THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 130/12

In the matter between:

IMVULA QUALITY PROTECTION (PTY) LTD **Appellant**

and

LICINIO LOUREIRO **First Respondent**

VANESSA LOUREIRO **SecondRespondent**

LUCA-FILIP LOUREIRO **ThirdRespondent**

JEAN-ENRIQUE LOUREIRO **Fourth Respondent**

Neutral citation: *Imvula Quality Protection (Pty) Ltd v Licinio Loureiro & others* (130/12) [2012] ZASCA 12 (15 March 2013)

Coram: Mthiyane DP, Cloete, Mhlantla and Bosielo JJA and Mbha AJA

Heard: **21 Nov 2012**

Delivered: **15 March 2013**

Summary: Contract ─ Delict ─ contract concluded by appellant and first respondent for guarding services for first respondent's property and family ─ invalidity of limited cession ─ conduct of the guard not negligent ─ respondents failed to prove breach of contractual terms and legal duty owed to them.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Satchwell J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following: 'The plaintiffs' claims are dismissed with costs.'

JUDGMENT

MHLANTLA JA (Mthiyane DP, Bosielo JA and Mbha AJA concurring):

Introduction

[1] This is an appeal from a judgment of the South Gauteng High Court, Johannesburg (Satchwell J) in which Imvula Quality Protection (Pty) Ltd (the appellant) was found liable to Mr Licinio Loureiro (the first respondent) in contract, and to Mrs Vanessa Loureiro and their two minor sons (the second to fourth respondents respectively) in delict for the loss they allegedly suffered in a robbery which occurred at their home on 22 January 2009. It is that incident which gave rise to the above claims.

Background

[2] The incident can be best understood by reference to the following background facts. On 25 November 2008, the first respondent and his family moved into their house at 50 Jellicoe Avenue, Melrose, Johannesburg. He arranged with Mr Barbosa of Sky Leah Sales to install a comprehensive security system at the house. This involved electric fencing, perimeter

protection, beams, multiple alarm systems, guard house, intercom and closed circuit television. There was a safe room concealed by large mirrors inside the house. The first respondent, his nephew (Ricardo Loureiro) and Ricardo's father were members of Combined Ceilings and Partitions CC (CC&P). The first respondent requested Ricardo to arrange a 24-hour service of armed guards to be placed at his house. The appellant, a private security firm, was employed for this purpose. The guards were placed at the entrance of the respondents' home with effect from 2 December 2008.

[3] The first respondent became concerned about the conduct of the guards who allowed access to visitors without his prior authorisation. On 10 December 2008 he instructed Barbosa to partially disable the intercom so that the guards would not be able to open and close the main driveway gate. This arrangement, however, affected the movement of the guards during their change of shifts. To alleviate this problem, the first respondent provided the guards with a key to open the pedestrian gate during the shift change only. He prohibited them from using the key to open the gate to allow access to anyone without his prior authorisation.

[4] On 22 January 2009, the first and second respondents left their home at about 19h45 to attend a school function. They left their children in the care of the domestic workers and the houseman Francis. Mr July Mahlangu (Mahlangu), a grade A security guard and instructor, was on duty. He was at the guard house when he saw a white BMW vehicle flashing a police blue light approaching. It drove past and stopped partially on the driveway near the guard house. A passenger alighted from the front seat. He was wearing dark blue clothing, a reflective vest marked "Police" and a police cap. The man walked towards the thick bullet-proof glass of the guard house and produced a card. He showed Mahlangu a police identity card. Mahlangu did

not have sufficient opportunity to inspect the card and thus could not see the photo thereon in order to compare it to the man before him. Mahlangu was adamant that the card was a valid police identity card as it had a police emblem on it. After seeing the card, he went to the intercom and tried to speak to the policeman. There was no response from the latter. He could not hear anything through the intercom and could not hear the sound of the car. He realised that the intercom was not working. He looked and realised that the policeman was no longer waiting in front of the window. He decided to open the gate and go outside in order to establish what the police officer wanted as he was obliged to co-operate with the police and members of other security services.

[5] He took the key to the pedestrian gate and opened the gate. He found the policeman standing about two metres from him. Mahlangu was startled when this 'policeman' immediately produced a firearm and pointed it at his head. Other armed intruders joined this 'policeman'. It was then that Mahlangu realised that he had been duped by a person posing as a police officer. The intruders forced him into the premises. They ordered him to lead them to the main house where they accosted the occupants and waited for the owners to return.

[6] The first and second respondents returned at approximately 21h00 and were accosted by the intruders as they entered the garage. The intruders robbed them and stole their belongings, mostly jewellery which had been stored in the safe room. The total value of the items stolen was in excess of R11 million. After the robbery, the first respondent, who had concluded an "Agreement of Loss" with Insurance Zone Administration Services (IZAS), submitted an insurance claim for the first loss in terms of his insurance policy. This agreement contained a clause relating to a cession of the claim. I

shall return to the details of the agreement in due course. The first respondent was paid an amount of R1 556 442.43.

