IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

11/8/15.

CASE NO: A55/15

In the matter between:

ATD SECURITY SERVICES CC Appellant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

06/08/15
DATE

SIGNATURE

and

FREDERIK JOHANNES ANTON BRINK Respondent

JUDGMENT

Tuchten J:

1 This is an appeal against a decision in the magistrate's court upholding the respondent's claim for damages against the appellant arising from a written agreement (the agreement) concluded between the parties. I shall describe the parties as they were in the court below, ie as defendant and plaintiff respectively.

2 The agreement provided that the defendant was to supply the plaintiff, a miner who operated a digging, with two guards to guard his equipment at his site on the farm Syferfontein in the Wolmaransstad district. One guard was to be on duty during the day and one at night. This case concerns the conduct of the night guard.

3 Clause 2 of the agreement provides:

> The general duties of the guard/s shall be to monitor the premises or part of the premises where he/they had been placed and to immediately sound alarm, should he/they notice any crime or unusual occurrence.

4 The evidence showed that the night guard was placed to monitor the whole of the plaintiff's site. The site was one hectare in extent. No digging or mining operations took place at night. The night guard was supplied with a cellphone, a torch and a firearm. Other than the guard's torch, there was no source of light.

5 During the night of 25 July 2008 or the early morning of the following day some three tons (about 75 running metres) of electrical cable belonging to the plaintiff was stolen from the site. The plaintiff testified that he arrived at the site on 26 July 2008 to find the night and day guard both present. The plaintiff did not say what time he arrived there

but it must have been early in the morning. The plaintiff discovered the loss. The cable had been laid on the surface to connect the plaintiff's equipment to his electricity supply, which in this case was a generator.

6 On inspection, the plaintiff found that the cable had been cut from where it was attached and then dragged away to a spot in the veld, some 200 metres from the plaintiff's site, where the cable was burnt, no doubt to remove those components which were of no value to the cable thief or thieves. The components of the cable which remained after the cable had been burnt were then removed by the thief or thieves.

7 A relatively large quantity of cable such as this was probably removed in a vehicle or vehicles and probably was stolen by a gang. No alarm was raised.

8 On these facts the plaintiff alleged in his summons that the guards neglected to monitor the premises or neglected to raise any or any adequate alarm or neglected to notice the theft in circumstances in which they would reasonably have been expected to do so.

9 Neither of the guards (who were not named in the evidence) was called to give evidence. However, Mr de Witt, employed by the defendant as a supervisor, gave evidence. He confirmed that he was notified at dawn on 26 July 2008 of the theft by one of the guards. De Witt was understandably unable to shed any light on the circumstances of the theft. He testified that the guards were no longer in the defendant's employ by the time of the trial in the court below and that he did not know where to contact them. He also explained that there was a caravan on the site in which the guard who was not on duty would sleep.

10 The issue at this level of the case is whether the plaintiff established, on a balance of probabilities, that the guards either were not monitoring the site at the relevant time or, although monitoring the site, did not raise the alarm when the theft took place.

11 The magistrate found that the plaintiff had proved the breach of the agreement pleaded and ruled in favour of the plaintiff and against the defendant on the merits. Thereafter quantum was determined.

12 On appeal it was submitted by counsel for the defendant that it was a natural and plausible inference on the evidence that the guard, while patrolling the site, simply did not see the cable theft taking place

because it was so dark and the thieves were acting silently, that the thieves could have stolen it by attaching it to a bakkie, cutting it away from the generator and speeding away. Or, submitted counsel, the thieves might have threatened the guard or his family with violence.

13 The difficulty with these submissions is that they ignore the proven facts. Firstly it is improbable that in that isolated rural setting, the thieves could have stolen the cable without alerting the guard, if he was in fact monitoring the site. The noise alone, produced by cutting the cable from the generator and dragging it to the spot where it was burnt, would be enough to alert any guard who was in fact on watch. If this was done with the help of a vehicle, the noise would have been even greater. Secondly, the submission ignores the proven fact that the thieves did not speed away with the cable. They dragged it some 200 metres and then burnt it. The flames of the thieves' fire and the smell of the burning plastic cable coating would have alerted any guard who was monitoring the site as required by the agreement. Thirdly, the guards did not raise the alarm until the next morning. That gives rise to a strong inference that the guard either did not know the theft was taking place or, knowing of the theft, decided not to raise the alarm.

14 On any of these bases, there was a breach by the defendant of its contractual obligations either to monitor or to raise the alarm. There was no suggestion in the evidence that either of the guards had reported that he was threatened by the thieves if he reported the theft.

15 The defendant raised a further defence on the strength of clause 9 of the agreement, which provides:

> It is recorded by the parties hereto that the security service provided in terms of this agreement, are complimentary [*sic*] to and not an alternative to insurance cover. It shall be incumbent on the Second Party [ie the plaintiff] to ensure that all of its property is adequately insured.

16 Counsel for the defendant submitted that clause 9 properly interpreted expressly excluded liability for damages on the part of the defendant.

17 I cannot agree. Clause 9 in effect provides that the agreement is not to be read as affording the plaintiff an indemnity in relation to any loss or damage to property of the plaintiff. The plaintiff is not seeking to hold the defendant liable on an indemnity. Clause 9 simply does not purport to exclude any liability that would otherwise attach to the defendant for breach of the agreement.

18 The appeal can therefore not succeed. The defendant applied for condonation for certain shortcomings in relation to the rules. The application for condonation was not opposed but the defendant must pay the costs of the application for condonation. I make the following order:

1 The application for condonation is granted.

2 The appeal is dismissed.

3 The appellant (defendant in the court below) must pay the costs of the application for condonation and of the appeal.

NB Tuchten
Judge of the High Court
6 August 2015

I agree.

S Magardie
Acting judge of the High Court
6 August 2015

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