THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1174/2018

In the matter between:

OSMAN TYRES AND SPARES CC **FIRST APPELLANT**

SHIRAZ MOHAMMED OSMAN **SECOND APPELLANT**

and

ADT SECURITY (PTY) LTD **RESPONDENT**

Neutral citation: *Osman Tyres and Spares CC & another v ADT Security (Pty) Ltd* [2020] ZASCA 33 [3 April 2020]

Coram: Ponnan, Saldulker, Mokgohloa and Nicholls JJA and Koen AJA

Heard: 5 March 2020

Delivered: 3 April 2020

Summary: Contract – civil procedure – clause in contract excluding liability for negligent conduct of security service provider – Private Security Industry Regulation Act 56 of 2001 and the Code of Conduct for Security Service Providers 2003 – whether liability for gross negligence excluded – whether a court could find for the plaintiffs on the evidence adduced – what evidence to

take into account - whether absolution from the instance should have been granted.

ORDER

On appeal from: North West High Court, Mahikeng (Hendricks J sitting as court of first instance): judgment reported *Osman Tyres and Spares CC and Another v ADT Security (Pty) Ltd* [2017] ZANWHC 113.

The appeal is dismissed with costs, to be paid by the appellants jointly and severally, the one paying the other to be absolved.

JUDGMENT

KOEN AJA:

[1] This appeal[1] concerns an order granted by the North West High Court, Mahikeng (the high court) at the close of the appellants' case, absolving the respondent from the instance and directing the appellants jointly and severally to pay the costs, the one paying the other to be absolved. The high court concluded that the first appellant, Osman Tyres and Spares CC (the CC) and the second appellant, Mr Shiraz Mohammed Osman had 'failed to make out a case on the probabilities', presumably meaning on a balance of probabilities. In that respect it clearly applied the wrong test and erred. The high court was

[1] The appeal is with the leave of this court.

however correct, for reasons which will be set out below, in granting an order absolving the respondent, ADT Security (Pty) Ltd (ADT) from the claim of Mr Osman. The material remaining question in this appeal is whether an order of absolution was justified in respect of the CC's claim. This judgment will, in what follows, consider the nature of the appellants' claims, record a brief reminder of the essentialia of those claims, assess the allegations made in the pleadings and the evidence adduced by Mr Osman, identify what were properly the issues which served before and had to be decided by the high court, and conclude by applying the correct test for absolution to the admitted facts and evidence.

The appellants' claims

[2] The standard of the appellants' representation[2] before the high court was disappointingly poor.[3] The particulars of claim were not a model of clarity.[4] They were however clear that the claims by the CC and Mr Osman, against ADT were damages claims. The CC's claim was for contractual damages based on a written agreement, a copy whereof was annexed as annexure 'A' to the particulars of claim,[5] concluded between the CC and ADT on 6 February 2005, for the rendering of security services at the CC's business premises. This agreement was admitted by ADT. All that remained to be considered to complete a cause of action for contractual damages were the

[2] Counsel who appeared for the appellants in the appeal did not appear in the high court.
[3] During argument on the application for absolution, counsel for the appellants presented a 'thesis' on constitutionalism which was irrelevant and misguided, rather than addressing the true issues involved.
[4] It is undoubtedly so that pleadings play an important role in litigation as set out in paragraph 38 below. But pleadings are made for the convenience of the court, and not the court for pleadings. Pleadings are drafted by practitioners of various levels of skills; some perhaps not all that skilled, and allowance must be made for that fact.
[5] The CC's cause of action could only be contractual - *Lillicrap Wassenaar and Partners v Pilkington Brothers* (S.A) (Pty) Ltd [1985] 1 All SA 347 (A).

breaches of the agreement and the damages caused by such breaches. By the time the matter was argued before the high court, it was apparent that Mr Osman's claim, on the other hand, was a delictual claim.

[3] The particulars of claim did not distinguish clearly between the allegations relating to the alleged breaches of the agreement for the purposes of the contractual claim, and those relating to wrongfulness, fault and causation for the purposes of Mr Osman's delictual claim. Instead, they were conflated in general terminology alleging 'a duty of care', and that ADT had been negligent alternatively grossly negligent in rendering its services to the CC. The interest of justice nevertheless require that the particulars of claim be examined carefully to identify the factual allegations relevant to each cause of action. Particulars of claim must be construed properly, even generously if ambiguous, as with exceptions,[6] to identify the material factual allegations advanced in respect of a particular cause of action.

Mr Osman's claim

[4] It is convenient to deal first with the order of absolution in respect of Mr Osman's claim. The conflated allegations in the particulars of claim[7] referring to Mr Osman's claim were as follows:

'11

[ADT] by concluding an agreement with the [CC], created and imposed upon itself, although tacitly and/or implied, a legal duty not to be negligent in the discharge of its contractual obligations. Further in the alternative, public policy and legal consideration, places upon [ADT] the legal duty not to be negligent and to render services in accordance with highest standards of care expected of a professional in the position of [ADT]. The

[6] *First National Bank of Southern Africa Ltd v Perry No and Others* 2001 (3) SA 960 (SCA) para 36.
[7] The particulars of claim are set out more extensively in the judgment of Ponnan JA below.

above stated burglary and damages suffered by the [CC] alternatively [Mr Osman] (in his capacity as the sole member of the [CC]) was caused by the sole negligence alternatively the gross negligence of [ADT] in the sense that [ADT] had a duty of care towards the [CC's] premises, and to exercise reasonable care in the rendering of security services which duty of care was not reasonably exercised by [ADT] in one or more or all of the following respects:

11.1 [ADT] was negligent alternatively grossly negligent by its failure to apply reasonable care when it responded to the emergency signal at [ADT's] premises.

11.2 [ADT] was negligent alternatively grossly negligent to attend to the matter only minutes after the alarm went off.

11.3 [ADT] was negligent alternatively grossly negligent in finding that everything was in order, when it eventually arrived at the premises, whilst a serious burglary in fact happened.