[7] The respondents subsequently instituted an action against the appellant, based both in contract and delict, for damages for the loss they had suffered.[1] The appellant raised a special plea that the first respondent had no *locus standi* as he had ceded all of his rights and remedies arising from the incident to IZAS. In its plea, the appellant pleaded that the contract for the guarding services had been concluded with CC&P and not with the first respondent. Consequently, the appellant alleged, the first respondent had no claim against it. Regarding the delictual claim, the appellant pleaded that the second to fourth respondents had failed to prove any blameworthy conduct on the part of the appellant and/or the guard.

[8] The matter came before Satchwell J. The learned judge granted an order separating the issues and proceeded to determine the merits. Regarding the special plea, the judge held that the cession related to the loss set out in the document and was limited to the amount paid to the first respondent. She declared the cession between the first respondent and IZAS invalid as it

[1] In their particulars of claim they inter alia alleged:
'5. On or about 1 December 2008 and at Cyrildene, the first plaintiff, represented by **RICARDO LOUREIRO**, and the defendant, represented by a duly authorised representative, entered into an oral agreement ("the guarding service agreement") which was amended orally on 10 December 2008 by the addition of the terms set out in paragraph 6.8 below when the first plaintiff represented himself and the defendant was represented by a duly authorised representative.
6. The express, alternatively, implied, alternatively tacit terms of the guarding services agreement included the following terms, further alternatively, the guarding service agreement properly constructed and interpreted provided inter alia that:
6.1 …
6.2 …
6.3 …
6.4 …
6.5 The defendant would take all reasonable steps to:
6.5.1 prevent persons gaining unauthorised access and/or entry to the plaintiffs' premises; and
6.5.2 protect the persons and property of the plaintiffs and/or the first plaintiff and his family and/or any other persons lawfully present at the plaintiffs' premises;
6.6 …
6.7 …
6.8 the defendant was not entitled to permit any person to gain access to the plaintiff's residence other than the plaintiffs and their two minor sons, unless the defendant had obtained prior authorisation from the first plaintiff alternatively the second plaintiff to allow such persons access to the plaintiffs' residence.'

amounted to a splitting of one cause of action between two creditors. In so far as the question relating to the contract was concerned, the judge held that the first respondent had concluded a contract for armed guards with the appellant. On the issue of the vehicle and the passenger, she held that Mahlangu had been 'presented with an apparent SAPS [South African Police Services] vehicle and an apparent member of the SAPS who came to the guard house and that he could not be criticised for assuming that this was a police patrol and a policeman'. She however found that Mahlangu was negligent as he had failed to take reasonable steps to prevent the anticipated harm from happening and that his conduct in opening the pedestrian gate caused the intruders to enter the premises and rob the family. The judge then concluded that the appellant was liable for the loss and/or damages suffered by the respondents.

Issues on appeal

[9] This appeal, with leave of the court a quo, is against that ruling and four issues arise for consideration by this court. The first is whether on a proper interpretation of the written 'agreement of loss', the first respondent had ceded his right to claim from the appellant to IZAS. The second is whether the first respondent was the party that concluded the agreement for guarding services with the appellant. The third is whether the appellant and/or its employee breached the terms of the contract. And the fourth is whether the conduct of the guard in opening the pedestrian gate constituted negligence and is causally linked to the damages sustained by the respondents.

[10] I shall consider the issues in turn.

The cession

[11] It is common cause that IZAS and the first respondent concluded an "Agreement of Loss" which contained a cession, the details of which are as follows:

'It is hereby mutually agreed between INSURANCE ZONE ADMINISTRATION SERVICES and L. LOUREIRO (policy IZIP4150) without admission of, or denial of any liability whatsoever, that the loss which occurred on 22 January 2009, as a result of THEFT, in respect of claim number IZP4150/1

In respect of	Jewellery	R1 500 000.00
	General All Risks	R 300 000.00
	Household Contents	R 256 672.00
	LESS EXCESS	R 250.00
	LESS INTERIM PAYMENT	R 500 000.00
		R 1 556 422.43

ONE MILLION FIVE HUNDRED AND FIFTY SIX THOUSAND FOUR HUNDRED AND TWENTY TWO RAND AND FORTY THREE CENTS

A Re-imbursement of above goods by Insurance Zone Administration Services is considered full and final settlement of all and any claims whatsoever which the insured as owner has or may have against Insurance Zone. I/We hereby authorize Insurance Zone irrevocably and *in rem suam* in my/our name to dispose of the salvage of the property and to retain any proceeds for its sole and absolute benefit.

