HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 17193/2014

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.

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DATE	SIGNATURE

In the matter between:

MALESELA TAIHAN ELECTRIC CABLE (PTY) LTD Plaintiff

and

FIDELITY SECURITY SERVICES (PTY) LTD Defendant

***Case Summary*: Contract – Specific performance - of obligation arising from contract for provision of security services, to reimburse loss due to theft where gross negligence or involvement of security guards in theft can be proven as cause of theft – security guards proven to have been complicit in and cause of theft of copper coils at manufacturer's premises.**
Quantum of loss due to theft determined with reference to primary source documents in the form of stock sheets, waybills and test certificates.
Exemption or limitation of liability clause – security service provider seeks to avoid liability in excess of limitation provided for in limitation clause – contract containing provision purporting to exempt or limit security service provider's liability also in respect of malicious, intentional, fraudulent, reckless or grossly negligent acts of itself or of its security guards expressly prohibited by sub-regulation 9(3)(d) of Code of Conduct for Security Service Providers read with s 28(2) of the Private Security Industry Regulation Act 56 of 2001 – limitation clause in contract partially illegal – legislative intent is to visit limitation clause with nullity to the extent that it purports to limit security provider's liability for the intentional or grossly negligent acts of its security guards - limitation clause to that extent also contrary to public policy and unenforceable – illegal portion severable from rest of contract.
Claim for reimbursement of total extent of loss due to theft granted.

JUDGMENT

MEYER J

[1] The plaintiff, Malasela Taihan Electric Cable (Pty) Ltd (M-TEC), a local cable and wire manufacturer, instituted an action against the defendant, Fidelity Security Services (Pty) Ltd (Fidelity), a security services provider and registered in terms of the Private Security Industry Regulation Act 56 of 2001, claiming the loss due to theft of copper raw material from its premises during the evening on Sunday, 3 February 2013.

[2] M-TEC's claim is based on clause 9 of the contract that Fidelity had concluded with it on 19 September 2012, for the provision of security services at its premises (the contract), which contractual provision reads thus:

'In the event of any loss to M-TEC due to theft, either where gross negligence or involvement on the part of any of the Supplier's [Fidelity's] employees can be proven as being the cause of such theft, the Supplier undertakes to reimburse M-TEC to the full extent of such loss….'.

[3] In terms of clause 9, M-TEC is also entitled to be compensated for its loss due to negligence on the part of Fidelity's employees, but then the contractually agreed limitation of liability on the part of Fidelity in the sum of R 2 million per event may find application, a matter I need not decide. At a judicial pre-trial conference held between the parties on 27-28 October 2015 before Wright J, Fidelity admitted negligence on the part of its employees and, during the course of the trial, also gross negligence on their part.

[4] In its plea Fidelity denied M-TEC's averment that it was a term of the contract that Fidelity should take all reasonable steps to prevent access to M-TEC's premises of unauthorised persons and prevent theft of material and/or equipment from its premises. But the purpose of the contract for the provision of security services was to prevent loss to M-TEC, *inter alia*, by means of theft. This term is implied by law. Sub-regulation 8(3) of the Code of Conduct for Security Service Providers (the code of conduct), which the Minister for Safety and Security prescribed, acting under s 8

(1) Private Security Industry Regulation Act 56 of 2001 (the Act) and published in Government Gazette 2491 of 28 February 2003 (GN 305) provides that:

'Every security service provider must endeavour to prevent crime, effectively protect persons and property and refrain from conducting him or herself in a manner which will or may in any manner whatsoever further or encourage the commission of an offence or which may unlawfully endanger the safety or security of any person or property.'

This provision is binding on all security services providers by virtue of s 28(2) of the Act, which provides that-

'[t]he code of conduct is legally binding on all security service providers, irrespective of whether they are registered with the Authority or not...'.

[5] It is also in issue whether M-TEC's 'Security Procedures Manual' formed part of the contract as M-TEC contends. Incorporated into the contract is 'THE ATTACHED INSTRUCTIONS TO CONTRACTORS ON COMPANY PREMISES'. M-Tec's security procedures include M-TEC site specific procedures, such as: signing in and out requirements in the security office at the main gate giving access to M-TEC's premises, of each visitor entering or leaving the premises, and for visitors to be received by an M-TEC employee; searching requirements of all vehicles entering and exiting the premises; weighing in and out requirements of all trucks delivering raw materials or collecting manufactured goods at the weighbridge where they are weighed before raw materials are delivered or manufactured products loaded and again before they leave the premises. Fidelity, on the other hand, contends that another document, Fidelity 'Site Instructions', constituted the site instructions part of the contract and not the M-TEC Security Procedures Manual.

[6] The evidence of M-TEC's present head of security, Mr Dave Pretorius, and its head of security at the time, Mr Danie Bosman, that the security guards who rendered security services at M-TEC's premises in terms of the contract, were trained in and operated in accordance with the M-TEC's Security Procedures Manual, and that these procedures were placed on the site file, which was kept in the security office to which the security guards had access, has not been refuted by Fidelity. This evidence supports the conclusion that it was the M-TEC's Security Procedures Manual that was incorporated into the contract. Furthermore, the Fidelity Site Instructions are not site-specific to M-TEC's premises. However, it is unnecessary for me to definitively decide this issue in the light of Fidelity's admission

of negligence, and indeed of gross negligence, on the part of its security guards and the view I take of the actions of the Fidelity guards on the occasion of the theft.

[7] It is M-TEC's case that Fidelity's security guards not only acted grossly negligently, but that they were involved in and indeed facilitated the theft, and that Fidelity was accordingly liable to reimburse it to the full extent of the loss it had suffered due to the theft. Although Fidelity persisted in denying the involvement of its security guards in the theft, it hardly challenged M-TEC's witnesses who testified on the question of Fidelity's liability *vis-à-vis* M-TEC and it did not call any witnesses to rebut M-TEC's evidence on the question. It, therefore, is not necessary to refer in any detail to the evidence presented on behalf of M-TEC on this question.