11.4 [ADT] was negligent alternatively grossly negligent by its omission to take positive steps to avoid alternatively to minimise the damages caused to the [CC] and or [Mr Osman] by the burglary, by neglecting to immediately inform the police and the [CC] as duly represented by [Mr Osman].

12.

As a result of [ADT's] above stated sole negligence alternatively gross negligence, the [CC] and [Mr Osman] suffered damages . . .

[5] The further allegations in the particulars of claim specific to Mr Osman's claim were as follows:

'CLAIM 2 – DAMAGES SUFFERED BY [MR OSMAN]

13.

The allegations contained in paragraph 1 to 11 above are herein repeated.

14.

As a result of the burglary, which [ADT] at all relevant times had a duty of care to reasonably avoid, [Mr Osman] (in his capacity as a sole member of the [CC]) suffered emotional damages, which damages were caused by the sole negligence alternatively gross negligence of [ADT], in one or more of the respects being:

14.1 [Mr Osman] is constantly in a depressed mood, as a result of Depressive Mood Disorder and Post Traumatic Stress Disorder.

14.2 [Mr Osman] is constantly in an anxious mood.

14.3 [Mr Osman] is experiencing intrusive images of the All [CC's] business in ruin as a result of the burglary.

14.4 [Mr Osman] suffers from sleep disturbances.

14.5 [Mr Osman] is experiencing feelings of being a completely different person from what he was before the burglary.

15.1 [Mr Osman] is experiencing continual feeling of his life coming to an end.

15.

15.1 As a result of the above stated emotional damages [Mr Osman] must attend to Specialist Psychiatry Treatment'.

[6] Mr Osman did not give any evidence on which it could be found that ADT had acted wrongfully. The high court further correctly found that Mr Osman 'did not testify in any detail about the emotional stress, trauma and depression he suffered as a result of the burglary. No expert and/or medical evidence was tendered'. Accordingly, there was no evidence on which a court acting carefully could or might find in his favour in respect of his personal claim. That was sufficient reason on its own to justify the order of absolution in respect of Mr Osman's claim. The high court in its judgment however also concluded that 'clause 6.2[8] exonerated [ADT] from liability arising out of delict . . .' That was a misdirection, as I shall endeavour to explain when dealing with clause 6.2 below.[9] It does not however effect the conclusion that the appeal against the order of absolution in respect of Mr Osman's claim falls to be dismissed.

[8] Paragraph 9(b)(v) below.
[9] Paragraphs 31 and 32 below.

[7] The appellants' counsel, although not authorised to make any concession in that regard, fairly stated that she could not advance any cogent argument that the order of the high court absolving ADT from Mr Osman's claim was incorrect.

The CC's claim.

[8] In identifying the material issues relevant to the CC's contractual claim, reference must be had not only to the issues pleaded but also to issues arising from the pleadings as widened by the evidence. **[10]** Thus widened, the issues included, amongst others, the specific obligations undertaken by ADT as part of the service it would render to the CC in terms of the agreement, and details of the respects in which the CC contended that ADT had breached the agreement. Some of the terms of the agreement were not pleaded in the

[10] *Shill v Milner* 1937 AD 101 at 105. In paragraph 42 below Ponnan JA contrasts this statement to the provisions of the parol evidence rule, the decision in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39, the provision in clause 11.8 of the agreement providing that the written agreement contains the entire agreement between the parties and the decision in *Johnson v Leal* 1980 (3) SA 927 (A) at 938. My statement does not seek to introduce anything in conflict with those principles. It simply deals with identifying what are truly the issues (as opposed to evidence) and determining which issues are in dispute. The issues in any contractual claim would ordinarily be whether a contract exists, the terms thereof, the breach of any of the terms, and the remedy the aggrieved party wishes to enforce. These would all be pleaded in the particulars of claim. In the present matter the terms of the agreement have not all been pleaded. They are however not disputed, as all the provisions contained in the written agreement, which document is acknowledged to be the 'entire agreement' between the parties, constitute the terms of the agreement. ADT does not dispute that. Many of these terms, notably those contained in clause 6 and the exclusionary provision relied upon, although not pleaded in the particulars of claim, were pleaded by ADT. Some that were not pleaded, such as the ambit of ADT's contractual obligations, have now been set out in paragraphs 37 and 39 of Ponnan JA's judgment below. Paragraphs 37, 39 and 40 of his judgment now record all these terms, which have become common cause, more extensively. All my statement seeks to convey is that at the level of the technical adequacy of the particulars of claim, terms not pleaded but referred to in the evidence of Mr Osman, where these specific terms were put to him in cross examination and conceded to be part of the agreement, resulted in the issues for determination by the high court, and which would be relevant also to adjudicating the application for absolution, not being confined to the issues expressly pleaded in the particulars of claim. The terms expressly pleaded in the particulars of claim have been broadened by these additional terms identified in his evidence. To that extent the issues have been widened by the evidence. Mr Osman's evidence does not contradict or add to the terms of the agreement, in contravention of clause 11.8 or the parol evidence rule. It simply cures the omission of these terms not having been pleaded fully in the particulars of claim. My statement relates to the *facta probanda,* not the *facta probantia.*

particulars of claim, but were elicited during the cross examination of Mr Osman, confirmed by him, and hence became common cause during the trial.

The existence of the contract

[9] The following were common cause:

(a) The existence of the agreement, annexure 'A' to the particulars of claim;

(b) The terms[11] thereof,[12] which included, inter alia, the following:

(i) ADT would supply security services, including radio monitoring, telephone monitoring, and armed response in respect of the CC's business premises (the premises) in Rustenburg

(ii) Armed personnel of ADT would attend at the premises in response to activation signals received from the alarm system fitted at the premises, as quickly as operational circumstances would permit, if no satisfactory explanation was given telephonically from the premises,;

(iii) On arrival of the armed personnel at the premises ADT would take such further steps as might be reasonably necessary to safeguard the premises, the contents thereof, the customer and/or the customers invitees;

(iv) ADT would exercise reasonable care[13] in the rendering of the services, but did not guarantee assurance of safety or against any

[11] In paragraph 44 below, Ponnan JA refers to evidence being given by Mr Osman of certain representations. Such evidence would clearly be inadmissible. In this judgement I have made no reference thereto. I did not understand that argument to be advanced by the CC in the High Court either. The parties were bound by the 'fine print' of the written agreement. The practice sometimes resorted to by counsel to engage in legal debates with lay litigants about the legal niceties of their claim, quoted by Ponnan JA, is to be avoided.

