

**GAUTENG LOCAL DIVISION, JOHANNESBURG**



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

**Case number: A5039/2014**

**In the matter between:**

**G4S CASH SOLUTIONS SA (PTY) LIMITED**

**Appellant**

**And**

**ZANDSPRUIT CASH & CARRY (PTY) LIMITED**

**First Respondent**

**DEVLAND CASH & CARRY (PTY) LIMITED**

**Second Respondent**

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**JUDGMENT**

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**SATCHWELL J:**

**INTRODUCTION**

1. This is an appeal, with leave of the Supreme Court of Appeal, against a judgment of this division to the effect that claims by respondents (plaintiffs in the court *a quo*) had not been hit by a time-bar clause in agreements between the parties and that those claims had not prescribed.

2. Plaintiffs entered into agreements<sup>1</sup> for the “collection, conveyance, storage and delivery of money” by defendant. On two occasions<sup>2</sup> monies were allegedly stolen from plaintiffs by unknown third parties. Plaintiffs sued defendant in delict.
3. Plaintiffs claimed that defendant had allowed the thieves/ conspirators access to the transit security guard roster, personnel uniforms, official identification cards, collections boxes, transit vehicles or failed to implement procedures whereby such could not be accessed and had failed to advise plaintiffs that such uniforms/cards/vehicles had been stolen and had failed to advise of previous theftuous schemes. Plaintiffs claimed that defendant “owed a duty of care” to the plaintiffs and that failure by defendant to disclose its relevant conduct to plaintiffs and the actions of defendant’s employees in confirming the identity of the thieves as employees was wrongful and such conduct constituted “reckless, alternatively gross negligent conduct”. Accordingly, plaintiffs claimed delictual damages in the amounts stolen from them.
4. Defendant raised a special plea of prescription relying upon sub clause 9.9 of the agreements between it and plaintiffs which provided that defendant should not be liable in respect of “any claim” [my emphasis] unless written notice of the claim had been given within three months and summons had been issued and served within twelve months from the date of the event giving rise to the claim”. It is common cause that the summons were not issued and served within the twelve month period.<sup>3</sup> Accordingly, defendant raised the Special Plea that “both plaintiffs’ claims against the defendant have become prescribed”.
5. In replication to that Special Plea, plaintiffs pleaded that such time bar as was contained in clause 9.9 offended against the Regulations of the Code of Conduct for Security Service Providers promulgated in terms of the Private Security Industry Regulation Act 56 of 2001 (‘the Code’).

### **SPECIAL PLEA AND SEPARATION OF ISSUES**

6. In the court *a quo*, the learned presiding judge granted a separation of issues. His judgment specifically states “the defendant’s special plea be separated from the other issues. The trial accordingly proceeded on the determination of the defendant’s special plea only”. No evidence was led. The court heard oral argument in support of the averments contained in the pleadings.

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<sup>1</sup> Dated 6<sup>th</sup> April 2005 (POC1) and 6<sup>th</sup> December 2006 (POC2).

<sup>2</sup> On 3<sup>rd</sup> April 2010 and on 12<sup>th</sup> March 2011.

<sup>3</sup> Summons issued on 25 June 2012.