[8] On Sunday evening, 3 February 2013, Fidelity's security guard on duty in the security office, was Ms Eunice Nakedi. Fidelity's security guards, Messrs Njabulo Oliphant and Doctor Matsiqui, were also on duty at M-TEC's premises. M-TEC presented real evidence in the form of Closed Circuit Television camera footage (the CCTV footage) that was taken during the occurrence of the theft at its premises by cameras positioned inside the security office (the inside camera), outside the security office (the outside camera), on the fibre optic cable building, which building is to the left of the main road that runs from the main gate inside M-TEC's premises (the fibre optic camera).

[9] The CCTV footage taken from the outside and the fibre optic cameras show two eight-ton trucks without loads entering M-TEC's premises at approximately 18:30; the first one is a flatbed (without panels) with a folded green canvass on it (the first truck) and the second one a white panelled truck (the second truck). The CCTV footage taken from the inside office between 18h28 and 18h30 shows four men entering the security office with hats pulled over their faces, probably to conceal them from the camera. Ms Nakedi is seen interacting with them briefly and positioning her back to the camera, probably to obscure the filling in and signing process of the visitor's slips in the visitor's book. Only two of the men sign the visitor's book, or rather pretend to sign it. Ms Nakedi also did not turn the visitor's book around and towards them in order for them to fill in the visitors slips. They left the security office when an M-TEC employee, Mr Botha, entered the security office. The same CCTV footage also shows Ms Nakedi and Mr Oliphant frequently taking

out their cell phones. Mr Oliphant is seen on his cell phone shortly before the arrival of the culprits and Ms Nakedi is seen rushing to her cell phone after the entry and exit from the control room of Mr Botha.

[10] An examination of the visitor's book reveals that there are no entries whatsoever around the time when the four culprits entered M-TEC's premises (notwithstanding the security procedure followed at M-TEC's premises that each visitor must complete and sign a visitor's slip). The ineluctable inference, therefore, is that the entire signing process of the visitors book was a deliberate sham.

[11] CCTV footage taken from the outside and fibre optic cameras show both trucks driving down the main road inside M-TEC's premises in the direction of the copper factory, which is beyond the weighbridge and to the right of the main road, without stopping at the weighbridge (notwithstanding the security procedure followed at M-TEC's premises that all trucks must be weighed at the weighbridge when they enter M-TEC's premises, and, if it is outside business hours, as was the case when the two trucks entered, for the security guards to ensure that the trucks wait until the weighbridge opens before allowing them entry or exit).

[12] The copper factory is where M-TEC manufactures products for its clients from copper raw materials – copper rod – purchased locally and abroad. It purchases 7.9 mm copper rod from Phalaborwa Mining Company, 7.9 mm copper rod from Zamefa mine in Zambia and 8 mm copper rod from Daewoo in Russia. It also uses what is called 'odd sizes' - 10mm, 13 mm and 20 mm - copper rod in its manufacturing processes. M-TEC receives the copper rod from its suppliers wound up in coils, each weighing between 3.5 to 4.8 tons. The 8mm copper coils from Daewoo in Russia are wrapped in clear plastic (the Daewoo copper coils), the 7.9mm copper coils from Zamefa in Zambia are wrapped in plastic in the same way as the Daewoo coils, except that the plastic wrapping of the Zamefa coils is black in colour (the Zamefa copper coils) and the 7.9mm copper coils from Phalaborwa Mining Company are not wrapped in plastic, clear or otherwise, and the copper rod is held together with vertical metal straps with a thin band of cardboard between the metal straps (the Phalaborwa copper coils). The copper coils are off-loaded in a designated area outside the copper factory and then moved into a designated area inside the copper

factory with fork-lifts. Due to their weight, it is only with the use of forklifts that copper coils can be lifted and moved.

[13] Mr Botha has been a die maker at M-TEC since 1980. Dies are used in the manufacturing process of reducing the copper rods into wiring cable. Mr Botha testified that he had been called out to M-TEC's premises on the evening of 3 February 2013 to supply the aluminium division with dies. CCTV footage taken from the inside camera shows Mr Botha entering the security office at about 19:21 and leaving it at 19:35. He testified that after he had left the security office he first went to the aluminium factory and then to the copper factory to fetch the dies. The 'die shop' is located inside the copper factory. Before entering the copper factory, he noticed the security guard, Mr Oliphant, running up the main road from the security office into his direction. Mr Oliphant then accompanied Mr Botha into the copper factory, and then proceeding to push him with his shoulder in an attempt, so Mr Botha perceived his actions, to steer him away from the route he was walking on his way to the die shop. Mr Botha saw an eight-ton flatbed truck parked inside the copper factory. There were two men standing on either side on top of the flatbed of the truck, busy covering three copper coils. Mr Botha testified that the three copper coils he had seen on top of the flatbed of the truck were not wrapped in plastic, but were bare copper. Mr Botha enquired from Mr Oliphant what the truck was doing in the copper factory. He responded that it was a 'delivery'.

[14] Mr Botha went into the die shop and while he was busy in there, Mr Oliphant waited outside the door, but he left before Mr Botha was finished. On his way out of the copper factory, Mr Botha noticed that the eight-ton flatbed truck was still inside the copper factory, but then with the copper coils on the back completely covered with the green canvass. One of the men sat on the driver's seat with his head on his arms on the steering wheel. Mr Botha took a photograph of the truck, which was admitted into evidence. The photograph shows a flatbed truck from behind with a load on it covered and wrapped in green canvass and straps hanging off the side, not yet fastened (Mr Botha's photograph).

[15] Before he left M-TEC's premises, Mr Botha had returned to the security office to book himself out. He also asked Ms Nakedi what the truck was doing inside the copper factory, and she twice responded that it was 'a copper delivery'. CCTV

footage taken from the inside camera shows Mr Botha leaving the security office at about 19.50. Ms Nakedi then took out her cell phone and walked into an adjacent office.

