



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

CASE NO: 2020/16910

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|-----|----------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| | DATE |
| | SIGNATURE |

In the matter between:

DEVLAND CASH AND CARRY (PTY) LTD

Plaintiff

and

G4S CASH SOLUTIONS SA (PTY) LTD

Defendant

JUDGMENT

MOORCROFT AJ:

Summary

A loss causally connected to a contract and arising from the performance of the contract may give rise to a claim for contractual damages.

A loss causally connected to a contract but not arising from the performance of the contract but rather from additional or complementary duties may give rise to a claim for delictual damages, subject to qualifications.

Order

[1] In this matter I make the following order:

1. *I declare that the defendant can not be held delictually liable to the plaintiff in respect of the services that were performed pursuant to the contract between the parties, as pleaded in paragraphs 10.3 to 17 of the plaintiff's particulars of claim; paragraphs 10 to 17 of the defendant's plea; and paragraph 4.2, 5.12 and 10 of the plaintiff's replication*
2. *The action and the issue separated in terms of paragraph 1.2 of the order of 23 May 2023 are both postponed sine die;*
3. *The plaintiff shall, if so advised, to apply for leave to amend the particulars of claim in terms of Rule 28 within fifteen days of this order.*
4. *The plaintiff is ordered to pay the defendant's costs to date, including the reserved costs of the application for separation instituted on 21 October 2022 and in terms of which the order of 23 May 2023 was granted.*

[2] The reasons for the order follow below.

Introduction

[3] Devland instituted a claim against G4S for money lost during an cash-in-transit heist that took place at a time when the cash was in the custody of G4S.

[4] On 23 May 2023 Coppin J ordered that two questions arising from the pleadings be separated and decided before the remaining issues in dispute.

[5] These questions are whether:

“1.1 The Applicant/Defendant can be held delictually liable to the Respondent/Plaintiff in respect of the services that were performed pursuant to a contract between the parties, as pleaded in paragraphs 10.3 to 17 of the Respondent/Plaintiff’s Particulars of Claim; paragraphs 10 to 17 of the Applicant/Defendant’s plea; and paragraph 4.2, 5.12 and 10 of the Respondent/Applicant’s¹ replication; and

1.2 The Applicant/Defendant’s conduct would constitute reckless, grossly negligent and negligent conduct, and whether, in the circumstances, the Respondent/Plaintiff’s claim is subject to the limitation of liability clause contained in clause 9.1 of the contract between the parties, as pleaded in paragraphs 5.4, 6.5 and 11 of the Respondent/Plaintiff’s Particulars of claim; and paragraphs 4.2.1, 6.3.2 and 11 of the Applicant/Defendant’s plea.”

[6] The matter was set down for trial in terms of Rule 33(4) but before the hearing date the parties agreed that subject to the consent of the Court, which is hereby granted, the question in paragraph 1.2 above be reserved for later deliberation to the extent necessary, and that the Court now deal only with the question in paragraph 1.1.

The merits

[7] The parties entered into a written contract whereby G4S would provide cash management and security services to Devland, more specifically the collection, storage and delivery of money in accordance with G4S’s operating methods.

[8] On 9 September 2019 G4S made two collections of cash from Devland’s premises. The first occurred before noon and the second in the afternoon. The two cash collections were both in G4S’s armed vehicle when it was robbed later on the same

¹ This is clearly intended to be a reference to the plaintiff’s replication.

afternoon.

[9] Devland's claim is for the amount of the first collection. It alleges that G4S's failure to timeously deliver the first collection to G4S's branch office at Crown Mines or alternatively deposit the first collection into Devland's two nominated bank accounts before it could be robbed was wrongful and negligent, and in breach of a duty of care,² and therefore renders G4S liable to Devland in delict for the loss of the money in accordance with the *actio lex Aquilia*. No claim is made (in contract or in delict) in respect of the loss of the second collection.

[10] The loss of both collections arose out of the performance of the contract. S4S's staff went to the Devland premises to collect cash twice on the same day. They did so in fulfilment of S4S's contractual obligations. G4S's duty was to collect money and then to safeguard the money until it was deposited. The robbery occurred after the collection of the money but before it could be deposited.

