



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **236/2013**
Heard: **18/10/2021**
Delivered: **21/01/2022**

In the matter between:

TOP SECURITY SYTEMS (PTY) LTD

Appellant

and

SAMY'S WHOLESALEERS CC t/a SAMY'S WHOLESALEERS Respondent

Coram: Williams AJP et Mamosebo J et Nxumalo J

JUDGMENT: FULL COURT APPEAL

Mamosebo J

- [1] This appeal, with leave of the Supreme Court of Appeal (SCA), stems from an action for damages for breach of contract for security and armed response services against Top Security Systems (Pty) Ltd (TSS), the defendant, now the appellant, by Samy's Wholesalers CC t/a Samy's Wholesalers, the plaintiff, now the respondent. The issues of quantum and liability were separated in terms of Rule 33(4) of the Uniform Rules of Court.

- [2] On 02 August 2019 O'Brien AJ found TSS liable to Samy's Wholesalers for the proven damages as a result of the burglary at Samy's Wholesaler's premises on 13 November 2011 in consequence of the breach of the agreement entered into between the parties on 21 June 2004. TSS, a private security company, concluded an agreement with Samy's Wholesalers to provide a 24-hour armed response and alarm monitoring service. The existence of the agreement is common cause.
- [3] The issue for determination before the trial court which still remains the issue in this Court, is whether there were reasonable, appropriate and adequate steps taken to investigate whether or not the burglary was in progress at Samy's Wholesalers. In short whether TSS is liable for breach of contract or not.

Factual background

- [4] Mr Poobalan "Tom" Pillay is a member of Samy's Wholesalers, a Cash and Carry supermarket or trade merchant, which sells groceries, confectionaries, snacks, airtime and cigarettes, amongst others. The store is open to the public from Mondays to Fridays 08:00 to 17:00 allowing staff to cash up until 18:00. On Saturdays the store opens from 08:00 to 13:00 with the staff cashing up until 14:30. The store does not operate at all on Sundays.
- [5] Samy's Wholesalers is situated at 78 Phakamile Mabija Street, Kimberley. In an effort to beef up its security it erected a 1.9 meter high palisade fence which served as its boundary. Two gates for access to the premises, one on the south and the other on the west, are provided. The installed alarm system comprising a 160 panel zone was monitored from the TSS control room. The alarm system was fitted with sensors, activation devices and beams which would be activated once there was movement in and around the store. The

beams were placed in the front areas of the store and the warehouse whereas inside the building sensors were fitted in the offices, canteen, strategic room and the cash office. There was also a device manipulated to the safe in the safe room. In the event of an activation the control room would be alerted that the safe has been tampered with.

- [6] Should any sensor or beam be triggered the alarm would be activated and the siren would go off alerting the control room. The control room would, in turn, telephonically contact the keyholders to obtain instructions whether to respond or not. If the instruction is to respond, the control room would then dispatch a warden to investigate the cause and furnish feedback. Mr Pillay and his sons, Nivendran Pillay and Dhesigan Pillay, are keyholders to the store. TSS was at liberty to contact either one of the three keyholders.
- [7] It is the responsibility of a keyholder to open and lock up the store. When the main door gets opened an SMS signal is given to the keyholder. When the door is closed at the end of the business day, and not at the exact time, TSS would make contact with the keyholder confirming whether they are still on site. None of the keyholders received notification prior to or on the day of the incident that the alarm system was malfunctioning. There was regular testing, including on 12 November 2011 at 19:20:42 when same was conducted to confirm that the system was in working order.
- [8] On **Sunday**, 13 November 2011, it is common cause, a burglary took place at Samy's Wholesalers. It is also common cause that the alarm was triggered on four different occasions which caused the control room to telephonically contact a keyholder on the supplied telephone number. According to the Client History Report furnished by TSS the first alarm was triggered through the front door beam at