7. In both the heads of argument prepared for this appeal and at the appeal hearing itself, defendant's counsel addressed the court on issues over and above the wording of the agreement itself including the law pertaining to co-existence of delictual liability with contractual arrangements and on the law pertaining to extension of liability for pure economic loss.
8. I have been concerned that these were not the issues which the court *a quo* or this appeal court were asked to decide. I also note that the court *a quo* was not confronted with an exception to pleadings and accordingly this appeal court does not have to decide whether the plaintiff alleged sufficient facts to constitute a cause of action for damages in delict or whether or not a delictual claim for pure economic loss was competent in the circumstances of this case.
9. The prescription point had been pleaded that "in terms of clause 9.9.... Defendant shall not be liable in respect of any claim [my emphasis] instituted unless written notice....." and the Special Plea concluded that both claims "had prescribed".
10. The essence of the Special Plea is apparent. The core issue for decision is that of prescription. The Special Plea requires this appeal court to consider whether or not delictual claims (whether for pure economic loss or not) are covered by sub-clause 9.9 of the agreement but only for purposes of determining whether such claims have prescribed.
11. This court is not asked to determine whether or not sufficient facts have been pleaded to found any or this delictual claim or whether or not a delictual claim for pure economic loss is appropriate in the circumstances of this case or whether or not Aquillian liability should be extended in the light of these particular facts or relevant policy issues. The only question set out in the Special Plea is whether or not plaintiffs' claim in delict (good, bad or indifferent) had prescribed by reason of the provisions of sub-clause 9.9 of the agreement.

### **ONUS**

12. Defendant has raised a special defence – that of prescription in terms of the contract. It is trite that defendant bears the onus of proving such special plea.<sup>4</sup>
13. Plaintiffs raised the prohibition in the Code in both their particulars of claim and their replications to both special plea and plea. Plaintiffs take the view that the onus is on defendant to prove that sub clause 9.9 applies notwithstanding the Code whilst

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<sup>4</sup> See *Pillay v Krishna* 1946 AD 946 and *Masuku v Mdlalose* 1998(1) SA 1 SCA.

defendant submits that the plaintiffs have failed to rebut the application of the special plea because they did not prove the allegations raised in the replication.

14. The Statute and the Code must apply to any contract entered into by a security service provider.<sup>5</sup> Plaintiffs seek to vitiate sub clause 9.9 by reason of the relevant regulation and must do so in their challenge to the special plea.

**DOES CLAUSE 9 APPLY ONLY TO CONTRACTUAL CLAIMS OR TO BOTH CONTRACTUAL AND DELICTUAL CLAIMS ?**

**The wording of the Agreement**

15. Clause 9 deals with ‘Liability and Risk’ and has nine sub-clauses. Defendant takes the view that this clause covers both contractual and delictual claims and therefore limits the time within which plaintiffs can institute litigation in respect of their delictual claims while the plaintiffs take the view that this clause is confined to contractual claims only.
16. Interpretation of the complete clause requires careful consideration of the language used and therefore that the relevant portions of the clause are repeated here:

“9. Liability and Risk

9.1 Fidelity shall not be liable for any loss or damage howsoever arising or for any reason whatsoever suffered by the client pursuant to or during the provision of Services by Fidelity unless such loss or damage is the direct result of the gross negligence of or theft by Fidelity employees, acting within the course and scope of their employment, and occurs while the money is in the custody of Fidelity....

9.2 Save for where it is expressly provided for in terms of this Agreement, Fidelity has no other liability to the Client for any loss or damage whatsoever and howsoever caused, at all.....

9.3 .....

9.4 .....

9.5 Fidelity will in no circumstances be liable for any consequential loss or damage, however arising.

9.6 In the event of any services to be rendered by Fidelity, the Client shall be solely responsible for the security of its

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<sup>5</sup> The wording of the Code makes this very clear indeed.

Premises and in the event of loss occurring on such Premises as a result of criminal conduct not attributable to the gross negligence or theft by Fidelity or its employees acting in the course and scope of their employment, Fidelity shall not carry the risk of loss for Money lost or stolen as a result thereof, despite such money being in the custody of Fidelity. In that event the risk of such loss shall be carried by the Client.

9.7 Subject to paragraph 9 read as a whole, Fidelity's liability in respect of any loss will commence from when the Money is in the Custody of Fidelity,.....

9.8 .....

9.9 The Client shall notify Fidelity immediately of the discovery of a loss, which notification shall be confirmed in writing within 24 [hours].<sup>6</sup> Fidelity shall not be liable in respect of any claim unless written notice of the claim has been given within three (3) months and summons has been issued and served within 12 months from the date of the event giving rise to the claim.

