

REPUBLIC OF SOUTH AFRICA



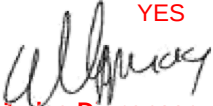
**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NUMBER: A5061/2021
23675/2012**

DELETE WHICHEVER IS NOT APPLICABLE

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

06 January 2022


Judge Dippenaar

In the matter between:

G4S CASH SOLUTIONS SA (PTY) LTD

Appellant

And

ZANDSPRUIT CASH & CARRY (PTY) LTD

First Respondent

DEVLAND CASH & CARRT LTD

Second Respondent

JUDGMENT

Coram: Mudau J, Adams J et Dippenaar J

Heard: 6 October 2021-the virtual hearing of the Full Court Appeal was conducted as a videoconference on Microsoft Teams

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 06th of January 2022.

Summary: Delict – Existence of a delictual legal duty arising out of a contractual agreement – adequate causal link resulting delictual liability- contributory negligence – the failure by a security company to inform its clients of the risk of third parties impersonating it amounts to an omission in delict – positive conduct in displaying duty rosters – legal duty established -

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Matojane J sitting as Court of first instance):

- [1] The appeal in respect of the first respondent is partially upheld;
- [2] Prayer 1.1.1 of the order of the court *a quo* is amended by the deletion of the amount of R265 465.25 and the replacement thereof by an amount of R132 732.63;
- [3] The first respondent is directed to pay the costs of the appeal insofar as it relates to the claim of the first respondent, including the costs of the application for leave to appeal;
- [4] The appeal against the claim of the second respondent is dismissed with costs.

JUDGMENT

DIPPENAAR J (MUDAU J ET ADAMS J CONCURRING):

Introduction and factual background

[1] The appellants appeal against the judgment and order of the court *a quo* granted on 17 February 2020 in terms of which judgment was granted in favour of the first and second respondents against the appellant. The appellant was directed to pay the first respondent the amount of R265 464,25 and the second respondent the amount of R641 744.00, together with interest at 15.5% per annum *a tempore morae* and costs. This appeal is with leave of the court *a quo*.

[2] The relevant facts and a summary of the evidence are set out comprehensively in the judgment of the court *a quo*. In summary, the appellant provided cash management and security services to both the first and second respondents in terms of written agreements in terms of which the appellant would collect, convey, store and deliver money from the respective respondents in accordance with its operating methods as amended from time to time.

[3] On 3 April 2010, the first respondent fell victim to a bogus pickup pursuant to which an amount of R265 465.25 was stolen from its premises (“the Zandspruit incident”) pursuant to a scheme in terms whereof unknown third parties (“the imposters”) arrived at the premises on the normal collection date to collect cash under the pretence of being the appellant’s security cash collection service. The imposters arrived in a vehicle that looked substantially identical to the appellant’s vehicles, were dressed in uniforms substantially identical to those worn by the appellant’s guards and carried what looked like official identification cards of the appellant against which the first respondent’s staff were to verify their identity. The sealed bags of cash were handed by the first respondent’s cash office clerk to the imposters, which bags were placed in cash collection boxes that could only be opened using an electronic key provided by the first respondent. The imposters provided receipts to the first respondent’s staff confirming receipt of the cash bags and the amounts contained therein (collectively referred to as “the scheme”). The first

respondent's staff member, Ms Kgampe did not acquire the imposter's identity card, nor did she verify the identity of the guard or contact the appellant's control room to verify the name of the guard on duty.

[4] On 12 March 2011, the second respondent fell victim to a bogus pickup pursuant to which an amount of R641 744 was stolen utilising the scheme ("the Devland incident"). In this instance not only cash but also cheque envelopes were handed to the imposters. An employee of the second respondent, Mr Bhana, obtained the imposter's official identification card and telephonically contacted the appellant's control room to verify the identity of the guard in question. The name of the guard was confirmed as Mr Masisi. Mr Bhana followed the applicable protocols and procedures utilised by the appellant in its collections.

[5] It was undisputed that the first and second respondents have the same directors, Messrs Shiraz Gathoo and Mahomed Gathoo¹, who are brothers and the only directors of the first and second respondents.

[6] The respondents sued the appellant in delict in two separate claims pertaining to respectively the Zandspruit incident and the Devland incident. The five requirements for delictual liability are trite².

