REPUBLIC OF SOUTH AFRICA

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

CASE NO: 25057/2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

11/02/2020

SIGNATURE DATE

In the matter between:

ZANDSPRUIT CASH AND CARRY (PTY) LTD	First Plaintiff
DEVLAND CASH AND CARRY (PTY) LTD	Second Plaintiff
G4S CASH SOLUTIONS SA (PTY) LTD	Defendant

JUDGMENT

MATOJANE J

Introduction

[1] The first plaintiff ("Zandspruit") and the second plaintiff ("Devland") were respectively victims of impersonators who tricked them into believing that they were authentic security guards of the defendant ("G4S") performing G4S cash collection services.

[2] In each case the impersonators followed the procedures utilised by G4S in conducting cash collections for purposes of cash in transit collection and deposits inclusive of uniforms, identification books, receipt books and cash boxes that resembled that of G4S.The first plaintiff (Zandspruit) and the second plaintiff ("Devland") unwittingly handed over to the impersonators sums of R265 465.25 and R641 744.00 respectively believing them to be employees of ("G4S").

[3] To recover the loss, the Zandspruit and Devland instituted an action against G4S alleging that their loss was attributable to G4S in that it failed to warn plaintiffs' of incidents which have occurred in the industry and also in regard to client of G4S, where criminals have stolen money from victims including clients of G4S, by fraudulently pretending to be associated with G4S.

Summary of the evidence

Zandspruit Cash and Carry (Pty) Ltd

[4] The case of Zandspruit is that on 3 April 2010 it fell victim to a bogus pickup whereby an amount of R 265 465.25 was stolen from its premises. Mrs Kgampe gave evidence on behalf of Zandspruit. She did not recognize the imposter security guard that arrived on that date to collect cash. The imposter security guard wore a uniform that was identical to G4S uniform. It was a white shirt with the G4S logo and blue causes.

[5] She testified that the imposter security guard had a plastic ID card that was clipped to his chest, which included a photo identifying the imposter as a security guard. She conceded under cross-examination that at the time of handing the case over to the imposter, she had not identified the imposter from his identification card.

She also conceded under cross-examination that G4S' usual identification card was a cardboard type booklet.

[6] Mrs Kgampe handed the cash over to the imposter in sealed bags, and it was placed in a collection box provided by the imposter which matched a coded electronic key supplied by G4S and the imposter provided receipts for the sealed cash bags that were handed to him on behalf of Zandspruit.

[7] She was not trained in the security measures that are contained in the induction pack which Mr Yusuf Bhana for Devland confirmed that he was familiar with and could not recall the box making the usual electronic noise when it is opened.

[8] Mr Du Tiro a security guard at Zandspruit gave evidence on behalf of Zandspruit. He recognized the imposter's vehicle due to its colour, G4S logo and some feature at the front. When he was shown a video of the imposter vehicle which did not have structural features similar to those of the armoured vehicle used by G4S he stated that the incident occurred some time ago and he could not remember those details.

[9] Mr Lou Calitz the national investigations manager of G4S testified that the imposter vehicle was not identical to a G4S vehicle. According to him, the G4S vehicle has an armoured windscreen, a two-way aerial radio, ventilation outlets on the roof of the vehicle a bolted rear door and a rear step at the base of the vehicle that allowed guards to enter and exit the heavy equipment. Mr Du Tiro, a security guard at Zandspruit, could only confirm that the imposter vehicle was blue had a G4S logo and some feature of the front he could not record any of the other specific features of a G4S armoured vehicle. He could not recall much as the incident occurred a long time ago.