B I/We warrant and declare that the property is fully paid for and is not subject to any Hire Purchase, Lease, Rental or any other agreement affecting or limiting any rights of ownership and/or possession of the property.

C Should the property or any part thereof be located after replacement of the above items, I/ we undertake to render all reasonable assistance in the identification and physical recovery of the property if called upon to do so by Insurance Zone provided all reasonable expenses in rendering such assistance shall be reimbursed by Insurance Zone. Failure to comply with this condition will render me/us liable to repay upon demand all amounts paid pursuant to this agreement.

D I/We declare that there is no other insurance in force covering the property.

E *I/We hereby cede, assign and transfer to and in favour of Insurance Zone all rights which I/we might have against any other party arising from the loss referred to above.*' (My emphasis.)

[12] Counsel for the appellant submitted that on a proper interpretation of the agreement of loss, the cession had to be taken to include the entire loss allegedly sustained by the first respondent on 22 January 2009 and consequently that the first respondent had ceded away his rights and had no *locus standi*. I do not agree. In its plain and ordinary meaning the word 'loss' in the agreement expresses a cession of the claim in relation to a limited loss and not the full loss. The amount paid out to the first respondent was only in respect of the insured items in the categories listed. The cover was limited and did not include all the items lost in the armed robbery. It is accordingly evident that the cession was limited to the loss set out and that it was subject to four qualifiers, namely:

(a) The loss that occurred on 22 January 2009;

(b) as a result of theft;

(c) in respect of claim no. IZIP4150/1; and

(d) in respect of the items listed and up to the amount set out in the document.

In the circumstances the submission that the cession was in relation to the entire loss falls to be rejected.

[13] In *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd*,[2] a case involving the construction of an insurance policy, Wessels CJ said:

'We must gather the intention of the parties from the language of the contract itself, and if that language is clear, we must give effect to what the parties themselves have said; and we must presume that they knew the meaning of the words they used. It has been repeatedly decided in our Courts that in construing every kind of written contract the Court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both the parties intended them to bear a different meaning.'

[2] *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465.

[14] In the result, the first respondent is not precluded from claiming the difference between the total value of the alleged loss and what was paid out by IZAS. Similarly, IZAS would have no right to claim the full R11 million of the alleged loss. In this regard, Mr Allen Johnston, a managing director of IZAS and the first respondent's insurance broker testified that IZAS only sought to recover the amount it had paid out. The cession accordingly related to the limited indemnity. It follows that the conclusion of the court below cannot be faulted. The special plea was correctly dismissed. The appeal on this ground fails.

The identity of the contracting parties

[15] I turn now to consider the next issue, which is the identity of the contracting parties. It was argued on behalf of the appellant that the first respondent had failed to prove that he was a party to the contract and that this contract had been concluded between the appellant and CC&P. On the evidence this argument is without merit. The first respondent and Ricardo testified about the circumstances relating to the conclusion of the contract. The first respondent had requested Ricardo to arrange the guard service since the latter already knew the relevant persons in the industry. Ricardo was adamant that he acted in his capacity as a family member and not as a member of CC&P. The services order form was issued in the name of the first respondent and the invoices were addressed to 'Rick', (a clear reference to Ricardo) and not CC&P. These invoices referred to the first respondent. The appellant did not adduce any evidence to contradict Ricardo's evidence. Furthermore, when the contract was amended at some point it was the first respondent and not CC&P who did so, clearly indicating that the first respondent was accepted as a party to the contract. It is therefore clear that the parties to the contract were the appellant and the first respondent. Any

argument to the contrary is without merit. Accordingly, the first respondent's version relating to the conclusion of the contract must be accepted.

Breach of contract

[16] I turn now to consider whether the first respondent has established the breach of the contractual terms relied upon. Counsel for the respondents submitted that the appellant breached the contract, that is the guarding service agreement, in that its employee had opened the pedestrian gate to the premises notwithstanding express instructions given by the first respondent to Mr Green, employed by the appellant as a supervisor of the security guards, not to do so. In my view, the evidence of what happened at the gate is crucial to the determination of the alleged breach and the alleged liability in delict. This is because this court is required to consider the reasonableness of the conduct of the security guard in both legs of the respondents' claims. That, too, is the approach adopted by the first respondent in the heads of argument and in the pleadings. Counsel for the first respondent averred in paragraph 18 of the heads that:

'[The] appellant was contractually obliged to take all reasonable steps to prevent unauthorised access and/or entry to the premises and to protect the persons and property of the respondents at the Loureiro home.' (My underlining.)

