



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 384/11

In the matter between:

GLENVILLE MERVIN KOGANA

Appellant

and

SBV SERVICES (PTY) LTD

Respondent

Neutral citation: *Kogana v SBV Services* (384/11) [2012] ZASCA 25
(23 March 2012)

Coram: NAVSA, NUGENT, CACHALIA and TSHIQI JJA
and PETSE AJA

Heard: 5 MARCH 2012

Delivered: 23 MARCH 2012

Summary: Breach of duties by security employees – robbery –
whether causal link established between breach
and the loss.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Tokota AJ sitting as court of first instance):

The appeal is upheld with costs. The order of the court below is set aside and substituted with an order absolving the first defendant from the instance with costs.

JUDGMENT

NUGENT JA (NAVSA, CACHALIA and TSHIQI JJA and PETSE AJA CONCURRING)

[1] The respondent in this appeal, SBV Services (Pty) Ltd (SBV), is a security company that delivers cash to automated teller machines on behalf of banks. It delivers the money in specially protected vehicles that are manned by an armed crew.

[2] On 28 June 2007 one of its vehicles, with a crew of four, set out to deliver cash at the automatic teller machines of one of the banks. The appellant, Mr Kogana was the supervisor of the crew. While they were unloading the cash at one such machine they were robbed by an armed gang. SBV sued Mr Kogana in the High Court at Port Elizabeth for recovery of the loss, alleging that the money had been stolen because he

had neglected his duties. The claim succeeded before Tokota AJ and Mr Kogana now appeals with the leave of that court.

[3] There is a conflict in the evidence as to what occurred but I need not resolve that conflict. To the extent that a conflict arises I will accept the evidence that was advanced on behalf of SBV for purposes of this appeal.

[4] The driver of the vehicle at the relevant time was Mr Dunywa who was armed with a 9 mm pistol secured in a holster strapped to his chest. His duty upon arrival at premises where cash was to be unloaded was to remain in the vehicle, monitoring the surroundings, while the other members of the crew left the vehicle. He was then to remain in the van throughout the unloading. Mr Mdlalisa was what was called the 'long gun man'. He was armed with an 'LM5' firearm, which seems to have been an automatic assault rifle. His duty was to leave the vehicle when it arrived and to take up a strategic position so that he could fire on attackers if it became necessary. Mr Nozukwa was the 'bag' man. His duty was to unload the cash once Mr Mdlalisa had taken up his position. Mr Kogana, who was armed with a 9 mm pistol, was required to ensure that the other crew members properly carried out their duties, and in particular to direct Mr Madlalisa to a suitable position before the money was unloaded.

[5] The ordinary procedure was that the vehicle would leave the base depot to do a 'run', which entailed driving to a succession of automatic teller machines. The crew would be told what run they were doing shortly before they left but they would not be told immediately in what order they would visit the various machines. They would be directed

instead to the various machines on the radio after they had left. There they would be met by an official of the bank, referred to as the ‘custodian’, who would supervise the filling of the machine.

[6] On the day in question the vehicle with its crew left the base depot at about 06h00 and drove to another depot where they loaded 23 bags containing R5 084 000 that had been counted out by an employee of SBV the previous day. Their first destination was an automatic teller machine situated at a petrol service station at Bluewater Bay.

[7] Access to the cubicle housing the machine was through an enclosed yard at the rear of the service station. On arrival at the yard at about 07h00 Mr Mdlalisa left the vehicle to open the gate. Mr Dunywa drove into the yard, leaving Mr Mdlalisa at the gate, turned the vehicle around, and reversed it towards the ATM cubicle, guided by Mr Kogana who had left the vehicle.