17. Defendant submits that two important phrases are repeated in this clause dealing with liability and risk.
18. Firstly, by using the word "any" in the phrases "any loss or damage" (9.1), "any consequential loss or damage" (9.2), and "any consequential loss or damage" (9.5), the clauses means the widely construed "all".<sup>7</sup> Accordingly, this clause 9 applies to all claims both contractual and delictual. Secondly, the three references to "howsoever arising and for any reason whatsoever suffered" (9.1), "whatsoever and howsoever caused" (9.2), and "howsoever arising" (9.5) assert the broad-based origin of such loss which means both contractual and delictual causes. In short, defendant contends that the language employed in clause 9 is wide with no restrictions.
19. Both parties have reminded this appeal court of the importance of context in construing the meaning of any document.<sup>8</sup>
20. Plaintiff has focused its argument on the context of the "services" rendered and to be rendered by the defendant to plaintiffs. These are defined<sup>9</sup> and described as

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<sup>6</sup> Word is missing in the agreement.

<sup>7</sup>See *R v Hugo* 1926 AD 268 where the word "any" was described as "on the face of it, a word of wide and unqualified generality.....prima facie it is unlimited" (at 271)

<sup>8</sup> See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Dexgroup (Pty) Limited v Trustco Group International (Pty) Limited* 2013 (6) SA 520 (SCA); and *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014(2) SA 494 (SCA).

<sup>9</sup> Clause 1.3.10 of agreement.

“collection, conveyance, storage and delivery of money”.<sup>10</sup> It is within this context of these identified ‘services’ that clause 9 must be understood. Plaintiff notes that clause 9 commences with “Fidelity shall not be liable for any loss or damage howsoever arising or for any reason whatsoever suffered by the client pursuant to or during the provision of Services by Fidelity unless.....” (9.1), that 9.6 commences “in the event of any Services to be rendered by Fidelity, the Client shall be .....”, while liability is stated in clause 9.7 to be “Subject to paragraph 9 read as a whole” and to only commence when a defendant employee is acting in the course and scope of employment “in the performance of the Service”. In short, plaintiffs maintain that the loss which was suffered and the claims which result are not (save for the call centre confirmation) based upon actions or inactions during provision of “services” as defined and are therefore excluded from any contractual claim.

21. His Lordship Mr Justice Van Oosten, in the court *a quo*, reasoned that clause 9 dealt only with liability and claims arising in relation to the contracted “services”. The learned judge found that both the context of the agreement and clause 9 as a whole dealt with ‘services’ to be rendered.
22. The use of the word ‘any’ is of wide import and may indeed cover “all” claims.<sup>11</sup> In *S v Wood* 1976 (1) SA 703 (A), the court referred to the meaning given to ‘any’ in the Oxford English Dictionary as “the indeterminate derivative of one” and “whichever, of whatever kind, of whatever quantity”. The court found that “any” “means a quantity or number however large or however small and is a word of very wide import” and “and *prima facie* the use of it excludes limitation” (*Clarke-Jervoise v Scutt* (1920) 1 Ch 382 at 388)."
23. However, the word “any” has always been acknowledged to be subject to restriction by subject matter or context. As was stated by the learned chief justice in *S v Hugo supra* “‘any’ may be restricted by the subject-matter or context”. In *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363, the court also allowed that the word ‘any’ could be “restricted by the context” and, in that case, the judgment of his lordship Innes JA carefully analysed the wording and import of the entire brokers note within which the word appeared and accepted the “plain and ordinary meaning of the language”. In *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd*<sup>12</sup>, the court questioned whether or not the word “any” had been restricted either by subject matter or context in a particular sentence and found in the negative because “no subject-matter had been indicated which qualified or limited the wide generality

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<sup>10</sup> Clauses 5 and 6 of agreement.