[17] In response to questions from the bench during argument counsel sought to distance himself from this proposition. In my view this was a futile attempt to wriggle out of a conundrum in which the first respondent found himself because the position adopted in the heads is precisely how the first respondent's case was pleaded. In paragraphs 6.1 and 6.7 of the particulars of claim it is alleged that the agreement, properly construed, was that the appellant 'would provide guarding services' at the first respondent's residence and 'would take reasonable steps to ensure that no persons gained unlawful access to the plaintiff's [the first respondent's] premises'. During

argument counsel for the first respondent sought to place sole reliance on paragraph 6.8 of the particulars of claim for the proposition that the appellant 'was not entitled to permit *any person* to gain access to the residence' without the prior authorisation of the first respondent, as if this stood alone (emphasis added). But this argument ignores paragraph 6.7 of the particulars of claim in which it is alleged that the appellant (and therefore the security guard) was required to take *reasonable* steps in deciding whether or not to permit access to the premises. The first respondent's part of the claim based on negligence also required of the security guard to conduct himself as the *bonus paterfamilias* (reasonable person) would do in the circumstances.

[18] The construction of the contract to mean that the guard was not permitted to allow any person into the premises is not sustainable. In so far as this contractual term is concerned, one must read it in such a way as to provide for a tacit term that excludes the police from the group of people who are not allowed access to the premises, otherwise the prohibition will for instance be in contravention of the provisions of section 25(3)[3] of the Criminal Procedure Act 51 of 1977. (See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531A-532A.)

[19] It is accordingly critical to consider the actions of the security guard on the night of the incident and establish whether he acted reasonably. But before doing so, it is apposite at this stage to comment on the remarks made by the judge and the doctrine of judicial notice she invoked.

Mahlangu's qualifications

[3] Section 25(3) reads:
'(3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he on reasonable grounds believes−
(a) that a warrant will be issued to him under paragraph *(a)* or *(b)* of subsection (1) if he applies for such warrant; and
(b) that the delay in obtaining such warrant would defeat the object thereof.'

[20] Regarding Mahlangu's qualifications, the judge remarked as follows:

'[T]he defendant company holds itself out as providing specialist services of a security nature and, in this particular instance, guarding of residential premises. The invoice is in respect of only a "Grade D" armed guard but nonetheless this is an employee who could be expected to have been trained (not only as regards specific duties) in the nature of criminal trends in the relevant area and the appropriate security response thereto.'

[21] This criticism is totally unjustified. The evidence showed that Mahlangu was qualified as a Grade A security guard and was in addition a training instructor. His qualifications were not challenged during the trial. He was accordingly properly trained in accordance with the security industry standards. According to his testimony he knew that he had to 'make sure that the property and the people [were] safe'. Mahlangu explained further that he had to apply common sense. It was not necessary for the appellant to rebut any evidence of what the training of a Grade A or D guard entailed and whether that was adequate. No evidence was adduced of the standard of training applied in the security industry to establish what could reasonably be expected or that Mahlangu's qualifications were inadequate.

Application of the doctrine of judicial notice

[22] The judge accorded undue weight to the existence of the notorious members of the 'blue light gang' which had received media publicity. These allegations were never pleaded nor proved in court. It was never suggested to Mahlangu that there was a blue light gang operating in the area and that their nefarious activities were of such public knowledge that Mahlangu should have been aware of them. No statistics were provided to show the number of offences committed in the area by such persons. There was no scope for the judge to take judicial notice of the scourge of criminals in police uniforms. In my view the judge incorrectly invoked the doctrine and accordingly erred in this regard.

[23] It follows that the first respondent has failed to establish that the appellant breached the contract.

Negligence

[24] I turn now to that part of the first respondent's claim based on negligence on the part of the appellant. This necessarily involves a consideration of Mahlangu's actions on the night in question. The classic test for negligence was articulated by Holmes JA in *Kruger v Coetzee*[4] as follows:

'For the purposes of liability *culpa* arises if−

(a) a *diligens paterfamilias* in the position of the defendant−

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

... Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down.'

[25] Van den Heever JA elaborated this in *Herschel v Mrupe*[5] where he said:

'The concept of the *bonus paterfamilias* is not that of a timorous faint-heart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise.'

[26] On the element of foreseeability, Scott JA expressed himself as follows in *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another*:[6]

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[4] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G.
[5] *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490E-F.

'It is probably so that there can be no universally applicable formula which will prove to be

appropriate in every case. ... Notwithstanding the wide nature of the inquiry postulated in para *(a)*(i) of Holmes JA's formula – and which has earned the tag of the absolute or abstract theory of negligence – this Court has both prior and subsequent to the decision in *Kruger v Coetzee* acknowledged the need for various limitations to the broadness of the inquiry where the circumstances have so demanded. For example, it has been recognised that, while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable.'

[27] Turning to the facts of this case, this court is required to determine whether a reasonable person in Mahlangu's position would have foreseen the reasonable possibility that the person or persons who approached him at the gate were not genuine policemen, and having so realised failed to prevent them from gaining access to the premises. The judge alluded to what Mahlangu should have done before deciding to open the pedestrian gate. She said:

'He did not try to use the intercom to contact the occupants of the house which could have confirmed whether or not the intercom worked. … He made no attempt to establish if these were members of the SAPS, [whether they were] at the correct address and what they wanted. … He did not speak through the peephole or through the gate.'