The issues on appeal

[7] The central issue is whether there was a legal duty on the appellant and whether the respondents had established wrongfulness. If so, it must be determined: (i) whether the respondents had established causation in respect of their claims, considering the respondents' knowledge of bogus pickups and specifically in the case of the second

¹ The spelling of the surname differs in the judgment of the court a quo and the record which refers to Mr Gathu

² "A delict is an act or omission of a person that in a wrongful and culpable manner causes harm to another"

respondent, in light of the knowledge of the respondents' directors of the Zandspruit incident; and (ii) in respect of the first respondent's claim, whether negligence was established and whether there was any contributory negligence on the part of the first respondent.

The parties' respective cases on the pleadings and the evidence

[8] The respondents' case was that the appellant had a legal duty to provide them with certain facts, and negligently failed to do so, which failure caused the respondents to suffer damages. In sum, the respondents' case was that the appellant owed them a legal duty to advise or provide them with certain information as pleaded pertaining to bogus pickups by imposters, to disclose certain of appellant's conduct, defined as "the relevant conduct" and not to represent to the respondents that the imposters were employees of the appellant duly collecting cash from their premises and that the failure by the appellant to disclose such information was wrongful. The respondents' case was thus principally based on omissions on the part of the appellant. In addition, the respondents relied on positive acts on the part of the appellant, being representations made by the appellant's control room operator in verifying the identity of the guard who collected the money in relation to the Devland incident and in allowing access to the cash in transit security guard duty rosters attending to the respondents' premises to the imposters³.

³ Albeit pleaded as part of the "relevant conduct" in the context of an omission to inform the respondents of this fact

[9] On the pleadings the appellant made various admissions,⁴ which must be accepted⁵. Facts which were common cause on the pleadings form no part of the dispute between the parties and the respondents bore no onus to prove them⁶.

[10] The appellant's plea must be read cumulatively and in context⁷. The appellant's central dispute is the existence of a legal duty and any wrongful conduct on its part. It did not however dispute that harm was foreseeable if a duty was found to exist. The appellant's case as pleaded was that no such legal duty exists. It pleaded:

"Defendant admits that it did not advise the plaintiffs regarding the allegations contained in paragraph 9.6 as the factual basis did not exist at the time and the defendant was not aware of the facts underlying the allegations, alternatively, defendant was not legally obliged to do so. In any event it was public knowledge at the relevant time that incidents have occurred in the industry, also in regard to clients of the defendant, where criminals have stolen from victims, including clients of the defendant by fraudulently pretending to be associated with the defendant or other security service provider in the industry".

[11] It was not challenged in evidence that the thefts occurred and that the respective respondents suffered damages in the amounts claimed. In respect of the second respondent's claim, the evidence was undisputed that a call was made by an employee of Devland, Mr Imtiaz Bhana whereby the name of the guard employed by the appellant

⁴ Those admissions were that: (i) the defendant concluded agreements with the plaintiffs for the provision of cash transit services; (ii) the appellant knew that incidents had occurred in the private security industry where thieves had stolen money from victims, including clients of the appellant by fraudulently pretending to be associated with the appellant and conducting the schemes; (iii) the appellant was a security service provider with knowledge and experience with cash in transit services and was aware or reasonably should have been aware that the respondents were, as clients of the appellant, vulnerable to falling victim to such schemes; (iv) the appellant knew or reasonably should have known that its wrongful conduct might cause the respondents to suffer loss; (v) the appellant could easily, and without incurring substantial expense, have refrained from its wrongful conduct; (vi) the appellant's clients, including the respondents, are bearers of fundamental rights to life, liberty and security of the person, and not to be arbitrarily deprived of property as contained in ss 10, 12 and 25 of the Constitution; and (vii) the number of potential claimants in the position of the respondents is finite in that they are limited to the clients with whom the appellant has contracted.

⁵ s15 of the Civil Proceedings Evidence Act 25 of 1965, which provides: It shall not be necessary for any party in any court proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings

⁶ FirstRand Bank v venter (829/2011)[2012] ZASCA 117 (14 September 2012) at para [9]; Absa Technology Finance Solutions (Pty) Ltd v Funela Trade and Invest 21 (Pty) Ltd t/a Caltex The Downs Service Station and Another (519/2015) [2016] ZASCA 127 (26 September 2016) at para [6]

⁷ McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 Cc t/a Harvey World Travel and Another 2012 (6) SA 551 (GNP) at para [11]

to collect money was provided and verified. The imposter was asked for his name and it was confirmed with the name and photo on the guard's Identity card and the name given to him by the appellant's control room staff. The theft was discovered later that day when another person by the name of Mr Masisi came to do the collection.