[12] The terms are set out more extensively in the judgment of Ponnan JA at paragraphs 39 and 40 below.

[13] Clause 6.1 of the agreement provided that:

loss, liability, injury or damage of whatsoever nature and howsoever arising;

(v) Subject to the provisions of the Act,[14] neither ADT nor any other persons for whom ADT may be liable in law would be liable to the CC in respect of, or pursuant to any loss, liability, injury, damage or claims of whatsoever nature, including without any limitation, any loss of profits and/or any special or consequential loss or damages whether arising through the rendering or non-rendering or attempted rendering by ADT of the service, if any such loss, liability, injury, damage or claims arose as a result of or pursuant to any innocent or negligent act or admission on ADT's part or any persons for whom ADT may be liable in law[15] (the exclusionary clause); and

(vi) The CC waived certain claims and indemnified ADT against certain claims by others.[16]

Breaches of the agreement

[10] The issues which arose from the allegations in the amended particulars of claim in this regard have been set out in paragraph 4 above. If ADT required

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'The Customer acknowledges that to the extent that the Services function as a deterrent, they are not a guarantee of safety against or prevention of loss liability, injury and damage of whatsoever nature and howsoever arising. Accordingly while ADT shall exercise reasonable care in the installation of the System and in the rendering of the Services, nothing herein contained shall be construed or interpreted in any manner whatsoever as providing the Customer or any third party whomsoever with any guarantee or assurance of safety or against any loss, liability, injury or damage of whatsoever nature and howsoever arising.'

[14] The agreement defined 'Act' as 'The Private Security Industry Regulation Act 56 of 2001 and the Regulations in respect thereof.' It would also include the code.

[15] Clause 6.2.

[16] Clause 6.3 provided that:

6.3 Subject to the provisions of the Act, the Customer:

6.3.1 hereby irrevocably waives all and any such claims referred to in clause 6.2 above.

6.3.2 hereby irrevocably indemnifies ADT or any other person for whom ADT may be liable in law against all claims of third parties arising out of the said acts or omissions, as referred to in clause 6.2 above, at the Premises.'

more particulars of the negligent alternatively gross negligent breaches, then it could have requested further particulars for trial.[17] ADT was however left in no doubt, having regard to these allegations, as amplified by Mr Osman's evidence explaining and widening the issues insofar as might be necessary, that the CC contended that ADT had breached its contractual obligations negligently, alternatively grossly negligently. The high court had no difficulty with the allegations regarding the various breaches of the agreement, as the judgment did not refer to a failure to plead breaches of the agreement, or a lack of evidence establishing the breaches, otherwise that would have been stated in the high court's reasons for granting absolution.

Causation and damages

[11] It is trite law that a plaintiff 'is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.'[18] A plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability.[19] This requirement will not be considered further in view of the separation of issues which occurred at the commencement of the trial.

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[17] Rule 21.
[18] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 449.
[19] *Primesite Outdoor Advertising (Pty) Ltd v Salvianti and Santori* (Pty) Ltd 1999 (1) SA 868 (W) at 881F-882B.

The separation of issues

[12] Not all the issues ordinarily required to be proved to succeed with a contractual damages claim, were to be adjudicated before the high court. In regard to the application for absolution the question thus became whether there was evidence on which a court acting carefully might or could find for the CC *on the issues separated for determination*, not all the issues. The parties agreed at a pre-trial conference that 'the merits and quantum should be separated in terms of Rule 33 (4)[20] and that the trial would be confined at first to the merits of the plaintiffs' claims.' Where parties conclude such an agreement, the sub-rule nevertheless requires that it is for the court to grant such an order for separation. It will ordinarily do so, unless it appears that the issues sought to be separated, cannot conveniently be decided separately. But it remains for the court to identify the issues which it orders to be separated clearly and with precision, otherwise considerable prejudice could ensue.

[13] Thus, it has been held that:

'It is imperative at the start of the trial that there should be clarity on the questions that the court has been called upon to answer. Where issues are to be separated rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.'[21]

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[20] Rule 33 (4) provides:
'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

[21] *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para 21.

The high court however made no formal order and did not identify the issues separated with clarity and precision. It simply requested the pre-trial minute, referred to the paragraph number containing the parties' agreement, and then said 'Okay. Yes proceed.' The appellants' counsel then referred to the breaches of the agreement. Nothing was said as to whether causation would form part of the merits or quantum. The learned judge simply remarked 'Yes, thank you' and the trial proceeded. No formal separation was ordered. It seems that the parties might have been ad idem as to what was included under 'the merits', but that begs the question as to which specific issues the high court and any appeal court might consider should have been dealt with separately. It has been held by this court in *FirstRand v Clear Creek Trading*[22] that the failure to make a formal order for separation of the issues, and the failure to specify an issue with clarity, would render the process incompetent. This would be particularly so, as in the present case, where the failure to address the matter properly under rule 33(4), introduced uncertainty.

[14] The high court and the parties do not appear to have experienced any particular difficulty in this regard.[23] During argument before this court it was however suggested[24] to counsel that there was no evidence on causation, specifically in respect of an alleged loss of profits claimed. That question presupposes that the element of causation formed part of the merits that had been separated for determination. Because no formal order was granted, there is no order to interpret in accordance with the usual principles applicable to

[22] *FirstRand v Clear Creek Trading* 2018 (5) SA 300 (SCA) para 13-14.
[23] In this regard I respectfully go beyond the statement by Ponnan JA in paragraph 46 below. Not only had the parties approached the matter on the basis that the issues of liability and quantum had been separated and that the trial would proceed in relation to the former, but further that causation was not included under the merits.
[24] See also paragraph 46 below.

the interpretation of court orders. The uncertainty as to what might have been separated would work to the CC's prejudice if it was now found that it should have provided evidence on causation, whilst it had thought, that the requirement of causation was separated for subsequent determination. This uncertainty, whether real or perceived, simply reinforces the importance of issues separated for hearing always being formulated with precision and clarity.