[28] This is an unjustified criticism especially given the finding by the judge that Mahlangu could not be faulted for assuming that the person who alighted from the vehicle was a policeman. The evidence was that the persons concerned came in a vehicle flashing a blue light which itself is indicative of an emergency and the need to act urgently. There was some suggestion that there was a peephole in the vicinity of the guard house. But that is a neutral fact as even the second respondent did not think that one could talk through the peephole. So the guard had to step out of the guard

[6] *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another* 2000 (1) SA 827 (SCA) para 22.

house and approach the person to find out the purpose of his visit. In a case such as this there is a temptation to be wise after the fact. It must be borne in mind that the court cannot approach the case as an arm-chair critic with the benefit of hindsight. *Ex post facto* knowledge is irrelevant. In *S v Bochris Investments (Pty) Ltd & another*,[7] Nicholas AJA said:

'In considering this question, one must guard against what Williamson JA called "the insidious subconscious influence of *ex post facto* knowledge" (in *S v Mini* 1963 (3) SA 188 (A) at 196E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have "prophetic foresight". … In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* 1961AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414G-H (in All ER):

"After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility."'

[29] Mahlangu was a candid and honest witness. No adverse findings were made against him. He stated that he intended to open the gate to find out what the policeman wanted, not to allow access to anyone. He thought he could help the police officer and believed that the police officer wanted something. He did not invite the intruders into the premises, they forced their way in after pointing a firearm at him. There was nothing suspicious about the person that could and should have put Mahlangu on his guard. Mahlangu was not unreasonable in believing that the individual, who was for all intents and purposes dressed like a genuine police officer, was a policeman. It follows that he was not negligent in opening the gate to establish what the police officer wanted. In my view Mahlangu was also a victim as he was duped by what appeared to him to be a police officer. That it later transpired that he was a member of a gang of robbers is irrelevant. There was no time to push the panic button or draw a firearm because he did not anticipate any

[7] *S.v Bochris Investments* (*Pty*) *Ltd & another* 1988 (1) SA 861 (A) at 866J-867B.

crisis when he went to open the pedestrian gate. There was equally no reason to call his superior, Mr Green. A *bonus paterfamilias* would not have foreseen that he was opening the gate to robbers and that he would be overpowered.

[30] I agree with the court below that Mahlangu cannot be criticised for assuming that he was dealing with a policeman engaged in official patrol. However, I do not agree with its subsequent finding that Mahlangu was negligent in opening the gate. That finding is not supported by the evidence. In my view, no reasonable person in Mahlangu's position could have believed that he was not dealing with a genuine policeman. Mahlangu was not negligent in being duped by the robbers. It follows therefore that no blameworthy conduct on the part of the guard has been proved. In the result, the first respondent has failed to prove the alleged breach of the contractual term; the express prohibition outlined in paragraph 6.8 of the particulars of claim could not have been intended to apply to police officers performing official duties.

The second to fourth respondents' claims

[31] The second to fourth respondents rely on the conduct of the guard and the vicarious liability of the employer for their delictual claims. Regarding the element of unlawfulness, the respondents can only succeed if they can prove that by opening the gate Mahlangu acted unlawfully and breached the legal duty he owed to them. The circumstances under which he opened the gate must be assessed in order to establish whether Mahlangu's conduct was unlawful or not. The same considerations relating to negligence as discussed earlier apply to the determination of these claims.

[32] Harms JA articulated the principle of the law of delict in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[8] as follows:

'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author *Asser* points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that 'skade rus waar dit val'. Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful….

'[C]onduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful….'

[33] Consideration has to be given to the legal convictions or the *boni mores* of the community.[9] It must also be borne in mind that private industry security officers have a duty to act in accordance with the provisions of the Code of Conduct for Security Service Providers, 2003. The Code includes an obligation to co-operate with the members of State security services. Clauses 7(1) to (3) thereof read:

General Obligations towards the Security Services and organs of State:

'(1) A security service provider must, within his or her ability, render all reasonable assistance and co-operation to the members and employees of the Security Services to enable them to perform any function which they may lawfully perform.

(2) A security service provider may not interfere with, resist, obstruct, hinder or delay a member or an employee of a Security Service or an organ of State in the performance of a function which such person may lawfully perform.

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[8] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) paras 12-13.

[9] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 17.

(3) A security service provider must, without undue delay, furnish all the information and documentation to a member or employee of a Security Service or an organ of State which such member or employee may lawfully require.'