[12] It was undisputed in evidence that the appellant failed to advise the plaintiffs that cash in transit employees' uniforms and/or official identification cards had been lost or stolen; vehicles were used without authority alternatively imposters had converted vehicles to look identical or close to those of the appellant and cash collection boxes of keys had been lost or stolen or could be duplicated.

[13] It was undisputed that the appellant knew that its clients and clients of other service providers had been victims of bogus pick up schemes in which criminals stole money by fraudulently pretending to be associated with the appellant or other service providers in the industry.

[14] The appellant's version was that it did not advise the respondents because it was public knowledge at the time that such incidents had occurred in the industry. It further contended that as the directors of the second respondent were aware of the Zandspruit incident, it had not established a claim.

[15] The appellant further pleaded that if a legal duty and breach was found, the damages were caused as a result of the respondents' own negligence as they failed to take the necessary and reasonable steps to verify the identities of the third parties and handed over money in circumstances where it was not safe to do so.

A legal duty and wrongfulness

[16] The court *a quo* phrased the issue to be determined at the trial as:

*“Whether the contract that exists between G4S and the plaintiffs prevent the plaintiffs from instituting an action in the delict pleaded”.*⁸

[17] The court *a quo* concluded that in circumstances where the appellant was aware of the schemes it was obliged to inform the respondents of those hidden dangers and its failure to do so grounds an action in delict.

[18] In its reasoning, the court *a quo* held⁹:

“In the present case, Mr Gathoo, the director of the plaintiffs, testified that the G4S was specifically contracted to take cash from the plaintiff’s stores and depositing it safely with the bank. The loss that the plaintiffs have suffered originate from the services that G4S was contracted to provide”.

[19] In challenging the correctness of that finding, the appellant relied on *G4S Cash Solutions (SA)(Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another*¹⁰ (“G4S”), wherein the Supreme Court of Appeal held, in the context of the limitation of liability clauses in the contracts concluded between these parties:

“Turning to clause 9.9 it follows from the above interpretation that the subclause envisages a loss and resultant claim arising pursuant to or during the provision of services by the appellant to the respondents in terms of the agreements. In my view the clear wording of the agreements shows that the parties did not contemplate that clause 9.9 would encompass delictual claims of the nature averred in the respondents’ particulars of claim. These delictual claims did not arise pursuant to or during the services rendered by the appellants nor while the money was in the possession of the appellant, but in circumstances where the respondents handed over the money to unknown third parties. Had the appellant intended the time limitation in clause 9.9 to also apply to delictual claims of this nature, it could easily have drafted the agreements to include such claims. Its failure to do so justifies the inference that the parties did not intend clause 9.9 to encompass the respondents’ delictual claims.”

[20] The appellant relied on the finding that *“the delictual claims did not arise pursuant to or during the services rendered by the appellants”* in contending that the court *a quo*’s finding on that issue was wrong as the finding in G4S was in fact the opposite by finding that these delictual claims did not arise pursuant to or during the services rendered by the

⁸ Para [23]

⁹ Para [27]

¹⁰ 2017 (2) SA 24 (SCA) para [16], which relates to the present dispute between the parties, albeit in a contractual context

appellant. It was argued that it was for this very reason that the Supreme Court of Appeal found that the appellant could not rely on the limitation of liability clause in the agreement, because the losses were not suffered as a result of the services provided under the contracts. This argument lacks merit for various reasons.

[21] First, in *G4S*, Fourie AJA was at pains to explain that the competence of the delictual claims was not part of the separated issues with which the appeal court was seized¹¹. He stated:

“The difficulty that I have with this line of attack is that the competence of the delictual claims was not an issue which Van Oosten J had separated out for determination in terms of rule 33(4). The special defence that the respondents’ delictual claims were time-barred by virtue of the provisions of clause 9.9 of the agreements, was the sole issue that had to be heard separately....

I have no doubt that had the competence of the delictual claims been in issue, the parties, or at least the respondents would have presented evidence regarding the question whether a duty to prevent loss of this nature should be held to exist. This would have involved considerations of policy, as well as a careful weighing-up of the interests of the parties involved, taking into account the public interest”.¹²

[22] Second, the court *a quo* did not find that the losses were suffered *pursuant to or during the services*. It was undisputed that the losses were suffered because the money was handed over to unknown third parties impersonating the appellant’s employees. The appellant’s argument conflates the performance under the agreement with the origin of the relationship between the parties. In my view, the court *a quo*’s finding was no more than a finding that the loss *originated* from the agreement under which the services were performed which formed the basis of the relationship between the parties. For the reasons set out below, the finding of the court *a quo* cannot be faulted.