[15] Accepting even in the absence of an express court order that the 'intention' was that the 'merits', whatever the exact meaning thereof might be, were to be separated, then the reference to the 'merits', in contradistinction to 'quantum', would still be ambiguous. On that basis alone, absolution should not have been granted, and the trial should be referred back for clarity to be obtained, the trial to continue, and the CC possibly to re-open its case, if so advised. If I am wrong in that conclusion then the discussion which follows remains apposite.

[16] It would be dangerous to speculate on what the non-existent order of separation possibly would have meant, by just having regard to the wording of the pre-trial minute. Nevertheless, the parties and the high court appeared to have accepted that causation was not an issue for determination. It is useful to have regard briefly to how the action was conducted, as such conduct is consistent with causation not having been considered as part of the 'merits'.

[17] As far as the learned judge was concerned, when Mr Osman commenced giving evidence of what 'other damages' the CC had suffered and he referred specifically to the 'loss of profits for the year 2008 after the

burglary', the court interjected and stopped the appellant's counsel stating, 'I thought that merits and quantum are separated'. Counsel responded, 'No, we are not going to the quantum' and the learned judge remarked approvingly, 'Oh, okay'. Counsel had clearly taken his cue from the learned judge who, on probability, would not have interrupted the evidence, if the issues separated for determination before him included causation.

[18] Likewise in his judgment, the learned judge did not refer to an absence of evidence regarding causation, as being a reason why the order of absolution should be granted. The high court simply held that the exclusionary clause in the agreement, excused ADT from liability to the CC for any loss, liability, injury, damage or claims of whatsoever nature, that the CC had irrevocably waived any claims that may arise out of contract or delict against ADT, and that the claim was not proved on a balance of probability. If evidence had been required on causation as well, then the failure to have adduced such evidence would have featured prominently in the judgment, just like the absence of evidence in support of Mr Osman's personal action featured in the high court's reasons for having granted absolution in respect of his claim.

[19] The court was responsible for formulating clearly which issues were separated. It did not do so. It was also never debated what order the high court would be required to make, should it, after a full trial, have decided the separated issue in favour of the CC. Presumably it would be a declaratory order that ADT was directed to compensate the CC for such damages as it would be able to prove it had suffered as a result of the breach of the agreement. That formulation would leave the issue of causation for subsequent determination.

[20] Considerations of convenience also render it unlikely that a separation of the 'merits', would have included causation. Evidence on causation would have to be repeated in the mechanical process of calculating the amount of the CC's damages. For example, the proof of the quantum of damages for computers stolen, would require evidence that computers were stolen, the number stolen and the value of each, which except for the last, would also be the evidence in respect of causation. To have separated causation as part of the merits, would result in a duplication of the same evidence, which would render such a separation not 'convenient' for the purposes of rule 33(4).

[21] The aforesaid uncertainty should have been clarified by the high court. The resultant ambiguity in the non-existent 'order', should not summarily be assumed against the CC. This is particularly so where the above facts and circumstances, indicate that the court was not even interested in hearing evidence on the general nature (loss of profits) of damages which the CC would contend had been caused by ADT's breach. For the purposes of adjudicating the application for absolution, the issue of causation did not and should not feature. The cursory manner in which the question of a separation of issues was dealt with, would be reason to refer the trial back to the high court. But absent such a referral considerations of practicality can be served by the order of absolution in respect of the CC's claim for that reason alone be dismissed, so that the matter may continue in the high court, and these issues can be addressed in that forum. At worst for the CC, evidence was given in general terms that the breaches of the agreement had resulted in it suffering various losses. That should satisfy the requirement of causation at the absolution stage, if causation in fact formed part of the 'merits'. On that basis,

alternatively, the basis that causation was not an issue before the high court, I turn to consider the facts and evidence the high court should have had regard to in deciding whether to grant absolution.

The facts and evidence the high court should have had regard to.

[22] For the purpose of considering whether absolution from the instance should have been granted, the relevant facts would be the allegations in the particulars of claim that were admitted in the plea, as widened by or explained in the evidence of Mr Osman in chief and reply, together with any concessions made by him during cross examination. Propositions put during cross examination as to what ADT's version might be when called upon to testify, not expressly admitted by Mr Osman, are not evidence and have no probative value.

[23] A court must not evaluate a plaintiff's evidence at the absolution stage, but must accept the evidence as true.[25] Nor should a court weigh up different possible inferences. It must rather determine whether any one inference, from a range of possible reasonable inferences, might favour the plaintiff.[26] The truthfulness or otherwise of Mr Osman's evidence and any conclusions drawn on what may be perceived to be the probabilities, would also be irrelevant at the absolution stage. Mr Osman was clearly an excitable witness, who felt very aggrieved by how he had been treated by ADT. Due allowance must be made for that, particularly where his evidence is considered in an application for absolution at the end of the plaintiffs' case. The statement by the high court

[25] *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C-E.
[26] *Gandy v Makhanya* 1974 (4) SA 853 (N) at 856B-C; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39.

in its judgment that the appellants had not proved their claims 'on the probabilities', was a misdirection.

[24] Keeping these very stringent considerations in mind, the following constituted the factual foundation on which the high court had to decide whether it should grant absolution, or not –

(a) The CC had concluded an agreement, with the terms set out above, in terms of which ADT was to render security services at its business premises. It was required to exercise reasonable care in doing so;

(b) At 06h48:38 on 21 December 2007 Mr Osman received[27] a text message on his cellular phone from ADT indicating that an emergency vehicle of ADT had 'responded to an alarm' at the premises;

(c) He attempted on numerous occasions to contact the offices of ADT, but was unsuccessful and they did not answer at all;

(d) At around 8h00 he proceeded to the premises where he found at the front that the locks were smashed, and the door had been left open. At the front door he found a slip of the kind issued by ADT when attending at the premises when the alarm had been activated, which recorded that the premises had been attended by a security response officer of ADT, Isaac, at 00h24 who, inconsistent with what Mr Osman discovered, recorded that he had found 'all in order';

(e) Mr Osman entered the building and realised that no one from ADT was present;

[27] Consistent with Mr Osman's evidence the plaintiffs' amended particulars of claim alleged that a short text message (sms) was received at 06h48:38. The defendant pleaded that a sms was sent at approximately 00h45:56 to cellular number 0824874512 advising that a reaction unit responded to a false emergency at the premises, but that it had no knowledge as to when the message was received by the recipient.