[34] Having regard to the facts of this matter, Mahlangu's conduct finds resonance in clause 7 of the Code. He could not lawfully resist opening the gate to a policeman's demand for entry to the premises if he had legitimate grounds for doing so. It was never suggested to Mahlangu that he should have ignored the policeman. He, at all times, acted in good faith under the impression that he was assisting the police. He tried to communicate with the policeman through the intercom. He could not speak through the armoured gate. In this regard, the second respondent did not think that one could talk through the gate. This aspect was only established during the inspection in loco that persons could hear each other when the gate was closed. It follows that Mahlangu cannot be held to have acted unlawfully when he opened the gate to speak to the policeman. The second to fourth respondents have therefore failed to prove a breach of the legal duty owed to them. Accordingly the appellant is not vicariously liable for the loss and/or damages they suffered as a result of the armed robbery. The appeal must therefore succeed.

[35] In the result, I make the following order:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'The plaintiffs' claims are dismissed with costs.'

N Z MHLANTLA

JUDGE OF APPEAL

CLOETE JA:

[36] I have had the advantage of reading the judgment of my learned colleague Mhlantla JA. I agree with the conclusion reached on the identity of the contracting parties. I also agree with the conclusion (in para 13) that the cession by the first respondent to the insurance company was limited and did not extend to all the items stolen in the robbery. The consequence is that the cession constituted an attempt to split one cause of action between two creditors (the first respondent and the insurance company) and since there was no question of consent by the debtor (the appellant), the cession was invalid for the reasons given in *Van der Merwe* v *Nedcor Bank Bpk* 2003 (1) SA 169 (SCA) para 6. But in my view the appeal should nevertheless be dismissed.

[37] In the particulars of claim, the respondents alleged:

'5. On or about 1 December 2008 and at Cyrildene, the first plaintiff, represented by RICARDO LOIREIRO, and the defendant, represented by a duly authorised representative, entered into an oral agreement ("the guarding service agreement") which was amended orally on 10 December 2008 by the addition of the terms set out in paragraph 6.8 below when the first plaintiff represented himself and the defendant was represented by a duly authorised representative.

6. The express, alternatively, implied, alternatively tacit terms of the guarding services agreement included the following terms, further alternatively, the guarding service agreement properly constructed and interpreted provided inter alia that:

. . .

6.5 The defendant would take all reasonable steps to:

. . .

6.5.2 protect the persons and property of the plaintiffs and/or the first plaintiff and his family . . .

. . .

6.8 the defendant was not entitled to permit any person to gain access to the plaintiffs' residence other than the plaintiffs and their two minor sons, unless the defendant had

obtained prior authorisation from the first plaintiff alternatively the second plaintiff to allow such persons access to the plaintiffs' residence.'

[38] This court has confirmed the finding of the high court that the appellant contracted with the first respondent. The first respondent therefore has an action in contract against the appellant for patrimonial loss suffered by himself, his wife and their children in consequence of a breach of the contract ─ if it was breached.

[39] The evidence of the first respondent was that on 7 December 2008 he was hosting a family get-together at his home. His brother arrived at the front door. That upset him because he did not want the security guard to admit anyone. The first respondent then caused the button in the guardroom that enabled the guard to open the main gate, to be disconnected. This caused a problem because the appellant's security staff could not gain access to the premises. The problem was explained to the first respondent by Mr Green, the area manager of the appellant, who requested a key to the smaller (pedestrian) gate next to the main gate. The first respondent's response, in his own words, was:

'I said look, I have got a problem giving you the key because I do not want nobody in my property, I do not want you guys to open the door for nobody because we have had an incident of you guys opening the doors for people and you know, I am being surprised at the door by family members that you opened the door for and it is an issue for me. I said to him I will give you the key, the shift key under one condition, under one condition, it is only for shift change and nothing else and Mr Green can verify that I did say that. I said this key is only for shift change and nothing else.'

After the robbery, Green came to see the first respondent again and according to the first respondent, he said to Green:

'What was my instructions on 8 December or 10 December saying to you that you do not open the door for nobody. I did tell them, well what happened here? . . . My instructions were to you when you came to see me when you came asked me for that key and you

promised you know, when I said to you this key is only for shift change, what happened after that?'

None of this evidence was controverted.

[40] It was therefore an express term of the agreement that the key to the small gate would not be used except to enable the guard on duty to admit his colleague who was relieving him, and to leave the premises himself, when the shift changed. As is clear from the evidence just quoted the prohibition was not merely against using the key to allow access to someone without prior authorisation, as my colleague suggests in para 3; although it was obviously a tacit term (as pleaded in para 6.8 of the particulars of claim) that the standing instruction could be relaxed on specific occasions by the first respondent or a person authorised by him, and the evidence establishes that it was. The guard's evidence was:

'Now if somebody comes to the gate and tells you at the intercom that they want to visit inside, what will you do? -- If he is a visitor I cannot just open for that person. What can I do? I can tell him to stand there so that I can confirm with the people inside.

