IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: PORT ELIZABETH)

CASE NUMBER 2722/2007

DATE DELIVERED 01 APRIL 2011

REPORTABLE

In the matter between:

SBV SERVICES LTD Plaintiff

And

GLENVILLE MERVIN KOGANA 1ST DEFENDANT

THEMBINKOSI MADLALISA 2nd Defendant

[1] THE PLAINTIFF IS A COMPANY REGISTERED IN TERMS OF THE COMPANY LAWS AND OPERATES ITS BUSINESS AS A PRIVATE SECURITY SERVICE PROVIDER IN TERMS OF THE PRIVATE SECURITY INDUSTRY REGULATION ACT NO. 56 OF 2001 CONDUCTING ITS BUSINESS AS SUCH WITH ITS HEAD OFFICE SITUATED IN JOHANNESBURG, GAUTENG PROVINCE.

[2] The evidence that was led did not put a proper picture of the factual background before the armed robbery of 28 June 2007 which is the basis of the plaintiff's claim. Scraping the barrel from the pieces of evidence, which I also tried to elicit from the witnesses, I will, to the best of my ability, try to summarise what I understood to be

the situation.

[3] Plaintiff has cash centres throughout the country, one of which is situated at Walmer, Port Elizabeth. The South African banks such as Standard Bank and Nedbank maintain, at various places such as garages and shopping malls, Automatic Teller Machines (ATMs) for the convenience of their clients to draw and deposit moneys thereat, among other things. Plaintiff has cash centres where the money is kept. Whenever banks are in need of money to refill the ATMs they make orders from plaintiff to deliver such sums of money as may be required. Plaintiff then delivers the cash on behalf of the banks to various ATMs. For this purpose it employs registered security officers ranging from the ranks of Protection Officers, Assistant Senior Protection Officers, Senior Protection Officers and Chief Protection Officers.

[4] During 2007 the first defendant was employed by the plaintiff as a Senior Protection Officer. On 28 June 2007 the first defendant together with other security officers were delivering cash to Blue Water Bay, Port Elizabeth, at the Nedbank ATM. He was in company of Wongalethu Alex Dunjwa, (the driver) the second defendant, (the long gun man referred to as LM 5 man), and Michael Zolani Nozukwa (the bag man). Whilst at Blue Water Bay and in the process of offloading the cash to hand it over to the bank official, referred to as the custodian, and at about 7h00 an armed robbery occurred at the scene. The robbers managed to get away with the money.

This was the first station for the delivery of the day.

[5] One Magdalene Viviers, an employee of the plaintiff, testified on behalf of the plaintiff that on 27 June 2007 she packed a sum of R5 084 000.00 which was the amount that was to be delivered to various ATMs including Blue Water Bay.

[6] The plaintiff issued summons against the first and second defendants claiming the above amount on the basis that they colluded with the robbers, alternatively, they were negligent in the performance of their duty and thereby caused the loss to the plaintiff. The amount was later reduced to R4 834 000.00. It will become clearer later in this judgment why the amount was reduced. A default judgment was granted against the second defendant. I am called upon to determine the claim against the first defendant only. He is resisting the claim.

[7] On 27 June 2007 Magdalene Viviers, an Assistant Treasury Custodian, employed by the plaintiff packed twenty three bags of money amounting to R5 084 000.00 for the delivery thereof to various ATMs. This was done after plaintiff had received the money order from Nedbank. The bags were sealed after packing. In this process she is assisted by another employee. There was no serious dispute that the money that was packed was the sum mentioned earlier. Sealing of the bags is done by other two employees.

[8] Normally security officers responsible for the delivery are not supposed to know of the destinations prior to the date of delivery. The money bags are simply handed over to them on the date of delivery and they do not know how much money is inside the bags.

[9] On 28 June 2007 the money was handed over to the abovementioned security officers in the manner already described for delivery at, *inter alia,* Blue Water Bay. They left Walmer shortly before 7h00.

[10] On arrival at the first station (Blue Water Bay) the LM5 man opened the gate at the entrance behind Engine Garage where the ATM was located. Immediately after entry the first defendant alighted from the vehicle and directed it to reverse; properly towards the ATM. After the vehicle had come to a standstill the first defendant called Dunjwa who was the driver to come out and see the spillage of the diesel at the back as the diesel ;cap was missing. It is common cause that the missing cap was well known by all of them as far back as 12 June 2007. Although Mr Van Niekerk, the Chief Protection Officer of the plaintiff at the time, denied that he knew about it the witness for the first defendant who was working at the control room testified that Van Niekerk was aware.

