

REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO 07/12735

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

30 March 2012

FHD VAN OOSTEN

In the matter between

THE MINISTER OF SAFETY AND SECURITY

APPLICANT

and

G4S INTERNATIONAL UK LTD

RESPONDENT

In re

G4S INTERNATIONAL UK LTD

PLAINTIFF

and

SOUTH AFRICAN AIRWAYS (PTY) LTD

FIRST DEFENDANT

AIRPORTS COMPANY OF SA

SECOND DEFENDANT

**GUARDFORCE INTERNATIONAL
TRANSPORTATION (PTY) LTD**

THIRD DEFENDANT

KHULANI FIDELITY SERVICES GROUP (PTY) LTD

FOURTH DEFENDANT

THE MINISTER OF SAFETY AND SECURITY

FIFTH DEFENDANT

and

PROTEA AVIATION (PTY) LTD

FIFTH THIRD PARTY

J U D G M E N T

VAN OOSTEN J:

[1] This is an opposed application for the rescission of an order of this court in terms of which the applicant's defences to the respondent's claims were struck out. In the action to which this application is related, the applicant is cited as the fifth defendant (the Minister). The action between the respondent (G4S) and the other defendants, so I have been informed, has recently become settled.

[2] For a proper understanding of the issues requiring determination, it is at the outset necessary to put the present application in its proper perspective by firstly, summarising the facts on which the respondent's cause of action is based and secondly, to refer to the procedural steps that were taken in the action, since summons was issued in May 2007.

[3] On 25 March 2006 a consignment of US dollar, Euro and Rand banknotes, belonging to G4S, was stolen in an armed robbery, from the apron at the OR Tambo International Airport (the robbery). Within days of the robbery, a large but undisclosed quantity of those banknotes were seized and recovered by members of the South African Police Service (SAPS). An undisclosed number of the recovered notes were taken for safekeeping to the Benoni police station and a total of at least US\$1m in notes were taken to the Booysens police station. Of the notes kept at Benoni at least US\$1 174 300 and R1 599 950 were stolen from a walk-in safe at the Benoni police station, where they had been stored (the Benoni theft). Criminal investigations by the SAPS revealed that three members of the SAPS, who were at the time stationed at Benoni, are implicated in the Benoni theft, and they were subsequently charged with the theft thereof. The charges against them however, were later withdrawn, "due to the unavailability of key witnesses". Some of the banknotes which had been stolen in the

Benoni theft were subsequently seized from the SAPS suspects and their relatives and are now kept in safe custody by the SAPS.

[4] The Booyens notes were seized from a suspect in the robbery and taken to Booyens police station for safe custody. On 30 March 2006 Inspector L Mbonani withdrew them from custody. In the papers before me it is admitted on the Minister's behalf that on 30 March 2006 Mbonani "*withdrew a packet of US\$ 100 and R8 700 in bank notes*" from the Booyens police station, in respect of which, it is further stated, "*their current whereabouts are unknown*" (the Booyens theft).

[5] In June 2007 G4S issued summons against the Minister and the other defendants for the recovery of the losses suffered as a result of the robbery. The claim against the other defendants was premised on their alleged wrongful conduct relating to the robbery. G4S's two claims against the Minister are based on the alleged wrongful conduct by members of the SAPS, on the facts I have alluded to, concerning the Benoni theft (the first claim) and the Booyens theft (the second claim).

[6] The first claim is premised on delict and on the basis that the policemen, who were admittedly involved in the Benoni theft, were stationed at the Benoni police station and that they were acting in the course and scope of their employment with the Minister. In the alternative it is alleged that other members of the SAPS, stationed at Benoni police station, negligently failed to prevent the theft.

[7] The second claim was introduced at a later stage by way of an amendment to the summons, in March 2010. In the second claim the return of the Booyens notes is claimed, and in the alternative, damages in delict based on the intentional misappropriation of the notes by Mbonani, alternatively the negligent failure of the SAPS to safeguard or recover the Booyens notes.