[23] The existence of a special relationship between the parties formed a main departure point between the parties. The appellant contended that the special relationship must exist entirely outside the agreements between the parties and the existence of the agreements cannot *per se* form the special relationship, whereas the respondents

¹¹ Paras [20]-[21]

¹² Para [22]

contended the opposite and relied on the existence of the agreement as foundational to the relationship between the parties.

[24] On this issue, the appellant challenged the court *a quo*'s finding on the basis that its reliance on *Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd* ("*Trio*")¹³ was incorrect as authority for the finding that in the circumstances of the matter delictual claims were competent where there was an agreement concluded between the parties. It argued that although it is correct that *Trio* is authority for the general proposition that a delictual duty can arise separately from a contract between the parties, this is conditional on it being established that those additional or complementary duties arise independently in delict, which is directly at odds with the respondents' case that a legal duty arises from *inter alia* the agreements concluded between the parties.

[25] In *Trio*, the relevant principles were summarized thus¹⁴:

"(a) A breach of contract is not, without more, a delict; (b) Where parties have chosen to regulate their relationship under a contract, the contractual rights and obligations undertaken will not ordinarily permit of the recognition of a delictual duty at variance with the contract; (c) Parties to a contract may have additional or complementary duties that arise independently in delict; (d) In determining wrongfulness, one must proceed with caution when assessing whether a third party, harmed by a breach of contract, can sue a party to the contract for such harm, outside well-defined causes of action".

[26] In *Trio*, Unterhalter J further held¹⁵:

"I recognise that the duties that are said to arise from the business relationship do not, on the pleaded case, arise independently of the agreement (since the agreement is pleaded to be foundational to the relationship). Nevertheless, where the business relationship is built upon an agreement but extends beyond the agreement and is complementary to it, I see no reason why a cause of action in delict cannot be pursued in the alternative as a claim that subsists concurrently with the claim based on a breach of contract."

¹³ 2019 (3) SA 580(GJ)

¹⁴ Para [29]

¹⁵ Para [40]

[27] I concur with the reasoning adopted in *Trio*¹⁶ and as adopted by the court *a quo* to the present factual matrix. First, the delictual duties to inform and not to cause harm, relied upon by the respondents as an incident of business relationship, are not repugnant to the agreement subsisting. Rather, these duties complement and expand upon the contractual obligations undertaken by the parties. Second, although the delictual duties may not have come into being independently of the agreement, it is not the causal origin of the duties that signify. They are duties that arise separately from the agreement by reason of a business relationship subsisting between the parties. Third, the business relationship that is said to give rise to the duties in delict is not at variance with the autonomy principles but an extension of it. The duties in delict to inform and not to cause harm rest upon a distinct foundation, i.e. the business relationship and are not repugnant to the contract or the choice of the parties to define their relationship in contract. There is no reason of principle in the present circumstances to exclude a concurrency of contract and delictual duties.

[28] It can therefore not be concluded that the court *a quo*'s reliance on *Trio* was misconceived. The court *a quo*'s finding seen in context that the duty originates from the contract cannot be faulted. The appellant's challenge on this basis must thus fail.

[29] The appellant further challenged the court *a quo*'s reliance on the Constitutional Court's judgment in *Loureiro and Others v iMvula Quality Protection (Pty) Ltd*¹⁷ ("*Loureiro*") to support its finding that the moral and legal convictions of the community demand that the appellant inform its clients of hidden dangers such as bogus pickups.

[30] The court *a quo*, found that:

"In my view, the moral and legal convictions of the community demands that where, as in the present instance G4S is aware that criminals were impersonating its own security guard and its procedures using similar uniforms, receipts and cash boxes, it must make its clients aware of the hidden dangers in allowing guards to enter their premises to collect cash. The fact that the relationship between the

¹⁶ Paras [42]-[43]

¹⁷ 2014 (3) SA 394 (CC)

parties is governed by contract does not make failure by G4S to warn the plaintiffs of that danger any less a fault which, independent of the origin of the danger grounds an action in delict.

The plaintiffs are bearers of fundamental rights to life, liberty and security of the person and have the rights not to be arbitrarily deprived of property as contained in section 10, 12 and 25 of the Constitution. I find that the failure by G4S to warn its clients of the aforementioned hidden danger of which it is aware of is an omission which grounds an action in delict.”¹⁸

[31] In the case of pure economic loss, as in the present instance, the question is whether public policy, or the convictions of the community, require that there should be such a duty. Although our courts have been circumspect in allowing a remedy because of the possibility of unlimited liability as the economic consequences of an act may far exceed its physical effect, our courts have recognised that if a special relationship exists between the parties it may give rise to a legal duty to take active steps to prevent harm¹⁹. Ultimately, what must be considered is not merely the interests of the parties *inter se* but also the conflicting interests of the community must be weighed up carefully and a balance must be struck in accordance with what a court conceives to be what the society’s notions are of what justice demands²⁰.