[11] According to the guidelines of the plaintiff it is improper for the driver to alight from the vehicle at the delivery point. The first defendant conceded

THAT THE DRIVER IS NOT SUPPOSED TO ALIGHT HE TESTIFIED, HOWEVER, THAT HE CALLED DUNJWA BECAUSE THE CUSTODIAN HAD NOT YET ARRIVED AT THAT STAGE. HIS EVIDENCE DIFFERS IN THIS REGARD FROM THAT OF DUNJWA.AND NOZUKWA. THEY BOTH TESTIFIED THAT THE CUSTODIAN HAD ALREADY ARRIVED AND THE BAG MAN (NOZUKWA) WAS ALREADY AT THE CUBICLE WITH THE BAGS IN THE PROCESS OF HANDING OVER THE MONEY. IT WAS AFTER THE BAGS HAD BEEN OFFLOADED FROM THE TROLLEY BUT BEFORE THE HANDING OVER THAT THE ROBBERS ARRIVED AND DEMANDED THE MONEY, I AM SATISFIED THAT DUNJWA AND NOZUKWA WERE TELLING THE TRUTH AND THEREFORE I FIND THAT THE CUSTODIAN HAD ALREADY ARRIVED WHEN DUNJWA WAS CALLED TO COME OUT OF THE VEHICLE.

[12] After Dunjwa was called by the first defendant he was instructed to bring a cable tie to attend to the spilling diesel. When he brought one it was said that it was short. He was instructed by the first defendant to go and look for a long one in the cab of the vehicle; The first defendant denied that on the second occasion Dunjwa went back to the car alone. According to him they went together. I may mention that, although this does not seem to have had any link with the robbery, there was a complaint that something called a pudu inside the door handle behind the driver was broken.

[13] WHILST DUNJWA WAS BUSY TRYING ATTENDING TO THE SPILLING DIESEL HE WAS INFORMED BY MADLALISA (LM 5 MAN) THAT HE SHOULD NOT USE THE PLASTIC IN

COVERING THE CAP BUT SHOULD USE THE MONEY BAG. MADLALISA THEN LEFT. WHEN DUNJWA TURNED AROUND TO FETCH THE MONEY BAG IN THE CAR, HE SAW A GUY WEARING MAGNUM UNIFORM CARRYING A PROTECTOR (SHORT GUN) WHICH HE POINTED AT HIM. HE WAS ORDERED TO TAKE OUT HIS GUN. HE, DUNJWA, WAS ARMED WITH A 9MM PISTOL. HE WAS INSTRUCTED TO PUT IT DOWN WHICH HE DID. THEREAFTER TWO GUYS CAME AND ONE OF THEM TOOK THE PISTOL. HE WAS INSTRUCTED TO CRAWL. THE FIRST DEFENDANT AT THAT STAGE WAS STANDING NEXT TO THE WALL.

[14] They were instructed by the robbers to lie down and they obliged. The custodian came out and ran away. Dunjwa closed his eyes and after a short space of time heard a sound of a vehicle moving away. He opened his eyes and gave chase but could not catch the robbers. He asked the first defendant to accompany him in the chase but the first defendant refused.

[15] THE PLAINTIFFS CASE AT THE TRIAL WAS DIRECTED AT PROVING THE NEGLIGENCE OF THE FIRST DEFENDANT AS THE SENIOR WHO WAS IN CHARGE OF THE TEAM. IT IS CONTENDED THAT THE POLICY PROHIBITS A DRIVER TO GET OUT OF THE VEHICLE WHILST THE MONEY IS STILL IN THE PROCESS OF BEING OFFLOADED. HE WAS THEREFORE NEGLIGENT IN THE PERFORMANCE OF HIS DUTY BY ORDERING DUNJWA TO GET OUT. IT IS CONTENDED THAT HE FAILED TO EXERCISE CONTROL AND SUPERVISION OF THE TEAM IN THE MANNER PRESCRIBED BY THE GUIDELINES.

[16] Mr Van Niekerk gave evidence, supported by documents, as to what should have been done at the scene when the money was being delivered. These guidelines are not in issue except that it was argued that they are mere guidelines. To me it is irrelevant whether or not these were guidelines or rules. The relevant enquiry is how a reasonable person in the position of the plaintiff, possessing the same skills and training, would have acted in the circumstances.