[8] The Minister filed a plea to the first claim in essence denying all the material allegations made by G4S. After the close pleadings a rule 35 notice requesting

discovery of documents, as well as a request for trial particulars, were served on the Ministers attorneys of record, being the State Attorney. No response was however forthcoming. G4S eventually sought and obtained an order against the Minister to compel discovery and the furnishing of particulars for trial. The order was duly served on the State Attorney, but not complied with. G4S then applied for the striking out of the Minister's defences. The following order was granted by default on 21 September 2010:

"1. That the defences by the fifth defendant to each of the following claims by the plaintiff against the fifth defendant be struck out in terms of Rule 35(7) and/or Rule 21(4) of the Rules of this Honourable Court:

1.1 The plaintiff's first alternative claim;

1.2 The plaintiff's second alternative claim (in the alternative to the first alternative claim);

1.3 The plaintiff's third alternative claim (in the alternative to the second and third alternative claims);

2. That the fifth defendant be ordered to pay the costs of this application."

[9] The second claim likewise remained unattended to: no plea was filed within the time allowed by the rules. Warnings and demands for delivery of the plea by the attorneys acting for G4S, elicited no response from the State Attorney. G4S then placed the Minister under bar from pleading to the second claim.

[10] Shortly thereafter, on 7 October 2010, an application was made for rescission of the order striking out the defences, for the removal of the bar and leave to plead to the second claim (the first application). G4S opposed the application. Shortly before the application was due to be heard, in March 2011, it was withdrawn. On 4 April 2011 the present application was launched, based on new grounds but substantially for the same relief, which, in general terms, is aimed at granting the Minister leave to re-enter the fray.

[11] In this application an order is sought in regard to the first claim, rescinding the order striking out the Minister's defence and granting leave to purge the defaults in respect of which the orders to compel were made and, in regard to the second claim, for the removal of the bar and leave to file a plea within a stated time. G4S opposes the relief sought on the grounds that none of the requirements which are necessary to obtain the relief sought, have been satisfied.

[12] The application falls to be decided under the court's common law power of rescission of default judgments (*De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A)). It is well-established that in order to succeed the applicant, seeking rescission, must show "good cause" or "sufficient cause", which encapsulates two distinct essential elements, firstly, a reasonable and acceptable explanation for his default and, secondly, that on the merits a bona fide defence exists (*Chetty v Law Society Transvaal* 1985 (2) SA 756 (A)). The interplay between the two requirements were somewhat refined in judgments of the Supreme Court of Appeal: in *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) 141H, Steyn CJ found difficulty in justifying condonation, unless there were "strong prospects of success", in *Chetty* Miller JA said that the circumstance of a proposed defence carrying reasonable or good prospects of success on the merits, might tip the scale in favour of the applicant for rescission where the two elements are "finely balanced", while in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), Jones AJA (at para [12]) in passing mentioned that a "weak explanation" may be cancelled out by a bona fide defence on the merits, having a "good prospect of success". In my view, a balancing exercise involving the two elements of "good cause" is unnecessary and may well lead to artificial results. The court exercises a wide discretionary power, influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case (*De Wet* 1042G; *Cavalinias v Claude Neon Lights SA Ltd* 1965 (2) SA 649 (T)). The weakness of the explanation or the good or poor prospects of a successful defence are but factors the court will take into consideration, together with all such other factors as may be relevant pertaining to that particular case, in the exercise of its discretion.

[13] Against this background I turn now to a consideration of each of the requirements. No explanation has been tendered for the State Attorneys' inaction. The matter was initially entrusted to Mr Rambau, who at the time was the senior assistant state attorney employed at the office of the State Attorney in Johannesburg. He has since resigned. For reasons that have not been explained, Rambau plainly ignored and in fact abandoned his duties as the legal representative of the Minister. A long line of notices, requests, warnings and even court orders were simply disregarded and not attended to.

Rambau deposed to the founding affidavit in the first application for the setting aside of the striking out order, which, as mentioned, was later withdrawn. In that application he put the blame for the inaction squarely on the shoulders of the police officials who, according to him, failed to co-operate concerning repeated requests for information and assistance from his office. Not a single document in support of these wide ranging allegations was however annexed to his affidavit. It is therefore not surprising that the application was withdrawn. In the present application Mr Lekabe, who is the head of the State Attorney's office in Johannesburg, is the deponent to the founding affidavit. He has shifted the blame to Rambau's inefficiency and in particular the "reckless and negligent manner" in which he had handled the matter. In argument, Rambau's behaviour, not without justification, was labelled as dishonest. In the meanwhile the State Attorney has lodged a complaint of professional misconduct against Rambau with the Law Society of the Northern Provinces, which is still pending.