[16] The same truck as the one depicted in Mr Botha's photograph is seen leaving M-TEC's premises at 20h00 on the CCTV footage taken from both the fibre optic and outside cameras, but with the straps now tightened. The only reasonable inference that can be drawn, therefore, is that the truck which Mr Botha had seen inside the copper factory was indeed the first truck, which on the CCTV footage is seen entering M-TEC's premises at 18.30 and leaving it at 20.00.

[17] The second truck, which is seen entering M-TEC's premises at 18.30 without a load, is seen on the CCTV footage heading to the main gate from the direction of the copper plant and leaving M-TEC's premises at 20:46, 45 minutes after the first one had left, also with a load that was covered with a canvass. CCTV footage taken from the fibre optic outside cameras shows how the security guards allowed both trucks to proceed out of the gate, without being weighed on the weighbridge and without the men entering the security office to return their visitor's slips (the normal security procedures followed at M-TEC).

[18] A delivery by trucks arrived shortly before midnight and M-TEC's security procedures was then properly followed. The CCTV footage shows that the trucks loaded with copper were permitted to park just on the inside of the main gate and the drivers duly signed in as is reflected in the visitor's book. The trucks had to wait until the weighbridge was opened the next morning at 07:00. This further supports the evidence of Mr Bosman that the three security guards on duty that evening knew M-TEC's security procedures, but did not follow them in the case of the two trucks which entered M-TEC's premises that evening without loads and left with loads.

[19] Ms Nakedi was interviewed by Mr Bosman and Mr Coetzee in the week following the event. She denied any knowledge of any persons entering M-TEC's premises during that Sunday evening. But she broke out in tears and refused to answer any further question after she had been shown the CCTV footage. Mr Matshiqui was also interviewed. He too initially denied that the two trucks entered

M-TEC's premises that evening, but thereafter stated that he recalled one truck with one coil. Mr Oliphant failed to return to work since the theft.

[20] Having watched the CCTV footage showing the involvement of the three security guards, Fidelity's Mr Sarel Coetzee, who managed the contract on its behalf, requested M-TEC's Mr Danie Bosman to testify at the disciplinary proceedings of the three security guards. On that occasion, he led Mr Bosman in evidence, using the same CCTV footage shown at this trial, to establish charges of breach of procedures, gross negligence and involvement in the theft on their part. They were dismissed upon conclusion of the disciplinary enquiry; Messrs Oliphant and Matsiqui on 25 April 2013 and Ms Nakedi on 3 May 2013.

[21] M-TEC has proven that Fidelity's three security guards were complicit in the theft. They acted in concert with the four men and allowed them to steal the copper coils. Had they not permitted the two trucks to enter, not facilitated their entry into the copper factory and their exit out of the main gate loaded with copper coils, M-TEC probably would not have suffered any loss. A simple refusal to allow them entry would probably have been sufficient to prevent the theft. Their breach of M-TEC's security procedures - ranging from the failure to require the men to properly sign in, to ensure that an M-TEC employee received them on M-TEC's premises, to search the trucks, to insist that the trucks wait until the weighbridge opened the next day prior to entering or exiting the premises - compels the conclusion that their actions caused the theft. Their gross negligence and deliberate involvement facilitated and made possible the theft and Fidelity, in terms of clause 9 of the contract, is thus liable 'to the full extent' of any loss to M-TEC due to the theft.

[22] Mr Botha's evidence and the CCTV footage establish that three coils were conveyed on the first truck and that they were 7.9 mm Phalaborwa copper coils. Under cross-examination Mr Botha conceded that it was difficult to, at a glance, distinguish between an 8 mm copper rod and a 7.9 mm one, but he remained confident in his ability to easily distinguish between 7.9 mm, 13 mm and 20 mm copper rods. The three copper coils which he had seen on the first truck were not wrapped in plastic and they accordingly originated from the Phalaborwa Mining Company, which company does not supply M-TEC with 8 mm, but 7.9 mm copper rods.

[23] Mr Botha testified that he did not hear the operation of a forklift during the time that he had spent in the copper factory on the evening in question. The forklifts used by M-TEC are noisy; they have loud diesel engines and a warning 'beep' when reversing. Had the copper coils been off-loaded from the first truck after Mr Botha had seen them on his way to the die shop and before he again had seen the truck's load covered on his way out, he would have heard the noise of a forklift. It is also improbable that the men would have loaded three Phalaborwa copper coils onto the first truck, just to off-load them again, and then to load copper coils from another manufacturer onto the truck after Mr Botha had seen them uncovered and before he had seen the first truck's load covered.

[24] The CCTV footage taken from the fibre optic and outside cameras show the first truck leaving M-TEC's premises at 20:00. It travelled from the direction of the copper factory, straight past the weighbridge and into the direction of the main gate. Three large cylindrical shapes can be seen underneath the canvass, which are held down with three straps, one across each large cylindrical shape. M-TEC's manager of the copper division, Mr Jansen Booysen, testified that (although it might be difficult for a lay person) a person working at the copper factory on a daily basis for many years like himself, is easily able to identify the three shapes underneath the canvass on CCTV footage as copper coils. He pointed out the indentation in the canvass in the hollow centre of each coil. The inevitable conclusion, therefore, is that the coils on the first truck were three 7.9 mm Phalaborwa copper coils.

[25] The next question is what was then conveyed on the second truck, which, on the CCTV footage, is seen entering M-TEC's premises at 18:30 and leaving it at 20:46. It is seen driving from the direction of the copper factory, without its headlights on, passing the weighbridge without stopping, and, when it passes close to the outside camera, three large cylindrical shapes, resembling what is seen on the first truck, can be seen underneath a black canvass. The three large cylindrical shapes take up the whole of the rear of the truck. It is improbable that the items on the back of the second truck would have been aluminium coils which, from the photographs admitted into evidence, are a lot smaller. The aluminium coils are narrower and taller. Photograph A1 in the D series shows that it is possible to place two aluminium coils side by side on a flatbed and almost two side by side on a

panelled eight-ton truck. Furthermore, photographs A3 and A4 in the D series show that when three aluminium coils are lined up on the back of an eight-ton truck the coil closest to the rear of the truck only reaches the beginning of the rear wheel axle. There is space for almost two more aluminium coils. The situation is different with copper coils. Mr Booysen loaded a panelled eight-ton truck with three copper coils. They filled the rear of the truck in much the same way as is shown on the CCTV footage in respect of both trucks.

