IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 72856/2016

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

27/11/2024 [redacted]

In the matter between:

3G MOBILE (PTY) LTD	Plaintiff
and	
RHENUS LOGISTICS (PTY) LTD	First Defendant/Third Party
SERVEST (PTY) LTD	Second Defendant

JUDGMENT

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van der Westhuizen, J

[1] The plaintiff instituted an action against the first and second defendants in terms of which it sought to claim damages from the defendants suffered as a result of an armed robbery perpetrated on the property situated at Longmeadow Business Estate West in Edenvale. The said robbery was committed on Sunday, 5 October 2014.

[2] The first defendant was registered as World Net Logistics (Pty) Ltd. It subsequently underwent a change of name and at the time of the trial it was known as Rhenus Logistics (Pty) Ltd following on a notice of substitution filed in November 2022.

[3] The first defendant held the head lease of the said property and sublet a portion of the building offices to the plaintiff. Both leases were in writing. The first defendant entered into a written service level agreement with the second defendant for rendering security services to the said premises.

[4] At the trial, the plaintiff withdrew the action against the first defendant and only proceeded against the second defendant. However, the second defendant joined the first defendant as a Third Party to the proceedings. The second defendant, in terms of the notice of joinder claimed an indemnity against the first defendant in terms of the service level agreement entered into between them.

[5] The first defendant remained in the trial only as a Third Party.

[6] At a prior pre-trial meeting, and in terms of the provisions of Rule 33(4) of the Uniform Rules of Court, the parties agreed to separate the issues of liability and quantum. I ruled a separation of the issues of the liability and quantum as requested by the parties. The trial continued on the issue of liability only.

[7] As sublessee, the plaintiff occupied 10% of the space of the second warehouse and offices on the said premises. It shared the space with

the first defendant. The first defendant occupied the first building on the premises on its own. A third unit was also occupied by the first defendant, which was separated by a wall from the other two units and enjoyed its own entrance separate and distinct from that shared by the plaintiff and the first defendant. In terms of the service level agreement between the first and the second defendant, the latter provided security services to the premises shared by the plaintiff and the first defendant.

[8] The plaintiff dappled in the distribution of cell phones and tablets, whereas the first defendant also distributed other electronic devices such as cell phones, tablets, television sets and the like. In a sense, the plaintiff and the first defendant were competitors, albeit in a limited sense.

[9] Initially, the plaintiff utilized the transport vehicles of the first defendant to distribute its goods from the premises to other outlets. However, the plaintiff made use of its own security support vehicles when so distributing its goods. All the first defendant's vehicles were branded.

[10] It was common cause that the first defendant refused to permit the plaintiff to arrange for its own security services to the premises in order to protect its own goods. The first defendant appropriated to itself the right to control and implement all security measures in respect of both itself and that of the plaintiff.

[11] The security control and security measures implemented in respect of access to the premises, as per the service level agreement between the first and second defendants, involved the following steps:

(a) A controlled entry gate;

(b) A second controlled gate deeper into the premises and beyond the first entry gate;

(c) A secured area, a so-called vacuum, between the two gates was utilised as a search area of vehicles entering the premises, whilst both gates were secured;

(d) A controlled access which included the completion of documents, such as a register and a so-called Kalamazoo slip for presentation to and completion by the person being visited;

(e) Only once the vehicle had been searched and the required documentation completed, the vehicle was permitted to enter through the second gate;

(f) After proceeding through the second gate, the vehicle was directed and accompanied to a designated parking area.

[12] A notice informing all vehicles prior to entry through the first gate, that all vehicles would be searched on entry was affixed and displayed on the outside of the first gate. The witness who testified on the second defendant's behalf sought to distance the second defendant from the said notice alleging that the first defendant erected the said notice. It does not matter who placed the said notice on the first gate matters not. It clearly warned of the search procedure that would follow on entry as stipulated in the service level agreement between the first and second defendants.

[13] In respect of the service level agreement, the evidence presented on behalf of the second defendant left much to be desired. The only document in that regard that was presented into evidence, was one that was dated 2014. The witness on behalf of the second defendant testified that the service level agreement between the first defendant and the second defendant was updated biannually. The witness further testified that only the schedules to the service level agreement were usually updated. However, no service level agreement that operated at the time

of the perpetrated robbery, were made available. That omission was not explained.