[17] Mr Van Niekerk testified that he called meetings almost on weekly basis to emphasize matters of security. He testified that if the driver was not ordered to move out of the vehicle the robbery would have been averted. He testified further that if the LM 5 man was not allowed to move from the gate he would have prevented the robbers from entering the premises. It was therefore contended that the first defendant was negligent in the performance of his duties by allowing the LM5 man to move away from his point and ordering the driver to leave the driver's seat,

[18] The first defendant denies that he was negligent in any manner, His view is that each member of the team is responsible for his duties and it is not for him (first defendant) to cdntrol the members in the performance of their respective duties. Alternatively, he argues that the plaintiff was negligent in not fixing the diesel cap and the pudu. It was argued on his behalf that if I find that there was any other manner of solving the diesel cap problem, he committed an error of judgment. It was further argued that the faulty cap had placed the first defendant in a sudden emergency

situation. Accordingly, so the argument went, even if I were to find that he was negligent the employer contributed to his negligence, alternatively, there was an error of judgment, further alternatively, he acted on the basis of sudden emergency,

[19] THE CLAIM AGAINST THE FIRST DEFENDANT IS PECULIAR. THE EMPLOYEES OF THE PLAINTIFF TESTIFIED THAT THE AMOUNT STOLEN WAS COVERED BY THE INSURANCE. IT HAS SINCE BEEN PAID BACK TO THE PLAINTIFF BY THE INSURANCE. THE EXCESS OF R250 000.00 WAS, IN TERMS OF THE SERVICE LEVEL AGREEMENT BETWEEN THE BANKS AND THE PLAINTIFF, PAID BY NEDBANK. THIS REDUCED THE LOSS BY THE PLAINTIFF TO THE FIGURE MENTIONED ABOVE. HOWEVER, THE PLAINTIFFS WITNESSES TESTIFIED THAT SINCE THE MONEY HAS BEEN RECOVERED BY WAY OF INSURANCE, EFFECTIVELY THE PLAINTIFF HAS SUFFERED NO DAMAGES. IT HAS BEEN FAINTLY ARGUED ON BEHALF OF THE FIRST DEFENDANT THAT IN THE CIRCUMSTANCES THE PLAINTIFF HAS SUFFERED NO LOSS, ALTERNATIVELY, IT HAS FAILED TO ESTABLISH HOW MUCH IT HAS LOST.

[20] In **Erasmus Ferreira & Ack&rmann v Francis 2010 (2) SA 228 (SCA) para 16** Cachalia JA **stated** as follows:

"As a general rule the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict In determining a plaintiffs patrimony after the commission of the delict advantageous consequences have to be taken into account But it has been recognised that there are exceptions to this general rule. Various attempts to formulate a legal principle as

to which benefits should be taken into account have been made. In Standard General Insurance Co Ltd v Dugmore NO 1997 (1) SA 33 (A) at 41E - 42B Olivier JA referred to these attempts and concluded;

'Boberg (The Law of Delict vol 1 at 479) succinctly states:

"The existence of the collateral source rule can therefore not be doubted; to what benefit it applies is determined casuisticaliy; where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit It now seems to be generally accepted that there is no single test to determine which benefits are collateral and which are deductible. Both in our country (Santam Versekeringsmaatskappy Bpk v Byleveldt (supra at 150F) and in England (Parry v Cleaver [1969] 1 All ER 555 (HL) ([1970] AC 1) at 14 and 31) it is acknowledged that policy considerations of fairness ultimately play a determinative role."'

[21] It is now well settled that the claim itself is in certain instances sustainable in law. It is based on the so-called "collateral source rule". In **Santam Versekeringsmaatskappy Bpk v Byleveldt 1973.(2) SA 146 (A) at 168** it was stated *"Th& cross-appeal raises an interesting issue relating to the 'collateral source rule', i.e., the rule that generally any compensation fpr bodily injuries that the injured party receives from a collateral source, wholly independent of the wrongdoer or his insurer, does not operate to reduce the damages recoverable by him."* The principle is based on the premise that a defendant in the situation such as the present case is generally not entitled to rely for his protection on a contractual arrangement between the plaintiff and a third party entitling the former to recover its loss from the latter.

"Such right stems from an extraneous source which is regarded as legally irrelevant; it constitutes a case of res inter alios acta. According to Rumpff J A (as he then was), who gave the majority judgment in ByleveJdt's case, the rule is based on considerations of equity, fairness and the interests of society, (See at150Fand153B-D."[1]

[22] THIS CASE CONCERNS THE APPLICATION OF THE ABOVEMENTIONED RULE WHICH I FIND APPLICABLE.

[23] I turn now to determine whether the plaintiff has discharged the onus resting on it *"At the end of the case the court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probabilities, just as the court would do in any other case concerning negligence. In this final analysis, the court does not adopt the piecemeal approach of (a) first drawing the inference of negligence from the occurrence itself, and regarding this as* a *prima facie case; and then (b) deciding whether this has been rebutted by the defendant's explanation,"*[2] It was conceded on behalf of the plaintiff that the plaintiff has not proved that there was any collusion between the first defendant and the robbers. It was however contended that the plaintiff has succeeded in proving that the first defendant was negligent and therefore is liable to pay damages.

