

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 14348/2009

In the matter between:

CHEMALUM (PTY) LIMITED

PLAINTIFF

and

SERVEST (PTY) LIMITED t/a GREMICK SECURITY

DEFENDANT

J U D G M E N T
Delivered on : Wednesday, 09 November 2016

OLSEN J

[1] This plaintiff in this matter, Chemalum (Pty) Limited, sues the defendant, Servest (Pty) Limited trading as Gremick Security, for damages for breach of a contract in terms of which security services were provided by the defendant for the plaintiff. The plaintiff is a local company of American lineage. It manufactures water treatment chemicals. It has a site in Richards Bay where its plant is situated. It claims that certain equipment was stolen from a large container used as a storage facility at that site, and that this occurred as a result of a breach by the defendant of its obligation to guard the site.

[2] The plaintiff called three witnesses to establish its case. These were its managing director, a citizen of the United States, Mr Huckabay; a Mr Chinsamy, the plaintiff's plant manager; and a Mr Mabuza, the plaintiff's maintenance manager. The defendant called two witnesses to counter the plaintiff's case. They were Mr MacArthur, its branch manager who was

stationed at Ballito, but responsible for sites at which the defendant provided guard services in Richards Bay; and Mr Ndlela, the defendant's senior supervisor in the Richards Bay area at the time. I do not propose to provide a separate account of the evidence of each of these witnesses. I prefer to attempt a coherent account of the facts, mentioning the testimony of particular witnesses only where necessary.

[3] The Erf upon which the plaintiff's plant is located is some 5 hectares in extent. But only about 1 hectare is used by the plaintiff. Access to it is gained along a driveway which traverses an unused portion of the land. At the point where this driveway gives access to the plant area there is a gate through which vehicles must pass. The hectare upon which the plant is situated is fenced. The storage container in question is situated on the South side of the property close to the fence, at a distance of approximately 35 metres from the compressor room at one corner of the plant; which room, according to the evidence of Mr Huckabay, was used as a base by the defendant's guards.

[4] The contract to guard this facility was concluded during August 2005. It was written. Initially it obliged the defendant to provide "D Grade" security officers ("guards") 24 hours per day, one for the day shift and one for the night shift. Subsequently, and apparently after a shooting incident during the night shift, the agreement was amended orally to provide for two guards at night, and one during the day. This oral amendment, and a similar one extending the period of the contract indefinitely, were accepted by the parties as valid, notwithstanding a clause in the contract which required any amendments to be written.

[5] Clause 6 of the contract read as follows.

"The sole function of the security officer(s) is to minimise the risk of loss or damage to Client's property resulting from theft, housebreaking, robbery and/or fire. Gremick, a division of Servest (Pty) Limited accepts no liability for any loss or damage of whatsoever nature which may be suffered by client and/or any of his/its

employees, servants or agents, provided that same is not caused by a wilful or negligent act or omission on the part of Gremick, a division of Servest (Pty) Limited or any of its employees/agents.

[6] On the pleadings, but to a much lesser extent in argument, there was an issue between the parties as to what precisely the term “security officer” meant. It is not defined in the agreement. The plaintiff pleaded that the defendant undertook to provide guards who were capable, properly trained and disciplined, conscientious and trustworthy and that they would be provided with a supervisor to ensure that their duties were carried out. In argument defendant’s counsel accepted the proposition that the defendant was obliged to provide guards that were at least capable and properly trained and that a supervisor would be provided. In view of the manner in which the evidence in this matter unfolded I do not think that it is necessary to go beyond the concessions made on behalf of the defendant.

[7] The plaintiff pleads that on or about 13 June 2007 thieves got into the storage container and stole and made off with two pumps, two mass meters, 26 pressure gages, 2 computer screens and a bicycle, property which is claimed to have had a value of around R500 000,00. It was agreed at the commencement of the trial, and I ordered accordingly, that all issues in the trial, save for the value of any of this property which might be found to have been stolen, would be dealt with separately and first.

[8] Counsel for the plaintiff accepted that, in order to succeed, the plaintiff would have to prove that the guards on duty on the night of 13 June 2007, in conjunction with their employer (or alone), failed to minimise the risk of the loss of the stolen property; and that as a matter of fact the loss in question was caused by the wilful or negligent acts or omissions of those persons. I did not understand counsel for the defendant to dispute this account of the onus borne by the plaintiff, although he did point out that what was pleaded was negligence, not wilfulness. (Actually, what was pleaded was that the guards and their supervisor were “grossly or wilfully negligent”.)