[14] Furthermore, an illegible and incomplete copy of the vehicle register for the day of the robbery was presented. The relevant details of the vehicles involved in the robbery was incomplete and nonspecific.

[15] The evidence on behalf of the plaintiff was tendered through four witnesses. Those were:

(a) Mr Kobus Meyer, who conducts the business of P&C Security Services which is responsible for the armed security escort services in respect of the plaintiff's goods when in transit;

(b) Mr Roberto Cinti, who at the time of the robbery was the plaintiff's Chief Executive Officer. At the time of the trial he was no longer in the employ of the plaintiff;

(c) Mr Kershwin Naidoo, was the Logistics Co-ordinator of the plaintiff at the time;

(d) Ms Angelike Charalambous, employed by Ian Levitt Attorneys at the time of the robbery, was involved in the litigation of this case. She took a number of photographs at the plaintiff's premises after the robbery which were handed in at the trial.

[16] Furthermore, a number of security video footage taken during the period prior to the robbery. These were also tendered into evidence at the trial.

[17] A single witness testified on behalf of the second defendant. Mr Morton's evidence was presented on behalf of the second defendant. At the time of the robbery, he was a regional branch manager in the employ of the second defendant. His duties included occasionally seeing clients. The

updating of standard operating procedures fell within his department. He did not undertake the updating of the standard procedures as those were done by specific persons whose duties were to attend to the updating of the standard operating procedures. They served in Mr Morton's department.

[18] Having observed and hearing the witnesses, it cannot be disputed that the witnesses on behalf of the plaintiff were objective and to the point. Necessary concessions were made where the context required it. Good impressions were created by all the plaintiff's witnesses.

[19] The same could not be said in respect of the second defendant's witness. His evidence was clearly partisan in the second defendant's favour. He testified to issues that were not borne out by the documents that were supposedly meant to support his version. In fact, the lack of alleged documentation that could support his version was glaring. No explanation was proffered why that was not available. It was documentation that would have been in the second defendant's records. Furthermore, Mr Morton's evidence in respect of the updated service level agreements that were supposedly undertaken biannually was vague and mostly of general comment. It lacked particularity. Again the lack of availability of the prevailing service level agreement for the period when the robbery took place, was telling. In my view, Mr Morton's evidence did not advance the case of the second defendant, nor did it assist in deciding this case. His partisan evidence tainted his credibility. He was obtuse in his response to questions put to him in cross-examination. Mr Morton was most unwilling to make concessions when the context called for a concession.

[20] A further issue of concern was the lack of tendering of the evidence of the security personnel on duty at the time of the robbery. Such evidence could have clarified many issues that were raised at the trial. No

explanation was proffered in that regard. The security guards were privy to what occurred on that fateful day.

[21] The first defendant, although no longer a party to the proceedings, albeit only present as a Third Party, tendered no evidence. An equal lack of relevant documentation which would of necessity have been in the first defendant's possession, was not made available to the court. Again no explanation was proffered.

[22] Consequently, most of the relevant evidence led on behalf of the plaintiff was not gainsaid by any of the defendants. This matter stands to be considered and decided on the plaintiff's evidence.

[23] Returning to the chronology of events on the day of the incident on 5 October 2014, the uncontroverted evidence presented by the security footage revealed the following:

(a) At approximately 9:34 on the 5th October 2014, a panel van entered the premises where the plaintiff occupied 10% of the first defendant's Longmeadow Business Estate West. It moved through the main gate and the second gate without being stopped in the vacuum. Both gates were open at the same time;

(b) From the security footage it is clearly observed that the second gate was open and the panel van moved through it. It stopped for a short period of time after moving through the second gate, after which it turned left in the direction of the warehouse which the plaintiff occupied. The vehicle was not escorted to the designated parking area;

(c) It is then observed that the driver of the vehicle approached warehouse;

(d) A short while later armed men, approximately 15 in number, were then seen emerging from the panel van and approaching the warehouse hurriedly;

(e) About half an hour later, a 10 ton Isuzu truck is seen moving through the open gates, briefly stopping after moving through the second gate. It then turned to the left and approached the said warehouse and reversed into an open loading bay. The loading bay closest to the area the plaintiff occupied was not operational at the time, due to the dock levellers not being operational;