[26] When the CCTV footage taken from the outside camera of the second truck leaving M-TEC's premises is viewed, it is evident, according to Mr Bosman and Mr Booysen, that there are three copper coil-like shapes beneath the black canvass that covers them. Furthermore, Mr Bosman testified that, in his experience, only copper was ever stolen from M-TEC's premises, and never aluminium or fibre optic cables. Aluminium is not as valuable as copper and fibre optic cables are not valuable at all. In my view, it is therefore safe to accept that the men who entered M-TEC's premises on the evening in question, were there to unlawfully enrich themselves with copper and that they loaded three copper coils onto each eight-ton truck.

[27] Mr Booysen identified two of the copper coils stolen as Zamefa copper coils. He testified that a load of Zamefa copper coils had been delivered at the copper factory on 28 January 2013. They were placed in a straight line on the floor inside the copper factory, just outside the raw materials store. He described the raw materials store as an area inside the copper factory, which is cordoned off with palisade fencing. The raw materials store has two gates, one used for what he called 'the odd sizes' (10 mm, 13 mm and 20 mm copper rod) and the other one for the 7.9 and 8 mm copper rods. Mr Booysen testified that when he had left M-TEC's premises on Friday 1 February 2013, there were eight Zamefa copper coils on the floor. When he had been made aware of the incident and possible copper theft on his return to work the next week, he inspected the raw materials store and immediately noticed that two Zamefa copper coils – the first two in the line of eight Zamefa copper coils - were missing. The two Zamefa copper coils were wrapped in black plastic and did not leave M-TEC's premises on the first truck. They, therefore, probably left M-TEC's premises on the second truck. There were no further Zamefa copper coils reported or seen to be missing, which means that the third copper coil

on the second truck probably was a Phalaborwa copper coil or a Daewoo copper coil.

[28] Mr Booysen's investigation shows that the third coil on the second truck was probably also a Phalaborwa copper coil and he identified the exact four Phalaborwa copper coils that were probably loaded onto the two trucks and driven out of M-TEC's premises during the evening on 3 February 2013. He had reference to the copper division's stock sheets that were compiled during the November 2012 quarterly stock count (the November 2012 stock sheets), the waybills of all copper raw materials delivered to M-TEC's premises from the November 2012 stock count until the next stock count that was done a few days after the incident, on 8 February 2013 (the waybills), the stock sheets that were compiled during the stock count on 8 February 2013 (the February 2013 stock sheets) and test certificates that were issued by M-TEC to its customers in respect of each product it manufactured, for the period from the November 2012 stock count until beyond the date of the February 2013 stock count (the test certificates).

[29] By way of interpolation, it is necessary to refer to the evidence relating to these source documents, their accuracy and reliability. Mr Booysen testified that the November 2012 and February 2013 stock sheets were reliable due to the meticulous way in which the physical stock counts are conducted quarterly and the verification by himself of each entry made on the November 2012 and February 2013 stock sheets. He was personally involved in the November 2012 stock count. The copper coils were each listed on a stock sheet, by size and weight. The net weight of each copper coil, which was entered onto the stock sheet by a planner, was obtained from a tag attached to each copper coil when it was manufactured, which also contains further identification information in the form of a 'run' and a 'coil' number and the date of production at the mine. During the two stock counts, Mr Booysen personally verified all the net weights entered onto the stock sheets, item by item, in the presence of the planner who entered the information onto the stock sheets. The stock sheets show which copper coils were physically in stock as at the November 2012 and February 2013 stock takes.

[30] Fidelity called Ms Barrett, an audit clerk, and Mr de Vos, a chartered accountant, as its witnesses on the question of the quantum of M-TEC's loss due to

the theft. Ms Barrett is employed by Mr de Vos, whom Fidelity called as an expert witness. Ms Barrett conceded that both stock counts were reliable. In the summary of his expert evidence, Mr de Vos expressed the opinion that the 8 February 2013 stock count was accurate and reliable. But when he testified, he expressed a reservation about its reliability, because the stock sheets only reflect the net weights of the copper coils, and not also their run and coil numbers. The evidence, however, establishes that the absence of run and coil numbers on the stock sheets did not in any way detract from the accuracy and reliability of the two stock counts and is not material to the determination of the quantum of M-TEC's loss.

[31] I have already mentioned that all trucks delivering raw materials or collecting manufactured goods are required to be weighed at the weighbridge before raw materials are delivered or manufactured products loaded and again before they leave M-TEC's premises. Most of the waybills had a security stamp, and a date and time of entry, and, those without such security stamp, were confirmed by delivery notes containing security stamps. Ms Barrett agreed that a delivery note or waybill containing a security stamp is a reliable primary source document to indicate the movement of goods. The waybills show the actual entry of each copper coil onto M-TEC's premises during the period between the two stock counts.

[32] A test certificate is a certificate of quality issued by M-TEC to its customers with every despatch of manufactured goods (electrical wires and the like). The goods manufactured by M-TEC are required to comply with SABS standards and other client-specific specifications. M-TEC, thus, provides its clients with a quality traceability certificate for each manufactured product. The certificate of quality contains information relating to the manufactured product, including its physical and electrical capabilities, which is tested in the laboratory during production by sample. At the same time, the laboratory keeps a record of which manufactured product originated from which raw copper rod. M-TEC's supervising laboratory technician, Mr Anton Miller, who prepared all the test certificates during the relevant period, testified that when a copper coil is taken from the raw materials store onto the production floor, the identity of the copper coil (run and coil numbers) is copied onto 'a buff tag' by the testers, who were supervised by him. His duties included ensuring the accuracy of the recordal of the run and coil numbers from the tag on the coil onto

the buff tag. The run and coil numbers of the raw materials from which the finished products had been manufactured, were recorded onto each test certificate. Mr Booysen testified that this was done for quality and traceability purposes so that, in the event of a fault or problem with a finished product, it could be traced back to the original copper coil from which the finished product was manufactured and to its supplier. The test certificates, therefore, show which of the copper coils had been used in production during that period.