[8] The cap for the diesoline tank had been missing from the vehicle for some days and the inlet to the tank was covered with plastic. When the vehicle came to a halt Mr Kogana noticed that diesoline had spilled from the tank and he called Mr Dunywa to the back of the vehicle. Mr Dunywa then set about securing the outlet, going back and forth to the cab of the vehicle to obtain material to do so. The custodian had meanwhile arrived in his vehicle and had entered the cubicle. Mr Kogana said that he accompanied him to the cubicle and when he was satisfied that all was well he radioed Mr Nozukwa to take the money into the cubicle. It was about then that the robbery occurred.

[9] Mr Nozukwa had just entered the cubicle with a bag of money when two armed robbers pulled open the door. At about the same time Mr Dunywa was alongside the vehicle when he was confronted by an armed man wearing the uniform of a security guard. The man demanded his pistol and forced him to lie on the ground. Mr Dunywa lay down, closing his eyes, but not before he had seen two other robbers, each carrying an 'R5', which I understand is an automatic assault rifle. Meanwhile, Mr Kogana said that he had taken up a position alongside the cubicle and found himself confronted by an armed man who took his pistol and made him lie on the ground. Precisely where Mr Mdlalisa was at the time is not clear, though Mr Kogana said that he was then at the perimeter of the yard.

[10] The custodian ran out of the ATM cubicle and fled. Mr Dunywa said that he heard the sound of many people and of a vehicle drawing into the premises. The back door of the armoured vehicle was closed but not locked. Inside the vehicle was a vault in which the money was kept and the door of the vault was also unlocked. The robbers took the bag of money from Mr Nozukwa, and the bags from the vehicle, and they fled. By the time Mr Dunywa looked up they and their vehicle had left the yard. He called his colleagues to the vehicle but said that they were 'sleeping' (by which I presume that he meant that they were slow to react). Mr Nozukwa clambered into the vehicle, with a shotgun that had been left behind by the robbers, and Mr Dunywa sped off in pursuit of the robbers. He said that he hailed a passing police vehicle but it failed to respond and he continued his chase. He said he saw what he described as the vehicle that had been used by the robbers, which was occupied by one person. After a while he called off the chase and returned to the yard.

[11] SBV sued both Mr Kogana and Mr Mdlalisa in delict for the loss of the money. It alleged in its particulars of claim that they had conspired with the robbers but that allegation was not pursued, nor was it suggested to Mr Kogana in evidence that they had done so, and I need say no more about it. SBV alleged in the alternative that the loss was caused by the wrongful and negligent performance of their duties and the trial proceeded on that basis. Mr Mdlalisa did not defend the claim, judgment was taken against him by default, and the matter proceeded to trial only on the claim against Mr Kogana, who had been cited as the first defendant.

[12] By the time the appeal came before us SBV had changed tack. By then it seems to have occurred to it that *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*,¹ and *AB Ventures Ltd v Siemens Ltd* that followed it,² might prove to be a bar to a delictual claim, and it sought to found its claim instead upon an alleged breach by Mr Kogana of his contractual obligations. In answer to objections by counsel for Mr Kogana against the change of stance it was submitted on behalf of SBV that the pleadings were sufficiently wide to include a contractual claim and that the facts relevant to such a claim had been fully canvassed at the trial. He also referred us to various cases and writers in support of his submission that an employee might be liable in damages for failure to fulfil his or her employment duties.

[13] I do not find it necessary to go into any of those issues. On the assumption that a contractual claim is properly before us, and that Mr Kogana is indeed liable for damages in contract if he failed properly to

¹1985 (1) SA 475 (A) at 500H-I.

²*AB Ventures Ltd v Siemens Ltd* 2011 (4) SA 614 (SCA) decided on 31 March 2011, which was the day before judgment in this matter had been handed down by the court below.

perform his duties, it remains for SBV to establish a causal link between his failure and the loss.

[14] The approach to causation is well established. The question that falls to be answered in this case is whether SBV has shown that the money probably would not have been stolen had Mr Kogana properly performed his duties.