(f) It was further gathered from the security footage that Chubb Security Services arrived at the premises, but were then dismissed by the guards;

(g) Neither the panel van, nor the truck, had any markings;

[24] The evidence of Mr Naidoo revealed the following:

(a) He was at work as there was an excess of orders that were to be processed. A Mr Pretorius, who was in the employ of the first respondent, was in the control room attending to the security cameras. The control room was on the first floor adjacent to the plaintiff's offices and in the said warehouse;

(b) The latter walked into the plaintiff's cage, where the plaintiff's goods were stored, accompanied by three armed men. The armed men took Mr Pretorius and Mr Naidoo up to the control room. Mr Naidoo, who was issued with a panic button linked to Chubb Security Services, contracted by the first respondent, activated the alarm. Everyone's cell phone was taken by the robbers.

(c) Soon thereafter, a robber entered the control room and informed them that someone had activated the panic button as Chubb had arrived on the scene. Mr Pretorius received a phone call on his cell. He did not answer it. He was then told to phone back and to put the call on speaker. The call was from a Mr Richard Readers, a colleague of Mr Pretorius. Mr Pretorius was instructed to advise Mr Readers that all was in order at the premises. Mr Readers apparently received a call from Chubb advising of the activated alarm. The robbers found the panic button on Mr Naidoo;

(d) The robbers then disconnected the security cameras;

(e) The plaintiff's goods were loaded into the truck. Mr Naidoo, Mr Pretorius and the plaintiff's staff, who were present, were locked in a vault. The robbers left;

(f) There was a telephone in the vault of which the robbers were unaware. That was used to call for assistance.

[25] Mr Naidoo further testified that it was gleaned from the security footage that the two vehicles were not stopped within the vacuum between the two gates. It was further gleaned that none of the prescribed security procedures were observed within the vacuum. The prescribed register was not completed within the vacuum. Nor was the required Kalamazoo slip issued within the vacuum. Furthermore, neither of the vehicles were searched within the vacuum.

[26] A partially completed register used on the said date of the robbery, was placed before the court. It was illegible and consequently impossible to decipher and to properly consider it. It did not contain the required information. The driver of the panel van was simply identified as "Mike from Express". Express was part of the first respondent which occupied the separate premise, although adjacent to that where the plaintiff

operated from. It had its own separate and distinct entrance gate as recorded earlier. Its transport vehicles bore a distinct brand marking dissimilar to that of World Net, the first defendant, which operated on the same premises as that of the plaintiff. The said register likewise contained insufficient detail in respect of the Isuzu truck. The driver was merely identified as "John from Kamaz."

[27] Mr Naidoo testified that the security guards were obliged to contact the first defendant's control room to inquire whether "Mike from Express", as well as "John from Kamaz" were expected. Who or what "Kamaz" was, was not explained at the trial, other than it being unknown. Express had no reason to enter into the said premises. Furthermore, the panel van bore no Express branding.

[28] It was further to be gleaned from the illegible register that there was no indication that the two vehicles were to go to the Plaintiff's premises.

[29] No gainsaying facts to the foregoing was tendered by the second defendant at the trial. The second defendant merely attempted to argue that the aforementioned procedure described was not applicable on the day of the robbery. In this regard, Mr Morton obtusely testified that:

(a) Different security measures applied over weekends;

(b) No searching of vehicles entering the premises within the vacuum was required over weekends;

(c) A different register was to be used over weekends;

(d) No Kalamazoo slip was required to be issued on weekends;

(e) Fewer security guards were to be deployed over weekends.

[30] The service level agreement that was placed before the court, i.e. a 2010 version, does not support the version testified to by Mr Morton. No distinction was made therein between the security measures to be taken during the week as opposed to those over weekends. It was clearly the same measures to be taken throughout.

[31] Mr Morton attempted to state that the lesser measures that were to apply over weekends were on instructions from the first defendant. Those instructions were apparently issued in e-mails from the first defendant to the second defendant. No e-mails supporting that evidence were handed into court. When confronted with contrary stipulations contained in the 2010 service level agreement that no distinction was drawn between week days and weekends, Mr Morton simply stubbornly stuck to his evidence.