[9] Mr Huckabay gave an account of how it came to be that the container in question was used as a secure storage facility. In earlier times equipment and tools were stored elsewhere on the site, and there were frequent occurrences of theft of such items. For that reason important equipment and, as I understood him, tools, came to be stored in a large secure locked container. Keys for the container were kept in the office. The plant ran 24 hours per day, but only three plant employees were on duty at night. As access to the storage facility might be required at night, the night guards were provided with a bunch of keys, one of which would give access to the storage facility. (There is confusion, on the plaintiff's case, as to whether the single day guard also had such a bunch of keys. That does not seem to me to be particularly relevant.) The defendant's two witnesses said that as far as they were concerned the guards were not entrusted with keys at night; but it was clear that they were unable to assert that as a fact.

[10] Mr Chinsamy, the plant manager, was in charge of the office. There was also a secretary employed as part of the administrative staff. If any of the plant employees required access to the secure store during the day they would go to the office where, ordinarily, Mr Chinsamy would provide the keys to the storage container. But neither he nor Mr Mabuza, the plaintiff's maintenance manager worked on night shifts. The office was ordinarily closed at night, although for four consecutive nights prior to 13 June 2007 Mr Huckabay was present on the premises from about 10pm until the early hours of the morning for the purpose of attending to business in the United States over the internet. (He said that he left for the United States on the day of the event.)

[11] Mr Mabuza was responsible for the storage container and its contents. He regularly went into the container on a weekly basis to ensure that everything was clean and in order. Everything was kept in an orderly fashion and he knew what was stored there.

[12] Mr Chinsamy's evidence was that during the day before the incident (it is not clear whether he meant 12 June or 13 June) he opened the store to put

his new bicycle in it. He too was familiar with the contents of the store and he observed that everything was in order.

[13] On the morning of 14 June 2007 at about 9am Mr Mabuza found that the door to the container was unlocked and he reported it immediately to Mr Chinsamy. The container has a sliding window. The sliding pane had been removed. An attempt had been made to force the burglar bars on the window clear of the opening, but from the inside of the container. The container was in a complete mess. Mr Chinsamy's bicycle was gone. So were the two pumps, very large articles which, like the bicycle, could not possibly have been taken out of the container through the window. Mr Mabuza was tasked with drawing up a list of what had been taken and he did so. It reflects the items listed in the particulars of claim.

[14] The defendant was notified of the incident and Mr MacArthur attended the scene at 11am. He found conditions in the container as they had been described earlier by Mr Chinsamy and Mr Mabuza in their evidence. He confirmed that the larger items mentioned above could not have been removed through the window.

[15] The two pumps that were in the storeroom were extremely heavy. They weighed between 250 and 300 kilograms each. They had been carried to and put into the container using a front end loader, still visible on the site in photographs taken in the course of Mr MacArthur's investigation. Mr MacArthur took numerous photographs focusing, inevitably, on the poor condition of some of the fencing and of the proximity of bush on the outside of the fence. He expressed the view that none of these large items could have been carried out through the bush, and it seems plain that if the pumps had been stolen on the night in question, as alleged by the plaintiff, a vehicle had to have been used to get them off the premises.

[16] Mr Ndlela, the defendant's senior supervisor, who also attended the scene the morning after the event, had never been to the plaintiff's site at night. It was left to Mr MacArthur to contradict Mr Huckabay's claim that the

site was “lit up like a Christmas tree”, 37 high wattage lamps being on site, some pointing inwards towards the plant and others outwards towards the perimeter (where the storage container was situated). According to Mr MacArthur the site was poorly lit. It does not seem to me that this dispute about the quality of lighting is material to the outcome of the case if it is found, as alleged by the plaintiff, that everything was stolen on the night of 13 June 2007.

[17] It was common cause between the witnesses that the two night guards were to be deployed as to one to look after the gate, and the other to patrol. I gained the impression from Mr Huckabay that he expected the patrolling to be more or less continuous. He said that it would take about eight minutes to do a walk around the perimeter of the plant and that he understood that the instruction was that the guards should patrol once every fifteen minutes. Mr MacArthur was adamant that the duty of the guards was to patrol once per hour, but had no answer to the proposition that it appears illogical that the two guards should sit together (presumably observing the gate) for most of each hour. It strikes me that this issue also is not of particular relevance if it is found that the plaintiff established that all of the items were stolen on the night of 13 June 2007.