[11] The delictual claim now pursued by Devland arose therefore pursuant to and during the performance of G4S's contractual obligations. I find that Devland's loss occurred in the performance of the contract and that G4S can not be held liable in delict.

[12] If S4S were under a contractual obligation to deliver the cash before going back for the second collection and it failed in that duty, Devland's potential claim would have been a claim for contractual damages. However, the fact that G4S failed to get the first collection to safety before going back for the second does not mean that it was no longer acting in fulfilment of the contract.

[13] The concurrence of contractual and delictual remedies has given rise to uncertainty.³

[14] It is not controversial that the existence of a contractual relationship does not without more preclude a claim in delict.⁴ The Aquilian action is, for instance, available to

² Breach of duty of care encompasses two elements, negligence and wrongfulness. My sentence can be construed as tautologous.

³ *Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd* 2019 (3) SA 580 (GJ) para 20.

an employer confronted by unlawful competition by an employee.⁵ An employee may not misappropriate confidential information and trade secrets of the employer. The authors of *Unlawful Competition* wrote:⁶

“... the same act may therefore in principle render the employee liable ex contractu as well as ex delicto. This is so because apart from breach of contract, the conduct complained of also wrongfully and culpably infringes a legally protected interest (trade secret) which exists independently of the contract.”

[15] Similarly, the Aquilian action is available in the event of a breach of a fiduciary duty independently from contractual duties owed to the company by a company director.

[16] However, a delictual remedy can not be made available merely because the contracting parties could have provided for a contractual remedy but failed to do so, or the parties excluded the contractual remedy in the contract that govern the relationship between the parties.⁷ The time to negotiate adequate contractual remedies is, after all, when the contract is being negotiated.⁸

[17] Contractual autonomy must be respected. When parties enter in a contract, their rights and obligations must be found in the contract subject of course to obligations imposed and rights created by law.⁹ The contract and its terms must be lawful. A contract that limits the obligations of a party or grants rights contrary to law will not be enforced.

⁴ Ibid para 21; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

⁵ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T).

⁶ See van Heerden and Neethling *Unlawful Competition* 1st ed. 1995 p 234 to 239, and specifically footnote 79 on page 235.

⁷ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 18. Brand JA said: “The point underlying the decision in *Lillicrap* was that the existence of a contractual relationship enables the parties to regulate their relationship themselves, including provisions as to their respective remedies. There is thus no policy imperative for the law to superimpose a further remedy. Consequently, the mere absence of a contractual remedy in the present case does not by itself distinguish it materially from *Lillicrap*.”

⁸ Compare *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 24.

⁹ The National Credit Act, 34 of 2005 comes to mind. So does the Private Security Industry Regulation Act, 56 of 2001 and Code of Conduct. It is not alleged in this matter that the contract was in conflict with obligations imposed by law.

[18] In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*,¹⁰ Grosskopf AJA said that -

*“... the Aquilian action does not fit comfortably in a contractual setting like the present. When parties enter into such a contract, they normally regulate those features which they consider important for the purpose of the relationship which they are creating. This does not of course mean that the law may not impose additional obligations by way of naturalia arising by implication of law, or, as I have indicated above, those arising ex delicto independently of the contract. However, in general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party. If the Aquilian action were generally available for defective performance of contractual obligations, a party's performance would presumably have to be tested not only against the definition of his duties in the contract, but also by applying the standard of the bonus paterfamilias. How is the latter standard to be determined? Could it conceivably be higher or lower than the contractual one? If the standard imposed by law differed in theory from the contractual one, the result must surely be that the parties agreed to be bound by a particular standard of care and thereby excluded any standard other than the contractual one. If, on the other hand, it were to be argued that the bonus paterfamilias would always comply with the standards laid down by a contract to which he is a party, one would in effect be saying that the law of delict can be invoked to reinforce the law of contract. I can think of no policy consideration to justify such a conclusion. See in this regard the dissenting speech of Lord BRANDON in the *Junior Books* case supra at 551E - 552E with which Lord KEITH of Kinkel agreed at 536G - 537D of the report. In the present case, the respondent repeatedly emphasized in its pleadings that it was its detailed requirements, as laid down in the contract between the parties, which defined the ambit of the appellant's obligations. It is these requirements which, according to the respondent, set the standard by*

¹⁰ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 500F to 501H. See also *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) paras 63 to 65 and *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 21 to 24.

which negligence falls to be determined. See para 4 (b) of the respondent's amended particulars of claim read with para 1 (a) of the respondent's further particulars dated 19 August 1981, as also paras 5, 6 and 7 of the particulars of claim and para 10 (d) of the said further particulars. It seems anomalous that the delictual standard of culpa or fault should be governed by what was contractually agreed upon by the parties.