[32] The witnesses on behalf of the plaintiff testified that searches of vehicles were regularly undertaken, contrary to Mr Morton's evidence that it was not required by the service level agreement. He stubbornly testified that the notice on the outside entrance gate was placed there by the first defendant. The clear intention on the part of the second defendant in that regard was to absolve itself from its lack of compliance to conduct searches. Mr Morton further sought to rely on an obscure phrase in the service level agreement which allegedly indicated that searches were to be undertaken randomly. In its proper context the reference to random searches did not absolve the second defendant from not conducting searches of vehicles. In my view, the conducting of searches of vehicles especially over weekends would be required, in particular where vehicles were unmarked and the identity of drivers were suspect and with no indication who was to be visited. The evidence of Mr Morton showed an unwillingness to make required concessions. Instead, he sought to distinguish throughout between security measures during the week from those over weekends, despite being shown documentation to the contrary.

[33] Much was made on behalf of the second defendant in respect of an ouster clause in the service level agreement that provided that the first defendant would indemnify the second defendant from any loss suffered by any third party on the premises. The second defendant accordingly pled that it was not liable for any loss suffered by any third party and in the present instance, it could not be held liable for any loss suffered by the plaintiff due to the robbery.

[34] Further in this regard, the second defendant, although aware of the plaintiff's presence on the property, only realised after the robbery that the plaintiff was an independent party occupying the said premises. Prior to the robbery, it was under the impression that the plaintiff was part and parcel of the first defendant's operation. It provided security services to all on the premises. Accordingly, and after the fact, the second defendant opted to invoke the indemnity clause.

[35] Consequently, in view of the second defendant's, although mistaken, belief throughout the period prior to the robbery that the plaintiff was part of the first defendant, it was obliged to afford the plaintiff the same protection as that in respect of the first defendant. The second defendant could hardly ignore the security measures in place as per the service level agreement in respect of the plaintiff as it would impact negatively upon the first defendant. The indemnity clause would only be relevant where loss occurred to a third party's goods, had the security measures been adequate and properly executed.

[36] It follows, that failure to comply properly with the stipulated security measures would of necessity impact negatively on the first defendant.

[37] It was undisputed that the plaintiff did not receive deliveries over weekends. In respect of deliveries to the plaintiff, it utilised logistic services such as RAM, for instance, during the week.

[38] The indemnity clause in the service level agreement did not absolve the second defendant from liability for loss due to non-compliance with the prescribed security measures. At most, the second defendant would be entitled to a regress against the first defendant. Hence the joinder of the first defendant as Third Party.

[39] From the foregoing, the crisp question to be determined is whether there was non-compliance with the second defendant's obligations in respect of the security measures stipulated in the service level agreement. In this regard, the second defendant was obliged to:

(a) Operate the entrance gate in such manner as to keep it closed at all times and only open it to allow a vehicle to enter into the vacuum area;

(b) To keep the second gate closed at all times and only open it to allow a vehicle through after the aforementioned procedures prescribed in respect of the vacuum area;

(c) To direct and accompany a vehicle after exiting the vacuum area to the specified parking area;

(d) At all times to search a vehicle within the vacuum area and to complete the detailed information on the register and issue a Kalamazoo slip. In particular, the register was to contain information concerning the person or entity to be visited. Furthermore, the Kalamazoo slip is to contain the details of the person to be visited. On completion of the meeting with that person, the latter is to complete the slip and it is to be handed back to the security guards at the main gate when leaving the premises.

(e) On leaving the premises, the vehicle is again to be searched, in particular whether the vehicle was secured by a seal applied by the relevant entity which was visited.

[40] It is clear from the foregoing evidence recorded that none of the aforementioned measures were followed on the fateful day. The second defendant failed dismally in complying with its stipulated obligations. In my view, it acted in a gross negligent manner, not only towards the plaintiff, but in particular towards the first defendant as client. The guards were clearly oblivious to the destination of the vehicles once they moved through the gates.

[41] The flippant approach to Chubb's arrival at the premises clearly shows the security guards' lack of commitment to their duties.

[42] From the foregoing it is clear that the second defendant, through the conduct or omissions by its security guards:

(a) Put the first defendant, as well as the plaintiff, at risk;

(b) Caused or contributed to the damages suffered by the plaintiff;

(c) Was in breach of its duties that were owed to the first defendant and by extension the plaintiff;

(d) The said conduct or omissions were wrongful and grossly negligent.