(f) He called ADT and a 'guard' Abel arrived to see what had transpired. Upon inspection they noted that the premises had been broken into at the front and also at the back, where the 'wall was broken down'. He discovered that various rims and tyres for motor vehicles, being stock in which the CC traded, and computers and cash had been stolen, and locks damaged;

(g) Mr Osman would have no personal knowledge as to when the premises were broken into early that morning.[28] The only information he had, was from a Customer History form for the period from 13 December 2007 to 2 January 2008[29] generated in the offices of ADT, which he introduced in evidence. It was not challenged that this history report accurately reflected the events contained therein. Additional matter put to him, as being what ADT's version of events would be, was invariably disputed and can therefore not be taken into account in deciding whether absolution should have been granted;

(h) According to ADT's own document, alarm signals were received from the premises twice at around 00h33, twice at around 00h47, twice at around 00h49, and once each at 00h50 and 00h51, that is eight times over a period of 18 minutes. These indicated that the alarm system had been triggered, in Mr Osman's words, at the 'front, front, front' of the building, which on probability would be indicative, as the only reasonable inference, that the building was being broken into at the front at that time. The repeated activations would be consistent, at the level of a reasonable inference, with continuous breaking-in activity

[28] The amended particulars of claim had alleged that a burglary took place at the premises at about 00h00.
[29] Significantly after each of the four distinct activations, the record reflects a 'restoral', which has not been explained by ADT.

and movement at the front of the building, where Mr Osman subsequently, not surprisingly, discovered evidence of a break in. Yet no one from ADT attended at the premises in response;

(i) Mr Osman also referred to the written report which he had found at the premises that morning around 08h00. He explained that the procedure was that ADT was to remain at the premises and to phone him whenever there was a break in.

[25] Had ADT discharged its obligations properly, the break in would, on probability have been detected and the intruders probably caught red-handed. ADT was then required to have safeguarded the premises and to have prevented further damage and loss. It did not do so.

The test for absolution from the instance

[26] The test for absolution, to be applied by a trial court at the end of a plaintiff's case, was formulated in *Claude Neon Lights (SA) Ltd v Daniel*[30] as follows:

'(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence lead by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff '.

This court added in *Gordon Lloyd Page & Associates v Rivera and Another*[31] that:

'This implies that the plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without

[30] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H.
[31] *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) para 2.

such evidence no court could find for the plaintiff. . . As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one . . . The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" . . . a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury. Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgement . . . Having said this, absolution at the end of the plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'

[27] The fact that a defendant had at that stage not yet given evidence, is often a cogent factor to be taken into account, particularly where the facts are within the peculiar knowledge of the defendant and the plaintiff has made out a case to answer. In those circumstances a plaintiff should not lightly be deprived of his remedy without the court first hearing what the defendant has to say.[32] Issues of negligence alternatively gross negligence are questions of fact best determined only after all the evidence has been heard. This is exactly the position in this matter.

[28] When the interpretation of a document foundational to a plaintiff's claim is in issue, a court will also normally refuse absolution unless the proper interpretation of the document is beyond question.[33] Generally, a trial court is a very chary of granting absolution at the close of a plaintiff's case.[34]

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[32] *Supreme Service Station (1969) (Pty) Ltd v Fox and Goodridge (Pty) Ltd* 1971 (4) SA 90 (RA) at 93.
[33] *Gafoor v Unie Versekeringsadvisuers (Edms) Bpk* 1961 (1) SA 335 (A) at 340; *Malcolm v Cooper and Others* 1974 (4) SA 52 (C) at 59.
[34] *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 526 H.

Discussion

[29] Although submissions were advanced as to the application of the Private Security Industry Regulation Act 56 of 2001 and the Regulations in respect thereof (the Act)[35], and the Code published in Government Notice 305 of 2003 issued pursuant thereto, these have no material bearing on the issues in the appeal. The exclusionary provision in the agreement did not offend against the provisions of the Act.[36] In terms of the wording of the exclusionary provision ADT did not, and indeed as a matter of law in terms of the provisions of the Act, could not contract out of liability for 'any malicious, intentional, fraudulent, reckless or grossly negligent act or omission'.

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[35] Section 8(3) of the Act provides that, 'Every security provider must endeavour to prevent crime, effectively protect persons and property and refrain from conducting himself or herself in a manner which will or may in any manner whatsoever further or encourage the commission of an offence or which may unlawfully endanger the safety or security of any person or property'.
Section 8(11) provides that a 'security service provider must in practising this occupation . . . always act in an honest and trustworthy manner'.
Section 9(5) provides that a security service provider 'must render the security service for which he or she has bound himself or herself contractually in accordance with the terms and conditions of the contract, the Act and this Code' and … with 'such a degree of skill, diligence and care as may be expected of a reasonable, competent and qualified security service provider in the circumstances'
In terms of section 9(15)(b) a security service provider may not 'intentionally or through gross negligence damage or lose any property of a client'.

[36] In terms of section 9(3) of the code:
'A security service provider may not-
. . .
(d) make a contractual offer to conclude a contract with the client containing any term, condition or provision that –
  (i) excludes, limits or purport to exclude or limit the legal liability of the security service provider towards the client in respect of any malicious, intentional, fraudulent, *reckless or grossly negligent act* or the security service provider, his or her security officers or other personnel, or any other person used by the security service provider or recommended by him or her to the client; or
  (ii) places a duty or purport to place a duty on the client to indemnify will compensate the security service provider or any other person in respect of any act referred to in subparagraph (i) by a person for whose conduct the client is not independently responsible in law;
(e) make a contractual offer or conclude a contract with the client containing any term, condition or provision that excludes or limits or purport to exclude or limit any duty on the security service provider in terms of the Act or this Code or any right which the client has in terms of this Act or this Code, or which constitute or purport to constitute a waiver of any such right by the client' (Emphasis added.)