[24] THE PLAINTIFF'S CASE, IN ACCORDANCE WITH ITS PLEADINGS, IS PREMISED ON THE

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1 **Botha v Rondalia Versekeritigskorporasie van Suid-Afrika Bpk 1978 (1) SA 996 (T); Lehmbeckers Transport (FTY) Ltd and Another v Rennies.'Finance (PTY) Ltd 1994 (3.) SA 727 (C)**

2 **See Sardi and Others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 780D - E and C - H. Sec also Arthur v Bczuidcnhout and Mieny 1962 (2) SA 566 (A) at 574B**

GROUND THAT THE FIRST DEFENDANT WRONGFULLY AND NEGLIGENTLY FAILED TO CARRY OUT HIS DUTIES AS AN EMPLOYEE OF THE PLAINTIFF. WRONGFULNESS OF THE CONDUCT OF THE FIRST DEFENDANT WILLDEPEND ON THE POLICY CONSIDERATIONS TAKING INTO ACCOUNT THE *BONI MORES* AND LEGAL CONVICTIONS OF THE SOCIETY. IT IS A VALUE JUDGMENT.

[25] In order for the plaintiff to establish wrongfulness there must be a legal duty to prevent the harm suffered.[3] In determining whether or not a legal duty exists in a particular case, it must be determined whether or not it is reasonable to have expected the first defendant to take positive steps to prevent the Inarm, by making a value judgment based on the legal convictions of the community and policy considerations.

[26] That generally speaking liability does not arise from an omission, *stricto sensu,* is well established. However, liability based on omission where there is a legal duty to act positively and the person fails to do so, is also well established. Such legal duty arises from common law when the omission invokes moral indignation and the legal convictions of the community demand that such omission be regarded as unlawful and that the person who omitted to act positively is required to be held liable to make good the loss suffered by the victim.[4]

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3 **See: Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust as Amicus Curiae) 2003 (1) SA 389 (S.CA) at 395 para 9.**

4 **See: Minister van POlisie v Ewels 1975 (3) SA 590 (A) at 59?A; Minister of Law & Order v Kadir 1995 (1)SA 303 (A) at 320 -**

[27] In **Donoghue v Stevenson**[5] Lord Artkin said *"The liability for (delict) ,.,is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief,,,. The rule that you are to love your neighbour becomes law: You must not injure your neighbour."*

[28] IN *CASU* THE FIRST DEFENDANT WAS AN EMPLOYEE OF THE PLAINTIFF PLACED IN CHARGE OF THE TEAM THAT DELIVERED THE MONEY. HE HAD A DUTY NOT ONLY TO ADHERE TO THE GUIDELINES BUT ALSO TO PREVENT ANYONE BREACHING THEM. IN SO DOING HE WOULD PREVENT OR MINIMISE ANY HARM TO HIS EMPLOYER. THE VERY IDEA OF ARMING THEM WITH WEAPONS POINTS TO NOTHING BUT THAT THEY HAVE A DUTY TO PREVENT ANY ROBBERY AND PROTECT THE PROPERTY OF THE EMPLOYER. THE QUESTION TO BE ANSWERED IS WHETHER HE FAILED TO FULFIL HIS DUTIES AND WHETHER HIS FAILURE, IF ANY, WAS CAUSALLY LINKED TO THE LOSS. BASED ON THE ABOVE PRINCIPLES COUPLED WITH THE CONDUCT OF THE FIRST DEFENDANT! FIND THAT HIS CONDUCT WAS WRONGFUL.

[29] I turn now to consider whether the plaintiff has established negligence on the part of the first defendant. As pointed out above the claim is based on negligence. In

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5 **[1932] AC 562 at 580**

this regard ! can do no better than quote from the well known case of **Kruger v Coetzee**[6] which sets out the basic test for negligence, where the Learned Judge of Appeal said:

> *gFor the purposes of liability culpa arises if-*
>
> *(a) a diligens paterfamilias in the position of the defendant*
>
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
>
> *(ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b) the defendant failed to take such steps.*[7]