[43] It is to be recorded that it was put to the plaintiff's witnesses that the first defendant would receive deliveries 7 days a week. If that was correct, then it is difficult to follow why different security measures would operate over weekends.

[44] Furthermore, it was telling that none of the security guards on duty on the fateful day were called to testify. No explanation was provided for the lack of their testimony. The absence of their version in respect of the circumstances that occurred on that day, and in particular their alleged non-compliance with the security measures stipulated in the service level agreement, puts paid to the second defendant's view that it adhered to its obligations in respect of the service level agreement. The failure to call the security guards calls for a negative inference to be drawn.

[45] The plaintiff alleged in its particulars of claim that the second defendant owed a duty of care to the first defendant, alternatively that the conduct or omissions on the part of the second defendant's security guards were grossly negligent and consequently constituted a delict that resulted in damage caused to the plaintiff. By the second defendant's admission that it was acutely aware of the presence of the plaintiff on the premises, albeit that it was thought to be part of the first respondent, it by extension owed a duty of care to the plaintiff. The indemnity clause contained in the service level agreement, in my view, did not taint the obligation of a duty of care towards either the plaintiff or the first defendant. As a company contracted to provide security services to premises, it would of necessity owe a duty of care to the contractor and any person or institution occupying the premises through the contractor.[1]

[46] The second defendant's own documentation revealed in its Risk Assessment Reports, under the heading "*Access Control*", that access control was a measure to protect a company against undesirable entry to its premises that would prevent theft, prevent or minimise damage to property and to protect lives. That rubric echoed the findings of the Constitutional Court in Loureiro, *supra*.

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[1] *Loureiro v Imvula Quality Protection (Pty) Ltd* 2041(3) SA 394 (CC); see also *Malesela Taihan Electric Cable (Pty) Ltd v Fidelity Security Services (Pty) Ltd* (17193/20) [2021] XAGPHJC 657 (24 August 2021)

[47] Consequently, the second defendant owed a duty of care, not only to the first defendant, but also to the plaintiff. Furthermore, the conduct or omissions of the security guards on duty on the fateful day were negligent in the extreme and resulted in loss being suffered by the plaintiff.

[48] It is to be recorded that no evidence was led by the first defendant in respect of the main action, nor in respect of its pleaded case in respect of the Third Party Notice. In particular no evidence was led in respect of why a different interpretation should be allotted to the provisions in the service level agreement relating to the indemnification clause. In its heads of argument the first defendant submitted that should the second defendant be found to have breached its duty of care or found to have been grossly negligent, the indemnity clause would not apply.

[49] In view of my findings that the second defendant owed a duty of care towards the plaintiff and acted in gross negligence of its obligations in terms of the service level agreement, the second defendant stands to be held liable for the plaintiff's loss. Consequently, due to the second defendant's breach of its obligations in terms of the service level agreement, it breached its duty of care towards the first defendant and acted in a gross negligent manner. The indemnification clause finds no application in the present instance and thus, renders the joinder of the first defendant as Third Party without merit.

I grant the following order:

1. The issues of liability and the quantum of damages are separated in terms of the provisions of Rule 33(4) of the Uniform Rules of Court;

2. It is declared that the second defendant is liable for the loss suffered by the plaintiff;

3. The second defendant is to pay the costs of the plaintiff, such costs to include the costs consequent upon the employ of two counsel where so employed;

4. It is declared that the second defendant is not entitled to an indemnification by the Third Party;

5. The second defendant is to pay the costs occasioned by the Third Party joinder.

[redacted]
C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:	Adv R Solomon SC Adv L Franck
Instructed by:	Ian Levitt Attorneys c/o Friedland Hart Solomon & Nicolson
On behalf of 1st Defendant:	Adv J Daniels SC Adv B Brammer
Instructed by:	Fullard Mayer Morrison Inc c/o JP Kruyshaar
On behalf of 2nd Defendant:	Adv R Stockwell SC
Instructed by:	Webber Wentzel Attorneys c/o Macintosh Cross & Farquharson
Judgment reserved on:	25 October 2024
Judgment handed down:	27 November 2024