Apart from defining the parties' respective duties (including the standard of performance required) a contract may regulate other aspects of the relationship between the parties. Thus, for instance, it may limit or extend liability, impose penalties or grant indemnities, provide special methods of settling disputes (eg by arbitration) etc. A Court should therefore in my view be loath to extend the law of delict into this area and thereby eliminate provisions which the parties considered necessary or desirable for their own protection. The possible counter to this argument, viz that the parties are in general entitled to couch their contract in such terms that delictual liability is also excluded or qualified, does not in my view carry conviction. Contracts are for the most part concluded by businessmen. Why should the law of delict introduce an unwanted liability which, unless excluded, could provide a trap for the unwary?"

[19] It is also alleged that G4S made a 'material misrepresentation' that caused harm to Devland. It is not alleged that the misrepresentation (whether innocent, negligent, or fraudulent) induced Devland to enter into the contract¹¹ nor is it apparent what the misrepresentation actually was.¹²

[20] The distinction between a loss that occurs pursuant to or in the performance of a contract for which the remedy is a claim for contractual damages, and a claim that arises between parties to a contract but independently and from additional or complementary duties for which the remedy is a claim for delictual damages, is illustrated by the judgment of the Full Court¹³ of the Gauteng Division in Johannesburg

¹¹ Cf *Novick and Another v Comair Holdings Ltd and Others* 1979 (2) SA 116 (W) 149C,

¹² Cf paras 5.5.2 and 15 of the particulars of claim and para 5.7 of the replication.

¹³ Dippenaar J, Mudau J and Adams J concurring.

in *G4S Cash Solutions SA (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and another*,¹⁴ (“the Zandspruit matter.”) Devland was the second respondent on appeal in the Zandspruit matter.

[21] As in the present matter, G4S provided cash management services to Zandspruit and Devland in terms of contracts. These two related firms suffered losses due to crimes committed by third parties and there was a causal¹⁵ connection between the losses and the contracts, but the crucial difference is that the losses did not arise out of the performance of the contracts.

[22] Zandspruit and Devland fell victim to fraud perpetrated by third parties who, using information and items such as identification cards stolen from G4S arrived at the gates and identified themselves as employees of G4S there to make a collection. They absconded with bags of cash.

[23] In the Court *a quo* Matojane J held that the loss suffered by the two firms originated from the services that G4S was contracted to provide, but that the delictual claims did not arise pursuant to or during the services rendered by G4S. He granted an order for damages in delict. G4S’ duties arose because of the business relationship evinced by the contracts (i.e., there was a casual connection) but the losses occurred independently. The losses therefore did not occur in the performance of the contract but were causally related. G4S had in breach of a duty of care failed to advise the two firms that uniforms and official identification cards had been lost or stolen, that its vehicles were occasionally used without authority, or that imposters had converted vehicles to look identical or similar to those of G4S, and that cash collection bosses and keys have been lost or stolen or that they could be duplicated.

[24] The appeal against the order granted in favour of Devland was dismissed with costs; the Court partially upheld the appeal against the order granted in favour of Zandspruit on the basis of contributory negligence but did not upset the finding that Zandspruit (and Devland) were entitled to damages in delict.

¹⁴ *G4S Cash Solutions SA (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and another* [2022] ZAGPJHC 7. This judgment must be distinguished from the judgment by the Supreme Court of Appeal in *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another* 2017 (2) SA 24 (SCA).

¹⁵ Cf *Van Wyk v Lewis* 1924 AD 438 p 443 (Innes CJ) and 455 to 456 (Wessels JA), and the analysis of these *dicta* by Grosskopf AJA in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 501H to 502G.