How do you do that? -- There are many way because of if it is during the course of the day the people, especially the garden boy was just around most of the day and it was simple to go to his, the place where he is staying you see, to tell him that there is a person there, can he talk to somebody maybe inside, maybe that guy is visiting someone inside the house or himself. Then if he is allowing me to open the gate I would open the gate for that person with his instructions.

. . .

Why will you not phone through to the house? -- Then if ever, because there was an intercom there, if the intercom is working for the house I could also use it to confirm to the intercom.

Who will you speak to on the intercom? -- It depends who is going to be visited.'

The evidence of the first respondent was to the same effect, as appears from the following passage in his evidence, which also describes the status of the man called Francis to whom the guard referred as 'the garden boy':

'Francis is . . . actually my right hand man . . . he does everything for me basically. If

there is ever a query or anything to ask, there was an intercom system, the guard could come and ask me or when he wanted to get hold of me. Francis was there just for me, to assist me in anything that I needed to get done or said or whatever, that is basically what Francis' duties are, it is to assist me.

I understand. You have a busy business life. -- Correct.

And management areas around the house you delegated to Francis. -- Correct.'

[41] When the robbers arrived on the night in question, the first respondent was not there; but we know that Francis was because he was tied up by the robbers. The only permitted purpose (absent an authorisation to admit someone) for which the key could be used, was to change shifts. The guard obtained no authorisation to admit anybody. It is an undeniable fact that he used the key for a purpose other than to change shifts. He thereby breached the contract. That breach was undoubtedly the cause of the loss.

[42] The appellant's counsel advanced two arguments as to why there was no breach. The first was based on a tacit term and the other was what I shall, for want of a better term, call compulsion of law.

[43] The tacit term for which counsel contended was that the obligation not to use the key save for the purpose for which it was given, had to be subject to a qualification that imported reasonableness. To use the hypothetical bystander test, this would mean that if the parties were asked 'Could the guard use the key for a purpose other than admitting a colleague when the shift changed, if such use would be reasonable?' they would both have answered in the affirmative. I have no doubt that the first respondent, in view of his emphatic evidence that I have quoted above, would have given exactly the opposite answer. He would never have agreed to vest a discretion in the guard. Therefore on the facts of this case, the guard was not entitled to open the gate to speak to the person he thought was a policeman, no matter how

reasonable that belief or his conduct might have been.

[44] I turn to deal with counsel's second argument effectively upheld by my colleague in para 18. Obviously if a policeman, who was entitled to do so, demanded entry to the premises, the guard would be obliged in law to comply with that demand, irrespective of the express term of the contract to which I have referred. But if the demand was not made by a policeman entitled to make it (and I emphasise that a policeman is not, without more, entitled to demand access to private property), the admission of the person making the demand would not be justified and the guard would breach the contract in using the key to open the gate. Negligence does not arise for consideration. The guard would only be entitled to disregard the contract if he was in fact obeying the lawful command of a policeman ─ not if he reasonably thought that he was doing so. The position is reinforced by regulation 7(1) in the Code of Conduct for Security Service Providers, 2003 made under s 35 of the Private Security Industry Regulation Act 56 of 2001. The regulation reads:

'A security service provider must, within his or her ability, render all reasonable assistance and co-operation to the members and employees of the Security Services to enable them to perform any function which they may lawfully perform.'

('Security Services' are defined as meaning the South African Police Service, the South African National Defence Force, the Directorate of Special Operations, the National Intelligence Agency, the South African Secret Service, the Department of Correctional Services and any other official law enforcement agency or service established by law, irrespective of whether such an agency or service resorts at national, provincial or local government level.)

In terms of the regulation not only does the person to whom the assistance and co-operation has to be rendered, have to be a member or employee of the security services, but the assistance must be to enable that person to perform

any function he or she 'may lawfully perform'.

[45] In view of the approach adopted by my colleague (in paras 16 and 17) to the pleadings and argument, and her statement (in para 16) that it is 'crucial' to the determination of inter alia the alleged breach of contract to consider whether the security guard acted reasonably, there are two points that require emphasis. The first relates to the terms of the contract. The second relates to the function of pleadings and the effect of argument.

[46] As to the first point: I have set out the relevant terms of the contract pleaded, in para 37 above. The obligation to take reasonable steps pleaded in para 6.5 that qualifies the obligation in para 6.5.2 simply does not, as a matter of linguistic interpretation, qualify the obligation in para 6.8 viz the prohibition against allowing persons to gain access ─ however counsel argued the matter. Nor, more importantly, did it qualify the express prohibition against using the key to the smaller gate for any purpose other than to effect shift changes ─ the term that was established on the uncontradicted evidence quoted in para 39 above. The reasonableness of the guard's actions, far from being crucial, is entirely irrelevant to the claim in contract based on a breach of that term.

