REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: 23675/12

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

20 NOVEMBER 2013 **FHD VAN OOSTEN**

In the matter between

ZANDSPRUIT CASH & CARRY (PTY) LTD **FIRST PLAINTIFF**

DEVLAND CASH & CARRY (PTY) LTD **SECOND PLAINTIFF**

and

G4S CASH SOLUTIONS SA (PTY) LTD **DEFENDANT**

Practice - adjudication of special plea as separate issue in terms of Rule 33(4) - Special plea of prescription based on time-limitation clause in agreement - interpretation of clause - principles applicable discussed and applied-plaintiffs' claims in delict - time-limitation clause not covering delict - special plea dismissed with costs.

J U D G M E N T

VAN OOSTEN J:

[1] The defendant, formerly known as Fidelity Cash Management Services, rendered cash management and ancillary services to each of the plaintiffs in terms of identical written agreements, styled 'Fidelity Cash Management and Ancillary Services Agreement' (jointly referred to as 'the agreement'). In regard to two identical incidents for the collection of cash monies from each of

the plaintiffs for the safe transportation thereof, some unknown person/s by way of a fraudulent scheme impersonated and acted as the employee/s of the defendant and deviously dispossessed the plaintiffs of the cash amounts of R265 465-25 and R641 744-00 respectively. The plaintiffs subsequently instituted action against the defendant in which payment of the said amounts respectively by each of the plaintiffs is claimed. The defendant defends the action and has raised a special plea of prescription based on a time-limitation clause in the agreement. This evoked the filing of a replication to the special plea. Pleadings subsequently closed and the matter was enrolled for hearing. At the commencement of the trial I ordered, by agreement between the parties, in terms of Rule of Court 33 (4), that the defendant's special plea be separated from the other issues. The trial accordingly proceeded on the determination of the defendant's special plea only. The issue was dealt with by way of argument and no evidence was presented.

[2] It is necessary at the outset to briefly examine the nature of the contractual relationship between the parties with particular reference to the terms of the agreement. The services to be provided by the defendant in terms of the agreement are defined as 'collection, conveyance, storage or delivery of money'. Clause 9 deals with 'Liability and Risk' and provides for exclusions and limitations to the defendant's liability for loss and damage suffered by the client 'pursuant to or during the provision of services'. The time limitation clause provides as follows:

9.9 The client shall notify Fidelity (the defendant) immediately of the discovery of a loss, which notification shall be confirmed in writing within 24. (sic) [hours]. Fidelity shall not be liable *in respect of any claim* unless written notice of the claim has been given within 3 months and summons has been issued and served within 12 months of the event giving rise to the claim'. [Emphasis added]

The defendant in its special plea relies on the plaintiffs' non-compliance with clause 9.9 in claiming that the claims have become prescribed. In this regard it is common cause between the parties that the plaintiffs' summons was issued and served outside the term of 12 months provided for in the clause.

The only issue remaining accordingly is whether the plaintiffs' claims are hit by the provisions of clause 9.9.

[3] The plaintiffs' claims are in delict. Based on the *actio legis acquilae* the plaintiffs claim damages from the defendant allegedly caused by the wrongful and negligent or intentional conduct of the defendant. The plaintiffs' particulars of claim commence with a recital of the relevant express terms of the agreement as they can be gleaned from the written documents. In addition a tacit term of the agreement is pleaded, which reads as follows:

'The defendant, in terms of the provisions of item 9(3)(d)(i) of Chapter 2 of the Regulations of the Code of Conduct for Security Service Providers promulgated in terms of the Private Security Industry Regulation Act 56 of 2001 (the PSIRA provision), might (sic) not exclude, limit or purport to exclude or limit its legal liability towards the plaintiffs in respect of any malicious, intentional, fraudulent, reckless or grossly negligent act of the defendant, its security officers or other personnel, or any other person used by the defendant or recommended by the defendant to the plaintiffs'.

Having set out the details of the two events I have already alluded to, the plaintiffs specify a large number of the defendant's acts of negligence relied on, for example in failing 'to put in place the necessary procedures whereby its cash in transit security uniforms could not be copied' in breach of the defendant's duty of care owed to the plaintiffs, rendering it liable for the loss. The facts pleaded therefore clearly establish a cause of action in delict.

[4] The plaintiffs' claims in essence being for loss of the money through theft are for pure economic loss sustained. The claims exist independently of the agreement although they would not have existed but for the existence of the agreement and are therefore competent (See *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA) para [7]; *Living Hands (Pty) Ltd and another v Ditz and others* 2013 (2) SA 368 (GSJ) para [62]; *Cathkin Park Hotel and others v JD Makwesch Architects and others* 1993 (2) SA 98 (W) 100D; and *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D)).