[33] Ms Barrett conceded that Mr Booysen's determination of which copper coils in stock had been used in production during the relevant period, was correct. It, however, transpired during further cross-examination that she did not have reference to the test certificates. But, on the assumption that the test certificates reliably recorded each copper coil that went into production, she conceded the correctness of Mr Booysen's methodology in ascertaining which copper coils had been used in production. Furthermore, Mr de Vos conceded that the test certificates were reliable primary documents to determine stock movement.

[34] The November 2012 stock sheets (M-TEC's copper coil stock on hand as at the date of that stock count) plus the waybills (all incoming copper coils from the November 2012 until the February 2013 stock counts) show all the copper coils which M-TEC had in stock and further acquired as at 8 February 2013. The test certificates show which of those copper coils were used in production and the February 2013 stock sheets show which of those copper coils were still in stock as at 8 February 2013. The copper coils, which in terms of the waybills were delivered to M-TEC from the Nov 2012 until the February 2013 stock counts, but not used in production in terms of the test certificates and not in stock in terms of the February 2013 stock sheets, according to Mr Booysen, were missing, not on M-TEC's premises, and could only have been stolen. They are, according to his determination, three Daewoo copper coils and 22 Phalaborwa copper coils.

[35] Mr Booysen testified that when a copper coil is retrieved from the raw materials store, it is always the last coil in that is retrieved and put into production first – last in, first out. This is because of the limited space in the raw materials store, the size and weight of the copper coils and the impossibility of moving them except with a forklift. When copper coils are delivered, they are stacked in the raw materials

store in front of the copper coils that have already been stacked there. They are used first, because of the impossibility of a forklift reaching the copper coils that have been stacked behind them.

[36] Mr Booysen identified that, of the missing copper coils, the last four which had entered M-TEC's premises, were delivered on 22 and 23 January 2013. The total weight of these four coils, together with the weight of the two missing Zamefa copper coils, add up to 25 767 kilograms or 25.767 tonnes. There were, according to Mr Booysen, no incidents or reports of theft of copper at M-TEC during the two weeks preceding the weekend of 3 February 2013. Also, Mr Danie Bosman, who reviewed the CCTV footage, testified that no further incident could be found during that period.

[37] When she testified, Ms Barrett pointed out several inconsistencies relating to stock movement and shortages between various Excel spreadsheets prepared by M-TEC's costing division. She also demonstrated variances between Excel spreadsheets prepared by the M-TEC's costing division and the copper division's physical stock counts at the end of November 2012 and on 8 February 2013. She, however, conceded under cross-examination that the accounting schedules and spreadsheets analysed by her, may or may not be correct depending on the extent to which they accorded with the underlying reality. Ms Barrett agreed that it was necessary for accountants to verify accounting records with primary or source documents and physical stock counts. She agreed that accounting records are wrong to the extent that they are not in line with physical stock counts and source documents. Ms Barrett conceded that Mr Booysen's determination of the missing stock from M-TEC's premises, is reliable. Mr de Vos' evidence also identified inaccuracies and inconsistencies in the accounting records of M-TEC, but took the matter no further for Fidelity. He did not undertake the actual stock counts, nor did he analyse the waybills and test certificates.

[38] Mr Booysen's identification of the six copper coils that M-TEC probably lost due to the theft at its premises on Sunday evening, 3 February 2013, and his determination of M-TEC's total net weight copper loss must, in my view, be accepted. His determination has not in any way been refuted by the evidence presented on behalf of Fidelity, is logical and accords with the probabilities. M-TEC has proved, on a balance or probabilities, that the two Zamefa copper coils and the

four Phalaborwa copper coils with a total net weight of 25.767 tonnes as identified by Mr Booysen, are the six copper coils that were stolen from M-TEC's premises on that evening.

[39] M-TEC is claiming specific performance from Fidelity of its obligation arising from clause 9 of the contract to reimburse its loss due to the theft. Clause 9 thus affords M-TEC the right to recover from Fidelity the loss which it has sustained because of the theft, in other words, the amount by which its patrimony has been diminished due to the theft should be restored to it. The quantum of its loss, therefore, is to be determined with reference to the value of the 25.767 tons of raw copper rod on the date of the loss. The parties agreed that the reasonable market value of the copper coil was R74,849.18 per ton (excl VAT) on 3 February 2013. The multiplication of this amount by 25.767 tons, plus VAT, amounts to R 2,198,648.25.

[40] Relying on the further provision in clause 9 of the contract, which stipulates that-

'[t]he Supplier's liability shall always and in all instances be limited to and not exceed an amount of R2 000 000.00 (two million rand) per event and always subject to an aggregate for any period of 12 months commencing on the commencement date, of R2 000 000.00 (two million rand)',

Fidelity seeks to avoid liability *vis-à-vis* M-TEC in excess of the R2 million aggregate limitation (the limitation clause). M-TEC, on the other hand, argues that the limitation clause is invalid to the extent that it limits or purports to limit Fidelity's liability for the intentional or grossly negligent acts of its security guards by virtue of the provisions of s 28 of the Act and sub-regulation 9(3)(d) of the code of conduct, which sub-regulation provides that-

'[a] security service provider may not . . . make a contractual offer to or conclude a contract with a client containing any term, condition or provision that . . . excludes, limits or purports to exclude or limit the legal liability of the security service provider towards the client in respect of any malicious, intentional, fraudulent, reckless or grossly negligent act of the security service provider, his or her security officers or other personnel, or any other person used by the security service provider or recommended by him or her to the client',

or, so it further argues, the limitation clause is to that extent contrary to public policy and thus unenforceable.