<sup>11</sup> *S v Hugo supra*; *Stuttafords.... Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914AD 363; *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) 245 (AD).

<sup>12</sup> 1983 (1) 245 (AD).

of the word under consideration". In short, the use of the words "any claim" does not necessarily mean that sub-clause 9.9 applies to all claims – both contractual and delictual. It all depends on context.

24. Defendant has argued that sub-clause 9.9 cannot be looked at in the context of sub-clause 9.1 alone and that other sub-clauses such as 9.2 are of assistance as well. Defendant also notes that the only sub-clause which is made subject to the provisions of clause 9 "as a whole" is sub-clause 9.7 which indicates that the other sub-clauses are not subordinated to the remainder of clause 9.
25. How such qualification is expressed is to be found in the context within which the phrase "any claim" and the import of the entire clause 9.9 is situate. The entire agreement is premised on the purpose of "Cash Management and Ancillary Services Agreement".<sup>13</sup> The purpose is restated in clause 2 under "use of services" which services are defined and described as aforesaid. Clause 9 has a heading announcing that it deals with "liability and risk" and such must pertain to the agreement between the parties. Clause 9 commences in 9.1 with a disclaimer of liability for loss or damage suffered "pursuant to or during the provision of services" unless certain conditions are met. The remainder of clause 9 continues to enumerate the basis upon which there is or is not liability – all of which circumstances are predicated upon the rendering of the 'services'.
26. To ignore the paramountcy of purpose and import of this context of the 'services' to be provided could allow for sub-clause 9.9 to cover delictual claims including those involving motor vehicle accidents or employee disputes which no reading of clause 9 suggests should be covered or subject to the particular time-bar set out in sub-clause 9.9 of the agreement.
27. Defendant's liability for loss is excluded in sub-clause 9.1 provided that certain jurisdictional facts are proven. Such exclusion occurs when loss is suffered pursuant to the "provision of services" unless there are act(s) of gross negligence or theft, perpetrated by defendant employees acting within the course and scope of their employment and such loss must occur whilst the money is in the custody of aforesaid defendant employees. Accordingly, liability can only be found within the arena of the "provision of services" and a certain set of jurisdictional facts.

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<sup>13</sup> First page of agreement.

28. The apparently unqualified generality of causation found in the phrases “howsoever arising” in sub-clauses 9.1, 9.2, 9.5 all have their own restrictions – in 9.1 the ‘services’, in 9.2 that which has been said elsewhere in the agreement which is one for the provision of services, in 9.5 a particular kind of loss - consequential loss.
29. Defendant has further argued that it was always open to plaintiffs to implement the provisions of clause 15 of the agreement and arrange for insurance to cover delictual claims. I fail to comprehend how this assists defendant’s argument. Whether or not plaintiffs took out insurance does not answer the question whether or not a delictual claim is possible. Certainly, the recent judgment of the Constitutional Court in *Loureiro & others v Imvula Quality Protection (Pty) Ltd*<sup>14</sup> did not require Mrs Loureiro to have taken out insurance against her delictual claims and (55 and 56) and granted her claim.
30. I am in respectful agreement with the finding of the learned judge in the court *a quo* on this point that clause 9.9 does not apply to delictual claims. Accordingly, plaintiffs’ claims in delict are not hit by the provisions of sub-clause 9.9 and have not prescribed. The Special Plea must fail.

### **Contractual Privity**

31. Of course contracts regulate many aspects of the contracting parties’ relationship including their respective liabilities towards each other (See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*<sup>15</sup>) and it is trite that contracting parties are capable of regulating their exposure to loss in the very contract which brought about their relationship (*AB Ventures v Siemens* 2011 (4) SA 614 (SCA)).
32. Defendant argues that these two contracting parties have so regulated their relationship and that a court should be hesitant to intervene therein by permitting delictual liability and claims where such are not regulated in this contract itself.
33. Firstly, a court should be “loath” to eliminate those provisions which the parties considered necessary or desirable for their own protection.<sup>16</sup> This principle does not apply to the facts in the present case. I do not understand which provisions in the already extant contract are to be so eliminated and none have been pointed out.