[30] IN MY VIEW THE FIRST DEFENDANT HAD A LEGAL DUTY TO PREVENT HARM. HE KNEW THAT IT WAS A BREACH OF HIS DUTY TO CALL THE DRIVER TO COME OUT OF THE VEHICLE. THERE WAS NO SUDDEN EMERGENCY AS CLAIMED BY HIM. THE DIESEL CAP WAS KNOWN BY HIM THAT IT WAS MISSING. THE SPILLAGE OF DIESEL WAS A NATURAL CONSEQUENCE OF THE ABSENCE OF THE CAP. IF HE WAS CONCERNED ABOUT THE SPILLAGE HE OUGHT TO HAVE TRIED TO PREVENT IT AT WALMER OR FRANK STREET WHERE THEY CAME FROM. HIS ACTIONS POSED THE DANGER WHICH :HE OUGHT REASONABLY TO HAVE FORESEEN/THE PURPOSE OF LEAVING THE DRIVER AT HIS SEAT WAS EXPLAINED BY DUNJWA. HE KNEW ABOUT IT. WHILST ATTENDING TO THE DIESEL CAP HE OUGHT TO HAVE TAKEN STEPS TO SEE TO IT THAT A PROPER LOOK OUT IS CARRIED OUT BOTH BY HIM AND THE LM5 MAN. HE

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6 **1966(2)SA428 (A) at 430 E-F**

7 **See also: Tsogo Sun Holdmgs^(Pry) Ltd v Qing-He Shan 2006 (6) SA .537 (SCA) at 540 para. 11**

FAILED TO DO SO. THE POSSIBILITY OF THE DANGER WAS FORESEEABLE.

[31] The spate of cash in transit robberies in the country is such that any security employees delivering money ought to foresee that it can happen at any time to any company. In my view it matters not that the first defendant might have called the driver out of the vehicle before the arrival of the custodian as he claimed. Since the test for negligence involves a fictitious reasonable person whose "conduct must conform to the society's expectations the first defendant's perception of the situation must yield for an objective test of a reasonable man in his situation. Cash in transit robberies do not only cause loss of property they pose a serious danger to life of bystanders as well. Accordingly I find that the plaintiff has established negligence.

[32] I TURN NOW TO CONSIDER WHETHER LEGAL CAUSATION HAS BEEN ESTABLISHED ON THE FACTS OF THIS CASE. IT HAS BEEN HELD THAT CAUSATION INVOLVES A TWO STAGE ENQUIRY. FIRST, THE ENQUIRY IS WHETHER THE DEFENDANT'S WRONGFUL CONDUCT WAS A CAUSE OF THE PLAINTIFF'S LOSS. SECOND, IS WHETHER THE WRONGFUL CONDUCT IS SUFFICIENTLY CLOSE OR DIRECTLY LINKED TO THE LOSS OR WHETHER IT IS TOO REMOTE.[8]

[33] ON THE FACTS OF THE PRESENT CASE THE EVIDENCE OF THE PLAINTIFF WAS THAT BUT FOR THE CONDUCT OF THE FIRST DEFENDANT THE ROBBERY WOULD HAVE BEEN AVERTED. WHEN THE FIRST DEFENDANT CALLED THE DRIVER HIS CONDUCT SHIFTED THE

8 **See: Intl Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680(A) at 700E-701F; Napier NO v Collett 1995 (3) SA 140 (A) at 148E-I**

ATTENTION OF THE DRIVER TO THE DIESEL CAP. IT WAS AT THE STAGE WHEN HE WAS STILL BUSY ATTENDING TO THE DIESEL CAP THAT THE ROBBERY OCCURRED.

[34] I am satisfied that both factual and legal causation have been established by the plaintiff. In my view there: was no emergency. There was no evidence that the leakage of any diesel hampered the operation of the vehicle On the contrary the vehicle was moving and Dunjwa even chased the robbers with it: A diesel cap has nothing to do with driving mechanism. Even if I were to find that the plaintiff was negligent in failing to replace the missing cap I would still find that such negligence was too remote to contribute to the loss.

[35] ACCORDINGLY I FIND THAT ON A PREPONDERANCE OF PROBABILITIES THE PLAINTIFF HAS DISCHARGED THE *ONUS* RESTING ON IT AND I THEREFORE MAKE THE FOLLOWING ORDER.

1 The first defendant is ordered to pay to the plaintiffs attorneys a sum of R4 834 000.00 which amount should be paid jointly and severally with second defendant as ordered in April 2008, the one paying the other to be absolved.

2. INTEREST ON THE ABOVE AMOUNT CALCULATED AT THE RATE OF 15,5% FROM THE DATE OF THIS JUDGMENT TO DATE OF PAYMENT.

3. The first defendant is to pay costs of suit.

BR TOKOTA

ACTING JUDGE OF THE HIGH COURT

DATE HEARING: 24 AND 25 MARCH 2011

DATE JUDGMENT DELIVERED: 1 APRIL 2011.

For the Plaintiff: Adv R Beaton SC

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