



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

(1)	REPORTABLE: YES / NO ✓
(2)	OF INTEREST TO OTHER JUDGES: YES / NO ✓
(3)	REVISED: YES / NO
DATE: 13 SEPTEMBER 2021	
SIGNATURE OF ACTING JUDGE:	

CASE NO. 2019 / 20886

In the matter between:

NIGHT GUARD CC

Excipient

and

T W VAN DEN HEEVER N.O

First Respondent

T MEDUPE N.O

Second Respondent

J S KOKA N.O

Third Respondent

In re:

T W VAN DEN HEEVER N.O

First Plaintiff

T MEDUPE N.O

Second Plaintiff

J S KOKA N.O

Third Plaintiff

and

Night Guard

Defendant

JUDGMENT

ALI AJ

- [1] The first, second and third plaintiffs who are in the process of liquidating Kappa Heavy Engineering (Pty) Limited ("Kappa"), bring an action against Night Guard CC - the defendant. ("Night Guard").
- [2] Kappa, in their particulars of claim, have set out that prior to the liquidation of Kappa Heavy Engineering (Pty) Limited (In Liquidation) ("Kappa"), it rented premises from Beec Cranes (Pty) Ltd, ("Beec"). Beec and Night Guard entered into an agreement where Night Guard agreed to guard the premises and provide a security guard 24 hours a day at the premises to prevent the loss or damage to the plant and equipment of Kappa, located on the premises, by theft, burglary or vandalism.
- [3] During the period February 2017 to April 2017, the warehouse on the premises, was broken into where the plant and equipment was vandalised and components of the equipment were stolen. Kappa claim that Night Guard wrongfully, in breach of their duty of care, and with negligence failed to take various measures so as to prevent the aforesaid crimes from occurring.

Kappa is claiming damages resulting from the theft and vandalism of their plant and equipment from Night Guard.

- [4] Kappa's cause of action is for delictual liability. Night Guard has not filed its plea and excepts to the amended particulars of claim. Night Guard filed an exception on the grounds that the particulars of claim fail to disclose a cause of action. The notice of exception contains 3 (three) grounds of exception. Night Guard has decided to proceed with only exceptions 1 and 2 and have abandoned exception 3.
- [5] The exceptions raised by Night Guard, in essence, is that the claim is one of contractual liability and as such it fails to comply with the provisions of Rule 18(6) of the Uniform rules of Court and therefore fails to disclose a cause of action. Night Guard says further that since Kappa was not a party to the contract it cannot sue Night Guard in contract. In the alternative, Night Guard says that Kappa may bring a delictual action, to support its pleadings that the security guards had a duty to guard the property of Kappa.
- [6] Night Guard excepts to the manner pleaded by Kappa regarding the negligent conduct of the security guards. Night Guard contends that Kappa pleaded that Night Guard failed to prevent a burglary. This ground of exception is abandoned by Night Guard as it excepted to the paragraphs in the unamended particulars of claim. The notice of exception was not amended to properly include the negligence aspect as raised by Kappa and for this reason I shall not deal with this ground.

- [7] The issue in the exception turns on the wrongfulness aspect which shall be dealt with.

Wrongfulness

- [8] Night Guard relies on Viv's Tippers (Edms) Bpk v Pha Pharma Staff Services (Edms) Bpk,¹ for its exception that the content of the delictual duty owed by the security company to the third party is to be informed by the contract between the security company and its employer, in *casu* between Night Guard and Beec. Night Guard further contends that when one determines wrongfulness where a contracting party is required to pay a third party for damage to property, the contracting party should be made aware of the likelihood of such claims against it as this would result in indeterminate claims against it. It relies on the judgment of the Supreme Court of Appeal in the Viv's Tippers case. There the Supreme Court of Appeal held that one should be circumspect when dealing with claims for economic loss as this opens the way for unlimited liability to unknown plaintiffs. (at para 19). Night Guard contends that Kappa's claim is one of economic loss. Hence, it contends that the particulars of claim fail to disclose a cause of action.
- [9] The Supreme Court of Appeal in the Viv's Tippers case further held it would be:

¹ 2010 (4) SA 455 SCA

“the terms of the contract that would play a role in assessing what the convictions of the community would be in relation to affording a claim for compensation to a non-contracting party.” (at para 13).