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<sup>14</sup> 2014 (3) SA 394 (CC)

<sup>15</sup> 1985 (1) SA 475 (A).

<sup>16</sup> *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty) Ltd* 1985 (1) SA 475 (A).



34. Secondly the law of delict should not be allowed to introduce an unwarranted liability into a contractually arranged and bounded relationship.<sup>17</sup> I do not know the basis upon which delictual liability could be called ‘unwarranted’ merely because the parties had failed to exclude or restrict delictual liability. ‘Unwarranted’ means “lacking justification or authorization”.<sup>18</sup> This can hardly be an automatic description of delictual liability where our courts have acknowledged and sometimes permitted such liability where the parties’ relationship is regulated by contract.<sup>19</sup>
35. Third, the court should be hesitant to intrude into the contractual relationship<sup>20</sup> or to subvert the provisions which the contracting parties considered necessary<sup>21</sup> or to entrap an unwary party.<sup>22</sup> This would be done where a court superimposes delictual liability by “scrubbing out”<sup>23</sup> or removing those very contractual limits which the parties have themselves chosen to curtail liability in their relationship. In the present case defendant has not adverted to any subversion or entrapment or reduction or redaction of any contractual terms or boundaries. The court has not been asked by plaintiff to undo or reword the contract in any way.
36. Fourth, it is argued that plaintiffs’ formulation of these claims in delict have had the inevitable consequence that the provisions of the agreements which the parties had agreed would govern the relationship between them has been deliberately circumvented. Specific reference has been made to the time bar (in 9.9), the obligation to individuals (in 5.3) and either parties’ election to procure insurance (in 15) as instances of what has been circumvented. Circumvention would require that there is some obstacle which has been avoided or evaded.<sup>24</sup> No such obstacle has been identified in the agreements. I have already found that the provisions of clause 9 are to be read in the context of the contractual provisions for rendering of defined “services”. Those provisions do not apply to delictual liability. Sub-clause 5.3 requires plaintiffs to verify the identity of a defendant employee before handing over money – that is an issue for decision by a trial court seized with determining the merits of the case. Plaintiffs could have taken out insurance – we do not know if they did or not – but it plays no part in our decision and, in any event, clause 15 only requires defendant to assist plaintiffs in obtaining insurance against losses incurred “during the performance of the Services in terms hereof”. The time –bar in sub-clause 9.9

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<sup>17</sup> *Lillicrap supra* and *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015(1) SA 1 (CC).

<sup>18</sup> Collins English Dictionary – Complete and Unabridged, Harper Collins Publishers 2003.

<sup>19</sup> *Lillicrap supra* and other authorities cited.

<sup>20</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>21</sup> *Country Cloud supra*.

<sup>22</sup> *Lillicrap supra* and *Country Cloud supra*.

<sup>23</sup> *Country Cloud supra*.

<sup>24</sup> The Concise Oxford Dictionary 10<sup>th</sup> ed.

applies to contractual claims arising out of the services rendered or to be rendered by defendant.

37. The question then remaining is whether or not the courts are precluded from permitting delictual issues to be raised where there is a *lacuna* in the contract because the parties themselves omitted or elected not to insert the appropriate contractual stipulations.<sup>25</sup> The answer to that question must be in the negative. There are a number of authorities which accept and permit that delictual liability may exist and be pursued notwithstanding that this does not emerge from and is not regulated by the contract itself.<sup>26</sup>
38. If defendant had hoped or wished that any time-bar set out in the agreement with plaintiffs should apply to all or any claims in delict, then it should have said so. It was open to the defendant to draft its standard contract including reference to claims which do not arise out of 'services' rendered but which also arise from delict.