[32] In *Loureiro*, the public policy reasons to impose liability were stated thus:²¹

“[54] The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.”²² Negligence, on the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault ...

[56] There are ample public-policy reasons in favour of imposing liability. The constitutional rights to personal safety and protection from theft 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

¹⁸ Paras [28]-[30]

¹⁹ *Viv’s Tippers* (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security 2010 (4) SA 455 (SCA) at paras [5]-[8], 459F-460A; *Cathkin Park Hotel and Others v JD Makesch Architects and Others* 1993 (2) SA 98 (W) 100D-E; *Faiga v Body Corporate of Dumbarton Oaks and Another* 1997 (2) SA 651 (W) 664G-665B; *Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd* 2019 (3) SA 580 (GJ) [31]-[45]

²⁰ *Kadir v Minister of Law and Order* 1992 (3) SA 737 (O)

²¹ Para [53]

²² This principle was restated in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para [21]

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”.

[33] The appellant argued that *Loureiro* is distinguishable on two grounds. First as the first plaintiff in *Loureiro* concluded a contract which the Constitutional Court found the defendant’s conduct had breached and the defendant was held liable in contract to the first plaintiff in accordance with the principle in *Trio* that if the parties’ relationship is governed by contract it is the contract that must inform a cause of action unless it can be established that a separate legal duty arose independently of the contract. The second distinction contended for by the appellant is that where no contract existed, a legal duty was recognised in the specific circumstances of that case, which are distinguishable from the present as in *Loureiro* the duty not to cause harm was breached when the security guard opened the gate and allowed imposters to enter (thus a positive act rather than an omission as in the present instance). It was argued that the circumstances are completely different here as the court *a quo* did not find and there is no evidence to find that the appellant did anything to cause the loss which would have been a positive act. The court *a quo* relied on a negative act. It was argued that our courts recognise that a higher hurdle must be imposed in respect of a negative act and that this matter is more analogous to *Saaiman and Others v Minister of Safety and Security and Another (“Saaiman”)*²³, wherein a duty was not recognised.

[34] There are various reasons why the appellant’s arguments do not pass muster. First, I have already dealt with the principles in *Trio* and why the appellant’s argument on that issue must fail.

[35] Second, *Saaiman* is distinguishable and does not assist the appellant, as the duty sought to be imposed was in relation to outside third parties who were not involved in any agreement with the security company and recognising a duty would result in

²³ 2003 (3) SA 496(O)

indeterminate liability. In this context appellant's contention that there must be a link between the wrongdoer and the defendant and that that link creates a special relationship lacks merit. The existence of such a link is but one of the factors to consider²⁴ and should not be considered in isolation. It was further not contested by the appellant that by recognising a duty it would not result in indeterminate liability, considering that on the pleadings, this was admitted.

[36] Third, the respondents did not only rely on omissions but also relied on positive conduct on the part of the appellant in providing the imposters with their assumed identities and by displaying the daily rosters in an open and unsecured part of its offices where it was available to everybody employed at such a branch, including cleaning staff. The evidence pertaining to the display of the daily duty rosters was presented by Mr Calitz, the appellant's own witness and it was at no stage contended that the appellant was prejudiced by the respondents' reliance on this evidence or that the evidence was inadmissible²⁵. The appellant further took no steps to ensure that such information did not pose a risk to its clients²⁶.

[37] Fourth, the basis on which a duty not to cause harm was imposed in *Loureiro* and the applicable policy considerations are substantially similar to the present where private security companies are involved which obtain remuneration for their services. The appellant operates within the framework of the security services industry and is therefore bound by the provisions of Private Security Industry Regulation Act²⁷ ('PSIRA') and its code of conduct, which in turn provides for adequate protection of the fundamental rights to life and security of persons and the right not to be lawfully deprived of property, which are fundamental values to the social and economic development of our country.²⁸ This was not disputed by the appellant and it did not challenge the facts on which the

²⁴ Kadir v Minister of Law and Order 1992 (3) SA 737 (O); Joubert v Impala Platinum Limited 1998 (1) SA 643 (B)

²⁵ EC Chenia and Sons CC v Lame & Van Blerk 2006 (4) SA 574 (SCA) paras [12]-[15]

²⁶ Holm v Sonland Ontwikkeling (Mpumalanga)(Edms) Bpk 2010 (6) SA 342 (GNP) 347-348 CHECK

²⁷ Act 56 of 2001

²⁸ Judgment van Oosten J in application for leave to appeal; Macadamia Finance Ltd v De Wet 1991 (4) SA 273 (T) 278

respondents relied to support the relevant policy considerations. The fact that here there are primarily omissions rather than positive acts involved, does not change the fact that similar policy considerations apply to impose liability.