11:25:25 and at 11:25:48, still showing the front door beam. The entry states that it was escalated by burglary signal. The control room dispatched Mr Andre Fourie at 11:27:00 to respond and investigate the cause for the triggered alarm. Mr Tom Pillay was contacted at 11:27:28 on his cellphone which went straight to voicemail. At 11:29:39 the control room phoned the landline of Mr Tom Pillay. His wife requested the warden to check and report back. A TSS response vehicle arrived at Samy's Wholesalers at 11:31:28. At 11:35:54 it is recorded that the control room acknowledged subsequent signals. At 11:38:42 Mr Andre Fourie checked and relayed a message to the control room that "All Is In Order" (AIO). At 11:41:19 Mr Tom Pillay was contacted and informed that all was in order.

- [9] The alarm was again triggered at 13:29:46 at the strategic store and recorded at 13:29:59 as **escalated by burglary signal**. At 13:30:32 it is recorded that subsequent signals were acknowledged. Warden Aaron Leburu was dispatched by the control room at 13:31:02. Mr Tom Pillay was contacted on his cellphone at 13:31:57. He gave an instruction for the warden to attend to Samy's Warehouse and check the front and back as well. The response vehicle arrived at 13:32:00. It is recorded that Mr Hendrick Hapane assisted Leburu at 13:34:36. By 13:34:19 they reported to the control room that they have checked the front and the back and by 13:37:23 logged that the alarm was checked and all was in order.

- [10] At 16:28:36 the alarm was triggered yet again at the strategic store. At 16:28:55 it is recorded as escalated by burglary signal. The control room recorded that at 16:30:05 the wardens were busy with other calls and Mr Tom Pillay was telephonically contacted on his cellphone. His response was that the warden can check on his own.

Warden Hendrick Hapane was dispatched at 17:01:08 and arrived at 17:05:11. At 17:08:11 he informed the control room that all was in order. At 16:28:55 the alarm was activated again at the strategic store and it is recorded as a burglary and again at 17:44:14 inside Nivendran's office. It was escalated by a burglary signal. Leburu was dispatched again at 17:46:14. The control room contacted Mr Tom Pillay on his cellphone. His instruction once again was that the warden must check on his own. At 17:56:43 the control room was notified that all is in order the warden has checked all around.

[11] The activation continued inside Nivendran's office at 17:44:27. In all these instances the control room could see through its monitoring of the system which zones inside the store were affected because they are recorded on the Client History Report furnished to Mr Pillay by TSS. The alarm panel, located in Nivendran's office, was removed and destroyed as depicted in photos 22 and 23. The last alarm activation was at 17:44:34.

[12] The following morning, Monday 14 November 2011, when Mr Pillay arrived at the business in the company of Mr Michael Miller to unlock the doors for staff to gain entry, they noticed that the infra-red light was off; even before they used their remote control to deactivate the alarm. It was discovered, upon entry, that there had been a burglary. This is also admitted by TSS. The South African Police Service (SAPS) members were summoned to the scene. The forensic division conducted a forensic investigation. The following goods were stolen or missing: airtime vouchers, cigarettes and an undisclosed amount of cash. Statements were obtained from the staff members as part of the criminal investigation. Upon inspection of the building and the premises it was discovered that access for the burglary was gained through two holes, one hole estimated to be 3½m on the neighbour's side of the building. The hole is depicted

on the left side at photo 3 of Volume 4. Then the second hole is depicted on the right side when viewed at photo 4 of Volume 4. There was also a palisade that was missing on the neighbour's side that also assisted the suspects to gain entry.

[13] On the analysis of Mr Tom Pillay's evidence the following is extrapolated. Throughout his testimony he maintained that prior to the day of the incident, when there were alarm activations he or the other keyholders were called out to the store for a site inspection. They were never specifically called out to give the warden access to the business premises and the building. He testified that had they been called out earlier they would have attended to the site.

