



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

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

Case no:	236/2013
Date heard:	05/03/2019
Date delivered:	13/03/2019

In the application of:

TOP SECURITY SYSTEMS (PTY) LTD Applicant

and

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

in re:

SAMY'S CC t/a SAMY'S WHOLESALERS Plaintiff

and

TOP SECURITY SYSTEMS (PTY) LTD First Defendant

THE MINISTER OF POLICE Second Defendant

Coram: O'Brien AJ

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

O'BRIEN AJ

[1] The applicant applies for leave to appeal against my judgment handed down on 2 August 2019. In that judgment I found the applicant liable for damages

suffered by the respondent in consequence of a burglary at the respondent's premises.

- [2] I found the wardens of the applicant negligent in their failure to do an adequate, appropriate and reasonable investigation at the premises of the respondent.
- [3] In its grounds of appeal, the applicant avers that I had erred in finding that the wardens could have scaled the fence at the premises to investigate the cause of the alarm activation.
- [4] In argument, Mr van Niekerk SC, for the applicant, argued that the palisade fence is an inherently dangerous object created for the very purpose to prevent scaling. Also, the wardens were both wearing bulletproof vests which are cumbersome objects and which would make climbing over a fence very difficult.
- [5] Mr Nankan, for the respondent, submitted that scaling the fence is not the only basis for finding negligence on the part of the wardens. The Court also found the failure to call Pillay to the premises after four alarms were activated, as negligent. He states that the wardens were trained officers whose employment is inherently dangerous; therefore, they failed to do a proper inspection.
- [6] In reply, Mr van Niekerk submitted that the failure to call Pillay was not a basis for finding negligence on the part of the wardens.
- [7] Mr van Niekerk submitted that there is a reasonable prospect that another Court might find differently regarding the factual question on whether the failure by the wardens to scale the fence constitutes negligence.

- [8] In deciding the question of the failure of the wardens to scale the fence, I was well aware of the fact that the palisade fencing has, as one of its objectives, to keep intruders out of the premises. However, to describe it as inherently dangerous and therefore, a reason for not scaling the fence appears to me as an oversimplification of the issue.
- [9] In my judgment, I referred to the assistance that Leburu could have offered. I can think of various ways he could have done so: he could have kept the vest and firearm of Hapane when the latter scaled the fence; they could have obtained any object like a ladder, a table or a chair to help them scale the fence. It is not helpful to suggest that it was dangerous to scale the fence. This loses sight of the fact that the wardens were trained officers who needed to be reactive when dealing with situations such as the present. Their inherent job description would require them to act reasonably.
- [10] What is stated in the preceding paragraph must be seen against the background of four-alarm activations, the removal of the control panel and the various alarm beams which were activated, indicating movement within the building?
- [11] In these circumstances, in my opinion, the wardens' failure to scale the fence to do a proper investigation (a factual finding) would not be susceptible to another Court coming to a different conclusion.
- [12] Accordingly, the application for leave to appeal is dismissed with costs.

O'BRIEN AJ

Northern Cape High Court, Kimberley

For the Applicant:
Instructed by:

Adv. J.G. van Niekerk
Haarhoffs Inc.

For the Respondent:
Instructed by:

Adv. Nankan
Justin Pillay & Associates