[18] As a result of concern about whether the patrols were being conducted, the defendant had installed a system on the premises to monitor the patrols. A number of sensors were placed at strategic points around the site. One of them was in fact placed on the storage container. The patroller was supplied with a baton-like device (which Mr Huckabay called a wand) with which to touch each sensor as he passed by on patrol. This then sent signals through to the defendant’s control centre where the patrol activity of the night before could be assessed each morning.

[19] Mr MacArthur was involved in the investigation of this event. The major player in the investigation appears to have been a Mr Naude, another employee of the defendant, who was not called. Neither were the guards called. Counsel for the defendant advised from the bar that these witnesses

were not called because they could not be found. Some written reports generated by the investigation into the incident by the defendant were discovered. Mr Naude appears to have been the principal scribe. However Mr MacArthur confirmed the finding that the guards on duty that night had claimed that they could not find their batons, and that no security patrols were done that night. He also said that during the course of the investigation it had crossed his mind that a vehicle had to have come on site in order to take the stolen property away, but the guards had told him that they did not know. Mr MacArthur made the point that it rained very heavily on the night in question, and he pointed to the pools of water still visible in the photographs he had taken of the site after 11am on 14 June 2007.

[20] Counsel for the defendant argued that as no one who had been on the site on the night in question had been called to give evidence, if the storeroom had indeed been broken into on the night in question, and everything on the list stolen that night, one can only but speculate about whether that was a result of any default on the part of the guards in minimising risk; and, if there was such default, about whether there was any negligence on their part causally linked to the event. In my view there is no merit in that argument.

[21] If the theft of all the items took place on the night of 13 June 2007, then it was a very substantial enterprise indeed. The gate to the premises is not quite but nearly in line of sight from the storage container and the compressor room. The storage container is only about 35 metres from the compressor room. If the guards had been out and about they could not but have seen what was going on. Mr MacArthur's concessions, and the report to which he spoke, make it clear that the guards were not out and about. In my view on all the evidence the guards were either complicit in the nights events, or they spent the night sheltering (presumably in the compressor room) from the rain, ignoring their duties and for that reason only quite oblivious of what was going on. The storeroom door was found open in the morning when the theft was discovered. There was no suggestion of forced entry. That means it had to have been opened with a key. That suggests complicity. I find it proved that the contractual obligation to minimise risk was breached. No discourse on

legal theory is required to explain my further finding, that the breach was accompanied by negligent or wilful conduct on the part of the guards, causally linked to the loss, on the assumption that it all occurred that night.

[22] By the time the defendant's case was closed these difficulties confronting it in its defence of the claim were quite obvious. I assume that it was for that reason that counsel for the defendant concentrated perhaps rather more on the question as to whether the plaintiff had established that it was indeed during the night of 13 June 2007 that these thefts took place. Counsel argued that perhaps these thefts could have taken place during the day, in dribs and drabs, and that the culprits could presumably be the plaintiff's own employees. They could perhaps have dismantled the pumps to make it easier to carry them out of the container in smaller pieces. He suggested that perhaps such items, moved from the container, could have been hidden on the rather unkempt site for later removal.

[23] In particular counsel for the defendant pointed out that the plaintiff kept no asset register of the items kept in the storeroom.

[24] In my view all of this ground was adequately canvassed by the plaintiff's witnesses. I was particularly impressed with the evidence of Mr Mabuza. The storage container was set up as a secure facility and access to it was tightly controlled. (That was where Mr Chinsamy chose to store his own new bicycle the day before the incident.) Mr Mabuza clearly took pride in his control over the store facility. He was not shaken on the proposition that he knew what was in the store. He went in every week, to see that all was well. For the four nights immediately preceding the night of 13 June 2007 Mr Huckabay himself was there most of the time. Mr Mabuza was quite confident about the accuracy of the inventory of stolen items he produced. It is clearly established, if only through Mr Chinsamy's evidence, that there had to have been a robbery on the night of 13 June 2007 as the day before the storeroom was not in the state of disarray in which it was found on the morning of 14 June 2007. It is improbable that both Mr Chinsamy and Mr Mashaba would not have been aware that employees were gaining access to the secure store

during the day shift, and especially gradually dismantling the pumps, so that these items could be moved out surreptitiously. Dismantling a pump takes some 15 hours. And as I understood the evidence the separated component parts are still of substantial size. Accepting counsel's theorem puts the credibility of Mr Mashaba and Mr Chinsamy at the least in doubt. My conclusion, however, is that they were both credible and reliable witnesses.