[14] Counsel for G4S focussed his attack on the adequacy of the explanation, on the two directly opposing versions, both tendered on behalf of the Minister, which this court is now required to evaluate. In my view however, the facts openly and fully disclosed by Mr Lekabe leaves me with no doubt that Rambau's inefficiency and indifference were the direct and sole causes of the inaction. It has authoritatively been stated that a litigant cannot be allowed to hide behind his legal representative's lack of diligence as an excuse for delays or disobedience of the rules of court (see *Saloojee* 140H). Counsel for the Minister urged me to have regard to the nature of the attorney client relationship which exists in legal matters concerning the State. Organs of state are obliged to avail themselves of the services of the State Attorney (see s 3 of the State Attorney Act 56 of 1957). State departments, such as the SAPS, do not have the free choice of instructing a particular legal representative or the right enjoyed by private litigants of terminating the mandate of one legal representative and instructing another. The SAPS is therefore bound to accept that all legal matters, such as the present, will be dealt with the State Attorney. Underpinning this particular relationship, in my view, is the trust placed by not only the SAPS, but other state organs, in the State Attorney to properly fulfil its mandate. But it goes further: the taxpayer also has an interest in these matters, as public funds are at risk in matters where damages against the Minister are claimed. It

cannot, generally speaking, be expected from members of the SAPS to regularly monitor the State Attorney's management of legal matters in which they are or may be involved. In most instances members of the SAPS would not even be aware of the pending litigation as service of the documents commencing legal proceedings, can and is effected on a representative of the Minister, including the office of the State Attorney. These matters are accordingly left entirely in the hands of the State Attorney who is required to perform their duties with the utmost diligence.

[15] At this juncture I consider it necessary to digress and to address the alarming neglect of duty by the State Attorney that appears to have become the order of the day in this division. I will confine the comments I am about to make to cases involving the State Attorney that have served before me in the last few weeks. A number of applications for default judgment against the Minister appeared on the unopposed motion court roll. In those matters the summons had been properly served on the State Attorney, on behalf of the Minister. Those cases all involved claims for an alleged wrongful arrest and detentions by the SAPS. In the absence of a notice of appearance to defend by the State Attorney, they were enrolled on the unopposed motion court roll, for default judgment. At the last moment when the matters were called in court, an appearance from or on behalf of the State Attorney's office was made resulting in a postponement and, of course, unnecessary wasted costs. No explanation was tendered for the State Attorney's non-entry of an appearance to defend, the plaintiffs always content with a suitable costs order in their favour. This kind of neglect, regrettably, permeated into a large number of unopposed matters appearing on another section of the motion court roll: applications against the Minister to compel discovery of documents or compliance with some other notice delivered in terms of the rules. Again, the notices requesting discovery were duly served on the State Attorney, but the lack of compliance, despite despatch of a "courtesy letter" again demanding compliance, caused them to be launched. In one week 12 such matters served before me. At the hearing there was an appearance by or on behalf of the State Attorney. I was informed that all those matters had become settled in respect of which draft orders were handed up for confirmation albeit without any explanation for the reason for the non-compliance. The draft orders all provided for payment of the costs of the applications by the Minister.

In the present matter, as I will deal with later, a further costs order against the Minister, is about to follow. These all provide examples of the unnecessary waste of public funds due to deteriorating standards of service and the absence of diligence.

[16] The instances of neglect and the general decline in the standards of service rendered by the State Attorney's office, is a matter of grave concern which needs to be addressed. It cannot be allowed to endure any longer. An urgent in-depth investigation by the authorities concerned, in my view, is necessary. In order to set the process in motion I have decided to cause a copy of this judgment to be forwarded to the Minister of Police, as well as the Minister of Justice and Constitutional Development. It is hoped that the flashing red warning lights which are apparent from what I have set out above, will encourage an investigation and correction where necessary, in order to rectify a state of affairs that is not conducive to the delivery of justice by a well-established legal service provider in the public sector.

[17] To revert to the present application. I am satisfied that the wilful neglect of Rambau cannot, in the circumstances of this case, be held against the Minister. I must not be understood to open the floodgates of neglect as reason for exoneration in applications for condonation. There is a limit beyond which the Minister cannot escape the State Attorney's lack of diligence. Exactly where to draw the line, will depend on the facts of each particular case. The possible measures of control and oversight to be implemented or reviewed, within the office of the State Attorney, in order to prevent occurrences of the kind referred to in this judgment, is perhaps one of the aspects to be addressed in the investigation I have proposed.