[41] The prohibition contained in sub-regulation 9(3)(d) of the code of conduct is by virtue of s 28(2) of the Act statutorily binding on all security service providers, including Fidelity. A contract containing such an exemption or limitation of liability provision is expressly prohibited. The limitation clause in the contract which Fidelity concluded with M-TEC violates the provisions of sub-regulation 9(3)(d) to the extent that it purports to limit Fidelity's liability towards M-TEC in respect of malicious, intentional, fraudulent, reckless or grossly negligent acts of itself or of its security guards, and, therefore, is partially illegal. However, the Act or the code of conduct is silent on the question what effect such a contravention will have on the validity of the contract or of the limitation clause.

[42] There are many statutes which expressly provide that certain contracts are void, such as the Alienation of Land Act 68 of 1981, but there are also many which do not contain such express statement. A thing done contrary to the direct prohibition of the law is generally void and of no effect; the mere prohibition nullifies the act. (See *Schierhout v Minister of Justice* 1926 AD 99 at 109.) But, as was said by Boshoff JA in *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188G,

'. . . this rule is not inflexible or inexorable. Although a contract is in violation of a statute it will not be declared void unless such was the intention of the Legislature and this is nonetheless the rule in the case of a contract in violation of a statute which imposes a criminal sanction. The legislative intent not to render void a contract may be inferred from general rules of interpretation. Each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other. In the case of *Standard Bank v Estate Van Rhyn* 1925 AD 266 SOLOMON JA at 274 stated the position as follows:

"what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As *Voet* (1.3.16) puts it – 'but that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it'. Then after giving some instances in illustration of this principle, he proceeds: 'The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow of the act itself done contrary to the law.'"

See also *Swart v Smuts* 1971 (1) SA 819 (A) at 829C and *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) at 913H-914C.'

[43] The relevant legislative instruments must be interpreted in accordance with the established principles of interpretation (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12). Section 39(2) of the Constitution also enjoins a court to 'promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation.

[44] In *Wille's Principles of South African Law* 9th Ed Francois du Bois et al, at 761, the learned authors refer to the following factors which the courts have considered relevant in ascertaining the legislative intent not to render void a contract:

'The legislative intent not to render void a contract may be inferred from general rules of statutory interpretation. In this regard, the courts have considered the following factors to be relevant: the subject matter of the prohibition; its purpose in the context of the legislation; the remedies, if any, provided in the event of a breach of the prohibition; the nature of the mischief which the prohibition was designed to remedy or avoid; and any cognizable impropriety or inconvenience that might flow from a finding of invalidity. Where the purpose of the prohibition is merely to protect the Revenue, the inclination will be to uphold the validity of the contract; so too where 'greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law'. On the other hand, where recognition of the validity of the contract would bring about, or give legal sanction to, the very situation which the legislature seeks to prevent, the inclination will be the other way.'

(Footnotes omitted.)

[45] I now turn to a consideration of the context and purpose of the Act and the code of conduct in the light of these principles. It is instructive for purposes of the present enquiry, what the Constitutional Court stated at the outset of its judgment in *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC), a case concerning the contractual liability and vicarious delictual liability of a security service provider for the wrongful and negligent act of its security guard:

'[1] The founding values of our Constitution include human dignity, the advancement of human rights and freedoms and the rule of law. The Bill of Rights recognises the rights to life, freedom and security of the person, freedom from all forms of violence, privacy and not to be arbitrarily deprived of property. And the preamble to the Constitution calls for our people to be protected. Our police service is mandated 'to prevent, combat and investigate

crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.

[2] Yet, there is a disturbingly dark side to the often-stated miracle of our constitutional democracy. South Africa is plagued by crime — often viciously violent, sometimes sophisticated and organised, often ridiculously random, but always audacious and contemptuous of the values we are supposed to believe in and the human rights enshrined in our Constitution — perhaps not unlike other young democracies. More than 16 000 murders were reported to have taken place in the 2012/2013 year — almost 45 a day — and almost 106 000 armed robberies. Many of our people live behind high walls and electrified fences; others rely on the communities around them for security; and many are mercilessly exposed to the cruelty of crime.

[3] The South African Police Service is not always perceived to be capable of meeting its constitutional mandate. Hence, the private security industry is a large and powerful feature of South Africa's crime-control terrain. While it should and could not be a substitute for state services, it fulfils functions that once fell within the exclusive domain of the police. This is in part because of our history. From the late 1970s and throughout the 1980s the apartheid regime concentrated policing activities on state security and maintaining political control, and so the private security industry increasingly played a role in protecting private individuals' safety and security.'

[46] The private security industry is extensively involved in crime prevention in this country; in protecting people's safety and security and their property from theft or damage. The private security industry, as it was held in *Loureia*, 'fulfils functions that once fell within the exclusive domain of the police'. The adequate protection of the constitutionally entrenched rights to life and security of the person as well as the right not to be deprived of property, is fundamental to the well-being and to the social and economic development of every person.

[47] The Act commenced on 14 February 2002. According to the long title, its scope and purpose is '[t]o provide for the regulation of the private security industry' and 'for that purpose to establish a regulatory authority . . . and to provide for matters connected therewith.' The Act is prefaced with a preamble that reads thus:

'WHEREAS the adequate protection of fundamental rights to life and security of the person as well as the right not to be deprived of property, is fundamental to the well-being and to the social and economic development of every person;

AND WHEREAS security service providers and the private security industry in general play an important role in protecting and safeguarding the aforesaid rights;
AND WHEREAS every citizen has the right to freely choose an occupation, including the occupation of a security service provider;
AND WHEREAS it is necessary to achieve and maintain a trustworthy and legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law, and is capable of ensuring that there is greater safety and security in the country;
BE IT ENACTED THEREFORE by the Parliament of the Republic of South Africa: -'

[48] The objects of the regulatory authority are set out in s 3. Its primary objects are to regulate and to exercise effective control over the practice of the occupation of security service providers in the public and national interest and the interests of the private security industry itself, and for that purpose *inter alia* to: promote a legitimate private security industry, which acts in terms of the principles contained in the Constitution and other applicable law (s 3(a)) and is characterized by professionalism, accountability (s 3(c)), trustworthiness (s 3(e)) and efficiency in and responsibility with regard to the rendering of security services (s 3(g)); ensure that all security service providers act in the public and national interest in the rendering of security services (s 3(b)); protect the interests of the users of security services (s 3(o)); promote high standards in the training of security service providers and prospective security service providers (s 3(j)); and determine and enforce minimum standards of occupational conduct in respect of security service providers' (s 3(f)).