[10] From the video of the incident, Mr Calitz testified that the bogus collection box was not the standard G4S electronic device. It was not even a mimicked version. He testified that the genuine collection box is carried by the left hand with the key on the right hand. He noticed that the collection box had clasps that suggested it was a

coinage box as opposed to the standard electronic collection box used by G4S. The bogus collection box presented by the imposter did not have any of the features that characterise an authentic G4S electronic collection box

Devland Cash and Carry (Pty) Ltd

[11] The case for Devland is that on 12 March 2011 an imposter provided what appeared to be an official G4S identification card to Mr Yusuf Bhana. He handed the key for the collection box to the imposter to open the collection box. He testified that the imposter appeared to use the key to open the collection box and he heard a noise when it was open, which is part of G4S security protocol.

[12] The identification card presented to Mr Yusuf Bhana by the imposter security guard identified the imposter as "Masisi". He testified that the imposter security guard wore a uniform that was identical to the G4S uniform except that the imposter also wore a cap which does not form part of the uniform of G4S security guards.

[13] Mr Imtiaz Bhana gave evidence on behalf of Devland, he testified that he confirmed with G4S call centre that a "Masisi" was scheduled to attend to the Devland collection that day. An amount of R641 744.00 was handed over to the imposter.

[14] Mr Calitz testified that although the cash collection box that was utilised by the imposter presented similar features to the electronic collection box utilized by G4S in that it made a noise when it was allegedly opened, it could not have been the G4S collection box which could be opened by the key provided to Devland. The legitimate G4S collection box would have exploded unless it was properly activated in time by the various mechanisms that are contained in an official G4S armoured vehicle.

[15] Mr Calitz testified further that bogus pick-up schemes in which G4S customers were the target were taking place prior to the incident that occurred in Zandspruit and Devland. Every incident was recorded and given a case number.

[16] He testified that during such bogus pick-ups G4S uniform or similar was used to make customer believe that the person collecting the cash was a G4S security guard. Falsified or stolen G4S ID books were used to satisfy the identification requirement in the G4S procedures, similar cash boxes were used as these containers were expect by customers as they were used in cash collections and vehicles were made to look like G4S vehicles and stolen or falsified receipt books were used.

[17] Mr Calitz conceded under cross examination that if bogus pick-ups were occurring in one area, it was just a matter of time until the other area was also hit. He explained that it is a procedure for a branch of G4S to inform its own customers in the area if there were incidents that occur in the area. He explained that communication was limited to a particular area so as not to encourage further bogus pick-ups

[18] The alleged breach of legal duty was defined as follows in paragraph 9.6 of the particulars of claim:

> "All material times hereto the defendant failed to advise the plaintiff that cash in transit:
> 9.6.1 security employees uniforms and/or official authorization cards had been lost or stolen;
> 9.6.2 vehicles were utilized without the necessary authority, alternatively that there were conspirators at work who had converted vehicles to look identical or very close to those of the defendant"

[19] In paragraph 9.6A the plaintiffs state:

> "All material times hereto the Defendant failed to advise the plaintiffs that cash collection boxes and/or keys to cash collection boxes had been lost or stolen or could be duplicated or used by unauthorized individuals."

[20] G4S pleaded to the allegations contained in paragraph 9.6 as follows:

"Defendant admits that it did not advise plaintiffs regarding the allegations contained in paragraph 9.6 as the factual basis for the allegations did not exist at the relevant time; alternatively the defendant was not aware of the existence of the facts underlying the allegations, alternatively the defendant was not legally obliged to do so. In any event, defendant pleads that it was public knowledge at the relevant time that incidents have occurred in the industry, also in regard to clients of the defendant, where criminals have stolen money from victims, including clients of the defendant, by fraudulently pretending to be associated with the defendant or other security service providers in the industry."

[21] The plaintiffs' next allegation in the particulars of claim in 9.7 is that:

"At all material times hereto the Defendant] failed to inform the plaintiffs of previous incidents whereby the scheme or the second scheme had been adopted by persons known or unknown in respect of other clients of the defendant alternatively within the industry known to the defendant."