[18] This brings me to the prospects of success. The facts in support of the Minister's defence on the first claim are tersely set out, again showing a lack of proper investigation into, and presentation of the material elements of, the Minister's defence. As to how the theft had occurred, in regard to both claims, precious little has been disclosed. It is merely stated that the recovered notes had been placed in walk-in safes, at the two police stations, and that at Benoni "the safe was broken into by drilling the locks" and at Booysens, that the notes were "withdrawn" by Mbonani, as I have already alluded to. The myriad of unanswered questions and possible inferences arising from

the scarce information, not surprisingly, provided counsel for G4S with a number of further strings to his bow.

[19] The pivotal issue on the merits concerns the Minister's vicarious liability for the delicts committed by SAPS employees. In this regard it is merely stated that witnesses will be called to prove that those members were off-duty at the time and that "this will be evident from the reports of sector commanders who compiled lists of all police personnel on duty on the night in question". A "Report by Section Commander" at the Benoni police station has been made available but it evidently has no relevance to, nor is it of any assistance in, establishing the names of police officers or personnel who were on duty on that particular evening.

[20] The position in our law concerning vicarious liability has recently been modified and expanded on in two leading Constitutional Court judgments, *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) and *F v Minister of Safety and Security and Others* [2011] ZACC 37; 2012 (3) BCLR 244 (CC). A summary of the legal position as it presently stands, especially in regard to the so-called deviation cases, is that two questions need to be asked, only the second of which is relevant for present purposes: which is whether a sufficiently close connection between the wrongful conduct and the wrongdoer's employment existed (*F* para [50]). The fact that a policeman was off duty, although of significance, is not decisive. The objects of the police service stated in s 205(3) of the Constitution include the protection of property of the inhabitants of the Republic. Counsel for G4S submitted that the Minister's denial that the implicated policemen were not on duty is not enough and that the assumption that they could only have acquired the knowledge concerning the notes held in safe custody, while they were on duty, is sufficient to show the necessary connection for finding vicarious liability. In response, counsel for the Minister contended that G4S has not made out an unanswerable case. As I understand the argument, G4S would still be required, when default judgment is sought, to prove its case by adducing the necessary evidence. I agree. In my view the issue concerning vicarious liability cannot be decided at this stage of the proceedings. The tests expounded in *K* that ultimately need to be addressed, require the consideration of several interrelated factors on which, at this

stage, there exists either no evidence or which have not been properly dealt with (see, for example, the thorough and comprehensive consideration of the facts of that matter, in the minority judgment in *F* para [152] *et seq*). This likewise applies to the grounds of negligence relied upon by G4S. I am therefore unable to express any firm views as to the merits or demerits of either the claims or the defence raised. Suffice, at the risk of repetition, to say that G4S, even if successful in this application, will still be required to prove its case at the next procedural step, which would have been a request for judgment by default. For all these reasons I conclude that the requirement of sufficient cause has been satisfied.

[21] Finally, I consider it in the interests of justice and fairness that the Minister be granted leave to continue in defending the claims. The action involves a large amount of money. The recovered notes were, so it seems, duly safeguarded in a walk-in safe. The notes were stolen by members of the SAPS who acted dishonestly and diverted their duties. The question of vicarious liability involves mixed questions of fact and law all of which require proper ventilation and determination by a court having heard all the evidence. In this process the Minister, in my view, remains intimately involved and he, therefore, should not be barred from further participation in the proceedings.

[22] As to costs, the opposition to the application was reasonable and the G4S accordingly is entitled to the costs in respect thereof.

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

1. Paragraph 1 of the order of this Court, dated 21 September 2010, striking out the fifth defendant's defence to the plaintiff's claims, is rescinded.
2. The fifth defendant is granted leave to deliver a response to the plaintiff's notice in terms of Rule 35(1), within 10 days of the date of this order.
3. The fifth defendant is granted leave to deliver a reply to the plaintiff's request for further particulars for trial, within 10 days of the date of this order.
4. The bar on fifth defendant's delivery of a plea on the plaintiff's second claim, is removed

5. The fifth defendant is granted leave to file a plea on the plaintiff's second claim within 10 days of the date of this order.
6. The fifth defendant (applicant in this application) is ordered to pay the costs of the plaintiff's (respondent in this application) opposition to the application, such costs to include the costs consequent upon the employment of senior counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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THE STATE ATTORNEY

COUNSEL FOR THE RESPONDENT

ADV MA KRIEGLER SC

RESPONDENT'S ATTORNEYS

NORTON ROSE SOUTH AFRICA

DATE OF HEARING
DATE OF JUDGMENT

19 MARCH 2012
30 MARCH 2012