[14] According to Mr Pillay TSS had issued an awareness report dated 22 November 2011, under the signature of Mr Phillip Hindley, the owner and/or director of TSS. The first and the fourth unnumbered paragraphs thereof in relevant part are of significance. They read:

"[1] There has been an alarming number of burglaries over the last three months targeting businesses. The burglars are entering the premises from the roof and targeting the alarm panel first by cutting the cable and/or destroying the panel before continuing to rob the premises. They lift up the sheet metal on the roof, climbing into the roof void and closing the sheet metal behind them. (even on double storey buildings!!!)

[4] Please help TSS look after your property by arranging for a keyholder to open up the premises in the event of an alarm activation (Burglary signal). The keyholder can open the premises and allow the Armed Reaction unit to enter the premises to do a thorough search while the keyholder can remain in his/her car outside the premises. In the event of multiple zones being triggered over a short time period (this is indicative of a positive alarm) we will request the South African Police Service to respond as well, but they will only come out if a keyholder comes out to open up the premises as is the standard in many overseas countries."

- [15] Mr Van Niekerk SC, for TSS, objected to the trial Court having accepted the evidence of the witness on this aspect of the report. He contended that it was not part of their case. This piece of information, which was within the knowledge of TSS and not of Samy's Wholesalers, made it even more crucial for TSS to have responded with vigilance and should have demanded that a keyholder came out to the site to give them access. What is more mind-boggling is the fact that there were multiple zones that were triggered. This information was evidently never relayed to any of the keyholders with a demand for them to come out because there was a possible burglary in progress.
- [16] It is inexplicable how an inspection which lasted only a few minutes would yield reliable results. It is noteworthy that the wardens paced outside the premises and informed the control room that all was in order. None of them inspected the palisade perimeter fencing. If they did they would have noted that there was a gap in a portion of the palisade fence and, I should add, the existence of a hole in the wall of the warehouse which was indicative of a burglary or housebreaking.
- [17] TSS called only one witness to testify on its behalf. Mr Mosimanegape Hendrick Hapane was a warden at TSS at the time of the incident but is currently a security officer at SBV Services. The role and intervention by Mr Fourie and Mr Leburu, who attended the scene twice, remains unexplained. Hapane's evidence was to the following effect: He was on duty on 13 November 2011 equipped with a 9mm pistol, a bullet proof vest, a hand radio and a torch. He is a Grade C security officer and involved in armed reaction since 2009. He is fairly experienced or competent because he explained that the highest level is A while the lowest is E.

- [18] Hapane's training was received in 2009 at Zabalaza Training College in Germiston and included both theoretical and practical sessions on how to inspect premises thoroughly, looking for signs of burglary, safe driving to get to the scene, use of firearms, and armed response.
- [19] He responded on 13 November 2011 after the alarm went off at 13:29:46. He went on site to assist Leburu at 13:34. Leburu checked at the back while he checked at the front of the warehouse. Reference is made to Transvaal Road, now known as Phakamile Mabija Road. They only conducted a visual inspection because they had no access to the premises. His inspection started from the gate on the South side to the front next to the billboard on the western side where there is an alleyway alongside the building. Viewing from the sidewalk in that alleyway he noticed a generator in front of a small gate. The alleyway has a roof over it casting a shadow which rendered visibility very poor.
- [20] In his response to the testimony by Mr Pillay to the effect that from the pavement a person had an unimpeded view into the alleyway, Mr Hapane stated:

"it would be impossible because of the generator, the shade of the corrugated sheet iron, the small gate and the billboard thing that is there in front as well, and the palisade fence as well, Sir. And another thing, and the angle of the whole things there at the site."

Despite this response, he and Leburu relayed a message to the control room that all was in order and the same message was furnished to Mr Pillay.

- [21] The following evidence-in-chief of Hapane by Adv Van Niekerk, for TSS, is also relevant to show that Hapane knew what was supposed to happen under the circumstances sketched by him:

Mr Van Niekerk: If there is a call out now and in another minute's time there is another call out and in another minute's time there is another call out, in which order do you attend to those callouts?