[49] The Minister for Safety and Security, must, in terms of s 28(1), prescribe a code of conduct for security service providers, which, in terms of s 28(3)(a), 'must contain rules that security service providers must obey in order to promote, achieve and maintain . . . '[a] trustworthy and professional private security industry which acts in terms of the law applicable to the members of the industry', . . . '[c]ompliance by security service providers with a set of minimum standards of conduct which is necessary to realise the objects of the Authority' . . . and . . . '[c]ompliance by security providers with their obligations towards the State, the Authority, consumers of security services, the public and the private security industry in general …', and, in terms of s 28(4)(a), must be drawn up ' . . . with due regard to . . . the objects of the Authority'.

[50] A code of conduct has been prescribed. Sub-regulation 9(3)(d) of the code of conduct contains the prohibition on exemption and limitation clauses that exempts or limits the liability of a security service provider for the acts referred to in the sub-regulation. The procedures for the enforcement of the code of conduct by the regulatory authority are contained in the 'Improper Conduct Enquiries Regulations', which regulations are by virtue of regulation 30 incorporated in the code of conduct. A contravention or the failure to comply with a provision of the Act or of the code of conduct, in terms of sub-regulation 24(1), constitutes improper conduct. A security service provider who is found guilty of improper conduct is liable to any penalty contemplated in regulation 25, which penalties are a warning or reprimand, suspension of registration as a security service provider for a period not exceeding six months, withdrawal of registration as security service provider, a fine not exceeding R10 000, publication of appropriate details of the conviction of improper conduct and any penalty imposed, or any combination of the penalties. Regulation 28 provides for a criminal sanction. It reads as follows:

'Any person who commits improper conduct in terms of this Code, is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding 24 months, or to both a fine and such imprisonment.'

[51] The prohibition in sub-regulation 9(3)(d) is directed not at the conclusion of contracts for the provision of security services by private security providers with their clients, but at the inclusion of an exemption or limitation clause that excludes or limits the liability of the security provider towards its client in respect of malicious, intentional, fraudulent, reckless or grossly negligent acts of itself, its security officers and the other persons listed in the sub-regulation. The Act, in its preamble, acknowledges the important role which the private security industry in general plays in the protection and safeguarding of the fundamental rights to life and security of persons and the right not to be deprived of their property. The legislative intent is to achieve and maintain a trustworthy and legitimate private security industry that protects and safeguards these fundamental rights and can ensure greater safety and security in the country. The legislature intended these objectives to be achieved and maintained through the establishment of a regulatory authority that regulates and controls the practice of the occupation of security service providers and through the Minister for Safety and Security prescribing a code of conduct binding upon them

inter alia with a set of minimum standards of conduct aimed at realising the objectives of the regulatory authority, including those of protecting the interests of the users of security services, high standards in training and of a private security industry which acts in terms of the principles contained in the Constitution and other applicable law, is characterized by professionalism, accountability, trustworthiness, is efficient and responsible and acts in the public and national interest in rendering security services.

[52] The sub-regulation 9(3)(d) prohibition against the inclusion of certain exemption and limitation clauses in contracts concluded by security service providers with their clients, is a measure aimed at realising and maintaining these statutory objectives. The nature of the mischief which the prohibition is designed to avoid is for a security service provider, through its own malicious, intentional, fraudulent, reckless or grossly negligent acts, or those of its security officers or of the other persons referred to, not to adequately protect and safeguard the fundamental rights to life and security of the person and the right not be deprived of property. A security service provider is employed to adequately protect and safeguard these fundamental rights, for reward.

[53] Having regard to the legislative intent as it appears from what has been said above, the limitation clause in the contract between Fidelity and M-TEC must be visited with nullity to the extent that it purports to limit Fidelity's liability for the intentional or grossly negligent acts of its security guards. Legal sanction will otherwise be given to the very situation which the legislature wishes to prevent. (See *Pottie v Kotze* 1954 (3) SA 719 (A) at 726-727.) An interpretation that the legislative intent is not invalidity, would detract from the adequate protection and safeguarding of the fundamental rights to life and security of persons and the right not to be deprived of their property. On the contrary, it would permit the security service providers, who are employed for reward, to infringe those fundamental rights, through their own intentional and grossly negligent acts or those of their security guards, without civil liability. That would undermine the purpose of the legislation, several of the objects of the regulatory authority, and it would undermine both the trustworthiness and legitimacy of the private security industry. Security service providers would be disincentivized from undertaking proper screening and exercising

proper control of their security guards. The users of security services would be exposed to a situation where those who protect them for reward, might, without civil liability, cause them harm. The purpose of sub-regulation 9(3)(d), on a proper construction of the Act, is not sufficiently served by the penalties prescribed for improper conduct.

[54] I am further of the view that public policy also demands that the limitation clause be held unenforceable to the extent that it purports to limit Fidelity's liability for the intentional or grossly negligent acts of its security guards. In considering whether the law should recognise the existence of a legal duty not to cause harm on the part of a security guard for the purpose of delictual liability, the Constitutional Court, in *Loureiro*, said the following:

'[56] There are ample public-policy reasons in favour of imposing liability. The constitutional rights to personal safety and protection from theft of or damage to one's property are compelling normative considerations. There is a great public interest in making sure that private security companies and their guards, in assuming the role of crime prevention for remuneration, succeed in thwarting avoidable harm. If they are too easily insulated from claims for these harms because of mistakes on their side, they would have little incentive to conduct themselves in a way that avoids causing harm. And policy objectives (such as the deterrent effect of liability) underpin one of the purposes of imposing delictual liability. The convictions of the community as to policy and law clearly motivate for liability to be imposed.' (Footnotes omitted.)