#### **Delictual claim for pure economic loss as between contracting parties**

39. As to whether or not the plaintiffs have pleaded the facts required for pure economic loss or have authority of law on their side are not issues raised in the Special Plea and are beyond the purview of either the hearing in the court *a quo* or this appeal.
40. The court *a quo* and this appeal court decide only the prescription point as raised in the Special Plea. A trial court may need to go further and have regard to the pleadings, issues of wrongfulness, policy considerations, extension or otherwise of delictual claims for pure economic loss, what alternative remedies were or were not available to plaintiffs to protect against risk. But those are issues for decision of a trial court and not this appeal court.
41. The application of the relevant principles and policies to the facts will be for the trial court not this appeal court which is seized only with the issue of prescription to a delictual claim.

#### **APPLICATION OF THE SECURITY SERVICE PROVIDERS CODE OF CONDUCT**

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<sup>25</sup> *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006(3) SA 138 (SCA) especially at paragraph 138.

<sup>26</sup> *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk t/a Phama Security* 2010 (4) SA 455 (SCA); *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) 368 (GSJ); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D); *Cathkin Park Hotel v JD Makesch Architects* 1993 (2) SA 98 (W); *Trustees, Two Oceans Aquarium Trust supra*.

42. Plaintiffs pleaded (both in their particulars of claim, replication to the special plea and in the replication to the plea) that regulation 9(3)(d)(i) of the Code of Conduct for Security Service Providers (the Code) was imported into the parties' agreement as an implied term and accordingly the Code precludes a contractual provision such as sub-clause 9.9 from agreements entered into by security service providers and accordingly clause 9.9 is therefore invalid. Defendant pleaded a denial.
43. The relevant regulation in the Code may be summarized as providing that a security service provider may not conclude a contract containing any term which 'limits the legal liability' of the security service provider.<sup>27</sup>
44. The first issue is whether or not this could be an implied term. Defendant submitted in heads of argument that this term could never have been implied since it is in conflict with the agreement and therefore the Code cannot be imported into the agreement. I do not understand plaintiffs to suggest that the parties personally introduced the 'implied' term but that the Code applies to all agreements involving security service providers. The replication contends that this term "is a statutory duty to which the defendant as a security service provider has to abide and adhere...".<sup>28</sup> I agree therewith. The relevant agreement proclaims on its first page that the defendant is "registered as a security service provider by the Private Security Industry Regulatory Authority". I am in agreement with the learned judge in the court *a quo* that the defendant operates within the framework of the security industry and is thereby bound by the provisions of the Code of Conduct. The Code is paramount. A security service provider cannot opt out of the applicability of or adherence to the Code.
45. Secondly, the parties contend for different meanings to the wording of the time limit in sub clause 9.9 and the prohibition in regulation 9(3)(d)(i). Plaintiffs squarely state that sub clause 9.9 seeks to "limit the legal liability" of defendant in contravention of the Code. Defendant argues that there is no tension between sub clause 9.9 and the Code. The Code purports to deal with conduct which may form the subject matter of contracts and in respect of which liability may not be limited whereas sub clause 9.9

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<sup>27</sup> Regulation 9(3)(d)(i) reads: General obligations towards clients, and issues related thereto: (3) A security service provider may not –(d) make a contractual offer to or conclude a contract with a client containing any term, condition or provision that – (i) 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 (ii) places a duty or purports to place a duty on the client to indemnify or compensate the security service provider or any other person in respect of any act referred to in sub-paragraph (i) by a person for whose conduct the client is not independently responsible in law;

<sup>28</sup> Replication at paragraph 1.1

does not deal with conduct but stipulates the period within which notification of a claim is given and legal proceedings instituted.