[10] In the Viv’s Tippers case, the security guard saw two men driving away with the truck and failed to prevent the theft of the truck from occurring. The issue before the court was the conduct of the security guard. The Supreme Court of Appeal held that:

“[5] the guard’s conduct constituted a positive act. The question, does not relate, therefore, to a wrongful omission. But the loss suffered is purely economic: so the law does not without more impose a legal duty on the guard to prevent the loss...”

[11] The Constitutional Court in *Loureira and Others v Imvula Quality Protection (Pty) Ltd*,² upheld the appeal and overruled the decision of Imvula in the Supreme Court of Appeal. The Constitutional Court held that the guard’s conduct was wrongful. It was held that the respondent – a private security company was vicariously liable in delict because its employee acted wrongfully by opening a gate to robbers and by negligently failing to foresee the reasonable possibility of harm and to take the steps a reasonable person in his position would have taken to guard against it.

[12] The Constitutional Court in *Loureiro* upheld the minority judgment of Cloete JA (where reference was made to the Viv’s Tippers case), in the Supreme Court of Appeal,³ where it was held that:

² 2014 (3) SA 394 (CC) at para 67

³ *Imvula Quality Protection (Pty) Ltd v Loureiro and Others* 2013 (3) SA 407 (SCA).

"[53] ... public policy requires the guard's employer, to be held liable for the guard's negligence and that a legal duty was therefore owed to the second to fourth respondents: the guard opened the small gate. That was a positive act and the cause of the loss. The loss was not pure economic loss..."

[13] In this regard, the Constitutional Court held that:

"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... 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."⁴

[14] Night Guard have not properly excepted to the theft and negligence issues raised by Kappa. It is clear that the particulars of claim deal with the conduct of the security guards (wrongfulness) and their negligent conduct.⁵

[15] In *Van Der Bijl and Another v Featherbrooke Estate Home Owners' Association (NPC) and Another*,⁶ the plaintiffs ("the Van der Bijls"), framed their cause of action as one of delictual liability, claimed damages from both the Association and the security company. The court held that the Association who employed Fidelity to provide security for the Estate did not establish that the Association, as employer, owed the same duty to the residents of the Estate as that assumed by Fidelity. (at paras 31-35).

⁴ Loureiro *supra* at para 53

⁵ POC paras 8-15

⁶ In *Re: Featherbrooke Estate Home Owners' Association (NPC) and Another* 2019 (1) SA 642 (GJ) (23 August 2018)

- [16] The Constitutional Court in Loureiro has rejected the majority's *ratio* in the Viv's Tippers case – the case that Night Guard relies upon, hence its exception on this ground stands to be dismissed.

Conclusion

- [17] In the result, the first and second exceptions must be dismissed. The particulars of claim disclose a cause of action in that Night Guard had a duty of care to prevent the theft, burglary, and vandalising of the property on the premises. The particulars of claim do make out a case for wrongfulness and thus this necessary requirement for Aquilian liability is present.

Costs

- [18] The costs of the exception should be borne by Night Guard as it was the unsuccessful party. There is, however, one further issue on costs. It concerns a Rule 30 application that was brought by Kappa against Night Guard. Both parties have agreed that the Rule 30 application has become moot. The Rule 30 application was linked to the exception and therefore in my view it would be just and fair in the present circumstances to add those costs in the costs of the exception.

Order

- [19] I accordingly make the following orders:
1. The exceptions are dismissed.

2. Night Guard – the excipient is to pay the costs of the exception as well as the Rule 30 application.

N. ALI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

This judgment was prepared and authored by Acting Judge Ali. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

DATE OF HEARING: 26 JULY 2021

DATE OF JUDGMENT: 24 AUGUST 2021

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