[38] Lastly, the appellant contended that on the present facts, a legal duty to inform does not arise as the respondents were aware of bogus pickups and the security measures implemented to minimize the risks. The appellant argued that the respondents were aware of the risks of bogus pickups because it had been trained in security measures aimed at avoiding such incidents and moreover, the fact that bogus pickups occur, is in the public domain. It was argued that the security measures used to minimize the risks were well known to the respondents. In support of this argument the appellant relied on the evidence of Mr Calitz that bogus pickups occur all over the world and that customers were aware of the risks and knew that procedures could be compromised, necessitating procedures such as verification of the identification card of guards arriving to collect money. According to Mr Calitz, those security measures are explained to customers when they are presented with an induction pack upon first contracting with the appellant, the purpose of which is to inform clients of measures they must implement to reduce the risk of theft. It was argued that the appellant cannot attract a legal duty to inform the respondents of the bogus pickups of which they were aware.

[39] In relation to the Zandspruit incident, there was nothing to arouse the first respondent's suspicions regarding bogus pickups. I agree with the appellant that in respect of the Devland incident the second respondent did know about bogus pickups and the general outline of the scheme as the second respondent was aware of the Zandspruit incident due to the commonality of directors between the first and second respondents and the knowledge of the Gathoo brothers²⁹. I do not however agree with the contention that the appellant could not have a legal duty on the present facts. The argument disregards that the respondents' case was predicated on a wider basis

²⁹ Northern Province Development Corporation v Attorneys Fidelity Fund Board of Control 2003 (2) SA 284 (T) para [31]

including a legal duty not to harm which included certain positive acts such as the display of the duty roster already referred to.

[40] It was undisputed that the second respondent's staff did follow all the security measures at the time of the Devland incident and that the imposter's identity was checked and verified with the appellant's control room staff as being the name of the appellant's guard on duty, Mr Masisi, which information was available on the duty roster and came to the knowledge of the imposters. Mr Bhana's evidence confirmed that the second respondent took all measures they were supposed to implement to reduce the risk of theft.

[41] Considering all the facts, I conclude that the conclusion of the court *a quo* to impose a legal duty cannot be faulted and it would be reasonable to impose liability in the present circumstances. The appellant's challenge to the imposition of a legal duty must thus fail.

Negligence on the part of the appellant and contributory negligence

[42] Negligence is determined by applying the authoritative test enunciated in *Kruger v Coetzee*³⁰. It must be determined whether: (i) a reasonable person in the position of the appellant would have foreseen the reasonable possibility that its conduct and its failure to inform the respondents of the scheme would injure the respondents' property causing loss; (ii) a reasonable person in the position of the appellant would have taken reasonable steps to guard against such loss; and (iii) the appellant failed to take those steps.

[43] In determining what steps a reasonable person would have taken to prevent harm a number of considerations are relevant, including: (i) the degree or extent of the risk

³⁰ 1966 (2) SA 428(A) at 430E-F

created by the conduct in question; (ii) the gravity of the consequences if the harm occurs; and (iii) the burden of eliminating the risk of harm³¹.

[44] The court *a quo* found no contributory negligence on the part of the first respondent. It reasoned that:

“Because G4S did not inform Mr Gathoo that criminals were impersonating its security guards and collecting cash under the pretence of performing cash collections services on behalf of G4S, Mr Gathoo would not have had a false sense of security about G4S procedures. He could have requested G4S to increase or improve its security measures to his satisfaction or consider alternative service providers. Ms Kgampe and the other employees would have been on their guard and every collection would have been given heightened security and attention. Even if Ms Kgampe had checked the identification card of the imposter like Imtiaz Bhana did, she would still have been tricked in handing over the cash as she had no reason to suspect that the imposter was not from G4S”.