Mr Hapane: I think the second or the third time the alarm goes off the keyholder must come out to the site to also inspect with the wardens."

In cross-examination by Adv Nankan, for Samy's Wholesalers, in respect of what he was taught in instances where he could not do a proper visual inspection of premises Hapane said:

"The keyholder must be called so we can do a thorough inspection with the keyholder."

He added that if the property is fitted with several sensors in different rooms and the alarm is activated, the control room notifies the warden of the specific room where the alarm was triggered. The responsibility lies with the control room to notify the keyholder of the location or the zone from where the alarm was triggered. Demonstrably, this was not done.

- [22] Hapane was also cross-examined on whether a warden could scale a wall or fencing to access the premises. In his initial response he was adamant that he could not do so wearing a bulletproof vest and carrying a firearm but he later qualified his statement by stating that it would depend on the height of the wall and it was discretionary.
- [23] The following cross-examination highlights the level and nature of the investigation carried out when Hapane purportedly assisted Leburu:

Mr Nankan: Mr Hapane, you told us just now that you were assisting Mr Leburu with this call out?

Mr Hapane: That's correct

Mr Nankan: You also told us as part of your training when an alarm is activated obviously the zone that is activated you would be aware of it, or something to that effect, isn't that correct?

Mr Hapane: That's correct.

Mr Nankan: You went to the scene at 13:29. You were assisting Leburu with this call out. Did you enquire which zone had gone off?

Mr Hapane: I answered no.

Mr Nankan: My question is then following from that, that's not part of your training. Your training according to you was that when you go to a scene you find out which zone is activated.

Mr Hapane: As the statement is here I was assisting. It was not my callout.

Mr Nankan: So you didn't ask which zone was activated.

Mr Hapane: It was not my call out Sir.

Mr Nankan: No, no, no Mr Hapane. You were going there to investigate if there is a burglary in progress, isn't that so?

Mr Hapane: That's correct.

Mr Nankan: You are going there Sir, to investigate if people had gained forced entry pursuant to your training to this premises, isn't that so?

Mr Hapane: That's correct.

Mr Nankan: Yet you go there to the scene. You don't find out which zones has been activated, full knowing that you need this information as part of your training Sir.

Mr Hapane: It was not my callout. **They will give the warden who acknowledges the signal where the signal went off.**

Mr Nankan: So you didn't think- let's put it this way. It wasn't your job, it wasn't your duty to find out, it was Mr Leburu's?

Mr Hapane: I was assisting Mr Leburu in inspecting the premises." (Own emphasis)

[24] Later on Adv Nankan followed up:

Mr Nankan: Just tell us again, you said Mr Leburu made those enquiries?

Mr Hapane: Mr Leburu was the one who acknowledged the alarm.

Mr Nankan: They told him the zone?

Mr Hapane: I believe that.

Mr Nankan: And did you ask Mr Leburu which zone is going off?

Mr Hapane: *No Sir.*

Mr Nankan: *Why not? You are there to investigate a burglary. He knows which zone is going off. To help in your investigations didn't you ask him which zone?*

Mr Hapane: *No.*

Mr Nankan: *Why? How are you going to investigate a case if you didn't know where the alarm was going off?*

Mr Hapane: *Because he was already on site and **I assumed that he checked all the zones as possible.***

Hapane somewhat astoundingly not only exposes that he has not personally sought information of the affected zones from Leburu but has also failed to verify for himself the precise detail of the affected zones directly from the control room. Resorting to the blame game does not advance TSS's case because Leburu was not called to testify. Instead, Hapane's inaction reflects a person who has failed to comply with his basic duties, which, unfortunately, resulted in a successful burglary.