[30] The high court should also have considered that there is a potential issue arising in regard to the proper interpretation of the agreement. I put it no higher at this stage, than that it seems incongruous that an agreement can positively undertake on the one hand that ADT 'would exercise reasonable care in the rendering of its services', that is according to an objective standard, but then simultaneously provide that ADT could contract out of liability for negligent conduct, which is determined with reference to that same objective standard. That issue, or at least how this apparent contradiction can be reconciled, should properly be considered only after all the evidence had been heard. The pleadings are wide enough to raise that enquiry, regardless of s 48 of the Consumer Protection Act[37] not having been pleaded specifically.

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[37] Section 48 of the Consumer Protection Act 68 of 2008 deals with 'Unfair, unreasonable or unjust contract terms. It provides:

(1) A supplier must not-
  (a) offer to supply, supply, or enter into an agreement to supply, any goods or services-
    (i) at a price that is unfair, unreasonable or unjust; or
    (ii) on terms that are unfair, unreasonable or unjust
  (b) . . .
  (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer-
    (i) to waive any rights;
    (ii) assume any obligation; or
    (iii) waive any liability of the supplier,

on terms that are unfair, unreasonable or unjust, or impose any such term as a condition of entering into a transaction.

(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-
  (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
  (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable ;
  (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
  (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and –
    (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
    (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.'

[31] That interpretation issue aside, the exclusionary clause did not, contrary to the finding of the high court, exclude liability for any grossly negligent act or omission.[38] Jurisprudentially it is now[39] accepted that gross negligence is different to and separate and distinct from negligence.[40] Whether an act or omission is negligent or grossly negligent, is a question of fact. Where the conduct in question falls peculiarly within the knowledge of the defendant, that question cannot be determined properly until all the evidence has been heard. A court should not be called upon to decide the issue of gross negligence until all the evidence is concluded.[41]

[32] The high court did not at all consider whether there was evidence on which a court might find that there was gross negligence. The established facts, in the absence of evidence in rebuttal, were consistent with recklessness, or at least gross negligence, which is what the CC had pleaded. It certainly could not be said that there was no evidence on which a court might or could find grossly negligent conduct on the part of ADT. The alarm was activated repeatedly on eight, but at least at four separate and distinct times, within a short period of 18 minutes. There was no reaction to those activations. On

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[38] In paragraph 41 below, Ponnan JA refers to the decision in First National Bank of SA Ltd v Rosenblum and another 2001 (4) SA 189 (SCA) at para6 – 7. I draw attention specifically to the dicta in that decision that an exclusionary provision, as in this appeal, is to be interpreted strictly. The court held that, '(t)he strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application…' In this matter liability for 'gross negligence' is not excluded. Yet the high court did not consider such liability at all.

[39] Contrary to earlier dicta in for example *Cape Town Municipality v Paine* 1923 AD 207.

[40] *Transnet Limited v Owners of the 'Stella Tingis'* [2003] 1 All SA 286 (SCA) para 7; *Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R). In an entirely different context of company law it is significant that s22 of the Companies Act 71 of 2008 provides for instances of a company carrying on its business 'recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose' (emphasis added)

[41] *Arthur v Bezuidenhout and Mieny* [1962] 2 All SA 506 (A); 1962 (2) SA 566 (A) at 573H.

those facts the alarm was ignored while access was being gained at the CC's premises. There was no evidence that ADT's staff could not attend; if was not even suggested that they could not attend. Their failure to attend in those circumstances, to properly inspect the premises, and had they done so, to protect and preserve the premises, could or might be reckless, but at the very least would give rise to a reasonable inference of gross negligence. There has, as yet, been no answer to that evidence. Consequently, only one inference can arise. Whether it might ultimately be the appropriate inference is not part of the enquiry at the absolution stage, but can only be determined at the end of the trial.

[33] When an application for absolution is considered at the end of a plaintiff's case is not the time to cast scorn on the plaintiff's prospects proving that it has suffered a particular form of damages. That would amount to an impermissible premature determination that the balance of probabilities don't favour the CC, at a time when there is no evidence contradicting the only evidence before the court. ADT should not have been absolved from the instance in respect of the CC's claim and the appeal must accordingly succeed to the extent that the order of absolution from the CC's claim is set aside.

Costs

[34] The CC has been successful and Mr Osman unsuccessful in this appeal. Most of the argument during the appeal was devoted to the order granted against the CC. In the exercise of this court's discretion on costs it would be appropriate if ADT is directed to pay 80% of the appellant's costs. A similar costs order would be appropriate in respect of the application before the high court.

Order

[35] I would grant the following order:

1 The appeal by the first appellant is upheld;

2 The appeal by the second appellant is dismissed;

3 The order of absolution granted with costs by the court a quo is set aside and is replaced with the following orders:

‘(a) The application for absolution in respect of the first plaintiff’s claim, is dismissed.

(b) The application for absolution in respect of the second plaintiff’s claim is granted.

(c) The defendant is directed to pay 80% of the plaintiffs’ costs of opposing the application for absolution.’

4 The respondent is directed to pay 80% of the appellants’ costs of the appeal.

P A Koen AJA

Judge of Appeal

Ponnan JA (Saldulker, Mokgohloa and Nicholls JJA concurring)

[36] I have had the benefit of reading the judgment of Koen AJA, who proposes to uphold the appeal of the first appellant (the CC) and dismiss the appeal of the second appellant, Mr Osman. Whilst I agree with my colleague in respect of Mr Osman's appeal, I regret I arrive at a contrary conclusion as to the fate of the CC's appeal.