[15] Had the claim been delictual, which is how it was advanced in the court below, the question would have been whether the loss would probably not have occurred had Mr Kogana acted reasonably,³ which in the present context comes to much the same thing. The court below answered that question in one brief paragraph:

‘On the facts of the present case the evidence of the plaintiff was that but for the conduct of the first defendant the robbery would have been averted. When the first defendant called the driver his conduct shifted the attention of the driver to the diesel cap. It was at the stage when he was still busy attending to the diesel cap that the robbery occurred.’

In my respectful view the enquiry called for more than that.

[16] It was submitted on behalf of SBV that Mr Kogana’s breaches were twofold. First, that he failed to ensure that Mr Mdlalisa was strategically placed before the money was removed from the vehicle. And secondly, that he failed to ensure that Mr Dunywa did not leave the vehicle. No doubt it was his duty to do both but would the theft have been averted had he fulfilled that duty?

³*International Shipping Co (Pty) Ltd v Bentley*, 1990 (1) SA 680 (A)700F-H.

[17] Mr van Niekerk was employed by SBV as a chief protection officer at the relevant time. He said that he would have deployed Mr Mdlalisa to take up position behind stacks of wood on the outer perimeter of the premises. Had he been deployed in that way, so he said, ‘we would have picked up a few dead robbers’, and the money would not have been stolen.

[18] It was submitted that the opinion of Mr van Niekerk had not been contested in cross-examination and is thus decisive but that is not correct. Whether the money would have been stolen is a question for the court and not for Mr van Niekerk. While the opinion of an expert is always helpful it is for a court nonetheless to evaluate whether it is properly grounded. No reasons were advanced by Mr van Niekerk for his opinion, other than that Mr Mdlalisa would have been well-placed to shoot down the robbers had he been taken up that position.

[19] The opinion suffers at least two defects. Mr Kogana’s duties called for him to exercise his judgment as to where Mr Mdlalisa should be placed. There is no reason to assume that he would have placed Mr Mdlalisa in the position that Mr van Niekerk would have chosen. Indeed, the question where he would have placed Mr Mdlalisa was not even canvassed with Mr Kogana. Nor does the opinion expressed by Mr van Niekerk take account of the capacity of the robbers to overcome any resistance, and I return to that later.

[20] As for the second deficiency, Mr van Niekerk said that if Mr Dunywa had remained in the vehicle he would have been able to shoot at the robbers through ports in the vehicle that are designed for that purpose. Once more, the question remains what resistance would he have

encountered, which Mr van Niekerk seems to have left out of account in forming his opinion. Mr Dunywa said that if he had been in the vehicle he would have driven off and averted the theft. Once more, Mr Dunywa was not in a position to predict what would have happened had he attempted to do so: he was on the ground with his eyes closed throughout the robbery and knew nothing of what he might have encountered.

[21] The difficulty facing SBV is that there is simply insufficient evidence to determine what might have been encountered had the crew resisted the robbery. The evidence does not disclose how many robbers there were, nor where they might have been located, nor what weapons they might have possessed, nor what precautions they might have taken to avoid escape through the gate. I think it can safely be inferred that they had inside knowledge of when the vehicle would be arriving and had set a trap. Unless Mr Kogana had been a conspirator, of which there was no suggestion, they must have anticipated that Mr Dunywa would remain in the vehicle, and that Mr Mdlalisa would be in a strategic position, which was what would ordinarily occurred, and it is most doubtful that they had not taken account of that when they planned the ambush.

[22] The evidence provides no basis for finding that their plans would have been thwarted had Mr Dunywa and Mr Mdlalisa acted as they were required to do. To predict what would have occurred in that eventuality would be no more than unfounded speculation. SBV bore the onus of establishing that the theft would have been averted and in my view the evidence does not discharge that onus. On that ground the claim ought to have failed and the appeal must succeed.

[23] The appeal is upheld with costs. The order of the court below is set aside and substituted with an order absolving the first defendant from the instance with costs.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant: Ms L Crouse

Instructed by:

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