[55] It now needs to be considered whether the illegal portion of the limitation clause is severable from the rest of the agreement. As the learned authors in *Wille's Principles of South African Law* (supra) at 771 state:

'Whether the portions of an agreement are severable or not depends in the first instance on the probable intention of the parties as appears in, or can be inferred from, the terms of the contract as a whole. Since the intention of the parties in this regard is seldom clearly expressed, the courts have devised certain guidelines to assist in arriving at such intention, including the following: Is there an express or implied interlocking of the portions of the agreement, or are they sufficiently distinct and independent of each other to render them both grammatically and notionally severable? Does the elimination of the illegal portion materially affect the nature or object of the contract? Does the illegal promise constitute the whole or main consideration for the promise sought to be enforced, or is it merely of a

subsidiary character? Most important of all, would the parties have been prepared to conclude the agreement had it not contained the illegal portion?
(Footnotes omitted.)

[56] The intention of the parties regarding the severability of illegal or unenforceable provisions is not clearly expressed in the contract. Importantly, voidness of the whole contract is a matter that is neither raised on the pleadings nor did any one of the parties contend that the illegal portion is not severable from the rest of the contract. Ms Oost, who is the Group Legal Manager of Fidelity, testified that the limitation clause in question is included in all the contracts which Fidelity concludes with its clients to ensure that Fidelity has sufficient insurance cover in place and that the amount which Fidelity pays for insurance cover is factored into its pricing of its security services. But it was not suggested by Ms Oost that the insurance which Fidelity has in place is either insufficient to cover M-TEC's claim or that Fidelity would have charged M-TEC more for the security services had the parties not included the illegal portion of the limitation clause into their contract, nor was evidence presented regarding any increased insurance premiums that Fidelity would have had to pay and of the effect that would have had on the pricing of its security services in this instance.

[57] The illegal portion is sufficiently distinct and independent of the rest of the contract to render them grammatically and notionally severable. Its elimination does not affect the nature or object of the contract for the provision of security services nor does it constitute the consideration for Fidelity's obligation sought to be enforced. I also take into consideration that an exemption clause, which is partially contrary to public policy, will be confined to the bounds of what is permissible rather than invalidated. (See *(Wells v South African Alumenite Company* 1927 AD 69 at 72-3; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 13.) As appears from what has been said above, I am unable to conclude that the parties would not have been prepared to conclude the agreement had it not contained the illegal portion in the limitation clause. The probable intention of the parties, as can be inferred from the terms of the contract and contextually, was that the illegal portion of the limitation clause is severable from the rest of the contract.

[58] A further issue is the date from which interest is to run. M-TEC argues that Fidelity is liable to pay interest from 19 February 2013 to date of final payment at the rate of 15.5% per annum. 19 February 2013, so M-TEC contends, is the date when its written demand dated that day, was sent to and received by Fidelity. It is recorded in the minutes of the judicial pre-trial conference that Fidelity denies that M-TEC's letter dated 19 February 2013 constitutes a letter of demand as contemplated in s 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975, which provides that interest shall run 'from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier'. It is further recorded that Fidelity admits that the letter was received by it on 19 February 2013 and, if the letter is held to constitute a demand for the purpose of s 2A(2)(a) of the Prescribed Rate of Interest Act, that interest will run on the amount of 'damages' proved by M-TEC, if any, at the rate of 15.5% from 19 February 2013 to date of payment, despite the change in the prescribed rate during 2014. This concession about the interest rate is sound. The rate prescribed at the time when interest begins to run governs the calculation of interest and does not vary if the prescribed rate is adjusted in the interim. (See *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 33G-302A.)

[59] I agree with M-TEC's contention that the letter dated 19 February 2013 indeed constitutes a demand as envisaged in s 2A(2)(a) of the Prescribed Rate of Interest Act. The letter is entitled 'claim for copper theft from December 2012 to February 2013' and it notified Fidelity that '[b]ased on the attached internal security reports M-TEC herewith claim for four possible incidences of copper theft'. It specifies the lost tonnage and Rand amount of M-TEC's claim, in the instance of the copper theft on Sunday 3 February 2013, an amount of R1,512,324.97. It further notifies Fidelity that because the losses were directly related to the actions of Fidelity's security guards on M-TEC's premises, it did not intend claiming from its insurance company.

[60] Fidelity also understood the letter to be a demand. In response, its Claims Manager, Mr Des Momsen, wrote to M-TEC on 26 April 2013, *inter alia* stating-

'. . . It is important for you to grasp that this is not from your perspective an insurance claim. You have embarked on a course of civil legal action and as such there are wide ranging interested parties and time consuming processes.'

And-

'. . . As discussed, our insurers have been notified and as such our rights have been ceded to this party.'

When Ms Oost testified, she too conceded that M-TEC's letter was understood by Fidelity to be a demand and the commencement of civil legal action.

[61] Finally, the matter of costs. M-TEC seeks a punitive costs order against Fidelity. In all the circumstances of this case, however, I am of the view that a deviation from the ordinary rule that the successful party is awarded costs as between party and party, is not warranted. This judgment, so Fidelity's counsel informed me, is not only of importance to the present litigants, but also of considerable importance to the private security industry.

[62] In the result the following order is made:

(a) The defendant is to pay to the plaintiff the amount of R2, 198, 648.25 plus interest thereon at the rate of 15.5% per annum *a tempore morae* from 19 February 2013 to date of final payment.

(b) The defendant is to pay the plaintiff's costs of suit.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	09 – 17 February 2017
Date of judgment:	18 April 2017
Plaintiff's counsel:	A J d'Oliveira
Instructed by:	Cliffe Dekker Hofmeyr Inc, Sandown, Sandton
Defendant's counsel:	A Mooij
Instructed by:	Blake Bester De Wet & Jordaan Inc, Johannesburg