[37] Koen AJA states that the particulars of claim are not a model of clarity. In that, he is being unduly charitable to the appellants. The particulars of claim provide:

'5.1 On or about 16th of February 2005 the first plaintiff, as duly represented by the second plaintiff, entered into a written agreement with the defendant as duly represented by Rina Du Toit, at Rustenburg.

5.2 The material terms of the agreement were inter alia as follows:

5.2.1 That the defendant will render telephonic monitoring, radio monitoring, medical response and armed response services in respect of the first plaintiff's premises situated at 28 Hollyhock Street, Zinnaville, Rustenburg.

5.2.2 That the defendant shall exercise reasonable care in the rendering of the above stated services.

5.2.3 That the agreement is for an unfixed period, subject to the terms in respect of termination or suspension of the agreement as contemplated in clause 10 of the agreement.

5.2.4 That the first plaintiff will pay the monthly fee, charged by the defendant, annually in advance.

5.3 At all relevant times hereto the annual fee was paid to the defendant by the first plaintiff alternatively second plaintiff further alternatively first and second plaintiffs, and the defendant had the contractual obligation to act in accordance with the provision of paragraph 5.2 above.

5.4 A copy of the service agreement is hereto attached as annexure 'A'.

6.1. On or about the 15th of June 2005 the Defendant confirmed in a letter, called security service confirmation, that:

6.1.1 That the defendant confirms security services at 28 Hoolyhock Street, Zinniaville, Rustenburg as from March 2005.

6.1.2 That the security system linked by a radio to the defendant's 24 hour, fully computerised SAIDSA approved control room and 24 hour armed response service, in respect of the first plaintiff's premises, is operative.

6.2 A copy of the above stated letter is hereto attached as annexure 'B'.

7. On or about the 21st of December 2007, and about 00h00 a burglary took place at the premises of the first plaintiff. An employee of the defendant, known as Isaac, who at all times acted in the scope of his employment, responded to the activation of the alarm at the premises of the first plaintiff, at 00h24, but reported that all was in order. A copy of the relevant alarm activation report is hereto attached as annexure 'C'.

8. On or about 06h48:38 on the 21 December 2007, the second plaintiff received a short text message from the defendant indicating that the defendant's reaction unit has responded to an emergency signal at the first plaintiff's property.

9. The first plaintiff, as duly represented by the second plaintiff, immediately attempted to contact the defendant telephonically to establish the whereabouts of the emergency signal, but could not get hold of the defendant.

10. When the first plaintiff, as duly represented by the second plaintiff arrived at the premises on or about 8h05 on the 21st of December 2007 the second plaintiff observed:

10.1 That a burglary took place as the door locks and walls to the premise were broken by force.

10.2 That the alarm system was disconnected and destroyed beyond repairs.

10.3 That a big amount of stock, in form of tyres, spares and rims were stolen from the premises.

10.4 That significant computer data was stolen.

10.5 That amounts in cash were stolen which were kept in a safe on the premises.

10.6 That the fax machine used on the premises was stolen.

10.7 That architect plans and engineering plans were stolen.

10.8 That the balancing machine was damaged.

10.9 That an antique till was stolen.

10.10 That an antique safe was stolen.'

[38] Pleadings play a vital role in litigation. The purpose of pleadings is to bring to the attention of the court and the other party the issues in the case. They must be lucid, logical and in an intelligible form, because they define the issues as well as the scope and ambit of the dispute between the parties. It will be immediately apparent that the amended particulars of claim in this case fall short in several respects.

[39] The CC's claim is one in contract. In that regard, reliance was placed on a written agreement. Although the relevant provisions relied upon by the CC were not pleaded, the entire agreement was annexed to the particulars of claim. Thus, one simply does not know which provisions of the written agreement are alleged to have been breached or in what respects. The agreement described as a 'Service Agreement' consisted of some six pages. The first page, which is in the nature of an offer to ADT by the customer, contains a block for the insertion of the customer's details. Immediately thereunder is a block under the heading 'Service Levels'. Three levels of service are described: maintenance; monitoring and armed response. For the present, the first is not relevant and I shall pass over the second. The third provides:

'The Armed Response Services are only applicable for Premises in areas which are patrolled by ADT and consist only of:

Attendance by armed personnel at the Premises as quickly as operational circumstances may permit in response to activation signals received from the system if no satisfactory explanation is given telephonically from the premises;

On arrival of such armed personnel at the Premises, such further steps as may be reasonably necessary to safeguard the Premises, the contents thereof, the Customer and/or Customer's invitees'.

[40] Pages two and three of the agreement contain the terms and conditions. Those, inter alia, provide:

'4.2 The System is designed to reduce the risks of loss or damage at the Premises so far as this can be the use of this type of equipment. We do not, however, guarantee that the System cannot be tampered or interfered with, or that there will be no miscommunication problems, or prevent working by you or by any other person. We are accordingly not liable to you for any loss or damage any other party may suffer however arising from any such removal, tampering, interference or System being prevented from working in any manner:

4.3 Furthermore, ADT do not undertake or guarantee to the Customer that:

4.3.1 Particular losses or injuries will be prevented by using the System and/or the Services;

4.3.2 The System and/or the Services will work continuously and without error; or

4.3.3 The radio signals or any other communication cannot be disrupted.

. . .

6.1 The Customer acknowledges that to the extent that the Services function as a deterrent, they are not a guarantee of safety against or prevention of loss, liability, injury and damage of whatsoever nature and howsoever arising. Accordingly while ADT shall exercise reasonable care in the installation of the System and in the rendering of the Services, nothing herein contained shall be construed or interpreted in any manner whatsoever as providing the Customer or any third party whomsoever with any guarantee or assurance of safety or against any loss, liability, injury or damage of whatsoever nature and howsoever arising.

6.2 Subject to the provisions of the Act, neither ADT nor any other person for whom ADT may be liable in law shall be liable to the Customer in respect of or pursuant to any loss, liability, injury, damage or claims of whatsoever nature (including without limitation any loss of profits and/or any special and/or consequential loss or damages) whether arising through the rendering or non-rendering or attempted rendering by ADT of the Services in

terms of this Agreement or in delict or otherwise whether at the Premises if any such loss, liability, injury, damage or claims arise as a result of or pursuant to any innocent or negligent act or omission on the part of ADT or any other persons for whom ADT may be liable in law.