[45] Ms Kgampe’s evidence was that despite not recognising the imposter she did not ask for his identification card and did not check the card or verify the information thereon. She confirmed that the imposter had a card which looked different from the booklet identity card used by the appellant at the time. Ms Kgampe was aware of the procedure that she was required to check the identification card and whether the photo and name corresponded with the person. She was not told of the procedure to phone the appellant’s control room to verify the identity of the guard. The imposter was wearing a uniform of the appellant. She gave him a tag and put the money in a bag and closed it. The imposter wrote down the seal number from the bag and gave her a receipt. She did not remember whether the electronic box made a noise when it was opened, which was normally the case. The imposter was wearing a uniform of the appellant. Nothing occurred which raised Ms Kgampe’s suspicions that something was amiss.

[46] The appellant’s argument that the first respondent failed to prove a material feature of the scheme as the identification card was not presented by the imposter for verification and the staff member at Zandspruit did not identify that person as an employee of the

³¹ Loureiro *supra* para [62]

appellant responsible for collecting the cash bags does not pass muster as the salient features of the scheme were not disputed in evidence.

[47] The appellant further argued that it was not negligent and that the loss was occasioned by the negligent conduct of Ms Kgampe, who was on duty the day of the Zandspruit incident. It argued that no amount of increased security measures would have made any difference if the first respondent's staff did not even bother to adhere to the security measures that were in place at the time and which ought to have alerted them to the fact that the person was an imposter.

[48] I am not persuaded that the appellant was not negligent, even though I agree that Ms Kgampe's failure to adhere to the existing security protocols by checking and verifying the identity of the guard who attended to the collection is significant and constitutes contributory negligence on the part of the first respondent. As correctly, in my view, found by the *court a quo*, if the risks were disclosed, Mr Gathoo could have requested the appellant to increase or improve its security measures. At the very least, the first respondent's employees could have been advised of the increased risks and placed on their guard to ensure the strict implementation of the existing security measures.

[49] I do not however agree with the finding of the court *a quo*, as also argued by the respondent, that on a balance of probabilities the theft would still have occurred even if Ms Kgampe had checked and verified the identity card of the imposter. To reach such conclusion, the facts of the Devland incident were conflated with those of the Zandspruit incident. Absent any attempt by Ms Kgampe to verify the identity of the imposter and absent any primary facts in relation to the Zandspruit incident, it cannot in my view be concluded that the probabilities favour a finding that she would have been tricked to hand over the cash even if she had verified the identity of the guard. The conclusion is speculative and based on similar fact evidence.

[50] I further do not agree with the respondents' argument that there was no evidence presented that Ms Kgampe's conduct was negligent or that if she had perused the identity

card or phoned appellant's control room, the theft would have been avoided. On Ms Kgampe's own version, and applying the relevant test, she was negligent.

[51] I conclude that Ms Kgampe's negligence contributed to the loss in relation to the Zandspruit incident and that negligence should be apportioned on the basis of 50% to respectively the appellant and the first respondent. To this extent the court *a quo* misdirected itself and the appeal must partially succeed on this issue.

Causation in respect of the second respondent's claim

[52] The court *a quo* did not expressly deal with causation in its judgment. It however accepted that causation was established as it granted judgment in favour of the two respondents.

[53] In challenging the findings of the court *a quo*, the appellant relied on the findings made by the court *a quo* on the issue of contributory negligence³², already referred to. The appellant's challenge was predicated on two grounds. First, on the basis that the respondents already knew of incidents of bogus pickups and the scheme employed by the imposters³³, specifically in relation to the Devland incident; and second, on the basis that the respondents did not do anything differently and continued to utilise the appellant's services.

[54] The undisputed evidence of Ms Kgampe established that a few months after the Zandspruit incident the first respondent changed to another security company, SBV, which follows different procedures, including advising the first respondent of the name of the person collecting and providing a password and the registration number for the

³² Para [31] of the court *a quo*'s judgment

³³ Also relied on by the appellant in challenging the legal duty dealt with elsewhere in this judgment

vehicle. The appellant's second challenge thus only applies to the second respondent's claim.

[55] The appellant's contention was that on the second respondent's own version, causation was not established because it did not do anything differently after acquiring knowledge of the bogus pickups. The appellant argued that the evidence presented on behalf of the second respondent contradicts the reasoning and finding of the court *a quo* as the second respondent knew of the risks associated with bogus pickups because it was aware of the Zandspruit incident, yet it continued to employ the appellant's services and Mr Gathoo confirmed that they were comfortable with such services. There was also no evidence that the second respondent insisted on more secure safety measures despite being aware of the Zandspruit incident. It was argued that this is entirely destructive of the argument that had the appellant informed it of bogus pickups it would have done something different to avoid falling victim to similar crimes.