[5] Against this background the two essential issues I am required to determine are, firstly, as I have mentioned, whether the time bar provided for in clause 9.9 applies to the plaintiffs' claims and secondly, if so, whether the clause is invalid in view of the PSIRA provision.

[6] As a starting point in the consideration of the first issue it is necessary to interpret the italicised words in clause 9.9. Counsel for the defendant although not challenging the basis of the plaintiff's claims being in delict, submitted that the italicised words were sufficiently wide in their meaning to include delictual claims falling outside the provisions of the agreement. In support of the argument counsel (in supplementary heads of argument) relied on the remarks by Innes CJ in *R v Hugo* 1926 AD 268 at 271, in regard to the word 'any':

'...upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject matter or the context, but *prima fa*cie it is unlimited'.

Applied to the interpretation of the agreement the words 'in respect of any claim' although of wide import must be considered in relation to the services contracted for and the liabilities and risks referred to in clause 9 thereof. The clause, read as a whole within the context of the agreement (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [17]-[19]), plainly deals with the services to be rendered by the defendant . The service is defined in the agreement as meaning 'the service to be performed by Fidelity for the client as described in the agreement' which, as I have already alluded to, consists of 'collection, conveyance, storage or delivery of money'. Clauses 9.1, 9.6, 9.7 and 9.8 contain specific references to the services to be rendered by the defendant.

[7] Counsel for the defendant in advancing further support for the contention, emphasised the provisions of clause 9.6 of the agreement, which provides as follows:

'In the event of any services to be rendered by Fidelity, the client shall be solely responsible for the security of its premises and in the event of a loss occurring on such premises as a result of criminal conduct not attributable to the gross negligence

or theft by Fidelity or its employees acting in the course and scope of their employment, Fidelity shall not carry the risk of loss for the money lost or stolen as a result thereof, despite such money being in the custody of Fidelity. In that event the risk of such loss shall be carried by the client.'

The introductory sentence in the sub-clause already disposes of the argument: it clearly provides for events occurring in the delivery of services. Nowhere is there any mention of delictual liability outside the ambit of services, as is relied on for purposes of the plaintiffs' cause of action. Counsel for the defendant had another string to his bow: he submitted that the plaintiffs in relying on and pleading the implied term to the agreement, thereby introduced delictual liability into the agreement resulting in such claims also being subject to clause 9.9. The argument is flawed in its premise: the plaintiffs' reliance on the implied term does not alter the nature of the relationship between the parties and certainly does not deal with the defendant's liability in delict. Its purpose and therefore the reason for the plaintiffs' reliance on it are manifestly clear: as is set out in the plaintiffs' replication, 'clause 9.9 falls foul of the implied term' and therefore, so it is pleaded, invalid. This concerns the second issue which I will presently deal with.

[7] I accordingly conclude that clause 9.9 does not apply to the plaintiffs' cause of action which in itself decides the fate of the special plea.

[8] Should I be wrong in the finding I have made I propose to briefly comment on the second issue. The crucial issue is whether clause 9.9 contains a restriction on the defendant's liability. In this regard it will be remembered that the prohibition in the PSIRA provision is aimed at an 'exclusion' or 'limitation', of liability. The contention advanced by the defendant is that the clause cannot be construed as an exemption clause or a clause limiting or excluding the defendant's liability as referred to in the PSIRA provision. There is no authority for the proposition. On the contrary, the Constitutional Court, in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [45], held that a time-bar clause in an insurance contract, limiting the insured's right to seek judicial redress to a prescribed period of time, constitutes a limitation of such right. On

a parity of reasoning clause 9.9 falls within this category. For the sake of completeness I should add that the constitutionality of time-limitation clauses was considered in *Barkhuizen*, in respect of which Ngcobo J (as he then was), writing for the majority, held that there was no conceivable reason either in logic or in principle why public policy would not tolerate time-limitation clauses in contracts subject to the considerations of reasonableness and fairness. For this purpose the terms of the contract are considered in order to establish its consistence with public policy and further having regard to the relative position of the contracting parties in their bargaining powers.

[9] For these reasons the second issue is decided in favour of the plaintiffs.

[10] In the result I make the following order:

1. The defendant's special plea is dismissed.
2. The defendant is ordered to pay the costs pertaining to the defendant's special plea.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFFS	***ADV HP VAN NIEUWENHUIZEN***
PLAINTIFFS' ATTORNEYS	***ZIYAAD E PATEL ATTORNEYS***
COUNSEL FOR DEFENDANT	***ADV E WESSELS***
DEFENDANT'S ATTORNEYS	***VAN DER MERWE DU TOIT INC***
DATE OF HEARING	***14 NOVEMBER 2013***
DATE OF JUDGMENT	***20 NOVEMBER 2013***