46. In conducting this enquiry, the court is testing the provisions and import of sub clause 9.9 of the agreement against regulation 9(d)(3)(i) of the Code and not (as in *Barkhuizen supra*) the provisions and import of a time –bar clause in an insurance contract against the provisions of section 54 of the Constitution.
47. Sub-clause 9.9 of the agreement between the parties, does indeed deal with time periods during which legal proceedings may be instituted. It lays down the time during which a court may be approached. Failing compliance with such agreed time periods, a party is precluded from seeking assistance from the courts. It is pre-eminently a ‘time-limit’ or ‘time-bar’ as envisaged in *Barkhuizen supra* in that it bars a contracting party from “seeking judicial redress” if they attempt to do so after the agreed time period.
48. Code regulation 9(3)(d)(i) prohibits provisions in a contract which “excludes” or “limits” the legal liability of a security service provider.
49. The distinction between “legal liability” and “judicial redress” was carefully maintained by Ngcobo J (as he then was) in *Barkhuizen supra*. The court pointed out (at para 45) that such a time-bar clause
 

“does not seek to deny applicant the right to seek judicial redress; it simply requires him to seek redress within the period it prescribes, failing which the respondent is released from liability”.
50. “Judicial redress” means no more than the use of a remedy or seeking assistance through the courts<sup>29</sup> whereas the exclusion or limitation of “liability” is to reduce or deny the responsibility or answerability for action/inactions and resulting consequences.<sup>30</sup>
51. Accordingly, Code regulation 9(3)(d)(i) prohibits a registered security service provider from contracting to limit its responsibility or answerability for that which is done or not done in its name. In other words, the Code precludes the exclusion of responsibility for certain conduct. However, a time-bar clause (as contained in sub-clause 9.9) does not remove or negate accountability in law for an act or omission but it does prescribe the period within which judicial redress may be sought.

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<sup>29</sup> See the definition of ‘redress’ in The Oxford English Dictionary.

<sup>30</sup> See the definition of ‘liability’ in The Oxford English Dictionary.

52. It would be strange indeed if the Code attempted to restrict anything other than accountability in an agreement. The Code can hardly prohibit a security service provider from including a reference to the Prescription Act in an agreement which records that the statute is applicable. The Code can only prohibit a security service provider from attempting to avoid responsibility for its conduct. It always remains up to the courts to decide whether or not the security service provider is actually responsible in law ie has “legal liability”.

53. I therefore cannot agree with plaintiffs that *Barkhuizen supra* is authority for the proposition that a time limitation clause limits legal liability. I am therefore in respectful disagreement with the finding of his lordship in the court *a quo*. However, my view in this regard makes no difference to the result of the appeal because the plaintiffs’ claims have already been found not to have prescribed, the Special Plea has not been upheld and the appeal on that point has not been successful.

### **CONCLUSION**

54. In the result I am of the view that sub-clause 9.9 does not apply to delictual claims brought by plaintiffs against defendant, that the claims of plaintiffs against defendant have not prescribed and that the Special Plea must therefore fail.

55. Although it does not affect the result, I am of the view that regulation 9(3)(d)(i) does not prohibit a sub-clause such as 9.9 of the agreements because such time-bar requires plaintiff to seek judicial redress within a period of time and does not limit liability for conduct of defendant or employees.

56. Accordingly, the appeal against the order of his lordship Mr Justice Van Oosten is dismissed with costs, such costs to include those occasioned by the employment of both Mr Van Nieuwenhuizen and Mr Patel.

**DATED AT JOHANNESBURG 28<sup>th</sup> MAY 2015**

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**SATCHWELL J**

I agree.

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**A.M. L. PHATUDI J**

I agree.

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**MATOJANE J**

Counsel for Appellant: Adv M A Chohan SC with him G-M Goedhart

Attorneys for Appellant: Norton Rose Fulbright South Africa Inc.

Counsel for Respondents: Adv H P Van Nieuwenhuizen and Mr Z Patel

Attorneys for Respondents: Ziyaad E Patel Attorneys

Dates of hearing: 13<sup>th</sup> May 2015.

Date of judgment: 28<sup>th</sup> May 2015