- [25] The training skills and background of three of the four wardens who attended the site inspection at Samy's Wholesalers is unknown. However, Hapane is a trained security officer who had the required knowledge and skill of monitoring and providing armed response following an activated alarm. He testified to the measures that would have to be taken should an activation trigger multiple zones. This information is also recorded in the awareness report alluded to that with multiple zone activation a red flag is raised that a possible burglary is taking place. In that event a keyholder must come on site to give access to the warden while TSS alerts and calls the SAPS that a probable serious offence is in progress.

- [26] There is no evidence that any of the wardens deemed it necessary to advise the control room that they only managed to conduct visual inspections outside the perimeter fencing only because they were deprived access to the premises and the building which they were required to do. Hapane also failed to inform the control room after his purported visual inspection that he could not 'thoroughly' investigate or inspect the alleyway because his vision was obstructed by the stated objects. It cannot be gainsaid that the fact that Hapane was unable to properly investigate the alleyway constituted inadequate inspection. On all four occasions the report relayed to the control room and to Mr Pillay was that all was in order, which gave a misleading picture and false sense of assurance to all reported to.
- [27] The trial court conducted an inspection *in loco* and arrived at a finding that had Leburu and Hapane done a proper investigation they would have noticed a hole in the perimeter fence on the northern side of Samy's Wholesalers through which access was gained. The SAPS would then have been called to investigate the burglary. This aspect was not contested by TSS. The trial court cannot be faulted for its finding that Fourie, Hapane and Leburu did not carry out a proper and adequate investigation to detect the sources of the activations.
- [28] Mr Van Niekerk, for appellant TSS, contended that this Court should apply the test for negligence to determine whether the conduct of the wardens was appropriate, reasonable or adequate. Such test should explore what a reasonable security officer, circumstanced as the wardens were, would do under the prevailing situation. In counsel's cross-examination of Mr Pillay he pointed out to Pillay that he knew that by merely instructing the control room to send out a warden without more, all that the warden was supposed to do was

to conduct a visual inspection. This argument lacks merit. The control room was in a better position with the data at their disposal to know that since multiple zones were triggered inside the building, it was crucial and incumbent upon a keyholder to be present to give access. This notwithstanding, they failed to relay the requisite information to Mr Pillay or any of the other keyholders.

- [29] Van der Westhuizen J in *Loureiro and Others v iMvula Quality Protection (Pty) Ltd*¹ made the following remarks pertaining to reasonableness:

"[65] *iMvula submitted that, in the absence of expert evidence on security-industry standards, this Court could not determine what a reasonable security guard would have done. I disagree. While courts sometimes do call on expert evidence for assistance in determining an industry-specific negligence standard, there is no absolute requirement that they do so. Ultimately, the negligence enquiry is one that must be determined by the court in question itself. If a court, on the facts, is able to determine what the reasonableness standard is it does not have to rely on expert evidence. Here, we are able to do so. **Security guards are trained to provide guarded protection and to detect nefarious ways in which opportunists may try to penetrate that protection. That is the core of their mandate.** This can clearly be ascertained without recourse to expert testimony."* (Own emphasis)

- [30] Mr Van Niekerk gave the phrase "All In order" an imprecise construction in his argument by submitting that it means 'as far as I can establish everything seems to be in order'. I disagree. The phrase was clear and unambiguous. Its plain meaning is that everything was fine or there was no problem detected or to be concerned about. What was conveyed was misleading because: first, there were multiple zones triggered; secondly, the control

¹ CCT 40/13 [2014] ZACC 4; 2014 (5) BCLR 511 (CC); 2014 (3) SA 394 (CC) para 65

room either failed to furnish the information of the zones or the wardens failed to demand to know the affected zones for an appropriate response. They practically visited Samy's Wholesalers the entire day on those four occasions, whereas, had they acted reasonably, they would have been eager on the second activation to eliminate the possibility of animals triggering the alarm or thinking the system malfunctioned. This they could only do by gaining access to the premises and the building. What would otherwise have been the point of the repeated visual inspections outside the premises when the problem was within the building?

