers Board]. The hazards to the public if the standards applicable to security officers are not maintained and the practices of security officers are not regulated are considerable; indeed life-threatening ." (Quoted with approval in Union of Refugee Women v Director: Security Industry Authority 2007(4) SA 395 CC).'

[30] On the CCTV dogs were seen moving through this area and the gate was not locked.
[31] Case no 98/13942, 17 August 1998, unreported.

56. The Constitutional Court has had occasion[32] to comment on "the very particular environment" of the private security industry which is large and powerful and "plays a vital role in complementing those [State security services]". There is a need for both "regulation and adherence to appropriate standards".[33]

57. The Supreme Court of Appeal[34] stressed the public interest in control of the "large and enormously powerful private security industry" so as to "ensure… that security officers have no links to criminal activities, are properly trained and are subject to proper disciplinary and regulatory standards…"

58. Security officers have been called "the first line of defence"[35] in protection against crime. They were certainly so perceived by the Loureiro family at their home.

59. All occupations demand certain requirements of the persons who fill them. These range over personal qualities, physical and mental attributes, levels of training and skills. The security industry is no different. After all, provision is made for compulsory training as also grading of security officers. Mr Mahlangu is, for instance, a Grade A guard who was employed in a Grade D position.

60. Amongst the requirements of a security guard, in the position of Mr Mahlangu, are: firstly, honesty, integrity and loyalty to both employer and the persons and property being guarded. Secondly, the ability to receive instruction and act in accordance therewith. Thirdly, wakefulness and alertness during the hours of a shift. Fourth, mindfulness of the responsibilities of guarding the post which entails watchfulness, wariness and lack of gullibility. Fifth, physical mobility and the ability to respond appropriately. Sixth, visibility.

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[32] In Union of Refugee Women supra
[33] Bertie van Zyl vs Minister for Safety and Security 2010(2) SA 181 CC
[34] Private Security Industry Regulatory Authority and Another v Anglo Platinum Management Services and others 2007[All SA] 154 SCA
[35] Bertie van Zyl supra

61. It is accepted that not all employees adhere to the standards which their employees expect of them. Similarly, not all employers meet the employment standards which are required of them. The security industry has been notorious for the random recruiting of employees, lack of training and skills of employees, absence of support structures for employees, low salaries and appalling working conditions. Hence the many instances of litigation involving employers of persons employed as security guards and the regulatory authority. In this judgment, I trust that I do not behave as an armchair critic expecting perfection from the security company and employee – I do not expect them to be perfect employer and employee but merely the reasonable employer and employee.

62. Mr Mahlangu gave evidence that he saw "my job to make sure the property and building and people [are] safe" which is a clear and precise definition of what was expected of him.

Negligence

63. In considering the conduct of both the defendant company and its employee, I must obviously have regard to the context within which such conduct did or did not happen – a residential home where the occupants fear crime and have installed extensive security systems to protect themselves; a company specialising in the provision of guarding services who contracted to provide graded and therefore trained guards for both day and night shifts; a security guard who is trained and graded and has experience.

64. I find that the reasonable security company would reasonably have foreseen the possibility inter alia: firstly, of unlawful intruders attempting to gain access to the premises; secondly, that such intruders might use disguise and guile to facilitate such unlawful access; thirdly, that the only point of access to the premises over which the company and its employee exercised control was the pedestrian gate

which therefore required particular surveillance and management; fourth, the only means of communication from the guardhouse to the family home, the company and the outside world was through the intercom in the guardhouse which functionality required to be checked; fifth, that clear, understandable or accessible instructions must be given and remain available from the company to the employee; sixth, that the employee in the guardhouse would require means to contact a supervisor for guidance or backup. In all these instances the company failed to take the reasonably appropriate steps to eliminate or ameliorate problems arising therefrom and were therefore in breach of their contract with the first plaintiff, negligent in failing to meet the standards required of a security company and the duty of care which they had assumed.

65. I find that a reasonable security guard should have been vigilant for intruders attempting to gain access under the guise of a legitimate occupation. In this instance, Mr Mahlangu was presented with an apparent SAPS vehicle and an apparent member of the SAPS who came to the guardhouse. It is my view that he cannot be criticised for assuming that this was a police patrol and a policeman.

66. However, a reasonable security guard in these circumstances should have ensured that he had sight of the card presented; gestured back the policeman when he left the window without giving the guard the opportunity to read the card; gestured back the policeman or the driver when the guard realised the policeman had left the intercom and was not responding (or even attempting to respond) through the intercom; perhaps gone to the pedestrian gate to enquire (through the gate without opening it) which station the SAPS had come from, which address they wanted and for what purpose; attempted to contact the main house through the intercom to enquire whether the SAPS had been called and for what purpose and seeking authorisation to let them in. I find that Mr Mahlangu, in opening the pedestrian gate, failed to take reasonably appropriate steps to prevent the anticipated harm from happening. By opening the pedestrian gate the security guard let down the

drawbridge and allowed the intruders to enter the Loureiro castle. This was negligence.

67. I find that the acts identified above constitute, individually and together, breaches of contract, failure to meet the duty of care expected, failure to meet the standards required of both security company and security employee and therefore negligence.

68. These acts and omissions are, as discussed above, causally connected to the harm which followed: entry into the house, apprehension of the family and staff; robbery of valuable items; captivity and trauma of the family and staff.

Conclusion

69. In the result:
    a. The defendant is liable in contract to the first plaintiff for the loss/damages he suffered as a result of the robbery on 22nd January 2009.
    b. The defendant is liable in delict to the second to fourth plaintiffs for the loss/damages they suffered as a result of the robbery on 22nd January 2009.
    c. The defendant shall pay the costs to date.

DATED AT JOHANNESBURG THIS 28th DAY OF SEPTEMBER 2011

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SATCHWELL J

Date of hearing: 5 May, 6 May, 9 May, 10 May, 11 May

Pleadings closed: 19th July 2011 (received mid August)

Date of judgment: 30th September 2011

Plaintiff's counsel: Adv. JG Smit

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Defendant's attorneys: Webber Wentzel