[22] In summary, it appears from the pleadings and the evidence of Mr Calitz that G4S knew that its clients and that of other cash in transit providers had been victims of bogus pick-up schemes in which criminals stole money by fraudulently pretending to be associated with G4S or other cash in transit service providers and G4S did not advise the plaintiffs because "*it was public knowledge at the relevant time that incidents have occurred where criminals have stolen money from victims, including clients of G4S by fraudulently pretending to be associated with G4S or other security service providers in the industry*".

Issue and submissions by the parties

[23] The issue that the court has to decide is whether the contract that exists between G4S and the plaintiffs prevent the plaintiffs from instituting an action in the delict pleaded. Counsel for G4S argues that the parties have chosen to regulate their relationship under a contract which would not ordinarily permit the recognition of a delictual duty at variance with the contract. Counsel refers to clause 5.1 of the contract which states that *"Fidelity shall collect, convey, store, and deliver Money in*

accordance with its operating methods as amended from time to time" and submits that the contract between the parties precludes the cause of action based on delict.

[24] The court in Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd 2019 (3) SA 580 held that delictual claims were competent where there was an agreement concluded between the parties. In paragraph 41-42 the court stated

> "...a case is made out that a duty in delict may be recognised, separate from the agreement that is said to have given rise to the business relationship. Thus, a duty in delict which is separate from the agreement is properly pleaded.
>
> This is so for these principal reasons. First, the delictual duties relied upon by Pilot as an incident of the business relationship are not repugnant to the agreement subsisting between Pilot and Trio. Rather these duties complement and expand upon the contractual obligations undertaken by the parties. For example, the duty not to impart confidential information to a third party goes beyond the terms of the agreement. Second, although the delictual duties may not have come into being independently of the agreement, it is not the causal origin of the duties that signify. They are duties that arise separately from the agreement by reason of a business relationship subsisting between the parties. Third, the business relationship that is said to give rise to the duties in delict is not at variance with the autonomy principle but an extension of it. It is a relationship voluntarily assumed by the parties."

[25] The constitutional court in Loureiro and Others v Imvula Quality protection services[1] held that the security guard owed Mrs Loureiro and her children a legal duty, even though they were not a parties to the contract with Imvula. Mr Loureiro entered into an oral agreement with Imvula Quality Protection (Pty) Ltd for a 24-hour armed security guard service at his home. He instructed Imvula not to allow anyone onto the premises without his prior authorization. Robbers masquerading as police officers approached the home and demanded entry. The security guard on duty was unable to communicate over the intercom with the men seeking entry, he opened the pedestrian gate without first checking their identity or business. The robbers then entered the property and robbed the family.

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[11] 2014 (3) SA 394 (CC)

[26] The court held that Imvula was liable for breach of contract by allowing access to the imposters. The Court held that, in its conclusion on wrongfulness, the majority in the Supreme Court of Appeal failed to have regard to weighty normative and constitutional considerations. Wrongfulness was established because Imvula's employee opened the gate for the robbers. There is a great public interest in ensuring that private security companies and their guards, in taking on the remunerated role of crime prevention, succeed in thwarting avoidable harm. Imvula's employee furthermore acted negligently by failing to foresee the possibility that an unauthorised person might try to gain access by purporting to be someone he is not; and by failing to take the fairly simple precautions a reasonable person in his position would have taken to guard against the harm.

> "There are ample public-policy reasons in favour of imposing liability. The constitutional rights to personal safety and protection from theft of or damage to one's property are compelling normative considerations. There is a great public interest in making sure that private security companies and their guards, in assuming the role of crime prevention for remuneration, succeed in thwarting avoidable harm. If they are too easily insulated from claims for these harms because of mistakes on their side, they would have little incentive to conduct themselves in a way that avoids causing harm. And policy objectives (such as the deterrent effect of liability) underpin one of the purposes of imposing delictual liability. The convictions of the community as to policy and law clearly motivate for liability to be imposed."