[25] I conclude that the plaintiff has established on a balance of probability that all of the equipment was stolen on the night of 13 June 2007.

[26] The plaintiff's claim was pleaded upon the basis that it was the owner of all the stolen property. It obviously did not own the bicycle. Mr Huckabay revealed in evidence (quite fortuitously, and as far as I could see not understanding the implications of it), that the two pumps in fact did not belong to the plaintiff but had already become the property of a customer on whose premises they were to be installed. He said that as a result of the theft he had to source and import two new pumps to replace the stolen ones. On his version the risk of loss of those items lay with the plaintiff, but they were not the property of the plaintiff. During argument after the close of the defendant's case, counsel for the plaintiff moved an application to amend the particulars of claim to assert that the two pumps were items in respect of which the plaintiff bore the risk of loss. Counsel for the defendant objected to the amendment. The objection was sound. His principal argument was that if the proposed amendment had been sought timeously (and indeed, it seems to me, if it had been pleaded originally) it would have generated an objection based on clause 8 of the contract. Clause 8 of the contract reads as follows.

"If the client permits any third party to occupy a portion of, or store any assets on, the premises without agreement in writing between the parties to this agreement, Gremick a division of Servest (Pty) Limited shall incur no liability whatsoever for such third party. Client agrees to advise such third party that the occupation and/or storage is entirely at the risk of such third party and, client indemnifies Gremick a division of

Servest (Pty) Limited from liability against all and any claims by such third party.”

[27] Recognising this difficulty, counsel for the plaintiff argued that perhaps I could adopt a more nuanced approach to Mr Huckabay’s evidence, as he perhaps only intended to say something along the lines that the pumps had been allocated to the customer, not really understanding the requirements of our law as to the passing of ownership. In my view I am not able to adopt that approach. His evidence was clear that the pumps were the property of the customer. Counsel for the plaintiff chose not to pursue the question of why Mr Huckabay said that. Counsel for the defendant was certainly not going to and did not challenge Mr Huckabay’s statement. To the extent that I might not have made my views concerning the application to amend clear during argument, I now formally refuse it.

[28] My conclusion is that the plaintiff is successful in part. Counsel agreed that it would not be appropriate to make any order of costs at this stage, but that I should record, if I should come to the conclusions I have, that if the quantum of the plaintiff’s claim is proved in due course, there is no reason arising out of the proceedings to date to make any order but that the defendant should pay the plaintiff’s costs.

The following order is made.

- 1. It is declared that the defendant is liable to pay to the plaintiff such sum as the plaintiff may in due course prove to be the value of the lost items listed in paragraph 8 of the plaintiff’s particulars of claim (as amended), save for the two pumps and the bicycle.**
- 2. The costs to date are reserved.**

OLSEN J

Date of Hearing: THURSDAY, 20 OCTOBER 2016

Date of Judgment: WEDNESDAY, 09 NOVEMBER 2016

For the Plaintiff : MR R VAN ROOYEN

Instructed by: BOTHAS INCORPORATED
PLAINTIFF'S ATTORNEYS
KINGFISHER COURT, 7 ADDISON STREET
(TEL.: 035 – 792 2011)
(REF.: J Coetzee/GK/CHE18/0001)
c/o TEES ATTORNEYS
45 STEEL ROAD
MORNINGSIDE
DURBAN
(TEL : 031 – 303 8108)
(REF.: cgs/0455/2011)

For the Defendant : MR JA LOURENS

Instructed by: FULLARD MAYER MORRISON INC
DEFENDANT'S ATTORNEYS
4 MORRIS STREET WEST RIVONIA
(TEL.: 011 – 234 3029)
(REF.: Mr A Lambat/bb/F0390/0136)
c/o BROWNE BRODIE ATTORNEYS
GROUND FLOOR, SINEMBA PARK
5 SINEMBE CRESCENT
LA LUCIA RIDGE OFFICE ESTATE
DURBAN
(REF.: AC Mackninnin/ol/F0390/0136)