[56] The undisputed evidence of Mr Mohamed Gathoo, a director of both first and second respondent, was that he had not been informed *inter alia* of the bogus pickups. The appellant admitted it did not advise the respondents that the uniforms and vehicles could be used by imposters and they did not say anything about their cash boxes and key cards being compromised. Mr Calitz, appellant's witness, also admitted that it did not warn the respondents about the fact that there were imposters in the industry that may impersonate their guards. If Mr Gathoo's evidence was undisputed that if he had been informed of bogus pickups when concluding the agreements, he would have asked what further steps the appellant could take to secure them. If the appellant could not satisfy him that further steps could be implemented to secure the respondents, he would have considered alternative service providers.

[57] Mr Calitz's evidence established that the identification verification procedure was a precautionary measure contained in the induction pack and explained to new clients for purposes of reducing the risk of theft by impersonators. Mr Bhana confirmed that in relation to the Devland incident that he was familiar with the introduction pack and

followed the process for verifying the identification of the imposter against the identification card that was provided. He also complied with the requirements by contacting the appellant's control room to verify the identity of the security guard.

[58] Mr Calitz acknowledged that at the time the appellant did not consider it necessary to advise its clients of any losses or incidents where the scheme was implemented. He testified that subsequently, however, the appellant had communicated such information to its clients in any particular area via letter. Thus the appellant has adapted its procedures to address the security concerns.

[59] In my view, the appellant's arguments do not pass muster for various reasons. First, in its pleadings the appellant admitted that it knew of the scheme, foresaw the risk it posed to the respondents, accepted that had the respondents been advised, the risk could have been avoided and that it, the appellant, could have taken steps to avoid such risks and consequent losses.

[60] Second, it was the undisputed evidence of Mr Gathoo that if the extent of the scheme had been known, it would have required the appellant to satisfy the respondents that measures had been put in place to protect the respondents. If they could not be satisfied, the respondents would have sought alternative service providers. The first respondent had in fact enlisted the services of an alternative service provider after the Zandspruit incident.

[61] Third, the evidence of the financial manager of the second respondent, Mr Masood Gathoo, established that it still employed the appellant because none of the other competing security companies which the second respondent approached could provide the same services required, being collections twice a day, six days a week and thus that the second respondent was obliged to retain the appellant's services although it would consider another option if one was available.

[62] Considering all the facts, the inferences sought to be drawn by the appellant are not sustained by the facts and the attempt to put up an unsubstantiated inferential proposition lacks merit and is of no value.³⁴

[63] On the facts, I conclude that the second respondent has sufficiently established causation and that the appellant's challenge on this issue must fail.

Conclusion and costs

[64] The only misdirection of the court *a quo* was in relation to contributory negligence on the part of the first respondent. The appeal in respect of the first respondent must partially succeed. For the reasons provided, the order of the court *a quo* must be amended and the amount awarded must be substituted with an award of 50% of that amount.

[65] In respect of the second respondent, the appeal must fail.

[66] The normal principle is that costs follow the result. There is no reason to deviate from this principle. The respondents sought the costs of two counsel where so employed, including the costs of Mr Patel, the attorney of record of the respondents who has right of appearance. In *G4S* the Supreme Court of Appeal granted such an order in similar circumstances.

Order

[67] The following order is granted:

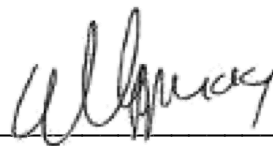
[1] The appeal in respect of the first respondent is partially upheld;

³⁴ Prinsloo v Woolbrokers Federation Ltd 1955 (2) SA 298 (N) 299D-H; Du Plessis NO v Phelps 1995 (4) SA 165 (C) 172D/E; Nedperm Bank Ltd v Verbi Projects CC 1993 (3) SA 214 (W) 220I-221B

[2] Prayer 1.1.1 of the order of the court *a quo* is amended by the deletion of the amount of R265 465.25 and the replacement thereof by an amount of R132 732.63;

[3] The first respondent is directed to pay the costs of the appeal insofar as it relates to the claim of the first respondent, including the costs of the application for leave to appeal;

[4] The appeal against the claim of the second respondent is dismissed with costs.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 06 October 2021
DATE OF JUDGMENT	: 06 January 2022
APPELLANT'S COUNSEL	: Adv. G. Herholdt
APPELLANT'S ATTORNEYS	: Webber Wentzel
RESPONDENT'S COUNSEL	: Adv. H Van Nieuwenhuizen
RESPONDENT'S ATTORNEYS	: Ziyaad E Patel Attorneys Mr Patel