[31] I further refer to the remarks by Van der Westhuizen in *iMvula*² which is apposite:

"[4] *...Indeed, security officers employed in the private industry greatly outnumber the members of the South African Police Service. Many of those with the resources to do so turn to the private security industry for the protection of their rights. The Loureiro family, the applicants, did just that.*"

Undoubtedly, Samy's Wholesalers resorted to TSS for the protection of its rights. When individuals or companies conclude agreements with private companies to render monitoring and armed response services, what they are seeking in effect is protection from criminals. The monitoring and response provided by TSS through the control room and the wardens failed to meet the standard of a reasonable security company and its officers.

[32] Van der Westhuizen J in the *iMvula* judgment³ further said:

"[37] *...Legal certainty on the correct approach to security companies' liability will benefit the public. This is*

² At para 4

³ CCT 40/13 [2014] ZACC 4; 2014 (5) BCLR 511 (CC); 2014 (3) SA 394 (CC) at para 37

particularly critical given the public role that security companies play in giving effect to fundamental rights."

He went on at para 42:

"[42] *...the law of contract does not require fault (even in the form of negligence) for breach.*" *In Thoroughbred Breeders' Association v Price Waterhouse*⁴ Nienaber JA expressly pronounced on this aspect as follows:

'[66] *The defence of a preponderance of fault on the part of the plaintiff, on which the Court a quo appears to rely, is incongruent within the field of contract. Where a plaintiff can prove that the breach of the defendant was a cause of the loss (as opposed to the cause thereof) he should succeed even if there was another contributing cause for the loss, be it an innocent one, the actions of a third party (compare Nedcor Bank E Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd 2000 (4) SA 915 (SCA) at paras [10] - [12]), or, logically, the carelessness of the plaintiff himself in failing to take reasonable precautions to avoid it. A defendant who commits a breach of contract does so independently of any of the extraneous factors mentioned above. All the requirements for his liability will have been fulfilled. In the absence of a contrary term in the agreement itself or of legislative intervention excluding or reducing his claim, he should therefore be held fully liable, regardless of whether the plaintiff's culpa was the dominant or pre-eminent cause of the loss."*

[33] In summary: This brings us back to the question whether the conduct of the TSS and its members was reasonable, appropriate and adequate? I do not think so. In the one instance, it took armed response more than thirty minutes to reach the site. This is clearly unreasonable and unacceptable. In all four instances the purported visual inspections were hurried, peripheral and perfunctory. I may add that they merely went through the motions. The intruders were

⁴ 2001 (4) SA 551 (SCA) at 588 para 66

obviously already inside the building hence the multiple zone activations. Significant to note further is that while the control room was at all times aware of the specific zones from which movement emanated which triggered the alarms, it is unknown whether they communicated the specific zones to the wardens or not, the reason being that the wardens who could furnish first-hand evidence were not called to testify by TSS. It is safe to infer that the wardens would not have conducted visual inspections outside the premises when they were made aware that the triggered zones were within the building. What exacerbates the situation is the failure by TSS's control room to call out a keyholder to the site after the alarm was triggered in more than one zone. These cumulative shortcomings point inexorably towards a breach of the contract by both the control room and the wardens which conduct attracts liability.

[34] In as far as costs are concerned, the general principle is trite, that costs will ordinarily follow the result. There is no reason to deviate therefrom.

[35] Resultantly, and for the foregoing reasons, I make the following order:

The appeal is dismissed with costs, which shall include the costs of the application for leave to appeal in the Supreme Court of Appeal and the court *a quo*.



MC MAMOSEBO

**JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

I agree



**CC WILLIAMS
ACTING JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

I agree



**APS NXUMALO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the Appellant:
Instructed by:

Adv. JG Van Niekerk SC
Haarhoffs Inc

For the Respondent:
Instructed by:

Adv. S Nankan
c/o Justin Pillay & Associates