[25] The present matter and the *Zandspruit* case are therefore clearly distinguishable on the facts, as in the present matter the loss arose directly out of the services rendered in terms of the contract whereas in the *Zandspruit* matter G4S was held liable in delict under circumstances where it breached a duty of care to advise the two appellants of cardinal facts and third party imposters were as a result able to defraud the two appellants.

[26] *Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd*¹⁶ is similarly distinguishable from the facts in the present matter. Pilot counter-claimed¹⁷ against Trio on the basis of a contractual claim for breach of an exclusive strategic distribution agreement, alleging that Trio had usurped a commercial opportunity by entering into an agreement directly with a client of Pilot. It also instituted a second counterclaim for contractual damages arising from a repudiation of the distribution agreement, and in the alternative¹⁸ a claim for delictual damages.

[27] Pilot alleged that by reason of the contractual relationship, Trio had obtained knowledge of and access to Pilot's confidential information and customer connections. This alternative claim grounded in delict was based on unlawful competition and specifically the usurpation of goodwill and business opportunities.

[28] Unterhalter J dismissed an exception to the second counterclaim and the alternative second counterclaim. He said that the law occupies a middle ground between the two extremes of recognising a delictual duty that co-exists with every contractual duty, and the equally unpalatable approach of refusing to recognise a duty in delict whenever a contractual duty is found to exist. Duties that complement or are not repugnant to contractual obligations may give rise to concurrent contractual and delictual claims¹⁹ framed in the alternative.

[29] He said:

*"[29] The position in our law may, I think, be summarised as follows:
(a) A breach of contract is not, without more, a delict.*

¹⁶ *Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd* 2019 (3) SA 580 (GJ).

¹⁷ *Ibid* paras 1 to 5.

¹⁸ *Ibid* para 34.

¹⁹ *Ibid* para 27.

(b) Where parties have chosen to regulate their relationship under a contract, the contractual rights and obligations undertaken will not ordinarily permit of the recognition of a delictual duty at variance with the contract.

(c) Parties to a contract may have additional or complementary duties that arise independently in delict.

(d) ...²⁰

The scope of the order

[30] Counsel had widely different views on what would be a proper order if I found that plaintiff did not have a claim in delict. Mr van Nieuwenhuizen for the plaintiff argued that the matter should be dealt with as an exception, and that the plaintiff be granted leave to amend the particulars of claim. Mr Herholdt for the defendant submitted that the action itself be dismissed.

[31] To my mind the answer is to be found in the order of 23 May 2023. The issue separated is a very narrow one. I am called upon to determine only if the defendant is liable in delict on the pleadings, with the contract as the basis for the delictual liability.²¹

[32] I am not called upon to determine whether, as Mr van Nieuwenhuizen argues, the necessary facts are pleaded (however ineptly and confusingly) to also sustain a contractual claim.

[33] I conclude that I am neither permitted to grant the plaintiff leave to amend the particulars of claim, nor to dismiss the action. The plaintiff is of course entitled to apply for leave to amend in terms of Rule 28, and should do so within a reasonable time so that the finalisation of the litigation is not unduly delayed.

[34] It is so that the present dispute could perhaps have been dealt with by way of exception on the basis that the particulars of claim were vague and embarrassing,

²⁰ Para (d) is not relevant to the present matter. It addressed the position of a third party who sues a party to a contract.

²¹ See para 14 of the particulars of claim.

alternatively did not disclose a cause of action.²² Having considered the costs aspect I am nevertheless of the view that the plaintiff should bear the costs, and that the cost order not be limited to costs on exception.

Conclusion

[35] I therefore make the order as set out above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **3 JULY 2023**.

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|---------------------------|------------------------------|
| COUNSEL FOR PLAINTIFF: | H VAN NIEUWENHUIZEN |
| INSTRUCTED BY: | ZIYAAD PATEL ATTORNEYS |
| COUNSEL FOR DEFENDANT: | G HERHOLDT |
| INSTRUCTED BY: | EVERSHEDS SUTHEROLAND SA INC |
| DATE OF THE TRIAL: | 5 JUNE 2023 |
| DATE OF JUDGMENT: | 3 JULY 2023 |

²² Compare *Edward L Bateman Ltd v C a Brand Projects (Pty) Ltd* 1995 (4) SA 128 (T) 141F.