6.3 Subject to the provisions of the Act, the Customer:

6.3.1 hereby irrevocably waives all and any such claims referred to in clause 6.2 above;

6.3.2 hereby irrevocably indemnifies ADT or any other person for whom ADT may be liable in law against all claims of third parties arising out of the said acts or omissions, as referred to in clause 6.2 above, at the Premises.

. . .

6.6 The Customer hereby agrees and acknowledges that the System and/or the Services are complementary to insurance cover and do not provide an alternative to such insurance cover. It remains at all times the duty of the Customer to ensure that the Customer has adequate insurance where necessary and that the Premises and contents thereof (including the premises for which the Customer, not being the owner thereof, is nevertheless responsible) adequately insured.'

[41] In *First National Bank of SA Ltd v Rosenblum and another* 2001 (4) SA 189 (SCA) paras 6–7, Marais JA stated:

'Before turning to a consideration of the term here in question, the traditional approach to problems of this kind needs to be borne in mind. It amounts to this: In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. This strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful

basis of potential liability to which the clause could apply and so have a field of meaningful application. . . .

It is perhaps necessary to emphasise that the task is one of interpretation of the particular clause and that caveats regarding the approach to the task are only points of departure. In the end the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common law and, now, with due regard to any possible constitutional implication.'

[42] The exclusionary clauses in this case are not ambiguous. They clearly state that while ADT shall exercise reasonable care, it gives no guarantee; that the contract is not an alternative to insurance; and that it is not liable to the CC for any damage or loss incurred. Nothing could be plainer. Koen AJA, para 8, states: 'In identifying the material issues relevant to the CC's contractual claim, reference must be had not only to the issues pleaded but also to the issues arising from the pleadings being widened by the evidence.' However, as Harms DP pointed out in *KPMG Charted Accountants* (SA) *v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 para 39:

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . . Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question'.

[43] Where, as here, a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying

the written contract. (see *Johnson v Leal* 1980 (3) SA 927 (A) at 938). What is more, clause 11.8 of the agreement records that:

'This Agreement is the entire agreement between ADT and the Customer's and ADT shall not be bound by any representations, undertakings, promises or the like not specifically recorded or incorporated herein. No variation of this agreement, waiver of rights, release from any obligations or any consensual cancellation in terms of this Agreement shall have no effect unless in writing and signed by both ADT and the customer.'

[44] Mr Osman testified at the trial. No other witnesses were called. He tried to suggest that at the time of signing the agreement, certain oral representations had been made to him by an employee of ADT. That evidence was plainly inadmissible. Under cross examination, after the exclusionary clauses alluded to were put to Mr Osman and he was asked, '[y]our summons says the opposite and I am simply asking you to explain to the court on what basis do you say the opposite to what you agreed to?, he replied: '[p]erhaps on the fact that I did not read the contract'. The evidence then ran thus:

'Well unfortunately Mr Osman [it] is going to be argued that you are bound by the fine print. . . .

My Lord, I cannot be bound by something that is drawn up against the client. A contract that is prejudice the client in the very first instance of that if the company in question draws up this contracts they can walk away from responsibility and that I am not prepared to accept regardless of how well the contract is written, how many legal terms that are on the contract the important thing is ADT does nothing for me'.

[45] A consideration that appears to weigh with Koen AJA (para 12) is the failure of the high court to separate the issues 'with clarity and precision'. It is so that in *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile*

Telephone Networks (Pty) Ltd and Another [2009] ZASCA 130; [2010] 2 All SA 9 (SCA) paras 89–90, this court cautioned:

'Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of the stated case or otherwise. If a decision on the discrete issue disposes of a major port part of a case, or will in some way lead to expedition it might well be desirable to have that issue decided first.

This court has warned that in many cases, once properly considered, issues initially thought to be discreet are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.'

However, as pointed out in *Consolidated News Agencies* para 86 '[t]he pleadings and the evidence should not be viewed microscopically. It is necessary to step back to see the bigger picture'.

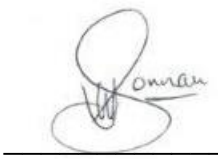
[46] In my view, although no formal order issued in terms of rule 33(4), the CC could not have been under any illusion as to the elements of the claim that had to be satisfied to survive absolution. The rule 37 minute recorded the parties' agreement that 'the merits and quantum should be separated in terms of Rule 33(4) and that the trial be confined to the merits of the plaintiffs' claim'. The parties appear to have approached the matter on the basis that the issues of liability and quantum had been separated and that at that stage the matter would be proceeding to trial only in relation to the former. That, it seems, is the basis on which the high court also approached the matter. That is where matters stood until it was first raised by a member of the court. It was not advanced on behalf of the CC, either in the heads of argument or by counsel during argument from the bar. It has never been suggested that the CC has suffered any prejudice as a result of the manner in which the trial

proceeded pursuant to the separation agreed upon at the rule 37 conference. Nor, it seems to me, could such a contention be advanced. After all, the CC was the plaintiff and thus the master of the suit. I, thus, simply cannot see how this point, which was never invoked by the CC, can be held to be decisive against ADT at this stage of the proceedings.

[47] However, on my analysis of the case, this hardly matters, because on a proper interpretation of the agreement, which is a matter for the court, the CC has failed to make out a prima facie case. The evidence of Mr Osman does little to tip the scales in its favour. If anything, properly construed, his evidence only serves to further detract from the CC's pleaded case. If the appeal were to succeed, I cannot conceive how things could possibly get any better for the CC. Thus, despite the fact that absolution from the instance at the end of the plaintiff's case, should be granted sparingly, it is clearly in the interests of justice for such an order to issue in this case.

[48] I accordingly cannot agree with Koen AJA that the order absolving ADT from the instance should be disturbed. In my judgment no court could find for the CC.

[49] In the result, I would dismiss the appeal with costs, to be paid by the appellants jointly and severally, the one paying the other to be absolved.



V M Ponnan

Judge of Appeal

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