[47] As to the second point: cases are decided on the evidence, not on the pleadings or counsel's argument. Of course, if the case is formulated in the pleadings in such a way that the opposite party is prejudiced, the position is different ─ but that is not the general rule. As Innes CJ said in *Robinson* v *Randfontein Estates GM Co Ltd* 1925 AD 173 at 198:

'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings.'

Furthermore, argument advanced by counsel (absent some special feature, such as an admission of fact that is not permitted to be withdrawn) does not bind the client, much less the court. That is trite. Lastly on this point, I record that there was no suggestion of any prejudice whatever when the argument that the appellant is liable for breach of the express term of the contract established by the evidence, was put to the appellant's counsel ─ nor could there have been; and counsel for the respondents, in terms, adopted the argument as correct.

[48] I would therefore dismiss the appeal on these grounds. I would do the same in regard to the claim based in delict.

[49] I share the view of the high court that the guard was negligent ─ particularly because he was a trained security guard and he was stationed at the entrance of the property for the very purpose of keeping out unauthorised persons, because of the ease with which precautions could have been taken and the serious consequences that could ensue if they were not ─ for the following reasons appearing from the judgment of Satchwell J:

'[A] reasonable security guard in these circumstances should have ensured that he had sight of the card presented; gestured back the policeman when he left the window without giving the guard the opportunity to read the card; gestured back the policeman or the driver when the guard realised the policeman had left the intercom and was not responding (or even attempting to respond) through the intercom; perhaps gone to the pedestrian gate to enquire (through the gate without opening it) which station the SAPS had come from, which address they wanted and for what purpose; attempted to contact the main house through the intercom to enquire whether the SAPS had been called and for what purpose and seeking authorisation to let him in. I find that Mr Mahlangu, in opening the pedestrian gate, failed to take reasonable appropriate steps to prevent the anticipated harm from happening. By opening the pedestrian gate the security guard let down the drawbridge and allowed the intruders to enter the Loureiro castle. This was negligence.'

[50] It only remains for me to record my respectful dissent from the conclusion reached by my colleague (in para 34) that the second to fourth respondents should be non-suited in their delictual claim because the guard did not act unlawfully, and they did not establish that they were owed a legal duty. (I prefer to use the term 'wrongfully' which, although a synonym for 'unlawfully' in this context ─ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking* v *Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 13 ─ conveys lack of justification without necessarily conveying illegality.)

[51] Of course, as my colleague postulates, the guard could not lawfully resist opening the gate to a policeman's demand for entry to the premises if the latter was lawfully entitled to make that demand. But the person outside the gate was no policeman and he made no lawful demand. Justification for the guard's actions on this basis was therefore absent.

[52] The guard's subjective state of mind and his actions described by my colleague are not relevant to the question of wrongfulness ─ which is whether it would be reasonable, taking into account considerations of public policy, to impose legal liability on the appellant for harm resulting from the guard's conduct; but to the question of negligence ─ which is whether the guard's conduct was reasonable, judged in accordance with the test in *Kruger* v *Coetzee* 1966 (2) SA 428 (A) at 430E-F. The test for reasonableness in each case is entirely different. In *Roux* v *Hattingh* 2012 (6) SA 428 (SCA) para 33 Brand JA quoted the following passage in the majority judgment he gave as Brand AJ in the Constitutional Court in *Le Roux* v *Dey* (*Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae*) 2011 (3) SA 274 (CC) para 122, with the addition of the words in parenthesis:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether ─ assuming all the other elements of delictual liability to be

present ─ it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct [which is part of the element of negligence], but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'

[53] As the courts have repeatedly emphasised for over 30 years, wrongfulness and negligence are discrete elements of the modern Aquilian action. In my view, both were established by the second to fourth respondents. I have already dealt with the element of negligence. And I have no hesitation in concluding that public policy requires the guard's employer, the appellant, to be held liable for the guard's negligence, and that a legal duty was therefore owed to the second to fourth respondents: The guard opened the small gate. That was a positive act and the cause of the loss. The loss was not pure economic loss (the criticism by Prof Neethling, 'Delictual liability of a security firm for the theft of a vehicle guarded by its employee' (2011) 74 THRHR 169 at 170, of *Viv's Tippers (Edms) Bpk* v *Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA) para 5, is in my respectful view well founded ─ cf *AB Ventures Ltd* v *Siemens Ltd* 2011 (4) SA 614 (SCA) para 6, n 6). There is therefore a presumption that the action by the guard was wrongful: see eg *Trustees, Two Oceans Aquarium Trust* v *Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10; Roux para 32 and authorities there cited. The presumption was not rebutted.

[54] Either way, therefore, whether in contract or delict, the respondents should in my view succeed.

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T D CLOETE

JUDGE OF APPEAL

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