[27] In the present case, Mr Gathoo the director of the plaintiffs testified that the G4S was specifically contracted to take cash from the plaintiff's stores and depositing it safely with the bank. The loss that the plaintiffs have suffered originate from the services that G4S was contracted to provide. In G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry[2] the SCA dealing with the services that G4S provided stated at para 14:

> "Turning to the wording of the agreements, and in particular clause 9 thereof read within the context of the agreements as a whole, it has to be borne in mind that the

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[2] 2017 (2) SA 24 (SCA)

> nature and commercial purpose of the contractual relationship between the parties is that of a services agreement in terms of which the appellant [i.e. G4S] is to perform cash management services for the respondents [i.e. the plaintiff], which would entail the collection, conveyance, storage or delivery of money by the appellant. Clause 9 deals with 'Liability and Risk', providing for exclusions and limitations to the appellant's liability for loss or damage suffered by the respondents 'pursuant to or during the provision of services'. In particular, clause 9.1 provides that the appellant shall not be liable for any loss or damage howsoever arising or for any reason whatsoever suffered by the respondents 'pursuant to or during the provision of services' by the appellant, unless such loss or damage is the direct result of the gross negligence of or theft by the appellant's employees, acting within the course and scope of their employment, and which occurs while the money is in the custody of the appellant. In my view, this wording clearly conveys that the loss or damage in respect of which the appellant wished to restrict its liability is a loss or damage suffered by the respondents pursuant to or during the provision of services by the appellant to the respondents. Differently put, it is a loss or damage which has its genesis in the provision of services by the appellant to the respondents".

[28] In my view, the moral and legal convictions of the community demands that where, as in the present case, G4S is aware that criminals were impersonating its own security guards and its procedures using similar uniforms, receipts and cash boxes, it must make its clients aware of the hidden dangers in allowing guards to enter their premises to collect cash. The fact that the relationship between the parties is governed by contract does not make failure by G4S to warn the plaintiffs of that danger any less a fault which, independent of the origin of the danger, grounds an action in delict.

[29] The plaintiffs are bearers of fundamental rights to life, liberty and security of the person, and have the rights not to be arbitrarily deprived of property as contained in section 10, 12 and 25 of the Constitution.

[30] I find that the failure by G4S to warn its clients of the aforementioned hidden danger of which it is aware of is an omission which grounds an action in delict.

Contributory negligence

[31] Because G4S did not inform Mr Gathoo that criminals were impersonating its security guards and collecting cash under the pretence of performing cash collections services on behalf of G4S, Mr Gathoo would not have had a false sense of security about G4S procedures. He could have requested G4S to increase or improve its security measures to his satisfaction or consider alternative service providers.

[32] Mr Kgampe and other employees would have been on their guard and every collection would have been given heightened scrutiny and attention. In my view, even if Mrs. Kgampe had checked the identification card of the imposter like Imtiaz Bhana did, she would still have been tricked in handing over the cash as she had no reason to suspect that the imposter was not from G4S.

[33] For the aforegoing reasons, I find that there was no contributory negligence by the employees of the plaintiffs.

[34] In the result judgment is granted in favour of the plaintiffs

Order

1. Judgment is granted in favour of the plaintiffs as follows:

    1.1 First Plaintiff's claim:

        1.1.1 Payment of the amount of R265 465.25 with interest thereon at 15.5% per annum *a temporae morae*

        1.1.2 Costs of the suit

    1.2 Second Plaintiff's claim:

        1.2.1 Payment of the amount of R641 774.00 with interest thereon at 15.5% per annum a *temporae morae*

        1.2.2 Defendant to pay the costs

JUDGE K.E MATOJANE
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

APPEARENCES

Counsel for plaintiff:	Advocate AJ D'Oliveira
Attorney for plaintiff:	Ziyaad E Patel Attorneys
Counsel for defendant:	Advocate G Herholdt
Attorney for defendant:	Webber Wentzel